Republic v Public Service Commission & another; Kirinyaga County Public Service Board (Exparte Applicant) (Judicial Review E003 of 2023) [2024] KEELRC 2129 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEELRC 2129 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

JUDICIAL REVIEW E003 OF 2023

ON MAKAU, J

AUGUST 9, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

KENYA UNION OF CLINICAL OFFICERS ..... 2ND RESPONDENT

AND

KIRINYAGA COUNTY PUBLIC SERVICE BOARD ..... EXPARTE APPLICANT

JUDGMENT

Introduction

1. Pursuant to the leave of this Court of 19th July 2023, the Applicant filed a Notice Motion dated 7th August 2023 and amended the same on 20th December 2023. It seeks for: -

    a. An order of *certiorari* to remove and bring to this Honourable Court for the purposes of quashing, the decision by the 1st respondent delivered on 14th April 2021 between the members of the 2nd Respondent and the ex-parte Applicant reinstating the members of the 2nd Respondent to their previous employment.

    b. That cost of this Application be provided for.

2. The application is premised on the facts and grounds set out in the Statutory Statement and the verifying affidavits sworn by Carolyne Kinyua on 14th July 2023. The grounds for review as laid out in the Statutory Statement are as follows:

    a. The decision is *ultra vires*, illegal and procedurally improper.

b. The decision is irrational, unreasonable and incapable of compliance.

c. The decision failed to take into account relevant factors.

3. The 1st Respondent opposed the motion vide a Replying Affidavit sworn on 19th September 2023 by Remmy Mulati, Deputy Commission Secretary. The 2nd Respondent on the other hand filed a Notice of preliminary objection dated 15th September 2023 on ground that the Court lacks jurisdiction over the matter, the application is time barred, the application is fatally defective and bad in law and that the prayers are inconsistent with the leave granted.

4. The Preliminary objection, was dismissed on 20th December 2023 and the applicant was allowed to amend the motion to align it with the leave granted for instituting the proceedings. Subsequently the 2nd respondent filed a Replying Affidavit sworn on 4th April 2024 by its General Secretary George Maroah Gibore and thereafter, the applicant filed a further affidavit sworn on 17th April 2024 by the said Carolyne Kinyua.

Facts

5. The undisputed facts of this case are that the 2nd respondent's members (hereinafter called "the grievants") went on strike from 28th May 2010 and the applicant obtained court orders declaring the strike as unprotected and directing the grievants to return to work. The grievants defied the court order and even the olive branch extended to them by the County government. As a result, the Applicant summarily dismissed them from employment vide letters dated 8th July 2019. The reason for the dismissal was absence from work without leave or lawful cause. The dismissal was back dated to 28th May 2019 when the grievants started the strike.

6. The 2nd respondent sought refuge from the Court of Appeal with respect to the said judgment of this court on the unprotected strike but when it failed to succeed, it filed an appeal before the 1st respondent on 22nd October, 2020. The appeal was allowed vide a decision dated 14th April 2021 whereby the applicant was ordered to reinstate the 46 grievants. The 1st respondent acknowledged that the grievants had continued in their strike after the court had restrained them but went on to hold that their dismissal did not adhere to the disciplinary process and there was no rebuttal from the applicant.

7. The bone of contention between the two sides is whether the impugned decision is tainted with procedural impropriety illegality irrationality.

8. The applicant averred that it was condemned unheard because it was never served with the appeal, hearing notice or even the notice of the date scheduled for rendering the decision. It further contended that as at the time of the alleged service the Board was not properly constituted. It also contended that it filed an application for review in order to salvage miscarriage of justice but the 1st respondent dismissed it on ground that the grievants were employed on permanent basis and were dismissed without being served with show cause letters. It maintained that it has air tight and concrete evidence against the 2nd respondent but it was denied an opportunity to prosecute its case.

9. The applicant, further contended that the impugned decision is irrational, unreasonable and incapable of compliance because it ordered for a reinstatement when the positions left by the dismissed grievants had already been filled by new officers. Further that, in passing the impugned decision, the 1st respondent failed to take into account relevant factors including limited budgetary allocation from public coffers for its operation, and the fact that the grievants were acting in contempt of court order that had declared the strike unprotected.

10. However, the 1st respondent averred that it has mandate under Article 234 (2) (i) of the *Constitution* and section 85 of its Act to hear and determine appeals regarding County Government's public service. It exercised the said mandate by entertaining the appeal by the Union dated 22nd October 2020 filed on behalf of its 46 members who had been dismissed by the applicant on account of absenteeism. It then procedurally served the Applicant with a letter dated 27th October 2020 requesting it to file a response and file the relevant documents in relation to the matter. The Applicant respondent by the letter dated 28th January 2021 indicating that it was not properly constituted and therefore could not respond to the appeal.

11. The 1st respondent wrote another to the Applicant on 5th February 2021 requesting for its response to the appeal since it had now been properly constituted, but again no response was elicited. As such, the matter was placed before the County Appeals Committee in accordance with Regulation 11 of the *PSC (County Government Public Service Appeals Procedure) Regulations, 2016* and a meeting was convened in accordance with Regulation 11(4) to consider the appeal and make recommendations to the Board. In the end the appeal was allowed on basis of the available documents and a decision passed and communicated to the parties on 14th April 2021 on basis of the recommendations. The decision acknowledged that the participation of the grievants in an unprotected strike was a valid reason for dismissing them, but still found the dismissal to be unlawful fair because procedure was not followed.

12. The 1st respondent contended that regulation 11 (7) provided the PSC the discretion to hear appeals orally or through written submissions where it felt that the evidence was not sufficient to make a decision. It further contended that the Applicant was not condemned unheard since it was served with all the documents but failed to file a response as requested. It further accused the Applicant of approaching the Court with unclean hands by concealing the fact that it appointed an advocate to represent it in a related appeal by the nurses, and the counsel appeared before the commission for oral hearing. The said appeal by the nurses was among the appeals listed in the letter dated 5th January 2021, whereby it reminded the Applicant to respond. Only after rendering the impugned decision that the Applicant's Advocates, Wanyonyi & Muhia Advocates served it with two letters on 3rd May 2021, one seeking joinder of the County Government to the proceedings and the other applying for review of the said decision.

13. The 1st respondent further averred that the 2nd respondent also applied for review of the impugned decision vide its letter dated 4th June 2021 on ground that it was aggrieved by order ii of the decision which indicated that the period of dismissal was to be treated as leave without pay for pension purposes but it dismissed 2nd respondent's application on 13th October 2021 and upheld its earlier decision. Thereafter the Union responded to the Applicant's review application vide a letter dated 5th November 2021 urging the commission to dismiss the application for lack of merit.

14. The application for review was canvassed by way of written submissions and upon consideration of the same, Commission rendered its decision on 28th March 2023 whereby it found that the application lacked merit as it failed to meet the threshold or review set out under section 88 of its Act and Regulation 24(2) of the Appeals Regulations, and proceeded to dismiss it. It was further held that all the parties were afforded a fair hearing before the decision of 14th April 2021. Therefore, the court was urged to dismiss the instant motion with costs.

15. The 2nd Respondent averred that the grievants were dismissed by the Governor Kirinyaga County, Ann Waiguru vide a media statement on 27th June 2019 following a resolution by the County Executive on 26th June 2019. Thereafter the applicant issued letters dated 8th July 2019 summarily dismissing the 46 grievants with effect from 28th May 2019. As a result, the grievants filed appeals before the 1st

respondent vide letters dated 13th October 2020. The 1st respondent then wrote to the Applicant on 27th October 2020 notifying it of the appeals and requested it to file responses to the appeals. On 5th February 2020, the 1st respondent sent a reminder to the Applicant about the ongoing appeals but again it failed to file any response to the appeals, although it appointed the firm of Waweru Gatonye Advocates to represent it in other related Appeals before the PSC. Therefore, the 1st respondent allowed the appeals by the grievants and ordered for their reinstatement vide its decision communicated through a letter dated 14th April 2021.

16. The 2nd respondent averred that the Applicant refused to comply with the said decision and on 23rd March 2023, two years after the decision, it filed an application dated 17th March 2023, urging the 1st respondent to review of the decision. It averred that, section 75(2) of the *PSC Act* and Rule 24(3) of the *Appeals Regulation 2022*, limits the time for filing review applications to 6 months after the decision.

17. It further averred that the said review application was premised on the same grounds as the instant application and it was dismissed for lack of merit on 28th March 2023, but the Applicant has not challenged the said decision.

18. He reiterated the grounds of objection raised in the notice of preliminary objection which was dismissed on 20th December 2023. In addition, it averred that the application is otherwise *res judicata* since it raises the same matters which were heard and determined on 28th March 2023 by a Commission with competent jurisdiction. It further averred that the only option available was for the applicant to challenge the decision of 28th March 2023. It also contended that the applicant is in contempt of the impugned decision by failing to reinstate the grievants yet there is no order staying the said decision.

19. The 2nd respondent contended that the application does not avail any grounds upon which the court can issue an order of *certiorari*. It averred that the Applicant has not provided grounds indicating the unreasonableness of the impugned decision to warrant the *certiorari* orders and instead it has gone all out to attack the merits of the decision. It contended that in an application for Judicial Review, the court is limited to consider only the administrative unreasonableness of the impugned decision as opposed to the merits of the decision.

20. It denied the Applicant's claim that it was condemned unheard and averred that there is evidence on record that demonstrates that the applicant was indeed served with the appeal papers but failed to enter appearance and participate in the proceedings. Besides, there is factual determination vide the decision of 28th March that the applicant was served with the appeal and the applicant has not challenged that decision.

21. It denied allegation that the impugned decision was illegal for being made in disregard of court orders and averred that the question of summary dismissal was never before the Court in Nyeri ELRC 17 of 2019 or Nairobi CA 270 of 2019. Besides the said court orders were never served on it or the grievants. It contended that, immediately the said cases were concluded, the grievants were locked out and thereafter they were issued with termination letters. It contended that none of the grievants were served any show cause letter or letter inviting them to disciplinary hearing. It averred that irrespective of the reason that an employer might have for dismissing an employee, the employment laws in Kenya require that procedural fairness must be observed. Consequently, the 1st respondent should not be faulted for following the law in that regard.

22. The 2nd respondent denied that the 1st respondent acted *ultra vires* and argued that the impugned decision was well within mandate of the 1st respondent. It averred that section 74(5) of the *PSC Act* mandated the 1st respondent to set aside a decision; or direct the refund, reinstatement of remuneration or release any withheld payments due to the public officer as it considers to be just; and make any

other appropriate decision in view of the circumstances of the case. It also contended that the applicant has not demonstrated how the 1st respondent acted outside its mandate with respect to the impugned decision.

23. The 2nd respondent further averred that the Applicant has not demonstrated any impracticability of reinstating the 46 grievants as ordered by the 1st respondent vide the impugned decision and averred that the purported list of recruited Clinical Officers is not an official document of the County Government of Kirinyaga. Further that, the list does not amount to employment letter and it is not a confirmation of recruitment. It therefore challenged the applicant to proof the alleged recruitment, and also proof any impracticability of reinstatement of the 46 grievants.

24. The appellant filed a rejoinder by way of the said further affidavit sworn on 17th April 2024 reiterating that the striking employees were issued with a warning letter dated 28th May 2019 calling them to resume duty or risk termination but the same was neglected by the employees. Thereafter Show Cause letters dated 31st May 2019 were issued to the employees inviting them for disciplinary hearing that was to take place on 6th June 2019 at 8.00am but they defied. The Applicant once again issued fresh show cause letters dated 7th June 2019 and served via registered post and emails inviting them for disciplinary hearing on 10th June 2019 followed by a public notice to all the striking workers, informing them that the notices were sent on email and that they should pick hard copies for their records but again, the grievants defied all that. Consequently, it was constrained to terminate the services of the grievants on 8th July 2019.

25. It averred that the decision of 14th April 2021 was based on the belief that fair procedure was not followed in the termination. It contended that the Court has the mandate to interfere with the decision since 1st respondent failed to take into account material factors in arriving at the same. It averred that the evidence was presented to the PSC on 17th March 2023 through the application for review, but the commission refused to regularize its decision.

26. It reiterated that at the time of the service of the notifications of the appeal by the commission, it was not properly constituted and no other service of the notices was made after it was properly constituted. She deposed that the PSC decision was incapable of being enforced since it had already filled the positions. She contended that the application is meritorious and urged the court to allow it as prayed.

27. The Application was canvassed by way of written submissions which were also highlighted by counsels in court.

Applicant's submissions

28. It was submitted for the applicant that the impugned decision is tainted with procedural impropriety because the 1st respondent denied the applicant an opportunity to be heard and to make representations. It contended that it was not served with the appeal, or hearing notice by the appellants and only learned about the appeal from a letter written by the 1st respondent on 27th October 2020. It was contended that the applicant was just ambushed with the impugned decision. Reliance was placed on the case of *Republic v National Assembly of the Republic of Kenya & 2 others; Director of Public Prosecutions & 3 others (interested parties) Ex-parte IDEMIA Identity and Security France SAS* [2020] eKLR where Mativo J, (as he then was) defined procedural impropriety as overlooking statutory procedural requirements or rules of natural justice and which renders a decision a nullity.

29. It was further submitted that, since the applicant was denied the right to be heard in the appeal, the impugned decision is a nullity and this court should quash it. It was submitted that the right to procedural fairness is codified under Article 47 of the *Constitution* and section 4 of the *Fair*

Administrative Actions Act while Regulation 11 of the *PSC (County Appeals Procedures) Regulations, 2022* provide that an appellant has a duty to serve the respondent with the appeal.

30. It was further submitted that the impugned decision was tainted with irrationality/unreasonableness because the 1st respondent failed to take into account relevant matters when reinstating the grievants. It was submitted that the 1st respondent blatantly failed to consider the fact that the grievants were treated fairly by being served with warning letters, public notice and show cause letters inviting them for disciplinary hearing but they defied. It was further submitted that the 1st respondent failed to consider that the grievants were in contempt of court orders which declared their strike unprotected. Consequently, it was submitted that the failure by the commission to consider that the applicant was prevented from conducting disciplinary hearing by the grievants' defiance rendered the impugned decision irrational and unreasonable.

31. For emphasis, reliance was placed on the case of *Jared Aimba v Fina Bank Ltd* Industrial Cause No 525 (N) of 2009 where it was held that the refusal by an employee to attend disciplinary hearing is valid ground for dismissal because it amounts to disobeying a lawful command from the employer. It also renders disciplinary hearing impossible.

32. It was further submitted that, the applicant filed an application for review and provided evidence to prove that the grievants were served with show cause letters inviting them to disciplinary hearing but still the commission refused to consider the same and upheld the impugned decision. It was urged that the 1st respondent should have set aside the impugned decision to allow the applicant a chance to be heard after it was reconstituted.

33. Lastly, it was submitted that the impugned decision is tainted with illegality because the 1st respondent had no power to sit on appeal over the decision of this Court after it declared the grievant's strike illegal. It was argued that, after the court declared the strike illegal and the grievants refused to resume work, they had no other recourse in law if dismissed. They should have been denied audience by the court and the 1st respondent. Reliance was placed on the case of Fred Matiangi, the CS Ministry of Interior and Coordination of the National Government vs Miguna Miguna. (Authority not fully cited or copy provided).

34. It was argued that by hearing the appeal, the 1st respondent sat on appeal of this Court's unequivocal orders and therefore, the decision of 14th April 2021 was an attempt to sanitize an illegality. Further that the decision was an illegality since 1st respondent lacked the jurisdiction to adjudicate over the dismissal.

35. It was also argued that the grievants appeal was time barred by dint of section 77 (3) *County Governments Act* which limits the time for filing an appeal to ninety days from the date of the decision. It was submitted that the appeal by the grievants was filed 15 months after the termination and no reason was given by the 1st respondent for entertaining the late appeal. The 1st respondents' impartiality was put to question for entertaining an appealed 15 months late and then denying the applicant a chance to be heard yet it was not served with the appeal.

36. It was further submitted that the impugned decision is incapable of implementation because reinstatement of the grievants is impracticable because even as at the time they filed the appeal before the commission, the applicant had already appointed new staff to replace the dismissed employees due to the essential nature of their services. Further that, there are no vacancies now and it is impracticable to terminate employment of the current employees in order to create vacancies for the grievants. It was also observed that three years have lapsed from the date of termination and therefore reinstatement is time barred. Finally, it was submitted that the Applicant depends on strained budgetary allocations that cannot accommodate parallel employees.

37. To emphasize the foregoing submission, reliance was placed on the case of Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others [2014] eKLR where the Court of Appeal set aside an order for reinstatement for being impracticable. Therefore, this Court was urged to allow the application and quash the impugned decision.

1st Respondent's submissions

38. As regards the alleged procedural impropriety, it was submitted for the 1st respondent that before arriving at the impugned decision, the 1st respondent complied with the provisions of Article 234 of the *Constitution*, section 77 of the *County Government Act* and section 85 of the *PSC Act* and followed the procedure laid down in *PSC (County Appeals Procedures) Regulations 2016*, (now repealed). It was submitted that, after receipt of the appeal from the 2nd respondent on 22nd October 2020, it wrote the letter dated 27th October 2020 to the applicant requesting it to file a response and forward all the relevant documents in relation to the record of proceedings, minutes and decisions made in the matter and by a letter dated 28th January 2021, the applicant wrote back stating that the Board was now properly constituted to handle the matter. On 5th February 2021, it wrote a reminder but no response was filed. Consequently, the appeal was determined on the basis of the information and documents on record and a decision was conveyed to the parties through a letter dated 14th April 2021.

39. It was submitted that the duty to serve the appeal was upon the commission under the *PSC (County Appeals) Regulations of 2016*, but under the Regulations of 2022, the duty is now upon the Appellant. It was submitted that the applicant has admitted in paragraph 20 of its written submissions that it learned about the appeal when it received a letter from the commission requesting it to file response. Consequently, it was submitted that the Applicant was given the opportunity to be heard but failed to file response.

40. It was further submitted that the commission has the power to determine an appeal filed out of time by dint of section 77 of the *County Government Act*, section 86 (2) of the *PSC Act* and Regulation 9(2) of *PSC (County Appeals) Regulations of 2016* if satisfied that circumstances warrant it. It was submitted that the applicant has raised the issue of limitation of time as an afterthought because it never raised the same during its application for review dated 30th April 2021 before the commission.

41. As regards the alleged illegality, it was submitted that, while considering the appeal, the commission was fully aware that this court had declared the grievants' strike illegal and unprotected and therefore that issue was never deliberated before it. It was submitted that the commission acknowledged that the applicant had a valid reason for dismissing the grievants but there was no evidence filed to prove that the grievants were given an opportunity to be heard. It was argued that the commission was guided by section 41, 44 and 45 of the *Employment Act* in reaching the impugned decision. Reliance was placed on the *Jared Aimba v Fina Bank Ltd* [2016] eKLR, and *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR where the Court held that, the procedure under section 41 of the *Employment Act* is mandatory before dismissing an employee for a cause.

42. As regards whether the reinstatement was impracticable, it was clarified that the decision was made barely 1 year and 9 months after the termination which was within the 3 years provided for under section 12(3) (viii) of *Employment and Labour Relations Court Act*.

43. Finally, the court was urged to dismiss the application herein with costs and adopt the impugned judgment for enforcement.

2nd Respondent's submissions

44. From the onset, it was submitted for the 2nd respondent that the 1st respondent's decision rendered on 28th march 2023 in relation to the applicant's application for review has not been challenged but rather the initial decision of 14th April 2021. As such it was argued that by the said application for review before the commission, the applicant had exhausted its right of review and therefore it cannot be allowed to seek judicial review of the same decision. It was opined that the best procedure would have been to challenge the decision of 28th march 2023. It was then submitted that the court has no jurisdiction to reopen a case where statutory mechanism has been exhausted.

45. It was further submitted that, even if the said jurisdiction existed, the application herein has no merits because the applicant was given an opportunity to be heard on the appeal before the impugned decision was made. It was pointed out that the applicant has admitted in paragraph 9 of its written submission herein, that it was served with the appeal on 30th October 2020 by the commission vide the letter dated 27th October 2020. It was submitted that service by the commission was the correct procedure under *PSC (County Appeals) Regulations 2016*, (now repealed).

46. It was further submitted that although it was alleged that the said service of the appeal was done to non-existent Board, it was clarified that a second service was done on 5th February 2021 after the applicant Board had been properly re-constituted. The court was referred to the commission's letter dated 5th February 2021 (RNN3) which listed down all appeals against applicant and indicated that the applicant had appointed Waweru Gatonye Advocates on 14th January 2021 to represent it in the Nurses appeal.

47. In view of the foregoing matters, it was submitted that the applicant was made aware of the appeal and was accorded an opportunity to be heard but it elected not to be heard. To fortify the foregoing submissions, reliance was made on the case of Rosemary Akinyi Kijana v Nairobi City Water and Sewerage Company Limited [2020] eKLR where it was held that the court or a tribunal cannot force a party to exercise the right to be heard, and that it was enough that the party is given the opportunity to be heard.

48. As regards the alleged irrationality, it was submitted that the commission considered all the relevant factors when it made the impugned decision. It was submitted that the question in the appeal before the commission was whether or not the dismissal of the appellants was lawful, and as such, it considered section 41, 43, and 45 of the *Employment Act*. The applicant failed to file any response to the appeal and therefore commission determined the appeal based on the evidence presented by the appellants. It was further submitted that the applicant ought to have raised the issue of unconsidered factors before the commission and not this court since it cannot venture into matters evidence. Besides, it was reiterated that the applicant has not challenged the decision of 28th March 2023.

49. As regards the impracticability of reinstating the grievants, it was submitted that the decision is capable of being implemented because the decision was made timeously within the three years required under section 12(3) (vi) of the ELRC Act. It was argued that section 88(4) of *PSC Act* mandates the applicant to comply with the decision of the commission notwithstanding any pendency of an application for review. As such it was submitted that the delay in implementing the decision to reinstate the 46 grievants was occasioned by the applicant's direct breach of a statutory mandate.

50. It was further submitted that the applicant has not demonstrated that it recruited other officers to replace the 46 grievants. It further submitted that the unsigned and undated documents filed by the applicant do not substantiate the alleged impracticability.

Analysis

51. Having considered the Application, evidence and the rival submissions, the following issues fall for determination:

    a. Whether the application is time barred.

    b. Whether the prayers sought in the Motion are at variance with the leave granted.

    c. Whether the application meets the legal thresholds for judicial review.

Limitation of time and the orders sought by the Motion

52. The issue of limitation of time for commencing judicial review application and the variance between the orders sought from the leave granted, were argued as preliminary points and the Court rendered its ruling on 20th December 2023. There after a Notice of Appeal was filed to challenge it before the Court of Appeal and therefore, I decline the invitation by the 2nd respondent, in its written submissions, to determine the two issues again. I leave that second determination to the higher court.

Legal threshold for judicial review

53. The case before the court is challenging an administrative decision made by the 1st respondent on 14th April 2021. It is worth noting that the right to fair administrative action is guaranteed under Article 47 of the *Constitution*, which provides that: -

> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in Clause (1) and that legislation shall-
>
> a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal, and
>
> b. Promote efficient administration."

54. The rights under Article 47 of the *Constitution* are illuminated by the *Fair Administrative Actions (FAA) Act*. Section 2 of the Act defines administrative action as –

> "(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
>
> (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."

55. Section 4(3) of the Act then provides that –

> "where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

a. Prior and adequate notice of the nature and reasons for the proposed administrative action;

b. An opportunity to be heard and make representations in that regard;

c. Notice of a right to a review internal appeal against an administrative decision, where applicable;

d. A statement of reasons pursuant to section 6;

e. Notice of the right to legal representation, where applicable;

f. Notice of the right to cross-examine; where applicable; or

g. Information, materials and evidence to be relied upon in Making the administrative action"

56. The legal thresholds upon which a court can review administrative decisions were discussed in the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008), E.A. 300 where it was held that: -

> " In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
>
> Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provision of a law or its principles are instances of illegality.
>
> Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.
>
> Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehidswi v Secretary of State for the Housing Department* (1990) AC 876."

57. In the instant case, the applicant alleges that the impugned decision is tainted with procedural impropriety, irrationality and illegality but the respondents have denied the said allegations. I will address each allegation separately.

Procedural impropriety

58. The applicant contended that the impugned decision was made without it being heard in the appeal as it was not served with the appeal, hearing notice or even a notice of the date scheduled for delivery of the decision. It contented that as at the time the appeal was lodged its Board was not constituted to enable it perform its mandate. It was further submitted that the appeal was filed 15 months after the dismissal of the appellants as opposed to the 90 days provided under section 77 of the *County*

Government Act. Finally, it was contended that the 1st respondent should have allowed the application for review of the impugned decision to enable the newly constituted Board have its day before the commission to prosecute its defence.

59. The respondents have unanimously denied the allegation that the impugned decision is tainted with procedural impropriety. They argued that section 77 of the *County Government Act*, section 86 (2) of the *PSC Act* and Regulation 9(2) of *PSC Regulations of 2016* allows consideration of an appeal after the lapse of 90 days if the 1st respondent is satisfied that circumstances warrant it. The said issue was deemed to be an afterthought because the applicant never raised the same during its application for review dated 30th April 2021 before the commission. They further unanimously agreed that the applicant had admitted in its submissions that service of the appeal was indeed done on 30th October 2020 and as such the failure to file response was deliberate.

60. I have perused the documentary evidence filed by the respondents. There are two letters by the 1st respondent to the applicant dated 27th October 2020 and 5th February 2021. The first letter notified the applicant about the appeal filed by the 2nd respondent on behalf of the 46 grievants and invited the applicant to file, within 14 days of receipt of the letter, a response and forward all the relevant documents within its possession including the record of the proceedings, minutes and decisions made on the matter. The applicant failed to comply with notice and instead wrote a letter dated 28th January 2021 indicating that it was now fully constituted.

61. The second letter, dated 5th February 2021 acknowledged receipt of the applicant's said letter and noted with appreciation that the Board was fully constituted and was now able to take up all its mandate. The letter then notifies the applicant about appeals against it that were pending before the 1st respondent and listed down six appeals including the one subject of this suit. It notified the applicant of the appointment of Waweru Gatonye & company Advocates to represent the Board in the appeal filed by the Nurses Union. The letter then requested the applicant to expedite finalization of the cases because they had delayed beyond the timelines set by the Regulations of 2016.

62. The applicant has admitted that she was served by the commission with the letter dated 27th October 2020. Paragraph 9 of the applicant's written submissions states that:

> " Despite Lodging an Appeal with the PSC, the 2nd respondent never served the Ex-parte applicant with the said Appeal. The Ex-parte Applicant only learnt about the alleged Appeal when the 1st respondent served a letter dated 27th October 2020 on 30th October 2020 requiring the Ex-parte Applicant to file a Response to the Appeal it had not been served with. By the time the 1st Respondent's letter was served upon the Ex-parte Applicant, the term of the members of the Ex- Applicant had lapsed and the board dissolved and it was awaiting reconstitution."

63. Regulation 10 of the *PSC (County Government Public Service Appeals Procedures) Regulations 2016*, (now repealed) provided that:

> " The Commission Shall notify a county government public service, within seven days of the lodging of an appeal, that the appeal has been lodged by a public officer against a decision of the county government public service in accordance with those Regulations and shall require that the county government public service to submit all the records in relation to the appeal including proceedings that led to the decision being appealed against."

64. In view of the foregoing provision and the admission by the applicant that the 1st respondent served it with letter dated 27th October 2020, I am satisfied that the applicant was indeed served with the appeal on 30th October, 2020 as was required by the law in force that time. Consequently, I agree with the respondents that the applicant was accorded a chance to file a response to the appeal and also to be heard but it elected to keep off the proceedings.

65. As regards the alleged late appeal, it is obvious that appeal was filed more than a year from the date when the cause of action arose on 8th July 2019. The 1st respondent contended that it had statutory mandate to entertain a late appeal if the circumstances warrant it. Section 86(2) of the *PSC Act* provides that:

> " An appeal under subsection (1) shall be in writing and made within ninety days from the date of decision.
>
> Provided that the Commission may consider an appeal filed out of time if, in the opinion of the Commission, the circumstances warrant it."

66. The above provision does not tell whether the 1st respondent is to act on application for extension of time or just act on its own motion. However, it is clear that the opinion to consider a late appeal must be based on some justification. In this case, the record is silent on what reasons, the 1st respondent took into account before admitting the late appeal to hearing. The applicant also did not demonstrate to this court that the failure by the 1st respondent to record the reason for admitting the late appeal rendered the appeal a nullity.

67. I have said enough on the alleged procedural impropriety. I am satisfied on the basis of the foregoing analysis that the impugned decision is not tainted with procedural impropriety. The 1st respondent acted within its constitutional and statutory mandate in making the impugned decision and the applicant was accorded an opportunity to be heard as required by the law.

Irrationality

68. The applicants case is that the impugned decision was made without taking into account relevant factors including the fact that the grievants had disobeyed court orders and persisted in an unprotected strike; that the grievants were served with show cause letters inviting them to disciplinary hearing but they defied; and that reinstating the grievants was impracticable since the applicant had already recruited other officers to replace the grievants even before filing the appeal 15 months after the dismissal.

69. However, the respondent maintained that the applicant did not provide any evidence during the hearing of the appeal to prove that it accorded the grievants an opportunity to be heard before the dismissal and also to prove that reinstatement of the grievants would be impracticable. They argued that the impugned decision was made after taking into account the documentary evidence on record and the provisions of section 41, 43 and 45 of the *Employment Act*. They contended that the issue for determination in the appeal was whether or not the dismissal of the grievants was lawful, and despite the 1st respondent acknowledging that there was a valid reason for the dismissal, procedural fairness had to be demonstrated but the applicant did not do so.

70. I again agree with the respondents that the impugned decision was arrived at after taking into account relevant factors, namely, that despite there being a valid reason for dismissing the grievants, 1st respondent considered procedural fairness. It considered the fact that the applicant did not adduce any evidence during the hearing of the appeal despite being served with the appeal and being requested

to provide the commission with the records of the disciplinary proceedings conducted against the grievants before the dismissal.

71. Section 45 (1) and (2) of the *Employment Act* which provides that:

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (2) A termination of employment by an employer is unfair if the employer fails to prove:
>
> (a) that the reason for the termination is valid;
>
> (b) that the reason for the termination is a fair reason—
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> (ii) based on the operational requirements of the employer; and
>
> (c) that the employment was terminated in accordance with fair procedure."

72. The applicant failed to tender evidence during the hearing of the appeal to discharge the burden of proof procedural fairness set out in the above provision. In addition, it failed to file response to oppose prayer for reinstatement and also failed to adduce evidence to prove demonstrate that reinstating the grievants was impracticable.

73. I agree with the applicant that the 1st respondent failed to consider whether reinstatement was the appropriate relief to grant almost two years after the dismissal, as required under section 49 (4) of the *Employment Act*. However, such consideration would have been relevant if the applicant had filed a response to the appeal opposing that prayer for reinstatement with reasons supported by evidence, but it never did so. Consequently, I find that impugned decision is not tainted with irrationality.

Illegality

74. The issues raised on illegality included jurisdiction of the 1st respondent and limitation of actions but I have already dealt with the same hereinabove and agreed with the respondents that the 1st respondent had the jurisdiction to entertain a late appeal and also to make the impugned decision. Consequently, I am satisfied that the applicant has not demonstrated that the impugned decision was tainted with illegality.

Conclusion

75. I have found that the decision by the 1st respondent rendered on 14th April 2021 is not tainted with procedural impropriety, irrationality and illegality. Consequently, I hold that the application has failed to meet the legal threshold upon which this court can review the said administrative decision. Accordingly, I dismiss the application, but with no costs because of the circumstances surrounding the proceedings before this court and the commission.

76. This judgment applies to, and resolves in the same manner Case number Nyeri ELRC JR E001 of 2023 *Republic v Public Service Commission and Kenya Union of Medical Laboratory Officers, Exparte Kirinyaga County Public Service Board* as agreed the parties herein and the said case.

77. As a parting shot, I wish to observe that most of the matters raised by the applicant herein, were raised in its application for review before the 1st respondent and a decision was rendered on 28th March 2023. The said decision was not been challenged herein. In my view, the applicant ought to have challenged the latest decision and then tag the entire proceedings with it in the prayer for *certiorari* and also seek *mandamus* for the court to give direction.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF AUGUST, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.