



**Kioko v Independent Electoral & Boundaries Commission (Petition  
E014 of 2023) [2023] KEELRC 2395 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2395 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E014 OF 2023  
JK GAKERI, J  
OCTOBER 4, 2023**

**BETWEEN**

**COSMUS KIOKO ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES  
COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner filed this Petition on 27<sup>th</sup> January, 2023 alleging violations of *the Constitution*, *Fair Administrative Action Act* and the *Employment Act*, 2007.
2. The Petitioner cites Articles 1(1)(3), 2(1), 2(2), 2(4), 3(1), 10(1), 19(3), 20(4), 21(1), 25(c), 27(1)(2), 28, 29, 32, 33, 35, 37, 41, 43, 47(1)(2), 50(1)(2), 59(4), 73(1)(2), 75, 231(g), 232, 236 and 259(1) of *the Constitution* of Kenya, 2010 as the foundation of the Petition.
3. The Petitioner alleges that he is a former employee of the Independent Electoral and Boundaries Commission (herein after I.E.B.C) having joined as a Regional Information Communication Technology Officer in October 2012 at a gross salary of Kshs.105,380/= and rose to the position of Systems Administrator on 15<sup>th</sup> July, 2016 at Kshs.212,794/= and served the Respondent diligently for 10 years.
4. It is the Petitioner's case that although he was suspended on 11<sup>th</sup> May, 2017, he resumed duty 28<sup>th</sup> August, 2017 after he was cleared of wrong doing.
5. The Petitioner avers that he received a notice to show cause on 11<sup>th</sup> April, 2022 which did not specify the charges against him and before he had responded, he was interdicted vide letter dated 11<sup>th</sup> April, 2022 on account having deleted a VMware data store that contained the Systematic ABIS data base. The terms of interdiction were;



- i. Response within 14 days.
  - ii. Reporting to the Director ICT ones every week on Mondays.
  - iii. Basic Salary, house allowance and medical cover.
6. That the Petitioner responded to both letters on 20<sup>th</sup> April, 2022 denying the allegation of deletion of data.
7. That no action was taken until by letter dated 18<sup>th</sup> October, 2022, the Petitioner demanded to know the cause of the delay in handling his case and no response was forthcoming until 29<sup>th</sup> December, 2022 when he was called by the Human Resource Office and notified of a disciplinary committee hearing on 3<sup>rd</sup> January, 2023 and he appeared alone before a committee comprising Dr. Abdi Guliye, Boya Molu and the Director Human Resource, Lorna Onyango.
8. The Petitioner avers that when asked about the alleged deletion, the Petitioner explained that no deletion had taken place and he had no role in it.
9. That the hearing took less than 3 minutes after which he was directed to pass by the Human Resource Office to collect his letter. The letter dated 23<sup>rd</sup> December, 2022 invited him to appear before the Commission Disciplinary Committee and made reference to a suspension letter dated 20<sup>th</sup> April, 2022. Thus, he received the invitation notice after the hearing.
10. It is the Petitioner's case that he was served with a letter of dismissal on 20<sup>th</sup> January, 2023 citing the decision of a plenary meeting held on January, 6<sup>th</sup> 2023.
11. The letter required him to clear and hand over to the Respondent.
12. The Petitioner avers that although the minutes of the disciplinary hearing were not availed, he lodged an appeal on 23<sup>rd</sup> January, 2023 and the same is still pending.
13. The Petitioner alleges that the Respondent violated its Human Resource and Administration Manual (herein after HR Manual) in several respects, such as the notice to show cause did not set out the charges and the interdiction letter followed shortly thereafter.
14. That the process took 9 months to conclude and was thus unconstitutional and void and the committee was illegally constituted by having Commissioners.
15. That the dismissal letter makes no mention of the Committee's decision and the plenary was illegal.
16. That the proceedings were procedurally flawed for want of a representative as per the law and the Human Resource Manual.
17. According to the Petitioner, the dismissal violated the provisions of Articles 35, 59(4), 79, 248 and 252 of *the Constitution* of Kenya, 2010 and Sections 41 and 45 of the *Employment Act*, 2007.
18. That Articles 201(a), 47(1), 50, 28, 41(1) and (2), 47(1) were violated as were Articles 73(1)(a) and 73(2)(b).
19. The Petitioner prays for;
  - a. A declaration that the disciplinary proceedings conducted by the Respondent on 3<sup>rd</sup> January, 2023 and the resultant decision of 6<sup>th</sup> January, 2023 communicated vide letter dated 19<sup>th</sup> January, 2023 dismissing the Petitioner from employment as a System Administrator was



unconstitutional and in violation of the Petitioner's rights under Articles 41, 47, 50, 159, 236 of *the Constitution* of Kenya and Sections 17, 41, 43, 45 and 49 of the *Employment Act*, 2007.

- b. Reinstatement of the Petitioner to the position held as a System Administrator prior to the said dismissal without any loss of rank/insignia/grade and payment of salary and allowances and other benefits entitled to him from 13<sup>th</sup> April, 2022.
- c. Damages for Constitutional violations under Article 23 of *the Constitution* of Kenya.
- d. Costs and interest be provided for.
- e. Any other relief which this Honourable Court deems fit and just to grant.

### **Respondent's case**

20. In its Replying Affidavit sworn by Chrispine Owiye on 6<sup>th</sup> June, 2023, the affiant deposes that the disciplinary action taken against the Petitioner was neither illegal or ultra vires nor a breach of *the Constitution*, as the Petitioner had performed his duties negligently which occasioned loss of sensitive data from the Respondent's servers on 10<sup>th</sup> April, 2022.
21. That on the material day, the Petitioner's supervisor requested him to create and install the IAMS Servers and in the course of doing so, sensitive database containing 20 million voters migrated from the Old BVR System with 1.5 million from EVCR 1 and 2 that had already been processed was lost.
22. That the register of voters and related data are a critical asset of the Respondent in its mandate to deliver a credible election and requires utmost care and the Petitioner was negligent.
23. That the Petitioner called the Director ICT around 2 pm to notify him of what had transpired, who requested the Petitioner to prepare a report on the matter which led to an investigation and systems audit and disciplinary action was recommended, starting with a notice to show cause which had sufficient clarity, followed by the interdiction pending further investigations.
24. The affiant avers that the interdiction was in conformity with the Respondent's Human Resource Manual.
25. That a Committee constituted by the Director Legal Services investigated the issue and filed a report dated 15<sup>th</sup> December, 2022 and the plenary found that the conduct of the Petitioner amounted to professional negligence by deletion of data as he was qualified and experienced, received clear instructions from the Director ICT, lacked concentration as the system had the necessary safeguards and about 19.8 million records were lost.
26. That the Petitioner admitted that the incident took place and the Respondent lost vital sensitive data relating to the voter register and the explanation given was unsatisfactory.
27. That the Commission Disciplinary Committee deliberated the Petitioner's case on 20<sup>th</sup> December, 2022 at Espashikino Resort and recommended his appearance before the Committee and was informed of his rights and he attended the hearing on 3<sup>rd</sup> January, 2023.
28. That the Respondent considered the Petitioner previous conduct of spying and phishing information on the voters register in 2017 and was notified of the termination.
29. The affiant deposes that the delay in concluding the exercise was occasioned by the 2022 general election and the Respondent has the discretion to resolve exceptional cases over a period of one (1) year as provided by Section 12.1.6 of the Human Resource Manual. That the Disciplinary Committee was properly constituted as ordained by Section 12.5.3 of the Human Resource Manual.



30. The affiant denies that the Respondent violated *the Constitution* of Kenya or the *Employment Act* as the entire process was fair and the Petitioner was accorded the necessary safeguards and the reason for termination was justifiable.
31. The affiant prays for dismissal of the suit with costs.
32. In his Supplementary Affidavit sworn on 30<sup>th</sup> June, 2023, the Petitioner avers that no sensitive data was lost on 10<sup>th</sup> April, 2022. He admits that he deleted data as advised but no data was lost and the General Election was held and affirmed as credible.
33. That the deleted data was restored on the V Block 240 and denies having acted negligently.
34. That the investigation report was prepared by incompetent people with no ICT knowledge or expertise and came up with misleading information.
35. That he was not summoned of the “hearing” on 20<sup>th</sup> December, 2022 and the invitation for the hearing on 3<sup>rd</sup> January, 2023 was never served.
36. That even if he was served, an allegation he denies, he was not accorded time to prepare for the hearing as it was during the holiday season.
37. That the hearing was rushed, had no time to present his case, the committee was improperly constituted and no minutes were availed.
38. That the signature of the then Chairman on the minutes was forged.

#### **Petitioner’s submissions**

39. Counsel for the Petitioner isolated five (5) issues for determination in his 54 page submissions.
40. As to whether the Petition discloses violation of constitutional rights, counsel relied on the decision in *Mumo Matemu V Trusted Society of Human Rights Alliance and Annarita Karimi Njeru* to urge that the Petitioner’s right to dignity and fair labour practices, freedom of expression and fair administration action were violated.
41. On the disciplinary procedures by the Respondent, counsel relied on the Certificate of Appreciation by the Respondent to the Petitioner for outstanding diligence and dedication in conducting a successful 2022 General Election and urged that the disciplinary procedure was illegal and of no consequence as the committee was the improper one, as it was the Commission Disciplinary Committee which deals with IEBC Grade 1 – 5 (CEC’s only).
42. The decision in *M W K & another V Attorney General (2017) eKLR* was cited to buttress the submission on the need to get the process right and urge that the procedure violated the constitutional right of fair administrative action as ordained by Article 47 of *the Constitution* of Kenya, 2010 and Section 4 of the Fair Administration Action Act.
43. Counsel further contended that Section 12.11.1 of the HR Manual was violated.
44. The decision in *Jacqueline M. Mutiso V Kenya Revenue Authority* was relied upon to buttress the submission on delay, where it had taken 4 years as was the decision in *Dry Associates Ltd V Capital Markets Authority & another (2012) eKLR* and the sentiments of the court in *James Willy King’ori V Chairman Extra Ordinary Meeting of Michimikuru Factory Ltd* on the essence of Article 47 of *the Constitution* to urge that the Respondent violated the Petitioner’s right to fair administration action as the process was not efficient, expeditious, lawful and reasonable.



45. Counsel submitted that the show cause letter had no specific charges and the Petitioner was not given a hearing notice but was summoned by a call and service of notice had not been demonstrated. According to counsel, only time was lost, not data.
46. Counsel urged that the Respondent was unable to prove the reason for termination under Section 43 of the [Employment Act](#) and conducted an illegal disciplinary hearing with no valid reason and the investigation was conducted by unqualified persons and the 2022 general election was clean.
47. That the Petitioner had a legitimate expectation of fair treatment by the Respondent and had given a satisfactory response and expected the matter to be closed at that stage.
48. That the allegation that data was lost was not substantiated.
49. The sentiments of the court in Republic V Kenyatta University ex parte Njoroge Humphrey Mbuti (2015) eKLR were relied upon to urge that the Petitioner was entitled to face his accusers for cross-examination and interrogate the investigation report.
50. The High Court decision in Menginya Salim Murgani V Kenya Revenue Authority (2006) eKLR was cited on the essence of the allegations made against the employee.
51. Reliance was also made on the provisions of Section 41 of the [Employment Act](#) on the rights of the employee facing disciplinary action as was the Supreme Court decision in Kenfreight (EA) Ltd V Benson K. Nguti (2016) eKLR to urge the essentials of a fair termination of employment, namely; valid and fair reason and fair procedure as required by the provisions of Section 45 and 41 of the [Employment Act](#), 2007.
52. Counsel further relied on the decision in Kenya Human Rights Commission V Non-Government Organization Co-ordination Board (2016) eKLR to urge the right to fair hearing and reinforce the submission that process was essential.
53. Counsel submitted that the 9 months delay in concluding the disciplinary process violated the Petitioner's right to fair hearing and fair administrative action and the notice before the hearing was too short, on 29<sup>th</sup> December, 2023. Counsel wondered why the invitation was via a phone call.
54. According to counsel, since the Commissioners sit on appeal, they could not be part of the Disciplinary Committee hearing the Petitioner and their presence rendered the same illegal as the committee had no jurisdiction and the Respondent had not responded to the issue.
55. Counsel further urged that the Petitioner was not accorded time to defend himself as the minutes on record reveal.
56. Counsel submitted that the Respondent did not apply the parameters set out by Section 12.21 of the Human Resource Manual on the appropriate punishment as the Petitioner remained faithful and diligent.
57. Counsel invited the court to find that the decision to institute disciplinary proceedings against the Petitioner was improper and was characterised by procedural improprieties or deficiencies thereby violating the Petitioner's constitutional rights of equal protection and fair hearing as the investigation report was not availed.
58. As regards the consequences of the impugned disciplinary process, counsel relied on Section 41 of the [Employment Act](#) to urge the essence of a fair hearing.



59. Counsel faulted the procedure adopted by the Respondent on account of summon or invitation was by a phone call as opposed to a notice, which was handed over on the date of hearing and the call came late in December 2022.
60. Counsel relied on the sentiments of the court in Kenya Union of Commercial Food and Allied Workers V Meru North Farmers Sacco Ltd (2014) eKLR, Kenya Union of Commercial Food & Allied Workers V Delmonte (K) Ltd Mombasa HCCC No. 149 of 2012 and Jared Aimba V Fina Bank Ltd (2016) eKLR to urge the centrality of the provisions of Section 41 of the Employment Act in the termination of employment.
61. That the dismissal letter did not set out the committee's decision and the Petitioner did not appear before the plenary on 10<sup>th</sup> January, 2023 where the decision was made and the term of the Commissioners expired by 19<sup>th</sup> January, 2023.
62. On remedies, counsel relied on the sentiments of the Court of Appeal decisions in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR, Co-operative Bank of Kenya Ltd V Banking Insurance and Finance Union (Kenya)(2015) eKLR, Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd (2014) eKLR and Alex Wainaina Mbugua V Kenya Airways Ltd (2017) eKLR to urge that the Petitioner was eligible for reinstatement to address the unfairness visited upon him by the Respondent.
63. Counsel itemised the parameters which the court ought to rely on as guiding principles including the fact that the Respondent had not challenged it.
64. In the alternative, counsel submitted that the sum of Kshs.2,777,901/=, equivalent to 12 months compensation would be fair, leave allowance Kshs.147,830/=, pay in lieu of notice Kshs.231,491.75 as well as general damages for violations of his constitutional rights. Reliance was made on the sentiments of the court in Gitobu Manyara & 2 others V Attorney General (2016) eKLR and Kenya Human Rights Commission V Non-Governmental Organizations Co-ordination Board (Supra).
65. According to counsel, the sum of Kshs.2,500,000/= would be fair for the alleged violations.

### **Respondent's submissions**

66. Counsel isolated 5 issues for determination touching on sufficiency of grounds for termination of employment, compliance with procedure, whether termination was unfair and costs.
67. On the grounds of termination, counsel submitted that the conduct of the Petitioner on 10<sup>th</sup> April, 2022 amounted to gross misconduct as the Respondent lost sensitive data base containing 20 million voters migrated from the Old BVR System with 1.5 million from EVCR 1 & 2 that had already been processed.
68. The decision in Cynthia Kuvochi Luyegu & others V Tourism Promotion Services Ltd & another (2006) eKLR was relied upon to buttress the submission.
69. Counsel further urged that the Petitioner's actions amounted to negligence of duty under Section 6 of the Election Offences Act in that he did not exercise due care and skill of a reasonable person. Counsel cited Charlesworth & Pery on Negligence (9<sup>th</sup> Edition), Sweet (1997) at page 19 to reinforce the submission.
70. According to counsel, the Petitioner's conduct amounted to professional negligence as explained in Common Wealth V Brown, 20 N.E. 2d 478 and Bolam V Friern Hospital Management Committee (1957) 1 WLR 582.



71. Counsel invited the court to interrogate the tone, language, text and spirit of the Petitioner’s response to the notice to show cause dated 20<sup>th</sup> April, 2022 as he admitted that the incident occurred.
72. That the investigation commissioned by the Respondent showed that the Petitioner did not carry out his duties professionally as the system had an inbuilt warning system.
73. That the Respondent, in the circumstances had sufficient grounds to terminate the Petitioner’s employment summarily under Section 44(3) and 4(a) of the [Employment Act](#), 2007.
74. On the procedure of termination, counsel relied on Sections 41, 43 and 47(5) of the [Employment Act](#) to urge that the employer was duty bound to demonstrate that the ground for termination fell within the “band of reasonable responses” encapsulated in Halsbury’s Law of England as adopted in legions of decisions such as Gilbert Michael Maigacho V Coast Development Authority (2021) eKLR among others.
75. Counsel urged that it complied with the prescribed procedure as it issued a notice to show cause, interdiction notice and the Petitioner responded, the issue was referred to the Disciplinary Committee according to the HR Manual, was deliberated by the Committee on 20<sup>th</sup> December, 2022 and the Petitioner was invited for a hearing, attended, was heard and the Committee resolved that his employment be terminated.
76. Counsel submitted that the Respondent acted in a fair and equitable manner and cited the sentiments of the court in George Okello Munyolo V Unilever Kenya Ltd (2019) eKLR as well as Reuben Ikatwa & 17 others V Commanding Officer British Army Training Unit Kenya & another (2017) eKLR to reinforce the submission.
77. According to counsel, the Petitioner misconstrued the import of Section 12.4 of the Respondent’s HR Manual that the Human Resource Management Advisory Committee (HRMAC) was a disciplinary committee, and the Respondent’s disciplinary powers rested on the Commission Disciplinary Committee.
78. The Respondent maintained that the Disciplinary Committee was properly constituted as it had quorum as held in Isaiah Biwott Kangwony V Independent Electoral & Boundaries Commission & another (2018) eKLR and as provided by Section 7(3) of the Independent Electoral & Boundaries Commission Act, 2011.
79. As to whether termination of employment was unfair, counsel relied on the provisions of Section 45(2) of the [Employment Act](#) and the sentiments of the court in Walter Ogal Anuro V Teachers Service Commission as well as Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd to urge that termination of the Claimant’s employment was fair.
80. On the reliefs sought, counsel submitted that a declaration was not merited as termination was fair and having committed gross misconduct, the Petitioner did not deserve reinstatement and in any case, the remedy was discretionary under Section 49(3) and (4) of the [Employment Act](#), 2007.
81. On damages, counsel urged that the maximum available was 12 months compensation under Section 49 of the [Employment Act](#) and as adverted to in D.K. Njagi Marete V Teachers Service Commission (2020) eKLR, remedies must be proportionate to the injuries suffered by the employee and the amount awarded was discretionary.

### **Findings and determination**

82. The issues for determination are;



- i. Whether the petition herein meets the threshold of a constitutional petition.
  - ii. Whether termination of the Petitioner’s employment was unfair.
  - iii. Whether the Petitioner is entitled to the reliefs sought.
83. As to whether the Petition herein meets the threshold of a constitutional petition, the court proceeds as follows;
  84. The Petition is expressed under Articles 1, 2, 3, 10, 19, 20, 21, 25, 27, 28, 29, 32, 33, 37, 41, 43, 47, 50, 59, 73, 75, 231, 232, 236 and 259 of *the Constitution* of Kenya, 2010.
  85. The Petitioner alleges that the Respondent violated the provisions of Articles 35, 59(4), 79, 248 of *the Constitution* of Kenya in that it did not avail minutes of the hearing and the investigation report for purposes of appeal.
  86. That the unfair and malicious dismissal of the Petitioner violated Articles 10 and 201(a) of *the Constitution* of Kenya on national values and principles of good governance, integrity, transparency and accountability.
  87. That the non-constitution of proper disciplinary proceedings violated Articles 47 and 50 of *the Constitution*.
  88. That payment of half salary and allowances violated Articles 28, 41(1) and (2)(a) and 47 of *the Constitution*.
  89. That because the proceedings took 9 months to conclude, the provisions of Articles 41, 47, 50, 159 and 236 of *the Constitution* were violated.
  90. That dismissal by the plenary too violated *the Constitution* of Kenya.
  91. Since the petition is premised on the provisions of *the Constitution*, it is essential to determine whether it meets the threshold of a constitution petition as enunciated in Anarita Karimi Njeru V Republic (1979) eKLR and restated in legions of decisions including Trusted Society of Human Rights V Attorney General & 2 others (2012) eKLR.
  92. In Anarita Karimi Njeru V Republic (Supra), Trevelyn and Hancox JJ stated as follows;
 

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
  93. In Kiambu County Tenants Welfare Association V Attorney General & another (2017) eKLR, the court stated as follows;
 

“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the bill of rights, they must not only state the provisions of *the Constitution* allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury.”



94. The Petitioner cites several articles of *the Constitution* allegedly infringed by the Respondent on account of delay. Articles 41, 47, 50, 159 and 236 of *the Constitution* of Kenya were allegedly violated. The precise nature of the alleged violation remains unclear.
95. Similarly, how did the failure to provide copies of minutes or investigation report infringe Articles 35, 59(4), 79, 248 and 252 of *the Constitution* of Kenya, 2010?
96. How did the alleged unfair and malicious dismissal of the Petitioner by the Respondent infringe Articles 10 and 201(a) of *the Constitution* and to what extent?
97. Creditably, the Petitioner has relied on the provisions of the *Employment Act*, 2007, alongside the various articles of *the Constitution* of Kenya, 2010.
98. It is trite law that where a matter is addressed by an Act of Parliament, the statutory procedure ought to be invoked in the first instance before *the Constitution* is invoked.
99. It requires no emphasis that the relationship between the Petitioner and the Respondent was one of the employer and employee and the Petitioner is challenging the termination of employment and nothing else. The basic remedies for breach of the *Employment Act*, 2007 are essentially statutory and unless incidental matters are pleaded and sustained, no other remedies are available.
100. The foregoing is exquisitely captured by the Petitioner's prayer for reinstatement as the principal relief, which is a statutory remedy.
101. A panoramic view of the Petitioner's case as adverted to elsewhere, in this judgement, shows that it is an employer/employee dispute and the alleged violations are in their totality remediable in an ordinary claim.
102. Courts have consistently held that not every dispute raises constitutional issues. Indeed most disputes are determined within the purview of *the Constitution* of Kenya, 2010, which remains the overarching framework, without invoking its provisions.
103. The sentiment of Muriithi J. in *Josphat Koli Nanok & another V Ethics & Anti-Corruption Commission* (2018) eKLR are instructive.
104. For the foregoing reasons, the court is satisfied that the petition before the court does not meet the threshold of a Constitutional Petition.
105. As to whether termination of the Petitioner's employment by the Respondent was unfair, counsel for the parties have adopted contrasting positions. While Counsel for the Petitioner urged that it was unfair for want of valid and fair reason and procedural propriety, counsel for the Respondent submitted that it was fair as the Respondent had a reason and conducted it in accordance with a fair procedure.
106. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR, the provisions of the *Employment Act*, 2007 set out the mandatory architecture on termination of employment and dismissal. The Act embodies specific provisions on notice, reason(s) for termination, examples of gross misconduct which would justify summary dismissal, burden of proof and termination procedure among others.
107. In a nutshell, the provisions of the *Employment Act*, 2007 lay it bare that for a termination of employment to pass muster, it must be shown that the termination was substantively justifiable and procedurally fair.



108. The sentiments of the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR and *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR are spot on.
109. In the latter case, the learned judge stated as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also 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 to effect the termination.”

110. I will now proceed to apply the foregoing framework for analysis to the facts of the instant case.

### **Reason for termination**

111. It is common ground that the Petitioner was the Respondent’s System Administrator working under the supervision of the Director ICT, Mr. Michael Ouma.
112. It is also not in contest that on 10<sup>th</sup> April, 2022, the Director ICT requested the Petitioner to perform various tasks, including creation of required vital machines, modify existing virtual machines and remove only those that were no longer needed. The tasks included deletion of certain data from the secondary not primary site.
113. It is also not in dispute that as the Petitioner was discharging his duties, he deleted data on the primary site and the Respondent expended time and human resource to restore the data and thus no data was lost.
114. Records show that when the deletion took place, the Petitioner informed the Director ICT immediately, which precipitated corrective measures.
115. The Director ICT issued a notice to show cause dated 11<sup>th</sup> April, 2022.
116. The Respondent’s Human Resource Department issued its notice to show cause on 13<sup>th</sup> April, 2022 and interdicted the Petitioner on the same day. The letter accused the Petitioner of negligence of duty and a response was required within 14 days and the Petitioner responded by letter dated 20<sup>th</sup> April, 2022 stating that the deletion of data was neither intentional nor malicious. The Petitioner indicated that he had worked late the previous day and was fatigued to underscore his commitment to duty.
117. That he was working alone and had a two (2) week deadline to meet as per Smartmatic requirements.
118. Equally not in contest is that the Director Legal Services constituted a team to investigate the alleged loss of data on 19<sup>th</sup> April, 2022 comprising Winnie Ingaiza, Mark Okoth and Samuel Maina Mwangi.
119. Although the Petitioner’s counsel used inelegant language to describe the membership of the panel, he did not contest its findings or seek expunction of the report from the record.
120. The panel found that;
- i. The Director ICT requested the Petitioner to create space by deleting less important Virtual Servers with no critical data. The instructions were not availed as evidence.
  - ii. The Petitioner informed the Director ICT of the deletion.
  - iii. The data was restored and the only damage was loss of time.



- iv. The Director ICT could not tell whether the deletion was intentional or accidental.
  - v. Working on the servers was challenging.
  - vi. To a large extent, the Petitioner’s action was an error not deliberate and amounted to professional negligence as the Data was inaccessible for sometime.
121. The panel recommended administrative disciplinary action as the commission deemed fit.
  122. Regrettably, the copy of the report availed by the Respondent is undated and no evidence was adduced to show that the Respondent availed a copy to the Petitioner.
  123. Interestingly, the Disciplinary Committee of the Respondent considered the Petitioner’s case on 20<sup>th</sup> December, 2022 among other cases and the Committee resolved that the Petitioner appears before the Committee for further hearing.
  124. The Respondent adduced no evidence to show that the Petitioner attended the hearing at Epashikino Resort, Nakuru County on 20<sup>th</sup> December, 2022. This lead to the hearing on 3<sup>rd</sup> January, 2023.
  125. It is common ground that the Petitioner appeared for the Disciplinary hearing on 3<sup>rd</sup> January, 2023.
  126. The minutes reveal that the Committee relied exclusively on the investigation report and other documents.
  127. The minutes states as follows;
 

“The incident was not intentional, malicious or the result of professional negligence, but rather the result of an unintentional deletion of the wrong data store while attempting to combine and merge two or more data stores to create the larger drive space required by Smartmatic to install the new system. He immediately notified the Director ICT of the deletion . . .”

The only damage occasioned was loss of time.”
  128. The minutes reveal that no evidence was adduced to prove otherwise.
  129. Intriguingly, the Disciplinary Committee did not make a recommendation to the full commission on the way forward.
  130. The dismissal letter dated 19<sup>th</sup> January, 2023 cites the show cause letter dated 13<sup>th</sup> April, 2022 on “Loss of data from Commission Servers pertaining to the Voters Register on April 10, 2022” the Petitioner’s response and the hearing on 3<sup>rd</sup> January, 2023.
  131. The dismissal was grounded on the provisions of Section 44(4) (c) and (g) of the *Employment Act, 2007*.
  132. The letter states in part;
 

“The Commission in its 284<sup>th</sup> Plenary Meeting of 6<sup>th</sup> January, 2023, deliberated and noted the history of similar offence, the sensitivity and severity of the matter jeopardizing its core mandate and touching on national security, and resolved to dismiss you, and hence, you are hereby dismissed from the service of the Commission effective the date of this letter on account of gross misconduct . . .”



133. Implicit in the foregoing is that the Petitioner’s employment was terminated on account of loss of data yet the reality is that no data was lost and the Respondent tendered no evidence that the deletion was intentional, malicious or out of negligence. The Petitioner’s Supervisor, Director ICT could not tell whether the deletion was intentional or not and reported it immediately it occurred and corrective measures were taken and the data was restored.
134. According to the Respondent’s evidence on record, the only thing lost was time and the energy expended in restoring the data, but none was quantified.
135. Section 43(2) of the *Employment Act* provides that;
- “The reason or reason for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
136. Case law is emphatic that as long as the employer has a reasonable basis for the genuine belief, the termination is justified, as held in *Galgalo Jarso Jilo V Agricultural Finance Corporation* (2021) eKLR.
137. The foregoing reasoning is consistent with the so called “band of reasonable response test” encapsulated in Halsbury’s Laws of England cited by the Respondent’s counsel and employed in legions of decisions including *British Leyland (UK) Ltd V Swift* (1981) I.R.L. R 91 as follows;
- “The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him the dismissal was unfair. It must be remembered in all these cases that there was a band of reasonableness within which an employer might reasonably take one view . . .”
138. In the instant case, the court is not persuaded that Respondent has demonstrated that it had a reasonable basis for believing that the Petitioner occasioned loss of data yet its investigation report state that the only thing lost was time as the deleted data was restored.
139. The Respondent did not disclose how long it took to restore the data or whether Smartmatic demanded payment for the restoration of the data.
140. Relatedly, the Petitioner maintained in his Further Affidavit that no data was lost.
141. Equally, the Respondent relied on a previous complaint which was not substantiated and the Petitioner’s interdiction was lifted unconditionally.
142. Granted that no data was lost as the letter of dismissal appears to suggest, the court is not satisfied that the Respondent has shown that it had a valid and fair reason to terminate the Petitioner’s employment.

## **Procedure**

143. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (Supra), Section 41 of the *Employment Act*, 2007 provides an elaborate and mandatory process to be complied with by the employer before termination of the employment contract.
144. The specific tenets of procedural fairness have been enumerated in legions of decisions including *Loice Atieno V Kenya Commercial Bank* (2015) eKLR by (Radido J.) and the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, such as explanation of the grounds of termination in a language understood by the employee, reasons for which termination is being



considered, entitlement to the presence of another employee of the employee's choice during the explanation and hearing and considering the representations made by the employee and/or the person chosen by the employee.

145. The Petitioner faults the procedure employed by the Respondent to terminate his employment in various respects, such as he was not given a copy of the investigation report, it took too long (9 months), he was invited for the hearing by a telephone call on 29<sup>th</sup> December, 2022 and had no time to prepare, was not informed of the right to be accompanied by a representative, was not accorded time to present his case and was not given a copy of the minutes to prepare for the appeal.
146. As regards notice of invitation to the hearing, the Petitioner's uncontroverted evidence is that, he was given the copy after the hearing on 3<sup>rd</sup> January, 2023. That it was during the hearing that he was requested to pass by the Human Resource Office to collect the letter.
147. The Respondent on the other hand adduced no evidence to show that the letter was served upon the Petitioner before 3<sup>rd</sup> January, 2023 or deny that it did not call the Petitioner to attend the hearing.
148. Although the letter makes reference to the suspension letter, it makes no reference to the allegations made against the Petitioner or the evidence the Committee would rely on.
149. The fact that the Respondent denied the Petitioner a formal invitation, denied him the liberty to respond to it in case he needed any document the Respondent had in its possession such as the investigation report, which the Disciplinary Committee relied upon substantially in its minutes. In addition, it denied the Petitioner the opportunity to attend the meeting with another employee of his choice as ordained by law. This was an important piece of evidence which the Respondent denied the Petitioner.
150. From the minutes on record, it is unclear whether the Respondent explained the charges to the Petitioner before the deliberations begun as it does not appear as an agenda item. The minutes makes reference to a report (it is unclear by whom) that the Petitioner occasioned loss of data.
151. Finally, the minutes make no reference to Petitioner's response to the charges or deliberations and recommendations of the committee which would appear to give credence to the Petitioner's contention that he was not accorded time to present his case.
152. The minutes filed by the Respondent are silent on when the meeting commenced or when it ended.
153. From the 3 pages on record, it is difficult to decipher whether any hearing took place on that day. There is no evidence of any proceedings.
154. The foregoing finds support in the sentiments of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) as follows;

“In this case, the letter inviting the Respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular. At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the Respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in



nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictment which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held. Instead, all the Respondent had was a technical appearance of less than 5 minutes with the board which evidence was not seriously challenged. For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find.”

155. These sentiments apply on all fours to the circumstances in this case.
156. The Petitioner also faulted *the constitution* of the Disciplinary Committee arguing that it denied him the right of appeal as the same Commissioners would sit on appeal and as the Respondent’s Human Resource Management Advisory Committee ought to have heard him in the first instance.
157. From the provisions of the Respondent’s Human Resource Manual, it is clear that disciplinary control, removal of employees is the mandate of the Commission. However, Clause 12.4.2 gives the Human Resource Management Advisory Committee power to deliberate on disciplinary matters involving employees in Independent Electoral & Boundaries Commission Grade 5 (excluding CECs) and below.
158. Under Clause 12.5.1, the Commission Disciplinary Committee handle cases involving officers in Grade 1 – 4 and 5.
159. Clause 12.5.3 of the Manual prescribes the composition of the Commission Disciplinary Committee as comprising members of the Commission and the Director Human Resource and Administration as the Secretary. The Clause makes no reference to quorum of the Committee and since the Respondent was duly constituted then, there is no reason to hold that the Disciplinary Committee was not properly constituted. At any rate under Clause 12.3 of the Manual, the Commission exercises its disciplinary powers through its committees as was the case here.
160. Clause 12.5.3 makes no reference to quorum of the committee.
161. Puzzlingly, neither the Petitioner nor the Respondent identified the Petitioner’s employment Grade in urging their case.
162. Similarly, the Petitioner did not raise any issue with *the constitution* of the Committee at the hearing and did not allege that he did.
163. Finally, the Petitioner faulted the entire disciplinary process on the ground that it took 9 months to conclude.
164. The Respondent avers that the delay was occasioned by its very busy schedule and the 2022 General Election of the Republic of Kenya, an enormous undertaking.
165. Although, Clause 12.1.4 states that “All” disciplinary cases should be concluded within 6 months, Clause 12.1.5 has an exception where the 6 months period need not apply “In exceptional circumstances due to nature and complexity of the case as long as it does not exceed 24 months.”
166. Bearing in mind that the alleged misconduct was communicated on 10<sup>th</sup> April, 2022 and the Petitioner admitted that he was operating under very strict timelines and was alone, the Respondent’s averment that the delay was justifiable on account of busy schedule of activities, and the General Election appears convincing and justifiable.
167. The court is not persuaded that the Respondent violated *the Constitution* of Kenya, 2010, *Employment Act* or the Human Resource Manual on the 9 months period. The court so finds.



168. For the above-mentioned reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that it terminated the Petitioner's employment in accordance with a fair procedure.
169. In the end, the court is satisfied and finds that termination of the Petitioner's employment was unfair for want of substantive justification and procedural propriety.

## Reliefs

### a. Declaration

170. Having found that termination of the Petitioner's employment was not conducted in accordance with the provisions of the *Employment Act*, 2007, the declaration that commends itself for issue is that the termination was unfair.

### b. Reinstatement

171. The remedy of reinstatement is provided for under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011, read with Section 49(3)(a) of the *Employment Act*, 2007.
172. The remedy restores the employee to the position he/she was in prior to the termination in all respects so that he/she is treated as an employee who had not been terminated from employment.
173. Analogous to other reliefs, however, under Section 49 of the *Employment Act*, 2007, the remedy of reinstatement is discretionary as acknowledged by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (Supra).
174. Puzzlingly, the Respondent did not vehemently oppose the remedy of reinstatement or demonstrate its impracticability or the challenges it would pose to its operations or that the parties parted ways in an acrimonious manner or allege any of the circumstances under Section 49(4) of the *Employment Act*, 2007.
175. The court is alive to the critical issue of practicability of reinstatement which the Respondent did not respond to or submit on substantively. As explained in *New Zealand Educational Institute V Board of Trustees of Auckland Normal Intermediate School* (1994) 2 ERNZ 414 (CA) cited in *Kenya Airways Ltd V Aviation and Allied Workers Union* (Supra), practicability involves the balancing of interests of the parties and justices of their cases and is thus discretionary even where termination of employment is adjudged to have been unfair. The remedy must be capable of being carried out without imposition of the employment relationship.
176. Having found that termination of the Petitioner's employment was unmerited and no unique or reasonably justifiable circumstances have been shown to deny the Petitioner the remedy of reinstatement and being a statutorily ordained remedy, the court finds no justifiable reason not to award the remedy of reinstatement as held in *Co-operative Bank Ltd V Bank Insurance and Finance Union (Kenya)* (Supra) as well as *Alex Wainaina Mbugua V Kenya Airways Ltd* (Supra).
177. Notably, the Respondent is a big organization and is at liberty to re-deploy the Petitioner to any of its stations or departments as it may deem necessary.

### c. Damages for Constitutional violations under Article 23 of *the Constitution* of Kenya

178. Having found that the Petitioner failed to demonstrate the manner and extent of the alleged violations, the prayer for damages is unmerited and is accordingly dismissed.



179. In conclusion, judgement is entered in favour of the Petitioner against the Respondent in the following terms;
- a. Declaration that termination of the Petitioner's employment by the Respondent was unfair.
  - b. Respondent is ordered to reinstate the Petitioner to his employment as System Administrator within 30 days, without loss of back pay, salary and benefits, with liberty to redeploy the Petitioner as it may deem necessary.
  - c. Having found as above, it is only fair that parties bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF OCTOBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

