



REPUBLIC OF KENYA



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**Mwanyale v Imarika Sacco (Employment and Labour Relations Claim  
10 of 2019) [2022] KEELRC 3972 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3972 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 10 OF 2019  
BOM MANANI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**GEORGE KATANA MWANYALE ..... CLAIMANT**

**AND**

**IMARIKA SACCO ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for alleged unlawful termination. The claimant asserts that the respondent unfairly implicated him in a financial scam that happened around 2018 and used it as a ground to unfairly terminate him. Consequently, the claimant has brought this action seeking the following reliefs: a declaration that his termination was unfair; an order for reinstatement to work without loss of benefits; and costs of the case.
2. Through a defense filed on May 24, 2021, the respondent denies the claimant's assertions. In particular, the respondent avers that the decision to terminate the claimant was for valid reasons and in accordance with the procedure set out in law. Accordingly, the respondent prays that the cause be dismissed with costs.

**The Claimant's Case**

3. From the pleadings and the evidence on record, it is the claimant's case that he was employed by the respondent's predecessor, Kilifi Teachers Co-operative Sacco on January 8, 2009. That his position at the institution was that of a marketing officer.
4. Apart from the averment that Kilifi Teachers Co-operative Sacco, the initial employer of the claimant was the predecessor of the respondent, it is unclear from the details on record how the claimant transitioned from being an employee of the former entity to the latter. Although the claimant alludes to being employed by the respondent on March 28, 2012, there is no letter of appointment evidencing this transition. The only letter on record dated March 28, 2012 appointing the claimant as marketing



- officer was issued by Kilifi Teachers Co-operative Sacco and not the respondent. Be that as it may, the respondent does not deny that the parties had an employer-employee relationship.
5. According to the claimant, his employment with the respondent was terminated on a date he does not disclose in his statement of claim. However, it does appear from his witness statement and the defense filed that the termination occurred on March 22, 2019.
  6. The claimant asserts that termination of his employment with the respondent was linked to loss of funds by the respondent around the year 2018. According to the claimant, this loss was occasioned by the weak Information and Communications Technology (ICT) platform that the respondent was using to run its banking business.
  7. According to the claimant, the weakness in the system led to heightened cyber attacks on a number of the respondent's branches resulting in loss of funds through cyber theft. That this development saw the respondent engage the services of a forensic investigator, Villbo Group Ltd to establish the extent of infiltration of the respondent's ICT system by external actors. That whilst the investigator confirmed that the system had been compromised, it surprisingly and without justification recommended that the claimant and other employees of the respondent be charged with offenses related to computer misuse and forgery.
  8. The claimant asserted that it is this recommendation that informed the decision by the respondent to suspend him in January 2019. It is the claimant's case that what was to follow was his arrest and presentation before the magistrate's court at Kilifi to face various unfounded criminal charges. That at the same time, the respondent instituted a flawed disciplinary process that resulted in the claimant's termination from employment.
  9. The claimant further asserted that he was a victim of a biased disciplinary process instigated by 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 an inquiry that appeared to focus on a select few employees. For instance, whilst the respondent had several computers, only the claimant's desktop and a few other computers run by targeted employees were allegedly investigated. Further, whilst some employees who were implicated in the syndicate were retained in employment, the claimant and one Erick Jumbale were terminated.
  10. 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 despite having procured for it. The claimant believes that he was a victim of alleged bad blood between him and the management of the respondent.

### **Respondent's Case**

11. On its part, the respondent admitted having employed and terminated the claimant. However, the respondent denied that the aforesaid termination was unjustified as asserted by the claimant.
12. According to the respondent, the claimant was involved in financial malpractices that led to loss of client funds at the respondent's institution. It was the respondent's case that the claimant used or allowed to be used his username to manipulate customer data and in the process illegally accessed and caused to be drawn funds from targeted customer accounts. It was also contended by the respondent that the claimant actively assisted an individual (Brenda Luria) who was not a customer of the respondent to illegally access and draw funds from one of the respondent's branches.



13. 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 linked the claimant to the malpractice aforesaid by confirming that he had used or allowed to be used his username to manipulate customer accounts through the main administrator account. That the claimant had also been captured on the respondent's CCTV surveillance system actively assisting one Brenda Luria to irregularly procure funds from the respondent. That this was later confirmed by withdrawal records that showed that the said Brenda had illegally accessed the respondent's banking facilities on 18<sup>th</sup> and October 23, 2018.
14. That once the claimant's involvement in the malpractices 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. That indeed, the claimant confirmed that his username had been improperly used to aid in the theft of the respondent's funds and that he had interacted with the said Brenda Luria on the dates in question.
15. That as a result of this misconduct, the disciplinary committee recommended for the termination of the claimant. That in implementing this recommendation, the respondent terminated the claimant on March 22, 2019. That the claimant's appeal against the decision of the disciplinary committee was not successful and hence the termination of March 22, 2019 stood.
16. 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.

### **Issues for Determination**

17. From the pleadings, evidence, individually framed issues and submissions on record 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**

18. 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.
19. I begin by acknowledging that the claimant filed his closing submissions in the cause. In my decision, I have considered the pleadings, the evidence on record, the submissions and the applicable law.
20. As is clear from the law, 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

21. 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 underpinned by the constitutional right to fair labour practices as protected under article 41 of the [Constitution](#) of Kenya 2010.
22. 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 has in effect substantially circumscribed the application of the common law doctrine of employment at will (also referred to as the pleasure doctrine) in Kenya. Currently and except in very limited instances involving some constitutional office holders, an employee can only be terminated with cause.
23. 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.
24. 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.
25. 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.”
26. 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 its own subjective assessment of what it considers as valid grounds with the decision of the employer.



27. Quoting *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Vol 16(1B) para 64, the Court of Appeal in *Kenya Revenue Authority v Reuel Waitbaka Gitabi & 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.”

28. 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 *Muthaiga 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**

29. In this case, the circumstances giving rise to the decision by the respondent to terminate the claimant are that the claimant was suspected to have been involved in a fraudulent online scheme to inappropriately access and convert for 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 this sinister intent. That as a result of these activities, money in the affected accounts was irregularly withdrawn. The respondent's case was that some of the accounts which were manipulated were found to have been saved on the desktop of the claimant but were later deleted.
30. The respondent also accused the claimant of assisting a stranger by the name Brenda Luria to unlawfully access and draw funds from one of the respondent's branches. These activities are said to have taken place on March 26, 2018 and 17<sup>th</sup> and or October 18, 2018.
31. After hearing the matter, the disciplinary committee investigating the claimant's involvement in the alleged heist was unable to verify whether the claimant had indeed participated in the manipulation of members' accounts through his username. However, it found that the claimant had unlawfully aided Brenda Luria to unlawfully access and draw funds from the respondent's accounts thereby causing loss of the funds in question. Consequently, through its minutes dated March 12, 2019 but signed by the committee's secretary on March 15, 2019, it recommended that the claimant be terminated.
32. The evidence on record shows that the Chief Executive Officer of the respondent, acting on the disciplinary committee's recommendations, terminated the claimant through his letter dated March 22, 2019. It is noteworthy that the singular ground for the claimant's termination according to the



- said letter was his alleged assistance to Brenda Luria to irregularly draw funds from the respondent's accounts.
33. 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 March 26, 2019. After considering his appeal, the appeals committee upheld the decision of the disciplinary committee.
  34. Although the case presented by the parties appears to stray into other matters that touch on whether or not the respondent's ICT platform was generally vulnerable to external cyber attacks, it is my view that since the basis of the disciplinary committee's recommendation against the claimant was the fact of his having aided Brenda Luria to unlawfully access funds from the respondent, the lawfulness or otherwise of the respondent's decision to terminate the claimant must be weighed against this singular issue. I will therefore confine my decision to examining the validity of this ground.
  35. It was the respondent's case that on October 18, 2018, the claimant assisted Brenda Luria draw funds from the respondent's Kilifi branch. The claimant denied this charge. According to the response to the notice to show cause (D exhibit 4), the claimant contended that he was only assisting this individual as he would do with any other customer of the respondent.
  36. The claimant repeated this assertion in his written statement to the disciplinary committee dated March 12, 2018. He further stated that he was assisting the lady with information on the respondent's loan interest rates. According to the aforesaid statement, the claimant indicated that it is him who took the initiative to engage the lady to see if she could open a Malaika account with the respondent.
  37. The claimant stated that his image in the CCTV footage relied on by the defense was just by chance. He suggested that he was just a victim of circumstances. That he had offered to assist Brenda in good faith and had met her for the first time on the day of their interaction at the banking hall. The claimant stated that at the time he interacted with the stranger (Brenda Luria), there was no way he would have known that she was a fraudster.
  38. In its decision, the disciplinary committee was not convinced with the claimant's account of events involving him and Brenda Luria on October 18, 2018. This is because and as is apparent from the content of the letter of show cause to the claimant dated January 21, 2019, the respondent had already established that Brenda Luria stole from the bank on October 18, 2018, the date she was spotted talking to the claimant at the banking hall.
  39. In rebuttal of the claimant's account about his interaction with Brenda Luria on the material date, the respondent called its ICT manager to produce and give an explanation on the recordings in the CCTV footage for October 18, 2018. This fact is self evident from the minutes of the disciplinary committee's proceedings. Based on the evidence of the said ICT manager, the disciplinary committee observed that the CCTV footage showed the claimant interacting with Brenda in the banking hall. That it later turned out that this same Brenda that the CCTV captured the claimant interacting with was confirmed to have made an illegal drawing of funds from the respondent on the same date that she was spotted with the claimant at the banking hall.
  40. It was the disciplinary committee's view that in view of the CCTV recordings and the subsequent confession by Brenda following her arrest that the claimant's interaction with her on October 18, 2018 at the respondent's banking hall was intended to assist her illegally draw funds from the respondent's account, the claimant's assertion that he was assisting her to confirm the respondent's loan interest rates or indeed open an account with the respondent was not convincing.
  41. While upholding the disciplinary committee's decision, the appeals committee questioned why the claimant intervened to assist the said Brenda with a bank transaction at the banking hall whilst the



respondent's branch was not busy at the time and other members of staff tasked with this mandate were present. The appeals committee wondered why the claimant had to move from the back office to come to the aid of this particular customer when this was not part of his core mandate as a sales or marketing officer particularly in view of the fact that other members of staff tasked with customer care were present within the banking hall.

42. Taking these factors into consideration, the disciplinary and appeals committees took the view that the claimant's conduct was suspect in the circumstances. This is particularly so that the respondent lost cash as a result of the drawings made by this individual (Brenda Luria) on the material day.
43. In his testimony in court and also through cross examination of the defense witnesses, the claimant tried to paint the picture of having not interacted with the said Brenda on the October 18, 2018. This can be discerned from his attack on the CCTV footage evidence that was produced by the defense. Yet, in his statement before the disciplinary committee, this very same claimant conceded to having interacted with this lady but sought to justify the interaction on account of assistance offered to her to open an account and explain to her the respondent's loan interest rates. It casts aspersions on the claimant's honesty when he attempts to reprobate and approbate on this issue as is convenient to him.
44. 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 the decision of the employer with its own view of the matter. 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.
45. Under section 44 (4) (g) of the EA, an employer is entitled to terminate an employee if "the employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property." Reasonable suspicion of involvement in criminal activity by an employee against the employer or the employer's property is therefore a reasonable ground to terminate the services of such employee.
46. In this case, the behavior of the claimant of moving from the back office to assist the lady who turned out to be a fraudster (as it is clear from the withdrawals she made as per the withdrawal slips presented in evidence as exhibits) provided reasonable grounds for the respondent to take the decision it did against the claimant. This is particularly because it was not within the docket of the claimant to assist clients to withdraw funds at the banking hall particularly when members of staff tasked with this kind of work were present within the respondent's banking hall. The explanation by the claimant that he was assisting the lady to open an account or to ascertain the respondent's loan interest rate is not helpful to his case as the real motive of Brenda's presence at the banking hall on that date, as can be inferred from the withdrawal slips, was to unlawfully draw funds belonging to the respondent. The circumstances surrounding the activities involving the claimant and Brenda on October 18, 2018, in my view provided a reasonable basis for the respondent to entertain a reasonable belief that the claimant was involved in the commission of an offense against the property of his employer.
47. It is important to point out that the measure of who a reasonable employer is for purposes of determining the validity of his reaction will vary from industry to industry. Consequently, it is necessary for this decision to be made 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.”

48. Having regard to the totality of the evidence presented before the disciplinary committee, I find that the decision the committee reached and which informed the recommendation it made to the respondent's management to terminate the claimant fell within the band of decisions a reasonable employer faced with similar circumstances would make. I therefore hold that the respondent had valid reason to terminate the claimant.
49. It should perhaps be noted that in reaching this conclusion, I have avoided making reference to evidence relating to events that occurred after the proceedings before the disciplinary and appellate committees. This is because what I am called upon to determine in this matter is the validity of the grounds or reasons for termination as presented to these two committees. Therefore, evidence of events that took place post the sessions before these committees is irrelevant. These include the testimony by Brenda before me in which she gave graphic details of how she was assisted by the claimant to illegally access and take away funds from the respondent and how she shared out the said funds between her boyfriend and the claimant. This evidence did not form the basis of the decisions by the two committees as it was not placed before them. This also explains why I have excluded evidence of withdrawal of the criminal charges against the claimant from my analysis. This withdrawal happened in 2021 long after the decision by the disciplinary and appeals committees.

### **c. Procedural Fairness in terminating the Claimant**

50. 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.
51. 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.
52. 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.
53. What the claimant appears to challenge is the *constitution* of the disciplinary committee. In his evidence and submissions, the claimant argued that the committee included the ICT manager that was subsequently charged in the criminal cause alongside him. Therefore, it was a case of an accused person becoming the accuser at the same time.



54. The claimant also makes allegations of a biased disciplinary process by mentioning the fact that it was based on a biased and selective investigative process as only the claimant's and a few other desktops were interrogated. That further, only the claimant and one other employee were terminated yet those who were suspects along with them were retained in employment.
55. In the statement of claim, the claimant questions the validity of the decision to terminate him before the criminal trial came to a close. In a sense, he suggests that the administrative hearing should have awaited the determination of the criminal case against him.
56. 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.
57. I have considered the evidence on record against these requirements. It appears to me that the respondent issued the claimant with a letter dated January 21, 2019 requiring him to show cause why his services should not be terminated for misconduct. The letter framed two charges against the claimant: -
- a) Misuse of the claimant's username to manipulate other accounts with a view to supporting fraudulent withdrawals of cash from accounts held by the respondent. Although the defendant's human resource manager stated in cross examination that the particulars of the affected accounts were not captured in the letter of show cause, it is apparent from the body of the letter that details of the transactions were supplied in a separate attachment to the letter. The exact dates of the alleged interference were supplied.
  - b) Assisting Brenda Luria to unlawfully withdraw cash from the respondent's account. The particulars of the place and date of withdrawal are also given.
58. To my mind, the respondent, by this letter, clearly set out the reasons why it proposed to take disciplinary action against the claimant. There is no indication that this was done in a language that the claimant did not understand. In fact, there is evidence that the claimant actually responded to the respondent's letter before he was suspended on January 23, 2019.
59. Also produced in evidence is the respondent's letter to the claimant dated March 7, 2019 notifying him of the disciplinary hearing. The letter reiterates the two counts against the claimant set out in the letter of January 21, 2019. The letter also reminded the claimant of his right to be accompanied by an employee of his choice during the disciplinary session.
60. The respondent also produced minutes of the disciplinary proceedings of March 12, 2019. From the minutes, although the claimant's co-accused (Reagan Kai) was in attendance, he is marked as attending in the capacity of the complainant's witness. Clearly, he was not part of the panel adjudicating the disciplinary case. He appeared as a witness for a party to the proceedings.
61. Further, it is noteworthy that the disciplinary proceedings were conducted on March 12, 2019. This was before this witness was arrested and charged alongside the claimant sometime around April 10, 2019. Importantly, the criminal charges against the said witness were actually dropped as they were against the claimant. In my view therefore, the complaint by the claimant that the presence of this individual at the disciplinary session prejudiced the claimant's case is without cogent basis. In any event,



- the claimant does not demonstrate how he suffered prejudice as a result of this witness attending the disciplinary session on March 12, 2019.
62. The minutes of March 12, 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.
  63. 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 either English or Kiswahili or both.
  64. Further the claimant was asked to indicate whether he had been supplied with the video clip that was going to be relied on by the complainant. He was also asked if he had adequate time to prepare his defense. As the record shows, he responded to the two inquiries in the affirmative. It is perhaps important to point out that since the CCTV footage was part of the critical evidence the committee relied on to establish the singular ground against the claimant, it was important that the claimant has the footage beforehand. And the record shows that he confirmed having been supplied with it before the proceedings before the disciplinary committee.
  65. 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.
  66. 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.
  67. 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.
  68. The complaint by the claimant that only he and Erick Jumbale were victimized even as two 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.
  69. With regard to whether the respondent ought to have halted the disciplinary session pending the results of the criminal case against the claimant, it is noteworthy that whilst the administrative process commenced on January 21, 2019 with the letter of notice to show cause and terminated on April 15, 2019 with the verdict on appeal, the criminal case was filed in court around April 10, 2019 and plea taken around April 11, 2019. Clearly, the criminal trial commenced after the claimant's case at the disciplinary committee had been concluded and was before the appeals committee. And the decision of the appeals committee was rendered within approximately four (4) days of the claimant taking plea on April 11, 2019 in the criminal trial.
  70. Importantly, the two processes have always been considered as separate with the issues for consideration distinct. Therefore, the suggestion that one should await the outcome of the other appears misplaced (see *David Kemei v Energy Regulation Commission* [2013] eKLR).
  71. 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.

### **The Remedies Sought**

72. 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 the marketing officer without losing his seniority and benefits.
  - c) Costs of the suit.
73. In view of my decision above, the claimant is not entitled to the prayers sought on the merits of the case. I will therefore not grant him any of them. 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.
74. In opposing the prayer for reinstatement, the respondent through its first witness indicated that it has already filled the position left vacant following the claimant's termination. That a Mr Silas Owuor Libogo has since been recruited to take up the position. A copy of the new employee's letter of appointment was produced as exhibit.
75. 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](#) prohibits the court from ordering reinstatement of an employee except when the order is made within three years of the employee's dismissal.
76. 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. This position has been reiterated in a number of judicial pronouncements (see for instance [Francis Okumu Ngesa v County Government of Siaya](#) [2017] eKLR).
77. As demonstrated by the respondent, it has already engaged a new employee in the same position as that previously held by the claimant. 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.
78. 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 March 22, 2019 and confirmed on April 15, 2019. This judgment is rendered on September 22, 2022, more than three years down the line. This period would have disentitled the court to even consider granting the remedy (see [Joshua Rodney Marimbah v Kenya Revenue Authority](#) [2021] eKLR).
79. I therefore dismiss the claimant's claim with costs to the respondent.

**DATED, SIGNED AND DELIVERED ON THE 22<sup>ND</sup> 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 12<sup>th</sup> 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**

**JUDGE**

