



Njau v Judicial Service Commission (Employment and Labour Relations Cause E766 of 2021) [2023] KEELRC 3413 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E766 OF 2021**

K OCHARO, J

DECEMBER 20, 2023

BETWEEN

RUTH MUTHONI NJAU CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim herein dated 17th September 2021, the Claimant impleaded the Respondent seeking; payment in lieu of notice; compensation for earned but unutilized leave days; salary for the remainder of the years of service up to retirement; compensations for wrongful termination; pension; and costs and interest. The claim flows from what the Claimant charges as an unfair and wrongful termination of her employment.
2. By its Statements of Response dated 19th October 2021, the Respondent, resisted the claim, contending that the termination was justified, and the reliefs sought by the Claimant unjustified, therefore.
3. At the hearing of the case the parties urged the Court to adopt the contents of their witness statements filed herein as part of their evidence in chief, and the respective documents as their documentary evidence.

The Claimant's Case

4. It was the Claimant's case that she first came into the employment of the Respondent on the 1st day of October 2008 as a Clerical Officer. At the appointment, she was temporarily deployed to Milimani Commercial Courts, Accounts Section before she was promoted to Clerical Officer (PLS 5), on or about the 18th of July 2009.



5. The Claimant stated that on or about the 26th of November 2013, she was transferred to Makadara Law Courts. On the 5th of October 2015 she was promoted to the position of Accounts Assistance 1 (PLS 9).
6. The Claimant stated that she performed her duties with utmost good faith, fidelity to the law and diligence. This earned her the trust of her employer, the Respondent. Resultantly she was appointed to be one of the team members charged with the responsibility of carrying out deposits and revenue reconciliation. Further, as a result, she earned salary increments and promotions.
7. On or about the 5th day of June 2019 a lady by the name of Lucy Wanjiru Kamau approached the cash office with receipt No. 4267445 dated 3rd June 2019, bearing the name of one Francis Gatery Kihara wanting to know whether the same had originated from the office. The lady handed over the receipt to Mr. Francis Otieno who in turn handed over the same to Ms. Mercy Migwi, the Accountant.
8. The Claimant stated that a check on the counterfoil receipt book revealed that the receipt No. 4267445, had been issued on 11th March 2019 to one Ahmed Bille Ahmed for Kshs, 20,000/=, for payment of a fine in Petty Crime File No. 1015/2019. The receipt number in question matched this receipt number.
9. On perusing the court file for Traffic Case No. 5686 of 2019, for which the receipt in question was purportedly issued, she discovered that there was a warrant of arrest pending therein against Francis Gathery Kihara for failing to attend Court on 3rd June 2019.
10. Francis Gatery Kihara was subsequently questioned by the Hon. Magistrate Mr. Nyaga about the fake receipt. He explained that the receipt in question was given to him by one of the business people around the Law Courts area. Upon receiving the explanation, the Hon. Magistrate ordered the arrest of all the people who were operating business around the Court area. However, Francis Gatery was unable to identify any one of them as the one who issued him with the receipt.
11. She stated that later Chief Magistrate Hon. Emily Ominde directed that the matter be reported to the police to enable them to carry out investigations. The matter was then reported to Buruburu Police Station.
12. On the 13th of June 2019, a Police Officer from Buruburu Directorate of Criminal Investigations asked, Mercy [the Accountant], and the Claimant to record their statements and give their specimen handwriting. They did.
13. The Claimant further stated that on the 30th September 2019, she was informed by the Chief Magistrate that the forensic examination of her specimen handwriting had revealed that she was the author of the receipt in question, and that, the matter was to be escalated to the Chief Registrar of the Judiciary. Further, on the 28th of October 2019, she received a letter from the Chief magistrate informing her that the Police had recommended that she be charged with a criminal offence alongside Francis Gatery and that she had forwarded the investigation report to the Director of Human Resources for action.
14. The Claimant further stated that on or about 7th November 2019, she was served with a suspension notice from the Chief Registrar of Judiciary through her head of the station. The letter indicated that the action taken was upon the premise that she had issued a forged receipt No. 4267445 on 3rd June 2019, of Kshs. 25,000, in Traffic Case No. 4977/2019, and that the investigations by the Police had implicated her.



15. She further stated that on 12th November 2019, she received a suspension letter dated 7th December 2019, indicating that she had been suspended from duty with effect from the date of the letter until finalization of her disciplinary matter.
16. On the 18th of November 2019, she wrote a letter to the Chief Registrar explaining her innocence on the accusations that had been levelled against her. Further, she wrote a letter to the Directorate of Criminal Investigation stating that she was dissatisfied with the Forensic Document Examination report made on the 30th of September 2019. The letter did not attract any response.
17. The Claimant further stated that she was constrained to engage a private Document Examiner for a report on whether or not she was involved in the authorship of the questioned receipt. Upon examination of her specimen handwriting and that on the questioned receipt, the examiner concluded that she wasn't the author of the receipt.
18. She testified that she was subsequently subjected to a Disciplinary hearing. Further, at the hearing she produced the private Forensic Examiner's Report dated 1st July 2019, but the Disciplinary Committee refused to accept it in evidence contending that the process before them was not equivalent to a court process. They further stated that they were to base their decisions on the evidence [a report] by the police expert. The Committee further indicated that they could not take evidence from the private Forensic Examiner as they could not allow an outsider to testify in the internal disciplinary process. Eventually, the Committee made a decision that her employment be terminated.
19. The Claimant stated that aggrieved by the decision to terminate her employment, she appealed against the same through a letter dated 8th February 2021. Further, the Respondent through its letter dated 28th June 2021, informed her that her appeal was considered but disallowed because it didn't raise any sound ground.
20. Cross-examined by Counsel for the Respondent, the Claimant testified that through the letter dated 7th November 2019, she was notified of the charges against her and asked to show cause why she could not be dismissed from employment on account of gross misconduct. She responded through a letter dated 18th November 2019.
21. She was subsequently invited for a disciplinary hearing which was adjourned severally because of the Covid-19 situation. Through a letter dated 6th August 2020, she was invited to a disciplinary hearing and in the said letter she was informed that she was at liberty to present a witness. However, it was emphasized in the letter that the witness must be from within the judiciary. At the hearing, she was not able to present a witness from the judiciary as none was willing. She further testified that the letter instructed her to supply the documents that she intended to rely on in her defence during the hearing. She had before the letter forwarded the documents to the Respondent.
22. She reiterated that during the hearing she asked to be allowed to avail the Forensic Expert but her request was declined as according to the Committee the proceedings before it were not equivalent to Court proceedings. In her view, they were eager to receive the evidence of the police expert to the exclusion of that of her witness.
23. She testified further that after the conclusion of the disciplinary hearing, she received a dismissal letter. In the letter the ground for the decision by the Respondent was expressly brought out, issuing a forged receipt. She appealed against the decision. She expected that she could be accorded a hearing before any decision was made on the appeal, however, this did not happen. She only received a letter dated 26th June 2021, informing her that the appeal had been considered and found to be lacking in merit. It was unfair for the Respondent to consider her appeal without hearing her first.



24. In her evidence under re-examination she stated that in her view she required an expert witness more than a Judicial Officer to support her defence in the circumstances of the case.
25. She further stated that she ought to have been heard first at the station level.

Respondent's Case

26. The Respondent presented RW1, Stephen Mutua, its Assistant Director of Human Resource Management and Development, to testify in support of its defence against the Claimant's case. The witness stated that the Claimant was given an Offer of Appointment by the Respondent as a Clerical Officer on 1st October 2008 vide an appointment letter dated 15th September 2008. She joined the Judicial Service with effect from 6th October 2008.
27. Later, through a letter dated 30th July 2009, she was promoted to the level of Clerical Officer (PLS 5) and transferred to Githunguri Law Courts vide letter dated 20th April 2021. Further, by a letter dated 20th January 2014, the Claimant was once again transferred and released to Makadara Law Courts.
28. The witness stated further that on the 5th of October 2015, the Claimant was promoted to the post of Accounts Assistant 1(PLS 9) by letter dated 4th November 2015. a position she was holding when the cause of action that led up to her dismissal and the Claim herein ensued.
29. He stated that on or about 5th June 2019, a lady, Loyce Wanjiru Kamau visited the Cash Office at Githunguri Law Courts. The lady had a Receipt No. 4267445 at hand which was issued to Francis Gateru Kihara on 3rd June 2019 in Traffic Case No. 4977/2019 for Kshs. 25,000.00. She Kamau sought to confirm the authenticity of the Receipt and whether the same originated from Makadara Law Courts. She then handed over the Receipt to Francis Otieno, the Cashier who then handed it to the Accountant, Mercy Migwi.
30. Thereafter, the Accountant headed to the Accounts Office and showed the Claimant the Receipt. The Claimant then requested the Accountant to confirm the authenticity of the Receipt by checking the Counterfoil Receipt Book (CRB) where all payments were originally recorded.
31. The witness stated that upon checking, they realized that the Receipt was issued on 11th March 2019 to one Ahmed Bille Ahmed for Kshs. 20,000/= being payment for petty crime (PCR) No. 1015 of 2009, a Police Forfeiture from Ruai Police Station.
32. Mercy Migwi and the Claimant perused the Court records at the Registry and discovered that Francis Gateru Kihara, Loyce Wanjiru Kamau's driver, was charged in Traffic Case No. 5686 of 2019.
33. Thereafter, the matter was escalated to the Court Administrator Ms Linda Thuma who then reported the same to the Chief Magistrate of Makadara Law Courts, Hon. Heston Nyaga. The Chief Magistrate then informed the Head of Station, Hon Emily Ominde of the existence of the matter who then directed that investigations be conducted by the Police.
34. The witness stated that the Head of the Station forwarded the said Receipt to the DCI stationed at Buruburu Police Station to ascertain who had issued it. This action was prompted by the fact that the station had experienced increased cases of forged receipts and the matter was therefore grave. Following the police report, on 13th June 2019 a Police Officer from the DCI, Buruburu visited the Accounts Office recorded statements and took the handwritten specimen of both the Claimant and the Accountant, Mercy Migwi. The specimens were taken to the Forensic Department Examiner to be compared with the forged Court Fine Receipt No. 4267445.



35. The witness testified that on 30th September 2019, the Document Examiner released his findings. The findings implicated the Claimant. The Forensic Document Examiner formed the opinion that the handwriting on the Court Fine Receipt and that of the Claimant's specimen handwriting were of the same author.
36. He stated further that the Report by the police expert recommended that the Claimant be jointly charged with Mr Kihara for forgery of a judicial document contrary to Section 351 of the Penal Code.
37. The witness argued that the Report from the DCI was based on an independent and professional investigation complete with an expert assessment and opinion on the authorship of the forged Receipt and there was therefore no reason for the Respondent to doubt the same. The Head of the Station therefore fully and exclusively relied on the Report in taking further steps.
38. Consequently, in October 2019 Honorable Ominde summoned the Claimant together with the Court Administrator, Linda Thuma and the Accountant Charge, Anne Njuguna and informed them that the report from the DCI identified the Claimant as the one who had issued the said forged Receipt because her handwriting was strikingly similar to the one issued to the Complainant's driver.
39. He contended that thereafter the Head of the Station forwarded the matter to the Director of Human Resources and Management for further action given the gravity and prevalence of the matter at Makadara Law Courts and informed the Claimant of the same vide letter dated 28th October 2019.
40. It was his evidence that upon review of the documents received from the Head of Station, Makadara Law Courts, the Chief Registrar of the Judiciary noted that the findings of the investigations carried out by DCI Buruburu implicated the Claimant and that her conduct amounted to a breach of integrity and was a corrupt practice which amounted to gross misconduct under Section D.7.2 (ix) of the Judiciary Human Resource Policies and Procedures Manual, 2014.
41. He added that under the Human Resource Policies Manual, Section D.7.2(ix) gross misconduct is described to include corrupt practices and breach of integrity.
42. By a letter dated 7th November 2019, the Chief Registrar of the Judiciary notified the Claimant of the report received in her office. She proceeded to frame a charge against her for issuing a forged receipt No. 4267445 on 3rd June 2019 from a court fine of Kshs. 25,000/= in Traffic Case No. TR 4977/19 which constituted a corrupt practice, breach of integrity and forgery.
43. The witness further stated that in the letter dated 7th November 2019, the Claimant was asked to show cause why she could not be dismissed from Judicial Service on account of gross misconduct. The Claimant was given fourteen (14) days to so do. Further, the letter also placed her under suspension from Judicial Service. She was informed that while on suspension she could only be entitled to receive an alimentary allowance, being a third (1/3) of her basic salary and not her monthly salary.
44. Subsequently, the Claimant responded to the Notice to Show Cause vide letter dated 18th November 2019 whereby she denied having issued the Receipt in question.
45. Further, by letter dated 25th November 2019 the Claimant informed the DCI that in her opinion, the report implicating her was false, inaccurate and in bad faith and requested for a second Forensic Document Examination.
46. He contended that by letter dated 27th November 2019 the Head of Station Makadara Law Courts, Hon. Ominde responded to the Claimant's response to the show cause letter and reiterated that the issue of fake receipts was rampant at the station and therefore an independent, thorough, objective and professionally conducted investigations needed to be carried out by the DCI.



47. Subsequently, the Claimant's matter was referred to the Human Resource Management Advisory Committee ("HRM Committee"), which deals with disciplinary matters regarding staff under job group JS 9 per Section D.4 of the HR Manual, and the Committee deliberated on the matter on 28th May 2020 and 25th June 2020.
48. The Committee thereafter recommended that the Claimant be invited for a disciplinary hearing. Consequently, she was invited for a disciplinary hearing scheduled for 24th August 2020.
49. The witness stated that under cover of a letter dated 1st July 2020, the Claimant forwarded a Forensic Document Examination Report conducted by Mr. Martin E. Papa and requested to have him as her witness during the disciplinary proceedings.
50. On 24th August 2020 the disciplinary hearing was held virtually because of the COVID-19 containment measures as announced by the Government. The Claimant reiterated that she did not issue the receipt in question and further that she was not party to any impropriety.
51. He testified that thereafter, the HRM Advisory Committee the findings and recommendations were placed before the Respondent's Human Management Committee on 7th December 2020. The HRM Advisory Committee concluded that the Police Report was not impartial and that the Claimant's Report exonerating her was more comprehensive than that of the Police. The Committee therefore recommended that the Claimant be given a benefit of doubt and hence be absolved of the charges and her suspension be lifted with full pay.
52. The findings and recommendations were placed before the Respondent's Human Resource Management Committee on 7th December 2020 which considered and reviewed the findings. It took a different view and recommended that the Claimant be dismissed from employment on account of gross misconduct.
53. It was further stated that the Respondent deliberated on the Claimant's, and considered the evidence that was submitted before the HRM Advisory and reached the determination that the charge of gross misconduct had been proved against the Claimant and therefore made the decision to dismiss the Claimant Summarily, with effect from 7th November 2019.
54. The Claimant was informed of the Respondent's decision to dismiss her from judicial service on 4th January 2021 vide a letter of even date. She was also informed of her right to appeal the decision which she did on 8th February 2021. The appeal was considered by the Respondent at its meeting held on 24th June 2021 and the same was disallowed for the reason that it did not raise sufficient grounds. The decision was communicated to the Claimant by letter dated 28th June 2021. She was also notified of her right to apply for review on grounds of discovery of new material facts which may affect the former decision. The Claimant did not apply for review of the proceedings.
55. The witness asserted that the Claimant was accorded a fair hearing right from the point where the police report implicated her for forgery up to the dismissal of her appeal by the Respondent. To wit, she was informed of her right to respond to all allegations against her as well as the right to appeal against, and review, the decision of the Respondent.
56. Cross examined by Counsel for the Claimant, the witness testified that he was present in the HR Committee that deliberated on the Claimant's matter but not as a member. He was part of the secretariat.
57. He further testified that disciplinary matters for staff members in the rank JS4- 11, fell under the authority of the Human Resource Management Advisory Committee.



58. The witness stated that the Claimant was allowed to present her private Examiner's report. It was considered though she was not allowed to present him as a witness. In the letter to her, she had been advised to avail witness[es] from within the judiciary. This restriction is aligned to the provisions of the *Employment Act* which allows accompaniment by a colleague [s].
59. The witness reiterated that the Advisory committee resolved that the Claimant be absolved of the charges and the suspension be lifted. They also formed the impression that the Report by the private Forensic Expert was more comprehensive than the one which had been prepared by the police.
60. The decision by the Advisory Committee was reviewed by the Respondent's Human Resource Committee. The Respondent did not place before the Court any document from which the reasons for the review can be discerned.
61. RW2, Martin Kitayi, a qualified Forensic Examiner working with the Directorate of Criminal Investigations testified that he prepared a report dated 12th June 2019. After examination of the specimen handwriting by the Claimant and the questioned receipt, he concluded that they were by the same author.
62. Cross examined by Counsel for the Claimant the witness testified that the machine that he used has an error rate of 0.005%. Various machines can be used for forensic examinations.
63. The witness acceded that sometimes Examiners encounter limitations that can yield incorrect results for example if the samples supplied are insufficient. In this matter, he didn't face any challenges.

The Claimant's Submissions

64. The Claimant's Counsel suggested three issues which in her view present themselves for determination in this matter, thus whether the claim is time barred; whether the Claimant's summary dismissal was unfair, improper and unlawful, and whether the Claimant is entitled to the prayers sought in his memorandum of claim.
65. Counsel submitted that under Section 90 of the *Employment Act*, the Claimant's suit herein cannot be held to be time barred. She was dismissed from employment on 4th January 2021 and the Claim herein filed on 21st September 2021, within the three years contemplated in the section.
66. It was further submitted that whenever an issue of wrongful or unfair dismissal is placed before the Court for interrogation, the Court considers the validity or justifiability of the reason for dismissal and procedural fairness. To support this point reliance was placed on the decision in *Iyego Farmers' Co-operative Society v Kenya Commercial Food and Allied Workers Union* [2015] eKLR.
67. It was submitted that under Section 47[5] of the *Employment Act*, the Claimant was supposed to prove that an unfair termination occurred. By denying the allegations that had been levelled against her through her letter dated 18th November 2019, she discharged her burden and then the burden shifted to the Respondent to justify the dismissal. To buttress these submissions, she placed reliance on the case of *Muthaiga Country Club v Kudheihwa Workers Union* [2017 eKLR].
68. Considering the material placed before this Court in its totality, it is easy to conclude that there was a justifiable reason to dismiss the Claimant from employment. Counsel urged the Court to specifically take into consideration the finding and recommendation by the Advisory Committee, and that the decision was reviewed without reasons being accorded to the decision.
69. It was argued that the dismissal was procedurally unfair for the reasons that; the Claimant was not allowed to present her expert witness to give testimony before the disciplinary committee; the



Respondent's Human Resource Management Committee reversed the decision of the Advisory Committee without providing reasons.

Respondent's Submissions.

70. Counsel for the Respondent identified three issues for determination; whether the Claimant's dismissal was founded on a valid reason; whether the Respondent adhered to due process in dismissing the Claimant; and whether the Claimant is entitled to the reliefs sought.
71. It was submitted that the Claimant was dismissed for a valid and justifiable reason. Section 43[2] of the *Employment Act*, 2007 provides that an employer is said to have a valid reason for the termination where the reason or reasons for termination of a contract of service are matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the termination.
72. Issuing of a forged receipt amounted to gross misconduct. Examination of the questioned receipt and the known handwriting of the Claimant by an independent expert revealed that the Claimant was the author of the receipt. The evidence of the expert was not controverted.
73. Counsel further submitted that in terminating the Claimant, the Respondent adhered to the procedure as set out in the law and judicial pronouncements. The Claimant in her testimony confirmed that she; received a charge and a letter inviting her to show cause why she could not be dismissed from service on account of gross misconduct; responded to the show cause letter and was subsequently invited to a disciplinary hearing scheduled on 24th August 2020; she was heard both orally and in writing; informed of the Respondent's decision and her right of appeal; and was notified that the appeal had been dismissed.
74. It was further submitted by Counsel that the Respondent demonstrated that the dismissal of the Claimant was lawful and in accordance with substantive and procedural tenets of law. Therefore, she is not entitled to any of the remedies under Section 49 of the *Employment Act*.
75. On the Claim for accrued pension, it was submitted that the Claimant is entitled to make a claim for the same under the *Retirement Benefits Act* and not the instant suit. The claim is premature.

Issues for Determination

76. I have carefully considered the pleadings, the evidence and the submissions by the parties herein and the following issues emerge for determination;
 - a) Whether the dismissal of the Claimant was fair.
 - b) Whether the Claimant is entitled to the reliefs sought.

Whether the dismissal of the Claimant from employment was fair.

77. It is now trite law that a Court confronted with a case to interrogate fairness in the dismissal of an employee from employment has to consider two statutory aspects, procedural fairness and substantive justification [fairness]. Procedural fairness relates to the procedure adopted in reaching the decision to terminate an employee's employment or dismiss an employee from employment. Substantive justification looks into the decision itself. Time and again this Court has held that the two aspects form the total unit of fairness. Consequently, the absence of any one of them or both in the termination or dismissal will by law render the termination or dismissal unfair.
78. Section 41 of the *Employment Act*, 2007 provides the statutory anchorage for procedural fairness. The section requires the employer contemplating the termination of an employee's employment or



summarily dismissing an employee from employment on grounds of, misconduct, poor performance, or physical incapacity to explain to the employee in a language that he understands, the reason stirring the intended action and extend to him the right to be accompanied by a fellow employee or a union representative of his choice during the explanation. Additionally, before terminating the employment or summarily dismissing an employee, the employer is obliged to hear and consider any representation that the employee or his representative may have. See *Naima Khamis v Oxford University Press [E.A] Ltd and Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2017] eKLR*, cited by Counsel for the Respondent.

79. In my view, in considering procedural fairness, the Court must where relevant not confine itself to the provisions of the section above stated only, but also consider relevant principles, procedures, and statutory and constitutional provisions. In mind, I have the tenets of natural justice, the Human Resource policies and procedures of an organization, Constitutional rights [the right to a fair hearing, and the right to a fair administrative action], and the stipulations of the Fair Administrative Actions Act.
80. The Respondent contended that contrary to the Claimant’s assertion it fully adhered to the canons of procedural fairness in that the Claimant; was informed of the Respondent’s intention to take action against her on account of gross misconduct; and was notified of the specific accusations levelled against her; responded to the show cause letter; made presentations both orally and in writing before the decision to dismiss her was taken; was availed the right of appeal and indeed appealed; and was notified of the outcome of the appeal.
81. A superficial consideration of the matter can easily lead the Court to agree with the Respondent’s stated argument. However, a deeper and broader consideration will direct the Court to a conclusion that procedural fairness was lacking in the process leading to the dismissal of the Claimant.
82. There is no dispute that at the time the disciplinary action was commenced and concluded against the Claimant, she was serving as Accounts Assistant 1[PLS 9]. Clause D.4 of the Respondent’s Human Resource Policies and Procedures Manual, 2014, provides;
- “Disciplinary Committees
- Disciplinary matters shall be handled by the following committees:
- i) A committee/ panel constituted by the JSC.
- ii) HRAC for staff in JS 9 and below as delegated by JSC.”
83. Undoubtedly, the Claimant’s disciplinary matter fell under the jurisdiction of the Committee provided for under clause 4[ii] mentioned above, the Human Resource Advisory Committee. The committee bears a delegated authority. It was common cause that true in conformity with the Respondent’s own Manual, the Claimant’s matter was placed before the Human Resource Advisory Committee. The Committee heard her on the 24th of August 2020 and with reasons found that she should be absolved from the charge, and the suspension that she was under lifted.
84. The above premise notwithstanding, the dismissal letter dated 4th January 2021 informed the Claimant that the Judicial Service Commission in its meeting held on the 10th December 2020 resolved that she be summarily dismissed. In my view, what the Respondent did was a review of a decision by a committee to whom it had delegated authority. In legal and organizational contexts, delegation of authority usually comes with certain conditions or limits, and the body delegating authority may have the power to modify decisions made by the committee. However, the modification must be;



- with reason; in accordance with rules, regulations or agreements in place; statutory provisions and Constitutional imperatives. It shouldn't flow from whimsical arbitrariness by the delegating entity.
85. To just vary the findings of a committee discharging a delegated function, without giving any reasons for the varying diminishes the importance of that Committee and trivializes the instrument establishing the committee. Public confidence in the Committee unnecessarily gets injured. The legitimate expectation of those served or to be served by the Committee to get services of reasonable quality, and justice, get eroded.
 86. I have carefully considered the material placed before me and conclude that none at all demonstrates that the Respondent; had the necessary authority to vary the decision of the committee, and if it had, under what circumstances it could; followed a certain provided procedure and; gave the reasons for the decision. The Respondent's witness admitted that the Respondent didn't place before this Court, minutes for the meeting in which the Committee's decision that the Claimant be absolved and her suspension lifted, was varied to a dismissal decision.
 87. Considering the fact that the Respondent decided to change findings which were in favour of the Claimant to her prejudice, Article 47 of *the Constitution* which bestows upon every person a right to fair administrative action, and the stipulations of Sections 4 and 6 of the Fair Administrative Actions act, placed a legal duty upon the Respondent to hear the Claimant first and give reasons for the prejudicial decision. The Respondent did neither of these.
 88. In administrative law, a right to a fair hearing is vital. Its vitality cannot be wished away or trivialized.
 89. In the upshot, I find without hesitation that the summary dismissal of the Claimant from employment was procedurally unfair.
 90. Section 43 of the *Employment Act* places a duty upon the employer in a dispute like the instant one to prove the reason[s] for the termination of an employee's employment. Section 45 of the Act places a further burden on the employer to demonstrate that the reason[s] was fair and valid, otherwise, the termination shall be deemed unfair by operation of the law.
 91. Legal burdens are only dischargeable by the production of evidence unless there is an admission on the matters that need to be proved or the Court has taken judicial notice of the matter[s]. Hereinabove, this Court has found that the Respondent failed to place before it, material from which the reason[s] for the dismissal can be discerned considering that the Committee which heard the Claimant had found in her favour. Reasonably, the reasons would be brought forth by way of production of the minutes or any record of the Respondent's meeting that was purportedly held on the date mentioned in the dismissal letter. In the absence of the minutes or the record, I am only left with the inescapable conclusion that the Respondent failed to prove that the decision to dismiss the Claimant was substantively justified.
 92. Before I depart from this subheading I find it necessary to say this, and employers should take heed, A person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of esteem. Post 2007, the law changed to recognize the social reality. See *Johnson v Unisys Ltd* [2003]1 AC 518.

Of the Reliefs Sought

93. The Claimant sought inter alia for reinstatement. An order for reinstatement is one of those reliefs contemplated under Section 49 of the *Employment Act*. This Court is cognizant of the fact that the remedy can only be availed subject to the statutory considerations set out in the section. However, to argue that the remedy should be granted as a last resort remedy as the Respondent has, with great respect is a misstatement. The stated provision of the law, apart from providing the considerations does



not provide that the remedy is a last resort remedy. In fact, in other jurisdictions like South Africa from which we have borrowed our Employment and Labour Relations law, heavily, expressly have the relief of reinstatement in their statutes as a primary remedy. This Court hopes that the legislature will see the need to make the stipulations regarding the remedy in our Kenyan situation more clearer.

94. I have carefully considered the material placed before me and considered the premises that emerge therefrom, including my view that in the circumstances of the matter, the decision by the Advisory Committee was right, and conclude that the justice of this matter requires that the Claimant be reinstated. I hereby direct the Respondent to reinstate the Claimant to the position she was serving at the time of her suspension, without loss of benefits or seniority.
95. In arriving at the foregoing decision, this Court has taken into consideration the desire of the Claimant, the practicability of the reinstatement considering that the Respondent is a large employer, and the position that she was serving in before the separation.
96. Having found as I have that the order of reinstatement commends itself as the most appropriate relief in the circumstances of this matter, I find it unnecessary to proceed to consider the other reliefs sought.
97. In the upshot, judgment is hereby entered for the Claimant in the following terms;
 - (i) A declaration that the summary dismissal of the Claimant from employment was procedurally and substantively unfair.
 - (ii) An order directing the Respondent to reinstate the Claimant to the position she was serving at the time of her suspension, without loss of benefit or seniority.
 - (iii) Costs of this suit shall be in favour of the Claimant.

READ, DELIVERED AND SIGNED THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE.

In the Presence of;

Ms. Sitati for the Claimant.

Ms. Saina for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

