Mwangi v Kenya Revenue Authority (Employment and Labour Relations Cause 148 of 2019) [2024] KEELRC 1792 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1792 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 148 OF 2019

MN NDUMA, J

JULY 11, 2024

BETWEEN

DANSON KAMAU MWANGI ..... CLAIMANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

JUDGMENT

1. The suit was first filed on 7/3/2019 vide a statement of claim which was amended and replaced by an amended statement of claim dated 14/6/2023.

2. The claimant seeks the following reliefs from the respondent:

   a. A declaration that the respondent is guilty of unfair labour practice in respect of purported termination of the claimant's employment.

   b. A declaration that the claimant's right to fair labour practices and fair administrative action has been breached resulting in unfair, irregular and illegal termination of employment.

   c. An order of reinstatement of employment and to be treated in all respects as if the employment had not been terminated.

   d. Costs and interest.

3. CW1, the claimant adopted an amended witness statement dated 14th June 2022. CW1 testified that he was employed by the respondent on 2/4/2008 as a driver. That he worked diligently until June 2012, when he was interdicted from duty by a letter dated 11/06/2012 in connection with a report on a car tracking incident that occurred on 10/1/2012.

4. The interdiction was pending investigation on alleged false report of carjacking while the claimant was dropping off officers, in KRA motor vehicle KAV 051E driven by the claimant outside Times Tower, main gate at Nairobi.

5. CW1 testified that he was called to a disciplinary hearing on 25/11/2015. However, by a letter dated 16/12/2016, the respondent informed the claimant that his previous disciplinary process had been faulted and that the claimant was to be subjected to a fresh disciplinary process.

6. The letter stated partly,

> Consequently, further to our letter dated 11th June 2012, we wish to advice that investigations carried out have revealed the following:
>
> a. That on 10th January 2012 at around 1445 hours you dropped off two Domestic Tax Department officers at the main entrance gate of Times Towers and immediately drove off vehicle registration number KAV 051V towards Haile Salassie Avenue.
>
> b. That you were observed stopping vehicles along Mai Mahiu – Naivasha road on the night of 10th January 2012.
>
> c. That you travelled to Limuru in a KRA vehicle without the requisite authority to attend to personal matters.
>
> d. That the motor vehicle in question was parked at your residence on the night of 10th January 2012 until the following morning when you drove back the same car to Times Towers.
>
> e. That when the vehicle was inspected it was found to have dents that you could not account for.
>
> f. That you did not report the alleged carjacking incident to the police or the KRA Security Control Room for necessary action."

7. The claimant responded to this letter by a letter dated 23/12/2016 in which he denied the allegations of gross misconduct aforesaid. The claimant stated that the carjacking incident took place after he had dropped the two DTD Officers on 10/ 01 /2012. That the carjackers ordered the claimant at gun point to drive as directed. That he drove on Haille Sellasie Road, Langata Road until he found himself at Magadi Road where he was ordered to stop. That the claimant was pushed to the back seat of the vehicle and one of the carjackers ordered the claimant not to attempt any stupid move of either calling for help or attempting to jump otherwise they would shoot him dead. That the other carjacker took control of the vehicle and drove off. The claimant said he did not realize where they were until the vehicle stopped as he was lying down.

8. The claimant said he was then woken up by a sharp pain in the head and a loud voice ordering the claimant to wake up. The claimant said he was in pain from a heavy kick on the head. That the car drove for a while, and the carjackers jumped off and told the claimant that they were through with him and warned him not to look back.

9. The claimant said he lay low for a long time scared and after a while he realized that he had been abandoned along a highway being Nairobi-Naivasha highway at Mai Mahiu. The claimant said he was shaken, frightened and confused and he drove fast to where he thought he was safe and that was his home.

10. That the claimant woke up early in the morning at 6 a.m. and drove to Times Tower and immediately reported the matter to the security division. That one Mr. Mongare recorded a statement from the claimant on the carjacking incident.

11. The claimant said he received the letter of interdiction dated 11/6/2012 and was subjected to a disciplinary hearing but no outcome was communicated to him until he was again served with a notice to show cause and intention to conduct a second disciplinary hearing on the matter dated 16/05/2016.

12. The claimant requested to be provided with important documents to responded to the notice to show cause including preliminary investigation report, alluded to in the letter of interdiction dated 11/6/2012; final investigation reports, if any, copy of the minutes of the disciplinary committee findings and recommendation if any; statement or a list of the shortcomings of the disciplinary process as alluded to in the letter dated 16/05/2016 that informed the review of the case and a second hearing by a different panel; copy of the inspection report on the alleged dents on the motor vehicle KAV 051V; and statements of the security division; copy of occurrence book at the division; copies of all witness statements and copy of the notice to show cause letter.

13. The respondent supplied some of the requested documents listed in a letter dated 1/11/2017 including investigation report of 2/2/2012, incident report with photographs of the dented vehicle; copy of personal statement by the claimant, OB entry copy and copy of daily work ticket. The claimant said that to-date he does not know why the initial disciplinary process was faulted and what recommendations were made therein because he was not given minutes of the previous disciplinary hearing and the findings by the committee. The claimant said that he was subjected to two different disciplinary processes hence double jeopardy. That the disciplinary process was also inordinately delayed from the date of the incident.

14. CW1 testified that he was called to a disciplinary hearing on 29/3/2018 after staying on interdiction for over 68 months. That this delay violated the respondent's code of conduct (Rules and Regulations Governing Discipline and Grievance) and section 41 of the *Employment Act*, 2007 which provided for an employee to be accompanied by a colleague. CW1 said he was not accompanied to the said disciplinary hearing. The claimant added that the procedure followed by the respondent violated Articles 41, 47, 48, and 50 of *the constitution* of Kenya 2010

15. CW1 stated that his employment was terminated by a letter dated 1/8/2018. The reasons for the dismissal are stated in the letter as follows:-

> "Management has considered your representation but found it unacceptable since it is evidenced that you misused KRA vehicle registration no. KAV 051E as confirmed by 557 kilometres travelled without authorization. The said vehicle was found with damage arising from this misuse.
>
> Further, it is also evidenced that you did not report the purported carjacking incident to any police station or even call the KRA Security Control Room or any of your supervisors contrary to the authority's procedure. It is a clear case of faked carjacking that never occurred which portrays how dishonest you are to your employer."

16. The claimant insisted that the carjacking took place and his explanation and plight was ignored by the respondent. That he was interdicted for 68 months with half salary to his loss and detriment.

17. That the letter of termination did not state that the claimant had been found guilty of gross misconduct. The dismissal was therefore without basis.

18. That the disciplinary process was extremely flawed as it was conducted after 3 years of interdiction in violation of section 41 of the *Employment Act* and Article 41, 47, 48 and 50 of *the Constitution* of Kenya 2010.

19. That CW1 appealed the decision to dismiss him from employment but the appeal was not determined by the commissioner – General of the respondent in accordance with Rule 11.2 of the Code of Conduct.

20. That the claimant was not given any hearing before the appeal was dismissed in a record 3 days.

21. That the constitutional right for fair labour practices and a fair administrative action were violated by the respondent in a gross manner.

22. The claimant was subjected to financial and mental anguish and could not support his livelihood and that of his family. That the claimant only received half salary and house allowance in the prolonged interdiction period.

23. The claimant was closely cross-examined by M/s. Wambua, Advocate for the respondent and the claimant by and large stack to his narrative of how he was carjacked, driven for a long time to places he did not know until finally he was left along Mai Mahiu Naivasha highway. The claimant explained how scared, traumatized and shaken he was by the ordeal hence when he realized that the carjackers had left, he drove home straight and woke up early in the morning to report the ordeal to the security department of his employer.

24. The claimant explained that the scare and trauma to have been the reason why he did not drive to a police station upon realization that he was free. The claimant explained that the carjackers had taken his phone and switched it off and so he could not speak to anyone. The claimant explained that during the long journey he was lying on the floor and one carjacker stepped on him.

25. The claimant explained that he had worked for KRA since 2007 and had no adverse record. The claimant explained that the armed carjackers had told him to go without looking back and not try anything. That nothing was stolen from him. That he had no money and his phone was returned to him.

26. The claimant denied that he had recorded a statement stating that he had taken his wife to Kijabe. The claimant said he was told to sign a statement by security officers of KRA without reading the same. The claimant said he never took his wife to hospital. The claimant produced his own statement in which he said he was carjacked. The claimant said he had no wife while he worked for KRA.

27. The claimant denied that he had concocted the hijack. He said he worked for 11 years for KRA and sought to be paid gratuity and other terminal benefits including unpaid salary during the interdiction. That he was not paid any terminal benefits upon termination. That he was not paid pension.

Defence

28. RW1 Thomas Mongare adopted a witness statement dated 26/7/2019 as his evidence in chief and produced bundle '1' as his evidence.

29. RW1 stated that he was a security officer and was tasked to investigate the matter. That he had interviewed several officers with a view to establish the truth. That he first interviewed the claimant who was a driver of the respondent. That claimant stated that he was allocated motor vehicle KAV 015E on 10/1/2012 to take DTD officers to various companies located in Kangundo Road and Industrial Area. That he brought back the officers at 1700 hours dropping them at the main gate at their request.

30. That upon dropping them, three armed men in suits entered the vehicle and asked him to drive away.

31. That he drove the vehicle to Magadi road arriving there in darkness and was ordered to go to the back seat and sat on the floor and that the carjackers spoke Kikuyu language and overheard them saying that they wanted to go to Limuru.

32. That he was called by the Transport Officer once at Limuru but could not answer the calls because he was confused and worried.

33. That he then drove the vehicle back to Ruaka where he resides and reported to work the following morning and reported the matter to his bosses and handed over the work ticket.

34. RW1 said that the claimant had around 2030 hours received a call from Mr. Antony Ng'ang'a, the Transport Officer on his cell phone who asked him where he was and he replied that he was in Kijabe town, where his wife was receiving treatment, under the carjackers instructions after they enquired who was calling.

35. RW1 stated that the claimant had admitted that he responded to calls from Assistant Commissioner Transport Maj. (Rtd) Nicholas Mayenze and another transport office Mr. Ngetich who had called to find out his whereabouts and he informed them that he was at Limuru on his way home. That the claimant had stated that at the time Mr. Ngetich called him, they had arrived at Mai Mahiu where the carjackers disembarked after taking everything from him including Kshs. 3,000/=, cell phone and other personal effects. That he drove the vehicle to his home at Ruaka around 22:30 hours where he remained until he reported to work the following morning.

36. RW1 said that the claimant had said that he did not inspect the vehicle but had heard a loud bang on the driver's door on the way to Mai Mahiu town. That he realized the vehicle had a dent the following morning.

37. RW1 said the two statements recorded from the claimant had inconsistencies. RW1 said he interviewed other officers including Mr. Anthony Ng'ang'a; Mr. Joel Ndaka; Mr. Robert Ngetich; Major (Rtd) Nicholas Mayenze; Ms. Roselyn Byta; Mr. Wilbert Nyabika Ochieng and Mr. Peter Kundu Njoroge.

38. RW1 said the vehicle driven by the claimant left the station in the morning on 10/ 1 /2012 at 10:30 hours and returned at Times Towers on 11/01/2012 at 0625 hours. That the claimant had dropped off staff on 10/1/2012 at 1445 hours and the claimant drove off immediately alone in the vehicle towards Haile Sellasie Avenue.

39. That the claimant was seen at Mai Mahiu on the night of 10/1/2012 flagging down transit vehicles according to Mr. Peter Kimani, a drive of investigation and enforcement department who relayed the message to Mr. Ndaka.

40. RW1 said the security officers at times tower would have noticed the carjack if it was true. That carjackers hardly allow victims to communicate to anybody and that there are road blocks along Nairobi/ Mai Mahiu road and the claimant would have reported in one of those roadblocks.

41. RW1 said that the investigators concluded that the claimant was not telling the truth from the many inconsistencies in his two recorded statements. That indeed the claimant drove off alone after dropping the officers along Haile Sellasie Avenue and drove off. That the DTD – Dr officers saw him drive off after dropping them.

42. That the claimant misused the vehicle in violation of the company policy. RW1 was cross-examined by Mr. Wandaka Advocate for the claimant. RW1 insisted that the claimant was lying. That he was not

carjacked but had decided to misuse KRA motor vehicle. That the Commissioner General would not be directly involved in a disciplinary matter of a driver. That there were many senior officers who dealt with the matter appropriately. RW1 insisted that KRA Security officers would have responded if there was a carjack outside Times Towers. That none of the witnesses interviewed witnessed any carjack. That the claimant drove off alone after he was told by security officers not to park at the gate.

43. RW2 Grace Mwangi the manager Human Resource and information adopted a witness statement dated 10/4/2019 as her evidence in chief and produced exhibits '2' to '8' as her evidence. RW2 said that she was a member of the disciplinary committee. RW2 said that they were about three (3) in the panel. That it was not a requirement for a Board Secretary or Commissioner to be part of the disciplinary panel. RW2 said that the panels relied on an investigation report which was before court. RW2 said that the claimant responded to a notice to show cause which response was considered by the disciplinary committee before which the claimant appeared on 29/3/2019. That the claimant declined to submit to the disciplinary process though the claimant was given opportunity to present his evidence in writing and orally before the disciplinary panel.

44. That the respondent communicated its decision to dismiss the claimant from employment without delay. That the panel considered all the facts of the case. That the rights of the claimant to fair labour practices and fair administrative action were not violated.

45. RW2 said she worked for KRA for 26 years and knew the claimant. RW2 said he was not privy to the facts of the carjack or the motor vehicle which the claimant was assigned to at the material time. That the claimant was in logistics department while she was in HR department.

46. RW2 said her work was to ensure due process was followed in disciplining the claimant.

47. RW2 said the minutes of the disciplinary hearing were not before court. That the claimant did not request for the minutes. That the minutes were in the custody of one Patrick K'ogodi, RW2 said the claimant had no warning letter in his record. RW2 said that the respondent has a Human Resource Manual which guides disciplinary process. That the claimant was found guilty of gross misconduct against the code of conduct of the respondent. RW2 said the claimant did not appear for oral hearing. That he was under interdiction for 37 months. RW2 said maximum period for interdiction should have been six months in terms of the code but due to the complex nature of the case it took time to conclude the matter. RW2 said investigations were completed in 2015 but the disciplinary process was done in 2018 about 3 years later. RW2 said that the interdiction was on half pay and full house allowance.

48. RW2 said that the Head of HR changed three times during that period and this affected the expedient conclusion of the case. RW2 said claimant's case did not have to go to the Board level since he was a lower cadre officer as a driver. That the committee made recommendation for dismissal to the commissioner corporate support services. The recommendation was not before court. That the Chief Manager Employee Relations signed the letter of termination on behalf of the Deputy Commissioner Human Resource.

49. RW2 said the respondent had a transport policy and code of conduct that governed all employees. That charges were outlined in the letter of interdiction. That the claimant was guilty of violating clause 6.5 of the code of conduct by using KRA motor vehicle for private purpose. That KRA had nine thousand employees. That there was no reason to target the claimant for termination unfairly. That the suit lack merit and it be dismissed.

Determination

50. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1, RW1 and RW2.

    The issues for determination are:

    a. Whether the termination of the claimant was for a valid reason?

    b. Whether the respondent followed a fair procedure in terminating the employment of the claimant?

    c. Whether the claimant is entitled to the reliefs sought?

51. The court will deal with issues (a) and (b) together.

52. The investigations leading to the interdiction of the claimant by the letter dated 11/6/2012 was in terms of part 8.1.1 of the KRA code of conduct. The claimant was accused thus:

> " We have received a preliminary investigation report detailing that on 10th January 2012 you were assigned KRA motor vehicle KAV 051E to drive two KRA officers on official duty. That you alleged to have been involved in a carjacking incident outside Times Tower, main gate, while dropping off the officers. However, no such carjacking incident occurred as claimed."

53. The interdiction was with immediate effect on half salary and full house allowance. The claimant was to forfeit his annual leave due for the period of interdiction.

54. The claimant was not asked to respond to the letter of interdiction.

55. The investigation report dated 17/6/2014 detailed the findings by the investigations regarding the allegations by the claimant of carjacking while driving motor vehicle KAV 051E on 10/10/2012.

56. It was not until 16/2/2016 when the respondent issued a show cause letter to the claimant in which the findings of the investigations regarding the incident of carjacking are summarized in bullets (a) to (f).

57. The claimant was accused of violating the following sections of KRA code of conduct

    i. Section 6.2.5.4 failure by an officer to discharge or perform assignments, duties or obligations in a manner and to a standard satisfactory and acceptable to KRA.

    ii. Section 6.2.5.6 negligence, dishonesty or want of care of an employee resulting in serious loss, shortage, injury or any 'damage to' the authority.

    iii. 6.2.5.9 failure to comply with statutory requirements, departmental instructions, court directives within the stipulated time without justifiable reasons.

    iv. 5.6.5.5 using the Authority vehicles or boats for private purposes without approval.

58. The claimant was to respond to the allegation within 14 days. The claimant requested for documents to help him respond to the allegations immediately upon receipt of the NTSC, however, it was not until 1st November 2017, when the respondent responded to his request and forwarded some of the requested documents.

59. The claimant did not receive statements from his accusers and in particular those who alleged to have seen him at the time the claimant said he had been high jacked at Times Tower and at Mai Mahiu.

60. It took a few other months for the claimant to be invited to a disciplinary hearing vide a letter dated 23/3/2018.

61. The hearing was said to be in terms of section 41(1)(2) of the *Employment Act* and section 7.10 of the KRA code of conduct. The hearing was scheduled for 29/3/2019. The claimant was invited to tender oral explanation and was informed of the right to bring a colleague of choice at the hearing.

62. The claimant declined to submit to the hearing process having not received the documents he had requested to prepare for the hearing. The claimant had given an extensive written explanation to the respondent on the allegations contained in the letter of interdiction. The response is dated 23/12/2016 in which the claimant had requested preliminary investigation report referred to in the letter dated 11/6/2022; final investigation report; minutes of first disciplinary committee proceedings; list of disciplinary process shortcomings that led to the 2nd disciplinary process in terms of the letter dated 16/12/2016 which commenced the 2nd disciplinary process; inspection report of motor vehicle KAV 051E; photographs of the dented car; copy of statements to the security division regarding the carjacking incident; copies of all witness statements on the subject matter and copies of daily work tickets six months prior to 10th January 2012 and a copy of the response to the notice to show cause by the claimant delivered to HR Department.

63. In terms of the Rules and Regulations governing discipline and grievances at KRA, the offence of misuse of the Authority's property falls under part 6.2 of general gross misconduct Part 7 on disciplinary procedure, which provided interalia: -

    7. 2 For mishandling and gross misconduct the regional head, heads of departments and station managers should forward the allegations, complainants to senior deputy Commissioner Human Resource for necessary action.

    7. 8 The senior department Commissioner Human Resources will on receipt of report, allegation or complaint seek approval from the Commissioner General and charge the employee with the offence committed spelling out the penalty applicable to such an offence.

    7. 4 The employee will be required to defend himself within fourteen to twenty one days upon receipt of the letter.

    7. 5 Copies of the necessary documents relating to the offence shall be provided to the empo9yee upon request except the investigations report.

    7. 8 The Disciplinary Committee will examine the circumstances of the case, receive any investigations report and hear such evidence from the staff and other witnesses and make recommendation to the Commissioner General.

    8. 2 Cases of interdiction will be determined within six months as much as may be possible (emphasis added).

    9. 11 Dismissals for employees in grades KRA 1-3 shall be approved by the Board of Directors on recommendation of the Commissioner General or the staff committee of the Board.

    Dismissals for all other employees shall be approved by the Commissioner General on recommendation of the Disciplinary Committee (emphasis added).

    11. 3 The Commissioner General shall constitute a committee to hear appeals for staff in KRA 4-16. Appeals for staff in KRA 1-3 shall be determined by the Board of Directors.

    11. 4 The appellant may also be invited to present his/her appeal in person before the committee."

64. In a letter dated 27/3/2018, written to DC Human Resources by the claimant, the claimant pointed out that documents he had requested vide the letter dated 23/12/2016 were not given to him to prepare for the disciplinary hearing on 29/3/2018. The documents not availed to him included, copy of report of preliminary investigations; copy of minutes of the disciplinary committee meeting held on 25/11/2015; statement or listing of the disciplinary process short comings alluded to in the respondent's letter dated 16/2/2016; copy of motor vehicle inspection report on alleged dents to motor vehicle KAV 051E and photographs showing alleged dents; copies of all witness statements on the subject matter and work tickets for the motor vehicle KAV 051E for the six months period before the incident.

65. The claimant noted that six (6) years had lapsed since the date of his interdiction. The claimant also notified KRA that

> " Finally, I wish to point out that should the disciplinary hearing set for 29th March 2018 proceed in the absence of the requested documents and answers on questions I have raised in the various correspondence to HR, the outcome of that hearing will no doubt lack legal validity."

66. As it came to pass the respondent did not avail the requested documents to the claimant. The claimant declined to submit himself to what he regarded as a flawed and unfair process. The committee went ahead and terminated the employment of the claimant by a letter dated 1/8/2018 referred to earlier in this judgment. The termination was said to be in terms of section 44 (a)(c) of the *Employment Act*, 2007 read with KRA 's code of conduct clause 6.2.5.4; 6.2.5.6; 6.2.5.9 and 6.5.5 as charged in the NTSC referred to earlier.

67. The claimant submitted a detailed memorandum of appeal to the commissioner corporate support services through the Deputy Commissioner Human Resource dated 22/8/2018. The claimant faulted the substantive and procedural validity of the process which led to termination of his employment. The claimant reiterated his innocence on the charges made against him and faulted the entire procedure followed in arriving at the termination.

68. The appeal was dismissed by a short letter dated 31/8/2018. The claimant was not invited to make any oral submissions before the appeals committee. In the letter written by Deputy Commissioner Human Resource, the officer stated: -

> " We have reviewed your case and wish to advice that you have not raised any new grounds to warrant review of our earlier decision."

69. The letter did not disclose who heard and determined the appeal. It would appear that the same committee that heard the disciplinary matter also considered and dismissed the appeal. A reading of the letter shows that the appeal was dealt with as an application for review before the same committee that had heard and determined the disciplinary case.

70. The conclusion by this court is that a delay of six years to determine a disciplinary case against the claimant amounted to a gross violation of the claimant's right to fair administrative action protected under Article 47(1) of *the Constitution* of Kenya 2010 read with section 4 of the *Fair Administrative Action Act*, 2015.

Article 47 provides: -

> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"

71. Lord Greene MR in Associated Provincial Pictures versus Wednesbury Corporation (1948) 1 KB 223 held as follows;

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

72. In Council of Civil Service Unions versus Minister for the Civil Service (1985) AC 374 it was held that;

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.
>
> The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (''[[Associated Provincial Picture Houses Ltd v Wednesbury Corporation]]'' [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in ''[[Edwards v Bairstow]]'' [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. <u>This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that</u>

are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of [[natural justice." (emphasis added)

73. In Animistic versus Foreign Compensation Commission (1969) 1 ALL ER 20, it was held that;

> " It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

74. In Republic versus Public Procurement Administrative Review Board & 2 Others Ex parte Pelt Security Services Limited (2018) e KLR

> " The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated. In Prasad v Minister for Immigration, the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively... so devoid of any plausible justification that no reasonable body of persons could have reached them".

75. In Republic versus National Land Commission and 2 others Exparte Archdiocese of Nairobi Kenya Registered Trustees St Joseph Mukasa Catholic Church Kahawa 2018 e KLR Odunga J held as follows

> " I agree with Chief Constable Pietermaritzburg vs. shim 1908 29 NLR 338 where the court held that:
>
> "it is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right. To the applicant, this court's decision shows that the audi alteram partem rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The audi alteram partem rule ensures a free and impartial administrative process, within which decisions and cognizance of facts and circumstances, occur altogether openly."

76. The respondent in this matter acted in a grossly irrational manner by delaying the disciplinary process while the claimant was under interdiction for a period of over six years. Furthermore, the respondent failed to provide essential documents to the claimant to enable the claimant to adequately defend himself and subjected the claimant to two separate disciplinary processes and failed to provide any reasonable explanation for that. In sum, the respondent grossly violated its own Rules and Regulations Governing Discipline and Grievances and in particular by

a. Failing to conclude the disciplinary process within a period of six months from the date of interdiction.

b. Failing to provide the claimant with various documents requested for which were essential for the claimant to defend himself.

c. Failure to provide any prove that the Commissioner General had approved the termination upon advice by the disciplinary committee.

d. Failure to prove that the committee that determined the appeal had been constituted by the Commissioner General and that the Commissioner General had made and or approved the decision by the appeals committee.

77. By subjecting the claimant to two different disciplinary committees and by failing to provide the claimant with the proceedings and recommendations of the 1st disciplinary committee, the respondent violated the principle of legality in subjecting the claimant to double jeopardy to his loss and detriment.

78. The disciplinary process amounted to unfair labour practice in violation of Article 41 of *the Constitution* of Kenya 2010.

79. The respondent denied itself a lawful opportunity to determine the validity of the allegations made against the claimant and by so doing violated section 41, 43 and 45 of the *Employment Act*, 2007.

80. By keeping the claimant under interdiction on half pay and without any work for a period of six years, the respondent did not only engage in unfair labour practice but violated, the claiman'ts to expeditious, efficient, reasonable and procedurally fair administrative action and in so doing violated the rules of natural justice well-articulated in the various decisions cited in the judgment above.

81. In sum, the termination of the Employment of the claimant was unlawful and unfair and the claimant is entitled to the reliefs sought including: -

i. One month salary in lieu of notice in the sum of Kshs. 51,000/=

ii. Unpaid half salary for the period 11/6/2012 when claimant was interdicted to the date of termination being 1/8/2018 a period of 37 months calculated as follows (37 x 51,000 x ½) Kshs. 943,500/=

iii. Full pension payable to the claimant from date of employment in 2007 to date of termination on 1/8/2018 to be calculated within 30 days by the respondent and presented before court for approval for computation and payment.

iv Compensation in terms of section 49(1)(c) and 4 of the *Employment Act*, 2007.

82. In evaluating compensation due to the claimant, the court has considered the hardship the claimant was subjected to unlawfully for a period of six years on half pay before the termination; failure to pay the claimant any compensation and or any terminal benefits upon termination; failure to pay the claimant any pension upon unlawful termination. Further, the claimant was not proved to have contributed to

the dismissal and was unlawfully denied opportunity to be employed and earn decent pay to date of retirement. The claimant had a clean record for 11 years he served the respondent without any warning.

83. The court has also considered the case of Kenfreight EA Limited and Benson K Nguti (2019) e KLR where the Supreme Court held that;

> "Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)"

84. The matter has taken a very long time to conclude and would be inappropriate to consider the remedy of reinstatement due to the inordinate passage of time especially in view of the edict under section 12(3) of the *Employment and Labour Relations Court Act*, No. 18 of 2014 which provides: -

85. In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders

> " para (vi)
>
> an order for reinstatement of any employee within three years of dismissal, ------''

86. The court therefore awards the claimant the maximum compensation of the equivalent of twelve (12) months' salary in the sum of Kshs. 612,000/=.

87. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-

    a. Kshs. 51,000/= in lieu of notice

    b. Kshs. 612,000/= in compensation

    c. Kshs. 943,500/= arrear salary

    d. Pension due and payable to the claimant for the period served between the year 2007 and 11/8/2018 (to be computed by respondent within 30 days and filed for approval).

    e. Interest at court rates from date of interdiction till payment in full for item (c) above; and from date of judgment in respect of (a) (b) and (d) above till payment in full.

    f. Costs of the suit.

DATED AT NAIROBI THIS 11TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Wandaka for claimant

M/s. Wambui for respondent

Mr. Kemboi Court Assistant