



REPUBLIC OF KENYA



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**Judicial Service Commission v Ndururi (Civil Appeal 650 of 2019)
[2021] KECA 365 (KLR) (5 March 2021) (Judgment)**

Judicial Service Commission v Joseph Riitho Ndururi [2021] eKLR

Neutral citation: [2021] KECA 365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 650 OF 2019
W KARANJA, SG KAIRU & AK MURGOR, JJA
MARCH 5, 2021**

BETWEEN

JUDICIAL SERVICE COMMISSION APPELLANT

AND

JOSEPH RIITHO NDURURI RESPONDENT

(Being an Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Radido, J.) delivered on 22nd November 2019 ELRC Petition No. 92 of 2019)

The running of a bar by a judicial officer is not in itself evidence of gross misconduct and conflict of interest

Reported by Beryl Ikamari

Labour Law - employment - unfair or unlawful termination of an employment contract - gross misconduct and conflict of interest - whether the running of a bar by a judicial officer was proof of gross misconduct or a conflict of interest warranting dismissal from employment.

Labour Law - employment - remedies for unfair termination of an employment contract - reinstatement - what were the circumstances under which reinstatement would be an appropriate remedy?

Jurisdiction - jurisdiction of the Judicial Service Commission (JSC) - jurisdiction to consider allegations raised against magistrates - where the Judges and Magistrates Vetting Board had not determined the dispute on merits - whether the JSC had jurisdiction to consider complaints about events arising in the year 2006 where the complaints related to the conduct of a judicial officer.

Constitutional Law - constitutionality of statutes - constitutionality of regulation 23 of the Third Schedule to the Judicial Service Act - where the constitutionality of regulation 23 of the Third Schedule to the Judicial Service Act was challenged on the basis that it had the effect of restricting the rights of a judicial officer facing disciplinary action to the minutes, reports and recorded reasons for a judicial officer's dismissal from employment - whether the



claim on the unconstitutionality of statutory provisions was proved- Judicial Service Act, No 1 of 2011, regulation 23 of the Sixth Schedule; Constitution of Kenya, 2010, articles 2(4), 10(2)(a), 35, 47(2), 232(e) and 232(f).

Constitutional Law - institution of suits - parties to a suit - where the suit was a petition challenging the constitutionality of a statute - whether the Attorney General and Parliament were necessary parties to a claim on the constitutionality of statutes - effect of non-joinder of the Attorney General and Parliament in such a claim.

Brief facts

The respondent joined the Judiciary in 2004 and had risen to the rank of Principal Magistrate when he was terminated. Pursuant to section 23 of the Sixth Schedule to the Constitution of Kenya, 2010 (Constitution), all judges and magistrates serving in the Judiciary at the time of the promulgation of the Constitution, were to undergo a vetting process to determine their suitability to continue serving in the Judiciary. The Vetting of Judges and Magistrates Act (Vetting Act) was passed into law to give effect to section 23 of the Sixth Schedule in accordance with the requirements of article 262 of the Constitution. The respondent appeared before the Vetting Board established under the Act and he responded to allegations of gross misconduct. The Vetting Board found him unsuitable to continue serving in office.

The respondent applied for a review of the Vetting Board's decision on various grounds including lack of jurisdiction to hear the matter as the Board's jurisdiction lapsed on March 28, 2013, errors apparent on the face of the record and discovery of new and important matters after the making of the Vetting Board's determination. The Vetting Board allowed only one ground for review which was the discovery of new and important matters and dismissed the rest. On grounds that it lacked jurisdiction, the Vetting Board referred the matter to the Judicial Service Commission (the appellant) on June 29, 2016. The appellant received complaints against the respondent and restarted a disciplinary process under the Judicial Service Act.

While the disciplinary process was pending before the appellant, the Chief Justice placed the respondent on interdiction on August 21, 2017. After being given an opportunity to defend himself before the appellant's Human Resource Committee, the respondent was dismissed from service. The reason for his dismissal was that the respondent had improperly and grossly misconducted himself by running a bar against the principle of impropriety contrary to articles 172(1)(a)(iv) and 75 of the Constitution.

The respondent lodged a claim before the Employment and Labour Relations Court. He explained that the charges leveled against him (running a bar) were about events occurring on or about the year 2006, and they were within the jurisdiction of the Vetting Board but not the appellant, as envisaged under the Constitution. He added that the appellant did not have the constitutional mandate to act retrospectively. Further, he stated that the disciplinary process which took 19 months violated his rights to fair administrative action and fair labour practices. He also claimed that he was not furnished with copies of the reports/ proceedings of the processes in breach of his right of access to information. Ultimately, the court found that although there were valid reasons for the respondent's dismissal, it was not fair because no evidence was adduced to demonstrate any inherent conflict of interest in the respondent running a bar.

On various grounds, the appellant lodged an appeal against the decision and the respondent filed a cross-appeal. The cross-appeal was premised on various grounds including the respondent's contention that the trial court should have granted the remedy of reinstatement which was the most appropriate remedy. The respondent also contended that the trial court failed to consider his allegations about violations of his constitutional rights and to compensate him for the violations.

Issues

- i. Whether the dismissal of a judicial officer (Principal Magistrate) from employment, on basis of allegations of gross misconduct and conflict of interest arising from running a bar, was fair.
- ii. Whether the Judicial Service Commission had jurisdiction to entertain a matter arising in the year 2006 where the Judges and Magistrates Vetting Board had not determined the matter on merits?
- iii. Whether regulation 23 of the Third Schedule of the Judicial Service Act was unconstitutional as it restricted a judicial officer's rights to the minutes, reports and recorded reasons for dismissal.



- iv. When would the remedy of reinstatement be appropriate in a claim of unfair dismissal from employment?

Held

1. The appellant had the burden of proving that the running of a bar by the respondent undermined the respondent's judicial office and the Judiciary as a whole. An allegation that the running of a bar amounted to impropriety was insufficient. Evidence had to be adduced to prove the impropriety.
2. From the material on record, the district heads based in Busia were the patrons of the bar. The bar was not open to members of the public. There was no iota of evidence or even a suggestion that the respondent used to serve litigants or other persons of dubious character in that facility.
3. The appellant failed to demonstrate any impropriety or appearance of impropriety on the part of the respondent supervising the running of a bar that was exclusively patronized by other senior civil servants in the area. Additionally, any conflict of interest arising from running the bar was not demonstrated.
4. The Judicial Service Code of Conduct and Ethics 2020, which came into force almost fourteen years after the alleged misconduct was committed could not be applied retroactively to condemn the respondent. The appellant ought to have availed the code of conduct if any, that was applicable in 2006 and used it as the criteria to determine if indeed the conduct complained of was proscribed or not. There was no evidence of any valid reasons for the respondent's dismissal.
5. An explanation was offered as to why it took 19 months to complete the respondent's disciplinary process and therefore the process did not take too long or compromise the respondent's right to fair administrative action.
6. The allegation that regulation 23 of the Third Schedule to the Judicial Service Act ought to have been declared unconstitutional by the trial court required the respondent to join the Attorney General and Parliament as parties. Furthermore, the respondent did not prove the alleged unconstitutionality to the satisfaction of the court.
7. The respondent did not provide proof that would lay a basis for compensation for violation of constitutional rights. The trial court did not err in not awarding the respondent damages for breach of his constitutional rights.
8. The complaint about running a bar had not been determined on merit by the Vetting Board and for that reason, it was referred by the Board to the appellant. The appellant had jurisdiction to deal with any disciplinary issues that were left hanging by the Board. The appellant was also not constrained to only deal with complaints arising after its reconstitution under the Constitution of Kenya 2010.
9. Section 49(4) of the Employment and Labour Relations Act obligated a court before ordering reinstatement to consider;
 1. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination;
 2. the practicability of recommending reinstatement or re-engagement;
 3. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 4. the opportunities available to the employee for securing comparable or suitable employment with another employer;
 5. any conduct of the employee which to any extent caused or contributed to the termination;
 6. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.
10. The respondent was dismissed from service on March 27, 2019 and it could not be said that, at the time the trial court made its judgment, the respondent had been out of service for long. It was also not shown that the appellant's and respondent's relationship was strained. The trial court ought to have considered reinstatement or given reasons as to why reinstatement was not a suitable remedy.



Appeal dismissed; cross-appeal partly allowed.

Orders

- i. *Orders of compensation of 10 months' salary granted by the Employment and Labour Relations Court were substituted with an order that the respondent be reinstated with immediate effect to the office of Principal Magistrate without loss of back pay salary and or benefits.*
- ii. *Costs of the appeal and cross-appeal were awarded to the respondent in the appeal and the appellant in the cross-appeal.*

Citations

Cases

Kenya

1. *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) Civil Appeal 239 of 2018; [2018] KECA 330 (KLR) - (Explained)*
2. *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)*
3. *Hassan, Sumayya Athmani v Paul Masinde Simidi & another Civil Appeal 195 of 2016; [2019] KECA 107 (KLR) - (Explained)*
4. *JRN v Judicial Service Commission Petition 92 of 2019; [2019] KEELRC 279 (KLR) - (Mentioned)*
5. *Judges and Magistrates Vetting Board v Kenya Magistrates and Judges Association & another Petition 29 of 2014; [2014] KESC 4 (KLR) - (Explained)*
6. *Judicial Service Commission v Sheikh Abubakar Bwanakai & Attorney General Civil Appeal 39 of 2018; [2019] KECA 890 (KLR) - (Mentioned)*
7. *Kenya Airways Limited v Alex Wainaina Mbug Civil Appeal 107 of 2018; [2019] KECA 697 (KLR) - (Explained)*
8. *Keroche Industries Limited v Kenya Revenue Authority & 5 others Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR); [2007] KLR 240 - (Explained)*
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)*
10. *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others Petition 278 of 2011; [2013] KEHC 6054 (KLR); [2013] 2 KLR 672 - (Explained)*
11. *Postal Corporation of Kenya v Andrew K. Tanui Civil Appeal 127 of 2015; [2019] KECA 489 (KLR) - (Mentioned)*
12. *Rai & 3 others v Rai & 5 others Petition 4 of 2012; [2013] KESC 21 (KLR); [2013] 3 KLR 685 - (Mentioned)*
13. *Ruto, Simon Rotich v Judicial Service Commission & another Petition 48 of 2019; [2019] KEELRC 523 (KLR) - (Explained)*
14. *Shollei v Judicial Service Commission & another Petition 34 of 2014; [2022] KESC 5 (KLR) - (Mentioned)*
15. *Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union Civil Application 4 of 2017; [2017] KECA 745 (KLR) - (Mentioned)*

South Africa

Wadeville v Khoza [1998] ZALAC 24 - (Explained)

United Kingdom

Watt or Thomas v Thomas [1947] 1 All ER 582; [1947] AC 484 - (Applied)

India

Sadhna Chaudhary v State of Uttar Pradesh & another Civil Appeal No 2077 of 2020 - (Mentioned)

United States



1. *In re Johnstone* 2 P 3d 1226 (Alaska 2000) - (Mentioned)
2. *Matter of Re Larsen* 616 A 2d 529 (Pa 1992) - (Mentioned)

New Zealand

New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School [1994] 2 ERNZ 414 - (Followed)

Regional Court

1. *Peters v Sunday Post Ltd* [1958] EA 424 - (Explained)
2. *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 2(1)(2)(4); 10(2)(a); 23(3)(a)(e); 24; 27(1); 35; 41; 47(2); 73(1)(a)(iv); 75; 76; 159; 160; 161(2)(a); 167; 168; 171; 172(1)(c)(a)(iv); 232(e)(f); 236(b)(e)(f); 252(1); 262; section 23; Schedule 6- (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 29(1) - (Interpreted)
3. Employment Act (cap 226) section 49(4) - (Interpreted)
4. Employment and Labour Relations Court Act (cap 8E) section 12(3) - (Interpreted)
5. Evidence Act (cap 80) section 107 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) section 4(4)(3)(f)(g) - (Interpreted)
7. Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A Sub Leg) regulation 23, 25(1); 40(1) - (Interpreted)
8. Judicial Service Act (cap 8A) part IV; Schedule Third - (Interpreted)
9. Vetting of Judges and Magistrates Act, 2011 (Act No 2 of 2011) section 23(2)(5)(a) - (Interpreted)

Advocates

Mr Issa Mansur and Ms Kwamboka for the appellant

Mr Okemwa for the respondent

JUDGMENT

1. The Judicial Service Commission (the appellant), hereafter referred to as JSC is one of the independent Commissions created under the *Constitution of Kenya 2010*, more specifically under article 171 of the *Constitution*. Among its functions as set out under article 172(1)C is to investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament. That Act of Parliament is the *Judicial Service Act* (JSA), which we shall be referring to severally in this judgment.
2. Hon Joseph Riitho Ndururi (the respondent) joined the judiciary in 2004 at the lowest rung of the magistracy ladder on permanent and pensionable terms of service. Like most young judicial officers he must have harboured aspirations to rise to the pinnacle of the Judiciary pyramid one day. In this journey, he was posted to serve in several parts of this great Nation including Busia, Kehancha, Kericho and Oyugis where he served until his dismissal.

As at the time of his termination, he had risen to the position of Principal Magistrate with a gross salary of Kshs 379, 720.00.



3. The Constitution 2010 brought with it what was believed to be the peoples' desire to clean up the Judiciary as it was then, hence the inclusion of section 23 of the sixth schedule in the Constitution. This section provided as follows:-

“ 23

- (1) Within one year after the effective date Parliament shall enact legislation which shall operate despite articles 160, 167, 168, establishing a mechanism and procedure for vetting within a timeline to be determined by the legislature, the suitability of Judges and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in article 10 and 159.
- (2). A removal or process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question, in, or review by any court.”

To give effect to section 23, and in accordance with the requirements of article 262 of the Constitution, Parliament passed into law the Vetting of Judges and Magistrates Act, No 2 of 2011 (the Vetting Act) and therein established a framework for the vetting of Judges and magistrates. Section 3, of the Vetting Act provided that:-

“ The object and purpose of the Act is to establish mechanisms and procedures for the vetting of judges and magistrates pursuant to the requirements of section 23 of the sixth schedule to the Constitution”.

Section 4 specifies that the Act will only apply to persons serving as judges and magistrates who were in office on or before the effective date. Section 6 of the Act established an independent Board to be known as the Vetting of Judges and Magistrates Board (“the Vetting Board”). Section 13 provided for the functions of the Vetting Board which were, *inter alia*:-

“ To vet judges and magistrates in accordance with the provisions of the Constitution and this Act.

The respondent, like all magistrates serving at the time the Constitution of Kenya 2010 came into force was subjected to the said process. He appeared before the Vetting Board which made inquiries into complaints levelled against him on grounds of gross misconduct. Ultimately, after considering the complaints against the respondent and the respondent's response thereto, the Board vide a letter dated December 19, 2013, gave its determination that it had found him unsuitable to continue serving as a magistrate.

4. Dissatisfied, the respondent sought a review against the Board's decision on grounds that: the Board's decision was unlawful as its jurisdiction over his matter lapsed on March 28, 2013; there were errors apparent on the face of the record and; there was discovery of new and important matters which emerged after the Board's determination.
5. Ultimately, on January 22, 2015 the Board dismissed the first two grounds and allowed the review after considering the new and important matters brought to its attention which were not available prior to the initial hearing.



6. Subsequently, on June 29, 2016, the Board referred the matter to the appellant citing its lack of jurisdiction. The appellant received the complaints and restarted the disciplinary process as mandated under the JSA vide a letter dated August 9, 2016 the appellant's Secretary informed the respondent as much and sought his response to the said complaints. On June 23, 2017 the Chief Justice highlighting 6 charges levelled against the respondent formally notified him to show cause within 21 days of the notice.
7. The respondent tendered his response on July 3, 2017 and July 11, 2017, but while awaiting final decision by the appellant, the Chief Justice placed the respondent on interdiction on August, 21st 2017. Almost one year later, on July 24, 2018 and December, 10th 2018, the respondent appeared before the respondent's Human Resource Committee for an oral hearing, where he was supposed to defend himself.
8. On March, 27th 2019, the appellant's Secretary informed the respondent of his dismissal from service in exercise of its mandate under article 172(1)(c) of the Constitution and regulation 25(11), Part IV third schedule of the Judicial Service Act. The reason cited for the dismissal was that the respondent had improperly and grossly misconducted himself by running a bar against the principle of impropriety contrary to article 172(1)(a)(iv) and article 75 of the Constitution.
9. Aggrieved, the respondent filed a constitutional petition at the Employment and Labour Relations Court ("ELRC") at Nairobi. As appears in the petition and supporting affidavit, it was the respondent's case that the charge leading to his dismissal read as follows:

"That while serving in Busia Law Courts (on or about July 19, 2006) you allegedly failed to observe the principles in relation to your private business by operating a personal business in form of a bar contrary to the Judicial Service Code of Conduct."
10. It was his case that since the charges levelled against him related to events on or about sometime in 2006, the same were within the jurisdiction of the Board and not the appellant since the appellant's powers and obligations as envisaged in the Constitution were to be effective from August 27, 2010. Further, that the appellant had no Constitutional and Legal mandate to act retrospectively and therefore, the Chief Justice had no jurisdiction to charge him and any such charge violated the principle of the rule of law and hence, it was illegal. It was also deponed that there was no evidence adduced warranting his dismissal from service.
11. In addition, that the reasons for his dismissal were unreasonable and flawed in law as they alleged a violation of article 75 and article 172 of the Constitution, 2010, which were not applicable to events which occurred in 2006. Further, that article 172(1)(a)(iv) as cited was a fictitious provision.
12. It was averred that he was never served with the particulars of his alleged breach of the Constitution and Judicial Service Act and Code of Conduct to enable him to adequately respond. Further, that during the disciplinary process and resultant dismissal, the respondent did not conduct any preliminary investigations contrary to the dictates of its policies. That the disciplinary hearing process violated his right to fair administrative action and fair labour practices as it took over 19 months to conclude. He also challenged the process on the basis that despite his request, he was never furnished with copies of the reports/ proceedings of the processes in breach of his right of access to information as provided for under article 35 of the Constitution.
13. The appellant opposed the petition vide a replying affidavit sworn by its secretary, Anne Amadi. It was conceded that the issue of the respondent running a bar was not a main charge levelled against him but came up during the disciplinary hearing process before the Board. Further, that during review of



- its decision, the Board did not clear the respondent of the issue but noted that it lacked jurisdiction to address the same hence referring the issue to the appellant. Therefore, that the appellant acted well within the law in dealing with the same as it was not dealt with by the Board.
14. It was deposed that the Chief Justice framed the charges levelled against the respondent and he was afforded an opportunity to respond both in writing and orally whereupon he admitted to running a bar.
 15. It was deposed that article 172(1)(a)(iv) as cited by the appellant was a typographical error which ought not to affect the substance of its decision to dismiss the respondent; that the intention of the appellant was to cite article 73(1)(a)(iv).
 16. On the issue of access to information, it was averred that the respondent only made his request for the alleged documents after his dismissal and that the same were availed on June 14th, 2019.
 17. Upon considering the matter before the court, the learned judge made findings that: the 19 months' period it took to determine the respondent's case was not inordinate or in violation of his right to fair administrative action or to fair labour practices; the appellant could not be said to have lacked jurisdiction to hear a matter that the Board declined to hear on merit because it itself lacked jurisdiction; the respondent did not prove that his right to access to information was violated because despite the constitutional provisions for transparency and accountability in public affairs, the same is not an open license or permission for an open government (not clear). Further, that public affairs cannot be run in public all the time hence restrictions in various pieces of legislation and; the dismissal of the respondent may have been for valid reasons but was not fair as there was no evidence adduced to demonstrate any inherent conflict of interest in the respondent running a bar.
 18. Ultimately, in a judgment dated and delivered on November 22, 2019 the learned judge, Radido, J, found in favour of the respondent declaring that his dismissal was unfair hence granting him compensation equivalent to 10 months' salary and costs against the appellant.
 19. The appellant has now proffered this appeal raising five (5) grounds of appeal being that the learned judge: misapprehended and misapplied regulation 3(5) of the Judicial Service Code of Conduct and Ethics which placed a duty on the respondent to avoid both impropriety and appearance of impropriety hence arriving at a wrong decision; erred and misdirected himself in law in holding that the appellant had not demonstrated that there was impropriety on the part of the respondent in running a bar while serving as a magistrate in Busia; erred and misdirected himself in law in awarding the respondent the sum of Kshs 3, 797,200.00 as compensation for unfair termination and; erred in law in holding that the appellant was unfair in imposing a sanction provided for under the third schedule, part IV, paragraph 19(1)(a) of the *Judicial Service Act*.
 20. The respondent also filed a cross-appeal premised on 7 grounds that the learned judge erred: in not issuing a remedy for reinstatement which was the most appropriate; in law and fact in not giving reasons why the remedy of reinstatement was not granted despite being pleaded; in law and fact in finding that the respondent's dismissal was for valid reasons; by failing to determine the violation of the constitution under article 2(1)(2)(4), article 10(2)(a) and article 236(b) and award damages for such constitutional violations as prayed for; in law and fact in holding that the 19 months' period it took the appellant to determine the matter before it was not inordinate and not in violation of his right to fair administrative action or to fair labour practices; in law and fact in considering that the appellant had jurisdiction in regard to the matter before it and; in law and fact in failing to find and declare that regulation 23 of the 3rd Schedule of the *Judicial Service Act* was unconstitutional and *ultra vires*, null and void for being in contravention of article 2(4), 10(2)(a), 35, 47(2), 232(e) & (f) of the *Constitution* as it restricted a judicial officer's right to the minutes, reports or the recorded reasons for his dismissal.



21. Urging the court to allow the appeal, counsel for the appellant citing article 172(1)(c) and section 32 as read together with regulation 23 of the third schedule of the *Judicial Service Act*, submitted that the appellant had jurisdiction to address the issue of misconduct levelled against the respondent before the effective date. He maintained that section 23(5)(a) of the *Vetting Act* permitted the Board to forward complaints against the respondent to the appellant for its consideration. Therefore, that the appellant had a duty to determine whether the said complaints met the threshold to commence disciplinary proceedings and issue the respondent with a notice to show cause.
22. Counsel contended that the trial judge was right to find that the Board's decision to review its decision in favour of the appellant was not on merit but was purely based on lack of jurisdiction.
23. Placing reliance on article 73(1)(a)(iv) and article 75 of the *Constitution* and regulation 12(3) and regulation 3(5) of the Judicial Service Code of Conduct and Ethics counsel submitted that a duty is placed on a state officer to exercise their authority with propriety. (See: Pennsylvania Supreme Court case of *Matter of Re Larsen* 616 A 2d 529 (pa 1992) and The Alaska Supreme Court case of *Re Johnstone* 999 P 2d 138 Alaska (2000)).
24. He submitted that it was on the respondent's own admission of running a bar that the appellant's Human Resource & Administration Committee objectively determined that the respondent's actions demeaned the dignity of the office he occupied, was in conflict with his public duty and created an appearance of impropriety in the reasonable man's mind. He maintained that even if such impropriety was not demonstrated, a demonstration of the appearance of impropriety was enough to challenge one's conduct.
25. Counsel urged that the learned judge erred in determining that the appellant's reasons for terminating the respondent's term of service may have been for valid reasons, but that the dismissal was unfair. Citing the Labour Appeal Court of South Africa in *Nampak Corrugated Wadeville v Khosa* JA 14/98, he submitted that the decision to sanction was at the discretion of an employer; that it was a court's duty to determine whether in the circumstances of the case, the sanction was reasonable and not whether the court would have imposed a different sanction.
26. Submitting against the cross-appeal, counsel argued that reinstatement like any other remedy is a discretionary remedy. Therefore, that the learned judge properly exercised his discretion to decline to award the same to the respondent.
27. He contended that the learned judge erred in awarding a sum of Kshs 3,792,200.00 which was to be paid by the appellant from public funds. He maintained that the most suitable remedy would have been to remit the matter back to the appellant for reconsideration.
28. Counsel argued that the respondent's contention that regulation 23 of the third schedule of the Judicial Service Act is unconstitutional, lacks merit and is based on a misapprehension of the law regarding limitation of rights and freedoms as provided for under article 24 of the *Constitution*.
29. He maintained that the right of access to information as envisaged under article 35 of the Constitution is not absolute and is subject to limitation as provided for under section 6(h) and (i) of the Access to Information Act. (See: *Judicial Service Commission v Sheikh Abubakar Bwanakai & Another* [2019] eKLR, Hon *JRN v Judicial Service Commission* [2019] eKLR).
30. Relying on *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR counsel submitted that contrary to the respondent's allegation that the learned Judge erred by failing to determine the violations of article 2, article 10(2)(a), 27, 41, 47 and article 236(b), the learned judge correctly determined the suit as an employment claim alleging unfair and



- unlawful termination. Further, that the respondent did not establish a violation of the said provisions. (See: *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR)
31. Opposing the appeal, counsel for the respondent, citing *Judges & Magistrates Vetting Board & Attorney General v Kenya Magistrates & Judges Association* [2014] eKLR submitted that the charges levelled against the respondent related to a period before the tenure of the 2010 *Constitution* hence falling within the pre-effective date of the *Judicial Service Act*. Further that this defeated the transitional nature of the process as those were matters that squarely fell within the Board's jurisdiction therefore it cannot be said that the Board failed to deal with the respondent's conduct of running a bar on the basis of lack of jurisdiction.
 32. He maintained that the appellant dealing with a matter already concluded by the Board amounted to double jeopardy. He argued that the charge relating to the respondent's conduct of running a bar was not before the Board but was only raised by the appellant as an afterthought.
 33. Counsel contended that the appellant's submission that the Board reviewed its determination wholly on the basis of jurisdictional challenges and not merit was unfounded. Further, that the Board was satisfied that there were no pre-effective date issues before it to warrant a finding of unsuitability of the respondent for office, therefore, this was a merit-based decision.
 34. Relying on the case of *Judicial Service Commission v Sheikh Abubakar Bwanakai & another* [2019] eKLR counsel submitted that where an issue of wrongful termination arises, a court looks not only at the validity and justifiability of the reasons for termination, but also interrogates the procedural fairness. Further, that the appellant's jurisdiction to discipline a magistrate as derived from the *Constitution* and statute is not inherent and absolute but must be strictly confined and constrained by the Constitution and statute. (See: *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Nairobi HCMA No 743 of 2006; [2007] KLR 240).
 35. Relying on regulation 25(1) of the third schedule of the *Judicial Service Act*, and article 161(2)(a) and article 252(1) of the *Constitution*, counsel submitted that the Chief Justice had a duty to carry out an investigation before charging the appellant. Further, that the appellant was also in breach of its policy of only receiving charges already investigated by the Chief Justice before the same is forwarded to the appellant. He maintained that there was no evidence that this policy was followed.
 36. Citing *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* Nairobi Civil Appeal No 239 of 2017, counsel contended that the respondent did not understand the charge against him as the particulars of the same were not supplied and evidence of the same was not supplied. That the Chief Justice ought not to have just listed down the charges against the respondent and served him with a letter to show cause but should have adduced documentary evidence and called evidence to be supplied before the disciplinary hearing in showing the truthfulness off the allegations. (See: *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR)
 37. Counsel contended that the appellant was in contravention of regulation 25(5) of the third schedule of the Judicial Service Act and section 4(4)(3)(f)(g) of the *Fair Administrative Action Act* by failing to produce evidence of the investigation conducted by the Chief Justice and adducing the same during the disciplinary hearing proceedings. He maintained that the appellant's Human Resource Committee is a quasi-judicial authority with strict rules of procedure and rules of production and furnishing of evidence just like a court of law.
 38. He posited that the Chief Justice violated article 75 and 76 of the Constitution by introducing a charge which was not before the Board. Further, that in breach of article 73 and 75 of the Constitution, the appellant purported to apply the provisions of the *Constitution* and *Judicial Service Act* retrospectively



- which was an unlawful application of the law. (See: [Samuel Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR)
39. Counsel further submitted that there is no clear and convincing evidence that the respondent's actions resulted in a conflict of interest that undermined confidence in the integrity and impartiality of the Judiciary. He maintained that there ought to have been a nexus between the omission and/or commission alleged and evidence of the wrong alleged. (See: [Gladys Boss Shollei v Judicial Service Commission & another](#) [2018] eKLR and [Jasbir Singh Rai & 3 others Tarlochan Singh Rai & 4 others](#) [2013] eKLR). Further that mere suspicion cannot constitute judicial misconduct; it needs to be supported with oral or documentary evidence. (See: [Sadbna Chaudhary v State of Uttar Pradesh & another](#) Civil Appeal No 2077 of 2020 arising out of Special Leave Petition (C) No 8550 of 2019)
 40. In conclusion he urged the court to dismiss the appeal.
 41. In support of the cross-appeal, counsel submitted that the respondent sought the remedy of reinstatement as a public law remedy whereby quashing the decision of a public authority to dismiss one from employment meant that employment is restored. He maintained that the learned judge did not give reasons as to why reinstatement was not a suitable remedy.
 42. Counsel argued that the learned judge erred by failing to pronounce himself on the uncontested violation of article 10, 27(1), 41, 47 and 236 although the same was pleaded. Further, that the learned judge erred by not framing an appropriate relief under article 23(3)(a)(e) i.e. to quash the proceedings and award compensation. He argued that since the trial court failed to address these violations, this court ought to make a determination on the issue. He urged this court to find in his favour and award him Kshs 5,000,000.
 43. He contended that the learned judge erred in finding that the period of the disciplinary process was not inordinate. He maintained that article 47 of the [Constitution](#) required expeditious, effective, lawful, reasonable and procedurally fair administrative action. Further, that the respondent was an individual with fundamental rights and freedoms which can only be limited by permissible extent of the law.
 44. Counsel submitted that regulation 23 of the third schedule of the [Judicial Service Act](#) is unconstitutional as it shields the appellant from accountability and promotes an abuse of state power. He maintained that the appellant has the burden to prove to the court how reasonable and justifiable it is for any of its policies consistent with the said provision to limit one's right to access to information i.e. reasons based on the harm or public interest considerations. (See: [Nairobi Law Monthly Limited v Kenya Electricity Generating Company & 2 others](#) Nairobi High Court Petition No 278 of 2011). He urged this court to be guided by the Supreme Court decision in [Simon Rotich Ruto v Judicial Service Commission & another](#) [2019] eKLR where regulation 23 of the third schedule of the Judicial Service Act was declared unconstitutional.
 45. When the appeal came up for plenary hearing before us learned counsel Mr Issa Mansur assisted by Ms Kwamboka appeared for the appellant while Mr Okemwa appeared for the respondent. They adopted the submissions as summarised above and made few highlights which we have also captured in our summary.
 46. This being a first appeal this court's duty, as set out in rule 29(1) of this court's rules, is to reappraise the evidence and to draw its own conclusions on the facts emerging from the evidence. In [Peters v Sunday](#)



Post Limited [1958] EA 424, the predecessor of this court pronounced itself as follows with regard to the mandate of this court on a first appeal: -

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.” Watt v Thomas, [1947] 1 All ER 582; [1947] AC 984, applied. See also Selle v Associated Motor Boat Company Ltd, [1968] EA 123

47. Having carefully perused the record of appeal, the rival submissions made by learned counsel for the respective parties and the authorities in support, it is apparent that the issues falling for this court’s determination are as follows:
- i. Whether the respondent’s dismissal was unfair and/or unlawful.
 - ii. Whether the appellant had jurisdiction to hear the matter before it.
 - iii. Whether regulation 23 of the 3rd schedule to the Judicial Service Act is unconstitutional.
 - iv. Whether the learned judge erred in failing to grant a remedy of reinstatement in favour of the respondent.
48. On the first issue, the appellant in its appeal faulted the learned judge for misapprehending the provisions of the Judicial Service Code of Conduct & Ethics in determining that the reason for dismissal ie that running a bar, did not amount to impropriety or an appearance of impropriety, hence warranting dismissal.
49. It is common ground that the respondent admitted to running a bar, Mumias Civil Servants Club. What is in contention is whether the running of a bar per se amounts to impropriety. It was also necessary for the court to apply the specific circumstances of this case before arriving at its conclusion as to whether the respondent’s conduct amounted to impropriety.
50. In his judgment, the learned judge pronounced himself thus on this issue:
- “78. The respondent did not place before the court any evidence or material to demonstrate any inherent conflict of interest in the petitioner running a bar.
 79. Judicial officers, just like other citizens are guaranteed several rights by the Supreme Law. The running and or operation of a bar of a judicial officer by itself does not violate any norm or conduct.
 80. However, the judicial office is not like any other office. Judicial officers are expected to maintain/ act in both private and public life with propriety. Propriety is a value. Determining where the contours of a value lie is not easy. Objectivity may be difficult to discern.
 83. There is no suggestion or attempt to demonstrate that there was any impropriety or apprehended conflict of interest on the part of the petitioner in running the bar in Busia. Could the decision have been different if the petitioner was running or managing a 3 or 4-star bar or hotel? That rhetorical question is best left to speculation.



84. The respondent had other sanctions or penalties it could have imposed if it objectively found there was a breach of the Code of Conduct.
85. This dismissal of the petitioner, in the view of the court, may have been for valid reasons, but it was not fair.”

51. The [Judicial Service \(Code of Conduct and Ethics\) Regulations, 2020](#) provided as follows on impropriety: -

40.

- (1) A judicial officer shall avoid impropriety, or appearance of impropriety and shall —
 - (a) not subject himself or herself to improper influences;
 - (b) not participate in activities as tend to impair the dignity and esteem of the court;
 - (c) ensure order and decorum in proceedings before the court;
 - (d) act courteously, and respect the dignity of others in court and in chambers;
 - (e) treat members of the public, staff and other public officers with courtesy and respect;
 - (f) not lend the prestige of the judicial office to the advancement of private interests;
 - (g) not engage in any type of trade or business in court premises or encourage others to do so; and
 - (h) not serve as executor, administrator or other personal representative, trustee, guardian or other fiduciary engagement, except for the estate, trust, or person within the judicial officer’s family, and only if the service does not compromise the proper performance of judicial duties.
- (2) A judicial officer may be involved in extra-judicial activities, such as those relating to their rights as citizens, unless such activities are incompatible with the principles of, impartiality or independence of the judicial officer, or affect or may be perceived to affect the judicial officer’s availability for the discharge of his or her judicial obligations.
- (3) A judicial officer shall conduct his or her private affairs in such a manner as that maintains public confidence in the integrity of the office.

52. A basic rule of evidence is that ‘he who alleges must prove.’ This burden of proof rule is captured by section 107 of the [Evidence Act](#), cap 80 thus:-

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



53. Therefore, it was upon the appellant to prove that the appellant's action of running a bar at Mumias Civil Servants Club undermined the respondent's judicial office and the Judiciary as a whole. The mere allegation that the running of a bar amounted to impropriety was insufficient; there had to be evidence adduced to prove such impropriety. The learned judge after considering all the material placed before him arrived at the conclusion that the appellant had failed

“to demonstrate that there was any impropriety or apprehended conflict of interest on the part of the respondent in running the bar in Busia”

54. In our duty to re-assess the evidence adduced before the trial court, we have noted that indeed the bar the respondent is accused of running was a “Public Service bar” which is a common phenomenon in many districts outside Nairobi where heads of Departments or ‘District Heads’ of all the Government ministries represented in the district would converge and relax over a cup of tea or other beverages after a hard day's work. From the material on record, the district heads based in Busia were the patrons of the said club. This was not a bar open to members of the public. It was not a bar where the respondent would serve impressionable members of public or litigants. There was no iota of evidence, or even a suggestion that the respondent used to serve litigants or other persons of dubious character in that facility.

55. We are in agreement with the learned judge's finding that the appellant failed to demonstrate any impropriety or appearance of impropriety on the part of the respondent supervising the running of a bar which was exclusively patronised by other senior civil servants in the area. We would like to observe that the term “impropriety” or “appearance of impropriety” is very broad and when put to a subjective test, it can mean one thing to one person and yet another to a different person. We are also in agreement with the learned judge that conflict of interest was not demonstrated either. We are also in agreement with learned counsel for the respondent that the Judicial Service Code of Conduct and Ethics 2020, which came into force almost fourteen years after the alleged misconduct was committed could not be applied retroactively to condemn the respondent. The appellant ought to have availed the code of conduct, if any, that was applicable in 2006 and used it as the criteria to determine if indeed the conduct complained of was proscribed therein or not.

56. Our point of departure with the learned judge is in his finding that there may have been valid reasons to dismiss the respondent. Our finding is that there were no evidence of any valid reasons whatsoever for the respondent's dismissal. For these reasons, grounds 1, 2 and 3 fall on the way side. That leaves us grounds 4 and 5 which are in respect of the remedy given by the learned judge. We will advert to these 2 grounds after we deal with the cross appeal.

57. On whether the process took too long and thus compromised the respondent's right to speedy administrative action, our view is that the explanation given for the delay by the appellant was plausible. On failure by the learned judge to declare section 23 of the 3rd Schedule of the JSA unconstitutional, again we agree with the learned Judge that for such a prayer to succeed, the respondent ought to have joined the Attorney General and Parliament as parties. We also agree with the learned judge that other than allege or merely state that the said provision is unconstitutional, the respondent did not prove the alleged unconstitutionality as required by law to the satisfaction of the court. That ground also fails.

58. We are also not persuaded that the respondent proved his case for compensation for violation of any of his constitutional rights. The learned judge did not therefore err in not awarding the respondent damages for breach of his constitutional rights.

59. On the issue of jurisdiction, it was the respondent's argument that the appellant had no jurisdiction to determine matters already considered with finality by the Board. We note however that the complaint



in question had not been determined on merit as the Board’s mandate expired before the Board determined the matter and it was on that basis that the complaint in question was referred to the appellant. The appellant had jurisdiction to deal with any disciplinary issues that were left hanging by the Board. The appellant was also not constrained to only deal with complaints arising after its reconstitution under the Constitution of Kenya 2010. Nothing therefore turns on that issue.

60. On the fourth and final issue, it is trite that a court must give reasons for its decision. It is clear from the record that the respondent prayed for reinstatement but the learned judge did not address that issue. The judge did not give his reasons for not ordering reinstatement or why that remedy was in his view not suitable in the circumstances of this case. The parameters to be considered before a court can order reinstatement are succinctly set out in section 49(4) of the Employment Act.
61. This court considered the said parameters in Kenya Airways Limited v Alex Wainaina Mbugua Nairobi Civil Appeal No 107 of 2018 which we quote in extenso as follows:

“Section 49(4) of the Employment and Labour Relations Act obligates a court before ordering reinstatement to consider;

“the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the opportunities available to the employee for securing comparable or suitable employment with another employer; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.”

In *Airways v Allied & Aviation Workers Union Kenya (supra)*, Murgor, JA. In her judgment cited with approval and we do as well, the sentiments expressed by the New Zealand Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414;

“Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.”

62. From the evidence on record, the respondent was dismissed from judicial service on March 27, 2019 and the impugned judgment was entered on November 22, 2019 therefore it cannot be said that the respondent had been out of employment for a long period. There is also no evidence to show that the appellant’s and respondent’s relationship was strained. The charge that sent him home was said to have been committed over 10 years earlier and it had not prejudiced the appellant in any way and the respondent had continued to serve in various capacities for many years thereafter.



63. In view of the learned judge’s finding that no impropriety, appearance of impropriety or conflict of interest had been demonstrated and that the dismissal was unfair, the learned judge ought to have considered reinstatement, or given plausible reasons as to why reinstatement was not a suitable remedy.
64. In view of the foregoing, our finding is that this appeal is devoid of merit and is hereby dismissed in its entirety.
65. On the cross-appeal, we are satisfied that the same succeeds in part on the ground the learned judge erred in concluding that there were valid reasons for dismissing the respondent even after finding no impropriety or appearance of impropriety or conflict of interest had been demonstrated ; for failing to address the remedy of reinstatement which had been prayed for and failing to give reasons why reinstatement was not available to the respondent.
66. We have considered the circumstances surrounding this matter vis a vis the provisions of section 49(4) of the *Employment Act* which we referred to earlier. As stated, the respondent was unfairly terminated; he did not contribute in any way to his termination; he had served in the Judiciary for about 15 years and gained experience and we doubt that opportunities exist for securing comparable employment; the Judiciary is a large institution, indeed a whole arm of Government, with courts in dire need of staff strewn all over the Republic and the respondent can be redeployed to serve in any of those courts; his interaction with his employer is minimal; he has many years left to serve and finally reinstatement would not cause any hardship or prejudice to the employer. In our view, there are exceptional circumstances in this case that warrant an order of reinstatement. We bear in mind that the three year limit set under section 12(3) of the *Employment and Labour Relations Court Act* have not lapsed since his employment was terminated.(See *Sotik Highlands Tea Estates Ltd v Kenya Plantation and Agricultural Workers Union* [2017] eKLR.
67. For the above reasons, the cross appeal succeeds in part. We set aside the order of compensation of 10 months’ salary granted by the Employment and Labour Relations Court and substitute therefor an order that the respondent/cross appellant be and is hereby reinstated to his employment with immediate effect to the office of Principal magistrate without loss of back pay salary and or benefits. Costs of the appeal and cross appeal are awarded to the respondent in the appeal and appellant in the cross appeal.

DELIVERED AND DATED AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

