REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLENEOUS CIVIL APPLICATION NO 1025 OF 2003

BETWEEN

REPUBLIC ..... APPLICANT

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

EX-PARTE PARENO

RULING

The *ex parte* applicant by an application dated 15th September, 2003 brought under o 53 rule 3 of Civil Procedure Rules seeks an order of *certiorari* to remove to the High Court and quash the decision of the Judicial Service Commission of Kenya delivered on and dated 31st July 2003 and contained in a letter dated 9th August 2003 ordering his dismissal as a Resident Magistrate. A statement as required by order 53 was filed on 12th December 2003. An affidavit in support sworn on 9th February 2003 and a verifying affidavit sworn on the same day were both filed on 12th September, 2003. The stipulated Notice to the Registrar was filed on the same day and endorsed by the Registrar on the same day.

The only relief claimed in the Statement is the judicial order of *certiorari*. In opposition the Registrar of the High Court of Kenya and the secretary to the Judicial Service Commission of Kenya swore an affidavit on 25th December 2003 and filed on same date.

When the matter was canvassed before me on 25th February 2004 it was common ground that the dismissal of the applicant was not denied. It was also a common ground that the applicant was an officer as defined in the Judicial Service Commission Regulations and that Regulation 26 of the Judicial Service Regulations applied to him.

It would be useful to set out the events which led to the dismissal. In Machakos Criminal Case 2586 of 2001 the applicant read a judgment which had been prepared by another magistrate Mr Soita who had been transferred to Kisii and who could not read his judgment because of the transfer.

It is not clear who had asked the applicant to read the ruling and whether there were urgent circumstances which warranted the reading of the judgment without it being typed first.

The applicant is said to have read the judgment by outlining the charges facing the accused person and finished off with the last sentence which he read:

“I do find him innocent and acquit him under section 215 of the Civil Procedure Code.”

According to the applicant he learnt later that in the main body of the judgment there were some convictions in respect of certain counts. As there was no specific count or counts mentioned in the last sentence of the judgment the applicant believed although mistakenly or erroneously that the acquittal was in respect of all counts facing the accused. On realizing the error the applicant claims that through the senior principal magistrate Machakos, who was the officer in charge of the station the applicant caused the file to be placed before the High Court for Revision vide High Court No1 of 2003 whereupon the High Court made an order that judgment be read again in full which order was complied with on 15th May 2003 and the accused was sentenced to 18 months on probation. The claimant asserts that since the error was corrected through revision nobody suffered prejudice.

The version of the respondent is somewhat different as reflected in Ouko's affidavit.

The secretary to the respondent depones that his office received a report from Mr J R Karanja the Machakos senior principal magistrate alleging *inter alia* the doctoring and or alteration of court judgments and rulings at the Machakos Law Courts.

The report specified Machakos Criminal Case Number 2586 of 2001 between the complainant and the Machakos County Council and the accused was one Benjamin Muli.

The secretary's information was that the particular file went missing from the court registry immediately the judgment was delivered on 27th February 2003 by the applicant on behalf the trial magistrate Mr Soita. The secretary's information was that the senior principal magistrate had indicated that his efforts to retrieve the file pertaining to the case had proved fruitless.

Finally the file was traced on the morning of 7th April 2003 and upon perusal by the said Mr J R Karanja he established that the applicant herein had selectively read to the accused parts of the judgment but failed to read the entire judgment when the applicant proceeded to acquit the accused contrary to the purport and/or spirit of the judgment of the trial magistrate who in his judgment had acquitted the accused on four charges and convicted him on two counts shortly before his transfer from Machakos Law Courts to Kisii Law Courts.

The secretary concluded by stating that it is not the applicant who caused the file to be placed before the High Court for revision as claimed by him and therefore his conduct as viewed by the respondent while reading the judgment constituted a case of professional dishonesty, misconduct and a breach of trust. On 10th July 2003 the applicant was notified of the charge framed against him and was asked to show cause why disciplinary action should not be taken against him on account of gross misconduct. He was given 14 days to respond.

By a letter dated 22nd July 2003 the applicant conceded *inter alia* that he acted mistakenly and that the error on his part was human. The applicant's response or answer was forwarded to the respondent which sat on 31st July 2003 and after deliberating on the matter reached the decision to dismiss him from service with effect from 31st July 2003 on account of gross misconduct.

The decision of the respondent was communicated to the applicant on 9th August 2003 and he was informed of his right of appeal to the respondent as per Regulation 27 of the Judicial Service Regulations.

The applicant did not lodge any appeal as required and the respondent claims that this is one of the grounds why the applicant should be denied relief. However on this point it is trite law that the availability of alternative relief could be a bar to judicial review. In fact there is no mention of appeal in the Regulation.

The Attorney General who appeared for the respondent admitted that Regulation 26 relating to discipline was not fully complied with before the applicant was dismissed, and contended that *certiorari* was not the proper remedy.

In the light of the Attorney General's admission that the disciplinary procedure outlined in Regulation 26

was not followed, the main issue before the Court for determination is whether noncompliance entitles the applicant to the relief claimed as a matter of right.

Regulation 26, sets out the procedure where a charge is made against an officer which in the opinion of the Chief Justice would justify dismissal. The steps are:-

(1) The Chief Justice to frame a cxarge or charges and forward the same to the officer together with a brief statement of the allegations if they are not clear from the charge, and the officer shall be invited to state his defence in writing before a day to be specified.

(2) If the officer fails to respond, or fails to exonerate himself in the opinion of the Chief Justice, the Chief Justice shall lay before the Judicial Service Commission the statement of the charge or charge and the reply if any and the Commission shall decide whether the disciplinary proceedings should continue or not.

(3) If the respondent/Commission decide that disciplinary proceedings should continue it shall appoint a sub-commission to investigate the matter consisting two or more persons who shall be persons to whom the Commission may by virtue of section 69(2) of the Constitution delegate its powers. Such persons may be puisne judges of the High Court.

(4) The sub-commission shall notify that on a particular day the charges against him shall be investigated and he shall have a right to be heard and to defend himself in person or by an advocate.

(5) The sub-commission shall after the investigation and hearing envisaged in 4 above submit a report to the respondent/Commission.

(6) The Commission shall decide on the punishment if any to be inflicted on the officer or whether he should be required to retire in the public interest.

Regulation 27 deals with the proceedings for misconduct not warranting dismissal – and not with appeal.

Under Regulation 28 the Chief Justice if he considers that it is desirable in the public interest that the service of such officer should be terminated on grounds which cannot be suitably dealt with under any other provision of these Regulations, he shall notify the officer in writing specifying the complaints by which his retirement is contemplated together with the substance of any report or part thereof detrimental to the officer and if after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the Chief Justice is satisfied that the officer should be required to retire in the public interest, he shall lay before the Commission a report of the case, the officer's reply and his own recommendation and the Commission shall decide whether the officer shall be required to retire in the public interest.

"When an officer is retired in the public interest, the Pensions Branch of the Treasury shall be furnished with full details of the case by the Chief Justice".

The Regulations have been made by the respondent/Commission pursuant to s 13 of the Service Commissions Act cap 185 of the Laws of Kenya. It has been contended in the application that the office of a resident magistrate is a constitutional office by virtue of s 69 of the Constitution.

However it is quite evident from the provisions of s 69 the reference to the officers mentioned in 69(3) including magistrates only relates to the vesting of power to appoint and to discipline on the Judicial Service Commission.

There is no protection from removal under the Constitution. It is also clear from the Regulations that magistrates can be dismissed and removed in accordance with the Regulations.

If the tenure of office as provided for in the case of judges under s 62 of the Constitution was intended

this could have been specifically stipulated. By analogy in the case of judges the Constitution provides:- s 62(3)

"A judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be removed except in accordance with this section."

As outlined earlier Regulations 26, 27 and 28 relate to discipline only and nothing in the Service Commission Act cap 185 prevents the removal of a magistrate. However it is clear that magistrates too do enjoy some protection in that the detailed and difficult process set out in Regulations 26,27 and 28 has to be undertaken before their services can be terminated by dismissal or retirement in the public interest. The statutory underpinning which has been emphasized by the counsel for the applicant has to be seen from the analogy drawn above.

In the case of the judges the Constitutional provisions clearly prevent removal except as outlined and for the reasons specifically identified in the Constitution. There is also the additional protection relating to remuneration of judges given by the Constitutional Offices Remuneration Act cap 423. Apparently salaries of constitutional job holders can never be altered to their detriment. In the case of magistrates there is no specific provision either under the Constitution or the Service Commissions Act or the applicable Regulations which prevents removal. Their salary is not also secured by an Act of Parliament

The applicable Regulations as set out above lay emphasis on discipline and the procedure to be followed. The Regulations clearly provide for punishment, dismissal or retirement and the steps to be taken in each case. It is however clear from the Regulations that the intention and the spirit was to give some protection in making it difficult for the relevant body to terminate their services.

Turning to the issue of the alleged misconduct the two parties have taken diametrically opposed positions. The applicant contends that the admitted error in reading the final part of a judgment which resulted in an intended acquittal ought not to have attracted the penalty of dismissal. On the other hand the respondent after deliberating on the matter came to the conclusion that the lapse was gross misconduct calling for immediate dismissal because the applicant was a magistrate of ten years standing. In addition both parties in their respective affidavits and the submissions to the Court take different positions concerning who instituted the revision process and prompted the High Court to order the revision. On the one hand the applicant claims to have done so upon realizing that he had made a mistake. The respondent claims that immediately after the delivery of the judgment the court file disappeared for over two months from the registry and it is the senior resident magistrate who was in charge of the Machakos Registry who initiated the revision process after retrieving and perusing the file. Moreover the officer in charge of the station was aware of other unspecified cases where judgments in the station had been altered. It is not therefore possible for this Court to determine the truth on this, on the basis of affidavit evidence and the facts presented or availed to the Court in the proceedings for judicial review. Ideally the determination of this would be the preserve or function of a trial court which would have the usual advantages of hearing oral evidence and observing the cross examination in order to adjudicate on the point. In a judicial review hearing on an application such as this one where the applicant has sought one single remedy only an order for *certiorari*, the opportunity for giving any other relief is not available because no other relief has been prayed for in the Statement. Yet the applicant's counsel in his submissions has argued that the decision to dismiss was not warranted or justified.

The Court has to answer the question as to whether it is the decision to dismiss which is under attack or the process which led to the dismissal. From counsel's submissions both the process and the decision are under attack and challenged.

What then is the scope of judicial review?

The *Supreme Court Practice* 1997 Vol 53/1-14/6 states:-

"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of

which the application for judicial review is made, but the decision – making process itself.

It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

The *Supreme Court* commentary also makes the position even clearer by stating in the same paragraph cited above:-

"The Court will not, however, on a judicial review application act as a "court of appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the Court would, under the guise of preventing the abuse of power be guilty itself of usurping power. Lord Bringtman in *Chief Constable of North Wales Police v Evans* [1982] I WLR 1155 p 1173"

In view of the mention of the "Wednesbury principle" it is appropriate to set it out:

"Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision." See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 per Lord Green M R.

From the above principles it is clear to the Court that its function is to decide on whether the process leading to dismissal was proper and not to adjudicate on the merits of the dismissal since it is not in dispute that the respondent, Judicial Service Commission has the power to discipline the applicant and has the power to dismiss. From the above principles this Court cannot therefore substitute the dismissal for anything else for example reinstatement because the Court would be usurping the power clearly vested in the Judicial Service Commission by acting as a Court of Appeal on the decision to dismiss. However, in a situation for example where a body like the Judicial Service Commission becomes politized and/or conducts itself with arbitrariness by dismissing a magistrate without giving a reason whatsoever or for being independent and impartial in the discharge of his duties or by failing to adhere to rules of natural justice at all, in the opinion of this Court, the Court would be justified in quashing the decision of dismissal in which event it would remit the matter back to the Judicial Service Commission with a recommendation that the victim of such arbitrariness be reinstated. The reason for this would be that the protection given to the magistrates pursuant to the regulations by the fact of making it difficult to sack then is based on the need to protect them because of the nature of their jobs and therefore in the public interest. Thus, while it is recognized by the applicable Regulations that a magistrate can be retired in the public interest, he can equally be protected to retain his office in the public interest because courts of law have a duty to uphold the public interest.

However, on the ground the need for such intervention should be the exception other than the rule in that the Judicial Service Commission is expected to be the greatest respecter of law and in particular the rules of natural justice. In the eyes of the legal fraternity and enlightened Kenyans the Judicial Service Commission is in this regard expected to be the pinnacle of excellence. An order to quash a dismissal coupled with a recommendation by the Court to reinstate would not usurp the jurisdiction of the Judicial Service Commission in the exceptions enumerated above because the ultimate decision would still be that of the Commission. Turning to the facts of the case and its role, this Court is on the other hand absolutely certain that the process leading to the dismissal was clearly flawed in not setting up a commission to inquire and in denying the applicant of a hearing. Regulation 26 ought to have been followed and this was not done although the respondent in causing a notice to show cause to issue, receiving the reply and taking it to the Commission did to some extent mitigate the harshness of the violation. The notice to show

cause did give him an opportunity to explain his position and he did explain. The Attorney General in his submissions did concede that Regulation 26 was not followed to the letter but contended that the dismissal having been made this Court could not undo it because this would not be the most efficacious remedy available to the applicant in the circumstances of this case.

The Attorney General's contention is that although there is an apparent violation of the Regulations the relationship between the parties is that of employer and employee and neither can be forced onto another because this would lead to servitude. He cited the case of *Johnson & Shrewsbury And Birmingham Ry Co* reported in the *English Reports* Vol XLIII Chancery at pg 362 – 363:-

"Assuming however that there is nothing in the agreement contrary to public policy still I apprehend that there may be objections to the Court interfering by way of specific performance. I may have made these observations rather out of place, but they do not seem to be immaterial. There is however an agreement the effect of which is that the plaintiffs are to be the confidential servants of the defendants in most important particulars in which not only for the sake of the persons immediately concerned but for the sake of society at large, it is necessary that there should be the most entire harmony and spirit of cooperation between the contracting parties .....

If that be so in private life, how important do these considerations become when connected with the performance of such duties - duties of society – as are incumbent upon the directors of a company like this. I think that by interfering in the present case there would be no equality."

The Court went on to deny specific performance or the equivalent of reinstatement in a contract of services because there would have been no equality.

In contrast the applicant relied on the authority of the Privy Council. *B Surinder Singh Kanda and Government of The Federation of Malaya* [1962] AC 323 where rules of natural justice were breached in dismissing an inspector of police.

In the case the dismissal was declared void, inoperative and of no effect. Their lordships also indicated that the only remedy available in that situation was not *certiorari* but that a declaration is also available as a remedy. In the case of *Regina v Southampton Justices exparte Green* [1976] IQB 11 the learned counsel relied on the quotation at page 21 of the above authority to illustrate that the Judicial Service Commission lacked jurisdiction to dismiss.

"Lack of jurisdiction may arise in various ways while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice or it may ask itself the wrong questions or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction."

On the facts of this particular case I need not try to categorise what was done or not done in view of the Attorney General's admission. But it is apparent that the notice to show cause procedure was put into practice. In the unreported case of HC Misc 805 of 1990 *R v The Commissioner for Co-operative Development Kariobangi Housing and Settlement Cooperative Society Ltd Exparte David Mwangi & 13 Others.* Bosire J as he then was, quoted with approval from *Halsbury's Laws of England* 4th Ed Vol II page 805 para 1508.

"*Certiorari* is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles."

In the important case of *Eric Makokha v University of Nairobi & 2 others* CA 20 of 1994 unreported, a five bench constituted to reconsider the Court's own decision in CA Nai 204 of 1993 entitled *Ochieng Nyamogo & Another v Kenya Posts & Telecommunication* where university lecturers had claimed that their contracts of service had by virtue of the University Act and the regulations made thereunder had statutory underpinnings and could therefore not be determined on the ordinary law applicable to master

and servant, the Court of Appeal went on then to hold as follows at page 10:-

1) The lecturers could sue for damages for breach of contract

2) Equitable remedies are said to be mutual if the lecturers could under the contract give notice to terminate their services and the University could not force them to resume duty by the equitable remedy of specific performance, the only remedy open to the University would be a claim for damages for breach of contract.

The Court emphasized the mutuality principle in contracts of service.

At page 11 the Court of Appeal ruled

"They cannot competently claim to be reinstated unless a statute to which they can point expressly conferred this right on them and by that method, underpinned their continued employment."

Briefly the lecturers had failed to perform their contractual duties as lecturers at the University. As a result the University authorities suspended the lecturers and also summoned them to a Disciplinary Committee of the University on 7th January 1994 warning that the University might result in terminating of their appointments. On the same day ie 7th January 1994 the lecturers filed suit and also sought and obtained an *ex parte* injunction restraining the University from evicting them from their residences. Their appointments were terminated and so the lecturers had their plaint amended and sought among other reliefs a declaration that the purported terminations of their appointments were void and an order of an injunction to restrain the University from acting on their purported terminations.

Four months before this case the Court of Appeal had in the case of *Ochieng Nyamogo & Another v Kenya Posts and Telecommunications* CA Nai 204 of 1993 unreported, held that:-

A contract of employment entered into in that case had statutory underpinnings and could not be determined under the ordinary law applicable to master and servant."

In *Eric Makokha v University & Another* as cited above a five bench Court of Appeal overruled it's own decision in the *Nyamogo* case and held as follows at 23 and 25 of the ruling:-

"In our opinion the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remain good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal service are exceptions to the general run of common law.

In our opinion, the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitude and the remedial changes they are bringing about, we cannot help feeling that the common law and doctrines of equity which section 3 of Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that transactions are entered into."

At page 25 the Court remarked:

"But we realize that we cannot force a remarriage on unwilling partners."

I would however wish to distinguish the magistrate's position to that of the University lecturers in the *Eric Makokha* case to the extent the Regulations applicable to magistrates deliberately make their dismissal, removal or retirement difficult because of the nature of their jobs. It is clear to the Court that the intention behind the making of the Regulations was to enable the magistrates to enjoy some protection in order to effectively discharge their duties. In the case of magistrates it is not just a question of statutory underpinnings as discussed in the *Eric Makokha* case above, the process of disciplining them is deliberately made difficult because it is in the public interest to do so.

The question is does the application of the cited Regulations to magistrates remove them or exempt them from the principles applicable to employment contract? In the view of the Court since the Regulations allow removal, dismissal or retirement in the public interest the general principles of law applicable to employment contracts do apply to them.

The protection enjoyed by magistrates is to the extent described above – where no reasons are given for dismissal or retirement or where the hiring body purports to dismiss or remove them for being independent and impartial in performing their duties or where the hiring authority purports to remove them without applying the rules of natural justice. In these instances the remedy of *certiorari* if applied for promptly should in the view of this Court be available to them.

However where they fall short of the standard, they descend into the arena of the other mortals in which event they could invoke the other remedies open such as a claim for damages should such removal from office turn out to have been unjustified or in fitting cases they could have the decision to dismiss quashed with a recommendation that the proper procedure be followed in removing them or that the decision be quashed and an order containing a recommendation for reinstatement in the exceptional cases set out above. In practice this would only be possible when relief is sought promptly and before the parties have parted company.

It must however be pointed out in the case of judicial officers although they occupy very important, dignified and powerful positions in our society, these positions are at the same time most vulnerable and sensitive and like the precious human soul which lives in earthen pots, judicial officers are also housed in breakable earthen pots. In the case of the precious human soul it flies away upon the breaking of the earthen pot and in the case of a judicial officer it he finds it difficult to retain his position when the earthen pot called perception becomes adverse. To give another analogy judicial officers of all categories are like virgins, virginity is lost only once and can never be restored. To judicial offices of whatever category perception is everything and once lost can never be restored. The sensitivity and the high standards reposed in judicial offices contributes greatly to this phenomenon. Very often public interest considerations do not give them a second chance.

Thus, where an officer has already left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in the public interest and the principles of master and servant clearly apply.

Turning to the facts of the case before me the reason for dismissal having been given in the case before me it is clear to the Court following the *Eric Makokha* case the statutory underpinnings of the Regulations relied on cannot per se prevent this Court from finding that at the end of the day there is a contract for personal services and the most efficacious remedy would be a claim for damages and no such damages have been claimed in these proceedings. In fact in the Statement filed with the application the only relief sought is an order for *certiorari* to quash the decision of the respondent. Similarly no declaration has been sought in the Statement. Even if the facts or evidence presented pointed to any of these reliefs they could not be obtained in these proceedings because the Court cannot grant that which has not been sought in the pleadings, in this case in the Statement.

De Smith, Woof and Jowell 5th Edition – Sweet & Maxwell *Judicial Review of Administrasive Action* at page 25 the learned writers have enumerated possible public law remedies which the Courts could give as under:-

1. A decision or subordinate legislation may be quashed

2. The matter may be remitted to the decision – maker for reconsideration

3. The Court may make a declaration as to the rights of the applicant on the invalidity of the administrative action or legislation

4. The Court may order the respondent public body to do or refrain doing any action

5. In limited circumstances an applicant may be entitled to damages or restitution. There is however no right to damages for unlawful action per se breach of some recognized tort must be established.

6. Interim relief may also be granted to preserve the status quo until the Court finally determine the issues between the parties.

The *Supreme Court Practice* cited above para 53/1-14/14 states:-

"Even if a case falls into one of the categories where judicial review will lie the Court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the Court will make depends upon the circumstances of the particular case."

It is clear from the above principles that the Court would be empowered to quash the dismissal decision in view of the flawed procedure adopted by the respondent before the dismissal. However did the flawed procedure (which has been admitted) necessarily affect the decision to dismiss. On the facts and the position taken by both parties and even after applying the "Wednesbury principle" as stated above can this Court safely conclude that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision? The answer is a clear "No". The judgment was improperly read (as admitted). It is contended that the file went missing. The underlying situation was that judgments were being altered at the station. The initiative to refer to the High Court for revision was allegedly not done by the applicant but by his immediate boss. The applicant has his story but all these points even without adjudicating finally on the points, do not support the position that the decision to dismiss was unreasonable although challengeable. Suppose this Court were to quash the dismissal decision and remit the matter back to the respondent with the recommendation that Regulation 26 be followed before another decision is reached is there a guarantee that the decision in the second instance would be different? I am not convinced in the circumstances that the decision would be different. An order to remit would therefore be in vain.

Lord Fraser of Tullybelton in the case of *Chief Constable v Evans* [1982] WLR 1155 at page 1164 posed the same question in these words (Letters D to E):-

"I wish to emphasize that the only matter which I am deciding is that the process by which the chief constable reached his decision in this case was unfair in respect that the respondent was never told the reasons why his dismissal was being considered, and that he was given no opportunity of making an explanation about the matters of complaint against him.

I am far from saying that, if the procedure had been fair the chief constable would not have been entitled to reach the decision that he did."

I think the same can quite rightly be said of the respondents here that they might quite reasonably reach the same decision after following Regulation 26. A remitting order is not therefore an option available to me. What are the options or option open to the applicant? In the case of *O'Reilly v Mackman* [1983] AC 237 the House of Lords held:-

"Where a person seeks to establish that a decision of a person or body infringes rights which are entitled to protection under public law he must, as a general rule, proceed by way of judicial review and not by way of the ordinary action whether for a declaration or an injunction or otherwise ...

These are however cases where it is permissible to litigate public law issues in private law proceedings, for instance where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to proceedings being continued by way of ordinary action."

I hold that in the circumstances of this case the most efficacious remedy would be attained by bringing an ordinary action if the applicant is so advised by his counsel. The cause of action if any is well within the

limitation period if commenced promptly. *Res Judicata* does not apply to judicial review and this would not be a an impediment to such an action. The Court in such a situation would be in a better position to determine the reasonableness of the dismissal where the positions taken by both parties will hopefully be backed by more evidence and cross examination and the issue of damages if any can be determined on merit as a matter of law. The applicant has served for 10 years and has lost valuable benefits as a result of the dismissal: He has the opportunity to have this addressed in an action.

Before I conclude this ruling I wish to highlight the following principles:-

1. Magistrates do have office protection in terms of the applicable Regulations set out above. The Regulations do have statutory underpinnings and it is clear that the intention and the spirit of the Regulations was to give them a special status because of the nature of their work which needs independence and protection. Their situation is therefore distinguishable from that of the lecturers in the *Eric Makokha* case referred to above. However the magistrates' special protection and status is only available where they are performing their duties with integrity in the style of Caesars wife and where they have not lost their professional virginity. As analysed above this important exception is where the statutory body purports to discipline or dismiss them without giving reasons or arbitrarily or without following the procedure outlined in the Regulations or without substantially adhering to the procedure and to rules of natural justice purports to terminate their services.

In these situations *certiorari* would in the view of this Court be available to them provided the relief is promptly sought.

2. Where reasons are given for discipline or dismissal the Court ought to apply the Wednesbury principle in order to determine whether or not an appropriate order in judicial review ought to be given. An order for judicial review can only be granted where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.

3. Where the relevant body or disciplinary body could reasonably have reached the decision the Court should not interfere with the decision at all.

4. The Court will not however on a judicial review application act as a "court of appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body's jurisdiction or the decision is Wednesbury unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the Court would, under the guise of preventing the abuse of power, be guilty itself of usurping power."

5. Where it is clear that the reasons given for a particular decision are contestable either way and the parties have arguable points and the Court has not been presented with sufficient evidence to enable it to conclusively determine the point in a judicial review application on the basis of affidavits, this is a clear signal that the relief sought is not suitable for judicial review and is perhaps better dealt with in an action where for instance damages could be awarded as a matter of right and not discretion in which case the Court should decline to give a judicial order.

6. It should be remembered that *certiorari* is a discretionary remedy which a court may refuse to grant even when the requisite grounds exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound, legal principles.

7. A court cannot go beyond the relief sought in the Statement.

8. In the case of magistrates where the statutory protection as set out above is unavailable they descend into the familiar arena where master and servant principles apply to them as duly established in the *Eric*

Makokha case. Where for example an officer has been out of employment for some time the proper remedy if any to pursue is damages and reinstatement or specific performance cannot be available. Each case must be put on the scales.

9. There will be cases where it is permissible to litigate public law proceedings for instance where the invalidity of the decision of the public authority arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to proceedings being continued by way of an ordinary action.

In such situations the Court should decline judicial review and leave the parties to pursue ordinary actions if so advised by the counsels. This could be the best option in nearly all cases where the decision for dismissal or any other decision is contestable and where the final decision could go either way depending on the evidence adduced at the trial.

10. Compensation can be ordered in appropriate cases in applications for judicial review where it has been claimed and there is evidence to support such an award.

11. In the case of magistrates and other judicial officers to whom the Regulations apply, just as it is in the public interest to protect them from arbitrariness and politics, it is also equally important to highlight that they are like virgins, once virginity is lost, and it can only be lost once, it can never be restored. Perception in judicial offices is everything – once lost regardless of what processes are set up thereafter it can never be restored.

Turning to the facts of the matter before me and applying the above principles the following scenario has emerged:-

(a) reason for dismissal was given but it is contestable

(b) the reason has been hotly contested by both parties – they have come up with diametrically opposed positions.

(c) although the process leading to the decision to dismiss is admittedly flawed, there was substantial compliance by way of a notice to show cause. The explanation was tabled before the decision making body namely the respondent and it deliberated upon the explanation given and made a decision to dismiss which decision was communicated to the applicant. The decision was made notwithstanding the fact that the applicant has rendered ten years service and also notwithstanding the fact that there was available to the respondent the option of retiring him in the public interest in which event he would have collected his pension and other benefits.

(d) These proceedings have been conducted on the basis of affidavit evidence and this Court does not have before it sufficient evidence to try the reasonableness or otherwise of the dismissal.

(e) the applicant has been separated from his former employer by a six months break

(f) although the applicant has sought a public law remedy what he is in fact asserting is his individual right and a private law remedy appears the most efficacious in the circumstances

(g) it is clear that if the applicant was to assert his private right in action if so advised by his counsel he would still be very well within the relevant limitation period and that these proceedings in the judicial review would not bar him because *res judicata* does not apply to judicial review proceedings and therefore the option of an action would still be open to him

(h) should the applicant be so advised it is clear to this Court that damages unlike judicial review are awardable as a matter of right and not discretion

(i) conscious of the fact that it is only a trial court which is equipped to test the reasonableness or

otherwise of the decision to dismiss.

And putting all the above on the scales this court in exercise of its judicial discretion declines to give an order for *certiorari* and the application is accordingly dismissed.

In the circumstances I make no order as to costs.

It is so ordered.

Dated and Delivered at Nairobi this 18th March 2004.

J.G.NYAMU

JUDGE