IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & SICHALE, JJ.A)

CIVIL APPEAL NO. 66A OF 2017

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

REUWEL WAITHAKA GITAHI.....1ST RESPONDENT

FERICHINA GATHONI WAWERU.....2ND RESPONDENT

GEDION KATHILA MUTUKU.....3RD RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court of

***Kenya at Nairobi (M. Mbaru, J.) dated 30th May, 2016* in E & LRC CAUSE NO. 1421 of 2014)**

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JUDGMENT OF THE COURT

The appellant, ***Kenya Revenue Authority*** **(KRA)** seeks to challenge orders of the Employment & Labour Relations Court **(ELRC) (Monica Mbaru, J.)** made on 30th May 2016, declaring that the employment of the three respondents herein was unfairly terminated; the respondents be reinstated to their former ranks without loss of rank; back salaries, bonuses and allowances be paid within 30 days; the respondents report back to their former stations on 2nd June 2016; and that the benefits paid to the respondents during their suspension be taken into account. The respondents were also awarded costs of the suit. The same court rejected a subsequent application seeking stay of execution pending appeal.

The record is bulky but the antecedent facts may be briefly stated.

At all times material to the appeal, the 1st respondent was the chief cashier, and the 2nd and 3rd respondents were cashiers under him, in the ***Road Transport Department*** where KRA collected motor vehicle inspection fees, among other taxes. Their duties were to receive payments from the taxpayers and enter the transactions into a computerized **Cash Receipting System (CRS)** which would then generate serialized receipts for issuance to the taxpayers. Where, ordinarily, the CRS skipped some serial numbers or a receipt was issued in error, the cashiers would inform the chief cashier whereupon such receipts would be lawfully deleted by the chief cashier from the system and the cancelled receipts would remain with the cashiers.

In December 2010, KRA stumbled on a receipt presented by a taxpayer for motor vehicle inspection. But the receipt appeared in the CRS as having been deleted. It was not the kind of receipt the chief cashier had authority to delete or cancel from the CRS. This meant that the money paid for that transaction was received from the taxpayer but not accounted for. In January 2011 a general audit trail was carried out on similar cases in the CRS and it unearthed deletions of 65,540 receipts with a revenue implication of Ksh. 54,814.084, between January 2009 and December 2010.

Investigations were then focused on twelve (12) accounting officers including the chief cashier, his deputy, and several cashiers. On 18th March 2011, a letter of suspension was served on the 1st respondent alleging that he had defrauded KRA in the sum of Ksh. 3,483,675 through deletion of receipts duly paid for by taxpayers and the money unaccounted for, which action would amount to gross misconduct warranting summary dismissal, if proved. He was suspended under ***article 6 B (iv)*** of the Code of Conduct. Similar suspension letters were served on the 2nd and 3rd respondents on 22nd March 2011 and 17th July 2012, alleging loss of Ksh. 95,510 and Ksh.274,350, respectively.

The two were alleged to have colluded with the 1st respondent to have the receipts deleted from the CRS and for failing to account for the receipts in their respective **'Daily Cashier's Collection Summary Sheets'.**

The investigations were not completed, in respect of the 1st respondent until 24th April 2014, and in respect of the 2nd and 3rd respondent until 21st May 2014 when the three were invited to Disciplinary Committee hearings **(DC)** to offer their defences. Upon completion of the DC hearings, the three were found culpable as stated in their suspension letters and were summarily dismissed with effect from 23rd July 2014.

Dissatisfied with their dismissal, the three appealed to the Commissioner General **(CG)** under **Part 11** of the Code of Conduct within 30 days of their dismissal. At the same time they went before the ELRC and filed the claim which gave rise to this appeal on 22nd August 2014. They asserted that their dismissal was unlawful because their suspensions went beyond the six (6) months' time limit provided for under the Code of Conduct; the DC hearings comprised of members who were not contemplated under the Code of Conduct; the DC which purported to dismiss the respondents had no power to do so, as such power is reposed on the CG only; there was no finding of gross misconduct and so, the summary dismissal was misguided; and that they had not been supplied with relevant documents to prepare for their appeals against the dismissal.

They sought the following orders:

> ***" a) A declaration that the Respondent is guilty to unfair labour practice in respect of its purported termination of the Claimants employment;***
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> ***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;***
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> ***c) An order for reinstatement to employment and to be treated in all respects as if the employment had not been terminated;***
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> ***d) An order compelling the Respondent to unconditionally pay the clamant all withheld salaries and benefits during the period of suspension;***
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> > ***i. In respect of the 1st Claimant since 18th march 2011;***
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> > ***ii. In respect of the 2nd Claimant since 22nd March 2011; and***
> >
> > ***iii. In respect pf the 3rd Claimant since 17th July 2012.***
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> ***e) Damages for the breach of the Claimants fundamental right to fair labour practices;***
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> ***f) Damages from illegal termination of employment;***
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> ***g) Interest on (d), (e), and (f) above at the Court rates;***
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> ***h) Costs of the claim; and***
>
> ***i) Any other remedy that this Court may deem just and expedient to grant."***

The trial court subsequently heard oral evidence from each of the respondents, as well as three witnesses called by KRA and considered the written submissions filed by their respective counsel. In the end, the court made findings, *inter alia*: that in failing to supply documents relevant to the defence of the respondents despite requests and a court order to do so, KRA had engaged in unfair conduct amounting to unfair labour practice contrary to ***Section 45*** of the **Employment Act (the Act)** and ***Article 41*** of the **Constitution;** that KRA had failed to exhibit any policy regulations and a Code of Conduct which the respondents allegedly violated and therefore there were no proper internal disciplinary mechanisms to guarantee fairness in procedure; that from the Code of Conduct documents exhibited by the respondents, suspension could not go beyond six months but was allowed to last 3 years; that the hearing before the DC was procedurally flawed since the provisions of ***section 41(2)*** of the Act were not complied with, particularly the requirement that the employee be accompanied by another employee of his choice; that there was no evidence that the respondents had committed acts of gross misconduct by fraudulently deleting computer receipts; that witnesses who had favourable information about the respondents did not testify before the DC; that KRA was generally in breach of fair labour practices in respect of the respondents; that the Cash Receipting System was so flawed that it could not establish acts of deletions, skipping or fraud and therefore the respondents could not be accused of fraud without cogent evidence; and that summary dismissal was wrongful as there was no substantive reason to warrant the sanction of such dismissal. Upon making those findings, the trial court proceeded to grant the orders sought by the respondents thus provoking the appeal before us.

KRA challenges those findings and decision on sixteen (16) grounds listed in the memorandum of appeal. However, in written submissions filed on their behalf by learned counsel, **Mr. Kenneth Kirugi,** the grounds were condensed into five grounds in the following manner:

> ***"i. Reasons for termination – Grounds 1, 2, 8, 9 and 11.***
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> ***ii. Grant of documents in accordance with Section73 of the Employment Act and whether failure to issue the said documents amounted to an unfair hearing – Grounds 3,4, and 5.***

iii. Representation of the Respondents at the disciplinary hearing as per the provisions of Section 41(2) of the Employment Act. Ground 6 and 7.

iv. Orders of Reinstatement of the Respondents – Ground 10, 12 and 13.

v. length and nature of engagement – Ground 14 and 15."

There was no oral highlighting of those issues in plenary.

On the first issue relating to proof of reasons for dismissal, counsel submitted that the burden of proof of the reasons for termination lay on the employer under ***section 43 (2)*** of the Act, but is limited to matters that the employer *'genuinely believed to exist'* at the time of the termination. As to what amounts to gross misconduct to justify summary dismissal, counsel cited ***section 44(4)(g)*** of the Act, that is: where an employee either *'commits a criminal offence'* or *"on reasonable and sufficient grounds is suspected of having committed"* a criminal offence to the detriment of his employer or his employer's property. ***Section 45*** of the Act which delineates fairness was also relied on. In counsel's view there was sufficient evidence on record to support those requirements of the law.

Indeed, counsel observed, the trial court had acknowledged that the respondents had been informed about the reasons for their termination and the consequences thereof if investigations, which again the court accepted took place, confirmed the allegations. It was wrong, therefore, for the court to find that the respondents did not know what was expected of them at the work place purportedly because KRA did not exhibit the Code of Conduct. In truth, he asserted, the two Codes of Conduct produced and relied on by the respondents were the existing Codes operating between the parties and there was no need for KRA to produce other copies. It is those Codes which spell out *'gross misconduct'* and the consequences of the respondents' actions. The respondents were informed about the charges in a language they understood and they reacted to them. In his view, the procedure followed was fair and accorded with statute.

As for substantive proof of the charges, counsel referred to the voluminous investigation record and the evidence of the investigating officer who was made available to the respondents during the DC hearings, as well as the hearing of their claim in court, for cross examination. It was established that the CRS was password based and had a unique code for each user. There was no difficulty, therefore, in tracing the deleted receipts to the officer who carried out the transaction. So too, the evidence on skipped or cancelled receipts which were easily traceable, leaving only the receipts issued to the taxpayers without the corresponding payment being accounted for. All that evidence, according to counsel, was given short shrift by the trial court when it found that the flaw was in the CRS while, clearly on the evidence on record, the CRS was artificially manipulated. There had been no reported flaw of the system from any of the respondents. In effect, charged counsel, the trial court chose to substitute its own *'reasonable grounds'* for those of the employer contrary to what this Court stated in the case of ***CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR.***

Turning to the second issue on 'fair hearing', counsel submitted that KRA had complied with the provisions of ***section 41(1)*** and ***(2)*** of the Act by issuing suspension letters explaining the reasons for suspension and giving the right of oral hearing before the DC. Counsel faulted the trial court for taking a decidedly adverse view of a purported failure by KRA to provide documents to the respondents. According to him, all relevant documents had all along been supplied and retained by the respondents before and after the DC hearings. The respondents would otherwise not have been able to present the comprehensive responses they did at the DC hearings. The proceedings of the DC hearings were exhibited before the trial court and it was surprising that the trial court did not appreciate that the respondents were only pursuing the original deleted receipts which, to their knowledge, were retained by the taxpayers. Counsel referred to the court order on release of the documents and a report made by the Labour Officer sent by the court to confirm compliance with the order, and submitted that the trial court ignored that report, instead imputing collusion between KRA and the Labour Officer. It was a misdirection therefore, concluded counsel, for the court to find that there were documents which had not been supplied to the respondents.

As for procedural fairness before the DC hearings, and the finding that the respondents were not allowed to appear with fellow employees of their choice, counsel submitted that the right was that of the employee and it was for him to choose, well knowing about the right, whether to appear with another employee or not. The right was expressly spelt out in the Code of Conduct *'Rules Governing Discipline and Grievance'* which the respondents themselves exhibited. The cases of ***Kenya Ports Authority vs. Fadhil Juma Kisuwa [2017] eKLR*** and ***Kenya Revenue Authority sv. Menginya Salim Murgani , Civil Appeal No.108 of 2010***, were relied on.

On the fourth issue relating to reinstatement, counsel submitted that it was not the most efficacious order in view of other remedies under ***section 49*** of the Act and considering the evidence that further criminal investigations relating to the fraud were going on, and the fact that the ***Road Transport Department*** which was the respondents' work station, had been moved to the National Transport and Safety Authority **(NTSA)** by the time the judgment was delivered. These, according to counsel, were exceptional circumstances which were not considered before the order was given. He relied on this Court's decision in ***Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR*** on the principles of reinstatement.

Lastly on the length and nature of the respondents' service, counsel submitted that KRA was a public body bestowed with the important duty of collecting revenue for the Government which activity attracts public scrutiny. As such, the employees of KRA must have utmost trust and integrity, the lack of which would only attract dismissal. Counsel prayed that we allow the appeal and reinstate the dismissals made on 23rd July 2014.

Responding to those submissions, counsel for the respondents **M/S Waruhiu, K'Owade & Nganga, Advocates,** similarly filed written submissions which were not orally highlighted in plenary. Counsel did not directly deal with the submissions of KRA as summarized above but chose a summary of their own, urging **Grounds1, 2 & 11** on *'breach of employment contract by the respondents'*, as one; **Grounds 3, 4, 5, 6, 7** on *'availing documents and representation at the DC hearings'* ; **Grounds 8 & 9** on *'weakness of the CRS'*; **Ground10,12,13,14**, on *'reinstatement'*; and **Ground 16** on *'evaluation of evidence'*.

In urging the first ground, counsel submitted that under ***section 44(3)*** of the Act, an employee could only be dismissed summarily if he had fundamentally breached his obligations under the contract of service. The onus lies on the employer to justify such dismissal. He relied on

section 47(5) of the Act and **Halsbury'sLaws of England, 4th Edition, Vol. 16, Para. 328**. In his view, KRA had failed to produce cogent evidence to prove gross misconduct or breach of contract and instead shifted the burden to the respondents whose defences it dismissed as *'not acceptable'*.

Turning to the second batch of grounds on procedural fairness at the DC hearings, counsel insisted, as found by the trial court, that the respondents were not allowed to appear with another employee at the hearings, and were not supplied with the necessary documents to mount their defences and appeals, despite requests made, and a court order issued for supply of the documents. In the circumstances, urged counsel, there was breach of the rules of natural justice and ***section 41*** of the Act. It did not matter that in making that finding, there was no specific complaint made by the respondents in their pleadings or submissions, since, in his view, ***section 20*** allows the court to decide without undue technicalities. ***Article 47*** of the Constitution also speaks to procedural fairness.

On the third batch, it was submitted that the vulnerability of the CRS was a fact acknowledged by KRA witnesses and the trial court was right to find that it was not possible to attach liability to the respondents in those circumstances.

On the penultimate batch of grounds relating to reinstatement, it was submitted that the grounds were misplaced since the trial court did not order *'reinstatement'* of the respondents, but their *'re-engagement'*. Counsel cited ***section 12(3)*** of the **Employment and Labour Relations Court Act** on the various orders a court may issue, including reinstatement. He also relied on the case of ***Bamburi Cement Limited vs. William Kilonzi [2016] eKLR*** where this Court examined the various remedies under ***section 49*** of the Act and stated:

> ***"In addition the court can order reinstatement or re-engagement of the dismissed employee".***

According to counsel, those were different remedies, and in this case, there was no order of reinstatement which can be challenged. The respondents had a legitimate expectation of re-engagement since they had done no wrong.

Finally, it was submitted that the evidence submitted by KRA was not ignored as complained, but was properly evaluated and found wanting. The appeal must therefore fail in its entirety.

We are aware of our duty under ***Rule 29 (1) (a)*** of the ***Court of Appeal Rules*** to re-appraise the evidence and to draw our own inferences of fact on a first appeal. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law. ***Section 17(2)*** of the **Industrial Court Act** no longer restricts first appeals to matters of law only as it was deleted by **Act No. 18 of 2014** in November 2014. See ***Narok County Government & another v Richard Bwogo Birir & another [2015] eKLR.***

Upon consideration of the entire record of appeal, the submissions of learned counsel and the law, we perceive three germane issues which are sufficient to dispose of the matter, thus:-

> ***(a) whether the summary dismissal of the respondents was wrongful or substantively justified.***
>
> ***(b) whether the dismissal was procedurally fair.***
>
> ***(c) whether the remedy of reinstatement was appropriate.***

In discussing the first issue, it is appropriate to appreciate the philosophy behind the enactment of the **Employment Act, 2007**. In the recent case of ***Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR (***delivered on 19th day of July, 2019) the Court had this to say:

> ***"In the case of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR this Court had the following to say on the burden of proof:-***
>
> > "*There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair* ***(****section 45****);*** *prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:*
> >
> > > *"..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."*
>
> ***Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:***
>
> > ***"****(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."* [Emphasis added].

> ***So that, the appellant(***employee) ***in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."*** [Emphasis added].

This Court has also stated as follows:

> "***Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway."*****-----**See ***Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR.***

As stated above, the first duty is for the respondents (employees) to lay a foundation that their services were terminated and that they were terminated wrongly. In this attempt, the 1st respondent pleaded and testified that he was employed by KRA in December 2005 and was working as Chief Cashier when, on 18th March 2011, he was served with a suspension letter stating as follows:

> ***"It has been reported that between 1st January 2009 and 30th January 2011, in your capacity as a Chief Cashier you defrauded the Kenya Revenue Authority a sum of kshs.3,483,675/= being payment due for amongst other items Motor Vehicle Inspection Fee. It has been alleged that your account for cancelled and skipped receipts included receipts that had been duly paid for and issued to taxpayers which is irregular (see attachments). Further as the officer with the authority and capacity to delete receipts, you cancelled receipts without justifiable reasons and did not account for the revenue collected from the receipts in question.***
>
> ***The above allegations if proved to be true, constitute of gross misconduct as defined by the KRA Code of Conduct.... Meanwhile, pursuant to the Code of Conduct article 6B (iv) you hereby (sic) suspended with immediate effect."***

He proceeded on suspension and did not hear from KRA for the next twenty-one (21) months until 23rd April 2014 when he was invited to appear before the Disciplinary Committee set up by the CG to hear his response. He asserted that the lengthy suspension was contrary to the provisions of the Code of Conduct. He denied any fraudulent deletion of receipts and insisted that he had the capacity and authority to delete receipts from the CRS since he was issued with a personal code to operate the system. There was no information or analysis of the receipts he could delete and those he could not. During investigations, he sought to be shown all the original receipts that were allegedly deleted but he was only shown two. At the DC hearings he again insisted on being shown the original receipts but he was not shown any. Despite his denials, he received a letter of dismissal on 23rd July 2014 which simply said, without more, that his presentation before the DC was not acceptable. He was not given a reason for his dismissal. He appealed the decision to the CG and applied to the court to assist him in obtaining several documents to assist him in his appeal. The court issued the orders but the documents were not supplied. By a letter dated 13th January 2015, he was informed that his appeal was rejected.

The 2nd and 3rd respondents testified that they were employed in the years 2004 and 2008 respectively and were cashiers working under the 1st respondent in 2011. They received similar letters of suspension on 22nd March 2011 and 17th July 2012, respectively, alleging collusion with the 1st respondent to have receipts deleted from the CRS and pocketing various amounts of money. They were also accused of failing to account for the receipts in the Cashiers Daily Collection Sheets. The period of suspension for the 2nd respondent was twenty-six (26) months until she was invited before the DC on 21st May 2014, while that of the 3rd respondent was twenty-two (22) months. They complained about the delay and the suffering they endured with only a house allowance being paid. In their testimony, they confirmed that they collected revenue and issued receipts to taxpayers. They had personal passwords for accessing the CRS but had no capacity or authority to delete any receipt from the system. For any receipts which were skipped by the system or where the taxpayer did not have enough money or no physical receipt was available, a report would be made to the 1st respondent who would make cancellations in the CRS. No deleted receipt could be found with a taxpayer, they confirmed.

In our assessment, a foundation had been made by the respondents as envisaged under ***section 47(5)*** of the Act.

In turn, KRA, in terms of ***Section 43***, embarked on establishing the reasons for termination. It is necessary, therefore, to re- evaluate the evidence presented to the trial court in order to arrive at our own conclusion as to whether the respondents committed a criminal offence or whether there were reasonable and sufficient grounds to suspect them to have committed such offence or to have done an act to the substantial detriment of KRA. As we do so, we are mindful about the usual caution that we neither saw nor heard the witnesses, and must therefore give allowance for it.

KRA called three witnesses who had intimate knowledge about the matter at hand. The key witness was **Peter Mugo Ndune (Peter)** who was the Investigator based at the Ethics Department of KRA. He was a former CID police officer since 1996 and was in 4th year University of Nairobi pursuing a law degree. He was seconded to KRA in 2002 and was later recruited as a full time investigator in 2006.

The initial suspicions about the fraud were raised when in December 2010, a letter was written by the Motor Vehicle Inspection Unit to KRA seeking confirmation of a computer receipt issued by the KRA cash office, which turned out to be deleted in the CRS although the taxpayer had possession of the original. The discovery triggered the formation of a task force by the CG where Peter was assigned an investigative role. The investigators combed through more than 65,000 receipts which had been deleted over a period of two years. Further investigations sampled 360 original receipts recovered from taxpayers but which had been deleted from the CRS and the system identified the person who made the deletions. That is how culpability was narrowed down to some twelve (12) officers, including the three respondents, out of forty (40) whose further investigations continued. The computer system could not be accessed for deletion of data by anyone who did not have the secret code which only the 1st respondent had. The cashiers had personal passwords to the computer system for collection of revenue.

The investigators also examined the Daily Cash Collection Sheets prepared by the cashiers and found them falsified. There was confirmation from Human Resource and ICT departments that there was unauthorized access to the computer system during the period under

investigation. Reports were then prepared showing that the 1st respondent had deleted 3,080 receipts which were not backed up with any reasons from the cashiers as per normal procedure. The 2nd respondent was implicated in fifty-one (51) deletions when she acted as chief cashier in 2009 and the 3rd respondent was implicated in 472 deletions. Some of the matters were handed over to the police for criminal investigation while KRA pursued disciplinary procedure under its Code of Conduct.

The other crucial witness was the Assistant manager, Information & Technology Security Department, ***Daniel Munge Sirorei*** **(Daniel)**. He was appointed by the CG to join other investigators and to provide information on the ICT system at the Road Traffic Department. He identified the deleted receipts in the system, the digital identity of the staff members involved, and the times each had access to the system. He confirmed the issuance of usernames and codes or passwords to specific staff for operation of the CRS. In his evidence, no information was passed to the ICT department on any unauthorized use of codes or passwords, in the absence of the authorized user. He then prepared a report on the trail audit and submitted it to the investigation team for analysis. In order to address the user-related or manipulation challenges of the CRS, it was upgraded to CCRS in 2013 to require cash payments be made with the banks and receipts submitted to KRA. Passwords were also encrypted on Oracle and managed from the Oracle database.

Finally, the Human Resource and Employee Relations Manager, ***Crispin Nyamweya Agata***, who was also the secretary to the DC, testified to confirm the reasons for dismissal of the respondents as stated at length by ***Peter*** and ***Daniel***, which information was at his disposal. He confirmed the issuance of suspension letters to the respondents, citing the relevant sections of the Code of Conduct and specifying the acts which would amount to gross misconduct, if proved. They were all given an opportunity to respond to the allegations, but due to the complexity of investigations and the multiplicity of staff involved, the investigations took longer than anticipated. Parallel criminal investigations were also taking place. He also testified about the procedure adopted in the DC hearings, confirming that it accorded with the provisions of the Code of Conduct. As to the original reports sought by the 1st respondent, he testified that samples were supplied to him but the rest were retained by the taxpayers. He further confirmed that the CG made the appointments for the various DC membership, and there was no challenge made by any of the respondents on the membership or quorum of the committees. In his evidence, the DC merely made recommendations to the CG for dismissal of the respondents and it was the CG who subsequently made the decision. He also testified that the respondents made appeals but no committee was constituted to hear the appeals before they were dismissed by the CG, since the appeals did not meet the threshold of fresh review of evidence.

In assessing the evidence relating to the 1st issue, the trial court stated as follows:

> ***"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 court found that there was no proof of any substantive reason to warrant the sanction of summary dismissal of the respondents. In the court's view, the systems and audit analysis carried out did not relate to the charges of fraud against each respondent; the claim by the 1st respondent that he was on leave when the fraud was committed was not discounted; the evidence in support of the exact figures allegedly defrauded was not made available to the respondents or to the court; only a financial audit report could confirm loss of the amounts, but none was in evidence; the defences of the 2nd and 3rd respondents that they had no authority to delete receipts was not considered; and that the CRS was so flawed a system that it could not provide cogent evidence on acts of deletion, skipping or fraud against the respondents, hence the reason why it was changed.

We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under ***section 43 (1)*** of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.

The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it ***"genuinely believed to exist,"*** causing it to terminate the employee's services. That is a partly subjective test. In the case of ***Bamburi Cement Limited vs. William Kilonzi [2016] eKLR*** this Court expressed itself on the nature of proof required as follows:

> ***"The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing..... The test to be applied is now settled. In the case of the Judicial Service Commission vs. Gladys Boss Shollei, Civil Appeal No.50 of 2014, this Court cited with approval the following passage from the Canadian Supreme Court decision in Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161***
>
> *"Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."*

Similar guidelines are to be found in **Halsbury's Laws of England,** 4th Edition, Vol. 16(1B) para 642, thus:-

> ***"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."***

In this matter, KRA provided evidence which on a balance of probability established that there was pilferage of tax collections in the ***Road Traffic Department*** and the nature of it was through deletion of valid receipts issued to taxpayers after which the money collected was not accounted for. There was evidence that specific staff members were issued with codes or passwords to operate the computerized cash receipting system and those codes were not transferable. At any rate, none of the staff members made any complaint of unauthorized use of their codes and passwords. Admittedly KRA was unable to exhibit all the original receipts issued to taxpayers and it may not have been possible to support all the allegations it made with physical receipts. But sample receipts were made available to the respondents. The defence of the 1st respondent was mainly that he was on leave when the deletions were made while the 2nd and 3rd respondents said they had no powers to carry out deletions. No one explained how, if that was the case, that their respective digital identities were found in the computer and why the daily collection sheets and the revenue collected, tallied with those of the chief cashier, unless they were falsified. The fact that KRA subsequently upgraded the technology for revenue collection did not mean, as construed by the trial court, that the CRS was incapable of registering unlawful manipulations and illegal transactions. Again, it is not the case of the respondents that the system was hacked into by the 3rd parties or manipulation was not traceable to them. More importantly, it is clear that the system was intended to protect and safeguard the interests of both employees and employer, in that no employee could be victimized for unlawful entry into the system. Here is a case the entry into the particular and subject entry into the system was largely and substantially traced to the respondents.

The employer was able to show that it genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the respondents had committed gross misconduct in their employment and had done acts which were substantially detrimental to KRA. It is not for the court to substitute its own *'reasonable grounds'* for those of the employer. See ***CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona [2015] eKLR.*** It is our finding on the 1st issue that the dismissal of the respondents was substantively justified and the trial court was in error in finding otherwise.

Was the dismissal procedurally fair? That is the 2nd issue.

The bulk of the judgment of the trial court was dedicated to castigating KRA for failing or refusing to supply documents to the respondents, hence the conclusion that KRA was engaged in unfair labour practices. The major documents said to have been withheld were the original deleted receipts, the record of investigations, and the Code of Conduct. KRA was also castigated for delaying the suspension of the respondents before carrying out DC hearings, improperly convening committees whose members did not sit throughout, and failing to scrupulously follow the mandatory procedure provided for in ***section 41*** of the Act. KRA attempted to explain those criticisms by showing, *inter alia*: that the bulk of the original receipts were held by the taxpayers and that there was a criminal investigation involving the same receipts; that the investigation report was made available at the DC hearings and an opportunity given for questioning the investigating officer; that the Code of Conduct produced by the respondents was the same one relied on by KRA and there was no need of duplicating the production of it; that the time limit made for suspension of an employee was not rigid since the Code of Conduct recognizes circumstances that can result in extension, as happened in this matter; that the DC proceedings were recorded and exhibited, showing that the disciplinary process was fair to the respondents; and that there was compliance with ***section 41*** of the Act. But all those explanations were hardly considered, despite the relevance of the same to the outcome of this somewhat complex issues. The trial court has no obligation to consider the said explanation and determine the same in the context of this complex dispute.

We have anxiously examined the record on this issue which is not without difficulty. Firstly, it is contended by KRA that the issue was not pleaded and it was improperly raised and decided on by the trial court *suo motu.* We, however, take the view that it was an issue of law which featured in the submissions of counsel and, therefore, attracted the decision of the trial court. Secondly, there are conflicting decisions of this Court on the construction and application of ***section 41***. The main conflict is whether the hearings before the disciplinary committee should be oral or not and whether the employee must have another employee of his choice, or a shop floor representative, to be present and be heard on the allegations. In the case of ***Kenya Ports Authority vs. Fadhil Juma Kisuwa [2017] eKLR,*** this Court stated on those issues thus:

> ***"We have said earlier that where dismissal is on the grounds of misconduct, poor performance or physical incapacity the employer, by the provisions of section 41 is bound, not only to explain the reason for which the employee's dismissal is contemplated but also to hear and consider any representations he may have. At the disciplinary hearing the employee is entitled to have in attendance, if he/she wishes, another employee or a shop floor union representative of his choice. This requirement only imposes a duty on the court to hear the employee in the presence of his/her colleagues where the employee wishes them to be present. The court cannot impose them on the employee. It must however be stressed that the necessity of oral hearing will depend on the subject and nature of the dispute, the whole circumstances of the particular case."*** [Emphasis added].

See also ***Kenya Revenue Authority vs. Menginya Salim Murgani***, ***Civil Appeal No.108 of 2010***, where the Court held that the hearing contemplated under ***section 41*** is not necessarily oral but one that will be determined on a case by case basis, depending on the circumstances of each case.

More recently, however, in the ***Postal Corporation of Kenya*** case (supra), the Court expressed itself as follows:-

> "***Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular***

case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for *"Notification and hearing before termination on grounds of misconduct"* ***in the following manner:-***

> *"(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 in capacity 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 employer 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, chosen by the employee within subsection (1) make."*

Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:-

> ***(i) an explanation of the grounds of termination in a language understood by the employee;***
>
> ***(ii) the reason for which the employer is considering termination;***
>
> ***(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;***
>
> ***(iv) hearing and considering any representations made by the employee and the person chosen by the employee."***

We choose to follow the latter decision and have weighed against it the disciplinary procedure conducted by KRA. We find that KRA substantially complied with its Code of Conduct but the Code does not require the presence of another employee or shop floor attendant at the disciplinary proceedings. To that extent, the Code is not consonant with the statute and must give way. The four elements decanted in the above authority were thus not complied with. So was the appellate procedure which the Code of Conduct provides, and which KRA admitted, that a committee ought to have been appointed to hear the appeals of the respondents but none was appointed. The appeals were summarily dismissed. Consequently, for reasons other than those advanced by the trial court, we find that the disciplinary process did not pass muster.

Having found on the first issue that the dismissal was not wrongful and on the 2nd issue that the process was unfair, what is the remedy?

We could have ordered that the respondents be taken through a proper disciplinary process afresh but plenty of water has gone under the bridge in the last five years. Only the criminal process is not affected by time limits so long as there is available evidence. In this case, the trial court ordered a reinstatement of the respondents upon the finding that there was no substantive reason for their termination and further, because of procedural unfairness. The trial court had the discretion to make such order, and this Court would have no business interfering if the discretion was judiciously exercised. The court appreciated that the proper legal basis for exercising the discretion is ***section 49*** of the Act. But the only reason the court gave for making the order was this:-

> ***"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."***

With respect, that consideration falls short of the provisions of ***section 49***. In the case of ***Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR*** this Court had this to say:-

> ***"Reinstatement is provided for under Section 49(3) (a) of the Employment Act as one of the remedies that a Court, by virtue of Section 50, shall be guided by. It is couched in mandatory terms and requires the court to take into account any of the following matters set out in Section 49(4) (a) to (m) before it can order reinstatement;***
>
> ***a. The wishes of the employee;***
>
> ***b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and***
>
> ***c. The practicability of recommending reinstatement or re-engagement;***
>
> ***d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;***
>
> ***e. The employee's length of service with the employer;***

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

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

h. The value of any severance payable by law;

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

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

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

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

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

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

We express similar sentiments in this case and in our considered view reinstatement is not and cannot be the only appropriate and effective remedy in the circumstances of what we have stated hereinabove.

As correctly observed by counsel for the appellant, KRA is a public body bestowed with the important duty of collecting revenue for running Government services, which activity must attract public scrutiny. As such, the employees of KRA must have utmost trust and integrity. When trust has irretrievably broken down, due to acts and omissions of the respondents, it would be foolhardy to force the employer and the employee to stick together. We are in no doubt that the respondents contributed to the acts leading to their termination as envisaged under ***Section 49(4) (b) (c)*** and ***(k)*** which leads us to the determination that the termination, though flawed due to procedural lapses, was lawful and justified. In the circumstances of this case and in consideration of public interest, the remedy that commends itself to us is that the services of the respondents shall stand terminated.

The appeal succeeds on the issue of termination of the respondents' employment which was not wrongful. It fails, however, on the process of termination which was flawed, hence the order we now give that the termination shall be a normal one. We order that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 11th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR