Judicial Service Commission v Muraya & 4 others (Civil Appeal E002 of 2024) [2024] KECA 1599 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1599 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E002 OF 2024

F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA

NOVEMBER 8, 2024

BETWEEN

JUDICIAL SERVICE COMMISSION ..... APPELLANT

AND

RUTH WANJIKU MURAYA ..... 1ST RESPONDENT

GRACE WAITHERA MACHARIA ..... 2ND RESPONDENT

BORU GUYO MOLE ..... 3RD RESPONDENT

JOAB OOKO ..... 4TH RESPONDENT

BENJAMIN MUTUKU NZIOKA ..... 5TH RESPONDENT

(Being an appeal from the judgement of the Employment and Labour Relations Court of Kenya at Nairobi (Manani, J.) dated 9th November 2023 in ELRC Cause No. E003 of 2022)

JUDGMENT

1. This appeal challenges the decision of Manani, J. dated and delivered on November 9, 2023 in Employment and Labour Relations Court (the ELRC) Cause No. E003 of 2022. The Judicial Service Commission shall hereafter be referred to as the appellant while Ruth Wanjiku Muraya, Grace Waithera Macharia, Boru Guyo Mole, Joab Ooko and Benjamin Mutuku Nzioka shall all be referred to as the respondents where the context permits.

2. The history of this litigation can be traced from the employment of the respondents in various capacities within the Judiciary in the accounts department. Having perused through the record, we deduce that both Ruth Wanjiku Muraya and Grace Waithera Macharia (the 1st and 2nd respondents) were employed in the year 1999 as Accounts Assistants. Boru Guyo Mole (the 3rd respondent) was employed on 27th March 2001 as a Clerical Officer and later promoted to the position of Senior

Accountant. Jacob Ooko (the 4th respondent) was employed as an Accountant on 30th September 2010 and Benjamin Mutuku Nzioka (the 5th respondent) was employed on 2nd October 2008 as a Clerical Officer and later promoted to the position of Accountant II.

3. By a letter dated 5th November 2013, the then Chief Justice, Dr. Willy Mutunga, issued interdiction letters to each of the respondents. The basis upon which the interdiction letters were issued was the outcome of an investigation report on the alleged theft of Kshs.80,013,302 by the respondents. The respondents were then placed on half salary during the interdiction period.

4. In addition, the respondents together with other eight persons were subjected to criminal proceedings, being Criminal Case No. 1457 of 2013. All of them were charged with 13 various counts in a charge sheet dated 12th November 2015. Without belabouring into the particulars of the charges since it is not the subject of the dispute in this Court, the appellants herein were charged with the offence of conspiracy to commit a felony of stealing Kshs.80,013,302 from the Judiciary contrary to section 393 of the Penal Code. In a judgement dated 10th January 2020, the learned Magistrate (Roseline A. Ongayo, CM.) acquitted the respondents of the offence charged.

5. Thereafter, on 6th August 2021, each of the respondents was issued with a letter authored by the Director in charge of Human Resource on behalf of the Chief Registrar of the Judiciary, stating that they were collectively responsible for the loss incurred by the Judiciary of Kshs.80, 013, 302/=, for having failed to safeguard and/or protect the passwords and log-in credentials assigned to them. They were required in the letter to show cause why their employment should not be terminated.

6. A disciplinary hearing took place on 21st September 2021 before the Human Resource Management Advisory Committee (the Committee) with all the respondents present. A report by the Committee members dated 19th November 2011 recommended that the respondents be absolved of the charge, their interdiction from 5th November 2013 be lifted and their half salaries withheld during the interdiction period be released. The Committee noted that the respondents were not culpable of the charge of negligence, and neither of them could conclusively be said to have been directly or indirectly involved in the alleged loss.

7. In a strange twist of events and in total disregard of the report from the Committee, the appellant issued each of the respondents with dismissal letters dated 22nd December 2021. The reasons thereof being failure to safeguard and/or protect the assigned password and log-in credentials causing loss to the Judiciary funds amounting to Kshs.80,103,302. In the said letter, the respondents were not given an option to appeal against the decision to terminate their employment.

8. The respondents challenged their termination of employment through a claim filed before the ELRC vide an amended Memorandum of Claim dated 20th July 2022 seeking: that the dismissal of the respondents vide letters dated 22nd December 2021 be declared unlawful, wrongful, unfair and unconstitutional; an order of reinstatement of the respondents to their positions as accountants with no loss of benefits or in the alternative, the respondents be paid all the salaries as particularized in paragraphs 6 (b) and 9 (b) of their amended claim plus interest; one month's salary in lieu of notice; service gratuity for each of the years served by the respondents; contributory pension prior to dismissal; 12 months' compensation for unfair termination; that permanent injunction be issued against the appellant from interfering with the employment contract of service of the respondents unless otherwise lawfully terminated; and that cost of the suit be borne by the appellant.

9. In its Amended Statement of Response dated 18th August 2022, the appellant stated that the respondents were not entitled to an automatic reinstatement; that it wrote to the respondents after receipt of the judgement dated 10th January 2020 from the criminal court and advised them that their

request was being reviewed; and that the delayed review of the respondents' claims was due to the fact that it was actively involved in the recruitment of the new Chief Justice.

10. Further, the appellant contended that the 2nd respondent's claim against it was time barred having been on interdiction for 6 years. The appellant defended its position to terminate the respondents' employment as being negligent in carrying out their duties leading it to lose Kshs.80,013,302. On the benefits entitled to the respondents, the appellant averred that since the respondents were found culpable, they were not entitled to payment in lieu of notice and other benefits accruing from their employment. In conclusion, the appellant urged that the claim be dismissed with costs.

11. After analysing the evidence before him, Manani, J. was of the view that the decision to terminate the respondents' employment was irregular on both substantive and procedural grounds. He held that the respondents were not complicit to the illegal harvesting of their credentials so as to steal money from the Judiciary.

12. On the argument by the appellant that the positions being held by the respondents were already filled, the learned Judge held that the decision to terminate the respondents was reached on 22nd December 2021; and that there was no evidence that the said positions were not available to the respondents as of then. It was held that the Judiciary being a large organization, the respondents could easily be reintegrated back to the organization with no difficulties. From the foregoing, the learned Judge was of the view that the respondents were within the 3 years' timeframe for the grant of the remedy of reinstatement.

13. Being dissatisfied with the decision of the trial court, the appellant is now before this Court challenging the said decision on 8 grounds of appeal in its Memorandum of Appeal dated December 11, 2023. We have summarised the grounds as follows:

    i. That the learned Judge erred in law and in fact by disregarding the loss of Kshs.80 million belonging to the appellant which loss was directly linked to the respondents' responsibility to safeguard their log-in credentials hence reaching an erroneous finding that the appellant did not have a reasonable and genuine ground to believe that the respondents were guilty of negligence as required by section 43 (2) of the *Employment Act*.

    ii. That the learned Judge erred in law and in fact in finding that the appellant was required to accord the respondents an opportunity to make representations prior to deciding on the appropriate punishment based on the report and recommendations of the Human Resource Management Administrative Committee (the Disciplinary Committee) contrary to paragraph 25 (11) of the Third Schedule of the *Judicial Service Act* No. 1 of 2011 which empowers the appellant to consider the report and decide on the appropriate punishment without recalling the respondents for a hearing.

    iii. That the learned Judge erred in making a finding that the appellant did not furnish the respondents with the reports in its possession prior to the disciplinary session at which their fate would be determined while in fact the respondents did not request to be furnished with the said documentation.

    iv. That the learned Judge erred in finding that the appellant's decision to terminate the respondents' contracts of service was irregular on procedural grounds and that the disciplinary process did not adhere to the rules of natural justice as set out under section 4 of the *Fair Administrative Action Act*.

    v. That the learned Judge erred in finding that the appellant was obligated to accord the respondents expeditious justice by initiating internal disciplinary proceedings against them

prior to the conclusion of the criminal proceedings contrary to the provisions of Paragraph 18 (2) of the Third Schedule to the *Judicial Service Act*.

vi. That the learned Judge erred in finding that the respondents were not required to exhaust internal appellate mechanism to challenge their dismissal before they could file their employment claim.

vii. That the learned Judge erred in making an order for reinstatement when the circumstances of the case did not tilt in favour of grant of the order.

14. We have been urged to allow the appeal by setting aside the decision of Manani, J. rendered on November 9, 2023 and to award the appellant the costs of this appeal.

15. This appeal was disposed of by way of written submissions with brief oral highlights from the parties whom we heard on 22nd April 2024. Learned counsel Mr. Kiprotich was on record for the appellant while the respondents were all in person. Ms. Muraya and Mr. Bolu submitted on behalf of the respondents.

16. Mr. Kiprotich condensed his grounds of appeal into three. Firstly, on the finding that the respondents were terminated irregularly on both substantive and procedural grounds. Secondly, that due procedure and process was followed prior to the dismissal and thirdly, whether the appellant was barred from initiating disciplinary proceedings against the respondents prior to the conclusion of the criminal charge or case in which the respondents were accused.

17. On the first issue, counsel referred to the provisions of sections 43 (2) and 45 (2) of the *Employment Act* which provide on the standard and burden of proof required to be met prior to dismissal of an employee from employment. To counsel, the law was not breached as there existed valid reasons for termination of employment of the respondents when they were dismissed. Counsel contended that the learned Judge held that the appellant should have considered two reports that were filed before it, that is the Vivium Consulting Report dated 21st July 2014 and the Cyber Crime Report by the Directorate of Criminal Investigations dated 28th June 2014 in determining whether the respondents were culpable for the charge of negligence. He argued that in so finding, the learned Judge prevented the appellant from undertaking its own analysis of the facts of the case based on the charge that the employer had raised against the respondents. To support its argument, the appellant relied on the South African Labour Appeals Court decision of Afrox Healthcare Limited vs. CCMA & Others (2012) 7 BBLR 649 (LAC); (2012) JOL 208 779 (LAC) for the proposition that in labour practice, proof of intention from the employee's end is not a requirement where a charge of negligence is proffered against the employee.

18. The appellant argued that the respondents' negligence caused it to lose over Kshs.80 million, hence the learned Judge erred in finding or in requiring the appellant to apply a different set of standard of proof in validating the reasons for termination other than what was provided for in the *Employment Act*. Counsel posited that the respondents being accountants with log-in credentials that would be used to transact judiciary funds were negligent in occasioning the loss; and that the negligence was the reason for the charge that was preferred against them, culmination in their dismissal from employment.

19. On the argument that fair procedure and due process was followed prior to termination, it was submitted that the respondents did not challenge the procedure that was used by the appellant in dismissing them except on two facts; that the appellant failed to furnish the relevant documents and reports that it used in undertaking the disciplinary process; and that the appellant did not accord them an opportunity to be heard before considering the recommendations of the Committee.

20. Counsel stated that the respondents requested for minutes of the Committee after the decision to dismiss them had been made. Therefore, the contention that they were not supplied with reports or minutes or relevant documents prior to the determination is erroneous.

21. On whether the respondents were required to be heard by the whole of the Judicial Service Commission, while considering the decision of the Committee, the appellant submitted that it was not a requirement under the law; that the respondents having been heard by the Disciplinary Committee, they made their representations; and that what the Committee submits to the appellant, is just but a recommendation. Therefore, the decision to dismiss the respondents emanated not from the Committee but from the appellant; the appellant is the ultimate decision maker. Counsel referred to this Court's decision in Nakuru Civil Appeal E082 of 2022 Judicial Service Commission & Another vs. Aggrey Oure Onyango (Unreported) for the proposition that the appellant is not bound by the decision of the Disciplinary Committee.

22. On the requirement by the appellant to initiate disciplinary proceedings if the grounds for termination are different, it was submitted that the learned Judge misinterpreted Paragraph 18 of Part IV of the Third Schedule of the *Judicial Service Act* which expressly bars the institution of disciplinary proceedings for dismissal of an officer once criminal proceedings are instituted against the said officer; that disciplinary proceedings can only be instituted after the conclusion of the criminal proceedings. The learned Judge was also faulted for misinterpreting Paragraph 18 (3) of Part IV of the Third Schedule to the *Judicial Service Act* which provides that even if the officer is acquitted, he/she can be dismissed or punished on a charge arising out of his/her conduct in the matter but which charge is different from the one upon which he/she has been acquitted of.

23. On whether the order of reinstatement was appropriate in the circumstances, it was submitted that the learned Judge failed to consider all the relevant conditions and circumstances provided for under sections 49(4) and 50 of the *Employment Act*. The appellant relied on this Court's case of Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR where it was held that: before reinstatement, the wishes and expectations of the employee must be factored; the common law principle is that there should be no order for specific performance in a contract of service except in exceptional circumstances; the practicability of reinstatement and chances of the employee securing alternative employment are matters of consideration.

24. In view of the above, it was the appellant's position that its relationship with the respondents is already strained; and that should this Court find that the process of dismissal was tainted in any manner, it should set aside the order for reinstatement as it amounts to subjecting the parties, particularly the appellant to servitude. On the whole, we were urged to allow the appeal with costs.

25. Ms. Muraya relied on the respondents' joint submissions dated and filed on 22nd February 2024, the pleadings and the Supplementary Records of Appeal that were filed and dated 12th February 2024. Out of the 8 grounds of appeal raised by the appellant, she condensed them into three issues, being whether the charge of negligence stood, whether due process was followed prior to their dismissal and whether reinstatement was a remedy available to them. As earlier highlighted, she submitted on behalf of all the respondents.

26. On the charge of negligence, she submitted that the issue of the fraudulent use of their (the respondents) credentials was canvassed in detail in the criminal matter; that the tendered forensic reports by the appellant through the prosecution in the criminal trial absolved them of any culpability; and that documentary evidence showed that there was hacking of their credentials, a fact the appellant's counsel admitted. To support this, Ms. Muraya referred us to pages 290 to 294 of the Supplementary Record of Appeal to demonstrate that the 1st respondent's credentials showed three different passwords

as a testament that they used to change their passwords often so as to protect the system. Ms. Muraya emphasized that if indeed there was negligence on their part and that their credentials were readily available, the fraudsters would not have invested in creating a malware which apparently was used to hack the system. Furthermore, the fraud was committed outside office hours and at night, for ease of access of their credentials.

27. It was therefore contended that, the investigation report having revealed that the loss of the funds was occasioned by cybercrime fraud, the issue of negligence on the part of the respondents could not hold; and that there being no other report that incriminated them, the appellant had no justification to go against the recommendation of the Disciplinary Committee which itself it constituted.

28. On the issue of due process, it was submitted that it took a cool 8 years to conduct and determine the disciplinary process facing the respondents, thereby violating the constitutional requirement for expedited administrative action. Ms. Muraya submitted that the appellant shielded itself under Paragraph 18(2) of the Third Schedule of the *Judicial Service Act* to justify holding the disciplinary process in abeyance pending completion of the criminal matter. That notwithstanding, the provisions of Paragraph 18(3) of the Third Schedule bound the appellant to determine the disciplinary proceedings based on the outcome of the criminal trial. In this regard, it was submitted, the substratum of the charge that was before the criminal court and the one before the Disciplinary Committee was the same; and that ultimately, the two processes had a bearing on each other and that is why the appellant awaited the outcome of the criminal matter.

29. The respondents defended the findings of the learned Judge who addressed himself on the applicability of section 43 (2) of the *Employment Act* that the employer must demonstrate that it has reasonable grounds to believe that the employee was guilty of the infraction in question. To them, the appellant did not meet this test, consequent to which the dismissal was unwarranted and unlawful.

30. Ms. Muraya added that the respondents could not have waived their right to be heard on the charge of negligence when in the first place there was change in the allegations they faced; and that even then, the right to be heard cannot be waived by the appellant under the disguise of exercising its mandate under Article 172 (1) (c) of *the Constitution*; that it was apparent that the appellant had no option but to execute the recommendations of the Committee, more so on account that it had no adverse report against the respondents.

31. On the remedy of reinstatement, Ms. Muraya submitted that under section 49 of the *Employment Act*, the learned Judge correctly addressed himself on the factors that the court ought to consider before granting the relief, and in this instance that there is no loss of trust on their part with their employer as they were absolved from any wrong doing; and that the trial before the ELRC having been concluded within the required 3 years means that all respondents are suitable for the remedy.

32. In conclusion, Ms. Muraya urged us to dismiss the appeal and uphold the decision of the ELRC.

33. To further buttress the submissions by Ms. Muraya, Mr. Bolu began by reiterating that the appellant had all the reports which showed that there was malware implanted in the system and therefore, it cannot be said that the respondents were negligent. Further, it was stated that hacking and negligence are mutually exclusive; the happening of one precludes the happening of the other. Simply said, the appellant could only attach the loss of the funds on the hacking of the respondents' passwords or that the respondents negligently availed their passwords to the fraudsters, but not both. From the investigations conducted, it was clear that a malware was implanted which was used to hack the system, which lend credence to the fact that if their (the respondents) passwords were readily available, then the hackers had no business investing in a malware.

34. Mr. Bolu urged us to read the decisions relied upon by the appellant and find that they are not relevant to the circumstances of this case before. He contended that within the meaning of section 45(2) of the *Employment Act*, the appellant failed to prove that the reasons for termination are on valid and fair grounds, as the loss of the funds was occasioned by hacking of the system which was not related to the respondents' conduct in their capacities as accountants. In addition, he submitted, that proof of the reason for termination as envisaged under section 43(1(and (2(of the *Employment Act* was not met.

35. Mr. Bolu posed how the appellants could allege that they complied with section 41 of the *Employment Act* while they it ignored other complementary provisions of the law that is; Articles 47(1) and (2) and 50(2)(b)(j) of *the Constitution* and section 4(1)(2) and (3) (g) of the *Fair Administrative Action Act*. In conclusion, he asked us to find that, if the appellant for any reason had evidence to prove their culpability, nothing was easier than to provide that evidence, which it did not.

36. This being a first appeal, our role as the first appellate court under rule 31 (1) of the Court of Appeal Rules, 2022 is to re-appraise the evidence, draw inference of facts and arrive at our own conclusion but give allowance to the fact that we neither saw nor heard the witnesses testify. This role was aptly put by this Court in J. S. M. vs. E. N. B. (2015) eKLR as follows:

> "We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

37. After considering the record of appeal before us and giving due consideration to the oral and written submissions of the parties, we are of the view that the only two issues arising for determination are: whether the termination of the respondents was fair, valid and procedural; and the appropriate reliefs to be granted.

38. Section 45(1) and (2) of the *Employment Act* provides that:

    1. No employer shall terminate the employment of an employee unfairly.
    2. A termination of employment by an employer is unfair if the employer fails to prove-
        a. That the reason for the termination is valid;
        b. That the reason for the termination is a fair reason-
            i. Related to the employee's conduct, capacity or compatibility, or
            ii. Based on the operational requirements of the employer; and
        c. That the employment was terminated in accordance with fair procedure.

39. Section 47(5) of the Act on the other hand places the burden of proving wrongful dismissal on the employee whereas the burden of justifying the grounds rests on the employer. It states:

> 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 for the termination of employment or wrongful dismissal shall rest on the employer.

40. Termination of employment is a two-step procedure. First, there must be a valid and justifiable reason for termination. Second, once the reason has been established, the termination must be done in accordance with the stipulated laid down procedure in the employer's human resource manual where one exists and in accordance with the minimum requirement set out in the *Employment Act*.

41. Prior to the termination of employment, the employee must be given an opportunity to be heard by being furnished with the charges he/she facing and afford him/her an opportunity to defend himself or herself. We emphasise that, it matters not if on the face of it, the employee's conduct smacks of guilt and that he/she has a hopeless defence; the right to be heard is inalienable.

42. This Court in Janet Nyandiko vs. Kenya Commercial Bank Limited (2017) eKLR summarized the procedure for termination of employment in accordance with section 45 of the *Employment Act* as follows:

> "Section 45 of the Act makes provision, inter alia, that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee. Section 41 of the Act enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer."

43. Mativo, JA. rendered himself as follows on what is considered to be fair dismissal in his concurring decision in *Nairobi City Water and Sewerage Company Limited vs. Irungu (Civil Appeal 458 of 2019)* (2024) KECA 677 (KLR) (14 June 2024) (Judgment) (with dissent – S. ole Kantai, JA): -

> "In any dismissal, what an employer is obligated to prove is a fair reason for the dismissal it effected. A reason is fair if it is related to the conduct of an employee. The determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer: (a) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b)

shall be determined in accordance with equity and the substantial merits of the case. In this case, there is no dispute that the accusations against the respondent constituted gross misconduct. However, an employer is still required to follow a fair procedure and show that dismissal is an appropriate sanction in the circumstances of the case. However, it is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal (See Fidelity Cash Management Service vs. Commission for Conciliation, Mediation & Arbitration & Others [2008] 29 ILJ 964 (LAC)). The Court should bear in mind the following when considering the appropriateness of a dismissal: (a) the decision to dismiss lies with the employer; (b) dismissals should be fair; (c) fairness implies reasonableness, in the sense that the sanction of dismissal must be a reasonable one in the circumstances; (d) fairness is not an absolute consent – there may be a range of fair responses to a given instance of misconduct;

e. should be a dismissal fall within that range of fair responses, the court should deter for the employer's."

44. It is undisputed that the independent forensic reports prepared by the Directorate of Criminal Investigations dated June 28, 2015 and the one by forensic investigators, Vivium Consulting dated July 21, 2014 confirmed that the credentials of Benjamin, machariag, BAOmollo, murayar, MOLEB and OokoJ who are basically the respondents, were used to transfer a total of Kshs.80,013,302 to various third- party accounts.

45. The interdiction letters served upon the respondents are dated 5th November 2013. The grounds upon which the respondents were being interdicted is after the then Chief Justice received a full report of the investigation on the theft of Kshs. 80,013,302. In the preamble to the report prepared by the Directorate of Criminal Investigations dated 28th June 2015, it was stated that they received a letter dated 2nd December 2013 instructing them to conduct investigations. Similarly, the independent forensic investigators, Vivium Consulting, stated that they received instructions and begun their investigations on 23rd May 2014. Therefore, it is not difficult to see that the respondents' interdiction came rather prematurely and there was not valid basis for them to be interdicted in the absence of a report which linked them to the loss of Kshs.80,013,302.

46. By a letter dated August 6, 2021, the respondents were issued with notice to show cause letters on why they should not be dismissed on grounds of negligence. Each of the respondents did write their separate response on why they should not be dismissed. The Disciplinary Committee considered the evidence of each of the respondents in the disciplinary proceedings of 21st September 2021.

47. In its final report dated 19th November 2021 on the outcome of the disciplinary proceedings, heavy reliance was placed on the forensic reports prepared by the Directorate of Criminal Investigations dated June 28, 2015 and the second report done by Vivium Consulting dated 21st July 2014. The salient findings of the Committee in regard to the possibility of the involvement of the respondents was as follows:

"From the various reports, it was noted that a malware could have been introduced by way of a physical flash disk or by way of an online malware. If at all the same was physically introduced, it is difficult to know, who could have introduced the malware in the G – Pay System among the twelve

12. members of staff or any other person who could have walked into the open office."

48. The Committee went on to further observe on the personal security of the system:

i. From the submitted reports and the account of the staff, changing of passwords could not prevent hacking either. The introduced malware had been in place since March 2013 and was capturing screenshots every 3 seconds and capturing keystrokes via a key logger every time the G-Pay was used; and

ii. The staff cannot be said to have been negligent with their passwords as they changed them frequently as requested to do hence protecting the same."

49. The Committee concluded as follows:

> "All members of staff changed their passwords as instructed and cannot therefore be said to have been negligent in the aspect. The fact that the G – Pay machine was also the server machine and accessible from various IFMIS machines within the building, there were chances of the malware being introduced from any of these machines to harvest the passwords. The payments were done after working hours on Friday night and Saturday when none of the staff members were within the Supreme Court Building. It was noted that on that Friday, the IFMIS system was not working most of the day from 10.00 a.m. How then was it working on Friday night and on a Saturday. Both the DCI Cybercrime Report and the Vivium Report were in agreement that all account staff passwords were available to the hackers (by way of malware). The hackers used the credentials to commit the fraud and there was nothing the staff could do to safeguard passwords from the fraudsters. The Auditor General's Report on IFMIS effectiveness for the period July 2010 to June 2014 raised several gaps in the system and upon looking at them, the subcommittee noted that the same gaps applied to the system within the Judiciary at the time and was likely the reason why the hackers managed to harvest the passwords of staff. The staff could not have been in a position to stop the fraud within their working capacity at that time."

50. The final recommendation of the Committee was that the respondents be absolved of the charge, the interdictions on the respondents with effect from November 5, 2013, be lifted and staff half salaries withheld during the interdiction period be released. However, the appellant being dissatisfied with the recommendations of the Committee saw it fit to issue the respondents with letters dated December 21, 2021 terminating their employment.

51. In view of the foregoing, it is quite clear that none of the respondents was pointed at, to have been an interested party either directly or indirectly in, or to be beneficiaries of, the fraudulently transferred monies. The appellant did not go a step further, at least going by the evidence before the trial court, to conduct a search to establish who were the faces behind the beneficiary companies, or, if perhaps, the respondents were proxies to the said companies.

52. In any event, by a letter dated September 21, 2020, the Judiciary wrote to the Governor, Central Bank of Kenya outlining the twelve companies which received money from the Judiciary's Deposit Account No. 1000182342 and Recurrent Account No. 1000181915. In an internal memo by the Chief Account Controller dated 24th June 2021, he confirmed that a sum of Kshs. 15,219,869.19 had been received from the Central Bank of Kenya, which monies were being held in 3 company accounts which were the recipients of the money fraudulently transferred.

53. In addition, several letters dated 9th February 2021 by the then Chief Registrar of the Judiciary addressed to various banks, asked them to release the frozen monies held in the accounts of the companies which were beneficiaries of the fraudulently acquired monies and that the same be transferred to the Central Bank of Kenya.

54. Learned counsel Mr. Kiprotich told us that there is nothing which stops the appellant from terminating its staff on other grounds other than those which a staff was facing in a criminal trial and has been acquitted of. He referred us to the decision of this Court differently constituted in Nakuru Civil Appeal E082 of 2022 Judicial Service Commission & Another vs. Aggrey Oure Onyango (supra) whereby it was held that the appellant is not bound by the decision of the Committee and that Paragraphs 18 (2) and (3) of Part V of the Third Schedule of the *Judicial Service Act* makes provision for the next steps to be taken after an officer has been charged and subsequently acquitted of criminal charges. This paragraph reads:

> 2. If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom:
>
> Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer.
>
> 2. An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted.

55. What we have understood from the above provision is that under Paragraph *18* (2), a Judiciary staff and/or employee can still be interdicted and/or suspend during the pendency of his/her criminal trial. Upon acquittal, under Paragraph *18* (3), the staff/officer shall not be dismissed or otherwise punished on the charge acquitted. However, if the charge arises from any other issue apart from what the staff/officer was acquitted of, then the staff/officer may face disciplinary proceedings.

56. Looking at the circumstances before us, the respondents were charged with, but were acquitted of the offence of conspiracy to steal money. The appellant could not therefore have brought any charge against them on the grounds of conspiracy. Instead, what the appellant now preferred against the respondents was the alleged offence of negligence for failing to secure their passwords. As we have elaborately stated above, the forensic reports did not lay any blame on the omission or commission of any action or inactions by the respondents to lead the Judiciary to lose Kshs.80,013.302/=. Both reports agreed that it was a malware which had been implanted long before the incident and it mattered not whether the respondents changed their passwords, their details were captured overtime leading to the intrusion. Furthermore, the transfer of the monies took place on Friday night to Saturday morning when the respondents were not at work. In addition, the Committee noted in its report that other staff members were not interrogated whilst even one left the country.

57. This Court's case in Nakuru Civil Appeal E082 of 2022 Judicial Service Commission & Another vs. Aggrey Oure Onyango (supra) is distinguishable from the instant circumstances. While acknowledging that indeed the Judicial Service Commission is not bound by the decision of the Disciplinary Committee, the learned Judges noted that the respondent in the case before them could not account how he was the recipient of funds from Molo Law Courts through an in-house cheque. The respondent therein, then proceeded to transfer the said money to the account of one Tamar at Stanbic

Bank. It is not difficult to see from those circumstances that a recommendation of reinstatement would be nothing more than a strained relationship between the employer and the employee due to the employee's conduct.

58. Applying the reasonable man test and considering all the factors on record, the appellant did not, on a balance of probability, have a valid reason to terminate the respondents' employment. None of the actions or inactions leading to the loss of the Judiciary funds could be attached to the conduct of the respondents and there was no justification for the appellant to depart from the recommendations made by its Committee. We then arrive at the inescapable conclusion that the respondents' termination was indeed wrongful, unlawful and unfair in the circumstances. We reinforce our argument with the holding of this Court in Kenya Revenue Authority vs. Reuwel Waithaka Gitahi & 2 others (2019) eKLR that:

> " 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."

59. Moving on to the final issue, which is whether the respondents can be reinstated, section 49 of the *Employment Act* provides for the remedies of wrongful and unlawful termination. The learned Judge in this case, was of the view that a reinstatement would be a befitting remedy for the respondents. Sub-section (4) (a)-(m) provides for the factors to be considered when recommending a particular remedy. In reasoning that reinstatement without loss of any benefits is the appropriate remedy, the learned Judge appreciated that the respondents were still within the three years' period since their dismissal to warrant the grant of the remedy.

60. The case of Butt vs. Khan (1982-88) 1KAR 1 is instructive that an appellate court can only interfere with the discretion of the trial Judge when it has been established that the damages/remedies awarded were based on wrong principles. We are also of the same view that the termination having happened in the year 2021, and further having regard that even as at the time of hearing this appeal the respondents were still within the 3 years period since their dismissal, reinstatement is an appropriate remedy. Notable too is the fact that Judiciary is a large organization with stations spread at every corner of the country. The respondents being accountants can be easily re-integrated into the Judiciary system to serve in the various stations. In addition, and crucially, no evidence was placed before the trial court that the positions the respondents held before their termination were no longer available. The remedy cannot therefore be said to be placing an onerous or burdensome responsibility on the appellant. Thus, we find no fault in the learned Judge's order of reinstatement.

61. The sum total of our findings is that this appeal lacks merit and the same is hereby dismissed. For avoidance of doubt, our further order is that the respondents shall be placed in the same position as they were prior to their dismissal and shall be entitled to all the benefits accrued during the period of their interdiction. We order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

F. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR