

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTION PETITION NO. E209 OF 2021

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS IN ARTICLES 20,21,27,28,35,41,43 &47
OF THE CONSTITUTION OF KENYA, 2010**

**AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE
CONSTITUTION IN ARTICLES 20,21,27,28,35,41,43 &47
OF THE CONSTITUTION OF
KENYA, 2010**

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

**AND
IN THE MATTER OF: SECTIONS 4, 7, 10(1), 10(2) OF THE FAIR
ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

BETWEEN

DAMARIS NDINDA.....PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....

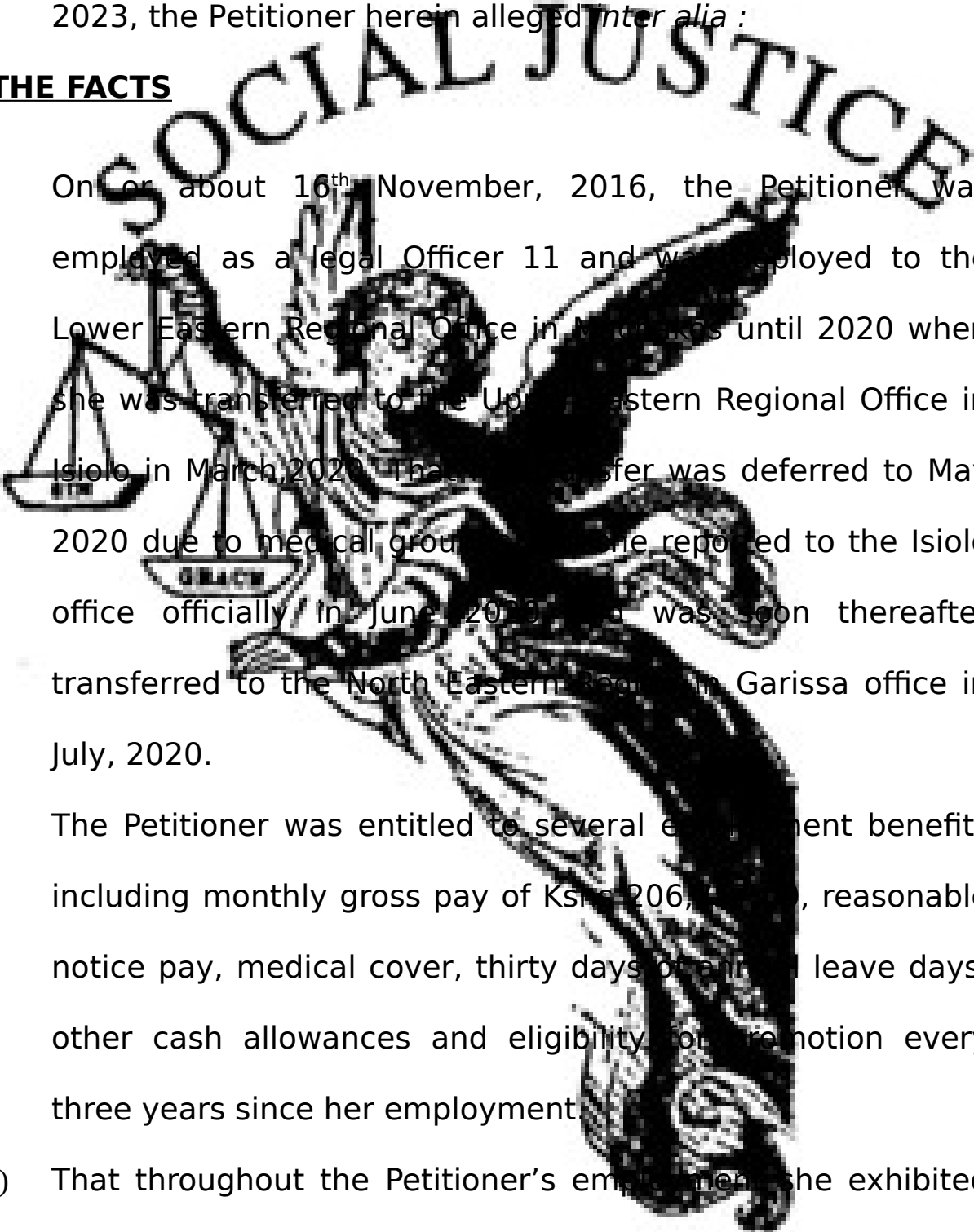
RESPONDENT

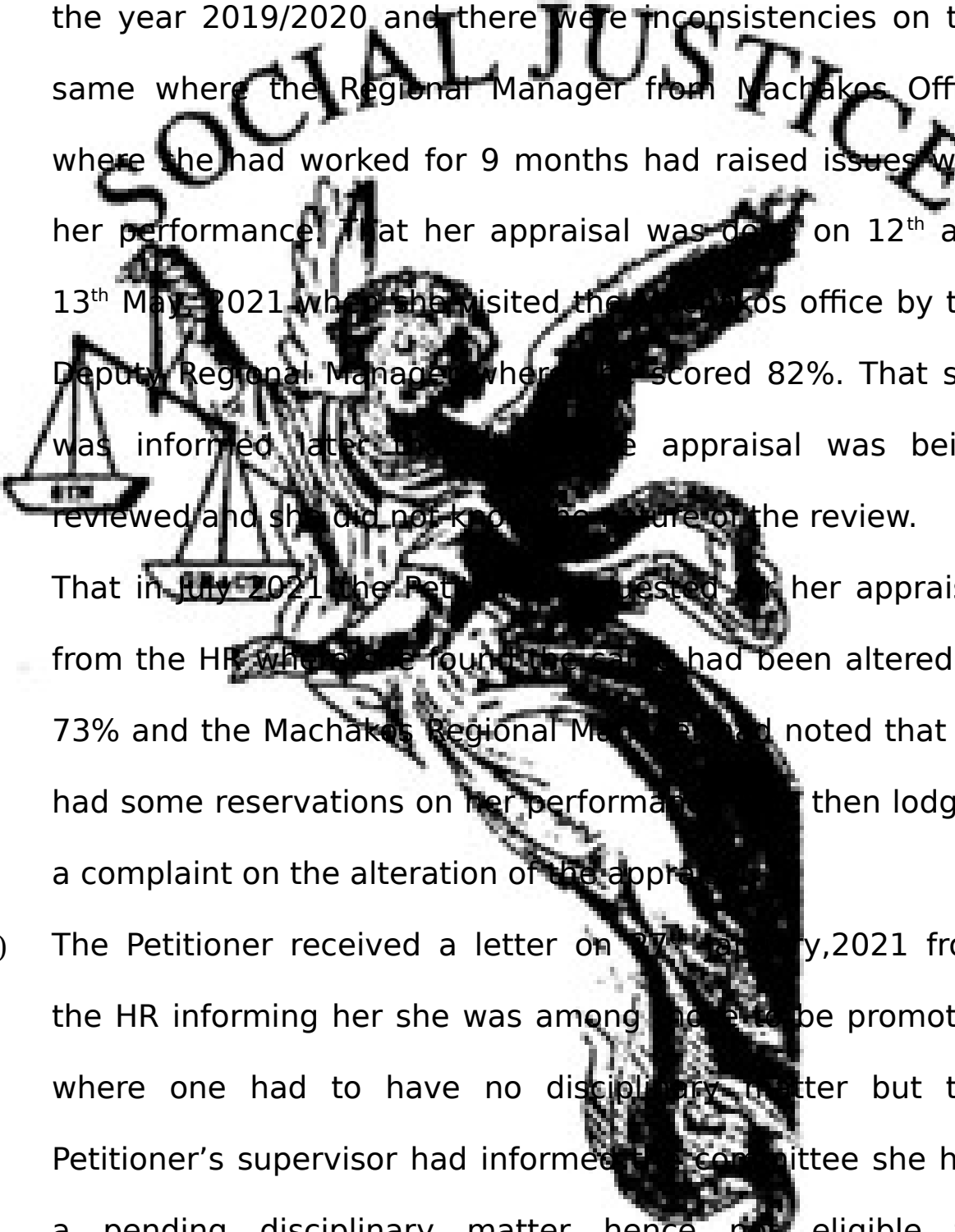
(Before Hon. Justice Abuodha Joseph Njorani)

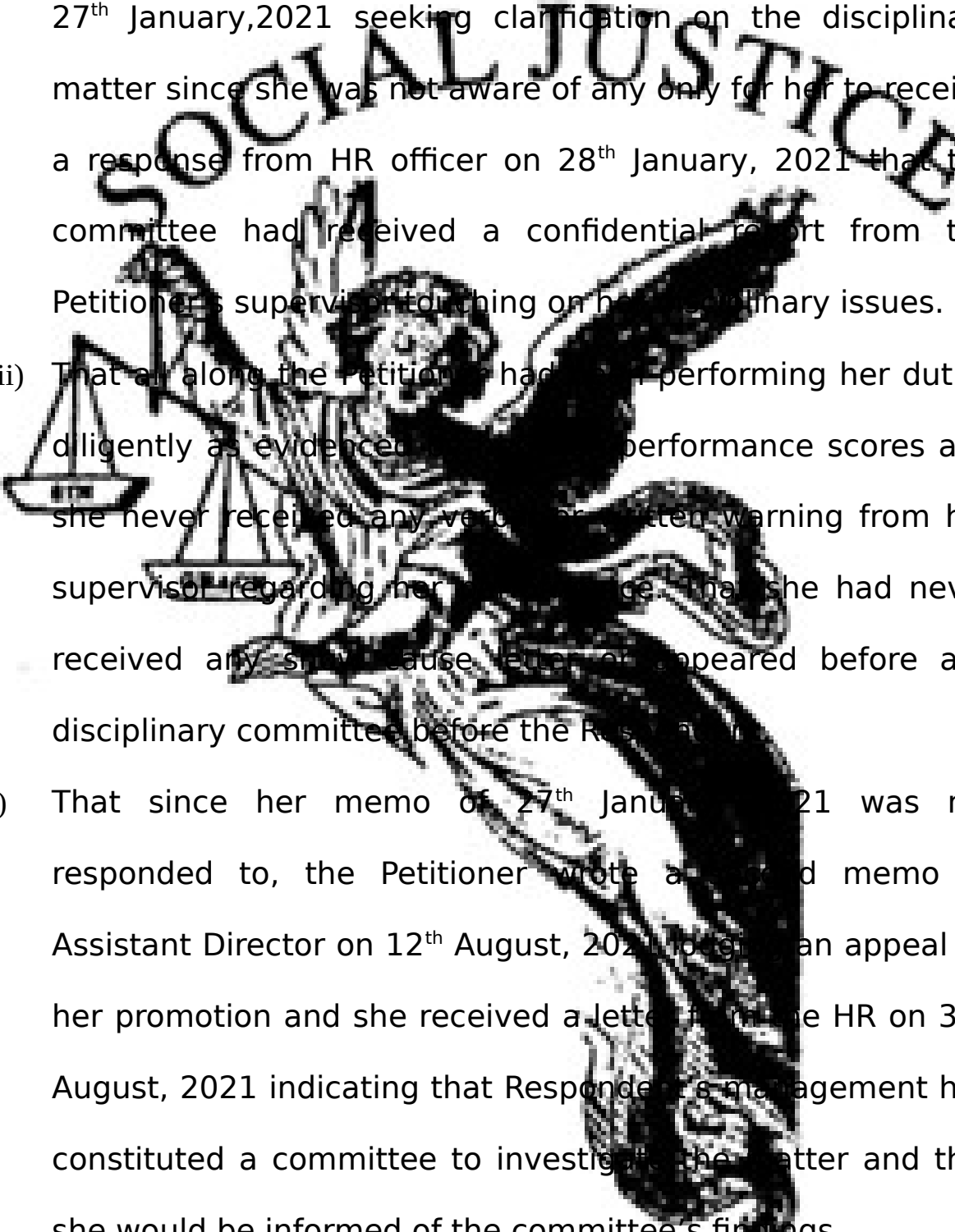
JUDGMENT

1. Through a Further Amended Petition dated 20th February, 2023, the Petitioner herein alleged *inter alia* :

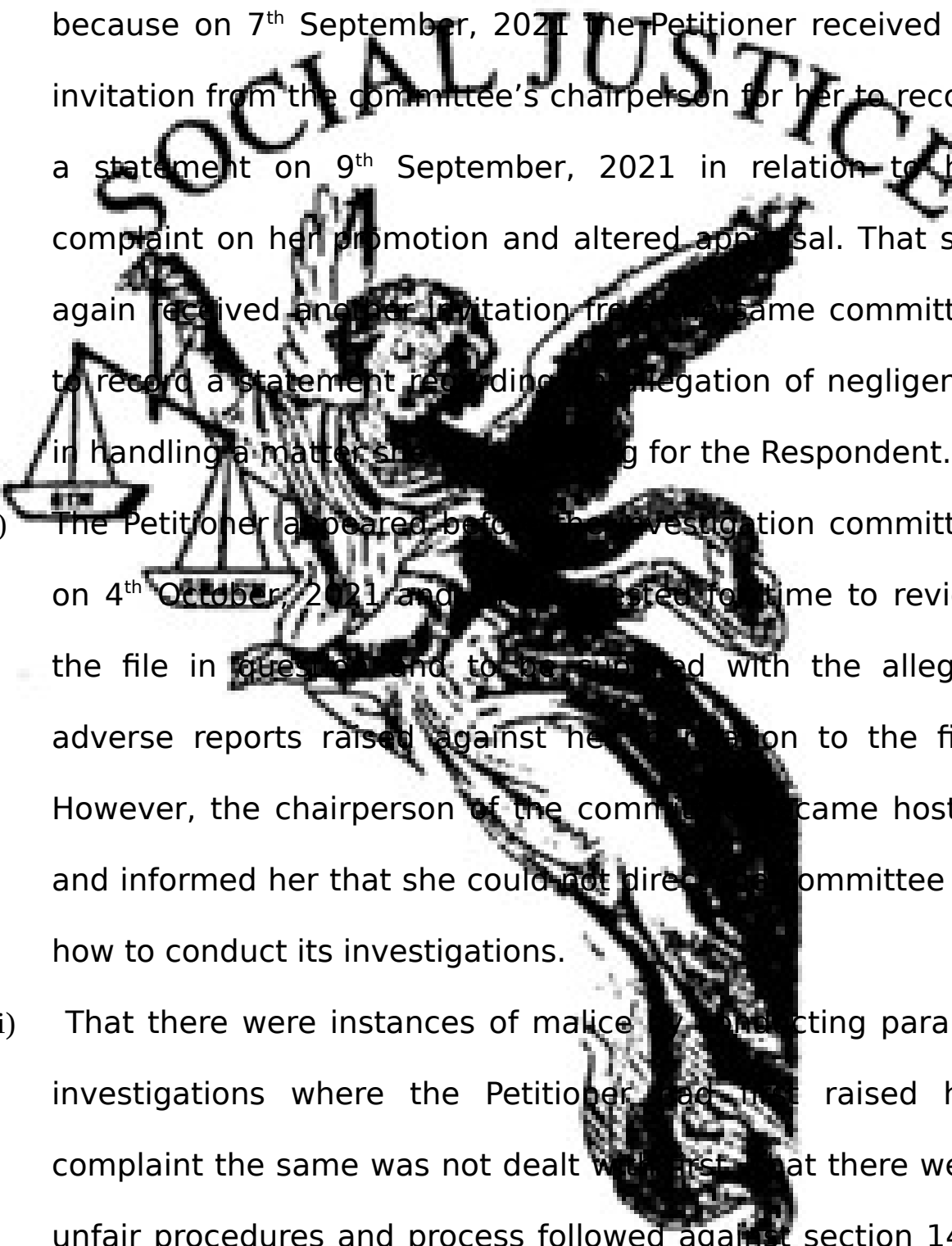
THE FACTS

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- i) On or about 16th November, 2016, the Petitioner was employed as a legal Officer 11 and was deployed to the Lower Eastern Regional Office in Mombasa until 2020 when she was transferred to the Upper Eastern Regional Office in Isiolo in March 2020. The transfer was deferred to May 2020 due to medical grounds. She reported to the Isiolo office officially in June 2020 and was soon thereafter transferred to the North Eastern Region in Garissa office in July, 2020.
- ii) The Petitioner was entitled to several employment benefits including monthly gross pay of KSh 206,000, reasonable notice pay, medical cover, thirty days of annual leave days, other cash allowances and eligibility for promotion every three years since her employment.
- iii) That throughout the Petitioner's employment she exhibited excellence in the performance of her duties and always received an excellent rating for her appraisals.

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- iv) That the Petitioner was denied the right to be appraised for the year 2019/2020 and there were inconsistencies on the same where the Regional Manager from Machakos Office where she had worked for 9 months had raised issues with her performance. That her appraisal was done on 12th and 13th May 2021 when she visited the Machakos office by the Deputy Regional Manager where she scored 82%. That she was informed later that the appraisal was being reviewed and she did not know the nature of the review.
- v) That in July 2021 the Petitioner requested for her appraisal from the HR where she found the score had been altered to 73% and the Machakos Regional Manager had noted that he had some reservations on her performance and then lodged a complaint on the alteration of the appraisal.
- vi) The Petitioner received a letter on 27th January, 2021 from the HR informing her she was among those to be promoted where one had to have no disciplinary matter but the Petitioner's supervisor had informed the committee she had a pending disciplinary matter hence not eligible for promotion.

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- vii) The Petitioner responded to the said letter via a memo dated 27th January, 2021 seeking clarification on the disciplinary matter since she was not aware of any only for her to receive a response from HR officer on 28th January, 2021 that the committee had received a confidential report from the Petitioner's supervisor touching on her disciplinary issues.
- viii) That all along the Petitioner had been performing her duties diligently as evidenced by her performance scores and she never received any verbal or written warning from her supervisor regarding her performance. And she had never received any show cause letter or appeared before any disciplinary committee before the Respondents.
- ix) That since her memo of 27th January, 2021 was not responded to, the Petitioner wrote a second memo to Assistant Director on 12th August, 2021 to file an appeal on her promotion and she received a letter from the HR on 30th August, 2021 indicating that Respondent's management had constituted a committee to investigate the matter and that she would be informed of the committee's findings.
- x) That there were instances of malice in the Respondents

actions and retaliatory investigation by the Respondent because on 7th September, 2021 the Petitioner received an invitation from the committee's chairperson for her to record a statement on 9th September, 2021 in relation to her complaint on her promotion and altered appraisal. That she again received another invitation from the same committee to record a statement regarding an allegation of negligence in handling a matter she was working for the Respondent.

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- xii) The Petitioner appeared before the investigation committee on 4th October, 2021 and requested for time to review the file in question and to be supplied with the alleged adverse reports raised against her in relation to the file. However, the chairperson of the committee became hostile and informed her that she could not direct the committee on how to conduct its investigations.
- xii) That there were instances of malice by conducting parallel investigations where the Petitioner had first raised her complaint the same was not dealt with just that there were unfair procedures and process followed against section 14.5 of the Respondent's manual which lays down the disciplinary

procedures.

xiii) That throughout her employment she never received any form of warning on her performance and it was only after she raised her complaints the Respondent violated its own policies by launching retaliatory investigation against her. That she was not afforded an opportunity to fully know the allegations levelled against her nor by whom nor allowed to have a representative at the proceedings.

xiv) The chairperson went on to threaten the Petitioner on supposed intention of her taking legal action against the Respondent and she was informed to request for the adverse report in writing which she complied with. She was handed a report dated 3rd September, 2020 and a set of questions to answer within 10 minutes. That she requested for more time to retrieve some information which would support her statement from the Respondent email which was down but the chairperson declined indicating that the investigation committee needed to complete investigation the same day.

xv) That the Petitioner was released upon recording one and half paged statement in the ten minutes. The Petitioner returned

to her Garissa office, continued working until 6th October, 2021 when she received an email from the Respondent's ICT Department that the email system was up and running. She then wrote an email on 7th October, 2021 to the Chairperson of the investigation committee seeking guidance on including the documents she intended to retrieve from the email which email elicited no response.

xvi) That on 25th October, 2021 the Petitioner received a notice to show cause letter dated 21st October 2021 from the Respondent. That the letter was in relation to the adverse reports that had been made in relation to a file she was handling. The Petitioner responded to the letter on 25th October, 2021 indicating that she had properly conducted her duties.

xvii) That further the Respondent issued the Petitioner with a Notice of Referral dated 14th December, 2021 referring allegations against her to its Staff Disciplinary Conflict Resolution Committee thereby commencing disciplinary proceedings against her. That she responded to the charge sheet vide the letter dated 20th December, 2021 where on

the same date she was invited to a disciplinary hearing scheduled for 29th and 30th December, 2021.

xviii) The Petitioner was apprehensive that the Respondent was likely to take an adverse action based on an exercise that was conducted in retaliation. That the allegations were false with tons of deceit, injury to reputation, malicious falsehood and defamation.

xix) The Petitioner sought an intervention on the unfair process instituted by the Respondent by filing this Petition and an application to the court on 4th April, 2022 gave its order that hearing be concluded first before any disciplinary action on her preserving her employment while she was to abide to the instructions and directions of the Respondent. The court brought to the Respondent's attention provisions of section 46(h) of the Employment Act.

xx) That on 17th June, 2022 through a letter to the Petitioner the Respondent indicated that it had completed a report in relation to the investigations carried out by the special investigations team set out to investigate the Petitioner's

grievance and constituted on 23rd August, 2021. The Respondent purported to have prepared a supplementary Report that was prepared by the same team constituted in 2021. That those actions were manifestly incorrect and contrary to the rules of natural justice as it was evident no new process was undertaken.

xxi) That on 17th November, 2022, the Petitioner received a second charge sheet that the Respondent intended to pursue the allegations against her and the same would be coming up for consideration on 29th and 30th November, 2022. The Petitioner was served with a third charge sheet on 18th November, 2022, which was supplied to her a year later on 19th November, 2023. A hearing to take place on 19th December, 2022.

xxii) That the hearing was postponed to 25th and 26th December, 2022 on a short notice despite the Petitioner's protest and unavailability of her legal representative when the disciplinary hearing proceeded and concluded. That the disciplinary hearing had instances of procedural failures which were against the court order of 4th April, 2022 since the

charge sheets kept on changing, conflict of interest of some of committee members hence some performing the role of investigator, prosecutor and judge.

xxiii) That on 10th February, 2022 the Petitioner received a letter terminating her employment on the grounds of gross misconduct which termination was irregular, unprocedural and unfair hence amounted to wrongful dismissal. That the reasons for her termination were unfair and invalid as the same were not given in the charge sheet of 14th December, 2021, initial charge sheet of 2019 where the consent of 25th April, 2019 was obtained where the Respondent changed to include consent of 15th June, 2019. As the charge sheet was back dated, the Petitioner acted on instructions received from her supervisor, on failure to file replies as the files were handled by her colleague Regina Jemita who failed to file defences but no proceedings were initiated against her hence ethnic discrimination, the whole process was initiated when the Petitioner went on sick leave which were approved early 2020 where she underwent two surgeries hence terminated due to her health status and the Respondent's

CEO had on various occasions stated that he would ensure that the Petitioner was fired merely for participating in the activities of the LSK which is a professional Members organization allegedly because she was an activist.

xxiv) The Petitioner alleged violations of her constitutional rights ranging from Article 27 on right to equality, Article 28 on her right to dignity, Article 30 on her right to freedom and security, Article 33 on her right of the rights and reputation, Article 35 on her right to receive information, Article 41 on fair labour practices and Article 47 on her right to fair administrative action.

Reliefs sought by the Petitioner

- a. A DECLARATION that the purported disciplinary process that the Petitioner underwent was unlawful, unconstitutional, null and void and violated the Petitioner's right to fair labour practices.
- b. A DECLARATION that the refusal by the Respondent to provide the Petitioner with information relating to her performance and failure to grant the Petitioner access to her employment file violated her right to access to information A declaration that the Petitioners Fundamental Rights and Freedoms have been violated by the 1st Respondent.
- c. AN ORDER OF CERTIORARI quashing the charge sheets dated 14th December, 2021. the second charge sheet dated 17th November, 2022 and the third charge sheet dated 18th November, 2021 the show cause letter dated 8th October 2021, the report by the investigation

committee and purported findings of misconduct by the Petitioner, the Petitioner's former supervisors complaint contained in the Petitioner's Human Resource File and the Human Resource report in respect of the subject matter of this petition.

- d. AN ORDER OF CERTIORARI quashing the proceedings before the Respondent's disciplinary committee and the letter of dismissal dated 10th February, 2023.
- e. A DECLARATION that clause 14.7.8 and 14.14.2 of the Corporate Services Policies and Procedures Manual is unconstitutional, null and void and of no legal effect.
- f. AN ORDER for promotion of the Petitioner to Legal Officer I effective from 1st October, 2020 with backdated pay and benefits and no loss of benefit whatsoever.
- g. A CONSERVATORY ORDER restraining the Respondent, its agents, servants or any other person acting for and or on their behalf from taking any action disciplinary action against the Applicant or interfering with her employment in any manner whatsoever including retaliation, reprisal, or victimization, or taking any adverse further action including disciplinary action on account of filing this petition.
- h. A CONSERVATORY ORDER do issue restraining the Respondent, its agents, servants or any other person acting for and or on their behalf from commencing, proceeding, concluding or otherwise conducting any intended disciplinary action against the Petitioner. In particular, disciplinary action including compulsory leave, suspension, termination or denial of benefits or loss of advancement of opportunity in respect to proceedings over the issued charge sheet dated 14th December, 2021 or any other complaint relating to the Show Cause Letter dated 8th October, 2021 or the subject matter of this petition. And the Petitioner be and is hereby deemed reinstated and/or re-engaged immediately from the date of the purported dismissal letter dated 10th February, 2023 with no loss of benefit and with continuity of employment.

gg. Further an Order for Compensation as follows:

- a. Twelve months compensation for unfair termination at Kshs. 2,480,484.00
- b. Unpaid leave arrears.
- c. Three months' notice pay.
- d. Medical cover for a year.
- e. A declaration that the 1st Respondent discriminated against the Petitioner

h. AN ORDER for general and aggravated including exemplary damages for breach of constitutional rights including the right to fair administrative action, right to human dignity, right of access to information and self-worth.

i. AN ORDER for general and aggravated including exemplary damages for discrimination and for injury to reputation.

j. AN ORDER for interest at court rate on the sum of e, gg, h, and i herein.

k. That the costs of this Petition be borne by the Respondent.

2. This court on 3rd October, 2023 due to complex pleadings and affidavits directed the parties to file the proposed issues and trial bundle containing statements and documents to be relied on during trial.

3. The Respondent filed the witness statements which were a summary of the Replying Affidavits by Ben Murei, Regina Jemutai, Ellyjoy Bundi and John Loikoloi dated between 31st

October, 2023 to 4th November, 2023. The Respondent alleged

as follows: -

- a. That the Petitioner was to handle the Machakos Prison Matters with ELC 39 of 2018 being the lead file. That she was to handle all the 12 consolidated files.
- b. That Mr. Murei in 2019 recommended for the Petitioner's promotion despite having some restrictions on her performance. That in January, 2020 the Petitioner sought Mr. Murei advise on the Machakos Prison matters where she informed him that she had consented to an application compelling the Commission to add more defendants. That Mr. Murei did not understand how she was arrived at and they agreed to send the court clerk Mr. Evans to go to peruse the court file.
- c. That after the perusal it was discovered that the Petitioner consented to addition of defendants and the merits for the suits. That Mr. Murei on March 2020 wrote an email to the Petitioner stating that the sued defendants did not have titles in judgment letters which was not allowed by law. That he never sought his instructions before consenting or inform him of the outcome in the matter after court. He requested the Petitioner to attend court and revoke her consent to add defendants.
- d. The Petitioner responded to Mr. Murei on 19th March 2020 stating that there was no jeopardy in the case if the defendants were added and she did not deny that she did not seek Mr. Murei's instructions or consult him on the same.
- e. That in addition to the consent there were some issues regarding the Petitioner's failure to file replies to amended pleadings and counterclaim which were filed in the lead file.
- f. Mr. Murei wrote a memo dated 22nd April, 2020 regarding the Petitioner's promotion pending an inquiry on mishandling of files. On 3rd September, 2020 he wrote a detailed report to the Legal Services about the handling of the Machakos Prison files and about findings of the inquiry with conclusion that the Petitioner was grossly negligent in her duties to defend the Respondent's interests while being dishonest, disrespectful and insubordinate.
- g. That Mr. Murei also wrote a letter to HRM on the same date not recommending the Petitioner for promotion. While the same time appraisal was ongoing Mr. Murei stated that he could not properly appraise the Petitioner due to his report, the broken relationship and waited until he was allowed to proceed with the appraisal where he requested Gideon Rukaria to first appraise her.
- h. That first appraisal was done on 12th and 13th May, 2021 where both of them signed the appraisal on 13th May, 2021 and since Mr. Murei was on leave he could not sign as second appraiser. Upon resuming from his leave on 17th May, 2021 he saw that Rukaria had awarded the Petitioner 82 points which was high. That the first target the Petitioner was

awarded 21 points when the highest would be 17.5 for the four targets. He sent back the form to Rukaria to review with his comments.

- i. That on 19th July, 2021 the Director Field Services called Mr. Murei for a meeting with HRM on Petitioner's complaint that her appraisal was changed without her knowledge. That Mr. Murei explained the reason which was found plausible and he did a brief incorporating Mr. Rukaria explanation and forwarded to HR on 22nd July, 2021.
- j. That the Petitioner around that time between 3rd August to 13th August 2021 began posting abusive and defamatory messages on Whatsapp group titled EACC Lawyers accusing Mr. Murei of abuse of disciplinary process and altering her appraisal.
- k. That the Petitioner appealed the appraisal on 1st August, 2021 and the Respondent CEO constituted a special investigation team to investigate her complaints. On 27th September, 2021 the investigation team concludes its investigation and concludes that appraisal was not altered instead it was reviewed by a second appraiser as required and the Petitioner was made aware of the same.
- l. The investigation team recommended further investigation on the Petitioner's mishandling of the Machakos Prison files most specifically on the consent she entered in to. On 1st November, 2021 the investigation team concluded its further investigation and recommended that disciplinary process be undertaken against the Petitioner for failure to safeguard Respondent's interests.
- m. Mr. Murei issued a letter to show cause dated 8th October, 2021 as the Petitioner's supervisor pursuant to clause 13 of the Commission Corporate Services Policies and Procedures dated 2020. The Petitioner responded to the show cause letter raising charges of retaliation by Mr. Murei upon her issuing her complaints about appraisal while stating that he did not have jurisdiction over her. She also lodged service of defences and counterclaims.
- n. That Mr. Murei after such acknowledgement was issued a memo dated 1st November, 2021 to Evans Misigo to undertake thorough scrutiny of all files in Machakos Prison matters. That Mr. Misigo wrote back to him in a memo dated same day stating that the defences and counterclaims were received by the Petitioner on 8th May, 2019 and responses were done. That this brought the total defences received by the Petitioner to four which had a claim of Kshs 66,900,000/=.
- o. That failure to reveal existence of defences for over 2 years was not only negligent but wilful and deliberate. That Mr. Murei wrote a memo dated 3rd November, 2021 to the Assistant Director HRM recommending referral of the matter to staff disciplinary and conflict resolution committee for hearing having found her response to the show cause letter not satisfactory.
- p. That Mr. Murei was summoned by the committee on 19th December, 2022 where he was questioned by the committee and cross-examined by the Petitioner. That the committee upheld the charges of willingly

failing to perform duties by the Petitioner and she was dismissed vide the letter dated 10th February, 2023.

- q. Mr. Murei specifically denied agreeing to the Petitioner recording the consent as she did and that the problematic consent was set aside by filing application dated 2nd September, 2020 which was supported by his affidavit that the Petitioner did not have authority to record the consent.
- r. That the Petitioner's assertions that her colleague Jemutai was responsible for filing the defences and counterclaims was not supported by any evidence of communication.
- s. Mr. Murei denied creating any toxic environment for the Petitioner and alleged that it is the Petitioner who was abusive and disrespectful as evidenced in emails during handover and WhatsApp group EACC lawyers derogatory & defamatory remarks. That as the sole appraiser he had power to alter scores & found erroneous. He referred the form back to first appraiser to review.
- t. That before hearing the Petitioner made an application to the court on 21st December, 2021 to halt the disciplinary proceedings. The court on 4th April 2022 determined the Petitioner's application through a ruling and directed that the Respondent concludes grievance process which the court found incomplete.
- u. That in line with the court's ruling the Respondent concluded the Petitioner's grievance process and communicated the outcome through letter dated 17th and 23rd July, 2022. That the court did not order restarting the process but to conclude as it was pending.
- v. That the Petitioner and her legal representatives sat through the entire disciplinary hearing, several witnesses were called and the Petitioner was informed of her right to cross-examine witnesses which she did. That the committee dismissed some of the charges against the Petitioner but upheld the charges of wilful failure to perform her duties.
- w. That the Respondent kept proper proceedings which were used before the court and the Petitioner was given enough time to respond of over a month since when she appeared in November 2021 for hearing the Respondent had to seek the approval of the CEO. The adjournment was solely due to the Petitioner's reason of attending with an external counsel.
- x. Ms. Jemutai on the other alleged that the Petitioner was in conduct of the Machakos Prison files. That while she filed a notice of change of advocates on 3rd April, 2020, the Petitioner was on leave since 20th June, 2017.
- y. That by a memo of 9th March, 2020 Mr. Murei instructed the Petitioner to hand over to her civil litigation files which the Respondent was not effected save for the Petitioner walking to her desk and informing her orally that she handed over civil litigation files and the same were in registry.
- z. That by a memo of 20th May, 2020 Mr. Murei indicated that the hand over process be in writing, verified by paralegal and clearly indicate status and what needs to be done. That the Petitioner handed over the first

- batch of civil litigation on 21st May, 2020 and on 22nd May, 2020 a separate report with regards to Machakos Prison matters the Petitioner tried to hand over but Ms. Jemutai declined to accept since the same did not meet conditions set by her supervisor.
- aa. That the Ms. Jemutai and the Petitioner never agreed or had discussions that she was to respond to the defences and counterclaim and in any event the Petitioner never handed over the said defences to her. That by the time the Petitioner was served with the said defences Ms. Jemutai had not taken over civil litigation matters or allocated the matters. That by filing notice of change of advocates it did not mean she had been handed over the files.
- bb. John Lokolol stated that he served as the team leader of the Responder's Special Investigation Team appointed by the CEO of the Commission on 23rd August, 2021 by appointment of even date to inquire into the matters set out in the Petitioner's appeal regarding her appraisal and promotion.
- cc. That on 9th September, 2021 during investigations the investigation team invited the Petitioner to a meeting. That team also invited Mr. Ben Murei who was the Petitioner's supervisor and the person she had accused of irregularly altering her appraisal form, to record a statement. Mr Murei recorded a statement dated 19th September, 2021 and a further statement dated 29th September, 2021.
- dd. That the special investigation team concluded its inquiry in to the allegations of unfair treatment by the Petitioner touching on the decision not to promote her and what she alleged to be the alteration of her appraisal form for the year 2019/2020. The recommendations of the special Investigation team were that her appraisal form was not altered but reviewed by second appraiser and she was made aware of the changes, not eligible for promotion and an independent internal investigation be conducted on handling of Machakos among others.
- ee. That on 27th September, 2021 internal memo also on the same date the CEO expanded the scope of the investigation team to investigate the allegations of negligence in handling the Machakos matter.
- ff. That on 4th October, 2021 the Petitioner was invited to record a further statement and was supplied with a certified copy of the court proceedings in Makueni ELC 39 of 2018 and a copy of the lead file among others but she was uncooperative and declined to respond to questions.
- gg. That the Petitioner contended that she could not proceed with the interview because the systems were down. Only 7 of 31 questions required access to office email. That the Petitioner could have answered the remaining 27 questions that did not require system access.
- hh. That the Petitioner was never placed under arrest or restriction from exiting the interview room nor threatened. That the investigation team remained professional, accorded her enough time during the interview, supplied her with necessary documents and tried to accommodate her

as much as possible.

- ii. The Petitioner's assertion that she was given only 10 minutes to answer a set of 35 questions was false. That she had nearly the entire day and only 31 questions were presented but she was uncooperative and declined to answer the questions.
 - jj. That at the conclusion of the investigations they prepared and submitted an investigation report and made conclusions of the appraisal form not being altered, Petitioner not being eligible for promotion and she was found negligent on handling the Machakos files.
 - kk. That the investigations team made recommendations of a disciplinary action to be taken against the Petitioner. That the investigation team handled the two issues separately and that was why the Petitioner was summoned twice to give testimony on the two separate issues rather than one session but the Petitioner remained uncooperative on the issues of mishandling of the Machakos files.
4. This court directed this matter to be heard orally in open court and on 7th November, 2023 the court formulated the issues for determination in regards to whether termination of the Petitioner was lawful or for valid reasons, or was influenced by improper motives, whether the same was procedurally fair, whether the reasons were those prohibited in section 46 of the Employment Act and the remedies available to the Petitioner if the Petition was found successful.

EVIDENCE

5. The Petitioner's case was heard on 13th February, 2023. She called two witnesses Wilfred Nderitu and herself. CW1 (the Petitioner) testified that she worked for the Respondent from 2016 to 2022 and relied on her affidavits and documents as her evidence in court.
6. CW1 stated that she was in court on 4.4.2019 and the court made a site visit to Machakos Prison. They traced prison land before the court commenced its proceedings. The surveyor stated that there were extra parcels of land and the court gave directions on the matter. According to the Petitioner, the matter was handled by her colleague Regina Jemutai

and the response to amended defence and defence to counterclaim were prepared by Jemutai.

7. It was her evidence that she was issued with three charge sheets which kept changing from entering consent without authority with other charges. That she was not furnished with documents in support of the charges and that the events occurred in 2019 but charges were preferred in 2021 after she had left for Garissa. That she was served with amended defences and counterclaim.
8. CW1 testified that they were a team of 12 and they used to share responsibilities. That the Respondent never suffered any adverse consequence over failure to file the response to defence and counterclaim. She further stated that Mr. Mureithi advised that they should not be opposed to the application of joinder of parties who were private developers on the prison land. That the responses to the defences and counterclaim were later on filed.
9. The petitioner stated that there was investigation and the parties were brought in to make it possible to develop the land. That she was told by HR that she could not be promoted as there was pending disciplinary issue which she was never aware of. In her evidence that she tried to explain what transpired but could not do so effectively because the email system was down. That the investigation team never gave her adequate time to respond. That she several times went for supporting documents but she was never given.
10. CW1 testified that she was denied calling her witnesses and was not given adequate notice that the summary of the proceedings was not accurate as it was edited. That it did not take into account examination of Michael the Chief Investigation Officer. That she was not given any counsel. That her cross examination was not fully recorded.
11. Concerning promotion, she stated that she was denied promotion due to a pending disciplinary issue and she filed complaint over it. That she was issued with show cause letter and she felt it was discrimination because the CEO and her supervisor were uncomfortable with her being a Council Member of LSK. The petitioner further stated that she was transferred from Isiolo to Garissa. That the CEO said she embarrassed him and called her activist in presence of her colleagues and threatened to cause her termination and there was bias and malice. That in a team of 3 she was the only one victimized.
12. CW1 testified that her supervisor wrote to HR to deny her promotion which was discrimination based on her sickness. That the hearing did not abide to natural justice and fair hearing and her issue was reported to the newspaper that she colluded with Defendants.
13. In cross examination CW1 confirmed that she did not oppose joinder of parties hence did not oppose the application so new parties were added to the suit. That investigations were still ongoing and the titles were not yet verified.
14. CW1 confirmed that she raised the issue of amendment with her

supervisor but she did not have a written approval in court. That the exchange of email between her and her supervisor about the consent was almost a year after. That the responses were later filed.

15. CW1 stated that the counterclaim amount was fluid throughout the disciplinary proceedings. She admitted that defence and defence to counterclaim should be filed within 14 days and that she did not file the same and that a default judgment could have been entered. It was the Petitioner's evidence that Jemutai was to file the defence to counterclaim and that she was part of the team handling Machakos Prison land cases.
16. Regarding her promotion she stated that a team was formed to look into her grievance and she appeared before the internal investigation team and given the outcome of the investigation in late 2022. That the team never communicated to her and she was not aware of expansion of the investigation to include Machakos files. She confirmed that the report recommended disciplinary action against her and she was issued with show cause letter, she responded to it and after she was summoned to a disciplinary hearing which was later dropped by court.
17. CW1 confirmed that she never attended the Court's ruling of 4th April, 2020 as she was unwell most times in 2020 and it was during COVID-19. That during disciplinary proceedings she was on sick leave but she never asked for time to get well. That the proceeding to her dismissal led to ill-health. She further stated that her colleagues were present when the CEO railed at her at Garissa but they could not testify against the Respondent as their employer. The CEO was transferred three times for signing the petition to remove the CEO where CEO said he was embarrassed him.
18. CW1 confirmed that she was not a member of Grievance Council at the time of disciplinary hearing. That she did not receive proper notice of the disciplinary hearing as she appeared in the court in December, 2023 and she was not given opportunity to be heard. That she was not aware of adverse report against her.
19. In re-examination the petitioner stated that she had discussed the consent earlier with Mr. Murei but she was surprised as he later denied knowledge of the same. That Mr. Amunga advised her to always discuss court matters with Mr. Murei before going to court. After receiving amended defence and counterclaim she handed them over to Jemutai to respond. That Jemutai was the case counsel and she did not refuse the documents as she was dealing with other applications.
20. CW1 clarified that she saw the memos in June 2023 after the court order. That as per clause 14.7.8.1 promotion was not to happen until disciplinary process was concluded was prone to abuse as it was abused in her case and others.
21. The petitioner called Mr. Wilfred Nderitu as a witness. He adopted his witness statement as his evidence in chief and further stated that he represented the Petitioner at the disciplinary proceedings but was not allowed to represent her at the proceedings. That he was met with hostility from the Respondent despite explaining that the Petitioner was

entitled to representation. It was his evidence that he was told the Petitioner could have been represented by one of her colleagues who she said could not come for fear of retaliation.

22. Mr. Nderitu further stated that the Petitioner on insisting proceeding with external counsel, the proceedings were adjourned and he could not make it to attend the adjourned date due to short notice.

23. In cross examination Mr. Nderitu stated that the Petitioner was next accompanied by SC Kanjama and opined that in some circumstances counsel can be allowed to appear before disciplinary proceedings. That the CEO was not part of the panel and he did not agree that the charges were picked from statute.

24. The Respondent's case on the other hand was heard on 30th September, 2024, 26th February, 2025 and 1st June, 2025. The first witness was Elroy Bundi RW1 who adopted a witness statement of 31st October, 2023 and bundle of documents as her evidence in chief. She further stated that she was the Deputy Director for HRM of the Respondent. Concerning the issue of irregular promotion of the petitioner and irregular appraisal she stated that the forms for promotion were sent to supervisor and filed and presented to the HR advisory committee and that the procedure was followed. She stated that the officer first does self-appraisal then next sits with the level supervisor then a second appraiser.

25. Ms. Bundi testified that the supervisor recommended withholding promotion on the petitioner pending the outcome of Machakos matters. That the matter led to Petitioner's disciplinary action which the Petitioner appealed. She denied that the decision by the Petitioner's supervisor Mr. Murei to withhold the petitioner's promotion was irregular. The issue was referred to an investigation team which the petitioner appealed and they upheld the decision and further found the appraisal was irregularly altered. The team further found on special investigation over the handling of the Machakos matters by the petitioner and at the conclusion thereof made recommendation for disciplinary action against the Petitioner. That the disciplinary process started with a show cause letter by the supervisor and the Petitioner responded and the matter was thereafter tabled before disciplinary panel.

26. RW1 testified that the first hearing however did not proceed as the Petitioner went to court to stop the proceedings and the court gave directions on what was to happen but the court did not direct the process to start afresh. So the disciplinary process started from where it stopped. It was further Ms Bundi's evidence that the Petitioner was invited for hearing which did not proceed because she attended with external counsel and they had to seek CEO's approval which was sought and hearing proceeded. That he attended as a witness.

27. RW1 testified that the panel recommended dismissal from the office. That they could not finalize within 14 days because the Petitioner sought court's intervention. That approval was sought from the CEO to

conduct the hearing beyond 14 days.

28. In cross-examination RW1 confirmed that the decision of the disciplinary committee was subject to approval by the CEO but could not remember when the recommendations to the CEO was made. That the report is usually sent with recommendations and is sent under cover of a forwarding memo and that the CEO responded.
29. It was her evidence that it was not a must to have a verbatim recording of proceedings. She could not remember who asked questions among the DC members and even remember the number of questions asked by the Petitioner. That she appeared before the disciplinary committee once.
30. RW1 stated that the report was dated 10th February, 2023 and the dismissal letter 10th February 2023. That the charge sheet was never given to the accused but extracts of the charge sheet were served to the accused in form of a letter. That it always give 3 days' notice to the disciplinary hearing that all letters were given to the Petitioner. She RW1 confirmed that the charge sheet was amended to include additional charges which was done after issuance of the letters. That the Petitioner was not notified of the amended charges.
31. RW1 confirmed that the court expected that the Respondent concludes the grievance lodged by the Petitioner first before commencing disciplinary process initiated by the charge sheet dated 14th December, 2021. That the parties names were not mentioned in the charge sheet. That the charge sheet 4472/2021 talked of consent while the dismissal letter talks of consent. She RW1 stated that she was not aware of pending disciplinary issue involving the Petitioner prior to this matter and all personal records were kept confidential. That the Petitioner requested for documents and she came and saw the documents as she went through the documents she needed.
32. Regarding appraisal she stated that the score was reviewed from 82% in the first appraiser to 73% in the second appraisal the same was communicated to the Petitioner by the second appraiser. She clarified that the change of score was necessitated by the fact that the petitioner had scored over and above the limit. Further that the charge sheet was issued after issuance of show cause letter and the same was responded to. It was her evidence that the letter of 14th December, 2021 was not a charge sheet.
33. RW1 clarified that when the court made its order the disciplinary process had not concluded. That communication of the outcome of the appeal was done to the Petitioner although the report was not attached.
34. The second witness who testified on 14th February, 2025 was Mr. Ben Murei who stated that he was the respondent's Director in charge of Asset Recovery and at the material time and that he was in charge of Lower Eastern Region. He adopted his witness statement dated 1st November, 2023 and bundle of documents as his evidence in chief.
35. Concerning the issue of the consent entered into by the

Petitioner, he stated that Counsel Mungata was acting for the intended defendants who applied to be joined in the suit. That the Respondent was served on 8/5/2019 and there were no consolidated pleadings and there was no verification of plot numbers subject of the application. That the Petitioner who was representing the Respondent consented to allowing the application. He further testified that he did not authorize the consent on the part of the Respondent. That he became aware of the consent in January 2020 after the Petitioner informed him of the need to amend the pleadings to join some two defendants and he wondered how that happened.

36. RW2 requested for perusal of the Court file and discovered that the suits were consolidated and there was a consent allowing the application to join other defendants. That he wrote comments over the issue and the Petitioner responded. That the Respondent was aware of the procedure of amendments and consents.

37. RW2 testified that the issue came to the attention of Director Legal Services after the court faulted the Respondent for not complying with the consent. That he assigned a lawyer to prepare a report on the matter and he also prepared a consent to present it to the Director legal services. That they applied for the review of the consent. It was Mr. Murei's evidence that the Petitioner made the replies to the defences and counterclaims which was an error on the part of the Respondent to an award of Kshs 66 million. That the Petitioner never informed him of those defences and counterclaim. He further stated that the Petitioner's hand over notes on civil litigation files do not mention the defences and counterclaims. That the Petitioner was supposed to handle those defences after she recorded the consent.

38. He further stated that the disciplinary process was not defamatory but it was the Petitioner who was discriminated by the Respondent and he raised the issues as soon as he became aware that the Petitioner was not discriminated on account of sickness.

39. In cross-examination RW2 confirmed that he was aware of the visit as it happened 4 days after he reported to Mr. Murei. That he was not aware of the other defendants in the Machakos case as they were joined as he was never briefed of the order of 4/4/2019 and that he never received the court attendance report.

40. In the court attendance sheets RW2 confirmed that the Petitioner mentioned about suing all persons on the Machakos prison land. That the commission has to investigate, verify the allegations and if necessary file a suit. That he recalled having a conversation with the Petitioner after the site visit but he did not recall discussing the issue of women intending to surrender land subject to compensation. RW2 confirmed that the Petitioner never sought instructions on what to do in court after site visit. That he responded to the Petitioner's email on attendance sheets that they will discuss but he did not call the Petitioner for discussions thereafter as it was the Petitioner to look for him for discussions.

41. RW2 confirmed that he had memos on handover but did not have correspondence between him and the Petitioner in 2019 filed in court. It was his evidence that it was the Petitioner who was dealing with the amendment and consent and that he issued the Petitioner with a show cause letter in his capacity as his supervisor. That he issued the show cause letter after recommendations of the investigation team. That investigations were in two parts and that the investigation did not convert itself in to a disciplinary panel but the panel was reconstituted by the CEO. That the Whatsapp was not mentioned in the dismissal letter and further that he was uncomfortable during the Petitioner's appraisal due to their relationship which had deteriorated but he changed his mind after discussing with Director Field Services who convinced him that he should appraise the Petitioner.
42. RW2 confirmed that the amended defences and counterclaims sought for eviction and money from the allotment. That as per statement of John Kisiangani in ELC 39 of 2019, 14 copies of allotment letters.
43. In re-examination RW2 confirmed that the court attendances for September and November were not representative of what transpired in court. That a mere site visit does give the facts needed to file suit. RW2 clarified that the dismissal letter did not raise the issue of amendment of pleadings and he could not find any communication between himself and the Petitioner on issues of 2019. That the manual was tied to one advocate and the corporate Manual addresses legal issues that it did not cover extraordinary circumstances that the commission is not strictly tied to the corporate manual.
44. The third witness was Regina Jeremias (RW3) who testified on 19th June, 2025. She adopted her witness statement filed 3rd November, 2023 and the Respondent's bundle of documents as evidence in chief and further stated that she was not given the physical files for Machakos prison files. That the amended defence was received by the Petitioner on 8th May, 2019 and she was not working on the files then. That the responses were not filed within the required timeline of 14 days because the Petitioner did not file them. That at that time she had not received the files from her supervisor. That she never discussed with the Petitioner about filing the responses.
45. RW3 testified that the notice of change of advocate was filed by herself almost a year later after the defences and counterclaim and that by that time there were no responses to the defences and counterclaims. She further stated that the Petitioner did not hand over as she claimed and that she took over the files after filing notice of change. That two memos were issued to the Petitioner to hand over the files. RW3 was not agreeable to the format of the hand over.
46. In cross-examination RW3 confirmed that Machakos matters were not handed over to her by the Petitioner. That civil litigation matters were not handed over to her. That she came in to Machakos files in 2020. She confirmed that she filed the responses later in 2021 and that she

refused to sign the handover report by the Petitioner and she informed the office and gave her reasons and further that there was a meeting after she declined to sign the report. The meeting was attended by Mr Murei, the Petitioner and herself. It was a heated meeting. She confirmed that it was agreed that the Petitioner sends the report and exhibits by soft copy and that she came into physical possession of those files mid-August 2020 but did not formally hand over when she was leaving for study leave as she was not leaving the region.

47. In re-examination RW3 clarified that the handwritten comments were hers and the listed files did not include the lead files as it was with the Petitioner. The commission had directed that the files be captured in the ICNS system.

48. The respondent's witness was Michael Mokolol (RW4) who stated that he was the Director Ethics and Governance at the Respondent. He adopted his witness statement dated 10 November, 2023 and the Respondent's bundle of documents as evidence in chief and further stated that he was appointed to lead a special investigation over allegations by the Petitioner as a member. That they were appointed on 23rd August, 2021. That they undertook the investigation where the Petitioner was invited and recorded a statement. He further stated Mr. Murei was the Petitioner's superior when he gave his statement. They gave the outcome of the investigation and recommendations which were approved by the CEO.

49. RW4 testified that they continued with investigations on Machakos Files and one more lawyer was brought in that the Petitioner was called to record a further statement. That they asked questions for the interview but the Petitioner declined to answer questions.

50. RW4 further stated that the special investigation report was not dated but on the special investigation report dated 10/2021 they recommended disciplinary action.

51. In cross-examination RW4 confirmed that he came into the matter when he was appointed a member of the special investigation team and that the disciplinary action started after the appointment. He confirmed coming across the confidential report. That in their report they interviewed Mr. Murei, the Petitioner and other relevant persons. He was not aware if the statements were included. That their report was sent to the CEO. He was not aware if their report was communicated to the Petitioner. That their report was in line with the Respondent TOR.

52. RW4 confirmed that they investigated allegations of altered appraisal and there was a format for preparing reports. The memo signed by all of them was summary of the investigation which was part of covering report. That the memo was forwarded via email. That the report did not have a date. That it was signed by Michael as the case officer.

53. RW4 confirmed that the report was for all of them and they recommended the officer to be furnished with copies of appraisal report before forwarding to HR to enhance transparency. He confirmed that the

second appraiser reviewed the appraisal to correct an error. That the review was discussed with the Petitioner but could not recall how it was discussed and that the review was justified. It was his evidence that the memo complied with the law and it was not for retaliation. That they asked the Petitioner to respond to issues arising from investigation on 4/10/2021 but she declined to respond. That the CEO added additional TOR to the team. The team was constituted pursuant to the Petitioner's complaint.

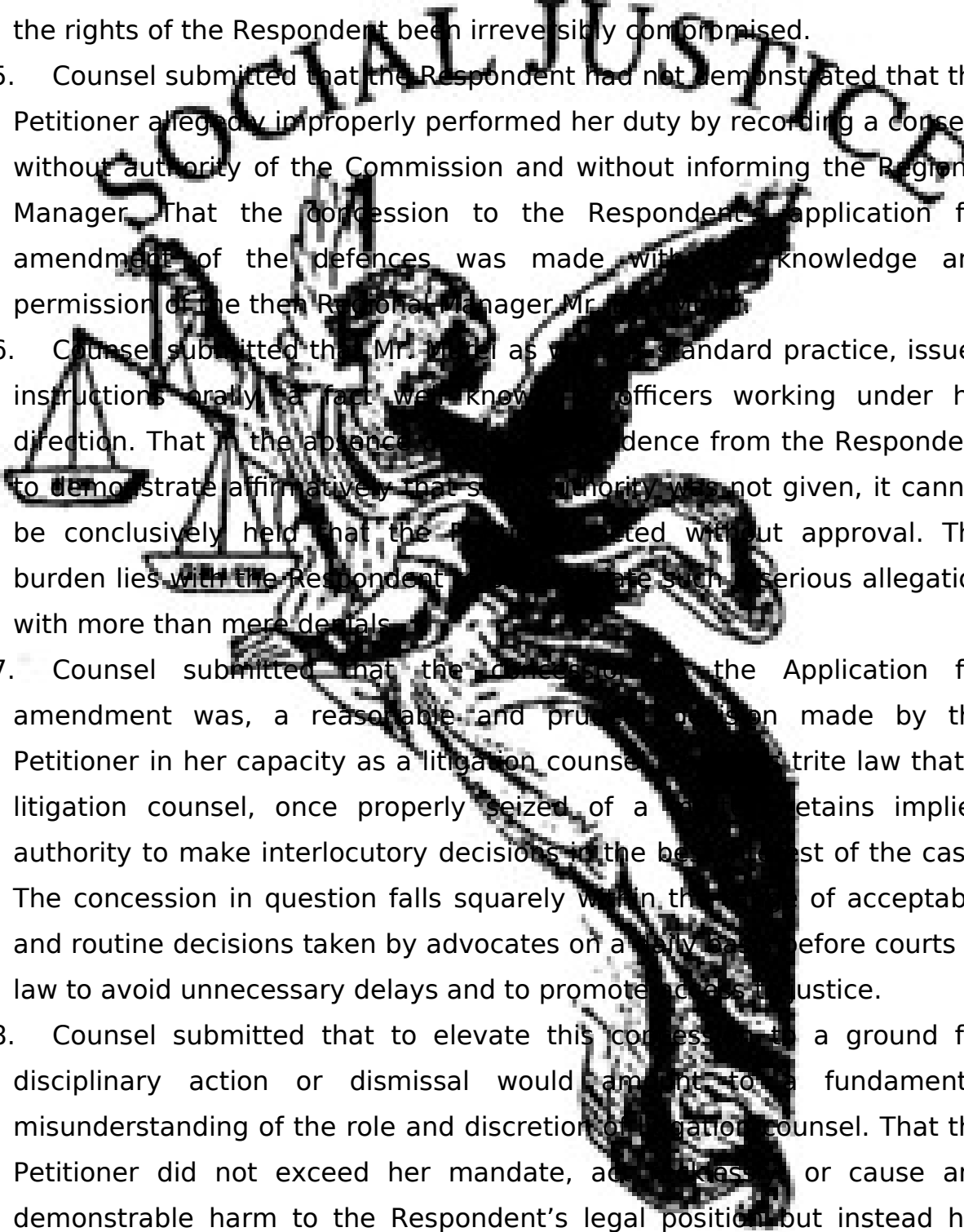
54. RW 4 confirmed that when the Petitioner appeared before them they explained to her that they were investigating the Mashakos files but she kept requesting for more time. That the written questions were given at 3.00 p.m. after the Petitioner refusal to answer questions, they gave the Petitioner the memo from Mr. Murei about the Mashakos Prison files.
55. RW4 confirmed he did not receive a written statement from the Petitioner and that even though the court system was down it was restored on 5th October. That he received an email and did not respond to it as only four questions required answers. It was his evidence that the Petitioner was uncooperative but that they gave the 2nd report on 6th October, 2021. That they interviewed the Petitioner and Mr. Murei and the Petitioner did not ask for statements from other witnesses.
56. RW4 confirmed that the Petitioner was not given the confidential report that she saw at the disciplinary hearing. In re-examination RW4 clarified that they did not interview any other witness after the court's ruling. That they did not contact the Petitioner again.

PETITIONER'S SUBMISSIONS

57. The Petitioner's Advocates, Mumba & Kanjira, filed written submissions dated 3rd July 2025. On the issue of the termination of the Petitioner from employment by the Respondent was unfair and premised on an invalid reason, counsel submitted that the termination of employment was unfair if the employer fails to prove that the reason of termination was valid and that the employee was terminated in accordance with fair procedure while relying on section 45 of the Employment Act, 2007.
58. Counsel submitted on the requirements for proof of reasons of termination while relying on section 43(1) of the Employment Act. That the reason for termination is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements while relying on the decision of the Court of

Appeal in **National Bank of Kenya v Anthony Njue John [2019] eKLR, (Nambuye, Kiage & Kantai, JJA)**

59. Counsel submitted that the reasons provided by the Respondent for termination of the Petitioner's employment were that the Petitioner willfully failed to file replies to the Amended Defences and Counterclaims dated 25th April 2019 in Machakos Prison suits thereby exposing the commission to liability for judgment in default and that the Petitioner allegedly improperly performed her duty by receiving consent without authority of the Commission and without informing the Regional Manager.
60. Counsel submitted that the Respondent did not demonstrate that the Petitioner willfully failed to file replies to the Amended Defences and Counterclaims dated 25th April 2019. There was no failure but delay in filing replies to the Amended Defences and Counterclaims and the same was not due to willful neglect, misconduct, or deliberate omission on the part of the Petitioner. Respondent's delay arose from a genuine miscommunication between the officers handling the matter.
61. Counsel submitted that the four Amended Defences and Counterclaims dated 25th April 2019 were served upon the Respondent on 8th May 2019. The series was handled by 2 co-counselors who worked together and share the work load of the series.
62. Counsel submitted that there existed a shared understanding between the Petitioner and one Ms Regina Jemutai, a fellow officer, that the workload relating to the replies to the Amended Defences and Counterclaims and application dated 26th April 2019 would be apportioned between them.
63. Counsel submitted that the Petitioner was under the impression that Regina Jemutai would take responsibility for analyzing and filing the replies. However, during cross-examination, Regina has since denied having taken up that responsibility, thereby exposing a clear breakdown in communication and coordination within the team.

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64. Counsel submitted that the four defences and Counterclaims were subsequently filed and no loss was suffered by the Commission nor have the rights of the Respondent been irreversibly compromised.
65. Counsel submitted that the Respondent had not demonstrated that the Petitioner allegedly improperly performed her duty by recording a consent without authority of the Commission and without informing the Regional Manager. That the concession to the Respondent's application for amendment of the defences was made with the knowledge and permission of the then Regional Manager Mr. Model.
66. Counsel submitted that Mr. Model as was the standard practice, issued instructions orally, a fact well known to officers working under his direction. That in the absence of evidence from the Respondent to demonstrate affirmatively that such authority was not given, it cannot be conclusively held that the concession was made without approval. The burden lies with the Respondent to prove such a serious allegation with more than mere denials.
67. Counsel submitted that the concession of the Application for amendment was, a reasonable and prudent decision made by the Petitioner in her capacity as a litigation counsel. It is the law that a litigation counsel, once properly seized of a matter retains implied authority to make interlocutory decisions in the best interest of the case. The concession in question falls squarely within the range of acceptable and routine decisions taken by advocates on a daily basis before courts of law to avoid unnecessary delays and to promote access to justice.
68. Counsel submitted that to elevate this concession to a ground for disciplinary action or dismissal would amount to a fundamental misunderstanding of the role and discretion of a litigation counsel. That the Petitioner did not exceed her mandate, act recklessly or cause any demonstrable harm to the Respondent's legal position but instead her decision facilitated the just and timely determination of the issues before court.

69. Counsel submitted that the Petitioner's actions were undertaken with the express consent and authority of the supervisor and it is unconscionable and procedurally irregular for the same acts to later be weaponized against her as grounds for dismissal, which action falls afoul of Article 47 of the Constitution which guarantees fair administrative action.

70. Counsel relied on among other cases the case of **Judicial Service Commission v Muraya & 4 others (Civil Appeal E002 of 2024) [2024] KECA 1599 (KE)** to submit that the standard of proof is on a balance of probability, not beyond reasonable doubt and all the employer is required to prove are the reasons that were genuinely believed to exist, causing it to terminate the employment.

71. Counsel relied on the case of **Teacher Ogal Anuro v Teachers Service Commission (2013) eKLR** for the requirement of both substantive and procedural fairness. That the Petitioner's record has remained beyond reproach throughout her employment with no record of any disciplinary concern or adverse findings regarding her character or conduct.

72. Counsel submitted that the Respondent's actions amounted to retaliation, victimization and malice in response to the Petitioner's complaints regarding her altered appraisal and denied promotion.

73. Counsel submitted that the reasons advanced for dismissing the Petitioner are invalid since both the reasons were not in her charge sheet issued to her on 14th December 2020. That the reasons of termination were also unfair since the Respondent charged the Petitioner in a disciplinary process for files that were being handled by both her and her colleague Ms Regina Jemutai and there has been no proceedings against her colleague, an action that amounts to gender discrimination.

74. Counsel submitted that no valid reason has been given as to how Ben Murei never issued a Notice to show Cause in September 2020. Ben Murei maintained a personal file on the Petitioner after she was transferred

purely for confidential disciplinary purposes. The fact that he did not share the report with Human Resource Management office or even the Petitioner is an indication of malice.

75. Counsel submitted that the Petitioner was targeted for exercising her constitution right of freedom of expression in relation to articulating her grievance thus violating her constitutional right.

76. Counsel relied on section 40 of the Employment Act 2007 to submit that the Petitioner's termination of employment was procedurally unfair. That the Disciplinary Committee was biased from the onset and was perfunctorily going through the motions of the disciplinary process not to establish the true facts but was mitigating mishaps as the matter was already in court.

77. Counsel submitted that the process leading to the Petitioner's termination was flawed, due process not followed and therefore unfair as it did not meet the threshold provided under section 45 of the Employment Act 2007.

78. Counsel relied on among other cases the case of **Republic v University of Nairobi Ex parte Lazarus Mwangi Kenani & 2 others [2017] eKLR** to submit that a procedurally unfair disciplinary process is null and void.

79. Counsel submitted that the Respondent violated the Petitioner's right to access of information as enshrined in Article 35 of the Constitution by denying the Petitioner an opportunity to review her Human Resource file containing complaints against her, failing to issue her with reports of the two investigative teams and other documents that she had continuously asked for in relation to the allegations levelled against her.

80. Counsel relied on the case of **Mary Chewend Kiptui v Kenya Pipeline Company Limited [2014] eKLR** to submit that unfair disciplinary hearing amounted to unlawful termination and further relied on article 47 of the Constitution of Kenya, 2010 and Section 4 of the Fair Administrative Action Act to submit every person has a right to

administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

81. Counsel submitted that the Petitioner was not afforded a fair opportunity to have the allegations levelled against her known well in advance. Further, she was not taken through a fair hearing and was not given an opportunity to produce evidence to support her defence. Mr. Kanjama further submitted that the Petitioner's right to fair labour practices was violated by the failure to comply with the provisions of the Corporate Services Policies and Procedures Manual which governs essential aspects of the employment relationship between the Petitioner and the Respondent.

82. That the Respondent violated the Petitioner's right to Equality and Freedom from Discrimination as enshrined in Article 27 of the Constitution in that the Respondent withheld the Petitioner's promotion on the basis of unfounded allegations in the absence of any verbal or written warning or notice to show cause, whereas she possessed qualifications similar to her colleagues and the Petitioner's right to Human Dignity as in Article 28 of the Constitution.

83. Counsel relied on the case of **Peter Mwangi v. Dedan Kimathi University of Technology [2021] eKLR** to submit that an employee who is absent from duty due to certified illness should not be faulted or punished and further submitted that the Petitioner raised formal complaints and inquiries regarding the alteration of her performance appraisal and denial of promotion, matters touching on transparency and fairness in the workplace. Termination closely following such complaints is indicative of retaliation. In this regard Counsel relied on the case of **Julius Ogola Ingari v Attorney General & Another [2020] eKLR** to submit that termination on account of lodging a lawful complaint violates Section 46(h) and is unlawful.

84. Mr. Kanjama further contended that the Petitioner's dismissal was also in retaliation for her active participation in the affairs of the Law Society of

Kenya and relied on the case of **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd** to submit that an employer could not lawfully terminate an employee who had engaged in professional body activities, which were not in conflict with the terms of employment.

85. On the issue of whether the Petitioner is entitled to declaratory and conservatory reliefs sought, including promotion, general damages for breach of rights and reputation, and quashing of disciplinary proceedings and compensation for unfair termination, counsel submitted that the Petitioner's termination from employment by the Respondent was procedurally unfair and the courts ought to declare the disciplinary process unlawful, null and void as it violated her right to fair labour practices.

86. Counsel relied on the case of **Primi Njiru v R (1976-80) KLR 1272** to submit and seek a writ of Certiorari. Counsel further relied on Section 49(4) of the Employment Act and the case of **Fredrick Odongo Owegi v CIC Life Assurance Limited [2014] eKLR** among other cases, to submit that reinstatement to employment and compensation are the exclusive remedies for unfair dismissal.

87. Counsel submitted that this Honourable Court should proceed under Article 22 of the Constitution to issue conservatory Orders restraining the Respondent, its agents, servants or any other person acting for and or on their behalf from taking any action, disciplinary action against the Applicant or interfering with her employment.

RESPONDENT'S SUBMISSIONS

88. The Respondent's Advocates Munyao Muthama and Kashindi Advocates, filed their written submissions dated 15 August 2025.

89. On the issue of whether termination of the Petitioner's employment was lawful and based on valid reasons, counsel submitted that the Respondent invoked inter alia section 44 of the Employment Act which

permits summary dismissal where an employee's conduct amounts to a fundamental breach of their obligations.

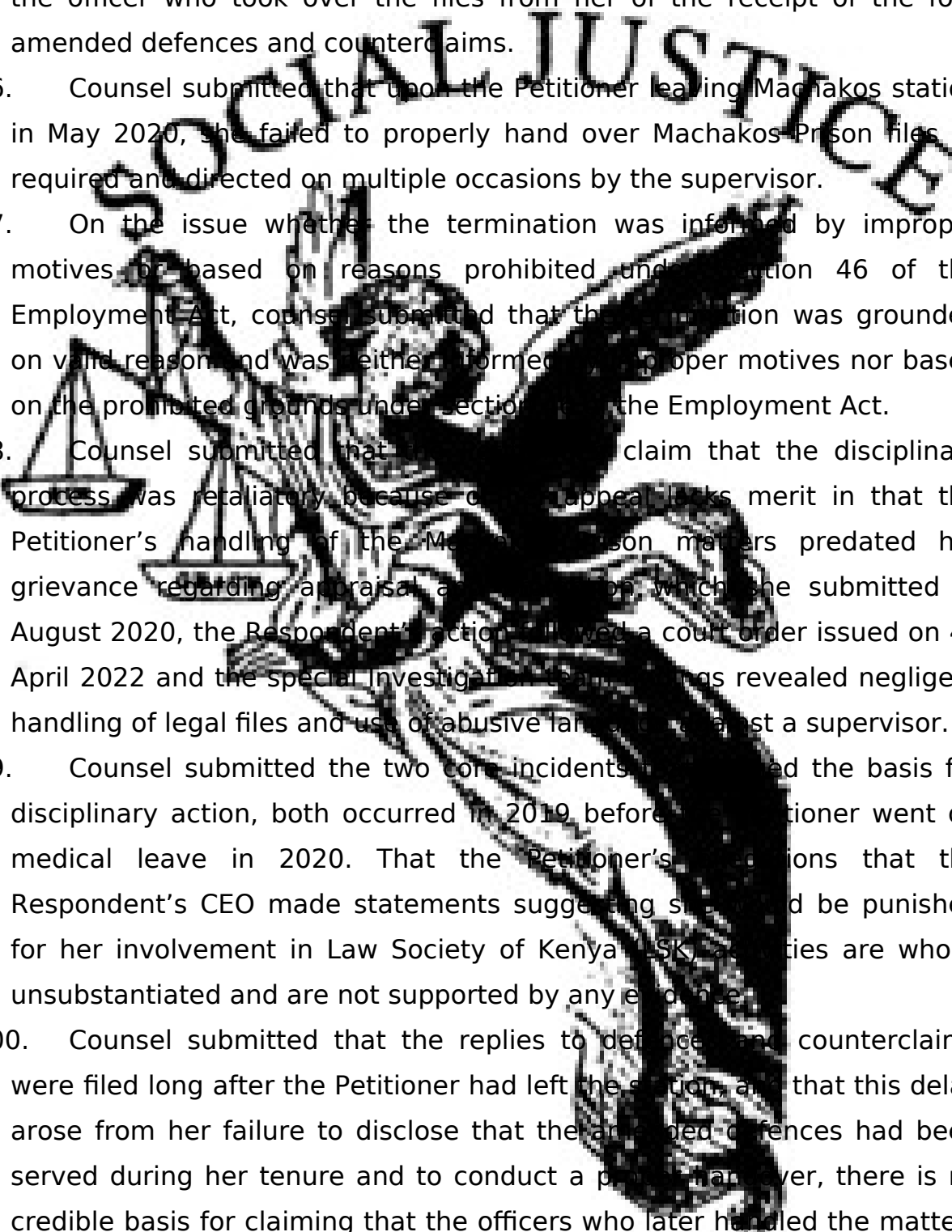
90. Counsel relied on the Court of Appeal decision in **Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR)** to submit that as long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable.

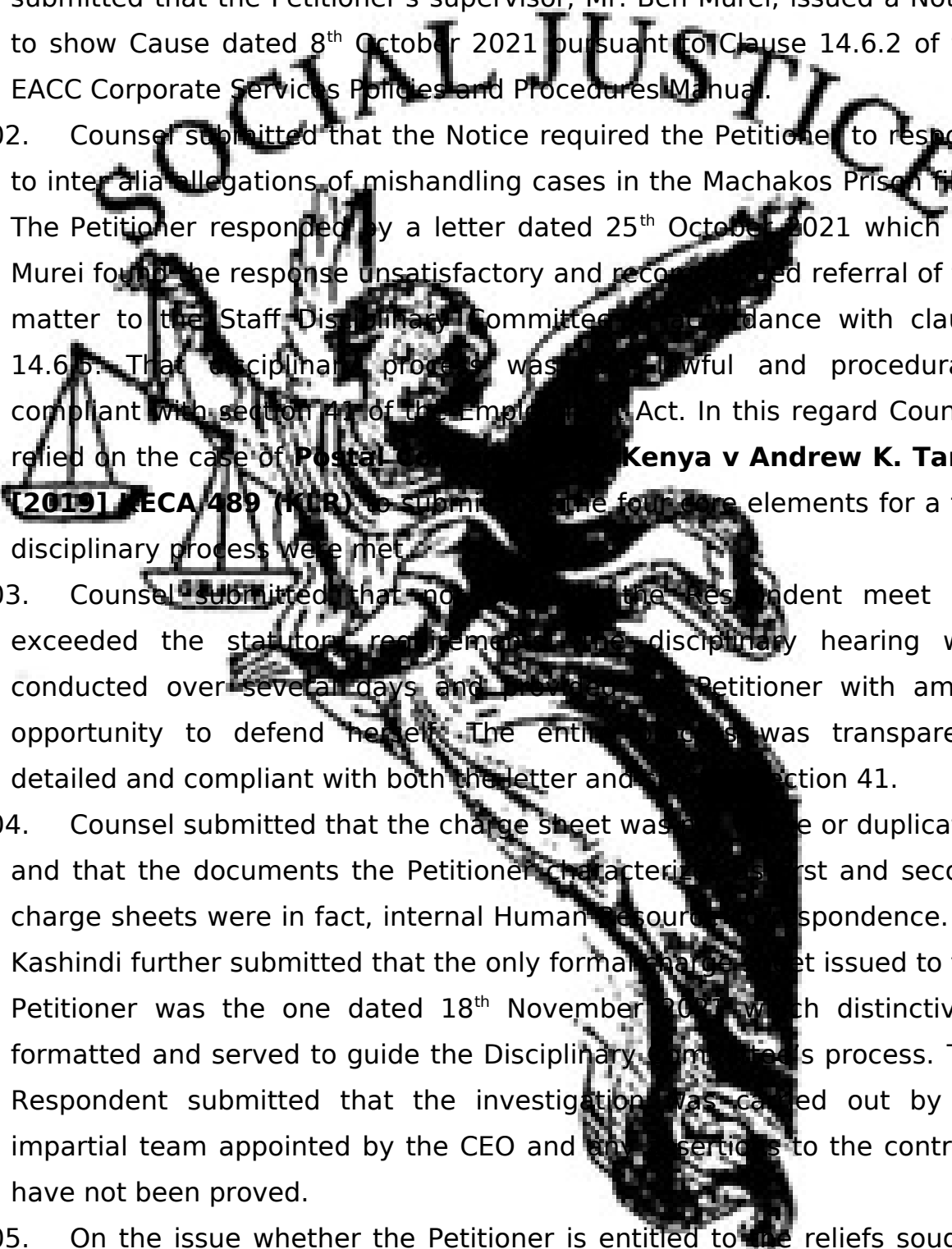
91. Counsel submitted that the recording of a consent for joinder of parties and amending the plaint without prior negotiation and failure to file replies to amended defences and defences to counter claims by the Petitioner constituted valid reasons for the Respondent genuinely believed to exist as reasonable grounds for the termination of the Petitioner's employment.

92. The Respondent submitted that the written and oral statement adduced in court by the Respondent, when considered together with documentary evidence presented to the court confirm that the Petitioner entered into a consent without her approval.

93. Counsel submitted that the Petitioner admitted at the time when the issue was still fresh that she had sought and received verbal instructions from Mr. Murei. The alleged verbal approval was given much later and was possibly an afterthought. Mr. Murei has categorically denied that he gave approval for the consent to be recorded.

94. Counsel submitted that after the Respondent filed the consent through file perusal in early 2020, Mr. Murei instructed that an application be filed to set it aside. That despite the clear requirement under Order 7 Rule 1 and 11 of the Civil Procedure Rules to file replies to defences within 14 days and defences to counterclaim within 14 days, the Petitioner failed to file the replies and defences, exposing the Respondent to potential default judgment to the total tune of Kshs. 66,900,000.

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95. Counsel submitted that the Petitioner did not inform her supervisor or the officer who took over the files from her of the receipt of the four amended defences and counterclaims.
96. Counsel submitted that upon the Petitioner leaving Machakos station in May 2020, she failed to properly hand over Machakos Prison files as required and directed on multiple occasions by the supervisor.
97. On the issue whether the termination was informed by improper motives or based on reasons prohibited under section 46 of the Employment Act, counsel submitted that the termination was grounded on valid reasons and was neither informed by improper motives nor based on the prohibited grounds under section 46 of the Employment Act.
98. Counsel submitted that the Petitioner's claim that the disciplinary process was retaliatory because of the appeal lacks merit in that the Petitioner's handling of the Machakos Prison matters predated her grievance regarding appraisal and promotion, which she submitted in August 2020, the Respondent's action followed a court order issued on 4th April 2022 and the special investigation findings revealed negligent handling of legal files and use of abusive language against a supervisor.
99. Counsel submitted the two core incidents that formed the basis for disciplinary action, both occurred in 2019 before the Petitioner went on medical leave in 2020. That the Petitioner's allegations that the Respondent's CEO made statements suggesting she should be punished for her involvement in Law Society of Kenya (LSK) activities are wholly unsubstantiated and are not supported by any evidence.
100. Counsel submitted that the replies to defences and counterclaims were filed long after the Petitioner had left the station, and that this delay arose from her failure to disclose that the amended defences had been served during her tenure and to conduct a proper handover, there is no credible basis for claiming that the officers who later handled the matters culpable.

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101. On the issue on whether the procedure followed was fair, counsel submitted that the Petitioner's supervisor, Mr. Ben Murei, issued a Notice to show Cause dated 8th October 2021 pursuant to Clause 14.6.2 of the EACC Corporate Services Policies and Procedures Manual.
102. Counsel submitted that the Notice required the Petitioner to respond to inter alia allegations of mishandling cases in the Machakos Prison files. The Petitioner responded by a letter dated 25th October 2021 which Mr. Murei found the response unsatisfactory and recommended referral of the matter to the Staff Disciplinary Committee in accordance with clause 14.6.5. That disciplinary process was lawful and procedurally compliant with section 41 of the Employment Act. In this regard Counsel relied on the case of **Postal Corporation Kenya v Andrew K. Tanui [2019] ECA 489 (KRB)** to submit that the four core elements for a fair disciplinary process were met.
103. Counsel submitted that notwithstanding the Respondent meet but exceeded the statutory requirements, the disciplinary hearing was conducted over several days and provided the Petitioner with ample opportunity to defend herself. The entire process was transparent, detailed and compliant with both the letter and spirit of section 41.
104. Counsel submitted that the charge sheet was not clear or duplicated and that the documents the Petitioner characterized as first and second charge sheets were in fact, internal Human Resource correspondence. Ms Kashindi further submitted that the only formal charge sheet issued to the Petitioner was the one dated 18th November 2021 which distinctively formatted and served to guide the Disciplinary Committee's process. The Respondent submitted that the investigation was carried out by an impartial team appointed by the CEO and any assertions to the contrary have not been proved.
105. On the issue whether the Petitioner is entitled to the reliefs sought, counsel submitted that the Petitioner is not entitled to a declaration that the disciplinary process she underwent was unlawful, unconstitutional,

null and void, or in violation of her right to fair labour practices and that the Petitioner's summary dismissal was based on substantiated grounds that were thoroughly investigated. The Petitioner was afforded a fair hearing and an opportunity to be heard in accordance with Section 41 of the Respondent's Policies.

106. Counsel relied on the case of **Patrick Abuya ICPAK & Another [2015] KEELRC 154 (KLR)** to submit that internal disciplinary process are not criminal trials hence her insistence on a written documentation and her personal file reflects a fundamental misconception of the applicable threshold. Counsel further relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 104 (KLR)** to submit that the courts will not force parties in a personal relationship to continue in such relations against the will of one of them hence the Petitioner was not entitled to an order for reinstatement.

107. Counsel submitted that the Petitioner was not entitled to compensation equivalent to twelve months salary for unfair termination since her dismissal was based on valid and substantiated grounds and was undertaken in accordance with a fair procedure compliant with Section 45 of the Employment Act.

108. Ms. Kashindi further contended that the Petitioner had not proved entitlement to unpaid leave arrears. She did not read or provide particulars of leave days earned but not taken, nor any evidence.

109. Concerning claim for medical cover Counsel relied on the case of **Pravin Bowry v Ethics & Anti-corruption Commission [2013] eKLR** to submit that the Petitioner's claim for medical cover for one year post-dismissal was without contractual or legal basis. Employment-based benefits, including medical insurance, cease upon termination.

110. Counsel further submitted that the Petitioner was not entitled to general, aggravated, or exemplary damages for alleged violations of

constitutional rights since she had not demonstrated how any of her constitutional rights were infringed.

111. Counsel further submitted that the Petitioner was also not entitled to general, aggravated, or exemplary damages for discrimination or injury to reputation since she has not pleaded or proven the essential elements of defamation. Her assertion of injury to reputation is speculative and unsubstantiated.

PETITIONER'S REPLY TO THE RESPONDENT'S SUBMISSIONS

112. Counsel for the Petitioner filed reply to the Respondent's submission dated 11 August, 2025, and submitted among others that the Respondent was trying to reduce her claim to a normal employment dispute while it involved unfair termination as well as retaliatory action, discrimination and breach of workplace safeguards under the Constitution as read together with the Women's Act.

113. On the issue of whether the termination of Petitioner's employment was lawful and based on valid reasons, counsel submitted that the termination of the Petitioner was based on an invalid and unfair reason. On the alleged recording of consent for joinder of issues and amending Plaintiff without prior authorization counsel submitted that the Petitioner acted within her professional discretion as counsel of record. That the Respondent's internal protocols could not supersede her overriding duty to the court as supported by **Delphis Bank Ltd v Mannan Singh Chatthe (2005) eKLR**.

114. Counsel submitted that the Respondent's assertion of prejudice was speculative as there was no binding financial or legal detriment to the Commission. Counsel relied on the case of **CMC Aviation Ltd V Mohammed Noor (2015) eKLR** to submit that proportionality must be observed even where procedural lapses are alleged.

115. Counsel distinguished the cases relied on by the Respondent on employer's reasonable belief standard that they involved ordinary

termination disputes under section 45 of the Employment Act not constitutional petitions alleging violations of equality, dignity, fair labour practices and fair administrative action. That none of the cited cases permit retaliatory action against an employee for exercising statutory or constitutional rights which is expressly prohibited by section 46 of the Employment Act.

116. Counsel submitted that the applicable test in a constitutional claim is whether the Respondent's action meets the threshold of legality, fairness, reasonableness, proportionality and non-discrimination under Articles 27, 41 and 47 as set out in and by another case of **Judicial Service Commission v Mpalu Mutava (2015)**.

117. On the alleged failure to respond to amended defences and defences to counter claims counsel submitted that the Respondent's narrative overlooks material facts. The findings in question were part of multiple related files handled in a period of contested transfers, medical absence and inadequate administrative support, handover difficulties were caused largely by the Respondent's own conflicting instructions and lack of structured protocols. If delays occurred they were remediable without resorting to the ultimate sanction of dismissal.

118. On the issue of whether the termination of the Petitioner's employment was informed by improper motives based on reasons prohibited under section 46 of the Employment Act, counsel submitted that whereas the Respondent alleged that the Petitioner's dismissal was unrelated to the Petitioner's grievance on appraisal and promotion the documentary record tells a different story as the disciplinary process was initiated after she lodged formal complaints, an appeal and participated in LSK activities all protected activities under section 45 of the act, the special investigation expanded its scope beyond the grievance to dredge up historical issues a classic retaliatory pattern identified in **Gibson Kipkemoi Koskei v Nakuru Water & Sanitation Services Co.**

Ltd(2015) EKLR and the Respondent selectively cites parts of the court's ruling of 4th April, 2022 but omits that the court understood the need for due process and completion of grievance handling before disciplinary action and acknowledgement of the risk of prejudice to the Petitioner.

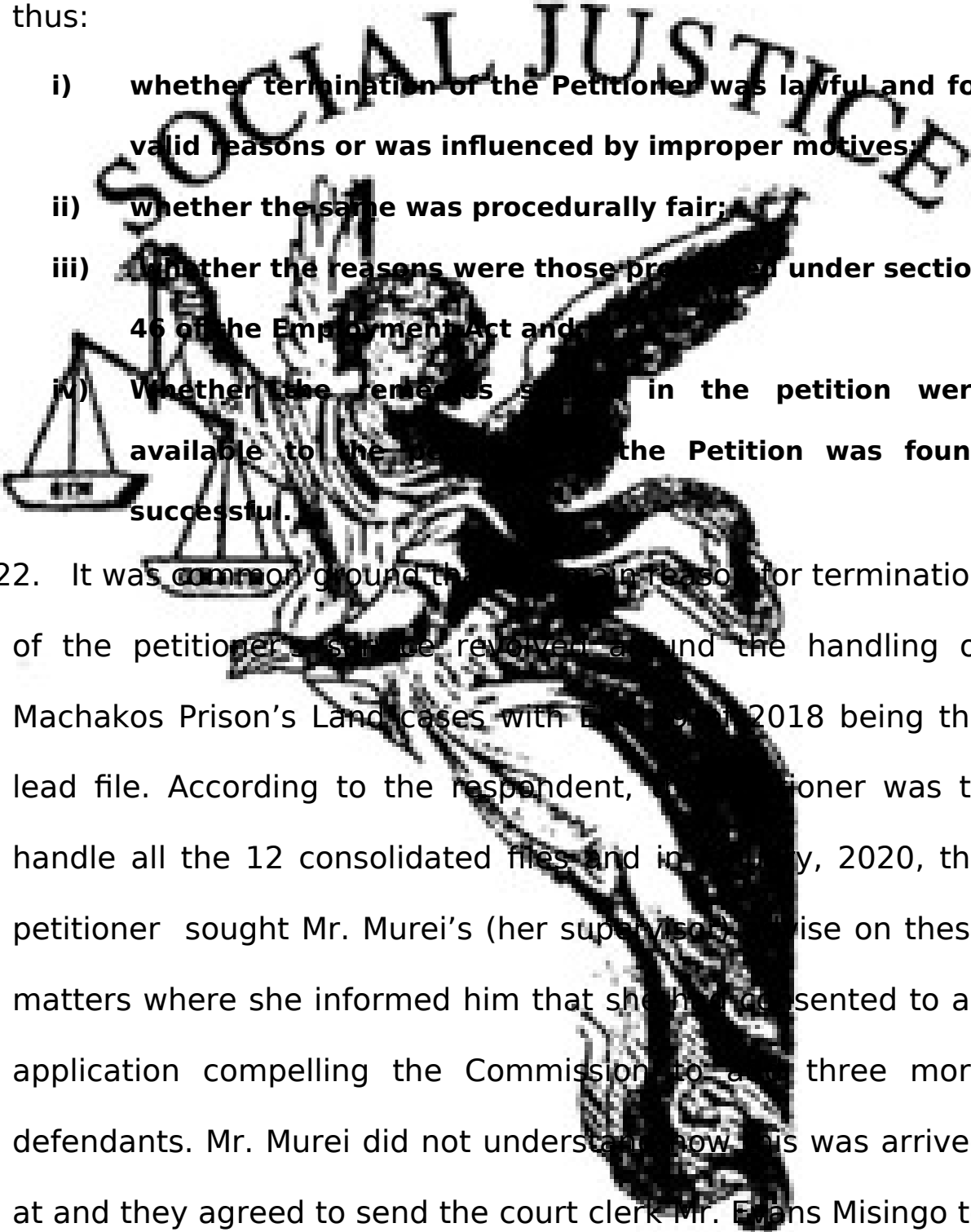
119. That there was no credible evidence as to why Ben Murei instituted disciplinary proceedings almost 2 years after his confidential report. On the issue of the procedure followed counsel submitted that the procedure followed in terminating the Petitioner was unfair and same was neither in accordance with section 41 of the Act nor with the Respondent's own HRM and procedure. That the Respondent's decision to proceed on the basis of an unreasonably short notice period of giving the Petitioner 10 minutes to respond to the findings of the investigations committee occasioned substantial procedural unfairness and the process by parity of reasoning stands vitiated.

120. On the issue of whether the Petitioner was entitled to the reliefs sought counsel relied on the case of **Prakash Anupa & Another vs AG & Another (2012) 1 EKLR** on employee's defining employee self-worth or dignity that the Petitioner's unlawful termination exposed her to severe loss and damage for she had worked for the Respondent for over 10 years to build an outstanding career for herself.

DETERMINATION

121. The court has reviewed and considered the Petition, the Respondent's responses through the written statements, the oral evidence and submissions by both counsels in support and opposition to the Petition; the affidavits relied on by counsels. The Court commends counsel for their industry and articulation of issues from each parties' perspective. The court

however on 7th November, 2023 formulated four issues for trial thus:

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- i) whether termination of the Petitioner was lawful and for valid reasons or was influenced by improper motives;
 - ii) whether the same was procedurally fair;
 - iii) whether the reasons were those prescribed under section 46 of the Employment Act and
 - iv) Whether the remedies sought in the petition were available to the petitioner if the Petition was found successful.

122. It was common ground that the main reason for termination of the petitioner was to be revolved around the handling of Machakos Prison's Land cases with E209 of 2018 being the lead file. According to the respondent, the petitioner was to handle all the 12 consolidated files and in January, 2020, the petitioner sought Mr. Murei's (her supervisor) advice on these matters where she informed him that she had consented to an application compelling the Commission to add three more defendants. Mr. Murei did not understand how this was arrived at and they agreed to send the court clerk Mr. Evans Misingo to peruse the court file. That after the perusal it was found out

that the petitioner had consented to addition of three more defendants and amendment of the plaint or the suits.

123. Mr. Murei consequently on March 2020 wrote an email to the petitioner stating that the sued defendants did not have titles but allotment letters which was not allowed by law and that the petitioner never sought his instructions before consenting to application seeking to add defendants to the suit or inform him of the order immediately after court. He requested the Petitioner to attend court and review the consent order. The respondent further stated that the petitioner responded to Mr. Murei's email on 10th March, 2020 stating that there was no jeopardy on the case as the defendants were added and she did not deny that she did not seek Mr. Murei's instructions or consult him on the same.

124. The petitioner did not significantly deny these facts as narrated by the respondent. She however contended that this was within her implied mandate as counsel acting in the matters and she did not require prior consent from her supervisor. This position was strongly urged by her Counsel Mr. Kanjama in his submissions in support of the petition. The

petitioner further contended that Mr. Murei gave her verbal instructions and that the responsibility of filing the response to defence and defence to counterclaim rested on her colleague Ms Regina Jemutai. Both Mr. Murei and Ms. Jemutai who appeared before me to give evidence, denied these allegations by the petitioner.

125. Stopping here and in order to determine first question framed by the court that whether the termination of the Petitioner's service was lawful or for valid reasons or not, the Court will revert to reasons for termination of employment as provided under section 43 of the Employment Act which provides:

43. Proof of reason for termination

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

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

126. In an attempt to unbundle the provisions of section 43 Act cited above, the decisions of this Court and the Courts superior to it, are awash with decisions concerning valid reasons for termination of employment. contract. For instance in the case of **Walter Ogal Anuro v TSC [2013] eKLR-** the Court held that for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

127. Concerning reasons for termination of employment, this Court while in appropriate cases is clothed with power to indulge in a merit review of the reasons for termination of service of an employee by dint of provisions of section 43 of the Employment Act, will not replace its subjective views of what constitutes a valid reason for termination of an employment contract with that of the employer. Justice Professor Ojwang' in the case of **Kenya Revenue Authority Vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009** as cited in **Republic Vs National Police Service Commission Exparte Daniel Chacha Chacha JR 36 of 2016 (2016) eKLR** observed as follows:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their tasks. It is for them to decide how they will proceed”

Further Lord Denning in the often cited case of **British Leyland UK Ltd v. Swift [1981]IRLR 91** stated:

‘The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal is fair. It must be remembered that in all these cases there is a broad range of reasonableness, within which an employer might reasonably take a different view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair, though some other employers may not have dismissed him.’

128. Deducing from the above principles, once the Court is persuaded that there existed reasonable grounds upon which a reasonable employer would consider termination of service as commensurate to the infraction perpetrated by the employee, the judge being human but presiding over the case must not substitute his or her view of what is reasonable with that of an employer unless unavoidable in the circumstances.

129. The respondent considered the petitioner consenting to the application to join additional defendants in the Machakos Prison Land cases without concurrence of her supervisor and failure to

file reply to defence and defence to the counterclaims raised by the additional defendants within prescribed timelines, negligent and exposed the respondent to a possible claim of close to Kshs. 66 million in the case. The petitioner on the other hand contended that she received, as was the practice, verbal concurrence from her supervisor and in the event, as counsel acting in the matter she had inherent power to act in the best interest of the respondent. Before there was nothing inimical in conceding to the application for joinder of additional defendants and further the issue of the defence and defence to the counterclaim were subsequently filed hence no risk of exposure for loss to the respondent.

130. It is an age old principle of practice that an advocate without breaking the law or subverting justice must always act in the best interest of their client. It is not uncommon that in most cases when counsel is not sure, they will tell the Court that they need to seek further instruction from their client. It is therefore not correct as the petitioner claims in advance and as submitted by Senior Counsel Kanjama that as counsel acting in the matter his client had inherent authority to compromise

or enter into any arrangement without the concurrence of the respondent. It did not emerge clearly and in any case it was denied by Mr. Murei that it was the practice by him to issue verbal instructions on matters before court. In the English case of **Ketterman v Hansel Properties Ltd (1978) 4 All ER 769**, Lord Griffith's stated that:

"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in the leisureed age. There will be cases in which justice will not be served by allowing the consequences of the negligence of lawyers to fall on their heads..."

131. A consent is akin to a contract and once entered into, can only be set aside on grounds similar to vitiating a contract. It therefore behoves an advocate to give unequivocal concurrence of their client before entering into consent. The fact that the consent was eventually reviewed and that no loss was occasioned to the respondent did not absolve the petitioner from her negligent act. Just like in criminal law, the offence of stealing money is not mitigated by the fact that the accused intended to return the money at some point. It was perchance albeit late that the Court was subsequently gracious enough to set aside the consent and allowed the respondent to

file reply to defence and defence to the counterclaims raised by the added defendants. In this regard, the Court finds and holds that the respondent had valid grounds for terminating the petitioner's service hence discharged the legal burden of proof placed upon it by section 47(5) of the Employment Act.

132. Regarding the procedure followed in terminating the petitioner's service, it is the court's view that from the evidence placed before it, the termination was carried out through a fair procedure. The petitioner complained about not being provided with the investigation report and document but the court wonders which documents the decision needed in addition to a matter she interacted with as counsel. She recorded a consent which she did not deny. Further she did not file the reply to defence and defence to the counterclaims within timeliness provided but sought to shift the responsibility to her colleague Ms. Jemutai which the latter denied. Not in all cases where an employee accuses the employer of unfair termination, documents must be provided even those within the knowledge of the employee and with which they have more than once interacted with in the course of employment.

133. Having found as above, the Court finds and holds that the petitioner is not entitled to any of the remedies should could have been entitled under the Employment Act if the petition was successful. The only issue left is whether in terminating the petitioner's service, the respondent discriminated or violated any of her rights and fundamental freedoms. Employment Act and employment law generally permits termination of employment contract by employer if it for valid reasons. Employment is not servitude, so it further adequately provides for available remedies including quantum of compensation payable in the event of a successful claim for unfair termination of the contract. The court is therefore reluctant to rush into looking at ordinary termination of employment from a constitutional lens. There ought to exist egregious and outrageous reasons and the process of termination that no reasonable employer would embark on for the matter to mutate into a claim for breach of rights and fundamental freedoms.

134. It has been held in several cases including the case of of **Anarita Karimi Njeri -vs- Attorney General [1979] Klr**

154 that if a person is seeking redress from the court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, that provision said to be infringed and the manner in which they are alleged to be infringed. This has been reiterated in the case of **Kamlesh Mansukhlal Ramkji Patil -vs- The Attorney General [2001] Klr, 264**. In this case, evidence was presented that met the threshold set by the Courts in the above cited cases and many others. In this regard, the Court finds and holds that the allegations by the petitioner of breach of her rights and fundamental freedoms is unfounded and unmerited.

135. In conclusion the Court finds and holds that the petition is unsuccessful in its entirety and is hereby dismissed with costs.

136. It is so ordered.

Dated at Nairobi this 13th day of November, 2025

Delivered virtually this 13th day of November, 2025

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

