Director General, National Intelligence Service & another v Chelimo (Civil Appeal 645 of 2019) [2024] KECA 606 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 606 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 645 OF 2019

F TUIYOTT, JM MATIVO & GWN MACHARIA, JJA

MAY 24, 2024

BETWEEN

DIRECTOR GENERAL, NATIONAL INTELLIGENCE SERVICE .... 1ST APPELLANT

ATTORNEY GENERAL ..... 2ND APPELLANT

AND

VINCENT KONGA CHELIMO ..... RESPONDENT

(An appeal against the Judgment of the Employment and Labour Relations Court of Kenya, Nairobi (Wasilwa, J.) dated 6th March 2018 in ELRC No. 256 of 2016)

JUDGMENT

1. The respondent, Vincent Konga Chelimo, was recruited into the Kenya Police Force on 11th May 1988. He rose through the ranks to Police Sergeant and on 1st July 1999, he officially joined the National Security Intelligence Service (NSIS), now National Intelligence Service (NIS), vide a letter of appointment dated 7th July 1999. He worked diligently and was promoted to the level of Senior Intelligence Officer (NSIS Level 7) with effect from 19th April 2008.

2. On 18th January 2011, it was alleged that on 28th September 2010, jointly with others stole property belonging to Kenya Police Sacco worth Kshs 600,000/=. He was arraigned before the Chief Magistrate's Court charged with the offence of theft contrary to Section 275 of the *Penal Code*. After his arraignment in court, he was served with an interdiction letter dated 24th February 2011. On 13th November 2013, while the criminal case was on going, he was served with a suspension letter stating that the court case had taken too long to conclude.

3. Subsequently, by a ruling delivered on 17th December 2014, the trial magistrate held that the respondent had no case to answer and acquitted him under section 210 of the *Criminal Procedure*

Code. He supplied NSIS with the court proceedings. However, NIS opened an inquiry and subjected the respondent to disciplinary action premised on the facts and circumstances that led to his arraignment in court. On 30th June 2015, while the respondent was waiting for the disciplinary proceedings, he was served with a letter of dismissal terminating his services at the NSIS. On 16th July 2015, he lodged an appeal against his dismissal but vide a letter dated 28th September, 2015 he was informed that his appeal was not successful.

4. Aggrieved by the termination, on 23rd February 2016, he filed a claim before the Employment and Labour Relations Court (ELRC) challenging his dismissal for being unfair. He prayed for inter alia, unconditional reinstatement to his employment, compensation for unpaid leave, unpaid commuter allowance, unremitted pension, unremitted retirement medical scheme contribution and general damages for loss of employment and loss of earning capacity.

5. In its reply to the respondent's statement of claim filed on 23rd May 2016, the NSIS averred that when the respondent took up the position of an intelligence officer, and he agreed to abide by all the regulations laid down for officers of the NSIS. That a complaint of alleged theft was received against the respondent; he was notified and given particulars of the alleged offence; that he admitted to wrongfully withdrawing money from the Police SACCO thereby displaying questionable integrity and conduct unbecoming of an officer; that a disciplinary panel found him guilty and he was dismissed from service. That by letter dated 30th June 2015, the respondent was notified of the decision to dismiss him from service; that he was informed of his right to appeal; that he appealed and his appeal was dismissed, and that a valid, fair and procedural process was followed in arriving at his dismissal.

6. The matter proceeded by way of written submissions. Upon hearing the parties and considering the material placed before her, the learned trial Judge framed two issues for determination, namely; whether NSIS had valid reasons to institute the disciplinary proceedings against the respondent; and whether due process was followed.

7. In the impugned judgment delivered on 6th March 2018, the learned Judge found that it had not been demonstrated that the respondent was accorded a hearing prior to the dismissal. The Court found that the respondent was not heard in person; he was never notified of the disciplinary hearings. Therefore, the process leading to his dismissal was flawed and un-procedural. Consequently, the learned Judge reinstated the respondent to his employment. In granting the order of reinstatement, the learned Judge observed:

> " 34. Of course, the respondents have submitted that they do not want the claim allowed. However, going by the fact that the claimant served the respondent for over 30 years and that he cannot easily get another job in a similar establishment at his age it is my finding that the only remedy which will put back the claimant in a position to compensate him for the wrong done to him is reinstatement. I therefore allow the claimant's claim and order immediate reinstatement of the claimant with no loss of benefits from the date of dismissal on 30th June 2015."

8. Aggrieved by the decision, NSIS filed this appeal seeking to overturn the whole judgment of the ELRC citing 9 grounds of appeal in its memorandum of appeal dated 13th December, 2019. In summation, the grounds are that the trial Judge erred in law and in fact: by ordering unconditional reinstatement; failing to consider that acquittal in criminal cases is not a bar to internal administrative processes against an employee; failing to consider Rule 2.1(xv), (xvii) and (xx) of the NSIS Disciplinary Rules and Regulations and Rule 10.1 (ii) on reinstatement; failing to consider that the respondent was paid

his dues from 23rd February 2011 to 30th June 2015 amounting to Kshs 5,842,800/= less a KCB loan of Kshs 2,200,000/= and P.A.Y.E of Kshs 1,752,840/= and that he was also paid his pension benefits; by not considering that the respondent was taken through an administrative action and was heard in person, and was notified of the disciplinary hearing; by not determining whether the respondent's dismissal was appropriate or not; and failing to determine the existence of exceptional circumstances reinstatement as opposed to compensation.

9. During the hearing of the appeal, learned counsel Ms. Oyugi represented the NSIS while learned counsel Mr. Samini represented the respondent. Both parties filed written submissions and list of authorities which they highlighted orally.

10. Ms. Oyugi addressed four issues, namely; whether the respondent was lawfully terminated; whether the respondent was accorded fair hearing before dismissal; whether the respondent's reinstatement should be quashed; and whether the respondent should be condemned to shoulder the costs of the appeal.

11. Submitting on the lawfulness of the termination, Ms. Oyugi cited Rule 2.1 (xv), (xvii) and (xx) of the NSIS Disciplinary Regulations in support of her argument that acquittal by a court of law would not lead to automatic reinstatement, since administrative disciplinary proceedings may still be preferred against such officer on account of gross misconduct. Counsel submitted that the respondent's acquittal was based on a technicality and as a result, the NSIS reserved the right not to reinstate the respondent because he had breached NSIS's code of conduct, he lacked integrity and honesty and he was lawfully dismissed.

12. Submitting on the question whether the respondent was accorded a fair hearing before dismissal, Ms. Oyugi maintained that the respondent was notified of the disciplinary inquiry into his actions vide internal memo dated 5th January 2015 which distinctly stated the date (12th January 2015), time (1100 hours) and place of inquiry (NIS Headquarters, Ground Floor, Office No 2/139). The respondent was also informed that he would have been expected to assist the inquiry, and he was allowed to call any witness who wished to avail evidence to the enquiry officer on his behalf. Further, when a decision to dismiss him was made, he was notified vide letter dated 30th June, 2015 and he was also informed of his right to appeal against the decision within 21 days. The respondent appealed but the Disciplinary Appeals Board upheld the decision to dismiss him. Consequently, section 41 of the *Employment Act* was followed to the letter. To buttress her argument, Ms. Oyugi cited Mary Chemwono Kiptui v Kenya Pipeline Company [2014] eKLR, where it was held that an employee must be taken through a mandatory process outlined under section 41 of the *Employment Act* before termination.

13. Submitting on the issue of the respondent's reinstatement, Ms. Oyugi maintained that he was lawfully dismissed as a result of alleged theft, a clear indication that an order of reinstatement was not tenable because the respondent's conduct was no longer compatible with NSIS and he had the potential of bringing the NSIS and its staff into disrepute. Counsel contended that the respondent's dismissal letter stated that he would be paid his dues from 23rd February 2011 to 30th June 2015, amounting to Kshs 5,842,000, less Kenya Commercial Bank (KCB) loan of Kshs 2,200,000 and PAYE of 1,752,840, plus his NSIS pension benefits since he was a member of the NIS superannuation scheme. Counsel maintained that the respondent took home Kshs 1,889, 969, therefore, he was not entitled to reinstatement having been terminated fairly and lawfully. In support of the foregoing argument, counsel cited the High Court decision *Kenya Airways v Aviation and Allied Works Union, Kenya & 3 others* [2014] in support of the holding that even though reinstatement is one of the remedies under the *Employment Act*, it is not an automatic right of the employee. Each case has to be considered on its merits.

14. Mr. Samini, the respondent's counsel's submissions were two- fold. First, whether the dismissal was flawed. Second, the considerations for the remedy of reinstatement and why it is was appropriate in the instant case.

15. Referring to Section 41 of the *Employment Act*, counsel submitted that the said provision is couched in mandatory terms and it requires an employer to explain to the employee the reasons for termination of employment and in case of gross misconduct, the employee is required to have another employee or union representative of his choice present during the explanation.

    Counsel contended that the minutes of 16th June 2015 are a clear demonstration that the respondent was not in the meeting during the hearing, none of his representatives were in the meeting and there was no justification at all to proceed with disciplinary deliberations without notifying the respondent or without having him present to be heard as required by the rules of natural justice.

16. Counsel questioned the veracity and probative value of the appellant's letter dated 5th January 2015 which was not part of the documents produced during the trial, but it was introduced through submissions. He argued that NSIS failed to prove that it had served the respondent with the required notice for purposes of appearing before the disciplinary committee and that he admitted to the theft as alleged. Consequently, NSIS violated the respondent's right to a fair administrative action under Article 47 of the *Constitution* and section 4 (4) of the *Fair Administrative Action Act*. Mr. Samini cited this Court's holding in *Standard Group Limited v Jenny Luesby* [2018] eKLR that hearing is a mandatory requirement under the law even in the worst case scenario where an employee grossly misconducted oneself.

17. Addressing the order of reinstatement granted by the trial court, Mr. Samini submitted that the trial judge in granting the reinstatement took into account the considerations in section 49(4) of the *Employment Act* including the respondent's age, the period of 30 years he had worked, the difficulty of being employed elsewhere, his advanced age and the few years to attain his retirement age.

18. Regarding the terminal dues paid, Mr. Samini submitted that the monies paid out to the respondent as was outlined in the letter of summarily dismissal was what was due and owing to him during the period in which he was suspended. However, the respondent was entitled to medical and house allowance which was not paid. Consequently, pursuant to section 18 (4) of the *Employment Act*, the respondent is entitled to be paid all monies and allowances that are due and owing to him up to the date of his dismissal. It is from that premise that NSIS was expected to settle the total claim of Kshs 2, 528,465.

19. We have evaluated the pleadings, the proceedings, the impugned judgment, the parties' submissions and the authorities cited. From our analysis, we find that the following two issues fall for determination: (a) whether the respondent's dismissal was procedurally fair and lawful, and, (b) whether the remedy of reinstatement was justified in the circumstances of this case.

20. A first appeal to this Court from the High Court or courts of equal status is by way of a 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (See *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 and *Jabane v Olenja* [1986] KLR 661).

21. Concerning the first issue, NSIS maintained that the respondent was notified about the disciplinary process and he was invited to attend the same on 12th January 2015 vide letter dated 5th January 2015. The respondent however disputed the invitation and questioned the validity of the said letter.

22. Undeniably, under our *Employment Act*, every employee has a right not to be unfairly dismissed. This statutory edict, which is deliberately couched in peremptory terms, is found in section 45

    1. of the *Employment Act* which provides that no employer shall terminate the employment of an employee unfairly. Sub-section

    2. of the same provision describes what constitutes an unfair termination. It reads:

        (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.

23. The scheme of the *Employment Act* is that the employee must establish the existence of a dismissal. On the other hand, the employer must prove that the dismissal is fair. Fairness in this sense means, the employer must demonstrate the existence of the reason(s) for the dismissal which must fall under the circumstances specified at Section 45 (2). An employer is also obligated to demonstrate that the dismissal was in accordance with fair procedure. Significantly, there is no shift of the burden of proof from one party to the other in dismissal cases. Each party bears the burden of proof in relation to separate issues (i.e. the employee regarding the fact of dismissal and the employer regarding the fairness of the dismissal). If there is no dispute about the fact of the misconduct, (i.e. misbehaviour was proven), the employer still has to prove that the dismissal was substantively fair as it was, inter alia, the appropriate sanction for the conduct in question. Where there are factual disputes, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. Clearly, the Act requires the employer to adduce evidence that is sufficient to persuade a court that there was a valid and lawful reason for dismissal and that the dismissal process was fair.

24. The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case. Whether the dismissal was fair turns on the factual findings. Thus, the starting point is to assess the versions presented by the parties during the hearing to determine the extent to which either parties' version is more probable than the other.

25. The standard of proof is on a balance of probabilities, not beyond reasonable doubt, and that all the employer is required to prove are the reasons it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test.

    In *Bamburi Cement Limited v William Kilonzi* [2016] eKLR this Court expressed itself on the nature of proof required as follows:

    > "The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing... The test to be applied is now settled. In the case of the *Judicial Service Commission v Gladys Boss Shollei*, Civil Appeal No 50 of 2014, this Court cited with

approval the following passage from the Canadian Supreme Court decision in *Mc Kinley v B.C.Tel.* [2001] 2 S.C.R. 161

> "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

26. Similar guidelines are to be found in *Halsbury's Laws of England*, 4th Edition, Vol. 16 (1B) para 642, thus:

> "...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

27. Similarly, in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court had the following to say on the burden of proof:

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble: ".to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees."
>
> Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.
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> 14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:
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> (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of

> proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer." [Emphasis added].
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> So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45." [Emphasis added].

28. We have carefully considered the parties' opposing versions on the dismissal and whether the process was fair. The dismissal is not disputed. In this regard, the respondent discharged his burden of prove. The reason for the termination is not disputed. The contestation is whether the dismissal process was fair and whether the respondent was afforded an opportunity to be heard on the allegations against him before the decision was made. The appellant was obligated to demonstrate by way of evidence, that the termination was procedurally fair as required by the law. At page 120 of the record is an internal memo dated 5th January 2015. On the face of the said letter it is the title "Notification of Disciplinary Inquiry". However, there is no evidence or proof that the said letter/memo was hand delivered to the respondent since on the face of the said letter there is no acknowledgement of receipt by the respondent. Furthermore, no tangible evidence was led by the appellant to demonstrate that the memo was delivered and received by the respondent. This issue appears to have been introduced in the submissions.

29. NSIS never adduced convincing evidence to demonstrate that the disciplinary process proceeded on 12th January 2015 in the presence of the respondent or his representative. The 1st appellant exhibited minutes of the Administration Division Disciplinary Committee Review meeting allegedly held on 16th June 2015 at Director Administration Conference Room at 1500 Hours. We have gone through the said minutes. There is nothing to suggest that the respondent attended the disciplinary hearing and/or he was allowed to defend himself before NSIS's Disciplinary Committee. There is nothing to suggest, even remotely, that he had been summoned or notified to attend the said proceedings.

30. The purpose of disciplinary hearing is to afford the employee an opportunity to explain his case/ defence and to hear such representations as he may make about what action, if any, that can or should be taken against him. The nature and formality of the hearing depends on the circumstances. The ultimate test however is whether the employee was given a fair opportunity to state his case before a decision is taken to dismiss him. This approach is consistent with section 45, 46 and 47 of the *Employment Act*, Article 47 of the *Constitution*, section 4 of the *Fair Administrative Action Act* and Article 7 of the *ILO Termination of Employment Convention*, 1982 (No 158), which provides that: "the employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

31. Ultimately, the consideration is whether the employee was given a reasonable opportunity to make representations before he was dismissed. The circumstances faced by both the employer and employees should dictate what procedural steps are reasonably practical and fair in the context. We do not believe that the appellant's version is sufficient to justify its failure to hold a disciplinary hearing. Consequently, we are satisfied that the employer has not established that the dismissal was procedurally fair.

32. Regarding the grant of the prayer of reinstatement, we may profitably cite the Supreme Court decision in *KenFreight (E.A) Limited v Benson K. Nguti* [2019] eKLR (Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola, SCJJ) that the *Employment Act*, 2007 provides for remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. Further, the Supreme Court held that it did not matter how the termination was done and provided the same was challenged in a court of law, and where the Court found the same to be unfair or wrongful, section 49 applies. The Supreme Court further held thus:

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

33. As was held by the Supreme Court in the above case, the trial court had the discretion to grant the order of reinstatement sought by the respondent. The only issue is whether the grant of the reinstatement order was justified in the circumstances of the case.

This Court in *Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR observed:

> "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) (viii) 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 the action against him will be minimal."

34. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in case law. In *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* [2014] eKLR, it was stated that the court ought not to interfere with the exercise of discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

35. Section 12 (3) of the *Employment and Labour Relations Court Act* which grants an employment and labour court power to order reinstatement of a dismissed employee provides that:

> "(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
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> i. interim preservation orders including injunctions in cases of urgency;
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> ii. a prohibitory order;
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> iii. an order for specific performance;
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> iv. a declaratory order;
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> v. an award of compensation in any circumstances contemplated under this Act or any written law;
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> vi. an award of damages in any circumstances contemplated under this Act or any written law;
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> vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
>
> viii. any other appropriate relief as the Court may deem fit to grant. (Emphasis by underline)
>
> (4) ...".

36. It is the NSIS's contention that since the respondent's theft breached its code of conduct, the respondent's continued employment was no longer compatible with it since he had the potential of bringing the NSIS and other staff into disrepute. We note that the learned Judge in granting the order of reinstatement based her findings on the fact that the respondent had worked for NSIS for 30 years and he was not in a position to get a similar job in a similar establishment at his age. The learned trial Judge held that the only fair remedy available to the respondent was reinstatement.

37. Section 49(4) stipulates the matters that should be taken into account in awarding damages, reinstatement or re- engagement which includes:

> c. the practicability of recommending reinstatement or re-engagement and
>
> d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.

38. This Court in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (*supra*) held:

> "69. 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, say something about the practicability factor...

71. Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties."

39. We find that the Judge considered the factors stipulated in the above provision, the respondent's advanced age, the period of over 30 years he had worked, the impossibility of securing another job and practicability of the reinstatement. We find no reason to fault the learned judge for reasons assigned to the exercise of her judicial discretion. We agree with the learned judge that the NSIS is not a small employer, therefore, the respondent's reinstatement would not in any way affect its running since the respondent can be re-deployed in another department/region.

40. In conclusion, we find and hold that the NSIS has failed to demonstrate that the learned judge misdirected herself in deciding that the respondent's dismissal was unfair and, in her interpretation, and application of the provisions of the *Employment Act*, and as a result arrived at a wrong decision. Accordingly, we find that this appeal is devoid of merit. We hereby dismiss it with no orders as to costs. For avoidance of doubt, the order of stay issued by this Court on 8th November, 2019 is hereby vacated with immediate effect.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR