



**Chief Justice and President of the Supreme Court of Kenya & another v Khaemba
(Civil Appeal 522 of 2019) [2021] KECA 322 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 322 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 522 OF 2019
MSA MAKHANDIA, S OLE KANTAI & P NYAMWEYA, JJA
DECEMBER 17, 2021**

BETWEEN

**CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF
KENYA 1ST APPELLANT**

JUDICIAL SERVICE COMMISSION 2ND APPELLANT

AND

BRYAN MANDILA KHAEMBA RESPONDENT

*(Being an Appeal against the entire judgment and decree of the
Employment and Labour Relations Court at Nairobi (Ongaya J.) delivered
on 30th August 2019 in Nairobi ELRC Petition No. 100 of 2019)*

The Judicial Service Commission, not the Chief Justice, was the body/office empowered to make any decision regarding the payment of judicial officers on suspension.

Reported by Ribia John

Judicial Officers – suspension of judicial officers – Chief Justice’s authority to suspend judicial officers - whether the Chief Justice had the power to suspend a judicial officer who was facing a disciplinary process - whether dismissal proceedings had to be undertaken before the Chief Justice could exercise the power of suspension of a judicial officer – whether the action of the Chief Justice to suspend a judicial officer without pay and to require the judicial officer to show cause why the judicial officer should not be subject to disciplinary action before dismissal proceedings was undertaken was unfair and illegal - Judicial Service Act, Act No 1 of 2011, Third Schedule paragraphs 17(1) and (2) and 25.

Judicial Officers – dismissal of judicial officers – role of the Chief Justice in the dismissal of judicial officers – procedure/stages to be undertaken in proceedings for dismissal of judicial officers - what were the stages required to be undertaken by the Chief Justice in dismissal proceedings against a judicial officer - at what stage of the disciplinary proceedings was the Chief Justice deemed to be able to make an opinion that an officer ought to be dismissed - Judicial Service Act, Act No 1 of 2011, Third Schedule paragraphs 17(1) and (2) and 25.



Judicial Officers – Chief Justice – authority of the Chief Justice to suspend a judicial officer – authority of the Chief Justice vis-à-vis the authority of the Judicial Service Commission - between the Judicial Service Commission and the Chief Justice, which body/office was empowered to make any decision as regards the pay of judicial officers on suspension – Judicial Service Act, Act No 1 of 2011, Third Schedule paragraphs 17(1) and (2) and 25.

Alternative Dispute Resolution – doctrine of exhaustion of remedies – exceptions - whether the court would rely on the doctrine of exhaustion of remedies where there was clear abuse of discretion by the bodies who the court referred to.

Brief facts

On May 30, 2019 the respondent received a letter from the Chief Justice, requesting him to explain why he handled only one matter when he was not in the duty court, to which he replied in writing on June 6, 2019. A few days later on May 30, 2019 after dispensing with the matter, the respondent received a letter from the Chief Justice, requesting him to explain why he handled only one matter when he was not in the duty court, to which he replied in writing on June 6, 2019. Subsequently, the Chief Justice exercised delegated power from the JSC, wrote to the respondent, and in the letter, the Chief Justice suspended the respondent without pay for gross misconduct, in particular for entertaining a matter which the respondent had no jurisdiction to entertain.

The respondent successfully obtained orders that the letter of the Chief Justice was illegal, null and void for being in contravention of articles 41, 47(1) and 236 of the Constitution. The trial court further made a declaration that the appellants pay the respondent all salaries, allowances and other contractual and statutory benefits withheld throughout the suspension period, and directed the appellants to reinstate the respondent to his employment and to continue in employment without loss of rank status and benefits. Aggrieved, the appellants filed the instant appeal, challenging the decision of the High Court on grounds that the appellants' acted within their constitutional and statutory powers to discipline the respondent.

Issues

- i. Whether the Chief Justice had the power to suspend a judicial officer who was facing a disciplinary process.
- ii. Whether dismissal proceedings could be undertaken before the Chief Justice could exercise the power of suspension of a judicial officer under paragraph 17(2) of the Third Schedule to the Judicial Service Act.
- iii. What were the stages required to be undertaken by the Chief Justice in dismissal proceedings against a judicial officer?
- iv. At what stage of the disciplinary proceedings was the Chief Justice deemed to be able to make an opinion that an officer ought to be dismissed?
- v. Between the Judicial Service Commission and the Chief Justice, which body/office was empowered to make any decision as regards the payment of judicial officers on suspension?
- vi. Whether the action of the Chief Justice to suspend a judicial officer without pay and to require the judicial officer to show cause why the judicial officer should not be subject to disciplinary action before dismissal proceedings were undertaken was unfair and illegal.
- vii. Whether the court would rely on the doctrine of exhaustion of remedies where there was a clear abuse of discretion by the bodies the court was to refer.

Relevant provisions of the Law

Judicial Service Act, Act No. 1 of 2011

Third Schedule Paragraphs 17 - Suspension

(1) *Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.*

(2) *The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.*



Held

1. Being a first appellate the court would consider the issues by re-evaluating the evidence adduced in the trial court and arriving at its own conclusions of fact and law. The court would only depart from the findings by the trial court if they were not based on the evidence on record, or where the trial court was shown to have acted on wrong principles of law.
2. There were two conditions that were provided for the exercise of the power to suspend an officer under paragraph 17 of the Third Schedule to the Judicial Service Commission Act. The first was stated in paragraph 17(1), which was when an officer had been convicted of a serious criminal offence, other than the minor offences referred to in paragraph 28(2). Where the condition precedent of conviction of a criminal offence in paragraph 17(1) obtained, the Chief Justice had power to peremptorily suspend a judicial officer from the exercise of the functions of that office, pending consideration of the case in the manner provided under the Third Schedule. That condition was not applicable in the circumstances of the respondent's disciplinary process, as no evidence was availed by the appellants that the respondent was charged with, or convicted of any criminal offence.
3. The second condition was in paragraph 17 (1) of the Third Schedule to the Judicial Service Act, which provided that the Chief Justice could suspend an officer against whom proceedings for dismissal had been taken if, as a result of those proceedings, he considered that the officer ought to be dismissed. Therefore, there was a condition precedent that dismissal proceedings had to be undertaken before the power of suspension was exercised.
4. The dismissal proceedings were set out in paragraph 25. A plain reading and interpretation of the provisions of paragraph 25 showed four stages required to be undertaken by the Chief Justice in the dismissal proceedings against a judicial officer. First, an inquiry; second, institution of the disciplinary proceedings by way of framing and forwarding of the charge or charges and any accompanying statements to the judicial officer, third, an invitation and opportunity to the officer concerned to state his or her case; and fourth, if the officer failed to exculpate himself or herself, laying of the charges and response if any before the JSC for a decision as to whether the disciplinary proceedings should continue or not.
5. The Chief Justice undertook proceedings in the nature of a confidential preliminary inquiry, and prior to the decision by the Judicial Service Commission (JSC) that disciplinary proceedings should continue against an officer, there would be no ground for the Chief Justice to suspend the officer as was provided for and envisaged in paragraph 25 (3) of the Third Schedule.
6. It was a condition precedent that before a suspension was effected under paragraph 17(2) of the Third Schedule to the Judicial Service Act, the applicable dismissal proceedings provided under paragraph 25 of the Third Schedule had to be undertaken. The duty of procedural fairness imposed upon the Chief Justice by article 47 of the Constitution and the provisions of the Fair Administrative Action Act, would also require that the process under paragraph 25 be undertaken where a suspension was being effected pursuant to paragraph 17(2) of the Third Schedule. Under the provisions of paragraph 17(2) as read with paragraph 25 of the Judicial Service Act, the Chief Justice could only make an opinion as to whether a judicial officer should be dismissed after considering the officer's response or lack thereof to the charges made, and after approval of his recommendation to continue with the disciplinary process, including any suspension, by the Judicial Service Commission.
7. The Chief Justice suspended the respondent with nil pay, and at the same time specifically required the respondent to show cause why disciplinary action should not be taken against him within fourteen (14) days. In effect, the suspension of the respondent was therefore imposed before the dismissal proceedings provided by paragraph 25 were undertaken, including the approval by the Judicial Service Commission. To that extent, the Chief Justice exercised the power to suspend the respondent unfairly and illegally, as there was non-compliance with the applicable conditions under paragraph 17(2) and



- paragraph 25 of the Third Schedule to the Judicial Service Act. The trial Court did not err in its findings in that respect.
8. Paragraph 17(3) of the Third Schedule to the Judicial Service Act provided that while an officer was suspended from the exercise of the functions of their office they were to be granted an alimentary allowance in such amount and on such terms as the Commission would by regulations determine. An allowance was a share or portion of money that was assigned or granted. The Concise Oxford English Dictionary defined alimentary as relating to nourishment or sustenance.
 9. There was no express, implied or other provision or suggestion in the Judicial Service Act and Employment Act of 2007 that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. The respondent could not be penalised in the absence of such a clear rule. In addition, his entitlement to alimentary allowance under paragraph 17(3) of the Third Schedule to the Judicial Service Act, had its basis on the Constitutional provisions on fair labour practices and the concept of reasonableness. It was notable that repository of the power to determine the pay a judicial officer on suspension in paragraph 17(3) of the Third Schedule was the Judicial Service Commission and not the Chief Justice, who was not therefore empowered to make any decision as regards the pay of judicial officers on suspension.
 10. The respondent's entitlement, was not diminished in any manner for want of provision and regulations by the JSC in that regard. That was one of the reasons why suspensions of judicial officers in the circumstances such as those of the instant appeal ought to be sanctioned by JSC, so that it could address its mind to the regulations needed by the Third Schedule to the Judicial Service Act with regard to payment of alimentary allowance and other conditions of suspension. The Registrar of the Court of Appeal was directed to send a copy of the judgment for the attention of the Attorney General, in light of the identified amendments and regulations required to be made to, and under the Third Schedule to the Judicial Service Act. For the purposes of the appeal, however, it sufficed that the suspension of the respondent with nil pay was illegal.
 11. Exhaustion of alternative remedies was a constitutional and legal imperative under article 159(2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act. That position notwithstanding, courts retained the residual jurisdiction to intervene in exceptional circumstances despite the existence of an alternative remedy.
 12. The disciplinary process by the 1st appellant against the respondent was marred from the start with illegality and procedural irregularity. It was evident that the Chief Justice had already made a finding in the letter dated June 13, 2019 that the respondent's actions amounted to gross misconduct, and therefore, as regards the respondent's culpability. The respondent was also subjected to extreme hardship having been illegally and indefinitely suspended with nil pay. Continuing with the disciplinary process in the circumstances would essentially have been an exercise in futility, and aid in the continued violation of the respondent's rights,
 13. The impugned disciplinary process, having been irregular and illegal *ab initio*, meant there were no valid proceedings that could be remitted back to the appellants for consideration. The trial court did not err in granting orders to restore the respondent to the status he was before the impugned disciplinary proceedings.

Appeal disallowed.

Orders

The orders in the judgment of the trial Court dated August 30, 2019 in Nairobi ELRC Petition No. 100 of 2019 were upheld, save to the extent that they may have been modified or qualified by the findings made in the instant judgment. Costs to the respondents.

Citations

Cases

East Africa;



1. *Ndegwa, Duncan v Lasit Limited* Civil Appeal 522 of 2019; [2018] eKLR) — (Mentioned)
2. *Fleur Investments Limited v Commissioner of Domestic Taxes & another* Civil Appeal 158 of 2017; [2018] eKLR — (Explained)
3. *Muthinja, Geoffrey another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] eKLR) — (Explained)
4. *Mworia, George Water Resources Management Authority & 2 others* Constitutional Petition 4 of 2015; [2015] eKLR — (Mentioned)
5. *Muriithi, Grace Gacheri v Kenya Literature Bureau* Cause 44 of 2011; [2012]eKLR — (Explained)
6. *Jabane vs Olenja* [1986] KLR 661 — (Explained)
7. *Jackson Butiya vs Eastern Produce* Cause No 335 of 2011; [2012] eKLR — (Mentioned)
8. *Muchiri, James Njuguna v Armed Forces Canteen Organization (AFCO)* Civil Appeal 245 of 2010; [2016] eKLR) — (Explained)
9. *Judicial Service Commission & another v Lucy Muthoni Njora* Civil Appeal 486 of 2019; [2021] eKLR — (Explained)
10. *Judicial Service Commission v Beatrice Nyambune Mosiria* Civil Appeal 263 of 2019; [2020] eKLR — (Explained)
11. *Judicial Service Commission v Davis Gitonga Karani* Civil Appeal 305 of 2019; [2020] eKLR) — (Explained)
12. *Judicial Service Commission v Gladys Boss Shollei & another* Civil Appeal 50 of 2014; [2014] eKLR - (Explained)*Ndyanabo vs Attorney General* [2001] EA 485 — Explained
13. *Lutta, Pamela Nelima v Mumias Sugar Co Ltd* Cause 293 of 2015; [2017] eKLR — (Mentioned)
14. *Republic v County Secretary and Head of Public Service, Bomet County & another Ex parte Bernard Soweke* Judicial Review 13 of 2017; 2017] eKLR — (Explained)
15. *Selle & nother v Associated Motor Boat Company Ltd & others* [1968] 1 EA 123 — (Explained)
16. *Speaker of National Assembly v Karume* [1992] KLR 21 — (Mentioned)
17. *Suraya Holdings Limited v ICICI Bank Limited* Civil Case No 85 of 2015; [2016] eKLR — (Mentioned)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 1, 41, 47(1); 172(1)(c); 159(2)(c) — (Interpreted)
2. Employment Act, 2007 (Act No 11 of 2007) In general — (Cited)
3. Fair Administrative Actions Act, 2015 (Act No 4 of 2015) section 3 — (Interpreted)
4. Judicial Service Act, 2011 (Act No 1 of 2011) In general — (Cited)

Texts

1. Halsbury's, (Ed)(1983) *Halsbury's Laws* Butterworth's 4th Edn Vol 44 (1) para 1240
2. Oxford, L., (Ed) (2011) *Concise Oxford English Dictionary* Oxford University Press

Advocates

1. Moses Kipkosgei and Mr. Ochola for for the appellants
2. Nelson Havi, Micheal Osundwa and Irene Kashindi for for the respondent

JUDGMENT

1. Bryan Mandila Khaemba, the respondent herein, filed a petition in Nairobi ELRC Petition No 100 of 2019 dated 17th June 2019 and amended on 26th June 2019, as against the Chief Justice of the Republic of Kenya and the Judicial Service Commission (JSC), who are the 1st and 2nd appellants herein



- respectively. He stated therein that he was employed by the JSC as a District Magistrate II (Prof) on 1st July 2020, and after serving for 9 years, rose through the ranks to the position of Principal Magistrate.
2. On 23rd May 2019, the respondent experienced numbness and discomfort on his right leg, and sent a short message of his illness via text to his immediate supervisor, the Chief Magistrate at Kiambu Law Courts. Further, that in the course of the day, he felt better after physiotherapy and went to court, and that in the midst of writing his judgment, he was informed of an urgent application in Kiambu Miscellaneous Criminal Application No 222 of 2019 - *Ferdinand Ndungu Waititu and Faith Njeri Harrison v the EACC, DPP & 3 others*, which file was brought to him by the head of Criminal Registry as all the other Magistrates were engaged at the time. A few days later on 30th May 2019 after dispensing with the matter, the Respondent received a letter from the Chief Justice, requesting him to explain why he handled only one matter when he was not the Duty Court, to which he replied in writing on 6th June 2019.
 3. On 13th June 2019 the Chief Justice exercising delegated power from the JSC, wrote to the respondent reiterating the contents of his previous letter and further communicating that: firstly, the respondent had no jurisdiction to entertain Kiambu Miscellaneous Criminal Application No 222 of 2019; secondly, that his actions amounted to gross misconduct contrary to section D7.2 (xviii) of the JSC Human Resources (“HR”) Policies and Procedure Manual and rule 3 & 12 of the JSC Code of Conduct and Ethics; thirdly, that the respondent should within 14 days show cause why disciplinary action should not be taken against him and finally, that the respondent stood immediately suspended until the hearing and determination of his disciplinary case and that he would receive nil salary.
 4. The respondent contended that the said letter from the Chief Justice amounted to constructive dismissal for the reasons that the contents of the said correspondence was widely published and circulated in the mainstream print media even before he received it, subjecting him to a sham trial through publicity thus effectively prejudiced any disciplinary proceedings that may eventually ensue respecting the issue. In addition, that the Chief Justice had already determined that the respondent was guilty of gross misconduct and finally, not only barred the respondent from accessing his place of work, but also withheld his entire salary and benefits in breach of the Constitution, the [Employment Act](#) and the JSC’s HR Policies and Procedure Manual.
 5. The respondent detailed the particulars of breach of his constitutional rights and freedoms, the unconstitutionality of sections of the Third Schedule of the Judicial Service Commission Act and JSC HR Policies and Procedure Manual relied upon by the appellants, the unconstitutionality of his suspension letter, and the prejudice he had suffered. He accordingly sought various declarations in this regard, the quashing of the Chief Justice’s decision, his reinstatement, and both general and punitive damages.
 6. In response, the 1st and 2nd appellants filed a replying affidavit and further affidavit sworn on 8th July 2019 and 24th July 2019 respectively by Anne Atieno Amadi, the Secretary of the Judicial Service Commission. The appellants cited various articles of the Constitution and sections of the *Judicial Service Act* relied upon in undertaking the disciplinary action against the respondent, and that the Chief Justice invoked the delegated powers pursuant to paragraphs 17 of the Third Schedule of the *Judicial Service Act* by requiring the respondent to show cause within 14 days why disciplinary action should not be taken against him, and suspended him. However, that the respondent did not respond to the said letter, but instead made a complaint to the JSC and filed the petition that is the subject of this appeal.
 7. After hearing the parties, the trial Judge delivered a judgment on 30th August 2019 in favour of the respondent, and made a declaration that the 1st appellant’s letter dated 13th June 2019 was illegal, null



and void for being in contravention of article 41, 47(1) and 236 of the Constitution, and infringed the respondent's fundamental rights guaranteed under articles 1 and 47(1) of the Constitution. The decision in the said letter was also quashed by the trial court, and the appellants were further prohibited from implementing the said decision. The trial court further made a declaration that the appellants pay the respondent all salaries, allowances and other contractual and statutory benefits withheld throughout the suspension period, and directed the appellants to reinstate the respondent to his employment and to continue in employment without loss of rank status and benefits.

8. The appellants were aggrieved by the said decision, and lodged a Memorandum of Appeal dated 24th October 2019, in which they raised five grounds of appeal on the findings made by the trial court in relation to the Third Schedule to the *Judicial Service Act* and the appellants' Constitutional and statutory powers to discipline the respondent. The grounds, together with oral highlights, were urged before us on 13th July 2021 by learned counsel Moses Kipkosgei and Mr Ochola for the appellants, and learned counsel Nelson Havi, Micheal Osundwa and Irene Kashindi for the respondent.
9. The main contest in this appeal is the interpretation and construction of the Third Schedule to the *Judicial Service Act vis-a-vis* the appellants' constitutional and statutory powers to discipline judicial officers. The three main issues urged in this respect were as follows:
 - a. What conditions, if any, are applicable to the exercise of the Chief Justice's disciplinary powers to suspend a judicial officer under the Third Schedule to the *Judicial Service Act*?
 - b. Whether a judicial officer can be suspended without pay under paragraph 17(3) of the Third Schedule to the *Judicial Service Act*.
 - c. Whether the court can interfere with a disciplinary process initiated under the Third Schedule to the *Judicial Service Act*.
10. As this is a first appeal from the decision of the trial court, we reiterate this court's role as expressed in *Selle & another v Associated Motor Boat Company Limited Co Ltd & others* [1968] EA 123 where it was stated that:

“..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”
11. We shall therefore proceed to consider the above issues by re-evaluating the evidence adduced in the trial court and arrive at our own conclusions of fact and law. In this regard we will only depart from the findings by the trial court if they are not based on the evidence on record, or where the trial court is shown to have acted on wrong principles of law, as held in *Jabane v Olenja* [1986] KLR 661.
12. With regards to the first issue, on the conditions applicable to the exercise of the Chief Justice's disciplinary powers to suspend a judicial officer, the appellants submitted that paragraph 15 of the



Third Schedule to the *Judicial Service Act*, delegated the powers of the Judicial Service Commission to the Chief Justice and the paragraph enjoyed a presumption of constitutionality and legality. Reliance was placed on *Ndyanabo vs Attorney General* [2001] EA 485 for the proposition that every Act of Parliament had a presumption of Constitutionality and the burden of proof lay with every person who alleged otherwise.

13. Further, that it was not in contention that disciplinary proceedings commenced the moment the Chief Justice framed the charge against a judicial officer as laid down under paragraph 25(1) of the Third Schedule to the *Judicial Service Act* as was held in *Judicial Service Commission vs Gladys Boss Shollei & Another* [2014] eKLR where the gist of the case was paragraph 25 of the Third Schedule which dealt with proceedings of dismissal of Judicial Officers and staff showed that disciplinary proceedings were initiated when the Chief Justice framed the charge which was then forwarded to the concerned officer and a committee or panel appointed to investigate the matter.

14. The appellants stated that the respondent was issued with a letter to show cause why disciplinary action should not be taken against him, the respondent instead of attending disciplinary proceedings, responded to the letter to notice to show cause terming it constructive summary dismissal.

They urged that the respondent through his own action elected not to subject himself to the Disciplinary Committee or panel and therefore cannot fault the Chief Justice for his actions or be allowed to benefit from his wrong doing. For this proposition, they placed reliance on the case of *Suraya Holdings Limited vs ICICI Bank Limited* HCCC No 85 of 2015. Also cited were the cases of *Jackson Butiya vs Eastern Produce* Cause No 335 of 2011, *Duncan Ndegwa Muriuki vs Lasit Limited* [2018] eKLR, and *Pamela Nelima Lutta vs Mumias Sugar Co Ltd* [2017] eKLR for a similar proposition that an employee who squanders the internal grievances handling mechanisms provided by the employer cannot claim that he or she was not heard.

15. The appellants further submitted that the respondent did not enjoy judicial immunity over his actions which resulted in the show cause letter as to why disciplinary action should not be taken against him. They placed reliance on the case of *Judicial Service Commission v Davis Gitonga Karani* [2020] eKLR for the proposition that, what the respondent was being disciplined for, fell within the purview of judicial independence, not just involving the decision making process, but for also being, in the entire circumstances of this case, devoid of good faith. They further cited the decision in *Judicial Service Commission v Beatrice Nyambune Mosiria* [2020] eKLR for the proposition that the Employment and Labour Relations Court must not substitute its own view for those of the employer, and that its function is to determine whether the facts and circumstances fell within or outside the band of reasonableness.

16. The respondent in his submissions dated November 2020 urged that the trial court clearly appreciated that the 1st appellant initiates disciplinary proceedings by framing charges and forwarding the statement of charges to the officer concerned under paragraph 25 of the Third Schedule, and that at this stage the proceedings undertaken by the Chief Justice will be in the nature of preliminary confidential inquiry prior to the decision by the 2nd appellant as to whether disciplinary proceedings should continue against the officer and rightfully held that it would serve no purpose to suspend an officer at the preliminary stage of the inquiry. Therefore, that while the trial court was of the opinion that the disciplinary powers were properly delegated and vested in the Chief Justice as head of the Judiciary, the trial court emphasized the need for compliance with the safeguards provided in paragraphs 16, 17 and 25 of the Third Schedule to the *Judicial Service Act*. Further, that the Chief Justice's powers to suspend a judicial officer are not absolute under paragraph 17(2), which were the provisions that were employed to suspend the respondent.



17. The Third Schedule to the *Judicial Service Act* contains provisions relating to the appointment, discipline and removal of judicial officers and staff.

Paragraph 15 of the Third Schedule provides for the disciplinary powers of the Chief Justice as follows:

1. The following disciplinary powers vested in the Commission are delegated to the Chief Justice—
 - a. the power to interdict an officer under paragraph 17;
 - b. the power to suspend an officer under paragraph 18;
 - c. the power to administer a severe reprimand or a reprimand to an officer.
 2. The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.
18. The Commission referred to in paragraph 15 is the Judicial Service Commission, and its disciplinary powers with respect to judicial officers are provided in article 172(1)(c) of the Constitution. Under this article, one of JSC's functions is to appoint, receive complaints against, 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. As noted by the trial court in its judgment, paragraph 15 has an error that requires to be corrected by amendment, as regards the reference to the applicable paragraphs on the powers to interdict and suspend officers, which are paragraphs 16 and 17 of the Third Schedule respectively, and not paragraphs 17 and 18.
19. There are two conditions that are provided for the exercise of the power to suspend an officer under paragraph 17 of the Third Schedule. The first is stated in sub paragraph 1, which is when an officer has been convicted of a serious criminal offence, other than the minor offences referred to in paragraph 28(2). Where the condition precedent of conviction of a criminal offence in sub-paragraph 1 obtains, the Chief Justice has power to peremptorily suspend a judicial officer from the exercise of the functions of that office, pending consideration of the case in the manner provided under the Third Schedule. This condition was not applicable in the circumstances of the respondent's disciplinary process, as no evidence was availed by the appellants that the respondent was charged with, or convicted of any criminal offence.
20. The second condition is in sub paragraph 2 of paragraph 17 of the Third Schedule, which provides that the Chief Justice may suspend an officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed. Therefore, there is a condition precedent that dismissal proceedings must be undertaken before the power of suspension is exercised. The dismissal proceedings are set out in paragraph 25, of which sub paragraphs 1 to 3 provide for the procedure to be followed by the Chief Justice as follows
1. Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite



the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.

2. If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not.
 3. If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the Constitution, delegate its powers: Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel.
21. A plain reading and interpretation of the provisions of paragraph 25 show four stages required to be undertaken by the Chief Justice in the dismissal proceedings against a judicial officer. First, an inquiry; second, institution of the disciplinary proceedings by way of framing and forwarding of the charge or charges and any accompanying statements to the judicial officer, three, an invitation and opportunity to the officer concerned to state his or her case; and four, if the officer fails to exculpate himself or herself, laying of the charges and response if any before the JSC for a decision as to whether the disciplinary proceedings should continue or not. The question to be answered therefore, is at what stage of these proceedings the Chief Justice is deemed to be able to make an opinion that an officer ought to be dismissed.
22. The trial court in this respect found that the Chief Justice undertakes proceedings in the nature of a confidential preliminary inquiry, and that prior to the decision by the JSC that disciplinary proceedings should continue against an officer, there would be no ground for the Chief Justice to suspend the officer as is provided for and envisaged in paragraph 25(3) of the Third Schedule. We agree with the trial Judge for the following reasons. Firstly, as shown in the foregoing, it is a condition precedent that before a suspension is effected under paragraph 17(2) of the Third Schedule to the *Judicial Service Act*, the applicable dismissal proceedings provided under paragraph 25 of the said Third Schedule must be undertaken. Secondly, the duty of procedural fairness imposed upon the Chief Justice by article 47 of the Constitution and the provisions of the *Fair Administrative Action Act*, would also require that the process under paragraph 25 be undertaken where a suspension is being effected pursuant to Paragraph 17(2) of the Third Schedule. Lastly, under the provisions of Paragraph 17(2) as read with paragraph 25 of the *Judicial Service Act*, the Chief Justice can only make an opinion as to whether a judicial officer should be dismissed after considering the said officer's response or lack thereof to the charges made, and after approval of his recommendation to continue with the disciplinary process, including any suspension, by the Judicial Service Commission.
23. It is notable in this respect that the Chief Justice in his letter of 30th May 2019 merely required the respondent to provide an explanation within fourteen (14) days, of the circumstances under which he went to court to handle the subject matter. There was no charge in the said letter, nor can it be construed to be a charge, since the letter being in the nature of a request for information was merely an inquiry. *Black's Law Dictionary*, 12th Edition defines an inquiry at page 913 as "a request for



information, either procedural or substantive”. A charge on the other hand is defined at page 282 as “a formal accusation of an offence as a preliminary step to prosecution” The actual charges against the respondent were revealed in the Chief Justice’s letter of 13th June 2019 , where after noting that the respondent’s explanation was unsatisfactory, the Chief Justice formally informed the respondent of the wrongs he was deemed to have committed, namely that the respondent had no authority to handle the matter the same having not been allocated to him and having had no jurisdiction, and that his actions amounted to gross misconduct contrary to the Human Resources Policies and Procedures Manual section D 72 (xvii) and was a breach of the Judicial Service Code of Conduct and Ethics rule 3 & 12.

24. By dint of the same letter, the Chief Justice then proceeded to suspend the respondent with nil pay, and at the same time specifically required the respondent to show cause why disciplinary action should not be taken against him within fourteen (14) days. In effect, the suspension of the respondent was therefore imposed before the dismissal proceedings provided by Paragraph 25 were undertaken, including the approval by the Judicial Service Commission. To this extent, we find that the Chief Justice exercised the power to suspend the respondent unfairly and illegally, as there was non-compliance with the applicable conditions under paragraph 17(2) and paragraph 25 of the Third Schedule to the *Judicial Service Act* , and that the trial court did not err in its findings in this respect.
25. Coming to the second issue as to whether a judicial officer can be suspended without pay, the appellants submitted that, although paragraph 17(3) of the Third Schedule to the *Judicial Service Act* provided for alimentary allowance, out of abundance of caution considering the weight and gravity of the evidence against the respondent, they recommended that he be entitled to nil salary in order to protect the public from eventual loss that it would have incurred once the charges were confirmed. Reliance was placed on the case of *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR for the proposition that whether an employee will be paid during the period of interdiction will depend on the outcome of the disciplinary proceedings.
26. The respondent on his part submitted that this court has held in several decisions, that it was unlawful for an employee to be suspended without pay, and cited the case of *James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO)* [2016] eKLR for the proposition that there was no inherent right to suspend an employee without pay and that any power to do so must arise from the terms of the contract. Worse, that the alimentary allowance permitted under paragraph 17 of the Third Schedule to the *Judicial Service Act* was not available to the respondent as per the suspension letter.
27. As noted by this court in *James Njuguna Muchiri v Armed Forces Canteen Organization (AFCO)* [2016] , the starting point in any inquiry as to whether suspension without pay is legal is the terms of employment. Paragraph 17(3) of the Third Schedule to the *Judicial Service Act* in this respect provides that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine. An allowance is a share or portion of money that is assigned or granted. The *Concise Oxford English Dictionary* defines alimentary as “relating to nourishment or sustenance”.
28. The terms of a statute withholding pay to an employee are essentially of a penal nature, and like all penal provisions must be construed restrictively, and a person should not be penalized except under clear law. The term penal and the rule against doubtful penalisation is explained as follows in *Halsbury’s Laws Vol 44 (1)* at paragraph 1240:

“... the true test is now considered to be whether a particular construction inflicts a detriment, or greater detriment on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are degrees of penalisation but the concept of detriment inflicted through the state’s coercive power pervades them all.



The substance, not the form of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity, hence the principle against doubtful penalisation.

29. We therefore are in agreement with the trial court's findings in this regard that there is no express, implied or other provision or suggestion in the *Judicial Service Act* and *Employment Act* of 2007 that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. The respondent could not therefore be penalised in the absence of such a clear rule. In addition, his entitlement to alimentary allowance under paragraph 17(3) of the Third Schedule to the *Judicial Service Act*, has its basis on the Constitutional provisions on fair labour practices and the concept of reasonableness. Lastly, it is also notable that repository of the power to determine the pay a judicial officer on suspension in paragraph 17(3) of the Third Schedule is the Judicial Service Commission and not the Chief Justice, who is not therefore empowered to make any decision as regards the pay of judicial officers on suspension.
30. We concur with the trial court's findings that the respondent's entitlement, was not diminished in any manner for want of provision and regulations by the JSC in this regard. Indeed, this is one of the reasons why suspensions of judicial officers in the circumstances such as those of this appeal ought to be sanctioned by JSC, so that it can address its mind to the regulations needed by the Third Schedule to the *Judicial Service Act* with regard to payment of alimentary allowance and other conditions of suspension. The Registrar of this court is thus directed to send a copy of this judgment for the attention of the Attorney General, in light of the identified amendments and regulations required to be made to, and under the Third Schedule to the *Judicial Service Act*. For the purposes of this appeal, however, it suffices that the suspension of the respondent with nil pay was illegal.
31. The last issue before us is whether courts can interfere with the disciplinary process initiated under the Third Schedule. The appellants in this regard submitted that courts should not interfere with internal disciplinary processes initiated against an employee. The appellants draw this court's attention to the decision in *Republic vs County Secretary and Head of Public Service, Bomet County & another ex parte Benard Soweke* [2017] eKLR for the proposition that a court cannot interfere with an internal disciplinary process unless the process is in contravention of the Constitution or legislation or is in breach of the parties' agreement/ contract or the process is manifestly unfair in the circumstances. Further, that the trial court's decision to hear and determine the claim filed by the respondent not only interfered with the appellants' constitutional and statutory powers to discipline their staff but also amounted to micromanaging the appellants in exercise of that power.
32. The decision in the case of *Judicial Service Commission v Beatrice Nyambune Mosiria* [2020] eKLR was cited for the proposition that if JSC was found to have violated the rules of procedure, or have been unreasonable, the trial court could not constitute itself into a disciplinary tribunal, instead it ought to have remitted the matter back to the JSC. The appellants in conclusion stated that had the trial court considered the above issues, it would have arrived at a different conclusion and ordered the respondent to subject himself to the disciplinary proceedings recommended by the 1st appellant herein.
33. The respondent on his part submitted that as a general rule, the court should not interfere with internal disciplinary processes except in exceptional circumstances which may include but not limited to a situation where there was a clear violation of the law or the employer's disciplinary procedure, or where the disciplinary procedure was being used by the employer to remove an employee from employment for no valid reason or for reasons not connected with the employee's conduct or performance as the case herein. The decision in *George Mworira v Water Resources Management Authority & 2 others* [2015] eKLR was cited for this position.



34. Exhaustion of alternative remedies is now a constitutional and legal imperative under article 159(2) (c) of the Constitution and section 9(2) and 3 of the *Fair Administrative Action Act*. The doctrine of exhaustion of remedies was first embodied by this court in *Speaker of National Assembly v Karume* (1992) KLR 21. The said court further clarified the doctrine under the current constitutional dispensation in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* (2015) eKLR

35. This position notwithstanding, courts still retain the residual jurisdiction to intervene in exceptional circumstances despite the existence of an alternative remedy, as was explained by this court in *Fleur Investments Limited v Commissioner of Domestic Taxes & another*, [2018] eKLR:

“Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

36. Were there circumstances in this appeal that justified an intervention by the court? It has been demonstrated and found that the disciplinary process by the 1st appellant against the respondent was marred from the start with illegality and procedural irregularity. It is also evident that the Chief Justice had already made a finding in the letter dated 13th June 2019 that the respondent’s actions amounted to gross misconduct, and therefore, as regards the respondent’s culpability. Lastly, the respondent was also subjected to extreme hardship having been illegally and indefinitely suspended with nil pay. Continuing with the disciplinary process in the circumstances would essentially have been an exercise in futility, and aid in the continued violation of the respondent’s rights, as was similarly noted by this court in *Judicial Service Commission & Another vs Lucy Muthoni Njora* [2021] eKLR.

37. In conclusion, this court also finds that the impugned disciplinary process, having been irregular and illegal *ab initio*, meant there were no valid proceedings that could be remitted back to the appellants for consideration.

In the circumstances, the trial Judge also did not err in granting orders to restore the respondent to the status he was before the impugned disciplinary proceedings.

38. The appellants’ appeal therefore fails for the foregoing reasons. We therefore make the following orders:

1. The orders in the judgment of the trial court dated 30th August 2019 in Nairobi ELRC Petition No 100 of 2019 are hereby upheld, save to the extent that they may have been modified or qualified by the findings made in this judgment.
2. The appeal herein is dismissed with costs to the respondent.

39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL



S. ole KANTAI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

