



**Kisang v Judicial Service Commission (Cause E521 of 2020)  
[2022] KEELRC 4857 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4857 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E521 OF 2020  
K OCHARO, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**PETER KIPKEMOI KISANG ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. At all material times, the claimant was an employee of the respondent up until the December 9, 2019, when his employment was terminated. Holding that the termination was wrongful, unlawful, unfair and in breach of his fundamental rights, he sued the respondent through a memorandum of claim dated September 8, 2020, seeking the following reliefs:
  - (i) A declaration that the termination was unlawful, wrongful and unfair, and a breach of the claimant's fundamental rights under the *Constitution* of Kenya;
  - (ii) Reinstatement of the claimant into service without loss of any benefit;
  - (iii) Compensation for unfair and unlawful termination;
  - (iv) Payment of any unpaid salaries, allowances and benefits;
  - (v) General damages for defamation;
  - (vi) Costs of the suit;
  - (vii) Interest on the sum awarded at court rates;
  - (viii) Any other relief which is just and fair to award the claimant.



2. Contemporaneously with the filing of the memorandum, the claimant filed a witness statement and documents under a list dated 8<sup>th</sup> September, documents that he intended to place reliance on in fortification of his case.
3. Upon being served with summons to enter appearance, the respondent did enter appearance by filing a memorandum of appearance dated the November 1, 2020, and subsequently filed a response dated November 6, 2020, to memorandum of claim.
4. In the response, the respondent denied the claimant's cause of action and entitlement to the reliefs he has sought. There was a joinder of issues, and the matter got destined for hearing on merit.
5. The respondent filed a witness statement dated November 6, 2020, by one Peter Bunde an assistant director human resource management and development and a couple of documents under its list of documents of the even date.

### **The Claimant's Case.**

6. At the hearing, the claimant adopted the witness statement hereinabove mentioned as his evidence in chief and sought that his documents be admitted as documentary evidence. There was no objection from the respondent, consequently the statement and the documents were so adopted and admitted respectively.
7. He presented his oral evidence in chief on matters out of the statement, and the documents that in his estimation needed clarification, before he was cross examined by counsel for the respondent.
8. The claimant came into the employment of the respondent on the September 15, 2008 as a clerical officer. In the course of his employment he worked in various stations and rose through ranks to the position of executive officer 1 PLS 11. At the time of dismissal, he was serving as the executive officer in charge of Nanyuki law courts.
9. He contended that the sails in his employment were smooth till towards the end of the year 2016 when storms set in. In the month of September 2016, his relationship with the then Chief Magistrate Nanyuki law courts, started deteriorating, she visited frustrations on him.
10. On the September 30, 2016 she wrote a letter to him, levelling allegations against him and required that he renders an explanation thereon. The explanation was being sought over issues that he had a one on one discussions with the honourable magistrate. This notwithstanding, he obliged and offered the same in writing.
11. Subsequently, he came to learn that the honourable magistrate had on the November 15, 2016, convened a leadership and management team meeting at Sportsman hotel without inviting him and/or notifying him of the same, notwithstanding that he was a member of the team by virtue of his position.
12. The claimant contended that in the meeting it was resolved that he be transferred from the station. Upon basis of the decision, the honourable chief magistrate proceeded to make a request to the regional assistant director – human resource and administration for the transfer.
13. The claimant stated that the letter by the honourable magistrate was done on the March 22, 2017, coinciding with the time when he was scheduled for a promotional interview. He alleged that the timing of the letter was all telling, malice and mischief on the part of the author.
14. The request for the transfer was declined by the chief registrar of the judiciary on the reason that the request prompted by conduct on the part of the claimant, that was in nature gross misconduct, and therefore it wouldn't be proper for the transfer to be effected on that basis.



15. He asserted that this turn of events did sit well with the honourable chief magistrate. She started lobbying everybody to be against him.
16. On the June 7, 2017, the claimant got his promotion. However, he did not get to celebrate the same. On the July 17, 2017 he received a notice to show. The notice to show cause had the following allegations against him.
  - “1. On Saturday, September 3, 2016, you allegedly and irregularly disposed of court exhibits which were in the exhibits store contrary to the *Public Procurement and Asset Disposal Act* [2015] as well as old mature trees that were growing around the court building without authority from the presiding judge or the head of the station; and
    - (i) You failed to surrender proceeds of that sale to the accounts office for accountability purposes.”
17. The claimant alleged that he was not supplied with better particulars of the allegations, and or evidence thereof. That the letter from the presiding judge dated April 16, 2017, to the Chief Justice clearly indicated that the exhibits were in respect of pending cases, yet no details of the matters were given.
18. He alleged that he was not given any particulars of the mature trees that were alleged to have been sold by him. According to him the only mature trees felled at the court station had been given to the prison department. The trees were cut and so given with the knowledge and blessings of the leadership of the station.
19. Nonetheless, he responded to the show cause letters through his dated August 3, 2017 and August 14, 2017, with the limited information he had.
20. Four months after his response, he received a letter dated September 29, 2017, [the charge sheet]. The same had an additional accusation to the effect that he failed to prepare an inventory of exhibits, photograph them and issue a public notice as directed by the head of the station. The additional allegation was raised notwithstanding that the inventory had been taken and a public notice issued. The charge sheet issued contemporaneously, with a letter of interdiction from the Chief Justice. The letter put him on half pay until February 2019. The claimant responded to the charges against him through his letter dated December 15, 2017.
21. Through its letter dated April 3, 2018, the respondent informed him of its decision that he appears before its human resource management committee for an oral hearing on a date to be communicated. Subsequently, the hearing got slated for the May 22, 2022, however it was rescheduled to a latter date without any reasons being given to him for the same. And thereafter the hearing didn't kick off on various dates, at the instance of the respondent. Eventually the hearing commenced on the February 14, 2024, a period of 7 [seven] months, from the date when it was first slated to commence.
22. On the February 27, 2019 he received a letter of suspension from the chief registrar of judiciary. At this point his salary was stopped.
23. The claimant asserted that disciplinary committee apparently had a predetermined on his fate. They locked out witnesses who would have given evidence exonerating him from the accusations, for instance Honourable Evanson Ngigi.
24. He further alleged that the disciplinary committee did not allow him an opportunity to adequately / properly cross-examine the respondent's witnesses to test the veracity of their allegations. The only



witnesses who were allowed to testify before the committee were those who had done statements under the supervision of the Chief Magistrate, Lucy Mutai, his accuser.

25. The claimant contended that the disciplinary committee ignored the letters from the prison department acknowledging receipt of the wood, letter whose contents would have exonerated him. His request for the committee to summon the relevant officers from the prison department to shed light on the allegations with respect to the trees, was turned down.
26. He was issued with a dismissal letter on the December 9, 2019 terminating his services. He contends that the dismissal letter did put forth reasons for the dismissal as failure to exercise due diligence, care and attention and disregarding the need to carry out duties assigned to him with highest standards of professionalism. These are grounds that were never the subject matter of the disciplinary process.
27. Under cross examination by counsel for the respondent the witness acknowledged that the leadership management team met on the November 15, 2016, and at the meeting one of the items that were discussed was the allegation that he had disposed of exhibits, and that the committee recommended his transfer from the station. The chief registrar declined the recommendation as some investigations were going on.
28. He admitted that he was served with a show cause letter dated July 17, 2017, and given an opportunity to respond. In his response, he pointed out the need, and requested, for better particulars.
29. Subsequently, he received an interdiction letter dated November 29, 2017, accompanied by a charge sheet.
30. At the hearing he was given an opportunity to cross examine the witnesses. He too was given an opportunity to refer to the documents that were being relied on.
31. The disciplinary matter was slated for defence hearing on the July 27, 2018. He did not avail witnesses because the notice was too short.
32. The letter from the prisons department was through his head of station.
33. In his evidence under re-examination, he stated that the letter from prisons was received by the Chief Magistrate on the August 3, 2017. It was addressed to her.
34. On the July 23, 2017, He received an invitation for his defence case that was slated for the July 26, 2017. He asserted that he had given the disciplinary committee notice that he intended to call a witness, the officer in charge of prisons Nanyuki. However, he was not given an opportunity to call the witness.
35. That though a transfer is not a disciplinary action, it was stirred by the allegations that had been levelled against him by the Honourable magistrate.

### **The Respondent's Case.**

36. It was the testimony of the respondent's witness that the claimant was first employed as a clerical officer on the October 7, 2008, and was subsequently promoted to the rank of executive officer 1 [PLS 11] with effect from May 17, 2017.
37. On the November 15, 2016 the Nanyuki court leadership and management team [LMT] held a meeting that was informed of the claimant's misconduct of;
  - (i) illegally and irregularly disposing of exhibits as well mature trees and failing to surrender the proceeds to court.
  - (ii) failing to surrender proceeds of that sale to the accounts office for accountability.



38. He stated that on February 2, 2017, the Chief magistrate Nanyuki law courts, wrote a letter to the regional assistant director – human resource and administration, central / south rift region requesting for a transfer of the claimant from the station.
39. That on the April 16, 2017, the Hon Lady Justice Mary Kasango, then the presiding judge of the High Court wrote to the Chief Justice informing him of the allegations against the claimant, for his action.
40. The witness stated further that the claimant was issued with a notice to show cause on the July 17, 2017, to which he responded through a letter dated August 3, 2017.
41. Pursuant to the provisions of paragraph 16, part iv, third schedule of the *Judicial Service Act*, the claimant was interdicted on the November 29, 2017.
42. Subsequently, the claimant was duly served with the charges framed against him on the December 4, 2017 and his response to the same was received on the December 15, 2017. Dissatisfied with the response, the Chief Justice escalated the matter to the respondent as required by paragraph 25 [2] part iv, third schedule of the *Judicial service Act*.
43. Through a letter dated April 3, 2018 that was issued pursuant to part iv, third schedule of the *Judicial Service Act*, 2011, the claimant was informed of the decision to have disciplinary proceedings commenced against him.
44. The witness contended that the claimant was furnished with all the documents that were to be relied on during the proceedings. The documents were forwarded through his advocate under cover of a letter dated February 7, 2019. The claimant was invited to attend a disciplinary hearing on February 14, 2019.
45. That the claimant appeared for two further hearings. he was allowed to cross examine witnesses, present his case, and make submissions at the end of the hearing. The respondent’s report dated December 2, 2019 is testament of this.
46. The respondent in its meeting held on December 6, 2019, deliberated on the claimant’s case, and upon evaluating the evidence and information tendered by its human resource management committee was satisfied that gross misconduct had been proved against the claimant. The claimant was dismissed through a letter dated December 9, 2019.
47. Subsequently, the claimant sought for a review of the committee’s decision through his letter dated January 17, 2020. The application was deliberated on by the respondent, but was found to be without merit.
48. Cross examined by counsel for the claimant the witness stated that he was not at any stage involved in the disciplinary proceedings relating to the claimant. He was relying on information from secondary sources.
49. Those who participated in the proceedings are still working, in the Judiciary, and they could be available to testify.
50. The complainant was Honourable Lucy Mutai, the then Chief magistrate Nanyuki. The matter was initiated through a meeting that was convened by her.
51. An executive officer of a station is a member of LMT by virtue of his position. The claimant was not invited to attend the LMT meeting that was held on the November 15, 2016. He would not tell whether or not the claimant was notified that he was going to be a subject of discussion in the meeting.



52. The decision to have him transferred emanated from the proceedings of the LMT meeting. He was being transferred because he had been identified with a misconduct. It was possible for the LMT to recommend for a disciplinary action against the claimant, they chose not to.
53. The minutes of the committee [LMT] are all indicative that they intended that the claimant be transferred, noting move.
54. The witness stated that the initiator of the complaint was the head of the station while the claimant was the head of staff. There is a possibility that there would be conflict between the two officers.
55. While the disciplinary proceedings were going on, Honourable Mutai testified twice. She first testified on the February 14, 2019. In her second testimony, that was taken on the February 26, 2019, she was allowed to present a letter dated same date by one Peter Mwangi.
56. The witness admitted that during the hearing new documents were introduced.
57. The witness testified that when the Honourable Chief Magistrate wrote to the human resource director central and north region, she did not give any specific allegations against the claimant. This prompted the directorate to through an email by Cicilia Thunge to request for specifics from the honourable magistrate.
58. The witness admitted that the grounds that he has placed fourth in his witness statement turned evidence in chief as the grounds that led to the dismissal of the claimant are not the grounds that are obtaining on the letter of dismissal. However, the letter of dismissal captures the grounds differently. There is no difference.
59. The specifics of the exhibits that were allegedly sold have not been given at all.
60. The witness testified that at the time of the disciplinary proceedings there was an assets disposal committee at the station. It was headed by Hon Ngigi. However, he would not be able to confirm whether or not Honourable Ngigi did testify before the disciplinary committee.
61. The witness asserted that the claimant did not merit for elementary pay. However, pushed further, he stated that the same was a right under the manual.
62. In his evidence under re-examination, the witness testified that the resident judge is the chairperson of the LMT. The team deals with administrative matters in the station. Normally, a member of staff against whom accusations have been levelled receives no audience before the committee. The chief registrar halted the transfer of the claimant to allow the disciplinary issue get handled first.
63. The disciplinary committee disallowed the evidence by one Mr Mwangi because it amounted to hearsay.
64. The claimant did not make any formal request for Honourable Ngigi to appear before the disciplinary committee.

### **The Claimant's Submissions.**

65. The claimant's counsel identifies three broad issues as those presenting themselves for determination in this matter thus;
  - (i) Whether a valid reason to dismiss the claimant has been proved;
  - (ii) Whether due process was followed in dismissing the claimant;



- (iii) What are the appropriate reliefs?
66. On the first issue, counsel submitted that the dismissal letter dated December 9, 2019 put forth the reason for dismissal as gross misconduct. He contends that there lacked specificity as regards the elements of gross misconduct.
67. It was submitted that the claimant was dismissed inter alia on a charge that he illegally and irregularly disposed of exhibits, a charge that borders criminality. However, keenly looking at the material that was availed all through in support of the charge, none of them identifies the exhibits specifically. It is unfair that all along the claimant was expected to answer to charges of disposing of unknown exhibits.
68. It was further argued that the respondent's evidence regarding the sold exhibits was contradictory. The charge sheet and the various notices to show cause were to the effect that the exhibits were disposed from the exhibit store. A custodian of exhibits at the station, Ms Catherine Kawira, appeared and testified before the disciplinary committee. In her testimony she stated that none of the exhibits from the exhibits store were missing. According to her the only exhibits that were missing but later returned into the store were jikos and chang'aa drums. They were outside the court yard. The witness did not mention that the claimant did sell any exhibits as was alleged.
69. The letter by the then resident judge Nanyuki High Court, dated April 16, 2017 claimed that the exhibits that were allegedly sold were in respect of pending cases. In the circumstance nothing could have been easier for the honourable judge than to specify the cases and the exhibits.
70. As regards the accusation of illegally and irregularly disposing of mature trees, it was submitted that it is common cause that there was a request from the prison department to judiciary for fencing posts. Too that the court's parking lot was in bad shape and needed to be renovated. Further that some old trees in the compound were hanging dangerously posing a risk at the parking yard.
71. However, the point of departure was whether the trees cut from the court compound were given to the prison department or were disposed of elsewhere. The photos that the claimant presented were all telling, the trees were cut by prisoners, and ferried by a prison department's motor vehicle. Beyond the photographs, the department wrote to the Chief Magistrate on the August 2, 2017 acknowledging receipt of the posts and firewood.
72. The disciplinary committee demonstrating outright bias when it without any proper basis chose to ignore the letter from the prison department on basis that the claimant's accuser, the Chief Magistrate had asserted that she had not seen it. The committee's holding that the letter was not reliable as it was written a year after the alleged delivery, was without justification and difficult to understand. the holding notwithstanding, the committee allowed the Chief Magistrate to introduce a letter written after the commencement of the hearing and authored by a person who was not present at the time the posts were delivered.
73. It was further submitted that the committee with a deliberate intention ignored the exculpatory evidence infavour of the claimant, for instance the evidence of its own witness, Cyprian Nkunja Mutua.
74. The claimant asserted that the third ground of failure to prepare an inventory of exhibits was an afterthought the same having been introduced mid-way the disciplinary process. The evidence before the committee was clear, the duty of taking the inventory belonged not to him.
75. Section 43 of the *Employment Act* bestows upon an employer the duty to prove the reasons for the termination of an employee's employment, and section 45 to prove that the reason[s] was valid. The evidence tendered by the respondent both before the disciplinary committee and this court tend to



support the claimant's case. The court should find that there was no valid reason for the dismissal. Reliance was placed on the case of *Muthaiga Country Club v Kudheiba Workers* [2017] eKLR.

76. The claimant further submitted that the disciplinary process leading to the termination of the claimant was not procedurally fair. Inexplicably, the disciplinary process against the claimant took a period of more than two years. An inordinate delay in conclusion of a disciplinary amounts to non-adherence to procedural fairness. To buttress this submission, the courts holding in *Jacqueline M Mutiso v Kenya Revenue Authority* [2021] eKLR was cited.
77. The introduction of new evidence mid-way the disciplinary proceedings was in breach of the tenets of natural justice and an ambush.
78. The claimant was served with an invitation on July 23, 2019 for a hearing scheduled for the July 26, 2019 giving him only 2 days to prepare. The notice was too short to enable him avail witnesses, since those he intended to call were public servants.
79. Reinstatement as a remedy for unfair termination is provided for under the provisions of section 49 and 50 of the *Employment Act*. The instant case is a perfect one where reinstatement should be granted. The respondent is a public entity with no personalized between employer and the employee. The respondent has more than one hundred stations, it can use its discretion to deploy the claimant to one of them, different from the Nanyuki station. To buttress this submission, reliance was placed on the Court of Appeal holding in the case of *Telkom Kenya Ltd v Paul Ngotwa*, thus;

“As pointed the industrial court ordered reinstatement. In his submissions, counsel for the appellant stated that the remedy of reinstatement should not be readily granted. We partly agree with him on that. A personal employee or an employee of a small firm who has been dismissed or whose services have been terminated should not be imposed on his employer. That would be casting such employer into servitude which is against public policy. We, however, do not agree with the said submissions where the employer, like in this case is a large organization. In large organizations where the sacked employee is not the immediate junior and or does not, on a day to day basis, deal with the officer he has clashed with, or where he can be redeployed to another department, and especially so in a country like ours where employment opportunities are very hard to come by, reinstatement is the most efficacious remedy. Before ordering it however the court must consider the employee's antecedents and age.”

80. It was submitted that the claimant should thus be awarded payment of unpaid salaries allowances and benefits. The claimant was not paid his salary from the date of suspension to the date of dismissal. He was also paid half salary from the date of interdiction to the date of suspension. He was denied the alimentary allowance which was due to him during interdiction.
81. The court was urged to, in the event that it does not find the matter herein a fit one for an order for reinstatement to award compensation pursuant to section 49 of the Act to the fullest extent contemplated thereunder, 12 months gross salary.

### **The Respondent's Submissions.**

82. Counsel for the respondent submitted on the issue whether there were valid reasons for terminating the claimant from employment. On this he submitted that the reasons that formed basis for the dismissal were valid and justified.



83. Counsel submitted that the claimant was an executive officer and a member of the asset disposal committee and part of his duties as a member of assets disposal committee and part of his duties *inter alia*, disposing of any store, equipment and in this case held by the station.
84. In the disposal of the stores, he was bound by the provisions of the [Public Procurement and Disposal Act](#). That contrary to the provisions of section 164 of the [Public Procurement and Disposal Act, 2015](#), the claimant proceeded to dispose of exhibits without the authority of the head of the station, and failed to account for the proceeds thereof.
85. It was further submitted that the claimant did not deny felling trees nor did he table any evidence that he had authority from the Chief Magistrate. The authority was imperative before any disposal.
86. The claimant's conduct was contrary to the conduct prescribed in the Judiciary Human Resources Policies and Procedures Manual, the Judicial Code of conduct and Ethics, the [Judicial Service Act](#), 2011 and the [Public Procurement and Disposal Act](#). It was a conduct which rightfully attracted the dismissal. To buttress this point, the Canadian Supreme Court Case, [MC Kinley v B C. Tel](#) [2001] RSCP was cited.
87. It was submitted further that in investigating the appropriateness of the respondent's decision, this court should abide the approach elaborated in the [Halbury's Law of England](#), 4<sup>th</sup> Edition Vol 16[1B] paragraph 642, thus: -
- “...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer would have decided to dismiss on those facts. The basis of this approach [the range of reasonable response test] is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”
88. It was argued that the claimant failed at the disciplinary hearing to explain to the satisfaction of the human resource management committee that he had irregularly disposed of exhibits and trees. He therefore failed to exonerate himself from the charges that had been levelled against him. This being the case, his conduct was in breach of his employment terms and that could sanction as it did a summary dismissal under the provisions of section 44 of the [Employment Act](#), 2007.
89. On procedural fairness, it was submitted that the claimant was accorded a fair hearing. The decision of [Republic v Commission on Administration of Justice exparte Stephen Gathuita Mwangi](#) [2017 eKLR] was cited to support this submission.
90. The claimant was notified of the allegations that were being levelled against him, he was given an opportunity to respond to the show cause letter and the charge sheet, and so he did. At the disciplinary hearing he was accorded a chance to cross-examine witnesses.
91. The claimant was accorded an opportunity to offer his defence, which he did. His right of accompaniment was adhered to. He was given a chance to avail witnesses to support his case.



92. The committee took into consideration his representations before it made the decision to have his employment terminated.
93. On the reliefs sought, it was argued that the respondent having demonstrated that the dismissal was on valid and fair grounds, and that fair procedure was adhered to, the claimant is not entitled to any of those reliefs he has sought therefore.
94. The order for reinstatement as sought by the claimant does not meet the threshold under section 49 [4] of the *Employment Act* which dictates that the court should take into consideration the practicability of recommended reinstatement or re-engagement.
95. It was contended that in the instant case, the claimant has been out of service from 2017 when he was interdicted and eventually dismissed in 2019, a period of more than 3 years and that it is therefore impractical to order for reinstatement. On this, the respondent relied on a number of authorities, *inter alia*, *Lawrence Onyango Oduor v Kenya Commercial Bank Limited* [2014] eKLR, *Kenya Aviation / workers Union Kenya & 3 others* [Civil Appeal No 46 of 2013].
96. As to whether the order of back pay for the alleged withheld salary during interdiction should be available to the claimant the court was urged to consider paragraph 16 [3], part iv, 3<sup>rd</sup> schedule of the *Judicial Service Act*, No 1 of 2011 which provides:

“Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this schedule, the whole of any salary withheld under subparagraph [2] shall be restored to them upon termination of such proceedings.

This provision is in a tone forbidding an order in the nature sought, in the circumstances of this matter.

### **Analysis And Determination.**

97. From the material placed before this court by the parties herein, the following broad issues emerge for determination thus:
- a. Whether the dismissal of the claimant from employment was fair;
  - b. Whether the claimant is entitled to the reliefs sought;
  - c. Who will bear the costs of this matter?

### **Whether The Dismissal Of The Claimant From Employment Was Fair.**

98. Whenever a court is presented with the task to interrogate, and decide on the fairness of a termination of an employee’s employment or summary dismissal of an employee from employment, consideration of two aspects become imperative, the procedural and substantive fairness.
99. In the case of *Judicial service Commission v Beatrice Nyambane Mosiria* [2020] eKLR, the Court of Appeal stated:

“17. .... whether or not a termination is considered fair will depend on whether the reason[s] for the termination are justified and the procedure for dismissal was fair. See the case of *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwonna* [2015] eKLR .....



100. Section 41 of the *Employment Act*, 2007 provides the structure for procedural fairness in the Kenyan situation, however as this court has stated in the past, this provision cannot be read in isolation from the relevant constitutional provisions and more specifically those that relate to fair hearing, the right to fair administrative actions, the provisions of the *Fair Administrative Actions Act*, and the tenets of natural justice, where an employer has a disciplinary policy and procedure the same shall be looked at using the statutory and constitutional lens obtaining under the statutes and the *Constitution*.
101. Fair procedure would entail three components, notification/hearing – the employer contemplating to sanction an employee has to inform the employee of the intention and the grounds stirring that intention, hearing component – the employee shall have to be given an opportunity to make representations on the grounds, intertwined in this component is the employee’s right to accompaniment, lastly consideration component – the employer shall take into consideration the representations by the employee before making a decision.
102. The components are clearly inherent in the stipulations of part iv of the *Judicial Service Act*.
103. The claimant contended and it was not disputed that on the November 15, 2016 the Honourable Chief magistrate, Hon Lucy Mutai convened a Nanyuki Law Courts leadership and management team meeting on the November 15, 2016, she neither invited him to nor informed him of, this meeting. The claimant was discussed in the meeting and it was resolved that he be transferred from that station. The respondent’s witness in his testimony under cross examination while admitting that the meeting was held in the manner alleged by the claimant, asserted that he wouldn’t have been invited as he was to be discussed. I find considerable difficulty in understanding the reasoning, how can it be that a person being accused of a misconduct in the performance of his duties like the claimant was, cannot be given an opportunity to present his version of facts concerning the allegations yet known that the deliberations and outcomes of the LMT, would go into the record of the officer and have an impact on his or her career?
104. In an employment relationship and environment, there must thrive good faith, candidness and forthrightness. This was expected of the leadership management team, but apparently it was lacking.
105. The happenings at the leadership management team meeting might not count a lot in the consideration of the procedural fairness of dismissal from employment of a judicial officer or staff, but for sure they do in the consideration of substantive fairness of the decision to dismiss and more especially considering that the complaint was initiated by the station head, the chief magistrate.
106. By reason of the foregoing premises, I am not prepared to agree with the claimant’s counsel’s submissions that this is a matter considerable under the procedural fairness realm. In the case of *Chief Justice and President of Supreme Court of Kenya & Judicial Service Common v Bryan Mandila Khaemba*, civil appeal No 522 of 2019, the Court of Appeal pointed out where under the *Judicial Service Act*, disciplinary proceedings start, thus:

“ 13. Further, that it was not in contention that disciplinary proceedings commenced the moment the Chief Justice framed the charge against a Judicial officer as laid down under paragraph 25 [1] of the third schedule to the Judicial service as was held in *Judicial Service commission v Gladys Boss Shollei & another* [2014] eKLR where the gist of the case was paragraph 25 of the third schedule which dealt with proceedings of dismissal of Judicial officers and staff showed that disciplinary proceedings were initiated when the Chief Justice



framed the charge which was then forwarded to the concerned officer and a committee or panel appointed to investigate the matter.”

107. Section D 7.2.2[1] of the judiciary human resource policies and procedures manual provides for pre-charge notice to show cause. Pursuant to the provision, the chief registrar of judiciary issued to the claimant a notice to show cause dated July 17, 2017 which brought out the accusations against him.
108. The pre- charge notice to show cause in the context of section 41 of the Act, forms part of the notification component of the fair process contemplated thereunder. Regarding the nature the notification should take, the court in Republic v Commission on Administrative Justice exparte Stephen Gitbuita Mwangi [2017] stated and I agree;
- “..... The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice. Notifications of proceedings or the proposed decision must be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise, the only proper course will be to postpone or adjourn the matter.”
109. The claimant contended, and I agree with him that the show cause letter lacked specificity as regards the exhibits the subject matter therein. In fact, from the onset the claimant took issue with the lack. In his response dated August 3, 2017, he stated in part;
- “..... again, which specific exhibit was lost and also the specific case files that were affected as a result of the alleged sale, I have also not been summoned to any of the three [3] Magistrates Courts and even the High Court to explain the whereabouts of any missing exhibits attributed to the alleged misconduct whenever cases came for mention or hearing.”
110. The Chief Magistrate’s letter dated September 30, 2016 has been brought to the attention of this court, the letter preceded the notice to show cause, equally it dealt with the issue of the exhibits in a manner devoid of specificity, and that was general. The issue of the exhibits came up in the LMT meeting of November 15, 2016, still no details were brought out concerning the specific exhibits that the claimant allegedly sold. Only a general statement was made.
111. Section 7.2.2. commands that a report from the immediate supervisor concerning the disciplinary proceedings against an officer or staff be factual and complete. This stipulation is there to facilitate a fair process in favour of the officer/staff. It follows therefore that where circumstances of a case required specificity as was in this case, the same was a must give.
112. I have carefully considered the charge sheet, just like the Chief Magistrate’s letter, the letter by the resident judge, and the show cause letter, the same did not have sufficient particulars or at all that would enable one know the exhibits that were the subject of the accusations against the claimant.
113. I have gone through the report of the human resource and management committee on the disciplinary proceedings, and it is not difficult to state that there was no point at which the particulars of the exhibits were particularised to enable the claimant adequately respond to the allegations that were levelled against him.



114. Through a letter dated December 7, 2018 the claimant's counsel requested to be furnished with all documents in respect of the disciplinary case. The respondent forwarded the same under its letter dated February 7, 2019. From the proceedings [see paragraph 35] the committee allowed production of a letter dated February 26, 2019, one which was apparently authored after the documents had been released to the claimant, and the disciplinary process started.
115. The claimant contended that the letter was an afterthought, and brought mid-way to seal the gaps in the respondent's case. This court sees no justifiable reason that lead the committee to allow introduction of a new document in the middle of proceedings, without care that the document was not among those that had been given to the claimant to enable him prepare for his defence.
116. In determining procedural fairness, the test is whether there was substantial compliance with the overall obligation by the employer to allow an employee an opportunity to rebut the allegations of misconduct and bring to the attention of the employer any relevant information before a final decision was taken. By reason of the premises foregoing, I hold there wasn't, in the claimant's disciplinary case.
117. In the upshot, I hold that dismissal of the claimant from employment was not procedurally fair.
118. In order to establish that the termination of the contract of service of an employee was substantively justified, the employer is enjoined to discharge the burdens bestowed on an employer by the provisions of section 43, 45[2] and 47[5] of the *Employment Act*. Section 43 requires the employer to prove the reasons for the termination, while section 45[2] demands of an employer to prove that the reason[s] was valid and fair, related to the employee's conduct, capacity and compatibility. Under section 47[5]. He or she is enjoined to prove that the grounds were justified.
119. Considerable judicial attention has been given regarding the test to be applied by courts in determining whether or not the reasons were valid and fair. In *British Leyland UK Limited v Swift* [1981] 1 RLR 91 at 93, Denning MR, enunciated the test, thus;
- “was it reasonable for an employer to dismiss the employee? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”
120. It is not in contest that the grounds upon which the dismissal of the claimant was intended were brought out on the notice to show cause and the charge sheet. They eventually formed the basis for the dismissal, and this was expressed in the dismissal letter. Throughout, the respondent maintained that they were the reasons for the dismissal. To this end, I am satisfied that burden of proof under section 43 of the Act was discharged.
121. Having said this, I now turn to whether the respondent did prove that the reasons were valid and fair, thus discharging the burden under section 45[2] of the Act. At the centre of the controversy was an alleged disposal of exhibits by the court. As I have pointed out hereinabove, throughout- at the pre-charge stage, and the post -charge stage, the claimant maintained that he never sold any exhibits. During the disciplinary hearing the respondent did not at all bring out evidence on the particular exhibits that were allegedly sold. The evidence of the respondent's witness was too silent on this aspect. Without any evidence as regards the particular exhibits that the claimant was accused of having sold, I am not persuaded that any reasonable employer would base a dismissal of an employee on the ground.
122. Catherine Kawira was the in-charge of exhibits store, the long and short of her evidence before the committee was that there were no exhibits missing. If there were, this was the witness who would have expressly stated that there were and that the claimant was involved in their disappearance, in one way or



the other. Indeed, the committee at paragraph 129 of the report clearly states that the evidence of Ms Kawira contradicts that of Hon Mutai. This notwithstanding and interestingly, the committee held;

“ 130. Despite the fact that there was no inventory before the allegation of the missing items and not was presented to the committee even after the incident, Hon Mutai who was head of station noted that the items were missing from the courtyard. Ms Kawira mentioned that that items were missing and were later returned.

131. The committee noted that there were items which disappeared from the store on the date of the incident, and it is Mr Kisang who was in the office on that day and therefore must bear responsibility for the missing items.”

123. It is difficult to understand where the above stated committee’s conclusion flowed from. Without, the inventories, any figures, any particulars of exhibits missing, and with the in-charge of exhibits denial how could one ascertain that some items were missing?

124. The accusation was that the claimant illegally and irregularly disposed of exhibits, contrary to the *Public Procurement and Asset Disposal Act* [2015] and retained the proceeds. This being the charge, it would not suffice for one to only allege that exhibits were missing. When one alleges that proceeds were retained, it automatically means that there was a sale. The evidence before the committee did not at all point towards or at all establish any sale by the claimant.

125. The charge was that the claimant disposed of exhibits that were in the store. However, when the Hon Chief Magistrate was cross-examined by the committee, [see paragraph 31] she stated the contrary, the exhibits allegedly sold were not in the store but open yard. Ms Kawira is captured to have stated before the committee, thus;

“ 43. That none of the exhibits kept in the store was missing. The missing exhibits were from the court yard and were the jikos and the changaa drums and these were later returned.”

Evidence that was greatly at variance with the particulars of the charge and the conclusion by the committee that exhibits were disposed of/missing.

126. It was alleged and the accused failed to prepare an inventory of exhibits, photograph them and issue a public notice for disposal as directed by the head of the station. The Hon Chief Magistrate testified that her stated instructions were verbal, the claimant denied ever receiving the instructions. It was her word against that of the claimant therefore. In believing the evidence of the committee held;

“ 156. Even though there were no formal instructions to Mr Kisang from the head of station for this assigned task, the committee chose to believe the evidence of the Hon Mutai who was the head of station indicating that she had given oral instructions for the task to be carried out by Kisang. Mr Kisang being the supervisor to Kawira, therefore had a responsibility to ensure that the task was carried out as per the instructions of the head of station.”

127. The view of this court is, that where a quasi-judicial committee, or a quasi – judicial tribunal, or court of law is faced with a situation where it has to choose on whose evidence to believe, where the evidence tendered by two witnesses is divergent on a particular fact, and where it is opted to believe the evidence



of one against the other's, the committee, or tribunal or court, must have to give a reason for that, and for that matter a reasonable, fair, and justifiable one.

128. The claimant contended that the task fell under Ms Kawira's scope of duty. The committee seems to have agreed with this. Ms Kawira testified that she prepared the inventory. In her evidence under cross examination, the Hon Mutai, admitted that the inventory was prepared by Catherine Kawira, the in-charge of the exhibit store. The committee didn't take these pieces of evidence into account, I conclude that the reason for not believing the evidence of the claimant was not fair, reasonable and justifiable.
129. Lastly, the claimant was accused of illegally and irregularly disposing of old mature trees that were growing within the court premises without authority from the presiding judge or the head of station. On this charge the respondent submitted that the claimant did admit that he disposed of the trees. The court sees the claimant's evidence differently. He admitted felling the trees, asserted that it was with the knowledge of the head of station, and denied that the felling of the trees was for his personal gain.
130. The court has carefully considered the evidence by Silvio Saewa, a clerical officer, and Mr Mauta, senior support before the committee. Their evidence in the court's assessment supported the claimant's case, that the cutting of the trees was done by the prisons department, and the cut trees ferried to prisons. The department in turn helped renovate the car park. Imperative to state that they were the respondent's witnesses.
131. The claimant submitted that the evidence of the was exculpatory. He however raised a concern regarding the manner the committee treated the evidence and concluded that the treatment was deliberate and was only geared towards ignoring the evidence. Of Mr Cyprian Mauta and his evidence the committee state, thus;

“ 162. That Mr Cyprian Mauta, the senior support staff who was asked to work on a Saturday, without pay, should be investigated further. His evidence seems to be too seamless to be true. He was promised that he would be paid a lunch allowance for working outside office hours, he was never paid and this promise he never pursued. Is it possible that he worked together with Mr Kipsang to dispose of the old mature trees?

132. Too seamless, that it attracted the fate of being considered untrustworthy. This was the evidence of the respondent's witness. This court sees not any reason that would justify the committee's decision to ignore evidence that was too seamless that ordinarily would be considered creditworthy by any judicial mind, for being such.
133. The claimant placed before the committee a letter dated August 2, 2017 from prisons that confirmed his position as regards the trees. He further presented a statement by one Mr Kati an officer at the prisons whose statement was in support of the claimant's evidence. The committee didn't find any value in the document and the statement for two reasons;
- a. The authenticity of the statement was questionable. “It may appear that Mr Kisang had acquired influence over the prison officers in a bid to assist his case.” The committee held.
  - b. The letter was written over one year after the date of the incident and the letter did not go through the normal mail channel as it was never seen by the head of station and therefore suspicious.
134. Certainly, this court cannot be off mark to conclude that the reason given for not attaching value to the statement of Mr Kati, was speculative. Suspicion has never been a good ground to disbelief a party's evidence.



135. What is not in contest is the fact that the letter was received and stamped by court. The fact that it was not seen by the Hon Magistrate wouldn't diminish its evidential value, not unless there was cogent evidence that the contents thereof were untrue and not to be believed. According to the claimant, the author of the letter was a person who was present when the trees were cut and the wood delivered to prisons.
136. The purpose of a notice to show cause is to enable an employee against whom the employer intends to take action against, know the grounds stirring the employer's intention, prepare to make a representation on the intention and the grounds and place before the employer any relevant material before the employer that would exonerate him from the accusations. I take it that the letter from the prisons was obtained and placed before the committee for this purpose. There was no allegation that the letter was a forgery. It mattered not when the same was written.
137. The Hon Magistrate was allowed mid-way the proceeding to get a letter from the prisons to counter the contents of the one that the claimant had tendered. The letter was written over three years after the incident. Yet the committee attached evidential value to it. I have not lost sight of the claimant's unchallenged contention that the letter that was procured and tendered by but Hon Magistrate was written by an officer who was not there when the wood was delivered. There was no equity here.
138. By reason of the foregoing premises, I am impelled to agree with the claimant's counsel that the committee treated the evidence that tended to exculpate the claimant in a biased manner and that created a picture of it as one that approached the matter with no open mind.
139. In conclusion, the termination of the claimant's employment was without a valid and fair reason[s]. It was substantively unfair.

#### **What Reliefs are Available To The Claimant If Any?**

140. The claimant sought *inter alia* reinstatement into service without loss of any benefit. [Black's Law Dictionary](#), tenth edition defines reinstate, thus;
- “ To place again in a former state or position.”
141. The enactment of the [Employment Act](#), 2007, ushered in a plurality of remedies to be available to an employee whose employment has been terminated unfairly or wrongfully. It is imperative to state that however, the Act retained some common law principles which have an effect on the exercise of discretion to grant the relief of reinstatement. Section 49 of the Act provides for the remedy of reinstatement, *inter alia*.
142. Section 12[3] of the [Employment and Labour Relations Court Act](#) read together with section 49 of the [Employment Act](#), gives this court power to order for reinstatement in appropriate cases. See [Anthony Njue John v National Bank of Kenya Limited](#) [2017]eKLR.
143. Considering the circumstances under which the claimant's employment was terminated, I am convinced that this is a matter where reinstatement would be an appropriate remedy. The respondent which is supposed to be an epitome justice, and matters adherence to the rule of law, without reason grossly deviated from what was required of them by the law in the process leading to, and on the decision on, the termination of the employment of the claimant. The conclusion hereinabove that the disciplinary committee came out as one that was without an open mind, and biased in some instances has not escaped the mind of this court.



144. This court takes cognizance of the fact that the Act commands that where it appears that the relief of reinstatement will be impracticable, the same shouldn't be availed. The respondent submitted that owing to the length of period that has passed since the interdiction to now, it will be impracticable to grant the relief in favour of the claimant. This court is not convinced that this reason as advanced by the respondent would be an impediment on an exercise of the court's discretion to grant the relief. The disciplinary process against the claimant started way back July 17, 2017 when the show cause letter was issued. It took the respondent more than two years to have the process finalized. In my view this was an inordinate delay which would easily pass for a breach of the claimant's right under article 47 of the Constitution, the right to a fair administrative action.
145. Looking at the process as revealed by the proceedings of the committee, it is clear that the claimant did not at all contribute to the delay. The matters did not kick off and get dealt with expeditiously for reasons best known to the respondent. I am not prepared to apply a situation created by the respondent to deprive of the claimant a relief that he is entitled to.
146. That a grant of reinstatement is practicable in this matter I find support in the Court of Appeal decision in *Telkom Kenya Ltd v Paul Ngotwa* [supra]. The respondent is a large organization he can redeployed to any other station other than Nanyuki, and where he is not going to work with Hon Mutai.
147. In making the order for reinstatement I have also considered the length of period the claimant had been in the employment of the respondent, and that considering the career progression he had made in the judicial service a failure to make the order which I consider the most efficacious in the circumstances of the matter, shall render the progress to nil. I have also considered the uniqueness of his employer- the respondent, as regards the service it renders, and therefore that the claimant in unlikely get an equal employer.
148. Having found that the termination was unfair, and made an order for reinstatement, I hesitate not to order that the same shall be without loss of benefit. The claimant shall be paid all the unpaid salary, allowances, and benefits if any.
149. The claimant further sought for compensation for unfair and unlawful termination. This court has the authority pursuant to the provisions of section 49[1][c] of the Act, to grant a compensatory relief. The grant of the relief and the extent thereof depends on the circumstances of each case. In the circumstances of this case, which includes, the substantial deviation by the respondent from what the law required of it, the picture that came out of the committee as one that was not balanced, and the length of time that the claimant was in the service of the respondent, I would find that the claimant is entitled to the relief and to the extent of 12 [twelve] months gross salary, but having ordered for his reinstatement with a pay back, I order not that he be compensated under this provision as it would amount to double compensation.
150. The claimant didn't put forth any basis for the relief sought for general damages. He adduced no evidence in support of the claim. Consequently, the court declines to make any award under the head.
151. In the upshot, this court enters judgement in favour of the claimant in the following terms;
- a. A declaration that the termination of his employment was wrongful and unfair.
  - b. That the respondent is hereby ordered to reinstate the claimant to the position he was serving in before his employment was terminated, without any loss of benefit.
  - c. That the claimant be paid all unpaid salaries, allowances and benefits.



- d. The unpaid salary, allowances, and benefits be paid with interest at court rates from the date of this judgment till full payment.
- e. Costs of this suit.

**Read, signed and delivered virtually at Nairobi this 29th day of September, 2022.**

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**OCHARO KEBIRA**

**JUDGE**

**In presence of;**

**Mrs. Saina for the Respondent.**

**No appearance for the Claimant.**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

