



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI COMMERCIAL

CASE NUMBER: ELRCPET/E097/2021

CITATION: SPENCER SANKALE OLOLCHIKE VS MAASAI MARA UNIVERSITY

JUDGMENT

1. The Petitioner through an Amended Petition dated 24<sup>th</sup> February, 2022 alleged inter alia;
  1. The Petitioner averred that he was first employed by the Respondent on 2<sup>nd</sup> November 2012 as an Assistant Internal Auditor Grade 11 earning a monthly gross salary of Ksh 97,680/= (with an annual leave allowance of Ksh 9600/=) per month. Rising through the ranks because of his dedication, integrity and professionalism, on 21<sup>st</sup> January 2016 he was promoted to the position of a Senior Accountant Grade 13 earning a monthly gross salary of Ksh. 258,393.00 (with an annual leave allowance of Ksh.22,400/=)
  2. That committed to integrity and professionalism, he whistleblew on the suspected embezzlement of funds at the University that was publicly aired on 1<sup>st</sup> September 2019 on Citizen Television. As a result, a number of university employees including the Vice Chancellor were charged with various corruption related offences.
  3. That while the Country lauded him for his heroism in defending the public purse, within the University, he became a target of witch hunt and the Respondent launched a campaign of intimidation against him. This intimidation extended to the series of summary dismissal and re- deployment of employees who are witnesses in the pending case to other departments.
  4. The Petitioner averred that on 31<sup>st</sup> January 2020 (three months after the expose), the Respondent redeployed him to the Endowment Fund where he was required to report to the Director. That two months later, on 12<sup>th</sup> March 2020, he was redeployed back to his previous position of Senior Accountant. Later on, 29<sup>th</sup> June 2020, he was asked to serve as an Acting Chief Internal Auditor.
  5. That while undertaking his role as acting Chief Internal Auditor, the Respondent created a hostile working condition for the Petitioner where his functional independence was greatly curtailed and he could only perform his work at the whims and direct control of the Respondent.
  6. That a case in point was when the Respondent ordered the Petitioner to expunge some information from the Internal Audit Report dated 29<sup>th</sup> May 2020, which the Respondent considered "problematic".
  7. That the reason given by the Respondent for seeking to expunge this information was because the Acting Vice Chancellor had allegedly already "explained away" the errors



when these alleged clarifications were never documented.

1. That the Petitioner, being the diligent person that he is, and motivated to always do right, instead of expunging this supposedly sensitive information, opted to prepare a summary of actionable recommendations on the Internal Audit Report, consistent with proper internal audit practice, which he presented at the 15<sup>th</sup> Audit Risk and Compliance Committee of the Council held on 20<sup>th</sup> August 2020.
2. That the Petitioner frustrated resigned from the position of Acting Chief Internal Auditor on 25<sup>th</sup> August 2020. That after resigning, he was never given an office and had to operate from the car. That his resignation as Acting Chief Internal Auditor was involuntary because the Respondent created a very hostile working environment making it impossible to perform his duties efficiently.
3. The Petitioner averred that shortly after, on 28<sup>th</sup> August 2020, he was invited for a meeting (on 1<sup>st</sup> September 2020) to, "shed light on the graft allegations" that he had made on an interview on National TV. That in the letter of the invitation, the Respondent applauded him for his vigilance and commitment to ensuring that public resources were well utilized within the University.
4. The Petitioner averred that at the meeting however, the Respondent assumed a very hostile stance against him: a stark contrast from the friendly tone in the invitation letter. The meeting became a forum to subject him to harassment characterized by all manner of name calling.
5. The Petitioner averred that the harassment, name calling and degrading treatment that he was subjected to stripped him of his right to dignity.
6. That on 7<sup>th</sup> September, 2020 the Respondent wrote to him offering an opportunity to provide a written documentary evidence of the corruption allegations that he had made against the University.
7. That the Petitioner was taken aback by this because it seemed like he was being investigated without his knowledge, yet all along made to believe that he was simply assisting the Respondent to unearth the corrupt activities within the university. The meeting of September 2020 was therefore a deliberate scheme to trap him.
8. The Petitioner averred that he declined to furnish the said documentary evidence and writing through his former Advocates, reminded the Respondent that the documents were already in their possession. That during the meeting of 1<sup>st</sup> September 2020, he affirmed that the statements he made to the press were based on the deliberations at the audit committee, as well as both the internal and external audit reports which were in the custody of the Respondent. The Petitioner therefore had nothing more to give over and above the reports.
9. The Petitioner averred that since then, he became a victim of targeted attacks within the University and had to endure numerous instances of harassment and unfair labour practices that often-involved name calling and open ridicule.
10. The Petitioner averred that on the 17<sup>th</sup> June 2021, the Respondent summarily dismissed him from his employment. That the purported dismissal was done after almost 10 months from the date he was invited to the meeting of 1<sup>st</sup> September 2020 and asked to furnish written documentary evidence of his graft allegations.
11. The Petitioner averred that his dismissal was in blatant disregard of the law and procedure and mainly in retaliation of his whistleblowing role.
12. The Petitioner averred that to prove that his dismissal was mainly in retaliation of his whistleblowing role, first he was never notified of any allegations against him neither was he made aware of any investigations against him over any allegation. He was never



accorded an opportunity to be heard and his dismissal was malicious and done in bad faith.

13. That the Respondent, having no cogent reason to dismiss him plucked multiple reasons from the air and based the dismissal on the following vague grounds:
  1. Sustained insolence to his employer
  2. Sustained cyber bullying
  3. Malicious representation of his employer
  4. Libel and Defamation
  5. Falsely maligning the image and reputation

of the university

1. Sustained disregard of university standards and procedure
  2. Sustained, incitement of university staff and general public against his employer
  3. Sustained gross insubordination
  4. Failing to act in the best interest of the university.
1. The Petitioner averred that none of these allegations were ever particularized or the circumstances upon which he allegedly committed these offences given. That he was never notified of these offences nor was he given an opportunity to be heard. In fact, he came to know of these allegations when he was served with a summary dismissal letter.
  2. That his summary dismissal was not only malicious, but contravened various provisions of the Constitution that guarantee his right to be heard and protect his right to fair labour practices.
  3. That in addition, the dismissal infringed on his rights as a whistleblower against disciplinary action as provided for under Section 65 of the Anti-Corruption and Economic Crimes Act, 2003 as well as Section 21 of the Bribery Act 2016.
  4. That the dismissal was equally inconsistent with the provisions of the Employment Act and violates the guarantees of procedural fairness in the Respondent's Human Resource Policies and Procedure Manual.
  5. The Petitioner alleged violation of Constitution and legislation ranging from Articles 10, 28,29,41,47, 50 and 236 of the Constitution and section 65 of the Anti-Corruption and Economic Crimes Act,2003.

1. The Petitioners prayed for: -

Under the Constitution

1. A declaration be and is hereby issued that the summary dismissal of the Petitioner by the Respondent in retaliation of his whistle blowing role amounted to a violation of his rights under Article 236 of the Constitution as read with Section 65 of the Anti-Corruption and Economic Crimes Act, 2003.
2. A declaration be and is hereby issued that the Petitioner's dismissal violated his constitutional rights to fair hearing (Article 50), right to dignity (Article 28), right to fair labour practices (Article 41), freedom from cruel and degrading treatment (Article 29), and fair administrative action (Article 47) besides violating Article 236 of the Constitution;
3. Damages for violation of Petitioner's constitutional rights under (a) above

Under Statute

1. A declaration be and is hereby issued that the summary dismissal of the Petitioner was in violation of his rights against disciplinary action as a whistleblower under Section 65 of the Anti-Corruption and Economic Crimes Act, 2003.



2. A declaration be and is hereby issued that the summary dismissal of the Petitioner equally contravened Section 21 of the Bribery Act 2016 which forbids an employer from summarily dismissing a whistle blower from employment.
3. A declaration be and is hereby issued that the Petitioner is entitled to protection of his rights as a whistleblower against retaliatory action under Section 65 of the Anti-Corruption and Economic Crimes Act 2003 and Section 21 of the Bribery Act 2016
4. A declaration be and is hereby issued that the Respondent's summary dismissal amounts to an unfair termination under the Employment Act, 2007.
5. An order be and is hereby issued reinstating the Petitioner back to employment without loss of benefits, and in the alternative:

i)12 months compensation for unlawful termination (12\*258,393.00 being the salary for the position of Senior Accountant as per appointment letter).

ii)Costs of the suit

iii)Certificate of service

1. Damages for continuous injury for the last 12 months, the continuous injury being harassment and degrading treatment.
2. Interest on all monetary awards
3. Any other and or further reliefs that this Court may deem fit and just to grant in the circumstances.
4. The Respondent by reply to the Petition in their Replying Affidavit sworn on 9<sup>th</sup> May, 2022 alleged inter alia that:-
  1. The Respondent averred that it summarized the Petitioners issues as victimization for whistleblowing and unfair dismissal. That the Petitioner's claim was based on the employment relationship he had with the Respondent institution. That what was before the court for consideration was the right of an employer to hold an employee accountable for his actions and not whether or not the Petitioner was a whistleblower.
  2. The Respondent averred that its image was heavily and negatively tainted following the expose on alleged corruption of university resources engineered by the Petitioner and aired on Citizen television on 1<sup>st</sup> September,2019. That the University lost many partners both local and international due to the tainted image.
  3. The Respondent averred that the Petitioner's expose accused the previous council and top management of mismanaging the resources of the University. That he was widely praised by many Kenyans achieving instant fame which might have gotten in to his head and made him think and believe that he was larger than the University and all its leadership. That he became arrogant and unmanageable.
  4. The Respondent averred that the new council was appointed on 20<sup>th</sup> March,2020 to provide leadership, regain and ensure continuity of the University's operation. That the new council resolved among other measures to interdict the vice Chancellor Prof. Mary Walingo pursuant to Section 71 of the Public Service Act 2017 pending determination of the criminal matter against her and appointed Prof. Kitche Magak as the Acting vice chancellor.
  5. The Respondent averred that besides these measures the council also commissioned a detailed internal audit exercise which culminated in to an Internal Audit Report. That the same was approved by the council and unresolved issues were forwarded to the Auditor General for forensic audit.
  6. The Respondent averred that in recognition of the Petitioner as a whistleblower the



council elevated the Petitioner from the rank of Senior Accountant to that of the Acting Chief Internal Auditor on 29<sup>th</sup> June,2020. That this was to give the Petitioner unrestricted access to all information, including confidential information of the university so that he would directly report to the council any anomalies for immediate corrective action in terms of clause 4.21 of the HR policy of 2018.

7. The Respondent denied the Petitioner's allegations of victimization for whistleblowing. That promotion is not a form of victimization.
8. The Respondent averred that after accepting the new role the Petitioner dramatically resigned on 25<sup>th</sup> August,2020 barely two months in the office. That on 26<sup>th</sup> August,2020 a day after resigning he went to citizen Television interview with allegations of corruption against the new council that was in office for only five months based on Internal Audit Report of 29<sup>th</sup> May,2020 and draft External Audit Report of 27<sup>th</sup> February,2020 for the office of the Auditor General.
9. The Respondent averred that during the interview the Petitioner alleged many things against the council and university management. That the said words and actions of the Petitioner were largely false, defamatory and were made in bad faith and unlawfully for reasons that: -
  1. The draft external Audit dated 27<sup>th</sup> February,2020 was conducted before even the new council came in place. The Internal Report dated 29<sup>th</sup> May,2020 covered the period from 1<sup>st</sup> July,2019 to 30<sup>th</sup> April 2020 before the new council started operating. The two audit reports did not concern the activities of the new council that was only in office for just about five months and the new acting Vice-Chancellor who had been appointed by the new council.
  2. He made disparaging remarks based on Draft External Report and ignored the fact that there was a final Report that was subsequently issued and was fully discussed and implemented by the council.
  3. The Petitioner disregarded the University management structure by failing to first share his purported findings of corruption to the council first as was required of him in law.
  4. The persons against whom allegations of corruption were levelled were never accorded any opportunity to be heard before the Petitioner drew his conclusions in violation of their fundamental constitutional right to fair hearing as guaranteed under articles 25,48 and 50 of the Constitution.
10. The Respondent averred that following the said graft allegations by the Petitioner on citizen Television the council held a special meeting on 27<sup>th</sup> August,2020 and resolved to invite the Petitioner for a meeting to deliberate on the allegations of corruption and offer an appropriate solution if the same were proved. That the council also resolved to engage the Auditor General to conduct a financial audit report of the Respondent from year 2013.
11. The Respondent averred that through another letter dated 28<sup>th</sup> August,2020 the council invited the Petitioner for a meeting scheduled for 1<sup>st</sup> September,2020 to shed more light on the said allegations, failure to which disciplinary action would have been commenced against him.
12. The Respondent averred that the Petitioner honoured the invitation and attended the meeting on 1<sup>st</sup> September,2020 but declined and /or failed to provide any information on the allegations he had made during the television interview. That the Petitioner chose to display total disrespect, disdain, contempt, arrogance and condescension towards the council. That the Petitioner chose not to respond to the majority of questions asked and did not bother to submit any of the documents he was requested to submit in his invitation letter dated 28<sup>th</sup> August,2020.





13. The Respondent denied the Petitioner's allegations that he was treated with hostility by the council. That the language used by the council members during the meeting was a mere expression of their concern and frustration from the Petitioner's continued attempts to disparage their credibility and that of the Respondent.
14. The Respondent averred that the Petitioner was constantly requested to substantiate his claims that the council was corrupt as per his statements to the media but he chose to respond to these questions with either no comment or refer to the audit reports. That the reaction defeated the purpose of the meeting and agitated the council members.
15. The Respondent averred that the council gave the Petitioner a second chance and requested him through a letter dated 7<sup>th</sup> September, 2020 to provide written response but he ignored the council's letter and continued to make unverified claims of corruption. That he could not therefore claim that he was never accorded a chance to be heard before his dismissal from employment.
16. The Respondent further averred that the current university administration was very much concerned about prudent use of resources. That it emerged that it was the Petitioner who was largely involved in fraud and pilferage of the University's finances. That he has acquired much wealth whose source was questionable for example it was alleged he owns a petrol station and commercial building in Narok town which business require huge capital and drives fancy cars which his earning from University could not support.
17. The Respondent further averred that the 1<sup>st</sup> and 3<sup>rd</sup> Interested parties were NGOs with no specific constitutional or statutory mandate. That they were totally irrelevant to the dispute herein or on operations of any government or public entity.
18. The Respondent averred that the 2<sup>nd</sup> Interested party was a professional certified Public Accountants in Kenya. That it had no role whatsoever on the labour dispute between the Petitioner and the Respondent.
19. The Respondent averred that the Interested Parties are therefore busybodies roped in unholy union with the Petitioner who is alleged to have swindled the Respondent's money. It was therefore curious that whereas they claim to advocate for transparency, they are keen to have the Petitioner kept at the University to frustrate the ongoing investigations and probably cover up massive theft for clout and free publicity to attract donor funding.
20. The Respondent averred that it was clear that the relationship between the Petitioner and the University's administration had irretrievably broken down and therefore this court should not force them to work together. That the position previously held by the Petitioner has since been substantively filed.
21. The Respondent averred that the summary dismissal of the Petitioner had nothing to do with his alleged whistleblowing. That it was the only recourse that the Respondent had in disciplining an employee who after being promoted as reward for his efforts in rooting out bad elements in the institution, made it personal mission to attack the new council without noting the changes it was making, illegally obtaining confidential reports and sharing the same with the public using disparaging terms to describe the council members and the Respondent and most importantly, failing to discharge his mandate as required.
22. The Respondent averred that the Petitioner was abusing the court process. That upon failing to obtain any interim orders, the Petitioner instructed Kenya Universities staff Union (KUSU) Masai Mara University branch to file another similar case in Nakuru ELRC cause No E39 of 2021 on 7<sup>th</sup> July 2021 on his behalf to mislead the court in to issuing conflicting orders. That this amounts to *sub judice*. That the Amended Petition be dismissed with costs to the Respondent.

5. The Petitioner filed a further Affidavit sworn on 11<sup>th</sup> October, 2023 and averred that;



1. That the meeting did not meet the threshold of a meeting under the CBA between the Respondent and the Union CBA in that no warning was given to the Petitioner or notified to attend the meeting with a fellow union representative of his choice. That the reasons for his dismissal were never communicated to him before hand or given opportunity to respond to them.
2. That the allegations of fraud against him were never substantiated, never reasons for his dismissal and they never reported to DCI for any investigations against him if the said allegations were true.
3. That he could not raise the issues of corruption internally since the nature of people involved and dynamics of power in the University. That he should not be blamed for the tainting of the University yet the people concerned have been charged and criminal cases ongoing.
6. The Amended Petition was disposed of by written submissions.

## PETITIONER'S SUBMISSIONS

1. The Petitioner filed his submissions dated 22<sup>nd</sup> November, 2023. On the issue of whether he was entitled to protection accorded under section 65 of the ACEC Act for his whistleblowing on the **Mara heist** he submitted that most whistleblowers pay a retaliation of abrupt termination as he did.
2. On this issue the Petitioner relied on the **United Nations Convention Against Corruption 2003** on a number of articles on protection of reporting persons. The Petitioner also relied on Constitutional safeguards ranging from Article,20,28,29,41 and 47 of the Constitution. He also relied on sections 65 of the ACEC Act and 21 of the Bribery Act,2016.
3. The Petitioner relied on a number of Authorities including the case of **Heinisch vs Germany(No 28274/08)** among others. The Petitioner submitted that the Respondent had abused public office contrary to section 46 of ACEC Act and should be held accountable under Article 73(2)(d) of the Constitution.
4. The Petitioner further submitted that the Respondent created a hostile working environment contrary to Article 41 of the Constitution. That the Respondent encouraged corruption when they instructed him to remove problematic information which contravened article 201 of the Constitution. The said instructions were made to falsify Internal Audit Report contrary to section 331 of the Penal Code.
5. The Petitioner averred that he had acted in public interest to expose Respondent's scheme to embezzle funds as per Article 22 of the Constitution hence entitled to be protected.
6. On the issue of whether the Summary dismissal of the Petitioner by the Respondent was procedurally and substantively fair the Petitioner relied on the case of **Nicholas Otinyu Muruka v Equity Bank Limited(2013) eKLR** on summary dismissal. He submitted that he satisfied the burden of proof under section 47(5) of the Employment Act and the Respondent failed to meet the dictates of Section 41 of the Employment Act on procedural fairness. He relied on the case of **David Gichana Omuya v Mombasa Maize Millers Limited(2014) eKLR**.
7. It was the Petitioner's submissions that he was never notified of any allegations against him or made aware of any investigations against him over the allegations. That he was never afforded an opportunity to be heard. That the reasons given by the Respondent for his dismissal were not supported by evidence. That he was never issued with a warning or notice to show cause. That he came to know of these allegations after he was served with a summary dismissal letter.
8. It was the Petitioner's submissions that being a member of a Union, his union was never informed of his misdeeds and he was never accompanied by a union representative during the disciplinary meeting.
9. The Petitioner submitted on violations of section 43,44(3) and 45 of the Employment Act as



well as the University Human Resource Policy while relying on the case of **Evans Kamadi Misango vs Barclays Bank of Kenya Limited(2015) eKLR** on the employer acting in the interest of justice and Equality.

10. It was the Petitioner's submissions that he was never notified of the summary dismissal contrary to the Employment Act and section 4 of the Fair Administrative Action Act. The Petitioner relied on the case of **Postal Corporation of Kenya V Adrew K Tanui (2019) eKLR** and submitted that the meeting held on 28<sup>th</sup> August, 2020 was not a disciplinary hearing as per section 41 of the Employment Act. That the dismissal was thus unfair under section 45 of the Employment Act.
11. On the issue of whether the Petitioner was entitled to reliefs sought the Petitioner relied on the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike (2017) eKLR** on considerations the court must take while ordering reinstatement. The Petitioner prayed for compensatory relief for unfair termination. He relied on the case of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR** on both Substantive and procedural fairness before termination which the Respondent did not adhere to and prayed that his prayers in his Amended Petition should be allowed.

## RESPONDENTS' SUBMISSIONS

1. Through its submissions dated 8<sup>th</sup> December, 2023 the Respondent submitted that the court lacked jurisdiction to adjudicate corruption matters. The Respondent relied on among other cases, the cases of **In the matter of Interim Independent Electoral Commission(2011) eKLR** in support of the submission.
2. On the issue of whether the summary dismissal was fair and justifiable the Respondent relied on section 45(2) of the Employment Act and submitted that it met both substantive and procedural fairness in dismissing the Petitioner.
3. It was the Respondent's submissions that section 44 (3) provides for summary dismissal when the employee fundamentally breaches his obligations under contract of service. That section 44(4) particularizes what amounts to summary dismissal as well as clause 19.3 of the HR policy Manual.
4. The Respondent submitted that the actions of the Petitioner amounted to gross misconduct hence substantially justified for his dismissal summarily. That he willingly neglected to perform his work. That if he had any complaint of the working environment clause 10 of the manual provided for procedure to be followed.
5. It was the Respondent's submissions that the Petitioner refused to cooperate when he was called for the meeting as provided for under clause 9 of the Manual. That he was uncooperative and resisted investigations.
6. The Respondent submitted that the court could only interfere with internal processes of the employer if there was fundamental breach. The Respondent relied on the case of **Kariithi v Micro and Small Enterprise Authority (Petition 87 of 2020)(2021) KEELRC 1819(KLR0 23 April 2021) Judgment**.
7. On the remedies sought the Respondent submitted that the court lacked jurisdiction to hear and grant remedies under ACECA and Constitution. On the prayer for reinstatement they submitted that the same was overtaken by events since the said position was already filled.
8. The Respondent submitted that the Petitioner would be entitled to damages in the unlikely event that the court finds the dismissal irregular under section 49 of the Employment Act.
9. On the issue of whether the suit was an abuse of court process the Respondent submitted that this suit was an abuse of court process after the Petitioner had filed another suit at Nakuru ELRC cause no E39 of 2021 on 7<sup>th</sup> July 2021. That the said Nakuru suit has since being dismissed with costs.





## 1<sup>ST</sup> AND 3<sup>RD</sup> INTERESTED PARTIES SUBMISSIONS

1. The 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties filed their submissions dated 10<sup>th</sup> January, 2024 and submitted among others that there existed an employer and employee relationship between the Petitioner and Respondent hence the Court had jurisdiction. They relied on the case of **Nick Githinji Ndichu vs Clerk Kiambu County Assembly and Another (2014) eKLR** among others where it was held that labour and employment rights form part of bill of rights hence the Court had jurisdiction. It was their submission that the predominant issue in the suit was violations of employment rights that arose as a result of retaliation for the whistleblowing and led to summary dismissal.
2. On the issue of whether the Respondent actions served to curtail freedom of expression guaranteed under the Constitution, the 1<sup>st</sup> and 3<sup>rd</sup> Interested Party submitted that the Petitioner had a right to freedom of expression subject to limitation of that right under Article 33(2) and that the dismissal was made to silence the Petitioner from exposing the corruption at the Respondent. They relied on the case of **Robert Alai v The Attorney General & Another (2017) eKLR** on this issue.
3. On the issue of protection of whistleblowers, the 1<sup>st</sup> and 3<sup>rd</sup> Interested party relied on article 2(6) of the Constitution on the effect of United Nations Convention Against Corruption, 2003 on the protection of the whistleblowers and further submitted that the Judiciary as an arm of the government ought to protect the Petitioner from retaliation as per the Convention, following the expose which saw the petitioner lose his job. That this will encourage other employees who go silent when such vices are happening in their work place.
4. On the issue of whether the termination of the Petitioner's employment was fair the 1<sup>st</sup> and 3<sup>rd</sup> Interested Party submitted in support of the Petitioner that he was dismissed unfairly hence was entitled to the prayers sought with costs.

## 2<sup>ND</sup> INTERESTED PARTY'S SUBMISSIONS

1. The 2<sup>nd</sup> Interested Party filed its submissions dated 20<sup>th</sup> March, 2024 and echoed the Petitioner's submissions. He further relied on the cases of **Pius Machafu Isindu v Lavington Security Guards Limited (2017) eKLR** and **Kenfreight(EA)Limited v Benson K. Nguti(2016) eKLR** on unfairness of the termination. The 2<sup>nd</sup> Interested Party submitted that the Petitioner was indeed dismissed for the role he played in the whistleblowing.

## DETERMINATION

1. The Court has reviewed and considered the amended Petition, the Respondent's replying affidavits, the further affidavit by the Petitioner and submissions by both counsels in support and opposition to the case. Further, the Court has further considered submissions by the interested parties and authorities relied on by Counsels and comes up with three main issues;
  1. I have Aa. aa. *Whether the Petitioner was entitled to be protected as a whistleblower.*
  2. *Whether the Petitioner's dismissal was unfair and due to his role as a whistleblower*
  3. *Whether the Petitioner is entitled to the reliefs sought.*
2. The Respondent has raised the issue of jurisdiction of this court which I will not dwell on since it was not disputed that there was an employer-employee relationship between the petitioner and the respondent.
3. On the issue of the abuse of the court process due to the **Nakuru ELRC Cause No. E039 of 2021** the Respondent submitted that the same had been dismissed with costs. In addition, nothing stopped the respondent from challenging this issue at the first instance before the matter came to conclusion besides the decision in the Nakuru matter was never placed before the Court.



***Whether the Petitioner was entitled to be protected as a whistleblower.***

1. It is not in dispute that the Respondent appreciated the role the Petitioner played as a whistleblower in this case. In their pleadings they appreciated this fact. They promoted him to his position so that he could have access to all information including confidential information. The Petitioner raised graft allegations in the University and it came out clearly that those involved were interdicted for being parties to criminal cases on those allegations.
2. The Mara Heist was aired on the Citizen Television on 1<sup>st</sup> September,2019 and the Petitioner recognized as a whistleblower. The Petitioner was therefore entitled to be protected from retaliation as provided for under Section 65 of the ACECA 2003 as well as Section 21 of the Bribery Act,2016 which prohibits intimidation and harassment. The Court also acknowledges the application of the United Nations Convention on Corruption 2003 by virtue of article 2(6) of the Constitution which allows for application of international treaties or conventions ratified by Kenya as part of the laws of Kenya.
3. I appreciate that article 10,13,17,32 and 33 of the Convention mandates the protection of whistleblowers. The letter from the Criminal Investigation Department to the Cabinet Secretary of Education referenced as "ECCU INQUIRY FILE NO. 188/2019: INTERFERENCE OF WITNESSES AT MASAI MARA UNIVERSITY" showed that there was interference with witnesses and the petitioner as the whistleblower was not spared. The Petitioner was therefore entitled to protection from retaliation.

***Whether the Petitioner's dismissal was unfair and due to his role as a whistleblower***

1. It is now an established principle that for termination to pass fairness test there must be both substantive and procedural fairness. This was noted in the cases of **Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR** and **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** among others. In the instance case the Respondent has put forth reasons for the summary dismissal of the Petitioner in its dismissal letter dated 17<sup>th</sup> June,2021 which are related to what transpired on the meeting of 1<sup>st</sup> September,2020. The Respondent was only avoiding giving the reason of whistleblowing as the ground for dismissal.
2. Whereas the Respondent raised those grounds it did not substantiate the same as required under section 43 of the Employment Act. It is a requirement of the law that the reasons must be fair and valid and the employer must believe they existed further the employer has a burden under section 47(5) to prove and justify the grounds of termination of an employee.
3. In this particular case there was no warning letter given to Petitioner and no show cause letter highlighting the accusations given as reasons in the dismissal letter. It is also interesting to note that the dismissal letter made reference to the meeting of 1<sup>st</sup> September,2020 where the Petitioner was invited to shed light on the graft allegations and not a disciplinary hearing. The fact that the Petitioner was dismissed some 10 months after the said meeting reasonably leads to the conclusion that the main reason was due to the Petitioner's whistleblowing role. The Respondent literally wanted to silence the Petitioner.
4. Whereas the Respondent has raised issues of fraud and inconsistencies with the Reports the same were not substantiated by the Respondent. The court also notes that the Petitioner was appointed to the position of Acting Chief Internal Auditor on 29<sup>th</sup> June,2020 but resigned on 25<sup>th</sup> August,2020. This meant the relationship between the parties ought to have ended at this point. The Respondent proceeded to invite the Petitioner for a meeting of 1<sup>st</sup> September, 2020 without addressing the issue of why the Petitioner resigned.
5. The Respondent continued engaging the Petitioner despite his resignation, for 10 months when it purportedly summarily dismissed him for a number of reasons different from what were discussed in the meeting of 1<sup>st</sup> September, 2020.
6. Whereas the Respondent relied on section 44(4) of the Employment Act to assert that the



Petitioner committed acts which were gross misconduct to warrant summary dismissal, the same were not been substantiated. The courts have emphasized that even in cases of summary dismissal the two requirements of fairness must be complied with. The court is guided by the case of **Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR**, where the Court of Appeal stated:

*“There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) - prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”*

1. In conclusion I find that the termination of Claimant’s employment was unjustified since there were no valid and fair reason for dismissal/termination.
2. On the procedure undertaken by the Respondent, whereas it states that it invited the Petitioner for meetings more specifically the meeting of 1<sup>st</sup> September, 2020 to shed light on the graft allegations the same were not disciplinary committee meeting. There were no charges preferred against the Petitioner in advance, no show cause letter was issued and he was never given an opportunity to be heard.
3. Section 41 of the Employment Act requires that an employee be notified of the charges against him, given time to make representations and attend the disciplinary hearing with a fellow employee or union representative.
4. In this case section 41 was never adhered to. Even in cases of summary dismissal the courts have maintained that section 41 of the Employment Act must be adhered to. This position was amplified by the Court of Appeal in the case of **Janet Nyandiko vs. Kenya Commercial Bank Limited [2017] eKLR** as follows:

*“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee’s employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”*

1. Failure to adhere to section 41 of the Employment Act and as emphasized by the above case law made the dismissal of the petitioner unfair contrary to section 45 of the Act and the Court so finds and holds.

### **Whether the Petitioner is entitled to the reliefs sought.**

1. On the prayer for reinstatement although it is one of the reliefs given under section 49(3) (a) of the Employment Act I agree that the relationship between the Petitioner and the Respondent had irretrievably broken down and he even tendered his resignation which was neither acknowledged nor accepted by the respondent as they still treated him as an employee and subjected him to the impugned disciplinary process and eventually purportedly summarily dismissed him. The Respondent has also stated that the petitioner’s position had since been filled up. The said prayer is therefore not available to the Petitioner. The Petitioner will therefore be only entitled to damages for unfair termination as earlier found.
2. I note that the Petitioner had worked for the Respondent for around 9 years and the court took the view that dismissing him summarily was intended to silence him from whistleblowing at



the university. Accountability and prudent use of public funds is one of the core values of our governance structure. To terminate the petitioner's service on account of one of the critical elements of our national values ought to be frowned upon. The Court therefore deems it a proper case to award the petitioner the maximum of 12 months' salary as compensation for unfair termination as provided for under section 49 of the Employment Act.

3. The claim for damages for continuous employment is rejected since employment contracts are finite and could end either by virtue of termination as provided in the contract or through other vagaries of life.

4. **In conclusion the Petitioner's Amended Petition is hereby allowed as follows:**

1. **Damages for unfair termination 12months x 258,393/= Kshs. 3,100,716/=**
2. **Certificate of service**
3. **Item (a) shall be subject to taxes and statutory deductions.**
4. **Costs and Interests**

**Dated this .....day of..... 2024**

**Delivered this .....day of .....2024**

**Abuodha Nelson Jorum**

**Judge**

SIGNED BY: HON. JUSTICE J. N. ABUODHA



THE JUDICIARY OF KENYA.  
NAIROBI EMPLOYMENT AND LABOUR RELATIONS COURT  
JUDICIAL REVIEW AND LABOUR RIGHTS DIVISION  
DATE: 2024-07-05 13:14:39+03

