



**COO v GAIN (Constitutional Petition E004 of 2025)
[2025] KEELRC 2046 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2046 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E004 OF 2025**

B ONGAYA, J

JULY 10, 2025

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION
IN ARTICLES 2, 3 & 10 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS IN ARTICLES 20, 21, 22, 23, 27, 28, 35,
41, 47, 48 & 162(2)(A) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF SECTIONS 4, 7, 10 (1), 11 AND 12 OF
THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

BETWEEN

COO PETITIONER

AND

GAIN RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 10th July, 2025)

JUDGMENT

1. The petitioner filed the Amended Petition as amended on 27.01.2025 through Muma & Kanjama Advocates. The petitioner prayed for:
 - a. A declaration that the disciplinary process by the respondent was unlawful and unconstitutional and violated the petitioner’s right to fair labour practices.



- b. A declaration that the refusal by the respondent to provide the petitioner with information relating to the purported investigations conducted between 23.10.2024 and 27.11.2024 violated his right to access to information.
 - c. A declaration that the refusal by the respondent to allow the petitioner to be accompanied by an advocate to the disciplinary meeting in the circumstances was unfair, unfounded, unlawful and unconstitutional.
 - d. A declaration that by directing the petitioner to respond to anonymous persons, the respondent violated the petitioner's right to fair administrative action.
 - e. A declaration that the refusal by the respondent to allow the petitioner to bring his witnesses and to cross examine the complainants violated the petitioner's right to fair administrative action.
 - f. A declaration that the petitioner's summary dismissal was unfair, unlawful and unconstitutional and of no legal effect to the extent that the impugned disciplinary process contravened the provisions on Articles 27, 28, 35, 41 and 47 of *the constitution* of Kenya, 2010.
 - g. An order of certiorari quashing the investigation report dated 27.11.2024, show cause letter dated 17.12.2024, and the dismissal letter dated 17.01.2025, in respect of the subject matter of the amended petition.
 - h. A conservatory order do issue restraining the respondent, its agents, servants or any other person acting for and or on their behalf from communicating to any third party about the allegations in respect of the allegations leading to the wrongful summary dismissal of the petitioner.
 - i. An order directing the respondent to pay the petitioner two months' salary in lieu of notice pursuant to clause 15(i) (b) of the contract of employment dated 25.05.2020 in the sum of Kshs 1,153, 286.00.
 - j. An order for compensation of twelve (12) month's salary amounting to Kshs 6,920,316.00 for violation of the petitioner's constitutional rights under Articles 27, 28, 35, 41 and 47 of *the Constitution* of Kenya 2010 as outlined hereinabove.
 - k. An order for compensation of twelve (12) months' salary pursuant to section 49(c) of the *Employment Act* No. 11 of 2007 to wit Kshs 6,920,316.00.
 - l. An order for general and aggravated damages for breach of constitutional rights including the right to fair administrative action, right to human dignity and self-worth.
 - m. An order directing the respondent to issue the petitioner with a certificate of service in accordance with section 51(1) of the *employment act*, no 11 of 2007.
 - n. An order for interest at 12% p.a. on prayers (i), (j), (k) and (l) above herein from the date of filing the amended petition until payment in full.
 - o. That the costs of this petition be borne by the respondent.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and his Further Affidavit sworn on 16.05.2025. The petitioner's case is as follows:



- a. The petitioner was employed on 25.05.2020 as an Influencing and Advocacy Manager and thereafter promoted to the position of Head of Policy and Advocacy, after about three years of service.
- b. He diligently performed his duties and prior to 23.10.2024 there were no complaints regarding his conduct or performance.
- c. The petitioner received a letter dated 23.10.2024 alleging gross misconduct on his part and an investigator, Vicky Widlake, had been assigned to conduct investigations into the allegations.
- d. The petitioner was initially suspended for two weeks, which was later extended for a further four weeks.
- e. The petitioner followed up on the status of the investigations with the respondent on 22.11.2024 and on 10.12.2024 since the prolonged period was causing him mental and psychological anguish.
- f. On 12.12.2024 the respondent wrote to the petitioner informing him that the investigations had been concluded and following an investigation report dated 27.11.2024 the respondent recommended disciplinary meeting which was scheduled for 18.12.2024.
- g. Being apprehensive and doubting the impartiality and fairness of the process, the petitioner opted to have legal representation in the disciplinary meeting.
- h. The firm of Muma & Kanjama Advocates on 17.12.2024 wrote to the respondent making various requests.
- i. All of the petitioner's requests were rejected by the respondent via an email of 17.12.2024.
- j. On 17.12.2024 the petitioner received a show cause letter wherein he was directed to respond within 3 days. The petitioner responded to the letter on 20.12.2024.
- k. On 06.01.2025 the petitioner received an invitation to a disciplinary meeting scheduled for 09.01.2025. However, due to a doctor's appointment on that date, the petitioner requested for adjournment, which was granted.
- l. On 07.01.2025 and 09.01.2025 the petitioner wrote to the respondent requesting that he be allowed to have independent legal representation during the disciplinary meeting, to have the statement of the complainants, to be afforded an opportunity to cross examine them and to present his witnesses.
- m. The respondent's head of human resource responded on 09.01.2024 declining the petitioner's requests and instead he was directed to consider asking his witnesses to provide written statements to be submitted to the disciplinary panel for consideration.
- n. The petitioner was apprehensive that there was a scheme to terminate his employment by certain individuals within the respondent and therefore his decision to seek independent legal counsel for the benefit of the process and to protect his constitutional rights.
- o. On 09.01.2025 the respondent invited the petitioner for a disciplinary meeting on 14.01.2024.
- p. The petitioner consulted his advocates who sought the intervention of the labour officer in accordance with section 86(1) of the *Employment Act* via a letter dated 10.01.2025.



- q. As at filing the petition, the labour officer was yet to issue substantive directions with regard to the proposed disciplinary meeting.
 - r. The petitioner attended the impugned disciplinary meeting and particularly protested the participation of Rebecca French for reasons that she was from Fitzgerald, a company that conducted the impugned investigations leading to the report dated 27.11.2024 and also requested the participation of Vicky Widlake as a witness, but his requests were denied.
 - s. The petitioner states that the disciplinary meeting was a monologue chaired by the said Rebecca French, who was not a staff of the respondent and the petitioner's representative in the meeting, Immaculate Nyaugo was not given a chance to give her views on the allegations.
 - t. After the hearing, a letter dated 17.01.2025 the respondent issued the petitioner with a summary dismissal letter referenced "Outcome of Disciplinary Hearing". In the said letter, co-signed by Rebecca French & Mduduzi Mbuya, the respondent concluded that they were reasonably satisfied that the petitioner had committed sexual harassment.
 - u. The petitioner states that he did have a sour work relationship with some of the identified complainants due to his strictness on deliverables for projects that he headed and this led up to him being at loggerheads with certain individuals to the extent that he was left out of correspondence and progress updates relating to the projects under his ambit.
 - v. At the time of the petitioner's summary dismissal he was earning a basic salary of Kshs 576,693.00.
 - w. It is the petitioner's case that his constitutional rights have been violated by the respondent in the manner in which they conducted the disciplinary process and eventually dismissed him from employment.
3. The respondent filed the Replying Affidavits of Jenny Belinda Moncada Ghalami, Head of Human Resources at the Respondent, sworn on 03.04.2025 and that of Vicky Widlake, an Investigation Officer at Fitzgerald HR, sworn on 04.04.2025. Both affidavits were drawn and filed through Daly Inamdar Advocates LLP. It was urged and stated as follows:
- a. The respondent and CARE, a non-governmental organization aimed at eradicating poverty worldwide, ran a joint initiative known as "Cascade" starting 23.09.2024. Under this initiative, a discussion known as 'pause & reflect' was held during which a mentimeter survey was undertaken where employees from both organizations provided anonymous feedback about cascade and how they would better their employer safety.
 - b. Four female employees approached Milka Shitanda, the respondent's lead for the cascade initiative and Dorothy Akinyi, CARE's Gender focal point and reported to have been victims of inappropriate sexual conduct by the petitioner.
 - c. The respondent noting that the allegations were severe and posed potential exposure of the victims to criticism, it decided to engage Fitzgerald HR, a third party firm which offers investigative and disciplinary process services for employers.
 - d. Upon the respondent instructing Fitzgerald HR, Vicky Widlake an investigation officer at the said firm was tasked with conducting investigations into the sexual misconduct allegations against the petitioner.



- e. Vicky Widlake spoke to about ten people drawn from both the respondent organization and CARE and thereafter prepared an Investigation report dated 27.11.2024.
- f. The investigation report found that the account given by witnesses during the investigation were consistent to the extent that the petitioner was named to have been involved in unwanted sexual conduct with employees subordinate to him and that on a balance of probabilities, it appeared that the petitioner had sexually harassed a number of employees.
- g. That given the conclusion of the investigation report, the petitioner was issued a notice to show cause why disciplinary action should not be taken against him for serious allegations of sexual harassment involving six employees drawn from the respondent and CARE.
- h. On 17.12.2024 the respondent received a letter from the petitioner's lawyers, requesting to accompany the petitioner to the disciplinary meeting and that the petitioner be allowed to cross examine the specific employees who had made allegations against him, and be given opportunity to bring witnesses of his choice to the hearing.
- i. The respondent states that the petitioner's lawyers requested the respondent to allow them attend a disciplinary hearing, cross examine witnesses and produce witnesses at a time when no such hearing had in fact been scheduled given the fact that as at 17.12.2024 the petitioner had not issued a response to the notice to show cause letter, which response would have determined whether a need for disciplinary hearing was necessary.
- j. It is the respondent's case that the petitioner's lawyer's request to attend the petitioner's internal disciplinary hearing was not founded in any law.
- k. Vide a letter dated 20.12.2024 the petitioner responded to the respondent's notice to show cause letter where he rejected all the allegations against him.
- l. The petitioner's disciplinary hearing was initially slated for 09.01.2025, the petitioner requested an adjournment which was allowed by the respondent and the hearing was ultimately scheduled for 14.01.2025.
- m. Vide a letter dated 10.01.2025 the petitioner's lawyers wrote again to the respondent requesting to be present during the petitioner's hearing. This request was refused by the respondent vide her email dated 13.01.2025 on grounds that the petitioner would be accompanied by a fellow colleague of his choice, and that he would be accorded a fair hearing.
- n. Vide a separate letter dated 10.01.2025, the petitioner's lawyers wrote to the Labour Officer, Ministry of Labour & Social Protection seeking the Labour Officer's suspension of the disciplinary meeting slated for 14.01.2025.
- o. The respondent did not receive any communication from the Labour Officer requiring it to stall the disciplinary hearing as had been requested by the petitioner's lawyers in their letter of 10.01.2025.
- p. The petitioner was taken through a disciplinary hearing on 14.01.2025 which he attended in the company of Immaculate Nyaugo, his colleague. At the hearing, the petitioner termed the allegations as false and malicious and indicated his intention to pursue the pending legal proceedings in the Court.



- q. The disciplinary panel found that the accounts given by the anonymous employees were consistent in so far as the complaints were made against the petitioner, which complaints related to physical, verbal and non-verbal forms of sexual harassment.
 - r. The panel found that the petitioner was unable to satisfactorily justify why so many employees made consistent allegations against him and that his actions offended a myriad of the respondent's policies.
 - s. Based on the aforesaid findings, the respondent summarily dismissed the petitioner vide its letter dated 17.01.2025.
 - t. The petitioner was also informed of his right to appeal the panel's decision within five working days from 17.01.2025.
 - u. The petitioner's appeal against his summary dismissal was heard on 27.01.2025 and the decision to summary dismiss him upheld vide a letter dated 29.01.2025.
 - v. It is the respondent's case that it did not breach the petitioner's constitutional rights, and that there was a substantive reason to subject him to a disciplinary process, and that his dismissal was procedurally, sound and in compliance with all labour laws.
4. The Petitioner filed a Notice to make Discovery on oath dated 23.04.2025 and requested the respondent to make discovery on oath, the following documents and records, namely:
- a. The identities of the alleged anonymous complainants;
 - b. Copies of the witness statements of the interviewees whose alleged evidence led to the conclusion that the petitioner has a case to answer.
 - c. A copy of the verbatim record of the investigation interviews sessions where the alleged complainants were interrogated.
 - d. A copy of the verbatim record of the investigation interviews sessions where the petitioner was interrogated.
 - e. A copy of the verbatim record of the disciplinary meeting held on 14.01.2025.
 - f. A copy of the verbatim record of disciplinary appeal meeting held on 27.01.2025.
 - g. A copy of the agreement between the respondent and Care international in respect to the Cascade Project.
 - h. A copy of the terms of reference issued by the respondent to Fitzgerald HR in respect to their participation in the disciplinary process.
5. In reply the Respondent filed the affidavit of Ruth Okowa, Country Director – Kenya at the respondent, sworn on 07.03.2025. It was stated and urged thus:
- a. The victims of harassment, who claimed to have been sexually harassed by the petitioner categorically sought their anonymity as of right and the respondent would not reveal their identities unless they consent to such revelation.
 - b. The respondent is obligated under law and its various policies to protect its employees from any form of anticipated ridicule, embarrassment, exposure to retaliation, stonewalling, and is therefore incapable of producing the information sought under paragraphs 1-4 of the Notice to Produce.



6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
7. To answer the 1st issue, the Court returns that there is no dispute that parties were in a contract of service. The respondent employed the petitioner on 25.05.2025 as an Influencing and Advocacy Manager and was subsequently promoted to the position of Head of Policy and Advocacy until his dismissal by the letter dated 17.01.2025. The petitioner's gross monthly salary as at termination was Kshs.576, 643.00.
8. To answer the 2nd issue, the respondent terminated the petitioner's employment by the letter dated 17.01.2025 with immediate effect on the same date. The reason for termination was an allegation of gross misconduct that during the three-year period between 2022 and 2024 the petitioner had sexually harassed six members of staff from GAIN and CARE. The letter stated that the witnesses or complainants remained anonymous in the terms thus, "It was deemed reasonable for witnesses to remain anonymous due to the severity of the allegations and their concerns for their well-being and personal safety." The letter of summary dismissal and titled "Outcome of Disciplinary Hearing" stated that had considered the evidence collated as part of the investigation and the petitioner's explanations and stated thus "...We can confirm that we have established that there is reasonable satisfaction, based on the balance of probabilities, that you had committed sexual harassment towards staff at GAIN and CARE during the three-year period between 2022 and 2024..." The letter notified the petitioner that he had the right to appeal within five working days being by close of 5pm Kenya time on Friday 24.01.2025. The petitioner appealed against the summary dismissal but the respondent upheld the same.
9. The 3rd issue is whether the respondent adopted a fair procedure to dismiss the petitioner. The evidence is that the respondent suspended the petitioner and contracted an independent investigator, the petitioner was given the show cause letter, he replied denying all the allegations and asked to cross-examine the alleged anonymous complainants, he was invited and attended the disciplinary hearing in presence of a colleague of his choice, he was summarily dismissed, and, appealed but the summary dismissal was upheld.
10. It is submitted for the petitioner that the petitioner and his counsel requested the respondent to provide witness statements of the alleged victims of sexual harassment, identities of the anonymous witnesses to be revealed to the petitioner, to call his own witnesses at the hearing, and to be allowed to cross-examine the witnesses. The request was not permitted. It is submitted for the petitioner that in the circumstances, the respondent had a pre-determined position to terminate the employment of the petitioner because the respondent denied the petitioner an opportunity to put a strong defence for exculpation. It was submitted that the petitioner's fate was sealed when the petitioner was put on suspension by the letter dated 23.10.2023. It was also submitted that Fitzgerald was contracted to investigate the allegations and thereafter, a member of staff from the same organization was involved in the respondent's internal disciplinary meeting and the pre-determined decision to terminate the petitioner's employment was therefore apparent.
11. For the respondent it was submitted that section 41 of the *Employment Act*, 2007 provides thus:
 - "(1) 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.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

12. The respondent further relied on *Postal Corporation of Kenya –Versus- Andrew Tanui* [2019] eKLR where the Court of Appeal held that the procedural elements in view of section 41 of the Act included an explanation of the grounds of termination in a language understood by the employee; the reason for which the employer is considering termination; entitlement of an employee to presence of another employee of his choice when the explanation of grounds of termination is made; and, hearing and considering any representations made by the employee and person chosen by the employee.
13. The Court finds that by the holding of the Court appeal in the cited case, the respondent appears to have complied with a fair procedure prior to imposing the impugned summary dismissal. The petitioner was accorded the tests set by the said section 41 of the Act. There is no material evidence to suggest that the suspension was blended with a predetermination that the petitioner must be terminated. There appears to have been a genuine investigation process. Further the petitioner has not established a contractual or otherwise provision that the person involved in the investigation or the person directly or indirectly involved in the allegations could not sit on the part of the employer as part of the disciplinary process for purposes of section 41 of the Act. It is the employer, by himself or herself or by agent that is to give a notice and a hearing to the employee under section 41. The petitioner’s grievance in that respect is found unjustified.
14. As relates to disclosure of witnesses and witness statements, the Court finds that the respondent ran into a procedural unfairness. The allegations against the petitioner were grave and extremely serious. It was submitted for the respondent that the respondent had a duty to ensure confidentiality and to prevent retaliation as enshrined in clause 5 and 6 of the Respect and Dignity at Work Policy and Clause 12 of the Code of Conduct. The Court considers that the policy provisions had to pass the statutory tests. Section 6(3) (b) (v) of the *Employment Act*, 2007 provides that an employer’s policy on sexual harassment shall contain a provision that that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto. By that provision, the Court finds that the respondent could not institute and rely on a non-disclosure policy in circumstances that were contrary to the statutory provision and where the petitioner had correctly requested for disclosure for purposes of the disciplinary proceedings that had been initiated against him by the respondent. To that extent the Court finds that the respondent adopted an unfair procedure and the petitioner’s right of equality before the law was infringed contrary to Article 27 of *the Constitution*. Further, the Court finds that to that extent the respondent relied upon and implemented its referred policy in an unreasonable manner in disregard of the said express statutory safeguard as was contrary to Article 47 of *the Constitution* and amounted to unfair labour practices under Article 41 of *the Constitution*.
15. While making that finding the Court returns that as urged and submitted for the respondent, there was no established contractual or statutory requirement that the petitioner be represented at the hearing by legal counsel. While allowing such representation was desirable, the Court returns that in the circumstances of the contractual arrangements between the parties the same was not mandatory. A was held in *Samwel Wambisiah –Versus- Eastern Produce Kenya Limited* (cause 106 of 2017) [2021]



KEELRC 1940(KLR) Pg.82, once the employee was informed of the allegations to confront and was afforded an opportunity to be heard and because there was no express legal requirement for presence of an advocate during internal disciplinary hearing, the Court found that the employer was in substantial compliance with the requirements of sections 35(1) and 41 of the *Employment Act*, 2007.

16. The Court, on the issue of legal representation (during administrative processes and proceedings) cites its opinion in the judgment in Republic –Versus- Arnold Karani Njiru, Fund Account Manager, Laikipia East Constituency Fund and 10 Others Ex-parte Amin Mohammed Ali [2015]eKLR, thus,

“While making that finding, the court holds that in a democratic civilised society, the right to legal representation during administrative decision making is desirable and in absence of any identifiable bar it is a crucial component of fair hearing which cannot be defeated in absence of clear statutory qualification. In the present case, there was no such statutory qualification and the court holds that the applicant was entitled to appear at the hearing together with his advocate especially in view of the gravity and consequence of the allegations that had been levelled against the applicant by the respondents. In this case, the respondents did not advance any ground that would have made legal representation inimical and the court finds that the respondents having allowed and not objected to the applicant attending the hearing with his advocate, the respondents were thereby bound to allow the advocate to effectively participate in the proceedings. It was desirable that the respondents exercised their discretion in favour of allowing the advocate to attend but by resisting the advocate’s participation in the proceedings, the court finds that the applicant’s legitimate expectation to the legal representation was thereby thwarted and the proceedings, taking into account the other defects stated in this judgment, fell short of the fair hearing the applicant was entitled to.”

17. It therefore appears that legal representation in disciplinary processes by employers is only desirable but not mandatory unless a statutory or contractual intervention making legal representation is established. In the instant case, the respondent was consistent that by contractual provisions, the respondent would not allow an advocate. There appears to exist no evolving legitimate expectation for legal representation in the circumstances of the case.

18. The 4th issue is whether as at the summary dismissal the respondent had a genuine existing reason per section 43 of the Act and whether the reason was fair as relating to the petitioner’s contact and the respondent’s operational requirements as envisaged in section 43 of the Act. The Court has considered all material evidence and it is that throughout the disciplinary hearing and the appeal process, the respondent relied upon the investigation report and no further evidence or material was available to justify the summary dismissal. At the disciplinary hearing and in response to the show cause letter the petitioner denied the levelled allegations and further demanded to be provided the witness statements and the opportunity to know the identities of his accusers with an opportunity to cross-examine them. The demands were not accorded. The investigation report by Vicky Widlake concluded as follows,

“In conclusion, as there were no witnesses to the specific allegations of sexual harassment by CO (other than on one occasion involving a comment CO made towards DA, in the presence of PO), this investigation has been unable to definitively verify that the majority of these events took place as reported. Nevertheless, the investigation found evidence that the accounts from those who raised concerns were consistent in nature, describing unwanted interactions that, in every case, appeared to have negatively impacted the individuals involved. Since there is no clear reason or benefit for these individuals to have fabricated their complaints – in fact, witnesses have been hesitant to come forward, fearing potential harm to their careers – it is reasonable, on the balance of probabilities, to conclude that



unwanted sexual interactions did occur. On this basis, there is a case to answer in relation to this allegation and GAIN may wish to consider this at a disciplinary hearing.”

19. The Court has considered the only one account the investigation report on one occasion involving a comment CO made towards DA, in the presence of PO. The report states as follows about that account, “DA finally explained that she herself, had also personally experienced inappropriate behaviour by CO. she explained that at a meeting in the week of 23 September 2024, CO met her outside the meeting room. During the conversation, DA states that CO said to her; ‘You couldn’t have missed me if you agreed to have children with me, then I would have to be in your life all the time.’ DA states that she told CO that she is married and ‘not in the business’ of having children. DA states that CO’s response to this was, ‘I would be the one to give you the best children.’ DA states that during the conversation during the week of 23 September 2024, she was also standing with a male colleague, Phinhas Ochieng (PO), from another office who stated, ‘that must be the Charles. He can’t help himself’.
20. The Court has also considered PO’s account as reported and it does not appear to tally the account by DA but instead it runs into PO not recalling the exact account. The Report stated thus, “PO recalls standing outside a room with DA in Kenya in the week beginning 23 September 2024 and also recalls CO making a comment to DA that he describes as a ‘sexy comment’. Although he states he cannot remember exactly what was said, he recalls DO being unhappy about the comment made to her by CO and DA stating that CO is ‘always like that.’ By that account, that DA stated CO is ‘always like that’ it would appear to the Court that DA had encountered the alleged unpleasant contact of CO severally but the report appears not to account why DA may not have reported the unpleasant behaviour if indeed it was unwelcome.
21. As for the single account of DA said to be in presence of PO, it appears to the Court that the reports account, by itself, would fall short of establishing the alleged sexual harassment.
22. The Court finds that nothing at the disciplinary hearing and at the appeal stage suggests that the petitioner was given chance to know his accusers and to cross-examine them. There is no further material presented by way of evidence to establish the alleged sexual harassment beyond the investigation report but which barely set out accounts by way of unverified allegations and which were never shown to really exist at the disciplinary hearing, administrative appeal or even in Court.
23. The Court returns that the respondent has failed to establish the sexual harassment as was alleged against the petitioner.
24. The respondent’s policies defined sexual harassment in like manner as section 6(1) of the Act which provides:
 - “(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—
 - (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—
 - (i) promise of preferential treatment in employment;
 - (ii) threat of detrimental treatment in employment; or
 - (iii) threat about the present or future employment status of the employee;



- (b) uses language whether written or spoken of a sexual nature;
- (c) uses visual material of a sexual nature; or
- (d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.”

25. The Court finds that by material on record, there was mere hearsay accounts in the investigation report and by the findings of the investigation report itself. The only account in the investigation report by DA said to have been in presence of PO has been found incredible as the account by DA and PO are not consistent and coherent and further, there was no account in the report on why DA had failed to report the alleged harassment.
26. Now, on what basis should the Court find that the reason was genuine per section 43 of the act as existing as at the time of summary dismissal? There appears no basis at all. The evidence has not been provided at all and the respondent has failed to discharge the statutory burden of proving the justification and existence of the alleged reason for the summary dismissal. It was unfair and unreasonable, contrary to Articles 27, 47 and 41 of *the Constitution* as already found.
27. The 5th issue is whether the petitioner is entitled to the remedies as prayed for. The Court returns as follows:
- a) As found in this judgment the petitioner is entitled to the declaration that the disciplinary process by the respondent was unlawful and unconstitutional and violated the petitioner's right to fair labour practices.
 - b) The petitioner has shown that he is entitled to a declaration that the refusal by the respondent to provide the petitioner with information relating to the purported investigations conducted between 23.10.2024 and 27.11.2024 violated his right to access to information.
 - c) The Court has found that the petitioner is not entitled to a declaration that the refusal by the respondent to allow the petitioner to be accompanied by an advocate to the disciplinary meeting in the circumstances was unfair, unfounded, unlawful and unconstitutional.
 - d) The Court has found that the petitioner is entitled to a declaration that by directing the petitioner to respond to anonymous persons, the respondent violated the petitioner's right to fair administrative action. While making this finding and in (d) below, the Court has considered that in *Gladys Boss shollei –Versus- Judicial Service Commission & Another* Petition No. 34 of 2014 [2022]KESC5(KLR) (17 February 2022) (Judgment) the Supreme Court (Kooame CJ &P, Mwilu DCJ, &V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ),held inter alia,
 - “19. Article 50(1) of *the Constitution* referred to the right to a fair hearing for all persons, while article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of *the Constitution* listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.



20. Although the right to a fair trial was encompassed in the right to a fair hearing in the Constitution, a literal construction of article 50(1) and 50(2) of the Constitution could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Constitution on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect.”
- e) The petitioner has established the declaration that the refusal by the respondent to allow the petitioner to bring his witnesses and to cross examine the complainants violated the petitioner’s right to fair administrative action.
 - f) The petitioner has established a declaration that the petitioner’s summary dismissal was unfair, unlawful and unconstitutional and of no legal effect to the extent that the impugned disciplinary process contravened the provisions on Articles 27, 28, 35, 41 and 47 of the Constitution of Kenya, 2010.
 - g) The petitioner prays for an order of certiorari quashing the investigation report dated 27.11.2024, show-cause letter dated 17.12.2024, and the dismissal letter dated 17.01.2025, in respect of the subject matter of the amended petition. In view of the legal status of the respondent being not in the public realm, an order will issue setting aside the impugned letters and decisions.
 - h) A conservatory order will issue restraining the respondent, its agents, servants or any other person acting for and or on their behalf from communicating to any third party about the allegations in respect of the allegations leading to the wrongful summary dismissal of the petitioner.
 - i) The petitioner is entitled to an order directing the respondent to pay the petitioner two months’ salary in lieu of notice pursuant to clause 15(i) (b) of the contract of employment dated 25.05.2020 in the sum of Kshs 1,153, 286.00.
 - j) The petitioner prays for compensation of twelve (12) month’s salary amounting to Kshs 6,920,316.00 for violation of the petitioner’s constitutional rights under Articles 27, 28, 35, 41 and 47 of the Constitution of Kenya 2010 as outlined hereinabove. The Court has considered the period served and the circumstances of the case. The unlawful and unfair summary dismissal was blended with violation of rights and freedoms in the Bill of Rights. The petitioner otherwise had a clean record of service. Such are factors that aggravate and entitle the petitioner to due compensation. The constitutional violations were intertwined with the unfair and unlawful summary dismissal. In that consideration a separate award will not issue for constitutional violations, the same having been considered an aggravating factor under section 49(c) of the Act. The respondent has not pleaded a mitigating factor as envisaged in the section and no submissions have been made in that regard. The court has considered the period the petitioner had served. To balance justice for parties he is awarded 10 months’ salaries in compensation making Kshs.5, 766,930.00.
 - k) The petitioner is entitled to an order directing the respondent to issue the petitioner with a certificate of service in accordance with section 51(1) of the Employment Act, No. 11 of 2007.

In conclusion judgment is hereby entered for the petitioner against the respondent for:



- a. The declaration that the disciplinary process by the respondent was unlawful and unconstitutional and violated the petitioner's right to fair labour practices.
- b. The declaration that the refusal by the respondent to provide the petitioner with information relating to the purported investigations conducted between 23.10.2024 and 27.11.2024 violated his right to access to information.
- c. The declaration that by directing the petitioner to respond to anonymous persons, the respondent violated the petitioner's right to fair administrative action.
- d. The declaration that the refusal by the respondent to allow the petitioner to bring his witnesses and to cross examine the complainants violated the petitioner's right to fair administrative action.
- e. The declaration that the petitioner's summary dismissal was unfair, unlawful and unconstitutional and of no legal effect to the extent that the impugned disciplinary process contravened the provisions on Articles 27, 28, 35, 41 and 47 of the Constitution of Kenya, 2010.
- f. The order hereby issued setting aside the investigation report dated 27.11.2024, show-cause letter dated 17.12.2024, and the dismissal letter dated 17.01.2025, in respect of the subject matter of the amended petition.
- g. A conservatory order hereby issued restraining the respondent, its agents, servants or any other person acting for and or on their behalf from communicating to any third party about the allegations in respect of the allegations leading to the wrongful summary dismissal of the petitioner.
- h. The respondent to pay the petitioner a sum of Kshs. 6, 920,216.00 (less PAYE) by 01.10.2025 failing interest to run thereon at Court rates from the date of this judgment till full payment.
- i. The respondent to deliver the petitioner's certificate of service by 15.08.2025.
- j. The respondent to pay the petitioner's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 10TH JULY, 2025.

BYRAM ONGAYA

PRINCIPAL JUDGE

