Kisirkoi v Maasai Mara University & 3 others (Petition 8 of 2017) [2018] KEELRC 2602 (KLR) (31 January 2018) (Judgment)

Samson Ole Kisirkoi v Maasai Mara University & 3 others [2018] eKLR

Neutral citation: [2018] KEELRC 2602 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

PETITION 8 OF 2017

DKN MARETE, J

JANUARY 31, 2018

BETWEEN

SAMSON OLE KISIRKOI ..... PETITIONER

AND

MAASAI MARA UNIVERSITY ..... 1ST RESPONDENT

VICE CHANCELLOR, MAASAI MARA UNIVERSITY ..... 2ND RESPONDENT

CHAIRMAN OF COUNCIL, MAASAI MARA UNIVERSITY .... 3RD RESPONDENT

COUNCIL, MAASAI MARA UNIVERSITY ..... 4TH RESPONDENT

JUDGMENT

1. This matter is brought to court by way of a Petition dated 19th May, 2017.
2. The respondents' in a Replying Affidavit to the Petition and Notice Motion of dated 8th May, 2017 denies the petition and prays that the same be dismissed with costs.
3. The petitioner's case that he was employed by the respondent as a Deputy Registrar (Administration) on permanent and pensionable terms in 2009. On 4th July, 2013 he was appointed as Acting Registrar (Administration.)
4. It is the petitioner's further case that he served the respondent diligently until the 24th February, 2016 when he was served with a suspension letter by the 2nd respondent. In this he was accused of not advising the management that one, David Bungei, was unqualified for the job he was deployed to do. Mr. Bungei was ultimately dismissed. The said Bungei also filed Nakuru ELRC Cause No.446 of 2014 and also wrote an article calculated at damaging the 1st respondent's reputation.

5. The suspension letter did not indicate the duration of the said suspension but however indicated that he would be paid half salary and house allowance and other benefits during this time. It was to be followed by another letter dated 26th February, 2016 revoking his appointment as Acting Registrar (Administration) of which he was requested to handover to a colleague, one Dr. James Namphushi.

6. The petitioner's other case is that as a consequence of the above, he filed a Judicial Review Application: Nakuru ELRC Judicial Review No. 4 of 2016 which he later withheld to await the outcome of the Bungei matter then in court. This was later withdrawn to give space to internal disciplinary mechanisms by the 1st respondent.

7. The petitioner's further case is that no action was taken by the respondent despite a lapse of 90 days, the stipulated life line of a suspension per the Collective Bargaining Agreement between the 1st respondent and the Kenya Universities Staff Union. Subsequently, on 23rd January, 2017 he was served with a letter accusing him of inciting students to protest and disrupt the university graduation held on 2nd December, 2016 and also planning to incite and instigate masaai community students and alumni to demonstrate in protest over students sent home as a consequence of a strike in the later part of 2016. This, it was alleged, was to pressurize the removal of the 2nd respondent.

8. The petitioner sought to be furnished with particulars of the charges against him vide a letter on 6th February, 2017 but this was declined in a letter dated 9th March, 2017. He appeared before the Disciplinary Committee on 9th February, 2017 when Mr. Lubulellah, counsel for the 1st respondent in the JR case at Nakuru was in attendance and represented the respondents. His attorney was denied access and participation.

9. At the disciplinary hearing, the petitioner was ambushed with allegations of inciting students to protest and disrupt the graduation ceremony, which allegations were not part of the charges contained in the suspension letter and he was at loss as to how to answer these in view of the fact that he had not been forewarned. The hearing proceeded despite his indication that he was not ready to respond to the new issues thereon raised. At the close of the day, the meeting was adjourned to the following day where he attended and on conclusion he was advised that the committee decision would be communicated to him in due course.

10. The petitioner was to later write to the 1st respondent inquiring on the disciplinary committee decision and in reply the 1st respondent through her legal officer wrote indicating that the issues raised in the letter of 20th January, 2017 raised weighty issues and requiring him to clear with the ministry of interior and co-ordination of National Government before a determination was made. This was a surprise as the issue of incitement had been raised and answered at the hearing with the respondent brushing it aside and emphasizing the original charges. Again, he has to date not been summoned to answer those allegations by either the police or the respondents. He indeed cleared with this government organ and was not found culpable and cleared, a clearance certificate he issued to the 1st respondent but to date he has not received any response on the fate of the disciplinary proceeding.

11. The petitioner further avers that he has since learnt that the positions of both Registrar Administration and Deputy Registrar Administration which he occupied were advertized but is still unclear of the outcome of proceedings. This clearly means that the respondent is intent on replacing and getting rid of him.

12. The 1st respondent has now moved on to deny the petitioner his allowances in contravention of the CBA and the letter of suspension. She has also lumped a debt or liability of Kshs.500,000.00 onto the petitioner without consultation or justification. Further, in the month of April 2017 the 2nd respondent summoned the petitioner to her office and demanded that he admits the charges of

incitement and also agrees to refrain from such incitement in exchange for clearance of the charges against him. He declined.

13. The petitioner is apprehensive that the series of events leading to the current situation is a choreographed scheme by the respondents, particularly the 2nd respondent to settle personal scores with the petitioner at the expense of the universities interest and that of the students and public. This is derived from the following;The indefinite suspension of the PetitionerThe demand for the reimbursement of the full allowance the Petitioner has been receiving since his suspension.Failure to give the Petitioner's union Representative notice of the disciplinary proceedings to enable them attend the proceedingDelaying the release of the Disciplinary committee verdict so as to arm twist the Petitioner into admitting to the allegations of incitement

14. The petitioner's other case comes out as follows;

    38. The Petitioner further contends that the entire process leading up to her dismissal was completely flawed and unprocedural thus rendering her dismissal unlawful, illegal, wrongful and in total contravention of the *Constitution* of Kenya, 2010, the *Fair Administrative Action Act*, 2015, The *Universities Act*, 2012, the Maasai Mara University Human Resource Manual and the Charter for Maasai Mara University for the reasons that;The disciplinary process and/or action the Petitioner was subjected to was purely orchestrated with malice and biasness. That the charges and/or allegations leveled against the Petitioner were as a result of the decision of his superiors and not his own making yet he was the only one singled out for this disciplinary process in total contravention of Article 41 (1) of the *Constitution* of Kenya, 2010The Petitioner has been forced to serve suspension for over one and half years contrary to Article 47 of the *Constitution* of Kenya, the Collective Bargaining Agreement between the 1st Respondent and the Kenya Universities Staff Union to which the Petitioner is a member that requires suspension to last for a period not exceeding 90 days and if no action is taken, the same to stand lifted. To date the Petitioner still serves the 'so-called' suspension against the laid down laws and/or the decision.The Petitioner was not adequately informed of the charges facing her contrary to Article 50 the *Constitution* of Kenya, 2010, Section 4(3)(a) of the Fair Administrative Action, Act, 2015 and 63(1)(a) of the *Universities Act*, 2012That the actions and/or the entire process of the said disciplinary process contravened and infringed the Petitioner's right enshrined in the *Constitution* under Article 41 of the *Constitution*.Despite the Petitioner religiously attending and subjecting himself to the disciplinary process put in place by the Respondents, the Respondents have elected not to disclose and/or make known their verdict to the Petitioner.The Respondent failed and/or refused to avail and/or supply to the Petitioner documentary evidence that were to be relied upon during the disciplinary proceedings against her contrary to Articles 35 and 50 of the *Constitution* of Kenya, 2010 and Section 4(3)(g) of the Fair Administrative Act, 2015.The Respondents leveled extraneous issues and allegations which were not part of the charges leveled against and supplied to the Petitioner in the letter dated 25/1/2017 contrary to Article 47 and 50 of the *Constitution* of Kenya, 2010 and Section 4(4) (c) of the *Fair Administrative Action Act*.The Petitioner was deprived of her right to representation, legal or otherwise during the disciplinary hearing despite the 1st Respondent being represented by their Advocate, A. M. Lubulellah throughout the disciplinary proceedings contrary to Article 41(1), 47 and 50 the *Constitution* of Kenya, 2010 and Section 4(4) (a) of the *Fair Administrative Action Act*The Respondents refused and/or declined to allow the Petitioner to call his witnesses during disciplinary hearing and/or proceedings contrary to Article 47 and 50 of the *Constitution* of Kenya, 2010.The Petitioner was ambushed to attend a disciplinary hearing without being accorded adequate and/or ample time to prepare for the hearing, put defence and/or call witness contrary to Article 47 of

the *Constitution* and 63 (1) (b) of the *Universities Act*, 2012.That is noteworthy to note that, other members of Maasai Mara University who attended the disciplinary hearing even after the Petitioner have known their fate as opposed to the Petitioner.Keeping the Petitioner herein in the dark as to the fate of his employment and/or decision made by the disciplinary council is in itself unfair and amounts to constructive dismissal contrary to Article 41 (1) of the *Constitution* of Kenya, 2010.The Respondents have refused to release the decision of the Disciplinary Committee and instead advertised the position of Registrar and Deputy Administration before the Petitioner has been informed of the decision of the Disciplinary Committee contrary to Article 47 of the *Constitution* of Kenya, 2010 and Sections 4(2) and 6 of the *Fair Administrative Action Act*, 2015 which action amounts to constructive dismissal and/or termination.In contravention of Article 35 of the *Constitution* of Kenya, 2010 and Section 6 of the *Fair Administrative Action Act*, 2015 the Petitioner has been denied access to the transcripts of the proceedings and the decision thereof.The petition has been deprived of his right to administrative action that is expeditious, efficient, lawful, transparent, open, reasonable and procedurally fair contrary to Article 47 of the *Constitution* of Kenya, 2010 and Article 4(1) of the Fair Administrative Action, 2015.The petitioner in the penultimate avers that the continued non disclosure of the decision of the disciplinary committee coupled with nonpayment of his dues on suspension have caused untold suffering and havoc in his career and life and therefore this such for remedy and relief.

14. He prays as follows;

a) A declaration that the suspension disciplinary process by the Respondents violated the provisions of Articles 41, 47 and 50 of the *Constitution* of Kenya hence null and void.

b) A declaration that the Petitioner's suspension violated Article 41, 45 and 47 of the *Constitution* of Kenya, 2010 hence null and void and ought to be lifted.

c) The suspension and the continued purported suspension contravenes the Collective bargaining agreement between the 1st Respondent and the Kenya Universities Staff union and therefore ought to be lifted forthwith.

d) A permanent injunction restraining the Respondents from commencing and/or continuing with any process towards replacement of, or replacing the Petitioner in the position of Deputy Registrar (Administration).

e) An order that the Petitioner be reinstated to resume his duties as the Deputy Registrar (Administration) of the 1st Respondent.

f) Alternatively, the Petitioner be paid her remuneration/salary, terminal benefits in full, allowances and any other dues effective from the date of his purported suspension up to the end of his term as Deputy Registrar (Administration) on attainment of the age of 65 years as per the letter of appointment and terms of service.

g) That the Petitioner be compensated by way of damages for mental, psychological and emotional anguish/torture and suffering he was subjected to by the Respondent due to violation of his Constitutional rights.

h) Costs of this Petition.

15. The respondents' case is that the petitioner was employed and worked for Maasai Mara in the capacity of Deputy Registrar (Administration) which meant that he was bound by the rules and regulations

of the university in regard to its staff. He was also subject to disciplinary proceedings as regards his conduct as employee.

16. The respondents' further case is that the petitioner signed a letter of appointment dated 10th June, 2009 accepting the terms and conditions of his employment. This letter also sets out the duties and responsibilities of the petitioner in the office of Deputy Registrar (Administration.) In this position he was expected to advice the university management of the suitability of all persons sent or assigned to take charge of inter alia student recruitment at Kilgoris Learning Centre. This placed a professional burden onto the petitioner over and above other academic staff of the University.

17. The respondents' other case is that contrary to the petitioners averment, he was not diligent or satisfactory in the performance of his duties and this failure to so advise the university management on the suitability of persons sent to take charge of the student recruitment at Kilgoris Learning Centre constituted a fundamental breach on his part and a threat on the ability of the respondent to deliver on its core business.

18. He was therefore suspended on 23rd February, 2016 to allow furtherinvestigations into his conduct. This was due to his decision to deploy Mr. David K. Bungei to Kilgoris Learning Centre being well aware of his limitations and lack of qualifications to partake the assignment.

19. The respondents' further case is that the petitioner on receipt of the suspension letter filed a Judicial Review Application: Nakuru (Nakuru JR No.4 of 2016) from which he fraudulently fronted leave and stay orders which had not been granted by the court. This was later withdrawn on realization that it did not meet the threshold for judicial review proceedings.

20. The respondents' further avers and submits that on the requirements of fair administrative action under Article 50 of the *Constitution* of Kenya, 2010 were pursued by the respondent in that the petitioner was invited to appear before a disciplinary committee, he was given an opportunity to be accompanied by a representative of his choice and call witnesses but he chose not to.

21. It is the respondents' further averment that upon hearing, the disciplinary committee entered a decision of reinstating the petitioner to employment but despite communication, he refused to acknowledge receipt or take up his position with the 1st respondent. In the meantime, the respondent received confidential information from the Principal Secretary Ministry of Interior and Co-ordination of National Government which information is classified and relate to the conduct of the petitioner within the 1st respondent and the danger he poses to the institution. The respondent opines that it would be unconstitutional to force the petitioner to work for the respondent against his volition and this would amount to servitude.

22. The respondents' other case is a denial of the efficacy of the CBA referred to by the petitioner in that it was not signed inter partes or even registered with this court to afford its legal validity. It is therefore inconsequential.

23. The respondents' in the penultimate avers that this petition is unfounded, lacks merit and is calculated to execute personal vendetta against the 1st and 2nd respondents'. In any event, the petitioner is about to retire and has been served with a retirement notice.

24. This matter was heard ex parte on 1st November, 2017 where the petitioner testified in reiteration of his case. He also produced various documents he sought to rely on in support of his case. All marked as exhibit 1 – 38. He testified that he was a diligent worker who performed exemplary well as is illustrated in his very commendable appraisal at the work place.

25. The respondents were absent at the hearing and did not in any way participate thereof. We are denied the benefit of the contribution in a determination of this matter. This is not fair but we have a consolation on the fact that this their own undoing.

26. The issues for determination therefore are;

    1. Whether the termination/retirement of the petitioner by the respondent was lawful?

    2. Whether the petitioner is entitled to the relief sought?

    3. Who bears the costs of this petition?

27. The 1st issue for determination is whether the termination/retirement of the petitioner by the respondent was lawful. It would be prudent to make a jurisprudential analysis of the term termination as employed in its various usages in employment law. On this, I wish to rely and take credence on the authority of D.K. Njagi Marete vs. Teachers Service Commission [2013] eKLR where my good friend and brother, Rika, J. very ably interrogated this term and came out as follows;

    17. Termination of employment as a general term, means, the coming to an end of the contract of employment. The end may come voluntarily, involuntarily or consensually. It comes voluntarily when for instance, the employee resigns; involuntarily when the employee is dismissed or has his position declared redundant; or consensually when a fixed term employment contract lapses. The overall terminology for the end of the employment contract is termination. The means by which that end comes vary. Any form of termination, as discussed by this Court in the Industrial Court Cause Number 886 of 2010 between Julie Topirian Njeru v. Kenya Tourist Board, should always be on objective and demonstrable ground.

    18. Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of a disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non performers from employer's business. As a decision based on public interest results in termination of employment, it would fall within the requirements of Section 43 of the *Employment Act* 2007. It is the responsibility of the employer to prove the reason or reasons for the retirement.

    19. The Respondent had the onus to show objective and demonstrable grounds warranting the retirement of Marete. When a public employer justifies the premature termination of a contract of employment, on the grounds of public interest, such an employer must show its decision is driven by public policy objective, and that the decision taken is legitimate and justifiable. It is not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest has been made. There must be shown valid reasons amounting to public interest, to justify termination. The employer would be expected to show adherence to fair termination procedure, before arriving at the decision. If the allegation against the employee is on non performance, the employer must at the outset advise, counsel, and assist the public servant to amend his ways. In case there is no change, the employer should call for special appraisal. At the end of these procedural steps, the employer would have material with which to confront the employee, and justify retirement on public interest. If public employers are allowed to merely invoke public interest in retiring employees, without giving elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the *Employment Act* 2007 would be meaningless to public servants.

28. This analysis clearly shows that in the circumstances that this case, the action of the respondents by their letter of retirement of the petitioner dated 20th February, 2017 amounted to termination of employment. The observations made by the court in this cause therefore apply to this petition and suit.

29. The petitioner in his written submissions dated 13th November, 2017 submits a case of unlawful termination of employment in that the disciplinary proceedings by the respondent were irregular due to the unavailability of an opportunity to present his case and also call a representative of choice and witnesses.

30. The petitioner submits a case of suspension vide a letter dated 23rd February, 2016 on grounds of transferring David Bungei to Kilgoris Learning Centre. He controverts this by submitting that this transfer was not a one person affair and that he had consulted and gotten the approval of his superiors before it was effected. His being singled out for disciplinary process was therefore an affront to section 41 (1) of the *Constitution* of Kenya, 2010.

31. The petitioner further submits a transgression of his right under Article 41 of the Constitution as follows;A denial of house allowance and other benefits by the respondent yet the suspension letter was clear that the petitioner could be entitled to half salary and other benefits.Massive delay in disciplinary proceedings in that the petitioner was suspended on 23rd February, 2016 but the disciplinary proceedings took place on 9th and 10th February, 2017. This was one year of suspension in contravention with the CBA and inspite several reminders on his part and that of the union.Delayed issue of the decision of the disciplinary committee.Advertisement of the position of Registrar (Administration) and Deputy Registrar (Administration) before a decision on his case was made.Issue of issuing of letter of retirement dated 22nd May, 2017 and a letter lifting the interdiction dated 26th May, 2017.Denial of his entire salary - allowances and other benefits on the guise of an interdiction which was never had.

32. The petitioner further faults the disciplinary proceedings leading to her retirement as follows;The disciplinary process and/or action the Petitioner was subjected to was purely orchestrated with malice and biasness. This is because the charges and/or allegations leveled against him were as a result of implementation of the decision of his superiors and not of his own yet he was the only one singled out for this disciplinary process in contravention of Article 47 of the *Constitution* of Kenya, 2010.The Petitioner was forced to serve suspension for over one year conatrary to Article 47 of the *Constitution* of Kenya, 2010, the Collective Bargaining Agreement between the 1st Respondent and the Kenya Universities Staff Union to which he was a member which specified that a suspension should last for a period not exceeding 90 days and if no action is taken, the same to stand lifted.The Petitioner was not adequately informed of the charges facing him contrary to Article 50 of the *Constitution* of Kenya, 2010, Seection 4(3)(a) of the Fair Administrative Action, Act, 2015 and 63(1) (a) of the *Universities Act*, 2012. This is because the Respondents raised other extraneous issues such as incitement of students yet the Petitioner had never been of incitement.The Respondent failed and/or refused to avail and/or supply the Petitioner with documentary as required by law so as to enable me to adequately prepare for the disciplinary proceedings contrary to Articles 35 and 50 of the *Constitution* of Kenya, 2010 and section 4(3) (g) of the Fair Administrative Act, 2015.The Petitioner was deprived of her right to representation by a person of her choice during the disciplinary hearing despite the Respondents being represented by their Advocates from M/s. Lubulellah Associates, Advocates throughout the disciplinary proceedings contrary to Article 41 Article 41(1), 47 and 50 of the *Constitution* of Kenya, 2010 and Section 4 (4)(a) of the *Fair Administrative Action Act*.The Petitioner was ambushed to attend a disciplinary hearing without being accorded adequate and/or ample time to prepare for the hearing, put defence and/or call witnesses contrary to Article 47 of the *Constitution* and 63 (1) (b) of the *Universities Act*, 2012. This is because the letter inviting the Petitioner for the disciplinary

hearing on 9/2/2017 was only served on him on 26/1/2017.The Respondents refused to release the decision of the Disciplinary Committee and instead advertised the position of Registrar and Deputy Registrar Administration before the Petitioner has been informed of the decision of the Disciplinary Committee contrary to Article 47 of the *Constitution* of Kenya, 2010 and Sections 4 (2) and 6 of the *Fair Administrative Action Act*, 2015 which action amounts to constructive dismissal and/or termination.The Petitioner was deprived of his right to administrative action that is expeditious, efficient, lawful, transparent, open, reasonable and procedurally fair contrary to Article 47 of the *Constitution* of Kenya, 2010 and the Article 4(1) of the *Fair Administrative Action Act*, 2015.

33. The petitioner further submits a case of unlawful notice of retirement in his letter dated 22nd May, 2017 for the following reasons;The terms of service the Petitioner signed on 7/2/2010 for the job grade he held (that is grade 14) as well as the Masaai Mara University Statutes indicated that his retirement age was 65 years (see Ex 23).The letter dated 8/9/2017 from the Petitioner pension scheme confirmed that from its records, the Petitioner's retirement age is 65 and not 60 years (see Ex 24 and 25).The issue of the government policy capping the retirement age at 60 years that was alluded to in the 1st Respondent's letter dated 28/9/2017 (see ex 26) was the subject of proceedings in Nakuru ELRC No. 506 of 2014 and 507 of 2014 (see Ex 28). The court in the aforesaid cases held that the said policy varying the terms of service was unlawful.

34. He therefore submits a case of unlawful termination/retirement which he argues should be revised and reversed in toto.

35. The petitioner further seeks to buttress her case on the authority of Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR where Mbaru, J. observed as follows;

> Section 41 of *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.
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> The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair.
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> The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

36. Here, the court was elaborate and emphatic on procedure as follows;

> 34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the *Employment Act*. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.
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> Further,

43. Is this the procedure envisaged as under section 41 of the *Employment Act*. "Did the respondent as the employer follow this procedure" Far from it. From 17th February 2009 to 29th June 2012, the claimant was still under suspension. The respondent Board of Directors met and made a decision to terminate the claimant on the reason of public interest. It was not pleaded or adduced in evidence as to the process employed by the respondent to arrive at this public interest reason of termination. The respondent has not claimed to have given notice or accorded the claimant the right to be heard before the issuance of the letter dated 29th June 2012. This is absurd as the very purpose of due process, natural justice and fair labour practices now demand that before termination, even in a case where the employer is ready and willing to pay in lieu of notice, a hearing must be conducted where an employee is given a fair chance to defend self in the presence of a union representative and if not unionized, in the presence of a fellow employee of the employees' choice. This is a provision core to fair labour practices that each party to an employment relationship must respect. This right was espoused in detail by this court in the case of *Elizabeth Washeke and others versus Airtel (k) Ltd and Another Cause No 1972 of 2012*. Section 41 of the *Employment Act* is mandatory as outlined above.

37. The 1st and 2nd respondents in their written submission dated 9th January, 2018 also reiterate their case as presented and pleaded. He submits and foments a case of lawful termination of employment in that the petitioner was negligent in the performance of his duties by transferring an unqualified officer, David Bungei to work in an office he was not qualified to. She also accuses the petitioner of underhand misconduct by inciting student unrest and disruption of the graduation ceremony for December, 2016.

38. The respondents' further submit that this petition is overtaken by events. The petition as originally filed challenges the suspension of the petitioner instituted by the letter dated 23rd February, 2016. The petitioner cannot therefore seek to extrapolate the petition through a further affidavit filed on the eve of the purported hearing. This petition comes after the petitioner had appeared before disciplinary proceedings under decision rendered and therefore rendering the petition an afterthought. I must admit that I find this submission jumbled up and incomprehensible.

39. The respondents further seeks to rely on the authorities of Rebecca Ann Maina & 2 Ors v Jomo Kenyatta University of Agricultural and Technology (2014) eKLR, Ndolo J held that the Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities, but Court could not to stop the process, but only put things right.

40. Again in Joseph Mutura Mberia & Ar v Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) (2013) eKLR, Mbaru, J. held that the court has jurisdiction to interdict any unfair conduct including disciplinary action but such intervention should be in compelling or exceptional cases.

41. In conclusion, the 1st and 2nd respondent vehemently submits a case against reinstatement by relying on the authority of Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR where the Court of Appeal observed thus:

> Reinstatement is provided for under Section 49(3) (a) of the *Employment Act* as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in mandatory terms and requires the court to take into account any of following matters set out in Section 49(4) (a) to (m) before it can order reinstatement;
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> a. The wishes of the employee;

b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. The practicability of recommending reinstatement or re-engagement;

d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. The employee's length of service with the employer;

f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. The opportunities available to the employee for securing comparable or suitable employment with another employer;

h. The value of any severance payable by law;

i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. Any expenses reasonably incurred by the employee as a consequence of the termination;

k. Any conduct of the employee which to any extent caused or contributed to the termination;

l. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m. Any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."

42. A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute.

... In the Kenya Airways Ltd case (supra) Githinji, J.A., expressed himself thus;

(27) The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be offered except in very exceptional circumstances. The court should

also balance the interest of the employees with the interest of the employer."

This was echoed in the same case by Maraga JA (now CJ), as follows;

> 68. As I have said in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them."

...New Zealand Education Institute vs. Board of Trustees of Auckland Normal Intermediate School [1994]2 ERNZ 414 CA stated as follows;

> Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justice of the cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the in the sense of being impracticable to reinstate the employment relationship."
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> With respect, we agree.
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> We think that in all respects the learned Judge got it all wrong. Where, as here, an employer has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders such as issued in the instant case be given. Much as courts are right to be solicitous of the interests of the employee,

> they must remain for a where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway.

43. The elaborate submission against reinstatement by the respondents is agreeable. Reinstatement should be a rarity and not common place or routine. However, I must add that the common law situation on which our current law is founded did not anticipate situations like are common place in our employment circles and circumstances. It did not anticipate cases of impunity where employers for no reason whatsoever send employees home and proceed to feign and manipulate circumstances and conditions justifying such termination of employment. Courts are therefore duty bound to lift the veil of termination and temperate this with the common law position as espoused in our law to come up with a case of justice for the employee.

44. We should applaud the revolutionary nature of employment law and practice incepted by the 2007 reforms on the law. The transformative *Constitution of Kenya, 2010* is also a pace setter in radicalizing Employment and Labour Relations Law. We should therefore be cautious so as not to appear like we wish to hide behind the law to deny parties their fundamental rights and freedoms enshrined in the Bill of Rights and applicable in contemporary society. This would be a derailment of the gains so far made and unacceptable.

45. This matter tilts in favour of the petitioner. This is because he has overwhelmingly brought out a case of termination of employment without regard to procedural fairness as provided for by section 41 (1) and (2) of the *Employment Act*, 2007. This is as follows;The disciplinary process was actuated by malice and bias. The petitioner was charged an issue that was directed by his seniors.The petitioner was forced to serve an elongated suspension period in contravention of the law and subsisting CBA.The petitioner was denied an opportunity to present his defence through denial of particulars of charges and also refusal of re-presentation by a person of his choice.Communication of the decision of the disciplinary committee has not been had to date. This is tantamount to constructive dismissal.Inclusion of additional charges and extraneous issues and allegations during the disciplinary proceedings.Refusal to call witnesses during the hearing.Denial of transcripts and decision of the disciplinary committee.Denial of an expediate, efficient, lawful, open, reasonable and procedurally fair disciplinary process.

46. The respondents' dispute some of the claims by the petitioner as above cited. They, however, do not proffer any evidence to controvert the petitioner's case as set out. Particularly, the respondents deny the presence of counsel Lubullelah during the disciplinary proceedings but the matter ends at that. Denial.

47. The respondents' in defence also submit that the petitioner cannot be awarded that which he refused in the first place. This is in reference to a letter dated 26th May, 2017 lifting the interdiction. I do not agree. This letter is unclear and contradictory. It is not a recall letter as such. The petitioner in his response dated 15th July, 2017 seeks interpretation of the letter and queries the interchange between the terms interdiction and suspension. We do not see any answer on this.

48. It was the foremost duty of the respondents to produce a copy of the disciplinary proceedings in support of their case. This is not only apt practice but evidence of compliance with section 41 of the *Employment Act*, 2007 and the authority of Mary Chemweno Kiptui, supra. This would tell the composition of the disciplinary panel. It would assuage and even shed light on the petitioner's claims on the presence of Mr. Lubullelah at the meeting. This is not availed anywhere in these proceedings

49. It is our finding that the petitioner's case overwhelms that of the respondents in terms of evidence. Even in the absence of this, it would still take sway on a balance of probabilities. Given this scenario, the petitioner's case sounds the more probable of the two. The actions and inactions of the respondents in all amounted to constructive termination of employment. I therefore find a case of unlawful termination/retirement of the petitioner by the respondent and hold as such. This answers the 1st issue for determination.

50. The 2nd issue for determination is whether the petitioner is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment he is entitled to the relief sought.

51. I am therefore inclined to allow the petition and order relief and declare as follows;

    i. A declaration be and is hereby issued that the disciplinary process by the respondents violated the provisions of Articles 41, 47 and 50 of the *Constitution* and is therefore null and void ab initio.

    ii. A declaration be and is hereby issued that the petitioner's suspension violated Articles 41, 47 and 50 of the *Constitution* of Kenya, 2010, is therefore null and void and lifted in toto.

    iii. That the suspension and continued suspension of the petitioner contravenes

    iv. the Collective Bargaining Agreement inter partes, is therefore null and void and is lifted in toto.

    v. A permanent injunction be and is hereby issued restraining the respondents from commencing any process towards replacement of, or replacing the petitioner in the position of Deputy Registrar (Administration.)

    vi. That the petitioner be and is hereby reinstated to employment as Deputy Registrar (Administration) with effect from the date of this judgement of court.

    vii. That the petitioner be and is hereby ordered to report back to work tomorrow, the 1st February, 2018 at 800 hours.

    viii. Six months salary as compensation for unlawful termination of employment, Kshs.201,319.50 x 6 .....=Kshs.1,207,917.00

    ix. The respondent be and is hereby ordered to meet and pay the respondents salaries and allowances owing but unpaid during his suspension.

    x. The commissioner for labour be and is hereby ordered to with the involvement of the parties compute the amount payable under order (viii) above within 120 days.

    xi. Mention on 9th May, 2018 for a report on computation.

    xii. The costs of this petition shall be borne by the respondents.

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF JANUARY 2018.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Miss Odwa instructed by Nyairo & Company Advocates for the petitioner.

2. Mr. Wabuge instructed by Lubullelah & Associates for the 1st and 2nd respondents.

3. No appearance for the 3rd and 4th respondents.