



REPUBLIC OF KENYA



**Kiema v Export Processing Zones Authority (Petition E002 of 2021)
[2024] KEELRC 13606 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13606 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION E002 OF 2021
MA ONYANGO, J
DECEMBER 19, 2024**

BETWEEN

PATRICK MUEMA KIEMA PETITIONER

AND

EXPORT PROCESSING ZONES AUTHORITY RESPONDENT

JUDGMENT

1. The Petitioner is a supplies practitioner and member of the Kenya Institute of Supplies Management. The Petitioner was until 14th January, 2020, an employee of the Respondent having been engaged as the Respondent's Manager, Supply Chain on 21st February, 2019.
2. The Respondent is a body corporate established under section 3(1) of the *Export Processing Zones Act*.
3. On 24th October, 2019 the Petitioner received a show cause and interdiction letter from the Respondent. The Petitioner was accused that on 21st August, 2018 he presented minutes of a meeting held to evaluate tenders that never took place. He was further accused of not following the procurement process and failing to give necessary professional advice to the Authority.
4. The Petitioner immediately handed over to his assistant and left office as was directed in the show cause cum interdiction letter.
5. On 30th October, 2019 the Petitioner responded to the letter dated 24th October, 2019.
6. On 8th November, 2019 the Petitioner was issued with a second show cause letter of the same date requiring him to respond to the same by 15th November, 2019. In the show cause letter he was accused of facilitating the change of specifications for furniture after the inspection committee had rejected the furniture delivered vide LPO no. 1198 of 24th September, 2019 due to non-compliance with terms and specifications as provided in the EPZA furniture specifications and requirements.



7. On 11th November, 2019 the Petitioner received a letter inviting him for preliminary stage of the disciplinary proceedings to take place on 18th November, 2019 at 10.30 am before the Human Resource and Administration Board Committee.
8. The Petitioner responded to the second show cause letter on 13th November, 2019 in which he requested to be furnished with a copy of the furniture procurement proceedings file in advance to adequately prepare for the proceedings.
9. On 18th November, 2019 the Petitioner was issued with a letter inviting him for hearing stage of the disciplinary proceedings against him on 19th November, 2019 at 10.00 am.
10. On 19th November, the petitioner responded to the letter dated 18th November, 2019 requesting for the specific charges against him, the complaints statement and the evidence to the charges to enable him adequately prepare for the hearing.
11. On the same day the Petitioner received a response from the Respondent that the specific charges against him were as stated in the show cause letters dated 24th October and 8th November, 2019. The letter further stated that the complaints were as spelt out in the show cause letters and that the evidence was being collected by the Board Committee and the Petitioner was expected to file his own evidence.
12. The disciplinary hearing was conducted on 19th November as scheduled in spite of the request by the Petitioner in his letter dated 18th November, 2019.
13. By letter dated 25th November, 2019 the Petitioner was invited to oral submission for the second show cause letter on Wednesday, 27th November, 2019 at 10.00 am.
14. On 27th November, 2019 the Respondent adjourned the disciplinary hearing to 29th November, 2019.
15. On 28th November, 2019 the Petitioner submitted his detailed submissions to both the first and second show cause letters attaching evidence where necessary.
16. On 14th January, 2020 the Petitioner received a letter of summary dismissal.
17. On 5th February, 2020 the Petitioner wrote to the Respondent requesting for copy of Board Committee minutes on investigations and copy of full board minutes for the meeting held on 10th January, 2020
18. The Petitioner appealed against the summary dismissal by his letter dated 6th February, 2020.
19. the Petitioner sent a reminder on his appeal on 24th June 2020 but did not receive any response.
20. The Petitioner filed supplementary appeal through his advocates by letter dated 13th July 2020.
21. He sent a reminder on the appeal by letter dated 31st October, 2020.
22. In the Petition dated 10th March, 2021, the Petitioner alleges that the Respondent violated his rights under Articles 27(1), 29(d) and (f), 41, 47(1) and (2), 232(1)(c) and (f) and 236 of *the Constitution*.
23. The Petitioner seeks the following reliefs:
 - a. Declaration that the Respondent contravened the Petitioner's rights and fundamental freedoms guaranteed under Articles 27(1), 29(d) and (f), 41, 47(1) and (2), 232 and 236 of *the Constitution* of Kenya, 2010.
 - b. Declaration that the summary dismissal and failure to hear the Petitioner's appeal are null and void.



- c. Order of Mandamus to compel the Respondent to hear and determine the Petitioner's appeal or to reinstate him with full benefits and rights.
- d. Compensate for violation of the Petitioner's rights and fundamental freedoms.
- e. Costs of the Petition

The Respondents' case

24. In the Replying affidavit of Miriam Mutuma, the Assistant Manager, Human Resource, in opposition to the Petition, the Respondent confirms the facts as set out by the Petitioner as captured above and states that it recruited somebody else to full the Petitioner's position.
25. The Respondent however denies receiving the Petitioner's appeal. It states that in March, 2020 its activities were disrupted by the deadly Covid-19 pandemic and the resultant lockdown as well as the directive for employees to work from home.
26. The Affiant deposes that the Respondent only became actively aware of the Petitioner's appeal upon being served with the pleadings in the instant suit.
27. The Respondent states that the process of termination of the Petitioner's employment was done in a transparent manner and was lawful. The Respondent denies violation of the Petitioner's rights under the Constitution and prays that the petition be dismissed with costs.
28. Upon being served with the Replying affidavit the Petitioner filed a further affidavit sworn on 24th April, 2022 in which he reiterates the averments in his petition and affidavit in support thereof. The Petitioner further states that his appeal was received by the Respondent and was acknowledged.
29. The petition was disposed of by way of written submissions.

The Petitioner's submissions

30. In his submissions, the Petitioner identified the issues for determination to be:
 - a. Whether the Respondent violated the Petitioner's rights.
 - b. Whether an order of judicial review should issue.
 - c. Whether the Respondent should compensate the Petitioner.
 - d. Whether the Petitioner is entitled to costs.
31. On the first issue, the Petitioner submitted that the Respondent summarily dismissed him without providing him with specific charges, the complainants', statements and evidence thereof. That clause 9.12 and 9.13 of EPZA Human Resources Procedures Manual provided for appeal/review of the summary dismissal, that the Respondent has in the past exercised its power and reviewed decisions as is evident from the Petitioner's annexure 21.
32. It is submitted that by failing to hear the Petitioner's appeal the Respondent violated his rights under Article 27(1) of the Constitution and section 5 of the Employment Act.
33. It is submitted further that by failing to perform its statutory duty of hearing the Petitioner's appeal the Respondent discriminated against the Petitioner.



34. It is submitted that the Respondent subjected the Petitioner to psychological torture by being kept in suspense about the fate of his appeal and thereby violated the Petitioner's rights under Article 29(d) and (f).
35. It is further submitted that the Respondent violated the Petitioner's right to fair labour relations as guaranteed under Article 41 and sections 41, 43, 45 and 47(5) of the Employment Act by subjecting him to grotesque unfair labour practices and unreasonableness, relying on the decision in Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR where the Court of Appeal held that the Employment Act places heavy obligations on employers in matters of summary dismissal.
36. The Petitioner further relied on Kenfreight (EA) Limited v Benson K. Nguti [2019] eKLR; Shollei v Judicial Service Commission & Another [2022] eKLR; Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR; Judith Brenda Onyango v General Insurance Limited (Formerly Gateway Insurance Company Limited) [2020] eKLR to support his submission that he is entitled to declaratory orders and that the Respondent violated his rights and fundamental freedoms guaranteed under the Constitution under Articles 27(1), 29(d) and (f), 41, 47(1) and (2), 232 and 236.
37. On whether judicial review orders should issue the Petitioner submitted that Article 23(3)(f) of the Constitution and section 11(1)(f) of the Fair Administrative Action Act empower the court to grant orders compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right. For emphasis the Petitioner relied on the decisions in R v Kenya National Examinations Council ex parte Gathengi & 8 others [1997] eKLR; and Shah v Attorney General [1970] EA 543
38. On damages the Petitioner submitted that Article 23(3)(e) of the Constitution empowers courts to grant an order for compensation. That section 12(3)(v) and (vi) of the Employment and Labour Relations Court Act and section 11(1)(j) of the Fair Administrative Action Act empower courts to grant awards of compensation and damages.
39. The Petitioner submitted that the Respondent violated his rights guaranteed under Articles 27(1), 29(d) and (f), 41, 47, 232 and 236 of the Constitution and he is therefore entitled to award of damages as compensation.
40. The Petitioner further relied on principles of granting damages for infringement of fundamental rights as set out by Lord Woolf in The Human Rights Act 1998 and Remedies in Andenes and D. Fairgrieve (eds), Judicial Review in International Perspective: 11(2000), pp 429 - 436 as follows:
 - a. If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.
 - b. The court should not award exemplary and aggravated damages.
 - c. An award should be "of no greater sum than that necessary to achieve just satisfaction. "
 - d. The quantum of the award should be "moderate" and "normally on the low side by comparison to tortious award"
 - e. The award should be restricted to compensating the victim for what happened "so far as the unlawful conduct exceeds what could lawfully happen. "
 - f. Failure by the claimant to take preventive or remedial action will reduce the amount of damages.



- g. There is no reason to distinguish between pecuniary and non - pecuniary loss. What matters is that the loss should be "real and clearly caused by the conduct contrary to the fundamental rights.
41. The Petitioner further submitted that applying the said principles in the case of *Esther W. Keige & another v Kenya Forest Service & another* [2018] eKLR each Petitioner was awarded Ksh. 2,000,000.00 damages for the infringement caused by the violation of their fundamental rights and freedoms. That in the case of *Josephat Alusiola Musambayi v Vihiga County Assembly & another* [2016] eKLR the court awarded the Petitioner Ksh. 5,000,000.00 as compensation for breach of his fundamental rights.
42. The Petitioner prayed for an award of Kshs. 5,000,000 as just and fair compensation in this case.
43. The Petitioner further submitted that he should be awarded costs relying on Mr. Justice (Rtd) Kuloba Posits in *Judicial Hints on Civil Procedure*, 2nd ed. (Nairobi: Law Africa, 2011), p. 94 to the effect that the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case and must not be made merely as a penal measure. That costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.
44. In his further submissions dated 6th October, 2022 the Petitioner submitted that he has a valid constitutional question for determination by this court, relying on the decisions in *East African Railways Corp. v Anthony Sefu Dar Es Salaam* [1973] EA 327; *Samuel Kamau Macharia & Another v Kenya Commercial Bank and Another* [2012] eKLR and *United States International University (USIU) v Attorney General* [2012] eKLR.

Respondent's Submissions

45. In its submissions the Respondent identified the issues for determination as:
- a. Whether there is a valid Constitutional question before the Court, or merely an ordinary dispute under the *Employment Act*, 2007.
 - b. Whether the Petitioner has established breach of his constitutional rights by the Respondent.
 - c. Is the Petitioner entitled to the reliefs sought?
 - d. Who is entitled to costs of this suit?
46. On the first issue the Respondent submitted that the petition is founded on a breach of contract and the Petitioner should have approached the court through a memorandum or statement of claim. That the petition does not disclose any breach of a constitutional right.
47. For emphasis the Respondent cited the decisions in *Jane Angila Obando v TSC & Others* and *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another* [2016] eKLR.
48. The Respondent further relied on Rule 7(3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* which provides that a party may seek enforcement of any constitutional rights and freedoms or any constitutional provision through a statement of claim or other suit filed before the court.
49. On the second issue the Respondent submitted that it had valid reasons to terminate the employment contract of the Petitioner and that the Respondent complied with the procedural requirements before terminating the employment of the Petitioner. It relied on the decision in *Antony Mkala Chitavi v Malindi Water and Sewerage Co. Ltd* [2013] eKLR.



50. The Respondent further submitted that the court should take judicial notice that around March, 2020 the deadly covid-19 pandemic struck Kenya leading to disruption of lives and activities and it is possible that some things may not have been done properly or perfectly. The Respondent relied on the decision in *Fatuma Farah Hassan v Issack Mahat Gabow & 2 others* [2022] where the court stated

“...I have also taken judicial notice of the advent of the Covid-19 pandemic and its effect to the dispensation of justice. Upon reporting of the first infection on 13th March 2020, Judiciary in conjunction with both the County and National Government undertook a series of actions to help control the spread of the disease through courts and to support continuity of service delivery ...”

51. The Respondent submitted that it became aware of the Petitioner’s appeal after the 6 weeks window for appeals provided for in its Human Resource Policy and Procedure manual, 2017 had lapsed.

52. On reliefs sought by the Petitioner the Respondent submitted that the Petitioner has not demonstrated that the Respondent breached any of his constitutional rights with precision.

53. The Respondent further submitted that reinstatement is not feasible relying on the Court of Appeal decision in *Dalmas B. Ogeye v KNTC Limited* [1996] eKLR where the court held that it cannot impose an employee on a reluctant employer.

54. On award of general damages the Respondent submitted that this court should be guided by the decision of the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where the court stated that the primary purpose of a constitutional remedy was not compensatory but to vindicate the constitutional rights infringement and to deter their future infringement, quoting with approval the South African case of *Dendy v University of Witwatersrand, Johannesburg & Others* [2006] 1 LRC 291.

55. On who should bear the costs of the petition the Respondent urged the court to be guided by the decision in *Geoffrey Makana Asanyo v Nakuru Water and Sewerage Company Ltd & 8 others* where the court stated that the court is under obligation to consider what the justice of each case demands, guided by section 12(4) of the *Employment and Labour Relations Court Act* and section 27(1) of the *Civil Procedure Act*.

Analysis and Determination

56. I have considered the pleadings and submissions by the parties. The issues arising for determination are in my view the following:

- i. Whether the petition discloses any breach of the Petitioner’s constitutional rights and fundamental freedoms;
- ii. Whether the Respondent violated the Petitioners constitutional rights

57. The Respondent submitted that the petition does not disclose any breach of a constitutional right or fundamental freedom of the Petitioner and should have been instituted through a claim. The petitioner on the other hand submitted that the Respondent did not hear the Petitioner’s appeal as provided in Clause 9.12 and 9.13 of the Respondents Human Resource Procedures Manual while it did so in the cases referred to in the Petitioner’s exhibits “PMK 21”, “PMK 16”, “PMK 17” and “PKM 18”. That in failing to do so the Respondent violated the Petitioner’s rights under Article 27(1) of *the Constitution* and section 5 of the *Employment Act*.



58. I would agree with the Respondent to the extent that protection of an employee from discrimination is provided for in section 5 of the *Employment Act* meaning that the right could have been sufficiently enforced under the provisions of the Act.
59. This was the essence of the decision in *Jane Angila Obando v TSC & Others and Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another* (supra).
60. In *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another* the court observed that:
- “...In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance...”
61. Be that as it may, Article 159(2)(d) of *the Constitution* and section 20(1) of the *Employment and Labour Relations Court Act* require this court to dispense substantive justice without undue regard to technicalities.
62. Further, Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the court.
63. From the foregoing, the filing of a petition in a suit arising out of an employment claim for alleged breach of a constitutional right which could have been done through a claim does not render such petition a nullity as to warrant a court to refuse to hear the petition or grant the orders sought therein if the petitioner proves that he is entitled to the same.

Whether the Respondent violated the Petitioners constitutional rights

64. The Petitioner submitted that the Respondent failed to hear his appeal thus breaching his constitutional right under Article 27 which provides for equality before the law. It was the Petitioner’s submission that had his appeal been heard he would have been reinstated as was done in the case of Peter Mathu. It was further the Petitioner’s submission that by denying him the right of appeal the Respondent subjected him to psychological torture and thereby violated his rights under Article 29(d) and (f).
65. The Petitioner further submitted that the Respondent violated his rights to fair labour relations under Article 41 of *the Constitution* and sections 41, 43, 45 and 47(5) of the *Employment Act*.
66. In the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR; *Judith Brenda Onyango v General Insurance Limited (Formerly Gateway Insurance Company Limited)* [2020] eKLR, the court stated as follows:

34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes



resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and an challenge that an employee may have would be with regard to substantive issues only.

67. Again in the case of Judith Brenda Onyango v General Insurance Limited (Formerly Gateway Insurance Company Limited) [2020] eKLR the court held as follows:

55. However, I am not satisfied that the claimant was accorded any hearing on her appeal. There is no correspondence from the respondent inviting her to a hearing or informing the claimant that her appeal was considered and rejected. To that extent, I find that the procedure followed was not fair because hearing of an appeal after the termination is as important as the hearing before the dismissal because under the terms of the contract of employment they all determine whether or not a separation would be done.

56. Clause 7.9 of the respondents HR Manual provides for Grievance Procedure and it includes the right to appeal. The manual provides that the Managing Director will study the minutes of the proceedings of the hearings and exercise discretion whether or not to constitute a grievance committee to hear the matter and advise him. The manual further provides that the ruling on any matter on the appeal by the Managing Director is final and binding.

57. Considering the said clause 7.9 of the manual, I am convinced that at the end of the day, the Managing Director must make a ruling on every appeal filed by an employee. The Managing Director has no discretion not to make a decision. It follows therefore that if a decision must be made, the same must be conveyed to the appellant. RWI contended that the appeal was determined but that allegation was not substantiated by any written evidence.

58. In this court's view the right to fair hearing before dismissal under section 41 of the Employment Act extends the right to be heard on appeal. The failure to hear the claimant on her appeal amounted to, not only a violation of section 41 of the Act but also a breach of the contract of service which is governed by the respondent's HR Manual.

68. In Kenfreight (EA) Ltd v Benson K. Nguti [2016] eKLR the Court of Appeal held as follows in a case where the employee was dismissed for improper performance of duty:

“An employer is duly bound to explain to an employee in the presence of another employee or union official in a language the employee understands the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of services is taken. “Non-compliance with the procedure in an employer's terms and conditions of service would constitute a denial of both the right to fair hearing and fair labour practices as was stated.”

69. The reason given by the Respondent for not hearing the appeal filed by the Petitioner is not justifiable. This is more so taking into account the manner in which the disciplinary hearing was conducted.

70. In the first show cause letter dated 24th October, 2019 the Respondent addressed the Petitioner as follows:

EPZA/CONF/216/CEO Date: 24th October, 2019

Mr. Patrick Kiema

Head of Supply Chain Management



Export Processing Zones Authority,
Administration Building, Viwanda Road,
Off Nairobi-Namanga Road, Athi-River,
O. Box 50563-00200,
NAIROBI

Dear

RE: Show Cause And Interdiction Due To Direct Procurement Of Unblocking The Sewarline

Reference is made to the above-mentioned matter.

You presented on 21st August 2019 evaluation minutes purported to have been emanating from a meeting held to evaluate tenders and, in the process, it has been noted that in the minutes presented were for a meeting that actually never took place. You also did not follow the procurement process and give necessary professional advice to the Authority accordingly.

Based on the above, you are therefore required to showcase why disciplinary action should not be taken against you on account of not meeting the required standards of performance and integrity. Your response should reach the undersigned on or before 1st November, 2019

In view of the above and in accordance with EPZA the Human Resources Policy and Procedures manual you are hereby interdicted pending investigation on the aforementioned matter among others.

During the interdiction period you will be entitled to half (1/2) basic salary with full allowances and medical benefits. Upon receipt of this letter you are required to handover your duties to Mr. Edgar Abayo, Supply Chains Officer.

71. The Petitioner responded to the show cause letter by his response dated 30th October, 2019 in which he gave a chronology of the events that led to the procurement of the impugned services and a detailed explanation of the procurement process. In the letter he demonstrated that he followed the procurement procedures to the letter and all the approvals were given as required by the Acting Chief Executive Office, George Makateto, the same one who issued the letter of interdiction.
72. On 8th November, 2019 the Respondent issued a second notice to show cause to the Petitioner, this time for alleged alteration of specifications of furniture that had been rejected. The notice to show cause is reproduced below:

CONF/EPZ /PE/319/HR 8th November 2019

Mr. Patrick Muema Kiea

Box 1098 -90200

Kitui

Dear Patrick

2nd Show Cause Letter

This is further to show cause letter dated 24th October 2019.

It has been established that as the Supply Chain of the Export Processing Zones Authority you facilitated the change of specifications on furniture after the inspection committee had rejected the furniture delivered vide LPO no 1198 of 24th September 2019 due to non-compliance with terms and conditions as provided in the EPZA furniture specifications and requirements.



Additionally, it is alleged that you intimidated the inspection committee that they should have given a favorable inspection report since the Authority committed into the process of procuring the office furniture.

You are required to respond to the allegations on or before Friday, 15th November 2019.

Yours Sincerely

Signed

George Makateto

Ag. Chief Executive Officer

73. From the wording of the notice to show cause the Respondent insinuated that the accusation against the Petitioner had already been confirmed.
74. Even before the period the Petitioner was given to respond to the 2nd show cause letter lapsed he was invited for disciplinary proceedings on 18th October, 2019 by letter dated 11th November, 2019 reproduced below:

CONF/EPZ/PE/319/HR 8th November 2019

Mr. Patrick Muema Kiema

Box 1098 -90200

Kitui

Dear Patrick

Disciplinary Proceeding - 18th November 2019

This is further to the show cause letters dated 24th October 2019 and 8th November 2019.

This is to invite for preliminary stage of the disciplinary proceedings against yourself on 18th November 2019 at 10.30 am.

Kindly note that failure to attend, the Human Resource and Administration Board Committee Shall proceed and execute the finality without further indulgence to yourself.

Yours sincerely,

Signed

George Makateto

Ag. Chief Executive Officer

75. By his letter dated 13th November, 2019 the Petitioner sought particulars of the charges in the 2nd show cause Letter. The Petitioner's letter dated 13th November, 2019 is reproduced below:

CONF/EPX/PE/319/HR

Patrick Muema Kema

Box 1098 - 90200

Your Ref: EPZPE/3191HR

13th November, 2019

Dear Sir,



RE: 2ND Show Cause Letter

Please refer to your letter dated 8th November, 2019 and note the following.

The charges

- a. Facilitating the change of specifications on furniture after the inspection committee had rejected the furniture due to non-compliance with terms and specifications

Please note that I did not facilitate change of furniture specifications as alleged.

Rejection of the furniture against the terms and specifications by the Inspection and Acceptance Committee was final. Rather, immediately informed the supplier in writing to collect their furniture citing the reason thereof.

- b. intimidating the Inspection and Acceptance Committee Kindly note that at no point did intimidate the referred committee to give a favorable inspection report, the inspection was conducted during the period when we were attending strategic plan presentation to the Board Members at Mombasa.

Also note as well that upon receiving the said report, to responded immediately by informing the supplier to collect their furniture in writing stating the reason thereof.

Request for information

Having received an invitation to attend preliminary stage of the disciplinary proceedings on 18th November, 2019 at 10.30 am, I hereby request to be furnished with a copy of the furniture procurement proceedings file in advance to adequately prepare for the proceedings.

Yours faithfully

Signed

Patrick Muema Kiema

76. On 18th November, November, 2019 the Petitioner was invited for disciplinary proceedings to be held the following day on 19th November, 2019 in respect of the two show cause letters. The invitation is reproduced below:

Patrick Muema Kema

Box 1098 – 90200

Kitui

Dear Patrick

Disciplinary Proceeding - Hearing Stage

This is further to the show cause letters dated 24th October 2019 and 8th November 2019.

This is to invite you for hearing stage of the disciplinary proceedings against yourself on 19th November 2019 at 10.00 a.m.

Kindly note that failure to attend, the Human Resource and Administration Board Committee shall proceed and execute the finality without further indulgence to yourself.

Yours sincerely,

signed



George makateto

Ag. Chief Executive officer

77. On 19th November, 2019 the Petitioner again requested for the specific charges in respect of the 2nd show cause letter dated 18th November, 2019. The letter is reproduced below:

Patrick Muema Kema

Box 1098 – 90200

KITUI

Your Ref: CONF/EPZ/PE/319/HR

19th November, 2019

Ag. Chief Executive Officer

Export Processing Zones Authority

Box 50563 – 00100

Nairobi

Dear Sir,

Disciplinary Proceeding — Hearing Stage

Please refer to your letter dated 18th November, 2019 and note that to adequately prepare for the hearing, I would kindly request to be furnished with;

1. The specific charges against me
2. The Complaint's Statement
3. The evidence to the charges.

Yours faithfully

Signed

Patrick Muema

78. In its response dated the same day, the Respondent's Chief Executive Officer wrote to the Petitioner as follows:

19th November 2019

Patrick Muema Kema

Box 1098 – 90200

Kitui

Dear Patrick

Disciplinary Proceeding - Hearing Stage

This is to acknowledge receipt of your letter dated 19th November 2019 on the above referred subject and received by the EPZ Authority on 19th November 2019.

In your letter you requested to be requested (sic) with the following:

1. The specific charges against yourself



2. The Complaints Statement
3. The evidence to the charges.

The EPZ Authority responds as follows to the requests

1. The specific charges against yourself

The charges were spelt out in show cause letters dated 24th October, 2019 and 8th November 2019.

2. The Complaints statement

The complaints are as spelt out in show cause letters of 24th October, 2019 and 8th November 2019.

3. The evidence to the charges

The Board Committee is collecting evidence. You are expected to file your own evidence.

Yours faithfully,

signed

George Makateto

Ag. Chief Executive Officer

79. By letter dated 25th November, 2019 the Petitioner was invited for oral submission on the 2nd show cause letter to be held on Wednesday 27th November, 2019, that is, in two days.
80. By letters dated 28th November, 2019 the Petitioner submitted his submissions on the charges levelled against him in the show cause letters. The submissions were separate for each of the two show cause letters. Specifically for the 2nd show cause letter the Petitioner submitted as follows:

Your Ref: EPZ/PE/319/HR

28th November, 2019

Ag. Chief Executive Officer Export Processing Zones Authority

Box 50563 — 00100

Nairobi

Dear Sir,

RE: Submission To The Second Show Cause Letter On The Procurement Of Office Furniture

Please refer to your letter dated 8th November, 2019 and note the following.

The charges

- a. Facilitating the change of specifications on furniture after the inspection committee had rejected the furniture due to non-compliance with terms and specifications

The inspection and Acceptance Committee inspected the furniture on 3rd October, 2019 and rejected the delivery due to non-conformity with specifications. (See annexure 1).

Please note that I did not facilitate change of furniture specifications as alleged.

Rejection of the furniture against the terms and specifications by the Inspection and Acceptance Committee was final. Rather, I immediately informed the supplier in writing



to collect their furniture citing the reason thereof. Kindly note that the supplier has so far unconditionally collected the furniture. (See annexure 2).

To continue with the process of procuring the furniture, I tabled the specifications issue to the HOD's meeting held on Tuesday 23rd October, 2019 under Min 2/23/10/2019 (d) Supply of Furniture. The meeting approved to change the previous specifications to clearly capture high back mesh seat with lumbar support and supply chain was mandated to commence the procurement process. (See annexure 3).

It is after this meeting that I generated pictorial specification of the furniture which was to be attached to the matching descriptions upon signing of the referred HODs' minutes signing and subsequent editing of the attached purchase requisition dated 18th June, 2019. (See annexure 4).

- b. Intimidating the Inspection and Acceptance Committee Kindly note that at no point did I intimidate the referred committee to give a favourable inspection report, the inspection was conducted during the period when we were attending strategic plan presentation to the Board Members at Mombasa.

Also note as well that upon receiving the said report, I responded immediately by informing the supplier to collect their furniture in writing stating the reason thereof.

From the foregoing, I acted in utmost good faith to make sure that the Authority procures standardized furniture with consultation with respective heads of departments.

I therefore humbly request that the interdiction order be lifted and I be reinstated back to my official duties which I promise to continue executing up to, and beyond expectations.

Your faithfully,

Signed

Patrick Muema Kiema

81. By letter dated 14th January, 2020 the Petitioner's employment was terminated by the Respondent. The termination letter is reproduced below:

CONF/EPZ/PE/319/HR 14th January, 2020

Patrick Muema Kiema,

O. Box 1098 — 90200,

Kitui.

Dear Patrick.

Termination Of Employment

Reference is made to the show-cause letters dated 24th October 2019 and November 2019.

Further reference is made to the disciplinary proceedings on the tender process for unblocking of the Trunk Sewer Line near Apex Steel Mills Ltd. process of procurement of furniture. All the allegations levelled against yourself as contained in the show-cause letters were found to have merit and were upheld-

EPZA Board in their meeting held on 10th January 2020 resolved that be summarily dismissed from the EPZ Authority for gross misconduct effective 10th January 2020-



shall be paid your final dues including your salary/gratuity upto 10th January 2020 subject to clearance by all Directorates/Departments.

Yours sincerely,

Signed

John- O. B. Akara

82. By his letter dated 5th February, 2020 the Petitioner requested for copies of board Committee minutes which investigated the allegations against him and copy of full board committee minutes/resolutions of 10th January, 2020 when the decision to terminate his employment was made. There was no response to the letter from the Respondent.
83. By letter dated letter dated 6th February, 2020 the Petitioner appealed against his dismissal. He did not receive an acknowledgment of receipt of the appeal and sent a reminder dated 24th June 2020.
84. When again he did not receive any acknowledgment from the Respondent he sent a further reminder dated 13th July 2020 through his lawyer. Again there was o response from the Respondent.
85. On 31st October, 2020 the Petitioner again sent a further reminder on his appeal.
86. He did not receive any response to any of the letters written after the termination of his employment. It is material to note that all the letters were hand delivered and have the received stamp of the Respondent.
87. The Respondent's plea that Covid-19 may have led to his letters not being acted on or that it became aware of his appeal upon service of the pleadings herein are not supported by the evidence on record. As I have mentioned above all the letters from the Petitioner bear received stamps of the Respondent.
88. Further, the Respondent has not adduced any evidence to show that at any time its offices were closed due to Covid -19 pandemic. The only notices filed by the Respondent on Covid-19 Pandemic are dated 20th July, 2020 while the Petitioner's first appeal letter is dated 5th February, and received on 7th February, 2020. This was before the lockdown of Covid -19 which as is in the public domain, was in March, 2020.
89. The Petitioner's averment that he was not given a fair hearing is therefore not without justification. There is no proof that the Petitioner was taken through a fair process based on the documents on record as reproduced above.
90. The Respondent did not submit either the investigation report or minutes of the Board or an extract thereof as proof that the hearing was fair.
91. Further, the letter of termination does not state the grounds of termination which even the Petitioner was not clear about as his request for the same elicited a response that "The Board Committee is collecting evidence. You are expected to file your own evidence." This begs the question: on what evidence had the Respondent issued the show cause and the letters of invitation to disciplinary hearing if it was still collecting evidence?
92. From the evidence on record, the Respondent did not prove that there were valid reasons to terminate the employment contract of the Petitioner or that the Petitioner was subjected to a fair process before the termination of his employment. He was further denied the right of appeal against the grossly unfair process that he had been subjected to.



93. For the forgoing reasons I find that the Petitioner has proved on a balance of probabilities that his rights to a fair hearing and fair labour practices were breached by the Respondent.
94. The Petitioner has further proved that by not being given an opportunity to appeal against his dismissal the Petitioner was subjected to less favourable terms than those set out in the Respondent's terms and conditions of service and those that other employees had been subjected to. He was thus denied equal treatment and protection of the law.

Remedies

95. The Petitioner sought orders of reinstatement. Due to the time that has lapsed since the termination of his employment, this remedy is no longer a viable or available as the same can only be done within 3 years of termination of employment.
96. Having found that the termination was without valid reason and the procedure was flawed, I make the following orders:
- a. I declare that the Respondent contravened the Petitioner's rights and fundamental freedoms under Articles 27(1), 29(d), 41, 47(1) and (2) of *the Constitution*.
 - b. I declare that the dismissal of the Petitioner by the Respondent was unfair and in violation of the provisions of sections 41, 43, 45(2)(b) and 47(5) of the *Employment Act*.
 - c. I award the Petitioner damages and compensation combined in the sum of Kshs. 5,000,000 taking into account the circumstances under which he was dismissed from service and all the relevant factors under section 49(4) of the *Employment Act*.
 - d. The Respondent shall bear the Petitioner's costs.
 - e. Interest shall accrue from the date of judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2024

MAUREEN ONYANGO

JUDGE

