Chingosho, Chairman of the Afraa Disciplinary Committee & another v Indetie (Civil Appeal 162 of 2018) [2025] KECA 969 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 969 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 162 OF 2018

PO KIAGE, LA ACHODE & WK KORIR, JJA

MAY 23, 2025

BETWEEN

ELIJAH CHINGOSHO, CHAIRMAN OF THE AFRAA DISCIPLINARY COMMITTEE ..... 1ST APPELLANT

AFRICAN AIRLINES ASSOCIATION ..... 2ND APPELLANT

AND

JULIET INDETIE ..... RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Wasilwa J) dated 27th November 2017 in Judicial Review No. 16 of 2016)

JUDGMENT

1. Elijah Chingosho, Chairman of the Afraa Disciplinary Committee the 1st appellant and African Airlines Associations, the 2nd appellant, have filed this appeal against the judgment and decree delivered by Wasilwa J on 27th November 2017, at the Employment and Labour Relations Court, (ELRC) in Nairobi in favour of Juliet Indetie the respondent.

2. This dispute commenced when the respondent, who was Deputy Director, Corporate Finance and Administration of the 2nd appellant, approached the ELRC on 18th August 2016 seeking leave to commence Judicial Review proceedings. leave was duly granted.

3. Consequently, she filed a substantive motion on 19th August 2016, seeking orders of:

    i. stay, restraining the appellants from unlawfully terminating her employment,

    ii. mandamus directed to the appellants to compel them to desist from the unlawful termination of the employment,

iii. certiorari to quash the entire proceedings, deliberation and decisions of the Disciplinary Committee chaired by the first appellant on 12th August 2016,

iv. prohibition against the appellants from interfering with her employment, and

v. declaration as unconstitutional all decisions and sanctions imposed on her vide summary dismissal Letter authored by the first appellant and dated 15th August 2016.

4. The respondent's umbrage was with the manner in which the disciplinary hearing held on 12th August 2016 was conducted. She averred that the disciplinary hearing was biased, procedurally unfair and was prosecuted in derogation of her constitutional rights. That the proceedings were a sham and the summary dismissal prejudiced her and she risks being denied the right to earn a living and provide for her family.

5. The respondent deposed that the appellants did not safeguard her right to fair administrative action, and thus, offended her constitutional rights and principles enunciated in the rules of natural justice. She averred that the outcome of the proceedings was already predetermined and the committee as constituted was incapable of making an objective decision. Further, that there was no clear charge(s) read or established against her and no known offence of gross misconduct as enumerated under the *Employment Act* to justify the summary dismissal had been framed.

6. It was the respondent's averment that according to the dismissal letter dated 15th August 2016, the acts complained of were committed by one Japheth Okemwa, who is still in employment. That the 1st appellant, if not restrained, will continue to use power to ensure that the termination takes full effect and that it had not taken full effect as she had not yet handed over.

7. The application was opposed by the appellants through an affidavit sworn by the 1st appellant on 26th August 2016. It was averred that the respondent was summarily dismissed from the employment of the 2nd appellant on 15th August 2016 due to gross misconduct. The gross misconduct included presentation of forged documents to the 2nd appellant in support of payment of a voucher and flouting the laid down procedure in obtaining approval for the payment of voucher.

8. The appellants deposed that their charges against the respondent commenced on the 19th March 2016 when the respondent left Kenya in the company of two of her workmates: Roselyne Mbugua and Japheth Okemwa to attend an Aviation Fuel Course Training that was to be held in Mauritius from 21st to 23rd March, 2016. The flight to Mauritius was via Johannesburg, where they were to get a connecting flight to Mauritius. In Johannesburg however, there was a glitch with the connecting flight as the only available seats were business class, which the respondent and Roselyne took up.

9. Japheth, having missed a seat in the connecting flight to Mauritius, was instructed by the respondent to go back to Nairobi. Therefore, he did not attend the Training in Mauritius. However, upon the respondent's return to Nairobi, she made a claim amounting to USD 1,470.50, as the amount she spent booking flights to Mauritius for the three employees. Further, that Japheth drafted a memo requesting a refund of USD 200.00 for alleged accommodation for a night spent at the Airport Transit Hotel in Johannesburg while on travel duty to Mauritius. He claimed that he had lost the receipt, and the respondent indicated that they were in the same hotel with him on 20th March 2016. Additionally, it was deposed that the respondent approved her own payment while there was another manager in the office who could have approved it.

10. Consequently, the 2nd appellant conducted disciplinary proceedings against the respondent, in which Japheth confirmed that he only got as far as Johannesburg and returned to Nairobi. That he was

directed by the respondent to lodge a claim for a refund which would be endorsed and approved by the respondent. That after receiving the claim demand, part of it was to be handed over to Roselyne. Roselyne on her part stated that the respondent instructed her to fabricate Japheth's ticket for flight to Mauritius, which she did.

11. The appellants deposed that they conducted a disciplinary process for the respondent, which was procedurally fair, lawful, and impartial. They invited the respondent by a letter dated 26th April, 2016 to attend the disciplinary hearing on 29th April, 2016 and the charges which she was facing were clearly set out in the letter. On 29th April, 2016 the respondent attended the hearing with her advocate and raised an objection on the disciplinary panel's composition made up of the 1st appellant, one Ms. Maureen Kahonge and a Ms. Pam Radier who was an assistant to the 1st appellant. The respondent's objection was on the ground that Ms. Kahonge and the 1st appellant were biased in the matter and ought to recuse themselves.

12. The appellants deposed that it was explained to the respondent that the 2nd appellant's management consists of only four members, being the respondent, the 1st appellant, Ms. Kahonge and Dr. Mrabet. That Dr. Mrabet was indisposed, thus the recusal of Ms. Kahonge and the 1st appellant meant that the panel would never be quorate. It was stated that the respondent was invited for the disciplinary hearing on 22nd July, 2016 by a letter dated 19th July, 2016 and was informed that the panel would be composed of Dr. Mrabet and the 1st appellant. The hearing was postponed severally on account of the respondent's health issues.

13. On 12th August, 2016, the matter was heard and during the hearing, the respondent was accorded a fair hearing. She was given ample time to make presentations in compliance with the*Employment Act* and the 2nd appellant's Administration Policy and Procedure Manual. Upon considering her explanation, the panel decided to summarily dismiss her, and the 2nd appellant upheld the verdict of the panel. It was deposed that the respondent was summarily dismissed on 15th August, 2016 with immediate effect, and her failure to hand over her duties does not invalidate the summary dismissal.

14. In the appellants' view, the respondent is attempting to circumvent the law on reinstatement of employees with its strictures as contained in Section 49 (4) of the *Employment Act*. They averred that the remedies sought by the respondent through judicial review application lie elsewhere under a different law and that judicial review should be commenced as a last option after exhausting any remedies available under any other written law. As such the Court lacked jurisdiction to entertain the matter. That in any case, a stay cannot be issued as the respondent stands already terminated.

15. Upon considering the application before her, the learned judge held that the court had jurisdiction over this matter. She quashed the letter of summary dismissal authored by the 1st appellant and invalidated the contents of the letter dated 15th August, 2016. She also quashed the entire proceedings, deliberations and decisions of the Disciplinary Committee chaired by the 1st appellant on 12th August 2016,

16. Obviously, the appellants were aggrieved by the judgment and they filed this appeal. In the memorandum of appeal dated 18th May 2018, they raise 11 grounds which in summary are that the learned judge failed to consider:

    i. that judicial review was not the appropriate mechanism for the resolution of employment disputes,

ii. the provisions of sections 9 of the *Fair Administrative Action Act* on the court's inability to review administrative actions or decision where an applicant has not exhausted all other remedies available under any other written law nor sought exemption from the same,

iii. the provisions of section 49 (4) of the *Employment Act* prior to reinstating the respondent,

iv. the appellants' submissions and determining the issues raised by the appellants, and finding that the respondent's termination was unfair.

17. The appellants filed written submissions through the firm of M/s Anjarwallar & Khanna LLP dated 28th October, 2019 and submitted that judicial review was not the appropriate mechanism for solving employment disputes where facts were contested. That the ELRC is suited in a claim instituted in the usual manner, because the *Employment Act* provides a clear redress mechanism for issues arising out of termination, making judicial review an inappropriate mechanism. To buttress their argument, they relied on this Court's decision in Maurice Odongo Anyango v Kenyatta International Convention Centre (2018) eKLR* .(the KICC case)

18. It was posited that the judicial review orders ought not to be granted where they are not the most efficacious remedies, such as in this case. They relied in R v East Berkshire Health Authority, ex p. Walsh (1984) 0 APP. L.R. O5/14 where it was held that judicial review is not available in disputes arising from termination of employment contracts even when the employer is a statutory body.

19. It was argued that the judicial review application herein discloses that it was wholly based on heavily contested issues, upon which the judgment was anchored. That the determination of the suit by way of judicial review proceedings denied the court and the parties the chance to interrogate the reasons and process leading up to the dismissal which was being challenged, contrary to settled principles set by this Court. They further submitted that determination of this matter by way of judicial review also denied the court an opportunity to consider the grounds set out in section 49 (4) (a) –(m) of the *Employment Act* as to whether the respondent was deserving of reinstatement.

20. On whether the court considered Section 9 of the Fair Administration Action Act, they held that the respondent had the option of appealing the decision internally or pursuing statutory remedies under the *Employment Act*, but she did not exercise any of these options. It was their disposition that Section 9(4) of the *Fair Administrative Action Act* required the respondent to file an application showing exceptional circumstances why she required to be exempted from exhausting the remedies existing under any other written law. That none of this was done yet the court in its judgment stated that it chose to give leave, nonetheless.

21. It was urged that the respondent did not provide any reasons for the failure to utilize the mechanism provided under the *Employment Act*, or failure to seek exemption from exhaustion of remedies available under any other written law. She only sought exemption from the obligation to exhaust internal remedies.

22. The appellants submitted that the effect of quashing the respondent's termination letter was to reinstate her without considering the mandatory principles applicable to the reinstatement of employees as set out in Section 49(4) of the *Employment Act*. They relied on this Court's decision in Cooperative Bank of Kenya Ltd v Banking Insurance & Finance Union (2016) eKLR to state that reinstatement without due regard to Section 49 (4) of the *Employment Act* is invalid.

23. It was submitted that the learned judge failed to consider that there was no employment relationship between the 1st appellant and the respondent, hence its name ought to have been struck out from the suit. Further, that the learned judge failed to consider the appellants application dated 30th August,

2016 and in reliance of MNM V DNMK &13 others (2017) eKLR, they asserted that it is a substantial objection to a judgment if it does not dispose of issues raised by the parties for determination.

24. The learned judge was faulted for holding that the appellants failed to comply with their internal progressive disciplinary processes, yet the 2nd appellant's policy explicitly provided that it could move to a later stage in the process including termination under certain circumstances. That in this case, the respondent was accused inter alia, of forging documents, an act of misconduct which attracts summary dismissal under Article 22(1) (f) of the 2nd appellant's Administrative Policy and Procedural Manual. The learned judge was also faulted for finding that there were incidences of bias, a factual finding that could not have been made during a judicial review process where only the process and not the merits were interrogated.

25. In rebuttal the respondent filed submissions dated 22nd March 2023 through the firm of M/s Nyaguthie Njuguna & Company Advocates and urged that *the Constitution* has transformed the nature and scope of judicial review beyond the technicalities suggested by the appellants. They relied on this Court's decisions in Sucha Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR, Child Welfare Society of Kenya vs Republic & 2 Others Ex-parte Child in Family Focus Kenya (2017) eKLR and Joshua Sembei Mutua v Attorney General (2019) eKLR where it was held that judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of *the Constitution* and as operationalized through the provisions of *Fair Administrative Action Act*.

26. The respondent urged that in the foregoing cases, it was found that the common law judicial review is now embodied and ensconced in constitutional and statutory judicial review. It is now part of the constitutional remedy that the court can grant under Article 23 (3) (c) and (f) of *the Constitution*. She posited that Rule 7 of the Employment and Labour Relations Court Rules 2016 provides that a person who wishes to institute judicial review shall do so in accordance with Section 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules.

27. The respondent urged that in prayer 2 of her application for leave dated 18th August 2016, she expressly applied and was exempted from exhausting internal remedies and that decision was not appealed. Further, the decision to exempt her was discretionary and it has not been demonstrated that the discretion was exercised without regard to the law and facts, or that irrelevant issues were considered, or that relevant issues were not considered, or that the decision was plainly wrong.

28. It was urged that the court considered all the relevant factors applied the law and rightly quashed the proceedings as communicated through the termination letter dated 15th August 2016.

29. The respondent argued that the appellants' contention that the court left certain interlocutory matters undetermined in the judgment, that is, that the court did not determine the challenge on, among others, the leave granted and the court's jurisdiction to hear and determine the respondent's application was not correct. She pointed out that although these matters were raised in the interlocutory application dated 30th August, 2016, no evidence was led or submissions made on them at the hearing of the main application.

30. When the matter came up for hearing on 4th November 2024, Mr Nkonge, learned counsel appeared for the appellant and submitted that the respondent's application to bar the appellant from filling the position she had held was dismissed. Her fixed term contract had expired in 2017 and the position filled. The cheque for the respondent's terminal dues sent to her counsel was returned. Ms. Nyaguthie, learned counsel appeared for the respondent and submitted that the respondent could not return to

work upon her reinstatement because there were stay orders that were issued by the court. She had since relocated to the United States of America and these proceedings were merely for her vindication.

31. This being a first appeal, we are clothed with the jurisdiction of re-appraising the evidence and drawing inferences of fact. In doing so, we are obliged to consider if the law was properly and correctly applied to those facts. That is the import of Rule 31(1)(a) of the Court of Appeal Rules, 2022. As expected of an Appellate Court, we bear in mind that the trial court had the chance to see and hear the witnesses testify and was therefore, better placed to assess their demeanour.

32. The mandate of the Court on first appeal was espoused in this Court's decision in Kenya Ports Authority v Kuston (Kenya)

Limited (2009) 2 EA 212 thus:

> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

33. We have given due consideration to the record of appeal, the supplementary thereto, the submissions by the parties and the law and the issues that fall for our consideration are:

i. Whether it was appropriate for the superior court to entertain the judicial review application.

ii. Whether the respondent's right to a fair administrative action was impeded, and if so,

iii. Whether the orders issued were appropriate.

34. The appellants urged that, since the facts were contested, the respondent should have moved the court by filing a claim and not an application for judicial review. They further argued that judicial review is not appropriate in employment relation disputes, and that it is the *Employment Act* which provides for the procedure and remedies regarding such disputes. On the other hand, the respondent urged that she sought to quash an improper disciplinary process carried out by the appellants and the consequential unlawful dismissal. That *the Constitution* provides for judicial review under Article 22 and 23 as read with Article 47 which is operationalized through the provisions of the *Fair Administrative Action Act*. In addition, Rule 7 of the Employment and Labour Relations Court Rules, 2016 gives a person the option to institute judicial review.

35. To begin with, we note that in the Notice of Motion dated 18th August, 2016 the respondent sought leave to file judicial review as well as to be exempted from exhausting internal remedies. The application was allowed and there was no appeal filed therefrom. Instead, the appellants filed an application dated 30th August, 2016 seeking to have the leave granted to the respondent set aside. In her judgment, the learned trial Judge revisited her decision to grant leave to the respondent to commence the judicial review proceedings and stood by her decision. It is noted that leave to commence judicial review proceedings did not oust the right of the respondent to raise the issue of the grant of leave at the hearing of the substantive Notice of Motion. Having reviewed the learned Judge's reasons for allowing the respondent to by-pass the available dispute resolution mechanisms, we are satisfied that the learned Judge correctly exercised her discretion and we find no reason to fault her.

36. The respondent was aggrieved by the appellants' administrative action. Upon being granted leave, she filed an application dated 19th August 2016, invoking *the Constitution*, and seeking judicial

review orders of prohibition, mandamus, and certiorari against the disciplinary proceeding and the consequential summary dismissal by the appellants.

37. Traditionally, Judicial Review was not concerned with the merits of a decision but rather, the propriety of the process and procedure deployed to arrive at the decision. *The Constitution* (2010) has since entrenched the importance of fair administrative action. Article 22 gives everyone the right to institute constitutional proceedings claiming that a right in the bill of rights has been violated, while Article 23 gives the courts the authority to enforce the rights in the bill of rights. One of the reliefs that the courts may grant under the article is an order for judicial review, (Article 23 (3) (f)).

38. Article 47 (1) provides for the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The article has been operationalized by the *Fair Administrative Action Act* which, at Section 7, reveals an implicit shift of the scope of Judicial Review to include power for the court to inquire into some aspects of the merit of the administrative action. This resulted in the emergence of divergent views on the scope of judicial review, with one view confining itself to the process employed by the statutory body to arrive at a decision, while the other holds that the current constitutional dispensation allows the courts to delve in to both the procedural and merit review to resolve a dispute.

39. The widening of the scope of judicial review by the Court of Appeal can be seen in Suchan Investment Limited vs Ministry of Natural Heritage & Culture & 3 others [2016] KLR, where the Court stated as follows:

> "Traditionally judicial review is not concerned with the merits of the case. However, section 7 (2)(1) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory judicial review..... The test for proportionality leads to a greater intensity of review than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision."

40. The Supreme Court was of a different view from the position held by the Court of Appeal in Suchan (supra) as can be seen in SGS Kenya Limited v Energy Regulatory Commission & 2 others, SC Petition No 2 of 2019 [2020] eKLR. The Apex Court stated that:

> " [40] The petitioner approached the High court by way of the prescribed procedures, under judicial review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabor the point. We have however, observed that the appellate court was right in its finding that the High court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

41. Again, in John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) which we quote in extensor, the Supreme Court stated thus:

> "Despite the shift from common law to codification in *the Constitution* and the *Fair Administrative Action Act*, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial

review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite the decision of Lord Hailsham LC in Chief Constable of North Wales Police v Evans (1982) 3 All ER at pg 141 said of the remedy of judicial review as follows:

It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under guise of preventing the abuse of power be guilty itself of usurping power ." [Emphasis added]."

42. Recently however, the Supreme Court mellowed to the Court of Appeal position in Suchan (supra), when it clarified the divergent approach to judicial review in Dande & 3 Others v Inspector General National Police Service & 5 Others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) (2023) KESC 40 (KLR). The Apex Court set the scope of judicial review and the circumstances under which it may be expanded to include inquiry into the administrative action thus:

> "With utmost respect to the learned judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speak succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

From the pronouncement of the Supreme Court, the entrenchment of judicial review in *the Constitution* elevated it to a substantive and justiciable right under *the Constitution*. It is no longer a strict administrative law remedy if a person pleads that their fundamental rights have been violated.

43. The respondent's claim herein was against the disciplinary process which she posited, was unfair and unconstitutional because, the presence of the 1st appellant in the disciplinary panel would deny her a fair hearing. We therefore, find no basis to fault the learned judge's finding that she had the jurisdiction to determine the judicial review application.

44. The constitutional provisions on fair administrative action in Article 47 and 50 provide that:

> "47(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 an administrative action, the person has a right to be given written reasons for the action.

3. Parliament shall enact legislation to give effect to the rights in clause (1) and the 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.

50.

(1) Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

45. The relationship between the parties in the appeal before us was governed by the *Employment Act*. Section 41 of the *Employment Act* provides for fair procedure before termination of employment as follows:

"(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or

(4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

46. This Court interpreted the above provision in Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019] KECA 408 (KLR) in reliance of the decision of David Gichana Omuya vs Mombasa Maize Millers Limited [2014] eKLR where it was pronounced that:

"Section 41 of the *Employment Act* requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness."

47. In the appeal before us, the appellant contended that the respondent was given notice to show cause and ample time to defend herself. Further, that the board was competent to hear the matter. On her part, the respondent posited that the composition of the hearing panel was not agreeable to her.

48. We agree with the superior court on this. The respondent was apprehensive that the hearing would not be fair, she communicated this to the appellants, but the appellants continued with the hearing anyway. We find that the respondent's right to fair administrative action was impeded.

49. Turning to the last issue, the appellants urged that the judicial review remedy granted by the court was not efficacious and resulted in the reinstatement of the respondent without regard to Section 49(4) of the *Employment Act*. The respondent on the other hand urged that upon considering all the relevant factors and applying the law, the court rightly quashed the disciplinary proceedings and her consequential summary dismissal.

50. Section 11 of the *Fair Administrative Action Act* provides remedies available under a judicial review application.

Section 11(1): In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order– (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions.

Therefore, the court was within its limits in quashing the decision of the disciplinary committee.

51. On whether the order of the court that resulted in reinstatement of the respondent was efficacious, we considered the decision in Kenya Airways Limited v Aviation & Allied Workers Union Kenya [2014] eKLR, where the Court stated that when trust has irretrievably broken down due to an omission of the claimant, the Court would be ill advised to force the employer and employee to stay together. The Court stated that:

> "....as correctly observed by the Counsel for the Appeal, KRA is a public body bestowed with the important duty of collecting revenue for running government service which activity must attract public scrutiny. As such, employees of KRA must have the utmost trust and integrity. When trust has irretrievably broken down due to the omission of the Respondents, it would be foolhardy to force the employer and employee to stick together. We are in no doubt that the Respondents contributed to the acts leading to their termination as envisaged under Section 49 (4) (b) c, and (k) which leads us to the determination that the termination though flawed due to procedural lapses was lawful and justified "

52. We agree with the foregoing decision that reinstatement is not always the best, or most appropriate remedy for unfair termination. Especially in a case such as this, where the grounds for termination were justified and it is only the process of termination that came up short. The trust between the parties has broken down due to the actions of the respondent and she may not be trusted.

53. In the Court of Appeal case of NYR C.A.C.A. No. 79 of 2016 Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR, the Court rendered itself thus:

> " A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied, or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out the factors that mark

out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not commonplace and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute".

54. Reinstatement of an employee is not an automatic remedy in wrongful dismissal cases. It is a rarity to be ordered in exceptional circumstances rather than a common place pronouncement. The appropriateness of reinstatement depends on the specific circumstances of the case. It is a possible remedy but not always the best one. The learned judge did not express herself on the exceptional circumstances that moved her to order for the reinstatement of the respondent.

55. The appellants averred that the respondent was summarily dismissed from employment due to gross misconduct which included presentation of forged documents to the 2nd appellant in support of payment of a voucher, and flouting the laid down procedure in obtaining approval for the payment of a voucher. We are in no doubt that the respondent contributed to the acts leading to her termination as envisaged under Section 49 (4) (b) c, and (k). Although the learned Judge had correctly concluded that the respondent had been subjected to an unfair disciplinary process, issuing orders quashing the disciplinary proceedings and dismissal letter, and thereby reinstating the respondent was not the appropriate remedy in the circumstances of this case. Section 11 of the *Fair Administrative Action Act*, 2015 provides several remedies as follows:

> " 11. Orders in proceedings for judicial review (1) in proceedings for judicial review under section 8(1), the court may grant any order that is just and equitable, including an order-
>
> a. declaring the rights of the parties in respect of any matter to which the administrative action relates;
>
> b. restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
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> c. directing the administrator to give reasons for the administrative action or decision taken by the administrator;
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> d. prohibiting the administrator from acting in a particular manner;
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> e. setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
>
> f. compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
>
> g. prohibiting the administrator from acting in a particular manner;
>
> h. setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

i. granting a temporary interdict or other temporary relief; or

j. for the award of costs or other pecuniary compensation in appropriate cases.

56. In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

a. directing the taking of the decision;

b. declaring the rights of the parties in relation to the taking of the decision;

c. directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

d. as to costs and other monetary compensation."

There were therefore remedies that were more efficacious and efficient which could have been issued by the trial court in the circumstances.

57. During the hearing of the appeal, learned counsel for the respondent informed us that her client had since moved on with her life. As such, granting any other remedy in place of the orders issued by the trial court will therefore not serve any useful purpose.

Consequently, this appeal is allowed on the narrow ground that the remedy of reinstatement was unjustified. Each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY, 2025

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar.