



**Kaloki v Kenya Pipeline Company Limited (Petition E059 of 2022)  
[2024] KEELRC 1834 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1834 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E059 OF 2022**

**JK GAKERI, J**

**JULY 11, 2024**

**BETWEEN**

**CATHERINE MBULA KALOKI ..... PETITIONER**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner commenced this suit in April 2022 by way of Certificate of Urgency seeking various orders which the court granted specifically prayer No. 3 and 4 of the Notice of Motion dated 6<sup>th</sup> April, 2022.
2. Subsequently, the Respondent, by a Notice of Motion dated 21<sup>st</sup> April, 2024 sought a stay or suspension of the interim orders and/or their variation or discharge as well as the Petitioner proceeding on leave and the striking out of the Petition.
3. The court granted prayer (c) of the Notice of Motion that the Petitioner proceeds on leave but dismissed the Notice of Motion vide its Ruling delivered on 20<sup>th</sup> September, 2022.
4. The Petition is grounded on Articles 1, 2(1) & (4), 3(1), 10(1) & (2), 19, 20, 21, 22(2), 27, 28, 41, 47, 50, 159, 236 and 259 of *the Constitution* of Kenya, 2010.
5. The Petitioner avers that by letter dated 10<sup>th</sup> January, 2022, the Auditor General raised audit queries on the experience of the General Manager Internal Audit, the Petitioner, and the General Manager-Human Resource for lack of a certificate in leadership and the recruitments had not been approved by the National Treasury.
6. The Petitioner avers that although the letter recommended that the Respondent's management should henceforth ensure compliance with the career guidelines on recruitment and promotions, the



- Managing Director issued a notice to show cause dated 2<sup>nd</sup> March, 2022 accusing the Petitioner of having given false declaration that she had 5 years experience required for the position.
7. It is the Petitioner's case that having served at the National Cereals and Produce Board (NCPB) from 10<sup>th</sup> April, 2007 to 1<sup>st</sup> December, 2008 as Regional Manager effective 4<sup>th</sup> June, 2007 and 4 years 4 months as at the Kenya Bureau of Standards (KEBS), she had a total of 5 years and 10 months experience in Senior Management.
  8. The Petitioner alleges that the Respondent's action of focusing on her was in bad faith and vendetta by the Managing Director as it inter alia refused to avail the response it had given to the Office of Auditor General and the investigation report as required by Clause 11.10.1 of the Procedures Manual, 2017, a request notwithstanding.
  9. Similarly, the Petitioner avers that the Respondent had not taken any action against the General Manager-Human Resource.
  10. The Petitioner avers that on 29<sup>th</sup> March, 2022, the Petitioner was invited for a disciplinary hearing slated for 4<sup>th</sup> April, 2022 but was not accorded the attendant right of being accompanied by a witness and had not been notified that she was under investigation and was not given evidence and/or information to facilitate preparation of her defence.
  11. The Petitioner further avers that she was appointed to office by the Respondent's Board of Directors and made all material non-disclosure.
  12. It is the Petitioner's case that the Respondent's conduct violates her rights and fundamental freedoms in particular Article 27 by subjecting the Petitioner to harassment, threats, intimidation and psychological torture and discrimination, violation of the rights to fair labour practices, right to fair administrative action and fair hearing.
  13. The Petitioner prays for;
    - a. A declaration that the action of the Respondent is opaque, egregious, clandestine, capricious, whimsical and contrary to articles 10, 27, 28, 41, 47, 50, 73 and 236 of the Constitution of Kenya, 2010 hence unconstitutional and consequently null and void.
    - b. An order to set aside the letters dated 29<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022.
    - c. A permanent injunction be and is hereby issued prohibiting/restraining the Respondent, its servants, officials, representatives and/or agents from taking any disciplinary action against the applicant or having so taken be restrained from acting there upon or otherwise in any other manner.
    - d. General damages for the constitutional violations of the Petitioner's fundamental rights.
    - e. The Honourable Court do issue other orders and give such directions as it may deem fit to meet the ends of justice.
    - f. Costs of the Petition.
    - g. Interest on the above at court rate.

### **Respondent's case**

14. By a Replying Affidavit sworn by Flora Okoth on 21<sup>st</sup> April, 2022, the Respondent avers that the court has no jurisdiction to hear and/or determine the Petition by virtue of Section 74 of the Public Service



Commission Act, 2017 and the same is incompetent and fatally defective for want of compliance with Sections 3 and 9(2) of the Fair Administrative Action Act, 2015 and is thus premature.

15. The Respondent avers that in Mid-2020, it advertised the position of General Manager-Internal Audit among others which required a minimum of 12 years experience in relevant work, at least 5 years in Senior Management position in the Public Service or reputable organization and the Petitioner applied for the position stating that she had met the threshold, was interviewed and employed thereafter based on her documentation and verbal representations and appointed General Manager Internal Audit on 19<sup>th</sup> November, 2020 (stated as 2021), KPC 2 and reported to work on 4<sup>th</sup> January, 2021.
16. It is the Respondent's case that the Office of Auditor General determined that the Petitioner did not qualify for the position of General Manager (Internal Audit) as she did not have at least 5 years experience in Senior Management and the Petitioner was requested to clarify the matter.
17. That the Petitioner had purposefully misled the Respondent on her qualifications to procure the job.
18. The KEBS confirmed that the Petitioner moved to the rank of Principal Internal Auditor effective 1<sup>st</sup> August, 2016 and had thus not attained 5 years as on the date of employment on 20<sup>th</sup> November, 2021 and had deliberately misled the Respondent and was deceitful and the issue remained an audit query till the final report.
19. That an explanation was sought vide letter dated 2<sup>nd</sup> March, 2022 and was responded to vide letter dated 8<sup>th</sup> March, 2022 by which the Petitioner sought documents from the Respondent and the same were availed and the Petitioner responded to the show cause letter on 14<sup>th</sup> March, 2022 admitting that she had not met the threshold of 5 years as Principal Internal Auditor and the matter was referred to the Board Human Resource Committee as only the Managing Director could initiate disciplinary proceedings under the Human Resource Manual and the Petitioner's disciplinary hearing was scheduled for 6<sup>th</sup> April, 2022 but she feigned sickness to avoid the meeting to enable her procure a court order to stop the meeting.
20. The Respondent avers that after the Petitioner obtained court orders, she sent out letters and directives that she would audit departments under colleagues not supportive of her cause and the audits were unplanned.
21. That the Petitioner had scheduled a meeting on 26<sup>th</sup> April, 2022 for purposes of changing the Board Charter to influence the composition of the Board Committee to address her disciplinary issue.
22. That the Petitioner had created a toxic work environment and animosity between self and colleagues and her disciplinary issue remains outstanding and will be accorded an opportunity to present her case and the allegations made against the Managing Director, her line manager were untrue.
23. That the Petitioner was neither harassed nor discriminated against and no right of the Petitioner has been breached and/or threatened with breach as the disciplinary proceedings are being conducted in accordance with the law.
24. The affiant deposes that since the Petitioner deliberately falsified her qualification in her CV and personal declarations to the Respondent, attendance of the disciplinary hearing was necessary to enable her provide responses to the allegations made against her.
25. That the Petition had not disclosed any breach of right or fundamental freedom and did not meet the threshold in *Anarita Karimi Njeru V Republic (1976 – 1980) KLR 1272* and *Mumo Matemu's case (2013) eKLR*.
26. That it is fair and just that the Petition be dismissed with costs.



## Submissions

27. Counsels for the parties filed written submissions and highlighted the same in court on 6<sup>th</sup> May, 2024.

## Petitioner's submissions

28. After a review of the history of the matter, counsel submits that although the Petitioner was invited for a disciplinary hearing scheduled for 4<sup>th</sup> April, 2022, she was not accorded the right to be accompanied by a witness of her choice contrary to Clause 11.4.1(f) of the Procedure Manual or the evidence the panel would rely on or arising out of the investigation.
29. That the Petitioner had not been notified of any investigation and the Respondent did not avail the Respondent's response to the Office of Auditor General's queries and the investigation report and only the Petitioner was subjected to disciplinary proceedings.
30. Counsel urges that the disciplinary process is flawed and the court's intervention was necessary.
31. Reliance was made on the sentiments of the court in *Geoffrey Mworira V Water Resources Management Authority* (2015) eKLR and *Kamau V Kenya Accreditation Service* (2021) KEELRC 8 (KLR) on the jurisdiction of the court to interfere with internal disciplinary processes.
32. Counsel for the Petitioner cited the decisions in *Jane Achieng & another V University of Nairobi* (2015), *Judicial Service Commission V Gladys Boss Shollei & another* (2014) eKLR, *Philip K. Tunoi V Judicial Service Commission & another* (2016) eKLR, *Sibiah Stella Otieno V Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 7 others* (2021) eKLR and *Republic V Kenya School of Law & 2 others ex parte Juliet Wanjiru Njoroge & 5 others* (2014) eKLR among others to urge that the Petitioner's right to fair hearing was threatened with violation by the Respondent and the court's intervention was necessary to obviate the breach.
33. Finally, the sentiments of the court in *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* (2013) eKLR were relied upon to urge that the process undertaken by the Respondent did not meet the threshold of Section 47 and 50(2) of [the Constitution](#) of Kenya.
34. As to whether the Petitioner's rights and fundamental freedoms and her constitutional rights were violated by the Respondent, counsel urges that the provisions of Article 10(1), 27, 41, 47 and 50 of [the Constitution](#) of Kenya, 2010 were violated as illustrated by the decision in *Mundia Njeru Gateria V Embu County Government & 3 others* (2013) eKLR on the right to be heard.
35. Concerning the reliefs sought, counsel submits that the Petitioner was entitled to all of them owing to the manner in which the Petitioner's rights were violated by the Respondent.
36. The decision in *Esther W. Kiege V Kenya Forest Service & another* was cited to reinforce the submission.
37. As regards costs, counsel submits that the same ought to be awarded to the Petitioner with interest and relied on the sentiments of the court in *Cecilia Karuru Ngayu V Barclays Bank of Kenya & another* (2016) eKLR.

## Respondent's submissions

38. As regards the Respondent's right to institute disciplinary action against the Petitioner, counsel submits that since the Respondent is a State Corporation, it is subject to the [Public Service Commission Act](#) and the Public Service Commission is empowered to discipline public servants as held by *Majaja*



- J. in *Grace A. Omolo V Attorney General & 3 others* (2012) eKLR but is empowered to delegate its powers to other bodies and disciplinary action against the Petitioner could be undertaken.
39. Counsel submits that the issue germane to the Petitioner's experience for the position she holds was raised by the Office of Auditor General in the course of discharging its constitutional mandate and the Respondent initiated disciplinary process against the Petitioner in accordance with its Human Resource Manual as held in *Miguna Miguna V Permanent Secretary, Office of the Prime Minister & the Attorney General* (2011) eKLR on the employer's power to commence disciplinary proceedings against an employee.
  40. That since the employment relationship is founded on trust, both parties are obligated to act truthfully.
  41. Counsel cited the Court of Appeal decision in *Chief Justice & President of the Supreme Court of Kenya & another V Khaemba* (2021) KECA 322 and the sentiments of *Rika J. in Alfred Nyungu Kimunguni V Bomas of Kenya Ltd* (2013) eKLR to urge that courts must not interfere with internal disciplinary processes against employees unless it is in contravention of *the constitution* or legislation or the agreement between the parties.
  42. That the Respondent cannot be faulted.
  43. As to whether the disciplinary process is unconstitutional on account of being egregious, clandestine or whimsical, counsel submits that the hodgepodge of alleged violations cited by the Petitioner were not proved, as whoever alleges must prove as underscored in *Evans Otieno Nyakwana V Cleophas Bwana Ongaro* (2015) eKLR and fortified in *Anarita Karimi Njeru V Republic* (Supra) as well as the Court of Appeal decision in *Judicial Service Commission V Gladys Boss Shollei & another* (Supra) to urge that the Petitioner's allegation were baseless and not even the alleged discrimination was substantiated and ought to be dismissed for being scandalous as held in *Joseph Gitau & 2 others V Ukay Estate Ltd* HCCC No. 813 of 2004.
  44. According to counsel, the alleged violation of the constitutional right to fair hearing and fair administrative action were mere misrepresentations to paint the Respondent in bad light.
  45. That the Petitioner responded to the Respondent's letter dated 2<sup>nd</sup> March, 2022, demanded documents which were availed, but demanded more not in the original letter which was an afterthought but was denied the Respondent's response to the Office of Auditor General and thus received all the documents she had asked for.
  46. Counsel urges that even if there was a response to the Office of Auditor General, the same was not relevant to the charges of misrepresentation and was confidential, a fact the Petitioner was aware of and in any case the right of access to information is not absolute.
  47. Counsel discounted the Petitioner's allegation that she was not informed of her right to be accompanied by a colleague on the premise that the hearing never took place and in any event the Respondent could not have turned away her witnesses.
  48. On the investigation report, counsel submits that Clause 11.10 of the Human Resource Manual was explicit that it is submitted to the Disciplinary Committee exclusively and the Respondent had no obligation to inform her that she was under investigation and in any event the Respondent is a master of its own procedures as held in *Selvara Jan V Race Relations Board* (1976) 1 ALL ER and *CFC Stanbic Bank Ltd V Danson Mwashako Mwakuwona* (2015) eKLR.
  49. As regards the relief of permanent injunction, counsel relied on the sentiments of the court in *Nyongesa & another V Egerton University College* (1990) KLR 692, *Sister Sarah Adipo V Teachers Service Commission* (2019) eKLR and *Mulwa Msanifu Kombo V Kenya Airways* (2013) eKLR.



among others to urge that courts ought not interfere with internal disciplinary processes as to deny employers the prerogative to discipline its employees or even terminate their employment fairly and the court cannot legally issue a permanent injunction against a disciplinary process.

50. As regards the reliefs sought, counsel submits that the Petitioner has failed to establish the alleged violations of constitutional rights as well as other accusations against the Respondent and its Managing Director.
51. Counsel urges that if the Petitioner had not misrepresented her experience in Senior Management during her recruitment, she would not have filed the instant petition as she would have presented her case before the disciplinary committee as held in *Kiama Wangai V Egerton University* (2016) eKLR to urge that the Petitioner is not entitled to the reliefs sought.

### **Determination**

52. After careful consideration of the Petition, Replying Affidavit and submissions by counsel, the issues for determination are;
  - i. Whether the instant petition meets the threshold of a constitutional petition.
  - ii. Whether the court has jurisdiction to intervene in internal disciplinary matters.
  - iii. Whether the Petitioner is entitled to the reliefs sought.
53. Since the Petition is premised on the provisions of *the Constitution* of Kenya, 2010 and a plethora of articles have been cited, it behoves the Petitioner to demonstrate that indeed the petition is a constitutional petition by showing that the petition meets the threshold enunciated in *Anarita Karimi Njeru V Republic* (1979) eKLR and other decisions.
54. In *Anarita Karimi Njeru V Republic* (Supra), 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.”
55. Similarly, in *Kiambu County Tenants Welfare Association V Attorney General & another* (2017) eKLR, Mativo J. (as he then was) stated;

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must not only state the provisions of *the Constitution* allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any). I find no infringement of constitutional rights at all where a landlord serves a quit notice to a tenant on the strength of a tenancy agreement. The only issue that can arise is the validity of the termination notice which is not a constitutional question.”
56. The court is guided accordingly.
57. The Petitioner cites Articles 10(1), 20, 27, 41, 47, 50 and 236 of *the Constitution* of Kenya, 2010 without setting out particulars of the conduct complained of. For instance, under Article 27 the Petitioner states that she was denied equal treatment before the law and under Article 41. The



particulars are that the Respondent was exercising a power it knows it did not have, victimized the Petitioner and disregarded the principles of natural justice.

58. Although what is complained of is articulated, the manner and extent of the alleged infringement is not.
59. More significantly, however, all the pertinent issues raised by the Petitioner are adequately addressed by the operative statutory framework on employment.
60. It is common ground that the Petitioner is an employee of the Respondent and thus subject to the contract of employment, the law, Respondent's Human Resources Procedures Manual as well as other policies of organization, Government policies and circulars applicable in the Public Service and professional edits.
61. In sum, the dispute between the Petitioner is an employment dispute over a proposed course of action by the Respondent against the Petitioner.
62. The foregoing is vividly exemplified by the unqualified reliance on the provisions of the *Employment and Labour Relations Court Act*, 2011 in urging the reliefs and the Respondent's Human Resource Policy and Procedures Manual 2019.
63. There is sufficient judicial authority for the proposition that not every infringement of *the Constitution* gives rise to a constitutional petition and specifically where the alleged violation or infringement is sufficiently addressed by an act(s) of Parliament which is more elaborate in details than the Constitutional provision.
64. Such violations ought to be pursued under the relevant statutory framework as opposed to *the Constitution*.
65. The foregoing is fortified by the sentiments of Muriithi J. in *Josphat Koli Nanok & another V Ethics & Anti-Corruption Commission* (2018) eKLR as follows;

“Moreover, I think that it trivializes *the Constitution*, its values and principles when empty allegations of infringement are made. A Petitioner who cites a violation of *the constitution* must by cogent evidence relate the alleged breaches with real, concrete and direct loss, damage of injury arising out of the violation. It does not help to allege violation . . . The violation must be real, with real implications on the lives of the people”.
66. The totality of the foregoing is that the Petitioner has failed to demonstrate that the instant Petition meets the threshold developed in the famous decision in *Anarita Karimi Njeru V Republic* (Supra).
67. Concerning whether the court has jurisdiction to intervene in internal disciplinary matters undertaken at the behest of the employer, the court addressed this issue vide its Ruling delivered on 20<sup>th</sup> September, 2022.
68. The court relied on the decision in *Stephen Nyarangi Onsom & another V George Magoha & 7 others* (2014) eKLR by Lenaola J. (as he then was) and the Supreme Court decision in *Albert Chaurembo & others V Maurice Munyao & 148 others* (2019) eKLR as the foundation that deference ought to be given to the dispute resolution bodies mandated to deal with the specific dispute in the first instance.
69. The court proceeded to rely on the emerging jurisprudence that there is room for interfering with internal disciplinary processes being undertaken by employers.



70. In *Chief Justice and President of the Supreme Court of Kenya and another V Khaemba (Civil Appeal 522 of 2019)* (2021) KECA 322 (KLR), cited by the Respondent’s counsel, the court stated;
- “Courts should not interfere with internal disciplinary processes initiated against an employee. The same decision was held by this court in *Republic V County Secretary and Head of Public Service Bomet County & another Ex parte Bernard Sowek* (2017) eKLR that a court cannot interfere with an internal disciplinary process unless the process is in contravention of *the Constitution* or legislation or is in breach of the parties agreement/ contract or the process is manifestly unfair in the circumstances.”
71. Similar sentiments were expressed in *William Odhiambo Ramogi & 3 others V Attorney General & 4 others* (2021) eKLR, *Eustace Muriithi Njeru V Energy Petroleum Regulatory Authority* (2020) eKLR, *Stella Nkatha Kebongo V Barclays Bank Ltd* (2016) eKLR, *Agnes Ongadi V Kenya Electricity Transmission Co. Ltd* (2016) eKLR, *Geoffrey Mworira V Water Resources Management Authority* (2015) eKLR and *John Mburu Kamau V Kenya Accreditation Service* (2021) eKLR among others.
72. The foregoing notwithstanding, courts are obligated to ensure that the intervention is justifiable in all circumstances as disciplinary processes is principally a management prerogative. See *Alfred Nyungu Kimunguni V Bomas of Kenya Ltd (Supra)* cited by the Respondent.
73. In *John Mburu Kamau V Kenya Accreditation Service (Supra)*, Onesmus Makau J. enumerated instances in which the court could interfere with an employer’s disciplinary process. These include;
- a. Where an employee establishes that the employer is proceeding in a manner that contravenes the provisions of *the constitution* or legislation; or
  - b. In breach of agreed terms of the contract or employer’s policy.
  - c. If the process is manifestly unfair and offends the rules of natural justice.
74. In this case, it is common ground that the Respondent advertised the position of General Manager-Internal Audit sometime in 2020 and the Petitioner applied, was interviewed and employed by the Respondent effective 20<sup>th</sup> November, 2021 when she accepted the offer.
75. The employment was for a fixed term of 3 years renewable on request but was later converted to 5 years vide the Respondent’s letter dated 19<sup>th</sup> August, 2021 following confirmation by the State Corporations Advisory Committee. The contract is scheduled to end on 3<sup>rd</sup> January, 2026.
76. The Petitioner furnished the Respondent with all the documents it required for purposes of her employment and none was isolated as wanting.
77. Relatedly, references were provided by the National Cereals and Produce Board (NCPB) and the Kenya Bureau of Standards (KEBS) vide letters dated 11<sup>th</sup> February, 2022 and 26<sup>th</sup> March, 2021.
78. Documents on record reveal that by its draft management letter dated 10<sup>th</sup> January, 2022, the Office of the Auditor General Queried the recruitment of the Petitioner and the General Manager-Human Resource on the premise that they lacked the requisite minimum qualifications as per the approved Career Guidelines of the Respondent and the Petitioner did not have the requisite experience.
79. Similarly, approval of the National Treasury had not been sought in accordance with Circular No. 22/2019.
80. The letter demanded the Respondent’s comments within 5 days from the date of the letter.



81. For unexplained reasons, the Respondent did not disclose how it responded to the audit query granted that it refused to avail the same to the Petitioner on request.
82. What is clear, however, is that the Auditor General's Management Letter dated 7<sup>th</sup> March, 2022 show that the query on the Petitioner's experience for the position of General Manager-Internal Audit was not dropped as the query on minimum qualifications for the position of General Manager-Human Resource appear to have been dropped. Failure to seek approval of the National Treasury was also retained.
83. Evidently, the Auditor General's query triggered the disciplinary process against the Petitioner and by letter dated 2<sup>nd</sup> March, 2022, the Respondent's Managing Director under the reference 'Alleged False Declaration' accorded the Claimant 72 hours to provide detailed reasons to exculpate herself from the allegation of having falsified information about her experience for the position.
84. The Human Resource Manual requires at least 7 days not 72 hours.
85. In her response dated 8<sup>th</sup> March, 2022, the Petitioner denied having wilfully falsified any information and requested for several (6) documents, in effect all documents in her staff file and by letter of even date the Respondent availed 5 of the documents and a response was needed by 10<sup>th</sup> March, 2022.
86. However, by letter dated 9<sup>th</sup> March, 2022, the Petitioner requested for her certificates and documents in her staff file as earlier requested together with the Respondent's response to the Office of Auditor General's query and by letter dated 11<sup>th</sup> March, 2022. The Managing Director responded that the documents were unavailable as those in the file were furnished by her and the Respondent's response to the Auditor General's letter was not relevant to the notice to show cause.
87. By a response dated 14<sup>th</sup> March, 2022, the Petitioner stated that she had summarised her work experience at the NCPB and KEBS in lieu of addressing the two separately and had additionally provided the requisite documentation to support the position including Letter of Promotion from KEBS and served as Regional Auditor at the NCPB from 4<sup>th</sup> June, 2007 to 1<sup>st</sup> December, 2008.
88. By letter dated 17<sup>th</sup> March, 2022, the Respondent's Managing Director notified the Petitioner that her case had been referred to the Board Human Resource Committee pursuant to Clause 11.2.1 of the Manual 2019.
89. What followed was an invitation to appear before the Board Human Resource Committee dated 29<sup>th</sup> March, 2022.
90. The invitation makes reference to the notice to show cause dated 2<sup>nd</sup> March, 2022 and the hearing was scheduled for 4<sup>th</sup> April, 2022 at 10.00 am contrary to the Respondent counsel's oral submission that the Committee required an explanation only. The letter is unambiguous that the purpose of the meeting was to afford the Petitioner an opportunity to offer her defense and/or explanation as to why disciplinary action should not be taken for gross misconduct.
91. A letter dated 4<sup>th</sup> April, 2022 rescheduled the meeting to 6<sup>th</sup> April, 2022.
92. A cursory reading of the invitation letter reveals that it makes no reference to the specific charges the Petitioner was supposed to rebut, or whether the response to the notice to show cause was deemed insufficient.
93. Equally, the letter makes no reference to the Petitioner's right to be accompanied by a colleague of her choice as well as her right to adduce documentary or oral evidence.



94. The Respondent's submission that it would not have denied the Claimant's witness the opportunity to testify on her behalf cannot avail it. It is too late.
95. The right of the employee to avail documents and produce witnesses and peruse documents is captured in Clause 11.10.1(a) and (b) of the Respondent's Human Resource Manual, 2019.
96. The law obligates the employer to notify the employee of his or her rights before the hearing and charges must be read out in the presence of the colleague, if the employee has one.
97. Regrettably, the meeting did not take place as the Petitioner filed the instant suit.
98. Documentary evidence on record shows that the Petitioner joined the NCPB on 10<sup>th</sup> April, 2006 as an Internal Auditor-Trainee and posted to Embu and left on 1<sup>st</sup> December, 2008 as the Regional Auditor.
99. By letter dated 15<sup>th</sup> November, 2007, the NCPB confirmed the Petitioner's appointment as Internal Auditor/Regional Auditor effective 9<sup>th</sup> October, 2007 after a one (1) year probation. Instructively, the Petitioner had acted as Regional Auditor from 4<sup>th</sup> June, 2007.
100. A letter dated 26<sup>th</sup> March, 2021 by KEBS shows that the Petitioner joined the organization on 2<sup>nd</sup> October, 2008 as an Assistant Internal Auditor and became the Principal Internal Auditor from 1<sup>st</sup> August, 2016 and left on 4<sup>th</sup> January, 2021.
101. Evidently, the Petitioner had served as Regional Auditor at the NCPB for at least one (1) year and 4 years 5 months at the KEBS.
102. Noteworthy, when the Petitioner applied for employment by the Respondent, she furnished the entire dossier as required with supportive documentation and the application was vetted, was shortlisted and interviewed by the Respondent's board which undoubtedly relied on the documents the Petitioner had provided and the Respondent was persuaded that the Petitioner fitted the bill until the Office of Auditor General raised the issue.
103. Notably, the Office of Auditor General did not accuse the Petitioner for having made a false declaration or misconducted herself. It sought an explanation to enable it determine whether to drop the issue or escalate it to the final report.
104. It did not recommend disciplinary action against the Petitioner which is within its mandate or further investigation.
105. The Office of Auditor General notified the Respondent's Board of Directors that it did not comply with its policies and procedures in the recruitment. It was an indictment on the board of directors of the Respondent which may have blamed the Managing Director who had to exculpate himself from blame.
106. Finally, it is unclear whether the issue was investigated as ordained by the Human Resource Manual and a report prepared as no document was availed to the Petitioner.
107. Closely related to the forgoing is the Respondent's refusal to avail a copy of its response to the Auditor General's query.
108. As found in the Ruling delivered 20<sup>th</sup> September, 2022, the Managing Director's refusal to provide the document on the ground that the same was irrelevant to the charge the Petitioner was facing is rather curious in that he was to all intents and purposes making himself the prosecutor and the judge as to what documents were relevant to the Petitioner's case.



109. As found in the Ruling, the Petitioner needed the documents to prepare her defence and they ought to have been furnished as they all related to her including the audit query.
110. Contrary to the Respondent counsel's suggestion that such a response was confidential, it is not. Indeed, the response is prepared by all departments or sections implicated to ensure that it is sufficiently comprehensive in an endeavour to have the query dropped.
111. Internal Audit is a core department in all dealings with the Office of the Auditor General.
112. The Petitioner ought to have been part of those who prepared the response as her input was necessary.
113. It would appear that she was not involved yet the response involved her position.
114. In the court's view, since the Petitioner considered the response relevant in the preparation of her defence, and had not indicated that she would use it for any other purpose, the same ought to have been availed in compliance with clause 11.4.1(f)(vi) of the Respondent's Human Resource Manual, 2019.
115. All the documents requested for ought to have been availed even at the Petitioner's expense, if necessity so demanded.
116. Their non-availment frustrated preparation of her defense.
117. (See sentiments of the Court of Appeal in *Regent Management Ltd V Wilberforce Ojiambo Oundo* (2018) eKLR on non-availment of documents by the employer to an employee who is facing disciplinary action).
118. Flowing from the foregoing, it is the finding of the court that the Respondent neither complied with its Human Resource Policy and Procedures Manual, 2019 nor the provisions of the *Employment Act, 2007* germane to hearing and facilitation of an employee who is facing a disciplinary hearing.
119. As the court held in September 2022, it could not hold its hands and permit a flawed process proceed to conclusion in the spirit of upholding managerial prerogative or indiscretion in this case
120. As adverted to elsewhere in this judgment and contrary to the Respondent's submission that the court should down its tools to allow the Petitioner be heard on the auditor query, the Petitioner was invited to defend herself against unidentified gross misconduct yet the Board Human Resource Committee was to sit as a Disciplinary Panel under Clause 11.2.1 of the Human Resource Manual, 2019.
121. In sum, the Petitioner is not responding to an audit query as the issue was responded to by the Respondent in its response.
122. In the court's view, intervention was justifiable on 12<sup>th</sup> April, 2022 as it was on 20<sup>th</sup> September, 2022 and had the requisite jurisdiction to intervene.
123. Regrettably, however, the highlighting of submissions initially scheduled for 5<sup>th</sup> December, 2023 took inordinately long owing to Mr. Agwara's absence on 5<sup>th</sup> December, 2023 and 14<sup>th</sup> March, 2024.
124. The totality of the foregoing is that it would be injudicious for the court to permit a flawed disciplinary process to proceed to conclusion in the face of demonstrable contraventions of the law and the Respondent's Human Resource Policy and Procedures Manual, 2019.
125. At all material times, the Respondent was in possession of the information it alleges that the Petitioner misrepresented.
126. Additionally, it had all the supportive documents on which the Petitioner's Curriculum Vitae was grounded.



127. Having served as a Regional Auditor and as Principal Internal Auditor, the Petitioner believed that she had the experience required and was employed on the basis of the documents she availed and the interview by the Respondent's board of directors.
128. Employment in public service is governed by very elaborate procedures including advertisement, shortlisting, interview, appointment, background checks and probation, among others.
129. Typically, it is assumed that employers such as the Respondent dutifully comply with their Human Resource Policy and Procedures Manual as well as career guidelines, *the Constitution* of Kenya, legislation as well as government policies and circulars on employment in the public service.
130. In the instant suit, the Respondent is blaming the Petitioner for its failure to conduct due diligence regarding the documents availed by the Petitioner and sat pretty until the Office of the Auditor General raised a query in the course of its annual audit and the Respondent responded and cannot turn round and blame the Petitioner for misrepresentation or non-disclosure which the Office of the Auditor General did not raise.
131. Significantly, the Office of the Auditor General relied on the documents in the Respondent's custody.
132. The court finds it an unfair labour practice for an employer in the public service to punish its employee for want of diligence by members of the board of directors as was the case here.
133. As to whether the Petitioner is entitled to the reliefs sought, the court proceeds as follows;
  - a. Declaration
134. Having found that the Petition herein does not meet the threshold of a constitutional petition as enunciated in *Anarita Karimi Njeru V Republic (Supra)*, the declaration sought is unmerited and is disallowed.
  - b. Letters dated 29<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022
135. Having found the Respondent's mode of operation against the Petitioner was in contravention of the procedural requirements of the *Employment Act*, 2007 and the Human Resource Policy and Procedure Manual, 2019, the letters dated 29<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022 are hereby set aside.
  - c. Permanent injunction
136. Having found that the Respondent's board of directors recruited the Petitioner on the basis of the documentation the Petitioner had availed and after having vetted the application and shortlisted her, the audit query by the Office of the Auditor General was an indictment on the board and it cannot pass the buck.
137. The Petitioner may not have segregated the years of experience at her previous places of work but provided supporting documentation and the Respondent conducted background checks as necessary.
138. Significantly, the Respondent tendered no evidence to prove that any of the Petitioner's documents was intended to deceive the Respondent to secure employment.
139. In the court's view, it is an unfair labour practice for an employer to take disciplinary action against an employee on the basis of an audit query by the Office of Auditor General where the Auditor General has not found the employee culpable or recommended that action be taken against the employee.
140. Granted that the Respondent's Managing Director based his notice to show cause on the Auditor General's audit query and did not conduct any investigation and the audit query referred to non-



compliance with the Human Resource Policies and Procedures as well as Career Guidelines by the Respondent's board and failure to obtain approval from the National Treasury, it cannot purport to act on the basis of the query without violating the law.

141. Had the Respondent conducted an investigation into the matter and unearthed evidence of culpability on the part of the Petitioner, the finding of this court would have been different.
142. Regrettably, the Respondent did not conduct any investigation as required by its Human Resource Manual 2019.
143. An investigation report would have been a solid foundation of charges against the Petitioner.
144. In the upshot, the Respondent is restrained from subjecting the Petitioner to a disciplinary process on the basis of the audit query by the Office of the Auditor General vide its letter dated 10<sup>th</sup> January, 2022.
  - d. General damages for violation of the Petitioner's Constitutional rights
145. The Petitioner availed no evidence to prove infringement of his rights and/or fundamental freedoms or entitlement to damages, the prayer is unproven and is disallowed.
146. In the upshot, judgment is entered in favour of the Petitioner as follows;
  - a. The Respondent's letters dated 29<sup>th</sup> March, 2022 and 4<sup>th</sup> April, 2022 are hereby set aside.
  - b. The Respondent is restrained from taking any disciplinary action against the Petitioner on the basis of the audit query by the Office of Auditor General unless the office so recommends.
  - c. The Petitioner is awarded 50% of the costs of the Petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF JULY 2024**

**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**

