Judicial Service Commission v Eric Michael Karanja Kamande (Civil Appeal E403 of 2021) [2024] KECA 1924 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1924 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E403 OF 2021

SG KAIRU, F TUIYOTT & PM GACHOKA, JJA

DECEMBER 20, 2024

BETWEEN

JUDICIAL SERVICE COMMISSION ..... APPELLANT

AND

ERIC MICHAEL KARANJA KAMANDE ..... RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (Rika, J.) delivered on 18th June, 2021 in ELRC Petition No. 50 of 2020)

JUDGMENT

1. At all material times to this appeal, the respondent was in the employ of the appellant as a principal administrative officer under their human resource directorate since 2013 on permanent and pensionable terms. Inter alia, the respondent was involved in the supervision of various outsourced security service providers for the Judiciary.

2. On 24th November 2016, the respondent was appointed as a tender evaluation committee member for the provision of security tender no. Jud/028/2016-17 for the Judiciary. Upon conclusion of the procurement process, one, Eric Okeyo T/A Bedrock Security Service Limited, the company's managing director, who was a dissatisfied bidder, filed an application for review before the Public Procurement Administrative Review Board (the Board). The findings of the Board in PPARB Application No. 111 of 2016 recommended a tender re-advertisement and investigation of the tender evaluation committee members.

3. On 3rd February 2017, the Chief Registrar of the Judiciary issued a show cause letter to the respondent based on the findings and recommendations of the Board. The respondent in a detailed letter dated 7th February 2017 denied all the allegations of impropriety. On 12th April 2017, the respondent received a charge and interdiction letter from the Honorable Chief Justice and he responded by a letter dated 2nd May 2017, pleading innocence. The record shows that the disciplinary hearing took long. During

its pendency, the respondent remained interdicted until 27th March 2019 when his services were terminated.

4. Following termination of his employment, the respondent filed ELRC Petition No. 50 of 2020 before the Employment and Labour Relations Court (ELRC) citing illegality, procedural unfairness, unreasonableness and invalidation of the disciplinary process. He pointed out that Bedrock Security Service Limited had been a continuing service provider for the Judiciary and that he was also actively involved in complaint handling and welfare of the appellant since January 2015. He argued that due to his position, he interacted with service providers, including Bedrock security services, in the course of his work. Therefore, it was unfair and unreasonable to be labelled as a person lacking integrity for meeting Mr. Eric Okeyo, proprietor of Bedrock Security services when the tender process was ongoing. He further argued that the recommendations of the Board were not tantamount to a disciplinary action against him.

5. Citing a contravention of Article 2 (4), 10 (2) (a) & (c), 22, 23 (f), 27 (1), 47, 172(1) (c), 236 (b), 237 (7) and 258 of *the Constitution*, section 25 (5) and the third schedule to rule 25 (1 – 11) of the *Judicial Service Act*, section 4 (1) (f) & (g), (4) (c) of the Fair Administration Actions Act, the respondent filed a petition amended on 19th October, 2020 in the Employment and Labour Relations Court seeking the following reliefs:

    i. A declaration that the charge, proceedings determination to dismiss the petitioner was unfair, unlawful, unconstitutional, null and void ab initio and are hereby quashed or set aside;

    ii. A declaration that the charge proceedings, determination to dismiss the petitioner was in violation of rule 25 (1-11) of the 3rd schedule of the *Judicial Service Act*, section 106, 107, 108 and 109 of the *Evidence Act*, section 4 (1)(c) and 4 (4) (c), 3 (g) of the *Fair Administrative Action Act*, Article 2 (4), 10 (2) (a) (c), 27, 41, 47, 172 (1) (c) 236 (b), (sic) hence null and void ab initio;

    iii. Compensation for the violation of the petitioner's fundamental rights and freedoms as pleaded in prayer (3) (sic) above;

    iv. An order of reinstatement to his post or deployment within the Judicial Service without loss of accrued benefits, allowances and back salaries in progression.

6. The appellant filed its response. It relied on the replying affidavit of the Honorable Chief Registrar sworn on 19th May 2020 rebutting all allegations raised by the respondent. The petition was disposed of by way of written submissions. In his judgment dated 18th June 2021, the learned judge (Rika, J.) allowed the respondent's petition.

7. The court observed that the appellant was bound by the dictates of the *Employment Act*, the *Judicial Service Act* and the Fair Administrative Actions Act. The court further held that the respondent was not barred from instituting the dispute as a constitutional petition rather than a claim since it alleged several breaches of *the Constitution*. Speaking to rule 25 of the third schedule to the *Judicial Service Act*, the court held:

> "What is intended by this rule? The court understands that the Commission must appoint a committee or panel to investigate, which in the view of the court, would be different from a committee or panel to conduct the hearing.
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> The procedural rights of an employee under investigation, are not the same as the rights while under hearing. The distinction must be made clear. The right to be accompanied by a colleague or a trade union representative for instance, under the minimum standards of fair hearing contained in section 41 of the *Employment Act*, cannot be read into an investigatory

process. Investigation is carried out to establish if there is a case to be defended; gather information from all relevant witnesses; record witness statements including the statement of the accused employee; and determine what should happen next. The *Judicial Service Act* does not contemplate that investigation and disciplinary hearing are merged into a single process.

The *Employment Act* does not compel employers to investigate employees suspected of employment wrongdoings, before hearing; it requires that employers prove there was valid reason, or reasons justifying termination.

Where however the contract of employment, collective agreement, labour instrument, human resource policy and procedure manual, disciplinary code, or applicable written law, provide for investigation separate from the disciplinary hearing, then this is a standard superior to the provisions of the *Employment Act*, and there must be investigation, preceding the hearing.

The 3rd schedule of the *Judicial Service Act*, specifically refers to a committee or panel to investigate. It also mandates the Chief Justice, to carry out preliminary investigation. This preliminary investigation, if the process moves beyond it, logically would be followed by a full investigation. It must have been intended that once the matter has come from the Chief Justice, there should be convened a committee or a panel to investigate. At the time of the hearing, the accused employee must be availed, if he so wishes, the preliminary investigation from the Chief Justice and the report of the committee or panel appointed to investigate.

The committee or panel which is mandated to investigate under rule 25 (3), is turned into a disciplinary hearing committee under rule 25 (4). The committee is required to give a written notice of not less than 14 days, specifying the date on which the accused may be required to answer the charges. From here on, the investigation is turned into a full blown disciplinary hearing, complete with the potential of having the employee prosecuted by the Director of Public Prosecutions."

8. The court underscored that the appellant, was by the third schedule to the *Judicial Service Act*, duty bound to conduct an internal investigation before commencing the disciplinary process. That did not happen in this instance. Further, the learned judge held that the disciplinary process had a glaring defect in failing to obtain the evidence of Mr. Okeyo. For this reason, the learned judge held that the hearing conducted by the appellant failed to meet the standards of fairness envisaged in the *Employment Act*, the *Judicial Service Act* and the Fair Administrative Actions Act. On this issue of procuring the attendance of a crucial witness, the court added:

> "If the respondent is able to utilize the services of the Director of Public Prosecutions to prosecute judicial staff at the workplace, it is not beyond the respondent to compel attendance of any witness before it, with the aid of other public agencies. Article 252 (3) (b) of *the Constitution* empowers the respondent specifically, to issue summons to a witness to assist for the purpose of investigations. The committee did not disclose if any summons were served on Okeyo. If there was defiance of summons issued under the command of *the Constitution* of Kenya, very grave consequences to Okeyo would have followed. There was no justification for the respondent to fold up, and take the position that this key witness, had irreversibly gone underground. This was after all, a witness with an ongoing contact with the respondent, and whose physical address must have been within the record of the respondent... It was improper for the respondent to close proceedings without summoning Okeyo. The respondent assigned high value to Okeyo's evidence. Why was his attendance

not procured, or at the very least his witness statement or affidavit, to support his allegation against the petitioner?"

9. The court continued that the charges concerning lack of integrity could not be ascertained because the witnesses did not testify as to its occurrence. The court agreed with the respondent's version of facts to the extent that the meeting giving rise to integrity issues did not qualify the allegations preferred against him. On the 2nd count of failure to disclose past interactions with the bidder, the court held that the same could not be substantiated. It concluded that due to the nature and responsibilities bestowed upon the respondent, he interacted with the losing bidder on issues relating to the subsisting contract. The meeting could not thus be taken to have been a solicitation of a bribe.

10. On the Board recommendations, the court found that the appellant was improperly influenced; yet there is a clear distinction between internal disciplinary proceedings and other legal proceedings. That the appellant ought to have conducted its own independent investigations, collect evidence from the relevant witnesses and arrive at its own conclusion. For the reasons above, the court found that the termination was legally infirm for want of fairness and substantive justification.

11. In light of the above, the court declared that the proceedings and determination to dismiss the respondent were unfair, unlawful, unconstitutional and in breach of section 41, 43 and 45 of the *Employment Act*, rule 25 of the third schedule of the *Judicial Service Act*, the Fair Administrative Actions Act and Article 47 of *the Constitution*. For those reasons, the court ordered that the respondent be reinstated without loss of benefits, allowances and salary. Alternatively, he be engaged in a position similar to that he was employed under without loss of benefits, allowances and salary.

12. The appellant, dissatisfied with those findings, filed its notice of appeal dated 23rd June 2021. It also filed a memorandum of appeal dated 21st July 2021. The appellant raised 13 grounds disputing the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: the court erred in holding that the *Employment Act*, the *Judicial Service Act* and the Fair Administrative Actions Act were the primary legislation in dealing with the facts and circumstances of the dispute; the respondent ought to have filed a claim rather than a constitutional petition; the trial court erred in holding that rule 25 of the third schedule mandatorily called for investigations before a disciplinary hearing; the trial court misinterpreted the provisions of paragraph 25 (3) of the *Judicial Service Act*; the respondent met a bidder during the procurement process and failed to disclose this information to the evaluation committee. As a result, his integrity was questionable; that in fact, the Board canceled the tender on account of inter alia, the respondent's external influence; the findings of the Board had not been overturned and thus remained valid; the court raised the standard of proof by error; the trial court usurped the functions of the appellant's human resource manual; the learned judge failed to appreciate that the disciplinary process met the constitutional and statutory requirements of fair administrative action; the trial court made an order for reinstatement without formulating a basis; and the appellant's response and submissions were not considered.

13. In view of the foregoing, the appellant urged this Court to allow the appeal and set aside the judgment of 18th June 2017. It further prayed that the respondent's amended petition be dismissed with costs.

14. When the appeal was heard through the GoTo virtual link platform on 8th May 2024, the appellant was represented by learned counsel Mr. Ochola while Mr. Okemwa learned counsel appeared for the respondent.

15. The appellant relied on its written submissions together with its case digest both dated 14th September 2021. It condensed its appeal into four issues for determination. On the first issue, it cited paragraph 25 (1) to the third schedule of the *Judicial Service Act* to argue that the language was not couched in

mandatory terms. For that reason, the trial court failed to appreciate that the Chief Justice was not mandatorily required by law to conduct an inquiry. It submitted that the material from the two letters from the complainant and the decision of the Board was sufficient to sustain a disciplinary action without any further need for an investigation.

16. Speaking to paragraph 25 (3) of the third schedule to the Act, the appellant submitted that the investigations contemplated therein were not separate and distinct from disciplinary proceedings provided in sub paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11. That the committee tasked with investigating the complaint is the same as that which the respondent appeared before. That the report envisaged in the schedule was meant for the commission to establish the best cause of disciplinary action. Thus, the court was incorrect in holding that the disciplinary process was unfair because of the omission of this step.

17. On whether the respondent was terminated from employment on account of valid reasons, learned counsel submitted in the affirmative. He argued that the disciplinary proceedings were set in motion following the decision of the Board recommending action against members of the evaluation committee. That the respondent met the complainant during the procurement process questioning his integrity since he did not disclose this meeting to his co-committee members. According to the appellant, the conduct of the respondent was in violation of Article 227 (1) of *the Constitution* and section 65 of the *Public Procurement and Asset Disposal Act*. Counsel concluded by stating that the respondent's actions were inversely proportional to the requirements of the law and his termination from service was valid.

18. Regarding the legislation responsible for the disciplinary process, the appellant submitted that it was only the *Judicial Service Act*, and no other statute, that governed the disciplinary process. In addition, it argued that the *Employment Act* was the general law while the *Judicial Service Act* specifically and comprehensively dealt with the procedure for handling the disciplinary process. Finally, the appellant faulted the trial judge for holding that the claim was properly filed as a constitution petition, when no constitutional issues were raised in the petition. For those reasons, the appellant prayed that its appeal be allowed and the cross appeal be dismissed.

19. The respondent relied on his cross-appeal, the written submissions dated 28th October 2021 and 14th February 2023 as well as case digests dated 28th October 2021 and 14th February 2023. He submitted that since the Chief Justice failed to conduct an inquiry or investigation by dint of rule 25 (1), (9), (10) and (11) of the third schedule to the *Judicial Service Act*, the whole process was flawed. Not only were investigations not conducted, but those findings were never furnished to the respondent for review and response. He argued that he was not called for an inquiry as envisaged in rule 25 (3) but invited for a disciplinary hearing. In addition, the inquiry was a mandatory step that could not be abdicated by the Chief Justice.

20. The respondent submitted that the appellant breached rules 23 (1) and 25 (5) of the third schedule to the *Judicial Service Act*.

    This is because the appellant failed to summon the complainant for cross examination of his evidence. It is for this reason that the trial court properly upheld his version of facts as substantiated and justifiable in terms of the meeting, the subject matter in controversy. He lauded the findings of the trial court holding that since the crucial witness was not availed before the appellant, no charges could stand against him.

21. The respondent further argued that the disciplinary process was in breach of Article 2 (4), 3 (1), 4 (2), 10 (2) (a), 25 (c), 41, 47, 50, 172 (1) (c) and 236 (a) and (b) of *the Constitution*. This is because the

process took 23 months when it ought to have taken six months and this violated the dictates of a fair hearing.

22. The respondent argued that the judgment of the trial court was well founded, lawful, justifiable and that the reliefs therein aligned with the law. He was emphatic that the applicable laws were the *Employment Act*, the *Judicial Service Act* and the Fair Administrative Actions Act. As to whether the petition was the proper mode of seeking relief, the respondent submitted in the affirmative. He prayed that the appellant's appeal be dismissed with costs.

23. The respondent then turned to his cross-appeal. He submitted that the trial court erred in failing to award compensation in the form of damages as envisaged in Article 23 of *the Constitution*. He advanced that since constitutional breaches were apparent, he was organically entitled to damages in the sum of Kshs. 2,000,000.00.

24. As a first appellate court, an appeal 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 allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

25. We have considered the record of appeal, the submissions by the parties as well as the authorities that were cited. We will refer to the facts and the law when dealing with the issues for determination.

26. The first issue for determination is whether the respondent filed the proper pleadings in seeking relief. In other words, did the constitutional petition, as filed, meet the threshold set out in the celebrated case of Anarita Karimi Njeru vs. Republic [1979] eKLR for the holding that a person seeking redress on a matter which involves a reference to *the Constitution* must set out with a reasonable degree of precision that of which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed. Restated by this Court in the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR:

> "We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

27. In the present case, the respondent alleged in its petition that the appellant had failed to afford him an opportunity to cross examine the star witness to the proceedings. That the said action amounted to an infraction of his right to fair administrative action envisaged in Article 47 of *the Constitution*. At this juncture, the issue is not on the merits of the allegations but whether the relevant constitutional provision has been cited and how the same was breached. We find that the same accorded to this dogma. We cannot therefore fault the respondent for lodging his claim by way of a constitutional petition.

28. The other issue for determination revolves around procedural fairness or unfairness in the disciplinary process and lawful nature or otherwise of the reasons for termination. Put differently, did the learned judge of the ELRC err in holding that the respondent was unlawfully, unprocedurally and unfairly terminated from employment?

29. According to the respondent, the appellant violated the provisions of rule 25 of the third schedule to the *Judicial Service Act* for failing to conduct investigations before being interdicted, failing to adduce evidence prior to the hearing and failing to afford him the opportunity to cross examine the crucial witness to the proceedings. The third schedule to rule 25 of the *Judicial Service Act* governs the procedure for dismissal of a member of the staff of the appellant. Rules (1), (3) and (5) provide as follows:

> "1. Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.
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> 2. ...
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> 3. If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of *the Constitution*, delegate its powers. Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under *the Constitution*, they may be members of the Committee or Panel.
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> 4. ...
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> 5. If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto."

30. The respondent argued that according to the provisions couched in rules 1 and 3, the appellant was mandatorily required to conduct an investigation before preferring charges against him; a procedure conceded by both parties to not have taken place. He added that there was a need for preliminary inquiries before disciplinary, the absence thereof determining the procedure as null and void. He fortified his argument by relying on this Court's decision of Chief Justice and President of the Supreme Court of Kenya and another vs. Khaemba [2021] KECA 322 (KLR).

31. We have considered the above authority and, in our view, it is distinguishable from the facts and circumstances of this appeal. In that case, the respondent had been sent on suspension without pay for gross misconduct for entertaining a matter he lacked jurisdiction to handle. The respondent therein was interdicted in line with rule 16, which allows the Chief Justice to interdict an officer on grounds of public interest.

32. In this appeal, the respondent was interdicted pursuant to rule 16 upon consideration by the Chief Justice of the inappropriate conduct of the respondent meeting a bidder during an ongoing tender process and failing to make a disclosure of the meeting. This misconduct only came to light when the tender process was challenged before the Board which made a recommendation for further investigations against the respondent. It was the recommendation of the Board that triggered a chain of events that led to the termination of the respondent from employment. It is important to note that

the respondent was interdicted and thereafter taken through a disciplinary process that went to a full hearing. We shall revert to that process later in the judgement.

33. The learned judge in his judgment held that the appellant is required to appoint a committee or panel to investigate the substance of the allegations preferred against an employee facing allegations before taking any action. He added that the provision mandated the Chief Justice to carry out a preliminary investigation that would morph into a disciplinary hearing.

34. In our view, rule 16 gives the Chief Justice wide discretionary powers to decide as to whether an inquiry ought to be done prior to a disciplinary hearing. The rule does not mandatorily establish that the inquiry must be conducted first. However, as held in the Chief Justice and President of the Supreme Court of Kenya and another vs. Khaemba (supra), the Chief Justice has to ensure that a fair process that respects the constitutional principles of a fair hearing are observed.

35. The question to answer is whether in this appeal the constitutional principles for a fair hearing were observed. In our view, the charges preferred against the respondent complied with the provisions of the third schedule to rule 25 (1) of the *Judicial Service Act*. We find that prior to the charges being drawn and preferred against the respondent, the Chief Justice's attention was drawn to the proceedings of the PPARB. Following those proceedings, the respondent was notified of the allegations against him and was invited to respond.

36. The respondent does not for a moment deny that he was served with a notice to show cause letter and that he responded. The record is also clear that the respondent was given a chance to appear before the disciplinary committee and was given a chance to defend himself. The record is also clear that indeed the disciplinary process took a long time and that eventually, one Mr. Okeyo, who had filed an application before the Board, did not honour summons to attend the hearing. The respondent made heavy weather of this fact and maintained that since the said Okeyo did not appear at the hearing, then the allegations against him were not proved.

37. We note that rule 25 (3) provides that if disciplinary proceedings are deemed fit to continue, the appellant is required to appoint a committee or panel to investigate the matter. The provisions following thereafter govern the procedure leading up to the findings of that committee or panel that could lead to infliction of an appropriate punishment.

38. According to the learned judge's interpretation of this rule, the investigations contemplated therein are not synonymous with a disciplinary hearing and therefore, the committee or panel envisioned therein are investigators of the charges levelled against the respondent with a disciplinary proceeding following thereafter. Interestingly, the learned judge then says:

> "The committee or panel which is mandated to investigate under rule 25 (3), is turned into a disciplinary hearing committee under rule 25 (4). The committee is required to give a written notice of not less than 14 days, specifying the date on which the accused may be required to answer the charges. From here on, the investigation is turned into a full blown disciplinary hearing, complete with the potential of having the employee prosecuted by the Director of Public Prosecutions."

39. We respectfully disagree with the learned judge for the following reasons: firstly, the heading under rule 25 states that the provisions therein are "proceedings for dismissal". This essentially means that they are disciplinary in their nature; otherwise the drafters of the said provision would have indicated otherwise. In other words, the ultimate goal is to arrive at a culmination of a disciplinary process. Similar findings

were held by this Court in Judicial Service Commission vs. Shollei & another [2014] KECA 334 (KLR) as follows:

> " The Third Schedule is entitled "Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff." This Schedule provides a more elaborate procedure at Section 23 to 25 for disciplinary proceedings leading to dismissal of judicial officers and staff."

40. It is also instructive to note that there are no transitionary clauses to point out that the committee contemplated under rule 25 (3) is purely for investigative purposes in every sense of the word. Instead, rule 25 (4) places a subsequent role that is played by the same committee in discharging their disciplinary mandate.

41. Secondly, while the word 'investigations' is expressly applied, this does not translate to a conclusion that the committee or panel can only investigate and down its tools. In our view, the investigations are to establish whether the charges preferred are legitimate or not. This can only be established if a hearing is conducted out of which the employee is given an opportunity to defend himself or herself.

42. Furthermore, it appears from the chronology of the provisions, that the matter proceeds to a hearing in which evidence is presented before the same commission or panel in the presence of the employee. In fact, the learned judge himself admitted that the rule 25 (4) governs disciplinary hearings.

43. We do not think that the committee acted outside its scope or was ousted from conducting itself in the manner it did. This is purely a disciplinary process that does not place the committee as an investigating agency but as a disciplinary committee. We understand the generality of rule 25 to be a disciplinary hearing from preferring charges. It then proceeds to furnish an employee with the requisite documents and charges after submitting his or her response. Thereafter, the employee is given an opportunity to be heard. It is only after a hearing is conducted that a decision is made.

44. As already stated, the above process was instigated by the findings of the Board in PPARB Application No. 111 of 2016, dated 20th December 2016. The appellant wrote to the respondent on 3rd February 2017 making reference to the recommendations of the Board and inviting the respondent's response. The ruling of the Board was attached to this letter. The respondent obliged and detailed his response in his letter dated 7th February 2017.

45. On 12th April 2017, the respondent received a charge and interdiction letter from the Honorable Chief Justice. He was charged with two counts of gross misconduct for meeting a bidder during the tender process contrary to Article 227 of *the Constitution* and section 65 of the Public Procurement and Assets Disposal Act. The other count revolved around the failure to disclose the said meeting to his co-committee members.

46. The respondent responded to the charges on 2nd May 2017. He was on 12th March 2019 then invited to a disciplinary hearing and was interdicted for a period of about 23 months until 27th March 2019 when his services were terminated.

47. During the disciplinary hearing that took place on 6th March 2018 and 6th June 2018, Mr. Okeyo the complainant did not honor the summons to attend the said hearing to give his testimony. In the absence of the complainant, the respondent detailed that on the morning of 16th December 2016, he was called by the regional assistant director human resource & administration Ms. Ruth Kimanthi and informed that the guards belonging to Bedrock Security Services Limited in Mwingi Law Courts indicated they would boycott due to late payment of salaries. This led to the discharge of poor services. He tried to reach Mr. Okeyo to discuss the way forward.

48. The respondent further testified that Mr. Okeyo called him requesting for a meeting at Nairobi Club at 7:30 p.m. He wanted to discuss his invoice and a personal matter involving his father in law. He informed him instead that he had gone for dinner with his colleague, one Fred Oboge at Kosewe restaurant. It was during that engagement that Mr. Okeyo showed up and joined them. He however maintained that by 15th December 2016, the evaluation committee had all the requisite information to make a determination.

49. For those reasons, the respondent maintained that there was no conflict of interest or any appearance of impropriety that could have arisen. He denied soliciting for a bribe. In his view, Mr. Okeyo's company's bid was unsuccessful because it was non- responsive and failed all technical specifications.

50. The respondent decried that he was not given a fair hearing because he was never given an opportunity to cross examine the complainant. The record however shows that the complainant was given two opportunities to appear before the committee and provide evidence. He however failed to honor the summons to attend. For that reason, the Committee dispensed with his attendance especially owing to the fact that time had really gone by and awaiting his evidence would have further impeded the efficacious disposal of the hearing. Regarding the other witnesses, the record shows that the respondent ably cross examined the witnesses to his satisfaction.

51. The respondent raised no objections to this procedure. He did not inform the committee that he hadn't been served with the relevant documents in preparation for his case. This would have been the right time to raise this objection,if had any. All factors considered, it is apparent that the respondent is raising this issue as an afterthought.

52. On the procurement of the complainant as a witness, the learned judge stated that it was incumbent upon the appellant or the committee to avail the witness. He posited that the appellant ought to have utilized the services of the available agencies in securing his attendance. We however do not agree with this position. The committee is not a court or an investigative agency as established in *the Constitution*. It is for this reason that it does not have powers to do certain acts since those powers have not been donated to it. The Committee is required to conduct the disciplinary process in a fair manner, and at the risk of repetition, it is our finding that the process that the respondent was taken through abided by the constitutional principles of fairness.

53. We therefore do not see any reason why the respondent was justified to state that there was no fair hearing as enshrined in the *Judicial Service Act* and section 4 of the Fair Administrative Actions Act. We find that the above process complied with the dictates of *the Constitution*, the *Employment Act*, the *Judicial Service Act*, the Fair Administrative Actions Act and the human resource manual belonging to the appellant. The respondent was afforded a fair hearing. We therefore find that the findings of the learned judge were misdirected.

54. On the reasons for termination, the appellant's letter dated 27th March 2019 informed that the respondent was guilty of gross misconduct on account of the charges leveled against him. In arriving at this decision, the committee found that the respondent had exemplified gross misconduct when he met a bidder during the evaluation process on 16th December 2016 and failed to disclose this information to the procurement committee members.

55. The respondent did not deny meeting the bidder. He only justified the same as follows: the tender evaluation process had concluded by the time the meeting took place; they discussed issues concerning the subsisting contract at that time; and the complainant unexpectedly showed up at the restaurant he was dining with another colleague.

56. We do not agree with the respondent. When a member of the tender evaluation committee meets a tenderer during the tender evaluation process, a perception of bias arises, the purpose of the meeting notwithstanding. Withal, the respondent herein did not disclose this meeting to his co-committee members. If indeed the meeting took place in good faith, why did he not disclose the same to his bidders?

57. We take guidance from this aspect of perceived bias by Lord Denning in the case of Metropolitan Properties Co (F G C) Ltd vs. Lannon and others (1968) 3 ALL ER 304. Although the same spoke to bias when making reference to a judge, we think the principle applies herein. The learned judge said:

> " A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a "direct pecuniary interest" in the subject-matter. Second, "bias" in favour of one side or against the other.
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> "So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart CJ in R v Sussex Justices, Ex p McCarthy ([1923] All ER Rep 233 at p 234, [1924] 1 KB 256 at p 259.):"... it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done."
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> In R v Barnsley County Borough Licensing Justices, Ex p Barnsley & District Licensed Victuallers' Assocn ([1960] 2 All ER 703 at pp 714, 715, [1960] 2 QB 167 at p 187.), Devlin LJ appears to have limited that principle considerably, but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see R v Huggins; R v Sunderland Justices ([1901] 2 KB 357 at p 373.), per Vaughan Williams LJ Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see R v Camborne Justices, Ex p Pearce ([1954] 2 All ER 850 at pp 8, [1955] 1 QB 41 at pp 48-51.); R v Nailsworth Justices, Ex p Bird. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly.
>
> Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

58. It is therefore our conclusion that in view of the foregoing, the findings of the committee that led to the termination of the respondent from employment were lawful and fair.

59. Turning to the respondent's cross appeal, it was submitted that the trial court erred in failing to award compensation in the form of damages as envisaged in Article 23 of *the Constitution*. He advanced that since constitutional breaches were apparent, he was organically entitled to damages in the sum of

Kshs. 2,000,000.00. We have already established that the respondent was properly, fairly and lawfully terminated from employment. He was therefore not entitled to those reliefs. We thus find no merit in the cross-appeal.

60. The upshot of our above analysis is that the present appeal has merit. It is hereby allowed to the extent that the judgment of the ELRC is hereby set aside. We substitute the same for an order that the respondent's petition amended on 19th October 2020 is dismissed with costs to the appellant. The respondent's cross appeal as found hereinabove, lacks merit and it is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR