REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. E063 OF 2021

IN THE MATTER OF INTERPRETATION OF ARTICLES 2(1) AND 3(1) OF THE CONSTITUTION IN RELATION TO AN EMPLOYEE AT THE WORK PLACE

AND

IN THE MATTER OF INTERPRETATION OF ARTICLE 10 OF THE CONSTITUTION IN RELATION TO EMPLOYEES OF GOVERNMENT PARASTATALS

AND

IN THE MATTER OF ARTICLES 19,21,22,23 AND 41 OF THE CONSTITUTION

BETWEEN

DISMAS KUNGU KIRA……....PETITIONER

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY……..……RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Petitioner commenced this suit vide a Petition dated 27th April 2021 seeking:-

a) *A declaration be issued that the dismissal of the Petitioner as contained in the Respondent's letter dated 18th December 2019 was unlawful, unconstitutional and null and void.*

b) *Consequent to (a) above, the Honorable Court be pleased to call into this Court and quash the decision of the Respondent dismissing the Petitioner from their employment contained in their letter dated 18th December 2020 and reinstate the Petitioner.*

c) *FURTHER and in ALTERNATIVE to (b) above, the Honourable Court be pleased to award damages to the Petitioner for unlawful termination of employment.*

d) *Costs of this Petition be provided for.*

2. The Petition was filed alongside the Verifying Affidavit of the Petitioner, sworn on 27th April 2021; the Petitioner's witness statement dated 7th July 2021; and a list and bundle of documents dated 26th October 2022.

3. In response to the said Petition, the Respondent filed a Response to Petition dated 13th January 2022. Further, they filed Grounds of Opposition dated 9th May 2022; a list of witnesses dated 27th September 2022; witness statement of ELPHAS CHOGE of even date; and a list and bundle of documents also of even date.

4. To counter the Respondent's averments, the Petitioner filed a Reply dated 5th April 2022.

Hearing and evidence

5. The petitioner's case was heard before me on the 3rd March 2025, when the petitioner testified on oath, adopted his witness statement dated 7th July 2021 and produced his

documents as P-exhibits 1-28 as his evidence in chief. He was cross-examined by counsel for the respondent, Sagana and re-examined by his counsel.

6. The respondent's case was heard on the 5th June 2025 before me with RW1 as Maltida Kerich, who testified on oath as a witness of facts and adopted their witness statement dated 4th June 2023 as their evidence in chief. He was cross-examined by counsel for the petitioner, Ms Kerubo.

The Petitioner's case in summary

7. The Petitioner's case is that he was employed by the Respondent in the year 2012 as an Assistant Supply Chain Management Officer, Grade 8.2. Some of his duties included sitting in various Tender Evaluation Committees constituted by the Respondent to award various tenders to deserving and qualified applicants.

8. The Petitioner states that he discovered several irregularities as a member of these Committees and blew the whistle on the same. Some of the irregularities that he discovered were strict instructions from superiors to manipulate the evaluation outcome to favor certain bidders whose names were clearly marked for each tender in flagrant violation of the Public Procurement Laws and the Constitution; coercion to recommend some contractors who were not eligible since they did not have genuine mandatory required documents or had visibly forged qualifications; and deliberate disqualification of bidders who had largely fulfilled the requirements in favour of preferred bidders to win. The Petitioner avers that most of the Committee members would be promised financial kick-backs, motivating them to comply with the instructions from superiors.

9. It is the Petitioner's case that he tried to raise his concerns severally with his superiors, in vain. As such, vide a letter written anonymously and dated 12th February 2019 addressed to Eng. Peter M. Mudinia, the Director General of the Respondent, the Petitioner highlighted the irregularities in the Respondent's tender processes and copied the Director of Criminal Investigations, EACC Chief Executive Officer, Director Assets Recovery and the Director General, Public Procurement Regulatory Authority. The same issues raised in the letter dated 12th February 2019 were also leaked to bloggers, who shared the story on social media.

10. On 27th July 2019, the Petitioner was issued with a Notice to Show Cause dated 25th June 2019 outlining offences under the Respondent's Human Resource Policy and Procedures Manual as follows:

i. Behaving in an inappropriate manner to the Authority (sub-section iii)
ii. Publishing uncleared and malicious information (sub-section 11.11.1(III)(xiii)
iii. Making unauthorized use of and disclosed confidential information (section11.11.1(III)(vii)
iv. Conduct in breach of policies, procedures and set regulations section 11.11.1(II)(ix).

11. The Petitioner replied to the Notice to Show Cause on 1st July 2019 denying the allegations that were set out in the Respondent's letter specifically indicating that he was not the author of the letter dated 12th February 2019 to the Respondent's Director General, and affirming his right to freedom of expression. The Petitioner further stated that he was suspended without a hearing. He, again, copied the letter to the DCI, EACC, ARA, and PPRA to

enable them confirm if the Respondent had a hand in the matter and if the investigations were done to conclusion. The Petitioner was taken through a pre-determined disciplinary process by the Respondent and his employment terminated. He lodged an appeal which was dismissed on 8th September 2020, when the Respondent informed him that the Board of Directors deliberated his appeal on Tuesday 4th of August 2020 and upheld their decision to terminate his employment contract.

12. The Petitioner admits that in a bid to retain his job, he wrote several letters to the Respondent, some denying the allegations and some admitting them. The Petitioner is adamant that the Respondent did not have a valid reason for the termination, hence the same was unlawful. He insists that he was terminated from employment because of he was a whistle blower who attempted to fight corruption within the Respondent. To reinforce this position, the Petitioner points out that the Respondent made some changes to their Tender Evaluation processes and introduced thorough due diligence exercises that have helped weed out forged documents.

13. The Petitioner complains that the actions of the Respondents constitute punishment for compliance with the constitution, and violated the Petitioner's right to fair labour practices under Article 41 (1). He argues that the Respondent’s Human Resource Manual, in so far as it does not comply with the provisions of the Constitution, is null and void.

Respondent's case in brief

14. The Respondent challenges the petition on the grounds that it does not meet the legal threshold as to what constitutes a Constitutional petition as it is vague, evasive and does not disclose any Constitutional violations. They state that the alleged violations contained in the petition are statutory in nature being an employment dispute, rather than violations of rights contained in the Bill of Rights. They urge that the matters raised in the petition should be ventilated under the Employment Act through an ordinary employment suit, rather than through a Constitutional Petition.

15. The above being said, the Respondent admits that the Petitioner is its former employee, having been employed in 2012 as a Procurement Assistant, Grade 3 on permanent and pensionable terms of service under employee no S/No. 110476. Sometime in 2017, the Respondent underwent re-categorization of its staff members and the Petitioner was appointed as the Assistant Supply Chain Management Officer, Grade8, which was his last position before the termination of his employment.

16. The Respondent states that it has Policies and Manuals which guide the conduct of its employees while undertaking their mandate, including the Human Resource Policy and Procedure Manual 2017 and the Social Media Policy 2017. All the employees are aware of the policies as it is the Respondent's practice to conduct induction to new employees on its policies and undertake periodic training to the staff members on the same. The employees also have access to all the policies.

17. On the facts of this case, the Respondent explains that the Petitioner's disciplinary issues arose in November 2018 when he endorsed negative reporting on the Respondent,

specifically, an online report by a blogger Robert Alai, on his 'Kahawa Tungu' website titled, "How Corrupt Networks at KenHA Works in Coordination of DG and Chairman" published on 14th November,2018, and widely circulated on social media platforms. On 19th June 2019, the Respondent's Human Resource Advisory Committee held a meeting to deliberate on the Petitioner's gross misconduct and recommended disciplinary action to be taken against him. for violation of the Respondent's Human Resource Policy and Procedures Manual 2017. Following the recommendations of the Committee, the Petitioner was issued with a Show Cause Letter dated 25th June 2019 detailing the charges against him. He was invited to respond to the same within 21 days. The Petitioner was equally suspended to allow investigations into the incident. The Show Cause Letter required the Petitioner to show cause why disciplinary action should not be taken against him for the reasons set out by the Petitioner.

18. On 1st July 2019, the Petitioner responded to the show cause later denying every allegation against him terming them as false and malicious and intended to hound him from duty. The Petitioner stated:

    i. That he was not the author of the subject article published by Kahawa Tungu' and he did not in any way intend to bring the institution to any disrepute. That he was exercising his freedom of expression as provided under the Bill of Rights.

    ii. The Petitioner denied the allegation of unauthorized use and disclosure of confidential information. He denied having any confidential information relating to the Respondent. He also reiterated that he had never published any malicious information on the Respondent.

iii. The Petitioner stated that the allegation of breach of the Respondent's policies, procedures, and set regulations were false and malicious and were intended to destroy his career and reputation.

19. Having considered his representations, the Petitioner was invited for a disciplinary hearing by the Respondent vide letter dated 9th August 2019. The disciplinary hearing was scheduled for 14th August 2019 at Barabara Plaza, 4th floor Boardroom. During the hearing, the Petitioner admitted to commenting on the subject online blog publication on the "Kahawa Tungu" page on Facebook, which came to the attention of officers of the Respondent being participants and followers on Facebook. Based on the Petitioner's testimony and evidence during the disciplinary hearing, and also because the Petitioner was the first person to comment on the blog publication implicating the Respondent, the Committee determined that the Petitioner was supporting the views of the author of the publication against the Respondent.

20. The Respondent's position is that the Petitioner's action of commenting on the blog post, being a staff of the Respondent, was inappropriate and contrary to the provisions of the Respondent's Human Resource Policy and Procedure Manual 2017, particularly its Social Media Policy 2017 under paragraph 5.1.5. In light of the foregoing. the Committee found the Petitioner guilty of the charges against him and recommended the termination of the Petitioner's employment.

21. On 18th December 2019, the Respondent's Human Resource Advisory Committee approved the termination of the employment of the Petitioner with effect from 18th August 2019,

culminating in the said issuance of a termination letter to the Petitioner, where he was duly informed of his right to appeal under the Human Resource Policy and Procedures Manual 2017.

22. Vide letter dated 3rd January 2020, the Petitioner tendered an apology for his misconduct and indicated that he deeply regretted his action of engaging the author of the subject blog post/article on social media. He admitted that he had not considered the potential consequences of his actions. He also appealed against the termination of his employment to the Board of Directors and begged for reinstatement of his employment. The Respondent notes that the Petitioner did not challenge any of the evidence that was adduced against him during the disciplinary proceedings.

23. On 4th August 2020, the Respondent deliberated on the Petitioner's appeal and upheld the decision to terminate his employment following the gross misconduct. This decision was communicated to the Petitioner vide letter dated 8th September 2020. The Respondent denies violating any constitutional rights of the Petitioner as alleged, and states that the right to freedom of speech is not absolute as alleged, hence the Petitioner’s claim that he was being punished for whistleblowing is false.

DETERMINATION

24. Following directions by the court that parties should file written submissions, both parties complied.

Issues for determination

25. In his submissions dated 1st July 2025, the Petitioner identified the following issues for determination:-

    i. Whether the Petitioner's employment was unfairly terminated;

    ii. Whether the Petitioner's constitutional rights were violated by the Respondent; and

    iii. Whether the Petitioner is entitled to the reliefs sought.

26. The Respondents filed submissions dated 23rd September 2025, where they identified the following issues for determination:-

i. Whether the Petitioner's employment was unfairly terminated;

ii. Whether there was substantive justification for the dismissal; and

iii. Whether the Petitioner's constitutional rights were violated.

27. The court found the parties were in agreement on the issues for determination in the petition to be-

    i. Whether the Petitioner's employment was unfairly terminated;

    ii. Whether the Petitioner's constitutional rights were violated by the Respondent; and

    iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner's employment was unfairly terminated;

Petitioner's submissions

28. WHETHER THE PETITIONER'S EMPLOYMENT WAS UNFAIRLY TERMINATED -

a) Did the Respondent's disciplinary process meet the requirements of procedural fairness

under Section 41 of the Employment Act and principles of justice? An employee must be afforded a meaningful opportunity to be heard and defend themselves before a fair, impartial body/ tribunal. The disciplinary process was neither impartial nor fair; it was orchestrated solely to sanitize an unlawful act of victimization. It was in flagrant violation of Articles 41 and 47 of the Constitution and Sections 41 and 45 of the Employment Act. In the case of James Ondima Kabesa vs Trojan International Limited 2017 KEELRC, the Court stated that: "Under Section 41 of the Employment Act an employer is required to inform the employee in the presence of a fellow employee or a shop floor union representative of his choice, the reasons for which the employer contemplates to terminate the services of the employee. The employer is then supposed to hear the employee's representations and the representations of the person who has accompanied the employee to the disciplinary hearing… In the present case there is no mention of whether the employee was informed of his right to be accompanied by a fellow employee to the hearing and no mention in the minutes of a disciplinary hearing." Further, in Postal Corporation of Kenya v Andrew K. Tanui, the Court of Appeal held as follows: "Four elements must thus be discernible for the procedure to pass muster: - (i) an explanation of the grounds of termination in a language understood by the employee; (ii) the reason for which the employer is considering termination; (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; (iv) hearing and considering any representations made by the employee and the person chosen by the employee. In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no

obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular." (Emphasis added) The Respondent issued a show cause letter dated 27th June 2019 suspending the Petitioner immediately. Following a letter dated 31st July 2019 (page 42 of Petitioner's bundle of documents), the Petitioner was invited to attend a disciplinary hearing on 6th August 2019. On the material date of the hearing, 6th August 2019, the Petitioner received another letter dated 5th August 2019 (page 43) postponing the hearing scheduled for that same day. On 9th August 2019, the Petitioner received another letter dated 8th August 2019 (page 44 of Petitioner's bundle) inviting him to attend a hearing on 13th August 2019, 4 days after receipt of the said letter. It is instructive to note that the Termination Letter dated 18th December 2019 stated that the alleged disciplinary hearing was held on 14th August 2019. Without the meetings for the Disciplinary hearing being attached, we cannot establish if the disciplinary hearing was held and when. In any case, the Petitioner submits that a 4-day notice or a 1-day notice, whichever it is depending on the date of the hearing or if at all the hearing took place to begin with, was not sufficient notice. In the case of Patrick Abuya v Institute of Certified Public Accountants and another, it was held at paragraph 78 that 'Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood'. The Petitioner was never issued with a copy of the minutes of the disciplinary hearing. RW1 admitted during trial that there were no minutes before this Court to show that a disciplinary hearing was conducted. It begs the question, was there a disciplinary hearing to begin with? The court in the case of Munyite v Harambee Sacco Society (Cause 671 of

2019) (2024) KEELRC 1287 (KLR) (27 May 2024) held thus: “The Respondent’s failure to supply the Claimant with the Internal Audit Report prior to their hearing and minutes of the disciplinary hearing prior to the appeal rendered the termination of the Claimant’s employment procedurally flawed and thus unfair within the meaning of Section 45 of the Employment Act, 2007.” (Para 94) Without such crucial document and evidence, the Respondent cannot prove that a disciplinary hearing took place and even if it manages to prove on a balance of probabilities, which we submit it did not, it cannot prove that the Petitioner was accorded a chance to defend himself. The abrupt postponement of the hearing on multiple occasions and without proper communication and reason; the Petitioner being called for hearing at a very short notice; not being informed of his right to representation; not being issued with a copy of the minutes of the disciplinary hearing; not being supplied with documents and statements to be relied on by the Respondent during the disciplinary hearing; not being afforded the opportunity to call witnesses and never being informed of existence of such a right…all point to a procedure that was marred by unfairness. b) Whether there was any substantive justification for the Petitioner’s termination OR, is 👍and “commenting” on a social media post a gross misconduct capable of warranting a dismissal?

29. The sole basis for dismissal was the fact that the Petitioner allegedly “liked” a Facebook post. No evidence was tendered before this court linking the Petitioner to the authorship, publication or dissemination of the blog post in question. The Respondent seeks to criminalize modern communication platforms by treating a “Like” as equivalent to endorsement or wrongdoing. This is absurd. A punitive dismissal such as the present case, must be based on clearly proven facts. Speculative conduct, assumptions or subjective

interpretations of conduct on social media cannot justify termination. Clicking “Like” on Facebook is an ambiguous, fluid, and multi-dimensional action. It cannot be conclusively interpreted as endorsement of the content. A “Like 👍” could mean: i. A passive-aggressive response; or ii. A sarcastic response; or iii. Dismissive response, implying a lack of genuine engagement, or enthusiasm; or iv. Acknowledgement of receipt; v. Bookmarking for future reference; vi. Signaling awareness of public debate; or vii. Expressing sympathy with procurement integrity without endorsing leakage, amongst many other things Dismissing a long-serving officer, your Lordship, based on ambiguous digital interaction is disproportionate, oppressive, and illegal. Hence, there was no substantive justification in this matter. A “👍” is ambiguous and cannot reasonably sustain dismissal. c) Proportionality: The Punishment did not fit the alleged wrongdoing When asked if automatically terminating the Petitioner’s employment based on thumbup emoji was sufficient justification, the witness for the Respondent affirmed it so. This however, we have refuted in the preceding paragraphs.

30. That even assuming, without conceding, that the Petitioner committed any misconduct (which he vehemently denies), the punishment meted out by the Respondent was grossly disproportionate to the alleged offence. Proportionality demands that sanctions imposed upon an employee must bear a rational and reasonable relationship to the gravity of the alleged misconduct. An employer must distinguish between trivial misconduct and serious misconduct warranting dismissal. A Facebook reaction neither compromised the Respondent’s business, nor jeopardized national security, nor endangered the safety of anyone. No evidence was ever tendered by the Respondent to show that a thumbs-up emoji undermined the Authority’s operations. The Respondent’s heavy-handed response

was clearly motivated by desire to eliminate the Petitioner as retaliation for whistleblowing and not to maintain discipline or protect its reputation. Section 45(5) of the Employment Act requires that in deciding whether an employer acted in accordance with justice and equity when terminating an employee's employment, a Labor Officer or this Court shall consider, inter alia: a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; b) the conduct and capability of the employee up to the date of termination; c) the existence of any previous warning letters issued to the employee. (Emphasis added) Termination is the ultimate sanction and should be reserved for grave misconduct where other measures have failed or are clearly inappropriate. The Respondent could have, if at all concerned, issued: a) A verbal warning; b) A written warning; c) A cautionary note; d) A counseling session; e) An internal clarification on social media policy. The Petitioner submits that by any objective or reasonable standard, the Respondent's action utterly failed this test. The punishment was not only disproportionate, but also irrational, malicious and unconstitutional.

RESPONDENT'S SUBMISSIONS

31. Whether the Petitioner's Employment Was Unfairly Terminated. The Petitioner invites this Honourable Court to find that he was denied procedural fairness. With respect, the evidence tells a different story. From the very outset, we submit that the Respondent complied with the safeguards laid down in Section 41 of the Employment Act. The Petitioner was notified of the charges, given a fair opportunity to respond, accorded a hearing before a disciplinary committee, and even allowed to appeal. At every step, the

Respondent acted with strict adherence to the law. The requirement of fair procedure is generally provided for under section 41 of the Employment Act. The Act requires the employer to give notice of the termination, allows the employee to make his representations on the charges against them, appear in a disciplinary hearing with a representative of their choice and be accorded a hearing and a chance to put up their defence. This position was amplified by the Court of Appeal in the case of Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR. The process leading to the Petitioner's termination commenced with a Show Cause Letter dated 25th June 2019. It set out the allegations in detail, including inappropriate conduct, endorsement of malicious information, breach of HR and Social Media policies, and disclosure of confidential material. The Petitioner was given twenty-one days to respond. This Honourable Court will appreciate that such advance notice meets the very essence of procedural fairness required under Section 41 of the Employment Act. On 1st July 2019, the Petitioner took up this opportunity. He filed a detailed response, denying the allegations and invoking freedom of expression. This was not a case of 6 Page ambush or surprise. The Petitioner knew the accusations he faced and was able to defend himself in writing. Your Ladyship, this demonstrates that he was not only aware of the case against him but was afforded the platform to put forward his defence fully. The Respondent then moved to the next stage of fairness. By letter dated 9th August 2019, the Petitioner was invited to a disciplinary hearing scheduled for 14th August 2019. He appeared before the Disciplinary Committee, participated in the proceedings, and the minutes show he admitted to commenting on the offensive publication and tagging colleagues. This Honourable Court will note that this was not a token hearing. It was a substantive engagement where the Petitioner's own admissions confirmed his misconduct. Following deliberation, the Committee

recommended termination, and the Director General approved that recommendation. On 18th December 2019, the Respondent issued a termination letter which expressly advised the Petitioner of his right of appeal. The Petitioner exercised that right, tendered an apology, and pleaded for reinstatement. The Board of Directors considered his appeal on 4th August 2020 and upheld the termination, communicating the outcome on 8th September 2020. This appellate stage goes beyond the minimum required by statute, showing that the Respondent bent over backwards to ensure fairness. The Respondent's conduct also satisfied the broader constitutional threshold of procedural fairness. Article 47 of the Constitution guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. In compliance, the Respondent issued the Petitioner with a detailed show cause letter, afforded him adequate time to respond, convened a disciplinary hearing where he was heard, and further granted him an appellate process. These steps were deliberate safeguards designed to protect the Petitioner's constitutional rights. In the same vein, the Fair Administrative Action Act and the rules of natural justice require that no adverse decision be made without prior notice, an opportunity to be heard, and reasons for the decision. The Respondent satisfied each of these requirements. The Petitioner was informed of the charges, defended himself in writing and orally, and received reasoned decisions at both the disciplinary and appellate stages. Respectfully, this was not a process marked by arbitrariness; it was a process anchored in fairness, legality, and transparency. That three core truths therefore emerge from the chronology of events leading to Petitioner's termination:-The process was procedurally fair. The Petitioner was notified, suspended, heard, and allowed to appeal, fully satisfying Section 41. The reasons were valid and fair. His conduct fell within the scope of Section 44(4)(g) and undermined the reputation of the Authority. The Petitioner

admitted his wrongdoing. He did so under cross-examination and in his own written apology. (|Page 45). Beyond procedure, Parliament imposed evidentiary obligations through Section 47(5) of the Employment Act, which provides: "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." This provision sets the ground rules: the employee must first prove unfairness, and the employer must then justify dismissal. We place reliance on the case of where the Court Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR reiterated this position by stating: "Section 47 (5) of the Act provides for the procedure to be followed in matters complaints of unfair termination as follows: of "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer." II. [Emphasis added]. So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. We submit that Petitioner did not discharge his burden during the hearing. Under cross-examination, he admitted that he was served with a show cause letter, that he responded to it, that he was invited to and attended the disciplinary hearing, and that he appealed. These admissions are fatal and are enough to dismiss the present

Petition. On the other hand, the Respondent justified the termination with evidence: the defamatory publication, the Petitioner's endorsement of it, the minutes of the disciplinary hearing, termination letter, and the appeal record. Respectfully, the Respondent's case is complete and consistent. The dismissal was based on a valid reason, and it was effected through a fair and transparent process. Sections 41, 43, 45, and 47(5) were all satisfied.

32. Whether there Was Substantive Justification for the Petitioner's Termination 40- on this issue, we submit that the evidence on record shows clear justification for the Petitioner's dismissal. In cross-examination and in his apology letter of 3td January 2020, the Petitioner admitted endorsing and spreading defamatory allegations against his employer. That letter, produced in evidence, confirmed his regret and plea for reinstatement. His appeal was considered by the Board of Directors and dismissed, showing his misconduct was fairly tested at every level. Section 43 of the Employment Act obliges the employer to prove reasons for termination. Section 44(4)(g) defines gross misconduct to include conduct inconsistent with an employee's duties or prejudicial to the employer's reputation. By endorsing a defamatory post and tagging colleagues, the Petitioner squarely fell within this category. His conduct breached Clause 11.11.1 of the HR Manual and Clause 5.1.5 of the social media Policy. Section 45 of the Employment Act shields an employer who acts on a valid reason and fair procedure. The Respondent met this test. The Petitioner was notified, responded in writing, attended a hearing, and appealed. At no stage did he dispute the authenticity of the evidence against him. The process was deliberate, transparent, and procedurally fair. We place reliance on the case of Vincent Masinde Munuku BOB Morgan Services Limited [2021] KEELRC 467 (KLR) [2021] KEELRC 467 (KLR). The Court held that the employer had provided a valid reason for termination where an

employee engaged in social media misconduct by stating that: "In the instant case, the Respondent genuinely believed that the Claimant's posts on the Bravo Mike Forum on Facebook from January to August 2015 were injurious to the reputation of the organization and its senior management. Relatedly, the Claimant led no evidence to demonstrate the reasons for the postings or that he had raised these issues with the Respondent and no action had been taken. In view of the foregoing, the Court is satisfied that the Respondent had a valid reason to terminate the Claimant's employment on 11th September 2015." In this instance, the Claimant's letter of termination was on account of social-media misconduct amounting to reputational harm to the employer. The Courts treat employee admissions about social-media posts targeting the employer as weighty and conclusive justification for dismissal. In Vincent Masinde Munuku v BOB Morgan Services Ltd [Supra], the Court recorded the claimant's admission that he 'was dismissed because of the posts on Facebook' and that he 'apologised for the posts,' following a disciplinary hearing. The same pattern appears here through cross-examination, minutes, and the Petitioner's apology. The principle emerging from Vincent Masinde Munuku v BOB Morgan Services Ltd [2021] is that social-media misconduct which injures the employer's reputation constitutes a valid ground for termination, particularly where the employee admits the conduct and tenders an apology. The Petitioner's case falls squarely within this authority: he endorsed and propagated defamatory content, admitted to it under oath, and apologised in writing. The Respondent therefore acted within the law in terminating his employment.

DECISION

33. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '*45(2) A termination of employment by an employer is unfair if the employer fails to prove—*

(a) that the reason for the termination is valid

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.'' To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission [2013] eKLR).

34. On procedural fairness the court found from the facts before the court the claimant was taken through a process which was substantially in compliance with the provisions of section 41 of the Employment Act. He was issued with notice to show cause, he was heard and appealed. The submissions that the lack of minutes of the hearing created doubts as to whether there was hearing flew in the face of the petitioner's own pleadings paragraphs 9,10,11 and 12 of the petition. Parties are bound by their pleadings. In the appeal dated 3rd January 2020, the petitioner did not raise any ground toot challenge the process but only challenged the decision and apologized. The court found that there was substantial compliance with the process under section 41 of the Employment Act. The process was not challenged in the pleadings and cannot be raised in submissions as submissions are not pleadings.

35. On the reason for the termination , the court found the reason was challenged on the basis that the accusation based on a like of post was vague as the meaning was not clear. The petitioner submitted as follows- A like "👍" is ambiguous and cannot reasonably sustain dismissal. Proportionality: The Punishment did not fit the alleged wrongdoing When asked if automatically terminating the Petitioner's employment based on thumb-up emoji was sufficient justification, the witness for the Respondent affirmed it is so. This however, we have refuted in the preceding paragraphs. That assuming, without conceding, that the Petitioner committed any misconduct (which he vehemently denies), the punishment meted out by the Respondent was grossly disproportionate to the alleged offence. Proportionality demands that sanctions imposed upon an employee must bear a rational and reasonable relationship to the gravity of the alleged misconduct. An employer must distinguish between trivial misconduct and serious misconduct warranting dismissal. A Facebook reaction neither compromised the Respondent's business, nor jeopardized national security, nor endangered the safety of anyone. No evidence was ever tendered by the Respondent to show that a thumbs-up emoji undermined the Authority's operations. The Respondent's heavy-handed response was clearly motivated by desire to eliminate the Petitioner as retaliation for whistleblowing and not to maintain discipline or protect its reputation. Section 45(5) of the Employment Act requires that in deciding whether an employer acted in accordance with justice and equity when terminating an employee's employment, a Labor Officer or this Court shall consider, inter alia: a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; b) the conduct and capability of the employee up to the date of termination; c)

the existence of any previous warning letters issued to the employee. (Emphasis added) Termination is the ultimate sanction and should be reserved for grave misconduct where other measures have failed or are clearly inappropriate. The Respondent could have, if at all concerned, issued: a) A verbal warning; b) A written warning; c) A cautionary note; d) A counseling session; e) An internal clarification on social media policy. The Petitioner submits that by any objective or reasonable standard, the Respondent's action utterly failed this test. The punishment was not only disproportionate, but also irrational, malicious and unconstitutional.

36. Conversely, respondent to justify the reason submitted that, in this instance, the Claimant's letter of termination was on account of social-media misconduct amounting to reputational harm to the employer. The Courts treat employee admissions about social-media posts targeting the employer as weighty and conclusive justification for dismissal. In Vincent Masinde Munuku v BOB Morgan Services Ltd [Supra], the Court recorded the claimant's admission that he 'was dismissed because of the posts on Facebook' and that he 'apologised for the posts,' following a disciplinary hearing. The same pattern appears here through cross-examination, minutes, and the Petitioner's apology. That the principle emerging from Vincent Masinde Munuku v BOB Morgan Services Ltd [2021] is that social-media misconduct which injures the employer's reputation constitutes a valid ground for termination, particularly where the employee admits the conduct and tenders an apology. The Petitioner's case falls squarely within this authority: he endorsed and probated defamatory content, admitted to it under oath, and apologised in writing. The reason for termination is liking a post by Kahawa Tungu blogger on Facebook'' how

corrupt networks at Kenha work in coordination with DG and Chairman'' and tagging his colleagues Patrick Kibii and Tom Ouko.

37. The respondent re- produced its social media policy which it relied on to terminate the employment of the respondent as follows- *'(iv) Your act of commenting on the article, being a staff of the Authority is termed inappropriate and contrary to the provisions of the Social Media Policy (2017) Section 5.1 and in particular;*

Section 5.1.4 which requires that all employees of KeNHA should exercise fairness. tolerance and caution while posting online in regards to the Authority or any of its employees, suppliers, or consultants.

Section 5.1.13 which requires all employees shall act responsibly, considering that information posted online by an employee without clearance on the Authority has the potential of harming the image of the Authority.

(v) You failed to exercise good judgement and went ahead to make comments and as a result drew the attention of others to the article that painted the Authority in bad light. Many people followed your unfortunate comments on Facebook. In doing so, your behaviour went contrary to the Authority's Code of Conduct, Section 10.22.3 of the Human Resource Policy and Procedures (2017) which states; 'While it is not desired to interfere with the liberty of free speech, any lack of discretion on the part of an employee in expressing an opinion that may embarrass the Authority, may result in

disciplinary action being taken against him..The Management found explanations for your actions unacceptable and therefore holds you culpable on the following charges:

(i) Charge No. 1. Behaviour deemed inappropriate to both the Agency and the Public' contrary to Section 11.11.1. part III (iii) of the Human Resource Policy and Procedure Manual (2017),

(ii) Charge No. 2 'publishing official information which has not been cleared for publication by the Chief Executive Officer' contrary to Section 11.11.1. part 111 (xiii) of the Human Resource Policy and Procedure Manual (2017);''

38. During the hearing, the petitioner admitted he liked the post from his personal social media page. On being asked if the allegations by the blogger had been substantiated, the petitioner said he did not know. He agreed the blogger was a third party. He agreed he was an insider as a procurement professional. He said he responded on own capacity and not as staff. He agreed he tagged Eng Kibiti and Tom Ouko to the post, who were fellow employees. He said he needed Kibiti, who was his senior, to see what was happening. On re-examination he said the issues by the blogger were true and they were being exposed on media. The court understood the petitioner to admit the accusation of liking of a post adverse to the employer by a third party and tagging other employees to the post. The court also understood the claimant to say the sanction for termination was not proportional to the offence which he admitted. The court has to caution itself not to replace its thoughts with that of the employer. The Court of Appeal in Ondari v National Hospital Insurance Fund [2025] KECA 687 (KLR) **observed '** *In several of its decisions,*

*this Court has held that it has no supervisory role and is not required to substitute the thoughts of an employer, where the employer has a valid reason to terminate employment and where due process has been followed.''*The petitioner being an insider on matters procurement liked and tagged to the post senior colleague and another which post was adverse to the employer's reputation. The social media policy of the employer prohibited such conduct. It is not open to the court to substitute its thoughts or opinion with that of the employer. The petitioner admitted the mistake. He was taken through a process in compliance with section 41 of the Employment Act as per his pleadings. The court upheld the decision inVincent Masinde Munuku BOB Morgan Services Limited [2021] KEELRC 467 (KLR) [2021] KEELRC 467 (KLR). The Court held that the employer had provided a valid reason for termination where an employee engaged in social media misconduct by stating that: "In the instant case, the Respondent genuinely believed that the Claimant's posts on the Bravo Mike Forum on Facebook from January to August 2015 were injurious to the reputation of the organization and its senior management. Relatedly, the Claimant led no evidence to demonstrate the reasons for the postings or that he had raised these issues with the Respondent and no action had been taken. In view of the foregoing, the Court is satisfied that the Respondent had a valid reason to terminate the Claimant's employment on 11th September 2015.'' The post was injurious to the reputation of the respondent, and the petitioner, knowing the content was not substantiated, liked and made his case worse by tagging colleagues, an act which the court concluded was to attract more audience contrary to the employer's social media policy. The reason for termination was justified. The court concluded that the termination was lawful and fair.

Whether the Petitioner's constitutional rights were violated by the Respondent;

The petitioner's submissions

39. WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE RESPONDENT - As held by the late Justice Majanja, in the case of United States University (USIU) Vs Attorney General [2012] eKLR: "Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. This Petition is not simply a claim for unfair dismissal under the Employment Act; it is first and foremost a matter of egregious violation of the Petitioner's fundamental constitutional rights. The Respondent, a public institution bound by the Constitution of Kenya 2010, chose to persecute the Petitioner for fulfilling his constitutional duty of integrity, transparency and accountability. We respectfully submit that while the Petition may not have itemized each constitutional provision submitted below with mathematical exactitude, the substance of the Petitioner's grievance is clearly discernable from the pleadings and the evidence before this Court. Also, it is now firmly established through subsequent jurisprudence – including Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR – that precision is not coterminous with exactitude and that a court should not elevate form over substance when the essence of the violation is evident and capable of being addressed. 34. In the instant case, while the pleadings may not mirror textbook structure with a terrible exactness, they clearly highlight violations of key rights as set out below: Article 10 requires all state organs and public officers, to uphold values such as integrity, transparency, accountability, good governance and protection of human rights. The Petitioner identified irregularities which violated these values. Instead of embracing transparency and investigating the irregularities, the Respondent punished the Petitioner for seeking to uphold Article 10 values. The Petitioner merely "liked" a blog post and further brought the post to the

attention of his colleagues by tagging them. He did not author or publish any defamatory content. The Respondent, without any factual or legal basis, treated this passive online engagement as gross misconduct. The Petitioner's reputation, dignity and professional standing were irreparably harmed by his malicious dismissal on spurious grounds. This offends the inherent dignity protected under Article 28. 38. Article 33 protects freedom of expression, including the right to seek, receive or impart information. In criminalizing a simple "Like", the Respondent infringed upon this freedom and attempted to regulate the Petitioner's private social media conduct unlawfully. Article 35 guarantees the right to access information. The Petitioner was entitled to access information related to his disciplinary hearing. The Respondent deliberately withheld these, denying him a fair opportunity to challenge the allegations.. Under Article 41, fair labor practices include procedural fairness, freedom from victimization and protection from unfair dismissal. The Respondent denied the Petitioner adequate notice, access to evidence, representation and an impartial hearing. Whistleblowers play a vital role in exposing corruption and maladministration. The law must shield them from reprisals. Further, Article 236 of the Constitution provides that a public officer shall not be victimized or discriminated against for having performed the functions of office, neither shall he/she be dismissed, removed from office or otherwise subjected to disciplinary action without due process of law. Rather than upholding constitutional values and protecting a conscientious employee, the Respondent trampled upon the Petitioner's most sacrosanct rights with impunity, malice and contempt for the rule of law. These violations are not merely stated in abstract but are supported by factual events and conduct attributed to the Respondent, which this Court can fairly evaluate. The Petitioner therefore humbly submits that, his rights under the

constitution were violated, and he calls upon this court to exercise its constitutional jurisdiction under Article 23 to fully vindicate the Petitioner's rights.

Respondent's submissions

40. Whether the Petitioner's Constitutional Rights Were Violated- The Petition invoked Articles 41, 47, and 50 of the Constitution but failed to particularize how they were infringed. The evidence instead shows full compliance. The Petitioner was notified, responded, appeared at a disciplinary hearing, and appealed. The Respondent produced the show cause, the response, the minutes, the decision, and the appeal outcome. These are not hallmarks of violation but of due process. It is firmly settled, beginning with Anarita Karimi Njeru v Republic [1979] eKLR, that a party alleging violation of constitutional rights must plead with precision: the specific provisions infringed, the manner of the infringement, and the injury suffered. Mere reference to constitutional articles without particulars is not sufficient. The Claimant's Petition falls far short of this threshold. While he lists various constitutional provisions, he does not demonstrate how the Respondent's actions to wit; issuing a show cause letter, convening a disciplinary hearing, and entertaining an appeal; violated those provisions. These were lawful employment processes, not constitutional infractions. Constitutional relief cannot be granted on the basis of broad assertions. The law demands detail, evidence, and a nexus between the impugned action and the alleged violation. None has been provided. On the contrary, the Claimant's own testimony confirmed that he was notified, heard, and given an appeal. What he styles as violations are in fact evidence of compliance with due process. In Kimaru v Inspector General of Police & another [2025] eKLR, this Honourable Court

reiterated that invoking Articles of the Constitution is inadequate unless accompanied by specific facts attributed to each alleged breach. The petitioner there failed for lack of particulars. This binds closely to the principle established in Anarita Karimi Njeru v 48. Republic [Supra]. In any event, we invite the Court to recognize that Article 41 guarantees fair labour practices. The Petitioner was taken through a lawful process in accordance with Sections 41 and 45 of the Employment Act. Article 47 demands fair administrative action. The reasoned decision communicated to him and the appeal mechanism provided prove compliance. Further, the administrative action was expeditious, efficient, lawful, reasonable and procedurally fair per Article 47 of the Constitution. This Honourable Court is therefore invited to find that the constitutional allegations are hollow, unproven, and incapable of sustaining relief. The Petition should be dismissed for want of precision, substance, and merit.

Decision

41. The court finds that the prayers by the petitioner confirm that the allegations related to fair labour practices as provided for under the Employment Act. The prayers were -*A declaration be issued that the dismissal of the Petitioner as contained in the Respondent's letter dated 18th December 2019 was unlawful, unconstitutional and null and void.*

    e) Consequent to (a) above, the Honorable Court be pleased to call into this Court and quash the decision of the Respondent dismissing the Petitioner from their employment contained in their letter dated 18th December 2020 and reinstate the Petitioner.

    f) FURTHER and in ALTERNATIVE to (b) above, the Honourable Court be pleased to award damages to the Petitioner for unlawful termination of employment.

g) *Costs of this Petition be provided for.'' The court finds that the remeieds sought are within the confines of section 49 of the employment act.*

This was a case falling under the doctrine of constitutional avoidance as the violations were all remedied under the Employment Act. In the Communications Commission of Kenya and 5 others –Versus- Royal Media Services Ltd and 5 Others (2014)eKLR it was held that the principle of constitutional avoidance entails that a Court will not determine a constitutional issue where a matter may properly be decided on another basis. Further, where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, then that is the course which should be followed. I find the issues before the court could have been addressed satisfactorily under the Employment Act. The prayers fell under unfair termination.

Whether the petitioner was entitled to the reliefs sought

42. The petitioner sought the following reliefs-

i. *A declaration be issued that the dismissal of the Petitioner as contained in the Respondent's letter dated 18th December 2019 was unlawful, unconstitutional and null and void.*

ii. *Consequent to (a) above, the Honorable Court be pleased to call into this Court and quash the decision of the Respondent dismissing the Petitioner from their employment contained in their letter dated 18th December 2020 and reinstate the Petitioner.*

iii. *FURTHER and in ALTERNATIVE to (b) above, the Honourable Court be pleased to award damages to the Petitioner for unlawful termination of employment.*

iv. Costs of this Petition be provided for.

43. The court held the termination was lawful and fair. The court further held that the petition fell under the doctrine of constitutional avoidance. The petition is held to be without merit and is dismissed with costs to the respondent.

44. It is so Ordered

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Petitioner: Ms. Kerubo h/b for Annan

Respondent: Otieno