



**Muhanji v Kenya Ports Authority (Cause 98B of 2021)
[2023] KEELRC 1547 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1547 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 98B OF 2021**

**AK NZEI, J
JUNE 19, 2023**

BETWEEN

ANTHONY MUHANJI CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a Memorandum of Claim dated 18th August 2021 and pleaded that in or about February 2010, the Respondent advertised for the position of Sub overseer, Grade HG2, pursuant to which the Claimant applied and was recruited to fill the said position; and that upon offering exemplary services to the Respondent, the Claimant was subsequently, vide a letter dated 17th October 2013, promoted to the position of Works Officer (Port) Grade HM3.
2. The Claimant further pleaded that he served in the aforesaid position diligently and with outstanding performance record until February 2016 when he was recommended for the position of Senior Works Officer Port C/No. 87798, Grade HM2 following retirement of the holder of that position, and that the recommendation was based on the Claimant's experience and education background. That the recommendation was followed by interviews whereby the Claimant emerged the top candidate, scoring 90% in comparison to the candidate coming in second with 66.67%; and was confirmed to the position whereupon he discharged his duties diligently until 19th March 2021 when the Respondent issued him with a letter of re-deployment/re-designation to the post of Senior Architect Post No. 830-3002. That the said deployment was arbitral and devoid of procedure.
3. It was the Claimant's further pleading: -
 - a. that barely a week after the illegal re-deployment, the Respondent issued the Claimant with a Show Cause Letter dated 23rd March 2021 requiring him to show cause why disciplinary proceedings could not be instituted against him over allegations that he was amongst



KPA Engineers who had issued certificates that led to overpayments to the tune of ksh. 89,192,909.66, relating to the construction of concrete barriers to Ezgo Limited amounting to ksh. 56,987,068 and to Grand Logistics Ltd, Salwa Kenya Limited and Haafah East Africa Limited totaling to ksh. 35,205,841.66.

- b. that the Claimant responded to the show cause letter denying the accusations levelled against him and explained the facts within his knowledge as follows:-
- i. that regarding the alleged overpayments to Ezgo Ltd (LPO No. 4500082404), payments were made vide invoice number 0396 and 0395 whereby none contained the Claimant's signature; and that the Claimant never certified any payment to Ezgo Limited, and was not involved in any dealing relating to overpayment to the said company.
 - ii. that regarding payment to Grand Logistics Ltd, the Claimant only certified the first and the second payments on Makongeni Goods Yard paving amounting to ksh. 85,439,461.25, which was within the contract sum. That given that interim payment certificates are prepared on cumulative basis, the stated overpayment of ksh. 2,040,955.61 could only be attributed to subsequent payments which the Claimant did not certify; and that the Claimant was not responsible for certifying the third payment of ksh. 19,743,064.70 which led to the alleged overpayment.
 - iii. that regarding payment to Salwa Kenya Limited, there were two local purchase orders under one proforma invoice and that when payment to that company was being processed, there was a challenge in paying for materials on site since the same contractor was paving Zones 5 and 7 with a combined contract sum of ksh. 68,870,809.50, and a common storage site. That the Claimant only paid for the materials on site, cognisant of the fact that the Respondent had the contractor's performance bond of ksh. 6,887,080.90 which was to secure the Respondent's interest in the event of non-performance or any unforeseen eventuality.
 - iv. that as regards payment to Haafah EA Limited, the Claimant was only responsible for certifying the first payment amounting to ksh. 38,882,575.81 which was well within the contract sum of ksh. 72,151,583.79. That the Claimant was not involved in certifying the subsequent payments to Haafah E.A. Ltd amounting to ksh. 29,660,428.80.
- c. that the Claimant explained his position regarding all the alleged overpayments vide his response to the show cause letter dated 30th March 2021, and further expounded the issues before the Respondent's Human Resource Committee of the Board's hearing; but despite that, the Respondent issued the Claimant with a summary dismissal letter dated 23rd June 2021 stating the reason as "..... you issued certificates that led to the overpayments of contractors in the concrete barriers and Makongeni Concrete Works cases."
- d. that the Respondent's actions of summarily dismissing the Claimant from employment were unjustified and malicious as none of the payments certified by the Claimant led to any overpayment.
- e. that the concrete barriers issue is a matter over which the office of the Directorate of Criminal Investigations undertook thorough investigations attracting public attention, and thereafter preferred charges against the persons found culpable in Milimani Criminal Case No. MCAC/E019/2020; and that the Claimant was absolved of any blame by the investigating authorities



and no charges were preferred against him, with the investigating report pointing fingers at the Managing Director and the Works Officer.

- f. that it was malicious and unjustified for the Respondent to condemn the Claimant over a matter from which he had been exonerated by the office of the Directorate of Public Prosecutions.
 - g. that the Respondent's Board of Directors that effected the summary dismissal had no such powers, with the appointment of its members having been quashed vide the High Court of Kenya's judgment delivered on 27th May 2021 in Petition No. 236 of 2018, and that the dismissal is therefore null and void.
4. The Claimant sought the following reliefs:-
- a. a declaration that the Claimant's summary dismissal was unfair, malicious, wrongful and illegal.
 - b. a declaration that the Claimant's re-deployment from the position of Senior Works Officer Port C/No. 87798 Grade HM2 to the position of Senior Architect Grade HM2 Post No. 830-3002 was malicious, unlawful and devoid of procedure.
 - c. a declaration that the Respondent's Board of Directors lacked power to summarily dismiss the Claimant, and that the dismissal was therefore null and void.
 - d. an order of permanent mandatory injunction be issued as against the Respondent reinstating the Claimant to his former position of Senior Works Officer Port C/No. 87798 Grade HM2 without any loss of benefit.
 - e. general damages for emotional and mental distress as well as damages for tarnishing the Claimant's reputations.
 - f. costs of the suit.
 - g. any other relief that the Court might deem fit to grant.
5. Other documents filed by the Claimant along with his memorandum of claim included an affidavit in verification of the claim and the Claimant's detailed witness statement dated 18th August 2021. The Claimant also filed a list of documents dated 18th August 2021, listing twelve documents which included letters dated 17/10/2013, 19/2/2016, 23/2/2018, 19/3/2021, the show cause letter dated 23/3/2021, Claimant's response to show cause letter dated 30/3/2021, Invoice No. 0395 from Ezgo Ltd, Invoice No. 0396 from Ezgo Ltd, a bundle of Invoices from Grand Logistics Ltd, a bundle of Invoices from Salwa Kenya Limited, summary dismissal letter dated 23/6/2021 and a copy of the High Court's judgment dated 27th May 2021 in Milimani Constitutional Petition No. 236 of 2018.
6. The Respondent filed Response to the Claimant's Memorandum of Claim on 20th January 2022 and denied the Claimant's claim. The Respondent further pleaded that the Respondent dismissed the Claimant from employment vide a letter dated 23rd June 2021, having found him guilty and culpable as charged, and that the administrative disciplinary action taken against the Claimant was distinct and independent of the alleged criminal charges and/or actions instituted by the Directorate of Criminal Investigations, if at all.
7. The Claimant further pleaded that the Respondent's Board of Directors has always been properly constituted in law and with requisite quorum to conduct business notwithstanding the judgment in



Petition No. 236 of 2018 alleged by the Claimant, and that the Claimant's dismissal was for a lawful cause, justifiable and procedural, and that the Claimant is not entitled to the reliefs sought.

8. On 23rd August 2022, the Claimant filed Reply to the Respondent's Response and joined issues with the Respondent.
9. On 26th October 2018, the Claimant filed a supplementary list of documents dated 25th October 2022, listing one document, a press statement from the Office of the Director of Public Prosecutions dated 27th August 2020.
10. On 27th September 2022, the Respondent filed a witness statement of one FATMA SHAFI, the Respondent's Human Resource Officer (Discipline) dated 26th September 2022. The Respondent also filed an evenly dated list of documents, listing a total of thirty one (31) documents. Documents listed by the Respondent included the Claimant's letter of promotion dated 17/10/2013, Respondent's letter of offer to change the Claimant's employment terms to permanent and pensionable status dated 25/3/2013, letter of Appointment of pensionable Employee dated 28/1/2014, letter of change of employment terms to permanent and pensionable status dated 28/1/2014, letter of promotion to the position of Senior Works Officer (Maintenance Port) dated 23/2/2018, Job description for the position of Senior Works Officer (Maintenance Port) dated 23/2/2018, show cause letter dated 23/3/2021, response to show cause letter dated 30/3/2021, extract of the minutes of the 176th meeting of the Respondent's HR Committee of the Board of Directors held on 12th and 13th May 2021, extract of the minutes of the 393rd meeting of the KPA Board of Directors held on 3rd and 4th June 2021, the Claimant's letter of summary dismissal dated 23rd June 2021, Report of the State Department of Public Works and an excerpt of the KPA Human Resource Manual 2017, among others.
11. When trial opened on 20th February 2023, the Claimant adopted his witness statement dated 18/8/2021 as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. The Claimant further testified that he was employed by the Respondent on 8/2/2008 at Grade HG2 and rose through the ranks to the rank of Senior Works Officer, the post that he held at the time of termination of his employment.
12. The Claimant further testified:-
 - a. that on 19/3/2021, he was re-designated to the post of Senior Architect, a post for which he had no qualifications as he is not an Architect, and has never studied Architecture. That due process was not followed in redesignating him.
 - b. that barely a week after his deployment, the Claimant was issued with a show cause letter dated 23/3/2021 alleging that the Claimant was among KPA Engineers who had issued certificates that led to over payment to the tune of ksh. 89,192,909.66 relating to construction of concrete barriers to Ezgo Limited and Grand Logistics Limited (ksh. 56,987,068), and ksh. 35,205,841.66 to Grand Logistics Limited, Salwa Kenya Limited and Haafah East Africa Limited relating to construction of Makongeni concrete works.
 - c. that payments to Ezgo were made vide Invoice No. 0396 and 0395 whereby none of them was signed by the Claimant. That the Claimant never certified those payments and was therefore not involved in any overpayment.
 - d. that on payment to Grand Logistics, the Claimant only certified the first and the second payments (for Makongeni Goods Yard Paving) amounting to ksh. 85,439,461.25, which amount was within the contract sum. That given that interim payment certificates are prepared on cumulative basis, the stated overpayment of ksh. 2,040,955.61 could only be attributed to



the subsequent third payment of ksh. 19,743,04.70 which the Claimant did not process or certify.

- e. that regarding payment to Salwa Kenya Limited, there were two local Purchase Orders (LPO's) given to one contractor by the Respondent under one proforma invoice, and that there was a challenge in paying for the materials on site as there were two Zones in the project, Zone 5 and Zone 7, and storage for the materials was one. That when paying a Contractor, one takes into account the work done and materials on site. That in the project in issue, work was done to perfection. That further, the Contractor had a performance bond of ksh. 6,877,080.90 which KPA (the Respondent) was holding, and that no loss could occur.
- f. that regarding Haafah East Africa Limited, the Claimant was accused of overpaying ksh. 29,660,428.80. That out of the contract sum of ksh. 72,151,583.79, the Claimant only certified ksh. 38,883,575.81, which was well within the said contract sum. That the Claimant did not certify the subsequent payments to the company/contractor amounting to ksh. 29,660,428.80.
- g. that the Claimant gave the foregoing explanation in his letter of response to the show cause dated 30/3/2021, and further expounded the issues before the Respondent's Human Resource Committee of the Board's hearing but despite this, the Respondent issued the Claimant with a summary dismissal letter dated 23rd June 2023, stating the reason for dismissal as being:-

“you issued certificates that led to the overpayment of contractors in the concrete barriers and Makongeni concrete works cases.”
- h. that the Respondent's action of summarily dismissing the Claimant from employment was unjustifiable as none of the payments certified by the Claimant led to any overpayment.
- i. that the issue of the concrete barriers was a public interest matter that was thoroughly investigated, and that charges were preferred against those found culpable in Milimani Criminal case No. MCAC/E019/2020, and that the Claimant was absolved of any blame by the investigation authorities, and no charges were preferred against him.
- j. that before the Claimant's termination, the Respondent's Board of Directors that effected the Claimant's summary dismissal had been deprived of such powers as the appointment of its members, including the Chairman, had been quashed vide a High Court Judgment delivered on 27th May 2021 in Constitutional Petition No. 236 of 2018, and that the Board was illegal and its actions were null and void.
- k. that the Claimant could not have appealed to the same illegal entity (Board) which had terminated his employment.

13. Cross-examined, the Claimant testified:-

- a. that his last post was Senior Works Officer Grade HM2 in the Civil Engineering Department, which is a Senior Management post, and that he was promoted to that post through a competitive process, and that his letter of appointment to that post, dated 23/2/2018, indicated that his salary was ksh. 126,680 per month.
- b. that the re-deployment letter dated 19/3/2021 was not a normal re-deployment/transfer letter.
- c. that the Claimant received the show cause letter dated 23/3/2021 on 29/3/2021, and responded to it on 30/3/2021, addressing the issues raised in the show cause letter.



- d. that the Respondent (KPA) was tasked by DCI to approach the State Department of Public Works to undertake a technical investigation over audit and evaluation of the concrete works and materials in issue and that the Claimant was not part of this when it happened.
- e. that the Claimant was not involved in payments to Ezgo Ltd, and that he did not append his signature to the invoices involved.
- f. that regarding Grand Logistics, the Claimant certified the 1st and the 2nd payments to a total of ksh. 85,239,461.25, inclusive of VAT; and that there was a third certificate (dated 7/8/2019) under the same LPO for ksh. 19,743,064.70, issued by one Juma Chigulu, a Works Officer working under the Claimant. That the Claimant did not delegate to the said person, and that the said person was responsible for his signature. That the total contract sum was ksh. 110,718,448.5, exclusive of VAT, and that the same was overshot by ksh. 2,040,955.60 due to Juma Chigulu's third certificate.
- g. that regarding Haafah East Africa Limited, the Claimant signed only one certificate for ksh. 38,883,575.81 against a contract sum of ksh. 72,151,583.79. That the Claimant did not over value the work done as at the time he certified payment. That Juma Chigulu signed the second payment for ksh. 29,660,428.87, making a total of ksh. 68,544,004.61. That there was no overpayment as work was in progress.
- h. that the Claimant was not among the persons prosecuted by the DPP.
- i. that the High Court's Judgment in Constitutional Petition No. 236 of 2018, which declared the Respondent's Board null and void and quashed it, was not stayed by the Court of Appeal until 23/9/2021. Hence the Claimant could not have appealed to the Board within 30 days of his dismissal in view of the High Court's judgment quashing it.

14. Re-examined, the Claimant testified:-

- a. that his re-designation as a Senior Architect from being a Senior Works Officer was illegal, was not accompanied by any job description and was within a week followed by a notice to show cause and subsequently by a summary dismissal.
- b. that overpayment to a contractor can only arise when the amount paid is more than the contract sum, and that there was a very big difference between the amounts certified by the Claimant and the contract sums.
- c. that in payment of contractors, there are usually issues that are on paper and not on ground, and which must be factored in the payment. That these include material tests in Government Laboratories to ascertain quality, mobilization costs (e.g hiring of excavators which excavate and leave site), labour (both casual and permanent), water and electricity, contractor's toilets on site, among others. That these factors may raise the amount certified for payment above the value of work on the ground, as there is always a process leading to work on the ground.
- d. that the valuation herein was done while work was still in progress, and the foregoing factors were not taken into account in arriving at what is being referred to as an overpayment. That the Claimant was not involved in that assessment which was done after the Claimant has already been charged by the Respondent.
- e. that those who did overpayment did so underground, without the Claimant's knowledge, and the clamant only saw those allegations in his show cause letter.



- f. that the Respondent's Board of Directors was quashed by the High Court on 27/5/2021 and the Claimant's employment was terminated by the quashed Board on 23/6/2023. That the High Court's decision was not stayed by the Court of Appeal until 23/9/2021. That the suit herein was filed on 18/8/2021, way before the said stay, hence no appeal to the Board could be filed (pursuant to the Respondent's Human Resource Manual.)
 - g. that when the DCI were called by the Respondent, the Claimant was investigated and did a number of statements, and was exonerated, while those found culpable are being prosecuted.
 - h. that the Claimant did (studied) his course for 7 years; and had worked and practiced what he had studied since 2008, and had never been involved in any wrong doing; and that the Respondent was trying to kill his career for no reason.
15. The Respondent called one witness, FATMA SHAFI [RW-1], a Human Resource Officer at KPA, who adopted her witness statement date 26/9/2022 as her testimony and produced in evidence the Respondent's documents referred to in paragraph 10 of this judgment.
16. Cross-examined, RW-1 testified:-
- a. that she (RW-1) had not come to Court with any written authority from the Respondent to represent it in the suit herein.
 - b. that the Claimant was interviewed and was given the post of Senior Works Officer (Port) Grade HM2 because he had acted on that post, was qualified, and had shown commitment to career progression.
 - c. that the Claimant had never had any disciplinary issue prior to the show cause letter on the issues herein.
 - d. that the Claimant is a qualified Engineer and not a qualified Architect, and has never undertaken architectural studies.
 - e. that on 19/3/2021, the Claimant was issued with a letter of re-deployment as a Senior Architect, and the redeployment was to take effect immediately. That the Claimant was not issued with a notice of intention to re-deploy him, and his consent was not sought. That RW-1 did not know what value the Claimant, an Engineer, was to add to the Architectural Department.
 - f. that the Claimant was not given any training in Architecture, and his redeployment letter was not accompanied with a job description, despite the wording of the letter to the effect that a job description was attached.
 - g. that the re-deployment was illegal, and was done contrary to Section 10 of the *Employment Act*.
 - h. that the re-deployment letter was dated 19/3/2021 while the show cause letter was dated 23/3/2023.
 - i. that the Respondent did not have any certificate to show that the Claimant had overpaid contractors, and that the allegation that he had done so was informed by a report from the State Department of Works which the Respondent's General Manager Finance had summarized vide a letter dated 26/2/2021 addressed to General Manager Human Resource and Management, which formed part of the Respondent's documents produced in evidence in Court (page 75-78 of the Respondent's bundle



of documents). That the summarized report mentions the Claimant in the following instances:-

- i. payment to Ezgo. That this payment was not paid by the Claimant but by other people who did not sign on behalf of the Claimant, and who carried personal responsibility for their actions.
- ii. payment to Grand Logistics where the Claimant issued two certificates for payment which was within the contract sum of ksh. 110,718,448.50. That other Engineers certified further payments thereafter.
- iii. that regarding Haafah East Africa Ltd and Salwa Kenya Limited, the amounts certified by the Claimant were within the contract sums. That payment certificates that led to overpayment were issued by other Engineers.
- j. that the Claimant appeared for a disciplinary hearing on 12/5/2021 before the Respondent's Human Resource Committee of the Board, which is made up of members of the Board of Directors, and in which the Respondent's Managing Director sits. That according to the Committee's minutes, the said disciplinary committee did not recommend the Claimant's dismissal. That the committee recommended that the Claimant be demoted; but when the committee's report was tabled before the full Board of Directors, the Board came up with the decision to terminate the Claimant.
- k. that the Board's Human Resource Committee was the only disciplinary panel before which the Claimant's case was heard/dealt with, and it recommended that the Claimant be demoted. That the disciplinary panel/committee was an independent committee, in which the Respondent's Managing Director sat.
- l. that the full Board of Directors which terminated the Claimants' employment was chaired by the Board's Chairman General (Rtd) Joseph Kibwana.
- m. that the Board of Directors cannot sit without its Chairman, and that in the absence of the Chairman, the members must elect another person to chair the Board's meeting, and if a Board sits without a chair, its decisions/activities are null and void.
- n. that in the present case, the Respondent's Board of Directors, as well as the personal appointment of the Board's Chairman, General (Rtd) Joseph Kibwana, had been quashed by the High Court on 27/5/2021, while the Board of Directors that made the decision to dismiss the Claimant sat on 4/6/2021.
- o. that the personal appointment of two other members of the Respondent's Board of Directors, Conrad Thorpe and Mary Ngare, had also been quashed by the High Court (on 27/5/2021), and that the Board did not have any power to conduct any business at that time.
- p. that the decision to dismiss the Claimant was invalid, as the stay order given by the Court of Appeal on 23/9/2021 did not sanctify the Board's actions done after the High Court's decision.
- q. that when allegations of overpayments came up, the Respondent invited independent investigation bodies, the EACC and the DCI to conduct investigations, and that upon investigation, the Claimant was not adversely mentioned by either of the two investigative bodies.



- r. that criminal charges were preferred against those implicated; and the Claimant was not one of them.
 - s. that the Claimant was not the final say in authorizing payments.
 - t. that the Claimant's dismissal was not legally justifiable.
17. Re-examined, RW-1 testified that although the Claimant's letter of re-deployment dated 19/3/2021 re-designating the Claimant to the post of Senior Architect stated that his new job description was attached to the letter, the same was not attached. That the Claimant could, however, have accessed the new job description from the Employees Self Service System (ESSS), which allows employees to apply for leave etc. The witness (RW-1) further testified:-
- a. that the Claimant was not consulted, and therefore did not consent to the redeployment and re-designation, and was not given notice of the intended redeployment and re-designation.
 - b. that the Claimants' disciplinary process was commenced by the General Manger Finance writing to General Manager Human Resource and Management, upon which the Claimant was given a show cause letter on 29/3/2023 (dated 23/3/2021), to which he responded on 30/3/2021. That the Claimant requested for a personal hearing, which was conducted on 12th and 13th May 2021, with a finding being made that the Claimant be demoted. That members of the disciplinary panel (committee) which made this recommendation were also members of the full Board of Directors which recommended that the Claimant be dismissed from service.
 - c. that the Board's decision was implemented, and the Claimant was dismissed on 23/6/2021.
 - d. that out of the Respondent's Board members appointed on 6/6/2018 vide Kenya Gazette Notice Nos. 5584 and 5599 which were quashed by the High Court on 27/5/2021, those who sat in the Board meeting of 3rd and 4th June 2021 (which recommended the Claimants' dismissal) were General (Rtd) Joseph Kibwana (Chairman), Ms Mary Ngare and Conrad Thorpe.
 - e. that General (Rtd) Kibwana, Ms. Mary Ngare and Conrad Thorpe sat in the Board when the decision to terminate the Claimant was made.
 - f. that under KPA's procedures, the Board of Directors cannot sit and cannot conduct business without a chairperson. That the appointment of General (Rtd) Joseph Kibwana was quashed by the High Court's decision made on 27/5/2021.
 - g. that the post to which the Claimant seeks to be reinstated no longer exists following a review of the Respondent's organization structure.
18. Having considered the pleadings filed and evidence tendered by both parties herein, issues that emerge for determination, in my view, are as follows:-
- a. whether the Claimants' redeployment and re-designation from the post of Senior Works Officer Port to the post of Senior Architect was unfair, unlawful and unjustified.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
19. On the first issue, it was a common ground that the Claimant, an Engineer by training was, upto 19/3/2021, working in the Respondent's Civil Engineering Department and held the post of a Senior Works Officer (Maintenance Port) Grade HM2 Post No. 810-2002, to which he was promoted vide a



letter dated 23/2/2018 following a promotion recommendation and interviews whereby the Claimant emerged the top candidate with a score of 90%. It was further a common ground that the Claimant was not an Architect and had not been given any architectural training, that the Claimant was not consulted prior to the redeployment, that his consent to the re-deployment and re-designation was not sought, and that the Claimant was not given the job description for the post of Senior Architect upon redesignation.

20. Section 10(1) of the [Employment Act](#) provides as follows:-

“a written contract of service specified in Section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of employment.”

21. Section 10(5) on the other hand provides:-

“(5) where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

22. In the present case, the Respondent purported to change particulars of the Claimants' employment without consulting the Claimant pursuant to Section 10(5) of the [Employment Act](#), which is couched in mandatory terms. Anything done contrary to express provisions of the statute is illegal, wrongful and unfair, and cannot be affirmed by a Court of law. In Board Of Governors Cardinal Otunga High School Mosocho & 2 Others -vs- Elizabeth Kwamboka Khaemba [2016] eKLR, the Court of Appeal stated as follows:-

“17. The Respondent was not consulted before assignment of the new duties. We agree with the trial judge that this omission amounted to violation of Section 10(5) of the [Employment Act](#) which requires an employer to consult with an employee before revision of a contract of employment.”

23. I find and hold that the Respondent's act of purporting to redeploy and to redesignate the Claimant from the post of Senior Works Officer (Maintenance Port) to the post of Senior Architect was unfair, unlawful and unjustified, and did not have the force of law.

24. On the second issue, it was held as follows in the case of Walter Ogal Anuro -vs- Teachers Service Commission [2013] eKLR:-

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

25. On substantive fairness, Section 43(1) of the [Employment Act](#) provides as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”



26. Under Section 45(2) (a), termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; while Section 45(4) (b) provides that a termination of employment shall be unfair if it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

27. The Claimant's show cause letter dated 23/3/2021 stated in part:-

“Reference is made to the letter of the Ag. General Manger Finance Ref: GMF/2/29 dated 26th February 2021 in which he made reference to the 383rd Board Meeting which was held on 29th January 2021 deliberating on several issues including the Biennal contracts under tender No. KPA/083/2015-16/CE, whereby overpayments had been made as a result of valuation of certification of works by KPA Engineers, compared to the valuation by Engineers from State Department of Public Works. This was in relation to the assignment for manufacture of concrete barriers and concrete works at Makongeni.

The Board directed that KPA Engineers who issued the certificates that led to overpayments should be held to account if they are still in the service of the Authority.

You are mentioned as being among the KPA Engineers that were found to have led to the overpayment of ksh. 89,192,909.66. your charges are included below:-

Concrete Barriers

Contractor	Contract Sum (KSHS.)	Amount Certified By Kpa (KSHS.)	Amount Certified By Sdpd (state Department Of Public Works) (kshs.)	OVERPAYMENT (KSH.)
Ezgo Ltd	109,281,268.61	82,969,318.92	25,982,249.96	56,987,088



Makongeni Concrete Works

CONTRACTOR	CONTRACT SUM (KSHS.)	AMOUNT CERTIFIED BY KPA (KSHS.)	AMOUNT CERTIFIED BY SDPD (STATE DEPARTMENT OF PUBLIC WORKS) (KSHS.)	OVERPAYMENT (KSH.)
Grand Logistics Ltd	110,718,448.50	97,021,812.74	94,980,857.13	2,040,955.61
Salwa Kenya Ltd	35,243,679.99	34,121,827.82	30,832,225.24	3,289,602.58
Haafah East Africa Ltd.	72,151,583.79	63,225,676.29	33,350,392.82	29,875,283.47
TOTAL				35,205,841.66

You are required to show cause within 72 hours from the time of receipt of this letter, why you should not be dismissed from service of the authority in accordance with Human Resource Manual 2017.....”

28. The Claimant responded to the show cause letter vide a letter dated 30/3/2021, and demonstrated that he did not certify any payment regarding Ezgo Limited, that other KPA Engineers did; and that regarding Grand Logistics Limited, the Claimant demonstrated that he only certified the first and the second payments amounting to kshs. 85,439,461.25, which was within the contract sum. That the alleged overpayment of ksh. 2,040,955.61 resulted from a third certificate issued by another Engineer. The Respondent (RW-1) confirmed this position in evidence.
29. Regarding Salwa Kenya Limited, the Claimant stated that the Contractor was paying two Zones (Zones 5 and Zone 7) with a combined contract sum of ksh. 68,870,809.50 as per the letter of award, and a common material storage site. That the Claimant paid for the materials on site, and that the sum paid was within the contract sum. This position was restated by the Claimant in evidence, and was not rebutted by the Respondent.
30. Regarding Haafah East Africa Limited, the Claimant stated, and demonstrated that he only certified the first payment of ksh. 38,283,575.81, which was within the contract sum, and that subsequent payments which led to overpayment were certified by other Engineers. This position was confirmed



by the Respondent (RW-1) in evidence. RW-1 was specific in her evidence that the Claimant did not certify any overpayment, and that other KPA Engineers did.

31. The Claimant's evidence in Court was basically a restatement of what he had earlier stated in his response to the show cause letter. The Respondent did not rebut that evidence. Indeed, the Respondent's evidence corroborated the Claimant's evidence on the alleged overpayments to contractors.
32. The foregoing notwithstanding, the Respondent summarily dismissed the Claimant vide a summary dismissal letter dated 23rd June 2021 whereby it is stated:-

“...the Board in its 393rd Regular Board Meeting held on 3rd and 4th June deliberated on your case found (sic) that you were culpable as charged in that you issued certificates that led to overpayments to contractors in the concrete barriers and Makongeni concrete works...

.....in view of the above, the Board decided that you be summarily dismissed from service of the Authority with immediate effect.....”

33. The Claimant's summary dismissal is not shown to have been anchored on any valid reason, in view of the evidence adduced by both parties herein.
34. It is to be noted that both the Claimant and RW-1 testified that payment for works such as those in the contracts in issue herein are made on cumulative basis as work progresses, in instalments, until the work is completed. The Claimant testified that such payments include payment for issues on paper but not on the ground as stated in paragraph 14(c) of this judgment, and that the State Department of Works' Valuation of the works in issue were done after the Claimant had been charged and without involving him. The Respondent did not challenge or rebut that evidence.
35. I must state here, for record purposes, that the contracts/executed tender documents against which payments were being made were never exhibited by the Respondent, and evidence on contractual intervals of payment of the contractual sums to the contractors and stages of the works at which such payments were to be made was never presented in Court. Further, the show cause letter was clear on the fact that the Claimant was not the only KPA Engineer charged with the duty of issuing certificates for payments to be made to contractors.
36. Further, the Respondent did not avail the author of, or an expert/technical witness to testify on the State Department of Works' Technical Report, which is an expert report, and which was the basis of the alleged overpayments, and was in competition with certificates issued by KPA Engineers. The Respondent did not produce in Court any Bill of Quantities on the works in issue. Terms and conditions of the contracts and itemized costing of the materials and labour and intervals of payment for such were never addressed. The Respondent (RW-1) testified to general issues and mentioned in passing (in her witness statement) the State Department of Works Report said to have been discussed by KPA's Board in January 2021.
37. The Court stated as follows in David Moshi Inganga -vs- Association Of Gaming Operators Kenya (AGOK) [2021] eKLR:-

“The burden of proof in any complaint of unfair termination of employment or wrongful dismissal rests on the employee, but the burden of justifying the grounds for the termination or dismissal rests on the employer. That is Section 47(5) of the [Employment Act](#).”

38. I find and hold that the Respondent did not discharge the burden of justifying the grounds for summary dismissal of the Claimant and/or termination of the Claimants' employment. The dismissal



was not anchored on valid reasons as the allegations of overpayment of contractors levelled against the Claimant were never proved on a balance of probability. The dismissal was substantively unfair.

39. In deciding whether the procedure adopted by the Respondent in effecting termination of the Claimants' employment was fair, the provisions of Section 41 of the *Employment Act* must be looked at. The Section provides:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

40. The Claimant was on 29/3/2021 served with a show cause letter dated 23/3/2021, setting out the charges raised by the Respondent against the Claimant, and requiring the Claimant to respond to the same within 72 hours of receiving the letter. The Claimant responded to the show cause letter vide his letter dated 30/3/2021. The Respondent invited the Claimant for a physical hearing on 12th May 2021. The invitation was done vide an email send to the Claimant on 10th May 2021. The email notified the Claimant of his right to be accompanied to the hearing by an officer of the Respondent Authority or a co-worker/Union official.

41. The disciplinary hearing was conducted by the Respondent's Human Resource Committee of the Board, which sat as a disciplinary panel. The Court was told that the Respondent's Managing Director sat in that panel. After conducting the disciplinary hearing for two days (12th and 13th May 2021), the panel/committee unanimously agreed that the Claimant be demoted.

42. When the disciplinary panel's findings were presented to the Respondent's full Board of Directors in which members of the disciplinary panel also sat, the Board of Directors varied the disciplinary panel's decision and recommended that the Claimant be dismissed from the Respondent's service.

43. Section 10(d) of the *Kenya Ports Authority Act* states one of the functions of the Respondent's Board of Directors as to:-

“(d) establish Committees from among its members for the purposes of the Authority and delegate functions thereto.”

44. The Court was not referred to any Section of the *Kenya Ports Authority Act* or any other statute that gives the Respondent's full Board of Directors power to veto, change or vary a decision of its committees that are mandated by the statute to carry out delegated functions. Decisions of the Committee of the Respondent's Board made in exercise of their delegated functions are decisions of the Board, and cannot, in my view, be changed or varied by the full Board except on appeal to the Board. No appeal was shown to have been referred to the Board against the disciplinary/Human Resource Committee's decision that the Claimant be demoted. It is to be noted that out of the six (6) members of the disciplinary/Human Resource Committee which heard the Claimant's case on 12th and 13th May



- 2021 and returned a unanimous decision that the Claimant be demoted, five (5) also sat in the nine (9) member Regular Board's meeting held on 3rd and 4th June 2021 which decided that the Claimant be dismissed. They were, indeed, the majority in the said full Board meeting. The five members were Rashid K. Kassim (Ag. Managing Director), Conrad Thorpe, Darius Mobe, Delilah K. Ngala, and Lydia Yator.
45. The foregoing scenario, in my view, amounted to an unfair procedure. This unfair procedure deprived the Claimant of any chance of ever being fairly heard on appeal by the Board or any part and/or Committee thereof.
46. I find and hold that the procedure adopted by the Respondent in dismissing the Claimant was unfair, and that the Respondent did not act in accordance with justice and equity in dismissing the Claimant.
47. Further to the foregoing, it was a common ground that the High Court sitting at Milimani had on 27th May 2021 delivered a judgment in Constitutional Petition No. 236 of 2019 quashing various Gazette Notices appointing some persons to various public offices, among them Gazette Notice No. 5584 appointing Joseph R.E. Kibwana (Rtd), who sat as the Respondent's Board Chairman on 3rd and 4th June 2021 when the Board made a decision that the Claimant be dismissed. Also quashed was Gazette Notice No. 5599 appointing, among others Mary Ngare and Conrad Thorpe, who also sat in the Respondent's Board of Directors on 3rd and 4th June 2021.
48. It follows that Joseph Kibwana (Chairman), Mary Ngare and Conrad Thorpe had had no legal capacity to sit in the Respondent's Board of Directors on 3rd and 4th June 2021, and that the Board's meeting on the said two days was without a valid Chairman and composition. RW-1 testified that the Respondent's Board of Directors cannot transact any business without a Chairman. This position appears to be anchored on Section 4 of *Kenya Ports Authority Act* which provides that the KPA's Board of Directors shall consist of a Chairman of the Board who shall be appointed by the Minister, the Managing Director, the Permanent Secretary of the Ministry for the time being responsible for ports, the Permanent Secretary to the Treasury, the Managing Director of the Kenya Railways Corporation and not less than six (6) other persons appointed by the Minister.
49. It follows, therefore, that the Respondent's Board's decision to dismiss the Claimant made in its meeting held on 3rd and 4th June 2021 was invalid in view of lack of a valid Chairman and due to the fact that Mary Ngare and Conrad Thorpe, whose appointment to the Board had also been quashed, sat in the said Board meeting and were, together with the invalid Chairman, part of the making of that decision. The Board was not properly constituted and its decision was null and void.
50. In *Macfoy -vs- United Africa Company* [1961] 3ALL ER 1169, the Court stated:-
- “if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court declare it as so.”
51. In *Michael Sistu Mwaura Kamau -vs- Ethics & Anti-corruption Commission & 4 Others* [2017] eKLR, the Court of Appeal stated:-
- “Having found the EACC was not properly constituted at the time it made a report and recommendations to the DPP to prosecute the appellant, and having further found that indeed the DPP formed his decision to prosecute the appellant on the basis of the impugned report and recommendations, it is inevitable to conclude that the appellant's prosecution was tainted with illegalities and that the High Court ought to have issued a declaration to



that effect and prohibited his prosecution founded on the report and recommendations of the improperly constituted EACC.”

52. On the third issue, and in view of my findings in this judgment, I find and declare that the Respondent’s Board of Directors lacked power and legal capacity to summarily dismiss the Claimant. The dismissal effected by the improperly constituted Board was null and void. I further declare that the Claimant’s summary dismissal was unfair, wrongful and illegal.
53. The Claimant sought reinstatement to his former position as Senior Works Officer Port C/No. 87798 Grade HM2, and an order of permanent mandatory injunction (compelling) the Respondent to reinstate him to the said position. The Respondent (RW-1) testified that the Claimant’s former Post No. 810-2002 is no longer in the KPA establishment since the Respondent has since conducted a review of its organization structure. The Respondent did not, however, tell the Court what the Claimant’s former Post changed to in the new KPA organization structure.
54. Under section 12(3) (vii) of the *Employment and Labour Relations Court Act*, this Court has power and jurisdiction to order reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated in any written law. Section 49(3) (a) of the *Employment Act* on the other hand provides for reinstatement of an employee whose employment has been unfairly terminated, and for such employee to be treated in all respects as if his employment had not been terminated.
55. In *Kenya Airways Limited -vs- Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, the Court of Appeal stated as follows:-
- “the remedy of reinstatement is discretionary. The Court should also balance the interest of the employee with the interest of the employer. The *Employment Act* has enacted the common law principle that the remedy of reinstatement should not be given except in very exceptional circumstances.”
56. The Court of Appeal in *National Bank Limited -vs- Anthony Njue JohN* [2019] eKLR stated: -
- “.....factors to be considered by a Court when considering reinstatement as an appropriate remedy for an aggrieved employee are as set out in Section 49(4) (a) to (m). Before settling for reinstatement as an appropriate award, the judgment reasoned as follows:-
- “Section 12(3) of the *Employment and Labour Relations Court Act* read together with Section 49 of the *Employment Act* give this Court power to order a reinstatement in appropriate cases. The Claimant’s case stands out as one of such cases where a reinstatement would be the best remedy to address the unfair termination of his employment.”
- We have considered the above reasoning in light of the circumstances of this appeal and we are satisfied as the trial Judge was that the circumstances demonstrated above both on the record and the reasoning of the judge warranted an order for reinstatement considering that the fault lay with the Bank in failing to re-evaluate the Respondents performance in the year 2014 as had initially been planned before terminating his employment with them on account of what the Bank termed as unacceptable performance. We therefore affirm the judge’s finding that reinstatement was the most appropriate remedy in the circumstances of the appeal.”
57. In the present case, no single overpayment was validly demonstrated to have been occasioned and/or certified by the Claimant. The Respondent (RW-1) stated as much in evidence. The Claimant was not



shown to have had previous disciplinary issues before the allegations of overpayment to contractors were leveled against him. The Claimant had worked for the Respondent since the year 2008. The Claimant has sought reinstatement, and the practicability of the remedy of reinstatement was not validly challenged by the Respondent with any tangible evidence. The Respondent's allegation that the Claimant's former post has since changed due to review of the Respondent's organizational structure cannot defeat the practicability of the remedy of reinstatement. No evidence was presented to back up the allegation, and the Court was not told that the Respondent's Engineers/Work Officers, Senior or otherwise, had been laid off and their departments/positions scrapped.

58. The Claimant was not shown to have secured an alternative employment. Indeed, the Claimant told the Court that he was, at the time of trial herein, doing business. He told the Court that it took him seven (7) years to study/to qualify, and had worked for the Respondent since 2008, and that the Respondent wanted to kill his career for no good reason.
59. Indeed, careers are not made over night. Acquisition of career qualifications and building of careers come at a cost, both in terms of time, effort and expense; both on the part of the career person/professional, his or her family and the society at large. Careers should never be killed for no reason or for no good and/or valid reason. An employee should never be deprived of his or her livelihood for no reason or for no valid reason, and should never be crucified for wrongs committed by others. I find and hold that the remedy of reinstatement is appropriate in the present case.
60. Consequently, and having considered submissions by both parties, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-
- a. it is hereby declared that the Claimant's re-deployment from the position of Senior Works Officer Port Grade HM2 to the position of Senior Architect Grade HM2 was malicious, unlawful and devoid of procedure.
 - b. it is hereby declared that the Claimant's summary dismissal was wrongful and unfair.
 - c. it is hereby declared that the Respondent's Board of Directors lacked legal capacity to summarily dismiss the Claimant, and the dismissal was null and void.
 - d. an order is hereby issued directing the Respondent to reinstate the Claimant to his former position of Senior Works Officer Grade HM2 forthwith, without any loss of benefits. The Claimant shall be treated in all respects as if his employment had not been terminated.
61. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



Miss Wanja for Claimant

Mr. Cheruiyot for Respondent

