



**Sikuku v Kenya National Trading Corporation (KNTC) (Employment and Labour Relations Petition E203 of 2024) [2025] KEELRC 2014 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2014 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E203 OF 2024**

**HS WASILWA, J  
JUNE 30, 2025**

**BETWEEN**

**AMOS JUMA SIKUKU ..... PETITIONER**

**AND**

**KENYA NATIONAL TRADING CORPORATION (KNTC) ..... RESPONDENT**

**JUDGMENT**

1. By a Petition dated 5<sup>th</sup> December 2024, the petitioner sought for the following reliefs; -
  - a. A declaration that the decision of the Respondent to subject the Petitioner to disciplinary processes and dismiss him from employment on allegations of non-compliance with the provisions of the *Public Procurement and Asset Disposal Act, 2015* together with the regulations attendant thereto in view of the fact that the Respondent had resolved that the said laws were not applicable in the relevant instance was unfair, unreasonable and unlawful and a violation of the Petitioner's right to fair labour practices and fair administrative action as enshrined under Article 41 and 47 of *the Constitution*.
  - b. A declaration that by introducing and dismissing the Petitioner on a total of ten grounds/ allegations of gross misconduct outside the three charges cited in his show cause letter and none of which the Petitioner was ever afforded an opportunity to respond to, the Respondent violated the Petitioner's right to fair labour practices, fair administrative action and fair hearing as provided under Article 41,47 and 50 of *the Constitution*.
  - c. A declaration that in dismissing the Petitioner from employment simply for discharging his duties as contained in his letter of offer and as allocated to him by his superiors/immediate bosses, the Respondent violated the Petitioner's right to fair labour practices and the provisions of Article 236 of *the Constitution*.



- d. A declaration that the Petitioner's termination of employment as communicated in the letter dated 6<sup>th</sup> March, 2024 was unfair, unlawful, unreasonable and a violation of the Petitioner's constitutional rights to fair labour practices and fair administrative action hence the same is null and void ab initio.
- e. An order directing the Respondent to compensate the Petitioner damages for violation of his constitutional rights.
- f. An order of mandamus directed at the Respondent ordering it to reinstate the Petitioner back to work without any loss as to job rank, salary and remuneration.
- g. An order directing the Respondent to pay the Petitioner all and any salary and benefits withheld as a result of the unlawful and unfair termination of his employment.
- h. Costs of this suit.
- i. Any further orders that this Honourable Court may deem fit and just to grant in the circumstances.

### **Petitioner's Case.**

2. The Petitioner avers that he was employed as a Supply Chain Management and Logistics Manager job grade KNTC 3 for a contract term for five years with effect from the 1<sup>st</sup> September 2022.
3. The Petitioner avers that vide a memo dated 23<sup>rd</sup> January 2024, the Respondent through its Ag. Managing Director issued him with a Notice to Show Cause (NTSC).
4. The NTSC alleged that he signed a Bidders evaluation report that the said bids had been evaluated when an internal audit report indicated that the procurement process was fabricated and conducted without following due process as the evaluation committee was not able to avail documents such as bid documents sent by the various bidder.
5. It was alleged that the Petitioner irregularly awarded tenders by signing a tender evaluation report falsely indicating that the tender evaluation committee evaluated tenders when there was no evidence whether the suppliers named were competitively sourced as required under the Public Procurement & Assets Disposal Act (PPADA).
6. It was further alleged that the Petitioner neglected duty by failing to ensure that the bid documents were availed to him and the committee for proper scrutiny and evaluation as guided by the Public Procurement & Assets Disposal Act (PPADA) and he failed to give proper professional opinions on the direct procurement as well as undertaking procurement of warehouses outside the PPADA.
7. The Petitioner avers that he responded vide a letter dated 29<sup>th</sup> January 2024 indicating that he was never part of the tender evaluation committee and never signed the said report as alleged. He gave a detailed breakdown of how the entire process was initiated when the Respondent received a Cabinet dispatch memo that designated it as the anchor state agency to stabilize prices of core essential commodities and farm inputs on the market which arose to alarming rates.
8. Consequently, the Respondent's Managing Director presented a concept paper to the Board which was approved and as such, the Petitioner's mandate was to implement the Board's resolution on the same. The Respondent also through its parent ministry sought approval to use specifically permitted procurement procedures.



9. The Ministry of National Treasury vide a letter dated 1<sup>st</sup> November 2022, noted that the Respondent had two policies governing the procurement process: the administrative activities that have no profit implications governed by the PPADA and commercial activities that involve trading for profit governed by its commercial policy to be able to raise enough funds to run its activities. This was reiterated by the Public Procurement and Regulatory Authority vide its advisory dated 18<sup>th</sup> November 2022.
10. The Petitioner avers that based on these advisories, the Respondent was free to use its own procurement policy outside the PPADA in executing its mandate, therefore, the allegations against him were misguided as the Respondent was procuring goods for trade which were not applicable to the procurement laws.
11. The Petitioner avers that he did not source for any suppliers as the list was dispatched from the then Managing Director's office based on the urgency of the Cabinet dispatch to stabilise sky rocketing prices of the core items and farm inputs.
12. The Petitioner avers that he indicated in his response that the margin analysis for different products was done and he attached the report and indicated he issued the relevant professional opinion based on the report and he did not participate in the procurement of the warehouses save for United Warehouse in Mombasa which due process was followed.
13. It is the Petitioner's case that the internal audit report upon which the charges against him were based, was prepared without seeking the input of the persons it purported to make adverse findings.
14. The Petitioner avers that he was subsequently sent on compulsory leave vide a memo dated 8<sup>th</sup> February 2024 and invited for a disciplinary hearing on 22<sup>nd</sup> February 2024 which he attended and offered his defence. Ultimately, he was summarily dismissed vide a letter dated 6<sup>th</sup> March 2024 on citing ten grounds of gross misconduct which he had never been called upon to answer to.
15. The Petitioner avers that he appealed the decision vide a letter dated 5<sup>th</sup> April 2024 which has never been acted upon to date.
16. It is the Petitioner's case that the dismissal of his employment was unjustified, unfair and a violation of his constitutional rights to fair labour practices and fair administrative action.

### **Respondent's Case.**

17. In opposition to the Petition, the Respondent filed a Replying Affidavit dated 3<sup>rd</sup> March 2025 sworn by its General Manager Internal Audit, Kevin Micheni.
18. It is the Respondent's case that the Petitioner and the former Chief Executive Officer (CEO) commenced the procurement of goods for public interest and not for profit as alleged. This is in line with the mandate to stabilise the price of essential food commodities in accordance with section 2 of the PPADA.
19. The Respondent avers that the former CEO, through the parent ministry sought approval from the National Treasury to utilise Specially Permitted Procurement Procedure (SPPP) UNDER THE PPADA; however, the approval sought was based on untrue facts that the corporation had existing trading and non-trading policy.
20. The 1<sup>st</sup> Respondent avers that the trading and non-trading policy were in draft at the time of evaluation and were approved on 3<sup>rd</sup> August 2023 and the Petitioner was aware of this fact. Therefore, the Petitioner and the former CEO intentionally misled the National Treasury of the existence of the policy which they knew was unavailable at time. The misrepresentation was meant to fabricate procurement



documents towards compliance of the PPADA as they had predetermined successful bidders to be awarded.

21. It is the Respondent's case the Petitioner's dismissal was based on valid reasons as he failed to comply with Article 227 of *the Constitution*, the PPADA and the Kenya National Trading Corporations Human Resource Policies Procedure Manual through the following particularised actions:
- i. Initiating the award of tenders on 8<sup>th</sup> and 21<sup>st</sup> November 2022 before the approval of bulk commodities was granted by the Cabinet on 12<sup>th</sup> November 2022 and the National Treasury on 1<sup>st</sup> December 2022.
  - ii. Acting on verbal instructions of the former Managing Director on a procurement matter by receiving list of suppliers from the accounting officer as per the response dated 29<sup>th</sup> January 2024 to the NTSC contrary to the PPADA and its subsequent regulation 2020.
  - iii. Failure to place an advert of the tender opportunities on the KNTC website for importation of Bulk Commodities inviting the suppliers consequently contravening the Section 90(1)(e) of the PPADA Regulations 2020.
  - iv. Failure to advise the Accounting officer to notify the PPR within 14 days after award of a direct procurement contract as stipulated in Section 90(1)(b) of the PPADA Regulations 2020.
  - v. Failure to undertake registration and prequalification of Bulk Commodities suppliers as per the PPADA and contravening Section 3.4(i) on Registration and Prequalification of Suppliers of KNTC draft trading policy which was purportedly used.
  - vi. Misleading information vide a letter dated 8<sup>th</sup> November 20022 purporting prequalification had been undertaken.
  - vii. Failure to keep records in electronic and manual on how quotations were floated to and received from the suppliers of bulk commodities violating Section 74(2) of the PPADA.
  - viii. Failure to negotiate prices offered by the suppliers' contrary to Section 3.1 of the KNTC draft Trading Policy which was purportedly used.
  - ix. Non-adherence to Article 227 of *the Constitution* on procurement of public goods and services that directs state organs or any public entity to contract for goods and services with a system that is fair, equitable, transparent, competitive and cost-effective.
  - x. Failure to undertake Supplier Quality Approvals as guided by the KNTC draft Trading Policy which requires the supplies to demonstrate they have necessary quality processes and practices in place to provide KNTC with products that are safe for consumers to use and in compliance with regulatory requirements. Each supplier must successfully complete this qualification step and subsequently maintain their approved status in order to supply KNTC.
  - xi. Failure to advise the accounting officer as the head of procurement that 'Scouting and negotiation' of warehouses in Mombasa and Nairobi as per the reviewed reports is not a procurement method recognised by law. The price negotiated in the process on behalf of KNTC ended up being exorbitant and not in tandem with market rate.
  - xii. Misleading the Committee that the method of procurement used was Specially Permitted Procurement yet the evaluation report indicated the method to be Direct Procurement.
22. The Respondent contends that as a consequence of the irregular tender process concerning the importation of Food Commodities Project, the corporation and the public suffered huge losses and



- financial exposure amounting to Kshs. 9,000,000,000. Due to the loss of these public funds, the matter was reported to the Directorate of Criminal Investigations (DCI), the Ethics and Anti-Corruption Commission (EACC), the Assets and Recovery Agency (ARA).
23. The Respondent avers that the DCI conducted its own investigations and arrested the Petitioner and charged him over the offences of and the matter is pending before the criminal court for determination. And the matter is currently being prosecuted against the Petitioner by EACC and is still active with ARA.
  24. The matter being of great public concern and there being subsequent loss of massive public funds, a special audit on the importation of edible oils by the Respondent was conducted by the Office of the Auditor General for investigations and a detailed report was subsequently released by the office. The report pointed out the massive irregularities in the procurement process of service providers, largely orchestrated by the Petitioner in his capacity as the head of supply chain department; and recommended that upon conclusion of investigations by the investigative agencies, culpable persons and entities found culpable for loss of public funds be prosecuted.
  25. It is the Respondent's case that tender evaluation report dated 18<sup>th</sup> November 2022 indicates the date of invitation to tender was 8<sup>th</sup> November 2022, two days before the Cabinet dispatch dated 10<sup>th</sup> November 2022. This indicates that the Respondent invited bidders before the Cabinet had sat and issued KNTC the mandate of price stabilization; while some quotations were invited on 11<sup>th</sup> November 2022 adding onto the sham of the process.
  26. The Respondent avers that the Petitioner was served with a NTSC dated 23<sup>rd</sup> January 2024 together with the internal audit report dated 17<sup>th</sup> January 2024 and he was given adequate time to respond. The Respondent allowed the Petitioners access to his email and the Enterprise Resource Planning System until 25<sup>th</sup> April 2024 to enable him retrieve evidence to be adduced at the hearing.
  27. Upon receipt of the Petitioner's response to the NTSC dated 29<sup>th</sup> January 2024, the Respondent considered it and found it inadequate and proceeded to invite the Petitioner to appear before the Board Ad-hoc Committee on 22<sup>nd</sup> and 23<sup>rd</sup> February 2024 to clarify the allegations in the NTSC.
  28. The Petitioner appeared before the committee and he was heard and subsequently, the Ad-hoc Committee submitted its findings to the full Board on 6<sup>th</sup> March 2024, where the report was discussed and a resolution was made to dismiss the Petitioner on grounds of gross misconduct.
  29. The Respondent avers that upon receipt of the ad-hoc disciplinary committee's report and findings, the Respondent implemented the same through termination letters dated 6<sup>th</sup> March 2024. The Petitioner was granted an opportunity to lodge appeals against his dismissal within 6 weeks, however, the Petitioner chose not to exhaust the internal dispute resolution or lodge any appeals with the Public Service Commission.
  30. It is the Respondent's case that the Specially Permitted Procurement Procedure was not authorised until 1<sup>st</sup> December 2022 meaning the entire process was undertaken without the necessary legal authority.

### **Petitioner's Submissions.**

31. The Petitioner submitted on two issues: whether this Honourable Court has the jurisdiction to hear and determine this Petition; and whether the Petitioner's dismissal from the Respondent's services was lawful and whether the same violated the Petitioner's constitutional rights.



32. On the first issue, the Petitioner submitted that it is a well-established legal principle that where a dispute resolution mechanism exists outside the courts, the same should be exhausted first before the jurisdiction of the court is invoked. However, the requirement for exhaustion is not always mandatory, there are exceptional circumstances permissible for a litigant to move and invoke the court's jurisdiction on a cause of action without exhausting internal dispute resolution as held in *Republic v Independent Electoral and Boundaries Commission(I.E.B.C) Exparte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR.
33. The Petitioner submitted that an appeal can only lie to the PSC when the same is against the merits of the decision being appealed against but such an appeal cannot lie when the party is contesting the legality/constitutionality of the entire exercise or action in the first place. He relied on the case of *Chief Justice and President of the Supreme Court of Kenya & another v Khaemba* [2019] KECA 46 (KLR) where the Court of Appeal weighed in on whether illegality both in procedure and substance constitutes exceptional circumstance to warrant exemption from the doctrine of exhaustion.
34. The Petitioner submitted that the nature of the grievance before this court, being the legality of the Respondent's actions as well as the violation of his constitutional rights, it not only constitutes exceptional circumstances to warrant the court's intervention of this court despite the doctrine of exhaustion, it also does not fall within the jurisdiction of PSC to determine.
35. It is the Petitioner's submission that when determining the legality of an action, an analysis and interpretation of the relevant legal provisions is inevitable. PSC does not have authority to interpret the law in order to make a determination as to whether the Respondent was acting within its authority or whether the Respondent's actions are legal in the first place, this is the preserve of only the courts and the suit herein is rightly brought before this court.
36. On the second issue, the Petitioner submitted that in as much as he was dismissed from service for failure to comply with provisions of the PPADA or the regulations arising therein, the same was grossly unfair and a violation of the Petitioner's right to fair administrative action and fair labour practices. The Respondent was mandated to procure goods for sale at a profit in order to aid it in stabilizing market prices for essential commodities, was not a procurement process subject to the PPADA. This was confirmed by both the National Treasury and the Public Procurement Regulatory Authority in their letters dated 1<sup>st</sup> December 2022 and 18<sup>th</sup> November 2022 and the Respondent's Board approved the acquisition of the items in question on 5<sup>th</sup> October 2022 and the Petitioner could not have been blamed for discharging his duties.
37. The Petitioner submitted that he was accused of irregularly awarding tenders which was misguided as it is common ground that being a Supply Chain Manager does not in any way award any tenders to anyone, their mandate was strictly limited to the evaluation of the bids received by the Respondent through its supply chain department.
38. It is the Petitioner's submissions that he was charged, subjected to a disciplinary proceeding and dismissed based on a draft internal audit report when he was never given an opportunity to answer any of the questions raised by the auditors. The Petitioner further denied the Respondent's claim that he was furnished with an audit report via email as he was forced to proceed on compulsory leave during the material period and he was locked out of the Respondent's ERP system including access to his emails within the Respondent's domain. Further, it was premature and a violation of his rights to fair administrative action and fair labour practices.
39. The Petitioner submitted that the NTSC called the Petitioner to answer to specific charges which were threefold, however, when he offered his responses, the disciplinary process morphed into a different



thing and he was ultimately dismissed based on a total of ten charges that he had never been afforded an opportunity to respond to in violation of the Petitioner's rights to fair administrative action and fair hearing. He relied on *Evans Nyang'wono Monda v Kenya Pipeline Company Limited* [2020] KEELC 1873 (KLR) where the court held:

“In view of the foregoing binding precedent, I must return that the introduction of new allegations or reasons for dismissal at the disciplinary hearing or in the dismissal letter after the hearing amounts to violation of fair hearing as envisaged under section 41 of the *Employment Act* and renders the dismissal of the claimant on such new grounds unfair within the meaning of section 45 of the Act.”

40. The Petitioner submitted that the Respondent having failed to justify that the intended dismissal was valid based on the charges it had framed against him, it came up with an entirely different list of charges and proceeded to dismiss the Petitioner based on new charges that it never afforded him an opportunity to answer to in the first place. This was a gross violation of the Petitioner's right to fair administrative action and fair hearing.
41. It is the Petitioner's submission that he was dismissed for simply doing the job he had been asked and was mandated to do. It is not in dispute that the PPRA and National Treasury both confirmed that the impugned procurement process was not subject to the PPADA which was sourcing for goods to sell at a profit. It is further not in dispute that the Respondent failed to substantiate the charges as framed in the NTSC dated 23<sup>rd</sup> January 2024 which erroneously related to an evaluation committee that he was never part of and he never prepared the report but she dismissed on entirely different grounds that he was never given a chance to defend himself against.

#### **Respondent's Submissions.**

42. The Respondent submitted that the Special Audit Report from the Office of the Auditor General dated 29<sup>th</sup> July 2024 pointed to massive irregularities in the procurement process of service providers, largely orchestrated by the Petitioner in his capacity as the head of supply chain department and detailed the procurement irregularities, attributable to the Petitioner.
43. The Respondent submitted that the evaluation report dated 18<sup>th</sup> November 2022 states that the Direct Procurement Method was used, whereas, the tender documents dated 21<sup>st</sup> November 2022 indicate that an Expression of Interest (EOI) was used. These inconsistencies prove that the procurement process was not transparent or lawful and confirms the fabrications orchestrated by the Petitioner as the Head of Supply Chain, as the anomalies ought to have been corrected in the professional opinion signed by him dated 21<sup>st</sup> November 2022.
44. The Respondent submitted that a Special Audit Report also indicates that the evaluation committee received oral instructions from the former CEO to proceed with the tender evaluation, contrary to Section 78(1) of the PPADA, which mandates that tender opening and evaluation be conducted by separate committees. The Petitioner ought to have advised the former CEO accordingly, a role he conveniently avoided.
45. It is the Respondent's submission that Petitioner failed to conduct due diligence as was required of his position as particularised under paragraph 21 herein. It further submitted that there existed valid reasons for terminating the Petitioner's employment and he was adequately informed of the said reasons for terminating his employment vide a NTSC under reference in compliance with *Employment Act* as well as Articles 4 and 7 of the International Labor Organization (ILO) Con-158 Termination of Employment Converters, 1982.



46. On whether the petitioner violated the PPADA, the Respondent submitted that the PPADA provides that direct procurement is permissible only in specific instances outlined in Section 74, such as when there is only one supplier and no reasonable alternative, or where there is an urgent need for the goods being procured. However, even where justification exists, Section 75 of the PPADA requires strict adherence to procedures, including negotiating fairly, ensuring the process is not discriminatory, and formalizing the contract in writing.
47. The Respondent submitted that the Petitioner failed to comply with these requirements. It relied on the case *Republic v Public Procurement Administrative Review Board Ex Parte Accounting Officer, Kenya Ports Authority & Another* [2021] KEHC 9343 eKLR which emphasized that public procurement processes must be strictly adhered to, and failure to meet notification requirements renders the procurement process unlawful.
48. The Respondent submitted that the Petitioner's failure to notify the Public Procurement Regulatory Authority (PPRA) within 14 days after the award of a direct procurement contract violated Regulation 90(1) (b) of the PPADA Regulations, 2020, effectively nullifying the procurement process.
49. Further, the PPADA and Regulation 58 of the Public Procurement and Disposal Rules (PPD Rules) require that before negotiations on direct procurement commence, the tender committee must approve the successful proposal. Moreover, at least two members of the procurement unit must conduct negotiations and submit a report to the tender committee. The Petitioner bypassed this critical requirement, leading to an opaque process that contravened the principles of accountability and transparency under Article 227(1) of *the Constitution*.
50. The Respondent submitted that the Petitioner's failure to justify the use of direct procurement and failure to involve the tender committee in negotiations indicate an outright abuse of procurement laws. As held in *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* [2019] KEHC 8239 eKLR that strict procedural safeguards exist to prevent the abuse of direct procurement. The court underscored that direct procurement should not be used to avoid competition, achieve collateral purposes, or favour specific suppliers.
51. It is the Respondent's submission that the Petitioner's failure to keep records on how quotations were invited and received violated this provision and facilitated an irregular procurement process that lacked transparency; in violation of Section 74(2) of the PPADA which requires that all procurement records be properly maintained, both electronically and manually, to facilitate audits and accountability. It relied in *Blue Sea Services Limited v Kenya Ports Authority & Others* [2023] KEHC 22382 eKLR, the court reiterated that failure to document procurement processes enables corruption and makes it impossible to ensure compliance with legal requirements.
52. The Respondent submitted that Article 227(1) of *the Constitution* mandates that all public procurement processes be conducted in a competitive and non-discriminatory manner. The Petitioner, by failing to advertise the tender publicly and instead engaging in selective awarding of contracts, violated this principle. It relied on *Royal Media Services v Independent Electoral & Boundaries Commission & 3 others* [2019] KEHC 8239 eKLR, wherein the court emphasized that the purpose of competitive bidding is to ensure the best possible outcome for public entities and prevent favouritism.
53. It is the Respondent's submission that the procurement rules explicitly prohibit public officials from engaging in negotiations before obtaining committee approval; the Petitioner's circumvention of these rules led to an opaque process that lacked the necessary safeguards to protect public funds from misuse.
54. On whether the Petitioner was procedurally and fairly terminated, the Respondent submitted that it facilitated the right to fair hearing enshrined in Article 50(1) of *the Constitution* by serving the



- Petitioner with a show cause letter dated 23<sup>rd</sup> January, 2024, along with an internal audit report that provided comprehensive grounds for potential disciplinary action. The Petitioner was further afforded a reasonable timeframe to respond, demonstrating adherence to the right to be heard.
55. It is the Respondent's submission that it formed an ad-hoc committee to conduct the disciplinary hearing in accordance with the Corporation's Employment Manual and it comprised of unbiased members who were tasked with evaluating the facts and evidence related to the alleged misconduct. The findings of this committee were subsequently used to validate the actions taken against the Petitioner, ensuring that decisions were based on deliberative assessments of evidence and testimony, as outlined in the *Employment Act*.
  56. The Respondent submitted that the Petitioner was clearly informed of the charges against him and was provided with the basis for dismissal as stipulated in the show cause letters and further documented in the ad-hoc committee's findings, in compliance of Section 41 of the *Employment Act*, which requires an employee to be informed of the specific grounds for disciplinary action.
  57. The Respondent submitted that its management considered the Petitioner's response to the NTSC and found it inadequate and vide a letter dated 8<sup>th</sup> February 2024 the Petitioner, together with others was invited to appear before the Board Ad-hoc Committee on 22<sup>nd</sup> and 23<sup>rd</sup> February 2024 to clarify the allegations as contained in the show cause letter. The Petitioner appeared before the Board's Ad-hoc Committee where he was heard and after the hearing, it came out that the charges outlined in the show cause were sufficiently proved as outlined in the ad-hoc board committee report.
  58. The Respondent submitted that the Ad-hoc Committee subsequently submitted its finding to the Full Board where the report was discussed and a resolution made to dismiss the Petitioner on grounds of gross misconduct as contained in the Minutes of the Full Board dated 6<sup>th</sup> March 2024. The Respondent then implemented the Ad-hoc disciplinary committee's report and findings through termination letters dated 6<sup>th</sup> March, 2024.
  59. The Respondent submitted that the Petitioner was granted opportunity to lodge appeals against his dismissal within 6 weeks, however, he chose not to exhaust the internal dispute disciplinary resolution mechanism or lodge any appeals with the Public Service Commission as ordered by Hon Byram Ongaya in Nairobi ELRC Petition No. E059 of 2024 between the Respondent and other Petitioners, who were dismissed alongside the Petitioner, by the Respondent. The Petitioners have since withdrawn that Petition without complying with the orders to lodge appeals with PSC for hearing and determination.
  60. It is the Respondent's submission that records indicate that at no point did the Petitioner seek additional time, or was denied access to any material that would have facilitated his response. This is in strict adherence to the case of *Evans Thiga Gaturu & Another v Naiposha Company Ltd & 13 Others* [2017] eKLR, where the court emphasized that implicit in the right to a fair hearing is the right to know the allegations in advance and a reasonable opportunity to respond.
  61. The Respondent submitted that the Supreme Court of India in *Indru Ramchand Bharvani & others v Union of India & others*, 1988 SCR Supl (1) 544, 555, found that a fair hearing consists of two elements: an opportunity to be heard, and reasonable opportunity to present a defence. In the present case, both elements were met: the Petitioner was duly notified of the proceedings before the Board Ad Hoc Committee and appeared before it, where he was granted an opportunity to present his case satisfying the requirement of procedural fairness.
  62. The Respondent submitted that the Petitioner's failure to present adequate evidence not only undermines his claim but also reflects a broader legal principle requiring precise and substantiated



allegations to establish the occurrence of constitutional violations. Hence, the Petition is unfounded, lacks merit and represents an abuse of court process.

63. The Respondent further submitted that it has demonstrated that the Petitioner was granted a fair hearing in accordance with *the Constitution* as he was given adequate notice, access to necessary materials, and an opportunity to present his case before a competent body. Therefore, the Petitioner's allegations of procedural unfairness are unfounded and should be dismissed.
64. On whether the Petitioner exhausted local remedies, the Respondent submitted that Hon Byram Ongaya in Nairobi ELRC Petition No. E059 of 2024 between the Respondent and other Petitioners, who were dismissed alongside the Petitioner, by the respondent over the same cause of action, ordered that the Petitioner exhaust the internal dispute disciplinary resolution mechanism or lodge any appeals with the Public Service Commission. The Petitioners have since withdrawn that Petition without complying with the orders to lodge appeals with PSC for hearing and determination.
65. The Respondent submitted the doctrine of exhaustion is established under Section 9(2) of the *Fair Administrative Action Act* that provides that a court shall not review an administrative action unless all internal mechanisms for appeal or review and all other remedies available under written law have been exhausted. The courts have consistently held that where a clear statutory remedy exists, a litigant must first utilize that remedy before approaching the courts. Reliance was placed on the Court of Appeal in *Speaker of the National Assembly v Karume* [1992] KECA 42 eKLR stated that:
- “where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
66. The Respondent submitted that Section 9(4) of the *Fair Administrative Action Act* allows for exemption from the exhaustion requirement only in exceptional circumstances. Courts have interpreted exceptional circumstances to include instances where the appellate body lacks jurisdiction, is biased, or where pursuing internal remedies would be futile. In this case, the Petitioner has not demonstrated any such circumstances.
67. It is the Respondent's submission that the Petitioner was provided with an opportunity to appeal within six weeks before the Public Service Commission, a competent appellate body. His failure to utilize this remedy bars him from seeking audience in this court and renders the petition premature and an abuse of court process.
68. On reinstatement, the Respondent urged the court to decline this prayer and submitted that there is a strained relationship and lack of trust between the Respondent and the Petitioner over the loss of KShs 9,000,000,000 as a result of procurement irregularities occasioned by the Petitioner. Additionally, it also filled the position previously occupied by the Petitioner therefore the reinstatement sought cannot issue.
69. On compensation, the Respondent submitted that the dismissal of the Petitioner was justified and procedurally fair and he does not deserve any compensation for award for unfair dismissal.
70. I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:
1. Whether there were valid reasons to warrant the petitioner's dismissal.
  2. Whether the petitioner's constitutional rights were infringed upon by respondents



3. Whether the petitioner is entitled to the remedies sought.

#### **ISSUE NO 1.**

71. The respondent dismissed the petitioner vide a letter of dismissal dated 6<sup>th</sup> March 2024 in which the respondents set out 10 grounds leading to dismissal as per para 21 of this judgment. Prior to this dismissal however the claimant had been served with a show cause letter dated 23/1/2024 which set out issues to be addressed as follows:
  - a) Irregular awarding of tenders where it was alleged, he signed a tender evaluation report falsely indicating that the tender evaluation committee evaluated tenders when there was no evidence whether the suppliers named therein were competitively sourced as required under the Public Procurement & Assets Disposal Regulations, 2020.
  - b) Making false statements and records where it was alleged that he signed a Bidders evaluation report indicating that the said bids had been evaluated when an internal audit report indicated that the procurement process was fabricated and conducted without following due process as the evaluation committee was not able to avail documents such as bid documents sent by the various bidders and;
  - c) Negligence of duty where it was alleged that he failed to ensure that the bid documents sent by the bidders were availed to him and the committee for proper scrutiny and evaluation as guided by the Public Procurement & Assets Disposal Act, 2015 and further failed to give proper professional opinions on the direct procurement as well as undertaking procurement of warehouses outside the Public Procurement & Assets Disposal Act, 2015.
72. The petitioner was asked to respond to the three issues raised in the notice to show cause and for which he responded vide his letter dated 29/1/2024. He denied being part of the tender evaluation committee and attached the report of the committee showing its membership. He also responded denying any culpability on the allegations against him.
73. The petitioner was thereafter invited before the respondent's ad hoc committee on 22<sup>nd</sup> and 23<sup>rd</sup> February 2024 to shed more light on the allegations contained in the show cause letter. The letter of 6/2/24 invited the petitioner to a disciplinary hearing scheduled for 22/2/2024 at 2pm.
74. The report of the ad hoc disciplinary hearing have been filed by the respondents plus the minutes showing that the board of the respondent met on 6/3/2024 and considered the said report and resolved to have the officers found culpable summarily dismissed.
75. The petitioner has submitted that his dismissal was unfair and unjustified because he was initially asked to show cause why disciplinary action should not be taken against him on 3 issues.
76. The minutes of the disciplinary hearing have not been produced before court and therefore there is no indication that the petitioner was not put to task over other charges.
77. In the letter of summary dismissal however, the petitioner is found culpable on 10 charges which were originally never presented to him. As submitted herein, the petitioner was served with 3 charges but was found culpable of 10 Where the other seven emerged from assuming the 3 were from the original notice to show cause is not clear.
78. As held in *Evans Nyangwano Monda vs Kenya Pipeline Company Ltd (2020) KE ELRC 1873 (KLR)* introduction of new allegations or reason for dismissal at the disciplinary hearing or in the dismissal



letter after the hearing amounts to violation of fair hearing. This in my view is against fair labour practice as per section 41 of the Employment Act.

## ISSUE NO 2.

79. On infringement of the Constitution article 41 of the Constitution envisages that there must be fair labour rights which includes a right to a fair hearing. Article 50(1) of the Constitution also envisages a right to a fair hearing which states as follows:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

80 Article 50(2)(b) also states as follows:-

2) Every accused person has the right to a fair trial, which includes the right—

(b) b) to be informed of the charge, with sufficient detail to answer it;

The need for a fair hearing with proper charges cannot therefore be wished away or be over emphasized.

81. In the case of the petitioner, it is my finding that he was subjected to an unfair disciplinary process and found culpable of charges not presented to him and therefore his rights under the constitution were infringed upon.

## ISSUE NO 3.

82. Having found as above, I return the verdict for the petitioner as follows:

1. A declaration that the respondents subjected the petitioner to a flawed disciplinary process as per articles 41, 47 and 50 of the constitution.
2. A declaration that by introducing and dismissing the petitioner on a total of ten grounds/ allegations of gross misconduct outside the three charges cited in his show cause letter and none of which the petitioner was ever afforded an opportunity to respond to, the respondent violated the petitioners right to fair labour practices, fair administrative action and fair hearing as provided under articles 41,47 and 50 of the Constitution.
3. An order directing the respondents to pay the petitioner 3 million as damages for violating his constitutional rights.
4. An order directing the respondents to pay the petitioner all and any salary and benefits withheld as a result of the unlawful and unfair termination of his employment.
5. The respondents to pay costs of this suit plus interest at court rates with effect from the date of this judgement.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> OF JUNE, 2025.**

**HELLEN WASILWA**

**JUDGE**

