



**Chishenga v Imarika Sacco (Cause 11 of 2019)
[2022] KEELRC 3947 (KLR) (22 September 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 11 OF 2019
BOM MANANI, J
SEPTEMBER 22, 2022**

BETWEEN

ERICK JUMBALE CHISHENGA CLAIMANT

AND

IMARIKA SACCO RESPONDENT

JUDGMENT

Introduction

1. This is a claim for alleged unlawful termination. The Claimant alleges that his employment with the Respondent was unfairly terminated around March 2019 for alleged unethical behaviour at the workplace. As a result, he seeks the following reliefs against the Respondent: a declaration that his termination was unfair; an order for reinstatement to work without loss of benefits; and costs of the case.
2. The Respondent has denied the Claimant's assertions. In particular, it is the Respondent's position that the decision to terminate the Claimant was for valid reasons and in accordance with the procedure set out in law. Thus, the Respondent prays for the dismissal of the action with costs.

The Claimant's Case

3. The Claimant avers that he was first employed by Kilifi Teachers Co-operative Savings and Credit Society around 1st February 2008 in the position of Office Assistant. That later on around 15th April 2013, he was hired by the Respondent as a System Administrator.
4. According to the Claimant, the employer-employee relation with the Respondent was terminated in March 2019. It is the Claimant's case that the reason given by the Respondent to justify the aforesaid termination was the alleged unethical behaviour of the Claimant with respect to execution of his duties.



5. The Claimant asserts that as a System Administrator, he was in charge of the Respondent's Information and Communication Technology (ICT) platform. That during his tenure in the aforesaid office, the platform suffered a series of cyber attacks leading to loss of money from various of the Respondent's branches.
6. According to the Claimant, the attacks on the Respondent's ICT system were attributable to the inherent weakness in the system. It is the Claimant's case that this problem was occasioned by the fact that the Respondent was sharing system licenses with Harambee Sacco.
7. The Claimant asserted that although the Respondent had procured its own licenses, senior staff of the Respondent had failed to ensure their full installation. As a consequence, the Respondent's operating system was rendered porous and vulnerable to frequent attacks by external actors.
8. The Claimant asserted that on realizing the problem, the Respondent engaged the services of a forensic investigator, Villbo Group Ltd to establish the extent of infiltration of the platform. That whilst the investigator confirmed that the system was faulty and had been compromised, it recommended that the Claimant and other employees of the Respondent be charged with offenses related to its misuse and computer forgery. That this recommendation was malicious and without justification.
9. The Claimant asserted that the Respondent relied on the recommendations aforesaid to suspend him. That at the same time, the Respondent instituted a flawed disciplinary process that resulted in the Claimant's termination from employment. The Claimant further asserted that the Respondent pushed for the Claimant to be charged with trumped up charges in order to fight off an intended civil action for defamation.
10. The Claimant asserted that he was a victim of a biased investigative and disciplinary process at the instance of the Respondent. In support of this claim, he stated that although the entire of the Respondent's ICT platform was affected by the cyber attacks, the Respondent ordered a selective inquiry that appeared to focus on a few employees. For instance, whilst the Respondent had several computers, only the Claimant's and a few other desktops for targeted employees were investigated. Further, whilst some of the employees who were implicated in the syndicate were retained in employment, only the Claimant and one George Mwanyale were terminated.
11. It was the Claimant's case that the real culprits in the syndicate were later charged separately in Mombasa. That his attempted prosecution before the court at Kilifi and termination from employment were a smokescreen to protect the individual who had failed to ensure that the Respondent installed a compliant ICT platform and fend off a possible action in defamation.
12. It's the Claimant's case that all he did with respect to his task as a System Administrator was done in lawful execution of his duties. Therefore, it was wrong for the Respondent to terminate his employment and press criminal charges against him.

Respondent's Case

13. On its part, the Respondent admitted having employed and terminated the Claimant. However, the Respondent denied that the termination was unjustified as asserted by the Claimant.
14. According to the Respondent, the Claimant was involved in the manipulation of the Respondent's ICT system that led to loss of client funds. It was the Respondent's case that the Claimant used his username to manipulate customer data and in the process illegally accessed and caused to be drawn funds from customers' accounts.



15. The Respondent contended that once it sensed that it had become a victim of electronic banking fraud, it commissioned a forensic audit to confirm these fears and unearth the cause and extent of the problem. That it is the results of this audit that confirmed that the Claimant had used or allowed to be used his username to manipulate customer accounts through the main administrator account that was under his control.
16. That once the Claimant's involvement in the malpractice was confirmed, the Respondent suspended and issued him with a notice to show cause why disciplinary action should not be taken against him for acting in a manner that was inconsistent with the Respondent's interest. That the Claimant was thereafter taken through disciplinary process where he was heard. That he was unable to clear his name in the process.
17. That as a result of this misconduct, the Disciplinary Committee recommended for the termination of the Claimant. That the Respondent terminated the Claimant on 18th March 2019 in implementation of this recommendation. That the Claimant's appeal against the decision of the Disciplinary Committee was not successful and hence the termination of 18th March 2019 was upheld.
18. It was the Respondent's case that having regard to the totality of the facts in the case, there were valid grounds to terminate the services of the Claimant. Further, the process leading to the Claimant's termination was undertaken in full compliance with the requirements of due process.
19. I have noted that the forensic report filed is dated 31st January 2019 and yet it is said to have been the basis of the Respondent's decision to issue a notice to show cause to the Claimant on 12th January 2019. It is not practicable that the Respondent would act on a report that was yet to be released to commence disciplinary action against the Claimant as suggested.
20. However, in his Statement of Claim, the Claimant appears to reiterate the Respondent's contention that the report dated 31st January 2019 was the basis for the Respondent's decision to issue him with the notice to show cause letter on 12th January 2019. In other words, save for the incredibility of the dates that are mentioned, the Claimant does not deny the existence of the report and does confirm that it was the basis for the proposed disciplinary action against him. From the foregoing, it appears to me that either the report filed is probably wrongly dated and must have been in existence as at 12th January 2019, the date the Claimant was issued with the notice to show cause letter or that the parties were acting on the basis of a preliminary report that was not included in their respective lists of documents but whose content informed the final forensic report dated 31st January 2019.
21. The parties gave oral evidence and called witnesses in support of their cases. The oral evidence, in large part, reiterated the parties' viewpoints as stated above. I shall in my judgment refer to portions of the evidence tendered as is appropriate.

Issues for Determination

22. From the pleadings, evidence, individually framed issues and submissions I am able to isolate the following as the critical issues for determination: -
 - a. Whether the Respondent unfairly and therefore unlawfully terminated the Claimant's contract of employment.
 - b. What reliefs, if at all, is the Claimant entitled to?



Analysis and Determination

23. I begin by acknowledging that as at the time of writing this judgment, only the Claimant had filed closing submissions in the cause. In my decision, I have considered the pleadings, the evidence on record, the submissions and the applicable law.
24. It is perhaps necessary to mention that the validity of termination of a contract of service by an employer is dependent on the presence of valid grounds supporting the decision to terminate and observance of due process in the steps leading to the decision. In this section, I will consider these two issues distinctly. I will however begin this analysis by giving a brief overview of the applicable law.

a. Synopsis of the Law on the Dispute

25. This part of the court's decision is essentially on all fours with the decision in a related file to wit Malindi ELRC No. 10 of 2019. The following rendition of the law on the dispute will therefore be a reproduction of my views as expressed in the above decision delivered contemporaneously with this decision.
26. The law on the dispute before me is largely to be found under the *Employment Act*, 2007 (the EA) as read with the *Employment and Labour Relations Court Act*, 2011 (the ELRC Act). Importantly, the requirements on substantive and procedural fairness in the termination of an employee that are inscribed in the EA are founded on the constitutional right to fair labour practices as protected under article 41 of *the Constitution* of Kenya 2010.
27. Under section 41 of the EA, an employer who wishes to terminate an employee on the grounds of gross misconduct, poor performance or physical incapacity is obligated to notify the employee of the reasons for the decision and to afford the employee the opportunity to offer a rebuttal of the ground(s). The employer is not entitled to terminate the contract of service without regard for these statutory edicts. This in effect has substantially circumscribed the application of the common law doctrine of employment at will (also referred to as the pleasure doctrine) in Kenya. Currently, the employer can only terminate an employee with cause. Only in very limited instances involving holders of constitutional offices is the pleasure doctrine still applicable.
28. This requirement has necessitated a shift in the application of the concept of burden of proof in resolving questions about the legitimacy of termination of employment. The law as currently framed, in a sense, applies the reverse burden of proof by requiring the employer to prove the reasons for termination of an employee notwithstanding that it is the employee who will be alleging that the termination is wrongful. Under section 43 of the *Employment Act*, where the employer is unable to prove the reasons for his decision to terminate, the law raises a presumption in favour of the unlawfulness of the termination.
29. Under section 45 of the EA, for the employer to justify a termination of an employee, he must provide a valid ground to support the decision and demonstrate that he accorded the employee due process in processing the termination. Some of the grounds that may be proved include: gross misconduct; insubordination; poor performance or incompetence.
30. However, in establishing the grounds for termination, it is not a requirement that the employer must have infallible evidence of the factual existence of the reason for termination. A genuine belief that the



ground for termination exists is sufficient ground to justify a termination. This position is clear from section 43(2) of the EA which provides as follows: -

“The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

31. In determining whether the employer’s decision is based on a genuine belief about the existence of valid reasons for termination, the test to be resorted to is not a subjective one but that of a reasonable person on the streets. If any reasonable employer would have dismissed the employee in the circumstances under evaluation, the court should uphold the termination as valid. The court is not entitled to substitute the employer’s decision with its own subjective assessment of what it considers as valid grounds.
32. Quoting Halsbury’s Laws of England, 4th Edition, Vol. 16(1B) para 64, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waitbaka Gitahi & 2 others* [2019] eKLR expressed the position on the issue as follows: -

“...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 could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses 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.”

33. Although the law applies the reverse burden of proof in employment termination disputes, it is nevertheless a requirement that an employee who has mounted an action for unfair termination lays the basis for his claim by presenting before the court prima facie evidence in support of his case for the employer to be required to justify the decision to terminate. This requirement can be inferred from section 47 of the EA which obligates the employee to prove the unfairness of the termination whilst obligating the employer to justify the grounds for termination of employment (see also *Mutbaiga Country Club v Kudbeiba Workers* [2017] eKLR, *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR, *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR).

b. Validity of the reasons to terminate the Claimant

34. The circumstances giving rise to the decision by the Respondent to terminate the Claimant are that he was suspected to have been involved in a fraudulent online scheme to inappropriately access and convert to his own use funds held by the Respondent in trust for its customers. It was the Respondent’s case that the Claimant had used or permitted to be used his username to access and manipulate data of accounts of particular customers of the Respondent with the above sinister intent. That as a result of these activities, money in the affected accounts was irregularly withdrawn.
35. The evidence produced shows that the Disciplinary Committee heard the Claimant on 11th March 2019 (see the minutes marked as document 2 on the Respondent’s supplementary list of documents dated 25th March 2022). The disciplinary session was held after the Claimant had been invited by a



letter dated 5th March 2019 to offer his defense against a charge of misuse of his navigation system user password to manipulate customer accounts leading to loss of funds.

36. The evidence on record shows that the Claimant recorded a statement with the Disciplinary Committee in which he confirmed that he had been furnished with the forensic audit report that formed the basis of the accusations against him. He is then shown as denying involvement in the fraudulent alteration of customer details in a bid to steal from them.
37. The evidence further shows the Claimant stating that he was surprised to learn from the forensic audit that his account had been used to unlawfully access and manipulate customer account details. He also expressed his dismay that these events happened outside official working hours.
38. The Claimant stated that due to pressure of work, he would sometimes work beyond official hours and away from his workstation. That this accounts for the times he accessed the Respondent's platform outside work hours.
39. According to the Claimant, he diligently changed his passwords on a regular basis to ensure security of the online platform in accordance with the Respondent's policy. He indicated that he had worked for the Respondent diligently for several years and had never engaged in activities that bordered on fraud at the workplace.
40. The Claimant is recorded as stating that he could not explain how his username had ended up being used to manipulate customer accounts. He asserted that all these activities were executed behind his back and without his knowledge or approval.
41. He conceded that he had saved some data on the accounts under inquiry on the desktop of G Mwanyale. His explanation for this action was that he wanted to print details from the accounts in order to prepare a report that was required by the Respondent in the investigations that were ongoing.
42. In a bid to explain how his account may have been accessed by external actors, the Claimant stated that the nature of his work exposed his username to the risk of external attacks. That his work as a systems administrator involved interacting with external players while making some of his postings such as TSC salaries. He believes that his account was infiltrated due to this. It was his case that the hacking into his account was as a result of his password having been compromised without his knowledge.
43. This evidence by the Claimant before the Disciplinary Committee was in response to evidence tendered by the Respondent's witness in terms of the findings by the forensic auditor. According to the evidence, the Claimant's username registered as ejumbale was traced to the transactions in which customer accounts were unlawfully accessed and their data manipulated (see the minutes of the disciplinary session held on 11.3.2019 filed under the defense list of documents dated 25th March 2022).
44. Examples of modifications to accounts that led to loss of cash around the same time were given. For instance, the investigations showed that the Claimant's username (ejumbale) interacted with the account of Sarah Choni on 12th December 2018 at 6.01.22 pm. The following day, funds were illegally drawn from the said account.
45. The Respondent also gave evidence that another account registered as Imarikasvri/Administrator was also used to effect constant data modifications on clients' accounts. That this account was under the control of the Claimant.
46. It does appear that the Disciplinary Committee was not convinced with the Claimant's defense. From the evidence tendered by the Respondent, the Committee was convinced that there were compelling



grounds to believe that the Claimant had negligently exposed the Respondent to the fraudulent activities that resulted in loss of funds.

47. According to the Committee, there was evidence that the Claimant had failed to adequately secure his username thus exposing the said username to possible abuse. The Committee also observed that in order to enable him to remotely access the Respondent's platform on his Personal Computer (PC) outside work hours and away from his work station, the Claimant had configured the office online system to the unattended mode. This, it was observed, opened the platform to every person who wished to access it thus exposing the bank to the risk of fraud.
48. It thus recommended that he be terminated from duty. Consequently, on 18th March 2019, the Respondent wrote to the Claimant terminating his services.
49. In the letter of termination, the Respondent also alluded to previous incidents in which the Claimant had violated the rule on confidentiality of passwords by sharing his password with other employees. The Respondent mentioned that as a result of this previous violations by the Claimant, the Respondent lost cash through fraudulent withdrawals.
50. Dissatisfied with the decision, the Claimant filed an appeal challenging it. The evidence on record shows that the Claimant filed this appeal through his letter dated 26th March 2019. After considering his appeal, the Appeals Committee upheld the decision of the Disciplinary Committee.
51. What the court is called upon to do at this stage is to make a determination whether the above facts as presented before the Disciplinary Committee provided a ground for a reasonable employer to act as the Respondent did. In this respect, it must be remembered that the court ought not to substitute its view with the decision of the employer. The court should uphold the Respondent's decision if it falls within the band of decisions any other reasonable employer would have made based on the foregoing set of facts.
52. The evidence presented by the Respondent to the Disciplinary Committee mainly centered on the forensic audit report dated 31st January 2019. The analysis in the report shows interactions between the Claimant's username with the accounts that were affected with the irregular withdrawals of cash. For instance, page 5 of the report shows that username ejumbale interacted with the account of Sarah Choni after 6pm on 12th December 2018 only for the account to be irregularly debited on 13th and 14th December 2018. At page 8 of the report, it is shown that the username ejumbale was also used to make a series of modifications to various Respondent's clients' accounts. Further, page 9 of the report shows that user account Imarikasvri/administrator was used frequently to change data on mobile telephone contacts of clients for a number of accounts that were affected by the unlawful withdrawals. The report showed tampering with logs to obliterate evidence of interactions between the affected accounts and the usernames ejumbale and IMarikasvri/administrator, evidence that the activities were suspect and the perpetrator was trying to cover his tracks.
53. The evidence by the Claimant before the Disciplinary Committee does not deny that some illegal activities were perpetrated through his username registered as ejumbale. His case before the Committee was that he was not responsible for the illegal activities. That his account had been hacked and the activities must have been by the hackers without the Claimant's knowledge or consent.
54. The record shows that the Disciplinary Committee rejected the Claimant's defense on account of the fact that he had left the accounts that were under his control and which were used to facilitate the illegalities exposed to the risk of abuse by failing to adequately secure them. Thus, it was either that the Claimant actively participated in the illegal acts or facilitated them through his negligence.



55. The Committee considered this evidence against the evidence that the Claimant had a previous record of having caused loss to the Respondent through fraud when he shared his password with other employees. The Claimant had been warned against this negligent conduct but pardoned.
56. From the facts placed before the Disciplinary Committee, I find that the said Committee had a justifiable basis for holding that there was evidence of either complicity or negligence on the part of the Claimant in the circumstances that resulted in the online banking fraud against the Respondent. In my view, any other reasonable employer faced with the same set of facts would have entertained the same thought as the Respondent.
57. The Claimant did not explain to the Committee how his password, which is ordinarily expected to be kept secret, ended up in the hands of the alleged hackers. His username, ejumbale, could only have been accessed for purposes of manipulating the accounts that were affected by the fraudulent activities if he either shared its password with third parties or otherwise left it unsecured.
58. All that the Claimant is recorded as saying in response to this critical issue is that the account was rendered vulnerable because of the nature of his work and that he did not know how the invasion happened. In my view, if an account that is protected by a password is put to improper use, it is reasonable for a bystander to entertain the belief that the password holder was either directly involved in its abuse or that he left the account exposed to third parties. As such it is reasonable to require him to bear responsibility for such abuse. In the case before me, the Respondent held the Claimant responsible on this basis.
59. The Claimant challenges the validity of this ground as a basis for his termination. Yet, he offers no reasonable basis for his attack of the ground. In the evidence he tendered before me, he appears to suggest that merely because the forensic audit report did not say that he was a beneficiary of the cash that was fraudulently drawn, the ground should fail. I do not agree with this thinking. The Disciplinary Committee's finding is clear that even if there is no proof that the Claimant directly executed the fraudulent manipulations, he provided fraudsters with the opportunity to access usernames under his control to defraud the Respondent by leaving the said usernames without proper protection.
60. The Claimant suggested that the Respondent's sharing of licenses with Harambee Sacco exposed the Respondent to the possibility of hacking of its platform. In response, the Respondent's witnesses emphasized that licensing had nothing to do with the security of the online banking platform. A license only goes to ensuring the entitlement of one to lawfully undertake an activity. This is a position I respectfully agree with. In any event, there was no evidence by the Claimant linking the intrusion into the Respondent's online banking platform with the sharing of licenses with Harambee Sacco. Importantly, the intrusion into the Respondent's platform was shown to have been partly executed through username ejumbale, an account used by the Claimant and for which he was expected to have a protective password to guard against its abuse.
61. The foregoing activities taken together with the previous conduct of the Claimant relating to the negligent handling of his password and for which he had been issued with a warning provided a justifiable ground to terminate him. In my view, the Respondent's decision to terminate the Claimant fell within the band of actions a reasonable employer would take in the circumstances.
62. As I mentioned in Malindi ELRC No. 10 of 2019 *George Mwanyale v Imarika* (unreported) the measure of reasonableness of an employer's reaction varies from industry to industry. This can only be determined on a case by case basis. In commenting on the issue, George Ogembo in his book, "Employment Law Guide for Employers, Revised Edition, 2016" pages 178-179 states as follows:-



“A reasonable employer is defined and described due regard being given to the peculiarity of the industry the employer is engaged in. For example, banks ordinarily operate in a highly sensitive environment which may require that employees adhere to the highest possible degree of probity and prudence.

The standard may not be as high in other industries. Hence a decision taken by a reasonable banker to dismiss an employee may be different from the range of responses open to an employer in an unrelated industry.”

63. It should perhaps be noted that in reaching this conclusion, I have avoided relying on evidence on events that occurred after the decisions of the Disciplinary and Appellate Committees. This is because what I am asked to determine in this matter is the validity of the grounds or reasons for termination against the facts presented to these two Committees. Therefore, evidence of events that took place post the sessions before these two Committees is irrelevant. This explains why I have excluded evidence on withdrawal of the criminal charges against the Claimant from my analysis. This withdrawal happened in June 2021 long after the decisions by the Disciplinary and Appeals Committees.

c. Procedural Fairness in terminating the Claimant

64. The evidence presented by the parties confirms that upon the Respondent indicting the Claimant, it issued him with a notice requiring him to show cause why disciplinary action should not be taken against him for involvement in the alleged malpractices. It is also common ground that the Claimant wrote back to the Respondent explaining his position on the issues raised.
65. The parties further agree that the Respondent subsequently suspended the Claimant from duty to enable further investigations into the matter. That immediately after the suspension, the Claimant was invited for a disciplinary hearing before the Respondent’s Disciplinary Committee. That the Committee heard the parties and delivered its verdict recommending termination of the Claimant.
66. It is also common ground that the Claimant was dissatisfied with the decision of the Disciplinary Committee and that he appealed against it. That after hearing the Claimant the Appeals Committee upheld the decision of the Disciplinary Committee.
67. The Claimant makes allegations of a biased disciplinary process against him. In support of this contention, he mentions that the investigations appeared to have targeted only his and a few other desktops for interrogation. That further, only the Claimant and one other employee were terminated yet those who were suspects along with them were retained in employment.
68. In the Statement of Claim, the Claimant questions the validity of the decision to terminate him before he was charged with related offenses in the criminal case that was to later follow. In a sense, he suggests that the administrative hearing should have awaited the institution and determination of the criminal case against him.
69. Although not raised in his Statement of Claim, the Claimant appeared to allege another procedural flaw in the disciplinary proceedings in his oral testimony before me. He asserted that he was not given the forensic audit report in time for the disciplinary session. Thus, he was deprived of sufficient time to prepare his defense.
70. As mentioned at the commencement of this judgment, the Respondent has a duty in law to ensure due process whilst processing release of its employees including the Claimant. The finer details of this legal edict are to be found in section 41 of the EA. Under this section, before determining the fate of an employee for the reasons set out there-under, the employer must: notify the employee of the



charges against him in a language the employee understands; permit the employee to be accompanied by a co-employee of his choice or shop-floor representative during the process if he elects; permit the employee to respond to the charge. In effect, the law requires the employer to ensure due process for the employee.

71. I have considered the evidence on record against these requirements. It appears to me that the Respondent issued the Claimant with a letter dated 12th January 2019 requiring him to show cause why his services should not be terminated for misconduct. The letter framed the charge against the Claimant as using or permitting to be used his navigation system user password to alter and manipulate figures in individual members' accounts resulting in fraudulent cash withdrawals and eventual loss of cash from the Sacco.
72. The evidence shows that the Claimant responded to the letter on 14th January 2019 or thereabouts. In his letter, the Claimant did not point to any inadequacies of the information supplied to him apart from the fact that the forensic audit report had not been supplied to him at that time. He therefore called for it.
73. The Claimant was notified of a disciplinary session to hear the case against him vide the Respondent's letter dated 5th March 2019. This letter reiterated the charge against the Claimant set out in the letter of 12th January 2019. The letter also reminded the Claimant of his right to be accompanied by an employee of his choice during the disciplinary session.
74. The Respondent produced minutes of the disciplinary proceedings of 11th March 2019. From minute 2/03/2019, the Claimant was asked whether he had been accorded sufficient time to prepare his defense and he answered in the affirmative. Further, at the bottom of the said minute, it is stated that the Claimant acknowledged that he had been supplied with the forensic audit before the disciplinary session. He also confirmed that he had been accorded sufficient time to interrogate the said report before he appeared before the Disciplinary Committee. Thus, the attempt by the Claimant to aver before this court that he was not given this report in time for the disciplinary session appears untruthful. By this latter position, the Claimant contradicts the position he presented before the Disciplinary Committee regarding the time he received the forensic report.
75. The minutes of the proceedings of 11th March 2019 also show that the Disciplinary Committee reminded the Claimant of the right to attend with another employee of his choice. However and as the record shows, the Claimant elected to conduct his case without the benefit of a witness or indeed any representative.
76. It is also clear from the minutes that the Claimant was asked to elect the language he preferred the proceedings to be conducted in. The record shows that the Claimant settled for English and Kiswahili.
77. The minutes also demonstrate that the parties were given a chance to present their respective cases. It is only after this that the Disciplinary Committee pronounced itself on the matter.
78. There is also evidence that the Claimant was given a chance to appeal to the Appeals Committee. The Appeals Committee once again considered his case before upholding the decision of the Disciplinary Committee.
79. The Claimant has argued that the process of inquiry into his case was flawed in so far as it relied on the forensic audit report that was allegedly based on a selective investigation. That the investigators were tasked to investigate only select desktops including the Claimant's. In response to this assertion, the Respondent's witnesses explained that the investigations covered the whole ICT platform. Reagan Kai,



one of the defense witnesses in particular stated that he was personally interviewed by the investigators over the matter.

80. The complaint by the Claimant that only he and G Mwanyale were victimized even as other suspects were allowed to resume work was also adequately addressed. According to the defense witnesses, the two individuals were allowed to resume duty only after they adequately responded to the letters of notice to show cause against them and were cleared of any wrongdoing by the Respondent.
81. With regard to whether the Respondent ought to have halted the disciplinary session pending the results of a possible criminal prosecution against the Claimant, it is noteworthy that whilst the administrative process commenced on 12th January 2019 with the letter of notice to show cause and terminated on 15th April 2019 with the verdict on appeal, the criminal case was filed in court around 10th April 2019 and plea taken around 11th April 2019. The two processes have always been considered as separate with the issues for consideration in each distinct. Therefore, the suggestion that one should await the outcome of the other appears misplaced (see [David Kemei v Energy Regulation Commission \[2013\] eKLR](#)).
82. My assessment of the above set of facts suggests substantial compliance with the procedural strictures in processing the Claimant's case. I do not see any significant procedural flaw in the process. I therefore hold that the Respondent has demonstrated that it terminated the Claimant in accordance with the procedure provided in law.
83. In his final submissions, the Claimant has questioned the admissibility of the forensic report produced by DW2. It is his position that because what was produced as exhibit is a copy and not the original of the report, it does not constitute primary evidence. Therefore it should be expunged from the record. In my view, this submission is not well founded for two reasons. First, the Claimant raised no such objection to admissibility of the report when it was tendered at the trial. Second, in any event DW2 who produced the report gave evidence confirming that he was involved in the actual forensic audit and preparation of the report. He gave a detailed oral account of the investigations and findings.

The Remedies Sought

84. The Claimant has prayed for the following orders in his Statement of Claim: -
 - a. A declaration that his dismissal was unfair and illegal.
 - b. An order for his reinstatement as a System Administrator without losing his seniority and benefits.
 - c. Costs of the suit.
85. In view of my decision above, the Claimant is not entitled to the prayers sought on the merits. I will therefore not grant the prayers. However, even if the Claimant had succeeded in the cause, it is doubtful that he would have been granted an order for reinstatement as pleaded.
86. In opposing the prayer for reinstatement, the Respondent indicated that it has already filled the position left vacant following the Claimant's termination. Through its Human Resource Manager, Josephine Thamuiri Kathure, the Respondent testified that it had hired one Dickson Shehi Kurwa as the Claimant's replacement. A copy of the new employee's letter of appointment was produced as exhibit.
87. Reinstatement as a relief in employment law is often considered as a remedy of last resort. It can only be granted sparingly. Hence, the law highly regulates it. For instance, although section 49 of the EA



recognizes it as one of the several reliefs that could be granted, the court is specifically directed to bear in mind “the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances.” Similarly, section 12 (3)(VII) of the ELRC Act bars the court from ordering reinstatement of an employee except when the order is made within three years of the employee’s dismissal.

88. Reinstatement is a discretionary remedy. The court ought not to grant it if it will not yield perfect results. For instance the court should decline to grant the order if the position that the Claimant was removed from is no longer available (see *Francis Okumu Ngesa v County Government of Siaya* [2017]eKLR).
89. As demonstrated by the Respondent, it has already replaced the Claimant through a new hiring. For this reason alone, I would have been hesitant to order reinstatement in the cause even if it was open for me to grant it.
90. That said, I hold the position that in view of the express provisions of section 12(3) (VII) of the ELRC Act, I would have had no jurisdiction to order reinstatement in this cause in any event. This is because the decision to terminate the Claimant was rendered on 18th March 2019. This judgment is rendered on 22nd September 2022, more than three years down the line. This period would have precluded the court from considering granting the remedy (see *Joshua Rodney Marimbah v Kenya Revenue Authority* [2021] eKLR).
91. I therefore dismiss the Claimant’s claim with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF SEPTEMBER 2022

B. O. M. MANANI

JUDGE

In the presence of:

Kamunda for the Claimant

Muliro for the Respondent

Order

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

B. O. M MANANI

