



**Nang'ole v Nairobi City Water & Sewerage Company (Petition E138 of 2022) [2023] KEELRC 2716 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2716 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E138 OF 2022  
JK GAKERI, J  
NOVEMBER 1, 2023**

**BETWEEN**

**MARTIN NANG'OLE ..... PETITIONER**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner commenced this suit by way of Petition filed on 1<sup>st</sup> August, 2022 seeking various ORDERS;
  1. An order restraining the Managing Director (MD) from unlawfully changing the Petitioner's terms of employment without the Petitioner's Consent and/or approval.
  2. An order restraining the MD from unfair treatment and discrimination by being forced to serve for two terms contrary to the Petitioner's lawful expectation.
  3. An order compelling the MD to renew the Petitioner's contract for a further 5 years as provided in the Petitioner's offer letter and contract, and letter dated 8<sup>th</sup> June, 2020.
  4. The court do issue a permanent stay in respect of notice of end of employment contract ref NCWSC/HRD/01674/TKT/LM dated 5<sup>th</sup> May, 2022.
  5. A permanent injunction restraining the Respondent authorised either by itself, employees, servants and/or agents from removing the Petitioner's name from the payroll or refusing, failing and/or neglecting to pay his salaries.



6. An injunction restraining the Respondent company from debarring/stopping the Petitioner from accessing the company offices and intimidating, harassing and/or interfering with his duties and/or work schedule.
  7. An injunction restraining the Respondent company from taking any steps to terminate the Petitioner's employment contract and be restrained from acting thereupon or otherwise in any other manner other than as by law provided.
  8. Award damages in respect of the sum of Kshs.3,907,409/60 being extraneous allowances due to the Petitioner.
  9. Damages for discrimination.
  10. Damages for constitutional rights violations.
  11. Pecuniary damages.
  12. Costs and interest.
2. The Petitioner avers that he was employed by the Respondent as ICT Director on 1<sup>st</sup> July, 2012 following a vigorous process of recruitment in line with the Respondent's Human Resource Manual, 2009 having worked at KETPA previously under a 3 year renewable contract as per the advertisement and the 2009 manual.
  3. That on 13<sup>th</sup> February, 2013, the Petitioner signed a contract of employment stating that the Respondent had agreed to employ him on a contract for a period of 5 years effective 1<sup>st</sup> July, 2012 renewable subject to performance.
  4. It is the Petitioner's case that on 5<sup>th</sup> May, 2017, he wrote to the Respondent's Managing Director for renewal of the contract and a renewal was issued on 23<sup>rd</sup> June, 2017.
  5. The contract stated that it would be effective upto 22<sup>nd</sup> August, 2022 contrary to the Petitioner's expectations.
  6. That on 8<sup>th</sup> June, 2020, the Respondent's Managing Director by an internal memo notified all staff that the Board of Directors had passed a resolution on 5<sup>th</sup> December, 2019 altering the terms of service as follows;
    - a. Managing Director and Functional Directors 5 year renewable based on performance.
    - b. Managers, Co-ordinators and Officers – contract for 5 years renewable based on performance.
  7. That the fixing of fixed terms was unlawful and discriminatory to directors and others.
  8. The Petitioner further avers that on 29<sup>th</sup> November, 2021, the Petitioner and 3 others wrote to the Managing Director raising concerns on the alleged discrimination and on 5<sup>th</sup> May, 2022, the Petitioner received the Managing Director's letter on expiry of his employment contract with instructions to proceed on leave to utilize leave days as the days would not be paid for.
  9. That the contract had not yet expired as it was due to lapse on 19<sup>th</sup> August, 2022 and the same was unrennewable.



10. By letter dated 14<sup>th</sup> December, 2021, the Managing Director denied having discriminated the Claimant stating that the contract issued on 23<sup>rd</sup> June, 2017 was final.
11. That the Petitioner had not been consulted on the decision to alter the terms of the contract.
12. The Petitioner avers that the Respondent's conduct was malicious, amounted to abuse of office and breach of fair labour practice and the Constitution of Kenya, 2010.
13. The Petitioner cites Articles 41, 47(1) and (2) and Article 50(1) of the Constitution of Kenya, 2010 and Section 10(5) of the Employment Act and the provisions of Fair Administrative Action Act, as the applicable law.
14. Similarly, the Petitioner cites Articles 3(1), 10, 41, 47 and 259 of the Constitution as those allegedly violated and Section 4 of the Fair Administrative Action Act.
15. The Petitioner avers that his right to legitimate expectation was violated as the Respondent's Human Resource Manual required notification of changes in the terms of employment as did the Employment Act and was discriminated in the payment of extraneous allowances.
16. That the Respondent unilaterally introduced term limits in the Petitioner's employment denying him the right to fair administration action and fair hearing.
17. The petition is supported by the Petitioner's Affidavit sworn on 29<sup>th</sup> July, 2022 which the Petitioner relied on in the Notice of Motion dated 29<sup>th</sup> July, 2022.
18. The Claimant tabulated his performance from 2012 to 2021 as appraised by the Board of Directors with an annual score of Good throughout the period.

### **Respondent's case**

19. In its Replying Affidavit, sworn on 24<sup>th</sup> August, 2022 by Monica Tuli, who deposes that paragraph 12 of the Agreement dated 13<sup>th</sup> February, 2013 stated that the same was renewable for a further period of 5 years.
20. That the contract was based on the Respondent's Human Resource Manual reviewed and approved by the board on 18<sup>th</sup> December, 2012 under clause 4.3.2 on the 2 term limit which amended the previous formulation in 2009.
21. That the Petitioner's contract was renewed for another 5 years and the Respondent's Managing Director communicated the decision of the Board vide letter dated 23<sup>rd</sup> June, 2017 which was clear that this was the final term of renewal as per the Respondent's Human Resource Manual approved on 18<sup>th</sup> December, 2012.
22. That the review of the Human Resource Manual was done by the Board of Management including the Petitioner and the Company Secretary and the Petitioner was thus aware of the provisions of the Human Resource Manual and did not object to the Employment Agreements based on the review and neither the Petitioner nor his colleagues raised the issue during the currency of the contract.
23. That the two terms limit was not unique to the Respondent as WASREB, KETRACO and GDC had similar provisions.
24. The affiant states that counsel's letter that prior to July 2012, Directors served on permanent and pensionable terms was not factual as they served under 3 year contracts until the documents were reviewed in December 2012 to 5 years contracts.



25. That as a consequence of the ruling in Petition No. E16 of 2021, the Public Service Commission (PSC) in circular Ref PSC/LEG/009/21/544(27) dated 10<sup>th</sup> February, 2022 notified all state corporations to continue applying existing Human Resource instruments as approved by respective boards and the Respondent complied with the directives.
26. After the ruling in Application dated 29<sup>th</sup> July, 2022 was delivered on 15<sup>th</sup> February, 2023, the Respondent was accorded 21 days to respond to the Petition as requested and the Petitioner was accorded 30 days to respond, if necessary and a mention was scheduled on 28<sup>th</sup> March, 2023 for directions.
27. On 28<sup>th</sup> March, 2023, counsel for the Respondent informed the court that they had instructions to appeal the ruling and had filed a notice of appeal dated 1<sup>st</sup> March, 2023 and would lodge an application to the Court of Appeal to seek extension of time to file the appeal.
28. Counsel for the Respondent sought time to file submissions, was accorded 10 days but had not done so by 2<sup>nd</sup> May, 2023 and 31<sup>st</sup> May, 2023 after a 21 day extension.
29. Puzzling, no submissions had been filed by 28<sup>th</sup> August, 2023 when the court retired to prepare this judgement.

#### **Petitioner's submissions**

30. Counsel isolated four issues for determination touching on violation of the fundamental rights and freedoms by the Respondent, whether restraining orders should issue, whether the Petitioner's contract should be renewed for another 5 years, whether the Petitioner was discriminated.
31. On the 1<sup>st</sup> issue, counsel urged that since the Petitioner's performance was good, he had a legitimate expectation that the contract would be renewed.
32. That the introduction of the two term limit affected his employment negatively and was contrary to Article 41 of *the Constitution* of Kenya as the Petitioner was unaware of the changes.
33. Counsel relied on the provisions of Article 47 of *the Constitution* to submit that the Petitioner's right to fair administrative action was violated.
34. Article 234 was also cited to underscore the functions of the Public Service Commission in human resource matters in the public service and submit that the Respondent did not comply with the provisions of Article 234(2) of *the Constitution*.
35. On restraining orders, counsel submitted that since the Respondent violated the Petitioner's constitutional rights, it should be restrained from changing the terms of his contract arbitrarily.
36. As regards renewal of the contract, counsel relied on the contract dated 1<sup>st</sup> July, 2012 to urge that based on the Petitioner's performance, from July 2018 to June 2021, the Petitioner was entitled to a further 5 years.
37. On discrimination, counsel submitted that the unilateral variation of the Petitioner's terms of employment by introducing a term limit without notification of the Claimant without reference to the Public Service Commission amounted to discrimination under the provisions of Section 5(3)(b) of the *Employment Act*, 2007.



## Determination

38. The issues for determination are;
- i. Whether the Petition herein meets the threshold of a Constitutional petition.
  - ii. Whether the Respondent varied the Petitioner's employment terms unilaterally.
  - iii. Whether the Petitioner was discriminated.
  - iv. Whether the Petitioner is entitled to the reliefs.
39. On the 1<sup>st</sup> issue, it is common ground that the petition is premised on various provisions of *the Constitution* allegedly violated by the Respondent.
40. Articles 3(1), 10, 41, 47 and 259 of *the Constitution* of Kenya, 2010 are identified as the constitutional foundation of the petition and the rights allegedly violated are the right to be consulted in the variation of terms of employment, right to fair administrative action and freedom from discrimination.
41. Needless to emphasize, for a suit to qualify as a constitutional petition, it behoves the Petitioner to establish with sufficient clarity and precision the provisions of *the Constitution* allegedly violated, the manner or nature of the violation and the extent of the alleged violation as enunciated in *Anarita Karimi Njeru V Republic (1979) eKLR*, where Trevelyn and Hancox JJ stated as follows;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
42. The court expressed similar sentiments in *Trusted Society of Human Rights Alliance V Attorney General & 2 others (2012) eKLR* and *Kiambu County Tenants Welfare Association V Attorney General & another (2017) eKLR*.
43. Although the Petitioner cites Article 3(1), 10, 41, 47 and 259 of *the Constitution* as allegedly violated by the Respondent, particulars of the allegations are largely missing. For instance, what specific national values and principles of governance under Article 10 were violated and how and can the alleged violation be remedied under statute law?
44. The same applies to Articles 41 and 47 of *the Constitution*.
45. Article 259 addresses the manner in which *the Constitution* of Kenya, 2010 ought to be construed.
46. The foregoing reasoning finds support in the Petitioner's reference to the provisions of the *Fair Administrative Action Act* and the *Employment Act*, 2007 to demonstrate the alleged violations including discrimination.
47. Courts have variously held that where a matter addressed by *the Constitution* is equally addressed by an Act of Parliament, the same ought to be litigated in accordance with the provisions of the Act of Parliament which are generally more elaborate.
48. This inter alia obviates the danger of constitution alising all alleged violations of rights and thus trivialising *the Constitution*.



49. In the instant suit, it is common ground that the Petitioner has been an employee of the Respondent since 2012 and the dispute herein is principally between an employer and employee on terms of engagement, an employment matter.
50. To the question whether the suit herein meets the threshold of a Constitutional Petition, the answer is in the negative.
51. As to whether the Respondent unilaterally varied the employment terms of the Petitioner, the court proceeds as follow;
52. It is common ground that the Petitioner was competitively recruited by the Respondent as its Director, Information Communication Technology (ICT) from 1<sup>st</sup> July, 2012 under a 3 year fixed term contract renewable without any term limit, with a probationary period of six (6) months and subsequently terminable by three months' notice or basic pay in lieu of notice.
53. The Petitioner's gross salary stood at Kshs.551,026.00 comprising basic salary, house allowance, fuel allowance, telephone allowance and entertainment allowance.
54. It is also not in dispute on 13<sup>th</sup> February, 2013, the Petitioner signed another contract of even date which altered the terms of the earlier contract specifically in relation to the duration of service from 3 years to 5 years and the effective date was 20<sup>th</sup> August, 2012.
55. The contract was renewable for a further period of 5 years at the instigation of the Petitioner by written notice of renewal.
56. The Petitioner served under the contract until 11<sup>th</sup> May, 2017 when he sought renewal of the contract and the same was renewed by letter dated 23<sup>rd</sup> June, 2017 which stated that the renewal was for a final term of 5 years effective 20<sup>th</sup> August, 2017.
57. The Petitioner by letter of even date expressed concern over the reference to final term of the contract relying on the offer letter dated 23<sup>rd</sup> February, 2013, the advertisement in the Daily Nation in February 2012 and the Respondent's Human Resource Manual, 2009 and sought amendments to the renewal letter.
58. At this juncture, it is essential to dispose of the issue of the two contracts signed by the Petitioner.
59. Simply stated, by signing the contractual document dated 13<sup>th</sup> February, 2013, the Petitioner rendered the earlier contract ineffectual and the relationship between the parties was henceforth based on the new contract. The old contract was discharged by way of novation.
60. Clause 15 of the contract is unambiguous on the effect of the transition from the 'old contract' as follows;
- “ This Agreement contains all the terms and conditions of the contract of employment and service between the Company and the Employee and entirely replaces and supersedes any previous agreement and the employee agrees that no representations have been made to his by or on behalf of the company other than those contained in this agreement . . . ”
61. At common law, signature prima facie means acceptance as held in *L' Estrange V Graucob* (1934) 2KB 394.
62. Having signed the document without any reservations and served the Petitioner was bound by its terms and conditions hook, line and sinker.



63. However, although clause 12 of the Agreement uses the words “be renewed for a further period of five (5) years with all attendant rights and privileges thereto” did not necessarily imply that the further term meant or was understood to mean a final term, thus an introduction of a term limit.
64. In the court’s view, use of the phrase “a further period of five years” did not exclude another or other renewals of the contract in question in future as deponed by Monica Tuli, the Respondent’s Director Human Resource and Administration.
65. Prior to the renewal of the Petitioner’s employment contract on 23<sup>rd</sup> June, 2017, the Respondent’s Managing Director, Engineer Nahashon Muguna had by an Internal Memo dated 8<sup>th</sup> June, 2020 communicated to Functional Directors, Manager Co-ordinators and Officers that a review of terms of employment for Management staff had taken place pursuant to the Respondent’s Human Resource Manual Clause 4.3.2.
66. According to the Managing Director’s memo, the clause was reviewed by the Board of Directors and introduced a 2 term limit for the Managing Director and Functional Directors. Managers, Coordinators and Officers had 5 year contracts which may be renewed based on performance.
67. Intriguingly, the Managing Director’s memo neither cited the year of the Human Resource Manual in question nor the minutes of the Resolution of the Board of Directors or provide a back ground to the changes by the Directors.
68. Puzzlingly, the Director Human Resource and Administration deposes that Respondent’s Human Resource Policies and Procedures Manual, 2009 was reviewed by the Board on 18<sup>th</sup> December, 2012.
69. The affiant neither captured the relevant resolution of the board nor the minute of approval or the relevant page of the manual.
70. In paragraph 12 of her affidavit dated 24<sup>th</sup> August, 2022, the Director-Human Resource and Administration states that the review of the Human Resource Manual was done by the Managing Director, Functional Directors including the Petitioner, Company Secretary and the Acting Technical Director.
71. In sum, the review was effected by management as opposed to the Board of Directors of the Respondent.
72. Regrettably, the Respondent did not attach any record to confirm that indeed the review of the Human Resource Manual originated and was actualized by the Board of Management and there was consensus in the deliberations or the issue was voted on.
73. The Respondent’s assertion that term limits was not unique to it cannot avail as it has not demonstrated how it got itself there in the first instance.
74. The affiant failed to explain how, when and the circumstances in which the term limits at the Water Services Regulatory Board, Kenya Electricity Transmission Company and Geothermal Development Company were introduced, to justify the same.
75. Intriguingly, the Respondent did not avail a copy of its Human Resource Policies and Procedures Manual, 2012 or 2021 or any other.
76. The Petitioner availed the March 2009 version, though it has no authentication signature by anyone.



77. Without an authenticated copy of the Respondent's Human Resource Policies and Procedures Manual, resolutions and minutes, it is difficult to make a finding as to which version was reviewed, by whom, when and how.
78. The Respondent's Replying Affidavit lacks essential annexures which would have guided the court in canvassing the correct state of affairs as regards the Human Resource Policies and Procedures Manual and the alleged reviews.
79. This is significant in that the Functional Director's letter dated 19<sup>th</sup> November, 2021 contested the reviews alleged and in particular the term limit for positions other than the Managing Director.
80. From the letter, it is evident that the issue of term limit had not been considered and a resolution passed by the Respondent's board of directors.
81. An undated and unauthenticated communication from the Respondent appears to respond to the issues contested by the four functional directors.
82. The communication has no addressee and is thus unreliable as evidence for want of authenticity.
83. Significantly, the notice of end of employment contract by the Respondent's Managing Director to the Petitioner dated 5<sup>th</sup> May, 2022 cited Clause 4.3.2 of the Respondent's Human Resource Policies and Procedures Manual without disclosing the date of the manual or attaching the same.
84. A copy of the manual or the relevant resolution or minute of the board of directors meeting would have shown that the concerns raised by the Petitioner and others in the joint letter dated 19<sup>th</sup> November, 2021 had been considered and resolved by the highest decision making body of the Respondent, its board of directors.
85. It requires no gainsaying that the board of directors is the policy making body of a company or state corporation such as the Respondent and provides the strategic direction. Its decisions ought to be available for perusal and verifiable by courts of law whenever they are relied upon by parties.
86. In addition, neither the Petitioner nor the Respondent has alleged that the purported reviews of the Human Resource Policies and Procedures Manual were approved or sanctioned by the State Corporations Advisory Committee (SCAC) as had been the case until fairly recently when the public Service Commission advised that it had the constitutional mandate over Human Resource matters in the public service, including approval of Human Resource instruments under Article 234 of [the Constitution](#) of Kenya, 2010 (See Consumer Federation of Kenya (COFEK) suing through officials Stephen Muturo, Ebhram Kanoke and Henry Ochieng V National Social Security Fund Board of Trustees & 2 others (2022) eKLR, Manyara Muchui Anthony V Communications Authority of Kenya & 3 others (2022) eKLR) on the functions of the Public Service Commission in relation to Human Resource in the Public Service.
87. It requires no emphasis that the Respondent is a public body and thus bound by government policies and procedures such as Mwongozo and [State Corporations Act](#) among others.
88. From the foregoing, it is the finding of the court that by failing to avail reviewed copies of its Human Resource Policies and Procedures Manual, December 2012 and 2021, the Respondent varied the terms



of the Petitioner's employment by introducing a two term limit without consultations as required by the provisions of Section 10(5) of the *Employment Act*, 2007 which provides;

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing.”

89. In the court's view, since the change of terms was made by the Respondent's board of directors and the Petitioner was not a member as he was part of management, it was incumbent upon the Respondent to notify its employees of the board's resolution on the matter as it affected them even if there had been public participation. The impact of such a change is individual and notice should not have taken a different form as are the attendant consultations.
90. The Respondent adduced no evidence that it undertook any consultations with the Petitioner before he signed the contract on 13<sup>th</sup> February, 2013.
91. Finally, as regards the alleged reviews to the Respondent's Human Resource Policies and Procedures Manual, having failed to avail the different versions of the manual and/or minutes or resolutions of the board of directors that approved the alleged changes or approval by SCAC in the case of the 2021 review, it is the finding of the court that the alleged reviews were irregular as they lacked the seal of the approving authority principally the board of directors and/or SCAC.
92. Human resource instruments are board documents and derive their authority from the seal of the board of directors without which they have no authority and the contract dated 13<sup>th</sup> February, 2013 could not have been grounded on the alleged review. The contract was nevertheless binding on the parties as was the renewal.
93. As regards the two terms limit which the Respondent did not justify but argued that it was not unique, it is common knowledge that the practice was popularised in the public service by the State Corporations Advisory Committee (SCAC).
94. There is a school of thought that holds that employment of persons on fixed term contracts enhances and sustains individual performance as it is the basis of renewal as employees will be vigilant to ensure a renewal while employment on 'permanent' terms provides complacency indifference and laziness.
95. While this may work in the private sector where the overriding objective is maximization of profit, in the public service sector profit is seldom an imperative. The mandate of the Public Sector entails rendering services to the public and assist the Government in accomplishing its blue print and to the extent that the performance of a particular officer is above average, the duration of employment ought not be limited to terms. Significantly, it guarantees continuity and institutional memory essential in the public service sector.
96. However, it is for the board of directors and their employees to agree on the most appropriate mechanism to enhance service delivery.
97. While the term limit is necessary for the Managing Director and board of directors to ensure diversity and leadership, it may be disadvantageous to technical staff particularly those who ascend to the positions of Director while relatively young who may be rendered jobless unnecessarily unless the terms are clearly spelt out and agreed upon.
98. The foregoing reasoning finds support in the provisions of the *Public Service Commission Act*, 2017.



99. Under Section 3 the Act subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of *the Constitution* and Section 28 of the *Kenya Defence Forces Act*, this Act shall apply to all Public bodies and persons holding office in the public service.
100. Section 45 of the Act provides for employment on contractual terms from 12 months to 5 years as long as the conditions set out in Section 43(a) are met.
101. Section 45(2)(e) states that a person may be engaged on contractual terms if “the person does not qualify to be employed under any other terms of service.”
102. Finally, Section 45(4) provides that;  
The Commission shall regulate the employment of persons on a term of contract as contemplated under this section.
103. A wholesome reading of Section 45 of the *Public Service Commission Act* reveals that Parliament did not envision contractual employment as the basic form of employing persons but by exception which explains the restriction on the duration and renewal.
104. In the court’s view, a provision requiring an employee to quit employment after two or three terms irrespective of whether they are performing or not is unfair unless the particular employee has agreed to such an arrangement.
105. In this case, the clause 12 of the Petitioner’s Employment Agreement had no time limit.
106. It is incumbent upon organizations to extensively consult and involve their existing employees in the formulation and/or review of their Human Resource Manual and Policies to ensure their acquiescence with the proposed changes.
107. In the instance case, it is evident that no involvement or consultations took place in 2012 and 2013 as the Respondent provided no evidence of any consultative meetings or notification of the changes before the Petitioner signed the contract.
108. As regards the internal memo dated 8<sup>th</sup> June, 2020, the Managing Director makes no reference to the board of directors’ resolution that reviewed the Human Resource Policies and Procedures Manual or the attendant consultations or involvement of staff.
109. To the issue as to whether the Respondent altered the terms of employment of the Petitioner unilaterally, the court returns that it did.
110. As to whether the Petitioner was discriminated, counsel submitted that the Respondent’s attempt to alter the Petitioner’s terms of employment by introducing term limits without notifying him and by-passing the Public Service Commission discriminated the Petitioner.
111. The Respondent denied the allegations stating that the Petitioner was aware of the contents of the Human Resource Policies and Procedures Manual having participated in the review as a member of the Board of Management which reviewed the term from 3 years to 5 years and had been made aware of the final term on renewal.
112. It is common ground that Section 5(3) of the *Employment Act*, 2007 outlaws direct and indirect discrimination on various grounds including terms and conditions of service.
113. According to Black’s Law Dictionary, Discrimination is defined as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.



114. The International Labour Organization Discrimination (Employment and Occupation) Convention, 1958 defines discrimination to include; any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation . . .”
115. It has also been defined as affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or accorded “privileges or advantages which are not accorded to persons of another such description.”
116. The court is guided by the foregoing definitions.
117. In the instant suit, although the Petitioner alleges to have been discriminated on payment of Extraneous Allowance, it is unclear as to whether it was a term of the contract or was payable in defined circumstances as the Petitioner’s request for payment dated 12<sup>th</sup> April, 2022 would appear to suggest.
118. Similarly, the subsequent internal memo 2 days later is an appeal against a decision made by his peers in the organization on 9<sup>th</sup> and 11<sup>th</sup> June, 2020, 10 months later.
119. The memo cites MIN 4/96/2020 and MIN/6/96/2020 without setting out the reasons why the decision of the Board of Management was adverse to him.
120. More significantly, the appeal to the Managing Director was successful as evidenced by the internal memo from the Managing Director to the Director Human Resource & Administration dated 14<sup>th</sup> March, 2022.
121. From the communication, there appear to have been unresolved issues between the Petitioner and the Director Human Resource & Administration as opposed to the Respondent as an organization as her comment on the Managing Director’s memo of 14<sup>th</sup> March, 2022 would appear to suggest.
122. Since payment was approved by the Board on 7<sup>th</sup> December, 2021, the Respondent cannot be said to have discriminated the Petitioner.
123. In sum, the court is not persuaded that the Respondent treated the Petitioner in a discriminatory manner in any respect.
124. As regards the reliefs sought, the court proceeds as follows;
125. As regards the terms of engagement, having found as above, the court is persuaded that the Respondent accords the Petitioner a further 5 year contract subject to a performance review of the previous contractual period.
126. The notice of end of employment contract ref NCWSC/HRD/01674/TKT/LM dated 5<sup>th</sup> May, 2022 has been overtaken by events.
127. As regards extraneous allowance of Kshs.3,907,409/60, having found that payment was approved by the Respondent’s board of directors on 7<sup>th</sup> December, 2021, any amount pending payment shall be paid.
128. Having found that the Petitioner failed to make a prima facie case for discrimination for the burden to shift to the Respondent, the prayer for damages for discrimination is dismissed.
129. Having found that the Petitioner failed to prove that constitutional provisions were violated, the claim for damages for constitutional violation is unsustainable and is declined.



130. The court is unsure of what pecuniary damages entail. The prayer is dismissed.
131. In conclusion, judgement is entered for the Petitioner against the Respondent as follows;
- a. The Respondent is restrained from altering or varying or otherwise changing the terms of the Petitioner's employment otherwise than in accordance with the law.
  - b. The Respondent shall accord the Claimant a further 5 year contract effective the date following the lapse of the previous contract and a performance appraisal of the previous contract be conducted for records.
  - c. Any Outstanding Extraneous Allowance due to the Petitioner be paid within 45 days.
  - d. In view of the orders herein above, the Petitioner is awarded 50% of the costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF NOVEMBER 2023.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

