REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 188 OF 2019

IN THE MATTER OF ARTICLES 10, 22, 23, 28, 31, 41, 47, 48, 50, 73, 75, 159, 160, AND 232 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF CONTRAVENSION OF ARTICLES 10, 22, 23, 28, 31, 41, 47, 48, 50, 73, 75, 232, AND 236 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015

IN THE MATTER OF THE JUDICIAL SERVICE ACT NO.1 OF 2011

IN THE MATTER OF THE JUDICIAL SERVICE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL

AND

IN THE MATTER OF THE JUDICIAL CODE OF CONDUCT AND ETHICS

- BETWEEN -

PAULINE MAISY OMUNG'ALA CHESANG.....PETITIONER

-VERSUS-

HON. CHIEF JUSTICE AND PRESIDENT OF

THE SUPREME COURT OF KENYA.....1ST RESPONDENT

JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th July, 2020)

JUDGMENT

The petitioner filed the petition on 15.10.2019 through Odero Osiemo & Company Advocates. The petitioner prayed for judgment against the respondents for:

a) A declaration that the respondent's letter dated 16.04.2019 and 27.07.2019 are illegal, null and void ab initio for being in contravention of Article 25 (c), 28, 31, 41, 47, 48, 50 and 236 of the Constitution of Kenya, 2010.

b) A declaration that paragraph 17 (3) of the third schedule of the Judicial Service Act No. 1 of 2011 contravenes Article 41 of the Constitution of Kenya 2010 and is therefore unconstitutional.

c) A declaration that clause D.7.5.2 (iii) of the 2nd respondent's Human Resources Policies and Procedures Manual contravenes Article 41 of the Constitution of Kenya 2010 as read together with Part iv and section 19 of the Employment Act, 2019 and is therefore unconstitutional.

d) A declaration that there is no offence committed by the petitioner that warrants disciplinary action.

e) A declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 is in conflict with section 13, 14 and 32 (1) and (3) of Judicial Service Act No. 1 of 2011.

f) A declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 and provisions of clause D.7.2 (xvii) and D. 7. 5.2 (ii) of the Judiciary Human Resources Policies and Procedures Manual are unconstitutional.

g) A declaration that the respondents infringed the petitioner's fundamental rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010.

h) A declaration that the 1st respondent violated Articles 10, 73, 232, and 236 of the Constitution of Kenya, 2010.

i) An order of certiorari to bring to the Honourable Court for purposes of quashing the decision of the 1st respondent as contained in the letters dated 16.04.2019 and 27.07.2019.

j) An order of prohibition or injunction to issue to prohibit and permanently restrain the respondents from implementing the decision contained in the 1st respondent's letter of 16.04.2019 and 27.07.2019 and from taking any adverse action pursuant to the said decision.

k) An order of mandamus directing the respondents to reinstate the petitioner to her employment including the reinstatement of her salary and employment benefits.

l) General damages for breach of the petitioner's rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010.

m) Costs of the petition.

n) Any other relief that the Honourable Court may deem fit and just to meet the ends of justice.

o) Interest.

The petitioner is an Advocate of the High Court of Kenya and at all material time employed by the 2nd respondent as a Resident Magistrate. She was initially employed as a District Magistrate II (Professional) effective 01.10.2010. She is therefore a state officer and a public officer as defined in Article 260 of the Constitution. She has served in Voi, Milimani, Kangundo, Kajiado, and lastly Nyeri Law Courts. She has been promoted to a Resident Magistrate.

The petitioner's case is that on 17.02.2019 her husband the late Robert Chesang was accosted by thugs and shot dead in their house at Moke Gardens, Lukenya. At that time the petitioner worked and stayed with her children as deployed in Nyeri. Following the husband's death, she was summoned by the Officer Commanding Police Station (OCPS)in Athi River for investigations. She attended the police station on a daily basis for over two weeks for purposes of the investigations. On 03.03.2019 the petitioner was put in cells and charged alongside four other accused persons for the alleged offence of murder of her said husband contrary to section 203 as read with section 204 of the Penal Code. It is her case that the reason she was charged with the offence of murder of her husband is because of domestic problems the petitioner and her late husband had culminating in a case in which her late husband had been charged at Mavoko Law Courts with assaulting the petitioner. The murder case was set for hearing in the High Court at Machakos from 11.12.2019. The petitioner was confined at the police station until 04.06.2019 when she was released on bond.

The petitioner further states that after arrest she immediately called her mother one Mrs. Norah Owino and requested her to inform the Chief Magistrate at Nyeri one Ms. Kagendo about the petitioner's predicament. Her further case is that her incarceration at Athi River Police Station was not of her own making but was an act by the police to investigate the death of her husband and was not due to misconduct at her place of work. Her advocate (one Assa Nyakundi Advocate) in the murder case promptly applied for her release on bond and she informed her supervisors at Nyeri Law Courts that the Magistrate at Mavoko and Machakos had declined to grant the application. In the circumstances she could not unlawfully escape from custody to report at her work station at Nyeri Law Courts. The murder case has not been heard and determined and the petitioner's case is that by the relevant constitutional provisions she is presumed innocent until proved otherwise.

The petitioner says she was released on bond on 04.06.2019 and she called her supervisor Hon. Kagendo, Chief Magistrate, who informed her that she had received a copy of the petitioner's suspension letter. The suspension letter was dated 16.04.2019, signed by the 1st respondent and addressed to the petitioner as follows:

"**Dear Madam,**

RE: GROSS MISCONDUCT

ARREST FOR COGNIZABLE OFFENCE PUNISHABLE BY IMPRISONMENT

It has been noted by this office that on 3rd March 2019 you were arrested by police and confined at Athi River Police Station for investigation into the killing of a City Lawyer, Robert Chesang. To date you are still in custody.

As per the Employment Act, 2007 Section 44(4) (f) an employer has a right to dismiss an employee from the service where "in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen (14) days either released on bail or on bond or otherwise lawfully set at liberty."

In view of the above, please show cause why you should not be dismissed from the service pursuant to the above provision. Your representation, if any, should be received in this office within fourteen (14) days from date of this letter, failure to which dismissal proceedings will be instituted without any further reference to you.

In the interim, you have been suspended from duty with effect from 11th March, 2019, the date you were supposed to resume from leave, until your disciplinary case is finalized. While on suspension, you shall not receive your monthly salary. Kindly arrange to handover all government stores in your custody with a detailed handover report to the Chief Magistrate, Nyeri Law Courts and copy to the Chief Registrar of the Judiciary. You will also be required to report to the Head of Station, Nyeri, every Friday.

Yours sincerely,

Signed

HON. JUSTICE DAVID K. MARAGA, EGH

CHIEF JUSTICE/ PRESIDENT, SUPREME COURT OF KENYA"

The petitioner replied by her advocates' letter (Odero Osiemo & Company Advocates) dated 24.06.2019 addressed to the 1st respondent. It was stated for the petitioner that the letter of suspension had never been delivered to her and she had learned about the letter when she made inquiries why her salary had been stopped as it had been addressed to an address she was not aware of. The letter further stated as follows:

a) Whereas the petitioner had been charged with the offence of murder of Robert Chesang in Machakos Criminal Case No. 10 of 2019, she was entitled to the presumption of innocence under Article 50 (2) (a) of the Constitution. Thus, the petitioner's case was that prior to being convicted of the offence after following due process, she cannot be summarily dismissed in the manner the 1st respondent purported to do in the suspension letter. The petitioner had not been arrested by the police but that she had been locked up when she presented herself to the police.

b) The petitioner was entitled to fair administrative process per Article 47 of the Constitution which presupposes her right to be heard before being condemned. The petitioner was ready to defend herself in the murder case, establish her innocence and after which she would continue with her career in the judiciary. That would be frustrated with the summary dismissal contemplated in the letter of suspension.

c) The letter of suspension was addressed to an address that is nonexistent and it appeared to be part of the petitioner's telephone number.

d) The petitioner was concerned that she was condemned without being served with the show cause letter when it was common knowledge that she was being held in custody at Athi River Police Station pursuant to an order of the court until she was finally released on bail on 21.06.2019 and the petitioner would not ignore summons to give her side of the story.

e) Despite suspension without pay, the petitioner was required to report to the Chief Magistrate, Nyeri Law Courts every Friday and that condition was unnecessarily punitive as it presupposes that the petitioner would have to maintain a house in Nyeri without a salary, transport allowance and house allowance.

The advocates' letter requested the letter of suspension be recanted and the petitioner's half pay be reinstated failing proceedings would be filed in Court.

The 1st respondent issued the letter dated 29.07.2019 addressed to the petitioner through her advocates. The letter referred to the letter by the petitioner's advocates and further stated,

"**Under provisions of the Employment Act, 2007 Section 44(4) (f), the employer has a right to dismiss an employee from the service, where in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days, either released on bail or on bond or otherwise lawfully set at liberty.**

In view of the above, please show cause why you should not be dismissed from the service pursuant to the above provision. Your representation, if any, should be received within fourteen (14) days from the date letter failure to which dismissal proceedings will be instituted without any further reference to you.

As a result, you will remain on suspension with effect from 11th March, 2019 until your disciplinary case is finalized. While on suspension, you will not be in receipt of your salary but will be entitled to an alimentary allowance at the rate of one third of your basic salary. You shall report to the Chief Magistrate, Nyeri law Courts, every last Friday of the month and a Report shall be made to this Office on the matter…."

The petitioner's advocates replied by their elaborate letter dated 01.08.2019. The letter set out the flow of events surrounding the investigations into the murder case, the petitioner's incarceration, and the subsequent release on bond on 14.06.2019. The letter urged that any attempt to subject the petitioner to disciplinary proceedings before being convicted of any offence would violate Article 50(2) of the Constitution which takes precedence over the Employment Act, 2007. The letter further took concern with alimentary allowance at one third of the basic salary while it was the advocates' opinion that while on interdiction she would be entitled to half her salary awaiting the outcome of her case and not just the alimentary allowance and which she had so far not received at all. The letter raised a concern that she was to report to the Chief Magistrate, Nyeri Law Courts every last Friday of the month and whereas the petitioner was as well ordered by the trial court in the criminal case to report to the Deputy Registrar Machakos once every month despite the fact that she would not receive house and travel allowances. The advocates' letter concluded thus, "**Our client is eager to face her trial and in the fullness of time will be vindicated and her innocence proven. As we await the trial to commence and run its course, we are of the opinion that the proposed disciplinary proceedings are premature and should await the outcome of the trial so that the outcome thereof is not preempted. We look forward to your prompt response in this matter**."

The Chief Registrar respondent to the advocates' letter by the letter dated 16.09.2019. The letter stated as follows:

"**SUSPENSION OF PAULINE MAISY OMUNG'ALA CHESANG**

Reference is made to your letter dated 1st August, 2019 on the above mentioned subject matter.

The contents herein have been noted and wish to inform you that the suspension placed on the Hon. Magistrate was as per the governing Judiciary Regulations. Specifically, the Judicial Service Act, Part IV Section 17 (2) and (3) states that "The Chief Justice may suspend from the exercise of the functions of their office against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed. While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine." The Judiciary Human Resource Policies and Procedures Manual, Section H.14 provides the rate of payment of the Allowance as one third of the basic salary.

On the issue of reporting to the Supervisor, an officer while on suspension is required to comply with such conditions as may be prescribed as per the Judiciary Human Resource Policies and Procedures Manual 2014. Section D.7.5.2 (iv). The directive to report is among the conditions in the suspension letter.

In view of the above, we believe that no contravention of any regulations or violation of her rights was undertaken. Thus the decision as communicated in the Hon. Chief Justice's letter dated 29th July, 2019 still stands.

Kindly be informed accordingly.

Signed

ANNE A. AMADI, CBS

CHIEF REGISTRAR OF THE JUDICIARY"

The petitioner moved and filed the petition on 15.10.2019.

The 1st and 2nd respondents opposed the petition by filing on 08.11.2019 the replying affidavit of Hon. Anne Atieno Amadi, the Secretary of the 2nd respondent and through learned counsel Mr. Isaac J.M Wamaasa Advocate. The affidavit urged as follows:

a) That under Article 173 of the Constitution of Kenya, 2010 the 2nd respondent's functions include appointing, receiving complaints against, investigating and removing from office or otherwise disciplining Registrars, Magistrates, other Judicial Officers and staff of the Judiciary and as provided for in the Judicial Service Act.

b) Under Part IV of the Third Schedule of the Judicial Service Act No.1 of 2011, the National Assembly delegated and vested in the 2nd respondent power to interdict, suspend, and administer a severe reprimand or reprimand to an officer to the 1st respondent. Paragraphs 17 and 18 of the Third Schedule vests in the 1st respondent the power to suspend from exercise of their functions an officer against whom disciplinary proceedings leading to dismissal have been commenced and that, when preliminary investigations disclose that a criminal offence may have been committed by an officer, and that the 1st respondent's power to interdict or suspend any such officer, are not prohibited nor restricted.

c) Under paragraph 17(3) of the Third Schedule an officer who has been suspended from the exercise of functions of their office is entitled to be granted alimentary allowance and under the Judicial Human Resource Policies and Procedures Manual Section h.14 the rate of the alimentary allowance has been set at one third of the basic salary.

d) The petitioner admits that she was arrested on 03.03.2019 and subsequently charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code and therefore the 1st respondent was justified in exercising his powers to suspend the petitioner under the provisions of the Constitution and the Judicial Service Act, 2011.

e) The suspension letter was delivered to the petitioner through normal channels and the contents were never released to the media as

alleged for the petitioner.

f) While serving suspension the petitioner was entitled to alimentary allowance at one third of her basic salary as provided by section H.14 of the Judicial Human Resource Policies and Procedure Manual and as per the 1st respondent's letter dated 29.07.2019.

g) In view that the petitioner admitted there were pending and alleged murder charges, the 1st respondent's letter of suspension did not amount to constructive dismissal.

h) It would be against the provisions of Articles 73 and 75 of the Constitution and public policy to reinstate the petitioner back to her position as a magistrate pending the hearing of the murder trial against her.

i) The right to fair administrative action has not been violated as alleged.

j) The Court does not have powers to interfere with the internal disciplinary processes between an employer and an employee provided for under the constitution and statute.

k) The petition lacks merit and should be dismissed with costs to the respondents.

The petitioner filed her supplementary affidavit on 27.11.2019. She stated as follows:

a) Her case was that she ought not to have been suspended with intention to summarily dismiss her but that she ought to have been placed on interdiction with half salary as opposed to a third of the basic pay.

b) It was wrong for the respondents to assume, cast aspersions and speculate that the claimant may have committed the offence of murder as charged and as was stated at paragraph 5 of the replying affidavit. The murder case shall be decided by the High Court at Machakos and the casting of aspersions is unjust. The disciplinary proceedings are *sub judice*.

c) The respondents admit that the petitioner is entitled to one-third of the salary for alimentary allowance and despite a consent in that regard no payment has been made to the petitioner.

d) The petitioner was not arrested but she went to the police station of her own volition and the police decided to put her under arrest to "pick the low lying fruit" in the murder investigations.

e) The 1st respondent enjoys power to suspend the petitioner but the power can be exercised only after due diligence, respect for rights and constitutional protections, rules of natural justice and procedures in administrative law. The power to suspend cannot be exercised arbitrarily.

f) For over a month the petitioner was held in police custody without being granted liberty and the 1st respondent is further victimizing her for mistakes made by the judicial officers not to grant her prompt liberty as she had applied for release on bond.

g) The petitioner stated at paragraph 10 thus, "**10. That indeed as I have not been formally dismissed from employment with the 2nd Respondent, I continue to hold the position of Magistrate. However, I do admit that given the fact that the murder case is yet to be heard and determined, I cannot exercise the powers and authority of a magistrate, nor carry out such duties for the time being until the matter is heard and determined.**"

h) That the letter of suspension asked her to return all property to her employer and vacate office shows constructive dismissal.

i) It is sufficient to report to the trial court in Machakos rather than to also report at Nyeri Law Courts per the suspension letter and without a house and travel allowance.

j) The respondents do not oppose the prayer in the petition that the suspension be replaced with an interdiction.

Submissions were filed for the parties. The Court has considered the material on record and makes findings as follows.

First, there is no dispute that the petitioner is an employee of the 2nd respondent. Accordingly, the Court has jurisdiction to determine the dispute pursuant to Article 162(2) of the Constitution and the provisions of the Employment and Labour Relations Court Act, 2011.

Second, are the provisions of the Act unconstitutional as urged and prayed for the petitioner thus, paragraph17 (3) of the Third Schedule of the Judicial Service Act No. 1 of 2011 contravenes Article 41 of the Constitution of Kenya 2010 and is therefore unconstitutional; clause D.7.5.2 (iii) of the 2nd respondent's Human Resources Policies and Procedures Manual contravenes Article 41 of the Constitution of Kenya 2010 as read together with Part iv and section 19 of the Employment Act, 2019 and is therefore unconstitutional; paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 is in conflict with section 13, 14 and 32 (1) and (3) of Judicial Service Act No. 1 of 2011; and paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 and provisions of clause D.7.2 (xvii) and D. 7. 5.2 (ii) of the Judiciary Human Resources Policies and Procedures Manual are unconstitutional? The Court has examined the submissions as filed for the petitioner. There are no submissions on the alleged unconstitutionality and as prayed for. The Court returns that the petitioner is deemed to have abandoned the claims and prayers in that regard. As submitted for the respondents, the 1st respondent is vested with the power to interdict or suspend as provided for in the Third Schedule of the Judicial Service Act, 2011 and the petitioner has not provided evidence and justification

for the alleged unconstitutionality. The prayers will therefore fail.

The Court further follows and upholds its findings in **Bryan Mandila Khaemba –Versus- Chief Justice and President of the Supreme Court of Kenya & Another [2019]eKLR** thus,

> **"In particular, the Court has considered the nature of the imposed delegation and returns that within the safeguards in paragraphs 15 and 17 of the Third Schedule, the 1st respondent is vested with the delegated power to perform an administrative role, namely, to impose a suspension within the stipulated safeguards. To that extent, the Court returns that the imposed delegation is an administrative role that is efficiently and effectively performed by an individual executive and which in the opinion of the Court, is properly vested in the Chief Justice as the Head of the Judiciary as per Article 161 (2) (a) of the Constitution. The Court considers that in that way, the power to suspend is conveniently exercised, within the safeguards in a manner that is responsive to the needs of the Judicial service. Accordingly the Court returns that there is no conflict between paragraphs 15 and 17 of the Third Schedule to the Act and sections 14 and 32 of the Act or the definition of "Committee" under the Act.**
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> **Fourthly, turning to alleged unconstitutionality of paragraph 17 (3) of the third Schedule, the petitioner laments that the section imposes suspension with nil pay and further that the prescribed alimentary allowance had not been determined by the Commission. The respondents' position is that indeed paragraph 17 imposes payment of an alimentary allowance and nil salary but the Commission had not determined the allowance. Further, the respondents allege and urge that the Employment Act 2007 does not apply because the Judicial Service Act exclusively applies to the service of judicial officers such as the petitioner. The Court has carefully examined paragraph 17 (3) and the Third Schedule in its entirety and there is nowhere it is enacted by Parliament that a judicial officer or other staff may or shall be suspended on nil pay.**
>
> **The Court returns that there is no such provision and the Court has searched and researched for such provision again and again in the Judicial Service Act but has not found it. The Court therefore returns that there is no express, implied or other provision or suggestion in the Act that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. While making that finding the Court has carefully considered the safeguards in paragraphs 15 and 17 of the Third Schedule. In exercising the power to suspend, the 1st respondent in paragraph 15(2) is to act in accordance with the provisions of the Schedule and in accordance with any other appropriate regulation which may be in force. Paragraph 17(3) provides that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine. Further, paragraph 17(4) states that an officer who is suspended shall be required to comply with such conditions as may, by regulations be prescribed. Paragraph 30 thereof provides that any case not covered by the Third Schedule shall be dealt with in accordance with such instructions as the Commission, the 2nd respondent, may from time to time issue. Section 47 of the Act then confers the 2nd respondent the power to make regulations for the better carrying out of the purposes of the Act. Thus the Court returns that the safeguards in imposing a suspension are that provisions of the Third Schedule must apply; an alimentary allowance must be paid; the regulations by the 2nd respondent prescribing conditions that may be imposed on an officer who is on suspension apply; and where the Schedule has not covered a given situation, the 2nd respondent must issue applicable instructions. To that extent, the Court returns that the provisions of paragraphs 15 and 17 have not been shown to be unconstitutional and they do not prescribe that an officer may be emplaced on suspension without pay or with nil pay**."

While making that finding, the Court notes that it was submitted for the petitioner that section 44 (4) (f) of the Employment Act,2007 and invoked for the respondents was unconstitutional. The section provides that it amounts to gross misconduct (justifying summary dismissal) if in the lawful exercise of any power of arrest, given by or under any written law an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days released on bail or on bond or otherwise lawfully set at liberty. The petitioner submits that Article 160(1) of the Constitution requires the Judiciary to be subject only to the Constitution and the law, but by implication of section 44(4) (f) of the Employment Act, 2007, an employee charged in a criminal case ought to influence a judge or magistrate in every manner so as to obtain release on bond or bail within 14 days if the employee wishes not to be dismissed by the employer. The section amounts to discrimination of those in employment as against to those in self- employment or not employed at all contrary to Article 27(4) of the Constitution against discrimination. Further it is submitted that the section shifts the burden of proof in a criminal case to the accused employee creating a window for malice and victimization as the accused employee has no control over the role of the judiciary in an eventuality of being arrested. It is submitted that the section fosters interference with the judicial independence. It is submitted that the section should therefore be declared null and void.

For the respondents no submissions were made with respect to the alleged unconstitutionality of section 44(4) (f) of the Employment Act, 2007 except the assertion that the section applied and was properly invoked. The Court has reexamined the petition and finds that the petitioner did not plead the alleged unconstitutionality of section 44(4) (f) of the Act. It is trite law that parties are bound by their pleadings and it is clearly an afterthought and misplaced for the petitioner to purport to submit on a matter that was not pleaded. The Court finds that the submission in that regard amounted to an ambush of the other parties and the respondents correctly failed to submit on that point. In any event the Court returns that section 44(4) (f) is a statutory intervention prescribing the action an employer may take in event an employee is arrested for a cognizable offence punishable by imprisonment and is not within 14 days either released on bail or on bond or otherwise lawfully set at liberty. In the Court's opinion the section does not offend any of the constitutional provisions of the constitution as submitted for the petitioner. The Court finds that the section does not inherently contain unconstitutional prescription or amount to a violation of a constitutional rule or provision. In the opinion of the Court the section merely provides for a situation which when it exists, may amounting to gross misconduct and prior to summary dismissal upon such allegation, the employer must accord the employee due process for exculpation as envisaged in sections 41 and 45 of the Employment Act, 2007.

Turning to the Manual, the impugned provisions state as follows:

a) Paragraph D. 7.2 (xvii) of the Manual states that gross misconduct includes improper handling of matters relating to the judiciary and negligence of work.

b) Paragraph D.7.5.2 (ii) states that the Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if as a result of those proceedings, he considers that the officer ought to be dismissed.

c) Paragraph D. 7.5.2 (iii) provides that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.

The Court finds that the petitioner has not shown the manner in which the stated provisions of the manual offend the Constitution. First, the Court returns that the power vested in the Chief Justice to suspend an officer within the safeguards in the Third Schedule to the Judicial Service Act, 2011 is not unconstitutional and the Manual merely repeats that provision. Second, as provided in the Third Schedule, the conditions to apply during suspension are to be made by the Commission by way of regulations. The Manual does not provide that the pay withheld during suspension would not be released if suspension is subsequently lifted and does not equally state that such withheld pay would be released upon lifting of suspension. The Manual is silent and in the opinion of the Court it does not amount to a provision that the pay is denied but the silence certainly amounts to an ambiguity requiring improvement upon the lines such as is provided in the Public Service Commission Act, 2017 and referred to in **Bryan Mandila Khaemba –Versus- Chief Justice and President of the Supreme Court of Kenya & Another [2019]eKLR** thus,

> "**As relates to payment of officers during the period of suspension, there are sufficient parliamentary enactments that may not be binding but may properly guide the 2nd respondent in prescribing the appropriate regulatory protections in line with emerging trends in the New Republic. One such latest enactment is section 71 of the Public Service Commission Act, 2017. Subsection 71(3) thereof provides that a public officer who has been suspended shall receive a half basic salary and full house allowance but other benefits shall be withheld, provided, an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case. Subsection 71(4) thereof provides that if the officer on suspension is not dismissed or otherwise punished, any salary, allowance or other benefit withheld under the section shall be restored to the officer upon conclusion of the disciplinary process. Subsection 71(5) thereof states that such withheld salary, allowances and other benefits shall not be restored in event a punishment, even if it is not a dismissal, is imposed upon the officer. In general, such provisions as in section 71 of the Act would enhance the exercise of disciplinary powers to suspend**."

The Court appreciates that to fully pay or to partially pay during the period of interdiction is a difficult issue towards striking a balance on the right and obligations or duties of both the employee and the employer. It is that the employee will not work during that period in view of the allegations levelled and whose outcome may or may not amount in exculpation. If payment is made during that period and the employee is not exculpated, then the employer will have paid for no work done – but probably the employer may expedite the disciplinary process and mitigate the losses in that regard. In striking that balance especially in the service by public and state officers, the Court considers that the fact that suspension or interdiction does not mean an end to the employment contract in effect means that there must be respect and protection of the rights and obligations of the parties flowing from the contract of employment. Thus the Court upholds and follows the holding in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR,** in which the court stated thus, "**The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."**

The Court returns that the relevant provisions of the Manual as impugned herein, while not being unconstitutional, the same appear to require improvement to keep pace with the emerging new trends applicable to state and public officers while on suspension or interdiction and which appear to favour the payment of at least half salary, house allowance and medical cover or medical allowance pending the determination of the fate of the suspension or the interdiction in issue. Further necessary improvement appears to entail clear provisions that pay withheld during interdiction or suspension would be released if the disciplinary case ends in favour of the public or state officer by way of exculpation in view of the allegations as may be levelled.

Further the Court observes that the parties did not submit on the legal status of the Manual but appear to be in agreement that the Manual applied to the case at hand. Perusal of the Manual does not expressly state the maker or show the maker's authority but by implication its authority appears to derive from the 2nd respondent's constitutional and statutory functions and powers. At paragraph A.1 on the introduction it is stated as follows:

> "**The Judiciary Human Resource Policies and Procedures Manual is a collection of human resource policies and procedures for use in the Judiciary. It is a guide in the management of human resource activities for the achievement of the Judiciary's goals and objectives. It serves as a reference for judicial officers and staff on human resource and administration policies and procedures.**
>
> **The Manual incorporates provisions of the Constitution of Kenya, 2010 and legislation governing various aspects of employee and employer relationship. It shall be read in conjunction with the Judicial Service Act, 2011, relevant statutes in force, policies and guidelines governing the management of the human resource good practices.**

Any terms and conditions of employment not covered, in part or in whole in this Manual shall be subject to the provisions of labour legislation in force in Kenya. This Manual will be subject to review from time to time by the Judicial Service Commission". The Court

finds that the Manual is clearly an administrative guide in delivery of human resource functions in the Judiciary. It does not therefore amount to legislation. Thus, it is not a regulation within the meaning of a statutory instrument under the Statutory Instruments Act, 2013 which provides for an elaborate procedure in the making of regulations as envisaged in the Judicial Service Act, 2011 and the Third Schedule thereof. Accordingly, in **Bryan Mandila Khaemba –Versus- Chief Justice and President of the Supreme Court of Kenya & Another [2019]eKLR** the Court stated, "**While the Court has taken judicial notice and commended the respondents for the various policy documents and manuals that have been initiated towards clarity on operational policies, systems, and requirements, it is the Court's opinion that such administrative policies do not substitute the instances where statutory provisions expressly impose the making of rules, regulations, and other statutory instruments. The Court considers that the making of such rules, regulations, and other statutory instruments amounts to a deliberate statutory safeguard towards ensuring that those to be affected by the rules, regulations, and other statutory instruments, as the case may be, and experts, are involved in the making of the applicable provisions; and further that parliamentary approval is obtained, as provided for in the Statutory Instruments Act. Thus, to emphasis the position, section 47 (3) of the Judicial Service Act amplifies the provisions of the Statutory Instruments Act by providing that regulations made under section 47 of the Act shall be presented to the National Assembly for debate and approval before they take effect. Thus, the Court returns that the manner of undertaking of human resource functions by the respondents is so crucial that it must be governed by regulatory provisions which have a force of subsidiary legislation or a statutory instrument under the Statutory Instruments Act and cannot be merely an administrative undertaking based on administrative policies alone.**" The Manual being administrative and by its own words in the introduction, it is not law but a guide. It appears to be a document for easy reference and use, codifying the applicable constitutional, statutory, regulatory, instructional, policy and practices governing the management and discharge of human resource functions in the Judiciary. In that sense the Court returns that the Manual is an administrative and a secondary source, rather than a primary source, of the matters it provides for and in appropriate cases reference will have to be made to the primary sources such as the Constitution, relevant statute, subsidiary legislation promulgated by the 2nd respondent by way of regulations, and instructions issued or given by the 2nd respondent or such lawful policies and practices as may be necessary. To that extent, the Court returns that the petitioner has not established, as alleged, that the impugned provisions of the Manual are unconstitutional.

Third, in the circumstances of the case, was the proper action to interdict the petitioner or to suspend the petitioner?

Part IV of the Third Schedule is titled "**DISCIPLINE**" and paragraph 15 on delegation of powers provides:

> **1) The following disciplinary powers vested in the Commission are delegated to the Chief Justice –**
>
> > **a) the power to interdict an officer under paragraph 17;**
> >
> > **b) the power to suspend an officer under paragraph 18;**
> >
> > **c) the power to administer a severe reprimand or a reprimand to an officer.**
>
> **2) The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.**

Paragraph 17 of the Third Schedule to the Act provides as follows:

> **1) Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.**
>
> **2) The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.**
>
> **3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.**
>
> **4) An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.**

Paragraph 28 of the Third Schedule provides as follows:

> **1) If an officer is convicted of a criminal offence which in the opinion of the Chief Justice warrants disciplinary proceedings he shall lay a copy of the charge and of the judgment and sentence and of any judgment or order made on appeal or in revision before the Commission, and the Commission shall decide whether the officer should be dismissed or subjected to any of the other punishments mentioned in this Schedule.**
>
> **2) For the purposes of this paragraph, the proceedings for minor offences, such as those under the Traffic Act and by-laws, may be disregarded, and disciplinary proceedings should normally be confined to proceedings under the Penal Code and other Acts where a prison sentence may be imposed other than in default of payment of a fine.**

Paragraph 16 of the Third Schedule to the Act provides as follows:

> **1) If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that**

criminal proceedings are being instituted against them.

2) An officer who is interdicted shall receive such salary, not being less than half their salary, as the Commission may by regulation prescribe.

3) Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this Schedule, the whole of any salary withheld under subparagraph (2) shall be restored to them upon the termination of such proceedings.

4) If any punishment other than dismissal is inflicted, the officer may be refunded such proportion of the salary withheld as a result of their interdiction as the Commission shall decide.

5) An officer who is under interdiction shall be required to comply with such conditions as may by regulations be prescribed.

6) **For the purposes of this paragraph and paragraph 18 of this Schedule "salary" means basic salary and, where applicable, includes inducements or overseas allowances**.

Paragraph 18 of the Third Schedule deals with situations where a criminal charge is pending against an officer and it provides as follows:

1) **When a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed by an officer, the Chief Justice shall act under either paragraph 26 or 27, as may be appropriate.** (26 being disciplinary procedure for proceedings for misconduct not warranting dismissal; and 27 being retirement on grounds of public interest).

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.

3) An officer acquitted of a criminal charge shall not be 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.

The petitioner's case is that there are no allegations of misconduct or poor performance alleged against her by the respondents. Further, instead of applying the clear provisions of the paragraph 16 of the Third Schedule of the Judicial Service Act, 2011 on interdiction, the respondents have erroneously and unfairly invoked section 44 (4) (f) of the Employment Act, 2007 and which is unfairly being invoked as a general provision instead of the specific provision on interdiction. The letter for the respondents dated 16.09.2019 signed by the Chief Registrar of the Judiciary states that the suspension was pursuant to the Judicial Service Act, Part IV section 17(2) and (3). As reproduced above, the section (paragraph) relates to a suspension of an officer against whom disciplinary proceedings have been taken and the Chief Justice considers that by reason of those proceedings, the officer ought to be dismissed. As urged and submitted for the petitioner, the Court finds that in the instant case there are no disciplinary proceedings exhibited in Court or otherwise shown to exist and upon whose basis an opinion may be formed that such proceedings may result in the dismissal of the petitioner. The Court further considers that it is clear and undisputed that criminal proceedings have been instituted against the petitioner and by reason of paragraph 18(2) of the Third Schedule, no administrative disciplinary proceedings may be instituted, continued and concluded as arising out of the initiated criminal charge. The Court therefore finds that as submitted for the petitioner, in absence of disciplinary proceedings (on account of alleged misconduct or poor performance) in the instant case, paragraph 17(2) and (3) of the Third Schedule of the Judicial Service Commission Act, 2011 was not available to be invoked against the petitioner.

The Court further finds that in the instant case, the undisputed evidence is that the petitioner has been charged with a criminal offence namely, an alleged offence of murder in criminal case no. 10 of 2019 in the High Court at Machakos. Paragraph 17(1) of the Third Schedule of the Act deals with a case when an officer can be suspended in cases involving criminal liability and it provides that where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule. It is clear that the petitioner has not been convicted of a serious criminal offence but that the criminal trial was pending as at the time of filing of the petition and the hearing thereof had not commenced. It therefore appears to the Court, and the Court finds, that paragraph 17 of the Third Schedule to the Act did not apply at all in the circumstances of the case and the petitioner's lamentation in that regard is upheld.

Turning to whether interdiction was available as per paragraph 16 of the Third Schedule, the Court readily finds that the provision properly applied in the circumstance. The evidence is that at all material times, criminal proceedings were being instituted against the petitioner as envisaged in the last limb of paragraph 16 (1) as a ground for interdiction. Accordingly, the just path, as submitted for the petitioner was for the petitioner to be interdicted and depending with the outcome of the criminal proceedings, then provisions of paragraph 28(2) might come into play as may be invoked to determine the fate of the petitioner's employment. The Court returns that the regime set out in the Third Schedule is clear that if an officer is charged with a criminal offence or criminal proceedings are being taken against an officer, the officer may be interdicted per paragraph 16 (1) of the Third Schedule; if the officer is convicted of a serious criminal offence, the interdiction may graduate to a suspension under paragraph 17(1); and if an officer has been convicted of a serious criminal offence, the officer's fate is determined in accordance with paragraph 28(1) of the Third Schedule. Looking at the disciplinary regime set out in the Third Schedule, the Court upholds the petitioner's case that the procedural arrangement is that where an officer is charged with a serious criminal offence, the officer is to be interdicted in a process whereby the disciplinary process that may lead to dismissal in that regard paves way for the hearing and determination of the criminal case and thereafter, depending with the outcome in the criminal case, paragraph 28(1) thereof may be invoked as necessary. The Court considers that in such cases where an officer has been charged with a serious criminal offence, the investigation and prosecution functions are given out to the police and the Director of Public Prosecutions respectively as per the relevant statutory and constitutional provisions, and in that regard, interdiction is the statutory balance of the interests of the officer and the respondents as employers. Further, in the understanding of the Court, since the investigation and prosecution goes to the police and the

Director of Public Prosecutions, paragraph 18 (2) of the Third Schedule provides that once criminal proceedings are so instituted, no internal or administrative disciplinary proceedings can be commenced or continued except that the concerned officer may be interdicted or suspended as provided for in paragraphs 16 or 17 respectively. Similarly, the Court's view is that in such circumstances (where criminal charges have been instituted against an officer like is the case in the present petition) taking into account the disciplinary regime in the Third Schedule, the respondents would await the outcome of the criminal case and depending with the outcome, lift the interdiction within the provisions of paragraph 16 or invoke paragraph 28(2) of the Third Schedule as may be appropriate. The Court considers that the regime as set out in the Third Schedule and as submitted for the petitioner is therefore consistent with Article 50 (2) (a) that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.

While the Court has found that section 44(4) (f) of the Employment Act, 2007 is not unconstitutional, the Court considers that in view of the evidence that the claimant had been charged with a serious criminal offence, the specific provisions in paragraphs 16 and 18(2) of the Third Schedule as opposed to the general provisions in section 44 (4) (f) of the Employment Act, 2007, applied. It appears clear to the Court that in absence of the safeguards of the disciplinary regime in the Third Schedule of the Judicial Service Act, 2011, the petitioner would actually not have a viable defence to an administrative disciplinary charge based on section 44(4) (f) of the Employment Act, 2007 and as was levelled against her. As submitted for the respondents, the evidence is that the petitioner was arrested on 03.03.2019 and released on bail on 04.06.2019 and for three months she was not on duty. It is submitted that the respondents were entitled to presume that the claimant had absconded duty. However, the Court finds that the alleged presumption is lifted by the undisputed evidence that the petitioner's husband was killed, investigations were undertaken by the police, the petitioner was held in police custody, she applied for release on bond but could only secure her liberty on 04.06.2019. The Court has also considered the suspension letters on record and it is clear that section 44(4) (f) dealing with a situation of arrest of an employee had been invoked so that the respondents, by implication, knew that the petitioner had been arrested and she had not been released by the police and subsequently the Court. Even if a misconduct of absence from duty for the three months was to be levelled against the petitioner (but which was not the case), paragraph 21 of the Third Schedule on absence from duty without leave states, "**Where an officer is absent from duty without leave or reasonable cause for a period exceeding twenty-four hours and the officer cannot be traced within a period of ten days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from them within ten days after the dispatch of the charge to them, the Commission may summarily dismiss them.**" It was not alleged against the petitioner in the suspension letters that she had been absent from duty without permission and her whereabouts had been unknown to the respondents for that while. It was that she had been arrested on 03.03.2019 for investigations into the killing of a city lawyer one Robert Chesang and so far she was still in custody. There is no reason to doubt that the petitioner had, after the arrest and incarceration, conveyed her predicament, through her mother, to her supervisor and as stated in the supporting affidavit. The petitioner then later explained (per her advocates' letter dated 24.06.2019) that she had in fact been charged with the offence of murder. The Court therefore considers that the case was therefore falling under paragraphs 16 (1), (2) and 18(2) of the Third Schedule and not about the absence from duty.

The Court finds that the applicable law and procedure was the specific paragraphs 16 (1) and 18(2) of the Third Schedule and not the general provisions in section 44(4) (f) of the Employment Act, 2007. The Court follows its holding in **Okiya Omtatah Okoiti –Versus- Attorney General and 2 Others; and Francis K. Muthaura (Ambassador) and 4 others [2019] eKLR** where in finding that section 7(3) of the State Corporations Act applied as the specific provision in the circumstances of the case, the Court stated, "**While making that finding the Court considers that the section is to be invoked in cases where a board has failed to carry out its functions in the national interest and in that case the Court finds that it exists as a remedial or emergency temporary measure rather than the norm. In that sense, there would be no reason to challenge the Parliament's wisdom for a summary action by the President to nominate a board member or chairperson for temporary service in the circumstances envisaged in the section. To that extent, the Court upholds the submission made for the respondents that the section is an exception to the general provisions on appointment and removal or dismissal in the public service and the Court upholds the legal doctrine of *lex specialis derogate legi generali*, which connotes that the law governing specific subject matters overrides a law which only governs general matters.**"

The Court further returns that whereas the Judicial Service Act,2011 is the primary and specific legislation on the service of the judicial officers and other staff of the Judiciary, the Employment Act, 2007 equally applies as appropriate or necessary where on a particular term or condition of service there exist no better terms and conditions provided for in the Judicial Service Act, 2011 than is provided for in the Employment Act, 2007, or where the Judicial Service Act, 2011 is silent on the point at hand. The Court therefore holds that the Employment Act, 2007 is the primary and general legislation for implementation of Article 41 of the Constitution and there is no established reason why it would not apply to judicial officers and other staff of the Judiciary especially where by statute or contract there are no better terms and conditions of service applicable than those prescribed in the Employment Act, 2007. The Court follows its decision in **Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR** thus, **"The second issue for determination is whether the office of the county secretary was excluded from the application of the Employment Act, 2007. The parties were in agreement that the office had not been excluded by the Minister under section 3 of the Act. The court finds as much and further holds that even if it had been excluded, the better or similar terms under the special arrangements as submitted for the claimant would need to be established so that the court would determine the case upon such special terms of service. Such better or similar terms, in the opinion of the court, would include the minimum safeguards of valid reasons; and notice and a hearing as provided in sections 43 and 41 of the Employment Act, 2007. In the opinion of the court, the import and scope of the proviso to section 3(5) of the Act is that if the terms and conditions of the special arrangement of an excluded office are inferior to the terms and conditions provided under the Act, then the provisions of the Act will swiftly apply to the case by default. The court further holds that if an office is excluded from terms of the Act under section 3 of the Act, the court's jurisdiction is not thereby ousted; the court will hear and determine that excluded employment dispute on the basis of the better terms of service as provided for in the special arrangement. Thus, the specific contractual terms would apply in determining the dispute."**

In the instant case, the Court has found that paragraph 16(1) and 18(2) of the Third Schedule to the Judicial Service Act, 2011 specifically provided that where an officer is charged with a serious offence like in the instant case, then such officer would be interdicted. The Court considers the said provisions of the Third Schedule to amount to specific statutory provisions applicable in the present case and which therefore rendered the general provision in section 44 (4) (f) of the Employment Act, 2007 inapplicable.

Fourth, could administrative disciplinary proceedings be continued against the petitioner and concluded in the circumstances that the only predicament against her was the pending trial as alleged in the pending murder charge and which criminal charge was independent of any misconduct or poor performance as an employee. It is clear to the Court that criminal proceedings are clearly separate from the administrative disciplinary proceedings and in a proper case they can be undertaken concurrently in an appropriate case. The Court has

considered the holding of the Court of Appeal in **Teachers Service Commission –Versus- Joseph Wambugu Nderitu [2016]eKLR** . The Court of Appeal held that a successful outcome of a criminal process against an employee did not have primacy over an internal disciplinary process against such an employee arising from the same set of circumstances and that the two processes were distinct.

The Court further considers and is alert that criminal liability can only be determined by a court of competent jurisdiction. In that regard the Court upholds its opinion in **David Nyamai and 7 Others –Versus- Del Monte Kenya Limited [2015]eKLR** thus, **"The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee."**

The Court further considers that whether administrative disciplinary proceedings may be undertaken concurrently as the involved criminal trial is a difficult discretionally decision on the part of the employer. In in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR,** the court opined and advised as follows:

"Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

> a) **Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.**
>
> b) **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
>
> c) **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.**
>
> d) **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."**

In the present petition the pending criminal trial is clearly independent of the petitioner's contract of service and the facts in the criminal charge are not said to concurrently constitute misconduct or poor performance on the part of the petitioner – so that the respondents are not confronted with a dilemma whether to concurrently initiate a disciplinary process on account of the facts in the criminal charge or substantially such similar facts and conclude the administrative disciplinary proceedings notwithstanding the pending criminal trial (and for which the Court considers that paragraph 18(1) of the Third Schedule was enacted for conclusion of a disciplinary case where allegations as well amount to a crime but then criminal proceedings are not preferred against the officer). The Court has also found that the statutory design of the administrative disciplinary process in the Third Schedule of the Judicial Service Act, 2011 is that where an officer is charged with a serious criminal offence such as in the instant case, the officer is to be interdicted; and, if an officer is convicted with a serious criminal offence, the officer is to be suspended and the fate of the officer's contract of service, consequential to such conviction, is to be determined by the respondents in accordance with paragraph 28(1) of the Third Schedule of the Act. Accordingly, to answer the fourth issue for determination, the Court returns that administrative disciplinary proceedings could not be continued against the petitioner and concluded in the circumstances that the only predicament against her was the pending trial as alleged in the pending murder charge and which criminal charge was independent of any misconduct or poor performance as an employee. The Court considers that even if the particulars in the preferred criminal charge had substantially flowed from the petitioner's alleged misconduct or poor performance as employed (but which was not the case in the present case), the design of the statutory administrative procedure in the Third Schedule of the Judicial Service Act, 2011 (in particular paragraph 18 (2)) would have operated as a bar to continuing and concluding the administrative disciplinary proceedings prior to conclusion of the criminal trial in issue.

Fifth, as submitted and urged for the respondent, no evidence was placed before the Court by the petitioner to show that the suspension

letters had been transmitted to her other than by the established channels and no evidence was provided to show that the letters had been dispatched, publicized or published to the media by or on behalf of the respondents.

Sixth, is the petitioner entitled to the remedies as prayed for? The Court has considered the prayers and makes findings as follows:

1) The petitioner has prayed for a declaration that the respondent's letter dated 16.04.2019 and 27.07.2019 are illegal, null and void ab initio for being in contravention of Article 25 (c) (right to a fair trial), 28 (right to inherent dignity and the right to have that dignity respected and protected), 31(right to privacy), 41(right to fair labour practices), 47 (fair administrative action), 48 (access to justice), 50 (fair hearing) and 236 (protection of public officers through due process) of the Constitution of Kenya, 2010. The Court has reconsidered its findings earlier in this judgment. As submitted for the respondents, the Court finds that the petitioner has not provided material to establish violations by reason of the suspension letters except with respect to Article 41 on fair labour practices and Article 47(1) of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Court has found that the petitioner was entitled to interdiction under paragraphs 16 (1) and 18(2) of the Third Schedule to the Judicial Service Act and not to suspension under paragraph 17 (2) thereof and on the basis of section 44(4) (f) of the Employment Act, 2007 as was done. The declaration will issue only to that extent. The Court has found that the regime under the Third Schedule is consistent with provisions of Article 50 but returns that in the circumstances of the case there was no evidence that the respondents had violated or threatened to violate the petitioner's rights in that regard. In so far as the letters invoked inapplicable provisions of law, the Court returns that the petitioner's right to fair labour practices was thereby violated. The declaration will issue that the letters herein dated 16.04.2019 and 27.07.2019 are illegal, null and void ab initio for being in contravention of Articles 41 and 47 (1) of the Constitution.

2) The petitioner prayed for a declaration that there is no offence committed by the petitioner that warrants disciplinary action. The evidence is that the petitioner has not been found guilty of the alleged charge of murder or any other criminal offence. The Court has further found that once the murder trial is concluded one way or the other, the respondents will be at liberty to lift the interdiction or to determine the fate of the petitioner's employment in accordance with paragraph 28(1) of the Third Schedule of the Judicial Service Act, 2011. Accordingly, a declaration will issue that there was no offence committed by the petitioner that warranted disciplinary action and once the murder trial is concluded one way or the other the respondents may lift the petitioner's interdiction as may have been or will be imposed or determine the fate of the petitioner's employment in accordance with paragraph 28(1) of the Third Schedule of the Judicial Service Act, 2011.

3) The Court returns that the petitioner is entitled to an order of certiorari to bring to the Honourable Court for purposes of quashing the decision of the 1st respondent as contained in the letters dated 16.04.2019 and 27.07.2019.

4) The Court considers that in alternative to an order of certiorari, the petitioner is entitled to an order of prohibition or injunction to prohibit and permanently restrain the respondents from implementing the decision contained in the 1st respondent's letters of 16.04.2019 and 27.07.2019 and from taking any adverse action pursuant to the said decision. The order would be in alternative because, in the opinion of the Court, once the offensive letters and decisions conveyed therein are quashed, nothing of the letters is thereby left for implementation.

5) The petitioner prayed for an order of mandamus directing the respondents to reinstate the petitioner to her employment including the reinstatement of her salary and employment benefits. The Court finds that it is common ground between the parties and the evidence is that the petitioner is still in the respondents' employment. The Court finds that the prayer is therefore misconceived. The petitioner's further case is that in view of the pending criminal charges it would not be proper and possible for her to continue discharging the functions of the office of a magistrate to which she is currently appointed to hold. That position is found to be the legitimate position in view of the provisions of the Leadership and Integrity Chapter Six of the Constitution and the last limb of paragraph 16 (1) of the Third Schedule of the Judicial Service Commission Act, 2007. In view of the findings and to balance the interests of the parties as well as the public interest within the relevant constitutional and statutory provisions in issue in the present case, the Court considers that the declaration that the petitioner may be emplaced on interdiction on account of the initiated and pending criminal charge of murder contrary to section 203 as read with 204 of the Penal Code in Criminal Case No. 10 of 2019 in the High Court at Machakos and in accordance with paragraphs 16(1) and 18(2) of the Third Schedule of the Judicial Service Act, 2011 and paragraph D.7.5.1 of the Judiciary Human Resource Policies and Procedures Manual, 2014, shall meet ends of justice.

6) The petitioner prayed for general damages for breach of the petitioner's rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010. It was submitted for the petitioner that the remedy for wrongful dismissal is damages. However, the Court has already found that in the instant case there has been no termination of the contract of service or dismissal. The Court finds that the remedies already found to be available in the instant case sufficiently meet the ends of justice in the circumstances of the case. The Court further returns that a case for award of damages for alleged breach of fundamental freedoms and rights in the Bill of Rights will fail because the cited Articles, with exception of Articles 41and 47(1) have not been established to have been violated or threatened with violation.

7) As the petitioner has substantially succeeded in her case, the respondents will pay the costs of the petition. The Court observes that parties had been encouraged to resolve the dispute amicably with a view of recording a consent. In particular, it is submitted for the petitioner (and not disputed for the respondents) that prior to filing the petition and by the letter dated 08.01.2020 by the petitioner's advocates the respondents were invited to explore a negotiated settlement but in vain. The costs are therefore awarded accordingly.

In conclusion judgment is hereby entered for the petitioner against the respondents for:

1) The declaration that the letters herein dated 16.04.2019 and 27.07.2019 are illegal, null and void *ab initio* for being in contravention of Articles 41 and 47 (1) of the Constitution.

2) The declaration that there was no offence committed by the petitioner for the time being that warranted initiation and conclusion of administrative disciplinary action (while the criminal trial in issue was pending) and once the murder trial is concluded one way or the other the respondents may lift the petitioner's interdiction (as may have been imposed or will be imposed) or determine the fate of the petitioner's employment, one way or the other, in accordance with paragraph 28(1) of the Third Schedule of the Judicial Service Act, 2011.

3) The order of certiorari which is hereby issued to bring to the Honourable Court for purposes of quashing the decision of the 1st respondent as contained in the letters dated 16.04.2019 and 27.07.2019.

4) In alternative to an order of certiorari above, the order of prohibition or injunction is hereby issued to prohibit and permanently restrain the respondents from implementing the decision contained in the 1st respondent's letters of 16.04.2019 and 27.07.2019 and from taking any adverse action against the petitioner pursuant to the said decisions conveyed by those letters.

5) The declaration that pending the conclusion of trial in the murder charge against the petitioner, the petitioner may be emplaced on interdiction in accordance with paragraphs 16(1) and 18(2) of the Third Schedule of the Judicial Service Act, 2011 and paragraph D.7.5.1 of the Judiciary Human Resource Policies and Procedures Manual, (accordingly, to be paid half basic salary, full house allowance and medical benefits while all other benefits and allowances will stand suspended) and, on account of the initiated and pending criminal charge of murder against the petitioner contrary to section 203 as read with 204 of the Penal Code in criminal case No. 10 of 2019 in the High Court at Machakos.

6) The respondents to pay the petitioner's costs of the petition.

Signed, dated and **delivered** by the court at **Nairobi** this **Friday, 24th July, 2020.**

BYRAM ONGAYA

JUDGE