



**Judicial Service Commission & another v Nyagol (Civil Appeal
E097 of 2021) [2024] KECA 198 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 198 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E097 OF 2021
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
FEBRUARY 23, 2024**

BETWEEN

JUDICIAL SERVICE COMMISSION 1ST APPELLANT

CHIEF REGISTRAR OF THE JUDICIARY 2ND APPELLANT

AND

JUDITH ACHIENG NYAGOL RESPONDENT

*(An Appeal from the Judgment and Decree of the Employment and Labour Relations Court
at Nakuru (Hellen Wasilwa, J.) dated 7th October 2021 in ELRC Petition No. E005 of 2020)*

JUDGMENT

1. This appeal originates from the judgment of the Employment and Labour Relations Court in Nakuru (Hellen Wasilwa, J.). The court, in its judgment, arrived at the following conclusions:
 - “ a) A declaration that the dismissal of the respondent was unfair and unjustified.
 - b. The appellants are to pay the respondent Kshs. 5,000,000/- as damages for the unfair and unjustified dismissal, which cut off the respondent’s career prematurely.
 - b. The appellants are to pay the respondent all withheld salary from the time of interdiction on 4th September 2015 to the time of dismissal on 21st August 2018.
 - c. The appellants are to pay the costs of the suit with interest at court rates from the date of the judgment.”



1. The facts of this case were that the respondent was employed by the 1st appellant as a Resident Magistrate on 20th June 2012 and stationed at Sirisia Law Courts. On 7th April 2014 she was transferred to Kericho Law Courts. On 20th August 2015, while working at Kericho Law Courts, she was arrested by Ethics and Anti-Corruption Commission (EACC) officers on allegations of corruption. She was then charged at Nakuru Law Courts in Criminal Case No. 5 of 2015 for soliciting Kshs. 20,000/- and for receiving Kshs. 10,000/- from one Wilson Yegon to award a favorable penalty in Kericho Criminal Case No. 3140 of 2014.
2. On 4th September 2015, the respondent received an interdiction letter and a letter containing charges against her from the 1st appellant.
3. On 15th September 2016, the respondent who had been charged alongside her court assistant in Nakuru Chief Magistrate's Court Anti-Corruption Case No. 5 of 2015 was acquitted under Section 210 of the Criminal Procedure Code. The respondent presented the ruling to the appellants. In their letter dated 27th January 2017, the appellants requested the respondent to wait for the final judgment in her co-accused's case as the ruling had reserved the reasons for her acquittal for the final judgment.
5. In a letter dated 22nd August 2017, the respondent was informed by the appellants that they had preferred fresh charges against her after deliberating on the judgment.
6. The charges against the respondent were a breach of Rules 6 and 5 of the Judicial Code of Conduct and Ethics; on conveying the impression that a staff was in a special position to influence the respondent to award a favorable penalty, and that a judicial officer was expected to exhibit respect for the rule of law, comply with the law, avoid impropriety and appearance of impropriety, and act in a manner that promotes public confidence in the integrity of the impartiality of the Judicial Service.
7. The respondent responded to the charges in the letter dated 30th August 2017. She was then summoned for a disciplinary hearing on 5th March 2018 vide the appellants' letter of 5th February 2018.
8. The respondent appeared before the appellants' Human Resource Committee for the disciplinary hearing, but her counsel was denied audience.
9. On 24th August 2018 the respondent was dismissed from employment on the ground that her conduct was not above board and that she exhibited impropriety and appearance of impropriety compromising the integrity and the impartiality of the Judicial Service.
10. Being dissatisfied, the respondent applied to review the dismissal through her letters of 24th September 2018 and 7th November 2018. She also reminded the appellants to expedite the review process in her letters dated 25th September 2019 and 2nd June 2020.
11. In their letter dated 1st October 2020, the appellants disallowed the review on the basis that the culpability in a criminal trial differed from that in a disciplinary process.
12. The respondent claimed that the disciplinary process grossly violated her fundamental rights and freedom under *the Constitution*. She was of the view that the charge against her was fundamentally similar to the charges she had been acquitted of. She contended that she was subjected to parallel proceedings over the same subject matter, which is against the principle of double jeopardy.
13. The respondent claimed that the appellants did not disclose the



- evidence they relied upon during the disciplinary hearing and that there was no formal charge leveled against her to warrant a disciplinary hearing.
14. The respondent also claimed that the issues she raised in her review were not considered by the appellants. She faulted the appellants for taking too long to resolve her case, and for failing to stipulate the nature of her misconduct.
15. The respondent prayed for the following orders in her petition:
- “ a) A declaration that the act of the appellants in instituting and conducting parallel proceedings based on the same issues that were determined in the Anti-Corruption case were in breach of the respondent’s constitutional rights under Articles 27(1)(2)(3), 28, 41 and 50 of *the Constitution*.
 - b. A declaration that the disciplinary proceedings conducted by the appellants against the respondent on 5th March 2018 and her eventual dismissal were disproportionate, unfair, lacked a valid reason and were null and void.
 - c. An order of reinstatement of the respondent back to the Judicial Service without loss of benefits.
 - d. An order directing the appellants to pay the respondent all the withheld salary since 4th September 2015 when the respondent was interdicted.
 - e. Damages for unlawful dismissal.
 - f. Costs of the petition.”
1. In response to the petition, the appellants stated that even though they served the respondent with a show cause letter on 4th September 2015 after her arrest by the EACC, the disciplinary hearing was held in abeyance awaiting the outcome of the court case.
17. They stated that the respondent’s case was resubmitted for consideration in accordance with Paragraph 18(3) of the 3rd Schedule of the *Judicial Service Act*, and also based on the respondent’s general conduct in the matter under Part IV of the 3rd Schedule.
18. The appellants noted that, during the disciplinary hearing by the Human Resource Committee, the respondent was asked oral questions as stated in the Hansard, which they had adduced in evidence. The respondent was also allowed to file written submissions within seven (7) days.
19. The appellants stated that after deliberations, the committee recommended that appropriate action be taken against the respondent as the charges had been proved satisfactorily. The appellants argued that although there was no direct evidence linking the respondent to the criminal charges, there was overwhelming circumstantial evidence that she was aware of the events leading to the charges.
20. The appellants deliberated upon the recommendations by the committee and resolved to dismiss the respondent from employment for gross misconduct, impropriety, and lack of integrity. The appellants further stated that the respondent’s review application was thoroughly considered before its dismissal.



21. The appellants argued that the respondent did not demonstrate how her constitutional rights were violated. They also stated that nothing stopped them from instituting disciplinary proceedings against the respondent after she had been acquitted as an acquittal does not render an employee immune to disciplinary action by the employer.
22. The appellants said that the respondent was accorded a fair disciplinary hearing and the documents relied upon during the process, being; the letter of charge, her response, judgment, and proceedings in the criminal case were all forwarded to the respondent before the disciplinary hearing.
23. The learned Judge determined that this was a case of double jeopardy because, even though the Chief Justice was allowed by law to interdict the respondent, the law did not envisage any internal disciplinary process. The learned Judge also held that the fresh charges against the respondent were not similar to the charges in the show cause letter of 4th September 2015, but the appellants waited until 2017 to prefer the charges.
24. The learned Judge determined that there were no valid reasons to warrant the dismissal of the respondent as the circumstances under which money was found in the respondent's office in her absence were not explained, given that the office was locked and there was no one else who could have had access to put the money in her bag. The learned Judge also stated that the police ought to have waited for the respondent to return and conduct a search in her presence. Additionally, the appellants should have called a witness to explain how the respondent ended up with the money.
25. The learned Judge held that there was no nexus between the respondent and the person who was said to have given the bribe and yet it was unclear why the appellants accused the respondent of corruption, given that the Anti-Corruption Court had acquitted her.
26. The learned Judge found that the respondent was convicted of charges that were not brought against her, and she was not allowed to defend herself. This was because she was found guilty of the charges mentioned in a letter dated 4th September 2015, even though the charges against her were listed in the letter dated 22nd August 2017.
27. The learned Judge determined that the respondent was not given a fair disciplinary process under Section 41 of the *Employment Act* as she was not accorded an opportunity to defend herself against the corruption charges, having been charged under the Judicial Code of Conduct and Ethics.
28. The learned Judge also determined that the disciplinary process the respondent was subjected to was not fair and that her constitutional rights were infringed upon. The learned Judge held that she was subjected to two (2) different charges and the fate of the first charges remained unknown. The learned Judge made a finding that the respondent underwent a disciplinary process that violated Article 47 of *the Constitution*.
29. Being dissatisfied with the judgment, the appellants lodged this appeal. They have raised 10 grounds to wit that:
 - a) The learned Judge failed to take into consideration material facts while determining that there was double jeopardy.
 - b. The learned Judge failed to consider that the appellants communicated to the respondent through the letter dated 27th January 2017 that the disciplinary process would await the outcome of the criminal case.



- c. The learned Judge erred in finding that the appellant was found guilty of charges she did not face and for which she was not allowed to defend herself.
 - d. The learned Judge failed to appreciate that the dismissal letter dated 24th August 2018 erroneously referred to the charges dated 24th September 2015 and therefore failed to consider the totality of the entire disciplinary process.
 - e. The learned Judge erred in finding that there were no valid reasons for the respondent's dismissal.
- f. The learned Judge failed to appreciate that the charges in the letter dated 4th September 2015 were held in abeyance pending the completion of the criminal case.
- g. The learned Judge failed to consider that the respondent was informed of the charges level against her, accorded an opportunity to respond, notified of the disciplinary hearing, accorded an opportunity to be heard, and was notified of the reasons for her dismissal and of her right to review.
 - h. The learned Judge erred in awarding the respondent Kshs. 5,000,000/- in damages without providing a legal justification, and which award was inordinately high.
 - i. The learned Judge erred in awarding the respondent withheld salary during interdiction, yet the respondent had not rendered any services during that period and she was being paid half her salary.
 - j. The learned Judge erred in awarding the respondent the costs of the suit when there were justifiable reasons for her dismissal.”
1. When the appeal came up for hearing on 18th October 2023, Ms. Koech, learned counsel holding brief for Mr. Senna appeared for the appellants while Mr. Okemwa, learned counsel appeared for the respondent. Counsel relied on their respective written submissions which they briefly highlighted.
31. Mr. Okemwa informed us that he had filed a notice of cross-appeal dated 1st September 2022. The respondent prayed for orders that:
- “ a) The appeal be dismissed with costs.
 - b. The judgment of the trial court be affirmed save as varied and reversed on cross-appeal.
 - c. The respondent be reinstated to her job without loss of rank and salary.”
- 1. Ms. Koech urged us to re-evaluate the evidence and make an independent conclusion. She argued that the two cases against the respondent were not similar, and thus did not breach the principle of double jeopardy. Counsel relied on the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 in support of this submission.
 - 2. Counsel submitted that even though there were two (2) show cause letters issued in 2015 and 2017, there was only one disciplinary hearing. The first proceedings were held



in abeyance as there was an ongoing criminal trial, and it was only after the respondent had been acquitted that the appellants restarted the disciplinary process.

3. Counsel noted that Paragraph 18(2) & (3) of the *Judicial Service Act* allows the 1st appellant to take disciplinary action despite a criminal acquittal. Counsel argued that the respondent's dismissal was justified due to integrity and impropriety concerns and that the fresh charges against the respondent were different from the criminal charges.
35. Counsel submitted that the standard of proof is lower in disciplinary proceedings than in criminal proceedings. Counsel referred us to pages 234 – 238 of the record and pointed out that there was evidence against the respondent as captured in the Hansard.
36. Counsel noted that the trial court did not give any justification for the damages awarded. The court did not order the reinstatement of the respondent, in the exercise of its discretion. In any event, it was not practicable for the respondent to be reinstated.
37. The appellants submitted that the disciplinary proceedings against the respondent did not run parallel to the criminal proceedings as the said proceedings were deferred until the conclusion of the criminal case under Paragraph 18(2) of the *Judicial Service Act*. They stated that they had acted within the law in instituting disciplinary proceedings against the respondent. They faulted the learned Judge for holding that the appellants could not bring fresh charges against the respondent in a disciplinary hearing after she had been acquitted.
38. The appellants also faulted the learned Judge for holding that there was no valid reason to terminate the respondent's employment. They argued that the learned Judge in her determination failed to consider the overwhelming circumstantial evidence against the respondent, the inconsistencies in her testimony before the committee, and the lack of credibility. They pointed out that the respondent was dismissed on grounds of gross misconduct, impropriety, and lacking integrity; and not for the reasons under the Anti-Corruption Act.
39. The appellants submitted that the respondent was accorded a fair disciplinary hearing as she was informed of the charges against her, to which she responded. She was also allowed to be heard during the disciplinary hearing while accompanied by her counsel, and she was also given reasons for her dismissal and informed of her right to review.
40. The appellants relied on the case of *Judicial Service Commission v Davis Gitonga Karani* [2020] eKLR in submitting that the trial court did not give a justification for the damages awarded. They faulted the learned Judge for awarding the respondent Kshs. 5,000,000/-, an inordinately high award, without reference to similar cases or any justifiable reason.
41. On the cross-appeal, the appellants submitted that reinstatement is not an automatic relief, but one that is subject to the conditions under Section 49(4) of the *Employment Act*. They submitted further that, the remedy of reinstatement is discretionary as was held in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR. They argued that the time for reinstatement has lapsed and urged that the cross-appeal be dismissed with costs.
42. In opposition to the appeal, Mr. Okemwa faulted the 1st appellant for failing to conduct independent investigations and relied on the evidence considered by the court, which had culminated in an acquittal. Counsel argued that there was an impropriety of procedure. Counsel was of the view that once criminal proceedings are instituted, no charges can be preferred against an officer, in disciplinary proceedings.



- Counsel contended that the Chief Justice preferred charges against the respondent while criminal proceedings were ongoing, and this amounted to double jeopardy.
43. Counsel submitted that Section 62 of the *Anti-Corruption and Economic Crimes Act* provides that an acquittal shall lead to the accused being restored to their former position, yet the 1st appellant has not reinstated the respondent. Counsel submitted that there was a gross violation of the respondent's constitutional rights, and therefore she ought to be reinstated. Counsel, however, noted that the court has discretion on whether or not to order reinstatement.
44. The respondent submitted on the cross-appeal that the actions by the appellants contravened the law under the *Judicial Service Act*, the *Evidence Act*, the *Employment Act*, and Articles 47, 50, 236(b) of *the Constitution*, as due process was not followed before her dismissal. The respondent submitted further that the silence of the courts does not constitute accountability, transparency, and the rule of law, as Article 10 provides that no reason is not a good reason and this Court has the power to interfere when no reasons are given for termination.
45. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:
- “
- “(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power— Power to reappraise evidence and to take additional evidence. (a) to re-appraise the evidence and to draw inferences of fact;”
46. It follows therefore that the primary role of this court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw its own conclusions on matters of fact. However, in doing so, we bear in mind the fact that the trial court had the advantage of seeing and hearing the witnesses, and we give due allowance for the same. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 O'Connor P. stated thus:
47. We have thoroughly reviewed all the evidence presented, arguments made by both parties, legal precedents, and applicable laws. The key matters to be resolved are whether or not the termination of the respondent was unjust and whether the sum granted as compensation was adequate. These issues are closely connected to the question of whether the respondent should have been reinstated to her previous position.
48. It is common ground that the respondent was dismissed from employment by the 1st appellant. Before being dismissed, the respondent had been charged with corruption by the EACC but she was later acquitted. The appellants had issued the respondent with a show-cause letter immediately after her arrest. However, after she was acquitted, the appellants brought fresh charges against her under the *Judicial Service Act*. The respondent argued that the charges against her amounted to double jeopardy as she had been charged and acquitted over the same charges.
49. The first impression arising from these circumstances is that there was double jeopardy in having the respondent face two separate judicial processes that arose from the same facts. However, it is well settled that the standard of proof in criminal cases is higher than that in civil cases. Therefore, whereas a person may be acquitted by a court that handled a criminal case against him, that would not necessarily be a bar to a civil action against him.



50. Criminal proceedings and disciplinary processes are distinct. The former is founded on criminal law while the latter is founded on the contract of employment between the parties concerned. None of the two binds the other and the standard of proof is different because

while in the criminal process, the standard of proof is beyond a reasonable doubt, in the disciplinary process, it is on a balance of probability. In *James Mugeru Igati v Public Service Commission of Kenya* [2014] eKLR the court held that:

“...There is nothing in the repealed *Employment Act* Cap 226 Laws of Kenya, and the Public Service Commission Regulations 2005 which applied to the dismissal of the Claimant from service, that suggest the disciplinary process, is tied to the criminal process that may arise from the same facts. Section 17 of the repealed *Employment Act* did not make disciplinary proceedings at the workplace subject to any criminal investigations, trial or convictions...”

51. It is not in dispute that the charges leading to the respondent’s dismissal were brought under the *Judicial Service Act*, while the criminal charges were brought under the Anti-Corruption and Ethics Act. However, the respondent pointed out that being acquitted of corruption charges prevented the appellants from subjecting her to disciplinary proceedings. Section 62 of the Anti- Corruption and Economic Crimes Act provides that:

“

“(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:

Provided that the case shall be determined within twenty-four months.

2. A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

3. The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.”

52. Based on our understanding of subsection (4), the intention of the legislature was not to prevent the use of suspension on half pay or dismissal by employers under other legal regimes, while corruption and economic crimes charges are ongoing. This subsection allows for a disciplinary process to take place under those legal regimes.

53. It is possible that the court or tribunal handling the civil action might find that the case against the said person had been proved on a balance of probability, notwithstanding the earlier acquittal.

54. In this instance, Paragraph 18(3), Part IV of the Third Schedule of the *Judicial Service Act* provides that:

“An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted.”

55. It follows therefore that the principle of double jeopardy was not applicable as the disciplinary process was not based on the criminal culpability of the respondent.



56. On whether or not the respondent was subjected to a fair disciplinary process, once the new charges were brought against the respondent on 22nd August 2017, she responded to the charges on 30th August 2017. The respondent attended the disciplinary hearing and after the hearing, she was allowed to file written submissions. At the end of the process, the respondent was dismissed from employment. She was informed of her right to review. She lodged an application for review, which was subsequently rejected.

57. It is trite that in cases where an employee has committed serious acts of misconduct that justify immediate dismissal, the law requires employers to provide the employee with a fair hearing. This means that the employee must be allowed to present their defense before any disciplinary action is taken against him. Section 41 of the *Employment Act* provides that:

“

“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.”

58. It is common ground that the respondent was informed of the charges against her, she responded to the charges and attended a disciplinary hearing in the company of counsel. It was only after due process had been followed that the respondent was dismissed.

59. Section 44(3) & (4) of the *Employment Act* provides that:

“ (3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

2. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
- c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;



- d. an employee uses abusive or insulting language, or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer;
 - e. an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
 - f. in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
 - g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.”
60. A termination is deemed to be unfair under Section 45 of the [Employment Act](#) as follows:
- “(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.
 3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
 4. A termination of employment shall be unfair for the purposes of this Part where—
 - a. the termination is for one of the reasons specified in section 46; or
 - b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
 5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider—
 - a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - b. the conduct and capability of the employee up to the date of termination;
 - c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;



- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- (f) the existence of any previous warning letters issued to the employee.”
61. It is evident from the dismissal letter dated 24th August 2018 that the appellants wrote:
- “Following the disciplinary process against you as per the charges set out in the letter dated 4th September 2015...”
62. The dismissal letter referred to the earlier charges and not the fresh charges. The trial court held that the respondent had been dismissed on the charges for which she did not defend herself. The appellants submitted that there was an error in the date on the dismissal letter and that they had followed due procedure.
63. Upon perusal of the record, we note that after receiving her letter of dismissal, the respondent made an application for review. In the said application, the respondent referred to the fresh charges dated 22nd August 2017. Similarly, in her petition, the respondent complained about the impropriety of her termination following the hearing of the 2017 charges. By her express conduct, the respondent demonstrated that she was aware of the charges against her, and the error of the date in the dismissal letter did not give rise to any confusion on her part. Having responded to the substance of the fresh charges, the respondent was not prejudiced at all by the error in question.
64. Considering the totality of the whole disciplinary process, the report by the committee indicates that the fresh charges in the letter dated 22nd August 2017 were read to the respondent and she responded to the said charges during the hearing. This to our minds, indicates that the process leading to the respondent’s dismissal was based on the 22nd August 2017 charges.
65. The appellants cited the reasons for the respondent’s dismissal as being: overwhelming circumstantial evidence that was incompatible with her innocence, her responses to the questions raised were inconsistent, thereby calling her credibility into question, and the standard of proof in a disciplinary hearing was not the same as in criminal cases where cases have to be proved beyond any reasonable doubt.
66. In the result, we find that the appellants followed due procedure in dismissing the respondent from employment. Therefore, the appeal is allowed.
67. Meanwhile, the respondent prayed for reinstatement, in the cross- appeal. The learned Judge did not make an order for reinstatement. In *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Others*, (supra), the court stated thus:
- “As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment



relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.

Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, to say something about the practicability factor.”

68. Section 12(3) of the *Employment and Labour Relations Court Act* as read together with Section 49 of the *Employment Act*; gives the court power to order a reinstatement within 3 years of dismissal, in appropriate cases. It is common ground that more than 3 years have lapsed since the respondent was terminated. As the respondent had lodged a constitutional petition, the remedy of reinstatement was not automatic. Secondly, the time within which the reinstatement could have been ordered has lapsed.
69. In any event, having determined that the respondent was not unfairly terminated, she was not entitled to any remedies.
70. It the result we find that the cross-appeal lacks merit and it is hereby dismissed with costs. On the other hand, the appeal is allowed with costs to the appellant.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF FEBRUARY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

