Muraya & 4 others v Judicial Service Commission (Employment and Labour Relations Cause E003 of 2022) [2023] KEELRC 2849 (KLR) (9 November 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2022

BOM MANANI, J

NOVEMBER 9, 2023

BETWEEN

RUTH WANJIKU MURAYA ..... 1ST CLAIMANT

GRACE WAITHERA MACHARIA ..... 2ND CLAIMANT

BORU GUYO MOLE ..... 3RD CLAIMANT

JOAB OOKO ..... 4TH CLAIMANT

BENJAMIN MUTUKU NZIOKA ..... 5TH CLAIMANT

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

1. This is a claim for unfair dismissal from employment. The Claimants, who were employees of the Respondent, assert that the Respondent unfairly terminated their contracts of service. By these proceedings, the Claimants pray for, inter alia, a declaration that the decision to terminate their various contracts of service was unlawful and for an order of reinstatement to their positions without loss of benefits. In the alternate, they seek compensation for unfair termination of employment.

2. The action is opposed by the Respondent. The Respondent argues that it had valid reasons to justify its decision to terminate the contracts of service aforesaid. Further, the Respondent posits that its decision was processed fairly. As a result, the Respondent prays that the action by the Claimants be dismissed with costs.

Claimants' Case

3. The Claimants state that they were all employed by the Respondent to work in various positions in its accounts department. It is their case that since they were hired by the Respondent, they have rendered their services diligently and without blemish.

4. The Claimants state that on 19th September 2013, they were all arrested from the office of the Respondent's Acting Chief Registrar where they had been summoned to go and record statements. They assert that the 1st, 3rd, 4th and 5th Claimants were subsequently arraigned in court for plea taking and bond applications.

5. The record shows that the 1st, 3rd, 4th and 5th Claimants were charged with the offense of conspiracy to commit a felony via Nairobi CMCC Criminal Case No. 1457 of 2013. It was indicated that on or before 13th September 2013, the four (4) Claimants conspired with other individuals not before the court to steal Ksh. 80,013,302.00 from the Respondent.

6. It is the Claimants' case that upon their release on bond by the court, they resumed their duties until 5th November 2013 when they were all issued with letters of interdiction. The Claimants state that the letters of interdiction indicated that they had been involved in the theft of Ksh. 80,013,302.00 from the Respondent which amounts had been transferred to various companies as particularized in the Amended Memorandum of Claim.

7. The Claimants deny involvement in the theft aforesaid. They deny any association with the several companies that were allegedly paid the aforesaid sums of money. They deny transferring the aforesaid amount of money or at all to the various beneficiaries of the theft.

8. The Claimants aver that on 10th January 2020 the trial court in the criminal case delivered its judgment absolving them of liability in respect of the alleged theft. It is their case that whilst the court cleared the four (4) who had been charged of the offense of conspiracy to steal, the fifth (5) Claimant was never charged with a criminal offense. Therefore, the five (5) of them got a clean bill of health.

9. The four (4) Claimants aver that after their acquittal of the criminal charge aforesaid, they wrote to the Respondent forwarding a copy of the court's decision. Their intention was that the Respondent lifts their interdiction and allows them to resume duty. The Claimants assert that the 2nd Claimant, who had not been charged in the criminal case, had also written to the Respondent severally asking for the lifting of her interdiction.

10. It is the Claimants' case that besides the trial court in the criminal case absolving them of liability for the loss of the amount of Ksh. 80,013,302.00, the cybercrime investigations had shown that they were not involved in the fraud and or theft. The Claimants also aver that the said investigations did not attribute any form of negligence against them in respect of the events that resulted in the aforesaid theft.

11. The Claimants state that on 6th August 2021, the Respondent wrote to them accusing them of negligence that resulted in the loss of the sum of Ksh. 80,013,302.00. The Respondent indicated that the Claimants had negligently permitted their IFMIS and G-PAY passwords and usernames to be used to steal the aforesaid sum of money. The Respondent accused the Claimants of having failed to safeguard and protect the said passwords and usernames.

12. It is the Claimants' case that by the aforesaid letters of 6th August 2021, the Respondent demanded that they show cause why they should not be dismissed from employment for gross misconduct. The Claimants were to tender their responses within fourteen (14) days of the letter of 6th August 2021.

13. It is the Claimants' case that they were subsequently invited for a disciplinary session through the Respondent's letter dated 7th September 2021. The disciplinary session was scheduled for 21st September 2021.

14. The Claimants aver that after the disciplinary process, the Respondent issued them with letters dated 22nd December 2021 terminating their respective contracts of service. The basis of the decision to terminate the Claimants' employment was their alleged negligence of duty by failing to safeguard their passwords and usernames thereby allowing the use of the aforesaid credentials to siphon Ksh. 80,013,302.00 from the Respondent's accounts.

15. The Claimants dispute the validity of the Respondent's aforesaid decision. It is their contention that the decision went against the recommendations by the Respondent's Disciplinary Committee which absolved them of blame and recommended for the lifting of their interdictions.

16. The Claimants have also faulted the Respondent's decision on several other fronts. First, they argue that the disciplinary process took unduly long thereby infringing on their right to fair administrative action. Second, they contend that the Respondent failed to take into consideration their responses to the notice to show cause. Third, the Claimants aver that the Respondent failed to furnish them with preliminary reports on the matters under inquiry prior to inviting them for the disciplinary session to enable them prepare their defense. In the Claimants' view, the entire disciplinary process was marred with irregularities thus breaching *the Constitution* and other pieces of legislation.

17. The Claimants deny having acted negligently in the circumstances of this case. It is their case that their passwords and usernames were harvested by a malware before they were used to access the Respondent's system and siphon the funds from it. The Claimants deny that they had a hand in what happened. They further deny that they had control over the harvesting of their data.

18. The Claimants aver that they took steps to ensure the security of their log-in credentials. They argue that the intrusion into the Respondent's system was due to its inherent weakness as demonstrated in the investigation reports. Thus, they contend that they cannot be held responsible for the unlawful access into the system by third parties. It is the Claimants' case that the Respondent's investigations laid these facts bare and the Respondent, at the time of making the decision to terminate their contracts, knew only too well where blame lay.

19. The Claimants have thus prayed for reinstatement to their respective positions as their primary prayer. In the alternate, they pray for the various other reliefs including compensation for unlawful termination from employment.

Respondent's Case

20. The Respondent admits that the Claimants were its employees. It further admits that the Claimants served in various positions until they were all interdicted on 5th November 2013. Further the Respondent admits that the Claimants were all relieved of their employment on 22nd December 2021.

21. The Respondent does not deny that most of the Claimants, except one of them, were arrested and charged with the offense of conspiracy to commit a fraud as asserted by the Claimants. The Respondent does not also deny that after their trial, those Claimants who had been charged with the aforesaid offense were acquitted of it.

22. The Respondent states that after it received a copy of the decision by the trial court in the criminal case, it notified the Claimants that it was reviewing the matter and was going to revert on their employment

status. The Respondent contends that after the criminal trial, it re-opened the disciplinary process against the Claimants for negligence of duty.

23. It is the Respondent's case that the delay in concluding the disciplinary process was occasioned by the fact that some of the Claimants had been charged with a criminal offense. Therefore, the Respondent held its internal disciplinary process in abeyance in order to give way to the external criminal trial. On the other hand, the delay that fell after conclusion of the criminal trial was occasioned by the process of appointment of the new Chief Justice and the emergence of the Covid 19 pandemic.

24. The Respondent contends that it had valid grounds to terminate the Claimants' contracts of service. According to the Respondent, despite the Claimants having been cleared of the criminal offense of conspiracy to commit a felony, there was sufficient evidence showing that they were guilty of the infraction of negligence of duty.

25. The Respondent asserts that the two infractions are mutually distinct. Further, the standards of proof for the two are distinct.

26. The Respondent avers that notwithstanding that the Claimants had been cleared of the criminal charge, it retained the right, as the Claimants' employer, to pursue separate disciplinary proceedings against them for the infraction of neglect of duty. The Respondent asserts that the two processes are mutually distinct.

27. It is the Respondent's case that the Claimants failed to secure their log-in credentials thereby allowing third parties to use them to access its accounts and steal the funds in issue. This failure amounted to negligence on their part.

28. The Respondent further avers that the Claimants were taken through a fair disciplinary process before they were released from employment. They were: issued with notices to show cause; permitted to attend their disciplinary sessions with witnesses and other representatives; permitted to carry any material that they considered necessary for their case; heard by the disciplinary panel; and were advised of their right to appeal. In the Respondent's view, it observed all the tenets of due process

29. In response to the Claimants' assertion that they were not supplied with preliminary reports before they attended the disciplinary session, the Respondent denies that the law, in particular the *Judicial Service Act* or its Human Resource Manual, obligates it to share its preliminary reports with employees facing disciplinary action. In the Respondent's view, it acted within the parameters of *the Constitution*, the law and its internal human resource regulations.

30. The Respondent has also argued that the claim by the 2nd Claimant is time barred. According to the Respondent the period between the decision to indefinitely suspend the 2nd Claimant from duty and the time she filed suit for reinstatement is more than three (3) years. Therefore, the action for reinstatement has been brought beyond the time that is allowed by statute.

Issues for Determination

31. The parties do not deny that they had an employment relation. Neither do they deny that the said relation was terminated on 22nd December 2021. Therefore, the only issues that require determination are the following: -

    a. Whether the claim by the 2nd Claimant is time barred.

    b. Whether the decision to terminate the Claimants' employment contracts was lawful.

    c. Whether the parties are entitled to the orders that they seek through their respective pleadings.

Analysis

32. Since the question of limitation of actions touches on the jurisdiction of the court to entertain the case by the 2nd Claimant, it is necessary that I first address this matter before I address the other issues in the action. In the statement of defense, the Respondent avers that the claim by the 2nd Claimant offends section 90 of the *Employment Act*. The Respondent states that the 2nd Claimant was suspended from duty more than six (6) years before she filed the current suit. Therefore, her action is time barred. The Respondent contends that if the 2nd Claimant wished to sue on the matter, she ought to have filed suit within three (3) years of the cause of action accruing as required by section 90 of the *Employment Act*.

33. It is clear from the Amended Memorandum of Claim that the case by the Claimants challenges the Respondent's decision that was rendered on 22nd December 2021 and by which, the Respondent terminated the Claimants' contracts of service. Therefore, the cause of action in the case accrued on 22nd December 2021. From the record, the 2nd Claimant, like the other Claimants, was dismissed from employment on 22nd December 2021.

34. Although the 2nd Claimant was interdicted from employment in November 2013, the decision to terminate her contract which is the basis of this action was taken on 22nd December 2021. Therefore, the cause of action in the suit did not arise in November 2013 when the 2nd Claimant was interdicted but on 22nd December 2021 when her contract of service was terminated.

35. According to the record, this suit was instituted on 7th January 2022. This was hardly one month after the Respondent had issued the 2nd Claimant with the letter terminating her services. Therefore, the action by the 2nd Claimant was commenced within the period that is stipulated under section 90 of the *Employment Act*. Accordingly, the suit is not time barred.

36. The circumstances that led to the dismissal of the Claimants from employment are not contested. It is clear that the genesis of the Claimants' tribulations was the loss of Ksh. 80,013,302.00 by the Respondent. From the record, this money was lost after fraudsters hacked into the Respondent's Finance Management System (IFMIS) and Information Management System (IMS) and siphoned the aforesaid funds.

37. Investigations showed that the Respondent's IFMIS and IMS systems were accessed using the passwords and usernames of the Claimants. This development led to the arrest of four (4) of the five (5) Claimants. They were subsequently charged with the criminal offense of conspiracy to commit a felony. The four (4) Claimants were later acquitted of the charge.

38. The evidence presented before the trial court in the criminal case suggested that the credentials of the Claimants and other employees of the Respondent were harvested using a malware. PW23 indicated that a malware was installed to harvest credentials that were then used to access the Respondent's accounts remotely. The witness stated that the malware was active between 28th July 2013 and 14th September 2013. He indicated that the malware may have been installed as early as 1st May 2013.

39. In its report signed off on 19th November 2021, the Respondent's Disciplinary Committee observed as follows:-

> ''None of the accused judicial staff was around the Supreme Court premises when the alleged theft took place. For instance, Mr. Boru Mole was actually in Isiolo at the time of the crime.

> The affected judicial staff were charged courtesy of their employment as accountants in the Judiciary and the fact that their credentials were used to make fraudulent payments of Ksh. 80,013,302.00.
>
> It is not in dispute that money was wired from the Judiciary accounts to several bank accounts as stated in evidence adduced in court.
>
> Two independent forensic audits by the Judiciary and the Central Bank of Kenya came up with the same conclusion that a malware was installed in all the accused Judicial Staff computers which harvested their credentials. The credentials were used to log into the financial system and transfer money to various accounts.
>
> The fraudulent transactions took place on 13th September 2013 to 14th September 2013 between 11.40 pm and 9.23 am."

40. The Committee went further to inter alia, observe as follows: -Four staff were charged in Nairobi Criminal Case Number 1457 of 2013 for being involved in loss of government funds amounting to Ksh. 80,013,302.00 but were acquitted under section 215 of the Criminal Procedure Code.The staff passwords were harvested using a malware.The machine used to harvest their passwords was based at the Supreme Court Building.The passwords were copy pasted from a flash disk- they were not keyed in.The syndicate was well planned, coordinated and orchestrated by employees from the respective banks. Emphasis added by underlining.

41. The Committee then made the following recommendations: -

> '' Staff's interdictions be lifted with effect from 5th November 2013 and the half salary withheld during the period be released- since the offense of conspiracy to defraud the Judiciary contrary to section 393 of the Penal Code was not proved."

42. At page 113 of the judgment in the criminal case, the trial court observed as follows: -

> ''This court doubts the ability of the accused persons herein to have conspired and stolen from the judiciary as charged in count 1 and yet they did not know each other. It also notes that the prosecution evidence and particularly that of PW20 as corroborated by that of DW12 that the 4th -8th accused credentials were fraudulently extracted by use of a malware installed in their computers." Emphasis added by underlining.

43. The fourth (4th) to eighth (8th) accused persons in the criminal trial are Claimants number one (1), four (4), three (3) and five (5) in this cause respectively. Of significance is that the trial court in the criminal case made a finding of fact that these individuals' credentials were fraudulently extracted by use of a malware that had been installed on their computers. This finding removes any doubt that the four played a role in the extraction of their credentials.

44. Upon the acquittal of the four, the Respondent issued them with notices to show cause why their employment should not be terminated for failing to secure their credentials. At the time of framing these charges, the Respondent was in possession of the decision by the trial court in the criminal case which indicated that the credentials of the four persons were fraudulently harvested.

45. The 2nd Claimant was not charged with the criminal offense that the other four Claimants were charged with. It is indicated that she was spared trial because she was expectant.

46. However and as has been seen from the report by the Disciplinary Committee dated 19th November 2021, independent forensic investigations by the Respondent and the Central Bank of Kenya had

shown that a malware had been used to harvest the credentials of this Claimant and the other four (4) Claimants. As a matter of fact, the harvesting is said to have affected more staff of the Respondent than the five (5) Claimants. The reports that the aforesaid Committee was refereeing to are dated 28th May 2015 and 21st July 2014. They were produced in evidence.

47. The notices to show cause issued to the Claimants are dated 6th August 2021. Therefore, they were prepared and issued by the Respondent when it was already in possession of the forensic reports and the decision of the trial court in the criminal cause all of which suggested that there was intrusion into its IFMIS and IMS systems without the knowledge of its members of staff.

48. The Respondent accused the Claimants of having failed to secure their passwords and usernames thereby occasioning the attack on its system and eventual loss of funds. It was the Respondent's case that the Claimants failed to regularly change their passwords thus exposing the system to the risk of attack.

49. In their responses to the notices to show cause and evidence in court, the Claimants stated that they had taken all steps to secure their credentials. They stated that they had kept their respective passwords secret and changed them regularly to ensure security of the system.

50. On his part, the 4th Claimant stated in court that he changed his password as soon as he was introduced to the IFMIS system in June 2013. However, the system did not work in July 2013. Therefore, he could not change the password during this period. He however stated that in August 2013 when the system became functional, he changed the password again. The Claimants stated that despite these security measures, their credentials were harvested by a malware that they were not aware of.

51. The Respondent accused the Claimants of failure to secure their credentials. Yet, it gave no cogent evidence to justify this claim.

52. The forensic investigations suggested that the installed malware would harvest the employees' data as soon as they logged into the system. The harvesting was a continuous process which occurred every time that a victim logged into the system.

53. This reality puts to question the argument that change in passwords even on a daily basis would have prevented the fraud. The malware, which was indicted to have been installed as early as May 2013, would still have captured the new passwords the moment that the victims used them to log into system.

54. It appears to me that the problem was more with the security features of the IFMIS and IMS system than it was with the alleged negligence of the employees who were using it. The solution to securing it did not lie in simply changing passwords even on daily basis.

55. But the foregoing should not be misunderstood to suggest that the court has arrived at the conclusion that the Claimants were guilty of failure to secure their passwords. As I have indicated earlier, the evidence by the Claimants is that they took all steps to secure their credentials including changing their passwords. I have alluded to the foregoing only to demonstrate the probable futility of such changes if there was already installed in the system a malware that was harvesting this information every time that an employee logged into it.

56. The Respondent has correctly submitted that an employer need not have foolproof evidence regarding an employee's infraction before he can take the decision to terminate the employee's employment. Indeed, all that the employer needs to demonstrate under section 43(2) of the *Employment Act* is that he had reasonable and genuine grounds to believe that the employee was guilty of the infraction in question.

57. It is in this context that we must ask whether, in the circumstances of this case, one can reasonably say that the Respondent had reasonable grounds to genuinely believe that the Claimants were guilty of negligence as asserted. In my honest view, I do not think so.

58. As I have mentioned earlier in this decision, at the time that the Respondent issued the Claimants with the notices to show cause, it already had in its possession the decision of the trial court in the criminal case in which the court had made a finding of fact that the Claimants' credentials were fraudulently harvested through the use of a malware that had been installed in their computers. The Respondent was at the time also in possession of the forensic reports which indicated that the Claimants' credentials had been harvested through a malware. Further, at that time, the Respondent also had in its possession its own Disciplinary Committee's report which exculpated the Claimants from blame for the occurrence.

59. None of the above instruments suggested that these occurrences had been accentuated by the negligence of the Claimants. On the contrary, the evidence in the Respondent's possession showed that the employees' credentials were being harvested every time that they keyed into the system. In my view, the evidence in the Respondent's possession strongly leaned towards demonstrating the Claimants' innocence in the entire scheme.

60. With this evidence in its possession, was it reasonable for the Respondent to hold onto the view that the Claimants had acted negligently in the circumstances? Was there other evidence on the basis of which the Respondent could still entertain the belief that despite the fact of the Claimants having been victims of a cyber-crime syndicate they were nevertheless negligent in the conduct of their duties? Was there evidence to demonstrate that the Claimants had been reckless in the manner that they had handled their log-in credentials? Was there evidence of willful neglect to perform duty on the part of the Claimants as submitted by counsel for the Respondent?

61. With respect, I struggle to see any such evidence. As correctly submitted by the Respondent's counsel based on the decision in the case of Jonah Mwaura Ngugi v Safaricom PLC [2019] eKLR, one can only be considered to have acted negligently if there is evidence to demonstrate that he foresaw risk of harm but nevertheless failed to act in the unreasonable belief that he or she will be able to avoid the danger. The court in the aforesaid decision expressed itself on the matter as follows:-

''It is therefore not sufficient for an am employer to site an employee for negligence. There must be evidence and proof that the employee was reasonably able to foresee risk and recklessly failed to avoid the same or by his conduct acted in a manner that was so reckless and unreasonable that exposed the employer to risk and or acted so radically from the standard of a reasonable person or the practice of the employer and thus deviated from what a reasonable employee placed in a similar situation would act.''

62. From the record, there is no indication that the Respondent has presented evidence on a balance of probabilities to suggest that any of the Claimants was, at the time that is material to this action, laboring under this state of mind. There is no evidence presented to demonstrate that the Claimants acted recklessly with respect to the duty to keep their log-in credentials secure.

63. It is noteworthy that the Respondent's Disciplinary Committee actually absolved the Claimants of blame and recommended that they be reinstated to their position. This is the body that heard the Claimants and evaluated the evidence on the matter.

64. It is true as argued by the Respondent that the Disciplinary Committee's findings were not binding on it and that the ultimate decision on the matter lay with it. However, if the Respondent was going to effect a radical departure from the recommendations made by its Disciplinary Panel with adverse consequences on the Claimants' jobs, should the Claimants not have been accorded an opportunity to make representations on the matter in compliance with the dictates of section 4 of the *Fair*

Administrative Action Act? Did the findings of the Disciplinary Committee not count for anything? What would be the need of having the Committee sit and deliberate on the matter only for its recommendations to be disregarded particularly on unclear and undisclosed grounds?

65. Having regard to the fact that the Claimants did not participate in the fraudulent scheme and taking into account that the Respondent did not provide evidence to demonstrate failure by the Claimants to secure their credentials, it is evident that the decision to terminate their contracts of service was unmerited. This is particularly in view of the fact that the forensic investigations alluded to earlier did not even suggest that the Claimants had acted negligently in the circumstance.

66. The Respondent has argued that because the Claimants did not proceed on appeal on its decision, they must be deemed to have accepted it. The Respondent argues that the Claimants case should be thrown out because they did not exhaust the appeal avenue.

67. I have considered this view and do not agree with it. In my view, once the Respondent made its decision terminating the Claimants' contracts, it became open to the Claimants to determine how to challenge this outcome.

68. Once there is a decision by the employer to terminate a contract of service, a cause of action in respect thereof crystallizes and the matter is ripe for review by the court. There is no legal requirement (except where the internal regulations provide otherwise) that the employee must first administratively appeal the decision before he invokes the court's jurisdiction.

69. In the case before me, the Respondent's regulations do not obligate an employee whose contract of service has been terminated to first appeal the decision to the Respondent before approaching a court of law on the matter. Therefore, the Claimants legitimately approached the court to challenge the decision.

70. I have looked at the decisions of Esha Chizi Lugogo v Pact Kenya [2013] eKLR and Carolyne Munala v Hoggers Limited [2018] eKLR which the Respondent relies on to advance its argument in this respect. All of them relate to the disciplinary process that precedes the making of the initial decision to terminate a contract of service. This is not the same thing as in the current case where an employee whose contract of employment has been terminated after an internal disciplinary process takes out proceedings to challenge the decision without first filing an administrative appeal.

71. Regarding procedural fairness, the Claimants stated that the Respondent did not furnish them with the reports in its possession on the matters at hand before they were taken through the disciplinary hearing. In response, the Respondent stated that the law does not obligate it to do so.

72. With respect, I do not think that the position taken by the Respondent on the issue is correct. It is true that the procedural requirements for fair termination of a contract of service are enshrined in section 41 of the *Employment Act*. However, these requirements are complemented by and ought to be considered together with the procedural strictures that are provided for in the *Fair Administrative Action Act*. Together, these two statutes breathe life into the constitutional rights to fair labour practice and fair administrative action both of which are significant in protecting the rights of employees at the workplace (Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR).

73. Section 4 (2) (g) of the *Fair Administrative Action Act* provides as follows:-

> ''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

information, materials and evidence to be relied upon in making the decision or taking the administrative action."

74. On the other hand, regulation 23 (1) of the Third Schedule to the *Judicial Service Act* provides as follows: -

> "An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it."

75. Based on the foregoing, it is clear that the Respondent was under obligation to furnish the Claimants with all preliminary reports and materials that were in its possession and which were relevant to the matters under inquiry before it went into the disciplinary session at which the fate of Claimants was to be determined (Mercy Kawira Mithika v Kenya Women Microfinance Bank PLC [2021] eKLR). The Respondent cannot wish away this right in the manner that it suggests.

76. I agree with the Respondent that the criminal process is distinct from the employer's internal disciplinary process and the standards of proof that are applicable to the two processes are not the same. Therefore, the fact that the Claimants were subjected to a criminal trial and acquitted of the charge of conspiracy to commit a felony did not mean that the Respondent could not press internal disciplinary proceedings against them so long as the grounds for the disciplinary action were different.

77. However, this reality presents a double edged sword for the Respondent. If the Respondent accepts the fact that the two processes were mutually exclusive and it had made up its mind to charge the Claimants with a distinct infraction of negligence which is conceptually different from what they were facing before the criminal court, why did the Respondent take so long to process the disciplinary action against them? Why was it necessary to keep the Claimants waiting for close to eight (8) years before they were finally presented before the Respondent's Disciplinary Committee to face distinct charges of negligence?

78. The obligation to suspend the internal disciplinary process where an employee is facing a criminal charge under regulation 18 (2) of the Third Schedule to the *Judicial Service Act* cannot, in my view, be invoked to justify the delay in concluding the internal disciplinary case against the Claimants since the grounds for the criminal charge were distinct from the infraction of negligence. Similarly, the events that occurred after the Claimants were acquitted and which the Respondent has invoked to justify the delay cannot account for the delayed processing of the disciplinary case during the pendency of the criminal case.

79. Both article 47 of *the Constitution* and the *Fair Administrative Action Act* entitle every person to the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. To have kept the Claimants waiting for close to eight (8) years before they were subjected to a charge of negligence which was clearly distinct from the one that they were facing before the criminal trial was, prima facie, a violation of the obligation to accord them expeditious justice. The anxiety that they were subjected to for all that while could have been mitigated by processing the internal disciplinary process expeditiously.

80. That said, whilst the two processes are mutually exclusive and the standards of proof that are applicable to them distinct, this does not mean that the Respondent could not consider relevant portions of the decision of the criminal trial court in making its ultimate decision now that it had opted to await the outcome of the case. Whilst it is true that the outcome of the criminal case did not bind the Respondent in making its administrative disciplinary decision, I do not think that it was appropriate

for the Respondent to ignore the findings of fact in the criminal trial which suggested the innocence of the Claimants with respect to the infraction of negligence that they were eventually charged with.

Determination

81. The upshot is that I find that the Respondent's decision to terminate the Claimants' contracts of service was irregular both on substantive and procedural grounds. Consequently, I declare the decision unlawful.

82. The Claimants have prayed for reinstatement to their previous positions with no loss of benefits as the primary relief. Section 49 of the *Employment Act* obligates the court to consider the wishes of the employee whilst designing the reliefs to grant. At the same time, this provision of law requires the court to consider the practicability of recommending reinstatement before the order can issue. I am also alive to the edict that the remedy of specific performance should only be granted for cogent reasons.

83. In Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR, the court expressed itself on the remedy of reinstatement as follows: -

> ''Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.''

84. The court went further to emphasize that before ordering reinstatement, the court should consider the practicability of granting the remedy. This, in the court's view, involves balancing the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future.

85. I have considered the Claimants' plea for reinstatement against the above principles. At the time of termination of their contracts, the Claimants were holders of various positions as accountants. I take cognizance of the circumstance that resulted in their separation with the Respondent. The Claimants were clearly not complicit to the illegal harvesting of their credentials in order to steal from the Respondent. I see no evidence to suggest that they contributed to this sad state of affairs.

86. The Judiciary is a large organization. There is little chance that if they are reinstated, the Claimants will have difficulties reintegrating into the organization without unnecessary friction with the Respondent's management.

87. In considering whether to grant reinstatement, I have also considered the state of unemployment in the country. In particular, I have considered the plea by some of the Claimants that it is not easy to secure employment.

88. In resisting the prayer for reinstatement, the Respondent's counsel submits that since the Claimants were interdicted close to ten (10) years ago, their positions have been filled. Therefore, an order reinstatement should not issue.

89. This argument is not sound. An interdiction from employment is not termination of a contract of service. It is only a temporary bar to the discharge of an employee's obligations under a contract of service. Therefore, it cannot be argued that the Claimants' positions were filled when they were

interdicted as counsel suggests. The Respondent could not fill these positions until after the decision to terminate the Claimants' contracts was rendered on 22nd December 2021. There was no evidence to demonstrate that the positions are no-longer available after the Respondent's decision of 22nd December 2021.

90. Having regard to the foregoing, I consider this to be a suitable case in which the remedy of reinstatement should issue. Accordingly, I order that the Claimants be reinstated to their previous positions without loss of benefits. I make this order fully appreciating that the Claimants are still within the three (3) year timeframe for grant of the remedy.

91. I award those Claimants who were represented by counsel costs of the case.

92. For the Claimants who were not represented by counsel, I direct that they recover the actual disbursements that they incurred in prosecuting this action.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimants

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI