# East African Portland Cement Company Limited v Ndauti & 4 others (Civil Appeal 202 of 2017) [2022] KECA 1202 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1202 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 202 OF 2017**

**W KARANJA, MSA MAKHANDIA & AK MURGOR, JJA**

**NOVEMBER 4, 2022**

**BETWEEN**

**EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED ..... APPELLANT**

**AND**

**BENJAMIN MWENDWA NDAUTI ............................................ 1ST RESPONDENT**

**IBRAHIM MUGO ......................................................................... 2ND RESPONDENT**

**DESMOND OWIYO ONINGU .................................................... 3RD RESPONDENT**

**EVANS ABUGA ............................................................................... 4TH RESPONDENT**

**FELIX VUNGA MUNGA MULWA ............................................ 5TH RESPONDENT**

***(Appeal from the Judgment and Orders of the Employment and Labour Relations Court, (H. Wasilwa, J.) delivered on 18th April 2016 in Employment and Labour Relations Court Causes No. 1267, 1274, 1275, 1340 and 1884 of 2013 (Consolidated under Cause No. 1267 of 2013)***

## JUDGMENT

1. In this appeal, the appellant, the East African Portland Cement Company Limited is aggrieved by the decision of the Employment and Labour Relations Court (ELRC) that found the dismissal from employment of Benjamin Mwendwa Ndauti, Ibrahim Mugo, Evans Abuga and Desmond Owiyo Oningu, the 1st to 4th respondents' (the respondents) to be unfair, and converting, their summary dismissal into a suspension pending the hearing and determination of a criminal case in the Mavoko Law Courts, and for further ordering that the 5th respondent, Felix Vunga Munga Mulwa, be paid;

    i. 1 month's salary in lieu of notice of Kshs 35,000;

    ii. Annual leave due;

iii. Gratuity under the contract; and

Vi. 3 months' salary as damages for unfair termination – Kshs 35,000 x 3 = Kshs 105,000.

2. The facts of the case are that the respondents who were employees of the appellant worked in its finance department until the determination of their employment sometime in May 2013, following allegations of their involvement in fraudulent activities. Simultaneously with this, they were charged with criminal offences ranging from stealing by servant to fraudulent or false accounting before the principal magistrates' court at Mavoko.

3. Being aggrieved by the termination of their services, the respondents' instituted claims in the ELRC where they stated that they were subjected to unfair labour practices, and the unlawful and unprocedural termination of their employment.

4. It was the 1st respondent, Benjamin Ndauti's case as instituted in Cause No 1267 of 2013 that he was employed by the appellant as an accountant on June 29, 2007 and that he had performed his duties diligently and in accordance with the rules and regulations of the appellant's code of ethics and standard of performance. As a consequence, he was promoted to the position of finance and administration manager at the appellant's depot in Kampala. He contended that he was interdicted by a letter dated April 26, 2013, for alleged involvement in fraudulent activities; that by a written response of May 2, 2013, he denied any wrong doing, and claimed that the transgressions set out against him were not part of his job description, and that in any event they had occurred after he been transferred to Kampala.

5. The 1st respondent further stated that on May 8, 2013, he received a fresh interdiction letter together with a letter dated May 7, 2013 requiring him to attend a disciplinary hearing on May 9, 2013; that the notice was too short and went against the provisions of the appellant's human resource manual which specifies that an employee should be given reasonable notice and provided with the evidence against him to enable him prepare for the disciplinary hearing. He also claimed that he was not informed of his right to be accompanied during the hearings and, that though the disciplinary committee had recommended that more information be provided to prove the allegations against him, such information had not been supplied. He confirmed that the committee nevertheless ordered that he be charged, and his services terminated immediately, resulting in his summary dismissal from employment on May 20, 2013, for alleged fraudulent conduct.

6. He prayed for judgment against the appellant for:

   1. A declaration that the termination of the claimant's employment on account of involvement in fraudulent activities is unlawful.

   2. An order for re-instatement of the claimant to the position of the appellant's accountant.

      Or in the alternative:

   3. An order substituting the dismissal for interdiction and or suspension from duty pending the hearing and determination of Mavoko Magistrates Court Criminal Case No 518 of 2013.

      Compensation to the claimant of twelve (12) months' salary in damages plus interest from the date of filing until payment in full.

   5. Costs of this suit and interest on costs from the date of filing until payment in full.

7. The 2nd respondent, Ibrahim Mugo's case, that is, Cause No 1274 of 2013 was that he was employed as a financial accountant from the year 2007 and performed the role of treasury accountant in charge

of company payments; that on November 1, 2012 he was transferred to the audit department to the position of an internal auditor, and was to report to the head of internal audit and risk management; that on the December 14, 2012, he was summoned by CID officers who were investigating a report into the loss of company money through the finance department, after which he wrote a statement in response. Six days later, by a letter dated December 20, 2012 he was interdicted for alleged involvement in fraudulent acts against the appellant.

8. In a written explanation of December 24, 2012, he denied any wrong doing, for the reason that the fraudulent transactions were not within his job description; that additional charges were preferred against him where he was accused of perpetuating or concealing fraud in the performance of his duties. He further stated that on May 7, 2013, he received a letter inviting him to appear before a disciplinary committee on May 9, 2013. He contended that the notice was too short and did not afford him sufficient time to prepare, nor did it specify the nature of the evidence against him to enable him prepare his defence; that he was not informed of his right to be accompanied during such hearings; that though the disciplinary committee recommended that more information be provided in respect of the allegations, he should nevertheless be charged in court, and his services terminated immediately; that by a letter dated May 20, 2013, he was summarily dismissed from employment for alleged involvement in fraudulent activity. In his claim, he sought similar orders to those of the 1st respondent.

9. In Cause No 1275 of 2013, the 3rd respondent, Evans Abuga's case was that he was employed by the appellant as a cashbook accountant grade 9 and later promoted to cashbook accountant grade 7; that on the April 26, 2013, he was interdicted from duty for alleged involvement in fraudulent transactions that had resulted in the loss by the appellant of colossal sums of money for which he was alleged to be responsible. In a response dated May 2, 2013, he denied any wrong doing and explained that the fraud alleged could not be detected through bank reconciliations. On May 7, 2013, he was notified in writing that he was required to appear before a disciplinary committee on May 9, 2013 which notice was too short. He too claimed that he did not have sufficient time to prepare his case, and was not informed of the evidence against him or of his right to be accompanied at the hearings; that the committee recommended that he be charged in court, and his services terminated immediately. Subsequently, he was summarily dismissed from employment on May 20, 2013 for involvement in alleged fraudulent activity.

10. The 4th respondent, Desmond Owiyo Iningu's case in Cause 1340 of 2013 was that he was employed by the appellant as an accounts clerk on the September 3, 2001 and had performed his duties diligently; that he was promoted to the position of accounts assistant – Kampala depot with effect from the May 15, 2003. By an internal memo dated March 30, 2011, he was transferred to the finance headquarters as treasury accountant, but by another internal memo dated April 4, 2011 he was redeployed to the position of acting treasury accountant.

11. He claimed that he was first suspended from duty on July 8, 2011 for alleged laxity and inefficiency in the performance of his duties in Kampala; that he received a notice specifying all the allegations against him and was given an opportunity to show cause within 14 days why severe disciplinary action should not be taken against him for gross misconduct; that on July 20, 2011 he provided a detailed response to each claim, and was summoned to appear before a disciplinary committee on October 5, 2011 where he was questioned after which his suspension was lifted and he was directed to report to Kampala as an accountant which he did on April 16, 2012.

12. Soon thereafter, he was interdicted on April 18, 2013 on allegations of involvement in and perpetration of fraud leading to the loss of Kshs 2,970,000.00; to which he responded on April 22, 2012. By a letter dated May 7, 2012 he was invited to appear before a disciplinary committee on May 9, 2013. He claimed that the notice was too short and did not give him sufficient time to prepare his case, and therefore he

did not make any oral presentations at the hearing. On May 20, 2013 he was summarily dismissed and was later arrested and charged in the principal magistrate court at Mavoko Law Courts in Criminal Case No 518 of 2013.

13. In an amended statement of claim, that is Cause No 1884 of 2013, the 5th respondent, Felix Vunga Munga Mulwa claimed that he was employed on contract as a debtor's clerk at a monthly salary of Kshs 35,000; that on December 20, 2012 he was unfairly interdicted from duty for alleged involvement in fraud and required to show cause within 7 days why he should not be summarily dismissed. He responded in a letter dated December 24, 2012. Thereafter he received another letter setting out additional charges. By a letter dated May 7, 2013 he was invited to a disciplinary meeting on May 9, 2013; that he was not afforded a hearing and that no proceedings took place; that he was not given any evidence relating to the charges and did not make any oral representations; that the appellant did not deal with his matter fairly or in accordance with its human resource policy manual; that he played a key role in commencing the investigations, and was surprised when he was summarily dismissed from employment by a letter dated May 20, 2013.

14. As a consequence, the respondents sought compensation for the balance of the contract period and reinstatement to employment. The trial court consolidated the claims and by a judgment delivered on April 18, 2016, the learned judge held;

> ' I therefore find that in terms of section 45 of the *Employment Act*, the termination of the claimants in all cases was unfair for lack of following due procedure before termination and in the case of Benjamin Ndauti, Evans Abuga and Desmond Oningu for lack of adequate reasons for dismissal. It is apparent that the claimants are currently facing criminal charges at Mavoko Law Courts. In the circumstances suspending them would have been the best option pending determination of the criminal case'

15. The appellant was aggrieved and brought an appeal on grounds that the learned judge wrongly concluded that no valid reasons were advanced that necessitated the termination of the respondents' employment despite there being evidence to the contrary; in finding that the respondents were not given adequate time to prepare their defence to the allegations yet they were issued with show cause letters in sufficient time to enable them prepare their cases; in finding that they were not given adequate material to enable them make adequate representations before the disciplinary committee; in finding that the termination was procedurally unfair and that the termination of the 1st, 3rd and 4th respondents was substantially unfair and in finding that they were all unfairly dismissed from employment.

16. Another ground was that the trial court wrongly ordered the reinstatement of the 1st to 4th respondents who had been out of employment for more than 3 years which was contrary to section 12 of the *Employment and Labour Relations Court Act* and section 49 of the *Employment Act*; exposing the appellant to financial loss by ordering their reinstatement, in view of the sensitive positions they held prior to termination; in acting contrary to the principles of privity of contract by reversing the termination of the respondents into suspensions, contrary to the provisions of the employment contract between the parties and the appellant's human resource policy.

17. All the respondents testified, and reiterated the contents of their claims, while DW1 Anthony Alala Shisero the appellant's business systems manager and DW2 John Ole Kimanjoye testified on behalf of the appellant.

18. DW1 stated in brief that, it was brought to his attention that the software system was being used to commit fraud resulting in the loss of between Kshs 100 and 200 million; that the fraud involved updating of fake receipts recorded as money received into the system when no money was actually

received; that once the receipts were recorded in the system the customer was allowed to collect the cement. He also testified that the process of reconciliation of the company documents, including the physical receipts, with bank and other statements was not thorough, leading to the loss suffered by the appellant.

19. DW2 worked in the human resources department. He testified that an audit that was carried out implicated a number of employees in fraudulent activities which had resulted in loss by the company of Kshs 182 million; that the respondents were issued with letters of interdiction and a notice to show cause why they should not be dismissed for involvement in fraudulent activities; that they were later invited to disciplinary hearings where their representations were considered and subsequently, they were summarily dismissed. He told the court that all the respondents were provided with particulars of the allegations well in advance to which they responded, and that the respondents were subjected to fair disciplinary hearings.

20. Both the appellant and the respondents filed written submissions which counsel for the parties highlighted during the virtual hearing. On behalf of the appellant, learned counsel Mr Muchiri informed us that he would be canvassing the appeal on 4 broad grounds. First, whether the respondents' termination was substantively fair, second, whether the termination of the respondent was procedural, third, whether the remedy of reinstatement was appropriate in the circumstances and four, whether the trial court infringed upon the administrative prerogative of the appellant which was contrary to the principles of privity of contract when it ordered the conversion of termination of the 1st to 4th respondents to a suspension.

21. On substantive fairness, it was submitted that for a termination to be considered fair and legal, the employer must demonstrate that the termination was both substantively and procedurally fair; that substantive fairness means that the reasons for termination must be valid or genuine and procedural fairness means that the manner in which the termination was carried out was in accordance with the prescribed legal procedure in terms of section 43 and 45(2) of the *Employment Act*. In support of this submission counsel cited the case of *Moses Kaunda Moro vs CMC Motors Group Ltd* [2013] eKLR for the proposition that the reason for termination must be valid. It was submitted that the respondents had ongoing criminal cases in the magistrates' court which was a valid reason for termination; that the trial court rightly found the termination of the 2nd and 5th respondents substantively fair, but there was no valid reason to justify the trial judge's conclusion that the 1st, 3rd and 4th respondents' contract was terminated unfairly; that only the 5th respondent was on a contract and the rest of the respondents were on permanent and pensionable terms.

22. On the question of whether the 1st, 2nd and 3rd respondents' termination was substantively fair, counsel submitted that, sufficient justification for terminating their employment was provided; that the disciplinary committee's observation that, further investigations into the allegations of fraud did not mean that the respondents' employment could not be terminated on the basis of the initial findings that the respondents were involved in fraudulent activities; that furthermore, section 43 of the *Employment Act* allows for termination of employment where the employer has genuinely established that valid reasons necessitated termination ; that in this case, fraud, which was supported by the show cause letters issued to the 1st, 3rd and 4th respondents was a fair and valid reason.

23. On the question of procedural fairness, counsel contended that, the trial court was in error when it found that the disciplinary proceedings were flawed for the reason that the respondents were provided only two days' notice to appear before the disciplinary committee; that it was not disputed that by letter's dated May 5, 2013, the respondents were invited to a disciplinary hearing to be held on May 9, 2013; that well before they attended the disciplinary hearings, the respondents were issued with show

cause letters in December 2012 and April 2013 which was more than 10 days and in some cases prior to the hearings; that therefore, the respondents were aware of the allegations that they faced, and were given sufficient time to respond; that as such, the breach to the right to fair hearing did not arise.

24. Furthermore, it was submitted, the appellant's human resource manual specified that the employer was required to give the respondents 7 days' notice upon issuing them with the notices to show cause letters. It is not disputed that the respondents were in fact given over and above the prescribed 7 days' notice and therefore, the applicable law was complied with. Counsel pointed out that at no time prior to filing their suits in the ELRC 'did the respondents complain that they were not given adequate time to prepare for the disciplinary hearings'.

25. Turning to whether the remedy of reinstatement ordered by the trial judge was appropriate, counsel submitted that section 12 (3) (viii) of the *Employment and Labour Relations Court Act* specifically provides that an employee cannot be reinstated after having been out of employment for more than 3 years; that all the respondents were terminated on May 20, 2013 and judgment was delivered on April 18, 2016 which was outside the statutory timeframe specified; that the criminal case is still ongoing and would render the respondents as having been out of active employment for more than three years. Furthermore, it was asserted that section 49 (4) of the *Employment Act* sets out factors that should be borne in mind before reinstatement is ordered, including that the respondents all worked in the finance and accounts department and had been dismissed for fraud. Counsel cited the case of *Kenya Airways Ltd vs Aviation and Allied Workers Union and others [2014] eKLR*, *Gladys Boss Shollei vs Judicial Service Commission [2013] eKLR* and *Tailors and Textile Workers Union vs Summit Fibres Ltd* in support of the proposition that the respondents' reinstatement did not meet the criteria set out in section 12 (3) (viii) of the *Employment Act*.

26. On the complaint that the trial court infringed on the appellant's administrative prerogative by making orders that were contrary to the principles of sanctity and privity of contract by converting the termination of the 1st to 4th respondents to a suspension, it was submitted that the standard of proof in criminal cases being different from the standard of proof in disciplinary hearings, the decision to terminate the employees' contract could not possibly be premised on the outcome of the criminal case. The case of *Crispinus Ouma Okiya vs The City Council of Nairobi and another [2015] eKLR* was cited for the proposition that the decision to place an employee on the suspension is a purely administrative prerogative bestowed upon an employer and the trial court is not entitled to interfere with such order.

27. There was no appearance for the 1st to 5th respondents, despite having been served with the hearing notice on the November 24, 2021. Needless to say, the 1st to 4th respondents filed written submissions. It was submitted that, the appellant's disciplinary committee did not find sufficient evidence against the respondents; that in the case of the 1st respondent, the appellant admitted that no sufficient evidence of fraud was found against him and that further information required to be gathered and verified; that this information was never provided and yet the 1st respondent's employment was terminated. With respect to the 3rd respondent, it was contended that the evidence against him was weak and as for the 4th respondent, the committee found that his involvement was not clear and that further investigation was required; that the respondents' employment was terminated on May 20, 2021, and arraigned in court on June 5, 2013 which was 16 days after termination; that this demonstrated that they were not terminated on allegations of fraud, but on suspicion that they had committed a criminal offence.

28. Regarding whether they were given adequate time to prepare their defence or sufficient material to support the allegations against them, the respondents stated that they were served with interdiction letters requiring them to show cause, but the interdiction letters were not accompanied by evidence in support of the allegations, which was an infringement of their right to fair hearing.

29. Turning to whether they were entitled to be reinstated, they contended that after they were dismissed from employment, the judgment of the trial court, converted their dismissal to suspension pending the outcome of Criminal Case No 518 of 2013 on April 18, 2016; that three years from the date of dismissal had not lapsed by the time of the judgment; that therefore they ought to have been reinstated.

30. This being a first appeal, this court's primary duty is to re-evaluate the evidence on the record and to reach its own independent conclusion on the evidence and the law, in accordance with rule 29 (1)(a) of the *Court of Appeal Rules.*

31. Being so guided, we consider that the main issues for determination in this appeal to be;

    i. whether the appellant was entitled to summarily dismiss the respondents;

    ii. whether the respondents were subjected to a fair procedure; and

    iii. whether the remedies of suspension and reinstatement were available to the respondents.

32. Beginning with the issue of whether the appellant was entitled to summarily dismiss the respondents, the learned judge found that whereas the substantive termination of the 2nd and 5th respondent was fair, there was no adequate evidence against the 1st, 3rd and 4th respondents to warrant their termination. The trial court concluded that;

> ' There is no proof that the said investigations were ever carried out as no evidence of the investigation report was adduced in court. They were also dismissed before they were charged in court as recommended by their disciplinary committee this shows that there were no valid reasons to warrant the trios dismissal'.

33. Section 43 of the *Employment Act* allows for termination of employment where the employer has established valid reasons that necessitate the termination of the respondents' employment. Section 45 of the *Employment Act* specifies that unfair termination of employment would arise where the employer fails to prove;

> ' (a) That the reason for the termination is valid.
>
> b. That the reason for the termination is a fair reason-
>
>     i. related to the employee's conduct, capacity or compatibility; or
>
>     ii. based on the operational requirements of the employer; and
>
> b. that the employment was terminated in accordance with fair procedures.'

34. Whilst addressing the issue of unfair termination in the case of *Regent Management Limited vs Wilberforce Ojiambo Oundo [2018] eKLR*, this court observed that;

> ' As noted by this court in Iyego Farmers' Co-operative Sacco vs Kenya Union of Commercial Food and Allied Workers [2015] eKLR, whenever an issue of wrongful or unfair dismissal arises the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.
>
> 26. Delving into whether the reasons for respondent's termination were fair we caution ourselves that we ought not to substitute our decision for that of an employer. Our duty is to determine whether the decision to dismiss was valid

and fair within the circumstances of the employer. See this court's decision in Alfred Mutuku Muindi –vs- Rift Valley Railways (limited) [2015] eKLR.'

35. In this case the respondents were summarily dismissed for gross misconduct arising from alleged fraudulent activities that led to financial loss by the appellant. Section 41 (4) provides for acts or omissions that are justifiable or lawful grounds for summary dismissal. Of relevance is, sub rule (4)(g) which states;

> ' [If] an employee commits, or unreasonable and sufficient ground is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.'

36. Misconduct is further defined under clause 12.6.3 of the appellant's human resources manual. For the purposes of this case, it is provided that;

> ' Gross misconduct leading to summary dismissal includes but is not limited to:
>
> (i) involvement or knowingly failing to report fraudulent or any such acts that lead to organised loss of the organisations property.'
>
> So, was the appellant's decision to dismiss the respondents valid and fair?

37. The appellant's case was that the respondents' dismissal was lawful and in accordance with sections 41, 43 and 45 of the *Employment Act* and section 12:12 of the human resources policy manual, 3rd Revision / June 2011 as read with section 12:6:3, in that their employment was terminated for valid and justifiable reasons.

38. In discerning what would be construed as valid and justifiable reasons for dismissal, this court observed in the case of *Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR* that;

> ' There can be no doubt that the act 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, prove the reasons are valid and fair, prove that the grounds are justified'.

39. Similar guidance is to be found in *Halsbury's Laws of England,* 4th Edition, Vol 16(1B) para 642, thus;

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

40. In effect, what an employer must demonstrate is whether there were valid and justifiable reasons for dismissing the employee, the reasons for dismissal and the nexus of the reasons to the employee facing summary dismissal.

41. As stated above, the trial court found the dismissal of the 1st, 3rd and 4th respondents to be without valid reason, while that of the 2nd and 5th respondents to have been valid. As to whether the learned judge reached the right conclusion, our analysis of the evidence discloses that the respondents were employed in the appellant's finance department during the period 2011 to November/December 2012. The evidence also discloses that during that period the appellant suffered loss of colossal sums of between Kshs 100 and 200 million through fraud and collusion of employees in the finance department.

42. The 1st respondent who was an accountant was summarily dismissed because he updated two fraudulent receipts in the JDE and GL totalling Kshs 1,744,996 without confirming or validating the receipts before posting them to the appellant's detriment; that he was subsequently interdicted to pave way for investigations and given 7 days within which to respond to the allegations. By a letter dated May 3, 2013, the charges against him were amended. On May 8, 2013 he responded to the further allegations. Thereafter, he was notified on May 7, 2013 to appear before a disciplinary committee where he made oral representations. He was summarily dismissed from employment on grounds of gross misconduct.

43. As concerns the 2nd respondent, he was employed as an accounts assistant responsible for updating receipts. Following investigations into the allegations of fraud, he was summarily dismissed because he was implicated in concealing or perpetrating fraud, in that, between February 16, 2011 and November 26, 2011 he updated 79 fraudulent receipts in the JDE and GL totalling Kshs 105,390,000 without confirming or validating them and after reviewing bank reconciliations for July, August and September 2011 failed to detect or inform the employer of the suspicious receipts used to defraud the appellant. The 2nd respondent was subsequently interdicted and given 7 days to respond. He responded on December 24, 2012. Additional allegations were brought against him on April 18, 2013 to which he responded on April 19, 2013. Thereafter he was invited to a disciplinary committee hearing where he made both oral and written representations which the committee considered and recommended that his services be terminated.

44. Turning to the 3rd respondent, he was employed in the position of cash book accountant and was summarily dismissed following investigations into allegations of fraud perpetuated during the review and approval of reconciliations. The allegations against him were that he approved a bank reconciliation for August 2011 that contained a fraudulent receipt for Kshs 900,000; that he also reviewed bank reconciliations for the January, June, August and September 2012 and failed to detect or notice suspicious receipts used to defraud the appellant leading to substantial loss. He was interdicted and given 7 days to respond to the allegations. He responded on April 26, 2013. He was invited for a disciplinary committee hearing, whereupon consideration of both his oral and written representations, the committee recommended termination of his employment.

45. The 4th respondent who was also employed as an accounts assistant responsible for updating receipts was summarily dismissed following investigations that found that he engaged in concealing or perpetrating fraud between February 16, 2011 and November 26, 2011, and that he updated 79 fraudulent receipts in the JDE and GL totalling Kshs 105,390,000 without confirming or validating them before posting. Furthermore, that he reviewed bank reconciliations for July, August and September 2011 and failed to detect or concealed suspicious receipts used to defraud the appellant. He was subsequently interdicted on April 18, 2012 and provided 7 days to respond. On December 24, 2012, more charges were levelled against him, to which he responded on April 19, 2013. He was invited for a disciplinary committee hearing where after his oral and written representations were considered by the committee which subsequently recommended that he be summarily dismissed.

46. The 5th respondent was employed as a debtor's clerk on a three-year contract. He was interdicted on the December 20, 2012, on reasonable suspicion that he was involved in fraudulent acts which led to substantial loss by the appellant. He was given 7 days to respond, and he responded on December 24, 2012. After he was interdicted, an investigation discovered that he used his position to generate 71 fraudulent receipts totalling Kshs 100,410,000 on diverse dates between February 16, 2011 and November 26, 2012 and that he had in fact shared his system password to perpetrate the fraud. Following their dismissal, the 1st, 2nd, 3rd, 4th, and 5th respondents were arrested and charged in Mavoko Criminal Case No 567 of 2013.

47. From the evidence, the 1st, 2nd and 3rd respondent were alleged to have updated fraudulent receipts worth over Kshs 100 million into the JDE and GL without confirming or validating them before posting them, while the 4th respondent concealed or perpetuated the fraud after reviewing bank reconciliations for July, August and September 2011, and failed to detect or inform the employer of the suspicious receipts used to perpetuate the fraud, and thereafter, approved bank reconciliation for August 2011 and January, June, August and September 2012 after failing to detect suspicious receipts used to defraud the appellant. The 5th respondent used his position to generate 71 fraudulent receipts totalling Kshs 100,410,000 on diverse dates between February 16, 2011 and November 26, 2012 and that he had in fact shared his system password to perpetrate the fraud. It becomes clear that following investigations, it was discovered that the appellant had suffered financial loss; that the respondents were alleged to have been involved in fraudulent activities that led to such loss, and that the loss occurred under their watch when they were working in its finance department.

48. Much as the respondents sought to extricate themselves from the allegations of fraud by claiming that they were not involved, and that in any event the fraudulent transactions were not detectable, it is not disputed that the appellant suffered massive financial loss as a result. It is not also disputed that the loss occurred during the period when the 1st to 5th respondents were working in the finance department, and clearly, the fraud involved matters intimately connected with their individual actions, duties and responsibilities. It cannot also be disregarded that they held sensitive positions in the appellant's finance department, and that it was the appellant's duty to safeguard itself against any further losses. We would further add that their subsequent arraignment in the criminal court at Mavoko lent further credence as to the appellant's belief that the respondents were involved in fraudulent activities. Without doubt, the reasons for dismissal were in keeping with the requirements of section 41 (4) (g) of the *Employment Act* and the appellant's human resource manual in that, the respondents were suspected to have committed acts that were to the substantial detriment of the appellant.

49. Given the above, we do not agree with the trial court that no valid reasons were established for dismissal of the 1st, 3rd and 4th respondents. We say this because, the trial court did not appreciate that an employer is only required to provide the reasons for dismissal, and to demonstrate that the reasons were valid and justifiable. This being an employer/employee disciplinary matter, the appellant was not required to prove beyond reasonable doubt, this being the standard of proof in criminal cases, that the respondents had committed the fraud. And neither was the court required to superimpose its own decision on that of the employer.

50. In the case of *Attorney General & another vs Andrew Maina Githinji & another [2016] eKLR* this court stated;

> ' A distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are

anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.'

51. In the case of *David O Owino vs Kenya Institute of Special Education [2013]eKLR* and cited in Kibe vs *Attorney General (Civil Appeal No 164 of 2000)* (unreported) this court held that:

> ' An acquittal in a criminal case does not does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair'.

52. Bearing the above in mind, we find that the appellant properly demonstrated that there were sufficient and justifiable reasons for summarily dismissing all the respondents from employment, and we are satisfied that their substantive dismissal was lawful and in compliance with sections 41, 43 and 45 of the *Employment Act*.

53. On the second issue of whether a fair procedure was followed in the termination of the respondents' employment, section 41 of the *Employment Act* provides the minimum standards of a fair procedure that an employer ought to comply with. The provision was elaborated by this court in the case of *Postal Corporation of Kenya vs Andrew K Tanui [2019] eKLR* where it was held that;

> ' It is our further view that section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for;
>
> 'Notification and hearing before termination on grounds of misconduct' in the following manner: -
>
> '(1) Subject to section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical in capacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.'
>
> '(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employer or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.'
>
> Section 42 (1) referred to in sub-section (1) relates to employees on probation.
>
> Four elements must thus be discernible for the procedure to pass muster:-
>
> i. an explanation of the grounds of termination in a language understood by the employee;
>
> ii. the reason for which the employer is considering termination;
>
> iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

iv. hearing and considering any representations made by the employee and the person chosen by the employee.'

54. The respondents' case was that they were not given adequate opportunity to defend themselves at the disciplinary committee hearings, for the reasons that firstly, they were not aware of the allegations that they faced as the letter inviting them for the hearings did not specify the offences and that they were not provided with the evidence against which to defend themselves. Secondly, that they were summoned to appear on May 7, 2013 for a disciplinary hearing on May 9, 2013; that 2 days was inadequate to prepare for the hearings. Thirdly, they were not accompanied by a person of their choice to attend the hearings or allowed to have witnesses. That the appellant's actions were contrary to the provisions of the human resource manual on the disciplinary procedure to be followed.

55. Clause 12.5 on the disciplinary procedure as set out on the appellant's human resources manual states that;

> ' When applying company disciplinary procedures, EAPCC supervisors will have regard to the requirements of natural justice. This means that employees shall be informed in advance of any disciplinary hearing of the allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and the evidence before decisions are reached.'

54. This would mean that before a disciplinary hearing takes place, the respondents would be informed of the allegations against them, and be provided with supporting evidence so as to be in a position to challenge the allegations against them before a decision is reached.

55. In so far as the sequence of events leading to termination was concerned, the respondents received letters of interdiction in April 2012. The letters also required them to show cause why they should not be dismissed. They variously provided their responses and were subsequently invited by a letter of May 7, 2013 to a disciplinary hearing on May 9, 2013. Their employment was terminated after the hearing on May 20, 2013, which was over one year from the date of interdiction.

56. Regarding the complaint that the respondents were not aware of the reasons for appearing before the disciplinary committee, it is not controverted that, the letters that invited them to appear before the disciplinary committee, were similar and read as follows;

> ' Following your suspension from duty on April 18, 2013 for offences already communicated to you, appear before a disciplinary committee on Thursday May 9, 2013 at 9 am to give your representations'.

57. In essence, it should not be overlooked that the respondents had earlier received interdiction letters that set out the nature of the allegations that they faced. It is also not to be disregarded that they provided responses and representations to the specific allegations well before they were invited to appear before the committee. Thereafter, the invitation letter stated that the hearings were in respect of 'offences already communicated to you', where reference was made to the earlier interdiction and show cause letter. In other words, the respondents were aware of the purpose of the hearings, and for which they had been provided ample time to respond, and indeed had provided comprehensive responses.

58. Furthermore, the minutes of the disciplinary committee of May 9, 2013 show that during the hearings, the respective charges were read out to each of the respondents. They were informed that their earlier written representations would be considered. They were thereafter asked whether they had any further representations to make. The respondents were allowed to make oral representations and the

committee based its determination on both the written and oral responses. We therefore do not agree that their appearance before the disciplinary committee was an ambush or that they were not aware of the charges they faced at the hearings.

59. On the assertion that they were denied documentary evidence to support the charges they faced, in view of the comprehensive responses they provided to the allegations against them, and the fact that there is nothing to show that they requested for the documentation for which they were denied, we consider these assertions to be baseless and unfounded.

60. As to whether the respondents were provided with adequate time to prepare for the hearing, our view is that having been issued with the show cause letters, that specified the nature of the allegations they faced one year in advance, and afforded adequate opportunity to respond, which they did, we find that the respondents had sufficient time to prepare for the disciplinary hearings. In any event the record does not show that they at any the time indicated that they were not suitably prepared. This assertion also has no basis.

61. On the question of whether they ought to have been accompanied by a colleague or a legal representative to the hearings or prior to termination of their employment there is also nothing in the letter of invitation or minutes that showed that they took place the presence of a colleague or representative of the respondents. In addition, when we interrogate the manner in which the respondents' employment was terminated, it becomes evident that the requirements of section 41 (2) (ii) of the act were not adhere to. We say this because, nothing in the evidence shows that prior to termination of their employment, the appellant explained to the respondents, in the presence of another employee, that their employment was to be terminated or the reasons for this. The appellant merely dispatched letters of termination dated May 20, 2013 to the respondents without complying with this mandatory step. This was contrary to the requirements of section 41 of the act, which as a consequence rendered the termination of employment of the respondents procedurally unfair, and we so find.

62. Having so found, we now turn to consider the final issue, which is whether the trial court rightly reversed the respondent's suspension thereby providing them with the remedy of reinstatement to employment? In considering this issue we caution ourselves that in granting the remedies sought, a court is exercising a discretionary jurisdiction. So that, whenever this court is called upon to interfere with an exercise of judicial discretion, as is the case here, it ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself or herself in some manner, and by so doing, arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and in the process occasioned injustice. See *Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 Others [2014] eKLR.*

63. That said, section 49 of the *Employment Act* provides a raft of remedies for unfair or wrongful dismissal. The mode of application of those remedies was set out by this court, in *Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union CA No 188 of 2014* thus;

> ' Section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re- engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or

suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.'

64. In this case, the trial judge converted their dismissal into a suspension pending hearing and determination of the criminal case at Mavoko Law Courts. The conversion of the summary dismissal of the 1st to 4th respondents into a suspension, effectively reinstated the respondents back to employment with the appellant. By so doing, it is evident that the trial judge's decision did not take into considerations the essential prerequisites specified by section 49 (4) that appertain to reinstatements, to wit, the circumstances of the termination, the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination before reinstating an employee. See Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR.

65. In weighing out the circumstances of the case against the stipulations of section 49(4), we consider that an order for reinstatement was not tenable or appropriate in view of the allegations of fraud the respondents faced and the sensitivity of the area of the appellant's operations in which they worked, that being the finance department. Furthermore, the judge did not also appreciate that the order of suspension pending the hearing and determination of the criminal case at Mavoko would cause indeterminate disruption to the appellant's operations, as the suspended employees would not be gainfully employed for an indefinite period at the appellant's expense. At the same time, the appellant would be forced to await determination of the criminal case one way or the other before being able to secure the services of other qualified accountants to fill these crucial positions, to its detriment. In point of fact, before exercising its discretion to convert their termination into a suspension thereby reinstating the appellants, the trial court failed to provide any justification or basis at all for that decision.

66. As such, we find and hold that the trial court misdirected itself in reversing their termination and it is therefore necessary for us to interfere with that decision.

67. With regard to the compensation paid to the 5th respondent, since the appellant did not specify or substantiate in what way the trial judge wrongly exercised her discretion, we have no reason upon which to interfere with the award of compensation to the 5th respondent.

68. In sum, the appeal succeeds in substantial part, and we make the following orders;

    1. The appeal is partially allowed.

    2. The order of suspension granted in the judgment dated April 18, 2016 be and is hereby set aside.

    3. The appeal having partially succeeded, each party to bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.**

**W KARANJA**

**.............................**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

..............................

**JUDGE OF APPEAL**

**AK MURGOR**

.............................

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**