



**Judicial Service Commission & another v Onyango (Civil Appeal  
E082 of 2022) [2023] KECA 1109 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1109 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL E082 OF 2022  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> APPELLANT**

**CHIEF REGISTRAR OF THE JUDICIARY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGGREY OURE ONYANGO ..... RESPONDENT**

*(An Appeal from the Judgment and Decree of the Employment and Labour  
Relations Court at Nakuru (H. Wasilwa, J.) dated 12th July, 2022 in ELRC)*

**JUDGMENT**

1. This appeal emanates from the judgment of the Employment and Labour Relations Court in Nakuru (Hellen Wasilwa, J.) dated 12<sup>th</sup> July, 2022. In that judgment, the court ordered the reinstatement of the respondent as an employee of the 1<sup>st</sup> appellant.
2. The respondent sued the appellants for unfair termination. In the suit, he sought to be reinstated back to employment. In the alternative, the respondent sought to be compensated for the unfair termination.
3. The facts of this case were that: on 26<sup>th</sup> February, 2001 the respondent was employed by the 1<sup>st</sup> appellant as a Process Server II. He was deployed to Migori Law Courts. On 28<sup>th</sup> February, 2013 the respondent was promoted to a Court Bailiff.
4. The respondent's woes with the appellants started on 24<sup>th</sup> October, 2019 when he was served with a show cause letter and directed to explain how on 26<sup>th</sup> June, 2018; 17<sup>th</sup> August, 2018; and 26<sup>th</sup> October, 2018; a total of Kshs.1,550,000/- was deposited into his account from the deposits Bank Account of Molo Law Courts.



5. In a letter dated 25<sup>th</sup> November, 2019 the respondent explained that the said money was sent to his account by a colleague, one Richard Tamar of P.J. Number 36108 hereinafter, “Tamar”. The said Tamar had approached the respondent and requested that he use the respondent’s account to receive money as his personal account had a loan. The respondent stated that he was not aware that the money deposited into his account was from the Molo Law Courts Deposit Account. He stated that he was only helping his friend.
6. On 7<sup>th</sup> January, 2020 the respondent was suspended for gross misconduct. He responded to the suspension through the letters dated 20<sup>th</sup> January, 2020 and 7<sup>th</sup> August, 2020. By a letter dated 2<sup>nd</sup> November, 2020 the respondent was summoned for a disciplinary hearing by the Human Resource Management Advisory Committee, hereinafter, “HRMAC”.
7. On 17<sup>th</sup> November, 2020 the hearing proceeded as scheduled. The respondent thereafter requested for the record of the proceedings and the decision of the HRMAC but the same was not given to him. He alleged to have learnt of his dismissal through the Judiciary Newsletter, and later in the letter of dismissal dated 4<sup>th</sup> January, 2021. The respondent stated that the failure by the appellants to supply him with the decision of the HRMAC and the proceedings thereof was contrary to the provisions of Articles 47, 48 and 50 of the Constitution. He also stated that he was not provided with the documents and evidence that the HRMAC was relying on, which he deemed to be in contravention of Section 25(4) of the Third Schedule of the Judicial Service Commission Act.
8. The respondent’s claim was that he was unfairly terminated from service and that he was not informed of the source of the funds deposited into his account by Tamar. He prayed for a declaration that he had been unfairly dismissed from employment by the appellants; a declaration that the disciplinary proceedings conducted by the appellants on 17<sup>th</sup> November, 2020 and the subsequent dismissal of the respondent from service were disproportionate, unfair, lacked a valid reason and they were null and void; an order to quash the appellants decision to dismiss the respondent from employment; an order of reinstatement to the position that the respondent held before dismissal without loss of benefits and salary; an order directing the appellants to pay the respondent salary and allowances thereto accruing from the date of dismissal being 4<sup>th</sup> January, 2021 to the date of reinstatement; an order for damages for unfair dismissal up to the age of retirement; terminal allowances and/or retirement benefits; and costs and interest of the suit.
9. In their response, the appellants contended that the letter dated 24<sup>th</sup> October, 2019 was not a show cause letter but rather a letter which required answers with regard to an audit query which the appellants were facing at the time. The appellants maintained that due procedure was followed before the disciplinary hearing. During the hearing, the respondent admitted that he had received the Kshs. 1,550,000/- in his National Bank Account. After interrogating the facts and the evidence, the HRMAC was satisfied that the respondent had consented to the said monies being sent to his account. The HRMAC then made its recommendation to the Directorate of Human Resource management, hereinafter “DHRM”. The DHRM upon further interrogation of the facts and the evidence, resolved to dismiss the respondent from service. The letter of termination was then served upon the respondent on the 4<sup>th</sup> January, 2021. The respondent’s appeal lodged on 5<sup>th</sup> January, 2021 was rejected for failing to advance sufficient grounds.
10. The appellants stated that in terminating the respondent, they were satisfied that he had committed an act of gross misconduct. They subjected him to disciplinary process, and the respondent failed to exonerate himself. The termination was justified in the circumstances.



11. In his response to the defence, the respondent stated that the investigation report revealed that Kshs. 1,200,000/- and not Kshs. 1,550,000/- was deposited into his account. The HRMAC made recommendation for the respondent's suspension to be lifted with effect from 7<sup>th</sup> January, 2020 and for the respondent to be reinstated back to employment. Tamar was ordered to pay the money. He faulted the DHRM for finding his answer to be unsatisfactory yet they did not participate in the hearing. He termed this move by DHRM to be unfair and contrary to the provisions of Article 50 (1)(f) of the [Constitution](#). He contended that at the time of filing the claim, his appeal had not been heard, and if it had, no decision was communicated to him.
12. The learned Judge observed that from the minutes of the disciplinary hearing, the HRMAC found that the respondent may have been duped and found himself being part of a malpractice he never schemed. The HRMAC recommended that the respondent be given a benefit of doubt and that his suspension be lifted and he be reinstated into the service with full pay, and that the staff who had wired money to him be asked to repay the said Kshs. 1,550,000/- within 14 days.
13. The learned Judge further observed that the 1<sup>st</sup> appellant in their letter dated 4<sup>th</sup> January, 2021 referred to the show cause letter dated 7<sup>th</sup> January, 2020; the respondent's response dated 20<sup>th</sup> January, 2020; and the disciplinary hearing of 17<sup>th</sup> November, 2020. The letter stated that the respondent had been found culpable of gross misconduct and had been dismissed from the service of the 1<sup>st</sup> respondent. The respondent contended that he had not been accorded a fair hearing and requested to have the decision reviewed and he be reinstated to work. He was only informed that his appeal had been considered and was dismissed. The learned Judge held that the respondent was dismissed without being accorded a hearing, and there was no evidence that he was heard by the 1<sup>st</sup> appellant after the HRMAC had recommended his reinstatement. The learned Judge held that it was not clear whether the decision to dismiss the respondent emanated from a disciplinary hearing of the HRMAC or the 1<sup>st</sup> appellant. It was the view of the learned Judge that the 1<sup>st</sup> appellant could not decide to change the decision of the HRMAC without according the respondent a hearing.
14. The learned Judge referred to Section 23(1) of the 3<sup>rd</sup> Schedule of [Judicial Service Act](#) which states as follows: "An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it" in holding that there was no evidence that the respondent was supplied with a copy of the documentary evidence relied upon by the 1<sup>st</sup> appellant in any disciplinary processes. The learned Judge held that this failure was in contravention of Article 50(2)(f) of the [Constitution](#). The learned Judge further observed that the respondent complained of this omission in his appeal, and the same was disregarded; it was also evident that the respondent never appeared before the 1<sup>st</sup> appellant, the commission which dismissed him. Therefore, the dismissal was effected without a hearing, in contravention of the Fair Administration Action Act and Section 41 of the [Employment Act](#) 2007 which envisages that a man should not be condemned unheard.
15. Consequently, the learned Judge held that the respondent was unfairly dismissed from service by the appellants, as the disciplinary process against him was flawed, as it did not accord him with the safeguards envisioned by Section 45(2) of the [Employment Act](#).
16. The learned Judge further held that, because the respondent was a young man who had served the Judiciary for 21 years without any record of misconduct and given the difficulty of finding alternative employment at his age, the only remedy that could compensate him was reinstatement. The learned Judge ordered that the respondent be reinstated with effect from the date of the Judgment, with back pay with effect from the date of dismissal without any loss of salary benefits. Costs of the suit were to be borne by the appellants.



17. The appellants were dissatisfied with the said judgment and subsequently lodged this appeal raising nine grounds of appeal which we summarize hereinafter. The appellants contend that the learned Judge erred in law and fact in finding that the respondent was unfairly dismissed by the appellants. They also contend that the learned Judge misdirected herself when she found that the HRMAC exonerated the respondent from blame. The appellants further contend that the learned Judge misdirected herself in finding that the respondent was not accorded a hearing by the 1<sup>st</sup> appellant and failing to appreciate that hearing of the respondent's appeal could be conducted by way of considering documentary evidence. It is also the appellants' contention that the learned Judge misdirected herself when she directed that the respondent be reinstated as an employee of the 1<sup>st</sup> appellant for reason that he was a young man, and the difficulty he would encounter in finding alternative employment. The appellants felt that the court did not consider the fact that the respondent had engaged in financial malpractice, which amounted to gross misconduct. The appellants further contend that the learned Judge misdirected herself when she faulted the 1<sup>st</sup> appellant for departing from the findings of the HRMAC despite the HRMAC acquiring a delegated authority from the 1<sup>st</sup> appellant. It was also the appellant's contention that the learned Judge misdirected herself by awarding the respondent back pay with effect from the date of dismissal without any loss of salary benefits and that the learned Judge erred in law and fact by condemning the appellants to pay costs of the suit despite the respondent having been fairly terminated from service. In the end, it is the appellants' prayer that the appeal be allowed and the impugned Judgement and Decree be set aside.
18. When the appeal came up for hearing, Mr. Kanjama advocate appeared for the appellants while Mr. Mongeri advocate appeared for the respondent. Parties sought to rely on their respective written submissions.
19. The appellants submitted that the respondent was issued with a show cause letter on the grounds of misconduct, to which he responded vide a letter dated 20<sup>th</sup> January, 2020 and through another letter that was forwarded by the Chief Magistrate on 25<sup>th</sup> November, 2019. Counsel pointed out that in both letters, the respondent conceded that he indeed offered his bank account for use by Tamar. The said Tamar caused the account to be credited with funds, whose source the respondent said he was not aware. Counsel also pointed out that from the contents of the respondent's letter it was clear that he was aware his account was being used to facilitate misappropriation of money contrary to the [\*Judicial Code of Conduct and Ethics\*](#), The [\*Public Officer Ethics Act\*](#); and that by the respondent's own admission during the disciplinary hearing, he was part of a financial malpractice, to the detriment of the 1<sup>st</sup> Appellant. To buttress these submissions, counsel referred the Court to Regulations 64 and 65 of the [\*Judicial Service \(Code of Conduct and Ethics\) Regulations\*](#) on accountability and prohibition against bribery and corrupt practices; and on integrity respectively. Counsel further pointed out that the respondent's actions amounted to money laundering as defined under Section 3 of the [\*Proceeds of Crime and Anti-Money Laundering Act\*](#).
20. The appellants further submitted that they were guided by the values and principles of governance under Articles 10 and 172(1) of the [\*Constitution\*](#) of Kenya and that it is in adherence to these provisions that they were duty bound to dismiss the respondent for breach of the principles of integrity, transparency and accountability.
21. On the issue of unfair termination, the appellants submitted that by finding that the respondent was unfairly terminated, in spite of evidence of gross misconduct, the learned trial Judge was perpetuating the criminal standard of proof. In support of this ground, counsel relied on the cases of [\*CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona\*](#) [2015] eKLR and [\*Kenya Power & Lighting Company Limited vs Aggrey Lukorito Wasike\*](#) [2017] eKLR.



22. On the question of procedural fairness, the appellants relied on the case of *Iyego Farmers' Co-operative Sacco vs Kenya Union of Commercial Food and Allied Workers* [2015] eKLR to submit that in a suit for termination of an employee, the court ought to look at the validity and justifiability of the reason for termination, and also interrogate the procedural fairness. The appellant maintained that the procedure leading up to the respondent's dismissal was fair. Counsel further relied on Section 44(1) of the *Employment Act* on summary dismissal. The appellants submitted that the process begun with the 1<sup>st</sup> appellant, when the Chief Registrar sent a letter to the respondent requiring him to explain the circumstances under which he received the payments totaling to Kshs. 1,550,000/- from the Molo Law Courts deposits account. According to counsel, the process of summarily dismissing the appellant was followed, and the reasons for termination were disclosed to the respondent. The appellant's counsel argued that the HRMAC is not an independent body and that its decisions are subject to ratification by the 1<sup>st</sup> appellant. Counsel relied on the case of *Re The Matter of Interim Independent Electoral Commission* [2011] eKLR where the Supreme Court pronounced itself on the independence of commissions and independent offices that: "the independence of commissions is secured by Article 249(2) of the *Constitution* which provides that such commissions and holders of office therein are subject only to the *Constitution* and the law and are independent and not subject to direction or control by any person or authority..." In the end, the appellants prayed that the appeal be allowed on the ground that the respondent was fairly dismissed from service by the appellants.
23. The respondent submitted that, for a dismissal of an employee to be fair there must be both substantive justification and procedural fairness. On this point, the respondent relied on the case of *Walter Ogal Anuro vs Teachers Service Commission* [2013] eKLR where the court held that substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. Counsel pointed out that the HRMAC had recommended that the respondent be accorded the benefit of doubt and that his suspension be lifted. Counsel proceeded to point out that the HRMAC recommendation was pursuant to the respondent's case, that Tamar was his colleague, and that the reason given by Tamar for receiving money through the respondent's account was nothing out of the ordinary and that it was a common occurrence in our social set up. According to counsel, by departing from the recommendation by the HRMAC, the 1<sup>st</sup> appellant acted without according the respondent a hearing. Counsel further pointed out that the appellants never communicated to the respondent how his appeal would be considered hence it cannot be said that there was any indication that the appeal would be heard by way of consideration of documentary evidence or that the respondent waived his right to appear in person at the hearing of his appeal. Counsel also pointed out that the 3<sup>rd</sup> Schedule of the Judicial Service Commission Act guaranteed the respondent the right to receive a free copy of the documentary evidence relied on or that he be allowed to access it. The respondent submitted that the appellants were bound by the HRMAC's recommendations since the establishment of the committee was for a good cause, and that the delegation of functions to it, was not a mere cosmetic exercise and that the duty to give reasons is a function of due process. The respondent relied on the case of *Flannery vs Halifax Estate Agencies Ltd* [2000] 1 All ER 373 where it was held that a decision made without reasons is not reasonable at all and it cannot be allowed to stand.
24. Relying on the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, the respondent pointed out that the remedy of reinstatement is discretionary and therefore the superior court is to be guided by factors stipulated in Section 49(4) of the *Employment Act* and also balance the interests of the employees against the employer's interest. He urged the court to appreciate that the *Employment Act* prescribes five remedies for both wrongful dismissal and unfair termination and that the Court was at liberty to decide which remedy was appropriate in each case.



25. Submitting on the issue of costs, counsel stated that the respondent would not have brought proceedings in the superior court but for the appellants' actions. Counsel urged that the respondent being the successful party in the superior court was entitled to the costs awarded. In the end, counsel urged this Court to dismiss this appeal with costs.
26. This is a first appeal and our mandate is anchored on Rule 29(1) of the *Court of Appeal Rules, 2022*. Ours is to independently reappraise the evidence and arrive at our own conclusions. In doing so, we must appreciate that unlike the trial court, we do not have the benefit of witnessing and assessing the demeanor of witnesses when they adduced their evidence.
27. We have carefully considered the record, submissions by counsel, authorities cited and the law. The issues for determination are whether or not the respondent was unfairly terminated; and if so what was the appropriate remedy in the circumstances.
28. It is common ground as evidenced by the letter of dismissal from the Judicial Service dated 4<sup>th</sup> January, 2021 that the respondent was summarily dismissed on account of gross misconduct. The dismissal was on the strength of the show cause letter dated 7<sup>th</sup> January, 2020 and the disciplinary hearing on 17<sup>th</sup> November, 2020 by the HRMAC.
29. It is trite that in instances where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.
30. We have considered the minutes of the disciplinary hearing the respondent was subjected to by the HRMAC and the recommendations made therein. It is clear that the appellants departed from the recommendations made by the HRMAC.
31. In the case of *Capital Markets Authority vs Jeremiah Gitau Kiereini & Another* [2014] eKLR, the court dealt with the issue of a committee of an organisation exercising delegated authority, and it held that the proceedings or the functioning of the committee which was exercising delegated authority did not disempower the organization. The court held thus;

“ All these functions remained reposed in the Board throughout.”
32. The court made it clear that the committee did not supplant the Board in the entire process. The committee gave its recommendations to the Board. At paragraph 72 of the judgment it was held that;

“ What deserved a constitutional challenge was the summary imposition of sanctions and other penalties before giving Kiereini an opportunity to be heard in mitigation.”
33. We understand that to mean that the board was not obliged to accept the recommendation of the committee. It is the board that had the mandate to make the final decision.
34. Pursuant to Section 25(3) of the third schedule to the *Judicial Service Commission Act*, the Judicial Service Commission (JSC) is mandated to delegate a committee or a panel to investigate matters in which disciplinary proceedings are deemed necessary. Therefore, when HRMAC gave a hearing to the respondent, the JSC is deemed to have undertaken the process through which the respondent was accorded a fair hearing.



35. In *Anthony vs Communications Authority of Kenya & 3 Others*, Petition No. E161 of 2021 the Court held as follows:

“The Public Service Commission, as an independent Constitutional Commission was empowered under Article 234(5) of the *Constitution* to delegate its functions and powers.

Delegation of function and power did not negate the power held by the principal. Responsibility lay with the principal.

Delegation did not imply parting with powers by the person who delegated, but conferred authority to do things which otherwise the person delegating would have to do himself.”

36. That finding might therefore lead to the question about what constitutes delegation, if the person delegating his authority still retains his power? The answer to that question was provided by the court in *Attorney General & 2 Others vs Independent Policing Oversight Authority & Another* [2015] eKLR, when it stated thus;

“What then amounts to delegation? Delegation is the assignment of responsibility or authority to another person, usually one’s subordinate or another officer of a lower rank. It is instructive, however, that the person delegating must remain fully accountable for the outcome of the delegated work.

One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority, and is not acceptable.”

37. Accordingly, whereas the JSC had delegated its authority to HRMAC, to give a hearing to the respondent, the Commission retained the responsibility to make the decision. On the one hand, the appellants submitted that the respondent was accorded an opportunity to be heard; whilst on the other hand, the respondent submitted that there was no hearing.

38. It is the view of the respondent that the JSC should have had him investigated first; and that if the said investigations yielded evidence of any criminal offence attributable to him, the JSC would have caused criminal charges to be preferred against him.

39. We find that the respondent was accorded a hearing by the HRMAC, to whom JSC had delegated the requisite authority. In a manner of speaking, the respondent conceded that there were disciplinary proceedings when he prayed, *inter alia*, for;

“... a declaration that the disciplinary proceedings conducted by the appellants as against the respondent on 17<sup>th</sup> November 2020 and the eventual dismissal of the respondent from service were disproportionate, unfair, lacked valid reason and therefore null and void ...”

40. At paragraph 20 of his written submissions, the respondent made it clear that;

“It is not in dispute that on 17<sup>th</sup> November 2020, the respondent appeared for a disciplinary hearing before the Human Resource Advisory Committee.”

41. After concluding the disciplinary hearing, the HRMAC made a recommendation to the JSC, that the respondent be reinstated. Notwithstanding that recommendation, the JSC decided to terminate the employment of the respondent. In the face of the said decision by the JSC, the respondent lodged an appeal. It is common ground that the respondent’s said appeal was dismissed.



42. Following the dismissal of his appeal, the respondent lodged a claim before the Employment and Labour Relations Court (ELRC), at Nakuru. In its judgment dated 12<sup>th</sup> July, 2022, the ELRC held, inter alia, as follows;

“ 52. The Judicial Service Commission could not in my view decide to change the decision of the Human Resource Management Advisory Committee without according the Claimant a hearing.”

Noting that the claimant had not appeared before the JSC for a hearing, the learned Judge said;

“ 56. He was heard by the Human Resource Management Advisory Committee but was dismissed by the Judicial Service Commission without being given a hearing.”

43. In the result, the ELRC made a finding that the disciplinary process meted out against the Claimant was flawed; and that therefore the Claimant was unfairly dismissed from employment.

44. It is our understanding that the court equated the recommendation of the Committee to a decision of the Commission. In effect, the court was convinced that the Commission had abdicated its responsibility. As was held in the case of *Attorney General & 2 Others vs Independent Policing Oversight Authority & Another* (*supra*);

“ One can delegate authority but not responsibility. If a person delegates both authority and responsibility then it becomes abdication of duty or denudation of authority, and it is not acceptable.”

45. At all times, the responsibility of making a decision was vested in the JSC. Whereas the Commission delegated its authority to HRMAC, to conduct the disciplinary hearing, that did not vest upon the said HRMAC, the mandate to make a determination on the respondent’s fate.

46. In any event, the HRMAC did not purport to have the mandate to make the determination on the fate of the respondent. The Committee made a recommendation to the Commission; and it is the Commission which had the requisite mandate to make the determination. But the all-important question is whether or not the Commission, (which had delegated its authority to the committee to conduct disciplinary hearing) could disregard the recommendation of the said Committee.

47. We hold the considered opinion that the Commission was not under an obligation to accept the recommendation from the Committee. Secondly, we find that the Commission was not obliged to conduct a fresh disciplinary hearing.

48. In the instant case, the respondent’s account was the recipient of funds from Molo Law Courts deposit account on 17<sup>th</sup> August, 2018 through an in-house cheque. The respondent claimed not to have been aware where the funds came from. He proceeded to transfer the money to Tamar’s account at Stanbic Bank Nakuru on 23<sup>rd</sup> August, 2018. At no given time did he question Tamar on where the money came from, or how it was possible for him to deposit the money into Tamar’s account less than a week after the money had been deposited into his account, if at all the loan was still pending payment. In the circumstances, we find that the reinstatement of the respondent would constitute compulsion on the employer’s part, to take back an employee whose actions caused the employer to suffer a huge financial loss. It would, in our considered view, be difficult for the employer to trust the respondent, given the events that led to the dismissal. We therefore set aside the order for reinstatement.



49. As held earlier herein, the responsibility for making a determination vested upon the Commission, and in so doing, the Commission was not bound to accept the recommendation of the Committee. We find no fault in the decision made by the Commission.

50. Accordingly, the appeal is allowed with costs the appellants.

**DATED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

