



**Judicial Service Commission v Mosiria (Civil Appeal 263 of 2019)
[2020] KECA 218 (KLR) (6 November 2020) (Judgment)**

Judicial Service Commission v Beatrice Nyambune Mosiria [2020] eKLR

Neutral citation: [2020] KECA 218 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 263 OF 2019
MK KOOME, MSA MAKHANDIA & DK MUSINGA, JJA
NOVEMBER 6, 2020**

BETWEEN

JUDICIAL SERVICE COMMISSION APPELLANT

AND

BEATRICE NYAMBUNE MOSIRIA RESPONDENT

(Being an appeal against the judgment of the Employment and Labour Relations Court (M. Onyango, J.) dated 6th May 2019 in E & LRC Pet. No 5 of 2018)

Jurisdiction of the Employment and Labour Relations Court vis-à-vis the jurisdiction of the Judicial Service Commission.

The appeal arose from a judgment by the Employment and Labour Relations Court (ELRC), which quashed the dismissal of Beatrice Nyambune Mosiria, a Principal Magistrate, by the Judicial Service Commission (JSC). The ELRC found the disciplinary process to be procedurally unfair and ordered her reinstatement. The JSC appealed, challenging the ELRC's jurisdiction, the reinstatement order, and the award of back pay. The Court of Appeal partially allowed the appeal, finding merit in the argument that the ELRC erred in ordering reinstatement without a merit review of the substantive allegations.

Reported by John Ribia

Jurisdiction – jurisdiction of the Employment and Labour Relations Court – jurisdiction to review the procedure of the Judicial Service Commission - whether the Employment and Labour Relations Court exceeded its jurisdiction by reviewing the merits of the disciplinary proceedings of the Judicial Service Commission instead of limiting its inquiry to procedural fairness - whether the Employment and Labour Relations Court erred in ordering the reinstatement of a Magistrate that was removed by the Judicial Service Commission without considering the relevant factors under Section 49(4) of the Employment Act - whether the respondent was denied a fair hearing during the disciplinary process before the Judicial Service Commission - Constitution of Kenya, 2010 articles 10, and 47; Employment Act (Cap 226) section 41; Fair Administrative Action Act (Cap 7L) section 4(3)(b); Judicial Service Act (cap 8A) sections 23(1), 25; part 4



Brief facts

The respondent, Beatrice Nyambune Mosiria, was a Principal Magistrate employed by the JSC. In 2017, she was dismissed following disciplinary proceedings related to financial misconduct involving the Judiciary Deposit Account. She challenged her dismissal before the ELRC, citing procedural unfairness, including lack of adequate notice, failure to furnish crucial documents, and denial of the right to cross-examine witnesses. The ELRC ruled in her favor, setting aside the dismissal and ordering her reinstatement with back pay.

JSC appealed, arguing that the ELRC overstepped its mandate by delving into the merits of the disciplinary case instead of focusing on procedural fairness. It also contended that the order for reinstatement was inappropriate given the nature of the allegations against the respondent.

Issues

- i. Whether the Employment and Labour Relations Court exceeded its jurisdiction by reviewing the merits of the disciplinary proceedings of the Judicial Service Commission instead of limiting its inquiry to procedural fairness.
- ii. Whether the Employment and Labour Relations Court erred in ordering the reinstatement of a Magistrate that was removed by the Judicial Service Commission without considering the relevant factors under Section 49(4) of the Employment Act.
- iii. Whether the respondent was denied a fair hearing during the disciplinary process before the Judicial Service Commission

Held

1. The ELRC exceeded its jurisdiction by substituting itself for the JSC in assessing the merits of the disciplinary case. The ELRC's mandate was limited to determining whether the respondent was accorded procedural fairness, not to reassess the facts of the case.
2. The ELRC failed to consider the factors set out in section 49(4) of the Employment Act when ordering reinstatement. Reinstatement was not an automatic remedy, particularly in cases involving serious misconduct, and the court must assess factors such as the employee's conduct and the practicability of reinstatement.
3. The ELRC's finding that the respondent was denied a fair hearing. The JSC had failed to provide adequate notice for the disciplinary hearing, furnish relevant documents, and allow the respondent to cross-examine key witnesses, all of which violated her right to a fair hearing under the Employment Act and the Fair Administrative Action Act.
4. The award of back pay was inappropriate since the reinstatement order was flawed. The disciplinary process should have been remitted to the JSC for fresh proceedings, meaning the respondent was not entitled to back pay during the period of dismissal.

The appeal was partially allowed. The Court set aside the ELRC's order for reinstatement and back pay. The disciplinary case was remitted to the JSC for reconsideration, with the JSC directed to follow proper procedures. JSC was ordered to bear half the costs of the appeal and the ELRC proceedings.

Citations

Cases

Kenya

1. *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* Civil Appeal 3 of 2014; [2015] KECA 919 (KLR) - (Mentioned)
2. *Ikatwa, Reuben & 17 Others v Commanding Officer British Army Training Unit Kenya & another* Civil Appeal 97 of 2016; [2017] KECA 274 (KLR) - (Explained)
3. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
4. *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3others* Civil Appeal 46 of 2013; [2014] eKLR - (Mentioned)



5. *Musera v Mwechelesi & another* Civil Appeal 279 of 1999; [2007] KECA 84 (KLR) - (Explained)
6. *Parliamentary Service Commission v Christine Mwambua* Civil Appeal 75 of 2016; [2018] KECA 810 (KLR) - (Followed)
7. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Explained)

Regional Court

Mbogo & another v Shab [1968] EA 93 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 47- (Interpreted)
2. Employment Act (cap 226) section 41- (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 4(3)(b) - (Interpreted)
4. Industrial Court Act, 2011 (Repealed) (Act No 20 of 2011) section 12 - (Interpreted)
5. Judicial Service Act (cap 8A) sections 23(1); 25; part 4- (Interpreted)

Advocates

Mr. Malenya for the appellant

Mr. K'Opere for the respondent

JUDGMENT

1. In 2003, Beatrice Nyambune Mosire (the respondent) joined the employment of the Judicial Service Commission (the appellant/JSC) in the position of a District Magistrate 11 (professional). She rose through the ranks to the position of Principal Magistrate. She served in that capacity until February, 2017 when she received a letter from JSC, informing her that her services had been terminated. Aggrieved, the respondent filed a petition before the Employment and Labour Relations Court (ELRC) claiming that her rights under the various Articles of the Constitution were violated, to wit, article 47 and 50 (1) of the *Constitution*, sections 23, 25 (4) and 5 of the 3rd Schedule of the *Judicial Service Act* (Act); sections 7 (2) (b) and 8 of the *Fair Administrative Action Act* and section 12 of the *Industrial Court Act*.
2. By the said petition, the respondent gave some specific details of several violations that started with a letter dated the August 15, 2016 informing her that she had been interdicted. The said letter contained a charge and was signed by the Chief Registrar of the Judiciary (CRJ). The letter also required her to respond to the charge levelled against her within twenty-one (21) days. Before replying to the letter, the respondent asked to be furnished with further and better particulars by a letter dated August 26, 2016 addressed to CRJ but received no reply, nonetheless she managed to file her response on September 2, 2016. She contended that most of the information she required so as to respond to the charge, was at Kapsabet Law Court and the Executive Officer who had worked with her had also been interdicted and therefore she could not get the necessary documentary evidence to back her response.
3. The second complaint was that while the respondent was on interdiction for a period of five (5) months awaiting communication from JSC, she received a phone call from the Registrar of the JSC, on January 23, 2017 requesting her to attend a Disciplinary hearing by the JSC Committee on January 24, 2017 which was not only too short a notice but unreasonable. The short notice notwithstanding, she hurriedly rushed from Eldoret to Nairobi travelling by night bus so as to attend the hearing. Whilst waiting to attend the hearing outside the Committee room, she was surprised to learn that the Committee had called and interviewed the auditor whose audit report formed the basis of the



complaints against her without affording her a copy of the audit report or allowing her to cross-examine the witness. But more glaring was the fact that the respondent later received a letter that was dispatched inviting her for the said hearing on January 27, 2017 three (3) days after the hearing had already passed. According to the respondent, failure by JSC to give her a fourteen (14) days' notice contravened section 25 (4) of the Third Schedule of the Act which not only provides a notice period but also full access to all documents. The same is also provided for under the *Fair Administrative Action Act* as a prerequisite to a fair hearing.

4. After the hearing, the respondent received a letter dated on February 9, 2017 from JSC advising her that at its meeting of the same day, it was resolved that she be dismissed from judicial service. Her appeal pleading that her case be re-considered according to the Judiciary Human Resource Policies and Procedures Manual was also dismissed. The respondent then filed the petition before ELRC seeking, inter alia, a declaration that the disciplinary proceedings were unprocedural/unfair, null and void. She sought an order setting aside/ quashing the decision of JSC and reinstating her back to the position of Principal Magistrate; payment of salaries and allowances that she had been deprived of, and compensation by way of damages for violation of her rights and costs of the suit.
5. JSC opposed the petition vide a replying affidavit sworn by its Registrar, Winfrida Mokaya on March 13, 2018 denying that there was any wrong doing on the part of JSC. The deponent stated that JSC has powers donated under article 172 (c) of the *Constitution* to receive, investigate and discipline magistrates; also, section 3 and 32 of the Judicial Service Act and the regulations made thereunder underscore JSC's mandate to appoint, discipline and remove judicial officers and staff. That during the disciplinary hearing as per the copy of the Hansard Report of the proceedings and by her own affidavits, the respondent expressly admitted to the charges that she authorized withdrawal and use of money deposited in the Judiciary Deposit Account on advice from the District Accountant, Nandi Central, on condition that it would be refunded once the station was allocated the Authority to incur expenditure. This was notwithstanding the financial regulation and procedures. According to JSC the petition was without merit.
6. The matter fell for hearing before Onyango, J. who faulted JSC for failing to follow disciplinary procedures; for not providing further and better particulars of the charges; and for denying the respondent a fair hearing. As a result, the respondent's petition was allowed on the following terms: -
 - a) A declaration that the Disciplinary Proceedings conducted by the respondent's Human Resource Management Committee leading to the decision to summarily dismiss the petitioner from service of the judicial service on 9th February, 2017 was irregular, unprocedural, unfair and a violation of the petitioner's fundamental rights and mandatory provisions of the disciplinary procedure under the Judicial Service Act and the Regulations made there under.
 - b) A declaration that the summary dismissal of the petitioner is null and void and of no effect in law.
 - c) An order for the reinstatement of the petitioner to her position as Principal Magistrate in Judicial Service with immediate effect with no loss of salary and benefit.
 - d) The respondent shall pay the Petitioner's costs of the Petition."
7. It is the foregoing orders that have triggered JSC's appeal that is predicated on some fourteen (14) grounds of appeal which are prolix, and repetitive. Nonetheless, the appellant's counsel may also have



come to the same realization because in the written submissions, the grounds were compressed in four thematic areas. The thematic areas are that the Judge erred by misconstruing the following:

- a) Jurisdiction of the ELRC vis a vis the disciplinary mandate of JSC over the respondent.
 - b) What constitutes a fair hearing by an administrative quasi-judicial body and that the charge presented to the respondent and the respondent's admission to have acted against the regulations constituted a waiver to cross-examine the internal auditor.
 - c) That an order for reinstatement of the respondent was erroneous as the Judge could not substitute a decision of a statutory disciplinary body with her own decision. Moreover, the parameters set by the Employment Act were not interrogated so as to arrive at the determination that reinstatement was just or the right remedy in the circumstances of the matter and
 - d) Whether the respondent was entitled to costs and back pay awarded.
8. This appeal was canvassed by way of written submissions filed by both counsel to urge the positions taken by their respective clients. The plenary hearing was conducted virtually via go to meeting platform under the Court's Covid 19 Pandemic practice directions. Mr. Malenya, learned counsel for the appellant, relied on the written submissions and made some oral highlights. Emphasizing that the learned trial Judge erred by assuming the jurisdiction of the disciplinary body in this case the JSC, and thereby proceeding to determine the disciplinary case on its merit and failing to appreciate the disciplinary procedure that is set out under the *JSC Act*. For this preposition, counsel cited the case of *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR where it was held that where a party has challenged a disciplinary procedure by way of a constitutional or judicial review procedure, the duty of the court is limited to: -
- “interrogation of the process leading to the termination of the respondent’s employment with a view to determining the procedural fairness, reasonableness and legality of the appellant’s action in light of the respondents’ constitutional right to a fair hearing, and right to fair administrative action...”
9. Counsel further submitted that the judgemisapprehended the JSC’s contention on the question of jurisdiction as the court was only mandated to audit the disciplinary process against the strictures of procedural fairness and not to venture into the merits of the disciplinary matter itself. Thus, the court was to give deference to the mandate of the disciplinary body and even if it disagreed with the procedure that was adopted, the remedy lay in remitting the matter for re-hearing but not to substitute itself as a disciplinary decision-making body. Counsel made reference to the case of *Reuben Itatwa & 17 Others v Commanding Officer British Army Training Unit Kenya and Another* [2017] eKLR, where it was held that in adjudicating on the reasonableness of the employer’s conduct, the employment court must not substitute its own views for those of the employer and decide whether it would have dismissed on those facts; the function of the court is to determine the whether the facts and circumstances fell within or outside the band of reasonableness.
10. [10] On the merit of the matter, counsel submitted that the judge ignored an admission of the charge by the respondent and failed to appreciate that by admitting the charge, the respondent waived her right to cross-examine witnesses. Counsel cited section 8.6 of the Government Financial Regulations and Procedures which were allegedly flouted by the respondent when she misapplied funds from the Court Deposit account while knowing the monies did not belong to the Judiciary. The respondent claimed ignorance of the regulations and the Judge agreed with her, which went against the tenets of law that ‘ignorance of the law is never a defence’. Counsel went on to state that the remedy of reinstatement



was not available to the respondent since she breached trust bestowed on her as a judicial officer and her actions of financial impropriety ran afoul of the principles of leadership and integrity which is not only the hallmark of the Judiciary but a constitutional command under article 10 of the Constitution. That reinstating the respondent would erode public confidence with the Judiciary.

11. On the question of fair hearing, counsel referred to the proceedings of JSC, where the Registrar furnished the respondent with the charge and gave her sufficient time to make a response. Furthermore, the respondent was given five (5) months before she was called to appear before the JSC Committee to answer to the charges. The Hansard Report reveals that when the charges were read to the respondent she admitted that it was true money was withdrawn from the Deposit account; that the respondent was a signatory to the account and she withdrew the money for office expenses; that the respondent was the head of station and her decision was contrary to government regulations. The respondent also did not request to cross-examine the auditor who merely presented the audit report which the respondent did not object to. In any event, by admitting the charge, the respondent waived the right to cross-examine the auditor, it was submitted. Finally, on reinstatement counsel submitted that the circumstances did not justify it as there are several considerations to bring to bear, including issues of integrity and public confidence in the Judiciary a matter that could only be determined by the disciplinary body in this case JSC. Counsel urged us to allow the appeal or remit it back to JSC for merit evaluation.
12. The appeal was opposed by Mr. K'Opere, learned counsel for the respondent. He relied on his written submissions and made some oral highlights dismissing the appeal as lacking in merit. Counsel submitted that the suit was filed before ELRC by the respondent by way of a petition which was not only a challenge to the validity, merit or otherwise of the charges but whether the disciplinary process leading to the dismissal of the respondent was in strict compliance with the Judicial Service Act, the Constitution, Fair Administrative Action Act, and the Employment Act. When the respondent was served with the letter of interdiction and charge, on 15th August, 2016 giving her twenty-one (21) days to respond to the charges she wrote a formal letter asking for further particulars to enable her adequately respond to the charges but the said letter was never responded to. This according to counsel was contrary to the provisions of the 3rd Schedule of section 23 (1) of the Judicial Service Act which provides in mandatory terms that an officer facing disciplinary proceedings shall be entitled to receive a free copy of documentary evidence to be relied on.
13. Counsel added that the basis of the charge against the respondent was an audit report for the year 2014/2015; that when the audit for the period was conducted the respondent was not working, having been found unsuitable to serve by the Judges & Magistrates Vetting Board which decision she successfully challenged. Therefore, the respondent needed to ascertain the particulars of the audit report; the details of the cheques issued; the persons who responded to the queries and the particulars of who were paid the subsistence and travelling allowances and the particular invitations that caused the respondent to incur travelling expenses while on duty. According to counsel, the respondent was not accorded a fair hearing. Moreover, the disciplinary hearing was on 24th January, 2017 but the Registrar in breach of the rules called the respondent one day before the hearing, asking her to attend the Committee hearing, thus forcing the respondent to travel overnight and appear before JSC without adequate preparation or even legal representation. It was instructive that the letter inviting the respondent was received on 27th January, 2017 three (3) days after the hearing. Further, the respondent was denied an opportunity to cross-examine the auditor which was a further violation of the provisions of section 25 (5) of the Act as well as the Employment Act that provides an elaborate disciplinary procedure.
14. It was for the aforesaid reasons that counsel for the respondent dismissed all the grounds of appeal as lacking in merit. He submitted that there was no admission of fault by the respondent, who merely



justified her actions and pleaded for time, opportunity and particulars to defend herself. He added that it was within the powers of the ELRC to uphold the constitutional safeguards on the fundamental rights of the respondent and mete out what was an appropriate sanction. On the remedies, counsel pointed out that the petition contained specific prayers which included quashing of the disciplinary proceedings and reinstatement of the respondent with back pay of salaries. Counsel cited the case of [Parliamentary Service Commission v Christine Mwamburi](#) [2018] eKLR and urged us to dismiss the appeal with costs to the respondent.

15. We have considered the record, submissions by counsel and the law, cognizant of our primary role in hearing this being a first appeal though no oral evidence as adduced. Our duty nonetheless is to re-assess and re-evaluate the evidence tendered before the trial court and reach our own conclusions while giving due reverence to the judge's exercise of discretion and findings of fact and law, unless there is no evidence in support of the said findings, or the findings are plainly not founded in law. This much was restated by this court in [Museera v Mwechelesi & Another](#) ([2007] KLR 159:

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

Also, in [Mbogo & another v Shab](#) ([1968] EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

16. That said, it is evident from the above summary that the respondent's complaint was unfair dismissal by JSC due to denial of a fair hearing. We will therefore address the issue of whether the respondent was subjected to a fair hearing, whether the trial judge exceeded her jurisdiction and substituted her decision with that of JSC by re-instating the respondent, and whether the judge considered the conditions stipulated in section 49 (4) of the [Employment Act](#) to determine that reinstatement and the order for back pay was just and most efficacious in the circumstances of the case.
17. It is trite that in a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See section 47(5) of the [Employment Act](#). Whether or not a termination is considered fair will depend on whether the reason(s) for termination are justified and the procedure for dismissal were fair. See the case of [CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona](#) [2015] eKLR. We however need to point out that this was not a purely wrongful dismissal claim, it was a constitutional petition that sought orders to quash or set aside the decision of the JSC, reinstate the respondent and award her damages.
18. The respondent complained that she was not granted a fair hearing and it is indisputable that due process is a fundamental aspect of the rule of law. The right to a fair hearing is encapsulated in the *audi alteram partem* rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is secured under section 41 of the [Employment Act](#) which stipulates:

“ 41



- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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 employee 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, if any, chosen by the employee within subsection (1), make.”

19. The above provisions resonate well with the provisions of part 1V of the *Judicial Service Act*, in particular section 23 (1) which provides that a person in respect of whom disciplinary proceedings are being held is entitled to a copy of documentary evidence and also section 25 (5) which provides for a fair hearing. The *Constitution of Kenya* in particular article 47 makes provision for fair administrative action. Section 4(3)(b) of the *Fair Administrative Action Act* stipulates that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard. These provisions require the person affected to be given information, materials and evidence relied upon in making the decision or taking the administrative action. In regard to the conduct of the disciplinary hearing, the respondent had three (3) complaints against the procedure and process that JSC employed leading to her dismissal.
20. The first complaint was failure by JSC to furnish her with documents to enable her answer to the charge. The respondent claimed and it was not disputed by JSC that when she was served with a letter interdicting her on August 15, 2016 she was given twenty-one (21) days to respond. The respondent wrote to JSC on August 26, 2016 seeking to be furnished with documents that supported the charge. In the petition, the respondent stated that when the audit was carried out, she was not in office as the Judges and Magistrates Vetting Board had vetted her out of office but she successfully challenged that decision; that she needed to know who was interviewed by the auditor and the details of the cheques that were paid from the said deposit account as well as the officers who were paid allowances. These documents were never supplied to the respondent. As if that was not enough, upon interdiction, the respondent was kept waiting for five (5) months, only to receive a telephone call from the Registrar of JSC on the eve of the hearing of the disciplinary case informing her to avail herself in Nairobi on January 24, 2017 for the hearing. The respondent said she travelled at night and did not have sufficient time to prepare or even engage legal counsel to represent her during the hearing. The third complaint was that she was not given an opportunity to cross-examine the auditor who produced the audit report which supported the charge.
21. In answer to the above, JSC claimed that the respondent had in any case admitted having flouted the regulations but feigned ignorance that she was not taken through any training in financial management, nor was she given a policy guideline or a hand book; that the acts by the respondent contravened article 10 of the *Constitution*; that the charge sheet clearly stated the particulars of misconduct, and that she was given adequate time to prepare for the hearing which came after five (5) months after her interdiction. The trial judge found, and we have no reason to disagree with her, that



the procedure adopted by JSC in disciplining the respondent did not comply with the Judicial Service Act because the respondent was not given adequate notice to appear before JSC. The respondent was entitled to a 14-days' notice but she was given a 3-days' notice vide a letter which she received after the disciplinary proceedings.

22. Having agreed that the procedure was wrong, the proceedings culminating with the dismissal of the respondent were rightfully set aside and quashed as per prayers Nos. (a) and (b) of the petition. Where we part company with the learned judges in regard to the order reinstating the respondent to the position of Principal Magistrate and the award of back pay. It has been stated time without number by this court that reinstatement of an employee, though provided as a remedy is not automatic but one that should be granted in exceptional circumstances. See Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR. By dint of section 49(4) (a) to (m) the court is mandated to take into consideration the following before making an order of reinstatement: -
- a. The wishes of the employee;
 - b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - c. The practicability of recommending reinstatement or re-engagement;
 - d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - e. The employee's length of service with the employer;
 - f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - g. The opportunities available to the employee for securing comparable or suitable employment with another employer;
 - h. The value of any severance payable by law;
 - i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - j. Any expenses reasonably incurred by the employee as a consequence of the termination;
 - k. Any conduct of the employee which to any extent caused or contributed to the termination;
 - l. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - m. Any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee."
23. Having evaluated the record of proceedings there is no indication that the trial Judge interrogated the above guiding principles to arrive at the conclusion that reinstatement was the most just and efficacious remedy. There were allegations that the respondent in her response had admitted having made the payments. The respondent denied that she admitted the charge and this is what she stated in her supplementary affidavit: -

"That my admissions, remorse and regrets were on the basis that I did not have sufficient material, information, time and opportunity to mount a meaningful challenge to the charges against me and the ambush hearing on 24/01/17..."



That paragraphs 36,37,38 and 39 of the replying affidavit are factually incorrect as I clearly stated that I relied on advice from the District Accountant who was the mandatory signatory to the account and the person with professional expertise on government regulations and accounting procedures and I was not aware that the Auditor who prepared the audit report had been called as a witness since I had not been notified of the audit queries before, during and after my disciplinary hearing and this kept me in total darkness contrary to the law.”

24. The issue of admission was a contested one and the only way it could have been resolved is through an oral hearing that avails the process of examination and cross- examination. We are aware that majority of labour disputes do not require oral hearing. However, in situations where matters are contested, that is the safe way of resolving them. We should not also lose sight of the fact that one of the reasons why the disciplinary hearing by JSC was quashed is because the respondent was not given an opportunity to cross- examine a witness. In determining this issue this is what the learned judge stated in one sentence: -

“The submission that the petitioner admitted the charges and did not require to cross-examine the Auditor is not borne by the proceedings of the hearing”

25. With respect, we think the substantive allegations or charges levelled against the respondent needed to be properly heard and preferably by the disciplinary tribunal that is mandated by law to deal with them. The respondent’s petition sought a combination of judicial review orders regarding the disciplinary process and also substantive orders of reinstatement and award of damages which called for a mixture of evaluation of procedure and merit examination of the evidence. The *Constitution* and *Fair Administrative Action Act* have shifted the parameters of the principles that governed prerogative writs under the common law to include merit review in examining such matters as reasonableness of an administrative tribunal. However, if the tribunal as in this case JSC was found to have violated the rules of procedure, or that matter was unreasonable, the ELRC could not constitute itself into a disciplinary tribunal, instead it ought to have remitted the matter back to the tribunal.

26. The case of *CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona* [2015] eKLR was cited and we think it also resonated with the case of *Suchan Investments Ltd v Ministry of National Heritage & Culture & 3 Others* [2016] eKLR where this Court stated: -

“The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the *Fair Administrative Action Act* permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

27. We think we have said enough to demonstrate that the ELRC was right to set aside the decision to dismiss the respondent because the procedure was not followed. As to the question of reinstatement and award of back pay, we are afraid the substantive allegations against the respondent needed to be taken through a merit review by the JSC by properly following the procedures of a fair hearing. We accordingly find merit in the grounds of appeal in this respect and allow the appeal in regard to reinstatement and payment of back salaries.

28. Accordingly, this appeal partially succeeds to the extent that the orders of the E&LRC requiring the JSC to reinstate the respondent and pay her back salaries are set aside. We order the disciplinary matter



be remitted back to JSC so as to address the said issues. JSC is directed to follow the disciplinary procedure provided by the law. JSC shall bear half of the costs of this appeal as well as before the E&LRC.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF NOVEMBER, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

