Maasai Mara University & 3 others v Kisirkoi (Civil Appeal 255 of 2018) [2021] KECA 217 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 217 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 255 OF 2018

DK MUSINGA, J MOHAMMED & S OLE KANTAI, JJA

NOVEMBER 5, 2021

BETWEEN

MAASAI MARA UNIVERSITY ..... 1ST APPELLANT

VICE CHANCELLOR, MAASAI MARA UNIVERSITY ..... 2ND APPELLANT

CHAIRMAN OF COUNCIL, MAASAI MARA UNIVERSITY ... 3RD APPELLANT

COUNCIL, MAASAI MARA UNIVERSITY ..... 4TH APPELLANT

AND

SAMSON OLE KISIRKOI ..... RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court of Kenya at Kericho (D.K. Njagi Marete, J.) delivered on 31st January, 2018 in Petition No. 8 of 2017)

JUDGMENT

Background

1. The dispute herein stemmed from an employer/employee relationship between Maasai Mara University (the 1st appellant) and Samson Ole Kisirkoi (the respondent). On 10th June, 2009 the respondent was engaged by Narok University College (this later became Maasai Mara University) on a permanent and pensionable basis as a Deputy Registrar (Administration). On 4th July, 2013, following the retirement of the substantive Registrar (Administration) the respondent was appointed as an Acting Registrar (Administration) effective from 4th July, 2013. Maasai Mara University, The Chairman of Council, Maasai Mara University and the Council, Maasai Mara University are the 2nd, 3rd and 4th appellants respectively.

2. On 23rd February, 2016, the 1st appellant suspended the respondent from duty pending disciplinary action citing violations, fundamental breach of duty and lack of diligence in the respondent's decision

to engage one David K. Bungei (David Bungei), a groundsman in the recruitment of students and performance of duties beyond his qualifications, scope and competence.

3. The letter suspending the respondent dated 23rd February, 2016 read in part:

> "...
>
> As you are aware, an article appeared in the standard Newspaper of 19th February, 2016 attributed to a Mr. David Bungei and which article was very damaging to the University's reputation.
>
> The said Mr. Bungei was a member of staff of the university engaged as a groundsman. You did deploy him to Kilgoris to recruit students and perform other duties as was to be assigned. In this, you failed to advice Management that Mr. Bungei was not the right person based on his qualifications which were within your knowledge. This resulted in the said Mr. Bungei committing many grievous violations and the same issues going to the press have tarnished the University's image.
>
> As a consequence of your acts of omission and/or commission, which have potentially damaged the reputation and image of the university, it has been decided to order your immediate suspension from duty. On suspension you will be paid half salary but house allowance and other benefits will continue to be paid in the normal manner until further notice.
>
> The university intends to take disciplinary action against you and before this is done, you are required to forward a written defence showing cause why you should not be subjected to the intended disciplinary action ...."

4. On 26th February, 2016, the 1st appellant revoked the respondent's appointment as acting Deputy Registrar (Administration).

5. To the respondent, the suspension was unwarranted. More so, considering that the deployment of the said David Bungei was with the consultation and approval of the respondent's superiors. Challenging his suspension, the respondent filed judicial review proceedings, JR No. 4 of 2016, which he ultimately withdrew.

6. Thereafter, the respondent with the assistance of Kenya Universities Staff Union (the Union), began following up on the disciplinary process, which they were of the view was taking too long, by writing a series of letters. In response, the respondent was served with a letter dated 20th January, 2017 under the hand of the 2nd appellant. The relevant extract of the said letter was as follows:

> "RE: ALLEGATIONS OF INCITEMENT OF STUDENTS AGAINST THE UNIVERSITY
>
> We are in receipt of a letter from the Principal Secretary, Ministry of Interior and Coordination of National Government raising serious charges against you on the grounds that you incited students to protest and disrupt the University Graduation held on 2nd December, 2016.
>
> Additionally, you planned, incited and instigated students of the University from the Maasai community and the Alumni to demonstrate against the University over students who were sent home arising from strike by students in the later part of the year 2016, to pressurize the removal of the Prof. Mary Walingo, Vice Chancellor of the University and render the University unmanageable.

Based on the forestated new allegations against you, you are required to respond to these grievous allegations leveled against you within 21 (twenty-one) days from the date of this letter stating grounds, if any, on which you rely to exonerate yourself.

Failure to respond within stipulated notice or render a satisfactory explanation will render you liable to disciplinary action as it will be deemed that you have no defense."

7. The respondent sought further particulars and documentation in support of the new allegations to enable him file a suitable defence. Nonetheless, instead of the particulars sought being provided he was served with a letter dated 25th January, 2017 inviting him to appear before a Disciplinary Committee of the 4th appellant on 9th February, 2017 to respond to a charge of negligence. The particulars of the charge were similar to what was set out in his suspension letter. There was no mention of the additional allegations of incitement. Nevertheless, the respondent sought more information concerning the said allegations.

8. With regard to the disciplinary hearing, the respondent claimed: that he was denied an opportunity to be represented by an advocate or a representative from his Union despite the 1st appellant's advocate, Mr. Lubulellah, being present; that he was also barred from calling witnesses in support of his defence; and that the allegations of incitement were brought up and he indicated that he was not ready to proceed with the hearing. Nevertheless, the disciplinary committee brushed aside those allegations and proceeded to hear the original charge of negligence.

9. Despite the conclusion of the disciplinary hearing on 10th February, 2017 there was no communication of the outcome thereof for a considerable period of time. As a result, the respondent by a letter dated 14th March, 2017 sought a response regarding the same from the 2nd appellant. In response, the 1st appellant's Legal Officer vide a letter dated 20th March, 2017 stated in part as follows:

"...

The letter to you by the Vice Chancellor and dated 20th January, 2017 raises very serious allegations against you. As indicated, the allegations were communicated to the University by the Principal Secretary Ministry of Interior and Coordination of the National Government. The issues have not been sorted out and it is requested that you clear yourself with the Ministry and/or relevant Government organs before a determination on the way forward can be made."

10. The above letter came as a surprise to the respondent since the allegation of incitement had not been brought up by the Disciplinary Committee and he had not been summoned to answer to those allegations either by the police or the appellants. The respondent obtained clearances from the Narok Criminal Investigation Office, the Deputy Commissioner's Office as well as the Criminal Investigations Department. He went ahead to inform the 1st appellant as much in his letter dated 12th April, 2017 and even attached a police clearance certificate to that effect.

11. The respondent was served with a retirement notice dated 22nd May, 2017 to the effect that he was scheduled to retire on 30th June, 2018 at the age of 60 years. However, the respondent was adamant that as per his letter of appointment and the terms of service he was scheduled to retire at the age of 65 years.

12. By a letter dated 26th May, 2017 to the respondent, the 2nd appellant stated as follows:

"Reference is made ... and our letter ... dated 23rd February, 2016 communicating the decision to have you interdicted (formerly treated as suspension) due to the negligent

manner that you handled the redeployment of Mr. David Bungei... Additionally, it was noted with great concern that you, with others, planned to incite and instigate students of the University with intent to disrupt the University Graduation Ceremony held on 2nd December, 2016.

After due consideration of your case, it has been decided that the interdiction imposed on you be and is hereby lifted with immediate effect.

However, you are hereby warned that a repeat of the misconduct that resulted in your interdiction and/or commission of any other misconduct will see serious disciplinary measures taken against you.

You are required to acknowledge that you have read and understood the contents herein."

13. The respondent was not amused with the above letter. In his view, he was never under any interdiction, and the same was simply calling upon him to accept the allegations of negligence and incitement which he denied. Towards that end, by a letter dated 15th July, 2017 the respondent wrote to the 2nd appellant to unconditionally recall the letter dated 26th May, 2017 to the extent that it required him to admit to allegations that he was not guilty of.

14. The 1st appellant seems to have taken the aforementioned letter as an indication of reluctance on the respondent's part to resume work. As such, by a letter dated 24th July, 2017 under the hand of the 2nd appellant, the 1st appellant wrote-

"...

Our said letter required that you resume duty with immediate effect. From your reply, you seem to have no interest in resuming duty as guided and as a consequence it has been decided that payment of salary to yourself be and is hereby stopped forthwith."

15. Subsequently, the respondent came across an advertisement of a vacancy of his position of Deputy Registrar (Administration) by the 1st appellant in the "Daily Nation" Newspaper. As per the respondent, there was bad blood between the 2nd appellant and himself due to the fact that he had on several occasions expressed his concern over promotions granted by the 2nd appellant to unqualified employees.

16. In the respondent's view, the appellants' conduct right from his suspension up to the advertisement of his position was in violation of the *Constitution*. More specifically, his right to fair labour practices, fair administrative action and fair hearing under Articles 41, 47 & 50 respectively had been violated. In addition, his suspension which exceeded ninety (90) days was contrary to Clause 5.2 of the Collective Bargaining Agreement (CBA) 2012-2013 between the 1st appellant and the Union; and likewise, the stoppage of his salary was not in tandem with the suspension letter. Consequently, the respondent filed a petition in the Employment and Labour Relations Court (ELRC) seeking various orders including, inter alia: a declaration that the suspension disciplinary process by the appellants violated the provisions of Articles 41, 47 and 50 of the Constitution and hence null and void; that the suspension should therefore be lifted; that the continued purported suspension contravenes the CBA between the 1st appellant and the Union; a permanent injunction restraining the appellants from commencing and/or continuing with any process towards replacing the respondent in the position of Deputy Registrar (Administration); in the alternative, the respondent be paid his remuneration/salary, terminal benefits and dues in full from the date of suspension to the end of his terms on attainment of 65 years; compensation by way of damages for mental, psychological and emotional anguish/torture and suffering arising from the violation of his Constitutional rights; and costs of the Petition.

17. Opposing the petition, the appellants were adamant that the respondent's suspension was warranted in light of his negligence. They attributed the delay in commencing the disciplinary hearing to the judicial review proceedings instituted by the respondent. As far as they were concerned, the respondent was granted sufficient details of the allegations against him and opportunity to respond to the same. Contrary to the respondent's contention, the appellants maintained that he was equally given an opportunity to be represented by an advocate or a union representative and to call witnesses but he opted not to do so.

18. The appellants claimed that after the conclusion of the disciplinary hearing the respondent was informed of the Disciplinary Committee's decision to lift his suspension and allow him to resume his duties by a letter dated 26th May, 2017. However, the respondent refused to acknowledge the said letter and to resume work. Furthermore, as per the appellants, the 1st appellant received sensitive and confidential information from the Principal Secretary Ministry of Interior and Co-ordination of National Government pertaining to the respondent's conduct which posed a danger to the 1st appellant. Therefore, the appellants were of the view that the respondent's reinstatement would not be suitable in the circumstances. All in all, the appellants contended that the entire disciplinary process was above board.

19. The learned Judge, (D.K Njagi Marete, J.,) upon hearing the respondent in the absence of the appellants who did not appear during the hearing of the petition, found in favour of the respondent vide a judgment dated 31st January, 2018. In that regard, the learned Judge issued the following orders:-

    i. A declaration be and is hereby issued that the disciplinary process by the respondents violated the provisions of Articles 41, 47 and 50 of the Constitution and is therefore null and void ab initio.

    ii. A declaration be and is hereby issued that the petitioner's suspension violated Articles 41, 47 and 50 of the Constitution of Kenya, 2010, is therefore null and void and lifted in toto.

    iii. That the suspension and continued suspension of the petitioner contravenes the Collective Bargaining Agreement inter partes, is therefore null and void and is lifted in toto.

    iv. A permanent injunction be and is hereby issued restraining the respondents from commencing any process towards replacement of, or replacing the petitioner in the position of Deputy Registrar (Administration.)

    v. That the petitioner be and is hereby reinstated to employment as Deputy Registrar (Administration) with effect from the date of this judgement of court.

    vi. That the petitioner be and is hereby ordered to report back to work tomorrow, the 1st February, 2018 at 800 hours.

    vii. Six months' salary as compensation for unlawful termination of employment, Kshs.201, 319.50 x 6 =Kshs.1, 207,917.00.

    viii. The respondent be and is hereby ordered to meet and pay the respondent's salaries and allowances owing but unpaid during his suspension.

    ix. The commissioner for labour be and is hereby ordered to with the involvement of the parties compute the amount payable under order (viii) above within 120 days.

    x. Mention on 9th May, 2018 for a report on computation.

    xi. The costs of this petition shall be borne by the respondents.

20. Aggrieved by the above decision, the appellants lodged this appeal which is premised on the grounds, inter alia, that the learned Judge erred in law and fact by: failing to appreciate that the respondent's petition had already been spent; awarding the respondent six months' salary as compensation for unlawful termination on the erroneous basis that he earned a monthly salary of Kshs.201,319.50 as opposed to Kshs. 87,750.00; misconstruing the applicable principles that govern the discretionary remedy of reinstatement; relying on an unregistered CBA; awarding reliefs that had not been sought and/or proved; involving the Commissioner for Labour in the proceedings to which he was not a party; being biased against the appellants and descending into the arena of litigation.

Submissions by Counsel

21. At the plenary hearing, learned counsel Mr. Lubulellah appeared for the appellants while the respondent was represented by learned counsel Mr. Mukhabani Mwani. The appeal was disposed of by way of written submissions as well as oral highlights.

22. It is instructive to note that the appellants raised an issue touching on the jurisdiction of the ELRC for the first time in their written submissions. This issue was never raised at the ELRC or in the memorandum of appeal on record. Nevertheless, relying on *Dubai Bank Kenya Ltd. vs. Kwanza Estate Ltd. [2015] eKLR*, the appellants urged that an issue ofjurisdiction could be raised at any stage of proceedings. They contended that the ELRC was devoid of jurisdiction to issue declarations concerning violations of the Constitution by dint of Article 165(3) of the Constitution. Consequently, we were urged to allow the appeal on that ground alone since the appellants contended that all the other orders issued by the ELRC could not stand on their own.

23. As far as the appellants were concerned, the learned Judge's impartiality was clouded by his past unpleasant personal experience with his former employer, the Teacher's Service Commission. In that, his bias and prejudice against the 1st appellant, as an employer, was exhibited by what the appellants termed as a suo moto application of the case *D.K Njagi Marete vs. Teachers Service Commission [2013] eKLR* in which the learned Judge was a party.

24. Mr. Lubulellah contended that the respondent had not established his case to warrant the impugned judgment. Besides, the respondent's petition had been compromised once his suspension was lifted and he refused/failed to resume work, leaving the 1st appellant with no option but to replace him.

25. The learned Judge was criticised for hearing and determining the main petition whilst there were pending interlocutory applications in the matter. More specifically, as per the appellants, on 13th October, 2017 the ELRC had not only directed the appellants to file responses to the main petition and an interlocutory application dated 19th May, 2017 but also set down the matter for hearing on 1st November, 2017. The appellants contended that in as much as it was not clear from the record what was scheduled to be heard on 1st November, 2017, their understanding was that it was the interlocutory application which was slated for hearing.

26. The appellants went on to submit that the main petition was heard on 1st November, 2017 in the absence of the appellants and parties were directed to file written submissions. On 29th November, 2017 when the matter was mentioned for purposes of confirming whether the parties had filed their written submissions, the appellants' advocates informed the Court of the pending application. However, the learned Judge still went on to schedule delivery of the judgment on 11th December, 2017.

27. Subsequently, before the impugned judgment was delivered, the appellants filed an application dated 5th December, 2017 seeking to be heard on the petition. Counsel contended that notwithstanding the

pendency of the above-mentioned interlocutory applications, the learned Judge erroneously rendered the impugned judgment.

28. Counsel submitted that the appellants were unfairly denied an opportunity to be heard hence they were condemned unheard contrary to the rules of natural justice. In point of fact, there was no evidence to suggest that it was the petition which was set down for hearing on 1st November, 2017.

29. The appellants took issue with the learned Judge's reliance on the CBA produced by the respondent, which in their view was not registered or recognized under Section 60 of the *Labour Relations Act*.

30. Questioning the reliefs granted, counsel begun by faulting the learned Judge for granting the respondent the main prayers he had sought in the form of declaratory orders as well as the alternative prayers in the nature of monetary claims contrary to his pleadings. Counsel contended that the only option that was available to the learned Judge was to make a choice between granting the main or alternative prayers and not both. In other words, it was not open for the learned Judge to order reinstatement of the respondent and also award him compensation. To buttress that line of argument, reliance was placed on the decision of this Court in *Alex Wainaina t/a John Commercial Agencies vs. Janson Mwangi Wanjihia [2015] eKLR*.

31. The appellants challenged the compensation for unlawful termination awarded to the respondent on the ground that it was computed on an erroneous basis that the respondent's monthly salary was Kshs. 201,319.50 which was not supported by the evidence or pleadings. It was submitted that the respondent's correct monthly salary was Kshs.87,750.00 hence to that extent the Court was called upon to interfere with the said award.

32. On the discretionary remedy of reinstatement, counsel submitted that the learned Judge failed to: consider the mandatory statutory requirements under Section 49 of the *Employment Act*; adequately balance the interests of the respondent, the appellants, the University's staff and students; take into account that the respondent had declined to resume duty despite his suspension being lifted; consider that the relationship between 1st appellant and the respondent had broken down; appreciate the retirement notice; appreciate that the respondent's position had since been filled through a competitive process; consider that the 1st appellant had received sensitive information from the Principal Secretary, Ministry of Interior and Coordination of the National Government to the effect that the continued presence of the respondent within its premises had negative security implications; and to appreciate that there were no exceptional circumstances to warrant reinstatement as laid down by this Court in *Kenya Airways Ltd. vs. Aviation and Allied workers Union & 3 others [2014] eKLR*.

33. All in all, the appellants' position was that reinstatement was untenable in the circumstances. Further, having found that the respondent's termination was unlawful, the only avenue that was available was for the learned Judge to consider the quantum of damages payable, if any.

34. Counsel faulted the learned Judge for directing the Commissioner of Labour who was not a party and without giving reasons, to compute the compensation for unlawful termination. Counsel contended that the same was tantamount to the learned Judge abdicating his judicial responsibility.

35. It was further submitted that the learned Judge did not exercise his discretion properly in issuing the injunctive order. The appellants added that there was no basis for the learned Judge to direct the respondent to report to work on a particular day since he had not sought such an order. Likewise, it was argued that there was no basis for special damages awarded since they were not specifically pleaded or proved.

36. The respondent opposed the appeal. Mr. Mwani contended that the appeal was frivolous since firstly, the learned Judge had properly analysed the evidence which was before him and arrived at the right

conclusion that the respondent's termination was unlawful. Secondly, the appellants had not raised any ground in their appeal expressly challenging the aforementioned finding.

37. Responding to the issue of jurisdiction, counsel urged that the appellants' position was a total misconception of the law in that it was well settled by the High Court in the case of *United States International University (USIU) vs. Attorney General [2012] eKLR* that the ELRC could deal withconstitutional matters.

38. Moving onto the reliefs granted, counsel argued that the learned Judge could not be faulted for granting the respondent six months' salary as compensation for the unlawful termination. Equally, the computation of that award, which was based on a monthly salary of Kshs. 201,319.50 was beyond reproach since the same was the respondent's monthly gross salary as evinced by his letter of appointment, terms of service and payslip.

39. Counsel further submitted that the only alternative prayer that the respondent had sought in his petition was for payment of his full salary, terminal dues and allowances effective from the date of his suspension up to when he was scheduled to retire upon attaining 65 years. Counsel maintained that the rest of the reliefs as set out in his petition were substantive prayers.

40. On reinstatement, counsel submitted that the learned Judge properly addressed his mind to the requisite guidelines. In any event, as per the respondent, there was no evidence of his position having been filled or that he was about to retire. Further, that the appellants had not demonstrated the interests which they alleged would be prejudiced by his reinstatement.

41. As far as the respondent was concerned, there was nothing wrong with the learned Judge involving the Commissioner of Labour in the computation of the dues owing to him during his suspension. More so, considering that the learned Judge had already made a finding that the respondent was entitled to those dues, the computation was necessary for purposes of perfecting the judgment.

42. The respondent submitted that contrary to the appellants' contention, his suit was not spent once his alleged interdiction was lifted. For starters, he was never interdicted. What was more, upon making enquiries on the purported interdiction, the appellants went on to not only deny him his salary and allowances but also subsequently, served him with a misleading retirement notice.

43. As for the CBA, the respondent urged that the appellant never challenged the validity of the same at the ELRC. Nonetheless, the learned Judge's finding that the respondent's suspension was prolonged for an unreasonably long period was not solely based on the CBA but also on the Constitution.

44. The respondent saw nothing odd with the learned Judge directing him to report back to work the following day after the judgment. This was simply because, according to respondent, decrees of the court ordinarily take effect immediately after delivery of judgment. To buttress that line of argument the decision of this Court of *Olive Mwihaki Mugenda & Another vs. Okiya Omtata Okoiti & 4 others [2016] eKLR* was cited.

45. Counsel for the respondent urged that the appellants did not establish bias on the part of the learned Judge to the required standard. The respondent further submitted that nothing prohibited the learned Judge from relying on a decision in which he was a party.

46. In regard to interlocutory applications, counsel submitted that all the interlocutory applications had been determined by the time the main petition was determined. Counsel urged us to dismiss the appeal with costs.

Determination

47. We have considered the record, submissions by the parties, the authorities cited and the law. This being a first appeal, we are at liberty to delve into matters of fact as well as law and make our own conclusions in such matters. However, we are cognizant that firstly, an appellate court would ordinarily not differ lightly with the findings of fact by the trial judge. Secondly, unlike the trial Judge we did not have the benefit of seeing the witnesses as they testified. See *Selle vs. Associated Motor Boat Company Ltd. [1968] EA 12*.

48. With regard to the issue of jurisdiction, this Court in *Paramount Bank Limited vs. Vaqvi Syed Qamara & Another [2017] eKLR* expressed as follows:

> "The preamble to *Employment and Labour Relations Court Act* states that the court is established to hear and determine disputes relating to "employment and labour relations" and "for connected purposes". Among its powers under Section 12, the court hears and determines all disputes relating to and arising out employment and labour relations. It follows therefore that the ELRC is clothed with jurisdiction to entertain not only employment and labour disputes but also any incidental issue (s) that may arise or is connected to employment or labour relations."

In the instant appeal, the declarations relating to constitutional violations sought by the respondent were anchored on the employment relationship between the 1st appellant and the respondent. As such, the ELRC had the requisite jurisdiction to entertain the petition.

49. The appellants also challenged the competency of the petition on the basis that it became spent once the respondent's suspension was lifted. In our view, contrary to the appellants' position, our reading of the petition and affidavit in support thereof does not indicate that the same was purely based on the suspension. Granted, the respondent challenged his suspension, but in addition he also raised, inter alia, issues of lack of procedural fairness in the disciplinary hearing as well unfair labour practices.

50. Taking into account all the circumstances of this case, we find that the respondent was constructively dismissed by the letter dated 24th July, 2017 which stopped payment of his salary forthwith. Therefore, what falls for consideration, as it did in the ELRC, was whether the process which led to the constructive dismissal of the respondent was fair and in accordance with the law.

51. Starting with the suspension, it was contended by the respondent that the same subsisted beyond the prescribed period of 90 days in the CBA. To counter that allegation, the appellants argued that the CBA in question was not applicable and that the delay was also occasioned by the judicial review proceedings. It is not in dispute that following the withdrawal of the judicial proceedings by the respondent, a considerable period of time passed before the respondent was invited for a disciplinary hearing by the letter dated 25th January, 2017. This is evinced by the letter dated 26th September, 2016 from the respondent's Union to the 2nd appellant which is on record.

52. On the disciplinary hearing, from the record, the respondent was furnished with sufficient details to enable him prepare an appropriate defence. We say so because whilst the suspension letter set out allegations of negligence in the deployment of David Bungei, the respondent was served with a letter dated 20th January, 2017 raising new allegations of incitement to which he was required to respond. Attempts by the respondent to get further information on the new allegations came to a nought as evident from the 1st appellant's letter dated 9th March, 2017 which read in part as follows:

> "...

> I refer to the above subject and the Vice Chancellor's letter dated 20th January, 2017 together with your undated communication in relation to the same subject matter.
>
> The allegations levelled against you are well documented in the Vice Chancellor's letter of 20th January, 2017. It is for you to respond to them in the manner that you understand them. The issue of supporting documents will arise (if at all) at the appropriate time. You response to the allegations is till awaited."

53. Meanwhile, the letter inviting the respondent for a disciplinary hearing indicated that the only charge against him was in relation to the alleged negligence set out in the suspension letter. Surprisingly, when the respondent sought an update on the outcome of the disciplinary proceedings he was served with a letter dated 20th March, 2017 calling upon him to answer on the allegations of incitement which allegation was never heard at the disciplinary hearing. Moreover, the letter dated 26th May, 2017 which apparently lifted the respondent's interdiction also spoke to the allegations of incitement.

54. In light of the foregoing, it cannot be said that the respondent had a fair hearing. Our position is bolstered by the decision of this Court in *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR* wherein this Court observed as follows;

> " Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary."
>
> [Emphasis supplied.]

55. Equally, we find that the only way the appellants could controvert the respondent's assertions that he was barred from attending the disciplinary hearing with his advocate or a union representative or even calling witnesses was by producing the minutes or transcripts of the hearing which they failed to do. More so, taking into consideration that under Section 45(2)(c) of the Employment Act the burden lies with an employer to establish that termination of an employee was based on fair procedure.

56. Accordingly, we agree with the learned Judge's finding that the respondent's termination was unfair and contravened Articles 41, 47 & 50 of the Constitution.

57. As to the remedies, we firstly cannot fault the learned Judge for the declarations that he issued. Secondly, having found that the respondent's termination was unfair and that his rights under the Constitution were violated, we see no reason to interfere with the award of 6 months' salary as compensation. The only evidence on record with regard to the respondent'

58. Thirdly, it is trite that the remedy of reinstatement is not an automatic remedy. This Court (Githinji, J.A.) succinctly stated as follows regarding the remedy of reinstatement in Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 Others (supra):

> " The remedy of reinstatement is discretionary. However the Industrial Court is required to be guided by factors stipulated in Section 49(4) of the Employment Act which includes the practicality of reinstatement or re-engagement and the common law principle that specific

> performance in a contract of employment should not be ordered except in very exceptional circumstances. The Court should also balance the interests of the employee with the interest of the employer...The employment Act has enacted the common law principle that the remedy of re-instatement should be given in "very exceptional circumstances."

Accordingly, the Court must exercise its discretion and each case depends on its own set of circumstances. Therefore, for us to interfere with the order of reinstatement issued by the learned Judge, we have to be satisfied that he misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. *See Mbogo & Another vs Shah [1968] EA 93*.

59. Whilst the learned Judge appreciated the guidelines for reinstatement stipulated under Section 49(4) of the Employment Act, in our view, he misapplied the same to the circumstances of this case. From the facts of the case, it is evident that there was a complete breakdown of the relationship between the respondent and the 1st appellant leading to the respondent's position being advertised as vacant. Furthermore, we are not satisfied that there were exceptional circumstances that warranted an order of reinstatement. See *Kenya Power & Lighting Company Limited vs. Agrrey Lukorito Wasike__ [2017] eKLR*.

60. Fourthly, having found that reinstatement was not practical, it equally follows that the injunction restraining the appellants from commencing any process towards filling the position previously held by the respondent could not lie.

61. On the alleged pending interlocutory applications, ideally a court should dispense with such applications before delving into and determining the substantive suit. Nonetheless, in the instant case there were only two applications which the appellants brought to this Court's attention. Both applications were dated 5th December, 2017 and filed on 6th December, 2017 after the main petition had already been heard and the judgment scheduled for delivery. One of the applications sought the recusal of the learned Judge while the other sought the setting aside of the proceedings of 1st November, 2017 and 29th November, 2017 to enable the appellants, who did not appear during the hearing, to give evidence and cross examine the respondent. From the record it is evident that both were canvassed on 14th December, 2017 and determined on 19th December, 2017. Subsequently, the impugned judgment was delivered on 31st January, 2018. At the point the impugned judgment was delivered, there was no indication of any pending application.

62. On the learned Judge relying on his own case, we restate this Court's position in *Maasai Mara University & another vs. Misia Manuguti Kadenyi [2021] eKLR* that-

> "On our own assessment of the case, the appellants have not placed before us any material that may show that relying on that case influenced the Judge in the assessment of the case. True, another Judge, many in fact, would shy away from relying on a case where the Judge was a party but that, at most, is a matter of choice and tidiness and we hesitate, in the circumstances, to make a serious pronouncement on that issue."

63. The upshot of the foregoing is that the appeal partially succeeds. For avoidance of doubt we make the following final orders:-

    i. The award of six months' salary as compensation for unlawful termination computed on the basis of a monthly salary of Kshs. 201,319.50 is hereby set aside. We substitute the same with an award of six months' salary as compensation computed on the basis of a monthly salary of Kshs. 87,750 (87,750 x 6 = 526,500)

ii. The order of reinstatement of the respondent is hereby set aside.

iii. We uphold the order for payment of unpaid salaries and allowances to the respondent.

64. Considering that the appeal has partially succeeded and the circumstances of this case, we direct each party to bear their own costs in this Court and in the ELRC.

Dated and delivered at Nairobi this 5th day of November, 2021.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR