REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

MISCELLEANEOUS CIVIL APPLICATION NUMBER 24 OF 2014

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS BY MOSES ECHWA FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

-AND-

IN THE MATTER OF: ORDER 53 RULE 1, 2, AND 3 OF THE CIVIL PROCEDURE RULES 2010, SECTION 1A, 1B AND 3A OF THE

CIVIL PROCEDURE ACT CAP, 21

-AND-

IN THE MATTER OF: A DECISISON ISSUED BY THE KENYA AIRPORTS AUTHORITY ON 9TH JULY 2014 WHEREBY THE EX PARTE

APPLICANT WAS SUMMARILY DISMISSED BY THE RESPONDENT

-AND-

IN THE MATTER OF: ARTICLE 10, 41 [1], 47 AND 50 AS READ TOGETHER WITH ARTICLE 21 AND 22 OF THE CONSTITUTION OF KENYA 2010

-AND-

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 THE LAWS OF KENYA

-AND-

IN THE MATTER OF: THE KENYA AIRPORTS AUTHORITY ACT, CAP 395 THE LAWS OF KENYA AND THE KENYA AIRPORTS AUTHORITY HUMAN RESOURCES MANUAL 2011

-BETWEEN-

REPUBLIC……..……..……..APPLICANT

-VERSUS-

KENYA AIRPORTS AUTHORITY…….1ST RESPONDENT

GENERAL MANAGER, HUMAN RESOURCE DEVELOPMENT,

KENYA AIRPORTS AUTHORITY MR. KEN V. KAUNDA.....2ND RESPONDENT

-AND-

MOSES ECHWA……..……. EX PARTE APPLICANT

Rika J

Court Assistant: Benjamin Kombe

Mr. Gikandi Advocate, instructed by Gikandi & Company Advocates for the Applicant

Mr. Wafula Advocate, instructed by Cootow & Associates, Advocates for the Respondents

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JUDGMENT

1. The Applicant Mr. Moses Echwa was employed by the State Corporation Kenya Airports Authority, through a letter dated 16th October 1996, as a Security Warden. He was confirmed in the position through a letter dated 6th April 1998. He was a Supervisor in the Ground Flight Safety Department, as of the 9th July 2014, when the Employer summarily dismissed him. The Employer alleged the Applicant was engaged in acts of gross misconduct.

2. The Applicant disputes the procedure adopted by the Employer in summarily dismissing him, and filed the substantive Application for Judicial Review on 4th December 2014 seeking in main, the following Orders:

a. An order of certiorari to bring before this Court, for purposes of quashing the decision of the Respondents contained in a letter dated 9th July 2014 dismissing the Applicant from his employment with the 1st Respondent.
b. An order of Mandamus compelling the 2nd Respondent to reinstate the Applicant to his full employment with the 1st Respondent to his immediate job position being a Supervisor in the Ground Flight Safety Department.

The Application was initially filed at the High Court in Mombasa. It was transferred by the High Court to the then Industrial Court at Mombasa, on the 5th November 2014.

3. The 1st Respondent filed a Replying Affidavit sworn by its Airport Manager Wilson Airport, Mr. Richard Ngovi, on the 27th February 2015. The Applicant filed its Submissions on 25th February, while the Respondents filed theirs on the 13th March 2015. The respective Advocates underlined their positions, in brief presentations made before the Court, on the 20th March 2015.

Undisputed Facts

i. It is not disputed that the Applicant was employed by the 1st Respondent as a Security Warden, in 1996, and confirmed in that position in 1998.
ii. He was a Supervisor in the Ground Flight Safety Department as of 9th July 2014, when he was summarily dismissed by the Respondent.
iii. His terms and conditions of service were contained in the letter of employment dated 16th October 1996 which under clause [f], incorporated terms and conditions of service and rules and regulations of the Kenya Airports Authority, which were in force, and which could be changed from time to time.
iv. There is in the workplace a Human Resources Manual 2011, which regulated the employment relationship
v. The substantive ground for the Employer's decision, is not disputed, and the nature of Judicial Review is restricted to the procedural aspects.

The Applicant's Submissions

5. The Applicant submits he was accused by the 1st Respondent on 14th May 2014, of having plucked 3 Official Documents from the 1st Respondent's records. The documents related to fuel spillage booklet. The 1st Respondent alleged the Applicant had conspired to defraud the 1st Respondent.

6. Without giving the Applicant a hearing, the Respondents took the decision to summarily dismiss the Applicant. The Respondents alleged there was a Disciplinary Committee sitting, which discussed the Applicant's case, on the 8th July 2014. The Applicant was not aware of such a sitting; never appeared before such a Committee; never heard any Witnesses who testified; was denied the opportunity to call his own Witnesses, and cross-examine any Witnesses called by the Respondents; was denied the chance to produce documentary evidence; and was also denied the opportunity to seek legal representation. Further the Applicant states he was not served with a charge sheet and notice to appear before the Disciplinary Committee; he was denied the chance to adequately prepare his defence; and did not have a Representative of his choice at the said meeting. The Respondents allege a charge sheet dated 23rd April 2014 was served upon the Applicant. The Applicant denies receiving such a sheet. The Respondents ought to have discharged the evidential burden of proof on service, under Section 107 and 108 of the Evidence Act Cap 108 the Laws of Kenya. The alleged charge sheet did not have a brief statement of the allegations. He was discriminated against, as other alleged Offenders, implicated in the same incident, were treated humanely and reasonably.

7. The decision to summarily dismiss the Applicant offended Regulations N. 9 [IV]; N. 6 [3]; and N.12 of the Human Resources Manual – all which regulate the procedure leading to dismissal. In sum, the Applicant was not given the opportunity to defend; his immediate Supervisor was not involved with any investigations; and the Appeal preferred against the decision of the Employer by the Employee was not determined in accordance with the Manual.

8. The Applicant was not supplied with the record of the disciplinary proceedings. The Respondents' treatment of the Applicant, violated the Applicant's fundamental guarantees under Articles 10, 41[1], 47 and 50 of the Constitution. The Respondents acted unlawfully, irrationally and contrary to the principles of natural justice.

9. The Respondents failed to consider the Applicant's 17 ½ years of unblemished service. Mr. Echwa never received a warning. Allegations were not based on credible evidence, and the Applicant ought to have been given the benefit of doubt.

10. The contract of employment cannot in law be deemed to have been terminated until termination is lawfully done. The Applicant is entitled to the full Benefits arising from his contract.

11. The 1st Respondent is a Statutory Body, whose powers are prescribed by Statute. Public Bodies have

always been historically subject to the control of the High Court. The Industrial Court enjoys similar powers under the Constitution. It cannot lie in the mouth of the Respondents to say that the Disciplinary Committee's decision cannot be questioned through Judicial Review. The undue insistence on technicalities is contrary to Article 159 of the Constitution of Kenya. The dismissal was not grounded on any clause in the contract of employment; it was based on the findings of the Disciplinary Committee, and the only way to test the veracity and integrity of the adopted process, is through proceedings of the nature herein.

12. The Applicant relies on the following Authorities:-

[a] ***H.W.R Wade, Administrative Law, 3rd Edition, page 130****- on the principle that certiorari and prohibition are primarily suited for the control of inferior Courts and all Special Statutory Tribunals, are liable to have their decisions quashed for excess jurisdiction…*

[b] ***Mombasa High Court Misc. Civil Application Number 569 of 2006 between Zaccheus Kyai Munyao v. Kenya Airports Authority****- where the Court held that whenever any Person breached the principles of natural justice and acted in breach of the Person's own internal disciplinary procedure, appropriate Judicial Review Orders in the nature of Prohibition and Certiorari would follow to quash the said decision.* The Applicant submits this decision was against the same Employer as in the present case, and the Employees lost their jobs through a similarly flawed process.

[c] ***C.A. Criminal Appeal Number 21 of 1996 at Kisumu, between William Cheruyiot Kandie v. the Republic*** where the Court held that the contentious nature of evidence against an accused Person ought to have resulted in the Trial Court giving the accused Person the benefit of doubt.

[d] ***C.A. Civil Appeal Number 239 OF 2009 at Nyeri, between Munyu Maina v. Hiram Gathiha Maina,*** where it was ruled that under Section 117 of the Evidence Act when any fact is especially within the knowledge of any Party to those proceedings, the burden of proving or disproving that fact is upon him.

[e] ***C.A. Civil Appeal Number 90 of 1989 between Nyongesa & 4 Others v. Egerton University College [1990] KLR.*** The Court held that the decision of the University Senate and Board to expel Students without the opportunity to be heard, was manifestly unfair, unjust and against natural justice, therefore null, void and of no effect.

[f] ***C.A. Civil Appeal Number 109 of 1984, between Kadamas v. the Municipality of Kisumu [1985] KLR.*** Hon. Justices Hancox, Nyarangi and Platt held that the Employees of Kisumu Municipality were in a class of Employees who could only be dismissed if there was something against them to warrant dismissal, and that by making a recommendation to dismiss them in their absence, the Municipality was in breach of rules of natural justice, and an order of Prohibition was merited.

13. The 1st Respondent's Human Resource Manual was a result of the acts of the 1st Respondent's Board. It was approved by the Board. It is a kind of a Bye-Law. All disciplinary matters are to be dealt with under the Manual, the CBA and the Employment Act. The Manual is a matter in the province of public law. It is insufficient to set up a Disciplinary Committee: a charge sheet must be drawn and served on the Employee; the Employee must have time to respond through his Supervisor; if the response is unsatisfactory, the Disciplinary Committee must be set up; this Committee must hear the Employee; and only after such hearing are recommendations forwarded to the Managing Director for his action. This is a matter in the province of public law, the Applicant submits. The Manual must be followed.

14. The Applicant argues under the Authorities contained in paragraph ***13 [c] and [d]*** above, the he was not served with the charge sheet, and it was for the Respondents, to give evidence rebutting the Applicant's position. Under the case of ***Munyao v. KAA,*** the Applicant submits KAA is a public body, with special mechanisms in dealing with its Employees. The Court is urged to adopt the holding in ***Nyongesa & 4 Others v. Egerton University,*** find the Applicant was denied natural justice and quash the decision of the 1st Respondent quasi-judicial public body. Dismissal had nothing to do with Section 41 of the Employment Act 2007. The Respondents did not invoke the contract of employment in dismissing the

Applicant; they anchored their decision on the Manual. Public law comes in because the 1st Respondent is a public body. The procedure adopted in the process of dismissal was in the nature of public law. If the Applicant came to Court under the Industrial Court Act and the Employment Act, the Respondents would argue he ought to have filed Judicial Review proceedings. Lastly Mr. Echwa submits the Court is bound by the decision in ***Kadamas v. the Municipality of Kisumu,*** and should find the dispute herein is a public law matter, where the decision of the KAA should be quashed, an order for mandamus issues, and the Applicant reinstated. The Applicant urges the Court to allow the Review, with costs.

15. The Respondents reply that Judicial Review is a special supervisory jurisdiction. It is to be distinguished from ordinary adversarial litigation, and distinguished from appeals which involve re-hearing. Private law proceedings involve a Claimant's assertion of rights; Judicial Review involves a Claimant invoking the supervisory jurisdiction of the Court, through proceedings nominally brought by the Republic. Judicial Review is to be invoked, where a public wrong has taken place, not where breach of private law is alleged.

16. Termination of employment must meet the tests of procedural fairness and substantive justification. Section 41 of the Employment Act 2007, governs the fairness of procedure. The 1st Respondent's Human Resources Manual supplements Section 41. The main issue before the Court is whether the Respondents met the requirements of Section 41 of the Employment Act.

17. Investigations against the Applicant and other Employees were carried out. A report, attached to the Replying Affidavit, recommended the Applicant is issued a letter to show cause why he should not face disciplinary action. The Applicant was found to have been involved in the disappearance of the 1st Respondent's official documents. He failed to remit revenue collected on behalf of the Employer, to the Employer. In plain terms, he stole from the Employer.

18. The Applicant was issued a letter to show cause dated 14th May 2014. He replied on 15th May 2014. He was charged alongside other Employees. The Charge Sheet is attached to the Replying Affidavit. He was invited to a Disciplinary Hearing on 8th July 2014. Fair procedure as required under Section 41 of the Employment Act, was followed. This is a case of termination of employment, and should the Court find the Respondents acted unfairly, the proper remedies are as given under Section 49 of the Employment Act.

19. Judicial Review remedies, being discretionary, are not guaranteed, and hence, a Court may refuse to grant them, even when the requisite grounds exist. If there is a more convenient, beneficial and effectual remedy, the Court would decline to grant mandamus. There are alternative remedies under the Employment Act. The Applicant should file a Statement of Claim and Witness Statements, to enable the Respondents respond. The dispute herein is not amenable to the Judicial Review process. Relying on the case of ***Kadamas,*** the Respondents argue there is no public interest involved in Mr. Echwa's case. ***Kadamas*** involved public interest. The fact that an Employee is employed by a public body does not bring the dispute within the ambit of public law. The dispute calls for a full hearing, where Parties are given the opportunity to call Witnesses. The Applicant should not use shortcuts.

20. The Respondents base their submissions on the following Authorities:

[a] ***The Case of Kadamas v. Municipality of Kisumu***. The Respondents emphasize the holding that the fact that an Employer is a body corporate, sustained by public funds and contributions does not, ipso facto, render the rights it has and the duties of which it owes its Employees, as of a public nature.

[b] ***Republic v. the Judicial Service Commission ex parte Pareno [2004] 1 KLR 203,*** where the Court ruled that the remedy of Judicial Review is to ensure the individual is given fair treatment, not to substitute the opinion of the Judge for that of the public body legally constituted. The Court should limit its review to the process, not the merit of the decision.

[c] ***High Court at Nairobi JR between Joccinta Wanjiru Raphael v. William Nangulu- Divisional***

Criminal Investigation Officer Makadara & 2 Others [2014] e-KLR. Odunga J stressed the discretionary nature of the remedy of Judicial Review, holding that the Court may refuse to grant the remedy, even where the requisite grounds exist to warrant the issue of the remedy.

[d] ***Industrial Court at Mombasa Cause Number 168 of 2012 between Samuel Kenga v. Lavington Company***, where it was held that Section 41 of the Employment Act 2007 has created an obligation on the part of the Employer to avail procedural justice to an Employee before termination. Section 41 is about what is referred to as natural justice in administrative law, and procedural fairness in industrial relations.

The issues for determination

21. The issues in dispute may be summarized as follows: *whether the employment relationship between the Applicant and the 1st Respondent was governed by private or public law; whether the Applicant was denied natural/ procedural justice; and whether the procedure, and remedies in Judicial Review, are appropriate in redressing this employment dispute.*

The Court Finds:

22. The employment record of the Applicant with respect to the date of employment, rank, date of termination, length of service, is not contested. It is agreed the Respondents terminated the Applicant's contract. The employment relationship was, as seen above, regulated by the Letter of Employment, the Human Resources Manual and the Employment Act.

23. Public or private law? The Applicant argues that the dismissal decision was taken under the authority of the Human Resource Manual. The Respondents did not cite the Employment Act, in justifying the decision. The Manual has the force of law, as it was created by the Board of Directors of the 1st Respondent, pursuant to the powers conferred on them, by the Kenya Airports Authority Act. The Manual brings the dispute within the ambit of public law, justifying the invocation of the Judicial Review Mechanism.

24. The Human Resources Manual is incorporated in the Applicant's contract of employment under clause [f]. The terms and conditions of employment contained in the Human Resources Manual are part of the Applicant's contract of employment.

25. The Human Resources Manual is not a Bye Law. It is a quotidian instrument of Human Resources Management which becomes an enforceable contract, if expressly incorporated in the individual employment contract. It is properly a contract of employment falling within Part 3 of the Employment Act 2007. The Respondent's Human Resource Manual, much as it is made pursuant to the powers donated to the 1st Respondent's Directors by the Kenya Airports Authority Act Cap 395 the Laws of Kenya, is not a public law document. It applies to the Employees of the Authority as part of their private law contracts of employment. It is not a document that would require legislative scrutiny for validity. It is not even created by the Directors, but by the Human Resources Department of the Authority, with the Directors merely giving their approval. It is not to be treated as a subsidiary legislation made under the Act, injecting it with the public law element.

26. The Manual does not pronounce itself to be a public law document. It provides that the Board may waive any of its provisions subject to statutory obligations. Such is its quotidian nature. It can be varied by the Directors, subject to statutory obligations, without any public consequences. It applies to all Employees, alongside other regulations, rules and instructions, including special notices, operating notices, staff circulars and memos. In short, the Manual can be equated to these other workplace instruments, which aim at the day to day management of the labour force.

27. The Applicant submits he was dismissed pursuant to the Human Resources Manual; and that the Respondent did not cite the Employment Act 2007 anywhere it making its decision. The Applicant himself does not rely on the Employment Act 2007, and sees no relevance in the Respondents'

submissions on the Act. The Applicant's position is incorrect.

28. As seen in paragraph 25 above, the Human Resource Manual is part of the Applicant's contract, and is subject to the Employment Act 2007. Clause E.13 [2] of the Manual states, *''An Employee's appointment may also be terminated by summary dismissal- an action that involves the application of the disciplinary procedure and the Employment Act.''* The Manual and the Act cannot be separated. Under Section 26 of the Act, the provisions of the Act shall constitute the basic terms and conditions of employment. The standards of employment set under the Act would have to be read in the entire contract of employment, joining the Letter of Employment and the Manual. It is not possible therefore, that the Applicant was summarily dismissed in accordance with the Manual, to the exclusion of the Employment Act 2007.

29. **Chitty on Contracts 31st Edition, Vol. 1,** characterizes contracts of employment as expressions of individual and private autonomy, to be contrasted with the expressions of public powers. The presence of a contract is seen as a significant element, if not the touchstone of the private nature of a Person's activity.

30. The Court is of the view that the Respondents acted pursuant to a contract of employment between the 1st Respondent and the Applicant, rather than in exercise of a statutory power. To be amenable to Judicial Review, the decision of a public body has to have some public element, and not relate exclusively to private law. Public element is determined by considering if the body's power, in making the decision, stems from a legal source. This test is referred to as the 'source test.''

31. The Applicant has not succeeded in his source test. He argues the Human Resource Manual is a Bye law, but the Court has given its view above, why this position is flawed. From most of the Authorities availed to the Court by the Parties, it can be said there is a danger of confusing rights with their appropriate remedies enjoyed by an Employee, arising out of a private contract of employment, with the performance by a public body of duties imposed on it, as part of the statutory terms under which it exercises its powers.

32. As held in ***Malloch v. Aberdeen Corpn [1971] 2 All E.R. 1278,*** ordinarily, an Employer is free to act in breach of the employment contract. If he does so, his Employee will acquire certain private law rights and remedies for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-engagement. Parliament may, as submitted by the Applicant, underpin the position of public body Employees by directly restricting the freedom of the public body to dismiss, thus injecting the terms and conditions of this category of Employees with public law rights.

33. In this Application the Court has not been shown legislation directly restricting the freedom of the 1st Respondent from dismissing its Employees. What has been displayed is a Human Resource Manual with no legislative content.

34. In ***R v. East Berkshire Health Authority Ex. P Walsh [1985] Q.B. 152,*** the Applicant nurse was dismissed on grounds of misconduct. He argued the dismissal was *ultra vires* and in breach of natural justice. Walsh had argued that the Employer had acted in breach of a particular condition of employment, which had been in his contract of employment, in compliance with Regulations made under statute. The Court found that this statutory background was not enough, to give the Applicant public law rights. This position was endorsed by the Court of Appeal of Kenya in ***Kadamas v. Municipality of Kisumu.***

35. In the case of ***R v. the Secretary of State for the Home Department Ex. P Benwell [1984] All E.R. 854,*** the Court reached a different conclusion from ***Walsh.*** Benwell a Prison Officer was dismissed on the failure to observe a Code of Discipline for Prison Officers. The Code was contained in Prison Rules, themselves made under a statutory power. The Court found that this basis gave the claim sufficient statutory underpinning to bring the dispute in the realm of public law, amenable to Judicial Review. It is pointed out however, that Benwell did not have an alternative remedy, which tilted the Court's thinking in his favour. It is worth noting also, that Benwell's Application was based on a Code of Discipline, made directly under a statutory power, not a Human Resources Manual without any direct legislative connection. The Court of Appeal of Kenya commenting on the case of ***Benwell*** in ***Kadamas***, was clear that the Home Secretary's duty to apply the Prison's Code of Discipline was in ***Benwell***, a public one, in

which the Applicant had an interest.

36. It has been submitted that the Applicant was a public servant, employed by a public body and discharging, a public function. This Submission involves the second test, the nature test. The consideration is whether the Employer exercises a public function, or whether the exercise of functions has public consequences. This test is founded on the recognition that in today's government, there are privatized utilities and private bodies, performing public functions. In the ***Industrial Court at Nairobi Cause Number 1664 of 2012 between National Union of Water & Sewerage Employees v. Mathira Water & Sanitation Company Limited [2013] e-KLR,*** it was observed there are private companies, individuals and NGOs, which render public services.

37. The High Court in ***Munyao v. Kenya Airports Authority*** took into consideration that the Applicant was an Employee of a public body, with a special prescribed mechanism for disciplinary action against its Employees. In the case of ***Kadamas,*** in relation to the nature test the Court of Appeal was emphatic, the fact that an Employer is a body corporate sustained by public funds, does not *ipso facto* render the rights and duties it owes to Employees of public nature. It would be wrong for Employees of public bodies to be clothed with exceptional legal rights by allowing them liberally to apply for Judicial Review.

38. Lord Reid, in ***Malloch v. Aberdeen Corpn,*** agrees with this position, holding that employment by a public body does not *per se,* inject any element of public law. This only makes it likely that there will be special statutory restriction on dismissal or other underpinning of the employment. A contrary conclusion would enable all Employees of public bodies to ignore ordinary employment actions, and file for Judicial Review.

39. The Employment Act 2007 specifically defines the term 'Employer' to include public bodies. The Act binds the Government. Public servants have the benefit of the Employment Act 2007. Most of the decisions preceding the enactment of the Employment Act, on Judicial Review of termination decisions in public bodies, were predicated on the assumption that rules of natural justice could not be read in contracts of employment. Secondly it was assumed employment disputes involving this cadre of Employees, needed to be resolved fast, to avoid inhibiting public service delivery. This is the reason, as argued in ***Malloch v. Aberdeen*** and decisions of the Kenyan Courts, senior servants in public bodies were given special statutory protection.

40. These arguments no longer have validity in light of the labour and employment reforms in Kenya from 2007. Rules of natural justice are applied in every termination decision, as a requirement of Section 41, 43 and 45 of the Employment Act 2007. The duty for Employers to act fairly is recognized in the Act as well as the Constitution of Kenya. Section 45 [4] requires Employers to act in accordance with justice and equity. These standards are injected in every contract of employment. The Court is mandated by the Constitution and the Act creating it, to resolve all employment disputes expeditiously. Its procedures are less technical than the procedures obtaining in the civil system. It also has the powers to grant provisional measures. There no longer can be justification for Employees of public bodies, senior or junior, to seek special procedures.

41. There is real danger in Courts granting Employees of public bodies remedies such as craved by Mr. Echwa. The Applicant questions the procedure leading to his dismissal, as he would be entitled to, under the Judicial Review mechanism. He has kept away the substantive grounds of his dismissal from the view of the Court. It would not matter how credible or grave the employment offence was. The Court is not allowed to examine that offence. It is not to review substantive justification.

42. This would result in the Court reinstating an Employee who was probably guilty of gross misconduct, to a public body, merely on the basis of flaws in the procedures adopted in dismissing him. Employees of public bodies could steal from public coffers, as the Applicant is alleged to have done, and get reinstated because the Employers have failed the procedural test. This is not how public interest is safeguarded.

43. The Court is of the view that Employees of public bodies must subject their complaints to the scrutiny of full trials, initiated through the Industrial Court Procedure Rules, rather than seek to impose

themselves on their Employers through Judicial Review, regardless of the employment offences they have been found to have committed. The Court must be cautious in admitting claims of termination of employment under the Judicial Review mechanism, not to distort the principles governing termination law; the need for examination of procedural and substantive justice; and be cautious not to distort the principles governing reinstatement to employment. Employment law must be consistent in the public and private sectors.

44. The Applicant complains he was not served the charge sheet prior to dismissal. He also states he was not allowed to call witnesses, or cross –examine any witnesses. He submits the Respondents have failed in discharging their evidential burden as required under the Authorities of ***Kandie v. the Republic*** and ***Maina v. Maina.*** These are issues that would best be resolved, if the Parties have the opportunity to call evidence. If the Applicant desired to call witnesses, and cross-examine witnesses at the disciplinary hearing, there is no reason why that desire should have waned after dismissal. There would be need today, to have the Parties heard in full rather than through affidavits. It would not be a fair hearing to deny the 1st Respondent the opportunity to justify its decision, and show as demanded by the Applicant that all procedural requirements were honoured. There are issues, from the submissions of the Applicant which need to be specifically identified and ventilated, through the process of a full trial.

45. The answers to the questions posed in paragraph 21 of this Judgment are that the Parties' relationship was based on private rather than public law; it is not possible to definitively say the Applicant was granted or denied procedural justice without additional evidence; and lastly, Judicial Review is not the appropriate procedure or remedy in redressing this employment dispute.

46. Using the anti-technicality legal and constitutional principles, the Court has considered whether the Applicant should be allowed to proceed with the Claim, as if it was initiated through a Statement of Claim, under the Industrial Court Procedure Rules. His position would be preserved, if it is likely he has a private law claim against the Respondents. It is not lost on the Court that the Claimant has served the 1st Respondent for 17½ years, and received no terminal benefits on dismissal. He seems unconcerned about the possibility of losing everything, including those terminal benefits, in his pursuit of quick reinstatement.

47. The Applicant seeks prerogative orders only, and it is not possible to have the proceedings continue as if initiated through an Employment Claim rather than Judicial Review. He would need to consider re-formulating what reliefs suit him. It is not to be ignored that the Respondents have sustained costs in responding to the proceedings herein, and would sustain costs in event of further proceedings brought by the Applicant. Weighing these considerations, the Court Orders:-

a. ***The Application for Judicial Review is rejected.***

b. ***The Applicant shall meet the Respondents' costs of the Review.***

c. ***The Applicant is at liberty to bring a Claim against the 1st Respondent under the Employment Act 2007 and the Industrial Court [Procedure] Rules 2010.***

Dated and delivered at Mombasa this 16th day of June 2015

James Rika

Judge