



**Masoud v Kenya Revenue Authority (Cause 906 of 2016)
[2022] KEELRC 1393 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1393 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 906 OF 2016**

**B ONGAYA, J
JULY 22, 2022**

BETWEEN

MUNIR ABUBAKAR MASOUD CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

ELRC awards Kshs. 15 Million to employee that was unfairly terminated for rejecting corruption and abuse of office in a public institution.

The claimant was employed by the respondent, and in 1998, a consignment of sugar was diverted without tax payment, leading to the claimant's summary dismissal for alleged misconduct. The dismissal was later rescinded, and the claimant was retired in the public interest. The claimant filed a case against the respondent, alleging unfair treatment, discrimination, and unlawful termination. The court found that the claimant had established discrimination under section 82(2) of the repealed Constitution of Kenya and had been targeted for rejecting corruption. The claimant was awarded damages of Kshs. 15,000,000.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – freedom against discrimination – where an employee was subjected to disciplinary action that was selective and excluded other culpable officers - whether a public officer that was subjected to disciplinary action that was selective and excluded other culpable officers was discriminatory - whether an award of general damages was justified to vindicate violations of fundamental rights, particularly where discrimination and victimization had caused lasting harm to an employee that had been terminated unfairly and illegally – Constitution of Kenya (repealed) section 82.

Labour Law – employment – unfair termination – termination attributable to settling of scores for refusal to engage in corrupt practices – assessment of reasons for termination – reason against termination being long and honourable service - whether a decision to terminate a public officer that was arrived at without following the institutions mandatory code of conduct was unfair and unlawful - whether long and honorable public service, combined with demonstrated integrity, should weigh in favor of an employee in assessing the fairness of termination.



***Anti-Corruption Law** – public bodies – duty of public bodies in the fight against corruption – duty to protect ethical officers -whether public bodies had a legal and moral duty to protect, rather than punish, public officers who acted ethically to expose or prevent corruption.*

***Words and Phrases** – political – definition - pertaining to politics; or, relating to the conduct of government – Black’s Law Dictionary Ninth Edition.*

Brief facts

The claimant was employed as a Customs Assistant in December 1975 and was later appointed as an Assistant Examining Officer in July 1996. In 1998, a consignment of sugar was diverted without payment of taxes. The claimant was summarily dismissed for alleged misconduct related to the missing bond securities. Prior to the dismissal, a letter to show cause was issued to the claimant, alleging that he took possession of certain Transit Security Bonds and had not returned them. The respondent alleged that these actions could lead to a loss of revenue. The claimant appealed the dismissal, arguing that the decision was premature and not based on proven facts. Subsequently, the respondent rescinded the dismissal and instead retired the claimant in the public interest. The claimant then filed a case against the respondent, alleging unfair treatment, discrimination, and unlawful termination. The claimant further asserted that he was targeted for rejecting corruption and abuse of his official duties.

Issues

- i. Whether a public officer that was subjected to disciplinary action that was selective and excluded other culpable officers had been discriminated against.
- ii. Whether a decision to terminate a public officer that was arrived at without following the institution's mandatory code of conduct was unfair and unlawful.
- iii. Whether subjecting an employee to disciplinary action with premeditated and predetermined disciplinary outcomes violated the principles of natural justice and due process.
- iv. Whether long and honorable public service, combined with demonstrated integrity, should weigh in favor of an employee in assessing the fairness of termination.
- v. Whether public bodies had a legal and moral duty to protect, rather than punish, public officers who acted ethically to expose or prevent corruption.
- vi. Whether an award of general damages was justified to vindicate violations of fundamental rights, particularly where discrimination and victimization had caused lasting harm to an employee that had been terminated unfairly and illegally.

Held

1. 30 days from October 28, 2016 were lapsing on or about November 28, 2016. The suit was in compliance with the terms of the leave order when it was filed on November 28, 2016. Therefore, the suit was not time barred.
2. The parties were in a contract of service. The respondent employed the claimant by the letter dated September 23, 1996 effective July 1, 1996. The respondent could only be found culpable and responsible for such claims as may be established by the claimant as accruing after July 1, 1996. The respondent was an autonomous employer from the claimant's previous employers being initially the East African Customs and Excise Department effective November 1975 then the Treasury at the Ministry of Finance and Planning effective on absorption effective July 1977 to June 1996.
3. The claimant's contract of service was terminated by the letter of retirement in the public interest dated May 14, 1999. The termination of the claimant's employment was unfair and unlawful.
4. The disciplinary procedure leading to the claimant's dismissal was based and governed by the KRA Code of Conduct (the Code). Clause 3.0 of the Code was in mandatory terms such that it was not



aspirational. The mandatory procedures prescribed under the Code were not complied with in the following manner:

1. lack of written report: there was no formal report outlining the offence, statements, or evidence was as required under clause 3.2(1) of the Code.
 2. Irregular charge letter: the charge letter dated September 22, 1998 was issued by an unauthorized officer, failed to identify the specific offence or applicable penalty, and did not refer to the relevant Code's provisions, rendering it irregular.
 3. Premature dismissal: the dismissal letter was issued on September 20, 1998, before the claimant's deadline to respond to the show cause letter (September 29, 1998), thus denying him a chance to defend himself.
 4. No head of department comment: since the claimant wasn't allowed to respond, his head of department could not comment on his defence as required under clause 3.2(4).
 5. Disciplinary committee not involved: the chief human resources and administration manager did not forward the case to the disciplinary committee as required by clause 3.2(5).
 6. Appeal mishandled: the response to the claimant's appeal only referred to his later statement and ignored his original grounds of appeal. Delay also violated the requirement for expeditious handling under clause 3.4(6).
 7. Improper authority: the dismissal and subsequent retirement were not sanctioned by the legally designated authorities under clauses 3.7(9) and relevant provisions of the Code, thus rendering the actions undertaken *ultra vires* and procedurally invalid.
5. The claimant having been denied the contractual due process, it could not be said that the respondent had a valid reason or ground to justify the dismissal and then the retirement in public interest. The respondent had failed to establish that the allegations as were leveled against the claimant were genuine and that there was a fair reason to terminate the contract of employment. The identified and established procedural improprieties showed that indeed the whole disciplinary process was a sham, whimsical, and malicious.
 6. The claimant had not failed to return the security bonds in issue but within his authority, he had passed them to the investigating officer on February 1998. He had the authority to receive the security bonds and investigate them. He had not got a receipt of the bonds from the investigating officer because immediately before the material time he had worked with him in the Investigation Branch for a long time and so he considered him a colleague in the same section where documents were exchanged without certificates. Missing bonds could not cause the respondent to incur loss of revenue because revenues had been lost in transactions even where relevant bonds were in secure custody – so that the business community had never wanted or sought to uproot bonds so as to divert transit cargo into local market.
 7. The claimant's testimony that the purported security bonds in issue were fake, obtained fraudulently and therefore unenforceable as null and void, was not challenged at all. In absence of evidence to the contrary of that claimant's testimony, the claimant had established that the reliance on the security bonds to dismiss him and later impose retirement in the public interest was unfair.
 8. The respondent destroyed the claimants' career within and outside the customs services. The termination was unfair in substance and procedure. After termination he joined trade union movement and when he tried to recruit the respondent's staff as part of his new gainful engagement, he was unfairly arrested and the arrest became the subject of a civil suit in which the respondent paid damages to the claimant for malicious prosecution and wrongful arrest. After retirement, he worked for a multinational company Forwarders Kenya Limited for only 6 months and had to resign due to threats from the respondent's agents.
 9. The claimant was singled out and punished, while other responsible officers were not held accountable for the loss of transit sugar. The termination was premeditated, based on an unfair and unsubstantiated



- reason, it effectively targeted the claimant who had acted within his lawful authority. The claimant was denied equal protection and safeguards under the employer's disciplinary procedures. The claimant suffered discrimination contrary to section 82(2) of the repealed Constitution due to inequitable, unfair, and unjust treatment.
10. The claimant's long service and integrity were noted, as was the abrupt and oppressive termination that dashed his legitimate expectations. The need to protect honest public officers who upheld integrity and fought corruption, recognizing them as key to public service reform, was recognized. The claimant had spent all his working life building his career with the Government in the unique specialty of revenue collection but the respondent suddenly ended the claimant's legitimate expectation to continue in employment to glorious retirement after the full realization his potential in his chosen career. It was most discriminatory, unfair and unjust.
 11. The respondent was ordered to pay the claimant a sum of KShs. 15,000,000 to vindicate the violation of his fundamental freedom from discrimination as was protected under the repealed Constitution which was in force at the material time.
 12. A public body through its agents or employees must not indulge in facilitating, aiding and abetting grant corruption and if such indulgence appeared to take place and the public body failed to prove that it did not deliberately fail to discharge its responsibilities according to its mandate, then the victim of the public body must be protected and adequately compensated. In absence of any other evidence the claimant appeared to have been targeted and also discriminated against for performing his duties.
 13. The war on corruption shall not only be won by punishing perpetrators but also by protecting and judiciously rewarding the anti-corruption soldiers. Public officers who acted in accordance with the values and principles of public service, integrity and honesty would receive protection and exoneration by the courts in event of victimization for their ethical and virtuous performance towards protection of public interest. The award was not made to punish the respondent as no punitive damages were prayed for. It was made and meant to make up the harm the claimant had suffered as flowing from the unfair discrimination and treatment.
 14. The court in making the award considered the following manifestations of serious harm the claimant had suffered:
 1. the unfair discrimination and mistreatment was repetitive and the claimant suffered severally.
 2. The claimant was subjected to sudden dismissal, placed under anxiety for a long time without determination of his appeal, and retirement in public interest was imposed – all without due process as was incorporated in the contract of service.
 3. The claimant had shown he acted professionally, lawfully and honestly performed his duties in the respondent's and public's best interests and as per applicable statutory provisions but was nevertheless unfairly targeted in exclusion of officers he had shown were likely culpable and not himself.
 4. The sudden dismissal and thereafter the belated retirement in public interest were imposed while there was another pending disciplinary process initiated against the claimant in similarly targeted and discriminatory manner and, whose outcome remained unknown to the date of the instant judgment.
 5. The flow of the foregoing events established malice and deliberate violations of the claimant's fundamental freedom from discrimination and unfair treatment.
 6. The claimant was therefore subjected to extreme anxiety and suffering whereas he had diligently worked to build his career towards his social and economic protection as well human dignity that flowed from the enjoyment of the right to work.
 7. The claimant's dignity, mental wellness, and motivation invariably suffered and got injured seriously when he had taken initiative to act lawfully and in the respondent's best interest and



thus being innocent, he got unfairly punished and victimized at the merciless and unashamed instance of his colleagues who appeared to otherwise have been the likely proper culprits.

8. His otherwise long and good service suddenly counted for nothing in face of the hasty unfair dismissal.
15. Back payment could issue only on account of an order for reinstatement. Such order had not been prayed for and the prayer was not justified. The claimant had not established the basis of the prayer and the same was declined. In absence of reinstatement, back pay stood on no ground and the prayer collapsed.
16. The claimant had established that he was discriminated, unfairly treated, victimized, and subsequently his contract of service with the respondent was terminated on account of his deep rooted political opinion and belief in rule of law and good public service delivery free from official or political corruption. He strongly believed and implemented good governance believing in prevalence of the rule of law, and, that official public service must be delivered in accordance with relevant statutory provisions, integrity, and honesty. He suffered loss of his job because he held a strong political opinion or belief of embracing integrity and good governance and consistently rejecting official or political corruption.
17. “Political” in Black’s Law Dictionary Ninth Edition meant, “pertaining to politics; or, relating to the conduct of government”. The claimant called it, correctly so, “settling of scores” – that, the unfair treatment and discrimination was meant to punish him for his upholding law and, so as to waiver in the future. He refused to waiver. Thus, premature and unfair termination was unleashed.
18. The claimant was a victim of settling of scores. The unfair treatment and discrimination was meant to punish him for his upholding law and, so as to waver in the future. He refused to waver. Thus, premature and unfair termination was unleashed. The claimant’s established discrimination under section 82(2) of the repealed Constitution was on account of his political opinion.

Claim allowed.

Orders

- i. *Declaration issued that the respondent targeted the claimant for continuous mistreatment.*
- ii. *Declaration issued that the respondent had ill motives on the claimant and intent to settle scores with the claimant and used the claimant as a scape goat to cover for misconducts of others.*
- iii. *Declaration issued that the respondent improperly and unlawfully sacked and subsequently improperly and unlawfully retired the claimant.*
- iv. *Declaration issued that the respondent destroyed the claimant’s career within and outside the customs services.*
- v. *Declaration issued that the respondent violated the claimant’s rights and freedoms and particularly his fundamental freedom from discrimination as was enshrined in section 82(2) of the repealed Constitution of Kenya.*

Citations

Statutes

1. Customs and Excise Act (cap 472) — sections 12(1) (a)(2); 14(2); 16(2); 26(1)(f); 7(1)(2); 34(2)(5) (6); 35(2); 72(1); 122; 127; 169(2); 185(d); 187(a)(b); 196(a)(b)(c)(f)(g); 200(2)(5); 201(1)(a)(b)(2); 203(1);211(1) — (Interpreted)
2. Employment Act (cap 224) (Repealed) — section 40(1)(2)(b)(i) — Interpreted
3. Employment And Labour Relations Court Act (cap 8E)— section 12(1)(2) — (Interpreted)
4. Kenya Revenue Authority Act (cap 469) — sections 13(2); 21 — (Interpreted)
5. Employment and Labour Relations Court (Procedure) Rules, 2016 (cap 8E Sub Leg) rule 34 – (Interpreted)
6. Industrial Court (Procedure) Rules 2010 rule No 4 - (Interpreted)



Text & Journal

Garner, BA., (Ed) 2009 Black's Law Dictionary St Paul Minnesota: West Group 9th Edn

Advocates

None mentioned

JUDGMENT

JUDGMENT ADDENDUM - SCHEDULE TO THE JUDGMENT AS DELIVERED ON JULY 22, 2022

(Upon the court's own motion under rule 34 of the Employment and Labour Relations Court (Procedure) Rules, 2016)

1. The court delivered judgment in the suit on 22 July 2022 for the claimant against the respondent for:
 1. The declaration the respondent targeted the claimant for continuous mistreatment.
 2. The declaration the respondent had ill motives on the claimant and intent to settle scores with the claimant and used the claimant as a scapegoat to cover for misconducts of others.
 3. The declaration that the respondent improperly and unlawfully sacked and subsequently improperly and unlawfully retired the claimant.
 4. The declaration that the respondent destroyed the claimant's career within and outside the customs services.
 5. The declaration the respondent violated the claimant's rights and freedoms and particularly his fundamental freedom from discrimination as was enshrined in section 82(2) of the *Former Constitution of Kenya*.
 6. The respondent to pay the claimant a sum of Kshs 15, 000, 000.00 by 01.10.2022 failing interest to be payable thereon at Court rates from the date of this judgment until full payment.
 7. The respondent to pay the claimant's costs of the suit.
2. In that judgment the court found that the claimant had established discrimination under section 82(2) of the *Former Constitution of Kenya*. The court found that the claimant was targeted for rejecting corruption and abuse of the official public employment he held because he remained steadfast and strongly believed in delivery of his official duty with integrity, honesty, and, in accordance with relevant law. The court is making this addendum and clarification that for purposes of section 82(3) of the *Former Constitution of Kenya*, the claimant has established that he was discriminated, unfairly treated, victimized, and subsequently his contract of service with the respondent was terminated on account of his deep rooted political opinion and belief in rule of law and good public service delivery free from official or political corruption. He strongly believed and implemented good governance believing in prevalence of the rule of law, and, that official public service must be delivered in accordance with relevant statutory provisions, integrity, and honesty. He suffered loss of his job because he held a strong political opinion or belief of embracing integrity and good governance and consistently rejecting official or political corruption – "political" in *Black's Law Dictionary* Ninth Edition meaning, "pertaining to politics; or, relating to the conduct of government". The claimant called it, correctly so,



“settling of scores” – that, the unfair treatment and discrimination was meant to punish him for his upholding law and, so as to waiver in the future. He refused to waiver. Thus, premature and unfair termination was unleashed.

3. Thus, for avoidance of doubt, the court clarifies that the claimant’s established discrimination under section 82(2) of the *Former Constitution of Kenya* was on account of his political opinion as was envisaged in section 82(3) of the Former Constitution. The Court clarifies that the judgment in place as delivered on 22 July 2022 be construed accordingly.
4. Further, for purposes of reporting by the National Council for Law Reporting, the Court directs that this Judgment Addendum may be reported as a schedule to the judgment as delivered on 22 July 2022.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA
THIS FRIDAY 29TH JULY, 2022.**

BYRAM ONGAYA

JUDGE

JUDGEMENT

1. The claimant applied for a vacancy at the Department of East African Customs & Exercise and by letter dated 29.10.1975 he was invited for an interview scheduled for 06.11.1975 at 9.00 A.M to be held at Customs Headquarters Building at Room No.220, Custom House, Mombasa. The claimant attended the interview and he was successful. By the letter dated 18.12.1975 he was employed as a Customs Assistant effective 01.12.1975 and he was posted to Mombasa Region. Following the break-up of the East African Community, in accordance with the Department’s Order No. 31 of 21.09.1977 on entry into the Kenya civil service, the claimant accepted the offer of appointment into the civil service under the Ministry of Finance and Planning. The offer was dated 10.11.1977 and the claimant accepted appointment as Customs Assistant Grade II.
2. Subsequently, the Kenya Revenue Authority (the respondent) was established as a body corporate under the Kenya Revenue Authority Act, 1995, cap 469 of the Laws of Kenya. By the letter of appointment dated 23.09.1996, the claimant was offered appointment as Assistant Examining Officer on Permanent and Pensionable terms of service with effect from 01.07.1996. The letter of appointment stated that the claimant was liable to be posted to any of the respondent’s work stations. Clause 3 of the letter of appointment stated thus, “3. You will abide by the Kenya Revenue Authority Code of Conduct and all Rules and Regulations governing employees of the Authority.” The letter further stated that on absorption into the respondent’s establishment with effect from 01.07.1996, the claimant would become a contributor to the respondent’s pension scheme effective the same date and he would contribute 7.5% of his basic salary towards the pension scheme. The letter further stated, “Please note that your pensionable service with the Kenya Government will be preserved for you until you leave the Kenya Revenue Authority in circumstances entitling you to retirement benefits. A detailed document on the KRA Pension Scheme will be sent to you in due course.”
3. The claimant filed in person a statement of claim on 28.11.2016. It is his case that he was not in good terms and relationship with the Treasury since the late 70s because the claimant asked to be treated in accordance with the terms and conditions of service in comparison to other officers. It is his case that the Treasury misconstrued his concerns and considered him a disgruntled element. It is his case that the difference grew exponentially to become very big divisions. His further case is that the respondent severally tried to contain him albeit by using illegal means of oppression, coercion, intimidation, and threats, stretching its muscle as a government; and, the threats included those of retirement, dismissal, suspension and others.



4. The claimant's further case is as follows. On 08.01.1998 a consignment of 160, 000 bags of Brazilian white refined sugar imported in transit to Zaire was diverted to the Kenyan market without payment of taxes. About 120, 000 bags of the sugar were diverted from a Customs controlled warehouse known as Shimanzi Go-down Mombasa; and, 40, 000 bags of that portion found and seized at AL YASIN warehouse Mombasa owned by the Hon Fahim Twaha, then MP Lamu East. His case is that the diversion was done with the full knowledge, facilitation, connivance, aid, and, abetment by senior managers of the respondent. His further case was that the respondent summarily dismissed him from employment alleging purported misconduct. It is his case that the action was taken in violation of the respondent's code of conduct and rules of natural justice and was without jurisdiction. The dismissal was in connection to misplacement of bond securities of the diversion of the transit.
5. From the material exhibited on the respondent's list of documents, it appears that prior to the dismissal letter the claimant had been issued a letter to show cause dated 22.09.1998 titled misconduct and signed by the Deputy Commissioner, Southern Region thus,

"Misconduct

It has been reported to me that on February 2, 1998 you took possession of Transit Security Bond No. GB7081/97 of Shs 10m and its Supplementaries ref Nos.

Supp Add – dated 28.11.97 - 10m

" – dated 4.12.97 - 10m

" – dated 10.12.97 - 7m

" – dated 22.12.97 - 22m

Supp GB 48/13.1.98 - 25m

Supp GB 49/7.1.98 - 60m

from the O/c Warehousing section and you have upto date not returned them. The security Bonds covered a consignment of sugar cleared on Transit Entry Nos 600 & 601 of 15.1.98 and which unlawfully was diverted into home use.

You are called upon to show cause why disciplinary action should not be taken against you for acting contrary to the Code of Conduct governing the Kenya Revenue employees in that you removed without authority KRA documents and kept them in your custody without proper authorization.

Your reply is expected within seven days from the date of this letter.

Signed

HPC Ndung'u

Deputy Commissioner – Southern Region

CC Commissioner General – KRA, Nairobi

CC Commissioner of Customs & Excise – Nairobi

CC Deputy Chief Human Resources and Admin. Manager"

6. The letter of summary dismissal was dated 28.09.1998 and it stated as follows:

"Dear Sir,



RE: Dismissal

It has been reported that on the February 2, 1998, you took possession of Transit Security Bond No GB 7081/97 of Kshs 10 million and its supplementaries reference Nos.

Supp Add – dated 28.11.97 - 10m

Supp Add – dated 4.12.97 - 10m

Supp Add – dated 10.12.97 - 7m

Supp Add – dated 22.12.97 - 22m

Supp Add GB 48 – dated 13.1.98 - 25m

Supp Add GB 49 – dated 7.1.98 - 60m

from the officer in charge of Warehousing section and you have up to date not returned them. The security bonds covered a consignment of sugar cleared on Transit Entry Nos 600 & 601 of January 15, 1998 and which was unlawfully diverted into home use.

These actions which could lead to a loss of revenue amounting to Kshs 144 million depict you as a dishonest person and the Authority has no intention of retaining such persons in its employment.

In view of the above, it has been decided that you be dismissed from the service of the authority on grounds of gross misconduct with effect from the date of this letter.

In view of the above, it has been decided that you be dismissed from the service of the Authority on grounds of gross misconduct with effect from the date of this letter.

You will as a result lose any benefits that would have been payable by the authority and the Government had you left employment under different circumstances.

However, you will be eligible for a refund of pension contributions paid by yourself to the Kenya Revenue Authority Pension Scheme, upon submission of the attached clearance forms duly completed.

Finally, you have the right to appeal against this decision to the Commissioner General through the undersigned. Such appeal must be filed within thirty (30) days of receipt of this letter.

Yours faithfully,

Signed

JN Githinji (Ms)

Deputy Chief Human Resources & Admin Manager”

7. The claimant appealed against the dismissal by his letter signed on 30.10.1998 stating as follows,

“Dear Sir,

Ref.: Appeal Against Dismissal

I beg to refer to the Deputy Chief Human Resources and Administration Manager letter on dismissal ref CONF/76044933 dated September 28, 1998. I wish to register many thanks for the occasion extended to me to appeal to you, Sir, and in my so doing I hereby say the following.



First, the decision to find me depicted as a dishonest person was taken too quickly and was not based on proven facts generally so acceptable. It was taken based on very broad assumptions and probabilities. In fact, it was taken 2 (two) days before my letter of explanation arrived at the Deputy Chief Human Resources & Administration Manager's office probably making the decision prematurely taken.

Second, the issues raised in the Deputy Commissioner's letter Ref SR/STAFF/76044933 dated 22nd September 98 were responded to in my letter dated 28th September 98 which was copied to you. The issue mentioned in the dismissal letter that to-date I have not returned the bond security to the Warehousing Section has also been replied to in my same letter ie. I did pass the bonds to an investigation officer the later Mr AK Mohdhar sometimes in February 1998. I had authority to refer such documents to him and equally well he had authority to received and investigate the bonds.

Third, the issue that I overlooked getting a certificate of receipt of the bonds from Mr Mohdhar is based on the fact that immediately before this time I had worked with the officer in the Investigation Branch for a long period and therefore I must have considered him as a colleague in the same section where in normal circumstances we exchange documents without certificates. The fact that I forgot to repossess the documents from him must have been due to the difficult, hard, unbearable and intolerable working atmosphere that has over many years been manipulated to prevail over me by many of my superiors. This was done over prolonged periods to intimidate, coerce and threaten me for no apparent reason. I have really suffered for long because of this. My 23-year service records do testify about these matters.

overone shilling. Billions of shillings have been lost over the years because of un-accounted for transactions whereas their security bonds are locked up in the cabinets. So far, the business community has never needed to "uproot" the bonds in order to divert any cargo. This incident therefore, should be judged on my intentions and not on the unfortunate end result.

Last but not least, I beg you, Sir, to consider this appeal on humanitarian and compassionate grounds taking into account the length of 23 years' service with clean records. Please therefore, find the dismissal as extremely excessive on this particular case, quash the findings of dishonesty, set aside the dismissal sentence and re-instate me to the service.

Yours faithfully,

Signed

Munir A. Masoud

MOMBASA

October 30, 1998"

8. The claimant's case is that he also filed on 14.04.1999 a Judicial Review Application being High Court Miscellaneous Civil Case No 351 of 1999 at Nairobi against the respondent to challenge the summary dismissal. On 14.05.1999 just before the hearing of the Application the respondent rescinded the summary dismissal and instead unilaterally retired the claimant purportedly in public interest at a time the claimant had not reached the age of retirement. The letter of retirement in the public interest stated as follows,

"Dear Sir,



Retirement in Public Interest

The Authority has carefully considered your appeal letter dated 11th January, 1999 and decided to rescind its earlier decision of dismissing you as communicated to you vide our letter dated September 28, 1998 and replaced it with retirement in public interest with effect from September 28, 1998.

Upon this retirement you shall be refunded all your contributions made towards KRA staff pension scheme. Your pensions for the period served under government will be paid by the Ministry of Finance and you are therefore advised to follow up your benefits with their office.

Yours faithfully,

Signed

JN Githinji (Ms)

Deputy Chief Human Resources & Admin Manager (HR)”

9. It is the claimant’s case that his retirement in the public interest was done in bad faith merely to frustrate the claimant because the respondent was not justified to do so. It is his case that due to the respondent’s unlawful acts he suffered loss of expectations, career, salary, benefits, and suffered damages, hence, the present claims. The claimant particularized the grounds of his claim as follows:
 - a. The respondent and its principal targeted and singled the claimant and continuously set him up for punishment for about 20-years amounting to mistreatment of an employee.
 - b. The respondent used or misused the claimant as a scapegoat and sacrificed him for crimes committed by others who the respondent wanted to cover and protect.
 - c. The respondent had clearly visible and definable ill will, ill motive, spite and bad faith intended to punish and sack the claimant.
 - d. The respondent allowed its agents to dismiss the claimant from employment improperly and un-procedurally and with power or authority to do so.
 - e. The respondent allowed its agents to dismiss the claimant in order to settle scores.
 - f. The respondent’s purported change of the claimant’s dismissal to retirement was done in bad faith in order to frustrate a filed case being the claimant’s application for judicial review of the impugned summary dismissal.
 - g. The respondent allowed its officers to use and abuse the powers and authority in furtherance of malpractices and corruption and blamed the innocent claimant.
10. The claimant pleaded that his termination from the respondent’s service breached the following applicable and relevant principles, policies, conventions, law, industrial relations issues and management:
 - a. Equity and equality and fairness and just treatment and protection against discrimination.
 - b. Sections 12(1) (a) and (2), 14 (2), 16 (2), 26 (1) (f), 27 (1) and (2), 34(2), (5), and (6), 35(2), 72(1), 122, 127, 169 (2), 185(d), 187 (a) and (b), 196 (a), (b), (c), (f), and (g), 200 (2) and (5), 201 (2), and, 203(1) of the Kenya Customs and Excise Act, 1978.



- c. Clauses 3.0 and 3.1 paragraphs 14, 15, 16, 17 and 3.5 paragraphs 14, 43, and 3.7 paragraphs 3 and 9 of the Code of Conduct of the respondent.
 - d. Sections 40(1) and (2)(b)(i) of the Employment Act, 1976 cap 224 (now repealed) and section 12(1) and (2) of the Employment and Labour Relations Court Act, 2011 and rule No, 4 of the *Industrial Court (Procedure) Rules* 2010.
11. The claimant prayed for judgment against the respondent for:
- a. A finding the respondent targeted the claimant for continuous mistreatment.
 - b. A finding the respondent had ill motives on the claimant and intent to settle scores with the claimant and used the claimant as a scape goat to cover for crimes of others.
 - c. A finding that the respondent improperly and unlawfully sacked and subsequently improperly and unlawfully retired the claimant.
 - d. A finding that the respondent destroyed the claimants' career within and outside the customs services.
 - e. The honourable court be pleased to make declarations of the breaches committed by the respondent to the claimant and the rights of the claimant.
 - f. The honourable court to order for adequate compensation for the claimant.
 - g. The honourable court be pleased to order for back pay of the claimant until lawful termination and interest thereof.
 - h. Costs of the suit and interest.
 - i. The honourable court be pleased to order for any other suitable relief to the claimant.
12. The respondent filed on 21.09.2017 the statement of response to the statement of claim through Kenneth JN Kirugi Advocates. The respondent's case is pleaded as follows. It is a distinct entity from the National Treasury Department. Thus the respondent is not liable and responsible for the claimant's allegations prior to his absorption to the respondent's service. The respondent admitted that indeed the claimant was summarily dismissed, he filed the Judicial Review Application as pleaded by the claimant, and the claimant was subsequently retired in the public interest. The respondent denied that the retirement was to frustrate the claimant or the Judicial Review Application that had been filed by the claimant. The respondent denied that the retirement issued in bad faith. It was denied that the claimant had suffered loss as claimed and as prayed for. The respondent employed the claimant for about three years and could not be held liable for the wrongs as was alleged for the claimant for over 20 years of his previous service with the respondent's predecessors who solely employed the claimant at the material times. Further the claimant was at all times subjected to equal treatment under the law, he was treated justly in accordance with the relevant law as at the time of retirement in the Authority's interest, and, he was subjected to disciplinary procedures as was existing under the respondent's Code of Conduct. The respondent's further case was that the sections of the Customs and Excise Duty Act cited by the claimant are irrelevant and of no legal basis in the suit. The respondent denied the reliefs as were prayed for by the claimant. The respondent prayed that the claim be dismissed with costs.
13. The claimant filed on 06.12.2019 the supplementary reply to the respondent's statement of response dated 06.09.2017 (filed on 21.09.2017). The reply equally stated that it was in response to the matters raised in the respondent's witness (RW) statement one Grace Mwangi (the Manager, Employee Relations Unit) dated 28.08.2019 and filed on 06.09.2019. The claimant pleaded about his



mistreatment and discrimination when he served in the Kenya Government Treasury and later with the respondent. His lamentations were as follows:

- a. He received threats to retire or get dismissed for requesting for advancement in the career cadres as follows. He stagnated and suffered retardation of his career and he was not confirmed in permanent and pensionable and he wrote letters dated 25.11.1978 and 06.11.1979 about the grievance of not being so confirmed. By letter dated 23.04.1985 he wrote to Commissioner of Customs for translation of his service to Examining Officer and he was given a precondition to resign so as to be promoted. On 16.06.1986 the claimant wrote to Treasury asking for a review of trainee Customs Officers (Customs Assistants) who had served for over 9-years in the trainee cadre. Instead of considering a rectification, the Treasury deducted the claimant's salary and imposed a loan on him by PCA No MF/ 2620/ 876/17 dated 26.11.1986 backdated from 10.01.1984. He missed his August 1986 salary on account of Special Salary of Kshs 330.00 which he was earning since 1977 and by letter dated 25.11.1986 he requested for an explanation – and by letter dated 21.01.1987 it was explained the deduction was for overpaid special salary which should have been stopped on 10.01.1984. On 16.01.1987 he wrote a letter on his promotion and by letter of 26.01.1987 he was informed he had not been promoted in 1984 but he had only been converted to Job Group F and he should not have been given financial increments. By letter dated 03.02.1987 the Treasury threatened to retire the claimant in public interest and with reference to his letter of 16.06.1986 stating that the Government did not recognize pressure groups and trade union kind of approach. At that time the claimant was about 32-years old. He was to show cause why he was ungrateful having been promoted in 1984 and for flouting government regulations on communication channels. The claimant took it that mutual trust and confidence had been lost between himself and the Treasury. Correspondence was exchanged about the threat to retire in public interest and the overpayment or deduction of salary issues and on 20.04.1987 the claimant wrote offering to be retired in the public interest. The respondent acted through the letter dated 10.06.1987 threatening to dismiss the claimant as his letter of 20.04.1987 was said to amount to insubordination because it disrespected authority, was in deplorable tone, was a displeasing approach and used derogatory remarks viewed as a serious breach of misconduct. The claimant says Hon. Ahmed Khalif took him to the Minister of Finance Hon. George Saitoti who caused the claimant's file to be reviewed and it was found the claimant had a clean record of service. The Minister directed the claimant be promoted and converted in the cadres. Despite repeated interventions by the Finance Secretary Mr. Ali Adam Hirsi and later Mr. Halake, the directive was not implemented. The claimant pleads that since other officers were promoted timely in accordance with rule of passing qualifying examinations, the denial of the same to the claimant amounted to discrimination contrary to section 82(2) of the Constitution of Kenya, 1969 and the claimant claimed accordingly. Further failure to implement the Minister's directive and orders amounted to insubordination of executive orders.
- b. The respondent alleges that the claimant was in contempt of authority for refusing to process defective yellow maize importation as per letters dated 06.10.1992 and 08.10.1992 on refusal to obey reasonable instructions and, a further letter dated 17.12.1992 on contempt of authority. The claimant's case is that the yellow maize was to be imported tax free in circumstances whereby the letter of exemption was a forgery and the transaction amounted to smuggling. It is his case that he was transferred by Southern Posting Order No. 3 dated 08.10.1992. His case is that the transfer to Jerquing Branch was so as the entries could be passed by another person and Jerquing Branch was normally used as officers' dumping ground such as excessive drunkards who could not be removed from service, officers refusing to toe the



line, and such like others. By letter dated 17.12.1992 he was charged for refusing to process the NCPB documents for the yellow maize and for locking the documents in the drawers. The claimant replied on 24.12.1992 that NCPB had defrauded the Treasury large sums of taxes albeit with the help of some senior officers contrary to section 194 of the Customs & Excise Act, Cap.472, laws of Kenya. Five months later by the letter dated 15.07.1993 Treasury sent a warning letter stating that the claimant sabotaged the country by refusing to process maize documents when the country was experiencing hunger. By letter dated 30.07.1993 the claimant replied denying being a saboteur and instead stating that he was patriotic in demanding that taxes be paid where it was due – and demanded the warning be withdrawn as malicious. By letter dated 02.11.1993 the Permanent Secretary Treasury wrote to the claimant that issue of the warning was not subject to discussion. The claimant replied on 25.11.1993 that the warning be withdrawn unless it was shown that the claimant breached any law or regulation failing, the warning would lose its meaning. The claimant opened a file Jerquing Branch Query Reference No SR/JBQ/330/93 against the NCPB in relation to the subject of the yellow maize imported under import entry no. 0963 of 27.10.1992. the claimant wrote several letters seeking a response from NCPB and demanded for taxes to be paid plus interest at customs rates. Such letters included one dated 31.03.1994. While NCPB wrote a letter dated 05.04.1994 received on 20.04.1994 and enclosing its letter of 10.01.1994 indicating VID was not applicable, on 10.07.1994 Commissioner SW Wainaina of Monopolies & Price Control wrote the letter dated 01.07.1994 addressed to the claimant (replying the claimant’s letter dated 11.01.1994) thus, “...At the time of gazettment of legal notice 148 of 4th June, 1992. Maize was not differentiated between white and yellow. The import reference price and the domestic reference prices were gazetted as Kshs.4849.30 and Kshs 4917.22 respectively. These prices remained in force until changed through legal notice no. 5870 of 9th December, 1992. I hope this information will be sufficient for the purposes of your inquiry.” On 20.09.1994 the claimant received Treasury letter threatening dismissal on account of alleged absence from duty for 4-months from 24.05.1994 to 20.09.1994 and alleging his whereabouts was unknown – and his salary was stopped. By letter dated 25.01.1995 the Treasury terminated the disciplinary proceedings since it was all fabricated. By letter dated 16.02.1995 he was asked to report on duty. For two months he was not deployed and later he was sent to the Examining Officer, Kenya Petroleum Refineries Limited, Customs Bonded Warehouse No 31, Mombasa. His case is that the deployment was without a written staff or posting order as it was improper contrary to the standard tradition, procedures and regulations to a most unfriendly station for customs officers where officers were frequently harassed.

- c. The claimant denied allegations of unbecoming behavior. It is his case that as at the letter dated 09.07.1995 on takeover of staff in the Treasury Revenue Department by the respondent, KRA, the claimant was still serving on extended punishment at Kenya Petroleum Refineries Limited, Customs Bonded Warehouse No 31. His case was that by letter dated 25.10.1995 he was deployed to Kenya Pipeline Company Limited (KPCL), a place without legitimate customs office. By letter dated 10.06.1996, the Assistant Commissioner of Customs at Kilindini reported to the Commissioner General about the claimant’s absence from duty. The claimant by the letter dated 17.06.1996 explained to the Commissioner General the illegality of the office of customs at KPLC and how it was used as a dumping ground to post officers considered not to toe the line. By the letter dated 22.10.1996 the customs office at KPLC was abolished following that claimant’s report to the Commissioner General. By the letter dated 23.09.1996 the claimant was absorbed into KRA, the respondent’s service. By letter dated 24.09.1996 in a made up story it was reported to the Commissioner General that the claimant was absent from duty. His case is that a conspiracy story had been designed Assistant Commissioner



of Customs at Kilindini so that the claimant was reverted to service at the Treasury. He was saved by the Commissioner General who did not accept the conspiracy because the claimant's file showed he had been oppressed. The Commissioner General promoted the claimant to Examining Officer II Job Group J. The Commissioner General instructed and by the letter dated 12.11.1996 the claimant was transferred from Customs and Excise to Audit and Inspection Unit, a different department under the Commissioner General's office. He was posted to Investigation Branch, Mombasa. The Audit and Inspection Department was under the office of the Commissioner General and the Southern Region Senior Assistant Commissioner of Custom had no jurisdiction to post officers in the Audit and Investigation Department. However, the claimant's deployment to the Audit and Investigation Department was interfered with when the incoming Acting Senior Assistant Commissioner, Southern Region by posting order No. 8 of 01.04.1997 posted the claimant to the Export Section, Mombasa. The claimant pleads that the posting was irregular and without authority as it was ultra vires. The claimant appears to have protested against the posting order in the office of Mr Ali Abdulkadir, Assistant Commissioner, Mombasa and whom the claimant stated had instigated the irregular posting – the claimant had protested at the office by tearing the posting order before Mr Abdulkadir. The claimant received the warning internal memo dated 07.04.1997 on that behavior and asked to apologize to Mr PH Ndungu, Acting Senior Assistant Commissioner, Southern Region.

- d. The claimant received a letter dated 16.03.1998 and addressed to him on alleged gross misconduct for disrespecting Commissioner. The letter stated as follows,

“ Dear Sir,

Re: Gross Misconduct

Reference is made to the seizure No D.016154 of January 27, 1997 issued at Malaba border post for vehicle and Trailer No KYX 299/ZB 1296 and High Court Appeal No 25 of 1997 where you undertook to overrule the Commissioner of Customs & Excise in regard to release of the goods under seizure. It is noted that vide your letter ref MIB/C/15/97 of June 10, 1997, you took it upon yourself to overrule the Commissioner's instructions contained in his letter ref No SR/OFF/1 of March 6, 1997 by directing the Principal State Counsel in Mombasa to release the seized vehicles back to the owners, despite the Commissioner's instructions that such goods would be released once bound security worth Kshs. 10,377,910/= and further duty of Kshs 2,090,000/= together with 3% penalty on all these outstanding payments had been settled.

This is a clear case of insubordination, especially noting that you did not bother to take up the issue with the Head of the Investigations Department but went ahead to embarrass the Authority by overruling your boss in public. This kind of conduct is not acceptable in the Authority and I am calling on you to explain why you took it upon yourself to go against the laid down regulations. I expect your reply by March 26, 1998.

Yours faithfully,

Signed

JN Githinji (Ms)



Deputy Chief Human Resources & Admin Manager”

14. The claimant replied by his explanation letter addressed to the Chief Human Resources & Administration Manager and dated 24.03.1998 thus,

“Dear Madam,

RE: Gross Misconduct

I am in receipt of your letter ref CONF/76044933 dated March 16, 1998 on the above issue and requiring me to submit my explanation by March 26, 1998.

I beg you to note that the issues in question happened over one year ago and it is difficult to remember the details instantly.

I have also been transferred from Investigation Branch where these issues happened. I do not have direct access to records as I have now to go through other officers. In fact recently the offices were repainted and many old records moved here and there. It will therefore take some little time to track the relevant files.

I am also in the process of invoking section 212(1) of the Customs & Excise Act and requesting the High Court before which appeal case No. 25 of 1997 was heard to issue me with a certified record that I had reasonable grounds to give consent for the release of the truck and trailer subject issue.

In the circumstances as stated above, I pray to you to extend the limit of the period of submitting my explanation for a further ten days.

Thanking you in advance.

I beg to remain,

Your most obedient servant.

Signed

Munir A Masoud”

15. In his pleadings at paragraph 104 of the reply to the response, the claimant states that he wrote to offer his explanation in the matter and the Commissioner General was satisfied that the claimant had done his work in accordance with the law. At paragraph 107 thereof the claimant states, “107. That by letter ref CONF/76044933 dated 16.03.1998, nine (9) months after the Pithdero Enterprise case fresh charges were made against the claimant for gross misconduct. This is why when the sugar case was referred to the Commissioner General he remarked about the claimant that “this officer already has a disciplinary case against him” referring to this charge of showing disrespect to the Commissioner in public.” The claimant answered to the letter to show cause dated 16.03.1998 by his detailed letter dated 03.04.1998. the claimant stated his concern that in the letter of 16.03.1998 the allegations were already taken as true even prior to his defense being considered. He stated that his consent to the Senior Principal State Counsel was written in good faith. Further, he had discussed the matter with the counsel and it had been discovered that the Commissioner of Customs could not seize suspect’s goods indefinitely but had a maximum of two months to proceed in accordance with procedure after notice of claim per section 202 of Part XV on Penalties, Forfeitures and Seizures of the Customs and Excise Act. The claimant further stated in his reply, “Unfortunately, the Commissioner who had personally taken over the case from me after my protest to him when he doubted and questioned my credibility and integrity in relation to the case and he personally signed letter ref: SR/OFF/1 of 6th March 1997,



he did not proceed as required by either section 202(1)(a) or 202(1)(b). The consequence of this failure or omission is that section 202(2) will automatically take over and prevail. This section supersedes any other factors whatever their implication to the case.” That being the case, the claimant explained in his replying letter that the longer the respondent delayed and kept the seized items unlawfully in his possession, the higher the liability the respondent would suffer. He had not disobeyed the Commissioner in public because his writing the consent to the senior principal state counsel was not an issue for the public a communication to the respondent’s legal representative and advisor. While he respected the Commissioner of Customs as his boss, by the letter dated 16.10.1996 the respondent had indicated that the Manager, Audit and Inspection Department was the claimant’s boss – so that he was not obliged to take orders from the Commissioner of Customs. The Commissioner of Customs had the liberty to file an appeal in court in June 1997 if he found out that the claimant was a hostile witness but he had not done so. Further the matter had been reported to the Commissioner General who had ruled it, correctly so, in the claimant’s favour, the matter was rested, and six months later the claimant was promoted. He concluded that he solely acted in accordance with the law in the respondent’s best interests devoid of intentions to embarrass any party, and if he appeared so, he requested his sincerest apologies were to be kindly accepted.

16. Against those pleadings the claimant testified to support his case and RW testified for the respondent. Parties filed their respective final submissions including the claimant’s submissions in reply to the respondent’s final submissions. The respondent’s submissions were filed through Nick Otieno Osoro Advocate. The court has considered the pleadings, the documents, the oral evidence, the submissions and all material on record and makes the pertinent findings as follows.
17. The 1st issue for determination is whether the court lacks jurisdiction to entertain the suit because it is time barred. It is submitted for the respondent that initially the claimant filed HCCC No. 196 of 2000 at Nairobi against the respondent on 07.02.2000. In that suit he prayed for a declaration that the retirement in public interest (also in issue in the instant case) was unlawful and unjustifiable. He also prayed for benefits and accrued salaries be paid dating back to 28.09.1999. That suit was dismissed on 24.02.2015 for non-prosecution. The claimant disengaged his counsel and acting in person applied for reinstatement of the suit. When that application came up for hearing the High Court ordered the suit be transferred to the Employment and Labour Relations Court for hearing and determination. The case was transferred to the court at Nairobi and later to the Court at Mombasa (registered as ELRC Cause No. 429 of 2015) and, where the claimant resides. The application came up before Rika J on 07.09.2015 and counsel for the respondent urged the court to make directions in view that the transfer order was made per incuriam; there was nothing to transfer as the substantive claim had been dismissed for want of prosecution; and, this court would not have the basis to consider the application for reinstatement of the suit. The court agreed with submissions by the respondent’s counsel and further that the claimant was entitled to access justice through filing of a fresh suit. Rika J in a ruling delivered on 28.09.2015 therefore ordered:
 1. High Court Civil Case No 196 of 2000 shall remain dismissed as ordered by the court.
 2. The file be returned to the High Court at Nairobi for preservation.
 3. Mr Masoud is granted the leave of the court to file a fresh claim within 40 days of the order.
18. It is submitted for the respondent that the claimant failed to comply with that order because he filed the instant suit on 28.11.2016 being almost a year belated. The suit is therefore a non-starter filed outside the time that was allowed by the court order granting leave that the suit is filed within 40 days from 28.09.2015.



19. The claimant has submitted that he filed *Munir Abubakar Masoud v Commissioner of Customs & 3 others* [2016]eKLR being ELRC petition No 7 of 2015 at Mombasa. The claimant submits that in that petition a ruling was delivered on 28.10.2016 by Rika J and it was ordered:
 - a. The petition filed on 06.11.2015 goes beyond the contemplation of leave granted to the petitioner on 28.09.2015 and is hereby struck out.
 - b. The petitioner is granted further leave to file a fresh claim against the 3rd respondent confined to the issues in dispute in the High Court and in conformity with the Industrial Court Procedure Rules.
 - c. Such claim shall be filed within 30 days.
 - d. No order on the costs.
20. The court finds that 30 days from 28.10.2015 were lapsing on or about 28.11.2016 and the court finds that the suit was in compliance with the terms of the leave order when it was filed on 28.11.2016. The suit is not therefore time barred.
21. To answer the 2nd issue, the court returns that there is no dispute that the parties were in a contract of service. The respondent employed the claimant by the letter dated 23.09.1996 effective 01.07.1996. The court further finds that the respondent can only be found culpable and responsible for such claims as may be established by the claimant as accruing after 01.07.1996. In particular, the respondent was an autonomous employer from the claimant's previous employers being initially the East African Customs & Excise Department effective 01.11.1975 then the Treasury at the Ministry of Finance and Planning effective on absorption effective 01.07.1977 to 30.06.1996.
22. To answer the 3rd issue, there is no dispute that the claimant's contract of service was terminated by the letter of retirement in the public interest dated 14.05.1999.
23. To answer the 4th issue for determination, the court returns that the termination of the claimant's employment was unfair and unlawful as urged for the claimant.
24. First, the parties are in agreement that the disciplinary procedure leading to the claimant's dismissal was based and governed by the respondent's Rules and Procedures Governing Discipline and Grievances known to the parties as the KRA Code of Conduct. As submitted for the claimant the same were incorporated in his contract of service at clause 3 which stated that the claimant was to abide by the KRA Code of Conduct and all Rules and Regulations governing employees of KRA. Further, as submitted for the claimant, the Code of Conduct, Rules and Regulations constituted safeguards of his terms and conditions of service as guaranteed by statutory underpinning because the Code, Rules and Regulations were prescribed by the respondent pursuant to section 21 of the Kenya Revenue Authority Act, 1995 cap. 469 which provides, "21. The Board may make regulations for the carrying into effect the provisions of this Act, and in particular but without prejudice to the foregoing make regulations – (c) prescribing the code of conduct and discipline."
25. Second, clause 3.0 of the Code is in mandatory terms so that it is not aspirational but was binding in its application. The clause on introduction states, "This document introduces disciplinary procedures which have been drawn up by the Authority. It contains the disciplinary procedures which are applicable to all employees and the appeal procedure. Specifically, it reproduces the code of conduct; procedures required for exercise of disciplinary powers; the matters which will give rise to those procedures being implemented; and the exercise of the actual disciplinary powers." The Court therefore returns that the provisions therein were mandatory on the standards of conduct, disciplinary



procedures, preconditions for initiation of disciplinary process, and manner of exercise of the powers of disciplinary control.

26. Third, the claimant has established that the mandatory procedures prescribe under the Code were not complied with. He has established the breaches as submitted and as follows:
- a. There was no written report detailing the offence committed, statements and any evidence available against him and forwarded by his Head of Department to the Chief Human Resources & Administration Manager as envisaged in clause 3.2 (1).
 - b. The letter purportedly charging him dated 22.09.1998 was issued by HPC Ndung'u, Deputy Commissioner, Southern Region instead of the Chief Human Resources & Administration Manager and did not spell out the offence committed and the penalty applicable to the offence as envisaged in clause 3.2 (2). For avoidance of doubt the matters giving rise to disciplinary procedures being implemented are elaborated in clause 3.5 (1) to (55); offences in clause 3.6 are categorized as gross misconduct, misconduct marked * in clause 3.5 (1) to (55), and misdemeanors; and penalties are at clause 3.7 and include warning, suspension, compulsory retirement, retirement on health grounds, withholding promotion, loss of salary, withholding of salary increment, surcharge, and dismissal. The letter dated 22.09.1998 did not refer to any of the clauses so as to identify the alleged offence and proposed penalty thereof. The court finds that the letter amounted to an irregular charge not contemplated under the Code. RW testified and confirmed that office note 2 was endorsed on the letter to show cause by the Commissioner General thus, "This officer already has a disciplinary case against him. His services should be terminated for a lawful cause (see section 3.5.15 of the Code." The court finds that by that endorsement, the claimant's case and submissions that the termination was premeditated and predetermined without a genuine opportunity for his defense towards exculpation is upheld. RW further confirmed that the letter of 22.09.1998 purporting to be the charge was titled misconduct but the claimant subsequently received a letter of dismissal on gross misconduct. RW admitted in her testimony that indeed such was an error and contrary to the design of the Code's disciplinary process.
 - c. Clause 3.2 (3) provides that the claimant would be required to defend himself within a specified period. The letter of 22.09.1998 required the claimant to defend himself by showing cause within 7 days from 22.09.1998 being by 29.09.1998. However, prior to 29.09.1998, the respondent had already issued the dismissal letter dated 28.09.1998. The court returns that the claimant has thereby established that he was denied the due contractual procedure to defend himself.
 - d. The claimant having been denied the chance to defend himself, it should be obvious that his Head of Department never commended on his defence as envisaged in clause 3.2(4).
 - e. The evidence as confirmed by RW is that the claimant's case was not forwarded by the Chief Human Resources & Administration Manager to the Disciplinary Committee for examination per clause 3.2 (5).
 - f. The claimant appealed against the dismissal by his letter of 30.10.1998. His statement in support of the appeal was dated 11.01.1999. The reply was the letter dated 14.05.1999 on retirement in public interest. The letter only referred to the claimant's statement of 11.01.1999 and not his appeal of 30.10.1998 – showing that in determining his appeal, the grounds in his appeal of 30.10.1998 had not been considered. Clause 3.4(6) of the Code required appeals to be determined expeditiously as may be possible in the circumstance. In absences of established



circumstance, it cannot be said that the appeal in the claimant's case had been determined expeditiously.

- g. Under clause 3.7(9) employees of grade KRA1-6 could be dismissed only by the respondent's Board upon recommendation of the Commissioner General or the Staff Committee of the Board. All other employees could be dismissed by the Commissioner General upon recommendation of the Appointments, Promotions and Disciplinary Committee. The Code provided for compulsory retirement on grounds of the respondent's interest and further, "Compulsory retirement must be sanctioned by the Appointments, Promotions and Disciplinary Committee, Commissioner General, Staff Committee or the Board." The Court finds that the impugned dismissal was imposed by the Deputy Chief Human Resources & Administration Manager in total disregard of the stated provisions of the Code. The impugned retirement in public interest is also found to have been alien to provisions of the Code and if it meant compulsory retirement, then it was equally contrary to the provisions of the Code as it was imposed by the Deputy Chief Human Resources & Administration Manager without authority and as urged by the claimant, the dismissal and the retirement were ultra vires. It was submitted for the respondent that under section 13(2) of the KRA Act, 1995 cap 469, the Commissioner General shall, with approval of the Board, appoint such heads of departments as may be required for the efficient performance of the functions of the Authority. It was submitted that the signatory of the letters was a head of department. However, the Court considers that the section empowers the Commissioner General to administratively designate and assign a head of department with approval of the Board. The Court finds that in the instant case, the signatory acted in own right as the letters did not state that they were conveying the decision by the Commissioner General or were being done by the signatory as a head of department and for the Commissioner General. The Court also finds that the Code vested the power to act in the Commissioner General and as per prescribed safeguards. Accordingly, the impugned dismissal and then retirement in the public interest were clearly in contravention of the Code.
27. Fourth, the claimant having been denied the contractual due process, it cannot be said that the respondent had a valid reason or ground to justify the dismissal and then the retirement in public interest. By evidence, the respondent has failed to establish that the allegations as were leveled against the claimant were genuine and fair reason to terminate the contract of employment. The identified and established procedural improprieties show that indeed the whole disciplinary process was a sham, whimsical, and malicious as urged by the claimant.
28. The claimant's explanation in the letter of appeal dated 30.10.1998 has not been rebutted at all. It was that he had not failed to return the security bonds in issue but within his authority, he had passed them to the investigating officer one Mr AK Mohdhar sometimes in February 1998. Further, he had the authority to receive the security bonds and investigate them. He had not got a receipt of the bonds from Mr Mohdhar because immediately before the material time he had worked with him in Investigation Branch for a long time and so he considered him a colleague in the same section where documents were exchanged without certificates. Further, missing bonds could not cause the respondent to incur loss of revenue because revenues had been lost in transactions even where relevant bonds were in secure custody – so that the business community has never wanted or sought to uprooted bonds so as to divert transit cargo into local market.
29. Further, the claimant's testimony that the purported security bonds in issue were fake, obtained fraudulently and therefore unenforceable as null and void, was not challenged at all. In absence of evidence to the contrary of that claimant's testimony, the court returns that the claimant has established



that the reliance on the security bonds as was alleged to dismiss him and later impose retirement in the public interest was unfair.

30. The 5th issue is whether the claimant is entitled to the remedies as prayed for. The court returns as follows:
- a. The claimant prays for a finding the respondent targeted the claimant for continuous mistreatment. The court has considered the manner the respondent breached the contractual disciplinary procedure and returns the prayer has been established. Further, the court has considered the unjustified mistreatments while in the respondent's employment such as unfair postings and initiation of unsubstantiated disciplinary processes and returns the claim and prayer will issue.
 - b. The claimant prayed for a finding the respondent had ill motives on the claimant and intent to settle scores with the claimant and used the claimant as a scape goat to cover for crimes of others. The claimant's evidence in that regard was not rebutted. His testimony was that officers who actually allowed the sugar in transit to be diverted in the local market were never punished. That testimony was not rebutted. The prayer will issue.
 - c. The court has already found that the claimant is entitled to a finding that the respondent improperly and unlawfully sacked and subsequently improperly and unlawfully retired the claimant.
 - d. The court finds that the claimant has established a finding that the respondent destroyed the claimants' career within and outside the customs services. The court has found that the termination was unfair in substance and procedure. The claimant has established that after termination he joined trade union movement and when he tried to recruit the respondent's staff as part of his new gainful engagement, he was unfairly arrested which became subject of a civil suit in which the respondent paid damages to the claimant for malicious prosecution and wrongful arrest. The claimant's testimony was that after retirement, he worked for a multinational company Forwarders Kenya Limited for only 6 months and had to resign due to threats from the respondent's agents was not rebutted at all. The order will issue.
 - e. The claimant prayed that the honourable court be pleased to make declarations of the breaches committed by the respondent to the claimant and the rights of the claimant and, to order adequate compensation. The claimant alleged discrimination. The claimant relies on then prevailing section 82(2) of the Former *Constitution* of Kenya which stated that no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. There is no dispute that the claimant was a public officer acting by virtue of the provisions of the Customs and Excise Act. Further, the respondent's officers acted in their official capacities in initiating and continuing the impugned disciplinary proceedings against the claimant. His undisputed evidence was that with respect to the security bonds in issue he acted within authority but other officers involved failed to perform their role but, he was victimized and punished through termination of his contract of service through retirement in public interest. His undisputed evidence was that he was targeted for having performed his duty while the other involved and responsible officers were not punished at all. His evidence was that the officers who failed to impound the sugar and allowed it to be sold in the local market at Mombasa were never punished. The undisputed claimant's evidence was thus, "See my booklet page 25 to 31. They show the failures on other officers in breach of law and procedures directing them to take specific action which they never undertook but allowed smuggler to complete acting



or diverting the transit sugar without payment of taxes. Transit cargo passes through Kenya within 3 months. If clearing agent does not re-export the cargo in 3 months, it is to be seized immediately as liable for forfeiture for having overstayed. The documents on transit entry was 05.01.1998. They entered warehouse on 22.09.1998 (9 months). The department allowed the sugar (on transit through Kenya) to stay for 9 months. Smugglers were being allowed to sell the sugar locally and slowly. Our managers including some Commissioners facilitated such actions. The Commissioner gave extension 3 times in instant case. They do not have reasons why they moved in September to discover the sugar was missing in warehouses. The sugar was found in in Assistant Minister's warehouse a Km from where it had been stored. He was wrongfully prosecuted by the police for the case to fail. The exhibit was sold by authority of the Commissioner for Customs. About 38, 000 out of 160, 000 bags were found in the warehouse of the Assistant Minister. He was arrested. Charges were not properly done to also give him a way to escape. In the end Commissioner for Customs went to High Court and gave consent for orders to be given for accused person (Assistant Minister) to be given back sugar which had been seized to go and sell in town. When he sold all the exhibit, the AG entered nolle prosequi. AG is member of Board of Directors of KRA charged with responsibility of suppressing corruption or smuggling of the sugar. All involved officers were never punished. The department only came for me in the matter of the bond securities which in true sense were fake bonds not worth even (Kshs.1.00) one shilling. The same persons arrested for the sugar were released. The same were later arrested with clerk and manager of Bank who guaranteed bonds. It is after I made my statement to CID with regard to bond securities and informed them that I took the bonds because I suspected that they were fake. CID went to Anti-Banking Fraud Unit arrested same team which smuggled the sugar. So you see what happened was selective punishment of individual officer who had nothing to do with disappearance or theft of transit sugar. The dismissal letter does not say I lost revenue. They say if bonds were lost then revenue could have been lost. I say my actions never caused Government to lose revenue." By that elaborate testimony, the Court finds that the claimant has established that first, the reason for termination was unfair and not genuine, second he was targeted for performing his duties in accordance with the law and his official authority as employed by the respondent, and, by that reason he was victimized and punished in exclusion of the other officers he has established appear to have failed in their responsibilities and duty. The claimant has also shown that he was denied equal enjoyment of the due process and safeguards under the respondent's Code of Conduct, Rules and Regulations. The claimant has further shown that by the respondent's letter dated 16.03.1998 and his reply thereto dated 24.03.1998, the respondent had elected to mistreat the claimant in a discriminatory manner. The Court returns that the claimant suffered inequity, in equality, unfairness, mistreatment and all of which amounted to discrimination as envisage in section 82(2) of the Former Constitution of Kenya. The court has considered the claimant's long service and his resolution to otherwise be an honest public officer keen to act in the best respondent's interests. He lost his employment in the most unfair and oppressive manner. He begged the respondent to retain him in the service but as the evidence shows that it had been predetermined that he had to be terminated from public service. The circumstances were that claimant had spent all his working life building his career with the Government in the unique specialty of revenue collection but the respondent suddenly ended the claimant's legitimate expectation to continue in employment to glorious retirement after the full realization his potential in his chosen career. It was most discriminatory, unfair and unjust. The court returns that the respondent will pay the claimant a sum of Kshs. 15, 000, 000 to vindicate that violation of his fundamental freedom from discrimination as was protected under the Former Constitution which was in force at the material time. While making that



award the court upholds the claimant's submission that a public body such as the respondent by its agents or employees must not indulge in facilitating, aiding and abetting grant corruption and if such indulgence appears to take place and the public body fails to prove that it did not deliberately fail to discharge its responsibilities according to its mandate, then the victim of the public body must be protected and adequately compensated. The court in awarding the compensation has also considered that in absence of any other evidence the claimant appears to have been targeted and so discriminated against for performing his duties. The court further reckons that the war on corruption shall not only be won by punishing perpetrators but also by protecting and judiciously rewarding the anti-corruption soldiers. It is the court's view that public officers who act in accordance with the values and principles of public service, integrity and honesty will receive protection and exoneration by the courts in event of victimization for their ethical and virtuous performance towards protection of public interest. Further, the court holds that the award is not made to punish the respondent as no punitive damages were prayed for. It is made and meant to make up the harm the claimant has suffered as flowing from the unfair discrimination and treatment. The court in making the award has considered the following manifestations of serious harm the claimant has suffered:

- i. The unfair discrimination and mistreatment was repetitive and the claimant suffered severally.
 - ii. The claimant was subjected to sudden dismissal, placed under anxiety for a long time without determination of his appeal, and retirement in public interest was imposed – all without due process as was incorporated in the contract of service.
 - iii. The claimant has shown he acted professionally, lawfully and honestly performed his duties in the respondent's and public's best interests and as per applicable statutory provisions but was nevertheless unfairly targeted in exclusion of officers he has shown were likely culpable and not himself.
 - iv. The sudden dismissal and thereafter the belated retirement in public interest were imposed while there was another pending disciplinary process initiated against the claimant in similarly targeted and discriminatory manner and, whose outcome remained unknown to date.
 - v. The flow of the foregoing events established malice and deliberate violations of the claimant's fundamental freedom from discrimination and unfair treatment.
 - vi. The claimant was therefore subjected to extreme anxiety and suffering whereas he had diligently worked to build his career towards his social and economic protection as well human dignity that flows from the enjoyment of the right to work.
 - vii. The claimant's dignity, mental wellness, and motivation invariably suffered and got injured seriously when he had taken initiative to act lawfully and in the respondent's best interest and thus being innocent, he got unfairly punished and victimized at the merciless and unashamed instance of his colleagues who appeared to otherwise have been the likely proper culprits.
 - viii. His otherwise long and good service suddenly counted for nothing in face of the hasty unfair dismissal.
- f. The claimant prayed for the honourable court to be pleased to order for back pay of the claimant until lawful termination and interest thereof. The court considers that back payment can issue only on account of an order for reinstatement. Such order has not been prayed for and



court returns that the prayer is not justified. As submitted for the respondent, the claimant has not established the basis of the prayer and the same is declined. In principle, the court considers that in absence of reinstatement, back pay stands on no ground and the prayer must collapse.

g. The claimant has succeeded in his claim and is awarded the costs of the suit.

31. In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration the respondent targeted the claimant for continuous mistreatment.
2. The declaration the respondent had ill motives on the claimant and intent to settle scores with the claimant and used the claimant as a scape goat to cover for misconducts of others.
3. The declaration that the respondent improperly and unlawfully sacked and subsequently improperly and unlawfully retired the claimant.
4. The declaration that the respondent destroyed the claimant's career within and outside the customs services.
5. The declaration the respondent violated the claimant's rights and freedoms and particularly his fundamental freedom from discrimination as was enshrined in section 82(2) of the Former Constitution of Kenya.
6. The respondent to pay the claimant a sum of Kshs 15, 000, 000.00 by 01.10.2022 failing interest to be payable thereon at court rates from the date of this judgment until full payment.
7. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 22ND JULY, 2022.

BYRAM ONGAYA

JUDGE

