



Case Number:	Petition 135 of 2016
Date Delivered:	26 Jan 2021
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Hellen Seruya Wasilwa
Citation:	Obuya Bagaka v Kenya School of Government [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 135 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 26th January, 2021)

OBUYA BAGAKA.....PETITIONER

VERSUS

KENYA SCHOOL OF GOVERNMENT.....RESPONDENT

JUDGEMENT

1. The Petitioner filed an Amended Petition on 8th July, 2019. He alleges that on 11th March, 2016, the Respondent interdicted him for gross misconduct as his “general conduct” was allegedly contrary to its Staff Terms and Conditions of Service. He avers that he was not issued with a show cause letter but he responded to the interdiction letter vide his letter dated 4th April, 2016 wherein he ably demonstrated the untruthfulness of the allegations.

2. He avers that on 27th April, 2016 he was invited to appear before the Corporate Staff Advisory Committee on 9th May, 2016 for a disciplinary hearing. He avers that in his letter dated 2nd May, 2016 he requested for the interdiction report findings and information provided by the alleged accusers/witnesses to enable him prepare for his defence but this information was not provided thus he attended the disciplinary meeting without this pertinent information.

3. He avers that it is not until April, 2017, long after filing of the original Petition that the Respondent purported to issue him with a termination letter. He avers that the Respondent’s action of serving him with a backdated termination letter on email was in bad faith and a violation of the right to fair and expeditious administrative action. He avers that his termination was an afterthought, unprocedural, unlawful and contrary to Articles 41, 47, 50 (1) and 236 of the Constitution.

4. He seeks the following prayers:-

a) A declaration that the Respondent’s actions and conduct amount to denial, violation and/or infringement of the Petitioner’s fundamental rights and freedoms under Articles 28,35,41,47 and 50 (1) of the Constitution.

b) A declaration that the actions and conduct of the Respondent are in breach of the Fair Administrative Action Act, its own Terms and Conditions of Service Manual, Rules of Natural Justice and also violates the Petitioner’s Legitimate Expectation.

c) A declaration that the termination of the Petitioner’s employment was unlawful, unprocedural and unfair.

d) A declaration that the termination of the Petitioner’s employment was in gross violation of the Constitution.

e) Compensation for violation of the Petitioner’s rights.

f) Payment of the Petitioner’s full salary, allowances and other benefits and/or perks from the date of interdiction until retirement.

g) Payment of the Petitioner’s terminal benefits.

h) Exemplary and punitive damages.

i) Damages for unlawful, illegal and unfair dismissal.

j) Costs of this Petition.

k) Any other relief and or further relief that this Honourable Court may deem fit and just to grant in the circumstances.

5. The Respondent filed a Replying Affidavit sworn by Nura Mohammed the Director of Finance and Administration, on 16th September, 2019. He confirms that the Petitioner was issued with an interdiction letter by the management.

6. He deposes that the grounds of interdiction included *inter alia*; falsely alleging publicly at a staff retreat on 29th October, 2015 that the School was broke without seeking official clearance to discuss official matters of the School from the Director General, communicating unbecoming and derogatory statements of staff about the school through posts on WhatsApp social media platform; and participating as lead consultant while in full time employment involving the publication of a Public Service Commission report containing information of an administrative nature about the School without official permission from the Director General as required in Section 13.7 of the Kenya School of Government (KSG) Terms and Conditions of Service.

7. He avers that the Petitioner was given an opportunity to respond to the letter of interdiction which he did by responding to each ground. He avers that the disciplinary proceedings of 9th May, 2016 were documented and the Committee looked at each and every ground of interdiction and the Petitioner was given an opportunity to respond to each ground. He further avers that the Petitioner did not object for the disqualification of the Chair or any member of the disciplinary committee.

8. The affiant deposes that after hearing the Petitioner, CSAC found him culpable on all grounds of gross misconduct and forwarded its recommendation to the Council of Kenya School of Government for final deliberation. He further deposes that the Council met on 14th October, 2016 and resolved that the Petitioner be dismissed from service.

9. He contends that the Petitioner's interdiction took more than 2 months due to a complaint which the Petitioner made directly to the Council which necessitated exhaustive investigations by Council and management before a decision could be made by Council on the interdiction. The complaint was later dismissed and the Council proceeded to make a final determination on his interdiction.

10. The affiant contends that the Petitioner was accorded a fair hearing in accordance with the Constitution and the guidelines as provided in the Terms and Conditions of Service Manual of Kenya School of Government by providing him with each allegation and ground of misconduct levelled against him and giving him an opportunity to respond to each ground. He contends that the letter dated 21st October 2016 was sent immediately to communicate the decision of the Council which was made on 14th October, 2019 and that the Petitioner has not denied receiving the email dated 21st October, 2016.

11. He denies that the Respondent plotted to forcibly evict the Petitioner from its staff housing and avers that the Petitioner has continued to occupy the official Kenya School of Government Staff House undisturbed and refused to pay rent or water charges totalling Kshs.556,069/=. He deposes that the Petitioner has not demonstrated with precision how his fundamental rights have been violated as required by the decision in **Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR and Annarita Karimi Njeru v Republic (1979) KLR 154.** He stated that the Petition has no merit and is an abuse of the Court process thus it should be dismissed.

12. The Respondent also filed a Cross-Petition on 14th October, 2019 in which it alleges that the Petitioner has accumulated rent and water charges amounting to Kshs.556,069 as at 16th September 2019. It avers that the amounts continue to accrue at the rate of Kshs.16,000/- rent per month and variable charges for water depending on consumption per month.

13. It avers that the Petitioner has denied it the right to use house No. KABE CD/2/269 CATEGORY C for staff housing and has denied and continues to deny the Respondent rental income that could otherwise be earned from the house if occupied by a rent paying tenant. It avers that it is entitled to mesne profits as compensation for loss occasioned by the Petitioner.

14. The Respondent seeks the following orders: -

a) The Petitioner's Petition is dismissed with costs to the Respondent/Cross-Petitioner.

b) A declaration is issued that by failing to observe the dictates of the contract of employment between the parties the Petitioner has violated the Respondent/Cross-Petitioner's right to fair labour practice by continuing to occupy the Respondent/Cross-Petitioner's house No. KABE CD/2/269 CATEGORY C without any conservatory order of injunction permitting such continued occupation when the contract of employment provided that "An employee who is terminated or has resigned shall vacate the house with effect from the date of termination".

c) The Petitioner shall pay to the Respondent/Cross-Petitioner rent accrued in respect of the Respondent/Cross-Petitioner's house No. KABE CD/2/269 CATEGORY C with effect from 14th October, 2016 until the Petitioner vacates the premises together with charges for water consumed by the Petitioner at the premises which rent and water charges have been invoiced to the Petitioner as pleaded in the Replying Affidavit of Dr. Nura Mohamed sworn on 16th September, 2019; and for the avoidance of doubt the amount due as at September 2019 is Kshs.556,069.00 due and payable and accruing monthly.

d) An injunction is issued to the Petitioner, his servants, relatives, agents and persons employed by him restraining him and them from using or permitting to be used any part of the Respondent/Cross-Petitioner's premises being house No. KABE CD/2/269 CATEGORY C and to vacate the house and premises within 14 days from the date of this judgment, failing which the Respondent shall be at Liberty to forcefully remove and evict the Petitioner, his servants, relatives, agents and persons employed by him or any of them from the premise and house.

e) The costs of the cross-petition are awarded to the Respondent/Cross-Petitioner.

15. The Petitioner filed a Replying Affidavit on 30th September, 2016. He avers that under Kenya School of Government Terms and Conditions of Service Manual, the CSAC is responsible for conducting disciplinary hearings but was never held in his case. He denies that the Respondent held a disciplinary hearing. He avers that he objected to the participation of Nura Mohammed and Solomon Letangule in the CSAC deliberations but this was ignored and treated with contempt.

16. He contends that the decision to terminate his services was made by the CSAC while carrying out investigations and not the Council which is the appointing authority. He avers that he was neither notified of the decision to terminate his employment nor was he given an opportunity to respond to the allegations levelled against him.

17. He avers that the quorum for Council meetings is 5 excluding the ex-officio Director General but the Council sitting on 14th October, 2016 had 4 members thus its decision is null and void. He further avers that the minutes of the Council meeting of 14th October, 2016 are unsigned and undated raising doubts whether there was meeting.

18. He avers that he was never given notice to appeal or a hearing by the employer-council to challenge the evidence against him by a Committee of management. He further avers that he was never given an opportunity to interrogate witnesses that provided adverse evidence against him and importantly he was never given an opportunity/notice of appeal.

19. He avers that he is not on the Respondent's payroll so he has no way of paying this as rent payment is done through a check-off system. He further avers that the Respondent owes him over Kshs.400,000 being an amount due for 4 Master of Public Administration classes taught in 2015.

20. He further filed a response to the cross-petition on 6th December, 2019. He avers that the Cross-Petition has been filed with ill will and it has not demonstrated any of the allegations. He avers that the cross-petition has been filed out of time and is in violation of Order 7 Rules 1, 3, 5 & 7 of the Civil Procedure Rules.

21. He contends that he has not received any bills or demands for rent regarding the same and the system of payment for the same has never been availed to him. He avers that the Cross-Petition is without merit and should be struck out with costs.

Petitioner's case

22. The Petitioner testified as Pw1. He testified that he was working at the Respondent as a Principal Lecturer, Senior Lecturer and eventually as the Head of Research. He testified that he received a letter of interdiction on 11th March, 2016 which was slid under his office door and that the letter was not accompanied by any other document. He testified that he requested the respondent for documents relating to the allegations and that the WhatsApp messages were not given to him.

23. He further testified that those WhatsApp messages were not issued to him when he appeared before the HR Committee on 9th March, 2016. He testified that at the hearing, he disputed the messages and that he offered his phone for forensic audit but they refused.

24. He submitted that he appeared before Dr. Kimili Sagana for the hearing and that the Respondent did not present any witness to support the allegations against him. He testified that the allegation against him was read and he was asked to read his response to the interdiction letter and thereafter the hearing was completed.

25. He testified that they had a staff retreat in Mombasa when he was asked for data on finances of each campus. He denied stating that the school was broke. He contended that his interdiction was unprocedural and unfair and that he has been on interdiction for 4 years. He stated that he wishes to go back to his job.

26. In cross-examination, he testified that though he did not seek reinstatement in his Petition, he was making the prayer orally. He testified that he came to Court seeking stay of his interdiction which lasted until April 2017 and when he filed a suit at court of Appeal, his application was dismissed because he had already been dismissed.

27. He contended that his rights under the Constitution and the Kenya School of Government Act were infringed upon. He cited Section 21 (3) of the Kenya School of Government Act and testified that he was an employee of Kenya Institute of Administration (KIA) and then he became an employee of Kenya School of Government. He denied being redeployed by the Public Service Commission. He testified that he was an employee of the Council of the Respondent and he was subject to the terms and conditions of the Public Service Commission. He testified that Public Service Commission has delegated its code to CSAC.

28. He testified that he was not given a fair hearing as no witnesses were called against him and no documents were issued. He testified that the Respondent did not act as per the Public Service Commission Manual. He did not agree with the Respondent's position in, its Replying Affidavit, that he did not demonstrate how his constitutional rights have been infringed upon as he had indicated the rights infringed upon.

29. He testified that he had been interdicted for 8 months and his interdiction was not handled timely as the process thus it was not fair and it was unprocedural. He testified that he was not given an opportunity to cross-examine witnesses.

30. He testified that he appeared before the CSAC but an employee of his level was to appear before the Council. He testified that the Committee was for staff below director's level and that his position was not below the director's level. He denied interrupting the interdiction process.

31. He testified that he had requested the Chair to investigate some issues at the school but he did not know what became of his complaint. He testified that interdiction should not exceed 2 months but for over two months he did not receive any communication.

32. He further testified that the Public Service Commission also expects resolution of a complaint within 6 months. He testified that the Chairman wrote to him informing him that he was investigating the complaint.

33. He testified that he was once a consultant at Public Service Commission and had taken leave from Kenya School of Government. He testified that his work was to analyse data from 234 institutions including Kenya School of Government but he was not involved in producing the report which he was aware touched on Kenya School of Government.

34. He testified that the issue of the Kshs.34 million indebtedness was in the fact sheet filed by Dr. Nura Mohammed. He testified that the letter of delivery was not received from all the agencies. She testified that Dr. Nura was the Director of Finance and that he did not know if the school was at Kshs.34 million loss though it is in the fact sheet.

35. He testified that to date he was not issued with the report made against him. He testified that he was terminated vide a letter dated 2016 which he received in 2017. He testified that he is yet to vacate the Respondent's house. He testified that it is not illegal for him to stay there and that he has not paid rent but should he be ordered to pay by law he shall pay. He testified that there are other people who live there but are not employees of the Respondent.

36. DANIEL MASINDE WESONGA, a consultant and educationist testified as PW2. He testified that he offers professional consultancy for various agencies. He argued that he was the Deputy Lead Consultant in tender No. PAC/03/2014-2015 and was in-charge of leading data collection processes and supporting the preparation of the report. He testified that they collected data in conjunction with the compliance department of the Public Service Commission which developed tools they adopted.

37. He testified that they collected data for ministries and government agencies amongst other institutions. He stated that Kenya School of Government was one of the agencies to be evaluated. He stated that they collected qualitative data on a fact sheet which covered 10 aspects to be undervalued and the principles of public service. He testified that he interacted with persons at Kenya School of Government who had been given to them by Public Service Commission and one of them included Mr. Ochuka. He testified that he interviewed him in July. He testified that he left fact sheets which were to be filled by Kenya School of Government and they were filed by one Wangare. He testified that it was signed by MDF and that the fact sheet was delivered to him.

38. In cross-examination, he testified that the status of finances at Kenya School of Government was filed by a designated officer and given to them. He testified that fact sheet 19 was signed by Dr. Nura but Ochuka did not sign the fact sheet. He testified that the tools were to be signed by institutional head and would not know who signed it. He testified that the research assistant collected the tools and that Wangare was his research assistant. He however testified that he did not know if what Wangare told him was correct. He testified that being a consultancy, any employee could participate as long as it was not within the time of the employer's work.

39. In re-examination, he testified that they presented the report to the Public Service Commission and that there was public participation.

40. KIMOLI SAGALA who works for the Ministry of Energy and is also a teacher at Kenya National Defence College testified as PW3. He adopted his witness statement dated 30th September, 2019 as his evidence in chief. He testified that he accompanied the Claimant to the disciplinary hearing after he asked him to do so. He testified that he appeared at the hearing as a witness but he did not give evidence.

41. He testified that at the meeting, they were 3 gentlemen, Mr. Letangule, Dr. Nura Mohammed and Dr. Nicholas Iko. He testified that as the meeting started the Petitioner objected the presence of Dr. Nura as he is the one who had written his interdiction letter. He contended that the Petitioner was overruled.

42. He testified that the Chairman went ahead and read the agenda of the meeting which was the Petitioner's disciplinary issue. He testified that the Petitioner asked for the investigations report but was told there was no investigations report. He stated that the Petitioner also asked for the witness statements but was informed that they did not have them. He testified that Mr. Letangule read the interdiction letter and stated that the proceedings of that day would be part of the investigations report and the proceedings went ahead.

43. It was his testimony that no documents were availed to the Petitioner. He testified that the Petitioner's case would be difficult without the investigations reports and the witness statements, as he did not know what he was to respond to. He testified that the proceedings were adjourned after interdiction letter and his report was read.

44. In cross-examination, he testified that the Petitioner was accorded an opportunity and he did not know if he had been given a

show cause letter. He confirmed that the interdiction letter was read to him spelling out grounds upon which he had been interdicted.

45. He testified that the Petitioner had a response to his case however the rules of natural justice were not followed. He stated that he had worked at Kenya School of Government since February 2013 and that he left upon his secondment to the Ministry of Energy on 1st October, 2016.

46. He testified that he had found the Petitioner at Kenya School of Government and worked with him for 3 years. He stated that the Petitioner's contract provided for one month's salary in lieu of notice and that he did not know if the Petitioner resigned.

Respondent's case

47. Dr. Nura Mohammed the Respondent's Director Finance and Administration testified as Rw1 and adopted his Witness Statement dated 23rd December, 2019.

48. He testified that the terms of fair hearing were duly stated in the Human Resource Policy and that the procedure set out in the policy was clearly followed. He testified that the Petitioner was given an opportunity as he appeared before the CSAC. He testified that the Petitioner wrote to the Chair of the Council and Chair referred the matter to the Committee of the Council.

49. He testified that the Petitioner was heard by the Council and that he as interdicted and finally dismissed due to the work he undertook at Public Service Commission. He testified that though Pw2 referred to the work done by Public Service Commission, the Petitioner participated in this assignment and did not notify the institution of this assignment.

50. He testified that there was a report from the Public Service Commission assignment that stated that the Respondent was indebted. He testified that though the Petitioner's witnesses state that he provided this information, he never filed the fact sheet and he could not verify that the stamp used was his. He testified that his stamp could be got anywhere even at the admission office.

51. He denied knowing Wangare or working with her. According to him, the fact sheet report did not reflect the true position of the institution. He testified that the Petitioner failed the institution as he did not go to him to verify the document before it was published.

52. He testified that the issue between Leah Munyao who was previously a Director Academic Affairs at the Respondent and the Claimant was personal. He confirmed that they had not mentioned this issue and that Dr. Munyao never sued the Petitioner in Court though the letter by HHM Advocates was clear.

53. He maintained that the Petitioner's rights were not violated and that they followed the procedure that needed to be followed. He testified that the Petitioner's claim for salaries until retirement is not viable. He testified that the Petitioner's contract could be terminated by giving one month notice or the equivalent of one month's salary.

54. He testified that the Petitioner's life is still on course because he is now a director at both KCB and National Banks' Boards. He confirmed that the Petitioner still resides in Kenya School of Government's house and this is despite the housing policy that provides that after separation an employee is to surrender the house within a month.

55. He testified that they have cross-petitioned for the Petitioner to pay rent and that the amount owing is Kshs. 973,661 which he admitted he will pay. He prayed that the Court dismiss the Amended Petition with costs and allow their cross-petition.

56. Upon cross-examination by Counsel Nani, Rw1 maintained that he gave the Petitioner a fair hearing. He testified that clause 14.4 (iii) of the Service Manual anticipates that an allegation is to be backed by evidence. He confirmed that at the hearing, they did not call evidence against the Petitioner. He confirmed that at page 49 of the proceedings, the Petitioner requested for some documents which were not provided. He further confirmed that they did not call witness with respect of the allegation that he stated that the school was broke.

57. He testified that at pg. 50, the Petitioner stated that he never raised the issue that the school was broke. He testified that the Petitioner was not a speaker of the retreat which was aimed at discussing the issues of the school. He testified that at the retreat, the

Petitioner was to seek the Director General's permission before responding to an issue. He further testified that they needed permission before making false allegations.

58. He testified that though the Petitioner stated at the disciplinary hearing who filled the Public Service Commission report, they did not call Joshua to verify this. He testified that Mr. Joshua Ochuka had been interviewed before another Committee and that Mr. Ochuka filled the questionnaire. He however testified that Mr. Ochuka stated that he did not fill the questionnaire.

59. He testified that they are not accusing the Petitioner of doing the Public Service Commission report but he should have verified the data. He testified that the questionnaire did not go to him. He testified that an intern filled the form but Mr. Ochuka got the form. It was his testimony that the fact that Mr. Ochuka did not fill the form is not part of his documents.

60. Upon cross-examination by Counsel Bosire, Rw1 confirmed that; he sat at the disciplinary hearing and that he signed the Petitioner's letter of interdiction and the letter of dismissal by the Director General. He testified that the Director General executes delegated powers from the Council and that the Director General delegated the powers to him.

61. He testified that though he is the Chair of the CSAC he did not chair the meeting that the Petitioner appeared. He testified that his conduct met rules of natural justice. He testified that the minutes at page 41, 54, 5 and 60 of the Respondent's documents were not signed and that the signed minutes are not in Court.

62. He testified that the report of the staff advisory Committee was to go to the Director General and then to the Council if there was an appeal. He testified that an appeal from the CSAC goes to the Human Resource Committee. He confirmed that the Petitioner appeared before the Human Resource Committee but this Committee's report was not filed in Court.

63. Upon re-examination, he testified that the minutes were not signed because they were to be signed in the next meeting. He testified that the Petitioner has not questioned legality of the minutes. He testified that the Report of the Public Service Commission was false because statistics given portrayed Kenya School of Government in a negative manner.

64. He testified that there is no mandatory provision that witnesses must be called. He testified that he wrote the interdiction letter and dismissal letter and sat in the Committee in his different roles. He testified that it is normal for an officer to delegate duties and that the dismissal letter was a decision of the council.

65. The parties were directed to file submissions within 14 days and 21 days respectively but only the Petitioner's submissions were filed within the stipulated period. The Respondent filed their submissions abt late but this court considered the aid submissions in arriving at its decision

Petitioner's submissions

66. The Petitioner submitted that the Kenya School of Government Manual and Discipline Manual of the Public Service have a designed disciplinary procedure that is hierarchical and sequential which includes that there is first an investigation, hearing and an appeal while ensuring the procedures follow the principles of natural justice.

67. He submitted that employees of the Council are required to appear before the Human Resources Committee which makes recommendations for interdiction. It was his submission that there was no HR Committee of the Council meeting that sat to hear and determine his case as required by the manual.

68. He submitted that the Mr. Nura Mohammed, Rw1, neither had authority nor powers under the Kenya School of Government Act and Kenya School of Government Manual to author the interdiction letter and dismissal letter thus this was a flagrant abuse of power. He argued that he did not author the Public Service Commission report and that the alleged information did not and could not have originated from him.

69. He submitted that the failure to furnish him with particulars necessary to prepare for his defence at the appearance before the CSAC resulted in flawed and unfair proceedings which breached section 47 (1) of the Constitution and Section 4 (3) (h) of the Fair Administrative Action Act. He relied on the Court of Appeal decision in **Judicial Service Commission of Kenya v Mubalu Mutava & Another [2015] eKLR** where the Court held that the right to fair administrative action is wide in scope and

encompasses several duties. He further relied on the case of **Daniel Mudanyi Ochenja v Judicial Service Commission [2019] eKLR**.

70. He argued that he was not given an opportunity to present his case before the HR committee of the Council hence violating Article 50 (1) of the Constitution. He submitted that the Public Service Commission Manual is applicable to Kenya School of Government Manual by virtue of the Delegation Instrument for State Corporations Advisory as established under Section 26 of the State Corporations Act.

71. He submitted that the Public Service Commission Manual realigns disciplinary procedures with the Constitution and that Public Service Commission Manual should have been followed and not the Kenya School of Government Manual. His argument was that the Public Service Commission Manual is superior thus is the default guideline in disciplinary proceedings.

72. He relied on paragraphs 4.7 (f) and 4.8 (f) of the Public Service Commission Manual and submitted that the CSAC's report was not sent directly to the Council sidestepping the Human Resource Committee. He submitted that the corollary is that he did not appear before any panel to defend himself and that he only appeared before CSAC which was an investigation committee.

73. He submitted that paragraph 4.0 of the Public Service Commission Manual requires an investigation to be carried out before disciplinary action is instituted. He argued that it is not clear whether the proceedings before CSAC were an investigation or disciplinary hearing because they could not have been both. He further submitted that the minutes of the CSAC were not signed thus they are null and void as they did not comply with paragraph 4.9 of the Public Service Commission Manual.

74. He argued that the right to fair hearing is a fundamental aspect of the rule of law which is founded on well established principles of natural justice and submitted that the lack of impartiality and flawed and unfair procedures violated his right to a fair hearing. He relied on Article 50 (1) of the Constitution and the decision of the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR** and **Phillip K. Tunoi & another v Judicial Service Commission & another [2016] eKLR** on the need for an independent and impartial tribunal or body in the hearing procedures.

75. He submitted that under paragraph 14.5 (viii) (d) of the Kenya School of Government Manual the responsibility for issuing dismissal letter to an employee rests with the Director General as delegated by the Council and the Manual does not provide that the responsibility may be delegated to another officer. He argued that the abuse of power was integral to the unfair process and relied on the case of **Republic v Cabinet Secretary Ministry of Interior and Co-ordination of National Government and 6 Others ex parte Africa Centre for Open Governance and 7 Others [2017] eKLR**.

76. He submitted that by purporting to terminate his employment without basis and without following due process, the Respondent violated Article 236 (2) of the Constitution. He averred that since the purported dismissal, he has not succeeded in securing another full time job, the lack of regular income and inability to get another job has caused him immense stress and psychological anguish. He argued that the Respondent's plot to forcibly evict him from its staff housing in the circumstances violated his right to dignity.

77. He submitted that in the South African case of **Minister of justice and Constitutional Development v Tshishonga 2009 30 ILJ 1799** where the Court held that in assessing damages for violation of the right to dignity the Court should consider factors such as the nature and seriousness of the injury, the circumstances in which the infringement took place, the behaviours of the defendant amongst other factors.

78. He argued that his right to fair labour practices under Article 41 (1) of the Constitution was violated because the disciplinary proceedings disregarded the principles of natural justice. He submitted that the Court in **Elizabeth Washeke and 62 Others versus Airtel Networks (K) Ltd & another [2013] eKLR** in addressing what is unfair labour practice held that the right is open-ended and includes unfair dismissal.

79. He further submitted that the Court in **Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2019] eKLR** held that an unsigned letter of termination of employment was invalid and was a violation of the principles of fair labour practices.

80. He submitted that the Respondent did not adduce evidence to validate its claim that he had made a speech that it was broke. He argued that the production of unverified and uncertified evidence to support its accusation did not comply with sections 78A and 106B of the Evidence Act. He further submitted that the Respondent did not call Mr. Joshua Ochuka to confirm or deny Pw2's

evidence that he interviewed him.

81. He submitted that his evidence and that of his witnesses was credible but the evidence of Dr. Nura was contradictory. He submitted that he had an expectation that he would serve the Respondent until the age of 60 years. He submitted that he had legitimate expectation that the Respondent would follow the law in taking disciplinary action against him or any of its employees and to be impartial in the discharge of its duties and his termination would be done in accordance with Kenya School of Government Manual and Employment Act, 2007.

82. He relied on the Supreme Court decision in **Communications Commission of Kenya & 5 Others v Royal Media Services [2014] eKLR** on legitimate expectation. He further relied on the case of **Republic v Principal Secretary Ministry of Mining ex-parte Airbus Helicopters Southern Africa (PTY) eKLR**.

83. He submitted that in **National Union of Water and Sewerage Employees & Lake Victoria North Water Services Board Kakamega - Busia Water Supply [2018] eKLR** the Court awarded the Claimants 2 million because they were punished for exercising their constitutional freedoms of association and fair labour.

84. With respect to the alternative reliefs, he submitted that Section 49 (4) of the Employment Act gives a guideline on what would be considered in the case of reinstatement and submitted that his case meets these guidelines.

85. He further relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**. He argued that his position is still available and vacant and that he is willing to continue with employment.

86. He submitted that costs are provided under Section 12 (3) of the Employment and Labour Relations Court Act and that the Court should find in his favour and wards costs against the Respondents.

87. With respect to the Respondent's cross-petition, he submitted that the Respondents are claiming Kshs.556,069/= for rent and utilities but the Respondent has not given him an alternative way of making the payment since these amounts as stated in the Kenya School of Government Manual are paid through a check off system. In conclusion, he submitted that he deserves to be granted the prayers sought in the Petition.

Submissions by Respondent

88. The Respondents filed their submissions indicating that the matter was purely an employment dispute and not a constitutional petition.

89. The Respondents cited **Samuel Kamau Macharia & Another vs KCB Limited and 2 Others (2012) eKLR**, where the Supreme Court at paragraph 68 restated the law on jurisdiction of Courts in Kenya:-

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

90. They also cited the Court of Appeal in **Sumayya Athman Hassan vs Paul Masinde Simidi and National Oil CK (2019) eKLR** where the Court states as follows:-

“[10] Our research has also revealed that in Communication Commission of Kenya & Others v Royal Media Services Limited &

5 others [2014] eKLR (Communications Commission case), the Supreme Court of Kenya considered the question whether where a legislation has provided a remedy and prescribed a clear procedure for address of a particular grievance, a litigant can invoke the provisions of the Constitution for redress of such grievance. In that case, three media companies filed a constitutional petition in the High Court alleging breach of constitutional rights by the Communications Commission and others, including breach of media freedom and right to property guaranteed by Articles 34 and 40 respectively of the Constitution. They sought various reliefs and one of the issues which arose and which was framed by the trial court was whether there had been a breach of violation of the petitioner's intellectual property rights. On that issue, the High Court held that the petitioners had not established that the intellectual property rights had been infringed and that a violation of intellectual property rights was a matter to be addressed by Copyright Act and not by a petition to enforce fundamental rights. On appeal to the Court of Appeal, the Court of Appeal held, among other things, that there was a violation of appellant's intellectual property rights. The issue was canvassed in the Supreme Court. Noting that section 35(4) of the Copyright Act provides an avenue for redress in the event of violation, the Supreme Court said at paragraph [256]:

“The appellants in this case are seeking to invoke ‘the principle of avoidance’; also known as ‘constitutional avoidance’. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

After citing two foreign decisions, the Supreme Court concluded at paragraph [258]:

“From the foundation of principle well laid in the comparative practice, we hold that – 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights was a plain copyright – infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

[11] The 1st Respondent’s counsel has even cited the case of Speaker of the National Assembly v Karume [2008] KLR 425 for the principle that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed”.

[12] The right to fair labour practices is part of the human rights secured by the Bill of Rights under Article 19 of the Constitution. By Article 21(4) of the Constitution, the State is required to enact and implement legislation to fulfill its international obligations in respect of Human Rights and Fundamental Freedoms.

By Article 22(1) as read with Article 22(3) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No. 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by Article 23(3), the Court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The Employment Act, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to “declare and define the fundamental rights of employees”.

Section 3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.”

6. The Court of Appeal in that case concluded their Judgment thus –

“[16] The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the

Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ”

91. The Court of Appeal rendered itself as follows:-

“[16] The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (supra) that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

[17] In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ”

92. The Respondents also submitted that Parties are bound by their pleadings and therefore the Petitioner should not seek a reinstatement which he never pleaded in his pleadings.

93. They cited the Court of Appeal in **Dakianga Distributors (K) Limited vs Kenya Seed Company Limited** held that indeed Parties are held by their pleadings.

94. The Respondents also pleaded the Petitioner’s rights under Article 234 of the Constitution were not breached. They aver that the Petitioner has submitted the Public Service Manual and not Kenya School of Government Manual should have been followed, and they have not demonstrated that the Public Service Commission had delegated its powers to the Kenya School of Government as a state corporation for the public service manual to apply.

95. The Respondents also submit that the Petition should not continue staying in Kenya School of Government house as he is no longer an employee of the institution.

96. The Respondents have also submitted that the termination of the Petitioner was fair and justified as these reasons were valid and the right procedure was followed.

97. The Respondents therefore submitted that the Petitioner should not be granted the remedies sought as this Court lacks jurisdiction to grant them.

98. I have examined all averments and submissions of the Parties herein. The issues for this Court’s determination are as follows: -

1. Whether this Court has jurisdiction to handle this matter.

2. Whether the Petitioner’s termination was unfair and unprocedural.

3. Whether the Petitioner’s rights under the Constitution were violated.

4. Whether the Respondent's Counter Claim stands.

5. Whether the Petitioner is entitled to the remedies sought.

Issue No. 1

99. On issue No. 1 the Respondents have submitted that this Court lacks jurisdiction to handle this matter as a Petition as it is purely an employment issue and there is no constitutional issue to be determined.

100. The Respondent also submitted that the Employment Act adequately handles the issues of the alleged breaches and is therefore able to adequately handle this matter.

101. It is indeed true that a Courts jurisdiction flows either from the Constitution or Legislation or both. This is the holding of the Supreme Court in **Samuel Kamau Macharia (supra)** which position in both binding and the true position in law and in fact.

102. This Court's jurisdiction from both the Constitution or Legislation is to deal with employment and labour relations issues. Is it also true **that where Legislation exhaustively** (emphasis is mine) prescribes a clear procedure for addressing a particular grievance, a Litigant cannot invoke the provision of the Constitution. This is the holding of the Court of Appeal in **Communication Commission of Kenya vs Royal Media Services Limited and 5 Others (2014) eKLR.**

103. The question then is whether the violations the Petitioner has sought for redness herein are adequately covered by the Employment Act 2007.

104. The Petitioner sought for redness for breach of his constitutional right under Article 41 and 47 of the Constitution. It is true that the Employment Act 2007 provides redness for unfair termination and the Fair Administrative Action Act provides redness for unfair Administrative Action Act. The 2 Acts however do not adequately cover for constitutional breaches.

105. Under Section 49 of the Employment Act 2007, the maximum remedy the Court can grant for unfair termination is 12 months salary as compensation.

106. There is no provision for damages for constitutional breaches. In any case, Article 41 and 47 provide extensively for processes and rights under the Constitution. It will be to miss the point to equate an unfair termination with a breach for fair labour practices. And indeed, the framers of the Constitution while aware of the existence of the provisions of the Employment Act 2007 thought it fit to anchor labour rights in the Constitution. In my view, this is because the rights have different weighting and different remedies.

107. It is therefore my finding in distinguishing this case with authorities cited that the Petitioner has a right to approach this Court and plead breach of his constitutional right because the Employment Act 2007 cannot adequately remedy any breaches as pleaded.

108. I therefore return that this Court has jurisdiction to handle this Petition and the Petition is rightly before Court.

Issue No. 2

109. In determining issue No. 2, this Court will consider reasons advanced in terminating the Petitioner and whether the correct procedure was adopted.

110. The Petitioner was dismissed from his service vide a letter dated 21/10/2016 which he avers was served upon him by email on

27th April, 2017. From the said letter, the reasons advanced for the dismissal are as follows:-

“.....you have been found to have engaged in acts of gross misconduct as follows:-

a) Falsely alleging publicly at a staff retreat on October 29, 2015, that the school was broke without seeking official clearance to discuss official matters of the school from the Director General.

b) Communicating unbecoming and derogatory statements to staff about the school through posts on WhatsApp group platforms social media.

c) On February 1, 2016 you attended a management meeting to discuss whatever grievances that caused your misconduct at which meeting you gave an undertaking to cease unwarranted attacks on the school through the WhatsApp group platform social media. Despite that undertaking you continued with the disrespectful attacks such as the post on February 6, 2016 words stating that management wasted public resources by failing to leave hotel rooms to attend to official duties.

d) While in full time employment of the school in November 2015 you participated as Lead Consultant in publication of a report for the Public Service Commission whose contents included information of an administrative nature about the school, without permission from the Director General to do so as required in Section 13.7 of the Terms and Conditions of Service Manual.

e) In December 2015 you submitted to the Public Service Commission as Lead Consultant a report for publication which falsely stated that the Kenya School of Government had incurred a deficit of Kshs.34 million in Financial Year 2014/2015 despite having full opportunity as a member of staff of the school, and in accordance with Section 13.7 of the staff manual, to access and verify the fact that the school had indeed reported a surplus. This widely circulated reported put the school into disrepute”.

111. Before this dismissal, the Petitioner had been placed on interdiction on 11/3/2016 on account of gross misconduct. The details of the gross misconduct are as per those listed in the dismissal letter.

112. The interdiction letter required the Petitioner to show cause why further disciplinary action including dismissal should not be effected. The Petitioner responded vide his letter dated 4/4/2016 denying all the allegations levelled against him.

113. On issue of stating that the Respondent was broke, he pointed out that he was not scheduled to make any speech during the staff retreat and only made his comments during the plenary session where he raised issues requiring management to respond. He indicated that in a staff retreat he would not have been required to seek clearance from the Director General’s office before engaging in a discussion.

114. He denied that on 1/2/2016 he ever discussed any individual’s misconduct or behaviour nor was it part of a disciplinary process as alleged in the Director General’s letter of interdiction.

115. On issue of social media attacks against management, he indicated that was a matter awaiting civil litigation.

116. On issue of his participation in Public Service Commission evaluation exercise, he indicated that the report was authored and published by the Public Service Commission and he only participated due to the letter reference No. PSC/Ethics/valuprin/vol.II/91 addressed to all Chief Executive Officers of state corporations including Kenya School of Government and that if the KSG felt that he should not have participated in the exercise they should have disputed the exercise commenced.

117. In any case, he averred that if Kenya School of Government found any part of the report improper, they should have directed its complaint to the Public Service Commission for clarification and appropriate action.

118. After the Petitioner’s reply, he was vide a letter of 27/4/2016 invited to appear before a staff advisory committee for a disciplinary hearing. He responded on this acknowledging receipt of the invite but requested to be supplied with certain information including: -

1) Copy of interdiction report findings containing information, materials and evidence to be relied upon in making

administrative decision in relation to his interdiction.

2) Names of specific persons/witnesses who provided adverse evidence to enable him cross examine them.

119. On 27/7/2016, the Petitioner also wrote to the Chairman of the Respondent's Council complaining about the composition of the ad hoc Committee appointed to hear him. He indicated that the Respondent was the accuser, prosecutor and judge in their own case and feared that justice would not be done to him.

120. The Petitioner further complained of being placed on interdiction for long whereas Section 14.5(1)(a) of Kenya School of Government Terms and Conditions of service explicitly states that interdiction period shall not normally exceed 2 months.

121. All the letters Petitioner wrote to management and Chairman however were not responded to.

122. The Petitioner then filed this Petition on 8/11/2016 when he got some interim orders restraining the Respondent from terminating his employment pending inter partes hearing of the application on 15/11/2016.

123. Section 43 of the Employment Act 2007 states as follows:-

1) "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

124. It is therefore imperative that the Respondent proves the reason for dismissing the Petitioner. There must be valid and existing reason that prompted the dismissal.

125. When the Petition was served with an interdiction letter, he was asked to respond to the allegations therein which he responded to denying any commission therein. He sought some documents which would have aided him to defend himself including WhatsApp messages he is alleged to have written, these were never produced even in Court.

126. He indicated that he offered his phone for forensic audit and the Respondents did not take the offer. This shows that in respect of derogatory WhatsApp messages the Respondents aver the Petitioner wrote, there is no proof of this.

127. On issue of stating that the Respondent was broke at a staff retreat, the Petitioner also indicated that the forum was a retreat and he was free to air his views and the expectation that he could only respond after clearance from the General Director was unreasonable.

128. I do agree with the Petitioner here. It is alleged he said that the Respondent was broke at a staff retreat. Retreats are meant to iron out sticky issues in an organization and it is a perfect opportunity to take a step back from the day to day work of an organization and spend some time thinking about the bigger picture, time to rejuvenate the team and get excited around a united mission, setting bonds between team members.

129. It is unthinkable that what a staff uttered in a retreat could be used against the member and in any case a retreat cannot be a time to expect a staff to only talk after permission from the boss. What the Petitioner may or may not have uttered at this retreat in October 2015 cannot be a source of his problems and is therefore is not a valid reason for dismissal.

130. On the issue of participating in a consultancy while in full time employment and submitting a report to Public Service Commission, the Petitioner gave oral evidence in Court and stated that the data sent to Public Service Commission was prepared by a group of 25 researchers and the Respondent's part was signed by one Dr. Nura Mohammed.

131. The R.W 1 Dr Nura testified before this court and in cross examination he stated that it was not wrong for the Petitioner to

have worked for the PSC whilst being an employee of the Respondent. He actually negated the entire accusation against the Petitioner on this aspect altogether.

132. He indicated that he was the lead researcher and interpreted the data on behalf of the Public Service Commission. When cross examined by Counsel for the Respondent, he still denied any wrong doing. He denied publishing any report and indicated that the fact sheet was filled by the office of Dr. Nura Mohammed.

133. The Petitioner called 2 witnesses. PW2 indicated he was Department Lead Consultant of the Lender No. PAC/02/2014.2015. He indicated he was in charge of collecting and processing data in conjunction with compliance department of the Public Service Commission with developed tools which they adopted. They collected data of ministries, departments and agencies. They had over 250 Managing Directors who provided data and also Office of the President and Department of Justice Independent Commission and Offices, Statutory Commission and Authorities and State Corporations.

134. Among the 250 Managing Directors was the Kenya School of Government, he interacted with Mr. Ochuka who Public Service Commission had given as contact person.

135. He indicated he left behind fact sheets to be filled by Kenya School of Government and it was filled and signed by Mr. Wangare. He indicated that issue of Kenya School of Government finances were filled by a designated officer and given to him. He indicated that the fact sheet had been signed by Dr. Nura.

136. PW3 indicated that he accompanied Petitioner for disciplinary committee hearing as a witness but never gave any evidence. He avers that at the meeting the Petitioner objected to the presence of Nura as he is the one who did his interdiction letter. The Petitioner also asked for investigation report and it was not availed. Proceedings nonetheless went ahead despite the objection of the Petitioner.

137. Back on issue of Petitioner participation in consultancy with Public Service Commission, the Respondents have not pointed out what wrong doing he did as this was a project of the Public Service Commission and even the Kenya School of Government also participated in it. My findings are that there were no valid reasons then to dismiss the Petitioner.

138. On issue of due process, from the evidence of the Petitioner himself, he avers that he was on interdiction for a long time and he cited Section 14.5(v)(a) of the Kenya School of Government Terms and Conditions of service which indicate that interdiction should be at most 2 months.

139. The Respondents have not disputed this and neither have they explained why the Petitioner was placed on interdiction for over 2 months.

140. The Petitioner has also indicated that the Respondent was the investigator, prosecutor and judge in his case. He accused one Nura Mohamed as having signed both his interdiction and termination letter. He said Nura also sat on CSAC committee when the Petitioner's case was discussed and also sat in the special Council meeting that affirmed the decision of the CSAC. The Respondents did not deny this fact.

141. The Petitioner has complained that the said Mohamed wrote the interdiction and dismissal letter yet he had no authority to do so.

142. In determining whether this process was fair or not, I refer to the Fair Administrative Action Act 2015. It is apparent that the processes meted against the Petitioner were flawed. He was not given an opportunity to adequately defend himself as documents and evidence requested was not provided. He was also heard by a panel improperly constated as he submitted that an officer of his rank was to be heard by the Council.

143. Section 4(3)(g) of the Fair Administrative Action Act states as follows:-

“Information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

144. Section 4(1) and (2) of the Fair Administrative Action Act also states as follows:-

- 1) *”Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
- 2) *Every person has the right to be given written reasons for any administrative action that is taken against him”.*

145. In respect of the Petitioner, even his accuser who purportedly received the WhatsApp messages never gave evidence against him. He was denied an opportunity to appeal before impartial panel whereby Mr. Nura was both the accuser and the judge and without authority.

146. Section 7(2)(a) of the Fair Administrative Action Act states as follows:-

- 2) *“A court or tribunal under subsection (1) may review an administrative action or decision, if:-*
 - a) *the person who made the decision:-*
 - (i) *was not authorized to do so by the empowering provision;*
 - (ii) *acted in excess of jurisdiction or power conferred under any written law;*
 - (iii) *acted pursuant to delegated power in contravention of any law prohibiting such delegation;*
 - (iv) *was biased or may reasonably be suspected of bias; or*
 - (v) *denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case”.*

147. In the case of the Petitioner, it is my finding that he was subjected to an unfair and unjustified hearing.

148. Section 45 (2) of the Employment Act states as follows:-

- (2) *“A termination of employment by an employer is unfair if the employer fails to prove:*
 - (a) *that the reason for the termination is valid;*
 - (b) *that the reason for the termination is a fair reason:-*
 - (i) *related to the employee’s conduct, capacity or compatibility; or*
 - (ii) *based on the operational requirements of the employer; and*
 - (c) *that the employment was terminated in accordance with fair procedure”.*

149. In the circumstances, I find his dismissal was unfair an unjustified.

Issue No. 3

150. The Petitioner has averred that his rights under the Constitution were breached. He cited Article 47 of the Constitution which states as follows:-

- 1) *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) Promote efficient administration”.

151. Indeed, having found that his rights under the Fair Administrative Action Act were breached, it follows that Article 47 of the Constitution was breached.

152. It is also true that the Petitioner’s rights under Article 41 of the Constitution on fair labour practices were breached. He was not subjected to a fair hearing process as such his right under Article 41 of the Constitution was breached.

Issue No. 4

153. The Respondents sought payment of 556,069 for rent and utilities. The Petitioner claimed that he had no alternative way of paying the payments since these amounts are to be paid through check off.

154. My finding is that this is an admission by the Petitioner that he is owing this amount and it is due and payable to the Respondent as claimed – Kshs.556,069/=.

Issue No. 5 - Remedies

155. Having determined that the dismissal of the Petitioner was unfair and unjustified it is my finding that the Petitioner is entitled to the following remedies:-

1. 10 months salary as compensation for the unfair dismissal.

2. A declaration that the Respondent’s action and conduct amounts to denial violation of the Petitioner’s fundamental rights and freedom under Articles 41 and 47 of the Constitution of Kenya.

3. A declaration that the actions and conducts of the Respondent are in breach of the Fair Administrative Action Act, its own Terms and Condition of Service Manual and Rules of natural justice.

4. The Petitioner is entitled to damages equivalent to 3 million for breach of his constitutional rights.

5. The Petitioner is also entitled to any back pay from time of interdiction to time of dismissal.

6. The Respondent is entitled to payment of rent equivalent to Kshs 556069.

7. The Respondent is also entitled to vacant possession of their house occupied by the Petitioner within 1 month from the date of this judgment.

8. The Respondent will pay costs of this Petition plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 26th day of January, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



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