

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; Ag. CJ & Ag. P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO. 42 OF 2019**

**—BETWEEN—**

**KENYA VISION 2030 DELIVERY BOARD.....APPELLANT**

**—AND—**

**THE COMMISSION ON**

**ADMINISTRATIVE JUSTICE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**ENG. JUDAH ABEKAH.....3<sup>RD</sup> RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi  
(Nambuye, Kiage & Murgor) in Civil Appeal No. 141 of 2015 delivered on  
27<sup>th</sup> September 2019)*

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**JUDGMENT OF THE COURT**

**A. BACKGROUND**

[1] This Petition of Appeal is dated 6<sup>th</sup> November 2019 and was filed on 7<sup>th</sup> November 2019. The Appellant has challenged the entire Judgment and orders of the Court of Appeal (*Nambuye, Kiage & Murgor*) at Nairobi in Civil Appeal No. 141 of 2015 delivered on 27<sup>th</sup> September 2019.

[2] This matter can be traced to the publication of Kenya Gazette Notice No. 1386 of 17<sup>th</sup> February 2009 which established the Kenya Vision 2030 Delivery Board (“**the Board**”) to, *inter alia*, make policies, provide advice and overall leadership, oversight, guidance and policy direction in the implementation of the Vision 2030. As part of meeting its objectives, the Board placed an advertisement in the daily newspapers for the position of Director (*Enablers and Macro*) within its establishment. The 3<sup>rd</sup> Respondent secured a three-year contract of employment for this position with the Board, effective 23<sup>rd</sup> March 2009. Clause 6 of the contract provided for renewal of the contract six months to expiry, but subject to approval by the Board. Six months to the expiry of his contract, the 3<sup>rd</sup> Respondent wrote to the Board requesting for a renewal of his contract. His request was rejected on the grounds that his performance was below par, and the contract was subsequently terminated through a decision dated 23<sup>rd</sup> March 2012.

[3] Aggrieved by the Board’s decision, the 3<sup>rd</sup> Respondent appealed to the Minister for Planning and National Development and Vision 2030 (“**the Minister**”). The Minister renewed the 3<sup>rd</sup> Respondent’s contract for a period of one year, but the Board declined to allow him back to work. As a result, the 3<sup>rd</sup> Respondent sought the intervention of the 1<sup>st</sup> Respondent, the Commission on Administrative Justice (**CAJ**).

[4] After investigating the matter, CAJ in a report dated 10<sup>th</sup> October 2013 concluded, *inter alia*, that the Board had “impugned Articles 47 and 59 of the Constitution and Sections 2 and 8(a), (b) and (d) of the Commission of Administrative Justice Act on fair administrative action.” Consequently, the CAJ made recommendations to the Board to: *pay the 3<sup>rd</sup> Respondent an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract; facilitate the 3<sup>rd</sup> Respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him.* The Board declined to implement CAJ’s recommendations

prompting the 3<sup>rd</sup> Respondent to file JR Case No. 223 of 2014, *Republic vs. Kenya Vision 2030 Delivery Board & another Ex-parte Eng. Judah Abekah*.

[5] At the High Court, the 3<sup>rd</sup> Respondent sought *an order of mandamus to compel the Board to comply with the recommendations of CAJ, compensation, and costs*. The High Court identified three issues for determination as follows: *Did CAJ have jurisdiction to determine the matter which had given rise to these proceedings? Can the decisions of CAJ be enforced by issuance of an order of mandamus? and Who should bear the costs of the proceedings?*

[6] On 26<sup>th</sup> February 2015, the High Court (*W. Korir, J*), found that although CAJ had the powers to investigate the 3<sup>rd</sup> Respondent's claim, it could not compel the manner in which such recommendations, findings or reports could be implemented. In the Learned Judge's opinion, in matters involving exercise of judgment and discretion, a 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. Ultimately, the learned Judge found that CAJ does not have coercive powers over the institutions that it investigates. The Court found that where an organization refuses to implement the recommendations of CAJ, the only action the Commission can take is to make a report to the National Assembly. Thereafter, the National Assembly can take appropriate action pursuant to Section 44(4) of the Commission on Administration of Justice Act (**CAJA**). With regard to costs, the Court ordered each party to bear their own costs on the ground that even though the 3<sup>rd</sup> Respondent's application had failed, it was not frivolous.

[7] The Judge concluded that since the Commission cannot compel a state agency to implement its recommendations, it follows that a court cannot compel a government agency to implement such recommendations through an order of mandamus. Further that the only exception where a court can compel a public agency to implement a recommendation is where "*there is gross abuse of discretion, manifest injustice or palpable excess of authority*" equivalent to

*denial of a settled right which the petitioner is entitled, and there is no other plain, speedy and accurate remedy.*” The trial court concluded that the 3<sup>rd</sup> Respondent had not invoked that exception to warrant issuance an order of mandamus.

**[8]** Aggrieved by the decision of the High Court, CAJ filed Civil Appeal No. 141 of 2015, *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others*. The 3<sup>rd</sup> Respondent also filed a cross-appeal. The Learned Judges of Appeal (*Nambuye, Kiage & Murgor*) framed four issues for determination as follows: *whether CAJ had the mandate to intervene in the 3<sup>rd</sup> Respondent’s complaint; whether the Board is a public entity; whether the CAJ’s request to the Board to implement its recommendations in favour of the 3<sup>rd</sup> Respondent fell within the realm of performance of a public duty; and whether in the circumstances of the appeal, the Judge exercised his discretion judiciously when he dismissed the JR proceedings.*

**[9]** On 27<sup>th</sup> September 2019, the Court of Appeal allowed both the appeal and the cross-appeal. The Appellate Court granted the 3<sup>rd</sup> Respondent’s prayer for mandamus as was sought in the Judicial Review Application; declared that the 3<sup>rd</sup> Respondent’s right to fair administrative action was infringed and awarded him KES 700,000/= as compensation with interest from the date of Judgment of the High Court. The costs of appeal and cross-appeal were also awarded. In doing so, the Learned Judges of Appeal agreed with the trial Judge’s finding only to the extent that CAJ had the powers to investigate the 3<sup>rd</sup> Respondent’s claim and make recommendations.

**[10]** The Court disagreed with the High Court’s finding to the effect that the only remedy available to a beneficiary of CAJ’s recommendations is limited to *reporting of such findings to the National Assembly*. The Court found nothing in Article 254 of the Constitution to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law. It also found that the complaint raised by the 3<sup>rd</sup> Respondent fell within the

definition of administrative action as defined in Section 2 of the CAJA as it related to the Board's failure to accede to the Minister's renewal of the 3<sup>rd</sup> Respondent's contract, and the failure to accede to CAJ'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. The Court emphasized that the Board's actions fell within the realm of public law and were therefore amenable to Judicial Review proceedings contrary to the findings of the Judge in the impugned decision.

[11] Consequently, the Court found that the 3<sup>rd</sup> Respondent had demonstrated gross abuse of discretion, and that the Board was bound to implement the recommendations of CAJ.

[12] Aggrieved by the finding of the Court of Appeal, the Board filed this appeal as of right pursuant to Article 163(4)(a) of the Constitution. The Board raises three grounds of appeal summarized as follows:

- a. *The Appellate Court incorrectly concluded that the recommendations of CAJ have the force of law and are binding to public bodies;*
- b. *The Learned Judges erred in law in holding that the fact that the Board did not challenge the action of the Minister in extending the 3<sup>rd</sup> Respondent's contract or CAJ's recommendations, then the CAJ's recommendations are binding on it; and*
- c. *The learned Judges erred by assessing damages in favour of the 3<sup>rd</sup> Respondent when the High Court did not make any assessment of damages.*

## **B. PARTIES SUBMISSIONS**

### ***(a) The Appellant***

[13] The Board submits that the Court of Appeal solely relied on Article 254(1) of the Constitution and overlooked Section 42(4) of the CAJA. In that context, the Board submits that Article 254(1) of the Constitution was not relevant to the matter before the Court as it relates to the general obligation of independent commissions to submit a report to the National Assembly at the end of each financial year. The Board contends that, pursuant to Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of CAJ, is for CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. Relying on the authority of ***Samson Chembe Vuko vs. Nelson Kilumo & others*** [2016] eKLR, the Board maintains that CAJ ought to have followed the procedure in the CAJA instead of seeking an order of mandamus.

[14] Learned Counsel for the Board further submits that in view of Section 43(3) of the CAJA, CAJ's recommendations are not outrightly binding and that an order of mandamus will not issue where there is discretion on the public body to act or not to act. Furthermore, that there is no provision in the Constitution or in the CAJA that gives CAJ powers to enforce its decisions and recommendations as if they were a Court order. In support of this argument, the Board cites the cases of ***Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others*** [2013] eKLR, ***R(Bradley) vs Secretary of State for Work and Pensions*** [2008] EWCA Civ 36(Pages 51 to 110) and ***Justus Kariuki Mate & another vs Martin Nyaga Wambora & another*** [2017] eKLR (pages 111 to 131). Learned Counsel also relied in the authority of ***Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)***, and SC Reference 3 of 2019; [2020] eKLR (***Re Council of Governors***).

[15] The Board furthermore submits that the recommendations of CAJ are not binding and that public bodies have no obligation to implement them and takes issue with CAJ's recommendations to compensate the 3<sup>rd</sup> Respondent despite the

Minister communicating to him that the extension of his contract had been declined. In that regard, the Board submits that the Court of Appeal converted what was a normal Judicial Review Application into a Constitutional petition.

[16] It is also the Board's submission that the 3<sup>rd</sup> Respondent could not overlook or sidestep the laid down dispute resolution institutions such as the Courts and go directly to CAJ for a determination of their grievance. Citing Sections 8 and 30 of the CAJA, Article 159(1) of the Constitution, the cases of *Sentiba Gordon & 2 others vs Inspector of Government* (Civil Appeal No. 06 of 2008) [2010] UGSC 30 and In *Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, the Board urges that if the dispute between the parties was whether the 3<sup>rd</sup> Respondent was entitled to the renewal of his employment, then the same ought to have been filed before the Employment and Labour Relations Court.

[17] Lastly, the Board faults the Court of Appeal for proceeding to assess damages on its own motion instead of referring the matter back to the High Court for assessment of damages. The Board closes its submission by praying that the appeal be allowed with costs.

### **(b) The Attorney General**

[18] We note that the Attorney General did not file its written submissions. However, Ms. Chilaka, appearing in person for the Attorney General on the date of the hearing, did associate herself with the submissions of the Board to the extent that CAJ's recommendations are not binding and therefore have no force of law.

### **(c) The 1<sup>st</sup> Respondent**

[19] In response, CAJ argues that it can make recommendations to a public body concerned in an alleged violation and that those recommendations are binding by

virtue of Articles 19, 249(1), 22(1) &(2) and 59(2),(4), (5)(b), (h),(i) & (j) of the Constitution. CAJ maintains that in Article 59(2)(e) and (j) of the Constitution, it does have the mandate to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated, report on complaints investigated under paragraphs (h) and (i) and take remedial action. CAJ also submits that, under Section 8(d) of the CAJA, it has an obligation to report to the National Assembly bi-annually on the complaints investigated under paragraphs (a)and (b) and the remedial action taken thereon.

[20] In that regard, CAJ argues that there are several ways through which it can achieve its mandate including recommendations, advisory opinions and proposals. Relying on the cases of **SABC vs. DA** (393/2015([2015] ZASCA 156, **Economic Freedom Fighters vs. Speaker of the National Assembly and Others; Democratic Alliance vs Speaker of the National Assembly and Others** [2016] ZACC 11, and **Black's Law Dictionary**, CAJ contends that it is empowered by the Constitution and the Act to make decisions that are compelling or binding on the public officers or bodies which are concerned in violations. It states that its action was equivalent to a remedial action and not a recommendation.

[21] In response to the Board's submissions that the order of mandamus could not issue, CAJ submits that the Board had a public duty to comply with its decision and failure to do so entitled the 3<sup>rd</sup> Respondent to an order of mandamus sought.

[22] CAJ contends that it had jurisdiction to handle the 3<sup>rd</sup> Respondent's complaint for renewal of his contract and that the process featured unfairness and irregularities which amounted to a breach of Article 47 of the Constitution on the right to fair administrative action. CAJ maintains that it was created to compliment the court system and that Chapter 4 of the Constitution does not set a hierarchy of jurisdiction of the Courts *vis a vis* its mandate in dealing with

complaints on violation of human rights. Consequently, CAJ prays that this Court upholds the Court of Appeal's decision.

**(d) The 3<sup>rd</sup> Respondent**

[23] In opposing the appeal, the 3<sup>rd</sup> Respondent, while citing Articles 59, 159(4), 249(1) (2), 252, 22(1) & (2) of the Constitution and Section 8 of the CAJA submits that CAJ 's recommendations have a binding character unless challenged by a legal process and are duly set aside or varied.

[24] The 3<sup>rd</sup> Respondent therefore submits that the Board and other public bodies have an obligation to implement the recommendations of CAJ unless challenged by a legal process and duly set aside or varied.

[25] The 3<sup>rd</sup> Respondent urges that CAJ is a part of constitutional dispute resolution mechanisms which are complementary to the court process. Further that the centrality of courts remains unchallenged considering that enforcement of recommendations of CAJ require judicial intervention.

[26] Concerning the Court of Appeal's mandate to assess damages in favour of a party on appeal when the High Court did not do so, the 3<sup>rd</sup> Respondent while citing Section 3(2) of the Appellate Jurisdiction Act, Rule 31 of the Court of Appeal Rules, and the case of ***Selle & another vs. Associated Motorboat Company & others*** [1968] EA 123, submits that the Court of Appeal did not err in assessing damages.

**C. ISSUES FOR DETERMINATION**

[27] From the above submissions, the following issues crystalize for determination:

- i. *Whether the recommendations of CAJ are binding on public bodies and if public bodies have an obligation to implement CAJ's recommendations?*

ii. *Whether the Court of Appeal had jurisdiction to award damages?*

iii. *If the answer to (i) is in the affirmative, what are the appropriate reliefs?*

**(i) *Whether the recommendations of CAJ are binding on public bodies?***

[28] CAJ is established under Section 3 of the CAJA as a successor to the Public Complaints Standing Committee. The CAJA is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission Justice pursuant to Article 59(4) of the Constitution. Regarding the powers of CAJ, Section 5 of the CAJA specifically provides as follows:

**“In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to—**

**(a) acquire, hold, charge and dispose of movable and immovable property; and**

**(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.”**

Section 5 implies that the powers conferred upon CAJ are in addition to the power of commissions in Article 253 of the Constitution. Article 253 of the Constitution makes provision for incorporation of Commissions, whilst Article 254 of the Constitution makes provision for reporting by the same.

[29] All constitutional Commissions and independent offices have an obligation under Article 254(1) of the Constitution, **“as soon as practicable, after the end of each financial year to submit a report to the President and to Parliament”**. These reports may be limited to a particular issue. From the foregoing provisions, it is evident to us that the CAJA was to give effect to Article

59(4) of the Constitution. CAJ is also bound by the provisions of Article 254(1) of the Constitution. We therefore find fault in the Court of Appeal's conclusion that the reporting that is anticipated to be done by CAJ to Parliament, is separate or different from the reporting of its investigative report undertaken in discharge of its mandate in any given year. [30] Further, the CAJA is clear on the functions of the CAJ in the following terms:

**“[8]. The functions of the Commission shall be to—**

**(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;**

**(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;**

**(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;**

**(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;**

**(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;**

**(f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;**

**(g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;**

**(h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;**

**(i) publish periodic reports on the status of administrative justice in Kenya;**

**(j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;**

**(k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;**

**(l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and**

**(m) perform such other functions as may be prescribed by the Constitution and any other written law.**

**[31]** From the foregoing provisions, it is not contested that CAJ is mandated to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public

sector. We therefore agree with both superior courts' finding that CAJ was mandated to entertain and make recommendations with regard to the 3<sup>rd</sup> Respondent's complaint.

**[32]** Under Section 29 of the CAJA, once it has investigated a complaint arising from the carrying out of an administrative action of a public officer or any other public body, CAJ is under mandatory obligation to resolve the matter before it by conciliation, mediation or negotiation. If the matter cannot be resolved, and it determines that the administrative action was carried out unjustly or unreasonably, the CAJ shall make such **recommendations as it deems fit**.

**[33]** Section 41 of the CAJA also provides for action to be taken by CAJ following an inquiry in the following terms:

**“The Commission may, upon inquiry into a complaint under this Act take any of the following steps—**

**(a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;**

**(b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;**

**(c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;**

**(d) provide a copy of the inquiry report to all interested parties; and**

**(e) submit summonses as it deems necessary in fulfilment of its mandate. “**

[34] Furthermore, under Section 44 of the CAJA, where CAJ concludes that the person or State Organ or public office or organization being investigated is guilty of misconduct, it has an obligation to report the matter to the appropriate authority.

[35] The bone of contention, then, is whether these recommendations are binding on such public bodies.

[36] In *the Matter of the National Land Commission*, Advisory Opinion Reference 2 of 2014; [2015] eKLR, in her concurring opinion, *Ndungu, SCJ*, defined the words ‘**recommend**’, advise, research, investigate, encourage, assess, monitor and oversight’ to mean **actions that provide a facilitative role rather than a primary one**. In her opinion, the context in which those words are used, presumes that **there is another body or organ whom such recommendations, advice, research, investigations, encouragement, and assessment shall be sent to, received by, and in relation to which the proposals shall be implemented**. In her opinion, a body with oversight function, and a body that implements the recommendations of the former, are different, and their roles do not overlap. For this reason, there is need for clear separation of roles between a body providing oversight, and a body upon which the oversight is to be conducted.

[37] Also, in *Re Council of Governors*, this Court defined a recommendation as follows:

***“[52] In our considered opinion, the term “recommendation” is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a***

**suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning, nature and effect, depending on the context in which they are deployed.**

[38] On the binding nature of the recommendations by the Commission on Revenue Allocation, this Court found as follows:

**“[60] Taking all these into account, it is our considered opinion that the recommendations by the Commission on Revenue Allocation are not binding upon either the National Assembly, or the Senate. What the two Houses cannot do however is to ignore or casually deal with such recommendations. To hold otherwise, would elevate the Commission above Parliament in the legislative chain. We therefore agree with both the Speaker of the National Assembly and the Law Society in their submissions to the effect that, it could not have been the intention of the makers of the Constitution to supplant the legislative authority of Parliament in matters Finance, by establishing the Commission on Revenue Allocation.”** [emphasis added]

[39] Similarly, in ***Re Council of Governors***, this Court was persuaded by the High Court decision ***Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others***, HC Constitutional Petition No. 368 of 2014; [2015] eKLR, where Lenaola, J (*as he then was*) found that the recommendations addressed to all the 47 County Assemblies and County

Executives, by the Commission on Revenue Allocation were not binding to the Senate but for good order, reasons for a deviation must be given.

**[40]** From the foregoing Constitutional provisions, the statutory provisions and authorities highlighted, it is our finding that whereas CAJ has the requisite mandate to make recommendations to a public officer or a public body, the same is not binding. A recommendation can only be binding when the same is specifically provided for in the Constitution or in law. Neither the Constitution nor the CAJA states that CAJ's recommendations are binding. Consequently, the Board had the discretion to determine the manner in which they were to implement CAJ's recommendations. Towards that end, we find and affirm that the CAJ's recommendations to inter alia: *pay the 3<sup>rd</sup> Respondent an equivalent of twelve months salary and allowances in compensation for a one-year period of the reviewed contract; facilitate the 3<sup>rd</sup> Respondent to access his personal effects from his former office; and offer him an unconditional apology for the treatment meted out to him,* were not binding upon the Board. We therefore fault the appellate court's conclusion that CAJ's recommendations were binding on the Board.

**[41]** We agree with the Board's submission and the High Court's finding that under Section 42(4) of the CAJA, the remedy where there has been non-compliance with the recommendations of the CAJ, is for the CAJ to prepare a report of the Board's failure to implement the recommendations to the National Assembly for appropriate action. CAJ ought to have explored the options set out in Section 41 of CAJA. Ultimately, we agree with the trial Court's finding that not even a Court of law can dictate the manner in which a recommendation should be implemented. The only exception, as pointed by the trial Court, is where "*there is gross abuse of discretion, manifest injustice or palpable excess of authority*" equivalent to denial of a settled right which the aggrieved party is entitled, and there is no other plain, speedy and accurate remedy." It is our finding that the circumstances of the appellant's case do not fit the said exception.

[42] Even where such exceptional circumstances are pleaded, who then bears the burden of proving abuse of discretion? It is our opinion that where a party is so aggrieved by the exercise of discretion or lack of it thereof, by a public officer or institution, it is for that party to prove that their case fits within the four corners of the exception set above. In the instant appeal, we agree with the trial Court that the 3<sup>rd</sup> Respondent did not discharge this burden of proof. Mere allegation that the Board declined to comply with the CAJ's recommendation is not enough to prove gross abuse of discretion, manifest injustice or palpable excess authority.

[43] We have observed that the question on the implementation of recommendations to public entities from Commissions has been recurring in different cases before this Court and other Superior Courts. As such we are of the opinion that the following *guiding principles* ought to assist courts when considering a matter concerning the binding nature of recommendations from Commissions or other public bodies:

**Guiding Principles on the recommendations from Commission to public bodies:**

- a. Any power to make a recommendation ought to be specifically provided for in the Constitution or in law;***
- b. Recommendations do not necessarily bind the person to whom, or entity to which, it is addressed;***
- c. A recommendation from a Commission is only binding upon a public entity where it has been specifically provided for in the Constitution or in law;***
- d. The manner in which a recommendation is to be implemented by a Public entity is discretionary;***
- e. Exercise of discretion in implementing a recommendation may only be interfered where there is gross abuse of discretion, manifest injustice or palpable excess of authority***

***f. Any recommendation by a Commission which is not implemented may be reported to Parliament for any further action, if necessary;***

[44] We need to note at this juncture that Commissions are supposed to act as watchdogs and co-operate and work with government arms. It is the duty of Parliament to implement reports from commissions pursuant to Article 254(1) of the Constitution and Section 8 of the CAJA. Commissions therefore cannot implement their own recommendations nor force a recommendation on a public body lest they usurp the role of Parliament, which is the organ vested with the mandate to enforce implementation. For avoidance of doubt, a public office or body or state organ to whom a recommendation is made need not appeal against such a recommendation for it not to be binding on it.

***(ii) Whether the Court of Appeal had jurisdiction to award damages?***

[45] The Court of Appeal allowed the 3<sup>rd</sup> Respondent payment of twelve (12) months' salary as compensation in lieu of the one-year renewal of contract which the Board declined to accept; access to the office to collect personal effects, and an apology. Over and above that, the Court of Appeal awarded the 3<sup>rd</sup> Respondent a sum of Kshs. 700,000.00 upon its finding that his right to fair administrative action had been infringed by the Board.

[46] The Board submits that CAJ did not have the mandate to award any relief to the 3<sup>rd</sup> respondent as it had declined to renew his contract, a decision communicated to him by the Minister. The Board faults the Court of Appeal for converting what was a normal Judicial Review Application into a constitutional

petition and proceeding to award damages instead of referring the matter back to the High Court. The Board also urges that the dispute between the parties was *whether the 3<sup>rd</sup> Respondent was entitled to the renewal of his employment* and that the same ought to have been taken to the Employment and Labour Relations Court. On the contrary, CAJ and the 3<sup>rd</sup> Respondent submit that CAJ had the mandate to make the compensation and that the Appellate Court rightly to awarded damages and compensation where none was made by the trial Court.

[47] Having found above that CAJ’s recommendations did not bind the Board, it is our ultimate finding that there was no basis for the Court of Appeal to award compensation to the 3<sup>rd</sup> Respondent. Although CAJ has the requisite mandate to award compensation under Section 8(c) of the CAJA, ***(which Section requires it to report to the National Assembly bi-annually on the complaints investigated and the remedial action taken thereon)***, it is our finding that Section 8 of the Act cannot be read in isolation. It has to be read together with **Section 41 which provides for action taken by CAJ after an inquiry.** Section 41 provides as follows:

**“The Commission may, upon inquiry into a complaint under this Act take any of the following steps—**

- a. where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;**
- b. recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;**
- c. recommend to the complainant and to the relevant governmental agency or other body concerned in the**

- alleged violation, other appropriate methods of settling the complaint or to obtain relief;**
- d. provide a copy of the inquiry report to all interested parties; and**
- e. submit summonses as it deems necessary in fulfilment of its mandate.”**

**[48]** In view of this, it is our finding that having concluded its investigation or inquiry on the 3<sup>rd</sup> Respondent’s claim, CAJ ought to either have **referred the matter to the relevant authority (which in our opinion includes the National Assembly); or recommended to the 3<sup>rd</sup> Respondent a course of other judicial redress; or recommend to the complainant appropriate methods of settling the complaint or to obtain relief; provide a copy of the inquiry report to all interested parties (in our opinion including the National Assembly) ; or submit summonses as it deems fit to fulfill its mandate.**

**[49]** Therefore, it is our finding that the because the dispute between the 3<sup>rd</sup> Respondent and the Board was an employer-employee dispute, CAJ ought to have recommended to the 3<sup>rd</sup> Respondent the appropriate method of settling the dispute. In our opinion, one of the methods would have been seeking redress at the Employment and Labour Relations Court (ELRC) which is established to hear and determine disputes relating to employment and labour relations and for connected purposes. The ELRC has the power make appropriate remedies for the 3<sup>rd</sup> Respondent pursuant to Article 162(2) and 165(5) of the Constitution and Section 12(3) of the Employment and Labour Relations Act including interim preservation orders; prohibitory order; an order of specific performance; a declaratory order; an award of compensation; an award of damages; an order of reinstatement among other.

**[50]** CAJ cannot usurp the role of the ELRC over employment disputes and award compensation. CAJ, under Section 8(g) of the CAJA, can only recommend

compensation or other appropriate remedies against a person or bodies to which the Act applies. Having found elsewhere in this Judgement that recommendations can only be binding where specifically provided for, we conclude that CAJ lacks the requisite jurisdiction to award compensation in the circumstances. In other words, even if CAJ recommends compensation after concluding its inquiry, there is an additional step or action to be taken by the entity or person to whom the recommendation has been made. That entity or person may or not implement the same depending on the manner on how they choose to exercise their discretion, unless otherwise provided for in the law. Consequently, we set aside the reliefs awarded by the Court of Appeal.

[51] On costs, this Court has previously settled the law on this issue, stating that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] and that a court has the discretion in awarding costs in its decision. This remains the law. In the instant case, we award costs of this Appeal to the Board.

[52] Consequently, we allow the appeal.

#### **D. ORDERS**

[53] Ultimately, upon our finding above, the final orders are that:

- 1. The Petition of Appeal dated 6<sup>th</sup> November 2019 and filed on 7<sup>th</sup> November 2019 be and is hereby allowed.***
- 2. The Judgment of the Court of Appeal sitting at Nairobi, dated 27<sup>th</sup> September 2019 is hereby quashed and set aside.***

**3. For the avoidance of doubt, the Judgment of the High Court delivered on 26<sup>th</sup> February 2015, be and is hereby upheld.**

**4. Costs of this Appeal to abide the appeal.**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> Day of March, 2021.**

.....  
**P. M. MWILU**  
**Ag. CHIEF JUSTICE & Ag. PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR,**

**SUPREME COURT OF KENYA**