



Kennedy v International Rescue Committee Kenya; Kenya Medical Practitioners and Dentists Council (Interested Party) (Petition E012 of 2024) [2025] KEELRC 360 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 360 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E012 OF 2024
HS WASILWA, J
FEBRUARY 12, 2025**

BETWEEN

DR LILIAN MUMBUA KENNEDY PETITIONER

AND

INTERNATIONAL RESCUE COMMITTEE KENYA RESPONDENT

AND

KENYA MEDICAL PRACTITIONERS AND DENTISTS COUNCIL INTERESTED PARTY

JUDGMENT

1. The matter before the court is a petition dated 19th January 2024, filed by Dr. Lilian Mumbua Kennedy, a medical practitioner licensed by the Kenya Medical Practitioners and Dentists Council, who was employed as a Medical Officer by the International Rescue Committee-Kenya Program. The Respondent is a non-governmental organization domiciled in Kenya, committed to assisting vulnerable refugees and providing support to host communities. The Interested Party is a regulatory body established under Section 3 of the *Medical Practitioners and Dentists Act*, responsible for overseeing the conduct of medical and dental practitioners and taking disciplinary measures for professional misconduct.
2. The Petitioner was employed at the Respondent's medical facility in Hagadera, Kenya, under a contract dated 1st January 2023, with a basic salary of Kshs. 256,346.30. Her responsibilities included ensuring the implementation of health activities, managing the health program in an acting capacity, attending to medical-legal cases, conducting ward rounds, and ensuring quality care in the hospital. She performed her duties diligently in accordance with her employment contract, the Kenya *Medical*



- Practitioners and Dentists Act* (Cap. 253), the IRC National Employment Handbook, and all other regulations of medical practice, without any complaints from colleagues, patients, or the Respondent.
3. On 21st May 2023, the Respondent issued a show cause letter, demanding that the Petitioner explain why a patient, Nurto Mohammed Hussein, was denied medical attention on 17th May 2023 by two nurses while she was present. The Respondent accused the Petitioner of negligence, alleging that she witnessed the denial of service and failed to act, making her complicit in the patient's death. In her response dated 23rd May 2023, the Petitioner explained that she had conducted herself professionally and instructed her subordinates accordingly. She also expressed willingness to engage in open dialogue to clarify any concerns.
 4. On 23rd May 2023, the Respondent held a maternal death review meeting to investigate the incident, acknowledging internal challenges in handling patients and concluding that the patient's death was due to inefficiencies in the Respondent's operations rather than the Petitioner's actions. The Respondent identified action points, including strict adherence to high-risk referral pathways, improved provider-patient communication, and quarterly review meetings. Despite these findings, the Respondent terminated the Petitioner's employment on 20th September 2023, citing negligence and gross misconduct under the IRC National Employee Handbook (Clause 10, Subsection 10.7) and the IRC Code of Conduct.
 5. On 21st September 2023, the Petitioner requested the Respondent to change the termination to a mutual separation agreement to maintain good relations, but the Respondent upheld its decision on 29th September 2023. On 4th October 2023, the Petitioner's advocates demanded that the termination be substituted with a mutual separation agreement and that all allegations of negligence be expunged from the Respondent's records. However, on 18th October 2023, the Respondent reaffirmed the termination.
 6. The Petitioner asserts that she was denied the right to expeditious, efficient, lawful, reasonable, and procedurally fair administrative action under Article 47(1) of *the Constitution* of Kenya, 2010. She was not granted a hearing to defend herself against the allegations. The maternal death review meeting occurred after her response to the show cause letter, preventing her from using its findings in her defense. She was given only 48 hours to respond, an inadequate period to gather documents and statements. The Respondent delayed the inquiry decision for four months, subjecting her to anxiety, stress, and uncertainty, and ultimately used the incident as a pretext for unfair termination.
 7. The Petitioner argues that the Respondent violated multiple constitutional provisions, including Article 1(1) on sovereign power, Article 2(1) on constitutional supremacy, Article 3(1) on the duty to uphold *the Constitution*, Article 19(3)(a) on fundamental rights, Article 20(4) on interpreting the Bill of Rights, Article 22 on enforcing rights, Article 23(3) on court remedies, Article 27(1) on equality before the law, Article 28 on human dignity, Article 41(1) on fair labour practices, Article 47(1) and (2) on fair administrative action, Article 48 on access to justice, Article 50(1) and 50(2)(c), (j) on the right to a fair hearing, and Article 259(1) on constitutional interpretation to promote justice, human rights, and good governance.
 8. The Petitioner invokes Sections 44 and 45 of the *Employment Act*, No. 11 of 2007, arguing that her termination was unfair, and the Respondent failed to prove a valid, fair, and procedurally sound reason for dismissal. She contends that the Respondent did not follow legal requirements in handling her dismissal, as stipulated under the *Employment Act*. She also cites the *Fair Administrative Action Act* (Sections 4(1) and 4(3)), which mandates that administrative actions be lawful, reasonable, and procedurally fair. The Respondent allegedly failed to provide prior notice, an opportunity to be heard, legal representation, or access to the evidence against her. Additionally, she claims the Respondent



- unlawfully assumed the jurisdiction of the Kenya Medical Practitioners and Dentists Council by determining her negligence, a function reserved for the Council under Section 4(j) of the Kenya [Medical Practitioners and Dentists Act](#).
9. The Petitioner argues that her constitutional rights were violated as she was denied adequate time to prepare her defense, a fair hearing, and a fair administrative process. The Respondent also breached labour laws by dismissing her unfairly and unlawfully. She seeks various reliefs, including:
 1. An order of Certiorari quashing the unlawful termination.
 2. A declaration that the termination was unlawful, unfair, and unconstitutional.
 3. A declaration that the Respondent contravened Section 4(j) of the Kenya [Medical Practitioners and Dentists Act](#) by assuming jurisdiction over professional negligence.
 4. Damages for wrongful and unlawful termination.
 5. Judicial review orders quashing all disciplinary proceedings.
 6. A declaration that the Petitioner's constitutional rights were violated.
 7. Compensation, with formal proof on quantum to be determined.
 8. Any other reliefs that the court deems necessary to uphold [the Constitution](#).
 10. The Petitioner maintains that the Respondent's actions breached [the Constitution](#), the [Employment Act](#), the [Fair Administrative Action Act](#), and the Kenya [Medical Practitioners and Dentists Act](#), rendering the termination unlawful and unjustifiable. She prays that the court grants her the reliefs sought to restore her professional standing and compensate her for the damages suffered.
 11. The Petitioner filed an affidavit dated 19th January 2024, stating that she was employed by the Respondent as a Medical Officer at its medical facility in Hagadera, Kenya, under a contract dated 1st January 2023, with a basic salary of Kshs. 256,346.30. Her responsibilities, as set out in the Respondent's Policies and Procedures, included implementing health activities, managing the health program in an acting capacity when required, attending to medical-legal cases, conducting daily ward rounds, and ensuring quality care in the hospital. She asserted that she diligently performed her duties in accordance with her contract, the Kenya [Medical Practitioners and Dentists Act](#) (Cap. 253), the IRC National Employment Handbook, and all relevant medical practice regulations, without receiving any complaints from colleagues, patients, or the Respondent.
 12. On 21st May 2023, the Respondent issued a show cause letter demanding that she explain within 48 hours why a patient, Nurto Mohammed Hussein, was denied treatment on 17th May 2023 by two nurses, while she was present at the facility. The Respondent accused her of negligence, alleging that she witnessed the denial of treatment and failed to act, thereby contributing to the patient's death. The Petitioner responded on 23rd May 2023, detailing how she had conducted herself professionally, given necessary instructions to her subordinates, and offered to provide further clarification.
 13. On 23rd May 2023, the Respondent held a maternal death review meeting at its administration boardroom, attended by all involved parties. The review acknowledged internal operational inefficiencies and concluded that the patient's death was not due to the Petitioner's actions but rather systemic failures in the Respondent's day-to-day operations. The Respondent identified three key action points: enforcing adherence to high-risk referral pathways, improving provider-patient communication, and conducting quarterly MPDSR meetings to review previous action plans.



14. Despite these findings, the Respondent terminated the Petitioner's employment contract on 20th September 2023, alleging negligence and gross misconduct under Clause 10, Subsection 10.7 of the IRC National Employee Handbook and a violation of the IRC Code of Conduct. The Petitioner, on 21st September 2023, requested that her departure be updated to a mutual separation agreement, but the Respondent upheld the termination in a letter dated 29th September 2023. On 4th October 2023, the Petitioner's advocates wrote to the Respondent, demanding that the termination be substituted with a mutual separation agreement and that the allegations of negligence be expunged from her record. The Respondent, through Messrs Kaplan & Stratton Advocates, reaffirmed the termination in a letter dated 18th October 2023.
15. The Petitioner argued that the Respondent denied her right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, as required under Article 47(1) of *the Constitution* of Kenya, 2010. She was not given a fair hearing to defend herself against the allegations. The maternal death review findings, which exonerated her, were issued after the deadline for her response to the show cause letter, preventing her from using them in her defense. She was given only 48 hours to respond, which was insufficient to gather relevant documents and statements. The Respondent also delayed the inquiry decision for four months, causing her undue stress, anxiety, and uncertainty before unlawfully terminating her employment.
16. The Petitioner asserted that the Respondent's actions violated multiple constitutional and statutory provisions. Article 27(1) of *the Constitution* guarantees equality before the law and equal protection. Article 28 protects the right to dignity, which she claimed was violated through unfair treatment. Article 41(1) guarantees fair labor practices, which she alleged were disregarded in her termination. Article 50(1) and (2)(c), (j) provides the right to a fair hearing, including adequate time to prepare a defense, which was denied. Article 48 ensures access to justice, which she argued was obstructed by the Respondent's actions. Article 259(1) requires constitutional provisions to be interpreted to promote justice, human rights, and good governance, which she claimed was disregarded.
17. The Petitioner contended that the Respondent failed to adhere to the *Employment Act*, No. 11 of 2007, particularly Sections 44 and 45, which require employers to prove valid, fair, and procedurally sound reasons for termination. She also cited the *Fair Administrative Action Act* (Sections 4(1) and 4(3)), which mandates lawful, reasonable, and procedurally fair administrative actions. She further argued that the Respondent unlawfully assumed the jurisdiction of the Kenya Medical Practitioners and Dentists Council, which, under Section 4(j) of the Kenya *Medical Practitioners and Dentists Act*, is the sole body authorized to determine cases of professional negligence.
18. She asserted that her constitutional rights were violated due to the denial of fair hearing, fair administrative action, and fair labour practices. She prayed for the court to grant reliefs, including quashing the termination, declaring it unlawful, awarding damages for wrongful termination, and issuing judicial review orders to nullify the disciplinary proceedings. She also sought compensation, with formal proof of quantum, and any other orders necessary to uphold *the Constitution*. The Petitioner maintained that the Respondent's actions were unlawful, unjustifiable, and in direct violation of *the Constitution*, the *Employment Act*, the *Fair Administrative Action Act*, and the Kenya *Medical Practitioners and Dentists Act*, and that she was entitled to the reliefs sought.

Petitioner's Written Submissions

19. The Petitioner filed submissions dated 20th December 2024, seeking various reliefs, including an order of Certiorari to quash the termination of her employment, a declaration that the termination was unlawful, unfair, and unconstitutional, and a declaration that the Respondent contravened Section



- 4(j) of the Kenya *Medical Practitioners and Dentists Act* by assuming jurisdiction to determine negligence. She also sought damages for wrongful termination, the quashing of all disciplinary proceedings, and a declaration that her constitutional rights under Articles 20, 27, 28, 41, 47, and 50 of *the Constitution* of Kenya, 2010, had been violated. She requested an award of compensation and any further orders the court deemed necessary.
20. The Petitioner argued that the Respondent violated Article 50(2)(c) and 50(2)(j) of *the Constitution*, which guarantee every person the right to adequate time and facilities to prepare a defense. She was only given 48 hours to respond to the show cause letter dated 21st May 2023, which she argued was insufficient. She further contended that Article 47 of *the Constitution*, which guarantees the right to fair administrative action that is expeditious, lawful, reasonable, and procedurally fair, was breached, as she was denied a fair hearing before an impartial disciplinary panel. The Respondent also failed to provide her with information and evidence relied upon in the decision against her, violating Section 4 of the *Fair Administrative Action Act*.
 21. She cited Sections 44 and 45 of the *Employment Act*, No. 11 of 2007, which require an employer to prove that termination was valid, fair, and procedurally sound. She claimed that the Respondent failed to grant her a fair disciplinary process before terminating her employment, thereby violating Article 41 of *the Constitution*, which guarantees the right to fair labour practices. She further argued that Section 4(j) of the Kenya *Medical Practitioners and Dentists Act* exclusively grants the Kenya Medical Practitioners and Dentists Council (KMPDC) jurisdiction over professional misconduct cases, and the Respondent unlawfully assumed this function.
 22. The Petitioner alleged that the Respondent's decision to terminate her employment was predetermined and that her right to equality before the law under Article 27 was violated. She cited Article 28, which protects the right to dignity, stating that her dismissal subjected her to public humiliation and professional embarrassment. She emphasized that Article 20 of *the Constitution* guarantees all individuals the right to enjoy fundamental freedoms, which the Respondent infringed by denying her due process.
 23. She submitted that her case met the threshold for constitutional petitions as established in *Anarita Karimi Njeru v Republic* (1976) eKLR and reaffirmed in *Mumo Matemo v Trusted Society of Human Rights Alliance* [2014] eKLR. These cases require a petitioner to set out, with reasonable precision, the constitutional provisions alleged to have been infringed and the manner of infringement. She argued that she had fulfilled this requirement by demonstrating how the Respondent denied her a fair hearing and procedural fairness before terminating her employment.
 24. She further relied on *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR, where the High Court held that fair hearing applies to both civil and criminal cases and includes the right to be heard before a competent, independent, and impartial tribunal. The court in that case emphasized the importance of procedural fairness in administrative actions, stating that due process must be observed before any adverse decision is made against an individual.
 25. The Petitioner outlined specific procedural violations committed by the Respondent, including failing to provide her with adequate documentation to prepare her defense, failing to inform her of her right to have a labour officer or colleague present, and denying her the opportunity to cross-examine witnesses. She also claimed that the Respondent abruptly changed the grounds for termination, initially recommending a first warning letter but later terminating her employment based on an email from Dr. Aston Benjamin Atwiine dated 18th August 2023. She argued that she was not given an opportunity to respond to this new evidence, rendering the disciplinary process unfair and biased.



26. She contended that the Respondent's decision was so unreasonable that no impartial tribunal following the principles of natural justice could have arrived at it. She emphasized that her termination was an afterthought, as the maternal death review meeting held on 23rd May 2023 concluded that the patient's death was not due to her actions but inefficiencies in the Respondent's operational processes. Despite this finding, the Respondent still proceeded to terminate her employment on 20th September 2023.
27. The Petitioner reiterated that her monthly salary was Kshs. 256,346.30, and her termination caused her financial distress, emotional suffering, and reputational damage. She maintained that her fundamental rights under *the Constitution*, the *Employment Act*, and the *Fair Administrative Action Act* were violated, and she was entitled to compensation and other reliefs sought.
28. The Petitioner further submitted that the right to a fair hearing is a principle of natural justice that cannot be limited or derogated, as enshrined in Article 25 of *the Constitution* of Kenya, 2010. She argued that her right to a fair hearing was gravely undermined when she was not given reasonable time and opportunity to adequately respond to the notice to show cause issued by the Respondent on 21st May 2023. Additionally, after the decision to terminate her employment was rendered, she was never informed of her right to appeal. She maintained that her termination was unfair and unlawful, as the Respondent failed to comply with the mandatory provisions of Section 45 of the *Employment Act* No. 11 of 2007, which requires an employer to prove that termination was based on valid and fair reasons and that due process was followed. The law explicitly states that termination is unfair if the employer fails to demonstrate that it was grounded on valid reasons related to the employee's conduct, capacity, compatibility, or operational requirements and that fair procedures were observed.
29. She relied on the case of *Jared Aimba v Fina Bank Limited* (2016) eKLR, where the Court of Appeal held that even when termination is based on valid reasons, the employer must follow due process, including notifying the employee of the grounds and affording them an opportunity to be heard before termination. She also cited *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* (2014) eKLR, where the court ruled that Section 41 of the *Employment Act* is couched in mandatory terms, and failure to follow the prescribed procedure renders the termination unfair, wrongful, and unlawful. She argued that in her case, she was not subjected to a fair hearing during her disciplinary process, making her dismissal unlawful.
30. She further submitted that the Respondent unlawfully assumed jurisdiction that is statutorily donated to the Kenya Medical Practitioners and Dentists Council (KMPDC) under Section 4(j) of the Kenya *Medical Practitioners and Dentists Act*. She pointed out that the Respondent's investigation report recommended only a first warning letter, indicating that the incident was isolated and that she had always conducted herself in accordance with KMPDC regulations. However, the Respondent upgraded its decision to termination based solely on an email from Dr. Aston Benjamin Atwiine dated 18th August 2023. She noted that Dr. Atwiine himself admitted in the email that he was unfamiliar with Kenyan law, yet his opinion was used as the sole basis to escalate the disciplinary action from a warning to termination. The Respondent failed to provide any evidence that it consulted KMPDC before making a determination of negligence. There was also no evidence that a complaint was lodged with KMPDC regarding her professional conduct before her employment was terminated on allegations of negligence. She contended that this amounted to an unlawful usurpation of power, and the Respondent's actions should be declared null and void as an abuse of authority.
31. The Petitioner also addressed the issue of costs, arguing that under Section 27 of the *Civil Procedure Act*, the general rule is that costs follow the event, unless the court directs otherwise for good reason. She relied on *Tasbir Singh Rai & Others v Tarlochan Rai & Others* (2014) eKLR, where the Supreme



Court of Kenya held that courts must consider each case on its merits to determine if there are valid reasons for departing from the general rule on costs. She submitted that her petition arose purely from the Respondent's failure to observe fair hearing principles and natural justice, which forced her to seek redress from the court. Had the Respondent complied with due process, she would not have been compelled to file this petition. She therefore prayed that costs of the petition be awarded to her.

32. In conclusion, she submitted that her petition had met the constitutional threshold established in *Anarita Karimi Njeru v Republic* (1976) eKLR, which requires a petitioner to state the provisions alleged to have been violated and the manner of violation with reasonable precision. She maintained that the Respondent violated her right to a fair hearing under Articles 25, 27, 28, 41, 47, and 50 of *the Constitution* and that the termination of her employment was unfair under Section 45 of the *Employment Act*. She argued that the Respondent unlawfully assumed jurisdiction over professional misconduct matters that fall exclusively under KMPDC's authority, as provided under Section 4(j) of the Kenya *Medical Practitioners and Dentists Act*. She insisted that the Respondent should bear the costs of the petition, and she should be granted all reliefs sought, including quashing of her termination, a declaration that her constitutional rights were violated, damages for unlawful termination, and compensation for loss of earnings, given her monthly salary of Kshs. 256,346.30.

Respondent's Case

33. The Respondent filed a Replying Affidavit dated 30th August 2024 through Laetia Mbaya, the Deputy Director of Human Resources at the International Rescue Committee Kenya, who was duly authorized to swear the affidavit on its behalf. The Respondent opposed the Petition dated 19th January 2024 and the Supporting Affidavit of Lilian Mumbua Kennedy, arguing that the Petition lacked merit and should be dismissed in its entirety. The Respondent contended that the Petition was incompetent, bad in law, and an abuse of the court process. It was argued that the Petitioner had failed to meet the legal threshold for a constitutional petition, as the alleged violations did not amount to an infringement of any rights or fundamental freedoms under the Bill of Rights, but were instead statutory in nature, arising from the termination of her employment. The Respondent asserted that the *Employment Act* No. 11 of 2007 provides sufficient mechanisms to address employment disputes, and that the Employment and Labour Relations Court (Procedure) Rules 2016 should have been followed through a Statement of Claim, rather than filing a constitutional petition.
34. The Respondent further stated that Justice Mwaure, in a ruling delivered on 26th July 2024, indicated that the objection to the Petition could only be determined after a full hearing. The Respondent maintained that the Petition offended the provisions of the Employment and Labour Relations Court (Procedure) Rules 2016, and was a veiled attempt to circumvent the legal process for employment termination claims, thereby creating an unfair advantage for the Petitioner. The Respondent reiterated that all issues arising from the Petition should be adjudicated under the *Employment Act* through an ordinary suit.
35. The Respondent confirmed that the Petitioner was employed as a Medical Officer under a contract dated 1st January 2023, which required her to comply with its rules and policies, including the Employee Handbook 2022. On 17th May 2023, a patient, Nurto Mohammed Hussein, sought treatment at the Respondent's facility after recently giving birth. The Petitioner and other staff on duty allegedly failed to provide medical care to the patient, despite the Petitioner witnessing the denial of treatment. The Petitioner did not review the patient but stated that she appeared stable. The patient left the facility untreated and died the following day. On 21st May 2023, the Respondent issued the Petitioner with a show cause letter, requiring her to explain why she had witnessed the denial of



- treatment without taking action. The Respondent argued that as the most senior staff member present, the Petitioner demonstrated a lack of leadership, and her omission contributed to the patient's death.
36. On 23rd May 2023, the Petitioner responded to the show cause letter, maintaining that the patient looked stable. The Respondent, however, found the response lacking in substance as it was not based on any medical examination or review by the Petitioner. The Respondent sought further clarity and invited the Petitioner to a disciplinary hearing on 30th May 2023, where she was given an opportunity to respond to all allegations. Following the hearing, the Respondent found that the Petitioner had failed to show cause, as her inaction went against the Respondent's core values, breached the IRC Kenya's Code of Conduct, and displayed a lack of accountability that was prejudicial to its interests and reputation. The Respondent argued that the patient's death was preventable, and it took time to consider the circumstances before making a decision.
 37. Although the Disciplinary Committee initially recommended issuing a warning letter, the Respondent, after further consideration, determined that the gravity of the incident warranted termination. On 20th September 2023, the Petitioner's employment contract was terminated on two main grounds: negligence in performing her duties as a Medical Doctor, which amounted to gross misconduct under Clause 10, Sub-Clause 10.7 of the IRC National Employee Handbook, and the Respondent's decision to invoke Clause 13, Subsection 13.2 to terminate the Petitioner's employment following the patient's death.
 38. On 21st September 2023, the Petitioner requested the Respondent to change the termination into a voluntary separation, acknowledging in her letter that the incident had revealed gaps in her leadership skills and that she was taking steps to improve. She stated that she understood her employment prospects with the Respondent were limited but sought to negotiate favourable separation terms. The Respondent reviewed her request and, on 29th September 2023, upheld its decision, citing the gravity of the misconduct and the avoidable circumstances leading to the patient's death.
 39. The Respondent argued that the disciplinary action was based on the Petitioner's degree of contribution to the patient's death and was not connected to the separate internal review of the Respondent's systems. The internal review was intended to identify gaps in patient care and improve service delivery. The Respondent maintained that the Petitioner failed to take responsibility despite admitting in her request for voluntary separation that she needed to improve her leadership skills.
 40. The Respondent further asserted that in employment termination disputes, the correct procedure is to file a Memorandum of Claim under the *Employment Act*, which allows for labour-related claims touching on alleged violations of the Bill of Rights. The Respondent emphasized that constitutional petitions should not be filed where there are adequate alternative remedies in statutory law. The Respondent also argued that the Petitioner had failed to demonstrate with precision how the investigation and disciplinary process contravened her constitutional rights under *the Constitution* of Kenya, 2010, and put her to strict proof.
 41. The Respondent denied that the Kenya *Medical Practitioners and Dentists Act* applied to the case, arguing that being a doctor did not prevent the Respondent from taking disciplinary action against the Petitioner for negligence. The Respondent maintained that the Petitioner was not entitled to any of the reliefs sought, as her termination was based on gross misconduct and negligence that resulted in the patient's death. The Respondent insisted that due process was followed, the termination was substantially and procedurally fair, and the Petitioner's claims were unfounded.
 42. The Respondent further argued that there was no legal basis for joining the Kenya Medical Practitioners and Dentists Council in the proceedings, as the matter was solely an employment dispute



between the Respondent and the Petitioner. The Respondent denied that the Petitioner was entitled to an order of certiorari or any other relief sought. The Respondent confirmed that a demand letter and notice of intention to sue were issued, but the Respondent denied liability in its response.

43. The Respondent maintained that the Petition was lodged in breach of applicable laws and lacked merit, praying for its dismissal with costs. The Respondent concluded that all facts stated in the affidavit were true to the best of its knowledge, based on official records.

Respondent's Written Submissions

44. The Respondent filed submissions dated 21st January 2025, opposing the Petition on the grounds that the termination of the Petitioner's employment was lawful, justified, and procedurally fair. The Respondent argued that the Petition lacked merit and should be dismissed with costs. The dispute arose from an incident on 17th May 2023, when Nurto Mohammed Hussein, a patient who had given birth less than a month earlier, visited the Respondent's facility complaining of joint pains. The Petitioner, the most senior staff member present, failed to examine or direct junior staff to review the patient, who subsequently left the facility untreated and died a day later. At a disciplinary hearing, the Petitioner acknowledged her failure to act and expressed remorse. The Respondent maintained that the termination was in accordance with the law and relied on the Replying Affidavit of Laetia Mbayá sworn on 30th August 2024 and annexures LM-1 to LM-9 to support its case.
45. The Petitioner was employed on 1st January 2023 as a medical officer and agreed to comply with the Respondent's rules, policies, and employment contract. The Respondent issued a show cause letter on 21st May 2023, asking the Petitioner to explain why she had not acted when the patient was denied service. The Petitioner responded on 23rd May 2023, stating that the patient appeared stable, but this was not based on any medical review or examination. Dissatisfied with her response, the Respondent invited the Petitioner to a disciplinary hearing on 30th May 2023, where it was emphasized that her inaction contributed to the patient's death. The minutes of the disciplinary hearing recorded that the Petitioner understood the allegations and expressed remorse. The Investigation Report dated 30th May 2023 further supported the finding that the patient's death was preventable.
46. Given the gravity of the situation, the Respondent terminated the Petitioner's employment on 20th September 2023 for gross misconduct under Clause 10, Sub-Clause 10.7 of the IRC National Employee Handbook and violation of the IRC Code of Conduct. The termination was carried out in accordance with Clause 13, Subsection 13.2 of the National Employee Handbook due to negligence in patient management. The termination letter was marked as LM-6 in the annexures. The Petitioner did not appeal the disciplinary committee's decision.
47. The Respondent argued that the Petition was incompetent and bad in law, as it did not meet the legal threshold for a constitutional petition. It maintained that the allegations raised were statutory in nature and should have been addressed through an ordinary claim under the *Employment Act*, 2007, rather than a constitutional petition. The Respondent relied on *Nzomo Kvangi Muinde vs. AG & DPP [2018] eKLR*, which held that constitutional claims should not replace normal legal procedures where statutory remedies exist. The Respondent also cited *Bahadur vs. AG (1986) LRC Const 297*, which emphasized that infringements of rights should be pursued under substantive law rather than directly under *the Constitution*.
48. The Respondent further cited *David Mathu Kimingi v. SMEC International PTY Limited [2021] eKLR*, where the court, relying on *Petronella Nellie Nelisiwe Chirwa vs. Transnet Limited and Others [2007] ZACC 23*, held that employment disputes should not be treated as constitutional matters unless they raise genuine constitutional issues. The Respondent also referred to Sumayya Athmani



- Hassan v. Paul Masinde Simidi & Another [2019] eKLR, where the court ruled that a litigant cannot base a claim directly on *the Constitution* if statutory remedies exist. The Respondent submitted that the *Employment Act* was sufficient to resolve the dispute and that the Petition should be struck out in its entirety with costs.
49. The Respondent maintained that it had valid reasons to terminate the Petitioner's employment, in line with Section 43(2) of the *Employment Act*, which states that reasons for termination should be based on genuine employer concerns at the time of dismissal. The Respondent relied on Mathias Omondi Nzuva v. Rell Co-Operative Savings & Credit Society [2022] eKLR, which emphasized that employers must prove valid reasons for termination under Sections 43, 45, and 47(5) of the *Employment Act*.
 50. The Respondent asserted that the Petitioner's negligence was the proximate cause of the patient's death and relied on BS v. Jonardan D. Patel [2019] eKLR, where the court held that medical negligence arises when a doctor falls short of reasonable medical care. The Respondent argued that the Petitioner failed to exercise sound medical judgment, citing Ricarda Nioki Wahome (Suing as administrator of the estate of the late Wahome Mutabi (Deceased) v. Attorney General & 2 others [2015] eKLR, which held that a doctor assumes a duty of care once they agree to treat a patient. The Petitioner's failure to act amounted to breach of duty, which directly contributed to the patient's death.
 51. The Respondent denied that the termination was based solely on an email from Dr. Aston Benjamin Atwiine, instead asserting that the disciplinary committee reviewed all factors, and the Petitioner's failure to prioritize patient care warranted termination. The committee initially recommended a warning letter, but on further review, the severity of the incident justified termination.
 52. The burden of proof under Section 47(5) of the *Employment Act* lies with the employee to demonstrate that termination was unfair. The Respondent contended that the Petitioner failed to discharge this burden and that the reasons for termination were valid, fair, and just under Section 43(2) of the *Employment Act*. The Respondent relied on CFC Stanbic Bank Limited v. Danson Mwashako Mwakuwona [2015] eKLR, which held that courts should assess whether an employer's decision to dismiss an employee falls within the range of reasonable responses. The Respondent also referred to Judicial Service Commission v. Gladys Boss Shollei & Another [2014] eKLR, where the court upheld the dismissal of an employee based on reasonable employer judgment.
 53. The Respondent submitted that any reasonable employer would have terminated the Petitioner's employment in light of her failure to prioritize patient care, provide treatment, or instruct junior staff to act. The Respondent maintained that but for the Petitioner's negligence, the patient's death would not have occurred.
 54. The Respondent further submitted that it followed due process in terminating the Petitioner's employment contract and that the decision was procedurally fair within the meaning of Section 41 of the *Employment Act*. The Respondent relied on Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, which outlined that an employer must inform an employee of the charges leading to dismissal, allow the employee sufficient time to prepare a defense, and provide an opportunity to respond in person, writing, or through a representative. The Respondent contended that the Petitioner's claims, as pleaded in paragraph 40 of the Petition, lacked merit, particularly allegations that she was not given adequate time or relevant materials to prepare her defense, that the disciplinary committee was biased, that she was not informed of the evidence used against her, that the Respondent assumed the jurisdiction of the Kenya Medical Practitioners and Dentists Council (KMPDC), and that her right to fair hearing and fair administrative action was violated.
 55. The Respondent maintained that the Petitioner was given 48 hours to draft a written response to the show cause letter dated 21st May 2023, and seven days to prepare for the disciplinary hearing held on



- 30th May 2023. It relied on *David Waniau Muhoro v. Ol Pejeta Ranching Limited* [2014] eKLR, which held that fair hearing requires an employee to have sufficient time to prepare, understand the charges, and access relevant documentation. The Respondent also cited *Patrick Abuya v. Institute of Certified Public Accountants of Kenya & Another* [2015] eKLR, which stated that adequate preparation time depends on the circumstances of each case. Given the gravity of the incident involving a patient's death, the Respondent argued that 48 hours for a written response and seven days for hearing preparation were reasonable.
56. The Respondent denied allegations that the disciplinary committee was biased, arguing that the Petitioner failed to raise this issue during the hearing. It relied on *Alexina Kerubo Misaro v. Postal Corporation of Kenya* [2019] eKLR, citing *Jackson Butiya Ndolo v. Eastern Produce Kenya Limited* (Industrial Cause No. 335 of 2011), where the court held that employees cannot ignore internal grievance procedures and later claim unfair treatment. The Respondent also cited *Ojuok v. Kenya Power & Lighting Co* (Cause 63 of 2018) [2022] KEELRC 1629 (KLR) (18 May 2022), which held that employees must provide evidence of bias in disciplinary proceedings. The Respondent asserted that the Petitioner provided no proof of partiality and her claim was baseless.
57. On the issue of access to information, the Respondent argued that the Petitioner did not request additional documents before or during the hearing. It cited *David Wanjau Muhoro v. Ol Pejeta Ranching Limited* (supra) and an unreported South African High Court case, *Oliver v. Universiteit van Stellenbosch*, which held that an employer is obligated to provide requested documents for a disciplinary hearing, but only if the employee makes a formal request. The Respondent maintained that since the Petitioner did not request any materials, her claim that she was denied access to evidence was false.
58. Regarding the jurisdiction of the KMPDC, the Respondent refuted claims that it had usurped the Council's authority in determining the Petitioner's negligence. It relied on Section 4(j) of the *Medical Practitioners and Dentists Act*, which mandates the KMPDC to regulate professional conduct. However, the Respondent argued that the Council does not act suo moto unless a complaint is lodged, and there was no legal obligation to report the Petitioner to the KMPDC. It cited *Agnes Kavata Mbiti v. Housing Finance Company Limited* [2017] eKLR, which upheld that an employer can summarily dismiss an employee for negligence. The Respondent emphasized that the Petitioner's inaction in treating the patient led to or contributed to the patient's death, justifying termination.
59. The Respondent also argued that the disciplinary process was fair, and that the Petitioner failed to prove otherwise. It pointed out that Clause 10.9 of the IRC Employee Handbook provided an appeal mechanism, but the Petitioner did not appeal the decision. Additionally, no witnesses were called during the hearing, as the decision was based on the patient's inpatient file and antenatal care booklet. The Respondent asserted that the Petitioner was aware of her right to have a representative at the hearing but chose not to exercise it. The Respondent reiterated that it adhered to the requirements of procedural fairness under Section 41 of the *Employment Act* and that termination was justified based on gross negligence that led to a patient's death.
60. The Respondent further submitted that the Petitioner failed to discharge her burden of proof under Section 47(5) of the *Employment Act*, which places the burden on an employee to prove unfair termination. It cited *Kennedy Maina Mirera v. Barclays Bank of Kenya Limited* [2018] eKLR, where the court held that an employee must present prima facie evidence that their dismissal lacked valid reasons and fair procedure. The Respondent argued that the Petitioner's claims were unsubstantiated, whereas it had demonstrated that termination was based on valid reasons and was procedurally fair.



61. On the order of Certiorari sought by the Petitioner, the Respondent argued that termination was based on gross misconduct due to negligence that led to a preventable patient death, and therefore, the decision should stand. The Respondent also opposed the Petitioner's claim for declaratory orders, asserting that she failed to provide evidence of unlawful or unconstitutional termination. It reiterated that the determination of negligence was within the employer-employee relationship and did not require involvement of the KMPDC.
62. The Respondent further submitted that general damages are not available in employment disputes, citing *D.P. Bachheta v. The Government of the United States of America* [2017] eKLR, which held that general damages cannot be awarded for wrongful dismissal. It argued that the Petitioner had not demonstrated special circumstances warranting an exception and thus was not entitled to damages.
63. The Respondent also opposed the Petitioner's claim for recalling and quashing the disciplinary proceedings, arguing that the process was fair and lawful. It maintained that the Petitioner failed to appeal the decision, thereby not exhausting internal dispute resolution mechanisms. Regarding compensation, the Respondent cited *Emmanuel Nyongesa & 34 Others v. County Government of Trans Nzoia* (2021) eKLR, where the court held that constitutional compensation applies only where rights have been violated. The Respondent maintained that the Petitioner's rights were not violated, and the Petition was filed to circumvent standard employment law procedures.
64. The Respondent concluded that the Petition was an abuse of court process and should have been filed as an employment cause. It submitted that the termination of the Petitioner's employment was justified, procedurally fair, and in accordance with applicable law. The Petitioner failed to prove her claims on a balance of probabilities, and as such, the Petition should be dismissed in its entirety with costs to the Respondent.
65. Having considered the evidence and submissions of the parties herein, the issues for this court's determination are as follows:
 1. Whether the petitioner's dismissal was fair and lawful
 2. Whether the petitioners' constitutional rights were denied or violated.
 3. Whether the petitioner is entitled to the remedies sought.

Issue No 1

66. The petitioner filed this petition alleging unfair and unlawful termination of her employment by the respondent. In determining the unfairness or otherwise, I considered the termination letter issued to the petitioner which indicates that the petitioner was terminated due to negligence in the management of a patient. The respondents invoked clause 13, of subsection 13.2 of their employee handbook in this regard.
67. Before the termination, the petitioner was served with a show cause letter dated 21/5/2023 and required to show cause why disciplinary action should not be taken against her for mishandling a patient on 17/5/2023 who failed to be attended to at their facility and she succumbed to death the following day.
68. The petitioner in her response dated 23/5/2023 denied any negligence on her part. She indicated that indeed the patient Nunto Mohamed Hussein had been brought in but was charred by one of the nurses from the ward. It turned out that the patient was charred by one Teresa Yoo. When asked about this Teresa replied that she had asked to wait in the HRC waiting area to be seen by the RHCO. She indicated that she was in the nursing station documenting the ward round files while all this was



- happening. She was then given a brief history of the patient and looked at the patient who appeared stable. She continued with other work as the patient was received with other walk in patients. She did not see the patient again.
69. After this incident on 23/5/23 the internal death review meeting sat and discussed the issue and resolved that there was need to enforce strict adherence of ANC and PHC High Risk referral pathway and reduce waiting time for referral women at High Risk clinic by having a depicted clinician running the clinic from 8am to 4pm every weekday and 8 am to 1pm on Saturday. According to the petitioner this was a confirmation that she was not to blame for the death of the patient and neither was she negligent of her duties.
70. The petitioner indicated that after this she was invited for a disciplinary hearing which she attended on 30th May 2023 at 9.40 am. During the hearing the petitioner indicated that she was not there during Teresa's (the alleged nurse who dismissed the patient) was interacting with the deceased.
71. The petitioner avers that the disciplinary process was flawed in that she was denied her right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. She avers that the maternal death review meeting which exonerated her were issued after the deadline for her response to the show cause letter. She averred that she was given only 48 hours to respond which was insufficient to gather relevant documents and statements. She also contended that she was not given a fair hearing and was not even informed of her right of appeal.
72. I have looked at all these processes. Neither party produced the letter inviting the petitioner for her disciplinary process. This court cannot therefore weigh in on the period the petitioner was given to prepare for the hearing.
73. The details of what to do or not to during the disciplinary hearing cannot also be ascertained. It is however clear that the petitioner attended the disciplinary hearing as scheduled and accusations levelled against her were read out to her. She responded indicating that she was not in the same place with Teresa when the patient was turned away. She avers that she was busy doing her notes after the ward rounds. That she even looked at the patient who appeared stable when she was brought to her attention. She found the patient stable and proceeded to attend to others as the patient waited. She denied turning the patient away. No witness was called during the disciplinary hearing to counter the evidence of the petitioner. There is no evidence that she ignored the patient.
74. Section 43 of the *Employment Act* 2007 states as follows:
- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
75. It is imperative that the reasons upon which the employer relies upon to dismiss an employee must be valid and in existence. In this case, no witness was called during the disciplinary hearing to explain what happened. There is no indication that the petitioner's position was disputed.
76. Section 41 of the *employment act* 2007 states as follows:
- Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain



to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

77. Under the law, the procedure to be adopted is clear. The witness the employer relies upon must be called to testify and the employee must be given an opportunity to cross examine them. In the case of this case it cannot be ascertained who testified against the petitioner and show the evidence the respondents were relying upon to find the petitioner culpable.
78. In the circumstances of the case, the existence of valid reason to warrant termination are not established. Going to the procedure used, the petitioner has contended that the respondent also usurped the powers of KMPDU. The petitioner avers that section 4(j) of the KMPDU Act states that KMPDU shall regulate the conduct of medical Practitioners and initiate disciplinary procedure for professional misconduct. Indeed that is true. However, this cannot be a bar to an employer initiating their own internal disciplinary processes as per the employment law. The contention by the petitioner that the respondent usurped the role of KMPDU is without merit.
79. It is however true in term of the procedure used during the disciplinary process as per the minutes submitted by the respondent. No witness testified against the petitioner. It therefore begs many questions on which evidence the respondents relied upon to find the petitioner culpable.
80. Having established as above and in view of section 45(2) of the *Employment Act* 2007, which states as follows:

A termination of employment by an employer is unfair if the employer fails to prove——

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason——
 - i. related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.

I find the termination of the petitioner unfair and unjustified.

Issue No. 2: Constitutional Breaches

81. The petitioner alleged infringement of her rights by the respondent in the manner in which they handled the disciplinary process and dismissed her. I have established that indeed the respondents flaunted proper disciplinary processes and also failed to establish the existence of valid reason to warrant dismissal of the petitioner.
82. In my view, failure to adhere to procedural dictates is a breach of article 41 of *the Constitution* which dictates adherence to fair labour practice. It is therefore my finding that the respondent breached the petitioner's rights under article 41 of *the Constitution* on fair labour practices.

Issue No 3: Remedies

83. Having found as above, I find for the petitioner and render the following orders:
1. A declaration that the decision to terminate the petitioner's employment vide the letter dated 20/9/23 was unlawful, unfair and un constitutional.



2. An award for damages against the respondents to the tune of 2 million for the wrongful and unlawful termination of the petitioner's employment.
3. An award of compensation to the petitioner equivalent to 8 months salary for the unfair and wrongful termination based on the unfairness meted against her = $8 \times 256,349.30 =$ Kshs 1,538,096/-
Total = Kshs 3,538,096/-. Less statutory deductions.
4. The respondent will pay cost of this suit plus interest at court rates w.e.f the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE

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