



**Kihara v Kenya Revenue Authority & 2 others (Employment and Labour Relations
Petition E205 of 2021) [2022] KEELRC 12718 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12718 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E205 OF 2021**

M MBARŪ, J

JULY 29, 2022

BETWEEN

JULIUS KAIYA KIHARA PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

WILSON GACONI 2ND RESPONDENT

DAVID WACHIRA KINUU 3RD RESPONDENT

JUDGMENT

1. The petitioner is seeking the following;

- a) Disciplinary action against the Petitioner premised on the impugned decisions of failure to file reports concerning the purported placing of the Petitioner in Performance improvement Programme (PIP) issuing a Notice to show cause, termination and dismissal of the appeal as well as any other related matter is of no consequence, null and void.
- b) Alternatively and/or without prejudice to above a declaration that the decision of the termination of services of the Petitioner by the Defendants is ultra vires their powers and a violation of Section 65(3) of the *Public Service Commission Act*, 2017, and the Regulations thereof and hence the same is null and void.

An Order be made reinstating the Petitioner back to his office as a Manager- Port and Boarder Control- Mombasa.

- c) A Declaration that the decision by the Respondents to terminate the services of the petitioner and/or to dismiss the appeal summarily as conveyed by letters dated July 16, 2021. And/or any other date violates the Petitioners fundamental rights and the right of fair labour practices.



- d) A Declaration that the decision by the Respondents to send the Petitioner and conveyed by eviction letters and dated August 13, 2021, October 28, 2021, and December 8, 2021, or any other date violate Articles and 47 of the Constitution and section 4 of the Fair Administrative Action Act 2015 and therefore unconstitutional.
- e) A Declaration that the Petitioner's termination of employment on account of the alleged neglect of duty and insubordination amounted to a violation of the Petitioner's rights under sections 41 and 45 of The Employment Act and in particular Article 41(1) of The Constitution of Kenya.
- f) A Declaration that the termination was in breach of the Petitioner's terms of employment;
- g) A Declaration that the purported hearing on June 24, 2021, did not meet the threshold of envisaged of Section 41,43 and 45 of the Employment Act of a fair hearing and/ or of a hearing at all, and is null and void. The process of termination lacked in procedural fairness as well as in substantive justification as envisaged of Section 41, 43 and 45 of the Employment Act.
- h) An Order of Certiorari to quash the improper implementation of the Performance Management Contracts and Policy by the Respondent on the permanent and pensionable employees of the 1st Respondent like the petitioner.
- i) An order of Certiorari be and is hereby issued to remove into this court and quash the decision of the Respondents to terminate the services of the Petitioner as conveyed in letter July 16, 2021, and mandamus be issued to reinstated the Petitioner with full benefits.
- j) An order be and is hereby issued restraining the Respondents by themselves, their employees, servants and or agents or other person(s) claiming, through or under them from interfering with the petitioner's pre-existing, employment terms and duties to the 1st Respondent.
- k) An Order directing the Respondents to reinstate with full benefits the petitioner back to his office and employment status and the House known as house No HG5- KRA Bamburi Estate, Mombasa, on the same tenancy terms.
- l) An order for compensation by way of general, and special and Exemplary damages, as may be assessed and found suitable.
- m) Costs of and incidental to this Petition;
- n) any other or further orders and or directions as may be appropriate in the circumstances including to but not limited to such orders as the Court may be fashioned by the Court based on the reliefs sought in this Petition.

PETITION

2. The Petitioner is adult male. 1st Respondent (KRA) is a public organization established as an agency of the Government of Kenya under the provisions of the Kenya Revenue Authority Act for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and taxes and other connected purposes.
3. The joinder of the 2nd and 3rd respondents was addressed by the court in a ruling herein dated February 17, 2022.
4. The Petitioner joined Customs and Excise the then Customs and Excise Department in the Ministry of Finance and performed his duties in various places and customs offices in Kenya including Forodha



House in Nairobi, Eldoret Station and International Airport, Isebania border Station, Nakuru Customs station, Excise office- Nairobi, Large Tax Payer office at Nairobi, Jomo Kenyatta international Airport, In-charge of exports Processing Zones, Malaba border station as a manager, Exemptions, Remissions and Rebates Section - Nairobi, Quality Management section, Country Revenue and regional operations then sent to Regional headquarters - Mombasa and out stations in Mombasa as a Manger - KRA Mombasa Port.

5. The Petitioner in the service of KRA was complimented on his services in revenue collection and management of the staff under him and was issued with various recommendations and certificates of recognition and the attendant promotions and cash bonuses given for meeting the targets of revenue collections severally culminating with the last one being given in August, 2021 of Kshs 269,380.00, for the year, 2021.
6. The claim is that Petitioner was working and residing at the Mombasa, and working as an officer in the position of the manager at the Mombasa port for about four (4) years, with effect from April, 2018 to September, 2021 and was undertaking his duties in full compliance with allocated duties and tasks particularly during the Covid-19 crises and Ministry of Health Protocols, the staff and other persons at the Kenya Ports premises- Mombasa Port were amongst the first heavy casualties and the Petitioner had to work prolonged hours.
7. This work and services that the petitioner was rendering in February, 2021 was so heavy that the Respondent found it necessary to engage and distribute the work load to five (5) persons who were promoted to the position of manager after undergoing tutelage from the petitioner and others he was supervising have been promoted to other positions.
8. The petitioner was reporting to the Chief manager Port operations who in turn reports to the Regional Coordinator Southern Region and the petitioner was not in his line of duty in any way reporting to directly to the 2nd Respondent at all.
9. In the midst of the foregoing challenges and COVID-19 Crisis, and without notice, or warning, and without any known reason, or intervention or complaint or assignment originating from his superiors believing to enjoy the confidence and trust of his superiors, and the other members of staff working with him, the 2nd Respondent wrote to the Petitioner letter dated May 3, 2021, and headed 'Negligence of Duty and Insubordination'.
10. The said letter made reference to another memorandum dated September 11, 2020 dated April 16, 2020 both read together that reportedly 'placed me on Performance Improvement Plan (PIP) for a period of three (3) months effective, April 1, 2020'.
11. The letter further stated that by the afore stated two (2) referenced letters, the petitioner was Required to submit monthly progress reports to Performance Contracting Division (PMD) but it was noted that he neither submitted the said monthly progress reports to PMD nor provided any explanation for such failure, which amounts to insubordination and negligence of duty.
12. The respondent also made reference to The *Employment Act*, 2007, Section 44.4 (c) (e) as read with Clauses 6.1.1.3 & 6.1.1.5 of the KRA code of conduct provides grounds for Summary dismissal.
13. The letter further required the petitioner to show cause why his employment should not be terminated for alleged negligence of duty and insubordination. He was given 7 days to respond. In the letter, the petitioner was required to acknowledge receipt.
14. The petition is that the Petitioner never received this letter or its duplicate and had no knowledge of it until he received the letter dated June 17, 2021. He has no knowledge and had never received the letter



- mentioned and dated April 16, 2020, that is stated to have placed him on Performance Improvement Plan (PIP) for a period of three (3) months effective April 1, 2020.
15. The Petitioner had no knowledge or ever having received and/or signed, as is required by the said applicable rules, PPI for the state period.
 16. The petition is that the only performance instruments were the Performance Management, contracting policy that had been introduced was regulated by a document known as FY 2021-22
 17. Despite of not being aware of the memo placing him on PIP, the petitioner was aware that in the Customs Department, where he worked, his colleagues and his superiors were in compliance with the Performance Management Policy, and Performance contracting process being introduced, and the balanced scorecard based targets, completing and filing the appraisal reports in the approved standard appraisal form. the petitioner and his superiors were filing and signing and his superior co-signing and filed the same.
 18. The reports for the period of the required contested period of April, 2020 had been filed and addressed to the Human Resource Department's Officer, a one Ms Grace Mwangi but who when questioned, reported to have overlooked sharing it with her boss the 2nd Respondent, a fact that made him furious and unfairly slighted resulting in him making a wrong finding that the Petitioner was guilty of insubordination, yet the Petitioner was not reporting to him according to the job structures of the Respondent.
 19. By a letter dated June 17, 2021, the 2nd Respondent wrote and invited the petitioner to appear before the Disciplinary Panel on the June 24, 2021, at 8:15 am and informed him that it was for oral representation on the subject of alleged *Negligence of Duty and Insubordination*.
 20. The letter did not contain the details or other particulars of the alleged negligence of Duty, nor was the negligence of duty mentioned by the petitioner's immediate superior, to the Petitioner and there is no evidence that he was privy to this complaint. There was also no known nor was any particulars given of the other charge of 'insubordination.'
 22. The Petitioner despite the short notice travelled from Mombasa and presented himself in Nairobi at the Disciplinary Panel comprised of the control and management of the 2nd respondent where he suffered heavy oppression, highhandedness and his dignity injured and felt humiliated, when he was shouted at and loudly told to keep quiet and the 2nd Respondent then adjourned the hearing to take evidence on the questioned service of the said letters and which he apparently acted on without giving the Petitioner a fair opportunity to respond or contradict it, yet it also hearsay evidence.
 23. The petition is that the respondent violated the petitioner's rights under the Constitution with regard to Article 23(1 which recognizes the right for every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated, infringed, or is threatened and this right is donated in terms of Article (c) to a person acting in public interest. Article 22(2) (b) of the Constitution permits for the filing of such a Petition on behalf of a class of persons. Article 41 of the Constitution on the right to fair labour practices which include among others the right to reasonable working conditions, and this Article is read as effected by a statute to include a fair hearing in disciplinary cases read together with Section 41 of the Employment Act, and Section 43 on proof of reason of termination is on the employer and Section 45(2) of the Employment Act on that provides that a termination of employment by an employer is unfair if the employer fails to prove-
 24. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 232(1) of the Constitution



- provides for the values and principles of public Service and Article 258 empowers any person to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.
25. Also Section 65(3) of the Public Service Commission Act, 2017, the Respondents have no power to terminate or reduce the rank of the Petitioner, the Petitioner being a Public Officer, who in July, 2021, has served for an aggregate of more than fifteen (15) years, he having served for some thirty-two (32) years, as the provisions of Section 65(3) provides.
 26. The petition is also that on unknown and unascertained date, but believed to be in the course of the year 2020, the Respondents Performance Management Division (PMD), whose head is the Commissioner of Support Services - KRA, started implementing what is now known as the Performance Management System (PMS) and extending - fending it to apply to the permanent and pensionable staff, while initially it was thought that this scheme was to be applied to the specific contract employees, who had been recruited with pre-negotiated terms of expected targets.
 27. The PMS at its gestation period, which is still ongoing, marred with confusion, inadequate preparation of the staff, no training or adequate training of what it entails and no comprehension of its benchmarks and targets and many things were and are still not clear to date, even to long standing and experienced officers, save that the PMS and the Human Resource departments, are seen to use it as a tool to oppress and target long serving officers, apparently to tool it, as a sword to irregularly terminate their services, so to prematurely retire them and have a discriminatorily and newly recruited promoted to take their place. the record of these premature terminations are apparently age based and not performance based, or other known legitimate criteria.
 28. The petition is that at this material time the petitioner was working at the Mombasa port of I Kilindini, as a manager. In a disciplinary case, the policy requirements were that an officer be issued with a notice to show cause and allowed time to respond and to attend a hearing upon which an appeal is allowed. Such measures were not undertaken with regard to the petitioner.
 29. The appeal system has been rendered opaque, and a nullity, as the 3rd respondent has made a decision to approve the termination aforesaid without the benefit of either reading or seeing the proceedings of the show cause as the Respondent has by letter stated that no proceedings were recorded hence the 3rd Respondent only rubber stamped.
 30. The right to fair labour practices encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees as held in the case of Kenya County Government Workers' Union v County Government of Nyeri & another [2015] eKLR. The Decision being made by an organ other than the employer is does not amount to basic fair treatment of employees the decision is unfair and ought to be declared as such.
 31. The decision to terminate the petitioner's employment was therefore ultra vires and without basis. The Respondent's decision to terminate the services of the Petitioner is tainted with illegality for the decision making organ procedural impropriates lack of power, or excess of power and hence an affront to the principle of the rule of law, and is disproportionate in penalty to the alleged wrongs committed which are denied because;
 - a. No evidence of service of the letter dated 16th April, 2020, and no valid PIP li.id he been entered into by the Petitioner and the Respondent, as set out in the Guidelines, and no time limit was provided for.



- b. Acted without authority and made the Decision without any legal or contractual foundation. By dint of Section 65(3) of The *Public Service Commission Act*, 2017, and as read with the implementing circular from the Public Service Commission, none of the Respondents had authority and power to terminate the services of the Petitioner, as this was the preserve of the Public Service Commission, with the Respondent only empowered to investigate and forward to the Public Service Commission for determination.
32. There was colossal procedural impropriety meted out on the Petitioner and by action taken by the Respondent for the reason that -as indicated above, the impugned Discipline Panel acted unfairly in the process of taking a decision due to non-observance of the Rules of Natural Justice because the petitioner was not provided with correct reasons for the Decision especially since the Decision affects him and he has a reasonable and legitimate expectation that he be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the *Constitution*.
33. The petitioner has supported the petition with his Supporting Affidavit and further gave his oral evidence in court that upon employment by the Ministry of Finance he was later deployed to the KRA where he worked diligently with outstanding performance and was recognized for his service.
34. At the KRA several policy initiatives were put in place to address work performance but he remained a permanent and pensionable employee regulated under his letter of appointment until May 3, 2021 when one David Wachira Kinuu wrote to him over alleged negligence of duty and insubordination over an alleged letter sent to him dated April 16, 2020 over which the respondent stated that the petitioner had been placed under a PIP for 3 months whereas such letter was never served upon him and when he was invited to the disciplinary hearing, the service of such letter became an issue forcing the panel to adjourn and check on the same but the petitioner was never given a chance to interrogate any material in this regard.
35. The petitioner also testified that through letter dated June 16, 2021 the respondent terminated his employment unfairly after failing to give him notice, hearing and without any justifiable case since he was not negligent of duty nor was he insubordinate and the letter subject of PIP was never served upon him in the first place so as to give rise to matters addressed in the notice to show cause notice dated June 21, 2021. Had the respondent checked the facts well it would have been apparent that the petitioner could not respond to a PIP that was not brought to his attention or to his supervisor.
36. The petitioner also testified that his appeal was not processed on the merits and the respondent was all out to terminate his employment unfairly. He had by then worked for the respondent for over 32 years without a record and had hoped to retire in the ear 2023 upon attaining the mandatory retirement age and the unfair termination of employment was meant to deny him his retirement dues. The alleged PIP process in the year 2020 was followed by excellent performance of the year 2021 when he earned huge bonuses as evidence that he was a diligent employee and thus is seeking to be reinstated back to his employment with full benefits and to be allowed to return to his allocated housing which he was forced to vacate under the unfair termination of employment and only a reinstatement would restore back his dignity.

Responses

37. In his Replying Affidavit and evidence Japheth Ogwen Alande case was that he is in charge of PMD to assist the KRA employees in their work performance. in order to achieve its mandate, the KRA has put in place several measures including but not limited to performance management processes. In this



- regard the KRA has the PMD which is solely charged with the mandate of managing the performance of its entire staff irrespective of their terms of service that is Contract or Permanent and Pensionable.
38. The respondent has put in place the performance management system, a government initiative introduced by the KRA in the year 2004 and its implementation is applicable to all employees of the KRA.
 39. The performance management process is not marred with confusion as alleged by the Petitioner and There is proper and adequate preparation of staff through training and sensitization on the performance management system that is conducted by the Division annually. It is aimed at improving staff performance in the collection of revenue based on the government set and signed target with the Board of Directors. through performance management the KRA has been able to meet the set targets. A case in point is the financial year 2020/2021 where the KRA exceeded its Revenue target resulting to all employees being awarded performance bonus in appreciation of their collective contribution in meeting the set corporate performance target. It is not a tool to oppress and target long serving officers to irregularly terminate their services so as to prematurely retire them and discriminatorily have the newly recruited staff promoted to take their place as alleged.
 40. The KRA has put in place several measures to ensure that the entire process of performance management is Objective. The process commences with the signing of a Performance Contract. all the employees negotiate and sign a performance contract in the beginning of every financial year. Before signing the performance contract an employee is required to negotiate and agree on specific target. upon negotiating and signing the performance contract the same is monitored and evaluated periodically on monthly, quarterly, half yearly and annually.
 41. The evaluation process begins with the employee evaluating himself and thereafter has a one on one discussion with the immediate supervisor where they agree on the employee's performance thereafter and in order to ensure objectivity and uniformity a panel of independent validators is constituted by the Performance Management Division and the employee appears before it to defend his/her final score and provides evidence.
 42. The panel of independent validators can either approve the employee's final score and/or vary the same depending on the evidence. For an employee who has scored well upon validation, that marks the end of the validation process for that particular period. Employees found not to have met the set and agreed targets with their supervisors as cascaded from the Board of Directors Performance Contract are guided accordingly and put on Performance Watch or PIP as appropriate for a specific period. Support to the affected employee is provided and one is required to cooperate with the supervisor after which the performance is again reviewed and a validation of such findings done by a different panel to inform the next cause of action which could include vacation of the PIP.
 43. In this case, the Petitioner negotiated and signed a performance contract for the financial year 2019-2020 commencing on July 1, 2019 to June 30, 2020. His performance for the period in issue was reviewed and or evaluated periodically and half year performance of July 1, 2019 to December 31, 2019 was found to be unsatisfactory. The Petitioner was therefore placed on a PIP.
 44. In a letter dated April 16, 2020 the Petitioner was informed that he had been placed on PIP for a period of three months commencing April 1, 2020 to June 30, 2020. During the period when the Petitioner was on PIP he was required to submit monthly progress reports to the Performance Contracting Division. from the letter;The Petitioner failed to provide the monthly progress reports as was required for the period he was on PIP.The Deputy Commissioner Performance Management forwarded its report on the entire validation process for the period in question to the Commissioner Corporate Support Services with various recommendations.



45. In the report the Petitioner was listed as one among twelve others who had failed to submit monthly progress reports as was required during the period they were on PIP. the Petitioner failed or declined to improve his poor performance that had seen him placed, on Performance Improvement Plan and the same is evidenced by the lack of monthly reports that were expected from him and the actions taken by the KRA were justified and lawful.
46. In further response the respondent filed the Replying Affidavit of Awino Diana Barasa who also testified that she is currently based at Kilindini Port Customs and Border Control Department of the KRA and At the time of the incident, I was attached at the Chief Manager's office port operations.
47. On April 22, 2020 she received a letter in an envelope from one David Kingori who was then serving as a registry officer in the Port Operations. The letter was addressed to the Petitioner and In the envelope it was indicated as 'confidential'.
48. Upon receiving the letter she signed the dispatch register as is custom and then delivered the letter to the Petitioner who was in his office. The Petitioner received the letter without any protest.
49. Since the letter was enveloped and bearing the word confidential, she cannot attest as to the contents of the same as my instructions from my superiors and particularly the Petitioner were that she should not open confidential letters and confirms having delivered a letter marked 'confidential' to the Petitioner on April 22, 2020.
50. Ms Awino also testified that she did not know the contents of the letter she served upon the petitioner.
51. The respondent also filed and the Replying Affidavit of Frankline Kiogora and called him in evidence and testified that he is the human resource officer of the respondent, KRA.
52. The petitioner was an employee of the respondent from 1st July, 1996 as a collector I on permanent and pensionable terms. He rose through the ranks to the position of manager-customs & border control department and at which rank his employment terminated on July 16, 2021 on the grounds of negligence of duty and insubordination.
53. Matters leading to termination of employment were that the human resource division received a report from the PMD indicating that the petitioner had not complied with the directive with regards to submitting monthly progress reports to the PMD despite being instructed to do so through letter dated April 16, 2020. The deputy commissioner human resource through letter dated May 3, 2021 issued the petitioner with a notice to show cause why disciplinary action should not be taken against him and which notice indicated that failure to submit monthly progress reports amounted to gross misconduct and would lead to summary dismissal pursuant to Section 44 of the *Employment Act* and KRA Code of Conduct.
54. The petitioner never responded to the show cause notice as directed. He was invited to appear before the disciplinary committee through letter dated June 17, 2021 and he attended and allowed to make his representations which were considered and found unacceptable since the petitioner failed to give any reasonable cause as to why he failed to submit monthly progress reports for 3 months he was placed under PIP contrary to instructions given in the letter dated April 16, 2020.
55. The disciplinary panel established that the petitioner was being dishonest by stating that his failure to submit monthly performance progress reports was on the basis that he had not received the letter dated April 16, 2020 placing under PIP. This assertion was discounted through paper trail which confirmed that he had received the letter dispatched through the Commissioner Customs and Boarder Control registry, then Postal Corporation of Kenya which delivered it to Mombasa Port and handed over to the



- petitioner in person by one Diana Barasa Awino an officer attached to the office of the Chief Manager Port Operations on April 22, 2020.
56. In the notice to show cause letter of May 3, 2021 the same made reference to the PIP letter of April 16, 2020 which the petitioner failed to question if he had not received it as alleged. He was therefore found to be of gross misconduct by the disciplinary panel, being of neglect of duty and insubordinate contrary to the Code of Conduct and Section 444(4)(c) and (e) of the *Employment Act* leading to termination of his employment.
 57. The petitioner was allowed to appeal which failed to raise any new grounds and was dismissed. Termination of employment was lawful and justified.
 58. The respondent also filed the **Replying Affidavit of Grace Mwangi** and called her in evidence and testified that she is an officer of the KRA in the human resource department and on May 4, 2021 mg Fred Mutuku Muema of the same department forwarded a show cause letter to the petitioner and on May 7, 2021 the petitioner notified her via email that he was at a place where he could not access his official email and for that reason he sought more time to respond to the show cause notice. On May 10, 2021 the petitioner forwarded to her various documents entitled *PIP Documents April – June 2020* and on May 12, 2021 she replied to him and informed him that he should send hard copies together with his response to the Deputy Commissioner Human Resource for further action. The petitioner never complied.
 59. The respondent also filed the Replying Affidavit of Abdi Malik Hussein and called him in evidence and testified that he was the immediate supervisor to the petitioner as the Chief manager Ports Operations while he was the Manager Ports Operations. The petitioner was his assistant and would be left in charge whenever he was out of office.
 60. Every employee placed under a PIP is required to submit reports to the PMD and not to the supervisor. All employees of the KRA who upon validation were placed under PIP were required to report to the Performance Contracting Divisions (PCD) as advised under the PIP letters.
 61. Whereas he signed the petitioner’s PIP report, the responsibility to submit the same to the PCD was on the petitioner who was on PIP. Ms Barasa was attached to his office and would receive letters on behalf of the department and pace with the subject officer.
 62. The Petitioner submitted that the legal basis of the Petition is founded under Articles 3(1), 10, 19, 20, 41(1) and 47 of the *Constitution* of Kenya and Sections 41, 43 and 45(2) of the *Employment Act*. Furthermore, that by Section 65(3) of the *Public Service Commission Act*, 2017, the Respondents have no power to terminate or demote a person of his rank, being a public officer who in July 2021 had served for some thirty-two (32) years, with Section 65(3) even providing for an aggregate of more than fifteen (15) years of service.
 63. He submitted that therefore the decision by the Respondents to terminate his services are ultra vires null and void as the same is tainted with illegality, procedural impropriety, lack of power, or excess of power. That the decision is further an affront to the principle of the rule of law and is disproportionate in penalty to the alleged wrongs he committed, which are denied. That by dint of Section 65(3) of The *Public Service Commission Act*, 2017 as read with the implementing circular from the Public Service Commission (PSC), only the PSC had authority and power to terminate his services and the Respondent is only empowered to investigate and forward to the PSC for determination. He further submitted that the Respondent’s procedural impropriety was a violation of Article 47 of the *Constitution* of Kenya and Section 4 of the *Fair Administrative Action Act*, 2015. That the impugned disciplinary panel acted unfairly as it failed to observe the rules of natural justice by providing him with



- the correct reasons for its decision especially because he had legitimate expectation that he would be granted a hearing before any adverse action is taken.
64. He further submitted that Respondents failed to produce to the Court the minutes of the disciplinary meeting that determined his fate. That whereas the Letter dated April 16, 2020 talks of a validation panel on April 1, 2020, no evidence has been produced in court showing the names of the panelists and what they found unsatisfactory above the performance of the Petitioner beyond the set yardsticks. Generally, the Petitioner questions the authenticity of the said letter relied in evidence by RW1 and submitted that the said evidence together with the evidence of all the other Respondent's witnesses should thus be rejected. The Petitioner submitted that the Respondents have not produced any evidence to prove the vague grounds stated in the Notice to Show Cause letter of May 3, 2021, read with the one of June 6, 2021. That the Respondents have also failed to discharge the burden of proving the grounds set out in the termination letter dated July 16, 2021 as is required by Section 43 of the Employment Act. Nevertheless, Section 44(4)(c)(e) as read with clauses 6.1.1.3 and 6.1.1.5 of the KRA Code of Conduct provides grounds for summary dismissal.
 65. The Petitioner further submitted that Section 26 of the Employment Act and the PSC Act is to the effect that where an employee transfers his service, then he transfers with his benefits and the protection afforded by law, without it being reduced. That therefore the Respondent's assertion that he severed his contract from the PSC in 1996 and his contract is subsequently governed by the Respondent's Code of Conduct, is an incorrect reading of the applicable law.
 66. In Petition No E161 of 2021, Manyara Muchui Anthony v Communications Authority of Kenya, State Corporation's Advisory Committee, Public Service Commission and Hon Attorney General, the Court held that employees of a State Corporation are subject to the provisions of the PSC Act and/or are persons in Public Service as envisaged by Article 13 Constitution 2010.
 67. In the case of Carolyne Osodo v Moi University, ELRC Cause No 219 of 2020, the Court found the respondent had wrongfully and unfairly terminated the employment of the claimant and ordered Reinstatement without any loss of benefits.
 68. The Respondent submitted that the Petition before Court is entirely a contractual dispute rather than a constitutional dispute and the Petitioner ought to have sought remedy from the Employment Act and from within the contract he alleges to have been issued by the Respondent as held in the case of Kelvin Gatembo Kariuki & 4 others v Office of the Auditor-General & 2 others [2021] eKLR. The net effect of the declarations the Petitioner seeks if granted, is that he will be reinstated and Reinstatement is a remedy available under Section 49 of the Employment Act. It submitted that therefore the Petition filed herein is an abuse of the Court process and should be struck out with cost.
 69. The Respondent also submitted that the Petitioner has failed to enumerate how the actions of the Respondents have violated the constitutional provisions whose articles he only cited and alleged to have been violated. In the case of Abdikadir Mohamed & 9 others v Sango Maewa & 2 others (Interested Parties) Oscar Soi & another [2021] eKLR, the Court while citing the Supreme Court decision in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR stated that a party invoking the right to initiate proceedings under Article 22(1) of the Constitution has to show the rights said to be infringed, as well as the basis of his or her grievance. It submitted that this Court should thus find that this Petition has not met the threshold of a Constitutional Petition and cannot be maintained.
 70. The Petitioner's dismissal from employment was fair and lawful in accordance with Section 45(2) of the Employment Act 2007 and further in accordance with the Respondent's Human Resource policies. That the reasons of negligence of duty and insubordination were valid grounds anchored on the



provisions of Section 44 (4) (d) & (e) of the *Employment Act*, 2007. That it also proved the said reasons in accordance with Sections 43(1) and 45(2) of the *Employment Act* particularly on the fact that the Petitioner was aware he was on PIP as he prepared the PIP reports but in a clear act of insubordination, refused and/or neglected to send them to the Performance Management Division until a NTSC was issued. Furthermore, that it terminated the Petitioner's employment as per the provisions of Section 41 of the Act.

71. In the case of *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR* the Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.
72. It submitted that it exercised its discretion properly and rightly concluded that the Petitioner's actions of demeaning the PIP process would have a negative ripple effect, and which justified his dismissal. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*, the Court held that in adjudicating on the reasonableness of the employer's decision, the court is not entitled to substitute its own decision for that of the employer particularly where the employer has exercised its discretion properly and in the best interest of the company.
73. The import of the definitions of public service and state organ under Article 260 of the *Constitution* is that a State Corporation is not a state organ by virtue of not having been established under the *Constitution*, and it falls outside the scope of the PSC. That pursuant to Section 5(1) of the *State Corporation Act*, the Respondent has the powers to hire and appoint staff for the expedient performance of its functions and that Section 13(4) of its establishing KRA Act provides that the terms and conditions of all persons employed by the Authority shall be determined by the Board. That it is therefore authorised to regulate the conduct of its employees.
74. The respondent submitted that the prayer for Reinstatement should fail as the Petitioner's services were terminated for a lawful cause. In the case of *Vincent Ouso Ochudho v Intercontinental Hotel Limited [2021] eKLR*, the Court declined to order reinstatement of the claimant or award him compensation after finding that the reason for the termination was valid and a fair procedure was followed. That however in the unlikely event that this Court finds that the termination was unfair, it should be guided by **Sections 50 and 49(4) (a) to (m) of the *Employment Act***. The Petitioner is thus not entitled to any compensation and the petitioner was informed of the reasons and that he would be paid all his dues and pension benefits upon clearance.

Determination

75. In a letter dated July 16, 2021 the respondent terminated the petitioner's employment on the grounds that he was negligent of duty and insubordinate. The allegations were that in a letter dated April 16, 2020 he was placed on PIP but he failed to make any reports as required for the period of 1st April to June 30, 2020.
76. The petitioner denied receiving the subject letter of April 16, 2020. That the filed letter is not signed by him in acknowledgement and he could not have failed to comply with a notice that he never received.
77. The PIP protocols heavily relied upon by the respondent was not attached. Save Japheth Ongweno Alande took the court through the purpose and objectives of the Performance Contracting process, the PIP process and the need for employer to ensure the employees were performing their duties to the required standards and level of expectations.
78. The PIP in itself was outlined as an important tool to enhance employee performance.



79. However, when the PIP became part of the performance contracting process, any change(s) to the employment contract should have been communicated to the employee and the subject employee such as the petitioner herein should have signified approval with a written consent to the noted changes in terms of Section 10(5) of the Employment Act, 2007 read together with Section 12 thereof.
80. In the case of Margaret Wanja Muthui v Kenya Rural Roads Authority (KeRRA) Petition E210 of 2021 the court held that an employment contract issued in terms of Section 9 of the Employment Act, 2007 where there is a review, change of its terms and or any revision must abide the provisions of Section 10 (5) of the Act and that any revision must be with the knowledge and consent of the employee;
- (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.
81. Where an employer therefore intends to use and apply a work tool which fundamentally alters the core and primary terms and conditions of service, and which if not adhered to may result in termination of employment, the employee must give approval and written consent to the new terms and conditions. As otherwise, such tools apply contrary to the clear provisions of fair labour practices outlined under Article 41 of the Constitution, 2010.
82. The subject herein is not the PIP *per se* but that when the PIP issued to the petitioner on April 16, 2020 he failed to submit the required reports as directed and that when he was directed to show cause why he failed to do so he failed to comply and was therefore insubordinate.
83. Section 44(4)(c) and (e) of the Employment Act, 2007 classify neglect of duty and failure to obey lawful instructions as gross misconduct and subject to summary dismissal
- 44 (4) (c) An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.
- 44(4)(e) An employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer
84. On the contested facts herein, upon the petitioner moving the court to assert that his rights in employment were violated by the respondent as the employer on the grounds that the subject letter leading to termination of employment and dated April 16, 2020 was not served upon him, he discharged the burden placed upon him pursuant to Section 47(5) of the Employment Act, 2007. The burden then shifted to the respondent to prove that indeed such letter was received by the petitioner.
85. The Court of Appeal in addressing the threshold of Section 47(5) in the case of Prof. Macha Isunde v Lavington Security Guards Limited [2017] eKLR, held that;
- 'There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.'



And the court in the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR in addressing the threshold for termination of employment by summary dismissal held that;

'Whether an employee's misconduct warrants dismissal requires assessment of the degree of the misconduct and the surrounding circumstances, a contextual approach. In *Mckinley vs BC Tel*, [2001] 2 SCR 161, 2001 SCC 38 [CanLII], it was held:

29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of alleged insubordination. Within this analysis a finding of misconduct does not by itself, give rise to a just cause. Rather the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship can no longer viably subsist.'
 39. To summarise, this first line of case law establishes that the question whether dishonesty provides just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, courts have held that factors such as the nature and degree of misconduct, and whether it violated the essential conditions of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of just cause.'
86. In the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR and which the respondent has heavily relied upon in submissions, the court held that before termination of employment there must be fair and valid reasons given to the employee as otherwise, termination of employment is substantively unfair.
 87. In this case, under clause 5.8 of the KRA Code of Conduct and Ethics *Negligence of Duty* is addressed and list matters of an employee failing to meet set deadlines for reports, on legal requirements, departmental instructions and court directives as matters which constitute negligence of duty. Where an employee commits such matters, then he is in negligence of duty.
 88. Clause 6.1.1.5 of the Code of Conduct and Ethics address *insubordination* to mean that;

If an employee knowingly fails or refuses to obey lawful and proper command which it was within the scope of his/her duty to obey, issued by his/her employer or a person placed in authority over him/her employer.
 89. The elements of the employee knowingly failing to take lawful instruction must exist. Such must be compounded by the fact that the subject employee at the time knew of his duty to obey the employer but deliberately failed to do so. Good cause is not established for such lapses.
 90. For any case of discipline, the KRA has an elaborate Procedures Manual for Human Resource Division, November 2020. I take it this document interfaced the period of April 16, 2020 and July 16, 2021 when the petitioner is said to have been placed under PIP and then employment terminated over alleged neglect of duty and insubordination.
 91. Under Clause 6.4.2 of the document, Discipline Management Procedures for misdemeanors is addressed and these are to be considered under the regions.



92. Under Clause 6.4.2.2 Cases of Misconduct/Gross Misconduct are addressed. Upon the Head of HR receiving a report of misconduct from Intelligence and Strategic Operations Department such report must be analyzed to determine whether the facts given present the threshold to warrant disciplinary action. Where there is no case, the process should terminate instantly and where there is a good cause, a show cause notice should issue to the subject employee to allow for investigations and upon the investigations report and another show cause notice be issued with an outline of the allegations/offences to allow the employee to respond.
93. Specifically under Clause 6.4.2.2 (vi) of the Procedures Manual for Human Resource Division, November 2020 then directs the KRA to;
- The Show Cause letter shall be issued to the officer in duplicate, where the duplicate copy shall be signed by the officer and returned to Head of HR for record.
94. The importance of service upon the subject employee of the show cause notice is given emphasis.
95. Upon invitation to the disciplinary panel, Clause 6.4.2.2. (x) directs the KRA to take a decision and appropriate recommendations for approval/consideration/further guidance by the appointing authority or any other authorized officer. In this case, no such matter has been addressed by the various officers who were called by the respondent as witnesses.
96. Such matter was left bare.
97. The record of the disciplinary panel was also denied of this court. The necessity to adjourn the disciplinary hearing so as to undertake a paper trail on how the petitioner was served with letter dated April 16, 2020 was lost with this record.
98. Service of this letter on the petitioner vies-a-vies the allegations he faced became relevant to the entire petition.
99. This is because; the letter of April 16, 2020 placed the petitioner on PIP taking effect from 1st April to June 30, 2020.
100. This letter is the core and in issue in the entire petition.
101. First, the letter was to operate retroactively though the intent was retrospective. It issued on April 16, 2020 to cover the period of 1st April to June 30, 2020. Already the petitioner was denied a complete 16 days into the PIP. Had such matter been addressed effectively, it would have been apparent to the employer that the intention of the PIP, meant to assist the employee improve on his work performance was already compromised.
102. The issue of service is further complicated and compounded by the evidence of Ms Barasa who testified that she received a letter addressed to the petitioner and noted as confidential. she served it on April 22, 2020. She did not know the contents. This piece of evidence cannot apply to assert that the subject letter of April 16, 2020 is the one that the petitioner received. At the end it required him to acknowledge receipt. It is not acknowledged. Ms Barasa cannot be faulted for such lapse. The author of it who knew the objective of it has to carry the burden. Any lapse thereof cannot be visited upon the petitioner.
103. The attached letter dated April 16, 2020 is not marked confidential as Ms Barasa noted in her evidence that what she served upon the petitioner was so marked. Even where such letter was to be marked confidential, which is not the case here, the policy and subject letter required the petitioner to acknowledge receipt and return a copy to the sender.



104. I take it, the author and officer who issued this notice, Wilson Gaconi for Deputy Commissioner – Human Resource had a duty to ensure that the petitioner as the recipient of such a crucial document signed for it and allocated the date. The filed letter is not marked ‘Confidential’ or signed or dated by the petitioner.
105. The letter served upon the petitioner by Ms Barasa cannot be confirmed to be the letter dated April 16, 2020 at all.
106. Was it so critically important to place the petitioner on PIP? If such a process was relevant and important to the respondent in terms of its operations and work performance, the very document relied upon and letter dated April 16, 2020 should have been given its due weight. It ought to have been acknowledged by the subject employee. This is the essence of Section 41(1) of the [Employment Act](#), 2007.
107. Failure to issue the letter to the petitioner and then alleged he was negligent of duty and insubordinate, such matter ought to have been flipped to the issuing officer, Wilson Gaconi and not the petitioner.
108. The process commenced by such officer did not complete. Calling Ms Barasa to testify that she served the petitioner with a letter cannot sanitise the conduct of Wilson Gaconi who failed to follow up on the matter and ensure the petitioner returned a signed copy of the PIP.
109. To sit back and wait for the petitioner to fail in his duties over alleged letter issued and dated April 16, 2020 is unfair labour practice. Such matter cannot get sanction by the court.
110. Secondly, the letter was send through surface mail. The court takes judicial notice that the KRA has one of the best networks in revenue, systems and other coordination of its mandate in the country. It prides itself as one of the best revenue collector of our time and all its witnesses testified to the fact that the year 2021 was one of the best in revenue collection. The petitioner actually earned a huge bonus from his excellent performance in revenue collection.
111. With this background, an important process and letter dated April 16, 2020 was sent to the petitioner through surface mail. No email copy. No hard copies through the available or possible networks were used.
112. The KRA opted for the surface mail. The letter never reached the petitioner.
113. Thirdly, Receipt of this letter was contested by the petitioner. There is no acknowledgement of him ever receiving this letter at all.
114. Upon realisation of this fact during the disciplinary hearing, the respondent had two options. To go all out and prove that the letter was served or initiate the entire process all over.
115. The respondent took the option to go all out and prove service.
116. As outlined above, such an option failed on its own accord. It never proved anything.
117. The filed letter is not acknowledged by the petitioner. It cannot form a sound basis that he neglected his duties and the allegation that he was insubordinate is far remote and removed from the series of events after failing to prove service of letter dated April 16, 2020. No valid or justifiable cause is demonstrated by the respondent as to why an officer of the petitioner’s standing would serve diligently for over 32 years and at the tail end of his career and a year to his retirement would want to jeopardise his employment.



118. To pitch up an employee for failure is nothing but the worst form of unfair labour practice. Such negates the very essence of the employment contract and the intentions of the PIP.
119. The court returns a finding that employment terminated unfairly. The reasons given lack any validity or justification. A substantive unfairness cannot be justified by taking the employee through the disciplinary process. Such is negated from the onset.

Reliefs

120. On the reliefs sought, the petitioner is seeking an order of reinstatement with the attendant benefits.
121. It is not contested that the petitioner has been in the service of the respondent for over 32 years. Section 45(5)(2) of the *Employment Act*, 2007 directs the court in considering the remedy for unfair termination of employment to take into account and to consider whether in terminating employment there was procedural and subjective justice which lacks in this case.
122. The court is further required to take into account the conduct and culpability of the employee, previous practice of the employer in addressing similar cases in the past and the record of the employees.
123. The court finds no matter standing against the conduct of the petitioner. He was of excellent work performance and in the period after the 2019/2020 years falling under which he was allegedly placed on PIP, he proceeded well into the year 2020/2021 and he was recognized for his starling work performance.
124. The provisions of Section 45(5) of the Act well serve the petitioner's case with regard to the order of reinstatement. It provides;
 - (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - (a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) The conduct and capability of the employee up to the date of termination;
 - (c) The extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) The previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) The existence of any pervious warning letters issued to the employee.
125. The record as laid bare in court brought out an employee passionate about his work and who received recognition by the employer. The allegations leveled against the petitioner by the respondent can only be but with intent to dent his work performance and to deny him the benefits therefrom for no justifiable cause.
126. An order of reinstatement being primary and meant to restore the work relations and to allow the petitioner be placed back in employment as if the termination had never occurred is herein justified.



127. If the exceptions to the remedy of reinstatement do not apply as set out under section 49(4), the court only has discretion with regard to the extent to which reinstatement should issue. See The Supreme Court in *Kenfreight (EA) Limited v Benson K Nguti [2019] eKLR* on the findings that the remedies available under Section 49(1) (a) of the *Employment Act* and the remedies available under Section 49(1) (b) of the Act can issue in multiple or in singular form.
128. Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49 (1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award exercises its discretion judiciously and is guided by Section 49(4) (m).
129. Pursuant to Section 49(3) of the *Employment Act*, 2007 the order of reinstatement is discretionary and should only issue in exceptional circumstances. The court is however guided under Section 49(4) of the Act and take into account the following;
- (4) In deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) The wishes of the employee;
 - (b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) The practicability of recommending reinstatement or re-engagement;
 - (d) The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) The employee’s length of service with the employer;
 - (f) The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) The opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) The value of any severance payable by law;
 - (i) The right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - (j) Any expenses reasonably incurred by the employee as a consequence of the termination;
 - (k) Any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
130. As noted above, the petitioner’s primary remedy is that of reinstatement. The circumstances leading to termination of employment should have been avoided had the respondent served the petitioner with the PIP letter of April 16, 2020. Had such been secured, this petition would have been unnecessary.



131. The respondent is a large entity and the petitioner has diligently served for 3 decades without any record.
132. Such exceptional circumstances place the petitioner in good standing to enjoy the order of reinstatement.
133. The Court of Appeal in the case of [*Kenya Airways Limited v Alex Wainaina Mbugua \[2019\] eKLR*](#) in addressing the issue of exceptional circumstances held that;

'Reinstatement is the primary remedy under section 49(3) of the [*Employment Act*](#), 2007 and involves placing the employee back in employment as if the dismissal had never occurred. If the exceptions to the remedy of reinstatement do not apply as set out under section 49(4) the court only has discretion with regard to the extent to which reinstatement should be made retrospective.

Having agreed with the learned Judge on the main issue that the dismissal was unfair, we now turn to the remedy of reinstatement that was issued reinstatement issues only in exceptional circumstances.'

134. And in the case of [*Ethics and Anti-Corruption Commission & 3 Others v Henry Morara Ongwenyi & 3 Others \[2019\] eKLR*](#) the court held that;

'In granting reinstatement, the learned Judge was exercising her discretion in accordance with section 49(4) [of the [*Employment Act*](#)]. It has not been demonstrated that she took into account irrelevant consideration or that she failed to take into account relevant consideration. There is no basis for us to interfere with the exercise of her discretion and with her conclusion that the circumstances in this case were very exceptional in light of both the substantive and procedural lapse in the dismissal of the 1st respondent. In any case, we were told that the 1st respondent has been on duty having been reinstated in October 2017

135. In this regard, after the 2019/2020 phase, the petitioner went into the 2020/2021 phase and performed exceptionally well. He earned a bonus and was issued with a certificate of recognition. Such recognition by the employer arose due to the nature of his role and contribution to the entire enterprise and should not be wasted.
136. An order of reinstatement is hereby found appropriate and is hereby issued.
137. At the time employment terminated the petitioner was occupying a company house which he had sought to retain pending hearing of the petition but on good basis, such matter was reserved until the hearing of the petition on the merit.
138. With the order of reinstatement affirmed, the respondent shall also deploy the petitioner accordingly and allow him to serve his employment unless otherwise lawfully terminated. The due benefits which come with employment and the deployment shall be appropriately allocated without placing the petitioner at any disadvantage for filing these proceedings pursuant to Section 46(h) of the [*Employment Act*](#), 2007.
139. On the claim for general, and special and Exemplary damages, with the order of reinstatement, the employment thus restored with back wages and attendant benefits, such damages are addressed and covered.
140. Accordingly, the petition is hereby allowed and the following orders are hereby issued;



- a. A declaration that employment terminated unfairly;
- b. The petitioner is hereby reinstated back to the position of Manager- Port and Boarder Control- Mombasa and all the attendant benefits;
- c. The petitioner is reinstated without loss of rank, benefits and back salaries;
- d. The petitioner shall report to his supervisor at the last work station on August 1, 2022 for deployment;
- e. The dues (c) above shall be paid within 45 days after which interests shall accrues; and
- f. The petition found with good foundation, the petitioner is awarded Costs.

DELIVERED IN COURT AT NAIROBI THIS 29TH DAY OF JULY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

