

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

PETITION NO. E154 OF 2022

**IN THE MATTER OF ARTICLES 2(1), 3, 10, 22, 31, 35, 47 &
50 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF RULES 4(1), 10(1) & (2), 23 AND 24 OF
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE EMPLOYMENT ACT 2007, LAWS OF
KENYA**

AND

**IN THE MATTER OF THE ACCESS TO INFORMATION ACT
(NO. 31 OF 2016)**

AND

**IN THE MATTER OF TEACHERS SERVICE COMMISSION ACT
2012**

AND

**IN THE MATTER OF TSC HUMAN RESOURCE POLICIES &
PROCEDURES MANUAL FOR SECRETARIAT STAFF 2018**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
10, 22, 35, 47 AND 50 OF THE CONSTITUTION OF KENYA,
2010**

BETWEEN

PAULINE MBITHE KIANDIKO.....
.....PETITIONER

AND

TEACHERS SERVICE
COMMISSION.....RESPONDENT

JUDGMENT

Background

1. The Petitioner was employed by the Respondent in the position of Personnel Officer III with effect from 12th June 1992. She contends that she rose through the ranks to the position of Acting Senior Deputy Director with a salary of Ksh. 215,985.00 per month.
2. During her employment, the Petitioner was attached to the Respondent's pension division. She avers that she worked in the division for 27 years without blemish.
3. The Petitioner avers that sometime in November 2018, she received a letter from the Ministry of Finance requesting her to investigate some fictitious pension claims. She contends that immediately she received the letter, she instructed a Mr. J G Mutwiri to prepare a brief on the suspicious accounts. She further contends that Mr. J G Mutwiri wrote to her admitting existence of the fictitious accounts and stating that two members of staff, Meshack Okong'o and Charles Yegon, were responsible for processing the accounts. She contends that Mr. J G Mutwiri informed her that the two

members of staff had prepared the fictitious claims and passed them to him for further processing in his capacity as their immediate supervisor.

4. The Petitioner avers that immediately she received Mr. Mutwiri's brief, she issued notice to show cause letters to two members of staff, Harriet Mathiu and Meshack Okong'o. She contends that Harriet Mathiu was served with the show cause letter because she was the endorsing officer for Meshack Okong'o. She avers that the notice to show cause letter required the two members of staff to explain why disciplinary action should not be taken against them for negligence of duty.
5. The Petitioner contends that she also issued an internal memo to the Director of Audit requesting him to investigate the fraudulent claims. She further contends that she wrote to the Chief Executive Officer (CEO) of the Respondent to notify her of the fraudulent bank accounts.
6. The Petitioner asserts that Mr. Meshack Okong'o subsequently admitted his involvement in processing the fraudulent claims. She contends that Meshack stated that he was assigned the fraudulent accounts by his supervisor, Harriet Mathiu.
7. The Petitioner contends that despite Meshack Okong'o having admitted to have been behind the fraudulent claims, the Respondent did not take disciplinary action against him.

- Instead, she asserts that it (the Respondent) transferred him (Meshack) from the pensions division to the ICT department.
8. Meanwhile, the Petitioner avers that the Respondent instructed her to proceed on leave for 21 days. She contends that whilst she was serving the leave term, the Respondent invited her to appear before the Vetting Committee on 11th January 2019.
 9. The Petitioner contends that the letter inviting her to appear before the Vetting Committee required her to avail copies of her clearance certificate. However, she contends that the letter did not require her to avail copies of her M-Pesa and bank statements.
 10. The Petitioner contends that whilst she was preparing to appear before the Vetting Committee, she received a telephone call from the Deputy Director (Security) on 7th January 2019 asking her to avail copies of her M-Pesa and bank statements. She avers that the caller informed her that the Vetting Committee wanted to verify some information from the statements.
 11. The Petitioner contends that when she appeared before the Vetting Committee, the chairperson of the Committee confiscated her M-Pesa and bank statements. She contends that this prompted her to write a protest letter to the Respondent. She further avers that by the time she filed this action, the Respondent was still withholding the aforesaid documents.

12. The Petitioner contends that three days after she appeared before the Vetting Committee, the Respondent issued her a letter of interdiction dated 15th January 2019. She contends that she wrote back to the Respondent on 29th January 2019 requesting for a copy of the investigation report and minutes of the meeting held on 11th January 2019 by the Vetting Committee. She further avers that she asked the Respondent to furnish her with a copy of the audit report which was prepared following her request to the Director of Audit to investigate the matter.
13. The Petitioner contends that the Respondent did not respond to her foresaid request. Instead, she avers that it (the Respondent) issued her with four other letters of interdiction dated 30th April 2019, 6th May 2019, 17th May 2019 and 4th September 2019.
14. The Petitioner contends that the several letters of interdiction she was issued with looked alike. She further contends that the Respondent did not explain to her why it took the extraordinary measure of issuing her with the several letters.
15. The Petitioner contends that the Respondent did not invite her to appear before the Investigating Committee before it issued her with the several letters of interdiction. She contends that although she wrote to the Respondent again to demand for a copy of the investigation report which sanctioned the extraordinary measure of issuing her with 5

letters of interdiction, she got no response. She further alleges that the Respondent failed to supply her with the statements which were extracted from Meshack Okong'o J.G Mutwiri and Harriet Mathu despite her request to be provided with them.

16. Citing regulation 116 of the TSC Human Resource Policies & Procedures Manual, the Petitioner avers that the Respondent had an obligation to accord her a fair hearing during the investigations into her case. She contends that the regulation requires the Respondent to: presume her innocent until proven otherwise; inform her of the accusations against her with sufficient specificity; and allow her a chance to appear before the Investigation Committee in person.
17. The Petitioner further contends that the Respondent violated regulation 115(1) of the TSC Human Resource Policies and Procedures Manual when it appointed a Mr. David Ngetich to investigate her case. She contends that this regulation required the Respondent to set up an Investigation Committee comprising of at least three officers who are of a higher rank than her to investigate her case. Yet, she avers that the Respondent tasked Mr. Ngetich who was serving as a Deputy Director, a position that was lower to hers, to investigate her matter.
18. The Petitioner avers that the Respondent wrote to her on 23rd October 2019 inviting her for a disciplinary hearing. She avers that immediately she received the invite, she wrote to

the Respondent on 26th October 2019 seeking clarification on the charges she was to respond to since the accusations in the letter of interdiction dated 15th January 2019 were different from the accusations in the other letters of interdiction.

19. The Petitioner contends that during the disciplinary hearing, the Disciplinary Committee asked her questions which were based on and emanated from various documents which she had requested for but had not been supplied with. These include: the statements by J.G Mutwiri, Harriet Mathiu and Meshack Okong'o; the audit report of November 2018; minutes of the session by the Vetting Committee; the report by the Vetting Committee; copies of M-Pesa and bank statements for 2018; and the investigation reports by Ngetich David for investigations which were carried out in November and December 2018.
20. The Petitioner avers that because the Respondent had not supplied her with the aforesaid documents at the time of the disciplinary hearing, her ability to prepare her defense case was greatly impaired. She avers that even after the court ordered the Respondent to supply her with the impugned documents, it only released some but not all. As such, she contends that she was greatly prejudiced.
21. The Petitioner contends that during the disciplinary hearing, the Respondent's witness (David Ngetich) handed over the investigation report to the Disciplinary Panel. She avers that

the Panel relied on the report (which she alleges was not supplied to her) to reach its verdict.

22. The Petitioner alleges that after her dismissal from employment, she lodged an appeal against the decision. She contends that she wrote to the Respondent to reiterate her earlier call for various documents including the minutes of the disciplinary hearing to enable her prepare for her appeal. She contends that whilst the Respondent supplied her with the minutes of the disciplinary hearing, it persisted in its refusal to furnish her with the other documents.
23. The Petitioner contends that her appeal was subsequently dismissed because the Respondent frustrated her ability to prepare for it by withholding the various documents she had requested for. She further contends that although she requested for copies of the record of appeal to enable her to move to court, the Respondent did not respond to the request. She contends that the Respondent only provided her with the documents on 4th April 2023 after she had moved to court.
24. The Petitioner contends that the manner in which the Respondent handled her case violated her rights to: fair administrative action; fair hearing; and access to information. She further alleges that the Respondent conducted the case against her in an opaque manner in violation of the constitutional values stipulated in article 10 of *the Constitution*.

25. The Petitioner asserts that she has suffered loss and injury as a result of the Respondent's conduct. She asserts that she lost the employment benefits she would have earned until her retirement age due to the premature closure of her contract. She further asserts that her integrity has been put to question due to the impugned process. She further alleges that she has been unable to secure alternative employment due to the manner she lost her employment.
26. Consequently, she prays for the various reliefs which have been set out in the Petition including:-
- a) A declaration that the Respondent's actions breached her right to access information under articles 35(1) (b) of *the Constitution*.
 - b) A declaration that the Respondent's actions violated her right to fair hearing under article 50(1) & (2)(c) of *the Constitution*.
 - c) A declaration that the investigation by Mr. David Ngetich violated the constitutional value of transparency under article 10 of *the Constitution* and her right to fair hearing under article 50(1) of *the Constitution*.
 - d) A declaration that the Respondent's actions violated her right to fair administrative action under article 47 of *the Constitution*.
 - e) A declaration that the Vetting Committee's decision to confiscate her M-Pesa and bank statements violated her

- right to privacy under article 31(b) & (c) of *the Constitution*.
- f) An order to quash the five letters of interdiction that were issued to her.
 - g) An order to quash the decisions of the Disciplinary and Appeal Committees by which her employment was terminated on the ground that the decisions were anchored on an investigation report which was prepared by a junior officer to her contrary to the Respondent's policy document.
 - h) An order to compel the Respondent to release her original M-Pesa and bank statements for the year 2018 back to her.
 - i) An order against the Respondent to pay her general damages for unlawfully accessing and withholding her M-Pesa and bank statements.
 - j) An order to reinstate her back into employment without loss of benefits.
 - k) An alternative order that the Respondent pays her compensation for wrongful termination of her contract of service.
 - l) Compensation for violation of her rights to: fair hearing; fair administrative action; privacy; and access to information.
 - m) Costs of the Petition.

27. In response, the Respondent filed a replying affidavit dated 20th September 2023 and further affidavits dated 16th November 2023, 21st November 2023 and 20th May 2024. The affidavits are sworn by the Respondent's officers.
28. The Respondent contends that at the time of the events which resulted in the dispute, the Petitioner was serving as an Acting Senior Deputy Director within in the pension division. It contends that the Petitioner was bound to abide by the law and its policies whilst discharging her duties.
29. The Respondent alleges that on 20th November 2018, it was discovered that the Petitioner had failed to bring to the attention of the Commission Secretary a letter from the National Treasury dated 31st October 2018. The Respondent contends that through the letter, the Ministry of Finance had raised concerns about some retired teachers not receiving their pension payments despite the National Treasury having released the payments through the bank accounts which had been submitted to it (the National Treasury). The Respondent contends that instead of the Petitioner bringing the letter to the attention of the Commission Secretary, she decided to engage the Director of Pensions on the matter informally.
30. The Respondent contends that it only learned of the fact that the National Treasury had written the letter dated 31st October 2018 when it (the National Treasury) did a reminder dated 14th November 2018. The Respondent asserts that

because of the serious nature of the issues which were raised in the letters from the National Treasury, it (the Respondent) issued the Petitioner with a letter of show cause dated 20th November 2018 requiring her to explain why disciplinary action should not be taken against her for insubordination and gross negligence of duty.

31. The Respondent avers that the Petitioner was given a chance to respond to the accusations against her in the show cause letter. It contends that she indeed proffered her response to the letter through her letter dated 27th November 2018.
32. The Respondent asserts that after it received the Petitioner's response, it set up an Investigation Committee in terms of regulation 115 of the Human Resource Policies & Procedures Manual for Secretariat Staff to investigate the matter. It contends that members of the Investigation Committee for the Petitioner's case were the Director in charge of Administrative Services, the Senior Deputy Director in charge of Record Management and Deputy Director in charge of Security. It further avers that the Committee co-opted the Senior Auditor and the Acting Deputy Director in charge of Integrity to provide technical support.
33. The Respondent asserts that although the committee which was set up to inquire into the Petitioner's case was christened as "Vetting Committee", it essentially was the Investigating Committee. It contends that the use of the

term “Vetting” instead of “Investigating” was a matter of semantics since the two terms mean one and the same thing.

34. The Respondent asserts that at the time of the investigations, the Petitioner’s substantive position was that of Assistant Deputy Director. As such, it contends that the Committee members were senior to her.
35. The Respondent contends that the fact that the Petitioner was serving as acting Deputy Director and acting Senior Deputy Director at the time does not mean that she held the positions in a substantive capacity. As such, it contends that it is a misrepresentation for her to insinuate that she was senior to the members of the Investigation Committee. Consequently, it (the Respondent) asserts that the Investigation Committee was set up in compliance with the applicable regulations.
36. The Respondent alleges that the Petitioner was accorded a chance to make her representations to the Investigation Committee. It asserts that she has confirmed this fact at paragraph 12 of her Petition. As such, it contends that her assertion that she was not heard by the Investigation Committee is misleading.
37. The Respondent denies that the Petitioner’s documents were forcibly taken from her. It asserts that the investigation involved several members of staff some of whom were found culpable at the end of the process.

38. The Respondent asserts that the results of the investigation showed that as the person who was in charge of the pension department, the Petitioner bore the uppermost responsibility for the malpractices which were uncovered in the department. As such, it contends that a decision was taken to subject her to disciplinary action alongside other officers.
39. The Respondent asserts that the investigation report it has presented to court is the genuine report which emanated from the investigation process. It thus disputes the Petitioner's assertion that the report was forged to introduce her name.
40. The Respondent asserts that after it was decided that the Petitioner should be subjected to a disciplinary process, she was interdicted from service. It further contends that it made amendments to the letter of interdiction in line with regulation 117(3) of the Human Resource Policies & Procedures Manual for Secretariat Staff which allows it to amend a letter of interdiction in order to correctly capture the charges which have been preferred against an employee. As such, it avers that the Petitioner's contention that she was irregularly issued with several letters of interdiction is misguided and meant to mislead the court.
41. The Respondent asserts that the Petitioner presented at least three responses to the accusations against her before her case was heard by the Disciplinary Committee. It

contends that this demonstrates the fact that she was accorded the opportunity to ventilate her case.

42. The Respondent asserts that the Petitioner was invited for a disciplinary hearing which she attended and presented her case. Further, it contends that she was allowed a chance to cross examine the witnesses who testified against her.
43. The Respondent asserts that after the disciplinary hearing, the Petitioner was found culpable of the accusations against her. It contends that the Disciplinary Committee, inter alia, found that she had abdicated her duties and had failed to draw the attention of the Commission Secretary to serious information which she had received. Consequently, it contends that her services were terminated.
44. The Respondent contends that the Petitioner was not satisfied with the decision and applied for review. However, it contends that she still lost the case.
45. The Respondent denies the Petitioner's contention that it failed to supply her with various documents to enable her to prepare her case both at the Disciplinary and Appeal Committee stages. It contends that the Petitioner was aware of the accusations against her and some of the documents she alludes to were either non-existent or not in its possession and control. For example, it contends that the statements recorded by the DCI were not in its (the Respondent's) possession and control. Further, it (the

Respondent) asserts that the Petitioner did not raise this grievance in her appeal.

46. The Respondent maintains that it supplied the Petitioner with all documents which were within its power and control. It refers to an email dated 5th April 2023 through which it shared some documents with the Petitioner following an order by the court to support its contention that it supplied her with the documents she required.
47. In response to the Respondent's reply, the Petitioner asserts that the Committee which the Respondent set up on 7th January 2019 was a Vetting Committee. She reiterates that no Investigation Committee was set up to inquire into her case.
48. The Petitioner contends that although she appeared before the Vetting Committee on 11th January 2019, the said Committee did not interrogate her on her case. She asserts that all that the Committee did was to pick her documents from her.
49. The Petitioner contends that the report which the Respondent purports to be by the Vetting Committee is falsified. She asserts that the report which the Vetting Committee prepared is the one which was produced in ELRC Petition No. 072 of 2021 between Florence Mumo and Teachers Service Commission.
50. The Petitioner alleges that the original report did not contain her name as one of the persons who were to be interdicted.

Yet, she alleges that the doctored report introduced her name in the list of persons to be interdicted.

51. The Petitioner disputes the Respondent's assertion that she was subjected to investigations before she was interdicted. She alleges that the only investigation which was carried out in her case was the one by David Ngetich on 30th March 2019 as per the report at page 64 of her bundle. She further asserts that the report was only shared with her advocates on 5th April 2023.
52. The Petitioner reiterates that Mr. David Ngetich did not invite her to defend herself during his investigations. She thus asserts that the investigation report of 30th March 2019 which the Disciplinary Committee relied on to make its verdict was prepared without her input in violation of her right to be heard.
53. The Petitioner contends that the interdiction letter which was issued to her on 15th January 2019 was amended five times in contravention of regulation 117(1)(a) of the Respondent's HR Manual for secretariat staff. She avers that no investigation report was presented to the Respondent's Secretary to justify the amendments.
54. The Petitioner reiterates that the decision to interdict her was rendered before the report by the Vetting Committee was forwarded to the Respondent's Secretary contrary to the Respondent's regulations. She asserts that the Secretary

received the report on 25th January 2019 after she had been interdicted on 15th January 2019.

55. The Petitioner asserts that the letter which appointed the Vetting Committee was specific that the Committee was to hand in its report by 21st January 2019. Yet, the Respondent interdicted her on 15th January 2019.
56. The Petitioner asserts that the report which the Respondent relies on to justify her interdiction was falsified. She asserts that the purported report was never submitted to the Disciplinary Committee which processed her case.
57. During the trial, the Petitioner admitted that she indeed received the letter dated 31st October 2018 from the National Treasury despite the fact that it was addressed to the Respondent's CEO. She contended that whilst it was customary for letters to the Respondent to be addressed to its CEO, they (the letters) would be directed to the appropriate department for action. She averred that in the instant case, the impugned letter concerned her department and that is why she acted on it before raising the matter with the CEO. As such, she denied that her actions were intended to insubordinate the CEO.
58. The Petitioner contended that she wrote to the internal audit department of the Respondent asking that the matter raised in the letter be investigated. She further stated that she did an internal memo to the CEO to notify her of the fraud and the individuals who were involved.

59. The Petitioner also contended that she wrote to the persons who were implicated in the scandal and asked them to explain their role in the matter. She stated that when the actors in the scandal responded, she wrote to the CEO and recommended on the way forward in the matter. However, she said that the CEO did not respond to her letter. Instead, she contended that she was issued with a show cause letter and instructed to proceed on leave.
60. The Petitioner asserted that whilst she was on leave, the Respondent directed her to appear before the Vetting Committee in order to complete vetting tools. She insinuated that before she was sent on leave, the Respondent was developing vetting tools and that the summons related to this exercise. She asserted that she handed over the documents which the Vetting Committee wanted.
61. The Petitioner asserted that she was also asked by Mr. David Ngetich to hand in her M-Pesa and bank statements for January 2018 to December 2018. She contended that she handed over the statements to the Vetting Committee where-after the Respondent issued her with the letter of interdiction.
62. The Petitioner asserted that the Vetting Committee declined to return the aforesaid financial statements despite the fact that they contain her confidential data. As such, she contended that she wrote to protest the decision but to no avail.

63. The Petitioner further asserted that the Respondent did not supply her with various other documents which were material to her case until she moved to court to seek assistance to retrieve them (the documents). Even then, she asserted that it (the Respondent) only released some of the documents.
64. The Petitioner reiterated that the Respondent issued her with the letter of interdiction before it had conducted investigations into the accusations against her. She asserted that this violated its (the Respondent's) policies which require that an employee who has been accused of an infraction should be subjected to an investigation before she can be interdicted.
65. The Petitioner contended that the letter of interdiction alleged that her interdiction was founded on the investigations which were conducted by the Vetting Committee. As such, she stated that she wrote to ask for a copy of the Vetting Committee's report and minutes of the meeting between her and the Committee on 11th January 2019 but got no response.
66. The Petitioner asserted that when she eventually got a copy of the Vetting Committee's report, she realized that the Committee was supposed to have handed in the report on 21st January 2019. Yet, her interdiction was ordered on 15th January 2019 implying that she was interdicted before investigations into her case were completed.

67. The Petitioner stated that after the Respondent issued her with the first letter of interdiction dated 15th January 2019, it (the Respondent) issued her with several other letters of interdiction. She contended that the contents of the letters were different. She thus contended that the interdiction was irregular.
68. The Petitioner contended that investigations in her case were conducted by Mr. David Ngetich who was junior to her in rank. Yet, she asserted that the Respondent's policies required that her case be investigated by an Investigation Panel of at least three persons whose ranks were senior to her.
69. The Petitioner further contended that Mr. Ngetich did not interrogate her before he prepared his report. Yet, she contended that it is this report which was used by the Disciplinary Committee to terminate her services. As such, she reiterated her case that she was denied the right to a fair hearing.
70. The Petitioner asserted that after she was interdicted from work, the Respondent invited her for the disciplinary hearing. She asserted that upon receiving the invite, she wrote to demand for copies of various documents including the Vetting Committee's report, witness statements by various employees who were to testify against her, minutes of the meeting between her and the Vetting Committee, the audit report, the Ant-Banking Fraud report and the bank and M-

Pesa statements which had been confiscated from her. However, she contended that the Respondent did not supply her with the documents until after she moved to court over the matter.

71. The Petitioner contended that by the time of the disciplinary hearing, she had not been supplied with any of the documents which she required to prepare her defense. She alleged that the only document she had at the time was the last letter of interdiction.
72. The Petitioner stated that Mr. David Ngetich appeared before the Disciplinary Committee as a witness and tendered his investigation report at the hearing. She averred that she had not been given a copy of the report by this time. Despite this, she contended that the Disciplinary Committee relied on the report to terminate her services.
73. The Petitioner reiterated that after her services were terminated, she called for the documents she had been pursuing in order to prepare for her appeal but her request was not granted. As a result, she contended that she was forced to proceed with the appeal without the benefit of the documents with the exception of the record of proceedings before the Disciplinary Committee which she was given.
74. The Petitioner stated that nothing much transpired during the appeal. She asserted that the appeal session was a mere formality. She confirmed that she lost the appeal.

75. The Petitioner stated that the Respondent generated several investigation reports in respect of her case. She alleged that one of the reports which did not mention her was tendered in evidence in another case (ELRC Petition No. 072 of 2021).
76. The Petitioner stated that the second report was generated in January 2019. She alleged that this report had no findings and was not submitted to the CEO. She stated that although the report mentioned a number of officers as having been involved in the scandal in her department, her name was not mentioned. Despite this, she contended that the report recommended that she should be subjected to disciplinary action.
77. In cross examination, the Petitioner confirmed that her substantive position within the Respondent's rank and file was that of Assistant Deputy Director. However, she stated that at the time of the disciplinary process against her, she was serving as Acting Senior Deputy Director.
78. At some point, the Petitioner insisted that she was serving as a substantive Senior Deputy Director when she was interdicted. However, she conceded that she did not have evidence of appointment to that position.
79. The Petitioner insisted that Mr. David Ngetich was her junior in rank. She asserted that she knew he was a security officer but did not know if he was a Deputy Director. However, she conceded that the position of Deputy Director was senior to that of Assistant Deputy Director. She further conceded that

Mr. David Ngetich was a Deputy Director, Security Services after she was shown his letter of appointment.

80. The Petitioner also conceded that the letter dated 31st October 2018 from the National Treasury was addressed to the Respondent's CEO. She confirmed that she was not the Respondent's CEO when she received the letter which she conceded raised serious issues of fraud.
81. The Petitioner contended that she drew the CEO's attention to the letter the same day she received it. However, she conceded that she did not have evidence to back this assertion.
82. The Petitioner further conceded that the reminder from the National Treasury dated 14th November 2018 was received by the Respondent's CEO. She further conceded that the reminder did not suggest that there had been a response to the letter dated 31st October 2018 despite her contention that she had responded to it.
83. The Petitioner confirmed that the Respondent issued her with a letter of interdiction dated 15th January 2019. She conceded that regulation 117 (3) of the Respondent's Human Resource instrument entitled it to amend a letter of interdiction and that the provision did not limit the number of amendments that can be made to the letter.
84. The Petitioner stated that the Respondent served her with 5 amended letters of interdiction. She confirmed that she

responded to all of the letters before her disciplinary case was heard.

85. The Petitioner stated that the Respondent invited her to attend a session which was convened by the Vetting Committee. However, she insisted that the Committee was set up for vetting and not investigation purposes.
86. When she was shown the vetting report, she confirmed that it dealt with the fraud at the pension department. She eventually conceded that the Vetting Committee was set up to investigate the fraud at the pension department.
87. The Petitioner further stated that the Vetting Committee conducted a joint investigation against the implicated staff. However, she stated that the disciplinary hearings were conducted against the members of staff individually.
88. The Petitioner further conceded that the vetting report she tendered in evidence related to one Florence Mumo and three other persons. However, she stated that the report which the Respondent alleged relates to her case was not approved by the CEO contrary to the Respondent's policies. Nonetheless, on being shown the Respondents' Human Resource Manual, she conceded that the instrument does not make it mandatory for the CEO to approve all investigation reports.
89. The Petitioner conceded her name was mentioned in the Vetting Committee's report of January 2019. She further conceded that the Committee had established that she did

not hand over the letter dated 31st October 2018 to the Respondent's CEO despite the fact that it was addressed to the CEO. She confirmed that the Committee considered her conduct as amounting to insubordination and recommended disciplinary action against her. She further conceded that both reports by the investigation team actually mentioned her as having acted negligently.

90. The Petitioner conceded that she could still obtain copies of her M-Pesa and bank statements from Safaricom Ltd and her bankers. However, she asserted that because the Respondent instructed the DCI to investigate her case, it (the Respondent) was in a position to supply her with a copy of the DCI report.
91. The Petitioner conceded that the review/apellate process did not call for a fresh hearing of her case. She conceded that a review can only be granted if the aggrieved employee is able to present new evidence to the Appeals Committee.
92. In re-examination, the Petitioner stated that she notified the CEO about the letter dated 31st October 2018 from the National Treasury through her internal memo dated 19th November 2018. Nevertheless, it is noteworthy that the memo was issued after the National Treasury had done a reminder to the letter of 31st October 2018 on 14th November 2018.

93. The Petitioner asserted that she was issued with 5 letters of interdiction. She alleged that not all the letters were amendments of the first letter.
94. The Petitioner reiterated that the Respondent did not share with her the investigation report until after the disciplinary case against her had been determined. She further asserted that the report was doctored in order to implicate her.
95. On its part, the Respondent called three witnesses. RW1, David Ngetich, stated that he was in charge of the Respondent's security docket. He stated that he was involved in the investigation of the Petitioner's case. He further stated that the investigations were triggered by fraud allegations within the pension department which was headed by the Petitioner.
96. The witness stated that the fraud was flagged by a letter dated 31st October 2018 from the National Treasury addressed to the Respondent's CEO. However, he asserted that the letter did not get to the CEO immediately and was only brought to her attention after the National Treasury did a reminder dated 14th November 2018.
97. The witness stated that the Respondent set up an investigation team comprising of 5 individuals to undertake an inquiry into the matter. He denied the Petitioner's assertion that he conducted the investigations alone.
98. On cross examination, the witness confirmed that the Vetting Committee had up to 21st January 2019 to present its

report. However, he stated that he did not remember if the report was presented earlier than the last day.

99. The witness identified the investigation report dated 30th March 2019 which he confirmed to have signed. He stated that the report indirectly mentions the Petitioner as one of the individuals who were recommended for disciplinary action since she was one of the two authorizing officers who were implicated in the scandal.
100. The witness acknowledged that there were two investigation reports on the Petitioner's matter: one dated January 2019 and the other 30th March 2019. He asserted that the first report was incomplete and was thus supplemented by the second one. Consequently, he contended that the two reports were part of the same continuum thus forming one report.
101. The witness denied that he tendered his investigation report to the Disciplinary Committee. He asserted that he only testified orally before the Committee and was therefore not in a position to tell which of the two reports the Committee relied on to reach its verdict.
102. The witness conceded that the Respondent's policy provides that an investigation against an employee should be conducted by three officers. However, he stated that he prepared the supplementary report with the approval of other members of the investigation team.

103. RW2, Buko Kiwanza Maneno, stated that the Director of Pensions at the National Treasury wrote to the Respondent's CEO on 31st October 2018 raising concerns about non-payment of pension benefits to some retired teachers despite the funds having been released by the government. He said the letter was received by the Petitioner but she failed to hand it over to the CEO.
104. The witness stated that the National Treasury wrote a reminder dated 14th November 2018. He stated that at the time the Respondent was receiving the reminder, the Petitioner had not updated the CEO of the earlier letter of 31st October 2018.
105. The witness stated that as a result of this development, the Petitioner was issued with a letter of show cause and subjected to disciplinary action on account of insubordination. He further stated that other employees were also subjected to disciplinary action due to the fraudulent activities at the pension department.
106. The witness stated that the Respondent set up a Vetting Committee which conducted investigations in the case against the Petitioner. He stated that the Petitioner was issued with a show cause letter before the Investigation Committee was set up. As a result, he conceded that there was a gap in the way the Respondent managed the process at this stage since the show cause was supposed to have been issued after investigations had commenced.

107. The witness explained that the mix-up in the sequence of events may have been occasioned by the fact that the issue at hand was serious and had caused embarrassment to both the Respondent and the Government. In his view, this may have triggered an expedited disciplinary process hence the decision to issue the Petitioner with the show cause immediately.
108. The witness further stated that the Petitioner was issued with the letter of interdiction on 15th January 2019 which appears to have been before investigations by the Vetting Committee were completed. He stated that if this was the case, the letter of interdiction may have been issued irregularly. However, he stated that he was not sure about the exact date when the investigations closed.
109. The witness stated that the investigation report of January 2019 by the Vetting Committee specifically mentioned the Petitioner as one of the individuals who were recommended for disciplinary actions. He stated that the Petitioner was issued with the letter of interdiction after the Vetting Committee which investigated her case had been set up.
110. RW3, Hellen Chirure, confirmed that the Petitioner's case was investigated by the Vetting Committee which prepared the initial report dated January 2019. She conceded that there was a subsequent report which was prepared by David Ngetich.

111. The witness stated that the Respondent's policies do not expressly provide for subsequent investigations against an employee after a first investigation. However, she asserted that the Respondent was at liberty to prepare preliminary and final investigation reports on the same subject.
112. The witness confirmed that Mr. David Ngetich referred to the second investigation report whilst testifying against the Petitioner before the Disciplinary Committee. She further stated that Mr. Ngetich confirmed at the disciplinary hearing that he finalized investigations into the Petitioner's case after she had been interdicted from duty.
113. The witness stated that the Respondent did not rely on the report by Ngetich to interdict the Petitioner. She asserted that the Petitioner was interdicted on the basis of the earlier report of January 2019.
114. The witness stated that the Respondent's policies require investigations against an employee to be undertaken by her seniors. She stated that the team which investigated the Petitioner's case comprised of members of staff who were senior in rank to the Petitioner.

Issues for Determination

115. After analyzing the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
 - a) Whether the Respondent had a justifiable reason to terminate the Petitioner's contract of service.

- b) Whether the Respondent terminated the Petitioner's contract of service in accordance with the procedure in the law and its (the Respondent's) policies.
- c) Whether the Respondent's actions infringed on the Petitioner's constitutional rights.
- d) Whether the Petitioner is entitled to the reliefs which she seeks in this action.

Analysis and Determination

116. The first issue for determination is whether the Respondent had a justifiable reason to terminate the Petitioner's contract of service. The Respondent's decision to terminate the Petitioner's employment was communicated to her through its letter dated 20th November 2019. According to the letter, the Petitioner's employment was terminated on grounds of; negligence of duty; insubordination; and poor performance of duties.
117. The Respondent accused the Petitioner of not taking decisive action on fraudulent activities within the pension department which was headed by her by concealing the fraud and not initiating disciplinary action against the offenders. It further accused the Petitioner of failure to draw the attention of the Commission Secretary to a letter dated 31st October 2018 from the National Treasury which had flagged the fraudulent activities in her department.
118. The Respondent stated that instead of the Petitioner seeking the Commission Secretary's advice and input on the matter,

she decided to engage the National Treasury directly. The Respondent further accused the Petitioner of failure to effectively supervise staff in the pension department resulting in chronic irregularities in the department.

119. It is not in dispute that there were fraudulent activities within the pension department which was headed by the Petitioner. As a matter of fact, when the matter was flagged by the Ministry of Finance, the Petitioner instituted preliminary inquiries which exposed the scandal.
120. According to the evidence which was tendered in court, the fraud appears to have been happening for some while. This is self-evident from the letters of show cause which were issued to Meshack Okong'o and Harriet Mathiu both of whom were attached to the pension department.
121. From the aforesaid show cause letters, it is apparent that manipulation of some bank accounts in order to divert pensioners' pay had been happening as early as March 2018 and persisted through May 2018. However, there is no evidence that the Petitioner unearthed the scandal.
122. It took the Ministry of Finance to uncover the scandal in October 2018. This state of affairs paints a picture of a department which lacked effective control mechanisms to expose fraudulent activities.
123. It was the Petitioner's responsibility as head of the pension department to ensure that suitable controls were developed to stem fraud within the department. The fact that the

impugned fraud was not detected until the Ministry of Finance exposed it speaks to a failure by the Petitioner to ensure the department had effective anti-fraud measures.

124. In the court's view, this state of affairs provided the Respondent with reasonable grounds to hold the view that the Petitioner had been negligent in the discharge of her duties. As such, the court is satisfied that the Respondent was justified to terminate the Petitioner's services on the ground of negligence of duty.
125. The other ground upon which the Petitioner's contract of service was terminated was insubordination. The Petitioner was accused of receiving and not handing to the Respondent's CEO the letter dated 31st October 2018 from the National Treasury. It is this letter which exposed the fraud in the Petitioner's department.
126. The Respondent stated that instead of the Petitioner bringing the letter to the attention of the CEO, she decided to engage the Ministry of Finance directly on it. In the Respondent's view, the Petitioner's conduct amounted to insubordination.
127. In response, the Petitioner asserted that although the letter was addressed to the CEO, the practice in the organization was that such letters would be acted on by the responsible officers. She argued that because the letter related to her department, it was proper for her to receive and act on it.
128. Although the Petitioner alleged that she notified the CEO of the letter immediately she received it, there was no

evidence that she did so. The only evidence of her disclosure of the letter to the CEO was her internal memo to the CEO dated 19th November 2018 which was issued after the Ministry of Finance had sent its reminder on the letter on 14th November 2018.

129. The Petitioner's conduct was improper. Since the impugned letter was addressed to the Respondent's CEO who is the overall officer responsible for the Respondent, it was only sensible that the Petitioner hands over the letter to her for her directions and input. It was improper for the Petitioner to ignore this protocol and act on the letter without the knowledge of the CEO.

130. Black's Law Dictionary defines the term insubordination to mean:-

"A willful disregard of an employer's instructions especially behaviour that gives the employer cause to terminate a worker's employment....An act of disobedience to proper authority especially refusal to obey an order that a superior officer is authorized to give."

131. The Petitioner's decision to deal with the National Treasury's request directly by bypassing the Respondent's CEO was a breach of protocol. Her disregard for protocol on the matter constituted an act of insubordination. As such, the Respondent was entitled to terminate her services on this ground.

132. The second issue for determination is whether the Respondent terminated the Petitioner's contract of service in accordance with the procedure in the law and its (the Respondent's) policies. According to the evidence on record, when the matters which led to the termination of the Petitioner's contract were flagged, the Respondent issued her with a letter of show cause dated 20th November 2018. The Petitioner did her response to the letter on 27th November 2018. The Respondent subsequently issued an internal memo dated 7th January 2019 vide which, it appointed a Vetting Committee to conduct investigations into the Petitioner's case.
133. From the aforesaid memo, it is apparent that the Vetting Committee was tasked to vet employees who had been sent on leave from the pension department. The Committee was to submit its report to the Respondent by 21st January 2019.
134. There is disagreement between the parties regarding whether the Committee appointed on 7th January 2019 was to undertake investigations into the fraudulent activities in the pension department. Whilst the Respondent asserts that this was the core task of the Committee, the Petitioner disputes it.
135. A scrutiny of the Committee's mandate as set out in the letter of appointment does not make it obvious that it (the Committee) was set up for purposes of conducting investigations in the pension department. However, the

report by the Committee dated January 2019 shows that it (the Committee) interrogated the fraud that had been reported in the department.

136. Further, although the Petitioner initially disputed the fact that the Committee was set up to conduct investigations on the fraudulent activities in her department, she subsequently conceded during cross examination that indeed it (the Committee) was set up for this purpose. Having regard to this evidence, the court is convinced that the Vetting Committee was set up in order to investigate the claims of fraud in the pensions department.
137. The Petitioner contends that the procedure which was adopted by the Respondent to process the complaint against her at the investigation stage contravened the Respondent's own policies. She contends that the Respondent's CEO issued her with a letter of show cause before the Investigation Committee was set up to inquire into the case. She further asserts that the Respondent interdicted her before investigations into her case were completed.
138. Part X of the Respondent's Human Resource Policies & Procedures Manual for Secretariat Staff deals with discipline of staff. Regulation 114 sets out the reporting procedure for an infraction against an employee. Regulation 115 provides that once the report under regulation 114 has been received, the Respondent is to set up an Investigation Committee comprising of at least three individuals to

conduct investigations into the case. The investigators must be of a higher rank than the affected employee.

139. Regulation 116(2) provides that upon the Investigation Committee being set up, the Secretary or Director of the Respondent (as the case may be) shall issue the affected employee with a letter informing him of the accusations against him and inviting his response within seven days. This, to my mind, is the show cause letter. It is therefore apparent to me that the show cause letter can only issue once the Investigating Committee has been constituted.
140. In the instant case, the Respondent's CEO issued the Petitioner with the show cause letter on 20th November 2018. She subsequently set up the Investigation Committee on 7th January 2019, several days after she had issued the Petitioner with the show cause letter. Clearly, the show cause was issued in contravention of the aforesaid regulation. It is so declared.
141. Regulation 116 states that once the Investigation Committee completes its investigations, it ought to prepare a report setting out its recommendations. This report should be addressed to the Respondent's CEO or Director as the case may be.
142. Regulation 117 provides that once the Respondent receives the investigation report, its (the Respondent's Secretary) should issue the affected officer with a letter of interdiction if he (the officer) has a case to answer. As such, it is clear to

the court that a letter of interdiction can only be issued once investigations have been completed.

143. In this case, the Respondent issued the Petitioner with a letter of interdiction on 15th January 2019. The Respondent contends that the letter was issued on the basis of the Vetting Committee's initial report dated January 2019. However, it is apparent that the exact date when that report was issued remains unknown.
144. Whilst it is not possible to tell the exact date the report was issued in January 2019, it is not in doubt that it was issued after 23rd January 2019. This fact is self-evident from subsection 2.0 in the report which speaks to the methodology the Vetting Committee adopted to execute its mandate.
145. In the paragraph, the Committee states that it first interrogated the affected officers on 10th and 11th January 2019 and subsequently on 23rd January 2019. The fact that the report states that the Committee interrogated the affected staff on 23rd January 2019 proves beyond doubt that the report was generated thereafter.
146. In any event, the evidence of the Respondent's witness (David Ngetich) demonstrates that the report of January 2019 was not the final one. Besides it, there was another report which he prepared on 30th January 2019. According to the witness, the report of 30th March 2019 was to complement the report of January 2019 which was incomplete. As such, it is apparent that the final

investigation report on the fraud was ready on 30th March 2019. This is after the Petitioner had been interdicted.

147. The fact that the Petitioner's interdiction preceded completion of investigations into her case was further confirmed by David Ngetich when he testified before the Disciplinary Committee. During that session, Mr. Ngetich stated that the Petitioner was interdicted before investigations into her case had been completed.
148. Having regard to the foregoing evidence, the court is convinced that the decision to interdict the Petitioner was irregular since it was made before investigations into her case had been concluded. It is so declared.
149. The Petitioner alleged that one of the members of the Investigation Committee (David Ngetich) was junior in rank to her. However, during cross examination, she conceded that this officer was a Deputy Director. She further confirmed that her substantive position at the Respondent was Assistant Deputy Director, a position which was lower in rank to that of David Ngetich. As such and based on this evidence, the court is convinced that the Investigation Committee was properly constituted.
150. That said, there was concern about how the investigation report dated 30th March 2019 was generated. From the evidence on record, this report was singularly prepared by David Ngetich purportedly to supplement the earlier report of the Vetting Committee.

151. Regulation 115 of the Respondent's Human Resource Policies & Procedures Manual for Secretariat Staff provides that an investigation against an employee shall be conducted by an Investigation Committee comprising of three persons. As such, it was not open to the Respondent to authorize Mr. David Ngetich to singularly conduct further investigations into the Petitioner's case. As such, the subsequent investigations by David Ngetich were irregular. It is so declared.
152. The evidence on record shows that the Respondent invited the Petitioner for a disciplinary hearing through its letter dated 23rd September 2019. Her case was to be heard on 22nd October 2019.
153. The record shows that the Petitioner responded to the invite through her letter dated 30th September 2019. In her letter, she requested to be supplied with a myriad documents, including: minutes of the Vetting Committee meeting of 11th January 2019; witness statements by J G Mutwiri, Harriet Mathiu and Meshack Okong'o; and the investigation report by the Vetting Committee.
154. The Petitioner states that the Respondent did not respond to her request. She asserts that she was not furnished with these documents yet she required them to prepare her defense. Indeed, there is nothing on record to suggest that the Respondent supplied her with these critical documents before the hearing of her disciplinary case.

155. It is not that the Respondent did not have the aforesaid documents. The documents were in its possession. This fact is confirmed by the Respondent's letter to the Petitioner's lawyers dated 5th April 2023.
156. By this letter, the Respondent forwarded to the Petitioner's lawyers, inter alia, the investigation report and the witness statements by J G Mutwiri, Harriet Mathiu and Meshack Okong'o. It is noteworthy that the Respondent only released these documents following a court order.
157. J G Mutwiri, Harriet Mathiu and Meshack Okong'o were part of the staff in the pensions department who were implicated in the matters which were under inquiry. Therefore, their statements were crucial for preparation of the Petitioner's case.
158. The investigation reports by the Vetting Committee and David Ngetich related to matters which gave rise to the accusations which the Petitioner was facing before the Disciplinary Committee. They were therefore critical to preparation of her defense.
159. Section 4 (3) (g) of *the Fair Administrative Action Act* obligates a decision maker to share with the person who is likely to be affected by a decision all information which will be taken into account in making the decision. As such, the Respondent was duty bound to furnish the Petitioner with the aforesaid documents before it processed her disciplinary case.

160. The evidence on record shows that the Respondent breached this obligation by withholding these critical documents from her. This, without a doubt, negatively impacted on her ability to prepare for her case. It is so declared.
161. Having regard to the totality of the evidence before the court, it is apparent that the Respondent had valid grounds to consider terminating the Petitioner's employment. However, it (the Respondent) failed to afford the Petitioner procedural fairness whilst processing her release from employment thereby rendering the decision to terminate her services irregular. It is so declared.
162. The next question for determination is whether the Respondent's actions infringed on the Petitioner's constitutional rights. The Petitioner's case is that the Respondent infringed several of her rights.
163. First, she contends that when she appeared before the Vetting Committee, she was asked to hand over her bank and M-Pesa statements for account no. 301032888002 and phone no. 0721322985 for the year 2018 for verification of certain information, a request which she acceded to. However, she asserts that the Vetting Committee confiscated the statements and refused to return them to her thus violating her right to privacy under article 31 of *the Constitution*. She contends that the statements contain information which is confidential and the Respondent was

not entitled to withhold them without the benefit of a court order. She further contends that although she wrote to the Respondent to release the statements back to her, it (the Respondent) ignored her letter.

164. The Respondent did not have a cogent response to the Petitioner's aforesaid assertion. All it stated was that the statements were in any event not utilized to build the case against the Petitioner and that she could still obtain copies of the documents from Safaricom Ltd and her bank.
165. The fact that the Respondent had no use for the statements in question is the more reason it should have surrendered them back to the Petitioner. However valueless the statements may have been to the Respondent, they are valuable to the Petitioner as contain confidential information on her financial transactions. It was thus improper for the Respondent to hold onto them particularly without a court order or other justification.
166. The Respondent's continued detention of the Petitioner's bank and M-Pesa statements violated her right to privacy. It is so declared.
167. The Petitioner also accuses the Respondent of having violated her rights to: access information; fair hearing; and fair administrative action under articles 35, 50 and 47 of *the Constitution*. The refusal by the Respondent to supply the Petitioner with the various documents which have been alluded to in the decision infringed her right to access

information. This in turn disabled her ability to prepare for her case thus infringing on her right to fair hearing. The Respondent's failure to share with the Petitioner information which was to be relied on to make the decision against her and its (the Respondent's) decision to conduct subsequent investigations against her outside the framework of its (the Respondent's) policies also infringed her right to fair administrative action. It is so declared.

168. The final question for determination is whether the Petitioner is entitled to the reliefs which she seeks in this action. A number of findings have already been made in the decision. However, for purposes of completeness of the record, they will be reiterated here.

169. **The court has found** that although the Respondent had valid grounds to terminate the Petitioner's employment, it nevertheless processed their separation in a manner that was procedurally flawed. Consequently, it is declared that the Respondent improperly terminated the Petitioner's Contract of service.

170. The court has also found that the Respondent violated the Petitioner's rights to privacy, access to information, fair administrative action and fair hearing. It is so declared.

171. The Petitioner's contract of service having been improperly terminated, she is entitled to compensation for unfair termination of the contract. In assessing the quantum of compensation to award, the court is guided by section 49 of

the Employment Act which requires it to have regard to, inter alia, the employee's length of service and whether his or her conduct contributed to the decision to terminate his or her services.

172. In this case, the court notes that the Petitioner had been in the Respondent's service for over twenty five years which is quite long. However, the court also takes into account the fact that the Petitioner's conduct substantially contributed to the decision to terminate her services.
173. Having regard to the foregoing, the court awards the Petitioner compensation for unfair termination of her contract which is equivalent to her gross salary for three months. According to the pay slip for April 2018 which the Petitioner tendered in evidence, her gross monthly pay was Ksh. 215,985.20. As such, she is awarded Ksh. 647,955.60 under this head.
174. The Petitioner has prayed for general damages for breach of her various constitutional rights. Taking into account the principles which guide assessment of damages for breach of constitutional rights as enunciated in the case of ***Akusala A. Borniface v OCS Langata Police Station & 4 others [2018] KEHC 9626 (KLR)***, I award her Ksh. 1,000,000.00 as compensation for breach of her constitutional rights.
175. The Petitioner has prayed for reinstatement to her employment. However, the court is disinclined to grant this relief because save for the procedural flaws which have been

highlighted in the judgment, it is apparent that the Respondent had valid reasons to consider terminating her services.

176. The Petitioner has prayed for an order to compel the Respondent to return her statements for bank and M-Pesa account numbers 301032888002 & 0721322985 respectively. The Respondent has no valid reason to continue withholding these documents. As such it (the Respondent) is ordered to hand over the statements to the Petitioner.
177. The award to the Petitioner is subject to the statutory deductions which were applicable at the time the contract between the parties was terminated.
178. The Respondent is ordered to pay the Petitioner costs of the case.
179. The Respondent is ordered to pay the Petitioner interest on the amount awarded at court rates from the date of this decision.

Dated, signed and delivered on the 30th day of April, 2026

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Petitioner

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI