

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: MUSINGA (P.), LESIIT & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. E125 OF 2021

BETWEEN

THE UNIVERSITY OF NAIROBI.....APPELLANT

AND

PROF. MICHAEL MADARA OGOT.....RESPONDENT

*(Being an appeal against part of the Judgement and Decree of
the Employment and Labour Relations Court at Nairobi
(Onyango, J.) delivered on 5th March, 2021*

in

ELRC Cause No. E617 of 2020)

JUDGMENT OF THE COURT

1. This is the first appeal from the judgment of the Employment and Labour Relations Court (ELRC) (Onyango, J.) delivered on 5th March 2021, where the respondent's claim was allowed. Our mandate is to re-evaluate the evidence and reach our own conclusion as was stated in the case of **Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123**, as follows:

"...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put

they are that this court must reconsider the evidence, evaluate

it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

2. The background of the case is that the respondent filed a claim against the appellant vide a statement of claim dated 6th October 2020 for unlawful termination of his employment as Deputy Vice Chancellor (DVC), Research, Innovation and Enterprise, and that the same was actuated by malice. He sought the following orders:

- a) A declaration that the termination of the respondent's employment as the DVC, Research Production and Extension is illegal, null and void.***
- b) An order of mandatory injunction directed to the appellant to immediately reinstate the respondent as the DVC, Research Production and Extension without any loss of pay or benefits.***
- c) In the alternative to (a) and (b) above, the appellant be ordered to pay the respondent damages for the unexpired term of his contract that was to expire in or about July 2024 as particularized herein below:***
 - i) Salary - Kshs. 359,236 p.m. (2020-2021), Kshs. 370,615 p.m. (2021-2022), Kshs. 383,103 p.m. (2022-2023) and Kshs. 395,591 p.m. (2023-2024).***
 - ii) Housing allowance - Kshs. 120,000 p.m.***
 - iii) Responsibility allowance - Kshs. 80,000 p.m.***

***iv) Entertainment allowance - Kshs. 40,000
p.m.***

v) Car Allowance - Kshs. 60,953 p.m.

vi) Telephone allowance - Kshs. 10,000 p.m.

vii) Leave allowance - Kshs. 25,000 p.a.

d) The appellant issues a certificate of service to the respondent.

e) The appellant bears the costs of this claim.

3. It was the respondent's case that the appellant appointed him as the DVC, Research, Production and Extension by letter dated 9th July, 2019, on a 5-year contract and through a letter dated January 6, 2020, the appellant appointed him as the Acting DVC, Finance, Planning, and Development. Through Gazette Notice No. 360 and Gazette Notice No. 361 in the Kenya Gazette, Vol. 102, No. 10, the Cabinet Secretary for Education (C.S.) revoked the appointment of the Chairperson of the University of Nairobi Council and the appointments of Members of the University of Nairobi Council. In a letter dated 17th January 2020, the Cabinet Secretary for Education revoked the appointment of the Vice Chancellor, Prof. Stephen Kiama, and appointed Prof. Isaac Mbeche as the Acting Vice Chancellor.
4. He further stated that on 18th January 2020, a meeting of the University of Nairobi Executive Board ("the Board") was convened by the Acting Vice Chancellor, Prof. Isaac Mbeche, to deliberate on the decisions made by the C.S. for Education. The Board deliberated and agreed it could not delve into the merits and demerits of the C.S.'s decision. The installation of

the Vice Chancellor, Prof. Stephen Kiama, was scheduled for
January 21,

2020 and due to the revocation of his appointment and that of the Council, the Board concluded that the installation could not proceed. Consequently, the Board took the decision that all members of staff, stakeholders, and students should be informed that the installation would not proceed. The Acting VC, Prof. Isaac Mbeche, instructed the respondent in his capacity as the Acting Deputy Vice Chancellor, Finance, Planning and Development, to draft a letter informing all members of staff, stakeholders and students that the installation would not proceed.

5. It was the respondent's case that, based on the instructions above, he drafted the letter that was subsequently reviewed and approved for circulation by the Acting Vice Chancellor. Upon approval, the respondent issued a memo dated 18th January 2020, to all staff and students of the appellant.
6. Thereafter, by a notice to show cause dated 19th June, 2020 and served upon the respondent on 19th June 2020, the appellant asked the respondent to show cause why disciplinary action should not be taken against him on account of alleged insubordination and failure to uphold the rule of law as he had breached the law in issuing the memo dated 18th January 2020, to all staff and students of the appellant.
7. By a letter dated 25th June 2020, the respondent responded to the show cause notice and in the letter dated 17th July 2020, the appellant invited the respondent to appear before the full Council for a disciplinary hearing on 24th July, 2020. On 21st

July 2020,

through his advocates on record, the respondent wrote to the appellant, requesting various documents to enable him to prepare adequately for the hearing. The appellant wrote to the respondent's advocate on 22nd July, 2020 and informed the respondent that the Council would rely on the information and documents already exchanged between the Council and the respondent.

8. The respondent stated further that the disciplinary hearing proceeded on 24th July, 2020. By a letter dated 2nd October 2020, the appellant terminated his employment as the DVC, Research, Innovation and Enterprise, with immediate effect, for inter alia, insubordination of the Chancellor and Vice Chancellor of the appellant.
9. The respondent, through a letter dated 2nd October 2020, was informed of his right to appeal the verdict within 14 days.
10. Through their email sent to the staff and students of the University on 5th October, 2020, the appellant informed its staff and students that it had appointed Prof. Horace Ochanda as the Acting DVC, Research Innovation and Enterprise with immediate effect.
11. The respondent's contents that the purported right of appeal was illusory since the disciplinary hearing against him was conducted by the Council of the University, which was the highest decision making organ of the appellant; there was no higher body to which an appeal could be preferred; and, further the appellant had

already appointed Prof. Ochanda as the Acting DVC, Research Innovation and Enterprise, therefore the position that the respondent occupied had already been filled.

12. In conclusion, the respondent contended that his termination from the appellant's employment was unfair and actuated by malice for the reason that the respondent had relied on the instructions of the Acting Vice Chancellor, and the resolution of the University Executive Board to issue the memo dated 18th January 2020; in the course of his duty, and had been singled out and victimized in total disregard of the provisions of the Constitution of Kenya and the University of Nairobi statutes; further he was unable to prepare adequately for the disciplinary hearing without the minutes of the meeting of the University of Nairobi Executive Board held on 18th January 2020, which the appellant's Council declined to provide, and which minutes would have demonstrated that the respondent had been instructed to issue the memo of 18th January 2020, and which minutes/resolutions were documents in the sole custody of the Council of the appellant.
13. The appellant filed a response to the statement of claim dated 13th October 2020, in which it acknowledged the appointment of the respondent as Deputy Vice Chancellor, Research, Production and Extension. In addition, the respondent was mandated to perform the duties of the Office of Deputy Vice Chancellor, Finance, Planning and Development in an acting capacity vide a letter of appointment dated 6th January 2020. The Deputy Vice

Chancellor, Finance, Planning and Development was the Head
of

the appellant's Finance, Planning, and Development Division. Pursuant to the University of Nairobi Statute VA 2016, the DVC, Finance, Planning and Development was in charge of designing, modelling, and managing long-term financial and physical plans, optimal utilisation and investments of the university's finances and assets, annual budget planning, monitoring and management strategies and provision of accurate and current financial information to support decision making.

14. The appellant contended that the memo dated 18th January 2020 issued by the respondent was contrary to the appellant's statutes, as he had no mandate to communicate the information contained in the said memo. The impugned memo informed the appellant's students and members of staff as follows:

"That the CS Education, Prof. George Magoha, has revoked the appointment of Prof. Stephen Kiama Gitahi as Vice Chancellor of the University of Nairobi and appointed Prof. Isaac Meroka Mbeche as Vice Chancellor in an acting capacity with effect from 17th January, 2020, until the process of recruiting a substantive Vice Chancellor is completed. Prof. Kiama returns as the substantive Deputy Vice Chancellor, Human Resource and Administration. In addition, the installation ceremony for the Vice Chancellor that was planned to take place on Tuesday, 21st January 2020 has been cancelled."

15. As a consequence, by the letter dated 19th June, 2020, the appellant's Council requested the respondent to show cause why disciplinary action should not be taken against him. The

respondent's response to the notice to show cause was in the form of a letter dated 25th June, 2020. The appellant averred that

the Council's Human Resource Committee deliberated upon the contents of the response and resolved that it did not satisfactorily address the issues raised in the notice to show cause. Additionally, the respondent did not provide evidence to support the matters stated in his response. Consequently, the Committee recommended that the respondent be invited to appear before the full Council for a disciplinary hearing.

16. The appellant contended further that by a letter dated 17th July 2020, the respondent was invited for a disciplinary hearing and was also notified, inter alia, that he was at liberty to present his witnesses in support of his response and was entitled to attend the disciplinary hearing in the company of a fellow employee of his choice and preference. It was further averred that the respondent was accompanied by his advocate, who requested the investigation report and a list of witnesses, and further demanded that the disciplinary proceedings commenced by the appellant be set aside.
17. The appellant also stated that the respondent made his representation before the Council and did not seek any adjournment. He was accorded an opportunity to be heard and was granted ample time to defend himself. The appellant maintained that hearing was fair, and by a letter dated 2nd October 2020, the respondent was notified that, arising from his acts and omissions, the Council had resolved that he ought to be summarily dismissed from employment. However, the Council did not dismiss him from employment but terminated his

appointment as DVC, Research, Innovation, and Enterprise and

reverted him to an academic position as Professor of Mechanical Engineering at the Department of Mechanical Engineering in the College of Architecture and Engineering, without the benefits and allowances attendant to the position of DVC. It denied that the respondent's right to appeal was illusory.

18. In conclusion, the appellant averred that the termination of the respondent as the DVC, Research, Innovation and Enterprise was lawful and in the public interest, hence no damages were due to him. Furthermore, the respondent's actions and omissions significantly undermined the Council's confidence in him and, in his suitability to continue holding an administrative position as the DVC of the appellant. As regards the claim to be reinstated, the respondent reiterated that there was already a replacement and therefore, an order of reinstatement was not tenable. The appellant prayed that the respondent's suit be dismissed with costs.
19. The matter proceeded by way of affidavits, witness statements, pleadings on record, and written submissions.
20. By the judgment dated 5th March 2021, the learned trial Judge observed that there was no substantive Vice Chancellor, the Vice Chancellor's appointment having been revoked by gazette notice, and Prof. Mbeche was the Acting Chancellor. Further the learned trial Judge found that the respondent acted on the authority of his immediate superior, the Acting VC and the Board to issue the impugned memo dated 18th

January 2020; that the contents of the said memo were factual and therefore accusations against

the respondent in respect of the minutes of the Board, insubordination of the VC or any other liability arising from the impugned memo were levelled against the wrong person, as the respondent had the mandate of the Acting VC and the Board to issue the said memo contrary to the averments in the letter of dismissal.

21. The Court further found that the termination of the appointment of the respondent was unfair and that he was maliciously singled out for punishment for no valid reason.
22. The Court also noted that the fact that the appellant referred to the respondent's application for the position of VC where he was ranked number two, and the fact that the Chairperson, Members of the Council and Vice Chancellor who were the subject of the impugned memo were part of the disciplinary committee, which meant that the disciplinary process was motivated by their displeasure over their removal and the respondent's communication of the same to staff and therefore malicious.
23. In conclusion, Onyango, J. held that there was no reason to dismiss or remove the respondent from the position as DVC, Research, Production and Extension, or even subject him to disciplinary action. The learned Judge issued the following orders:

- 1. That the termination of the respondent was unlawful and unfair.**

- 2. That the respondent be and is hereby**

**reinstated to the position of Deputy
Vice Chancellor,**

Research Production, and Extension without any loss of pay or benefits.

- 3. That the order for reinstatement is made based on the fact that the position is still vacant and the respondent's performance in that position has not been questioned in these proceedings.***
- 4. That the appellant shall bear the respondent's costs of this suit.***

24. Aggrieved and dissatisfied with the said orders, the appellant preferred an appeal to this Court. In its memorandum of appeal dated 16th March, 2021, the appellant faulted the trial Judge claiming that she erred in law and fact in, inter alia descending into the arena of the dispute by addressing issues that had neither been pleaded nor argued by the parties, hence denying the appellant a fair hearing as envisaged by Article 50 (1) as read together with Article 25(c) of the Constitution; in not appreciating sufficiently or at all that by considering Prof. Isaac Mbeche's witness statement which had not been presented before the appellant's disciplinary committee, the Court admitted and/or relied on material which was neither before the appellant's disciplinary committee nor subjected to cross-examination; in not appreciating sufficiently that the respondent was granted an opportunity to call witnesses before the appellant's disciplinary committee which opportunity he declined to utilise hence shifting the burden of proof from the respondent to the appellant; in holding that the uncorroborated testimony

made by the respondent before the appellant's disciplinary committee that he had issued the memo dated 18th January 2020, pursuant to an

alleged resolution of the appellant's board and on instructions of the then Ag. Vice Chancellor Prof. Isaac Mbeche was satisfactory defence against the charges levelled against the respondent; by abdicating her constitutional authority donated by Article 50 (1) and Article 159 of the Constitution; by failing to consider whether the appellant disciplinary committee's finding that the respondent was guilty of insubordination of the appellant's Chancellor was a valid reason for terminating the respondent's employment as Deputy Vice Chancellor, Research, Production and Extension; in issuing an order of reinstatement without paying attention to the factors outlined in section 49(4) of the Employment and Labour Relations Act and without considering the practicability of such an order; and condemning the appellant to pay costs of the suit notwithstanding that in terminating the respondent's employment as Deputy Vice Chancellor, Research and Extension, the appellant was undertaking its statutory mandate of disciplining its employees.

25. The appellant thus urged that the appeal be allowed; the judgment and decree of the ELRC dated 5th March 2021 be set aside, and substitute therefor with an order dismissing the respondent's suit with costs.
26. At the hearing of this appeal on 23rd July 2024, learned senior counsel Mr. Ngatia (SC), appeared for the appellant, whereas learned counsel, Mr. Ondieki, appeared for the respondent.
27. Highlighting the appellant's written submissions dated 27th

May 2021 and 20th September 2021, Mr. Ngatia, submitted that the

respondent was a Professor in the Department of Mechanical Engineering and that he was appointed DVC in the Department of Research Production and Extension which appointment was for a period of five (5) years, which the term already expired by effluxion of time and he had reverted to his position as a professor.

28. On the issues that triggered the dispute between the two parties, Mr. Ngatia, submitted that the respondent had no capacity, mandate or authority to write the memo dated 18th January 2020, cancelling the installation of the incoming VC, Prof. Kiama, which had been scheduled for 21st January 2020 and indicating that Prof. Kiama would revert to his previous position as a DVC. Furthermore, the respondent issued the memo without consulting the Chancellor, which led to a disciplinary hearing against him.
29. Counsel further submitted that the respondent was given an opportunity to defend himself during the disciplinary hearing, and he appeared with counsel of his choice. He noted that the respondent's defence was that he had been authorized by the previous Acting VC, Prof. Mbeche, and in addition, that there was a meeting of the Board that authorized him to make the contested communication. Mr. Ngatia, emphasized that although it was upon the respondent to tender evidence, he nevertheless opted not to call any witness or give the minutes of the meeting of the Board or the notice thereof.

30. Mr. Ngatia contend that before the oral highlights of the parties' submissions at the trial, the respondent tendered an affidavit by Prof. Mbeche, which he had not tendered before and claimed that it was incorrect for the trial Judge to accept new evidence which had not been tendered before the tribunal. He relied on the case of **Wanga & Company Advocates vs. APA Insurance Company Limited [2014] KECA 819 (KLR)**, where this Court held that a legal notice that was not brought to the attention of the learned Judge of the superior court by any of the parties did not form part of the appellant's case before the trial court and for the appellant to rely upon evidence which was not adduced before the High Court they ought to have sought leave of the court to do so.
31. Further, counsel relied on **Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] KEHC 3151 (KLR)**, where this Court emphasized that the introduction of new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law.
- 32.** Mr. Ngatia, contended that if Prof. Mbeche was the person who authorized the contested action of the respondent, it was incumbent upon the respondent to tender the witness statement at the disciplinary committee, and in not doing so, the opportunity was lost. The evidence being brought later was intended to panel beat and refurbish a case that had already been lost. In support of this contention, counsel relied

on the decision of the Supreme Court in **Kidero & 4 Others**
vs. Waititu & 4
Others (Petition 18 & 20 of 2014 (Consolidated)) [2014]
KESC

11 (KLR) (29 August 2014) (Judgment), where the Supreme Court held that for the material to be relied upon to establish a contested fact, the material ought to have been relied upon or spoken to by the persons competent to talk about them. Counsel submitted that the person ought to have been subjected to cross-examination by the other party, in a competent forum, in this case, the disciplinary committee.

- 33.** Mr. Ngatia urged that by admitting the contested evidence, the trial court usurped the powers of the disciplinary committee. The court's purported review of the committee's decision was unjustified. Furthermore, the trial court should have found the termination process to be fair and in accordance with **Section 45(2) of the Employment Act**.
34. Mr. Ngatia also challenged the decision of the trial court to reinstate the respondent to the position of DVC, Research, Innovation and Enterprise, and submitted that the court ought to have considered the practicability of reinstatement taking into account the common law principle that specific performance in a contract of employment should only be ordered in exceptional circumstances. That the holder of the position supervised all research conducted at the appellant university, and required total confidence in the holder. Yet, the appellant had lost confidence in the respondent. He urged the court to allow the appellant's appeal with costs, both at the trial court and before this Court.

35. In rebuttal, highlighting the respondent's submissions dated 14th June 2021, Mr. Ondieki maintained that the termination of the respondent's employment was unfair and unlawful. He contended that the reason for the respondent's termination, as per the letter dated 2nd October 2020, was that the respondent in subordinated the duly appointed VC by issuing the memo dated 18th January 2020. He submitted further that the said ground for termination was invalid for the reason that the C.S. of Education at the time, through Gazette Notices Nos. 360 and 361 dated 17th January 2020, revoked the appointment of Prof. Stephen Kiama as a VC of the appellant and appointed Prof. Isaac Mbeche in an acting capacity, until the process of substantive recruitment was completed. Further, on the same date, the Ministry of Education also released a press statement informing the general public of the said gazette notices, whose effect was that the installation of Prof. Kiama as VC, which was scheduled to take place on 21st January 2020, could not take place, and therefore, the issuance of the memo dated 18th January 2020 could not be considered to be insubordination as it restated what was contained in the gazette notice. Further, Mr. Ondieki submitted that the evidence before the court showed that the Acting VC, Prof. Mbeche, convened a Board Meeting on 18th January 2020, and the Board took the decision to inform the staff, stakeholders, and students that the installation of Prof. Kiama could not proceed.

36. In response to Mr. Ngatia's submission that there was no evidence to support the respondent's assertion, Mr.

Ondieki

argued that the sworn statement of Prof. Mbeche corroborated the respondent's word that the respondent was acting on the instructions of Prof. Mbeche as the Acting VC, and on the authority given by the Board pursuant to the meeting of 18th January 2020.

37. Mr. Ondieki further urged the court not to delve into the validity of the decision of the C.S. Ministry of Education, in issuing the impugned notice as requested by the appellant for the reason that the C.S. was not a party to these proceedings, and in any event, he submitted that the gazette notice was issued before the appellant's Board and the Acting VC at the time had authorized the respondent to issue the memo dated 18th January 2020.
38. On the issue that the trial court considered the affidavit of Prof. Mbeche, Mr. Ondieki submitted that the parties had agreed to conduct the trial by way of affidavits, in accordance with **Rule 21 of the Employment and Labour Relations Court Rules**. It is settled law that a party challenging a disposition contained in an affidavit can cross-examine a deponent or file a further affidavit in response. The appellant did not seek to cross-examine Prof. Mbeche or respond to the affidavit. Counsel distinguished the **Kidero & 4 Others vs. Waititu & 4 Others** (supra), from the current case as in that case the trial court declined a request to cross-examine a deponent of an affidavit.
39. Lastly, on the issue of reinstatement, Mr. Ondieki submitted

that the same is discretionary and the trial court could not be faulted for finding reinstatement was a feasible remedy. He relied on the

case of **Parliamentary Service Commission vs. Christine Mwambua [2018] KECA 810 (KLR)** and **Ethics and Anti-Corruption Commissions & 5 Others vs. Henry Morara Ongwenyi & 3 Others [2019] eKLR** and urged this Court not to interfere with the judgment as the appellant had not met the test to justify this Court's interference with the trial court's discretion as demonstrated in the well-settled decision of **Mbogo vs. Shah [1968] EA 94.**

40. Mr. Ondieki brought to our attention that, despite the ruling of 23rd April 2021, where a stay of execution of the impugned judgment was issued, the appellant filled the position of DVC in breach of the said orders, and appointed a DVC in September 2020. Counsel urged the court to dismiss the appeal, uphold the judgment of the trial court and noted that the judgment meant he would have served his full term.
- 41.** In response to two issues raised by this Court, on who had the burden of calling Prof. Mbeche, and secondly, a confirmation on whether there was no objection raised by the appellant to the affidavit by Prof. Mbeche, Mr. Ondieki urged that the appellant, as the employer of the respondent, had an obligation to call Prof. Mbeche, if at all it had any doubt with the respondent's response that Prof. Mbeche had authorised him to issue the memo dated 18th January 2020. On the second issue, Mr. Ondieki contended that the appellant did not object to the filing of Prof. Mbeche's affidavit and that the parties had agreed that the case would be determined based on documents under Rule **21 of the**

Employment and Labour Relations Court Rules.

42. In his rejoinder on the two issues raised by the court, Mr. Ngatia submitted that he had taken an objection to the production of the new evidence, since the matter was contested; however, the trial Judge allowed the evidence. Further, Mr. Ngatia urged that the respondent had the burden of calling Prof. Mbeche and producing the notice convening the Executive Council, as well as the resolution made by the Council. He posed the question: if the respondent could tender the affidavit of Prof. Mbeche before the trial court, why did he not do so before the disciplinary committee?
43. We have considered the record, submissions by counsel, the cases they relied on and the law. We are of the view that the issues for our determination are twofold:
- i. Whether the trial Judge erred in law by admitting new evidence through the affidavit of Prof. Isaac Mbeche to vary the decision made by the appellant's disciplinary committee, and***
 - ii. In view of our finding on the first issue, whether the trial court's order should stand or be set aside.***
44. We shall begin with the appellant's challenge of the trial court for considering the evidence of Prof. Mbeche, claiming that the respondent did not present the same before the disciplinary committee and should therefore not have been admitted.
- 45. The cases of Wanga & Company Advocates vs. APA**

Insurance Company Limited, and **Otieno Ragot & Company Advocates**
vs. The National Bank of Kenya Limited (supra) relied upon

by the appellant's counsel, are distinguishable in that they dealt with the introduction of evidence at the appellate stage, which evidence was not made available at the trial court.

46. As for the case of **Kidero & 4 Others vs. Waititu & 4 Others** (supra), it involved an election petition. The issue before the Supreme Court was whether the High Court erred in law in declining to admit affidavit evidence brought after the close of pleadings, saying it was too late to do so. The Supreme Court found that the trial Judge erroneously disallowed the admission of the additional affidavits and, in doing so, violated the 1st respondent's right to a fair hearing. The case is equally distinguishable from the instant one, as it involved an election petition that was time-bound, and the consideration was whether there would be sufficient time for the parties to respond to the new evidence and for the court to hear and determine the petition.
47. We note that in the matter before us, the parties agreed to dispose of the claim by way of the affidavits, witness statements, pleadings on record and written submissions. Each party filed their respective documents and in the respondent's documents was the supplementary list of witnesses as well as the sworn statements of evidence of Prof. Isaac Mbeche and that of the claimant. There was no objection raised before the trial court to this or any of the other documents filed by the respondent.
48. The learned Judge noted in her judgment that the parties had

agreed that to save time, they would proceed by way of

documents, witness statements, affidavits and written submissions. At no time did either party challenge the admission of any of the documents filed.

Section 61 of the **Evidence Act** provides:

“Facts admitted in civil proceedings.

No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have accepted by their pleadings:”

49. We find that it was within the parties' discretion to agree on how to proceed with their case, which agreement would be binding upon them and to renege on the same at this stage would tantamount to an afterthought and ought not to be allowed.
50. In any event, the claim before the court was a new matter and not part of the disciplinary process of the university. Prof. Mbeche's affidavit was therefore admissible based on the parties' agreement referred to above. The suit was not a judicial review matter either, in which the court exercises supervisory jurisdiction to review decisions, inter alia, of quasi-judicial bodies such as the Disciplinary Committee of the University of Nairobi that made the decision the subject of the suit; and which review would not ordinarily delve into the merits of the decision, but examines the process, except in a few instances when it may be called upon to do so. Thus,

ordinarily, in judicial review, the court would not consider new evidence that was not before the body that made an impugned decision.

51. **Section 45 of the Employment Act** (“the Act”) defines unfair

termination thus:

(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 employees 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.

52. The respondent sued the appellant for unfair and malicious termination of his employment. Under **Section 45 of the Act** the appellant had the burden of proof to show that the termination of the respondent’s employment was not unfair. The issue is whether the reasons given for the termination were valid or fair reasons related to the respondent’s conduct, capacity or compatibility or based on the operational requirements of the appellant.

53. Mr. Ngatia posited that there was a valid reason to terminate

the respondent's employment. He urged that the respondent had no mandate or authority to write the memo of 18th January 2020 or

to cancel the installation of the VC scheduled for 21st January 2020. He relied on this Court's decision in ***National Bank of Kenya vs. Samuel Nguru Mutonya [2019] eKLR***, for the proposition that this Court's duty is limited to examination of the circumstances under which the respondent's employment was terminated, and to determine whether there was a basis for his complaint that the termination was unfair. He also cited ***Peter Njuguna Chege vs. Timsales LTD [2020] eKLR*** for the proposition that an employee who squanders the internal process provided by his employer cannot come to court and claim payment, saying '*I refused to talk to those people and therefore I was not heard.*' We agree with the decisions as cited.

54. Also cited was the case of ***Rose W. Kiragu vs. TSC [2014] eKLR*** for the proposition that the court should not interfere with the disciplinary process of an employer unless the process was flawed, in which case the role of the court would be to correct the procedural errors. We equally agree with that holding, except to say that '*correction of errors*' may entail interference with the conclusion reached by the employer.
55. The respondent posited that the reason given for the termination was not valid since the respondent's action was made collectively by the Board, an organ of the appellant and therefore attributing the action against the appellant alone was discriminatory, and in any case the contents of the impugned memo were correct.

56. The trial Judge, upon consideration of the matter, had this to say regarding fair procedure:

“The claimant has acknowledged that he was first issued with a notice to show cause, which he responded to. That he was thereafter invited for a disciplinary hearing which he attended. That he was given an opportunity to call witnesses and to be accompanied to the disciplinary hearing and that he was informed of his right of appeal.

I find the procedure was fair and in line with the law and the Respondent’s Procedure.”

There is no challenge to the learned Judge’s finding that the disciplinary process complied with the law.

57. The key document and central to the determination of this appeal is the impugned memo of 18th January 2020, which we reproduce verbatim as follows:

“FROM: Deputy Vice Chancellor (FPDJ

TO: AU Staff and Students

RE: APPOINTMENT OF ACTING VICE CHANCELLOR

This is to inform the University Community that the CS Education, Prof. George Magoha has revoked the appointment of Prof. Stephen Gitahi Kiama as Vice Chancellor of the University of Nairobi and appointed Prof. Isaac Meroka Mbeche as Vice Chancellor in acting capacity with effect from 17th January, 2020 until the process of recruiting a substantive Vice Chancellor is completed. Prof. Kiama returns as the substantive Deputy Vice Chancellor, Human Resource and Administration. In addition, the installation ceremony for the Vice Chancellor that was planned to take place on Tuesday 20th January, 2020 has been cancelled.

SIGNED

Prof. Madara Ogot.”

58. The appellant, after conducting the disciplinary committee proceedings and receiving the respondent's evidence, found that the respondent was guilty of insubordination, that he flouted the Constitution and the law; and that he had no authority to issue the memo.

59. The reasons given as the basis of the finding of insubordination were:

“g) That your contention that there was no substantive Vice Chancellor in office on January 17, 18 and 19 is misplaced and has no basis in law. On January 3, 2020, Council as the appointing authority informed you that the process of recruitment of the substantive Vice Chancellor had been successfully concluded. The Council takes notice that you were an active participant in the Vice Chancellor and the Deputy Vice Chancellor recruitment processes before it and therefore you are well aware and cannot feign ignorance of Council's power to appoint the Vice Chancellor whether in acting or substantive capacity. On this basis, your contention that the recruitment process was yet to be completed has no basis. ...

Consequently, you were found to have insubordinated the duly appointed Vice Chancellor.”

60. In regard to the contraventions of the law, the appellant wrote:

“(i) That your actions and omissions constituted fundamental breach of your obligations as a Deputy Vice Chancellor of the University of Nairobi and the rule of law in contravention of the provisions of:

a) Articles 10(2)(c), 73 and 234(1)(e) & (f) of the Constitution of Kenya 2010

- b) Sections 10(1) and 25 of the Public Officers Ethics Act, 2003
- c) Sections 36, 38(3)(c) the Universities Act, 2012
- d) Sections 12(3)(c), 22(8) and (10)(a) of the University of Nairobi Charter, 2013
- e) Statute VA of the University of Nairobi Statutes
- f) Sections 15 and 16 of your terms and conditions of employment.”

61. On whether the respondent had authority to issue the impugned memo, the appellant wrote thus:

“(iii) That as the Ag. Deputy Vice Chancellor Finance, Planning and Development, you had no mandate to issue the communique dated 18th January 2020. In issuing the communique, you acted without jurisdiction thereby failing to uphold the rule of law.

iv) Assuming that there was no Council in place as you contend, you failed to consult the Chancellor prior to issuing the memo of 18th January 2020....

vi) That the authority assigned to the holder of the office of a Deputy Vice Chancellor is a public trust, the holder of the office is under obligation to adhere to the rule of law and good order of a public institution. By failing to uphold the rule of law as exemplified hereinabove, you as a senior member of staff and supervisor of hundreds of other university employees undermined public confidence in the integrity of the aforesaid office.

vi) That the Council takes note of the gazette notices number 360 and 361 adduced in support of your contention that there was no council in place on January 17, 18 and 19 2020. As this matter is pending determination in court, the Council elected not to delve into the merits or lack thereof of this contention. On this basis, the charge of insubordination of the Council could not be sustained.

Pursuant to the findings as set out herein above, the Council noted that you ought to be summarily dismissed from employment in accordance with Section 44(3) & (4) of the Employment Act, 2007 and Clause 4.6

(d) of the Public Service Commission, Discipline Manual for the Public Service."

62. The learned Judge found that there was a valid gazette notice published in the Kenya Gazette for public notification of the revocation of the appointment of the Chair and Members of the University of Nairobi Council and the Vice Chancellor. That, therefore, at the time of writing the impugned memo, the claimant was the Acting Deputy Vice Chancellor, Finance, Planning and Development. According to the University Statute, he could be assigned or delegated duties by the Vice Chancellor in accordance with Statute III, which is what happened; Prof. Mbeche authorised him to issue the memo, and that, as the appointment of the Vice Chancellor, and the University Council had been revoked by Gazette Notice No. 360 & 361 on 17th February 2020 and the memo contained factual content. The learned Judge observed:

***“I also do not find it practical to expect
a
communication of the nature that the claimant
is***

accused of to be done through a resolution, as there was really nothing to pass a resolution on, the issue under discussion having been published in the Kenya Gazette and having been the subject of a press release by the Office of the Cabinet Secretary, Education. This was mere consultation on how to handle the situation that had been brought about by the action of the Cabinet Secretary.

No issue has been raised by the Respondent over the power of the Acting Vice Chancellor Prof. Mbeche to assign the duty of issuing the impugned internal memo as the claimant did. In fact, Prof. Mbeche has very expressly, in his sworn affidavit, confirmed what the claimant had been telling the Respondent all along, that he is the one who instructed the Claimant to issue the circular.”

The learned Judge also took note of Prof. Mbeche’s affidavit that:

“b. As at 18th January 2020, there were only 4 Deputy Vice Chancellors in the University of Nairobi out of whom the Claimant was best suited to issue the memo in his capacity as the Acting Deputy Vice Chancellor Finance and Planning. He is the only DVC who attended the Board meeting and therefore the only other senior employee of the respondent [appellant] other than myself who could communicate the resolution of the Board.”

63. The evidence of Prof. Mbeche that he had the mandate, and did call the Board Meeting, in which the actions of the C.S. as per Gazette Notice Nos. 360 and 361 were discussed, including the resolution of the Board, which was not

controverted Prof. Mbeche averred that after the board's deliberations, he instructed the

respondent to prepare a memo to inform the students and staff of the appellant, which he confirmed before it was circulated internally.

64. Under **section 45 (2)(a) of the Employment Act**, the ingredients of fairness are spelt out thus:

“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 employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer.” (emphasis added)

65. In the case of **Moses Daniel Kyalo vs. Treadsetters Tyres Ltd [2019] eKLR**, the court observed:

“Under section 45(2) of the Employment Act, termination of employees’ contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee’s conduct, capacity and compatibility, or based on the employer’s operational requirements. Fair procedure on the other hand, includes but not limited to, granting a fair hearing to the employee before termination.”

66. It is not disputed that Prof. Kiama was appointed Vice Chancellor of the University of Nairobi by the University Council. There was no dispute that on 17th January 2020, the C.S. for Education, by Gazette Notice No. 360 and 361, revoked the appointment of the Vice Chancellor and the University Council. At the same time, Prof. Mbeche was appointed as the Acting Vice Chancellor. In the circumstances, the installation ceremony scheduled for 21st January 2020, could not proceed. That being the case, the content of the impugned memo of 18th January 2020, was factual.

67. Secondly, there could not have been insubordination of the University Council as, at the time the memo was issued, the Council was not in existence, a matter the Chairperson of the Council observed under paragraph (vi) of the termination letter as follows:

“vi) That the Council takes note of the gazette notices number 360 and 361 adduced in support of your contention that there was no council in place on January 17, 18 and 19 2020. As this matter is pending determination in court, the Council elected not to delve into the merits or lack thereof of this contention. On this basis, the charge of insubordination of the Council could not be sustained.”

68. The above statement of the Chairperson of the Council is an admission that the University Council had been revoked. With the Council gone, the Board was the body that could step in to avoid a vacuum in the appellant university leadership, which, as the learned trial Judge found, they did effectively. That

admission

means the memo was factual; there was therefore no valid reason for the appellant to find the respondent guilty of insubordination of the Vice Chancellor and the Council, as the C.S. of Education revoked both positions. That ground is without merit.

69. The memo was made within the mandate of the Acting Vice Chancellor and not without authority, as the appellant posited. Its content was factual, backed by the gazette notice of 17th January 2020. There was no illusion about what the memo communicated, as it was the same as per of the gazette notice. We therefore find that the termination of the respondent's employment was not valid as the grounds upon which it was based were not well-founded.
70. It is clear that the action taken by the appellant against the respondent was unfair and discriminatory for the reason that the decision that gave rise to the memo was a collective decision of the appellant's board. Choosing to discipline the respondent alone was proof of malice.
71. An issue was raised about the order for the reinstatement of the respondent to his former position. We find this issue moot as the respondent had a five-year contract, the period of which has since run out by effluxion of time. That, in turn, means that the order for reinstatement cannot for now stand. To give effect to the learned Judge's exercise of discretion, the respondent should get full recovery of what he would have earned had his employment not been unfairly and

unlawfully terminated, and the learned trial Judge cannot be faulted for the finding that the

termination of the respondent was unfair and malicious. Accordingly, the orders that comments themselves to us are as follows:

(1) The judgment of the ELRC Cause No. E617 of 2021 delivered on 5th March 2021 by M. Onyango, J., is hereby upheld in part as follows; -

a. The finding that the termination of the respondent was unlawful and unfair is upheld;

b. The order reinstating the respondent to the position of Deputy Vice Chancellor, Research, Production and Extension is set aside;

c. Prayer (c) of the respondent's prayers in the alternative to reinstatement is allowed in the following terms:

(i) the appellant is hereby ordered to pay the respondent damages for the unexpired term of his contract, that is from 19th June 2020 to July 2024, as particularized herein below:

(a) Salary - Kshs. 359,236 p.m. (2020- 2021), Kshs. 370,615 p.m. (2021- 2022), Kshs. 383,103 p.m. (2022- 2023) and Kshs. 395,591 p.m. (2023-2024).

(b) Housing allowance - Kshs. 120,000 p.m.

**(c) Responsibility allowance - Kshs.
80,000 p.m.**

**(d) Entertainment allowance -
Kshs. 40,000 p.m.**

**(e) Car Allowance - Kshs. 60,953
p.m.**

**(f) Telephone allowance Kshs.
10,000 p.m.**

**(g) Leave allowance - Kshs.
25,000 p.a.**

**(2) The appellant issues a certificate
of service to the respondent; and,**

**(3) The appellant bears the costs of
this Claim in the ELRC and of this appeal.**

**Dated and delivered at Nairobi this 24th day of October,
2025.**

D. K. MUSINGA (PRESIDENT)

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF

APPEAL ALI-

ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY REGISTRAR