Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment)

Judicial Service Commission & another v Lucy Muthoni Njora [2021] eKLR

Neutral citation: [2021] KECA 366 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 486 OF 2019

PO KIAGE, SG KAIRU & F SICHALE, JJA

MAY 7, 2021

BETWEEN

JUDICIAL SERVICE COMMISSION ..... 1ST APPELLANT

CHIEF REGISTRAR OF THE JUDICIARY ..... 2ND APPELLANT

AND

LUCY MUTHONI NJORA ..... RESPONDENT

(Being an application for stay of execution against the judgment of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 20th September, 2019 in Petition No. 50 of 2018)

Circumstances under which a merit review would be permissible in judicial review proceedings.

Reported by Beryl Ikamari

Judicial Review *- nature of judicial review - merit review in judicial review proceedings - whether administrative action was reasonable - whether there were circumstances wherein a merit review in judicial review proceedings was permissible.*

Labour Law *- employment - dismissal from employment - grounds for dismissal - gross misconduct characterized by a failure to follow the Chief Justice's instructions - whether the dismissal of the Deputy Registrar of the Supreme Court from duty was justified.*

Labour Law *- employment - unlawful dismissal from employment - remedies - reinstatement - what were the circumstances under which the remedy of reinstatement would be available for the unlawful dismissal of a state officer?*

Constitutional Law *- enforcement of fundamental rights and freedoms - remedies - damages – establishing that an award of damages should be granted by the court - what were the circumstances under which damages would be an appropriate relief for human rights violations?*

Civil Practice and Procedure *- costs - discretion to award costs - circumstances under which an appellate court would decline to interfere with a trial court's discretion to award costs.*

Brief facts

The respondent was a Deputy Registrar of the Supreme Court. She received instructions in relation to a matter that was pending before the court - Application No 11 & 12 of 2016. She was requested to send hard copies of the application to the residence of the then Chief Justice and was informed that the Chief Justice would handle the application as a single judge of the Supreme Court. Moments later, she found that a judge of the Supreme Court (Njoki, SCJ) was in chambers in a session with an advocate wherein the application was being addressed. The judge issued interim orders for stay of execution and fixed the applications for *inter partes* hearing.

Later, the respondent received a letter from the Chief Justice, which was referred to as a charge, in which she was accused of gross misconduct taking the form of fixing matters for hearing without consulting the Chief Justice and in complete disregard of his direction. Through another letter, the Chief Justice interdicted the respondent and placed her on half pay while requiring her to report to the Chief Registrar of the Judiciary every Friday.

Later, on June 17, 2016, the remaining judges of the Supreme Court held a meeting where they resolved that the respondent's interdiction had fully been resolved and disciplinary action against her was unwarranted. They resolved that she should continue performing her duties. The respondent's resumption of duty was short-lived as she found that the locks in her office had been changed. A letter from the Chief Registrar of the Supreme Court made reference to the meeting held by the Supreme Court Judges and she told the then acting President of the Supreme Court that he had no power to recall an officer from interdiction before the charge that the officer faced had been processed.

The respondent received a letter on January 25, 2017 requiring her attendance before a committee of the Judicial Service Commission (JSC) the next day. Due to the shortness of the notice given she sought an adjournment upon attendance before the committee. The matter was eventually heard and the respondent was found guilty of insubordination and gross misconduct and the committee recommended that the JSC should take appropriate action against her. The JSC's decision to dismiss her from service with effect from June 15, 2016 was conveyed to her *via* a letter dated January 26, 2018.

The respondent filed a matter before the Employment and Labour Relations Court. She complained that her rights to fair administrative action had been violated and she had been subjected to unfair labour practices, discrimination and harassment. The Employment and Labour Relations Court ordered for the reinstatement of the respondent and found that the proceedings involving the petitioner and her termination were unfair. The appellants lodged an appeal at the Court of Appeal. The respondent filed a cross-appeal on grounds that the trial court failed to award her damages for the uncontested violation of her fundamental rights and freedoms.

Issues

i. Whether in judicial review proceedings a merit review of administrative action complained of was permissible.

ii. Whether the dismissal of a Deputy Registrar of the Supreme Court on grounds of gross misconduct arising from a failure to follow instructions from the Chief Justice was justified.

iii. When would the remedy of reinstatement be available?

iv. When would damages be an appropriate relief in a claim of human rights violations?

v. When would an appellate court interfere with a trial court's exercise of discretion in awarding costs?

Held

1. The traditional process-only approach to judicial review involved a measure of merit review because it could be necessary to determine whether an action complained of was reasonable. It could be necessary to examine certain circumstances in order to weigh them against what was reasonable or fair.

2. The Constitution of Kenya, 2010, changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act to article 22(3)(f) of the Constitution which recognized judicial review as an appropriate relief for human rights violations. Superior courts in Kenya had spoken with near unanimity that the existing constitutional and statutory landscape called for a more robust application of judicial review to include, in appropriate cases, a merit review of the impugned decision.
3. There was nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. It would be erroneous for a judge to do so under a misconception that judicial review was limited to a dry and formalistic examination of the process while strenuously and artificially avoiding merit.
4. The trial court did not misconstrue the nature of the respondent's complaint or violate jurisdictional bounds by engaging in a merit review.
5. The circumstances that gave rise to the respondent's interdiction and dismissal were a toxic mix of high stakes, bruised egos and assertion of decisional and procedural independence at the Supreme Court.
6. It was established that Njoki SCJ was on duty on the material date and given the exchange of emails between her and the Chief Justice on that day, it was obvious that having placed the two files before the judge at her request, the respondent acted squarely within her lawful duties. She had the two files forwarded to all the judges of that court in line with the practice of the court.
7. It seemed odd that whereas Njoki SCJ, in clear conscience and in discharge of conscientious duty, was categorical that she handled the files properly and in accordance with section 24 of the Supreme Court Act, the Deputy Registrar of that court was singled out for condemnation and dismissal for doing her supportive duty. The respondent's dismissal was a disproportionate reaction from the JSC and was unreasonable without any valid justification. The dismissal decision imposed upon her was irredeemably tainted with irrationality, altogether disproportionate and was properly invalidated by the trial court.
8. The respondent should first have exhausted internal appeal mechanisms in accordance with the Judicial Human Resources Policies Manual. However, given the attitude of the JSC, which was displayed in the manner in which the respondent was questioned, such an appeal would have served no purpose as the decision maker had already made up their mind. Moreover, the Manual did not represent a constitutional or statutory bar against access to the courts. Access to the courts could not be limited except by a clear and unambiguous statutory provision.
9. Once a dismissal decision involving a State officer was adjudged unlawful, null and void, reinstatement was an automatic remedy. The trial court did not abuse its discretion in making the order of reinstatement. There was no error in making that order.
10. A proper case had not been made for the award of damages as sought by the respondent. Reinstatement was granted by the trial court without loss of salary or benefits from the date of interdiction. That meant that the half-pay during interdiction would be compensated with the withheld salary being paid. She would be fully compensated by way of salary for the entire period in question even though she was not working. The order for reinstatement provided adequate compensation.
11. The appellants did not submit or argue about why the court should interfere with the trial court's award of costs. Since, as a general rule, costs followed the event, and the trial court awarded the costs to the successful party, it would be remiss to interfere with the award.

Appeal dismissed with costs; cross-appeal dismissed with no orders as to costs. The judgment and decree of the Employment and Labour Relations Court upheld.

Citations

Cases

Kenya

1. *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* Civil Appeal 3 of 2014; [2015] KECA 919 (KLR); [2012] 2 KLR 261 - (Explained)
2. *Child Welfare Society of Kenya v Republic & 2 others ex-parte Child in Family Focus Kenya* Civil Appeal 20 of 2015; [2017] KECA 175 (KLR) - (Explained)
3. *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)
4. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Explained)
5. *Ethics and Anti Corruption Commission & 5 others v Henry Morara Ongwenyi & 3 others* Civil Appeal 229 of 2017; [2019] KECA 438 (KLR) - (Mentioned)
6. *Ikatwa, Reuben & 17 others v Commanding Officer British Army Training Unit Kenya & another* Civil Appeal 97 of 2016; [2017] KECA 274 (KLR) - (Explained)
7. *Judicial Service Commission v Karani* Civil Appeal 305 of 2019; [2020] KECA 16 (KLR) - (Followed)
8. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Followed)
9. *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Civil Appeal 46 of 2013; [2014] KECA 404 (KLR) - (Distinguished)
10. *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* Civil Appeal 79 of 2016; [2017] KECA 446 (KLR) - (Explained)
11. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
12. *Mbogo v Shah* [1968] EA 93 - (Explained)
13. *Okinda, Winfred v Kenya National Union of Teachers & 12 others* Cause 119 of 2014; [2014] KEELRC 1202 (KLR) - (Mentioned)
14. *Okumu, Geoffrey Ajuong & another v Engineers Board of Kenya* Judicial Review Miscellaneous Application 3 of 2021 - (Followed)
15. *Pareno, Stephen S v Judicial Service Commission of Kenya* Civil Appeal 120 of 2004; [2014] KECA 307 (KLR) - (Followed)
16. *Republic v Commissioner of Customs Services ex parte Imperial Bank Limited* Miscellaneous Application 123 of 2014; [2015] KEHC 6939 (KLR) - (Applied)
17. *Republic v Public Service Commission & another ex parte Joel Kaithia Mathiu* Miscellaneous Application 3 of 2016; [2017] KEELRC 1329 (KLR) - (Followed)
18. *Shollei & another v Judicial Service Commission & another* Petition 34 of 2014; [2018] KESC 42 (KLR) - (Explained)
19. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Explained)
20. *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* Civil Appeal 98 of 2016; [2018] KECA 17 (KLR) - (Explained)

South Africa

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

United States

Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co 463 US 29 (1983) - (Mentioned)

Texts

1. Garry, PM., (2006), *Judicial Review and the Hard Look Doctrine.* Nevada Law Review, 151
2. Hogg, QM., (Lord Hailsham) et al (Eds) (1987), *Halsbury's Laws of England* London: Butterworth 4th Edn Vol 16 (1B) para 462

Statutes

Kenya

1. Constitution of Kenya articles 2(6); 3; 10; 19; 22(3)(f); 27; 28; 41; 47(1); 172(1)(c); 163(7); 232; 236(a)(b) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 93(4) - (Interpreted)
3. Employment Act (cap 226) section 49(3)(4)(a)-(m) - (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 7(2) - (Interpreted)
5. Judicial Service Act (cap 8A) section 25(1)(5) - (Interpreted)
6. Supreme Court Act (cap 9B) section 24 - (Interpreted)
7. Supreme Court Rules, 2020 (Repealed) (cap 9B Sub Leg) rule 29(1) - (Interpreted)

Advocates

Mr. Malenya for the 1st and 2nd appellant
Mr. Okemwa for the respondent

JUDGMENT

JUDGMENT OF KIAGE, JA

1. A startling exchange of e-mails between the then Chief Justice and a judge of the Supreme Court, with the latter complaining that the former was interfering with the decisional independence of Judges of that court, set in the background of two of their colleagues' making a last-ditch effort to remain in office up to the age of 74 years after this court declared that they had to retire at 70 years, speaks to a mighty tussle between jurists of the apex court. That storm was later to engulf and ultimately upend the judicial career of Lucy Muthoni Njora (Njora), one of its Deputy Registrars. It was fodder for the press, and elicited heated public discussion on social media.

2. It all started on Friday May 27, 2016 when an extra-ordinary 7-Judge bench this court rendered its decision and dismissed Civil Appeal Number 1 and 6 of 2016 filed by then Deputy Chief Justice Hon Lady Justice (Retired) Kalpana Rawal, and Hon Justice (Retired) Philip Tunoi, respectively, by which they had challenged the decision of the High Court on the retirement age of Judges appointed before the promulgation of the *Constitution of Kenya, 2010*. Following that decision, the Chief Justice, Dr Willy Mutunga, called Esther Nyaiyaki, the Registrar of the Supreme Court, who was then on official duties in Mombasa, on her mobile phone. He instructed her to inform Njora, who was on duty, that should any application arising out of that decision be filed before that court, it should be placed before him for appropriate directions. That message was duly relayed to Njora.

3. As expected, Rawal DCJ and Tunoi SCJ immediately filed applications number 11 of 2016 and 12 of 2016, respectively, at the Supreme Court Registry, seeking conservatory orders to suspend this court's decision pending the hearing and determination of those applications and intended appeals to the Supreme Court. At about 2.00 pm of that day, Njora, who had stepped out, was called by the registry that an urgent application had been filed. She immediately returned, confirmed that it was compliant with the *Supreme Court Rules*, and informed her registrar of the said filing. The ICT officer at that registry, in keeping with extant practice, e-mailed soft copies of the same to all judges of that court. Njora was shortly thereafter called by Nyaiyaki who enquired whether the Chief Justice had called her, to which she answered in the negative. Nyaiyaki requested Njora to send hard copies of the application to the Chief Justice at his residence.

4 . As Njora walked to the Chief Justice's chambers with the copies to be sent to his house, she received a call from Njoki, SCJ, requesting for her copies of the files. Complying, she rang a registry clerk and

instructed him to take the files to the judge. Njora had earlier requested counsel for the applicants to vacate the registry, which was then crowded, and wait at the chambers of Njoki SCJ, who was the duty judge. While in the Chief Justice's chambers, she received a call from him on her cell-phone at about 2.15pm enquiring whether she had been told to send the files to his house. Njora then briefed the CJ on the application, the parties and counsel appearing. He then directed her to inform the duty judge, Njoki, SCJ, that he would handle the applications himself, as a single judge of that court.

5. Njora immediately went to Njoki, SCJ's chambers but found her in session with Kilukumi, Advocate addressing her on the very applications. She whispered to the Judge the CJ's instructions that he would handle the applications himself. Njoki, SCJ did not take the interruption kindly. She told Njora she would call the CJ, whereupon Njora left chambers. She went to the CJ's Chambers and called him to report what transpired in Njoki SCJ's chambers,. He said he would write to the Judge.

6. In the meantime, Njoki, SCJ certified applications urgent, issued interim orders staying the judgment and order of this court, and fixed the applications for *inter partes* hearing on Friday June 24th, 2016.

7. As that was happening, Mutunga, CJ wrote an email to his Supreme Court colleagues at 2.26 PM in which he told them that he had instructed Njora to place the applications before him for directions, and that he would deal with them as a single judge. Later that day, he wrote an e-mail to Njora directing her to take the files to him on the following Monday for directions. He also sought an explanation as to how and why his instructions were disregarded. Her response was that she did immediately relay those directions to Njoki SCJ, the duty judge. She sent the files to him as directed. He issued "administrative directions" in them by which he varied the *inter partes* date given by Njoki, SCJ from 24th to June 2, 2016.

8. Before that, on the fateful Friday, Njoki SCJ had written to Mutunga CJ at 3.32 pm indicating that she saw his e-mail about the applications very late after she had already dealt with the applications. She stated that in so doing she had "followed the provisions of [their] rules and Act strictly."She also stated that it would have been better for him to have called her directly on phone, if he had directions for her.

9. Mutunga, CJ in turn, by an e-mail sent at 3.45pm retorted that it is she that should have called him. She should also have involved the other judges in some brief conferencing and, even as a duty judge should have "complied with the standing guideline that after the files are given to Judges it is either the CJ or the DCJ who does the allocation." Njoki SCJ's reply the next morning was to term the tone of the CJ's email "angry and inappropriate", to explain that she did not see anything wrong or untoward in the manner she had handled the matters, to wonder whether he had a specific outcome in mind, and to state that it appears he had issues with decisional independence of judges in his court, especially herself.

10. The tiff between those two legal worthies was later resolved in a manner we shall revert to.

11. For Njora, all was quiet and she went on with her duties, including assisting in the final acts of Mutunga CJ who was proceeding on terminal leave and handing over the headship of the Judiciary to Ibrahim SCJ pending the appointment of a successor. On June 16, 2016, the day of the hand-over, at about 5.00pm, Njora received a letter dated June 15, 2016 from Mutunga CJ the contents of which were;

> " Re: Charge
>
> That: In the matter of Application Nos 11 and 12 of 2016, you committed an act of Gross Misconduct by fixing the subject matters for hearing without consultation with the Hon Chief Justice and in complete disregard of his direction."

12. The letter concluded by giving Njora notice that she was required to give a written response to the charge within 21 days. That letter was accompanied by another, by the same author, titled "Interdiction."It repeated the contents of the charge and explained that;

13. Improper handling of matters relating to the court amounts to Gross Misconduct. It has an adverse effect on the administration of justice and cannot be condoned in the transforming judiciary."

14. Mutunga CJ by that letter interdicted Njora from the performance of her duties in light of the imminent proceedings that might lead to her dismissal. She was placed on half salary and required to report to the Chief Registrar of the Judiciary (CRJ) every Friday, until further notice. She was also to hand over all Government stores, including accountable documents, and a detailed hand-over report, to CRJ.

15. That interdiction caught the attention of the remaining Supreme Court Judges who held a meeting on June 17, 2016 chaired by MK Ibrahim SCJ, who was the Acting President of that court. From the minutes of that meeting that are on record, it emerges that they took the collective position that the issues forming the basis of Njora's interdiction had been fully resolved by the Supreme Court itself and that any disciplinary action against her was unwarranted. They resolved that she "should continue to perform the Supreme Court's essential work, on a regular basis", as a final resolution was awaited. They directed Njora to make a formal response to the interdiction letter to the attention of the Ag President, and copied to the Registrar. On the same day Njora wrote a detailed response giving a chronology of the events surrounding the matter.

16. Njora's continuation of work was, alas, short-lived: a few days later she found the locks to her office changed and was denied access thereto.

17. In the meantime, the CRJ by a letter dated June 23, 2016 acknowledged receipt of the minutes and resolutions of the meeting of the Supreme Court judges but indicated to their Acting President that she had no power to recall an officer from interdiction before the charge was processed. No action was taken in the direction of processing the charge for several months, however, prompting Njora to write to the new Chief Justice on October 24, 2016, stating that the matter had pended since June, 2016 and caused her immensurable pain, stress and anxiety. She got no response.

18. Action was finally taken on January 25, 2017, when Njora received a letter requesting her to attend before the relevant Committee of the JSC the next morning. She attended and sought an adjournment due to the shortness of the notice. The hearing was accordingly adjourned and eventually started on April 27, 2017. Njora was present at the hearings with her advocate, Mr George Oraro, SC After hearing the testimony of some 8 witnesses, the Committee found Njora guilty of insubordination and gross misconduct and recommend to JSC that appropriate action be taken against her. The full JSC accepted those recommendations at its meeting held on January 26, 2018, and decided to dismiss her from Judicial Service with effect from June 15, 2016. That decision was conveyed to her by a letter dated January 26, 2018.

19. Aggrieved by that decision, Njora moved to the Labour and Employment Court at Nairobi by a Petition dated June 6, 2018. The 35-page petition, which is a study in prolixity, verbosity, argumentation and altogether too long, narrated in tortured detail the events we have set out herein. With copious editorial explanations and in extravagant prose, it is to the effect that JSC and CRJ proceeded against her in a manner that was "patently illegal, tainted with procedural impropriety, abstraction of justice, impunity, gross incompetence, gross abuse of public and state power" in contravention of her "fundamental rights, the *Constitution* and all applicable laws and procedures and the basic tenets of the rules of natural justice ...." In particular, she pleaded that articles 2(6), 232, 47,

19, 41, 27 as read with 236(a) and (b), 3, 28,10, and 236 had been violated and transgressed in various respects which she particularized at length.

20. The main thrust of her complaint was that her right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was violated, as was her right to dignity. She was subjected to discrimination, harassment and removal from office without due process of law; was subject to unfair labour practice and was unlawfully dismissed; her right to privacy was infringed and she was subjected to procedural impropriety contrary to the provisions of the *Judicial Services Act*.

21. In consequence of those alleged violations, Njora prayed for numerous orders and declarations numbering nearly a score. They included, in the main, that the disciplinary proceedings against were unfair and unprocedural, and so null and void *ab initio*; a quashing of the entire proceedings and her termination from employment; and an order of reinstatement. She also sought damages of Kshs 10 million each for violation of her right to privacy; access to information; fair administrative action; non-discrimination; and human dignity. She also sought 12 months' gross salary as compensation for unlawful termination of employment.

22. That petition was filed with Njora's supporting affidavit which, at a mind-boggling 150 paragraphs, is a study in what affidavits ought not to be, and is quite scandalous for sheer length and repetition. I shall not go into it as the gist of the history and content of the dispute between the parties and of her main complaints, which it treats of at length, has already captured in what I have already set out herein. It also had some 29 exhibits attached thereto, comprising a motley collection of many documents.

23. In answer to the petition, JSC and CRJ filed a replying affidavit sworn on August 10, 2019 by the latter, Anne Amadi. In it, they first complained that the petition as drawn lacked particularity, was repetitive; and did not specify with reasonable precision which provisions of the *Constitution* were infringed, and the manner of such infringement. After detailing the constitutional and statutory provisions that govern the discipline of judicial officers, the deponent gave a background of the matters leading to disciplinary action against Njora, as well as an account of how the process was conducted.

24. Turning to specific responses to the petition, Ms Amadi swore that;The composition and quorum of the JSC was properly constituted. Considering the part-time nature of the JSC with a wide mandate, even though the disciplinary proceedings "took a little longer than anticipated," the process was expeditious in the circumstances. Njora ignored and/or disregarded the Chief Justice's directions "by placing or facilitating the hearing of applications 11 and 12 by Justice Njoki Ndungu who went ahead to give *ex-parte* orders on the said matters."The charge read out to Njora was precise and communicated the particulars of the issue in contention, and her subjecting herself to the jurisdiction of the Supreme Court Judges when her disciplinary case was pending "was an act of defiance of the process and the role of the JSC" with the meeting of the said Judges on the same being "inconsequential."Njora did not demonstrate discrimination against her or any violation of her rights to dignity and privacy.The JSC properly informed Njora of the reasons for her dismissal.The omission to expressly advise Njora of her right of appeal did not prejudice her as the right is provided for in the Human Resources Manual with which she was familiar. Njora was provided with all the documents relevant and necessary for her to prosecute her case and anything not availed was for good reason and within the law.Njora's claimed remedies including damages of over Kshs 70,000,000 were unfounded in law, and her termination having been fair, the petition was an abuse of the process of the court, deserving of dismissal.

25. After being served with that replying affidavit, Njora swore yet another in response thereto. It dismissed Ms Amadi's affidavit as "frivolous and vexatious by being evasive and wilfully ignorant of material facts, law and procedure" regarding the petition, which she then went on to rehash to extraordinary lengths of 131 paragraphs running into 30 typed pages. The affidavit, like first, is highly argumentative,

repetitive and in intemperate language. Once more, I say this is what an affidavit ought not to be. As what it says is no more than a traverse of Ms Amadi's affidavit by rehash of the supporting affidavit, I shall not wear myself out by restating its contents.

26. Following directions to that effect, the parties filed submissions and lists of authorities on the basis of which Abuodha, J rendered his judgment on September 20, 2019. He allowed the petition and ordered;

    (1) That the disciplinary proceedings involving the petitioner and eventual termination from service be and are hereby declared unfair, lacked valid reason, therefore null and void.

    (2) That the petitioner be and is hereby reinstated back to judicial service from date of dismissal without loss of salary and benefits.

    (3) That salary will be payable net of taxes and statutory deductions from date of interdiction less amount payable during the period.

    (4) That the petitioner is further awarded the costs of the petition.

27. JSC and CRJ were aggrieved by that decision and filed notice of appeal followed by the record of appeal. The memorandum of appeal therein raises complaints that the learned judge erred by;Misinterpreting the court's jurisdiction and failing to appreciate that Njora's case was limited to the interpretation of the process leading to her determination for fairness, reasonableness and legality; that she had an alternative remedy by internal appeal and review, thereby allowing the petition to operate as a general substitute for normal procedure.Misconstruing the petition thereby usurping JSC's disciplinary mandate and interfering with its human resource functions.Failing to appreciate that the disciplinary process met the constitutional and statutory requirements of fair administration action.Making an erroneous factual finding on Njora's culpability for ignoring directions given by the CJ on handling of the retirement of Judges cases. Making an order of reinstatement absent Njora's showing of sufficient basis and exceptional circumstances to warrant it.Awarding unproven and unjustified costs.Failing to consider their response, submissions and authorities.

28. On her part, Njora filed a notice of cross appeal under rule 93(4) of the *Court of Appeal Rules*. In it, she sought to have the decision of the learned Judge reversed in so far as he erred by failing to award her damages for the "uncontested violation of her fundamental rights and freedoms."In addition, she filed a notice of grounds affirming the decision other than those relied on by the learned Judge, namely that;There was a binding resolution of the Supreme Court made on June 2, 2016 that the substantive duty Judge on May 27, 2016 was Njoki SCJ, rendering JSC's re-opening of the matter unconstitutional, null and void.There was a binding resolution of the same court on June 17, 2016 that determined that Njora return to work.There was a binding ruling of that court in the two petitions over the matter, divesting JSC and CRJ of jurisdiction to deal therewith.The charge and interdiction was served after Mutunga CJ's retirement, rendering the same, and subsequent proceedings, impotent, null and void.The procedure adopted by JSC was not in strict conformity with article 172(1)(c) and it did not act in the manner prescribed by the *Judicial Service Act*.JSC's panel unfairly and irregularly digressed from the charge, considered extraneous issues and made a finding unrelated to the charges.JSC irregularly backdated Njora's dismissal by 19 months.No proof beyond hearsay, speculation and witch-hunt was tendered that Njora irregularly fixed the hearing date, or that she was guilty of gross misconduct.JSC's determination contravened the Constitution and was invalid, null and void.

29. In readiness for the hearing of the appeal, the parties filed written submissions together with case digests and lists of authorities which we have carefully considered alongside the addresses by Mr Malenya,

learned counsel for JSC and CRJ in support of the appeal, and opposing submissions by Mr Okemwa , learned counsel for Njora.

30. Besides factual matters already captured in our summary of the parties' respective cases, Mr Malenya reiterated that Njora fixed the two petitions for hearing in stark disregard to the directions of Mutunga, CJ, which amounted to gross misconduct.

31. He insisted, rather oddly, given the record, that it was Ibrahim SCJ who was on duty on the material day. Counsel criticized the learned judge for entering upon an interrogation of the case when all he should have done was determine whether the disciplinary process was compliant. Citing Okwengu, JA's judgment in *Judicial Service Commission v Gladys Shollei & anor* [2014] eKlR, he posited that the court's jurisdiction does not extend to a merit review of what was before the JSC. The learned Judge was therefore wrong to make a merit finding that Njora did, in fact, go into Njoki SCJ's chambers on the material day to communicate Mutunga CJ's directions, but was repulsed by the judge.

32. Submitting that Njora was accorded a fair hearing, Mr Malenya contended that there was substantial compliance with the requirements of the Fair Administration Act in that she was presented with charges, given enough time to prepare for the hearing, granted an adjournment when she sought it, and was represented by a senior counsel who cross-examined the 8 witnesses who testified. To him, Njora did not deny the charges but proffered the reason that the matters in question were beyond her control.

33. Assailing the learned judge's order reinstating Njora, counsel submitted that the remedy is discretionary and available only in exceptional circumstances, and that the learned judgefailed to give reasons justifying the particular award, as he ought to have under section 49(3) of the *Employment Act*. He cited in aid this court's decision in *Kenya Power & Lighting Co Ltd v Aggrey Lukorito Wasike* [2017] eKLR for the proposition that it was incumbent upon the learned judge to evince a consideration of the matters set out in section 49(4)(a) to(m), and in particular to point out what the exceptional circumstances in the case were, that warranted reinstatement. He rested by stating that a consideration of Njora's contribution to her termination, and the fact that she had lost the trust of her employer, militated against her reinstatement.

34. Resisting the appeal, Mr Okemwa first made the bold assertion that there is nothing wrong Njora did, and that she did carry out Mutunga CJ's instructions. He pointed out the fact that the full Supreme Court on June 6, 2016 acknowledged the fact that Njoki SCJ was the judge on duty on the material day. Moreover, continued counsel, JSC had unreservedly apologized to Njoki SCJ, "for having peddled lies" that she was not on duty. What is more, on June 17, 2017, the full Supreme Court had resolved that Njora return to work which, in counsel's view, was a show of that court's "supreme confidence" in her. He contended that CRJ wrongfully disregarded that court's resolution, and also defied the Chief Justice by progressing the matter to JSC, yet she had no jurisdiction over matters involving judicial officers, as she admitted in her affidavit. Further, she usurped the powers of the Chief Justice, whose role it was to investigate or convey the charge to JSC, under rule 25(1) of the 3rd Schedule to the *Judicial Service Act*.

35. Counsel attacked the disciplinary process some more, contending that under rule 25(5), the complainant is required to have been availed for cross-examination, but this did not occur. It was his view that JSC and CRJ did not contest the fact that relevant rules were breached and illegalities committed, including CRJ's usurpation of disciplinary powers over magistrates, and JSC's coming up with a new finding, not in the charge, that Njora had "facilitated a hearing."

36. Asserting that the learned judge did not conduct a merit review, counsel pointed out that the Supreme Court had made rulings on the issue that were binding on the learned judge, as it was on all courts and persons, by virtue of article 163(7) of the *Constitution*. Counsel then defended the decision of

the learned judge on the basis that merit review of administrative action is now permissible following developments in this area of law both within our jurisprudence and in other jurisdictions as well. He cited various authorities among the numerous in his digest, including *Mumo Matemu v Trusted Society Human Rights Alliance & 5 others* [2013]eKLR and the *US Supreme Courts' decision in Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Co* 463 US 29 1983 with the latter exemplifying the "hard look review" approach by courts aimed at policing agency decisions for genuine arbitrariness.

37. Mr Okemwa concluded his address by urging us to dismiss the appeal, consider the cross-appeal as uncontested and award damages in addition to upholding the order of reinstatement.

38. This being a first appeal, our mandate as spelt out in rule 29(1) of the rules of court is to re-appraise the evidence and to draw our own inferences of fact. We proceed by way of re-hearing, putting ourselves in the shoes of the court that exercised original jurisdiction. We do so on the basis of the record to which we apply a fresh and exhaustive analysis so as to arrive at independent conclusions. Where, as here, the matter in the court below proceeded on the basis of pleadings and affidavit evidence only, we have a wider latitude to depart from the findings of that court, as it did not enjoy the greater advantage of hearing and observing witnesses in live testimony. That is not to say that we do not pay respect to the findings of the first instant judge.

39. It is in acknowledgement of and obedience to our duty that I did, at the beginning of this judgment, go into the detailed and expansive account of the parties' respective cases as were placed before the learned judge, and captured on the record.

40. Having carefully perused the said record, and considered the submissions made and authorities cited before us, I think that the following limited issues are wholly dispositive of the appeal and the cross appeal;

    (i) Whether the learned judge improperly embarked on a merit review of JSC's action.

    (ii) Whether Njora's dismissal was justified.

    (iii) Whether the remedy of reinstatement was available in the circumstances of the case.

    (iv) Whether damages should have been awarded.

    (v) Whether the order on costs was proper.

41. On the first issue, JSC and CRJ have made heavy weather of the learned judge's treatment of the disciplinary issue facing Njora. In particular, they are aggrieved by what they see as the learned judge's entry into a detailed analysis and discussion of Njora's actions at the material time. This is exemplified by paragraphs 30, 34 and 35 of the judgment as follows;

> "30. The petitioner was charged and indicted for failure to obey lawful directions of the Chief Justice and proceeded to facilitate and have the applications heard by Lady Justice Ndungu. Strange as the charge may sound, apart from drawing the attention of Lady Justice Ndungu to the Chief Justice's direction which in any event the learned judge was or deemed to be aware of but proceeded all the same, what more was the petitioner supposed to do?....
>
> 34. The foregoing email exchange between the retired Chief Justice and Lady Justice Ndungu clearly display an issue which was beyond the administrative control of the petitioner. There was evidently nothing she could do to prevent Lady Justice Ndungu entertaining the applications even if as alleged, it was contrary to the Chief Justice's directions.....

35. As observed, the extent to which the petitioner tried to draw the attention of Lady Justice Ndungu to the Chief Justice's direction on the two matters earning the petitioner reprimand from the learned judge was the best she and indeed any reasonable Deputy Registrar put in her place could have done."

42. It is contended that the learned judge adopted an approach that was inimical to the true purpose and intent of the judicial review jurisdiction, which should be limited to an interrogation of the process leading to an employee's termination to determine whether it met the requirements of procedural fairness, reasonableness and legality, as measured against the constitutional and statutory guarantees of fair hearing and fair administrative action. Under such approach, a court would be slow to interfere with the sanction imposed by an employer, unless the employer acted unfairly in so imposing the sanction, which must be viewed from a point of reasonableness, not the court's own view of whether it would itself have imposed the sanction. See, *Nampak Corrugated Waderville v Khoza*(JA 14/98) [1998] ZALAC 24 a decision of the South African Labor Appeal Court, and this court's decisions of *Cfc Stanbic Bank Ltd v Danson Mwashako Mwakuwona*[2015] eKLR and *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit & anor* [2017] eKLR which adopted the position that a court would not interfere with an employer's decision to dismiss an employee if it fell within a range or band or reasonable responses,and must not substitute its own views for those of the employer. See also *Halbury's Laws Of England* 4th Edn Vol 16 (1B) para 462.

43. It is this latter, and in its view improper, approach, that JSC accuses the learned judge of, arguing that he exceeded his jurisdiction and ventured into a merit review. I have taken time to examine the record and the learned judge's decision on this point, and it seems to me that it was ultimately based on a test of reasonableness. He concluded that Njora's actions were the only ones reasonably open to her, or to any reasonable Deputy Registrar placed in her position, so that, per force, disciplinary action of the extreme character of dismissal, for acting reasonably, was disproportionate and unreasonable.

44. To my mind, even fealty to the traditional "process-only" approach to judicial review must involve a measure of merit analysis. How would a court determine whether an employer acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the bond or range of reasonable responses? I think that it would be unrealistic for a court to engage in a dry and formalistic approach, steeped in process alone, while eschewing a measure of merit examination. Such merit review is a *sine qua non* of meaningful engagement with the question of reasonableness and fairness as the antidote to the arbitrary, capricious or illegal conduct of authorities, that invite judicial review in the first place.

45. Judicial review as an area of law is not static and its parameters have never been cast in stone. Thus, in the common law jurisdictions, there have been major developments in the field, especially in the last four decades or so. In the United States, for instance, there has been a decisive shift, with the Supreme Court there seeming to impose a heightened standard of judicial review that involves more judicial scrutiny of administrative action through "a searching and careful" engagement. This has been recognized as the "hard look doctrine". It is much less deferential to the decision-maker as formerly encapsulated in the process-only approach.

46. I have had the advantage of perusing Prof Patrick M Garry's article *Judicial Review and the Hard Look Doctrine* (originally published on 7 Nev LJ 151 2006-007) and found it to be highly persuasive. The learned author's conclusion, which I would respectfully endorse and adopt, is that;

> "Prior to, and during the two decades following passage of the Administrative Procedure Act, judicial review of agency action was quite deferential. This changed on the early 1970s,

> when judicial review became more scrutinizing ... courts began employing a 'hard look' review that examines agency decision-making under a more heightened standard.
>
> ...
>
> The hard look doctrine has evolved from the very nature of judicial review ... the courts have... become less deferential and less of a rubber stamp on agency decisions ... Hard look can thus be seen as inherent in the very process of judicial review. In a way hard look represents an internal duty owed by the courts to the constitutional function of judicial review ...."(Our emphasis)

47. In our own jurisdiction, judicial review has taken the same trajectory in recent years, spurred in large measure by the *Constitution of Kenya, 2010*. It changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act, to its article 22(3)(f), which recognizes judicial review as one of the appropriate reliefs available. This is bolstered by article 47(1), which decrees the right to fair administrative action, given further effect by the *Fair Administrative Action Act* which, at section 7(2), sets out an expansive list of circumstances in which a court may review an administrative action or decision.

48. The superior courts of this country have spoken with near-unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision. See, for instance, *Communication Commission of Kenya v Royal Media Services & 5 others* [2014] eKLR by the Supreme Court, this court's decisions in *Suchan Investment Ltd v Ministry of Natural Heritage & Culture & 3 others* [2016]eKLR and *Child Welfare Society of Kenyavarious Republic & 2 others ex parte Child In Family Focus Kenya*[2017]eKLR and the High Court's. in *Republic v Commissioner of Customs Services Exparte Imperial Bank Ltd*[2015] e KLR (per Odunga, J). They all speak to the unmistakable sea change and approach, stated thus by this court in *Super Nova Properties Ltd & anor v district Land Registrar Mombasa & 2 others, Kenya M_anti Corruption Commission & 2 others* (interested Parties) [2018] eKLR;

> 27. "On our part, we find no fault that the judgeexpanded the grounds of judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites a court to evaluate the merits of the decisions by assessing the balance to make; that is whether the decision to be made is within the range of rationality or reasonableness. Secondly, the proportionality test may go deeper into examination of the interests of those affected by the said decision."

49. This court conducted a thorough and exhaustive review of the post-2010 jurisprudence on the evolution of judicial review into the deeper scrutiny, hard look, merit-based standard of review mode in its recent decision in **Geoffrey Ajuong Okumu & anor v Engineers Board of Kenya* [2021] eKLR . I respectfully echo as representing the current legal position on the subject what we said there was on our way to the conclusion that;

> "--- we have been able to demonstrate from ... the decisions we have enumerated that, by stating that he could not consider evidence presented as defence or analyze the agreements executed by the parties in the dispute because doing so would amount to a merit review, the learned judgeerred."

50. We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. To the contrary, the error would

lie in a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality.

51. Being of that mind, on the critical complaint that the learned judge misconstrued the nature of the complaint, and even violated jurisdictional bounds by engaging in a merit-review, I find that the learned judge did not err. I answer the first issue in the negative.

52. I now turn to the question of whether Njora's dismissal was justified. The charge that was laid against her was that she"committed an act of gross misconduct by fixing the subject matters for hearing without consultation with the Hon Chief Justice and in complete disregard of his direction." At the end of the disciplinary hearing, she was found guilty and was dismissed for having acted against the direct and specific instruction of the Chief Justice in that she proceeded to "and have the matter (sic) heard", which action amounted to insubordination. According to the JSC Committee that conducted the disciplinary hearing, "allowing it to proceed to Justice Njoki and knowing very well that Judge Njoki would deal with it as a duty judge was tantamount to fixing it for hearing."

53. Njora's complaints about the manner in which the disciplinary process was conducted are many and varied but, as will soon become apparent, I do not consider it necessary to go into any depth with them. They include impropriety in CRJ's proceeding to forward the matter to JSC in usurpation of the Chief Justice's role, which rendered the entire process a nullity; the failure of JSC to call Mutunga CJ as the complainant so as to testify and be cross-examined; failure to scrupulously adhere to the procedure set out in the *Judicial Service Act*; disregard of clear resolutions, findings and rulings of the Supreme Court to the effect that she did nothing wrong and should have been allowed to continue working; the varied and shifting composition of the JSC Committee that conducted the disciplinary process; and the fact that the charge was not proved but was improperly altered at the findings stage with a view to finding her culpable. I do not consider those complaints to be entirely without substance but I need not make findings on them specifically in order to answer the question we are dealing with. It is enough for me to restate what we said in *Geoffrey Ajuong Okumu & anor v Engineers Board of Kenya & 4 others* (*supra*) that in a disciplinary process that may lead to loss of career, the laid down steps in the relevant statute must be followed with scrupulous care.

54. Beyond those complaints, however, it should be plain from the long and detailed account I gave at the beginning of this judgment that the circumstances giving rise to and surrounding Njora's interdiction and ultimate dismissal were a toxic mix of high stakes, bruised egos and assertion of decisional and procedural independence at the Supreme Court. This was compounded by competing interests over the retirement of two judges of that court who were the applicants in the two matters that were at the centre of the push and pull. Those applicants needed to have their matters placed before the duty judge and their counsel and other parties interested had jammed the registry. It would seem, from the exchange of emails, that there was some controversy between Mutunga CJ, Ibrahim SCJ and Njoki SCJ as to who was on duty on the material date. This also featured prominently during the disciplinary hearing. However, by that time the matter had been resolved with finality at the Supreme Court in judicial proceedings held before the disciplinary hearing.

55. Njoki SCJ took the unusual, but in the circumstances quite understandable and necessary step, of filing an affidavit within proceedings over which she was one of the judges. In the affidavit, sworn on June 6, 2016, she stated that she was on duty on the material day, and took issue with misleading factual allegations made by JSC and CRJ denying the fact of her having been on duty, and querying her integrity and the integrity of the manner in which she handled the two applications before her. Those aspersions had in fact been picked up by the media, and given prominence causing Njoki SCJ much distress.

56. In a sitting of the full Supreme Court on the same June 6, 2016, with Mutunga, CJ presiding, Issa Mansur, learned counsel appearing for JSC and CRJ took responsibility for the false and misleading aspersions that denied the fact of Njoki SCJ being on duty on the material day. He unreservedly apologized for it, and prayed that the offending paragraphs be expunged from the record, and it was so ordered.

57. Once it was established that Njoki SCJ was on duty on the material day, and given the exchange of emails between her and Mutunga, CJ on the day in question, it seems rather obvious that in having the two files placed before the Judge at her request, Njora was acting squarely within her lawful duties, as when she had the two files forwarded to all the judges of that court in line with practice that we already set out from the record. Njora's account as to the instructions she got from Mutunga CJ regarding the two files, and the steps she took to inform the judgeabout those instructions, earning her a reprimand for interruption, do not appear to have been controverted. At any rate, without delving deeper into the email exchanges I already referred to, I, like the learned judge in the court below, must pose the question: What more was Njora supposed to do?

58. It seems to me rather odd that whereas Njoki SCJ, in clear conscience and in discharge of conscientious duty, was categorical that she handled the files properly and in accordance with section 24 of the *Supreme Court Act*, the Deputy Registrar of that court should have been singled out for condemnation and dismissal for also doing her supportive duty. Taking all the unusual circumstances of the case, I have no difficulty arriving at the conclusion that the learned judge also did, that Njora's dismissal for those reasons was a disproportionate reaction from JSC, was unreasonable and without any valid justification.

59. I am unable to discern a reasonable or logical nexus between Njora's rather innocuous actions, and the extreme reaction by JSC. Its actions smacked of victimization and an attempt to make someone pay for the embarrassing events that surrounded the two applications before the Supreme Court. She was made to carry that burden of embarrassment and discomfiture as some kind of scapegoat. There was no reasonable basis for the decision to hoist that cross upon her. The dismissal decision imposed upon her was irredeemably tainted with irrationality, was altogether disproportionate and was properly invalidated by the learned judge.

60. It is time employers understood that in taking drastic dismissal actions that cut short the careers and livelihoods of employees, they should be sure that they are acting reasonably and fairly with the dismissal being a necessary step. They must eschew and resist the temptation to flex corporate muscles, settle scores or appear to be just plain bullies because they are boss. It is not for nothing that by statutory command the duty to show that the dismissal was justified is always on the employer. Whichever way it is viewed, Njora's dismissal was clearly not justified.

61. In arriving at that conclusion I necessarily dispose of the complaint that Njora should first have exhausted internal appeal in accordance with the Judicial Human Resources Policies Manual. Given the predilection exhibited by JSC in its entire attitude towards Njora, some of it in full display in the manner she was questioned by the relevant committee, I think that an appeal to the same JSC, as was held in *Republic vs Public Service Commission ex parte Joel Kaithia Mathiu*[2017] eKLR would have served no purpose as the decision maker had already made up its mind. Moreover, the said Policies Manual does not represent a constitutional or statutory bar to access to the courts. That right cannot be limited save by clear and unambiguous statutory provision. In short, I do not subscribe to the notion that an aggrieved party should lightly be denied access to courts in the name of exhaustion of administrative procedures. See *Winfred Okinda v Kenya National Union Of Teachers & 12 others* [2014] eKLR.

62. I now must address the order of reinstatement. JSC and CRJ contend that it is a discretionary remedy available only in exceptional circumstances which the court must set out to justify it within the context of section 49(3) of the *Employment Act* as clearly propounded in *Aggrey Lukorito Wasike* (*supra*). It is urged on Njora's behalf, however, that the said decision, alongside others to the same effect, such as *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, are inapplicable as they did not concern state officers who enjoy due process protection under article 236(a) and (b) of the *Constitution*. *County Government of Nyeri & anor v cecilia Wangeci Ndungu*[2015] eKLR was cited in support of the assertion that the *Employment Act* does not apply to state officers. Instead, it is the *Constitution*, the relevant statute, namely the *Judicial Service Act*, and the Fair Administration Action Act and the rules of natural justice, that are relevant. 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 v 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.

64. It behooved JSC and CRJ to demonstrate before us, consistent with *Mbogo v Shah* [1968] EA 93, that the learned judge in ordering reinstatement abused his discretion in some respect that would entitle us to interfere as an appellate court. With respect, no such showing has been placed before us and we have no basis upon which we would interfere with the discretionary order. See also *Ethics & Anti Corruption Commission & 5 others v Henry Morarot Ongwenyi & 3 others*. My answer, therefore, is that there was no error in the order of reinstatement.

65. Turning now to Njora's cross appeal, leaving the issue of costs for last, its main thrust is that she was entitled to orders for general damages amounting to a whopping Ksh 70,000,000, to compensate her for, *inter alia*, JSC and CRJ's reckless and deliberate abuse of power, including by leaking or causing to be leaked, the internal disciplinary process to the media thereby subjecting her, judges and the entire judiciary to online hatred, contempt and ridicule. Damages were also sought on the basis that the disciplinary process took way too long. In support of this last contention, *Judicial Service Commission v Davis Gitonga Karani* [2020] eKLR, a decision of the High Court, was cited. Finally, alleging "arbitrary, tortious, reckless and outrageous use of state power", this court's decision of *Peter M Kariuki v Attorney General* [2014] eKLR was relied on to urge an award of Kshs 15,000,000 in compensatory damages.

66. Even though JSC and CRJ did not respond, frontally or at all, to the cross appeal on damages, I are not satisfied that a proper case has been made out for the same. It is noteworthy that the learned judge in granting reinstatement, which I have affirmed, also ordered that it be "without loss of salary and benefits," from the date of interdiction. This means that for the period of time Njora was out on interdiction on half salary, she was to be paid the withheld half, up until the date of her reinstatement. Essentially, therefore, she would be fully compensated by way of salary for the entire period, even though she was not working then. I think, with respect, that the said order provided adequate compensation. We need only add that the *David Karani Gitonga* (*supra*) award of Kshs 1 million was subsequently set aside by this court for being unwarranted, in an appeal by JSC. The circumstances of *Peter M Kariuki*(*supra*) involved so egregious and brutal misuse of state power that the case is most definitely distinguishable from the case before us. I sat on both appeals. At any rate,

I have already found that the order of reinstatement with full salary and benefits did not require supplementation. In the result, I find no merit in the cross appeal.

67. Regarding costs, it is complained in the appeal that Njora should not have been awarded the same. JSC and CRJ do not offer any submission or argument as to why the order, made within the learned judge's discretion in the award of costs, should be interfered with. Since, as a general rule costs follow the event, and the learned judge awarded the same to the successful party, I would be remiss to interfere therewith.

68. Ultimately, the orders I would make in disposition of this matter are as follows:

    (a) The judgment and decree of Abuodha, JA is upheld.

    (b) The appeal is dismissed with costs.

    (c) The cross appeal is dismissed but with no order as to costs, noting that the appellants made no submissions on it.

    As Gatembu and Sichale, JJA agree, it is so ordered.

Judgment of Gatembu, JA

1. I have read in draft the judgment of Kiage, JA and I am in agreement with the reasoning and the conclusions.

Concurring Judgment of Sichale, JA

1. I have had the advantage of reading in draft the judgment of Kiage, JA. I am in full agreement with his reasoning and conclusions and, therefore, have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR