



REPUBLIC OF KENYA



KENYA LAW
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**Omondi v Wahome & 3 others (Petition E84 of 2021)
[2022] KEELRC 1677 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1677 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E84 OF 2021**

JK GAKERI, J

JULY 21, 2022

BETWEEN

JAMES AMBUSO OMONDI PETITIONER

AND

AGNES MERCY WAHOME 1ST RESPONDENT

**KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT SERVICES
(KUCCPS) 2ND RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION (EACC) 3RD
RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. Before me for determination is the Petition dated 7th June 2021 and amended on 21st July 2021. The Petitioner, Mr. James Ambuso Omondi avers that he was employed by the 2nd Respondent as its Director-Corporate Services on 26th April 2021.
2. His services were terminated shortly thereafter on 6th July 2021 barely 3 months into his employment. He avers that in arriving at the decision to terminate his employment him, his rights under the Constitution of Kenya have been breached by the Respondents and seeks the following:
Under the Constitution and the FAA, 2015
 - a. A declaration be and is issued that section 42(1) and 47(6) of the *Employment Act*, 2007 violate Articles 10, 27, 41, 47, 48, 50 and 236 as far as they deprive probationary contracts of the equal benefit due process of law in termination.



- b. A declaration that the CEO, KUCCPS and EACC violated Ambuso's rights under Articles 27, 28, 29, 35, 41, 47, 50 and 236 of the *Constitution* by their conduct on the facts of this case.
- c. Damages for the constitutional violations in para (a); Under the *Employment Act*, 2007 Under the *Employment Act*
- d. Payment of the balance of monthly salary held by 1st and 2nd Respondent (from 26th April to 6th July 2021, 2 months 10 days);
- e. A declaration be and is issued that the 2nd Respondents' summary dismissal amounts to an unfair termination.
- f. An order reinstating the Petitioner to employment and in the alternative:
 - i. One month's pay in lieu of notice;
 - ii. Compensation for loss of employment being 12 months' pay (12 x 450,239.00) being the applicable rate for the position of Director Corporate Services;
 - iii. Payment of 31% gratuity due to the Petitioner under the contract;
 - iv. Costs of the suit
 - v. Certificate of service
- g. Interest on all monetary awards.
- h. Any other, further or appropriate relief.

The Petitioner's Case

3. The petitioner avers that while he was applying for the job with the 2nd Respondent, he obtained all requisite Chapter Six documents and in disclosing his litigation history, he responded "Yes" to the question in the EACC's First Schedule (S 13) Self-Declaration Form, "Have you ever been the subject of disciplinary or criminal proceedings for breach of the Public Officers Ethics Act, 2003 or a Code prescribed thereunder?"
4. That during the interview he was not questioned about this response and was employed by the 2nd Respondent on 26th April 2021 as Director-Corporate Services at a gross monthly salary of Kshs. 450,239.00 plus other employment benefits and allowances.
5. The Petitioner avows that on 11th May 2021, he was suspended orally by the 1st Respondent, the 2nd Respondent's CEO for a period of two weeks. That on 25th May 2021, his suspension was extended but this time it was indefinitely and without pay. He states that he was directed to "stay away from the office until otherwise advised" on grounds that he had concealed material information from the interview panel.
6. On 7th June 2021, the petitioner states that while in Kisumu serving his suspension, he received a letter from the 2nd Respondent inviting him to a hearing before the Board Human Resource Committee that would be taking place on 11th June 2021.
7. He states that on 9th June 2021, he wrote a letter seeking an adjournment of the said hearing seeking sufficient time to prepare as he had no documents with him in Kisumu and additionally, informed the 2nd Respondent of his intention to exercise his right to appear with his advocates and any objection



- of the same to be done in writing. He also requested to be furnished with the allegations against him forming the basis of the planned hearing and the requisite evidence being used against him.
8. The petitioner avers that the requests were met with silence despite the implications they would have on his right to a fair hearing. That on 11th June 2021, the 2nd Respondent progressed with the ‘hearing’ and made adverse findings against him including that the CEO should serve him with a letter to show cause why terminative action should not be taken against him.
 9. In addition to the above, the petitioner avows that the committee recommended that the 2nd Respondent “should acknowledge receipt of his letter requesting for adjournment and information.
 10. He further avows that on 15th June 2021, the 2nd Respondent wrote to him informing him that the HR Committee had carried out investigations and found that he had concealed important information touching on his integrity during the recruitment exercise and that it was clear that he had serious on-going litigation touching on his integrity.
 11. As a result, he was directed to show cause within 21 days why his employment should not be terminated and he was invited to a hearing on 6th July 2021. He states that on 2nd July 2021, he wrote to the 1st and 2nd Respondent reminding them of his earlier request for information which request was declined.
 12. The petitioner avers that on 5th July 2021, he wrote to the 1st and 2nd Respondents reminding them of his pending request and the 1st Respondent wrote back declining to supply the information stating that among others that the investigation report was “confidential in nature, only privy to the Human Resource Committee members hence cannot be shared”.
 13. Following this response, the petitioner avers that he wrote to the CEO, informing her that he could not attend the hearing because he did not have the requested documents and materials necessary to help him to respond to the show cause letter and prepare for the hearing.
 14. He states that the 1st Respondent wrote informing him that the meeting of 6th July 2021 would go on without him. That on the fateful date, he was summarily dismissed.
 15. As a result of the foregoing events, the petitioner contends that the actions leading up to his summarily dismissal were in breach of his fundamental rights and freedoms under Articles 10, 27, 28, 41, 47 and 50 of the Constitution.
 16. He also avers that the probation period of six months included in his letter of employment was wrongful as the same had neither been agreed on nor supported the 2nd Respondent’s Human Resource and Procedures Manual. That the provisions of Section 42(1) and 47(6) of the Employment Act are both unconstitutional and invalid in so far as they discriminate between employees in probationary contract and other employees contrary to Articles 27, 41, 47, 48, 50 and 236 of the Constitution.
 17. As for the 3rd Respondent, the Petitioner avers that the Ethics and Anti-Corruption Commission acted ultra-vires the law by purporting to bar his employment as no statute makes provision to bar an individual who has not been convicted under the Act.

1st and 2nd Respondents’ Case

18. The 1st and 2nd Respondents responded to the amended petition vide a Replying Affidavit sworn by the 1st Respondent on 21st September 2021. In it, the 1st Respondent avers that the petitioner has no capacity to claim that he was dismissed unfairly as he was under probation.
19. The affiant avers that contrary to the petitioner’s allegations that he was not questioned with regard to the requirements of Chapter Six of the Constitution and whether he had any active criminal and



- anti-corruption cases; the petitioner was indeed questioned on the same during his interview which he answered in the negative.
20. The affiant further avers that the petitioner, in corroboration of the above assertions, had on 5th January 2021, through his email address forwarded documents in support of his application, one of which was the EACC self-declaration form where he had marked as “NO” to the question asking whether he had ever been subjected to disciplinary or criminal proceedings.
 21. She notes that of the petitioner’s Self Declaration Form annexed as “Annexure JA-8” attached to his Further Affidavit dated 29th June 2021 is substantially different from the one he had submitted to the 2nd Respondent during the application process. That the former is therefore a forgery and/or was altered to mislead the court and as a result she avers that he has committed perjury.
 22. The affiant avers that barely two weeks after his reporting to work, the 2nd Respondent received results from its background checks on the petitioner which revealed that he had grossly concealed material information about having criminal cases in court. That the same, had it been received earlier would have altered the decision to appoint him.
 23. On 11th May 2021, the affiant avers that while in the company of the Chairperson of the 2nd Respondent summoned the petitioner to her office to clarify whether he deliberately concealed his litigation history from the interviewing panel to which the petitioner denied. That on the same date, upon receiving more details on the court case against him, the petitioner was summoned once again and after highlighting the relevant cases, he conceded to the same and apologised.
 24. She states that the petitioner asked for and was given time until 17th May 2021 to furnish her with his interdiction/termination letter from his former employer and all documents pertaining to any concluded and/or ongoing court cases involving him. The petitioner complied with the same and the 2nd Respondent, from the documentation provided ascertained that the Petitioner had intentionally concealed 3 active cases involving him with two at the Anti-Corruption and Economic Crimes Division Court and one at this court.
 25. That on account of the foregoing and in line with its Human Resource Policies and Procedure Manual, the petitioner was lawfully suspended from service pending disciplinary proceedings. That on 7th June 2021, the petitioner was invited to appear before the Human Resource Board Committee to shed more light on the issues at hand and contrary to his allegations, he failed to attend the said hearing.
 26. The affiant avers that the petitioner was not suspended indefinitely and that he had been invited to the first preliminary investigation hearing which he snubbed. That the Human Resource Committee, upon investigation found that the petitioner had intentionally concealed important information on adverse matters touching on his integrity and that on the basis of the reviewed documents, it was clear that the petitioner had serious on-going litigation that touched on his integrity.
 27. That the foregoing had since been affirmed by a letter from the 3rd Respondent dated 9th June 2021 questioning the 2nd respondent on how the Petitioner had landed the current job given that there were active corruption cases against him. That the 3rd Respondent had subsequently threatened investigations and actions against officers of the 2nd Respondent involved in the appointment of the Petitioner.
 28. The affiant avers that following the above, the petitioner was issued with a show cause letter requiring him to appear before the full Board of the 2nd Respondent on 6th July 2021 for a disciplinary hearing in accordance with its Human Resource Policies and Procedure Manual. She avows that the petitioner



failed to show up at the hearing despite being afforded sufficient time leaving the Board no choice but to proceed with the matter in his absence.

29. She states that the Board determined that the petitioner was guilty of concealing material information to the 2nd Respondent's interviewing panel during the interview process, the consequence of which is his summary dismissal.
30. The affiant avers that the petitioner, having worked in a number of public offices has sufficient knowledge that a public officer is subjected to the 6 months' probation period unless otherwise instructed. She therefore states that his allegation of the illegality of the same is invalid especially since he had signed his acceptance letter which contained the probation proviso.
31. The affiant concludes that the 2nd Respondent had paid the petitioner all dues owed to him despite barely working for two weeks before his suspension. That in addition, by inviting him to hear his representations, the 2nd respondent had bent over backwards to comply with its policy manual for an employee on probation.
32. The affiant avers that the petitioner is a disreputable person who has lied to this court. She urges the court to find that the amended petition is devoid of merit and therefore to dismiss the same with punitive costs.

3rd Respondent's Case

33. The Ethics and Anti-corruption Commission, opposed the petition vide a Replying Affidavit sworn on 21st September 2021 by Mr. Ali Madera, an Investigator who was part of the team that investigated the petitioner on allegations of abuse of office and bribery while he was serving as Finance and Administration Manager at the Water Resources Management Authority.
34. The affiant avers that the 3rd Respondent had received an anonymous report that the petitioner, in his previous position had solicited for benefits by issuing instructions to members of staff throughout the country to send him an amount equivalent to 10 and 20% of the amount disbursed as Government Water Development/Operation Funds.
35. He further avers that the Commission, upon receipt of the same commenced its own independent investigations and prepared a report to the Director of Public Prosecutions setting out all the evidence obtained in the course of the investigations and its recommendations in light of the evidence presented.
36. That the Director of Public Prosecutions, upon carrying out an independent review of the evidence, made a decision to prosecute the petitioner and on 10th April 2019, he was charged in Anti-Corruption Case No. 5 of 2019 *Republic vs James Ambuso Omondi*. That the trial court, on 1st September 2021 established that the petitioner had a case to answer and the matter had been scheduled for a mention to confirm filing of submissions and obtaining of a judgement on 12th October 2021.
37. The affiant avers that the petitioner's contract with his former employer terminated by virtue of effluxion of time.
38. As for his appointment by the 2nd Respondent, the affiant states that on 9th June 2021, the Commission had received information that the petitioner had secured employment. That in compliance with its mandate, the commission wrote to the 2nd Respondent advising them of the petitioner's charges and that he could therefore not be engaged until the matter was finalized.
39. Mr. Madera avers that the provisions of Section 62(1) of the [*Anti-Corruption and Economic Crimes Act*](#) make it mandatory for a person charged with corruption or economic crimes to be suspended until



such case is concluded. That in addition, the Commission was under no obligation to hear or copy the petitioner in its letter to the 2nd Respondent.

40. He further avers that the Commission learnt of the Petitioner's suspension and subsequent termination through a letter dated 2nd July 2021 from the 2nd Respondent. He maintains that the termination was an internal decision made by the 2nd Respondent and that the Commission was not privy to the same and as such cannot be said to have influenced the decision as its mandate is limited to the giving an opinion. As such, he maintains that the Commission was not involved in the internal disciplinary procedures of the 2nd Respondent in any way.
41. In addition, he avows that contrary to his averments, the petitioner had indeed responded to the negative in his declaration forms submitted on 16th April 2019 and 5th January 2021.
42. The affiant avers that the petition is fatally defective as it does not set out with reasonable precision, the particular provisions of the constitution which he alleges have been contravened or infringed by the Commission and the manner of said infringement as illustrated in the case of *Anarita Karimi Njeru vs The Republic* [1976-80] 1KLR. That the petitioner has not produced any evidence to the court to demonstrate how the performance of its constitutional and statutory mandate violated his rights.
43. He concludes by attesting that the petitioner has not met the threshold for the grant of orders sought and as such urges the court to dismiss the amended petition with costs.

4th Respondent's Case

44. The 4th Respondent, being the Attorney General filed its Grounds of Opposition dated 12th August 2021 in response to the Petition.
45. It avers that this Court lacks jurisdiction to entertain this matter as the proper court that has the power to determine the question whether any law is inconsistent with or in contravention to the Constitution is the High Court, by dint of Articles 165(3)(d)(i).
46. The Attorney General avers that the petitioner has not rebutted the presumption of the constitutionality of impugned provisions of the Employment Act or at all to warrant the orders sought.
47. In addition, it states the Petitioner has not demonstrated with precision how his fundamental rights and freedoms under the Constitution have been violated or are threatened and has not produced any evidence to prove the alleged violations contrary to the principles espoused in the locus classicus decision in *Mumo Matemu – v – Trusted Society of Human Rights Alliance* (2013) eKLR and *Annarita Karimi Njeru* (1979) KLR 154.
48. The 4th Respondent states that the petitioner has declared himself unaccountable and unanswerable to the 2nd Respondent and in turn seeks to rubberstamp his wishes through the court. In addition, it attests that no one is indispensable and immutably immune from a vertical accountability to his/her employer.
49. That the petitioner's denial, defiance, violation of such accountability and answerability to the 2nd Respondent constitutes insufferable act of insubordination inviting appropriate disciplinary measures. It further states that there is no legal underpinning barring the employer from disciplining its employees on account of pending criminal charges as employers are not bound by the outcome of either convictions or acquittals.
50. The Attorney General contends that the petitioner wants this court to micro-manage the human resource functions of the 2nd respondent contrary to the law and the Constitution. It avers that this



court has no mandate to interfere with the internal affairs of the 2nd Respondent and that the court has a constitutional obligation pursuant to Article 3(1) of the Constitution to respect, uphold and defend the constitution which includes safeguarding and securing the independence of the 2nd Respondent in managing its affairs and workforce.

51. The 4th Respondent concludes by averring that the court will be acting in excess of its jurisdiction by interrogating the reasons as to why the Petitioner has been asked to show cause. That the petition is scandalous and amounts to an abuse of the court process; as such, it urges the court to dismiss the same with costs.

Petitioner's Submissions

52. The petitioner in his submissions listed the following issues for determination:
- a. Is section 42(1)/47(6) of the *Employment Act*, 2007 constitutional?
 - b. Was the indefinite suspension without pay lawful?
 - c. Was EACC's recommendation lawful?
 - d. Did the summary dismissal adopt a fair procedure?
53. The petitioner submitted that Section 42(1) disentitles employees on probationary contract to a notice and hearing, while Section 47(6) bars them from making a complaint about unfair termination. He contended that a three-judge bench in of this court *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR declared section 42(1) unconstitutional insofar as it excluded an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, as it is inconsistent with Articles 41 and 47 of the Constitution hence null and void.
54. As for Section 47(6), the petitioner urges that the Section has both an unconstitutional purpose and effect. He relied on the decision of the court in *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR where the court held that a statute is unconstitutional If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution.
55. The petitioner contended that the legislated purpose of section 47(6) is to bar employees serving probationary contracts from complaining about summary dismissal and unfair termination. That the effect is to discriminate against employees on probationary contracts contrary to Article 27(4), while impairing the employee's right to fair labour practices under Article 41, right to fair administrative action under Article 47, right of access to justice under Article 48, and right to fair hearing under Article 50: no matter how egregious the dismissal.
56. That the section also contradicts Article 236 which guarantees all public officers (including those on probationary contracts) due process in their dismissal. Reference is made to the decision in *Kenya Bus Services Ltd & Another v Minister for Transport & 2 Others* [2012] eKLR to bolster the submission and urge the court to find that Section 47(6) of the Employment has both an unconstitutional purpose and effect and is therefore unconstitutional.
57. As for the indefinite suspension without pay, the petitioner argues that the same amounted to cruel, inhuman and dignity-eroding treatment contrary to Article 28 of the Constitution. He made reference to the case of *Donald C. Avude v Kenya Forest Service* [2015] eKLR where the court held that a suspension should be for a determinate period where such suspension is without pay, otherwise it would constitute inhuman treatment.



58. The petitioner also relies on the decision in *Transport Workers Union vs African Safari Diani Adventure* [2013] eKLR where the court held that the legal obligation at common law on an employer is to pay wages not to provide work and that unless the same is varied by statute or contract, the obligation continues even during suspension. Reliance is also made on the Court of Appeal decision in *Chief Justice and President of the Supreme Court & Another v Bryan Mandila Khaemba* (Civil Appeal 522 of 2019) where the court found that “the Respondent was also subjected to extreme hardship having been illegally and indefinitely suspended with nil pay”.
59. The petitioner urges that the Respondents violated Article 50 right to a fair trial including the presumption of innocence for suspending him for being party to a criminal case where he is yet to be convicted and also his right to a fair hearing by penalising him for filing a labour cause against his former employer.
60. The petitioner submits that his dismissal was not in accordance with fair procedure as he was dismissed without being supplied with information, material and opportunity to enable him to mount a defence. He relied on the Supreme Court and Court of Appeal cases of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR and *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR respectively to buttress the submission.
61. He maintained that the suspension and subsequent summary dismissal violated the petitioner’s fundamental rights and freedoms under Articles 10, 27, 28, 41, 47, and 50 of the *Constitution*, the *Employment Act*, the *Fair Administrative Action Act* and the Human Resource Policies and Procedures Manual of the KUCCPS.
62. As regards the legality of EACC’s recommendation, the petitioner submitted that the commission committed an error of law and acted ultra vires contrary to the provisions of Section 62 of the *Anti-Corruption Economic Crimes Act*. In addition, he submitted that the advice by the Commission that he cannot be engaged or take up any public appointment until the matter in court is finalised is ill advised as neither section 4 nor section 44 of the *Leadership and Integrity Act*, 2012 empowers EACC to make such a recommendation.
63. He maintained that the EACC letter was written on 9th June 2021 some two weeks after the indefinite suspension on 25th May 2021 and could not be justification for it in the terms of section 43(2) of the *Employment Act*. That given that the Commission’s letter was *ultra vires* statute, the 1st and 2nd Respondents cannot rely on it under section 43(1) to discharge the burden of proving the reason for the termination, in the absence of which the termination is deemed to have been unfair.
64. The petitioner urged the court to uphold the petition and grant him the prayers sought.

1st and 2nd Respondents’ Submissions

65. When the court retired to prepare this Judgement, the respondents had not filed any submissions, however, there was a list of authorities in the Court Tracking System (CTS).

3rd Respondent’s Submissions

66. The Commission submitted that in writing the letter dated 9th June 2021 to the 2nd Respondent, it was simply carrying out its mandate pursuant to Sections 4(2) and 44 of the *Leadership and Integrity Act*, 2012 as read together with Article 252(1)(d) of the *Constitution*.
67. It maintained that Section 62(1) of the *Anti-Corruption and Economic Crimes Act* makes it mandatory for a person charged with corruption and economic crimes to be suspended until conclusion of its case.



Reliance is placed on the decision in *Joash Oindo & another vs Ethics and Anti-Corruption Commission & another; National Land Commission & another (Interested Parties)* (2020) eKLR.

68. The Commission argued that it did not act ultra vires the statute as alleged by the petitioner. That on the contrary, it rightfully advised the 2nd Respondent not to engage the petitioner until the finalisation of the case against him.
69. On the alleged violation of the Petitioners rights under the constitution, the Commission maintains that the Petitioner had neither pleaded nor proved how the Commission has infringed his rights. The commission also submitted that by writing to the 2nd Respondent, it neither victimised nor discriminated against him as alleged and as such, the provisions of Article 236 of the *Constitution* did not apply.
70. The Commission maintains that the petition had failed the competency test set out in the case of *Anarita Karimi Njeru vs Republic* (1976-80)KLR 1272 as the petitioner had not indicated with precision the Constitutional violations complained of and neither has he particularised the manner in which the alleged violations were committed.
71. It argued that the petitioner ought to have urged this case through a Statement of Claim as opposed to the petition herein. It relied on the case of *Peter Ndegwa Nderitu vs Teachers Service Commission*(2019) eKLR cited with approval the case of *Nicholas Mayieka & 22 Others vs Judicial Service Commission* Petition No. 260 of 2016 (Nakuru).
72. The commission submits that the petition is frivolous and urges the court to dismiss it with costs.

4th Respondent's Submissions

73. The Attorney General submitted that by a ruling of Hon Mr Justice Nzioki Wa Makau delivered on 2nd November, 2021, the court formulated one issue for determination to wit: Whether the dismissal of the petitioner was fair or not.
74. It is submitted that given that a court of concurrent jurisdiction has settled the only issue for determination; this court cannot sit as an appellate court on its own decision/the said ruling and entertain issues a-c as formulated by the petitioner. The AG urges this court to decline to entertain the issued as formulated by the petitioner and instead hold that “when no appeal is lodged against an interlocutory ruling by a trial court, the issue in dispute is settled by judicial decision” as held by the Supreme Court in *Mawathe Julius Musili v Irshadali Sumra & Others*, Petition No. 16 of 2018.
75. The 4th Respondent relied on the submissions by the 1st-3rd Respondents and made reference to the following cases. *Judicial Service Commission V Gladys Boss Shollei & Another*, Civil Appeal No 50 of 2014 which held that no one is indispensable and immune from a vertical accountability to its employer. Additionally, the court, while making reference to the decision of the Canadian Supreme Court in *Mc KINLEY – VS- B.C. TEL* [2001] 2 S.C.R 161 held that courts should not intervene in employer-employee disputes but even as they do so, they must appreciate that the work-place must be allowed and enabled to operate in a manner that is productive and harmonious. Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector.
76. The Attorney General also referred to the case of *Geoffrey Kiprotich Sang v Chairman, Board of Directors National Water Harvesting and Storage Authority & another* [2020] where the court held that an employer has a valid reason to doubt the integrity and suitability of a party who has been the subject of investigations by the Ethics and Anti-Corruption Commission.



77. Additionally, in *Michael Chege Ndisbu v Dedan Kimathi University of Technology* [2019] eKLR the court held that non-disclosure is actionable as negligent and is a breach of the employee's terms of service. The 4th respondent concludes that given that the petitioner had concealed past records of the anti-corruption cases facing him which put his integrity into question, the 1st and 2nd Respondents were had a valid reason to terminate his services.

Petitioner's Rejoinder

78. In rejoinder to the 4th Respondent's submissions that the court, through Hon. Justice Nzioki wa Makau had listed only one issue for determination, the petitioner submitted that the same is unfounded. The petitioner argued that only a plea of res judicata can oust the jurisdiction of a court and that obiter dictum observations given by way of case directions in a Ruling on an entirely different issue (certification for a bench) do not suffice. He maintained that the court is not bound by those observations and must not unduly fetter its jurisdiction.

79. The petitioner highlighted on the right to a fair hearing and made reference to the decision in *Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others* [2014] eKLR to support his claim.

Analysis and Determination

80. From the pleadings and submissions on record, the issues for determination are;

- i. Whether the Petitioner's Constitutional rights were violated by the 1st, 2nd and 3rd Respondents.
- ii. Whether termination of the Petitioner's employment by the respondent was fair.
- iii. Whether the Claimant is entitled to the reliefs sought.

81. Before delving into the issues identified herein above, it is pertinent to mention that this petition was in the hands of another learned Judge from 15th June, 2021 upto and including 2nd November, 2021 when the last of two rulings on record was delivered and by which the learned Judge recused himself on the premise that he could not dispassionately hear the Petitioner having expressed inter alia the view that the petition should have been filed as an ordinary cause as it relates to dismissal from employment and had nothing Constitutional about it and declined the application for certification.

82. The Judge was emphatic that in his view, "... there is nothing much left in it other than a determination as to whether the dismissal of the Petitioner was fair or not ..."

83. Be that as it may, as submitted by the Petitioner, the sentiments of the learned judge are not binding on this court but are highly persuasive bearing in mind that the court delivered two different rulings on the same case. The court has no compelling reason to hold otherwise.

84. As to whether the Claimant's Constitutional rights were violated by the respondents excluding the Attorney General, the Petitioner alleges that Articles 10, 27, 28, 41, 47 and 50 of the *Constitution* of Kenya, 2010 had been violated following his suspension by the 2nd respondent by letter dated 25th May, 2021. The Petitioner alleges that the suspension was unconstitutional, unlawful and unfair as it was indefinite and without pay. That the suspension was made without a fair hearing.

85. The starting point on matters germane to violations of Constitutional provisions is a recapitulation of the jurisprudence on this issue.

86. Since this is a Constitutional petition premised on alleged violations of various articles of the *Constitution* of Kenya, 2010, it behoves the Petitioner to demonstrate with sufficient particularity the



specific articles allegedly violated or infringed or threatened with violation, the manner or nature of the alleged violation and its extent as enunciated in *Anarita Karimi Njeru V Republic (Supra)* as well in *Trusted Society of Human Rights Alliance V Attorney General & 2 others* (2012) eKLR.

87. In *Anarita Karimi Njeru V Republic (Supra)* Trevelyn and Hancox JJ Stated as follows;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

88. Similar sentiments were expressed by the court in *Kiambu County Tenants Welfare Association V Attorney General* (2017) eKLR as follows;

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

89. The Petitioner did not identify the foregoing issues as one of the issues for determination and has no specific submission on it.

90. The 3rd and 4th respondents on the other hand submits that the Petitioner does not meet the threshold in *Anarita Karimi Njeru V Attorney General (Supra)*.

91. It is the 2nd respondent’s case that the Petitioner has not adduced evidence to demonstrate how its conduct as mandated by law violated the Petitioner’s Constitutional rights.

92. The Petitioner’s case is as follows;

That he was appointed Director Corporate Services Grade 2 by the 2nd respondent by letter dated 16th April, 2021 for a five (5) contract renewable subject to satisfactory work performance and would be subjected to a 6 months’ probation period extendable to a maximum of 12 months. The letter incorporated the other terms and conditions of employment as provided by the Human Resource Department.

93. The letter of Appointment also stated inter alia

“If you accept this offer and the terms and conditions as stipulated herein, please sign a duplicate copy of this letter to signify your acceptance then retain the original and return the duplicate copy to the undersigned on or before 23rd April, 2021.”

94. The Petitioner appended his name and signature on the letter on 16th April, 2021 and indicated that he would report to work on 26th April, 2021.

95. Although the Petitioner faults the 1st and 2nd respondents for placing him on probation for six months, the petitioner did not contest this contractual term when he signed the offer letter on 16th April, 2021.



This is in consonance with the provisions of Section 2 of the *Employment Act*, 2007 which provides that;

“Probation contract means a contract of employment, which is of not more than twelve months duration or part thereof is in writing and expressly states that it is for a probationary period.”

96. The Petitioners appointment letter dated 16th April, 2021 states *inter alia*
“ . . . and you shall be subjected to a six months’ probation period extendable to a maximum of twelve months. Upon confirmation, the employment may be terminated by . . . ”
97. Paragraph four of the Appointment Letter is unambiguous that probation was a term and a condition of the contract between the Petitioner and the 2nd respondent.
98. The Petitioner accepted the offer and cannot be heard to say that there was no agreement on probation.
99. It is trite law that signature Prima facia means acceptance. The petitioner has not led evidence that he signed the letter under a mistake, duress misrepresentation or undue influence. See *L’Estrange V F. Glauco*b [1934] 2 K.B. 394.
100. The court is satisfied that paragraph 4 of the Appointment Letter was one of the terms of the contract the Petitioner agreed to abide by and was therefore bound by it. He did not sign the letter under protest.
101. For these reasons, the court is satisfied that the Petitioner was on probation at the time of dismissal by the 2nd respondent.
102. A second issue, characterized as a Constitutional violation relates to the indefinite suspension by letter dated 25th May, 2021. The notice is faulted on the ground that the suspension was indefinite with no pay and no fair hearing preceded it.
103. Whereas clauses 11.4 and 11.5 of the 2nd Respondent’s Human Resource Policies and Procedures Manual dated January 2018 provide for interdiction and suspension respectively. The former provides for at least 50% of the basic monthly salary less statutory deductions during interdiction while the latter makes provision for full house allowance, medical benefits and no basic salary.
104. Since the Petitioner was on suspension, from 25th May, 2021, he was entitled to full house allowance and medical benefits.
105. The court is in agreement with the Petitioner that suspension without pay may occasion hardship particularly if it is illegal and unjustified.
106. As regards hearing, suspensions are typically not preceded by any formal hearing. It is typically a window to carry out investigations to ascertain the authenticity and validity of allegations made against an employee. Depending on the findings, the suspension is lifted with no sanctions and the employee is cleared or subjected to disciplinary hearing after a notice to show cause which catalogues the allegations/charges against the employee for his rebuttal.
107. The concatenation of events from Tuesday May 11th 2021 to Wednesday May 26th 2021 is what the Claimant describes as an unfair process on account that the steps taken by the 1st and 2nd respondents were unprocedural and unilateral.
108. On 11th May, 2021 at 2.30 pm, the 1st respondent summoned the Petitioner to her office and the Board Chairman of the 2nd respondent was present. That he was orally questioned about letters by his former



- employer and the investigations by the EACC about him, existence of a criminal case and labour dispute between the Petitioner and the former employer, the Water Resources Management Authority (WRMA). That after the discussion, the Petitioner was verbally suspended for 5 days to 17th May 2021.
109. That on 17th May, 2021, the Petitioner submitted the requested write up but was again suspended for another 9 days to 25th May, 2021 and on 26th May, 2021 a suspension letter dated 25th May, 2021 was issued.
110. The Petitioner urges that the suspension was unconstitutional because it was indeterminate and without pay.
111. The Petitioner does not cite the provisions of the Constitution allegedly infringed by the 2nd respondent, manner or extent of the violation and injury sustained.
112. For the above stated reasons, the court is satisfied that the Petitioner has on a balance of probabilities failed to establish that the probation clause in the Letter of Appointment, suspension and subsequent termination of employment violated any provision of Constitution of Kenya, 2010, manner and extent of violation and the ensuing injury.
113. As regards Section 42(1) and 47(6) of the *Employment Act*, the Petitioner urges that these two provisions are unconstitutional in purpose and effect as they deny persons holding probationary employment contract liberty to seek judicial redress.
114. The decision in *Katiba Institute & another V Attorney General & another; Julius Karangi & 128 others (Interested Parties)*(2021) eKLR is relied upon in support of the submission.
115. Before the three Judge Bench in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (interested Party)* (2021) eKLR declared section 42(1) of the *Employment Act* null and void to the extent that it excluded an employee holding a probationary contract from the provisions of section 41 of the *Act*, there were two schools of thought as exemplified by the decisions of Rika J in *Danish Jalang'o & another V Amicabre Travel Services Ltd* (2014) eKLR on the one hand, and Ndolo J. in *Evans Kiage Onchwari V Hotel Ambassadeur Nairobi* (2016) eKLR on the other. In the latter case, the learned judge was unequivocal that;
- “I venture to add that section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the right secured under Article 41 must still be respected.”
116. In the *Monica Munira Kibuchi & 6 others* case (*Supra*), the learned judges expressed themselves as follows;
- “Further, in addition to the inconsistencies among section 42(1), 42(2) and 41 considered earlier in this judgement, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*.
- To this extent therefore, we find and hold that section 42(1) in so far as it excludes an employee holding a probationary contract from the provision of section 41 of the *Employment Act* is inconsistent with Articles 41 and 47 of the Constitution hence null and void.”
117. Having established that section 42(1) of the Employment Act is void to the extent that it excludes employees on probation from the safeguards under section 41 of the Act, I now proceed to examine



- the issue of whether section 47(6) of the Employment Act is unconstitutional as submitted by the Petitioner.
118. Regrettably, none of the respondents submitted on this issue substantially perhaps for the simple reason that the petitioner is already in court and has ventilated his case robustly, the provisions of sections 42(1) and section 47(6) of the Employment Act, notwithstanding.
119. Needless to emphasize, this court has heard and determined legions of decisions by employees whose employment was terminated during the probationary period. Being a non-contested issue, the court will say no more.
120. As to whether termination of the petitioners employment was fair, the court proceeds as follows;
- The basis infrastructure on termination of employment contracts including dismissal is prescribed by the provisions of section 35, 41, 42, 43, 44, 45 and 47(5) of the *Employment Act*, 2007. These provisions set out the requirements on valid and fair reason for dismissal, notice including in the case of probationary contracts, burden of proof, examples of gross misconduct and procedure.
121. The provisions set out the entire gamut of the law on termination which courts have interpreted to mean that for a termination of employment or dismissal to pass muster, it must be substantively justifiable and procedurally fair. Decisions of this court and the Court of Appeal have been consistent on the essence of substantive and procedural fairness in termination employment contracts.
122. In *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR the court held that;
- “For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . .”
123. Similar sentiments were expressed by the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR as follows;
- “From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
124. See also *CMC Aviation Ltd V Mohammed Noor* (2015) eKLR.
125. Courts have indelibly inscribed that the bedrock of fair termination of an employment contract is substantive and procedural fairness.
126. In response to the Petitioners submission that the suspension and subsequent summary dismissal violated the petitioner’s fundamental rights and freedoms under Articles 10, 27, 28, 41, 47 and 50 of the *Constitution* of Kenya, 2010, *Employment Act* and the *Fair Administrative Actions Act* as well the Respondent’s Human Resource Policies and Procedures Manual, the court proceeds a follows.
127. In *Speaker of the National Assembly V James Njenga Karume* (1992) eKLR, the Court of Appeal emphasized that;
- “ . . . in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance, prescribed by the Constitution or an Act of Parliament, that Procedure should be strictly followed . . .”



128. In *Gabriel Mutava & 2 others V Managing Director Kenya Ports Authority & another* (2016) eKLR the court further held that;

“Of course, violations of Constitutional rights may nonetheless be different and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law or have been superceded by statute. Certainly invoking the Constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a through fare for resolution of every kind of common grievance. . . . This was purely a labour dispute that could have been resolved by the application of the Employment Act as well as the Regulations”

129. Nzioki Wa Makau J. found as much in the certification ruling dated 2nd November, 2021 where he was unambiguous that;

“ . . . the petition ought to have been filed as an ordinary cause since it is plainly a suit about the dismissal of an employee and has nothing Constitutional about it”

130. The court is guided by these sentiments.

131. The pith and substance of the Petitioner’s case is the suspension and the summary dismissal.

132. I will now proceed to apply the law on termination of employment to the facts of the instant case.

133. It is not in dispute that the Petitioner was employed by the 2nd respondent on 16th April, 2021 but reported on duty on 26th April, 2021 and was suspended from office by letter dated 25th May, 2021 for concealment of information about his litigation history to the interviewing panel.

134. Before the suspension letter, the Petitioner had been called upon to clarify issues raised during a meeting at the CEO’s office between the Petitioners, CEO and the Board Chair of the 2nd respondent and did so by letter dated 17th May, 2021.

135. The Petitioner disclosed that he had a case against the previous employer pending before this court, the EACC had raided his house and feared that he would be charged, and finally that the Employment and Labour Relations Court ruled in his favour.

136. The letter made no reference to pending criminal case, but the Petitioner forwarded certain documents to the CEO and Board Chairman including the charge sheet dated 10th April, 2019 with nine (9) counts.

137. By letter dated 6th June, 2021, the 2nd respondent invited the Petitioner for a meeting with the Board Human Resource Committee slated for 11th June, 2021.

138. The Petitioner responded by a letter dated 9th June, 2021 indicating that he was away in Kisumu and had no access to documents to enable him appear before the Committee and sought indulgence of the committee, specifically 21 days to prepare. In addition, the Petitioner requested the 2nd respondent to avail several documents including, charges/allegations against him, minutes of all meetings at which the said allegations were discussed, notes taken at the interview including audio/video recording, if



available, statements by complainants and an indication as to the timing of the next meeting during office hours.

139. From the last item of the Petitioners request, it is evident that he had no intention of attending the meeting and did not attend as item V of the minutes of the meeting show.
140. Significantly, the Petitioner was still an employee of the 2nd respondent and missed an essential opportunity to put his case for the documents and materials he needed to launch his rebuttal to any allegations to be made.
141. Incidentally, no allegations had been made and the request for the information and documents was in courts view less persuasive at this stage. He had been invited for a meeting to discuss the documents he had availed to the 2nd respondent. It was more of an investigatory meeting to determine the way forward by the Board Committee responsible for Human Resource matters.
142. The meeting recommended that the 1st respondent issues a notice to show cause to the Petitioner to show why his employment with the 2nd respondent should not be terminated.
143. The notice to show cause is dated 15th June, 2021. The notice accuses the Petitioner of;
 - i. Intentional concealment of important information on adverse matter touching on his integrity during the interview.
 - ii. The petitioner had serious on-going Litigation touching on his integrity.
144. The Petitioner was accorded 21 days to respond and appear before the full board of the 2nd respondent on 6th July, 2021.
145. The Petitioner responded to the notice to show cause by letter dated 18th June, 2021 requesting for numerous documents including Acts of Parliament and the 2nd Respondents Human Resources Policies and Procedures Manual among others.
146. By letter dated 2nd June, 2021, the 2nd respondent informed the Petitioner that he could attend the meeting with his advocate.
147. Finally, the Petitioner's letter dated 5th July, 2021 reminding the 1st respondent about the documentation requested for was unresponded to. A special board meeting held on 6th July, 2021 resolved that the Petitioner be summarily dismissed by letter to be dated on even date.
148. Neither the Board Human Resource Committee nor the full board of the 2nd respondent heard oral or written representations of the Petitioner or his representative.

Reasons For Termination

149. The summary dismissal letter dated 6th July, 2021 sets out two grounds for the summary dismissal of the Petitioner;
 - i. During the interview for the position of Director Corporate Services, you had indicated that you have never had adverse matters touching on your integrity and presented to the Board a duly filed First Schedule (S13), Self-Declaration Form to confirm the same. This contradicts your subsequent submissions including your letter dated 11th May, 2021 confirming that indeed you have had matters before the court touching on your employment and integrity.
 - ii. The EACC mandated by the *Constitution* of Kenya to ensure compliance and enforcement of Chapter Six on Leadership and Integrity, by its report confirming the active court case(s)



invalidate your suitability for appointment to the position of Director Corporate Services citing integrity issues against you warranting your investigation and prosecution by the state.

150. It is not in dispute that the EACC Self-Declaration Form on record completed by the Petitioner dated 5th January, 2020 was supplied by the 2nd respondent as part of the documents submitted by the Petitioner when he applied for the position of Director, Corporate Services advertised by the 2nd respondent.
151. In response to the question whether he had been the subject of disciplinary or criminal proceedings for breach of the Public Officer Ethics Act, 2003 or a code prescribed thereunder, the Petitioner answered in the negative yet he had an on-going criminal case and the charge with its various counts implicated the Petitioner's integrity as a public officer.
152. This answer is contradicted by the minutes of the meeting dated 11th May, 2021 and in particular the disclosures the Petitioner made as well as the submissions made in the letter dated 17th May, 2021
153. Granted that Criminal Appeal No. 24 of 2019 James Ambuso Omondi V Republic (2020) eKLR was finalized on 30th January, 2020, the Petitioner was aware that he had an on-going Criminal Case by 26th February, 2021 when he appeared for the interview.
154. Was the Petitioner bound to disclose this information? Although the contract of employment is not one of the utmost good faith, the information was critical and answering the question in the negative implicated the Petitioner's integrity.
155. In Zeddy Cheronu Sambu V National Oil Corporation (2022) eKLR where an interviewee had misrepresented her salary to the interviewing panel, a fact the interviewee did not deny this court, the court found that the blatant misrepresentation was a valid reason for termination of employment.
156. In the instant case, although the Petitioner states and submits that he answered the question in the affirmative, he has tendered no evidence to contradict the Self-Declaration Form on record which shows that he responded in the negative.
157. Affidavit evidence alone cannot substantiate the claim in the face of a document showing the contrary.
158. It requires no gain saying that Chapter VI of the Constitution of Kenya, Public Officer Ethics Act and the Leadership & Integrity Act require public officers to be of unquestionable integrity and this includes applicants for positions in the Public Service.
159. Responding to a question in the negative when in fact the answer ought to be in the affirmative, as was the case here is a mark of dishonesty which undoubtedly implicates the Petitioner's integrity as confirmed by the documents and information he supplied after the meeting on 11th May, 2022.
160. It is also elemental to underline the fact that the Petitioner joined the 2nd respondent at Grade 2 which is a very senior position in the Public Service and he was responsible for a critical department including Finance and Accounts among others which demand the highest degree of integrity.
161. For the reasons stated above, it is the finding of the court that the 2nd respondent has on a balance of probability established that it had a valid and fair reason to terminate the Petitioner's employment. Section 43(2) of the Employment Act provides that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.



162. The fact that the Petitioner had a pending corruption case whose details he did not disclose before engagement impinged his integrity.
163. It is essential to interrogate the second reason cited by the 2nd respondent in its letter of dismissal which is based on the letter from the Ethics and Anti-Corruption Commission (EACC) dated 9th June, 2021. The Commission is emphatic that the Petitioner “cannot be engaged or take up any public appointment until the matter in court is finalized.”
164. The Petitioner submits that the EACC acted Ultra vires by giving such recommendation as it relied on section 62(1) of the *Anti-Corruption and Economic Crimes Act*, 2003 which provide for suspension of public or state officers who are charged with corruption or economic crimes.
165. The 3rd respondent submits that it was merely performing its constitutional and statutory mandate and its letter was an advisory. The Commission sought information on the circumstances in which the Petitioner was engaged. Its letter did not direct the 2nd respondent to terminate the petitioner’s employment. Relatedly, the letter is dated 9th June, 2021, after the Petitioner had been suspended and had been invited for a meeting with the Board Human Resource Committee scheduled for 11th June, 2021.
166. While the section relied upon is explicit on suspension, it does not address employment or appointment into public or state office. There is sufficient Judicial authority on the essence of suspension in such cases. See *John Oindo & another V Ethics & Anti-Corruption Commission & another* (2020) eKLR and *Republic V Ethics & Anti-Corruption Commission and Attorney General Ex parte Patrick Gachunge Mwambia and Francis Atanasio Kithure*, Meru JR No. 25/2016 and others.
167. It is not in dispute that the 2nd respondent is a legally established and constituted state corporation with a functional board of directors, management and staff complement to discharge its mandate.
168. The 2nd respondent was not bound to act on the advisory given by the EACC. Its board of directors is the decision maker and the accountable organ of governance.
169. For these reason, the court is unpersuaded that the 3rd respondent violated the constitution or any other law by cautioning the 2nd respondent regarding the petitioner’s employment.
170. Having demonstrated that the 2nd respondent had a valid reason to terminate the Petitioner’s employment and has discharged the burden prescribed by section 43 of the *Employment Act*, I will now proceed to determine whether the prescribed procedure was complied with.

Procedure

171. Section 41 of the Employment Act prescribes the mandatory procedural precepts to be complied with prior to dismissal or termination of employment. See *Pius Machafu Isindu V Lavington Security Guards* (2017) eKLR.
172. Several decisions of this court and the Court of Appeal have elaborated and itemised the specific procedural steps to be compiled.
173. For instance, in *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal stated as follows:

“Four elements must thus be discernible for the procedure to pass musters:-



- i. an explanation of the grounds of termination in a language understood by the employee;
 - ii. the reason for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee. "
174. The court also delved into the issue of fair hearing and reiterated its position in *Kenya Revenue Authority V Menginya Salim Murgani*(2010) eKLR where it held that the hearing envisaged by section 41 of the *Employment Act* need not be oral.
175. In *Kenya Postal Corporation V Andrew K Tanui* (*Supra*) the court stated that;
- “ ... A hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that this is still good law...”
176. I will now proceed to apply the law to the facts of the instant case.
177. It is not in dispute that respondent invited the petitioner for a meeting with the Board’s Human Resource Committee. The invitation letter dated 7th June, 2021 had no accusations or charges against the Petitioner. It was an invitation to a hearing before the Human Resource Committee.
178. Being aware of the possible reason for the invitation, the petitioner requested for;
- i. Postponement of the meeting as he was in Kisumu.
 - ii. Several documents itemised in his letter.
 - iii. New date and time of the next meeting. He appeared uncomfortable with a meeting at 7.30 am which was outside official working hours.
179. The letter was unresponded to and the meeting took place as envisioned and made several recommendations including;
- i. Issuance of a show cause letter to the petitioner promptly to save time.
 - ii. Acknowledge receipt of the petitioner’s letter dated 9th June, 2021.
 - iii. Committee to deliberate the matter and present its final report with recommendations to the Board.
 - iv. 2nd respondent’s legal counsel to appear in court on 15th June, 2021 to seek time to involve the Attorney General in the Petitioner’s case against Respondent.
180. EACC’s letter dated 9th June, 2021 was received on 11th June 2021.
181. The show cause letter was issued on 15th June, 2021 and gave the Petitioner 21 days to show cause why his employment with the 2nd Respondent should not be terminated and was to appear before the full board on 6th July 2021 at 8.00 am.



182. The letter did not inform the Petitioner that he had the right to be accompanied by a fellow employee.
183. The Petitioner responded to the show cause letter by letter dated 18th June, 2021 by which he notes that his earlier letter had not been acknowledged in the show cause letter.
184. More significantly, the Petitioner requested for additional and the previously requested documents to prepare his rebuttal.
185. The letter was neither acknowledged nor responded to. The 2nd Respondent's Board sat on 6th July 2021 at 7.30 am.
186. The dual agenda of the meeting was;
- i. To receive a report of the Special Human Resource Committee on the Petitioner.
 - ii. To provide a hearing of the Petitioner.
187. Puzzlingly, the absence of the special Human Resource Committee report and the Petitioner notwithstanding, the board resolved that the Petitioner be summarily dismissed and the letter be issued on the same day.
188. The salient issue is whether the 2nd Respondent complied with the provisions of section 41 of the *Employment Act*. The court is satisfied that the 2nd Respondent did not comply with the procedure as by law prescribed for several reasons.
189. First, although the meeting slated for 11th June, 2021 was not a disciplinary hearing properly so called, the Petitioner sought an adjournment which was denied for unexplained reasons. The Petitioner had indicated that he was in Kisumu and needed time to prepare and travel to Nairobi. The right to apply for an adjournment is integral to the right to fair hearing.
190. The court is guided by the words of Lenaola J. (as he then was) in *Mandeep Cheohan v Kenyatta National Hospital and 2 others* (2013) eKLR.
- “It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creation of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all other laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rules as captured in the latin phrase audi alterum partem literally translates into hear the parties in turn and has been appropriately paraphrased as do not condemn anyone unheard. This means a person against whom there is a complaint must be given a just and fair hearing.”
191. The court is guided by these sentiments.
192. Denial of the adjournment by conduct denied the Petitioner the opportunity to appear before the Board Human Resource Committee.
193. The 2nd Respondent could have acceded to the request to accommodate the petitioner at least once to signify good faith even if in its view, the Petitioner may not have had a good reason. It did not.
194. Second, the Petitioner requested for documents and information to facilitate his appearance. Although, the 2nd Respondent had not framed any charges against the Petitioner, it had copies of interview notes, advisory by the EACC and copies of minutes of the meeting held on 11th May, 2021. These were materials at its disposal which it could have forwarded to the Petitioner. The interview



- report for instance is part of the employee's personal file according to the Human Resource Policies and Procedure Manual, 2018. He requested for them.
195. Intriguingly, the 2nd Respondent did not responded to the request. Needless to emphasize a response would have enabled the Petitioner to take the next course of action. The palpable silence on the part of the 2nd respondent was disconcerting.
 196. It requires no belabouring that the right to seek information from the custodian is inextricably intertwined with the right to fair hearing.
 197. The 2nd Respondent had information which it could have availed to the Petitioner or declined to do with reasons.
 198. The 1st Respondent did not implement the resolution of the Special Human Resource Committee meeting held on 11th June, 2021. As the accuser, the 2nd Respondent should have furnished the Petitioner with the information at its disposal to facilitate his appearance before the Human Resource Committee and the full board after the notice to show cause was issued.
 199. The absence of a response in both instances is curious and impacts negatively on the 2nd Respondent.
 200. The Petitioner's response to the notice to show cause requested for additional documents including the report of the Special Human Resource Committee on the issue and reminded the 2nd Respondent of the earlier request. The letter elicited no response from the 2nd Respondent. The 2nd Respondent does not appear to have given the Petitioner's requests for adjournment and documents due consideration, if at all.
 201. In sum, the Petitioner was neither facilitated to appear before the Board Human Resource Committee meeting nor the formal hearing before the board on 6th July, 2021 and did not appear.
 202. In *Regent Management Ltd v Wilberforce Ojiambo Oundo* (2018) eKLR, where the appellant declined to provide the documents requested for by the respondent, the Court of Appeal expressed itself as follows;

“We are at a loss as to why the appellant refused to grant certified copies of the documents requested even at his own expense. In our view, these documents were integral to the respondent preparing his defense. By only availing the documents for his perusal at its premises for a few number of hours was not adequate.”
 203. The same may be said of the instant case. Failure of a response to the request may have convinced the Petitioner that there was no point of appearing for the two meetings.
 204. Third, the 2nd Respondent appears to have been in a hurry to terminate the Petitioner's employment. The full board of the 2nd Respondent passed its resolution in MIN 02/06/07/2021 without the benefit of the recommendation of the Special Human Resource Committee.
 205. Fourth, the 2nd Respondents Human Resource Policies and Procedures Manual, 2018 provides that “No disciplinary action may be taken against an employee until a case has been fully investigated” and an elaborate procedure for investigation is provided and at all stages the employee has the right to be accompanied by an employee representative or work colleague or other person of his choice and the right of appeal.
 206. The 2nd respondent did not avail these safeguards to the petitioner.



207. For the above reasons, the court is satisfied that although the 2nd Respondent may have had a good reason to terminate the Petitioner's employment, it did not do so in compliance with the procedure as by law prescribed and the termination of employment was therefore procedurally flawed and thus unfair and the court so declares.

Relief

208. Having found that the Petitioner's dismissal from employment on 6th July, 2021 was unfair for want of procedural propriety, I will now examine the appropriateness of the reliefs sought.

a.As the court is in agreement with the finding and sentiments of Nzioki wa Makau J. in his ruling delivered on 2nd November, 2021 that the Petition is fundamentally an issue of dismissal of an employee by an employer, prayers (a) (b) and (c) fall by the way side and are disallowed.

b.Balance of monthly salary held by 1st and 2nd Respondents from April 26th to 6th July, 2021 (2 months, 10days).

209. Documents on record show that the sum of Kshs. 666,187.33 was paid to the Petitioner for the months of April, May, June and July, 2021 including prorated gratuity for the duration served of Kshs.152,650.

The petitioner's submissions are reticent on payment of the above stated sum.

For this reason, the prayer is disallowed.

c.A Declaration on the Dismissal Being Unfair has Already been made.

d.Reinstatement.

210. This remedy is available under section 49(3) of the *Employment Act* and section 12(3)(vii) of the *Employment and Labour Relations Court*, 2011, which provide that;

Where in the opinion of the labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to

- (a) Reinstatement the employee and treat the employee in all respect as if the employee's employment had not been terminated;

211. It is trite that the remedies provided by section 49 of the *Employment Act* are discretionary and courts are enjoined to exercise that discretion judiciously and not capriciously or whimsically. This was underscored by Maraga JA (as he then was) in *Kenya Airways Limited V Aviation & Allied Workers Union, Kenya & 3 others* (2014) eKLR where he stated as follows;

“ . . . in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3) (vii) of the *Industrial Court Act* that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is a discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such a relationship against the will of them . . .

Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant



to this appeal include the wishes and expectations of the employee. The Common Law Principle . . . ; Practicability of reinstatement . . ."

212. The court is guided by these sentiments.
213. In the instant case, the Petitioner reported to work on 26th April, 2021 and was suspended on 25th May, 2021 and was summarily dismissed on 6th July, 2021, a duration of 2 months and 10 days only and did not appeal the decision as provided by the 2nd respondents Human Resource Policies and Procedures Manual, 2018, but wished to continue as exemplified by the prayer for reinstatement.
214. Having found that the 2nd respondent had a valid reason to terminate the petitioner's employment coupled with the fact that the petitioner was convicted of soliciting and receiving a benefit in his capacity as a public officer, in Criminal Case No. 5 of 2019 at the Anti-Corruption and Economic Crime Court, on 4th February, 2022, the court is satisfied that the remedy of reinstatement would be inappropriate in this case. The prayer is disallowed.
215. In the alternative the Petitioner prays for;

i. One Month Notice in lieu of Notice

216. Having found that termination of the Petitioner's employment was unfair, the petitioner is awarded 7 days notice as ordained by the provisions of section 42 (4) of the Employment Act.

ii. 12 Months Compensation for Loss of Employment

217. Having found that termination of the petitioner's employment by the respondent was procedurally unfair, the petitioner is eligible for the discretionary relief provided by section 49(1) (c) of the Employment Act. As stated herein above, the quantum of compensation is determined on the basis of the factors outlined in section 49(4) of the Act. In this case, the court has considered that the petitioner was an employee of the 2nd respondent for about 2 months and 10 days, he failed to disclose critical information about an on-going Criminal Case whose charges implicated his integrity as a public officer, he did not appeal the dismissal and did not attend any of the meetings he was invited to the absence of the documents and/or information he had requested for notwithstanding and wished to continue.
218. Finally, and as adverted to above, the petitioner was convicted in Criminal Case No. 5 of 2019. In the circumstances the court is satisfied that one (1) months gross salary is fair.

iii. Payment of 31% Gratuity Due under the Contract

219. As stated above, documents on record show that the sum of Kshs.152,050/= due the Petitioner as gratuity was paid as part of the final dues.

The prayer is disallowed.

iv. Costs of the suit.

220. The petitioner is awarded costs of this suit against the 2nd respondent only.

v. Certificate of service

221. The 2nd respondent to issue a certificate of service to petitioner by dint of section 51(1) of the *Employment Act*.



222. In conclusion, judgement is entered for the petitioner against the 2nd respondent on the following terms;

- i. Salary for 7 days in lieu of notice.
- ii. Equivalent of one (1) month's salary.
- iii. Costs of this suit to be met by the 2nd respondent.
- iv. Interest at court rates from the date of judgement till payment in full.
- v. Certificate of Service to issue.

223. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2022

DR. JACOB GAKERI

JUDGE

ORDER

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

DR. JACOB GAKERI

JUDGE

