

**THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**CONSTITUTIONAL PETITION NO. E011 OF 2021**

MERCY MURREY.....PETITIONER

**VERSUS**

TOURISM FUND.....1<sup>st</sup>  
 RESPONDENT

THE BOARD OF TRUSTEES OF TOURISM FUND.....2<sup>nd</sup>  
 RESPONDENT

JUDGMENT

1. Through a petition dated 21<sup>st</sup> January, 2021, the Petitioner herein petitioned this Court alleging, among others,

- a. **THAT** on the 11<sup>th</sup> January, 2021, an order was issued with a letter dated 21<sup>st</sup> December 2020, wherein it purported to offer options, to the Petitioner to elect between **termination from employment or dismissal from employment** and further, contrary to the provisions of **Section 10 of the Employment Act, 2002** promoting the Petitioner from **Job Grade 4** to **Job Grade 6** without consultation.
- b. **THAT** apparently, purport of the impugned letter comprised of **double jeopardy** wherein the 2<sup>nd</sup> Respondent intends to punish and/or the Petitioner twice over unsubstantiated and unverified allegations.
- c. **THAT** worthy of note, the alleged provision relied upon

therein to issue these options to the Petitioner does not exist; therefore, it is resoundingly distinct that the impugned action by the Respondents does not have any foundation in law; it being illegal and invalid *ab initio*, thus.

d. **THAT** upon review and categorical analysis of the impugned disciplinary process that resulted to the impugned letter, it is derived that it was marred with impropriety and illegality by reasons that:

i. the interdiction was executed contrary to the provisions of **Clauses 11.9.9 and 11.9.10** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual wherein the Petitioner was summoned by email correspondence by an Internal Auditor, Mr. William Kiboko Kiptum, to attend before the Audit & Finance Committee of the Board **prior to issuance of a Notice to Show Cause**.

ii. the purported interdiction letter was issued by the Chief Executive Officer contrary to the provisions of **Clause 11.9.10** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual which **requires that a Notice To Show Cause be issued by the Head of Human Resource & Administration**, the purported interdiction letter did not contain provision for the Petitioner to report to a supervisor contrary to the provisions of **Clause 11.12.3** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual, the Human Resource Advisory Committee did not produce and/or supply a report contrary to the provisions of **Clause 11.9.11** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual **and requires that the Human Resource Advisory Committee to prepare a report consisting of the background information leading to the relevant incident, input from the witness(es), employees response, an analysis of**

**facts, a statement that all the entitlement of the employee have been observed and recommendations.**

iii. the purported hearings were conducted void of supply to the Petitioner of any evidentiary material, an investigative report, witness statements, cross-examination of witnesses, logical proof and a right to fair hearing contrary to the provisions of **Article 50 of the Constitution of Kenya**, and **Clauses**

**11.1.3, 11.3.1 & 11.4** of the Respondent's Human Resource Policy Manual, and that

there were no investigations carried out contrary' to the provisions of **Clause 1** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual, especially, establishing and recording the investigation, giving the

Petitioner the opportunity to produce relevant documents, call and examine witnesses, **sum up the case and record their comments so as to clearly show their findings and opinion on the issues under investigation in view of the evidence on record.**

e. **THAT** on the **18<sup>th</sup> June, 2019**, at about **3:30 p.m.** the Petitioner received a telephone call from **Mr. Abraham Kiprono Kiptum** informing that the Petitioner ought to attend before the Audit & Risk Committee of the Board on the **19<sup>th</sup> June, 2019**, without disclosing, to her purpose of convening.

f. **THAT** soon thereafter, at on or about **8:30 p.m.** email correspondence was sent, by the General Auditor, to the Petitioner with similar address.

g. **THAT** upon attendance before the Board, the Petitioner was queried as to whether she was cognizant or aware of the reason for being summoned; to which the Petitioner responded in the negative.

h. **THAT** contrary' to settled procedure and principles of Natural Justice, the Board apprised the Petitioner of the allegations against her and required that she responds thereto without prior notice and sufficient time and facilities to mount a defence.

i. **THAT** hereafter on the **27<sup>th</sup> July, 2020**, the Petitioner was issued with a letter titled "Notification of Disciplinary Action Against You" which proceeded to send the Petitioner **on indefinite interdiction** contrary' to the stipulated period of **six months** as provided for at law.

j. **THAT** on the **29<sup>th</sup> October**, 2020, the Petitioner appeared before the Human Resource Advisory Committee where she was subjected to a **flawed hearing** wherein it proceeded without the Petitioner being supplied with any investigative report, witness statements, evidentiary material relied on by the Respondents and without opportunity to cross-examine the witnesses relied upon by the Respondents to sufficiently verify the allegations levelled.

k. **THAT** on the **10<sup>th</sup> November**, 2020, the Human Resource Advisory Committee purported to issue a decision wherein it failed to attain the requisite threshold demonstrating validity and fair reason of its decision.

l. **THAT** contrary to that which is required by law and as fair labour practise, the correspondence by the Human Resource Advisory Committee did not clearly outline the background, reasons and rationale for such determination.

m. **THAT** further, the Human Resource Advisory Committee, in its correspondence dated **10<sup>th</sup> November, 2020**, relied on a non-existent provision, *to wit*, **Section 68(3) (3) of the Public Service Commission Regulation 2020**, to purport to offer the Petitioner disciplinary penalty options.

n. **THAT** upon appeal, the Petitioner appeared before the Staff & Technical Committee of the Board on the **8<sup>th</sup> December**,

**2020**, where yet again the proceeding was fraught with malady by reason that the Petitioner was not supplied with any investigative report, any witness statements, evidentiary material relied on by the Respondents and without opportunity to cross-examine any witnesses relied upon.

o. **THAT** in terms; the Staff & Technical Committee of the Board, too did not disclose, demonstrate and/or adduce any source of allegations levelled against the Petitioner.

p. **THAT** in delivering its decision, through a letter dated **21<sup>st</sup> December, 2020**, the 2<sup>nd</sup> Respondent acted *ultra vires* and void of jurisdiction by reporting to depose the Petitioner void of consultation, pursuant to the provisions of **Section 10 of the Employment Act**.

q. **THAT** further, in the alternative and without prejudice to the foregoing, the purported action by the 2<sup>nd</sup> Respondent comprised of *double punishment* by reason that there were forms of punishment (*selecting between termination from employment or dismissal*) imposed by the Staff & Technical Committee of the Board; that the further disciplinary sanction amounts to punishing the Petitioner twice over the same cause.

r. **THAT** further, too, upon the forms of punishment contained in the letter dated **10<sup>th</sup> November, 2020**, which was upheld by the Staff & Technical Committee of the Board, the 2<sup>nd</sup> Respondent became *functus officio* and could therefore not issue any further sanctions, thus.

s. **THAT** in demonstration of utter discrimination and bias, it is only the Petitioner, in the hierarchy and/or procurement process, to whom the severe forms of punishment of dismissal, termination of employment and demotion have been preferred despite involvement of various senior ranking and/or departmental staff to whom the Petitioner received instruction from.

t. **THAT** amongst the **nine (9) personnel** subjected to disciplinary proceedings, the Respondents exerted excessive weight and/or liability upon the Petitioner despite there being demonstration that there were requests and memorandums from the user and relevant departments as well as ratification of the variation by the Petitioner's superiors.

u. **THAT** the Respondents ignored evidence adduced and probative material relied upon by the Petitioner demonstrating the framework within which the variation was established and accepted.

v. **THAT** consequently, the evidence shows that the manner in which the Petitioner was unfairly discriminate and biased.

w. **THAT** ultimately, the Respondent's preferred irregular threshold and burden of proof upon the Petitioner by illegally shifting the burden upon the Petitioner to disprove the allegation as opposed to the Respondents to prove them.

2. The petitioner alleged that the actions by the respondent contravened articles 236 of the Constitution as follows:

i) a Public Officer shall not be victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law or be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

### **Particulars of Breach**

a. That the Respondent's portrayed and engaged in **discriminatory and biased practice** by singling out the Petitioner herein for termination, dismissal and demotion from her **Job Grade 4 to Job Grade 6** despite there being other focal personnel and/or senior officers who were involved in the procurement process by issuing instruction to the Petitioner.

b. That it is resoundingly distinct that, in carrying out the

variation, the Petitioner acted in compliance of instruction from her superior officers; thus, it is incomprehensible and unreasonable that it is only the Petitioner that is being discriminately punished.

c. That the 2<sup>nd</sup> Respondent breached the provisions of **Articles 236 & 10 of the Constitution of Kenya, 2010**, by purporting to demote the Petitioner without consultation in direct contrast to the provisions of **section 10 (5) of the Employment Act, 2007**.

d. That the Respondents further breached the provisions of **Article 236 of the Constitution of Kenya, 2010**, by subjecting the Petitioner to disciplinary action without following the due process.

e. **Article 50 of the Constitution of Kenya, 2010**, which provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing, or by a court or, if appropriate another independent and impartial tribunal and body; to be informed of the charge, with sufficient detail to answer to it and to have adequate time and facilities to prepare a defense.

f. A fair hearing comprises of both qualitative and quantitative elements, *to wit*, that an affected party should be provided with adequate time to prepare a defense (qualitative) and all necessary and appurtenant protective material and/or statements (quantitative) to allow one to do so.

**3.** That as The Constitution provides for the right to a fair hearing, this includes evaluation and/or opportunity for the evaluation of properly adduced and admissible evidence.

### **Particulars of Breach**

a. the Human Resource Advisory Committee did not produce and/or supply a report contrary to the provisions of **Clause 11.9.17** of the 1<sup>st</sup> Respondent's Human Resource Policy

Manual in order to demonstrate the basis and substratum of the allegations,

- b. the purported hearings were conducted void of supply, to the Petitioner, of any evidentiary material, an investigative report, witness statements, cross-examination of witnesses, logical proof and a right to fair hearing contrary to **Clauses 11.1, 11.3, 11.3.1 &**

**11.4** of the Respondent's Human Resource Policy Manual, c. there were no investigations carried out contrary to the provisions of **Clause 10.1** of the Respondent's Human Resource Policy Manual, respectively establishing and recording issues for investigation, giving the Petitioner the opportunity to produce relevant evidence, call and examine witnesses, sum up the case and make their comments so as to clearly show their findings and opinion on the issues under

investigation in view of the evidence on record in order to allow the Petitioner adequate time and facilities to mount proper defense.

- d. Ultimately, the Petitioner was subjected to a hearing with neither knowledge of the accuser/accusant nor the substantive and probative value leading to the allegations.

**4. Article 47 of the Constitution of Kenya 2010** which provides that every person has the right to administrative action that is expeditious, efficient, **lawful, reasonable and procedurally fair.**

#### **Particulars of Breach**

- a) The Petitioner was placed on **interdictio in personam** with the Notice To Show Cause stating that "*you are hereby interdicted with immediate effect until such a time when this matter is concluded,*" contrary to the requisite maximum period of **six (6) months,**
- b) The summons to the Petitioner, on the **18<sup>th</sup> June, 2020,** by

telephone call and subsequent email correspondence, to attend before the Board on the **19<sup>th</sup> June, 2020**, were issued without any provision in the 1<sup>st</sup> Respondent's Human Resource and Policy Manual or at law,

c) That, similarly, the originator and/or communicator of the purported summons **Mr. Abraham Kiprono Kiptum**, the 1<sup>st</sup> Respondent's internal auditor, did not have authority and/or *locus standi* to issue summons directly to the Petitioner,

d) the interdiction was executed contrary to the provisions of **clauses 11.9.9 and 11.9.10** of the Respondent's Human Resource Policy Manual when the Petitioner was summoned, through email correspondence by an Auditor, to attend before the Ad hoc Committee of the Board prior to issuance of a Notice To Show Cause.

e) the purported interdiction was issued by the Chief Executive Officer contrary to the provisions of **Clause 11.9.10** of the Respondent's Human Resource Policy Manual,

f) there were no investigations 'without contrary' to the provisions of **Clause 11.10.1** of the Respondent's Human Resource Policy Manual, especially, establishing and recording issues for investigation, giving the Petitioner the opportunity<sup>7</sup> to produce relevant documents, call and examine witnesses.

g) In the alternative and without prejudice to the foregoing, the provisions of Clause **11.9.15** are unconstitutional by reason that they provide for investigations subsequent to issue of a Notice To Show Cause; thereby presuming guilt of an affected officer **in contrast to the tenet that a party is innocent until proven guilty.**

**5. Articles 41 of the Constitution of Kenya, 2010** which provides that every person has the right to fair labour practices.

### **Particulars of Breach**

a) The Respondents breached the provisions of Article 41 of the

Constitution, 2010, by summoning the Petitioner to attend before the Board for a disciplinary inquiry void of adequate notice, material and facilities to mount response/defense or prepare to convene,

b) The Respondents breached the provisions of Article 41 of the Constitution, 2010 by subjecting only the Petitioner to the excessively punitive and severe disciplinary options despite there being other parties and/or senior personnel involved in the disputed procurement/variation process.

c) The Respondents breached the provisions of Article 41 of the Constitution, 2010 by supporting the Board to punish the Petitioner twice over the same causation, thereby occasioning double jeopardy, thus

d) The Respondents breached the provisions of Article 41 of the Constitution, 2010 by failing to demote the Petitioner without due consultation and process.

e) The 2<sup>nd</sup> Respondent breached the provisions of Article 41 of the Constitution, 2010, by failing to demote the Petitioner in purporting to demote the Petitioner.

**6. Article 43 of the Constitution of Kenya**, which provides for Economic and Social Rights:

#### **Particulars of Breach**

a) The Respondents purport and intend to dismiss and/or terminate the Petitioner from her employment predicated upon a process that did not abide by due procedure; thereby denying her of her economic right to employment and social right as to providing for her family.

**7. Article 27 of the Constitution of Kenya, 2010**, which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law and that a person shall not discriminate against another person on any ground set out in Sub-Article 4, particularly predicated upon ethnicity.

## Particulars of Breach

- a) By isolating the Petitioner and meting out the most severe and/or punitive disciplinary action despite her ancillary role,
- b) By isolating the Petitioner and meting out the most severe and/or punitive disciplinary action despite abiding by instructions from her superiors who did not receive similar punitive sanctions,
- c) By isolating only the Petitioner and meting out the most severe and/or punitive disciplinary action despite the number and more frequent arrests of officers involved in the procurement process,
- d) In the alternative and without prejudice to the foregoing, it is resoundingly distasteful and repugnant to the conscience of the Petitioner being limited to drafting an affidavit pursuant to request and approval by other senior officers: whereby following instructions in the course of duties and emerging as the most severely punished, the Respondents discriminatorily and in bias considered the Petitioner's involvement resulting into **denial of the right to equal protection and equal benefit of the law.**

8. That in totality the acts and/or omissions of the Respondents comprise of grievous contravention and misfeasance of justice contrary to the provisions of **Article 10 (2) of the Constitution of Kenya, 2010**, provide that the national values and principles of governance in this article bind all State Organs and Officers public officers and all persons, whether any of them, *inter alia*, enacts, applies or interprets a law and that the national values and principles of governance comprise of the **rule of law, equality and human rights.**

9. In sum, inference is drawn that the acts of the Respondents constitute abuse of power and/or misfeasance of public office by subjecting the Petitioner to a process that is illegal, arbitrary, harsh,

unfair and manifestly unconstitutional.

**10.** The petitioner therefore sought from the Court the following:

- a) a declaration that the provisions of **Articles 2 (1) & (4), 10 (1) & (2), 19 (1) & (3) (a), 20, 21, 27, 41, 43, 47, 50, 236 & 259** of the Constitution of Kenya, 2010 have been violated; therefore, the actions of the Respondents are null and void.

**And orders THAT:**

- b) This Honourable Court be pleased to issue a declaration that the provisions of **Articles 2 (1) & (4), 10 (1) & (2), 19 (1) & (3) (a), 20, 21, 27, 41, 43, 47, 50, 236 & 259** of the Constitution of Kenya, 2010 have been violated; therefore, the actions of the Respondents are null and void.
- b) This Honourable Court be pleased to declare that the interdiction, interdictio, letter dated **27<sup>th</sup> July, 2020**, together with the purported disciplinary process were illegal, null and void thereby setting them aside.
- c) This Honourable Court be pleased to set aside, too, the letter dated **21<sup>st</sup> December, 2020**, upon finding that it is illegal, not supported by any law and *ultra vires* therefore it is null and void *ab initio*.
- d) This Honourable Court be pleased to issue general damages arising from the Constitutional violation demonstrated hereinabove.
- e) This Honourable Court be pleased to issue any further orders that it may deem fit for the ends of justice to be met.
- f) That costs of this Petition be provided for.

**11.** The respondent filed a Replying through one, **David Komu Mwangi** who deposed among others that:

- a) I am the Acting Chief Executive Officer at the 1<sup>st</sup> Respondent, and I

have the authority of the Board of Trustees to make this affidavit on behalf of the Respondents.

b) The Respondents admit that the Claimant has the requisite locus standi to institute this petition and avers that the dispute arises from the Respondents intention to terminate or dismiss the Petitioner from her employment upon finding her guilty of offences which constitute gross misconduct under the Human Resource Policy Manual (hereinafter " the HR Manual")

c) At all material times to this petition, the Respondents maintain that the Petitioner was interdicted and dismissed through a procedural and lawful disciplinary process based on genuine reasons that the Respondents believed to exist.

d) In terms of the reason provided for the intended termination or dismissal, the Respondents assert that the Petitioner executed duties conferred to the procurement function, which is a preserve of the Manager, Supply Chain Management, in total disregard of the duties of the accounting officer, the procurement function, and the evaluation committee to recommend and approve a price variation and extend the contract term.

e) The Respondents further aver that the Petitioner in preparing an addendum to the contract for supply, implementation and commissioning of an integrated revenue management system between the 1<sup>st</sup> Respondent herein and Centric Limited , extended the contract term which had since lapsed on 12<sup>th</sup> February 2019; caused a price variation outside the contract term which had not been recommended by the evaluation committee or approved by the accounting officer ; or founded on the consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation report issued by the Central Bank of Kenya.

- f) The Respondents reiterate contents of paragraph 9 and assert that the Petitioner's conduct amounts to negligence of duty and tampering with tender documents, which constitute gross misconduct under the HR manual . (I refer to page 77 and 80 of the Petitioner's Bundle of documents.)
- g) On or about 11<sup>th</sup> January 2021, the 2<sup>nd</sup> Respondent vide the letter dated 21<sup>st</sup> December 2020 informed the Petitioner of the outcome of the Appeal and the disciplinary options the Staff and Technical Committee of the Board had recommended to be imposed against her *inter alia* that she be dismissed from employment or her services as Principal Legal Officer be terminated. (I refer to the letter dated 21<sup>st</sup> December 2020, page 48(b) of the Petitioner's bundle.)
- h) The 1<sup>st</sup> Respondent further informed the Petitioner that her promotion from Job Grade 6 to Job Grade 4 had been revoked by the Management after it was established that it was made outside the law, without the approval of the Board and was null and void *ab initio*.
- i) The letter dated 21<sup>st</sup> December 2020 does not comprise of *double jeopardy* as alluded by the Petitioner as it merely provides her with an option to choose the disciplinary action, she prefers to be taken against her either dismissal from employment or termination of her services as Principal Legal officer which options led to termination of the employment relationship.
- j) I concur with the Petitioner's assertion that Section 68(2) (3) of Public Service Commission Regulation 2020 does not exist and aver that citing the wrong provision in the letter dated 21<sup>st</sup> December 2020 does not render the disciplinary process and action taken against the Petitioner illegal, and null and void *ab initio* as the disciplinary measures taken against the Petitioner are provided

under Section 68(1) of the Public Service Act No.10 of 2017 and the HR manual

k) I am aware that the Section 68(l)f of the Public Service Commission Act, 2017 provides demotion/reduction in rank or seniority as one of the penalties which may be imposed on a Public Officer as a result of disciplinary proceedings and aver that the same will only arise where an employee was lawfully promoted , whereas revocation would occur where the promotion is established to be unprocedural, irregular and unlawful as happened in the present case.

l) In the foregoing, the 2<sup>nd</sup> Respondent is not required to consult the Petitioner to revoke her promotion as the same was unprocedural, irregular and unlawful, and was imposed as a disciplinary penalty.

m) The disciplinary process leading to the Respondent to issue the letter dated 21<sup>st</sup> December 2020 was procedural, legal, fair and compliant with all the legal requirements *in alia* :

n) The Petitioner was interdicted by the Manager Human Resource & Administration, Mr. Aden O. Adoo, who exercised the letter dated 27<sup>th</sup> July 2020 in accordance with clause 11.9.9 and 11.9.10 of the HR Manual; (*I refer to the letter dated 27<sup>th</sup> July 2020 at page 51 to 52 and the HR manual at page 82 of the Petitioner's exhibit.*)

o) The interdiction letter was issued and signed by the Manager Human Resource & Administration, Mr. Aden O. Adoo, as the Head of Human Resource and Administration in compliance with clause 11.9.10 of the HR manual;

p) Clause 11.12.3 of the HR manual requires an officer on interdiction to report to his supervisor at agreed intervals and I am aware that the Petitioner was not required to report to her supervisor or any other person during the period of interdiction as the parties herein

did not agree on the same or the intervals thereon.

- q) The Human Resource Advisory Committee (hereinafter "HRAC") is only obliged under Clause 11.9.17 of the HR Manual to prepare a report after the disciplinary hearing and is not required to produce and or supply the same to the Petitioner;
- r) The HRAC has the discretion to determine which matters and or disciplinary cases require to be investigated, and CE has the power to constitute a committee to investigate a matter. In the opinion of the HRAC, such investigations are necessary prior to the hearing of a disciplinary case. (Refer to page 8 of the Petitioner's bundle.)
- s) In response to paragraph 10 of the hearing proceeded on a basis of logical proof and without an investigation report as the same was unnecessary in the circumstances of the HRAC and
- t) The Respondents aver that the terms provided under the HR manual form part of the Petitioner's employment terms and conditions, and the Petitioner is obliged to request the Respondents to provide witness statements relied upon if any were allowed to cross-examine the witnesses if any adverse evidence had been tendered against her.

u) I confirm that Mr. Abraham Kiprono Kiptum requested the Petitioner to attend before the Audit and Risk Committee on 19<sup>th</sup> June 2019 and deny that the purpose of the said meeting was to conduct a disciplinary hearing as the Respondents had neither established that the Petitioner had conducted any offence nor initiated the disciplinary process.

v) In the foregoing, 1<sup>st</sup> Respondent is not in breach of the Petitioner's Constitutional right to a fair hearing as there was no hearing before the Audit and Risk Committee but a disciplinary inquiry to the facts leading to preparing the addendum to the contract and extension of the contract term.

w) The Petitioner was interdicted with immediate effect vide a letter dated 27<sup>th</sup> July 2020 for a period of five (5) months and twenty-five (25) days from 27<sup>th</sup> July 2020 to 21<sup>st</sup> January 2021 during which period she was given the opportunity to respond to the show cause letter, attend the disciplinary hearing of the HRAC on 19<sup>th</sup> October 2020, mount an appeal as provided under the HR manual, attend before the Staff and Technical Committee of the Board for the hearing of the Appeal after which the appropriate disciplinary action was communicated to her.

x) The disciplinary process was therefore conducted expeditiously, efficiently and lawfully in compliance with the Constitution of Kenya and the HR Manual, (f refer to page 78 of the Petitioner's bundle.)

y) The HR manual does not expressly provide the length of time an employee should be interdicted for, and in any case, the Petitioner was on interdiction for a period of five (5) months and twenty-five (25) days when the appropriate disciplinary action was communicated to her.

z) The Petitioner appeared before the HRAC on 19<sup>th</sup> October 2020 for the hearing of the disciplinary case which was procedural and lawful, and I confirm that the Petitioner did not request to be supplied with the investigation report, witness statements and or any evidentiary material relied upon. (I refer to the Petitioner's bundle at pages 90 to 94 & 130 to 134).

aa) I reiterate contents of paragraph (g) of the Affidavit that the provisions of the HR manual, and in particular of the Petitioner's employment terms and conditions, and the Petitioner is deemed to have waived her rights or reliefs under the law, as she does not exercise the same appropriately. In any case, the Petitioner had access to, and provided the Respondents with the contract between Centric Limited and the 1<sup>st</sup> Respondent, the addendum to the said contract, the necessary correspondences and the tender documents which were the only documents relied upon by the Respondents in the disciplinary process. In the foregoing, the Petitioner did not suffer any prejudice thereof during the disciplinary hearing and appeal.

bb) The HRAC issued its decision vide a letter dated 10<sup>th</sup> November 2020 outlining valid and fair reasons, and the basis of the disciplinary action recommended against the Petitioner *inter alia* the Petitioner failed in her professional responsibility in drafting and execution of contracts; prepared an addendum to the contract which occasioned a variation of Kshs. 28,900,592.05 that had not been recommended by the evaluation committee and was above 10% cap set in the BIA document; extended the contract for RMS outside the contract validity period without request from the Supply Chain Management; failed to seek an opinion on the justification for extension of contract and its variation; failed to ascertain the existence of the evaluation committee negotiation report on the variation of contract; and withdrew the contract for the 1<sup>st</sup> Respondent and the service provider which amounts to conflict of interest. (I refer to page 49 to 50 of the Petitioner's bundle.)

cc) Indeed, I am aware that the Petitioner is an Advocate of the High Court of Kenya and is not a procurement professional in the 1<sup>st</sup> Respondent and failed to exercise due diligence in performance of duties that were not allocated to her as the variation to the contract was contrary to the law having not recommended by the evaluation committee; failed to ascertain the existence of the evaluation committee negotiation report on the considered variation and extended a contract whose term had lapsed on 12<sup>th</sup> February 2019.

dd) The Petitioner in her response dated 5<sup>th</sup> August 2020 , admitted that variation of any tender is a function of the premise of the Supply Chain Management Department through an evaluation committee , and the fund's Chief Executive Office , and that her function and that of the Legal department is limited to offer advisory opinions as to the legality of the intended variation, the provisions of the contract and tender documents/ *I refer to page 91 of the Petitioner's bundle.*)

ee) In further response to paragraph 30 of the Petition, the Respondents aver that the letter dated 10<sup>th</sup> November 2020 provided the Petitioner with a copy of the background leading to the disciplinary action as well as to generate herself from the allegations should she show cause letter and avers that proper background and rationale of the same was provided in the letter dated 27<sup>th</sup> July 2020.

ff) I confirm that the Respondent did not raise new allegations against the Petitioner and the allegations raised in the show cause letter were reiterated in the decision of the HRAC as the reasons for dismissal upon the same being proved. *(I refer to a copy of the minutes of the HR Advisory Committee held on 19<sup>th</sup> October 2020 at page 1 to 5 of the Respondent's bundle.)*

gg) The Petitioner was informed of her a right to appeal the decision of the HRAC to the Staff & Technical Committee of the Board and granted an opportunity to make oral and written representations in the appeal in respect of the reasons provided for dismissal. (i) Refer to page 135 to 138 of the Petitioner's bundle.)

hh) On Appeal, the Staff and Technical Committee is expected to either uphold, review, and/or set aside the decision HRAC to terminate and/or dismiss the Petitioner from employment and the letter dated 21<sup>st</sup> December 2020 does not comprise of *double jeopardy* or punish the Petitioner for the same offence as it merely provides the Petitioner with the option to choose the disciplinary action she prefers to take against herself.

ii) In the foregoing, the Respondent was acting *status officio* and it was obliged under clause 11.2.1 of the ... to handle the Petitioner's appeal, had the jurisdiction to impose any disciplinary penalty against the Petitioner, and avers that the Petitioner's promotion from Job Grade 6 to Job Grade 4 was imposed as a disciplinary measure.

jj) The disciplinary process against the Petitioner was not discriminatory and or biased against her as she failed to demonstrate that her superiors engaged in negotiations with the service provider to vary the contract price , approved any variation to the contract, extended the contract term or that she executed the variation of the contract price, prepared an addendum to the contract and extended the contract term with the requisite authority or approval from her superiors

kk) I am advised by my Advocate on record which advise I accept as true, that section 44 of the Public Procurement and Asset Disposal Act provides that any variation can only be approved by the accounting officer on the recommendation of the evaluation committee accompanied by a certificate from the tenderer making justifications for the variation. The said variation should be based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation report issued by the Central Bank of Kenya. The variation is executed within the period of the contract.

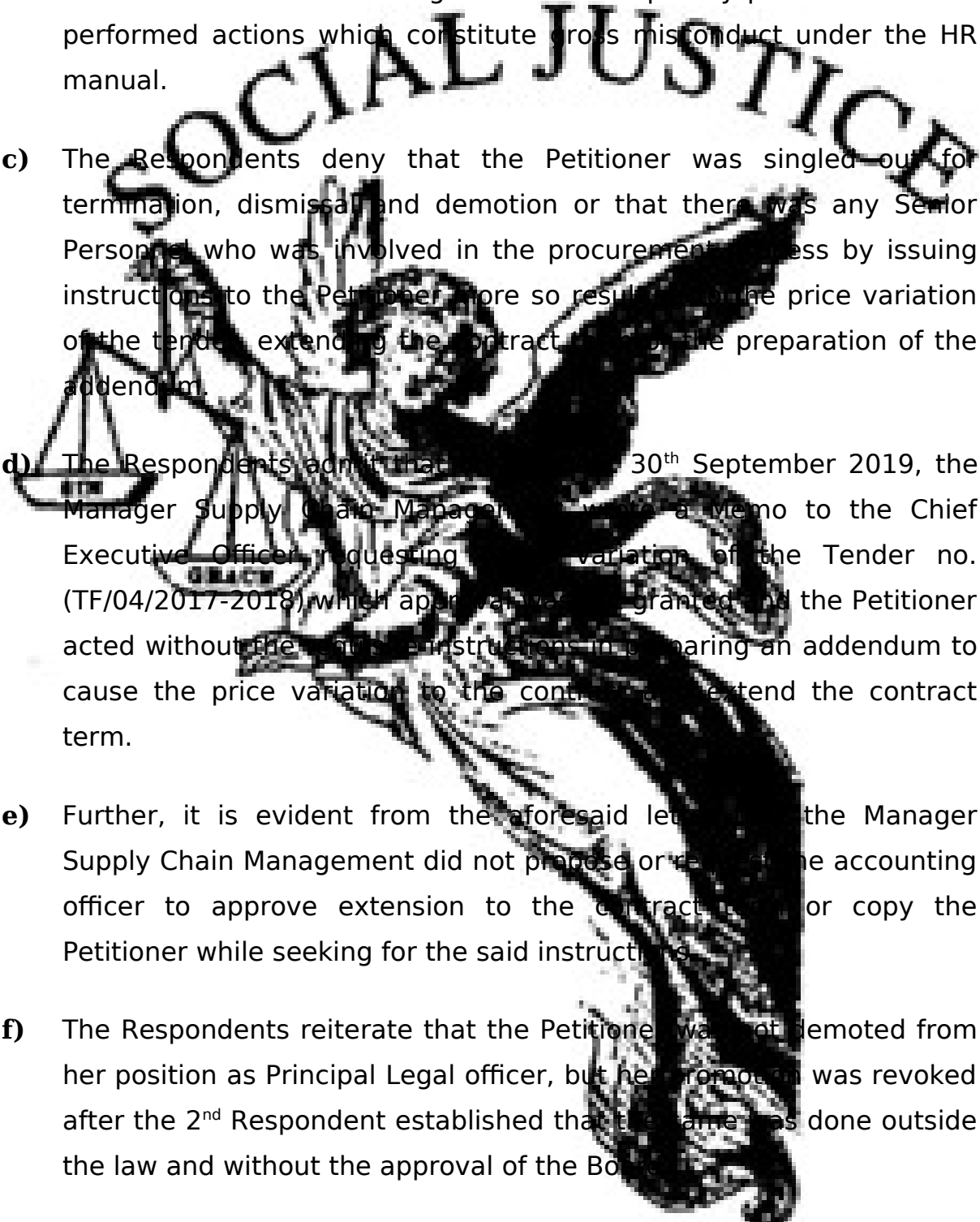
ll) Paragraph 1.4 of the 1<sup>st</sup> Respondent's Grading and Organization structure provides the hierarchy and ranking system but does not demonstrate that the Petitioner varied and prepared an addendum to contract pursuant to the instructions of her superiors or that her superiors ratified and approved the variation to contract price and extension to the contract term. (I refer to page 113 of the Petitioner's bundle).

mm) confirm that the Respondents considered the evidence adduced, the probative material raised by the Petitioner both at the initial and the appeal hearing, oral and written submissions in reaching the decision to reprimand the disciplinary action against her. (I refer to pages 114-115 of the Petitioner's Bundle.)

nn) The Respondents aver that under clause 11.9.9 and 11.9.10 of the HR manual, the Petitioner was required to show cause why severe disciplinary action should not be taken against her and to respond to the allegations raised against her. However that the Petitioner has the burden to prove that she did not commit the allegations raised against her in internal disciplinary proceedings.

**12. Regarding contravention of the Constitution  
Article 236 of the Constitution**

a) The Respondents reiterate contents of paragraph 28 and 29 of the Affidavit that the Petitioner undertook duties that were outside her mandate without due approval and in breach of law and was neither victimized nor discriminated against by the Respondents as alluded.

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- b)** The Respondents aver that the disciplinary process was not discriminatory or biased at any point, and the Petitioner was interdicted and taken through a lawful disciplinary process after she performed actions which constitute gross misconduct under the HR manual.
- c)** The Respondents deny that the Petitioner was singled out for termination, dismissal and demotion or that there was any Senior Personnel who was involved in the procurement process by issuing instructions to the Petitioner more so resulting in the price variation of the tender, extending the contract term, or the preparation of the addendum.
- d)** The Respondents admit that on 30<sup>th</sup> September 2019, the Manager Supply Chain Management sent a memo to the Chief Executive Officer requesting for a variation of the Tender no. (TF/04/2017-2018) which approval was granted and the Petitioner acted without the said instructions in preparing an addendum to cause the price variation to the contract and extend the contract term.
- e)** Further, it is evident from the aforesaid letter that the Manager Supply Chain Management did not propose or refer to the accounting officer to approve extension to the contract term or copy the Petitioner while seeking for the said instructions.
- f)** The Respondents reiterate that the Petitioner was not demoted from her position as Principal Legal officer, but her promotion was revoked after the 2<sup>nd</sup> Respondent established that the same was done outside the law and without the approval of the Board.
- g)** Accordingly, the disciplinary process leading the 2<sup>nd</sup> Respondent to recommend the termination or dismissal of the Petitioner is compliant with the governing law and not in breach of Article 236 of the

Constitution of Kenya.

- h)** In response to paragraph 46(a), the Respondents aver that they are not obliged under clause no. 11.9.17 of the HR manual to produce or supply the Petitioner with a report to demonstrate the basis and substratum of the allegations, and that the said provision merely requires HRAC to prepare a report after the disciplinary hearing.
- i)** The Petitioner was accorded a fair hearing that was compliant with the provisions of clause 11.4.1 of the HR Manual. She was granted adequate opportunities to prepare and present her defence before an impartial disciplinary tribunal and appeal committee; the process was expeditious, reasonable and procedurally fair, the Petitioner was provided with written reasons as to why the 1<sup>st</sup> Respondent had contemplated to take the disciplinary action against her; an opportunity to attend, be heard and to make oral and written representations, and the right to appeal.

#### **Article 47 of the Constitution**

- a) The Human Resource Manual does not specify or define the period of interdiction, and the Respondents aver that the Petitioner was only interdicted for a period of (thirty) months and Twenty (25) days.
- b) The Respondents aver that the attendance before the Board on 19<sup>th</sup> June 2020 was not a disciplinary measure as the disciplinary process had not commenced then.
- c) I reiterate contents of paragraph 17 (a) and (b) of Affidavit in response paragraph 47 (e) of the Petition.
- d) I reiterate contents of paragraph 17 (e) and (f) of Affidavit in response to paragraph 47 (f) of the Petition and aver that the Petitioner was accorded an opportunity to produce the relevant

documents while responding to the Notice to Show cause in her letter dated 5<sup>th</sup> August 2020 which was accompanied by a list of documents in support of the response , and the letter dated 23<sup>rd</sup> November 2020 outlining her grounds of appeal and reasons thereof .(I refer to pages 90 to 138 of the Petitioner's bundle )

e) At all material times, the Respondents aver that the Petitioner was aware that she was subject to all the regulations applicable to the employees of the 1<sup>st</sup> Respondent including the HR manual and did not exercise her rights to call or examine any witness in support of her case.

f) Clause 11.9.12 to 11.9.15 of the HR manual are neither unconstitutional nor in violation of the tenet that a party is innocent until proven guilty. The offences raised against the Petitioner are not criminal in nature, and the procedural and standard of proof thereof is not criminal.

#### **Article 41 The Right to fair labour practices**

a) The Respondents suspected that the Petitioner had committed acts of gross misconduct, and in accordance with Clause 11.9.9 and 11.9.10 of the HR Manual, requested her to show cause why disciplinary action should not be taken, and provided her with adequate time and facilities to give an explanation to the charges thereof.

b) The Respondents aver the Petitioner did not at any point request to be provided with documents or other information to enable her to respond to the charges raised against her.

c) I reiterate contents of paragraph 27 and 31 of the Affidavit in response to paragraph 48(b) of the Petition.

d) The HR Manual provides that the punishment for the offence of

gross misconduct is summary dismissal or termination, and the action recommended to be taken against the Petitioner is lawful and proper in the circumstances.

- e) I reiterate that the Respondents issued the Petitioner with optional disciplinary action, to either dismiss or terminate her from Employment and did not demote the Petitioner as alluded.

### **Article 43 Economic and Social Rights**

- a) I am advised by my Advocates on receipt of their advice I accept as true that the Economic and Social Rights are not absolute and may be limited when an employee is terminated and or dismissed from employment upon being found guilty of an offence or offences which constitute gross misconduct or upon a lawful cause.

- b) Accordingly, the Respondents decision to dismiss or terminate the Petitioner from employment was not in contravention to her economic and social rights as she was found guilty of gross misconduct under the HR manual.

### **Article 27 Equality before the Law**

- a) The Petitioner was not isolated for disciplinary process and was lawfully taken through the disciplinary process and found culpable for gross misconduct after she failed to demonstrate that she was following instructions of her supervisors.

- b) I reiterate contents of paragraph 48 of the Affidavit in response to paragraph to paragraph 50(a), (b) and (c) of the Petition.

- c) In response to paragraph 50(d) , I reiterate contents of paragraph 19 of the Affidavit.

- d) An employee who is suspected of committing an offence which

constitutes gross misconduct must be subjected to the disciplinary process provided under the law, and compliance with the provisions of the Constitution of Kenya, the Employment Act and the HR manual, does not constitute abuse of power and or misfeasance of Public Office.

- e) It is evident that there is no basis for the Petitioner to file the present petition as all the actions taken by the Respondents were compliant with the law.

**Regarding declarations sought by the petitioner**

- i. The Respondents aver that their actions are in accordance with the Constitution of Kenya, the Employment Act and the 1<sup>st</sup> Respondents HR manual and it is in the interest of justice that the present petition is dismissed with costs.
- ii. It is accordingly the Respondents' view that the Petition is speculative, ambiguous, without cause, instituted in bad faith and is a waste of the Court's time.
- iii. Further, the Petition fails to adhere to the requirement for precision, does not disclose the Constitutional provisions violated and or infringed, the acts of omissions committed, and the manner of alleged infringements, and the Applicant has not satisfied the requirements for the grant of the orders sought in her Petition.

- 13.** Despite the comprehensive nature of the averments in the petition and the response by the respondent, the petition was further prosecuted by oral hearing in which the petitioner stated among others that she relied on the petition, further affidavit sworn on 1st August 2021 and witness statement at 13th October 2024. She stated that she was working as Principal Legal Officer and that she had officers superior to her. She was reporting to Manager,

Legal Services and Affairs. It was her evidence that she was disciplined due to a variation in the procurement process and that her work was to draw the contracts.

**14.** The petitioner further stated that the Manager, Supply Chain had requested for a variation from Chief Executive Officer and it was approved and she brought her the approval and asked that I draft the variation. She stated that the writings on the top signified approval. She conceded that variation must be approved by the Chief Executive Officer. She further stated that there was consultation between supply chain department and Chief Executive Officer before variation was done. It was her evidence that she was the only one who drafted variation in this case yet variation involved other officers. The petitioner further stated that she was not availed any documents, variation reports or witness statements during the disciplinary hearing and that no witnesses were called for her to cross-examine.

**15.** In cross-examination she stated that she joined the respondent at job group 6 and was employed on 1st April 2019. Professionally she held LLB (Bachelor of Law) at the time of appointment and was promoted to job group 4 on 1st November 2019 and at the point of promotion to job group 4 she did not have Master's degree and did not have eight years' experience and had not taken a management course. She conceded that she did not have the qualifications for job group 4.

**16.** Concerning the addendum contract she admitted that she varied the contract by a sum of 28,900,792 to run for five months and that contract varied commenced on 1st February 2018 was dated 1st October 2019 and that the contract lapsed on 11th February 2019. It was her evidence that the markings signified approval and it was done on 30th September 2019. She stated that the approval did not contain extension of contract's period and was

not sure if an evaluation committee was appointed.

**17.** Regarding the disciplinary process she stated that she was issued with a notice of disciplinary action and a notice to show cause and that her case took five months and she left the respondent around 1st August 2020. It further her evidence that from 1st January 2021 to 30th April, 2024 she was receiving half salary. She stated that she was aware that the Chief Executive Officer Mr. Cherutoi Joseph resigned and she remembered Emily Wagemba, the Supply Chain Manager and Joseph Muriithi, the legal Affairs, also resigned. She was informed of her right of appeal and appeared before the appellate committee of the board. In re-examination she stated that appeal was the prerogative of the Respondent and that variations were consistent with the letter from Supply Chain Manager.

**18.** The respondent's witness witness Mung'alo stated among others that he was respondent's manager in charge of Supply Chain Management and that he filed a witness statement on 20th September 2022 which he adopted as his evidence in chief. In cross examination he stated that he was familiar with Respondent's Human Resource Policies and that that the petitioner was terminated for genuine and legitimate reasons. He further his evidence that a person ought to be given an opportunity to cross examine witness and was not aware if the petitioner was given witness statements and was only familiar with supply chain issues. It was further his evidence that no variations could be done singlehandedly, other departments had to be involved and that the variation must be sent to the Chief Executive Office for approval.

**19.** In re-examination he stated that the user department could request for contract extension or variation and the Chief Executive Officer was to appoint an evaluation committee to evaluate the request. The Supply Chain Manager was also required to give their

professional opinion over the evaluation report before it was acted upon. The contract for extension had already expired and there was no evaluation report.

**20.** The respondent's second witness, Mr. George Machoka stated that he was the Acting Manager, Human Resource and Administration and that he filed a witness statement on 20th September 2022 and relied on the same as his evidence in chief. He also relied on his bundle of documents dated 20th September 2022. In cross-examination, he stated that the Petitioner was provided with the details of the offence and that there was a committee on internal audit and there was a request, there was no investigation committee and no officer was asked to testify against the Petitioner. It was further his evidence that the Respondent followed due process in terminating the Petitioner. In re-examination he stated that there were no statements because the committee relied on the Audit Committee report and that the Petitioner attended the Audit Committee proceedings.

**21.** The petitioner's counsel, Mr. Muyu, stated among others that the submissions hereunder were written on behalf of the Petitioner, urging this Honourable Court to grant in favour of her prayers predicated upon the pleading that the Respondent's herein undertook an irregular and illegal disciplinary process by abridging and/or disregarding various provisions of the Constitution of Kenya, 2010 and the 1<sup>st</sup> Respondent's Human Resource Policy Manual. Ultimately, the submissions sought to be heard by this Honourable Court to return a finding that the rights of the Petitioner were violated and set aside the impugned letter dated the 27<sup>th</sup> July, 2020 and the 21<sup>st</sup> December, 2020 over which this Honourable Court issued injunctive relief pending the hearing and determination of this Petition.

**22.** According to counsel, the Petitioner herein was a Principal

Legal Officer of the 1<sup>st</sup> Respondent and through an impugned letter dated **21<sup>st</sup> December, 2020**, the Respondents herein purported to compel the Petitioner to select her own mode of punishment between termination from employment or dismissal therefrom. The impugned decision of the Respondents was premised upon a disciplinary procedure that deviated, abridged and contravened the mandatory and substantive provisions of the Constitution of Kenya, 2010 and the 1<sup>st</sup> Respondent's Human Resource Policy Manual. Similarly, the impugned letter instructed the Petitioner's demotion from the Petitioner's **Job Grade 10 to Grade 6** without consultation, contrary to the provisions of **Section 10 of the Employment Act, 2007**.

23. Mr. Muiya urged the court to note that the alleged provision, (**Section 68-(2)-(3) of the Public Service Commission Regulation 2020**) relied upon to support the alleged disciplinary options did not exist, therefore, it was soundly distinct that the impugned action taken by the Respondents was void of any foundation in law. According to counsel for the Petitioner, what is undertaken contrary to law and especially the Bill of Rights as well as the 1<sup>st</sup> Respondent's Human Resource Policy Manual should not be allowed to stand as they are illegal, null and void *ab initio*.

24. Concerning the facts and context of the dispute, Counsel stated that on or about the **30<sup>th</sup> September, 2019**, the Manager of the Supply Chain Management, through a memorandum dated **30<sup>th</sup> September, 2019**, and referenced **TF/CO/F/19/057**), requested for variation of tender **TF/04/2017-2019** to the Chief Executive Officer which request was accordingly approved and pursuant to such approval and review of the tender documents which at the Special Conditions allowed for price variation upon discussion between the Successful bidder and the Tendering entity, the Petitioner prepared an addendum that provided for the approved variation.

**25.** According to counsel, from review of the management structure, it was derived that the manner in which the variation was executed and conducted followed the hierarchy and ranking system provided, with particular regard to the chain of command which demonstrated that the Petitioner received and abided by the instructions of her superiors but surprisingly, upon the Petitioner abiding by the instructions of the superior and relevant officers who had received, considered and accepted the request for variation, the Petitioner was subjected to a severely flawed and irregular disciplinary process that totally abridged the requisite provisions and parameters within which a legitimate valid process ought to abide by.

**26.** Mr. Mulyati further submitted that the interdiction was executed contrary to the provisions of **Clauses 11.9.9 and 11.9.10** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual wherein the Petitioner was summoned through email correspondence by an Internal Auditor, Mr. Abraham Koronek, to attend before the Audit & Risk Committee of the Board pursuant to the issuance of a Notice To Show Cause and that during his attendance before the Audit & Risk Committee of the Board, the Petitioner had no notification of the agenda of the meeting and had not been supplied with any information of the alleged offences that were the subject of the meeting; therefore, the Petitioner attended the meeting in complete unawareness of that which she had been asked to answer to but was still placed on her defense. Further, that the purported interdiction letter did not contain provision for the Petitioner to report to a supervisor contrary to the provisions of **Clause 11.12.3** of the 1<sup>st</sup> Respondent's Human Resource Policy Manual.

**27.** It was further submitted by Counsel that during the entire impugned disciplinary process, the Human Resource Advisory Committee did not produce and/or supply a report contrary to the provisions of Clause 11.9.17 of the 1<sup>st</sup> Respondent's Human

Resource Policy Manual that required that the Human Resource Advisory Committee prepares a report consisting of the background information leading to the relevant incident, input from the witness(es), employees response, an analysis of facts, a statement that all the entitlement of the employee have been observed and recommendations however during the entire period of the impugned disciplinary process, the Respondents, contrary to the provisions of Section 11.10.1 of the Respondent's Human Resource Policy Manual, failed to record all relevant material on documentary evidence, record details of any matter that may aggravate or mitigate the matter, sum up the case and record their comments so as to clearly show their findings and opinion on the issues under investigation in view of the evidence on record.

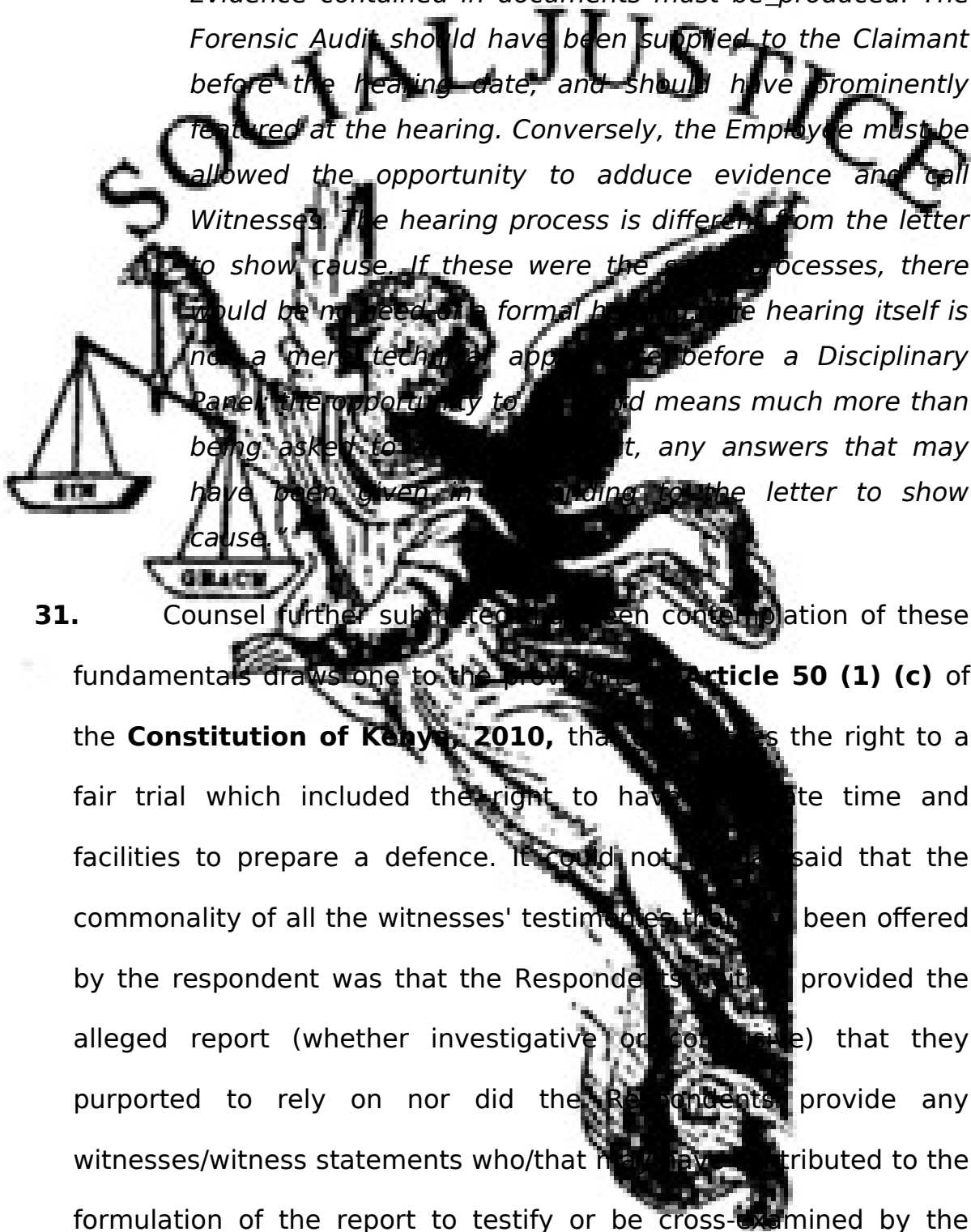
**28.** Counsel submitted that the reported hearings were conducted, void of supply of any evidential materials, an investigative report, witness statements, cross examination of witnesses, logical and an analysis of the evidence and statements and a right to fair hearing contrary to the provisions of Article 50 of the Constitution of Kenya, 2010 and Clauses 11.3.1 & 11.4 of the 1<sup>st</sup> Respondent's Human Resource Policy Manual and that there were no investigations carried out contrary to the provisions of Clause 11.10.1 of the 1<sup>st</sup> Respondent's Human Resource Policy Manual; especially, establishing and recording issues for investigation, giving the Petitioner/Applicant the opportunity to produce relevant documents, call and examine witnesses, sum up the case and record their comments so as to clearly show their findings and opinion on the issues under investigation in view of the evidence on record. Cogent items that include hearing witnesses' testimonies.

**29.** According to Mr. Muyuri, the respondent's witness Mr. George Machooka (RW2 (Acting Manager Human Resource Office and Administration) though during cross-examination indicated in his

witness statement that the Respondents followed due procedure in undertaking the disciplinary process, was unable to illustrate and/or demonstrate the framework, authority and procedure within which such impugned actions were enabled and further that upon being queried by the Petitioner's counsel as to whether there were any investigations that were conducted prior to the Petitioner being taken through the impugned disciplinary process, he categorically stated that no investigations had been conducted.

30. Mr. Muyuri therefore submitted that the main issues for determination in the petition was the procedural integrity of the disciplinary process. In that regard, counsel submitted that it was commonplace and had been judicially enunciated by the Honourable Court that **Section 45 of the Employment Act, Capp 226** of the Laws of Kenya provide for the derived minimum standards that an employer ought to comply with in order for a disciplinary process to be regarded as fair and particularly, **Section 41 (2)** provided that it was mandatory for an employer to ***hear and consider*** any representations that an employee may have with regard to the issue at hand and **Section 42 (c)** provided that termination of employment would be fair if the employment was terminated ***in accordance with the procedure.*** Accordingly, from these derivations, it became apparent and monumental that the termination of employment should only be upheld where the disciplinary process had been undertaken in a procedurally fair manner. In this respect, counsel relied on the case of **Postal Corporation of Kenya v Andrew K. Manui [2019] eKLR** where the Court of Appeal stated:

*“An Employer should not merely recite the grounds listed in a letter to show cause and then ask the Employee if there is anything to add or subtract; the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those*



*allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers' Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical application before a Disciplinary Panel; the opportunity to be heard means much more than being asked to show cause, any answers that may have been given in responding to the letter to show cause.'*

31. Counsel further submitted that in contemplation of these fundamentals draws one to the provisions of **Article 50 (1) (c)** of the **Constitution of Kenya, 2010**, that guarantees the right to a fair trial which included the right to have adequate time and facilities to prepare a defence. It could not be said that the commonality of all the witnesses' testimonies that were offered by the respondent was that the Respondents had provided the alleged report (whether investigative or otherwise) that they purported to rely on nor did the Respondents provide any witnesses/witness statements who/that may have contributed to the formulation of the report to testify or be cross-examined by the Petitioner during the hearings. It was therefore the petitioner's submission that the Respondents failed to adhere to the mandatory

dictates **Article 50 (1) (c)** of the **Constitution of Kenya, 2010** by failing to provide adequate facilities to the Petitioner in order to mount a defence.

**32.** According to Mr. Muryani, in severe contravention of these fundamental rights, the Respondents had at **paragraphs 17 (f) & (g)** of the Replying Affidavit, dated the **21<sup>st</sup> August, 2021**, admitted that the hearing proceeded on the basis of logical proof and without an investigation report as the same was considered unnecessary in the opinion of the Respondents and stated that it was the responsibility of the Petitioner to request the employer to provide any statements that were relied upon and for the Petitioner to request to be allowed to cross-examine any witness that may offer adverse testimony in this regard Counsel relied on **section 4 (3) (b)** of the Fair Administrative Action Act, 2015 which imported the rules of natural justice by providing

*"...Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision the opportunity to be heard and to make representations in that regard."*

**33.** Accordingly, the 'opportunity to be heard' incorporated the elements of a fair hearing and a demanded that the employer ought to present the employee with full and complete information of all that which forms the allegation against them in order for the employee to make any representations with full knowledge of that which is relied upon by the employer. In this respect counsel relied

on the decision of the Supreme Court of India, in **Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555** where it was stated thus:-

*"...an opportunity of hearing must be given, and that opportunity must be reasonable.*

**34.** Counsel submitted that the alternative and without prejudice to the foregoing contestations, that it could be inferred that for the Respondents to hold the view that an investigation was unnecessary in a matter that resulted in the contractual amount varied in the sum of millions of Kenya Shillings, with due care and diligence in its resolution, then the Respondents had formed a predetermined outcome/mindset which, yet again, deprived the Petitioner of the benefits of a procedurally fair process of hearing and trial.

**35.** Regarding the merits of some of the reasons for terminating the petitioner's service, Counsel submitted that the gravamen of the allegations levelled by the Respondents was the preparation of an addendum to a contract between the 1<sup>st</sup> Respondent and the firm of Ms. Centric Limited which had the effect of varying the contractual price of the contracted service by an amount of **Kenya Shillings Twenty Eight Million Nine Hundred Thousand Five Hundred and Ninety Two and Five Cents (Kes. 28, 900, 592.05/-)**. Amongst the allegations was that drafting the contracts and/or addendums by the Petitioner, being the Principal Legal Officer of the 1<sup>st</sup> Respondent, deviated/transferred the parties away from the standard and technical conditions of the bid

documents against the provisions of the Public Procurement and Disposal Act.

**36.** For context, as viewed from the correspondence dated the **27<sup>th</sup> August, 2019**, at **page 144 of the Petition**, the firm of Ms. Centric Limited wrote to the 1<sup>st</sup> Respondent's Chief Executive Officer requesting for a variation of the contract amount and stated the reason for such request to be due to various delays during the implementation of the revenue management system, the consultants incurred extra costs; therefore, the contractual amount ought to be varied to include the same. This variation was valued at **25% of the contractual price, realising an additional amount of Kenya Shillings Thirty Six Million One Hundred and Twenty-Five Thousand and Nine Hundred and Ninety-Nine (Kes. 36, 125, 999/-).**

**37.** At **pages 60 & 61 of the Petition Bundle**, the correspondence dated the **30<sup>th</sup> September, 2019**, emanating from the **Manager Supply Chain Management** to the **Chief Executive Officer**, discloses the request for variation from the supplier, explained the reason for the attendant delay and recommending a variation of **20% (Kenya Shillings Twenty-Eight Million Nine Hundred Thousand Five Hundred and Ninety-Two and Five Cents (Kes. 28, 900, 792.05/-)** so as not to exceed the **25%** threshold. On the right margin of this correspondence, it is viewed that there are writings, a signature and the date **30/9/19**; which during the examination of

the Petitioner, it emerged that the writing is a shortened form of the word **'approved'**, the signature belonged to the then Chief Executive Officer and the date disclosed therein demonstrated the date which approval for the requested variation was issued. According to counsel, it was the testimony of the Petitioner, that it was the practice at the 1<sup>st</sup> Respondent that the relevant officers would normally indicate their instructions and preferred courses of actions on the margins of memoranda and correspondences addressed to them.

**38.** During cross-examination, the Petitioner provided a narration of the manner in which procurement and/or variation processes were undertaken at the 1<sup>st</sup> Respondent. In this account, **RW-1** stated that the user department would initiate the request for a variation whereupon the Chief Executive Officer would appoint a committee to offer justification for the variation in order for the Chief Executive Officer to consider validity thereof and consider whether to approve or reject it. Further, it was **RW-1's** testimony that the Chief Executive Officer was the final authorizing person on behalf of the Respondents and that it was impossible for the Petitioner to have undertaken the variation by herself without the involvement of other senior ranking and/or instructing staff members. According to Mr. Muyuri, the administrative hierarchy disclosed that the Petitioner as being the Principal Legal Officer of the 1<sup>st</sup> Respondent hence ranked as one of the Managers of various departments. Accordingly, it was incumbent upon the Petitioner, upon receipt of

an approved memorandum and/or correspondence for variation, to draw an addendum that disclosed that which had already been requested, discussed and agreed by her superior officers.

**39.** Further, the variation and extension of the said Tender was in compliance with the provision of **Section 139 (2) of the Public Procurement and Asset Disposal Act** which allowed the accounting officer to approve requests for variation by a maximum of **twenty-five (25%) per centum**. The variation did not emerge, to the Petitioner, as an irregularity during the period when she prepared the addendum. It was the Petitioner undertaking her duty to prepare the addendum and for variation as required by her superiors upon the alteration of terms of the contract, the amount and/or percentage of variation was not randomly forged in the Petitioner's mind, but rather it was compliant with the recommendations made by the Manager of the Procurement Management as evident in the correspondence contained on page 60 of the Petitioner's Bundle of Documents.

**40.** Considering the variation had been approved by the Petitioner's superiors, the Respondents placed excessive burden upon the Petitioner expecting that the Petitioner should:

- a) verify whether the evaluation committee had been properly formed and whether it recommended the sale of the property formulation which is a reserve of the Chief Executive Officer;
- b) offer a legal opinion where none had been requested from her especially when the request for variation had not been copied to her department, and
- c) decline to prepare an addendum for a variation that had been

clearly approved by the Chief Executive Officer; the final authority on behalf of the Respondents.

**41.** Worthy of note, the Respondents had at no point alleged or advanced any argument to the effect that the Petitioner was requested to offer a legal opinion on the variation and that the Petitioner declined to do so. According to counsel it was the norm that within an employment environment, an employee would ordinarily undertake the tasks that have been assigned to them by their superiors according to their job description. It was further submitted by counsel that there was no demonstration that any responsibility and/or action being taken was asked upon the Petitioner and the Respondents to justify the allegation that the Petitioner was negligent in her duties.

**42.** The respondent through its Counsel Muthee submitted among others that the issues for determination in the petition were whether the Respondent the respondent terminating the petitioner's service was in breach of the Clause constitutional rights as provided under article 2(1) & 4, 10(1) & 19(1) & (3), 20, 21, 27, 41, 43, 47, 50, 236 and 259 and whether the petitioner was entitled to the reliefs sought. In this regard counsel invoked the burden of proof and cited the Supreme Court case of **Gwer & 5 others v Kenya Medical Research Institute & 5 others** where that court stated that the Petitioner had the burden of proof in a petition to demonstrate that the Respondents have violated her constitutional rights or that the treatment at the hands of the

Respondent was unconstitutional before the burden of proof can shift to the Respondent. It stated thus:-

*50. This Court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden..."*

*51. In the foregoing context, it is clear that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court in discharge of the evidential burden establishing their argument. The hands of 1<sup>st</sup> respondent as unconstitutional. Only if the threshold transcended would the burden fall to the 1<sup>st</sup> respondent to prove the contrary. In the light of the turn of events at both the Superior Courts below, it is clear to us that, by no means, the burden of proof shift to 1<sup>st</sup> respondent.*

**43.** Counsel further submitted that section 47(5) of the Employment Act ("**the Act**") provided the burden of proof in employment matters as follows:

"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."

**44.** Section 43 of the Act further provided that an employer is required to prove the reason for terminating an employee's employment; failure to do so would result in such termination being deemed to have been unfair. Accordingly, the Petitioner had the burden of proof to demonstrate that the Respondents violated her constitutional rights to equality and freedom from discrimination; a

fair hearing; fair administrative action; fair labour practices and Economic and Social rights.

**45.** Concerning allegation of breach of the Petitioner's right to fair administrative action, Mr. Muthee submitted that the relevant provisions of the Constitution and the Fair Administrative Action Act provided for comprehensive guidance on the procedural fairness and substantive justification in administrative action, which was also echoed in the Employment Act. Whether the termination of employment was procedurally fair.

**46.** In **Pius Machafu vs. Lukenya & London Security Guards Limited**, the Court of Appeal in paragraph 13 of its judgment, stated that:

*"A mandatory and elaborate process is then set up under section 41, requiring notification to be given before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. (Emphasis added).*

**47.** Further in the case of **Anthony Mwangi Njiru v Malindi Water & Sewerage Co Ltd** the Court expressed its opinion on procedural fairness as provided in Section 41 of the Employment Act in observing thus.

*"And what does Section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance, or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the*

*employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.” (Emphasis added).*

**48.** Mr. Nothee further submitted that Respondent's Human Resource Policy and Procedures Manual dated January 2018 (hereinafter "HRP") provides a disciplinary procedure, which the Respondent must comply with in handling any disciplinary issue. It states that disciplinary issues will be dealt with promptly and finalized within a period of 65 months. The Petitioner confirmed in cross-examination that the entire disciplinary process was concluded within the stipulated period. Further, in the event of a gross misconduct offence, the manual provides that the employee should be provided with a show cause letter explaining why severe disciplinary action should not be meted against her, stipulating particulars of alleged misconduct and inviting her to respond in writing to the allegations and the grounds, in relation to which she relies to exonerate herself /herself.

**49.** According to Counsel, the Petitioner in cross-examination, confirmed that she received a show cause letter dated 27<sup>th</sup> July 2020 from the Human Resource and Administration Officer and was allowed to respond to the same. He therefore submitted that the notice to show cause letter constituted prior and adequate notice of the nature and reasons for the proposed administrative action against the Petitioner as per the requirement of fair administrative action. Further, the manual provided for the interdiction of an officer

where the proceedings may lead to dismissal. It was not in dispute that the Petitioner was interdicted per the letter dated 27<sup>th</sup> July 2020 by the Manager Human Resource and Administration in accordance with the HRPP, which provided:-

Further to this and in line with the Tourism Fund HR manual clause 11.12.2 and 11.12.3, you are hereby interdicted with immediate effect until such a time when this matter is concluded."

**50.** The Petitioner was not required to report to the supervisor as there was no agreement in accordance with HRPP and that the Petitioner's misleading letter subpoenaing, asserting that she was interdicted through email from Graham Kiptoo Kiptum, the internal auditor, yet it was mentioned in invitation to the Board Audit Committee on 19<sup>th</sup> June 2020, was the commencement of the disciplinary process. The manual also provided that an officer should be given a reasonable opportunity to respond to the charges against him/her, and the period within which response should be specified in the statement. The 1<sup>st</sup> Respondent's show cause letter to the Petitioner complied with this requirement as particulars of charges are well stipulated and there is no obligation to the Petitioner to respond to the show cause letter within seven (7) working days. The Petitioner also testified and confirmed in cross-examination that she was allowed to respond and responded to the show cause letter vide her letter dated 5<sup>th</sup> August 2020<sup>1</sup> before attending the hearing before HRAC.

**51.** The manual further provided that the order should be presented to the 1<sup>st</sup> Respondent's HRAC to deliberate, conduct a disciplinary hearing and make recommendations upon expiry of the period specified in the show cause, and prepare a report. It was indisputable that the Petitioner was invited and attended a

disciplinary hearing in person before HRAC on 19<sup>th</sup> October 2020, as confirmed by both PW- 1 and RW-2, and was provided with an opportunity to be heard and make representations per the requirements of the Fair Administrative Action Act. In re-examination, RW-2 confirmed that the Petitioner declined the opportunity to attend the proceedings with a lawyer or an employee of her choice, proceeded alone to make the appropriate representation.

**52.** RW-1 further testified that the disciplinary hearing proceeded as a document-only hearing and he produced the minutes and report of the HRAC and SLC which were marked as the Respondent Exhibits no. 3 and 4. The Respondent objected as such, given that for the variation to be considered, an accounting officer would have appointed an evaluation committee in writing, the evaluation committee upon deliberation would have prepared and provided the supply chain with an evaluation report and its minutes, which would subsequently inform the professional decision by the supply chain, in the absence of which demonstrated that the process was not followed.

**53.** Counsel therefore contended that while the administrative process provided that a party should be given notice of their right to cross-examine, this right was only available where it was applicable. The right to cross-examine was not available in the present circumstances as there were no statements written or witnesses called and that an investigation report would only be available when investigations were commissioned by HRAC per clause 11.9.14 of the manual, which was not the case in the matter, while the Petitioner submitted at paragraph 9(f) that she was not provided with the materials that were to be relied upon, she has failed to disclose to the Court that she had all the documents relating to the variation of the Tender and had annexed them to her response

dated 5<sup>th</sup> August 2020 to the show cause letter. Counsel submitted that the entire evidence against the Petitioner was in preparing an addendum without an existing evaluation report and extending the contract term, which was not requested for by the contractor and for an expired contract.

**54.** According to Counsel, the Petitioner had not been able to point out any information, materials, and evidence, which the Respondents relied upon in making the decision for taking the administrative action which were not available to her. Accordingly, the Petitioner had failed to demonstrate that the Respondents were in breach of her right to a fair trial, *inter alia*, the right to have adequate time and facilities for her defence and further that the issue before the disciplinary hearing and before this Court simply turned on the lack of availability of documents, the evaluation report prepared by the evaluation committee approving the variation of price and extending the term of contract, which was not in existence, and which the Respondent did not produce. The Petitioner's submission that the Respondent CEO approved the variation by indicating the initials was untenable given that the Petitioner did not call the CEO, and was left to the Court to speculate. In any case, the purported CEO approval of the variation of the contract price and extending the contract term without an evaluation committee or an evaluation committee report did not sanitize the procedural lapses or validate the variation.

**55.** In sum total, Mr. Muthee submitted that the Petitioner's gross misconduct was an offence of omission and the only conclusion the Respondents could arrive at based on the absence of the appointment of an evaluation committee and an evaluation report supported a finding that the Petitioner was guilty of having improperly performed her work/gross misconduct. With regard to the cited case of **Postal Corporation of Kenya vs. Andrew K.**

**Tanui 2019 Eklr**, Counsel submitted that it was distinguishable from this case, as PCK was found to have denied the employee material documents in their possession, which would have assisted the Claimant in preparing his defence, while in the instant case, the Petitioner was already in possession of all the requisite documents.

**56.** Mr. Muthee further submitted that the Petitioner had raised an issue that the disciplinary action was anchored on a non-existent provision of the Public Service Regulation 2020, but she did not deny that clause 11.3 of the HRPP provided for dismissal, while clause 11.4 of the HRPP provided for reduction in rank of seniority and termination of employment as means of punishment. The 1<sup>st</sup> Respondent, in citing the Commission of the Public Service Commission regulation, did not apply the proposed punishment to the Petitioner, which was provided for in the HRPP. Further, the Petitioner appealed the decision of the GEC vide a letter dated 23<sup>rd</sup> November 2020 and appeared for the hearing of the Appeal on 8<sup>th</sup> December 2020. She rendered a decision on the appeal vide a letter dated 21<sup>st</sup> December 2020, finding the Petitioner guilty of various offences. The Petitioner's promotion was annulled, having been made outside the law and without the approval of the board. The Respondents were able to demonstrate in clear determination that the Petitioner was not qualified for the position of principal legal officer grade 4 as she did not have a master's degree qualification, a management course lasting at least 4 weeks, at least 8 years of work experience, or at least 3 years' experience in a supervisory role. Counsel therefore submitted that there existed a valid reason for termination of the petitioner's services and relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited** where it was stated thus:-

*"...Under subsection 43 (2) of the Employment Act, 2007, 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 services of the employee. However, this reason or these reasons must be addressed before the termination notice is issued and subjected to a hearing to establish if the employee has a defence that is worth consideration. The reasons should never be given after the termination has taken effect. This would be an outright negation of the purpose, intent, and validity of any reason or reasons an employer may have against the affected employee."*

**57.** The 1<sup>st</sup> Respondent's reasons to terminate the Petitioner were captured in the letter dated 21<sup>st</sup> December 2011 which was making an assumption that the evaluation committee met and discussed contract variation based on the memorandum of the Petitioner allegedly claimed stated there was a negotiation between the 1<sup>st</sup> Respondent and the contractor, preparation of a variation which had not been recommended by the evaluation committee and was above 10% cap set on the bid documents; a finding that it was not advisable to witness the contract for the Respondent and the contractor; unconvincing defence that the appeal did not follow the required procurement process. Counsel for the Respondent relied on the case of **Thomas Sila Nzivo v Bamburi Cement** where the Court observed as follows:

*"The Respondent had reasonable and sufficient grounds to suspect the Petitioner of having acted to the substantial detriment of the Respondent and its property and was justified in summarily dismissing the Petitioner under Section 4(1)(g) of the Employment Act 2007. The Employer was not required to have conclusive proof of the Claimant's involvement, it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Petitioner protested, he received such oil all gave the Respondent reasonable and sufficient grounds to act against the Claimant."*

**58.** Counsel therefore submitted that the Respondent had

sufficient and reasonable grounds to terminate the Petitioner's employment. In sum, the Petitioner's employment was terminated on account of valid reasons which were genuinely believed to exist, and which were proved, and have been admitted before this Court.

**59.** Regarding whether the Petitioner was entitled to the reliefs sought counsel submitted that the Petitioner's case was hinged on a single document, the lack of an investigation report, which the Respondents have clarified did not exist as no investigation was conducted, hence no investigation report was prepared. It was therefore submitted that the petitioner failed to discharge her burden of proof by failing to prove before the Court that her rights under Article 3, 19, 19, 20, 21, 22, 23, 24, 28, 41, 47, 50, 159, 162(2), 165(b), 232, 236 and 238 of the constitution were violated as alleged in the Petition. Based on the foregoing, the Petitioner's termination was both substantively justified and procedurally fair, and no relief is warranted as the petitioner has failed to demonstrate how her constitutional right was violated.

### **DETERMINATION AND DISCUSSION**

**60.** The Court has extensively reviewed and considered the petition as filed, the prayers sought, the respondent's response and submissions by counsel for both parties and takes the view that the main issues to be considered in order to determine the dispute herein are:-

- a. Whether in terminating the petitioner's service, the respondent's violated her constitutional rights as enumerated in the petition;**
- b. Whether the reasons for terminating the petitioner's service were valid as required under section 45 as read together with sections 43 and 47(5) of the Employment Act and whether in carrying the termination, the respondent**

accorded the petitioner due process as required under section 41 of the Employment Act, section 4 of the FAA and articles 40, 41 and 47 of the Constitution and;

**c.** If successful, what remedies are the petitioner entitled to?

**61.** On the issue whether in terminating the petitioner's service, the respondents' violated her constitutional rights as enumerated in the petition, the Court will seek guidance in the often cited case of **Anarita Karimi Njeri v AG [1979] KLR 154** where it was stated as follows:-

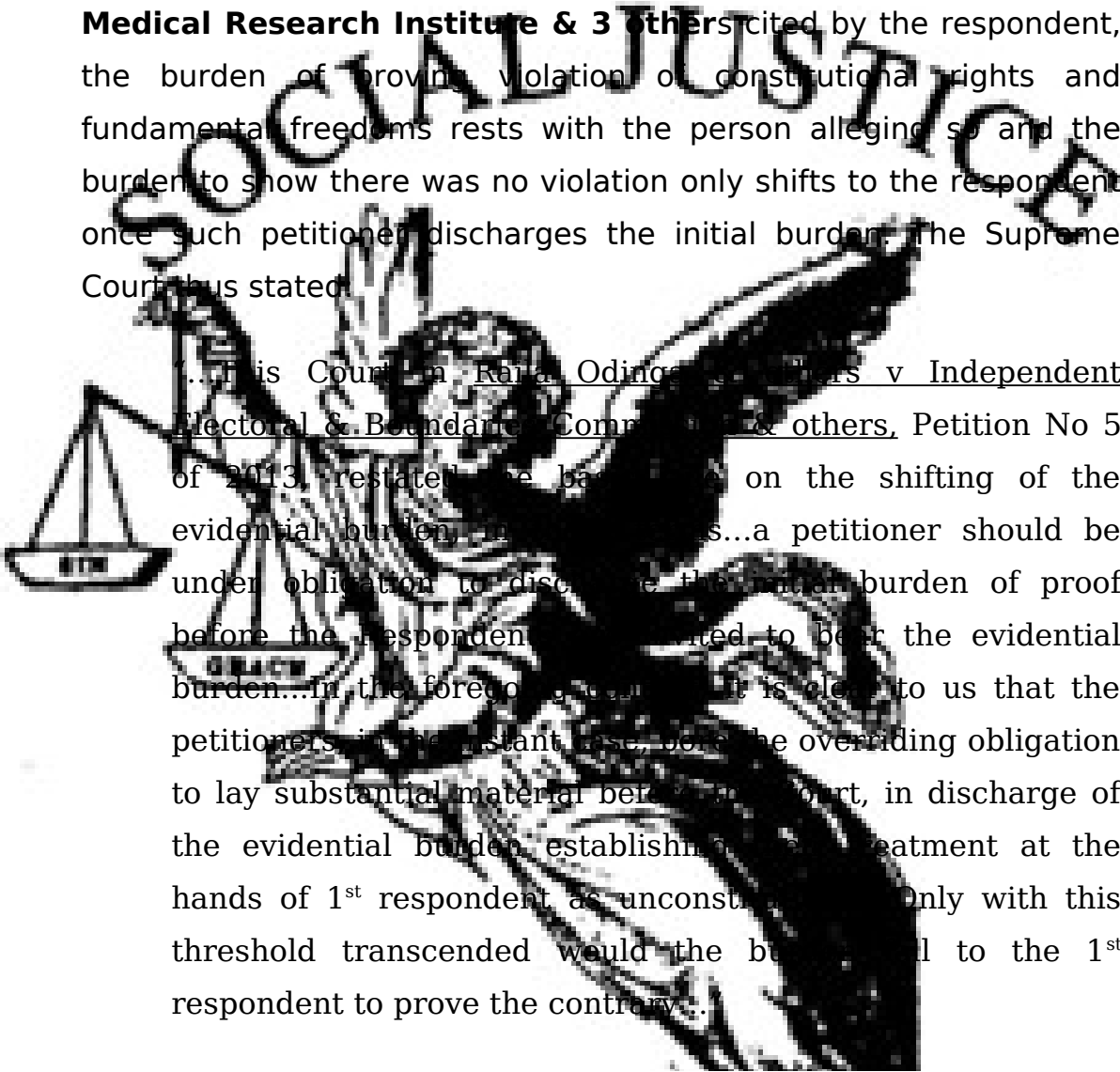
"...we would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed"

This was further cited in **Kamlesh Pattni v The AG [2001] KLR 264** and **Mumo Matemu -vs- Trusted Society of Human Right & 5 others [2013] eKLR**. Further the Supreme Court in **Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256)** stated that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. It was also stated in the South African case of **Sports and Recreation Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501** as follows:-

"...Courts will not normally consider as a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach

of the Declaration of Rights..”

**62.** Further as was held in the case of **Gwer & 5 others v Kenya Medical Research Institute & 3 others** cited by the respondent, the burden of proving violation of constitutional rights and fundamental freedoms rests with the person alleging so and the burden to show there was no violation only shifts to the respondent once such petitioner discharges the initial burden. The Supreme Court has stated:



...This Court in Kari Odingo & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic principle on the shifting of the evidential burden, in the following terms...a petitioner should be under obligation to discharge the initial burden of proof before the respondent is required to bear the evidential burden...In the foregoing circumstances it is clear to us that the petitioners in the instant case bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing the treatment at the hands of 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended would the burden fall to the 1<sup>st</sup> respondent to prove the contrary..

**63.** The petitioner herein was terminated from the service of the respondent on the grounds that she executed duties conferred to the procurement function, which was a preserve of the Manager, Supply Chain Management, in total disregard of the duties of the accounting officer, the procurement function, and the evaluation committee to recommend and approve a price variation and extend the contract term. That is to say, she was accused of preparing an addendum to the contract for supply, implementation and commissioning of an integrated revenue management system between the 1st Respondent herein and Centric Limited , extended

the contract term which had since lapsed on 12th February 2019; caused a price variation outside the contract term which had not been recommended by the evaluation committee or approved by the accounting officer ; or founded on the consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation report issued by the Central Bank of Kenya.

64. It was not contested that under **section 139 (2) of the Public Procurement and Asset Disposal Act**, an accounting officer could approve requests for variation by a maximum of twenty-five (25%) per cent. Therefore, any approval beyond the capping as provided by the Act would be unlawful. The approval further should be done by the accounting officer. The petitioner alleged that she received the approval, including that of the accounting officer (the CEO) according to her, the **Manager Supply Chain Management** wrote to the **Chief Executive Officer**, disclosing the request for variation from the supplier, explaining the reason for the attendant delay, recommending a variation of only **20% (Kenya Shillings Twenty Eight Million Nine Hundred Thousand Five Hundred and Seventy-Two and Five Cents (Kes. 28, 900, 792.05/-)** so as not to exceed the 25% threshold and that on the right margin of the correspondence, it was viewed that there were writings, a signature and the date **30/9/19**; which during the examination of the Petition, it emerged that the writing was a shortened form of the word **'approved'**, the signature belonged to the then Chief Executive Officer and the date disclosed therein demonstrated the date which approval for the requested

variation was issued.

**65.** The petitioner is an Advocate of the High Court of Kenya and the amount of the variation being Kenya Shillings Twenty Eight Million Nine Hundred Thousand Five Hundred and Ninety Two and Five Cents (Kes. 28, 900, 592/05) did not ( at least to the court) look like *pocket change*. Due diligence therefore required of her to confirm with the CEO that the writings should be interpreted as the shortened form of the word *approved* and not *approve* meant that. She ought not to have left the issue to speculation and more so where the issue of variation of a statutory matter regulated by section 139 (2) of the Public Procurement and Asset Disposal Act.

**66.** Concerning the duty of a lawyer, Lord Griffiths in the English case of **Ketterman v Hansel Properties Ltd (1988) 4 All ER 769**, Lord Griffiths stated that:

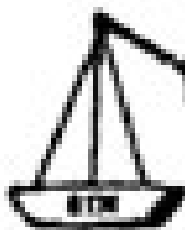
“Legal business should be conducted efficiently and we can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more lenient era. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads.”

**67.** Section 43(2) of the Employment Act provides that 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 services of the employee. Further, 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**, Justice (Prof.) J.B Ojwang' stated 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 now often cited case of **British Leyland UK Ltd v. Swift [1981]IRLR 91** stated that:-



'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 was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

**68.** From the foregoing it emerges that it is the work of the Court to second guess management decisions to terminate the service of an employee. Management must be granted the decisional independence in the control and discipline of its employees. If termination of service is the only reasonable measure in the light of the infractions by an employee, the court ought not to interfere since it is not within the realm of the court as an adjudicator of an employment dispute to substitute its sense of reasonableness with that of an employer who in most cases is more concerned with the efficiency in operations and staying afloat in the

ever competitive business world.

**69.** The petitioner complained that she was not provided with any investigation report and no witnesses were called to give evidence on the allegations against her and provide her with an opportunity to cross-examine them. In response to these complaints, the respondent stated that since the disciplinary issue arose over extension of the tender which had expired and the revision of the tender fee without the requisite approval, no investigation was necessary hence no investigation report. Besides, these documents were in the possession of the respondent. Further, at no point during the disciplinary hearing did the petitioner ask for the documents and provide evidence during the trial. She did so and was refused.

**70.** The Court has taken the matter for an extensive review and consider the issues raised in the petition in order to determine whether the petitioner has adequately demonstrated that the respondent in terminating her service violated her constitutional and statutory rights as protected in the constitution, the FAA and Employment. It is the Court's view that the grounds raised in the petition do not meet the threshold to merit to be addressed by the court as violation of constitutional rights and consequential orders sought thereunder. The complaints in the court's view are mundane employment disputes which are normally addressed by the Employment Act and consequential employment contracts and HR and Policy Manuals. The Court does not find itself confronted by any complaint whose remedy depends only on the Constitution. The

petitioner has not demonstrated that the reasons for termination of her service were so flimsy and the conduct of the respondent in carrying out the termination was so egregious that it removed the conduct from an ordinary process of termination of employment and to remedy the wrongs if any, perpetrated by the respondent, resort must be made to the constitution.

**71. The foregoing having been said, to answer the questions for determination in this petition as framed under paragraph 54 above, the court finds and holds as follows:-**

- a. The respondent did not violate the petitioner's constitutional rights in terms of reasons and process of termination of her service.**
- b. The respondent had valid and justifiable reasons for terminating the petitioner's service and that the termination was carried out through a fair procedure as provided under section 45 of the Employment Act and the respondent's Human Resources and Policy Manual.**
- c. The petition is therefore found without merit and is hereby dismissed with costs.**

**72. It is so ordered.**

**Dated at Nairobi this 13<sup>th</sup> day of March 2026**

**Delivered virtually this 13<sup>th</sup> day of March 2026**

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**

