



**Judicial Service Commission & another v LMN (Civil Appeal
551 of 2019) [2024] KECA 1394 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1394 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 551 OF 2019
SG KAIRU, JW LESSIT & GWN MACHARIA, JJA
OCTOBER 11, 2024**

BETWEEN

JUDICIAL SERVICE COMMISSION 1ST APPELLANT

CHIEF REGISTRAR OF THE JUDICIARY 2ND APPELLANT

AND

LMN RESPONDENT

*(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court
at Nairobi (Hon. Stephen Radido, J.) dated 11th October 2019 in Petition No. 152 of 2018)*

JUDGMENT

1. The facts of the appeal before us as can be discerned from the Petition dated 31st December 2018, filed before the Employment and Labour Relations Court (ELRC) is that LMN (the respondent) was employed on 14th May 2001 as a District Magistrate II, working with the Judiciary of Kenya. She served in various jurisdictions across the Republic of Kenya rising ranks to the position of Senior Principal Magistrate, which position she held until her dismissal on 9th February 2017.
2. Prior to her interdiction, by a letter dated 22nd May 2014, the then Registrar of the Magistrates' Court (Hon. P.N. Mulwa) wrote to the respondent directing that she prepares a report of all the pending judgements and rulings she had not written in all stations she had previously served, and that she proceeds on leave for 30 days. The respondent heeded to the call and forwarded a list of the pending judgements and rulings yet to be delivered by a letter dated 30th May 2014.
3. Thereafter, The Chief Registrar of the Judiciary (the 2nd appellant) wrote to the respondent two letters dated 22nd August 2016. The first letter with the subject head 'charge' outlined the allegations that the respondent was in custody of a total 204 files which were pending delivery of judgements and rulings. She was required to respond to the charge within 21 days from the date of the charge. The second letter



- was an ‘interdiction’ letter whereby she was placed on half salary and was required to report to the 2nd appellant’s officer every Friday until further notice. She was also directed to hand over all Government materials in her possession.
4. In compliance with the directive to answer to the charge, the respondent in a letter dated 13th September 2016 wrote a comprehensive response to the letters dated 22nd August 2016, on the charge and interdiction respectively.
 5. According to the respondent in her petition dated 31st December 2018, she received a one-day notice through a telephone call to attend a hearing before the panel constituted by the Judicial Service Commission (1st appellant). The oral hearing was conducted on 25th January 2017, and the decision to dismiss her was communicated vide a letter dated 9th February 2017.
 6. The respondent appealed against her dismissal by setting out the grounds of appeal in a Memorandum of Appeal forwarded through a letter dated 1st March 2017. The 1st appellant through the office of the 2nd appellant communicated its decision vide a letter dated 13th July 2017 upholding its decision to dismiss the respondent.
 7. Aggrieved, the respondent moved the ELRC and filed a petition dated 31st December 2018. According to her, the 1st appellant violated the provisions of Article 172 (1) (C) of *the Constitution*, and therefore, the proceedings leading to her dismissal from employment were a nullity. Further, it was pleaded that the appellants jointly violated the mandatory provisions of section 32 (3) of the *Judicial Service Act* by supplanting the 2nd appellant to carry out the functions of the Chief Justice who solely has the power to interdict, charge and reprimand a judicial officer as per Regulation 15 (1) of the of the Third Schedule of the *Judicial Service Act*.
 8. The respondent averred that in the absence of a substantive Chief Justice in office, the 1st appellant’s remaining Commissioners, grossly violated *the Constitution*, suspended The *Judicial Service Act*, The *Employment Act*, The *Fair Administrative Action Act*, rules of natural justice and in particular the principle of ‘audi alterem partem.’
 9. The respondent particularised the procedural impropriety of the 2nd appellant as failure to observe the procedural rules laid down under Part V, Third Schedule of the *Judicial Service Act*, and breach of natural justice by condemning the respondent unheard. She averred that the decision to terminate her employment was unfair and a breach of sections 45, 41, 43 and 47 (b) of the *Employment Act*.
 10. Further, the respondent urged the ELRC to invoke Article 165 (6) and (7) of *the Constitution* and section 7 (2) (a) (i), (ii) and (iii) of the *Fair Administrative Action Act*, and find that the disciplinary proceedings commenced and as conducted were not authorised by any known written law, were without jurisdiction, exercised in excess jurisdiction and that the court should declare them void and a nullity.
 11. The respondent also pleaded that there was violation of Article 41 of *the Constitution* on the right to fair labour practices. It was pleaded that she was subjected to illegal and unconstitutional disciplinary process that was not in conformity with the law; and that she was discriminated on grounds of health and without being given an opportunity to be rehabilitated and improve her capacity.
 12. As a result of the alleged violations, the respondent sought 15 different declarations of alleged constitutional violations. Amongst the declarations, she prayed for release and payment of her accrued back salaries and arrears from 22nd August 2016 until payment in full; 12 months gross salary compensation for unlawful dismissal/termination of employment; unconditional reinstatement



- and deployment to the rank of Senior Principal Magistrate (SPM); an order for compensation for aggravated and exemplary damages; costs; and interest incidental to the suit.
13. In answering the petition, the appellants through the Registrar of the 1st appellant, Hon. Winfrida B. Mokaya (as she then was), filed a replying affidavit sworn and dated 6th February 2019. The appellants restated the various regulations contained in the 3rd Schedule under Part V of the *Judicial Service Act* relating to discipline of judicial officers and staff. It was deposed that the powers to discipline employees working under the Judiciary is vested upon the 1st appellant by dint of Article 172 of *the Constitution*; that the power is only delegated to the Chief Justice by Regulation 15 (1) of the 3rd Schedule for purposes of initiation of the disciplinary process; and that in the absence of the Chief Justice and the Deputy Chief Justice, the disciplinary powers revert to the JSC, 1st appellant until when a substantive office holder is appointed.
 14. On the alleged summary interdiction, the appellants took the position that the respondent was not condemned unheard as alleged; that she was served with the charge that was accompanied by her interdiction letter which she responded to before being invited to an oral hearing that was followed by the eventual dismissal; that the respondent's health was not one of the issues considered at the time of her interdiction; and that it was raised at the hearing and thus, she was using her health status to cover her misconduct which led to her dismissal.
 15. The appellants took the position that even before diagnosis of the respondent's health, the respondent failed to deliver on her duties. Therefore, appellants did not have the luxury of further retaining her at the expense of litigants who sought redress from her over the delayed judgments and rulings; and that she failed to demonstrate the alleged violation of her right to fair labour practices. They urged the trial court to find that the termination of the respondent was fair and that the respondent was accorded a procedurally fair disciplinary process which was in accordance with the relevant laws. They asked that the petition be dismissed with costs.
 16. Upon being served with the appellants' response, the respondent in rejoinder filed a further affidavit sworn on 15th February 2019, chiefly reiterating the illegality which led to her termination from employment.
 17. In his judgement dated 11th October 2019 (Radido, J.), the learned Judge observed that save for the letter dated 22nd May 2014 from the Registrar of Magistrates' Court, there was nothing placed before him to suggest that inquiries were made as contemplated under Regulation 25 of the 3rd Schedule of the *Judicial Service Act*. The learned Judge further observed that the then Chief Justice left office on 16th June 2016 while the charge to the respondent was served upon her on 22nd August 2016; and that there was no evidence that it is the Chief Justice who framed the charges under the hand of the 2nd appellant.
 18. The learned Judge went on to find that the 2nd appellant could not exercise functions which were within the purview of the functions of the Chief Justice in the absence of the office holder; that even in the instance where the office of the Chief Justice was not occupied, no material was placed before the court to confirm that the 2nd appellant was given powers to perform the functions of the Chief Justice; and that therefore, the actions of the 2nd appellant were ultra vires her constitutional and statutory mandate.
 19. Having come to the above conclusion, the learned Judge did not address the other issues proposed and submitted upon by the parties. In allowing the petition, he made orders that the 2nd appellant had no powers to commence disciplinary action against a judicial officer; that the process leading to the respondent's dismissal from the position of a Senior Principal Magistrate was void ab initio; that fresh disciplinary process against the respondent do commence within 60 days; that the respondent



be deemed as having been on interdiction with half salary from 22nd August 2016 up to the date of conclusion of the fresh disciplinary process; and that costs be awarded to the respondent.

20. Dissatisfied with the learned Judge's decision, the appellants filed an appeal premised on 5 grounds of appeal as follows: -
- a. The learned Judge erred in law and in fact by misinterpreting the disciplinary process of Judicial Officers as provided for under Part IV of the 3rd Schedule to the Judicial Service Act and in so doing: -
 - i. Failed to appreciate the power of the Judicial Service Commission to initiate disciplinary proceedings in the absence of the Chief Justice;
 - ii. Failed to appreciate that the 2nd appellant as the Secretary to the Judicial Service Commission can transmit and communicate decisions of the Judicial Service Commission.
 - b. The learned Judge erred in law and in fact by failing to appreciate the fact that the appellants' disciplinary process met the requirements of a Fair Administrative Action in accordance with Article 47 of the Constitution and Paragraphs 15, 16, 17 and 25 of Part IV of the 3rd schedule to the Judicial Service Act.
 - c. The learned Judge erred in law and in fact in making an order for reinstatement of the respondent when she had not demonstrated sufficient basis to merit such an order under the Employment Act and that in fact no exceptional circumstances were provided to warrant such a relief.
 - d. The learned Judge erred in awarding costs which were neither proved nor justified in the circumstances.
 - e. The learned Judge erred in law and in fact by failing to consider the appellant's response to the petition, written submissions and authorities.
21. The appellants asked that the appeal be allowed and that the judgement and decree of the ELRC be set aside.
22. The respondent filed a cross appeal dated 13th January 2020 on 8 grounds which we summarise as follows:
- a. Having found that the respondent's interdiction was illegal ab initio, the court erred in law and in fact by denying the respondent a relief of full reinstatement, back salaries and allowances in according her full protection, benefits and enjoyment and protection of the law.
 - b. Having found that disciplinary the procedure was unconstitutional, null and void, the learned Judge failed to consider, declare and award damages against the uncontested constitutional violations against the respondent, inter alia; Article 27 on equal treatment and benefit of the law, Article 43 (1) (a) (b) (c) and Article 26 (1) and
 - (3) on discrimination on health grounds and threat to life, Article 28 on entitlement to a right to inherent dignity, aggravated and degrading cruel treatment contrary to Article 29 (d) (f) and Article 43 (1) (a) on the right to health care.
 - c. The learned Judge failed to declare the violation of the rights under Articles 41, 47 and 236 (b) and 259 (11) of the Constitution as pleaded.



- d. The learned Judge failed to award compensation for aggravated and exemplary damages for the violation of the respondent's rights.
- e. The learned Judge failed to interrogate the constitutionality of Regulation 22 and 23 of the 3rd Schedule of the Judicial Service Act.
- f. Regarding HIV/AIDS, the learned Judge failed to determine and declare: whether the same are workplace disability/impairment as per the definition under Article 260 of the Constitution; whether the appellants and all employers need to put policies to give and ensure 'reasonable accommodation' to such infected and affected employees; whether the respondent was discriminated on account of her HIV/AIDS status and should have been accorded reasonable accommodation having regard to her health and her right to health as envisaged under Articles 26, 27 (1) and 43 of the Constitution; and that the action of the 2nd appellant disentitled the respondent medical card which was unlawful, null and void ab initio.
23. The respondent prayed for: a declaration that the appellants jointly and severally violated her fundamental rights and freedoms under Articles 10 (2) (a), Article 26 (1), 27, 28, 29 (d) (f), 41, 43, 47, 236 (b), 161 (2) (c), 171 (2) (a) and 259 (11) of the Constitution, the Judicial Service Act, The Fair Administrative Action Act and the Employment Act; a declaration that Regulations 22 and 23 of the 3rd Schedule of the Judicial Service Act are unconstitutional and ultra vires to Articles 10 (2) (a) (c), 40, 43, (1) (e), 3, 47 (2), 35, and Article 232 (1) (e), (f) and (e) of the Constitution, right to social security and section 5 (1) of the Pension Act; an order of reinstatement to the rank of Senior Principal Magistrate (SPM) with all back pay, accrued benefits, allowances and interest since August 2016 until payment in full; an award of general, exemplary and punitive damages; and costs of the suit in the trial court and the instant appeal.
24. We heard this appeal virtually on this Court's Go to Platform on 19th March 2024. Learned counsel Mr. Ocholla appeared for the appellants while learned counsel Mr. Okemwa appeared for the respondent. Each counsel highlighted their written submissions dated 10th September 2020 and 25th February 2021 respectively. They further relied on their respective case digest and list of authorities.
25. At the outset, we wish to state that, although the appellants in the Memorandum of Appeal referred to violation of Part IV of the 3rd schedule to the Judicial Service Act as one of the grounds of appeal, it is noteworthy that Part IV of the Act deals with financial matters while Part V deals with procedure for appointment and removal of judges, and discipline of other judicial officers and staff. The regulations relating to conduct of the disciplinary procedure of appointment and removal of judicial officers and staff are contained in the Third Schedule of the Act. We have therefore, in this judgment referred to the Third Schedule of Part V and not Part IV of the Act in so far as the conduct of the disciplinary process of the respondent was concerned.
26. Mr. Ocholla submitted that the learned Judge misinterpreted the disciplinary process of judicial officers; that the inherent power to discipline judicial officers is placed upon the 1st appellant by dint of Article 172 of the Constitution; and that this power is delegated to the Chief Justice under Regulation 15 of the Third Schedule to the Judicial Service Act, but that despite this delegation, the residual power still resides within the Judicial Service Commission.
27. It was urged that at the time when the show cause and interdiction letters were issued, there was no holder of the office of either the Chief Justice or Deputy Chief Justice in August of 2016. At that point in time, the disciplinary power which had been delegated to the Chief Justice reverted to the 1st appellant. The 1st appellant therefore had the inherent responsibility to undertake disciplinary action until such a point in time when a substantive office holder of the office of the Chief Justice would have



been appointed. To this end, we were referred to the Supreme Court’s Advisory opinion in Reference No. 3 of 2019, Council of Governors and 47 others vs. Attorney General & 3 others, (2020) eKLR, In the Matter of the National Land Commission (2015) eKLR and this Court’s case of Capital Markets Authority vs. Alnashir Popat & 8 others (2019) eKLR where the subject of delegation of authority within Government agencies was discussed.

28. On the role of the 2nd appellant, it was submitted that she issued the show cause notice, the charge and interdiction letters as part of her role as the Secretary to the 1st appellant. Whilst citing section 21 of the Judicial Service Commission Act, it was submitted that the role of the 2nd appellant ensured continuity of the functions of the 1st appellant, of disciplining judges and judicial officers under Article 172 of *the Constitution*. Counsel placed reliance on the Supreme Court Advisory Opinion Reference Number 3 of 2019-Council of Governors and 47 others (supra).
29. Counsel submitted that the learned Judge failed to appreciate that the disciplinary process met the requirements of the *Fair Administrative Action Act* in accordance with Article 47 of *the Constitution*. Counsel referred the Court to pages 200 to 202 of the Record of Appeal which contain a detailed narration of the steps that were taken by the 1st appellant in the disciplinary process in conformity with the *Judicial Service Act*.
30. It was contended that sufficient timelines were given to the respondent to respond to the charge; that a hearing was conducted on 25th of January 2017; and that the respondent did not challenge any of the allegations raised against her but instead admitted them. To this end, reliance was placed on this Court’s case of Judicial Service Commission vs. Gladys Boss Shollei (2014) eKLR and the decision in Kenya Power and Lighting Company vs. Aggrey Wasike (2017) eKLR for the proposition that a fair disciplinary process was followed.
31. On the issue of reinstatement, it was submitted that it is a remedy which ought to be granted in exceptional circumstances. In this case, there was no exceptional circumstance to warrant reinstatement of the respondent; and that in any case the employment relationship between the 1st appellant and the respondent was already constrained on the grounds of misconduct. Further, that the accusations against the respondent of delaying judgments and rulings had occasioned injustice to prisoners and other litigants such that the only remedy available was to dismiss the respondent from employment.
32. On the cross appeal, counsel isolated two issues. The first one was on the constitutional right of access to information which he submitted should not impede the due process of the law. The submission was hinged on the respondent’s submission that Regulations 22 and 23 of the Third Schedule of the *Judicial Service Act* were violated for not furnishing the respondent with some information she needed to enable her mount her defence in the disciplinary proceedings. According to counsel, the 1st appellant being a public body is protected from unwarranted disclosure of certain documentation, including office orders, minutes, reports, and recorded reasons for decisions. The Court was thus urged not to find that the aforesaid Regulations as unconstitutional.
33. The second submission was on the alleged discrimination on account of health. Mr. Ocholla submitted that the respondent had not illustrated how she was treated differently from any other person on account of her health status. Reliance was placed on the case of V. M. K. vs. Catholic University of Eastern Africa (2013) eKLR for the proposition that sufficient evidence on discrimination ought to have been brought out. Counsel submitted that the respondent’s medical condition is not a disability, and should not be treated as such; and that if her condition was to be treated as such, it would perpetuate and entrench stigma against other employees who have the condition but are living healthy and productive lives. Counsel thus prayed that the appellant’s appeal vide the Memorandum of Appeal dated 12th November 2019 be allowed.



34. In response, Mr. Okemwa submitted that the procedure available for the discipline of judicial officers is set out under Article 171(1)(c) of the Constitution as read with the Third Schedule of the Judicial Service Act. Counsel invited us to consider this Court's decision in the cases of Judicial Service Commission vs. Daniel Mudanyi Ochenja (2020) eKLR and Chief Justice and President of the Supreme Court of Kenya & Another vs. Khaemba (Civil Appeal 522 of 2019) (2021) KECA 322 (KLR) (17 December 2021) (Judgment) wherein the procedure in conducting a disciplinary hearing concerning a judicial officer was laid out.
35. It was submitted that the Chief Justice is the executive head of the judiciary under Article 161(2)(a) of the Constitution, as an independent office; that the office of the 2nd appellant under the Constitution is twofold, namely as the Chief Accounting Officer (under Article 161(2) (c)) and as the Secretary of the 1st appellant (under Article 171(1)(3)); that other functions of the 2nd appellant are set out under section 21 of the Judicial Service Act; and that had Parliament intended that the 2nd appellant would step into the shoes of the Chief Justice, it would have legislated the same.
36. Counsel drew our attention to paragraph 37 of the appellants' replying affidavit where it was deposed on admission that it is the 2nd appellant who reached a decision to interdict the respondent whilst that ought to have been done by the Chief Justice under Regulations 15 and 16 of the Third Schedule of the Judicial Service Act. With that admission, there was no resolution of the 1st appellant to interdict or charge the respondent; and the decision undertaken by 2nd appellant amounted to gross violation of the Constitution under Article 259(11). Counsel relied on the decision of Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others (2015) eKLR where this Court held that unlawful delegation without consent of mandatory constitutional process is a nullity.
37. On the issue of exercise of inherent powers, it was submitted that the 1st appellant having acted upon the recommendation of the 2nd appellant but without the Chief Justice, was a violation of the Constitution; that it was clear that it is only the Chief Justice who has the powers to charge as per Regulation 25(2) of the Third Schedule of the Judicial Service Act; and that therefore, the foundation of the disciplinary process being premised on the charge that violated the Constitution means that it was not only unconstitutional but also null and void.
38. Counsel also submitted that Regulation No. 25 (4) of the Third Schedule was violated as the respondent was given one-day notice to travel overnight from Eldoret to Nairobi for hearing while the law stipulates that the notice should be of at least 14 days; that the respondent was denied the right to counsel; and neither was she notified of that right as required by Regulation 25(7) of the Third Schedule.
39. To further support his position, counsel referred us to the decision In the matter of Martin Wanderi & 106 Others vs. Engineers Registration Board & 10 Others (2018) eKLR where the Supreme Court opined that if the principle of legality is violated, then the Court cannot proceed to rule on the merits of the matter.
40. On the cross appeal, counsel submitted that the only thing the learned Judge erred in was to order a retrial of the case. In support thereof, counsel cited the case of Chief Justice and President of the Supreme Court of Kenya & another vs. Khaemba (supra) at paragraph 37, where it was held that once it was found by the trial Judge that the matter was a nullity, the court cannot revert to the 1st appellant for retrial.
41. Finally, it was submitted that the learned Judge erred in not granting damages once it was very clear that the respondent had been subjected to an unfair administrative action which negatively impacted on her dignity. We were thus urged to dismiss the appeal and allow the cross appeal.



42. In a brief response, counsel for the appellants submitted that the 2nd appellant did not usurp the powers of the Chief Justice since she is not vested with disciplinary powers; that she forwarded the complaint to the 1st appellant which under Article 172 (1)(c) of *the Constitution*, is vested with powers to receive complaints, investigate and remove from office or otherwise discipline magistrates amongst other judicial officers; and that by virtue of the 2nd appellant being the Secretary to the 1st appellant, she properly exercised her powers under Article 172 of *the Constitution* as the offices of the Chief Justice and the Deputy Chief Justice were vacant.
43. On the allegation that the respondent was called to the disciplinary hearing within one day and that she had to travel overnight, counsel submitted that from the report of the Board of the Disciplinary Committee, there was no one point at which the respondent complained that she was not accorded an opportunity to have a counsel or that she was called to the disciplinary hearing on short notice.
44. We have considered the Memorandum and the Record of Appeal, the written and oral submissions of both parties. As the first appellate court, we are under a duty to reanalyse and re-assess the evidence on record and reach our own conclusions on the issues for determination in the appeal.
45. Generally, we should also bear in mind that unlike the trial court, the appellate court does not have the benefit of seeing or hearing the witnesses testify and, therefore, must give allowance for that handicap. This position was restated by the predecessor of this Court in *Selle vs. Associated Motorboat Co.* (1968) EA 123. Furthermore, this Court is not bound to necessarily follow the trial judge's findings of fact if it appears that there was no evidence to support the findings of the trial court even if a judge does not give his reasons for his findings; the appellate court can arrive at its independent finding based on evidence on record as was held in *Alfarus Muli vs. Lucy M Lavuta & Another* (1997) eKLR.
46. Being alive to our mandate, on the main appeal, we find that the issue falling for our determination is whether the respondent was accorded a fair disciplinary process in light of the conduct of the 1st appellant and notification to her on the hearing. On cross appeal, we will determine the propriety of reinstatement to employment and terms thereof of the respondent and whether damages, if any, are awardable to her.
47. Counsel for the appellants submitted that since the 2nd appellant could not perform the disciplinary function, she forwarded the same to 1st appellant by dint of Article 172 of *the Constitution*.
48. There is no dispute that the respondent is a judicial officer and holds the designation of the rank of a Senior Principal Magistrate. The procedure laid down under the law for discipline of judicial officers is founded under the *Judicial Service Act*. Under section 32 (1), the 1st appellant shall constitute a Committee or Panel for the purposes of appointment, discipline and removal of judicial officers and staff. Section 32 (3) provides that in exercising its mandate, the Committee or Panel shall be guided by the provisions laid out in the Third Schedule of the Act.
49. Part V of the Act creates Regulations in the Third Schedule of the Act which, inter alia, governs the procedure for disciplining judicial officers and staff. Of interest to us, is the correct procedure to be followed prior to hearing of a disciplinary case. Regulation 25 (1) - (3) provides:
 1. Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing



should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves;

2. If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not;
3. If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of *the Constitution*, delegate its powers:

Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under *the Constitution*, they may be members of the Committee or Panel.

50. In considering the interpretation thereof of Regulation 25 (1) - (3), this Court in the case of Chief Justice and President of the Supreme Court of Kenya & another vs. Khaemba (supra) held as follows:

“A plain reading and interpretation of the provisions of paragraph 25 show four stages required to be undertaken by the Chief Justice in the dismissal proceedings against a judicial officer. First, an inquiry; second, institution of the disciplinary proceedings by way of framing and forwarding of the charge or charges and any accompanying statements to the judicial officer, three, an invitation and opportunity to the officer concerned to state his or her case; and four, if the officer fails to exculpate himself or herself, laying of the charges and response if any before the JSC for a decision as to whether the disciplinary proceedings should continue or not.”

51. We conclude, based on the foregoing, that under Regulation 25, only the Chief Justice has the powers to frame and forward a charge or charges to a judicial officer under investigation. Even if for argument’s sake it was to be said that the 1st appellant had the powers to prepare the charge, the 2nd appellant’s mandate in relation to his/her role in the 1st appellant is that she is the Secretary in accordance with Article 171 (3) of *the Constitution*.
52. We are unable to find the point of convergence of the appellants’ arguments on the limited role as the Secretary of the 1st appellant vis a vis writing the charge letter, under Regulation 25, to initiate disciplinary proceedings against a judicial officer. Therefore, the argument by the appellants that the 2nd appellant merely wrote the charge in her capacity as Secretary to the 1st appellant and on behalf of the 1st appellant cannot stand in law.
53. Flowing from above, we are not persuaded that Regulation 25 allows the 1st appellant to purport to act on behalf of the Chief Justice in his or her absence. We reject the argument that the 1st appellant had the capacity to act as a Chief Justice. We therefore agree with counsel for the respondent that in the circumstances of this case, the action of the appellants to write a charge and commence disciplinary proceedings against the respondent was ultra vires and a usurpation of the powers of the Chief Justice.
54. Secondly, Article 47 of *the Constitution* provides that every person is entitled to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. To give effect to Article 47 (3) of *the Constitution*, Parliament enacted the *Fair Administrative Action Act*. What is not disputed



is that the respondent was given a day's notice to attend the disciplinary hearing which took place on 25th January 2017.

55. Regulation 25 (4) of the Third Schedule states as follows:

The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.

56. The appellants have put a rather beguiling argument that the respondent did not complain of the short notice she was given as evidenced in the proceedings. The wordings of Regulations 25 (4) are put in mandatory terms by use of the word 'shall' which requires the Committee or Panel to give a notice of not less than 14 days. It mattered not whether the respondent would have complained or not, but the law compels a fourteen days' notice to be issued. Therefore, the action by the appellants is one to be frowned upon. Ultimately, it cannot be said that the respondent was given sufficient time to prepare for her defence, a cardinal right which is also underpinned under Article 50 (2)(c) of *the Constitution* on proper right of audience before the Committee.

57. Turning to the cross appeal, the respondent prayed for reinstatement to her rank of service as a Senior Principal Magistrate with full pay and all the accrued benefits since August 2016.

58. Learned counsel Mr. Okemwa confirmed that the respondent was reinstated in March 2020 but with half benefits. We have carefully considered the final orders issued by the learned Judge. He did not make an express order of reinstatement. Rather, he ordered that the respondent be deemed to have been on interdiction on half salary since 22nd August 2016, and he referred the issue to the 1st appellant with orders that fresh investigations do ensue and a decision be delivered within 60 days. It seems that the 1st appellant suo moto reinstated the respondent to the position she held save that she was still being given half salary.

59. It would be remiss of us not to make an observation made by this Court in *Judicial Service Commission & another vs. Njora (Civil Appeal 486 of 2019) (2021) KECA 366 (KLR) (7 May 2021) (Judgment)* where Kiage, JA. rendered himself as follows:

“The question that I must grapple with is whether it is permissible that a public body that is subject to *the Constitution* and its statute, and which has been found to have been in breach of law and to have acted unlawfully, irrationally and disproportionately in dismissing an employee, can escape an order of reinstatement. I think that were courts to accept such a position, they would be aiding in the entrenchment of a culture of lawlessness and impunity by such bodies, which would consider themselves safe from a reversal of their actions, notwithstanding that they were irrational, unjustified and in violation of the duty to act fairly. I reiterate the position taken by this court in *Stephen S. Pareno vs. Judicial Service Commission of Kenya [2014] eKLR* that once a dismissal decision involving a state officer is adjudicated unlawful null and void, reinstatement is an automatic remedy.” (emphasis added)

60. We take the view that the appellants did very well to reinstate the respondent. However, there having been an outright flaw on the procedure used to terminate her (the respondent), it was only proper that reinstatement was done with full pay and benefits. As for the award of general, exemplary and punitive damages, the respondent did not make a case for it. In any event, she will eventually be paid the other withheld half of her salary even and including the period of 4 years when she was not at work. No doubt this will be adequate compensation for damages.



61. Ultimately, the following are the final orders of this Court:
- a. The appeal is dismissed with costs to the respondent.
 - b. The cross appeal partially succeeds with half costs to the respondent.
 - c. The respondent is hereby deemed to be reinstated to her position of Senior Principal Magistrate with accrued salary and benefits from the date of interdiction, which is 22nd August 2016.
 - d. The 1st appellant may commence disciplinary proceedings if it so wishes.
62. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

S. GATEMBU KAIRU, FCIArb

.....
JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

G. W. NGENYE–MACHARIA

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

