



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI
CAUSE NO. 1421 OF 2014

REUWEL WAITHAKA GITAHU 1ST CLAIMANT
FERICHINA GATHONI WAWERU 2ND CLAIMANT
GEDION KATHILA MUTUKU 3RD CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY RESPONDENT

JUDGEMENT

BACKGROUND

1. The Memorandum of Claim was filed on 22nd August 2014 together with an application under Certificate of Urgency on the same date. In the Application, the Claimants were seeking various orders among them being;

1. ...

2.

5. That the Court be pleased to issue a conservatory relief order compelling the Respondent to provide the Claimants with the documents listed at ground (f) of this application pending the hearing and determination of the Statement of Claim and or the Claimants' Appeals to the Commissioner General of the respondent.

6. That this Court be pleased to make such further or other orders or give such directions in light of the Claimants Appeal before the Commissioner General of the respondent.

2. The documents listed at ground (f) of the application related to;

In respect of the 1st Claimant

i. All the alleged deleted receipts reconciling to the amount of the alleged revenue loss;

ii. Witness statements within KRA;

- iii. Investigations report or reports as the case may be;
- iv. Inspection stickers issued on the strength of the alleged deleted receipts;
- v. Statements by the motor vehicle inspectors;
- vi. Statements by vehicle owners or their authorised agents, of the vehicles that allegedly accessed the motor vehicles inspection services on the strength of the allegedly deleted receipts;
- vii...
- (ix) Statements of his co-accused (Cashiers) as taken by the Revenue protection Services (RPS) and Internal Ethics & Integrity Department.

...

In respect of the 2nd claimant

- i. All the purported deleted receipts totalling to the stated amount Kshs.95,510/-;
- ii. All Cashiers Collection Summary Reports for the affected dates;
- iii. All Cashiers Collections Summary Sheets for the affected dates;
- iv. All the inspection reports and stickers of the affected motor vehicles;
- v. The IP address of the machine she used;
- viii ...
- ix. Minutes of the disciplinary committee that listened to her and her co-accused.

...

In respect of the 3rd claimant

- i. Copies of all daily Collection Control Sheets for the transactions in questions;
- ii. Copies of all computer generated revenue reports for the transactions in questions;
- iii. Copies of alleged deleted receipts Kshs. 274,350/-
- iv. ...

(xii) Statement of his co-accused (Chief Cashier) as taken by the by the Revenue Protection Services (PPS) and Internal Ethics & Integrity Department.

...

3. On 10th September 2014, the Court heard both parties and directed the Respondent to issue the Claimants with all the listed documents as above and set out underground No. 5 of the application and Notice of Motion. The Court gave the Respondent 7 days to do so.

4. The Respondent did not comply. On 25th September 2014, the Court directed the Claimant to proceed with their case without the requested documents pursuant to the provisions of section 73 and 74 of the

Employment Act. This Court heard the Claimants on their application dated 22nd August 2014 and delivered a ruling on 16th December 2014. The Court made orders with regard to the failure by the Respondent to issue the required documents to the Claimants and directed that the main cause be heard without such documents or records.

5. The 3 Claimants testified in support of their case. The Respondent called three (3) witnesses in defence.

Claim

6. The Claimants were all employed by the respondent, a corporate body established under the Kenya Revenue Authority Act Cap 469 with the responsibility to assess and collect tax revenue in Kenya. The Claimants had each a contract of employment the 1st claimant, Reuwel Waitthaka Gitahi 19th December 2005; the 2nd claimant, Ferichina Gathoni Waweru on 17th June 2004; and the 3rd claimant, Gideon Kathila Mutuku on 22nd February 2008. The 1st Claimant last position held with the Respondent was Chief Cashier while the 2nd and 3rd claimant's last position was Cashier.

7. On 18th March 2011, the 1st and 2nd Claimants were suspended from employment on the grounds that the 1st Claimant as Chief Cashier, between 1st January 2009 to 30th January 2011 he defrauded the Respondent a sum of Kshs.3,483,675.00 being payment due for amongst other items motor vehicle inspection Fee. That his account for cancelled and skipped receipts included receipts that had been duly paid for and issued to taxpayers which was irregular. The 2nd Claimant was suspended on the reasons that between January 2009 to September 2010 in her capacity as Cashier defrauded the Respondent a sum of Kshs.95,510.00 being payment for amongst other items Motor Vehicle inspection Fee. The amounts had been paid and receipts issued to taxpayers and thus committed the fraud by colluding with the chief cashier who then deleted the receipts in the common cash receipting system. That she failed to account for the receipts issued at the close of the day in the Cashiers Collection Summary Sheet as is required.

8. The 3rd Claimant was on 17th July 2012 suspended from employment on allegations that he fraudulently deleted computer receipts and as cashier defrauded the Respondent a sum of kshs.274,350.00 being payment due for among other items Motor Vehicle Inspection Fee. That he committed the fraud by colluding with the Chief Cashier who then deleted the receipts in the Common Cash Receipting System.

9. The Respondent in suspending the Claimants invoked the provisions of the Code of Conduct (Rules and Regulations Governing Discipline and Grievances) (herein referred to as the 'Code'). Such Code at Article 6B (g) regulated suspensions to be for a period of 3 months and where not possible to resolve a matter the Commissioner General (CG) had the discretion to extend the period. Further, part 8.4.7 as revised in 2012, required that employees on suspension, their cases should be determined in 6 months. These provisions notwithstanding, the 1st Claimant was invited to a disciplinary hearing on 23rd April 2014 while the 2nd and 3rd Claimants were invited on 21st May 2014. The Claimants were then all dismissed from employment on 23rd July 2014.

10. The claim is also that the dismissal of the Claimants were procedurally and substantive irregular. Letter issued to the Claimants stated that following a disciplinary committee meeting on 21st May 2014, the defences and presentations made had been found unacceptable. This was contrary to set procedures in the Code as such dismissal would only happen in cases of gross misconduct which was not the case for the Claimants. The composition of the disciplinary committee was also pre-set in the Code which was not adhered to in this case. The committees that heard the Claimants made a decision to dismiss them which action was beyond the mandate under the Code as this was reserved for the CG.

11. Following the dismissal of the Claimants and in application of the Code, the Claimants wished to lodge appeals but could not do so without key documents being provided by the Respondent. To be able to lodge such appeals, they wrote to the Respondent seeking to be issued with various documents. Such

documents were not issued.

12. The claim is also that the actions of the Respondent were unlawful and unconstitutional which has caused the Claimants immense psychological, financial and mental anguish. Since suspension, the Claimant only received house allowance without a salary and no other employment benefit was paid. The claimant's prayers are;

a) A declaration that the Respondent is guilty to unfair labour practice in respect of its purported termination of the Claimants employment;

b) A declaration that the Claimants right to fair labour practices and fair administrative action had been breached resulting in unfair, irregular and illegal termination of employment;

c) An order for reinstatement to employment and to be treated in all respects as if the employment had not been terminated;

d) An order compelling the Respondent to unconditionally pay the clamant all withheld salaries and benefits during the period of suspension;

i. In respect of the 1st Claimant since 18th march 2011;

ii. In respect of the 2nd Claimant since 22nd March 2011; and

iii. In respect pf the 3rd Claimant since 17th July 2012.

e) Damages for the breach of the Claimants fundamental right to fair labour practices;

f) Damages from illegal termination of employment;

g) Interest on (d), (e), and (f) above at the Court rates;

h) Costs of the claim; and

i) Any other remedy that this Court may deem just and expedient to grant.

13. The 1st claimant, Reuwel Waithaka Gitahi testified that upon employment by the Respondent on 19th December 2005 he served diligently until he was unfair terminated. On 18th March 2011 he was suspended on allegations that he had defrauded the Respondent Kshs.3, 483,675.00 money for motor vehicle inspection fee. The Respondent did not disclose who had made the reports of fraud despite the Claimant having authority and capacity to delete receipts in the system. The allegation that he cancelled receipts without authority had no basis as the Respondent had not done an analysis of receipts that they could delete and then make the allegation. The impact of this allegation was the every deleted receipt amounted to fraud. The notice did not set out what misconduct had been committed. The letter of dismissal sent on 23rd July 2014 did not outline what issues were not acceptable so as to amount to reason(s) sufficient enough to dismiss the Claimant. The appeal lodged was rejected on 13th January 2015 without provision of necessary materials.

14. The 1st Claimant also testified that since his suspension he has been without a job and salary which has turned his life upside down. The alleged deleted receipts related to a period when he was on leave and approved by the Respondent. He was suspended upon the Respondent undertaking internal investigations but he was never issued with the reports. The Claimant was supervised by Jane Muiruri who made a statement and confirmed that the deleted receipts were all supported and where there was error, it was permissible. The section supervisor and claimant's senior officer Ms Margaret Ogega also confirmed he had no wrongdoing. That the disciplinary committee failed to consider all these statements and responses the Claimant made while arriving at the decision to dismiss him from his employment.

15. The Claimant also testified that while on suspension he was paid half salary without benefits. This caused him mental suffering and anguish as he could not be able to support his family. His claim relate to salaries unpaid; annual increments for the period; bonus payments set by Treasury and paid to Respondent employees for the last 4 years; July 2011 Kshs.97, 000.00; July 2012 kshs.104, 000.00; July 2013 kshs.111, 000.00; July 2013 Kshs.118, 000.00.

16. The total dues unpaid amounting to Kshs.6, 829,000 of which house allowances were paid at Kshs.30, 000.00 x 39 months making the total dues payable at Kshs.5, 659,000.00. These dues have been withheld by the Respondent and the claiomtn being a father of 3 children was unable to support them. His lowest moment was his 5 year old son who is in baby class refused to go to school as his slice of bread did not have margarine and he threw tantrums. This caused the Claimant great mental torture as at the time he could not be able to support his children for lack of money. The Claimant is also supporting his ailing mother who require medicines and the demands of life have become a heavy load that is unbearable.

17. The Claimant also testified that the Respondent breached his employment contract, his fundamental rights and for the mental torture and anguish he is seeking damages. The Respondent denied him employment; withheld his salaries; and should therefore pay for such unfair labour practices, the costs of the suit and interests on all amounts. The Court should also declare the Respondent to have violated fundamental rights of the Claimants and make an award in compensation.

18. The 2nd Claimant on her part testified that she was employed by the Respondent vide letter dated 17th April 2004 and worked diligently until he suspension and dismissal. The suspension was on the 22nd March 2011 on the grounds that she had fraudulently deleted computer receipts amounting to Kshs.95, 510.00. The details of the alleged fraud were not stated. On 21st May 2014 she was called to the disciplinary committee hearing following a long and unwarranted delay as this was contrary to the code. Despite the procedural irregularities, the Claimant was terminated on 23rd July 2014 on the grounds that her defence was not acceptable. The findings of the disciplinary committee were not correct and the findings of the investigations undertaken while on suspension were never shared. There was no evidence produced to show that the deletions made were made by the Claimant as she had no such power to make deletions from the system. The recipes produced at the hearing with regard to deletions related to periods outside what is stated – Yusuf Abdulgani Ltd and Silverine Trading dated 21st December 2010. The related receipts for these clients were not cancelled/skipped or on the deleted list.

19. The 2nd Claimant also testified that her suspension was done without proper investigations and the disciplinary committee that called her for hearing was not properly constituted. The proceedings did not comply with the code. Upon dismissal, her efforts to appeal were frustrated by the Respondent when they failed to issue her with key documents relied upon at the hearing. The Respondent engaged in unfair labour practices and violated her fundamental rights.

20. The 2nd Claimants claim relate to bonus payments over the period she was on suspension and were not paid; salaries not paid; salary increments and the benefits that go with it. Costs and interests are due as the dismissal was unfair and has caused her great anguish that warrant payment of compensation and damages.

21. The 3rd Claimant also testified that he was employed by the Respondent vide letter dated 22nd February 2008 and served diligently until termination. In July 2012 he was suspended on allegations that he fraudulently deleted computer recipes. He remained on suspension until 21st may 2014 when he was called to the disciplinary committee hearing. That the procedures applied for his suspension and hearing were irregular as he was kept on suspension beyond the time periods allowed under the code and he was never given details of the alleged fraudulent deletions. The disciplinary committee also failed to take his defence into account when they made a finding that it was not acceptable.

22. The 3rd Claimant also testified that he was never made privy to the documents or receipts alleged to have been issued to taxpayers and in any event he had no power to delete recipients from the system as this could only be done by the Chief and Deputy Cashiers. The materials therefore presented in the letter

of suspension stating that he had deleted 251 receipts amounting to kshs.274,350.00 while the investigations report state that he deleted 472 receipts amounting to kshs.577,045.00 is a contradiction. The disciplinary committee failed to put these matters into account and had they done so, they would have arrived at a different decision. Their decision was therefore irregular and their decision wrong. The committee was wrongly constituted and its composition did not comply with the code regulations.

23. The Claimant also testified that the actions of the Respondent has caused him suffering; financial loss and mental anguish and claim for damages, compensation and his dues payable not paid while on suspension and until his dismissal. Since the matter started he has suffered. His wife has been sick with a terminal condition and he has had abdominal pain and cannot afford treatment. His social life changed with friends and relatives avoiding him and therefore seek justice from the court.

Defence

24. In defence, the respondent's case is that on divers dates the Claimants were suspended from duty due to defrauding the Respondent by fraudulently deleting and or cancelling receipts which had been dully paid for and issued to taxpayers. The suspension notices informed the Claimants that their actions amounted to gross misconduct in accordance with the Code paragraph 4 on lack of integrity; theft, fraud and forgery; and negligence resulting in the loss shortage, injury and damage to the Respondent. The Code allowed for the extension of suspension period for purposes of completing investigations which in this case were intricate and involved many employees and the receipts issued were held by diver's members of the public and not accounted for. It took time for the Respondent to complete investigations so as to arrive at the Claimants as culpable.

25. The respondent's Code of Conduct provides that an employee under suspension is entitled to house allowance and to continue benefiting from the respondent's medical scheme and once the suspension is lifted, full pay and all withheld dues, benefits and increments are all payable. Upon dismissal on 23rd July 2014 the Claimants were to be paid their withheld dues upon clearance with the Respondent and hence no prejudice shall be suffered.

26. The Respondent did not violate fair labour practices or fair administrative action in this case. That while on suspension, the Claimants did not file any claim(s) with regard to the violation of their rights and the disciplinary action taken against them was procedural.

27. The allegations of fraud and deletion of receipts related to 9 employees of the Respondent and all such persons including the Claimants appeared before the disciplinary committee. The committee held several sitting to hear the cases as they were intertwined but final deliberations were only done on 21st May 2014 despite the 1st Claimant being heard by the session held on 25th April 2014. The composition of the disciplinary committee was based on the code which also considers the Disciplinary Committee Business Rules which provides for the setting up, composition and the operations of the same. The members to the disciplinary committee(s) were appointed by the CG from among the commissioner and deputy commissioners of the Respondent. The disciplinary committee made a recommendation on the termination of their employment which was implemented.

28. The defence is also that when the Claimants filed their appeals with the CG, they also filed the current suit demanding for documents. All necessary documents were supplied to the Claimants. The appeals were dealt with in accordance to the Code and a decision made vide letters sent to the Claimants on 13th January 2015. The appeals were found without any new evidence to warrant a change in the decision of termination of employment.

29. The Claimants were charged with the responsibility of collecting revenue as Cashiers in the Road Transport Department and the accusations against them of fraudulent deletion of receipts had a direct impact to the revenue hence a direct adverse impact to the respondent's legal mandate. The Respondent conducted investigations and called the Claimants for hearing and found them guilty of the allegations made on them. Section 44(4) allow the Respondent on reasonable suspicion to separate with the Claimants noting its legal mandate.

30. In evidence, the Respondent called **Crispin Nyamweya Agata** the human resource officer in charge of employee relations with the Respondent. The Claimants were suspended upon the Respondent receiving report from the Ethics and integrity compliance department that there was duplication of receipts in the Road Transport Department and some cashiers from accounts were involved. The office took the details of all the officers in the accounts office, their roles and charged them based on their roles. Each allegation of fraud had a monetary implication and a violation of the Code. Each Claimant was given the individual details of the fraudulent activity.

31. The 1st Claimant had from January 2009 and January 2011 as chief cashier defrauded the Respondent Kshs.3, 483,697.00 being payment due for motor vehicle inspection fee. The Claimant had skipped receipts and issued to taxpayers which was irregular. At the officer with authority to delete receipts, he cancelled receipts without reason and did not account for the revenue collected. This amounted to gross misconduct contrary to the code as it amounted to theft, lack of integrity, fraud and forgery. The actions of the 1st Claimant were also found to be negligent causing injury to the Respondent. He was suspended without salary but on house allowance.

32. Similar notices were issued to 2nd and 3rd Claimant together with amounts lost, their role and attached were a list of receipts irregularly issued, and a show cause notice of 14 days to respond to the allegations set out. All the Claimants were invited for a hearing. Each disciplinary committee hearing the Claimants were constituted in accordance with the code and made a recommendation to the DG who agreed and implemented with the dismissal of the Claimants. Upon termination, the Claimant filed their appeals which were considered and rejected. Upon clearance, the Claimants will be paid their terminal dues.

- The disciplinary hearings related to many employees. He is not sure all the committee members understood each case.
- The ICT and investigating officers did the systems analysis that he cannot talk to.
- On 21st may 2014 the dg made a recommendation to terminate the 1st Claimant before the special meeting was held. Procedure was not followed. The panel members were different in each sitting; and
- The minutes made are not correct. On 21st May 2014 he was not at DC meeting but they are recorded as having been signed by him on 18th July 2014.

33. The second witness for the Respondent was Peter Mugo Ndune who testified that he is a supervisor with the Respondent within the Ethics and Integrity Department – Internal Affairs Division with duties to investigate cases of misconduct, fraud, corruption and integrity lapses among the Respondent staff. In January 2011 he was called upon with other internal affairs Division staff by the Commissioner, Investigations and Enforcement department to undertake a comprehensive audit trail of the deleted computer receipts in the Cash Receipting Systems in the Respondent and provide details of officers involved with deleting of the same. In the investigations team were Alice Kiptoo, Martin Mati and the witness from the Ethics and Integrity Department ad CI Ndolo from the Revenue Protection Service and who was to institute criminal prosecution for staff found culpable.

34. Mr Ndune also testified that the subject investigations were prompted by the fact that on 29th December 2010 where the officer in charge of Likoni motor Vehicle Inspection Centre wrote to the Respondent requesting the Registrar of Motor vehicles for verification of a computer receipt No. 0120305010128W. This receipt was confirmed to be genuine, issued at Forodha House but the transaction appeared as deleted in the system and the Kshs.1, 000.00 paid by the taxpayer on the same had not been accounted for. This prompted the audit trail of other computer generated receipts and the findings indicated more unwarranted deletions. For the period 1st January 2009 to 31st December 2010, a total of 65,540 Road Transport Department receipts with a revenue implication of kshs.54, 814,084.00 had been deleted. Initial investigations focused on Times Tower and Forodha cash office in Nairobi which had the highest number of deletions. On 17th January 2011 the investigations team did the first report submitted

to the Respondent. Other reports were submitted on 11th March 2011, another submitted on 23rd December 2011 and another on 21st March 2013. There was also a preliminary report dated 27th April 2011 generated by the Revenue Protection Services Department.

35. These investigations unearthed that the Road Transport Department cash receipting system was used to receipt cash collection for Road Transport Department. This Road Transport Department of the Respondent has since changed and is now under the National Transport and Safety Authority.

36. Mr Ndune also testified that the receipts captured took different status including open, confirmed and deleted. Deletions were achieved by flagging the receipt as deleted in the system. The changes flagged were audited and system users occasioning the changes could be identified. An examination of the audit trail showed that cashiers created the receipts while the chief cashier deleted. Daily collection for cashier report that was used to determine amount collected by a cashier needed to include the amount and number of receipts deleted. Deleted receipts were done by chief/deputy cashier who was assigned the function and this was done where the concerned cashier reported to the chief cashier about a cancelled receipt or a skipped receipt – the correct accounting procedure for deletion of receipts is that every deleted receipt must be supported by the original physical receipt and if skipped, by both copies of the previous receipt and the preceding which he/she retains for records and accountability. In case of a skipped receipt no hard copy was printed.

37. That the deletions were fraudulent and revenue collected from therein was not accounted for. Copies of original deleted receipts were recovered from taxpayers who provided evidence that the deletions were irregular. Majority of deletions were confirmed to a few cashiers and chief cashiers. Most deletions were fraudulent and were not backed by requisite procedures. The daily pay-in recorded less revenue than had been collected. Chief cashiers deleted receipts and did not render full account for revenue collected. Cashiers filed false cashier summary collection record where they purported to have collected less revenue than the actual. To cover the irregularity the chief cashiers deliberately failed to include the deleted receipts in the cancelled and skipped receipts register.

38. Mr Ndune also testified that during the investigations they took statements from several cashiers and chief cashiers within the Road Transport Department. Statements under enquiry were taken from the Claimants. There was evidence against some cashiers and chief cashiers who had high number of deletions of receipts and their cases were recommended for disciplinary and criminal action. 12 employees were dismissed who included the Claimants. Before dismissal, the 12 employees were suspended but due to the nature of transactions involved, attempts to recover exits, receipts held by taxpayers and tracing them took long and investigations are still ongoing. The Claimants were found to have been involved in the fraudulent deletion of receipts.

39. On 23rd April 2014 Mr Ndune was called to give evidence before the disciplinary committee against the 1st Claimant who was also allowed to ask him questions. On 30th May 2014 he was called to testify against the 2nd and 3rd Claimants where he presented the charges and evidence and he was asked questions by the Claimants.

The cashiers blamed the chief cashier for deleting the cash receipts from the system and they had no right to make deletions but the cashiers could not explain why the deleted receipts were held by the taxpayers and why the daily records for receipts issued and revenue collected, tallied with those of the chief cashiers. That the action taken against the Claimants was appropriate, there was cogent evidence against them to warrant the summary dismissal.

40. Mr Ndune also testified in cross-examination that he is a trained CID and was seconded to the Respondent as an investigations officer. He was called to undertake investigations and audit trail of deleted receipts that involved long and tedious searches from taxpayers and various department and from this investigation, 4 reports were prepared and submitted to the Respondent dated 17th January 2011 as a preliminary report; report dated 11th March 2011 and another dated 23rd December 2011 and the revenue protection service unit also submitted a report. In the process of investigation, the deleted receipts were

recovered by inspector Ndolo who is leading in the criminal prosecution cases. The Claimants were found to have made irregular deletions and in the report dated 21st March 2013 sample deletions receipts were analysed and were traced to the Claimants. On 21st December 2010, the 2nd Claimant collected inspection receipts and the 1st Claimant as chief cashier deleted them from the computer system. The cash register for the day noted is signed by hand but he could not be able to make out whose handwriting it was. The computer however captured all officers who had interacted with the deletions and in this case, it was the 1st Claimant. The respondent's ICT personnel made extracts from the system and access to the computer system was through an officer logging in with a password but the manual registers could be delegated.

41. Mr Ndune also testified that he is not aware that the 1st Claimant was on leave on the dates he is alleged to have made deletions. At the disciplinary hearing it was said the 1st Claimant was on leave but according to his investigations, the computer system was found to be accurate. He relied on the computer system to arrive at his findings and unless the Claimants gave their password to other staff of the Respondent or that he failed to log off from the computer system as required there was access to the system. The human resource officer submitted at the 1st claimant's disciplinary hearing that there were unauthorised access to the consumer system. In defence, the 1st Claimant argued that the deletions he did were permissible.

42. Mr Ndune also had statements from other officers working with the 1st claimant, Lucy Meroka, Jane Muiruri, Margaret Ogega under ICT department. Jane Muiruri had the role to create, move or remove a user from the computer system. Upon creation of a user, she could not delete anything at the level of chief cashier but the system would record who had made any deletion by capturing his code. The Finance Procedure Manual and ITC Procedures manual gave the details of the procedures to be undertaken. Margaret Ogega noted mistakes on the system and in her statement recommended that more investigations were required.

43. The 1st Claimant was chief cashier for both Forodha and Times Towers and the cashiers under him for one year, period under investigations, 2009/2010 their returns for revenue kept fluctuating and the reasons given for deletions could not be confirmed save for an audit. At the disciplinary committee hearing, where the Claimants required investigations reports, such were to be directed to the human resource office.

44. Mr Ndune also testified that the 2nd Claimant had issued receipts recovered from taxpayer and had been deleted from the computer system but the revenue collected was not accounted for. He sampled 2 receipts on 21st December 2010 issued by the 2nd Claimant but the revenue collection sheet for the day is not signed by the 1st Claimant as the chief cashier as the person who made the deletions. In his investigations he discovered that in 2009, the 2nd Claimant had been allocated the role of chief cashier and she deleted receipts. The roles kept changing and when the chief cashier was absent, authority would be given to the 2nd claimant. The 3rd Claimant was suspended for 251 deleted receipts. Upon investigations it was discovered that He was involved in 472 deletions where revenue was lost. The 251 deleted receipts are the joint deletions with 1st Claimant and the other deletions were done together with other cashiers but such other were not sampled. Of the deleted receipts made by the 3rd claimant, 10 receipts were recovered from taxpayers as letter-head receipts with Multiple Hauliers. There are no statements from the taxpayer.

45. The third witness for the Respondent was **Daniel Munge Sirorei** with the Respondent in the information and Communication Technology Department as an assistant manager attached to the Information Systems Security Section. In January 2011, the ICT department was called upon to investigate into facts leading to interference and or lapses in the Road Transport Department cash receipting systems operated by the Respondent. The Road Transport Department receipting system was operated at cash offices at Times Tower Building and Forodha House in Nairobi. The system was used to receipt cash collection for Road Transport Department cash offices for provisional driving licences, test booking and applications for motor vehicle inspection. Upon receipt of cash by a cashier, he/she must enter the name of taxpayer, the tax head for the payment, related motor vehicle registration number or

driving licence and the system must generate a receipt and issued to the taxpayer. The system maintains details of the transaction in its database. The receipts captured can take 3 forms – open, confirmed or deleted during processing.

46. Deleted receipts occurs in ordinary business of the Respondent where there is an error, is cancelled or skipped. Deletion is achieved by flagging a particular receipt record and done by chief cashier upon being satisfied that there are supporting documents of the original physical receipt as it is not issued to the taxpayer. Any changes in the system can be audited and identified as the computer system users have a unique code with a password.

47. Mr Sirorei also testified that an analysis of cash receipts for 1st January 2010 to 12th January 2011 as done through audit which revealed different tax heads had varying proportions of deleted receipts that 14,305 out of 130,107 payments for application of motor vehicle inspections appeared deleted in the system. The name and code of the user was for the chief cashier who had flagged the receipts as deleted. The report was submitted for the Investigations and Enforcement department to carry out further investigations.

Submissions

46. The Claimant submit that the Claimants were subjected to several procedural failures in the disciplinary process noting the composition of the disciplinary committee and the determination of their appeals which was contrary to the policies in place. The Claimants remained on suspension for long periods beyond the allowed timelines, 3 years being an unreasonable time period and the eventual termination amounted to unfair labour practice as held in **Nyaata Makori versus Kiamokama Tea Factory Co. Ltd, Cause No.142 of 2013**. Suspension without pay for an indefinitely long period was unlawful and against the principles of natural justice as held in **Joseph Munyithya Mutisya versus Chairman BOG Mivukoni Secondary School, Cause No.1458 of 2010**. To therefore keep an employee on interdiction or suspension for a long period of nearly 4 years before making a decision either way is not only a violation of article 47 of the Constitution but is an abuse of power as held in **Elizabeth Onyango versus Ministry of Health & 2 Others, Misc. CA 391 of 2013**.

47. The Claimants also submit that Mr Agata for the Respondent testified and admitted glaring errors in the disciplinary committee meetings. That such recklessness only speak to the fact that the procedures applied by the Respondent against the Claimants were flawed as held in **Dishon Kamau Muiruri versus Kenya Revenue Authority, Cause No.117 of 2014 (Nyeri)**. As a result, the summary dismissal of the Claimants was wrongful. The failure to supply the Claimants with key documents or the investigation reports rendered their defences basic as they did not know the cases and evidence against them. termination of employment is a serious penalty with serious consequences to an employee and must be done with utmost regard and notice to the affected employee who should be granted reasonable opportunity to give a defence as held in **Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd, Cause No.435 of 2013**.

48. The Claimants also submitted in confirmation of their remedies asserting that an order of reinstatement will be most appropriate in a case of wrongful termination as held in **Frederick Odongo Owegi versus CFC Life Assurance Ltd, Cause No.1001 of 2012**. Where the Claimants have a legitimate expectation of a reinstatement, such can be granted under the provisions of section 49 of the Employment Act as held in the **Mary Chemweno Kiptui case (above noted)**. Equally the claimant are entitled to payment of their back salaries withheld during suspension and the disciplinary proceedings. Damages are also due for the violation of clear provisions of the law and the Claimants should be awarded Kshs. 5 million in damages.

49. The Respondent on their part submit that the termination of the claimant's employment was fair, lawful and justified. Section 45(2) of the Employment Act defines what amounts to unfair termination as to where there is no valid or fair reason for termination. There were clear reasons given to the Claimants for their termination in the letters of suspension and in the termination notices setting out the fraudulent deletion of receipts and the revenue loss. Such details were confirmed at the disciplinary hearings. Fair

procedure was applied in accordance with section 41 of the Employment Act read together with the policy of the respondent. The Claimants were found to lack integrity; they committed theft, fraud and forgery; they were negligent and dishonest, all of which are serious offences under the Code of Conduct.

50. Under the provisions of section 43(2) of the Employment Act, the Respondent had genuine reasons to believe that there existed sufficient cause to suspend the Claimants and then terminate their employment. There was evidence that the Claimants had engaged in fraudulent deletion of receipts and upon suspension, investigations confirmed the same based on the audit trail and ICT analysis that had a clear linkage to the computers used by the claimant, their password and personal codes. The Cash Receipting System was of the nature that each individual employee of the Respondent had a specific code and password that could be used to trace each transaction and deletion of receipts from the computer system. The claimants, even where they were allowed to delete receipts failed to follow accounting procedures where the physical receipt that was deleted was supposed to be attached and if skipped, both copies were supposed to be accounted for. The Claimants failed to follow these procedures leading to massive losses of revenue and the deleted receipts issued to taxpayers with the revenue collected being accounted for. Such amount is negligence, fraud and or forgery. Such is not allowed by the Code of Conduct. In the circumstances, the Respondent was right to dismiss the claimants.

51. The Respondent also submit that they applied the provisions of section 44(4) of the Employment Act against the claimant appropriately as what they committed was gross misconduct. In the case of **Evans Kamandi Misango versus Barclays Bank of Kenya Limited, Cause No.717 of 2010** the Court held that, in adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts, it must take a wider enquiry as to whether a reasonable employer could have dismissed the employee on those facts.

52. Fair procedure was followed in the case of the claimants, they were called to the disciplinary committee where each gave their defence and were allowed to ask questions and examine the witnesses. The Claimants also filed appeals that were considered and a decision sent to them. The fairness of a hearing is not only determined by its oral nature it can be conducted by an exchange of letters as held by the Court of Appeal in **KRA versus Menginya Salim Murgani, CA No.108 of 2010**.

53. The Respondent also submit that the right to fair labour practice or fair administrative action were not violated. However a claim for constitutional violations in its nature must be under a petition and not through a cause as filed by the Claimants and as held in **Lydia Pamela Nyangala versus Royal Media Service, Cause No.1889 of 2015**. The Claimants can therefore not enjoy damages for constitutional violations as they can be adequately compensated under section 49 of the Employment Act where there is a finding of any employment related violation, which is not the case here.

54. The Respondent acted within the law and its legal mandate and correctly dismissed the claimants. No remedies are due as claimed. The claim should be dismissed with costs.

Determination

Whether the Respondent applied internal disciplinary procedures appropriately;

Whether the Claimants committed acts of gross misconduct;

Whether the termination was unfair;

Whether there are any remedies due to the claimant.

55. The outline in the above *background* of the case is crucial in the determination of this matter. The 1st Claimant was issued with a letter of dismissal on 23rd July 2014 after he had been suspended on 18th March 2011; the 2nd Claimant was suspended on 22nd March 2011 and terminated from her employment

on 23rd July 2014; and the 3rd Claimant was suspended 17th July 2012 and dismissed on 23rd July 2014. The suit herein was filed on 22nd August 2014. Subsequent orders to provide the Claimants with various documents for purposes of their lodging appeals and having the materials necessary used against them were not provided despite the Court issuing various orders and directions.

56. The failure and refusal to give materials and documents necessary for the claimant's case are in their nature to be issued at the work place. Such records/documents/materials are not for the consumption of the court. They should be made available at the shop floor at all material times. Such facilitate fair administration of any dispute at the internal level and offer both parties, employer and employee the best chance to be heard based on the facts at hand.

57. On 20th February 2015 and the 25th February 2015 the Respondent filed their defence and List of Documents. Therein the Respondent attached various documents and records. The List of Documents has documents and statements made as far back as 30th March 2011 [statement of Millicent Ochuka], 31st March 2011 [statement of Florence Malika], 7th September 2011 [statement of Querobino Lopez], 19th January 2011 [findings on deletion of Road Transport Department and DTD cash receipts], and all sampled documents from the list. Where were all these records since the suspension of the claimants? Were they made available to them before the hearing or at the hearing of their disciplinary cases?

58. The failure to issue these filed records by the Respondent in itself compromised to a large extent the defence. Such records, available to the Respondent way back in 2011, when requested for should have procedurally gone to the Claimants before their disciplinary cases or for help them lodge their appeals as they formed material parts and thus the Respondent relied on such records to arrive at the decision to terminate the claimant's employment and more so, reject their appeal. To file such documents way after crucial decisions had been made and when requested for they were not available, only goes to the credibility of the disciplinary process the Claimants were subjected to. Did the Claimant have all the material necessary to address their defences as set out under section 41 of the Employment Act? Did the Respondent act in fairness and with justice? The late filing of the records now produced by the Respondent in Court on 20th and 25th February 2015 is way past when they were required. Such records should have been issued to the Claimant before the 23rd July 2014, the date of termination of their employment.

59. What then did the Respondent rely upon to arrive at the decision to terminate the Claimants on 3rd July 2014? Why were the documents filed in Court on 20th and 25th February 2015 not immediately made available to the Claimants at the disciplinary hearing or on 16th December 2014 when the Court directed on the matter? On a balance of probabilities, I find that such documents were not brought to the knowledge of the Claimants and this greatly impaired their defences at their disciplinary hearings. Such led to a miscarriage of justice and contrary to section 45(2) of the Employment Act which requires an employee to act with fairness and to have valid reasons to terminate an employee.

60. What is also apparent is that the Respondent took their time from the time the Claimants were each suspended to the time when they were called for disciplinary hearing. Such time was ample and sufficient to put together all material necessary to put them to account. It should not have therefore taken over 6 months [August 2014 to February 2015] to file the required documents. Where such documents have formed the crucial evidence against the Claimants in July 2014 when they were dismissed, their availability upon request and by direction of the Court in September 2014 should have been a matter of course. Such delay, procrastination, failure to oblige speaks to one thing – this is an unfair labour practice applied against the Claimants. Such is not permissible in an open and democratic society such as ours. In employment and labour relations, such amounts to unfair conduct contrary to section 45 of the Employment Act and contrary to article 41 of the constitution.

61. On the question as to whether the Respondent applied internal disciplinary procedures appropriately, The Court ruling herein on 16th December 2014 refers save to add, The Employment Act allow an employer to formulate internal policy, regulations or mechanisms to address disciplinary cases by setting

the procedures. Such are to be shared with employees or made part of the employment terms and conditions. Such policy/regulations are as of necessary to apply in addressing any misconduct as the subject employee is already aware of what is to happen and can reasonably expect to be taken through the set policy/regulations. To therefore go outside the set policy/regulations, the employer must have good cause, otherwise the very purpose of having such a policy/regulations has no basis. In **Okiya Omtata Okoiti & Another versus KEMRI Board of Management & Others, Petition No.33 of 2014** the Court held that upon exhaustion of these internal mechanisms, an aggrieved party has the right to move the Court as appropriate. Where these internal procedures are undertaken in disregard to due process, an aggrieved party can move the Court for appropriate orders. To therefore apply a different policy unknown to the employee is taking advantage of an employee which amounts to unfair labour practice as held in **Frederick Kariuki versus bank of India, Cause No.2424 of 2012.**In **David Otunga Kenani versus Office of the Controller & Auditor General & Another, Cause 933 of 2013** the Court held that;

... A suspension in itself is not an admission of guilt with regard to employment relations, such action is allowed to permit the employer to investigate the subject matter at hand whereupon the employee is then required to show cause where the investigations undertaken result in the finding that there is a good case made against the employee.

62. Section 5(8) (c) of the Employment Act requires an employer to formulate policy (ies) that regulate conduct at the workplace to ensure industrial peace and cohesion. The Respondent submitted that there were in place policy regulations and a code of conduct that the Claimants violated. Such a document has not been attached in the various bundles of documents. Such a policy and regulations is meant to guide both the employer and employees with regard to what is expected of them at the workplace and in the case of any misconduct, the employer sets the framework within which such can be addressed. The employee on his part is aware of the actions which amount to misconduct and the sanction where found culpable. Such a policy is made to ensure predictability and create a balance on interests where an employee may go against the set rules and norms and the employer has a context within which they can address such wayward conduct contrary to the pre-set rules or norms. Fair labour practice also requires that the employer should not act in an erratic manner but ensure fairness in addressing any misconduct at the shop floor.

63. In the statement of defence, the Respondent has relied on the provisions of *Code of Conduct 4.1.1, (2) and (9)* to suspend the Claimants. The Respondent also relied upon the *KRA Code of Conduct Revised Edition 2012, Disciplinary Committee Rules of Business, and Disciplinary Committee Rules* – all of which are not attached.

The conduct of the Respondent noted above, failure to issue relevant documents to the Claimants for preparation of their defences is implicated here.

64. It is evident that the Respondent and its officers have undertaken wide scale investigations into the issue of deletion of receipts following loss of revenue. Such investigation are said to be ongoing and may lead to more employees being implicated. The Claimants have since been found culpable and dismissed. however, as noted above, the respondent, to pre-empt cases of misconduct of employees have in place a policy manual with *Rules and Regulations Governing Discipline and Grievances* attached to the Memorandum of Claim at page 39 of the bundle as an extract. The Respondent did not attach the policy regulations in full or parts they relied upon in the disciplinary cases of the Claimants for the Court to have a full picture of what such policy regulations entails.

65. From the Code of Conduct submitted by the claimants, at clause 4.1, the code set out what gross acts/action once committed by an employee amounted to gross misconduct. Such include negligence of duty; lack of integrity or dishonesty by employee. Where there is gross misconduct, the code disciplinary procedure is to hear the employee at the department level before going before the disciplinary committee. Part 6B of the Code regulate suspensions where an employee can be sent on suspension if he/she has criminal proceedings; is convicted of a criminal offence and dismissal is contemplated; there is an appeal pending; has a charge of gross misconduct and dismissal is being contemplated. The Claimants in this case were alleged to have committed acts of gross misconduct and were called to the disciplinary

committee.

66. The policy/code requires that such suspension be for 6 months. The 1st Claimant was suspended on 18th March 2011 and replied on 30th March 2011 but was only heard by the disciplinary committee on 25th April 2014. In the respondent's letter inviting the Claimant to the hearing and advised he to *bring along any documents that support your evidence*. In his letter of response on 30th March 2011, the Claimant had asked the Respondent to provide him with various documents and he did a list;

a) Copies of the deleted receipts register for the period under consideration;

b) Copies of cancelled computer receipts and support documents for skipped receipts as filed in the deleted receipts files for the period under consideration;

c) Copies of received soft copies reports by the ACT-Cash Offices and the SAC-Revenue Accounting & Reconciliation on the deleted receipts Reports with the comments if any;

Receipts namely

002009338060454K, S/NO 7534761

002009343090115X, S/NO 7534763

002009355130015L, S/NO9322515

67. Was the Claimant issued with these documents so as to be able to prepare his defence? I find no evidence of such provision. These are documents also equated for through Court and the Respondent remained adamant – there was no compliance despite time lapse and efforts made by the Court to give the Respondent time to comply.

68. With regard to the 2nd claimant, she was suspended on 22nd March 2011 and on 28th March 2011 she submitted her responses thereon. The Claimant was invited for hearing on 21st May 2014 with instructions to *bring along any documents that support your evidence*.

69. The 3rd Claimant on his part was suspended on 17th July 2012, he submitted his response and was only called for hearing on 21st May 2014.

70. The failure by the Respondent to file the policy/code regulating the disciplinary process, hearing and the applicable sanction(s) has affected the Court assessment of the issues before court. Such is the duty of the Respondent as the employer to file in Court once the suit against them was filed by application of sections 73 and 74 of the Employment Act. However, even where the Respondent was able to comply with their own internal policy/code with regard to hearing the Claimants within the timelines set out under the same, the applicable law with regard to the protection of the rights of an employee must be adhered to. Section 41 of the Employment Act requires that, even in the most serious cases of gross misconduct, an employee must be given a fair chance to be heard thus;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

71. Under section 41(2) cited above, an employer should hear and consider the representations with the employee may have even in the cases of breach of contract or gross misconduct and *fundamentally* at the hearing of such representatives, the employee must be allowed to choose another employee of his/her choice to be present at the hearing. The provisions of section 41 of the Employment Act are mandatory. They are not at the option of the employer. The employer must explain to the employee these rights under section 41 of the Employment Act and ensure that the employee has understood *in a language the employee understands* that he/she has appreciated this fact/right.

72. The disciplinary hearing at the shop floor therefore offers the best place to hear the employee within the environment of work where there is primary evidence to ensure all facts and basis of any allegations are best addressed. The disciplinary proceedings are an internal mechanism to determine the allegations of misconduct and get the best sanction. Such proceedings are not what would constitute Court proceedings of a criminal nature with strict rules of evidence as held in the case of **George Musamali versus G4S Security Services Kenya Ltd [2016] eKLR** that internal disciplinary proceedings are not similar to Court proceedings or criminal trial where witnesses have to be called and confirm beyond reasonable doubt as to what happened. This position was adopted with affirmation in the case of **Joseph Onyango Asare versus Brookside Dairy Limited, Cause No.1204 of 2014** that The shop floor is the best place to get the best evidence in a case of employer and employee misconduct and the requirement is to ensure that an employee is reasonably give a hearing to be able to give his defence.

73. In this case therefore, the Respondent was required by operation of the applicable law to invite the Claimants for the disciplinary hearings and accord them their right to make their representations in the presence of another employee of their choice. The duty is upon the employer to secure such a right. The ignorance of the employee in this regard is not a defence to the employer that such a request to have another employee present with the Claimants was not made. The right does not cease in such circumstances. It is a protected right. The failure by the Respondent to therefore ensure the right was promoted within the shop floor goes contrary to fair labour practice. The resulting decision to dismiss the Claimants without according them the procedural protections set in mandatory terms, resulted in an unfair decision tainted with illegality. The compliance with the provisions of section 41 of the Employment Act, I find are not beyond the capacity of the Respondent. As submitted, the Respondent as a government agency has many employees spread out within the Republic. The simple procedural direction to the Claimants to bring with them another employee of their choice is a matter than senior officers at the disciplinary committee meetings should have ensured was complied with.

74. Summary dismissal of an employee is a penalty with serious consequences that must be addressed with outmost regard and notice to the affected employee, who should be granted a reasonable opportunity to give a defence as set out under section 41 of the Employment Act. The sanction of summary dismissal should be the last resort as it were. The sanction of summary dismissal should be issued only in the clearest of cases.

75. Noting the various procedural issues and lapses above analysed, the decision to dismiss with Claimants in the circumstances was most severe. The Respondent has competent staff with skills of human resource to ensure compliance with the law. The various policy documents should be harmonised with the provisions of article 41 of the constitution to ensure fair labour practices are entrenched within the hierarchies of the Respondent. Compliance with the rights under the Employment Act is not optional. Such is the law protecting all at the workplace. Failure to accord the Claimants fairness and justice in the hearing of allegations levelled against them, I find went contrary to the provisions of what is just and equitable and is therefore unfair as under section 45 of the Employment Act.

76. On the question as to whether the Claimants committed acts of gross misconduct, the charges and allegations against them related to fraudulent deletion of receipts. Fraud is in its nature a criminal act as defined under section 330 of the Penal Code. To arrive at such a charge, an accuser must have the requisite evidence. In this case, at the point of sending the Claimants on suspension on 18th March 2011; 22nd March 2011; and 17th July 2012, the allegations made by the Respondent was that each Claimant *fraudulent deletion of computer receipts*. Therefore, as at the time of suspension, there was reasonable evidence against the Claimants to warrant the suspension. However, where was such evidence? In

employment and labour relations and unlike in criminal proceedings, parties are required to address disciplinary cases at the shop floor as the best source of primary evidence. To therefore fail to give an employee any material evidence to aid in their defence; to fail to investigate the case within reasonable time so as to give an employee appropriate directions; to fail to adhere to the pre-set rules of engagement such as the internal policy regulations relating to disciplinary cases; such amounts to an unfair labour practice. The realm or rights under the Employment Act, section 41 read together with 43 and 45 requires and employer to act with fairness, justice and equity. To keep an employee for long period on suspension, such suspension begin without pay and crucial benefits is tantamount to reducing the employee to a life of want and thus subjecting them to indignity. Such is prohibited under article 28 of the constitution and with regard to the employment relationship, this is in breach of fair labour practice.

77. The 1st Claimant testified that receipts were deleted when he was on leave. Did the Respondent produce the leave schedule of the 1st claimant? At the time of suspension, the Respondent stated that the Claimants had defrauded the Respondent the sums of Kshs.3, 483,675.00, Kshs.95, 510.00, and kshs.274, 350.00 respectively. Where was the evidence to support such allegations at the time? Where is such evidence to this date? On a charge or allegation of fraud, only a financial audit report would confirm such amounts as lost and I find no reference to such material or evidence in the respondent's pleadings or evidence in court.

78. Termination of employment is a serious matter. It should not be causally treated or acted upon at the whims of any officer who holds authority or power to send a particular employee on suspension or effect summary dismissal. The investigations required to be undertaken upon suspension should be preceded by a clear suspension that upon investigation can be verified and where not possible, the employee must be notified of the need to extend the suspension so as to complete the investigations. To avoid the abuse of such procedures, the Respondent has the Code. Such a Code, I find was put in place to ensure that all parties to contested issues get a fair chance to argue their case. the Code regulated the duration of such suspension for the reasons that to place an employee on suspension for a period of 3 months was a reasonable time span to undertake meaningful investigations and where not possible, not go beyond 6 months as such would be a time too large and beyond what is reasonable and acceptable as a fair labour practice.

79. The Respondent has explained that the reason why the investigations took so long with regard to the Claimants was because there were so many employees involved and the investigations are still ongoing. However, the Claimants had individual contracts of employment and where there is a serious charge as they faced, fraudulent deletion of receipts, the concept of the collective stopped at that point. Each Claimant had persons/individual rights to be protected as at the point of suspension. Where indeed the Claimants were alleged to have fraudulently made transactions amounting to the loss of Kshs.3, 483,675.00, Kshs.95, 510.00, and kshs.274, 350.00 respectively, such required individual information and address. The collective ceased.

Each Claimant was required to personally Respondent to her show cause notice and personally attend at the disciplinary hearing. therefore, when the 1st Claimant testified that he was on leave when the alleged deletion of receipts were done, the Respondent should have carried out investigations to that effect as taking of leave is a right and the Respondent has the systems and structures that regulate the same. The 2nd and 3rd Claimants testified that they were cashiers but had no authority to delete receipts from the computer system an in each response they made to the respondent, each reiterated this fact. The general accusation that the Claimants *fraudulently deleted receipts* thus required specific and individual assessment based on the responses each Claimant made on the show cause notice.

80. I find the evidence of the ICT officer Mr Sirorei quite informative. He confirmed that there were deletion of receipts by the 1st Claimant based on the system in place. He also confirmed that the 1st Claimant at his level and position, he had authority to delete cash receipts. However what the witness failed to show is whether such deletions amounted to fraud. Such evidence should have been sourced by Mr ndune, the officer investigating the cases against the claimants, he however questioned all else save for the claimants; he wrote various reports and leased with Mr Ndolo but his report remained with him

and were not shared with the Claimants so as to have then defend themselves effectively. The Human Recourse Officer, Mr Agata did not make matter any better, he confirmed to Court that the disciplinary committee members presiding over the hearings related to many employees and he is not sure the members understood each case well. Such can only be the case where different disciplinary committee members were not constant, were changed at each session and there was no continuity. Even though the Respondent had the right to constitute the various panels of the disciplinary committee hearings, the end result was to have disciplinary committee member(s) who had no history of each individual case.

81. The ICT and investigating officer did a systems analysis and audit but they did not relate the charges in the show cause or establish fraud on the part of the Claimants. The disciplinary committee hearing ended up being a matter of course. The disciplinary committee sitting on 21st May 2014 therefore made a recommendation to terminate the 1st Claimant even before the special meeting was held. Due process was not followed and the fact that the panel members were different from the one that heard his case, such is the result – the minutes of the session are not correct, Mr Agata confirmed that he was not at the disciplinary sitting on 21st May 2014 but the record indicates that he was the signatory on 18th July 2014. This I find is not a minor mistake or a typographical error. Such are details that go into the root of the entire panel. The Claimants made a challenge as to the composition of each panel and even though I make a finding that the Respondent had the right to decide who sat at each panel, such ended in a miscarriage of justice.

82. It is not lost to the Court on the intensive investigations conducted by Mr Ndune and his team. Such went into great lengths and took a lot of his time. I find great detail in his data and audit trail but the linkage to the allegations against the Claimants fails. I find no material evidence to link the same to fraud against the Claimants. Equally the ICT records were supposed to leave a trail and indeed confirmed that there were cash receipts in Road Transport Department deleted and skipped by the 1st Claimant based on his code and password, however such was within his authority to do and no fraud was established. Of interest is the fact that the ICT officer was never called at the disciplinary committee hearing, why this was not found necessary at the time is not clear. He is the officer who had the individual codes and password and had he been called at the internal hearings, he would have taken the different disciplinary committee members through the system audit and trail for them to appreciate the roles each Claimant played and the fact that it was in the duty of the 1st Claimant to delete receipts upon presentation of records from different cashiers. Whether such deletions and skipping of receipt was linked to the 2nd and 3rd claimants, had the committee opened itself to all available primary evidence, I find they would have arrived at a different recommendation other than the one of summary dismissal of the Claimants.

83. What is also apparent from the entire proceedings is the fact that the 3 Claimants were supervised by senior officers of the Respondent. Some wrote statements with Mr Ndune and others have not. None were called at the disciplinary hearing to support the allegations made against the claimants, Mr Ndune was simply left on his own to carry out investigations and read his various reports at the hearing. Some of the statements filed by officers senior to the Claimants give far-reaching recommendation, Jane Muiruri, Ms Ogega – all were of the view that each Claimant worked according to their mandate and more investigations were required before charging the Claimants. Why these officers who had were direct contacts with the Claimants ignored, is not clear. Such gaps only serve one purpose – the disciplinary committee(s) were not keen on such evidence. It was not in favour of the recommendations they made. Such are matters that go contrary to the fair administrative action served by industrial peace within the shop floor. Justice demands that each employee be given a hearing in good faith without preconceived outcome. Where is apparent to the Court that such proceeding were tainted with unfairness, the final sanction is fundamentally flawed and cannot stand.

84. Ultimately, Mr Ndune confirmed that the Respondent has since changed the Road Transport Department which is now under a different agency, the National Transport and Safety Authority. The ICT officer also confirmed that the technology system in place then has since changed. The inference then is that the Respondent recognised that they had a flawed system that could not immediately establish acts of deletions, skipping or fraud and accusing the Claimants without cogent evidence and summarily dismiss them, I find to be too harsh.

85. The analysis and findings above indict the Respondent. the acts of omissions against the Claimant to ensure procedural fairness and there being no substantive reasons to warrant the sanction of summary dismissal amounted to unfair labour practice which is against the clear provisions of section 45 of the Employment Act. The summary dismissal was wrongful.

Remedies

86. The Claimants are seeking various declarations and orders. On the finding that the Respondent procedurally failed to meet the mandatory provisions of the law and that the summary dismissal was wrongful, the main prayer the Claimant as seeking is that of reinstatement, payment of back wages; damages for breach of fundamental right to fair labour practice; damages for unfair termination of employment and costs of the suit. In submissions, the Claimants have extensively addressed the Court on the reasons and made a case for the order of reinstatement.

87. Reinstatement, re-employment and compensation, as the exclusive remedies for unfair dismissal, under section 49 of the Employment Act were introduced into labour legislation to remedy the absence of satisfactory relief for the unfair termination of the contract of employment by employers. This is unlike in Common Law where the only remedy available to a dismissed employee was an action for wrongful breach of contract where the injured party could elect to sue for specific performance or for damages. Section 49 of the Employment Act changed that by giving the employee unfairly dismissed to claim for;

49. (1) where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

[Emphasis added].

...

88. The law thus clear give various remedies available to an employee dismissed without justification. where In the context of an employment contract, a claim for specific performance is a claim for reinstatement on the same terms and conditions of employment that existed at the date of dismissal and must be accompanied by a tender by the employee to resume services or at least to fulfil the principal obligation under the contract to make his or her services available. The employee's entitlements under a contract of employment are dependent on the availability of his or her services to the employer and not the actual rendering of services.

89. Though specifically set out as a remedy under section 49(3) of the Employment Act, the Act does not define what 'reinstatement' is under section 2. I find a clear outline of what 'reinstatement' is in the Constitutional Court of South Africa in the case of **Equity Aviation Services (Pty) Ltd v CCMA and Others [2008] 12 BLLR 1129 (CC)** held;

The ordinary meaning of the word "reinstatement" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards worker's employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.

90. The order of reinstatement is specifically articulated under section 49 (3) and (4). The Court on assessment of all facts can order reinstatement upon consideration of all claims made and the best possible order to remedy the case appropriately. In the case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited, Cause No.435 of 2013** the Court held that where there is a legitimate expectation for a reinstatement and the termination of employment is within the three (3) years period contemplated in law, such and order can be made by the court. The Court went on to set out that;

...the law is well settled in this respect under sections 49 and 50 of the Employment Act, that in the clearest cases of unfair and unlawful termination of employment and based on the best wishes of the employee, the Court may order a reinstatement without loss of back salary, benefits and privileges.

91. Therefore based on the main claim the Claimants have submitted, noting the circumstances they were placed upon suspension and the psychological trauma well set out in their evidence, I find the only appropriate remedy to effectively address the unfair dismissal is a reinstatement and back to their positions without loss of any benefits. This I find to be the most effective remedy in the circumstances of this case.

92. The Claimants were suspended from duty from 18th March 2011; 22nd March 2011; and 17th July 2012 respectively. The suit was filed on 22nd August 2014 following the dismissal of the Claimants on 23rd July 2014. Mr Ndune in his evidence testified that the respondent's investigations on the deleted receipts from the computer system are ongoing with a rider that criminal charges are possible as Mr Ndolo his counterpart in the investigations is charged with the responsibility of prosecutions. Such should not affect the orders of the Court herein as the employment and labour relations regime is different from criminal proceedings and the applicable procedures. In any event, it has been over several years since 2011 for the 1st and 2nd Claimant and 2012 for the 3rd Claimants when they were suspended and no criminal charges have been levelled against them. For justice and equity, the Claimants should be allowed to earn an honest living by offering their labour to their employer, the respondent.

93. With the changes that have occurred within the Respondent since 2011 to date, the functions that the Claimants were undertaking having been moved to the National Transport and Safety Authority and the ICT system having been changed, there shall be a re-engagement of the Claimants in work comparable to that in which they were employed prior to dismissal, or other reasonably suitable work, at the same remuneration, terms and conditions. There shall be payment of all the back pay due to the Claimants without break in employment and putting into account what was paid during the period of suspension period. This is in putting into account the fact that the Respondent as an agency of government has a network of offices all over the Republic for securing comparable or suitable employment for the Claimants. The re-engagement shall be without loss of rank, benefits or change of terms to the disadvantage of the Claimants. To order otherwise would be to meet the Claimants with injustice and fail them in equity.

Judgement is hereby entered for the Claimants against the Respondent in the following terms;

- (a) I declare the Claimants were unfairly terminated from their employment with the respondent;**
- (b) The Respondent shall re-engage the Claimants in appropriate positions without loss of rank and the terms that go with it or being put at a disadvantage.**
- (c) The Claimants shall be paid all back salaries, increments, allowances, benefits, due bonuses as paid to other employees, and any other legal dues within 30 days from the date of this judgement;**
- (d) The Claimants shall report at their last stations of work for re-engagement and deployment on 2nd June 2016 at 8.30 hours;**
- (e) The benefits paid for during the period of suspension of the Claimants shall be put into account noting (c) above;**
- (f) The Claimants are awarded costs of the suit.**

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MAY 2016.

M. MBARU

JUDGE

In the presence of

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