IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR JJA)

CIVIL APPEAL NO. 141 OF 2015

BETWEEN

THE COMMISSION ON ADMINISTRATIVE JUSTICE.....APPELLANT

VERSUS

KENYA VISION 2030 DELIVERY BOARD.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT
ENG. JUDAH ABEKAH.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Weldon Korir, J.) Dated 26th February, 2015

in

J.R. Misc. Application No. 223 of 2014)

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JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court of Kenya at Nairobi (**Mr. Justice W. Korir, J.**) Dated 26th February, 2015.

The background to the appeal is that, the first respondent was created by Gazette Notice No. 1386 of 17th February, 2009 to *inter alia* make policies, provide advice and overall leadership, oversight, guidance and policy direction in the implementation of the Vision 2030. In furtherance of the above objectives, the 1st respondent placed an advertisement in the daily Newspapers for the position of Director (Enablers and Macro) within its establishment. The 3rd respondent successfully applied for that position earning a three year contract of employment

with the 1st respondent effective 23rd March, 2009. Clause 6 of the contract provided for renewal of the contract six months to expiry, subject to approval by the 1st respondent. Six months to the expiry of his first contract, the 3rd respondent unsuccessfully applied to the 1st respondent for renewal of his contract. After successfully appealing to the Minister to the contract was renewed, but for only one year vide a letter dated 19th March, 2012.

The 1st respondent declined to effect the Ministers' decision, prompting the 3rd respondent to lodge a complaint with the appellant claiming *inter alia* that he had been subjected to an unfair administrative process by the 1st respondent. Vide a letter dated 12th September, 2012, the appellant unsuccessfully requested the 1st respondent to reconsider their rejection of the Minister's decision prompting the 3rd respondent to resubmit his complaint to the appellant for reconsideration and necessary action.

In a report dated 10th October, 2013, the appellant faulted the 1st respondent for flauting **Articles 47** and **59** of the Constitution, and **sections 2** and **8(a) (b)** & **(d)** of the Commission on Administrative Justice Act (The CAJA). In exercise of its powers under **Article 59(2)(i)** of the Constitution and **section 8(g)** and **26(g)** of CAJA, the appellant unsuccessfully directed the 1st respondent to pay the 3rd respondent an equivalent of twelve months' salary and allowances as compensation in lieu of the one year contract renewed by the Minister, to facilitate his access and the removal of his personal effects from his former office; and to offer an apology for the unfair

administrative treatment meted out against him, precipitating the Judicial Review (JR) proceedings resulting in this appeal. In the said JR application the 3rd respondent sought an order of mandamus to compel the 1st respondent to comply with the appellant's directions contained in the above report and the assistance of an order for compensation and assessment of attendant damages together with costs.

The JR Notice of Motion dated 6th June, 2014 was premised on sections 8 &9 of the Law Reform Act, Chapter 26, Laws of Kenya, Articles 2,8,22,23,26,27,28,35, 41, 42 47,50 & 59 of the Constitution of Kenya 2010. It was supported by grounds in its body, a statement, a verifying affidavit with annextures thereto, and a supporting affidavit deposed on behalf of the appellant by **Otiende Amollo EBS**, on 17th July, 2014 and filed on 22nd July, 2014. It was opposed by a replying affidavit deposed and filed on 17th July, 2014 by **Gituro Wainaina** on behalf of the 1st respondent together with annextures thereto. The office of the Attorney General that was cited as the 2nd respondent neither filed any papers either in support or opposition of the JR proceedings nor participated in the proceedings.

The JR proceedings were canvased by way of written submissions fully adopted by learned counsel for the respective parties without orally highlighting the same. The trial Judge evaluated and analyzed the record and upon construing and applying **Article 59** of the Kenya Constitution 2010, and **sections 2, 8** and **29** of the

CAJA to the rival submissions on want of jurisdiction, ruled that the appellant had jurisdiction to entertain the 3rd respondent's complaint.

Turning to the merits of the JR proceedings, the Judge reviewed case law on the scope and efficacy of the order of mandamus and drew out the following conclusions:

> ***"From the cited decisions, it is apparent that an order of mandamus will issue to compel the performance of a statutory duty owed to an applicant. Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of Judgment and discretion, the public officer or public Agency can only be directed to take action. It cannot be directed in the manner or the particular way the discretion is to be exercised."***

The Judge then construed **Articles 59, 249, 252** and **254** of the Constitution in light of **sections 8, 26, 41, 42** and **44** of the Act and concluded *inter alia* that the appellant is not vested with coercive powers over the entity it investigates; that in the event of default of compliance with any recommendations and or directives given to such an entity by the appellant, the only remedy the appellant has in law to redress such breach/default is to make a report to the National Assembly for action. Secondly, that **section 42** of the Act as read with **Article 252 (1) (b)** of the Constitution donates a discretionary obligation in the 1st respondent with regard to the implementation of the appellant's directions. The 1st respondent was therefore not amenable to compulsion by the appellant for it to implement its (appellant's) directive in favour of

the 3rd respondent. Neither does the Court have the mandate to direct the 1st respondent on the manner of the exercise of that discretionary obligation in the absence of demonstration of gross abuse of discretion, manifest, unjust or culpable excess of authority equivalent to a denial of a settled right to which the 3rd respondent was entitled without demonstration that there was no other plain, speedy, adequate and efficacious remedy available to the 3rd respondent.

In light of the above conclusions, the Judge ruled that the 3rd respondent had failed to demonstrate that the exception applies to his case; and secondly, that since the Board had already exercised its discretion by declining to accede to the appellant's recommendations, there was no basis upon which the court could issue an order of mandamus, and dismissed the JR proceedings precipitating the appeal and cross appeal now before us.

In the appeal, the appellant raised six grounds of appeal which may be paraphrased that the learned Judge erred in law:

> ***"when he declined to grant the order for mandamus; in holding that government Agencies/public bodies have no obligation to implement the decisions, determinations and or recommendations of the appellant thereby rendering the exercise of the constitutional mandate of the appellant in vain; in erroneously making a finding that the sole mode of enforcement of the decision, determinations and recommendations of the appellant is by way of making a report to the National Assembly for appropriate action; and lastly, by generally arriving at a judgment that negates Article 24 of the Constitution."***

The 3rd respondent on the other hand raised six (6) grounds in his cross appeal, which may also be paraphrased, that the learned Judge erred in law by:

> ***"applying an erroneous threshhold when construing the provisions of the Act vis avis those of the Constitution; by making a finding that ignore the 3rd respondent's right to fair administrative action; by failing to properly appreciate the intent and purport of Article 59(2) (d) and (i) of the Constitution; by erroneously declining to grant the order of mandamus; and lastly by erroneously holding that the appellant's findings and recommendations did not have the force of a court Judgment."***

The appeal and cross-appeal were canvased by way of written submissions filed, fully adopted and orally highlighted by counsel for the respective parties. Learned counsel **Miss Desma Nungo** appeared for the appellant, learned counsel **Mr. Queenton Ochieng** for the 1st respondent, while learned counsel **Mr. James Okeyo** appeared for the 3rd respondent. There was no representation for the office of the Attorney General. Neither were any written submissions filed on its behalf. The court being satisfied that the office of the Attorney General had due notice of the directions for filing of submissions and the date for the hearing of the appeal, allowed learned counsel present to prosecute the appeal.

Supporting the appeal, **Miss Nungo** faulted the Judge for the failure to: properly appreciate the mandate of the appellant which includes over sight on the right to fair administrative action; properly appreciate that a proper construction of **section 42** of the CAJA is that a public body subjected to remedial action by the

appellant is under an obligation to comply with the findings and recommendations as directed by the appellant; properly appreciate the right vested in the appellant to move the High Court for enforcement of its findings; properly appreciate the court's obligation to enforce the 3rd respondent's right to Fair Administrative Action as crystalized by the appellant's remedial action against the 1st respondent.

To buttress the above submissions, counsel cited among others the case of **Speaker of the Senate & another versus Hon. Attorney General & 4 others [2013) eKLR**, **Paul Musili Wambua versus Attorney General & 2 others [2015]** eKLR, asserting that the Judge fell into error when: he failed to enforce the 3rd respondent's right to fair administrative action as recommended by the appellant; and, for erroneously held that the 1st respondent as a State Agency/Public body only had a discretionary obligation when it come to the implementation of the appellant's report in favour of the 3rd respondent.

Relying on Article 59 of the Kenya Constitution 2010, as read with **section 42 (4)** of the CAJA, counsel faulted the Judge for erroneously holding that the appellant's only redress for the 1st respondent's default on the implementation of its recommendation in favour of the 3rd respondent lay in making a report to the National Assembly. Counsel also relied on the case of **In Re matter of the Interim Independent Electoral Commission [2011] eKLR**, in support of the submission that the appellant has an entrenched constitutional right of recourse to courts of law for

enforcement of its recommendations for purposes of ensuring good governance and the protection of human rights.

In support of the cross-appeal, **Mr. James Okeyo**, faulted the Judge for ignoring and failing to address his mind to the cross-appellant's rights enshrined in **Article 22(1)** and **47** of the Kenya Constitution 2010,as all that the 3rd respondent had complained of and proved before the court was the 1st respondent's failure to accord him fair administrative action which, in counsel's view, the court was under both a constitutional and statutory obligation not only to address, but also to provide an appropriate remedy for the breach. Default on the part of the court in counsel's view, violated the principle of constitutionalism; that the decisions and recommendations of the appellant are binding and have the force of a court's judgment; that they are therefore amenable to enforcement by a court of law; that the Judge's failure to grant the order of mandamus rendered the whole mandate of the appellant inconsequential; and lastly, counsel maintained that, the relationship between the 1st respondent and the 3rd respondent gave rise to a public duty; that the best forum for redressing the 3rd respondent's grievances for an unfair administrative action against the 1st respondent was the JR proceedings.

Relying on the case of **Mbogo & another versus Shah [1968] EA93,** counsel urged us to interfere with the Judge's wrongful exercise of discretion in failing to grant the JR remedies the 3rd respondent had sought from court and reverse the same.

Opposing both the appeal and cross-appeal, **Mr. Queenton Ochieng** relied on the case of **Kenya National Examination Council versus Republic ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR,** and **National Social Security Fund Board Trustees & 2 others versus Central Organization of Trade Union (C) [2015] eKLR**, on the scope and efficacy of an order of mandamus, and submitted that neither the appellant nor the 3rd respondent demonstrated the existence of a statutory duty that vested a public obligation in the 1st respondent to implement the appellant's decision in favour of the 3rd respondent so as to warrant the granting of an order of mandamus; that **section 42(2) (c)** of the CAJA when considered in light of the legal definition of the word "recommendation" which according to counsel implies a freedom to follow or not to follow, to accept or to reject, there is clear demonstration that it was never the intention of the Legislature that the recommendations of the appellant would be out rightly binding on any public body.

In counsel's view, the use of the word "if any" in **section 42(3)** of the CAJA, contemplates situations when a public body may not act on the appellant's recommendations; that the election to act or not to act on such recommendations being discretionary, an order of mandamus could not in the circumstances issue to redress the 1st respondent's failure to so comply.

Relying on the cases of the **Speaker of the National Assembly versus the Hon. James Njenga Karume [2008] 1KLR 425** and **Kakuta Maimai Hamisi**

versus Peris Pesi Tobiko & 2 others [2013] eKLR, counsel submitted that under **section 42(4)** of the CAJA, redress for the 1st respondent's alleged disobedience of the appellant's recommendation only lay in reporting the breach to the National Assembly. There was therefore no legal basis for granting the order of mandamus. Counsel also relied on the case of **Mbogo versus Shah** (supra), and urged us to find that the Judge exercised his discretion judiciously when he dismissed the JR proceedings. On that account, counsel urged us to dismiss both the appeal and cross-appeal with costs to the 1st respondent.

There were no replies to the 1st respondents' submissions.

This is a first appeal. Our mandate is to re-appraise the evidence and draw out own inferences of fact. See **Rule 29(1) (a)** of CAR and also **Selle & Another versus Associated Motor Boat Company & others [1968] EA 123** where the Court stated:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."***

We have considered the record in light of the above mandate, the rival submissions and principles of law relied upon by the respective parties in support of their opposing positions. The issues that fall for our determination are as follows:

(1) Whether the appellant had the mandate to intervene in the 3rd respondent's complaint.

(2) Whether the 1st respondent is a public entity.

(3) Whether the appellant's request to the 1st respondent to implements its recommendations in favour of the 3rd respondent fell within the realm of performance of a public duty.

(4) Whether in the circumstances of this appeal, the Judge exercised his discretion judiciously when he dismissed the JR proceedings.

On the first issue, we agree with the Judge's finding that on the basis of both the constitutional and statutory provisions reviewed by the Judge with regard to this issue, the appellant had the mandate to entertain and make recommendations with regard to the complaint the 3rd respondent had raised before it against the 1st respondent.

The 2nd, 3rd & 4th issues are interrelated and will be dealt with as one. From the record, the first respondent was set up by the government of Kenya vide gazette notice number 1386 of 17th February, 2009 to *inter alia* make policies, advise and provide overall leadership oversight, guidance and policy directions in the implementation of

the Vision 2030, a government initiative which leaves no doubt in our minds that the 1st respondent is a public entity created to oversee the implementation of a public function. In the same vein, officers hired to discharge that public mandate on behalf of the 1st respondent did so in the discharge of a public function. Those actions were therefore amenable to Judicial Review procedures. The above finding now leads us to the determination of the core issue in this appeal namely; whether the Judge exercised his judicial discretion judiciously when he dismissed the JR proceedings.

The principles that guide the High Court in the exercise of judicial review Jurisdiction are as were aptly restated by the Court in **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** as follows:-

> ***"Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a***

party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR."

In light of the above, our mandate when determining whether the Judge exercised his discretion judiciously when he dismissed the JR proceedings is as was set out in the case of **United India Insurance Company Limited –versus East African Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected himself in law, misapprehended the facts, took account of considerations which he should not have taken into account, failed to take into account a consideration of which he should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong.

As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in **National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others** (supra), namely:

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing

therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

Further that:

"..... the party against whom the application is made must be legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

We have considered the above threshhold, in light of **Articles 59,249, 252** and **254** of the Constitution that the Judge construed and considering these in light of the provisions of **sections 8, 26, 41** and **44** of the CAJA found no basis for the JR proceedings before him and dismissed the same on that account, and find that **Article 59(1)** sets up the appellant. Sub **Article 2** of this Article sets out a litany of the powers donated to the appellant, which include but are not limited to investigation and securing redress for complaints of unfair treatment. Sub **Article 3** grants to individuals the right of access to services provided by the appellant. **Article 249** of the Constitution sets out the objects of the appellant and other like commissions. Among these falls the obligation to secure observance by all state organs of democratic values and principles. **Article 252** donates to the appellant the right to receive and redress complaints by persons entitled to institute court proceedings under **Article 22(1)**.

Article 254 makes provision for a reporting system by the appellant to the National Assembly

Section 2 of the CAJA defines Administrative action among others to include a decision or an action carried out in the Public Service; or a failure to act in the discharge of a public duty required of an officer in public service. **Section 8** of the CAJA entrenches the statutory mandate of the appellant couched in almost similar terms as those set out in **Article 59(1)** of the Constitution. **Sections 26, 41, 42** and **44** in our opinion, are simply capacitation provisions meant to empower the appellant and enable it effectually discharge both its constitutional and statutorily mandates.

Our take on the construction of the above provisions of both regimes of law is that **Article 254** relates to the exercise of mandate by the appellant for the year in respect of which the report is being made. It is our view that these fall into what have come to be known as accountability reports required of public entities in the discharge of their constitutional and statutory mandates as provided for in both regimes of the law. In our view, it has nothing to do with the reporting of each and every investigative report undertaken by the appellant in the discharge of its mandate under the regimes in any given year.

We therefore find nothing in the above Article to suggest that the only remedy available to a beneficiary of the appellant's recommendations for redress to a public entity in the discharge of its undoubted public investigative and oversight mandate is

limited to reporting of such findings to the National Assembly. Neither do we find anything in the said Article to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law.

It is also our finding that the complaint raised by the 3rd respondent firstly before the appellant and subsequently in the JR proceedings, fell within the definition of administrative action as defined in **section 2** of the CAJA as it related to the 1st respondent's failure to accede to the Minister's renewal of the 3rd respondent's contract with them for one year in the first instance, and the failure to accede to the appellant's request to convert the Minister's renewal of the said contract for one year to twelve (12) months' salary compensation together with other attendant remedies. We therefore have no hesitation in reiterating that the 1st respondent's actions fell within the realm of public law and were therefore amenable to JR proceedings contrary to the findings of the Judge in the impugned decision.

In **Ransa Company Ltd versus Mania Francesco & 2 others [2015] eKLR,** the Court expressed itself *inter alia* as follows:

> ***"..... a court sitting on judicial Review exercises a*** *sui generis* ***jurisdiction which is very restrictive indeed in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction rather than the merit of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties."***

In **Bahajj Holdings Ltd versus Abdo Mohammed Bahajj & Company Ltd & another Civil Application No. Nai 97 of 1998,** the Court held *inter alia* that,

limits of Judicial review continue expanding so as to meet the changing constitutional demands affecting administrative decisions. Similarly, in **Re. National Hospital Insurance Fund Act and Centrol Organization of Trade Union Kenya, Nairobi HCMA No. 1747 of 2004 [2006] 1EA47, Nyamu, J** (as he then was), held the view that:

> ***"while it is true that so far the jurisdiction of a judicial review court had been principally based on the "3'I's" namely illegality, irrationality and impropriety of procedure, categories of intervention by the court are likely to be expanded in the future on a case to case basis."***

In the case of **Child Welfare Society of Kenya versus Republic and 2 others exparte Child In Family Forces Kenya (supra),** the court was categorical that since the promulgation of the Kenya Constitution 2010, judicial review may be granted as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya, 2010.

In light of the above reviewed case law, it is our finding that the trial Judge fell into error when he restricted the determination of the JR proceedings before him to the traditional view of JR Remedies restricted to the 3, I's namely, illegality, irrationality and impropriety which as Nyamu, J stated in **Re. National Hospital Insurance Fund Act and Central Organization of Trade Union (Kenya)** (supra), was the traditional restrictive mode for determination of a JR claim. By taking the above restrictive approach in the determination of the JR proceedings before him, the Judge, failed to properly appreciate and address the interplay between Administrative law and

constitutional law that were engaged in the complaint the 3rd respondent had raised in the JR proceedings before him, which in our view was laid in the exercise of his constitutional right bestowed upon him by **Article 59(3)** as read with **Article 252(2)** of the Kenya Constitution 2010. He had a right in his individual capacity to complain to the appellant in the first instance and seek redress for the unfair administrative action he had been subjected to at the behest of the 1st respondent, and which redress appellant accordingly accorded him.

Article 252(2) explicitly provided that the 3rd respondent could only access the appellant's jurisdiction if he had capacity to institute court proceedings seeking redress for violation of a fundamental right. In our view, the 3rd respondent met this threshhold as **Article 22(1)** donated to him the right to access the court, and seek redress for any alleged violation of his rights. Considering that his complaint before the appellant, the trial court and now on appeal before this Court has consistently been that he was subjected to an unfair administrative action by the 1st respondent, in violation of **Article 47** of the Kenya Constitution 2010 which entrenched the Right to Fair Administrative Action, as one of the conditions for accessing JR proceedings, it is apparent that the Judge erroneously overlooked this provision, hence his failure to interrogate and make an appropriate finding as to its applicability or otherwise in relation to the relief the 3rd respondent sought in the JR proceedings.

It is also our finding that the Judge failed to properly appreciate as to who between the appellant and the 3rd respondent was the proper complainant in the JR proceedings before the Judge. In our view, this approach is what accounts for the Judge's heavy focus on both the constitutional and statutory investigation mandate of the appellant together with the attendant appropriate redress procedures for any default or breach arising from non-compliance with any resulting recommendations, and directions. In so doing, he failed to address the 3rd respondent's complaint of unfair administrative action by the 1st respondent, and erroneously dismissed the JR proceedings.

Contrary to the findings by the Judge in the impugned decision, the 3rd respondent had demonstrated gross abuse of discretion, because in the absence of any assertion on the part of the 1st respondent that the Minister had not mandate to review the 3rd respondent's contract for one year, the 1st respondent was bound to implement the Minister's decision in the absence of any provision of law donating to them a discretion to either reject or accept the directive, and none was cited to us as proof thereof.

Likewise, upon the appellant intervening on behalf of the 3rd respondent and substituting the one year contract with an award of compensation, the 1st respondent was obligated to implement that decision in the absence of any move by them either to appeal against it or to apply to have it quashed through an appropriate court process.

Gross abuse of discretion and manifest injustice was also borne out by the undisputed conduct of the 1st respondent refusing to allow the 3rd respondent access his former office to remove his personal effects upon refusal to accede to either the Minister's or the appellant's action conferring a benefit on to the 3rd respondent.

Furthermore, there was the failure to render an apology as directed by the appellant without any basis being shown by the respondent that the appellant's request was not well founded, particularly as the appellant gave reasons as to why the apology should be rendered.

Culpable excess of authority equivalent to a denial of a settled right at the instance of the 1st respondent was demonstrated by the fact that the 3rd respondent as an undoubted employee of the 1st respondent was entitled to a constitutionally entrenched right to a fair administrative Action. Secondly, his consistent complaint to the Minister, the appellant and in the JR proceedings was that he had been denied a Fair Administrative Action at the instance of the 1st respondent. The 3rd respondent having elected to invoke the **Article 59(3) & 252(2)** of the Kenya Constitution 2010, procedures to redress the unfair Administrative Action, he had brought himself within the ambit of **Article 22(1),** which donated to him a right to access the court to champion his JR proceedings of which we have no doubt the Judge was properly seized of.

Lack of a plain, speedy, adequate and efficacious remedy for the vindication of the 3rd respondent's complaint of subjection to an unfair Administrative Action by the 1st respondent had clearly been demonstrated by the fact that by reason of the interplay between the constitutional and Administrative law on which the JR proceedings were anchored, the 3rd respondent's complaint against the 1st respondent could only be handled through JR proceedings or through a constitutional petition. Declining relief through JR meant that the only other alternative redress system the 3rd respondent had at his disposal was through a constitutional court which in essence if resorted to would in our view defeat the principle of speedy access to justice, considering that there was jurisdiction for the court to accord him relief where a fundamental breach had been established as in the instant appeal.

Based on the above assessment and reasoning, it is our finding that both the appeal and cross-appeal have merit. They are accordingly allowed.

The above finding brings us to the determination of an appropriate remedies for redressing the 1st respondent's infringement of the 3rd respondent's right to Fair Administrative Action on the one hand and the 1st respondent's flagrant default to implement the appellant's recommendation in favour of the 3rd respondent, with the ultimate beneficiary of both reliefs with the exception of an award of costs to the appellant being the 3rd respondent.

The first relief sought from the Court was an order of mandamus to compel the 1st respondent to comply with the findings and recommendations of the appellant, namely, payment of twelve (12) months' salary as compensation in lieu of the one year renewal of contract which the 1st respondent declined to accept; access to the office to collect personal effects, and an apology, all of which we find were well founded both in law and on the facts as demonstrated above and are accordingly allowed.

As for an order for compensation and assessment of the attendant quantum of damages, having ruled above in favour of the 3rd respondent in his claim that his right to a Fair Administrative Action was infringed by the 1st respondent, we issue a declaration that the 3rd respondent's right to a Fair Administrative Action was violated by the 1st respondent.

Consequent to the above finding, we now proceed to redress the same. The approach we take is as was stated by the High Court in **Ericson Kenya Limited versus Attorney General & 3 others [2014] eKLR** for the holding *inter alia* that:

> ***"a court of law has a duty after finding in favour of a party under Article 23 of the Kenya Constitution 2010 to frame appropriate reliefs to vindicate the rights that may have been infringed and which reliefs are not limited to the specific (reliefs) outlined in Article 23(3) (a) to (e)"***

In **Gitobu Imanyara & 2 others versus Attorney General [2016] eKLR** we observe that the primary purpose of a constitutional remedy is not compensatory or

punitive, but it is for purposes of vindicating the rights violated and to prevent or to deter any future infringement. See also **Lucas Omoto Wamari & 2 others [2017] eKLR** for observations *inter alia* that:

> ***"....mere declaration without any specific award of damages do not vindicate the appellant. Neither do they convey a derogative message regarding the sanctity of the constitution and the need for protection of fundamental rights and freedoms...."***

In **Kenya Agricultural Research Institute versus Peter Wambugu Kariuki & others Nakuru Civil Appeal No. 315 of 2015**, the following observations were made:

> ***"Our construction of Article 23 of the Constitution of Kenya, 2010 is that, it simply makes provisions that where a violation of the guaranteed constitutional rights and fundamental freedom has been established, the court has a wide range of remedies to grant. Among these is payment of monetary compensation. In the instant appeal as already mentioned above, the Judge simply made a pronouncement that the cross-appellant's rights and fundamental freedom had been violated but made no provisions for an appropriate remedy in line with that finding."***
>
> ***"We find nothing in the said Article to suggest that a particular relief for the alleged violation must be prayed for before it may be granted. We therefore find that there was jurisdiction for the Judge to grant the reliefs notwithstanding, lack of specific prayer for the particular appropriate remedy."***

In light of the above, it is our finding that the 3rd respondent is entitled to an award of damages which we now proceed to assess. The comparables for an appropriate award of damages for the established breach are as were set out in **Lucas Omoto Wamari versus Attorney General & Another** (supra) wherein, the Court

reviewed the awards granted in **Jennifer Muthoni Njoroge and others versus the Attorney General [2012] eKLR,** and **Benedict Munene Kariuki & 13 others versus the Attorney General**; High Court Petition No. 722 of 2009, wherein, claimants were variously awarded amounts of between Kshs. 1.5. Million and Kshs. 2 million for torture, cruel and in human treatment and unlawful detention for periods ranging between seven (7) days to fourteen (14) days.

Bearing in mind, the compensatory relief already accrued to the 3rd respondent under prayer (a) of the JR application, the fact that issue of torture, cruel, and inhuman treatment and unlawful detention do not arise herein and doing the best we can, we allow Kenya Shillings seven hundred thousand (Kshs. 700,000/=) as adequate compensation under this head.

In the result, we make the following orders:

1. Both the appeal and cross appeal are allowed.
2. Prayer (a) of the JR proceedings for an order of mandamus is granted as prayed.
3. Under prayer (b) which is also granted, a declaration be and is hereby issued that the 3rd respondent's right to affair Administrative Action was infringed. The 3rd respondent is therefore entitled to Kshs. 700,000/ as compensation for the said infringement of his constitutional right to fair Action Administrative.

4. Resulting sums under items 2&3 above will carry interest at court rates from the date of Judgment in the High Court.
5. Both the appellant and the 3rd respondent as the cross-appellant will have costs of the appeal and cross appeal and the JR proceedings before the High Court.

Dated and delivered at Nairobi this 27th day of September, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.