Nairobi City Water and Sewerage Company Ltd v Irungu (Civil Appeal 458 of 2019) [2024] KECA 677 (KLR) (14 June 2024) (Judgment) (with dissent - S ole Kantai, JA)

Neutral citation: [2024] KECA 677 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 458 OF 2019

MA WARSAME, S OLE KANTAI & JM MATIVO, JJA

JUNE 14, 2024

BETWEEN

NAIROBI CITY WATER AND SEWERAGE COMPANY LTD ..... APPELLANT

AND

SOLOMON GITHAE IRUNGU ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Mathew N. Nderi, J.) delivered on 29th June 2016 in E.L.R.C Cause N0. 1921 of 2013)

Court of Appeal outlines key principles for employment courts to consider when determining the fairness of a dismissal.

Reported by John Ribia

Employment Law *– summary dismissal – conditions precedent – safeguards that employers must adhere to – employee's previous record - what procedural safeguards must employers adhere to for fairness in cases of summary dismissal - whether an employee's prior disciplinary record would be considered in assessing fairness and the justification for summary dismissal of the employee – Employment Act (cap 226) section 44.*

Employment Law *– dismissal – principles that the court considered in determining if there was a fair dismissal – adherence to internal human resource policies - what principles did an employment court refer to in determining whether there was a fair dismissal - to what extent should internal administrative policies and disciplinary frameworks influence judicial findings on employment disputes - Employment Act (cap 226) sections 41, 43(1), 44, 45, 49(1)(c), 49(4), and 90.*

Employment Law *– time- limitation of time – expiry of time barring an employment claim - what constituted sufficient grounds to bar an employment claim under statutory limitation periods – whether a dismissal process exceeding the 90-day timeline prescribed in the employer's human resources manual, taking five years instead, constituted a procedural breach and was time barred - Employment Act (cap 226) section 90.*

Brief facts

The respondent, employed by Nairobi City Water and Sewerage Company, was summarily dismissed in 2009 for alleged gross misconduct, including bribery and fraudulent activities. His appeals within the company's disciplinary framework were unsuccessful, prompting a claim of unlawful dismissal in 2013. The Employment and Labour Relations Court ruled in his favor, citing procedural unfairness and lack of substantive justification under the Employment Act. The employer's appeal raised issues of procedural compliance and substantive grounds for dismissal, asserting the dismissal was lawful and the trial court misapprehended the evidence.

Issues

i. What constituted sufficient grounds to bar an employment claim on grounds of statutory limitation periods?
ii. What procedural safeguards must employers adhere to in order to ensure fairness in cases of summary dismissal?
iii. Whether an employee's prior disciplinary record should be considered in assessing fairness and justification of summary dismissal of the employee.
iv. Whether a dismissal process exceeding the 90-day timeline prescribed in the employer's human resources manual, taking five years instead, constituted a procedural breach and was time-barred.
v. What principles did an employment court refer to in determining whether there was a fair dismissal?
vi. How should courts approach conflicting evidence or procedural irregularities in disciplinary processes when determining the fairness of dismissal?
vii. To what extent should internal administrative policies and disciplinary frameworks influence judicial findings on employment disputes?

Held

Per M Warsame, JA

1. The role of the first appellate court was to re-evaluate the evidence and make its own findings on those made by the trial court as contemplated in rule 31 of the Court of Appeal Rules, 2022.
2. The appeal was not statute barred. The three-year period ran from March 25, 2011 to allow time for conclusion of the internal appeal mechanism. That meant that the respondent was entitled to move the court at the expiry of the two months period indicated in the letter, being May 24, 2011. The respondent pursued reinstatement and it was only on September 27, 2013 that the decision declining to reinstate him was communicated.
3. The trial court fell short in analyzing the evidence before it. It was not clear which evidence convinced the court, or which evidence called for countering by the appellant. Considering the two diametrically opposed positions, the court was expected to, in addition to the testimony, undertake an analysis on the documentary evidence adduced by the parties. There was enough to point at the wayward nature of the respondent's conduct. There was also evidence of previous warnings and cautions including over meter readings. While that may not be the subject of the instant appeal, there was enough evidence that called for consideration, whether the appellant called a further witness or not, as the same remained uncontroverted by the respondent or at all. As for the calling of a further witness as sought by the appellant, nothing turned on it.
4. The respondent was at all times called upon to appear at the disciplinary and appellate proceedings. At no time did the respondent express dissatisfaction in that regard. Moreover, from the report by the Commission on Administrative Justice (Office of the Ombudsman), there was no administrative injustice suffered by the complainant as far as the dismissal process was concerned. There was no procedural impropriety.
5. The dismissal of the respondent was merited. The appellant observed all the procedures and process before, during and after the disciplinary. The dismissal was justified and within the purview set by the law. There was no ground to fault the disciplinary process. It was fair and in accordance with law.

6. The reason for termination was not only valid, but it complied with the procedural tenets of the Employment Act. The trial court's holding that the appellant had no valid reason in terms of section 43(1) of the Employment Act to summarily dismiss the respondent, was set aside.

Per Mativo, JA, (Concurring)

7. An employer was obligated to demonstrate by evidence that the dismissal was fair. The initial burden of proof lay with the employer. The respondent never pleaded that he was never invited to a disciplinary hearing nor did he plead that he never attended the hearing. There was no reason why the trial court ignored the disciplinary proceedings which remained uncontroverted. The trial court erred when it failed to interrogate the probability or improbability of particular aspects of the respondent's version, and the cogency of his version.
8. The determination of an appropriate sanction was a matter which was largely within the discretion of the employer. However, that discretion must be exercised fairly. A court should not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question was not whether the court would have imposed the sanction levied by the employer, but whether in the circumstances of the case, the sanction was reasonable. Under the Employment Act and the appellant's Code of Conduct, gross misconduct was a ground for summary dismissal.
9. In any dismissal, what an employer was obligated to prove was a fair reason for the dismissal it effected. A reason was fair if it was related to the conduct of an employee. The determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer:
    1. depended on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
    2. was to be determined in accordance with equity and the substantial merits of the case. There was no dispute that the accusations against the respondent constituted gross misconduct.
10. An employer was required to follow a fair procedure and show that dismissal was an appropriate sanction in the circumstances of the case. The fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.
11. The court should bear in mind the following when considering the appropriateness of a dismissal:
    1. the decision to dismiss lay with the employer;
    2. dismissals should be fair;
    3. fairness implied reasonableness, in the sense that the sanction of dismissal must be a reasonable one in the circumstances;
    4. fairness was not an absolute concept – there may be a range of fair responses to a given instance of misconduct;
    5. should a dismissal fall within that range of fair responses, the court should defer to the employers.
12. Fairness implied an approach based on reasonableness, which in turn required a consideration of all relevant circumstances, hence it was not a novel one. There was little point in making abstract enquiries as to whether an employer had acted fairly, as opposed to reasonably, in deciding to dismiss. The real issue was whether the employer acted in light of prevailing circumstances.
13. The right to a fair dismissal process embraced a concept of substantive fairness which was not to be equated with what might pass muster in a criminal court. The inquiry was whether there had been an irregularity or illegality, which was a departure from the formalities, rules and principles of procedure according to which Kenyan law required disciplinary proceedings to be initiated or conducted.
14. Whether or not a person was accorded a fair hearing of his case depended on the circumstances and the type of the decision to be made. The minimum requirement was that the person got the chance to present his case. The emphasis that the courts had recently placed on an implied duty to exercise

discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But the idea of fairness was also a substantive principle.

15. The standards of fairness were not immutable. They could change in their application to decisions of a particular type. The principles of fairness were not to be applied by rote identically in every situation. What fairness demanded was dependent on the context of the decision, and that was to be taken into account in all its aspects.

16. The courts looked at all the circumstances of the case to determine how the demands of fairness should be met. The range of procedural protections varied, depending on the context, with greater protections in some contexts rather than others. Fairness was an explanation of other grounds of review. That was apparent in relation to judicial review for breach of substantive legitimate expectations. The courts had also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also used fairness to rationalize judicial review of decisions based on wrongful or mistaken assessments of evidence. Fairness had operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

17. When an employer was deciding on an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. The employer may be said to have discretion.

18. The respondent was accorded a fair process. Fairness was contextual in nature and determined on the nature of the dispute. A party could not answer allegations against him, go through disciplinary proceedings, lodge an appeal and re- appeal and claim he was not afforded a fair process.

Dissenting opinion

Per Kantai, JA, (Dissenting)

1. In addition to substance, the Employment Act (the Act) placed process as the central consideration in matters of employment where an employer was considering or had decided to terminate the services of an employee. Process was everything under the Act and an employer who ignored it while terminating services of an employee would fall foul of the law and would be visited with consequences as set out in the Act.

2. The HR Manual provided for periods within which a disciplinary process should be undertaken and concluded. That process which began with suspension on August 19, 2008 should have been completed within a maximum of 90 days. It was not. An appeal process should have been completed within a maximum of 120 days. That was not done. The whole disciplinary process dragged on for over 5 years contrary to the appellants HR Manual and any other law.

3. Process was everything in matters of termination of employment by an employer of an employee. Because process was not followed by the appellant, nay, it was flagrantly flaunted, the appellant had no valid reason to summarily dismiss the respondent from employment. There was no valid reason to terminate in terms of section 43(1) of the Act. The dissenting court would agree with the trial court's findings that summary dismissal of the respondent by the appellant was wrongful and in violation of the law.

Appeal allowed.

Orders

i. *The reliefs awarded to the respondent were set aside in entirety.*

ii. *The judgment of the High Court delivered on June 29, 2016 was set aside and in its place be substituted with an order upholding the summary dismissal of the respondent from employment by the appellant.*

iii. *The appellant was awarded the costs of the claim before the Employment and Labour Relations Court, and the costs of the Appeal*

Citations

Cases

Kenya

1. *Attorney General & another v Andrew Maina Githinji & another* Civil Appeal 21 of 2015; [2016] KECA 817 (KLR) - (Mentioned)
2. *Banking, Insurance and Finance Union (K) v Bank of India* Cause 1201 of 2012; [2018] KEELRC 403 (KLR) - (Explained)
3. *CMC Holdings Ltd v James Mumo Nzioki* Civil Appeal 329 of 2001; [2004] KECA 143 (KLR) - (Mentioned)
4. *Independent Electoral and Boundaries Commission & another v Mule & 3 others* Civil Appeal 219 of 2013; [2014] KECA 890 (KLR) - (Mentioned)
5. *Isindu, Pius Machafu v Lavington Security Guards Ltd* Civil Appeal 301 of 2015; [2017] KECA 225 (KLR) - (Explained)
6. *Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company* Judicial Review Application 4 of 2018; [2019] KEELRC 1418 (KLR) - (Mentioned)
7. *Mary Chemweno Kiptui v Kenya Pipeline Company Ltd* Cause 435 of 2013; [2014] KEELRC 905 (KLR) - (Mentioned)
8. *Muturi, Mburu v Dalago Tours Ltd* Civil Appeal 80 of 2017; [2019] KEHC 10238 (KLR) - (Explained)
9. *Mwangi v Wambugu* Civil Appeal 77 of 1982; [1984] KECA 13 (KLR) - (Followed)
10. *Nairobi Bottlers Ltd v Imbuga* Civil Appeal E661 of 2022; [2024] KECA 434 (KLR) - (Explained)
11. *National Water Conservation & Pipeline Corporation v Mwanza* Civil Appeal 178 of 2014; [2017] KECA 797 (KLR) - (Explained)
12. *Nderitu v Kenya Power and Lighting Co Ltd & Stima Sacco Ltd* Cause 34 of 2010; [2013] KEELRC 84 (KLR) - (Mentioned)
13. *Ndirangu v Henkel Chemicals (EA) Ltd* Petition 1 of 2013; [2013] KEELRC 890 (KLR) - (Explained)
14. *Rioba Nsongo & another v Gisiri Sagwe* Civil Appeal 241 of 2002; [2006] KEHC 116 (KLR) - (Explained)

Uganda

Iga v Makerere University [1972] EA 65 - (Mentioned)

South Africa

1. *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* (DA 10/05) [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); (2008) 29 ILJ 964 (LAC) (5 December 2007) - (Mentioned)
2. *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437(E) - (Explained)
3. *National Union of Mineworkers v Vaal Reefs Exploration & Mining Co Ltd* 1987 8 ILJ 776 (IC) - (Explained)
4. *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) - (Explained)
5. *Stellenbosch Farmers' Winery Group Ltd & another v Martell & Cie SA and others* (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002) - (Explained)

Nigeria

Adetoun Oladeji (Nig) Ltd v Nigerian Breweries Plc (SC 91/2002) [2012] NGSC 1 (18 October 2012) - (Mentioned)

United Kingdom

1. *Jones vs National Coal Board* [1957] 2 All ER 155 (CA) - (Followed)
2. *McInnes v Onslow-Fane* [1978] 3 All ER 211 - (Mentioned)

3. *R v Secretary of State for the Home Department, ex p Doody* [1993] UKHL 8 - (Mentioned)

Regional Court

Shah v Mbogo [1967] EA 116 - (Explained)

Texts

De Smith, SA., Evans, JM., (Eds) (1980), *Judicial Review of Administrative Action* London: Stevens and Sons Ltd, 4th Edn p 352

Statutes

Kenya

1. Constitution of Kenya article 164(3) - (Interpreted)
2. Court of Appeal Rules, 2022 (cap 9 Sub Leg) rule 31- (Interpreted)
3. Employment Act (cap 226) section 41, 43(1); 44; 45; 49(1)(c)(4); 90- (Interpreted)
4. Limitation of Actions Act (cap 22) section 4(1)- (Interpreted)

Advocates

None mentioned

JUDGMENT

Judgment of Warsame, JA

1. The respondent, Solomon Githae Irungu, was an employee of the Nairobi City Council (as it was at the time) in 1998 and was seconded to the 2nd respondent in 2004 where he held different positions. This included as a marketing assistant and a disconnection/reconnection supervisor. On 27 June 2006, he was confirmed to the position and was assigned duties at Githurai 45 Kahawa Wendani, Kahawa Sukari in the appellant's northern region.

2. On 19 August 2008, the appellant issued a letter of suspension and transfer to the respondent on allegations that he had received a bribe to reverse the water meter for a customer and colluding with fellow staff to defraud the appellant of revenue. This culminated in a letter of summary dismissal on 5 February 2009 on account of loss of trust, his response following the appearance before the disciplinary committee having been found to be unsatisfactory. The respondent's appeal and request for reinstatement was rejected vide a letter dated 29 April 2009. His re-appeal before the Corporate Appeals Committee was also unsuccessful. The respondent further approached the Commission on Administration of Justice and the Kenya Local Government Workers Union and his efforts did not bear fruit.

3. The respondent filed a Statement of Claim dated 28 November 2013 on 3 December 2013 against the appellant. He founded his claim on un-procedural, unfair and unlawful summary dismissal. He pleaded reinstatement or in the alternative, payment aggregating Kshs 1,341,068.88 in respect of salary arrears, compensation for unlawful termination, salary in lieu of notice, salary accrued during suspension period, service pay, accrued leave days and acting allowance. He also sought interest, costs of the suit and any other relief.

4. The claim was defended by the appellant who filed its Statement of Defence dated 15 January 2014, and at the hearing called one witness. The appellant *inter alia* objected to the claim being statute barred for being filed beyond the 3-year period contemplated under section 90 of the *Employment Act*. The appellant maintained that the grounds for the summary dismissal were valid for amounting to gross misconduct.

5. In a judgment rendered on 29 June 2016, the court allowed the claim, rejecting the contention that the claim was statute barred. It found the claimant's testimony believable holding that the claimant had been framed up for daring to challenge a fraud perpetrated in a building owned by the Managing Director of the Malindi Water Services Corporation. The court found that the respondent had no valid reason in terms of section 43(1) of the *Employment Act*. It further found that the respondent's summary dismissal was wrongful and unfair within the meaning of section 45 of the *Employment Act*.

6. With this holding, the court was persuaded that the respondent was entitled to the reliefs sought in terms of section 49(1)(c) as read with section 49(4) of the *Employment Act*. The court declined the prayer for reinstatement and instead awarded all the sums claimed including the maximum compensation equivalent to 12 months salary for the unfair termination of employment. Service pay was awarded on the basis of a Collective Bargaining Agreement between the appellant and the Union.

7. This judgment prompted the present appeal. The appellant's sixteen grounds set out in the memorandum of appeal have been compressed to seven in the appellant's written submissions dated 19 October 2020.

8. On substantive fairness, the appellant reiterates the summary dismissal and the evidence on record pointed to his involvement in the un-procedural disconnection of a water meter, the reversal of the meter and collusion with Mr Geoffrey Okaya in soliciting a bribe. The appellant faults the trial judge for not upholding the summary dismissal despite the finding that fraud is a criminal offence and that two other people – Mary Muthusi and Geoffrey Okaya - had been dismissed from employment on account of the misconduct. That all these pointed to the violation of the Human Resource Policy and the trial judge overlooked the internal administrative and policy framework taking into account the respondent's previous improprieties that had resulted in warnings through various letters and memos.

9. On procedural fairness, the appellant maintains that disciplinary proceedings were conducted in line with the procedure set out in sections 44 and 41 of the *Employment Act* (*Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014]eKLR). It adds that despite being furnished with sufficient evidence, the trial court ignored the fact that the testimony tendered on behalf of the appellant proved that the appellant accorded the respondent all the opportunities and safeguards affording him due fairness including being informed of the charges and attending the proceedings.

10. The appellant submits that the learned judge failed to appreciate that the respondent has woven in his written submissions to the court new facts displaying a narrative of prejudice against the appellant. This went against the principle that parties are bound by their pleadings. Reference is made to the case of *Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc* SC 91/2002 and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014]eKLR. The appellant takes issue with the reliance on the Collective Bargaining Agreement, CBA No 321 of 2015 which was not part of the original documents filed or tendered in evidence. The additional new fact relied upon by the trial court according to the appellant is the finding that the respondent was dismissed as a result of the friendship between the Managing Director of the appellant and the Managing Director of Malindi Water Services Corporation, a fact that was neither pleaded nor supported by evidence during trial.

11. On denial of an opportunity to call a second witness, the appellant relies on Court of Appeal decisions in *Rioba Nsongo & another v Gisiri Sagwe* [2006] eKLR and *Lawrence Muturi Mburu v Dalago Tours Limited* [2019]eKLR where appeals were allowed to allow the calling of witnesses. This action went against the rules of natural justice leading to a miscarriage of justice especially as the trial court having relied on submissions by the respondent that not only introduced new facts but misrepresented the appellant's testimony. The appellant adds that had it been allowed to call another witness, the outcome of the case would have differed.

12. On the rank/position of the respondent, the appellant faults the trial court's holding that the respondent was appointed as a disconnection / reconnection supervisor in an acting capacity thereby entitling him to acting allowance. The appellant points out that the respondent only held two positions, as a Labour Officer II and Marketing Assistant as supported by signed contracts. There was therefore no basis to grant the respondent acting allowance in the absence of a written contract as held in *National Water Conservation & Pipeline Corporation v Jayne Kanini Mwanza*, Civil Appeal No 178 of 2014 (UR).

13. On the claim being statute barred, the appellant relies on section 90 of the *Employment Act* and submits that the cause of action having arisen on February 5, 2009 upon the termination of employment, the claim was statute barred by February 5, 2012, three years after the alleged cause of action. Thus, in the absence of leave to extend time upon lapse, the court had no jurisdiction. The appellant cites several cases to support this position. These are *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR, *Banking Insurance and Finance Union (K) v Bank of India* Industrial Court Cause No 1201 of 2012, *Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company*, *Michael Maina Nderitu v Kenya Power & Lighting Company* and *Iga v Makerere University* [972] EA 65.

14. In response, the respondent filed submissions dated November 30, 2022. He submits that the appeal is a gimmick, hot air of applicability of the principle of law that justice delayed is justice denied. He urges the court to dismiss the appeal for lack of merit.

15. The respondent argues that the court should only interfere with the trial court's exercise of discretion if the same was exercised wrongly. On this, he cites *CMC Holdings v Nzioki* (2004) 1 KLR 173 and *Shah v Mbogo* (1967) EA 116. On the trial court's application of the CBA, the respondent posits that the judge relied only with the memorandum of claim filed and it is the appellant's witness who introduced the CBA and conceded that it applied to the respondent's terminal dues. He adds that the decision of the trial court was based on evidence before it. He also points out that the he was the appellant's prosecution witness in *Geoffrey Okaya v Republic Anti-Corruption* Case No 28 of 2008.

16. On the opportunity to call a second witness, the respondent argues that the law is very clear on the filing of witness statement. The claim having been filed in November 2013 with the hearing starting in 2016, the appellant had all the time to file its witness statement.

17. From the foregoing, the following issues emerge for determination:

    a. Whether the claim was statute barred.

    b. Whether the summary dismissal was valid and procedural

    c. The appropriate reliefs to be granted.

18. As is now well settled, our role as an appellate court is aptly delineated under article 164(3) of the *Constitution* and section 3(1) of the Appellate Jurisdiction. As a first appellate court, we are called upon to re-evaluate the evidence and make our own findings on those made by the trial court as contemplated in Rule 31 of the *Court of Appeal Rules, 2022*. It is in this context that I now proceed to evaluate the grounds.

Whether the claim was statute barred

19. The appellant argues that the claim was statute barred having been instituted beyond the three-year period contemplated under section 90 of the *Employment Act*. Section 90 deals with limitations and provides as follows:

> "Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

20. The Employment and Labour Relations Court has held that Section 90 of *Employment Act* is the law that regulates limitations in employment contracts. This was stated in *Ndirangu vs Henkel Chemicals EA Ltd* (2013) eKLR and Cause No 1201/2012 *Banking Insurance and Finance Union (K) v Bank of India* where it is stated that the limitation time in employment contracts is now three years.

21. In the present case, the respondent was terminated by a letter issued on February 5, 2009. He filed his claim on December 3, 2013. On the face of it, this was beyond the three-year period. However, it is apparent that after the summary dismissal, the respondent was entitled to an appellate process under the Human Resource Policy and Procedure Manual.

22. From the chronology of events, set out in the claim, the first appeal was made *vide* letter dated 18 February 2009 responded to on 29 April 2009. His second appeal *vide* letter dated 18 December 2010 was responded to on March 25, 2011 indicating that the appeal would be finalized within two months. The respondent's further letter dated 3 April 2012 culminated in his being invited to appear before the Corporate Appeals Committee on 18 pril 2012. It was only on 18 September 2013 that the respondent received communication to the effect that he would not be reinstated, effectively concluding the appeals.

23. The trial court found that under the circumstances, the three-year period ran from 25 March 2011 to allow time for conclusion of the internal appeal mechanism. This means that the respondent was entitled to move the court at the expiry of the two months period indicated in the said letter, being May 24, 2011. I therefore see no reason to interfere with this finding by the trial court as the suit was filed within three years of the said action. At any rate, the respondent was entertained unreservedly including by the Corporate Appeals Tribunal which only rendered itself on 27 September 2013.

24. Taking into account the words next after the act, neglect or default complained contained in section 90 of the *Employment Act*, the respondent pursued reinstatement and it was only on 27 September 2013 that the decision declining to reinstate him was communicated. This ground of appeal therefore is devoid of merit and fails.

a. Whether the summary dismissal was valid and procedural.

25. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court of Appeal held that:

> "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."

26. The bone of contention between the parties here is whether the reason for dismissal was valid and fair and whether the appellant followed due process under the Act.

27. The appellant maintains that the reason for the dismissal of the respondent arose from the latter's collusion with his supervisor, one Geoffrey Okaya in which a bribe was solicited in order to reverse a meter reading. On his part, the respondent urges us that the real reason for his dismissal is victimization for exposing a fraud in premises owned by the Managing Director of Malindi Water Services Corporation who was a friend of the appellant's Managing Director. That the charges against the respondent were trumped up and intended to cover up the fraud.

28. From the record, one thing that remains certain is that there was indeed an incident involving a meter belonging to the Director of Malindi and Water Sewerage Services. This is the issue that not only formed the basis of the suspension but the eventual dismissal from employment. As captured in the minutes of the appellant's disciplinary committee meeting held on 27 January 2009, the accusation against the respondent was in reversing a customer's meter with a view to defraud the company of revenue. It is further captured that before the disciplinary committee, the respondent agreed that he had indeed disconnected the customer's water as the account had been ungathered. He conceded that he had done the right thing only that he could have used the wrong procedure. There was an element of collusion with Mr Geoffrey Okaya, supervisor.

29. The minutes for the Corporate Appeals Committee meeting held on 26 July 2013 are more succinct. It states that the respondent disconnected the customer's water on 12 August 2008 and left the site. The customer visited Pangani Offices where he met Mr Okaya who offered to assist him to pay the bribe in exchange for reversing the meter. The customer insisted on being present when the readings were being reversed. The reversal was done on 13 August 2013 to 100 in the customer's presence accompanied by John Njoroge a driver and Geoffrey Okaya. This prompted the customer to report to Kenya Anti-Corruption Authority. It is also conceded by the respondent that the said Geoffrey Okaya was prosecuted and terminated for his role in this transaction.

30. The trial court, having had the advantage of listening to the testimonies opted to believe the respondent, concluding that he was framed up for daring to challenge a fraud perpetrated in a building owned by the Managing Director of Malindi Water Corporation. Was it an accurate assessment of the facts?

31. Before taking this path, I caution myself as to the limited extent to which this court can review findings of facts. Our jurisdiction in this regard is well settled. In *Mwangi v Wambugu* (1984) KLR 453, we stated as follows:-

> " A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

32. From the findings by the trial court, no assessment of facts was made. The court simply stated:

> "28. To this extent, the evidence tendered by the claimant under oath remains largely uncontroverted. The claimant was closely cross examined by counsel for the respondent and he came out as a truthful witness. ...
>
> 29. The court believes the testimony by the claimant in the absence of any credible version put forth by the respondent to counter it. Accordingly, the court finds that the claimant was framed up for daring to challenge a fraud perpetrated in s building owned by the Managing Director of the Malindi Water Corporation."

33. In my view, the trial court fell short of analyzing the evidence before it. It is not clear which evidence that convinced the court or which evidence called for countering by the appellant. In a matter such as this with the two diametrically opposed positions, I expected the court to, in addition to the testimony, undertake an analysis on the documentary evidence adduced by the parties. As I have noted above, there was enough to point at the wayward nature of the respondent's conduct.

34. For instance, on 19 August 2008 the respondent was redeployed to HR section with immediate effect to ensure he is closely monitored having been adversely mentioned in corrupt practices that go against the Company's HR policies. There is also evidence of previous warnings and cautions including over meter readings. While that may not be the subject of the present appeal, there is enough evidence in our view that called for consideration, whether the appellant called a further witness or not, as the same remains uncontroverted by the respondent or at all. As for the calling of a further witness as sought by the appellant, nothing in my view turns on it.

35. As to the process, it is manifest that the respondent was at all times called upon to appear at the disciplinary and appellate proceedings. At no time did the respondent express dissatisfaction in that regard. Moreover, from the report by the Commission on Administrative Justice (Office of the Ombudsman), the conclusion supports the appellant's position in the following manner:

> "The (appellant), however, did consider the complainant's appeals. There was no administrative injustice suffered by the complainant as far as the dismissal process is concerned. We therefore find that there was no procedural impropriety." (Emphasis ours)

36. Having addressed my mind to all pertinent issues raised by the parties herein, including but not limited to the process, procedure and substance of the dispute, I come to the inevitable conclusion that the dismissal of the Respondent was well merited. The appellant observed all the procedures and process before, during and after the disciplinary. The dismissal was justified and within the purview set by the law. Having read through the whole material set before court, I am unable to see any ground to fault the disciplinary process. It was fair and in accordance with law.

37. The foregoing leads us to respectfully disagree with the trial court and find that the reason for termination was not only valid, but it complied with the procedural tenets of the *Employment Act*. I therefore set aside the finding that the appellant had no valid reason in terms of section 43(1) of the *Employment Act* to summarily dismiss the respondent.

38. With the above finding, the reliefs awarded to the respondent are set aside in entirety. As is the principle, costs follow the event. Accordingly, the appeal is allowed in the following terms:

a. The judgment of Hon Mr Justice Mathew N Nderi delivered on June 29, 2016 be set aside and in its place be substituted with an order upholding the summary dismissal of the respondent from employment by the appellant.

b. The appellant be and is hereby awarded the costs of the claim before the Employment and Labour Relations Court, and the costs of the Appeal.

As Mativo, JA concurs, this is the judgment of the court.

Concurring Judgment of Mativo, JA.

1. I have had the benefit of reading the draft judgment of Warsame, JA and the dissenting judgment of Kantai, JA. The facts which precipitated the litigation before the ELRC and the judgment the subject of this appeal have succinctly been appraised by my brothers in their respective judgments. It will add no value for me to rehash them here.

2. It will suffice for me to mention that the two key issues in this appeal are: (a) whether there was reason to justify the respondent's dismissal; and, (b) whether the dismissal was fair. The respondent's offer of appointment letter dated 15 September 2005 provided inter alia for summary dismissal on the grounds listed therein which include:

   (i) if the employee is deemed guilty of any grave misconduct or gross neglect of duty;

   (ii) if the employee is deemed guilty of fraud and misappropriation of funds; (iii) acts in any manner contrary to the stipulations in the staff manual or contrary to the employer's Code of Conduct.

3. Vide a letter dated 19 August 2008, the respondent was suspended on allegations that he reversed a customer's meter with a view to defraud the employer contrary Clause 11 of the Code of Conduct. He was required to within 21 days explain why disciplinary action should not be preferred against him. At page 262 of the record, he testified that "on 5 September 2008, I wrote an explanation only to be called to a disciplinary meeting soonest possible." He claimed he was only called to receive a letter dated February 5, 2009 which turned out to be letter for summary dismissal. He alleged that the letter stated that he attended a disciplinary hearing on 27 January 2008 which claimed was not true. At page 263, he says "I was now invited to a disciplinary committee on 18 April 2012. I appeared." Upon cross-examination, the respondent stated: "my name is here, but I did not attend a disciplinary hearing."

4. Two contradicting versions are clear in the respondent's evidence. First, he is recorded saying he was invited to a disciplinary committee on 18 April 2012 which he appeared. Later, on cross-examination he maintains that he did not attend the hearing.

5. On its part, the appellant's witness testified that the respondent appeared before the Corporate Appeals Committee. The minutes of the disciplinary committee hearing are at pages 180 to 182. Specifically, the respondent's proceedings are recorded at page 181 to 182. It is recorded that he appeared before the disciplinary committee and in his defence he is recorded stating that he indeed disconnected the customer's water contrary to procedure, and that he failed to raise a disconnection order before the disconnection. He admitted using the wrong procedure. The committee recorded that after listening to his defence, it decided to dismiss him.

6. There is no doubt that an employer is obligated to demonstrate by evidence that the dismissal was fair. Therefore, the initial burden of prove lies with the employer. In *South Cape Corporation (Pty) Ltd vs Engineering Management Services (Pty) Ltd* 1977 (3) SA 534(A) at 548 Corbett, JA (as he then was)

explained the distinction between the burden of proof properly so called and the evidential burden as follows:

> "As was pointed out by Davis AJA in *Pillay v Krishna and another* 1946 AD at 952-3, the word onus has often been used to denote, *inter alia* two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In *Brand v Minister of Justice and another* 1959 (4) SA 712 (A) at 715 Ogilvie-Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."

7. In *Jones vs National Coal Board* [1957] 2 All ER 155 (CA) at 159A-B. Denning LJ said:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, LC, who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question" . . . and Lord Greene, MR, who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses,
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> > "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."
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> . . .
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> So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties . . . So also, it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appears to favour one side or the other . . . And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost . . . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

8. The procedure described by Denning LJ governs trials in this country. In this matter the trial court was faced with two mutually destructive versions presented by the parties. In order to assess which version

is more probable, it was perhaps expedient for trial court to evaluate the evidence adduced in support of each party's case. Where the court is faced with two mutually destructive versions, the proper approach was restated in *Stellenbosch Farmers Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at 14J-15E where Nienaber JA said:

> " To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as
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> (i) the witness' candour and demeanour in the witness-box,
>
> (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version,
>
> (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

9. In *National Employers' General Insurance Co Ltd v Jagers*, 1984 (4) SA 437(E) at 440E Eksteen AJP stated thus—

> ". . . where there are two mutually destructive stories, [the plaintiff] can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

10. The appellant produced minutes of the disciplinary proceedings.

The minutes include disciplinary hearings of several persons among them the respondent. Each person's case is reported separately in the disciplinary hearing proceedings. The respondent denies

being invited to the hearing. During cross- examination, he said his name appears in the said minutes but he insisted he did not attend. Faced with these two versions the trial court accepted the respondents' version.

11. The appellant's contestation was that he was never invited for a disciplinary trial. However, the trial court does not appear to have evaluated the parties diametrically opposed versions before arriving at its final conclusion. I say so because in his Memorandum of Claim, the respondent never pleaded that he was never invited to a disciplinary hearing nor did he plead that he never attended the hearing. This crucial evidence was only adduced in court. It is not supported by the pleadings. It raises doubts as to its credibility and veracity unlike the appellant's testimony which is supported by the disciplinary hearing proceedings. I find no reason why the trial court ignored the disciplinary proceedings which remained uncontroverted. The trial court erred when it failed to interrogate the probability or improbability of particular aspects of the respondent's version, and the cogency of his version.

12. Regarding the summary dismissal, the determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction levied by the employer, but whether in the circumstances of the case, the sanction was reasonable. Under the *Employment Act* and the appellant's Code of Conduct, gross misconduct is a ground for summary dismissal.

13. In any dismissal, what an employer is obligated to prove is a fair reason for the dismissal it effected. A reason is fair if it is related to the conduct of an employee. The determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer: (a) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case. In this particular case, there is no dispute that the accusations against the respondent constituted gross misconduct.

14. However, an employer is still required to follow a fair procedure and show that dismissal is an appropriate sanction in the circumstances of the case. However, it is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal (See *Fidelity Cash Management Service vs Commission for Conciliation, Mediation & Arbitration & Others* [2008] 29 ILJ 964 (LAC)).

15. The court should bear in mind the following when considering the appropriateness of a dismissal: (a) the decision to dismiss lies with the employer; (b) dismissals should be fair; (c) fairness implies reasonableness, in the sense that the sanction of dismissal must be a reasonable one in the circumstances; (d) fairness is not an absolute concept – there may be a range of fair responses to a given instance of misconduct; (e) should a dismissal fall within that range of fair responses, the court should defer to the employer's

16. Fairness implies an approach based on reasonableness, which in turn requires a consideration of all relevant circumstances, hence it is not a novel one. As long ago as 1987, in *National Union of Mineworkers vs Vaal Reefs Exploration & Mining Co Ltd*, 1987 8 ILJ 776 (IC). Fabricius AM recognized that there was little point in making abstract enquiries as to whether an employer had acted "fairly", as opposed to "reasonably", in deciding to dismiss. The real issue is whether the employer acted "in light of prevailing circumstances.

17. The right to a fair dismissal process embraces a concept of substantive fairness which is not to be equated with what might pass muster in a criminal court. The inquiry is whether there has been an irregularity or illegality, which is a departure from the formalities, rules and principles of procedure according to which our law requires disciplinary proceedings to be initiated or conducted.

18. More important is the fact that whether or not a person was accorded a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle. (See S De Smith, *Judicial Review of Administrative Action,* 4th ed J Evans (1980), 352- 4).

19. The standards of fairness are not immutable. They may change in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (See *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560).

20. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met. (See also *McInnes v Onslow-Fane* [1978] 3 All ER 211). In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm per se by which the relevant administrative decision was judged.

21. Equally true is the fact that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It is in this sense that the employer may be said to have discretion.

22. I have seen the correspondence between the parties, ranging from the letter of suspension, the decision to dismiss, the appeal and what the respondent described as re-appeal. At page 262, the respondent admits he wrote any explanation on 5 September 2008. This was in response to the letter of suspension. However, in cross-examination at page at page 266, he denied that he was invited to a disciplinary hearing. As stated earlier, this pertinent issue was not pleaded casting doubts on its veracity. But one thing is clear. The respondent was notified the allegations against him. He replied to the allegations. A hearing was conducted. A decision to dismiss him was arrived at and communicated to him. He appealed against the decision. Curiously, in this appeal, he never raised the ground that he never attended the disciplinary hearing. His appeal was disallowed. He submitted what he called "re-appeal." Nevertheless, the appellant entertained and ultimately communicated its rejection on 25 March 2011, effectively bring to a close a process that started on 19 August 2008.

23. In my view, the respondent was accorded a fair process. Time without a number, our courts have held that fairness is contextual in nature and determines on the nature of the dispute. A party cannot answer allegations against him, go through disciplinary proceedings, lodge an appeal and "re- appeal" and claim he was not afforded a fair process. Accordingly, I agree with the opinion of Warsame, JA and add that this appeal succeeds in terms of the orders issued by Warsame, JA which shall be the orders of this court.

Dissenting Judgment of Kantai, JA.

1. I have had the advantage of reading in draft the judgment of my brother Warsame, JA. I do not agree with the conclusion reached.

2. The facts as summarized by my brother are clear. The respondent engaged in misconduct when he fraudulently reconnected a water meter of the appellant's customer without that customer paying pending bills. That was an act of fraud amounting to criminal negligence and against the respondent's terms of employment. The appellant would have been entitled to summarily dismiss the respondent from employment for gross misconduct under section 44 of the *Employment Act* for he had committed fraud which had led to loss of revenue by the appellant.

3. The way I understand it is that in addition to substance the *Employment Act, 2007* ("the Act") places process as the central consideration in matters of employment where an employer is considering or has decided to terminate the services of an employee.

4. As I stated in a recent judgment in the case of *Nairobi Bottlers Limited v Adrian Imbuga* Civil Appeal No NAI E661 of 2022 [2024] KECA 434; Section 41 to 49 of the Act cover areas relating, *inter alia*, to notification and hearing before termination on grounds of misconduct; reason for termination; summary dismissal; unfair termination; reasons for termination or discipline; complaint relating to summary dismissal or unfair termination; representation during disciplinary hearing and remedies for wrongful dismissal and unfair termination. An employee who is being dismissed for gross misconduct, poor performance or incapacity in performance of duties must be notified of the reason why he is being dismissed. The communication must be in a language that the employee understands; the employer is duty bound to hear and consider the explanation, if any, by the employee and the employee is entitled to appear at the hearing accompanied by another employee or by a representative who must also be heard. The employer must prove the reasons for termination. Dismissal may be for instances of gross misconduct, absenteeism, refusal to work, carelessness in performance of duties, intoxication, use of abusive language, criminal conduct to the detriment of the employer. The employer must also prove that termination is for a valid reason which is fair and must prove that due process has been followed for termination of an employee from employment. The employee has a duty in law to prove that termination from employment was unfair while the duty shifts to the employer to prove that termination of an employee from employment was fair. Remedies available to the employee under the Act include notice in lieu of termination, wages for time worked, compensation in form of salary for not more than 12 months; and reinstatement if the period of 3 years has not elapsed the court always to consider the witness of the employee, the circumstances leading to termination, practicability of reinstatement, other opportunities available to the employee, the employee's conduct before termination of employment and mitigation factors available to the employee.

5. So process is everything under the Act and an employer who ignores it (process) while terminating services of an employee will fall foul of the law and will be visited with consequences as set out in the Act.

6. The respondent Solomon Githae Irungu was employed by the appellant Nairobi City Water and Sewerage Company Limited by a letter dated 15 September 2005 as a Marketing Assistant on terms and conditions set out in the said letter. He served in that position but his services were found unsatisfactory by the appellant leading to a letter of suspension from employment dated 19 August 2008 where he was accused of reversing a customer's meter with a view to defraud the appellant. He was told in that letter that his conduct was contrary to a code of conduct whose clause 11 stated that members of staff must conduct affairs of the appellant in a professional and responsible manner and avoid colluding with

customers and other people to compromise the interests of the appellant. He was informed that what he had done amounted to gross misconduct and he was suspended from employment with immediate effect and he was required to explain within 21 days why disciplinary action should not be taken against him.

7. His response by a letter dated 5 September 2008 is difficult to follow or understand - reading it is like listening to a harangue by a rather loud street preacher. Suffice to say that he denied the allegations and even dared appellant's Human Resource Manager to immediately summon him to a disciplinary hearing where he would clear himself of the allegations. There are on record minutes of the appellant's disciplinary committee meeting held on 27 January 2009 where cases of various employees were considered. No employee whose case was being considered was invited to this meeting. Of the respondent the meeting was informed that he had been suspended by letter of 19 August 2008 for reversing a customer's meter with a view to defrauding the appellant of revenue. The respondent had appeared before a disciplinary committee which had decided that he be summarily dismissed from service on account of loss of trust.

8. By letter dated 5 February 2009 the appellant informed the respondent that he had been summarily dismissed with immediate effect.

9. The matter should, perhaps, have ended there but, no, the appellant kept the door wide open and allowed another appeal process to start and go on for a long time.

10. By letter dated 25 March 2011 titled "Appeal for reinstatement" the appellant informed the respondent that: "...We hereby inform you that your case will be looked upon and finalized within two (2)months from the date of this letter..."

11. The 2 months finalization of the appeal process was not to be as seen by a letter of 3 April 2012 (more than 1 year after the said promise) where the respondent wrote to the appellant complaining amongst other things that he had been dismissed illegally and the matter had taken too long to be resolved. This was followed by the appellant's letter of 11 April 2012 "Summons to appear before the Corporate Appeals Committee – Nairobi City Water & Sewerage Company" where the respondent was required to appear in person before that committee on 18 April 2012. He was told that he was free to be accompanied by a representative.

12. Minutes of that meeting are not on record.

13. There is a letter dated 27 September 2013 "Appeal for reinstatement" where the appellant informed the respondent that his appeal had not been considered favourably and the appellant had decided not to reinstate him to employment.

14. So the disciplinary process that started by the letter of suspension dated 19 August 2008 was being concluded by a letter of 27 September 2013, a period of over 5 years.

15. The appellant's Human Resources Policy and Procedures Manual ("HR Manual") which appears from page 54 of the record sets out an elaborate disciplinary procedure where the appellant has reason to take disciplinary action against an employee. It provides on gross misconduct that an employee found guilty of any act of gross misconduct after a full investigation may be dismissed, even for a first offence, as provided under section 44 of the *Employment Act* 2007. It provides, at clause 8.24 "Interdiction/suspension" that an officer may be interdicted only if disciplinary proceedings against him/her require investigation or when criminal proceedings are being taken against him/her. It says "...Interdictions shall not exceed 60 days..."

16. It further provides:

> In the event that an employee is suspended, the duration shall not exceed 90 calendar days. The corporate disciplinary committee shall ensure the cases are deliberated and completed within the stipulated period. An employee shall be given a minimum of 10 workings days' notice by the Human Resource Manager to appear before the Corporate Disciplinary Committee. The affected employee shall be informed of the outcome of his/her case within one month on conclusion."

Further:

> For purposes of this Manual, suspension shall be for a period of 90 days. If by the lapse of the period there is need for extension of the suspension period, the same shall be extended for a further period of 30 days only. After expiry of the extended period, the employee shall be reinstated notwithstanding the fact that the disciplinary process will have not been completed."

On appeals Clause 8.25 provides:

> A member of staff aggrieved by the decision of the Company shall appeal to the Managing Director within fifteen (15) calendar days. The Managing Director shall immediately acknowledge receipt of the appeal and after considering the facts of the case, communicate his decision to the appellant within 30 days. If dissatisfied with the decision of the Managing Director, a further appeal shall be made to the Board of Directors through the Managing Director, a further appeal shall be made to the Board of Directors through the Managing Director within ninety (90) days from the date of communication. The decision of the Board of Directors shall be final. However, the aggrieved member of staff has a right to seek legal redress through the legal process. For the unionisable staff, they may make an appeal in accordance with the procedure laid down by the CBA between the Company and the Union."

17. It will therefore be seen that the HR Manual provides for periods when disciplinary process should be undertaken and concluded. In the case we are dealing with that process which began with suspension on 19 August 2008 should have been completed within a maximum of 90 days. It was not. An appeal process should have been completed within a maximum of 120 days. This was not done. The whole disciplinary process dragged on for over 5 years contrary to the appellants HR Manual and any other law.

18. I began this judgment by stating that process is everything in matters of termination of employment by an employer of an employee. Because process was not followed by the appellant, nay, it was flagrantly flaunted, the appellant had no valid reason to summarily dismiss the respondent from employment. There was no valid reason to terminate in terms of section 43(1) of the Act. I would agree with the trial Judges' findings that summary dismissal of the respondent by the appellant was wrongful and in violation of the law. But I am on a lonely path here. The final orders will be those of the majority.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR