



**Judicial Service Commission v Ochenja (Civil Appeal 312 of 2019)
[2020] KECA 3 (KLR) (25 September 2020) (Judgment)**

Judicial Service Commission v Daniel Ochenja [2020] eKLR

Neutral citation: [2020] KECA 3 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 312 OF 2019
F SICHALE, J MOHAMMED & S OLE KANTAI, JJA
SEPTEMBER 25, 2020**

BETWEEN

JUDICIAL SERVICE COMMISSION APPELLANT

AND

DANIEL OCHENJA RESPONDENT

JUDGMENT

1. Daniel Mudanyi Ochenja (“the respondent”) was employed in the year 1993 by the appellant (Judicial Service Commission) and he served as a magistrate in various stations for about 26 years. By the time his troubles with the appellant began he had risen to the senior position of Acting Chief Magistrate and his station was Milimani Commercial Courts, Nairobi, and he presided over Court No.
2. A British national was arrested at Jomo Kenyatta International Airport, Nairobi, and he was charged for breaching certain immigration laws in **Milimani Chief Magistrates Court Criminal Case No. 1367 of 2014**. That case was allocated to Court No. 6, presided over by **Hon. Hannah Wamuyu Kaguru**. The accused in the case initially pleaded not guilty; was remanded at the request of the prosecution and when the case came up before Court 6 for mention the accused was released on a cash bail of Kshs.200,000 which was paid. Hearing was set for 13th November, 2014 but by a letter by the lawyers of the accused M/S Garane & Associates Advocates they requested that the matter be mentioned earlier because the accused wished to change plea. The letter was received by the Court Registry and brought to the attention of the respondent who, although this fact is disputed, ordered that the matter be mentioned before him on 31st October, 2014 because he was the duty Court that week. There is then a twist of facts where Hon. Hannah Wamuyu Kaguru, the presiding magistrate of Court 6, which court the said Criminal Case No. 1367 of 2014 had been assigned for hearing, before the mention ordered by the respondent, called for the court file from the registry and retained it in her chambers contrary to procedure, and this became the subject of investigations leading to a case in court



and the magistrate (Mrs. Kaguru) resigned from the Judiciary as investigations proceeded. Meanwhile come 31st October, 2014 the lawyer for the accused in the said case attends court for mention but the case is not listed. According to the appellant the respondent was anxious about unavailability of the court file and even delayed the day's court business as he called for the file. He eventually went to court and in the course of the proceedings a skeleton file had been opened and brought to court. According to the appellant the respondent adjourned court proceedings, retired to Chambers where, in the absence of the accused and with no proper coram, the respondent imposed a fine of Kshs.50,000 for each of the four counts, and at the request of counsel for the accused, but in the absence of the copy of Court Receipt the respondent ordered that bail paid Kshs.200,000 be converted to the fine imposed. It is interesting that the fine imposed amounted to the same sum deposited in court as bail by the accused person.

3. It is not clear from the record how those facts reached the Hon. The Chief Justice (Dr. Willy Mutunga) who, by a letter dated 12th November, 2014 the respondent was accused of having colluded with Court Registry staff to open a skeleton file and proceeded to unprocedurally, unethically and corruptly deal with the file while he knew where the original court file was. It was further stated in the letter headed **“interdiction”**:

“... Further, you allowed the release of the accused person notwithstanding the fact that that forfeited cash bail could not be converted into fine in the absence of the file copy receipt of the cash bail.

You are hereby interdicted from performance and functions of your duties with effect from the date of this letter since proceedings which may lead to your dismissal are about to be taken....”

4. The letter went on to inform the respondent that he would receive half salary during the period of interdiction; he should, every Friday, report to the Chief Registrar and he must hand over all Government stores and a detailed hand over report to the Registrar, Magistrates Courts.
5. By a letter dated 18th November, 2014 the respondent explained that the Judiciary Ombudsman, who had been instructed to interrogate the case, had not interrogated him. He also gave a narration of the events that led to the criminal case file landing before him – that he was the plea court that week and the skeleton file was opened when the original file could not be traced. He denied engaging in any collusion and explained that there was no irregularity, in his view, in ordering that cash bail be converted to a fine.
6. The Chief Justice, as Chairman of the appellant, ordered an investigation which was conducted by a panel of the appellant and this culminated in the letter by the current Chief Justice Hon. Mr. Justice David Maraga dated 15th February, 2017 where the respondent was informed that the appellant had established that he had engaged in gross misconduct and breach of Judicial Service Code of Conduct and Ethics and he was dismissed from the Judicial Service.
7. That is a synopsis of the facts that led to the respondent filing a constitutional petition at the Employment and Labour Relations Court (“ELRC”) at Nairobi, which runs into 33 pages with a 26 page Supporting Affidavit. We observe that the same is otiose, it is repetitive and it is too long – where, as here, a party is represented by counsel, counsel should focus on the point in the case and state it in a summarized way.
8. It is stated in the petition and supporting affidavit that the respondent was first employed as a State Counsel in the office of the Attorney General (1991) and was employed by the appellant as a Magistrate in 1993 where he rose through the ranks to the position of Acting Chief Magistrate where he served in various stations; his last gross salary was Kshs.297,141; that he at all times performed his duties with



utmost good faith and with fidelity to the law; he was vetted by the Judges and Magistrates Vetting Board which found him fit for office, and:

(vii) THAT as a judicial officer as defined under Article 260 and Article 161(1) of the Constitution the Petitioners terms and conditions of service are regulated by the Constitution and “the JSA”) and the Schedule of rules thereunder, the FAAA) and the principles thereunder, the rules of natural justice.

viii. The Petitioner brings this Petition under Article 22(1) and Article 258(1) that his right to Natural Justice, his fundamental freedoms enshrined in the Bill of Rights and also the Constitution of Kenya as pleaded were denied, suspended, breached, violated, infringed and contravened in account of his arbitrary, unlawful, unprocedural and unconstitutional interdiction and dismissal from Judicial Service.”

9. The facts of Criminal Case No. 1367 of 2014 are then given, it being stated that it was an Officer in charge of the Court Registry who had ordered that a skeleton file be opened when the original one could not be traced; that the case was fresh and could be handled by any Court and that is why the respondent, who was the duty Magistrate that week, handled the file. On the issue of interdiction which came when he was on leave, the respondent states that it violated his constitutional rights under **Article 47, 50, 160 (5) and 226** of the **Constitution**; that it was a breach of his rights on rules of natural justice; that it lacked factual foundation and basis and was not backed by evidence. Various articles on the supremacy of the Constitution are set out and it is alleged that the respondent was condemned by the appellant unheard against rules of natural justice and against the provisions of the Employment Act and violated The Judiciary Human Resource Policies and Procedures Manual. It is alleged in the petition that the respondent was interdicted for 26 months without any good reason and lawful justification which, according to the respondent, amounted to unfair labour practice and that termination of employment was an abuse of power by the appellant. On alleged violation of **Article 47** of the **Constitution** and breach of provisions of the Fair Administrative Action Act it is alleged that there were no particulars in the charge made by the Chief Justice against the respondent; that no opportunity to be heard was given before termination of employment; that proceedings were conducted by the appellant in secrecy where witnesses were called by the appellant but the respondent was not accorded a right to be present or to cross examine those witnesses; that there was no notice of a right of appeal or review; that proceedings took 26 months to be concluded and that the proceedings were not fair. It is further alleged in the petition that after the hearing the appellant refused to serve or supply the respondent with the proceedings of the case or a detailed report despite a demand to provide those items and that this amounted to violation of **Articles 35 and 47 of the Constitution**; **Sections 4(3) (g) and 6 of the Fair Administrative Action Act (“FAAA”)** and **Section 9 of Access to Information Act**. The mandate of the appellant under **Article 172 of the Constitution** is set out as is the disciplinary process under **Section 32 of the Judicial Service Act (“JSA”)** and the regulations made thereunder. It is therefore alleged that the appellant breached the Constitution and the JSA in that the charge against the respondent was not accompanied by a statement; that the Chief Justice did not conduct a preliminary investigation; that interdiction of the respondent was through a summary process contrary to law. It is further alleged that there was violation by the appellant of the respondent’s rights under **Article 160 of the Constitution** in that, while performing a judicial function, the respondent was not subject to the control or direction of any person or authority. Of **Article 236 of the Constitution** the respondent alleged that his rights to due process of law was violated in that the interdiction was drastic, rules of natural justice were breached and the Constitution and other laws were not followed in the way his case was handled. He reproduced certain provisions of the United Nations such as the Universal Declaration on Human Rights and the African Charter on Human and Peoples Rights which, in his view, were not observed but were breached by the appellant.



10. The ELRC was asked for 11 prayers and we set them out here in full:

- (1) A declaration that the purported summary interdiction and charge (without a hearing) of the petitioner offended the strict and mandatory rules of Natural Justice, Section 41 of the Employment, Article 41, Article 47 of the constitution as read with Section 4(1), (2) and (3) of the Fair Administrative Action Act, and Article 236 of the Constitution and was therefore; illegal, ultra vires unprocedural, unfair and unconstitutional null and void ab initio and are hereby condemned, revoked, quashed and or set aside and the consequent proceedings and determinations founded on the interdiction and charge suffer the same fate.
2. That the impugned charge was void, defective, ultra vires and a nullity for none conformity to the strict mandatory statutory requirement as laid down under Regulation 25(1) of the 3rd schedule of the JSA being without an accompanying statement, and in so far as it purported to sanction a lawful judicial order conduct of the petitioner the same was without jurisdiction/excess of jurisdiction unconstitutional, ultra vires, null and void hence all consequent proceedings and determination were a none stator (sic) and without foundation and are hereby set aside revoked and quashed.
3. A declaration that the proceedings as conducted by the respondent were procedurally unfair as the 1st respondent violated its constitutional and statutory role strictly confined under Article 171(2) to only deal in a manner confined by statute under to Section 32(3) of the JSA, as read with Regulation 25(1-11) of the 3rd schedule of “the JSA” as read with Section 4(1), (2) and (3) (6) of the Fair Administrative Action Act and Article 47 and Article 236 of the constitution, the rules of natural justice hence the proceedings and consequent determinations were unconstitutional, ultra vires, null and void ab initio and are hereby condemned revoked, quashed and or set aside.
4. A declaration that the Respondent’s Acts jointly and severally were in gross abuse of the National Values Principles under article 10(2)(b) and Chapter 6 of the Constitution, Principles of Public Service under article 232 and principles of natural justice and therefore unconstitutional and a nullity.
5. A declaration that the petitioner as a judicial officer as envisaged in 160(1) and 160(5) of the Constitution and section 45 of the JSA is only subjected to the constitution and the law and enjoyed absolute immunity and protection from personal and adverse actions and victimization in cause of action based on an act or omission emanating from the lawful performance of a judicial function and such action was illegal and unconstitutional, null and void ab initio.
6. A declaration that the respondent and its agents violated the petitioner’s right to work as envisaged under Article 23(1) (2) (3) of the Universal Declaration of Human Rights and constitutional right to fair labour practices under Article 41 of the Constitution of Kenya.
7. A declaration that the respondents jointly and severally breached the constitutional rights and freedoms of the petitioner under Article 27(1), Article 28; Article 29(d) and (f); Article 35, Article 41, Article 47 and Article 236 (a) (b) the petitioner be compensated a sum of Kshs.10,000,000.00 and or whatever sum the Honorable Court may deem just and reasonable to award.
8. A declaration that under article 236 of the Constitution the petitioner is still the legitimate and lawful holder and remains a legitimate and lawful holder of a rank of A.g. Chief Magistrate and a mandatory injunction do issue against the respondent to unconditionally reinstate and



deploy him with effect from the date of the judgment to her service without any break and loss of salary, benefits and privileges in a similar or equivalent rank/capacity within the judiciary forthwith.

9. That the Honorable court do order forthwith release and payment of the petitioners accrued back salaries and arrears as a lumpsum forthwith, and with interest as at times of the accrual from 22nd April 2016 until full payment and a mention date be given to conform full compliance of the courts orders and directions as follows: Accrued salaries during the interdiction
 - a. Kshs297,141 (gross) x 26 months x ½.= Kshs.3,862,833/=
 - b. Kshs.297,141.70/= (gross) per month from 8th February 2017 until full compliance with the Honorable Courts judgment.
10. (Twelve) 12 months gross salary compensation for unlawful termination of employment or has (sic) the Honorable court shall deem fair and just to break the ceiling.
11. The respondent be condemned to pay the costs and interest or incidental to these proceedings.”
11. In a lengthy replying affidavit the appellant, through the Chief Registrar of the Judiciary (“CRJ”) deponed that the petition did not specify which provisions of the Constitution had been violated. The mandate of the appellant was set out including how disciplinary matters for Registrars, Magistrates and other judicial officers are handled. The CRJ stated that the Chief Justice has power under Regulation 15 of the Third Schedule of JSA to interdict, suspend and administer a severe reprimand or a reprimand to a judicial officer engaged in misconduct and the Chief Justice has power to interdict such officer in cases where proceedings which may lead to dismissal of such officer are being taken. She (the CRJ) set out the process contemplated by **Regulation 25(1) Part IV, Third Schedule** of the **JSA** and the process under **Regulation 25(2) Part IV, Third Schedule** and **Regulation 25(11)** on processes to be followed in disciplinary cases and punishments which may be meted out. Also that the appellant is guided in such cases by a Judiciary Human Resource Policies and Procedures Manual and that all provisions of law and the said Manual were followed in the case involving the respondent.
12. The CRJ in the affidavit repeated the facts involving Criminal Case No. 1367 of 2014 stating at paragraphs 18-23 (inclusive):
 18. I am aware that when the matter was mentioned on 29th September 2014 before Court No. 6, the Hon. Magistrate Hannah Wamuyu Kaguru, directed that the accused be released on a Cash Bail of Ksh.200,000/-. The Court further slated the hearing for 16th November 2014 with a mention fixed for 13th October 2014 before the same court. The mention for 13th October 2014 did indeed take place before Court No. 6 as evidenced from the proceedings in Annexure AAA-2. From the time when the matter first came in Court, Court No. 6 was seized with the matter and the hearing of 6th November 2014 was to take place before Court No. 6.
 19. I am further aware that on 29th October, 2014 when the matter was pending the hearing slated for 6th November 2014, the accused’s advocates wrote a letter requesting that the file be mentioned for purposes of changing plea that the accused person had taken. The letter from the accused’s Advocate was duly received by the Registry and the petitioner marked it for mention on 31st October 2014 Court No. 2. This was despite the fact that the petitioner knew that the file was before Court No. 6. In essence, the petitioner allocated the file to himself.
 20. On 30th October, 2014 Hon. Hannah Wamuyu, called for the file from the registry to be brought to her in chambers. Hon. Wamuyu retained the file in her chambers contrary to the set



down procedures relating to the handling of Court files. This fact was known to the Registry staff who in fact brought the file to Hon. Wamuyu's chamber at her request. I am aware that the issues leading to the misconduct of Hon. Wamuyu are the subject of a separate Cause in ELRC Cause No. 9 of 2018 – Hannah Wamuyu versus the Judicial Service Commission.

21. I am aware that despite the foregoing, the petitioner in total disregard of the standard practice, ordered that a skeleton file in respect of Nrbi. Crim. Case No. 1367 of 2014 be opened. On 31st October, 2014, whilst the petitioner presided over Court No. 2, he, in the course of proceedings and in total variance with the standard practice abruptly walked out of the court and proceeded to chambers.
 22. That while in chambers, the petitioner proceeded to deal with the matter in respect to change of plea with no quorum as his Court Clerk one Mr. Okoth was not in chambers at the time when the matter was mentioned. Further to the foregoing, the change of plea was taken in the absence of the accused person.
 23. I am aware that in dealing with the matter, the petitioner fined the accused person Kshs.50,000 for each of the four counts that the accused person had been charged with and further made an order that the cash bail of Ksh.200,000/- that had been paid by the accused be converted to a fine. This was notwithstanding, that the forfeited cash bail – which the accused's Advocate had prayed that it be converted to a fine – could not have been converted into a fine, in the absence of the file copy receipt of the cash bail.”
13. Further, that upon receiving a complaint in regard to the way the respondent had handled the said case, the Chief Justice interdicted the respondent in accordance to **Regulation 15 and 16** of the **Third Schedule to the JSA** as disciplinary proceedings were about to be taken against the respondent; that the respondent responded to the allegations; that the Chief Justice, meanwhile, had written to the Law Society of Kenya seeking information from the lawyers who had represented the accused in the said criminal case and had received a response from the lawyers; that the Chief Justice made a decision to institute proceedings for dismissal against the respondent and in that regard framed charges which were forwarded to the respondent who was required to respond to the charges within 21 days. The respondent replied to the charges but the Chief Justice found that the respondent had not exculpated himself and thus the matter was escalated to the appellant which followed the law in dealing with the respondent's case. Stating that the JSA takes precedence over all other statutes in matters disciplinary under the said Act the CRJ deponed that the Chief Justice followed the law to the letter. Further, that upon receipt of the charge and response thereto from the Chief Justice the appellant referred the disciplinary case to its Human Resource Management and Administrative Committee for oral hearing which, the CRJ says at paragraphs 46-50 (inclusive) of the affidavit:
46. I am aware that upon inquiry into the allegations against the petitioner, the JSC through its Human Resource Management Committee in a meeting held on 22nd January, 2016, deliberated on the discipline issue regarding the petitioner and recommended that the petitioner be invited for an oral hearing. This recommendation was ratified by the full JSC in a meeting held on 17th February 2016. Attached and marked as AAA-8 is a copy of the Excerpt of the report from the JSC regarding the recommendations.
 47. In accordance with the decision made by the JSC enumerated above, the JSC vide a letter dated 24th March 2016 invited the petitioner for an oral hearing of his disciplinary case on 11th April 2016 before the Committee. Attached and marked as AAA-9 is a copy of the letter dated 24th March 2016 inviting the petitioner for the hearing.



48. I am aware that in accordance with the decision made by the JSC inviting the petitioner for oral hearing, the JSC HRM Committee indeed held sittings on the oral hearing on 11th April 2018 as had been communicated to the petitioner in the letter of invitation. In its sitting, the JSC also invited other persons who were involved in the issue leading to the disciplinary case involving the petitioner. Attached and marked as AAA-10 is a copy of extract of the minutes of the Human Resource Committee for the meeting of 11th April 2016.
49. I am aware that the Committee heard and considered all the evidence available including the petitioner's responses regarding the allegations raised against him. The Committee noted the key issues regarding the conduct of the petitioner arising out of the disciplinary hearing which included the reasons the petitioner handled the criminal case when he was not the trial court in the first place issues leading to the opening of the skeleton file by the registry staff as well as the reasons why the petitioner gave orders for conversion of the cash bail to fine without the benefit of seeing the original receipts. Attached and marked as AAA-11(a) and AAA-11(b) is a copy of the Minutes of the JSC Human Resource Committee regarding the Disciplinary process held on 11th April 2016 and a report of the Committee on the Disciplinary hearing held on 11th April 2016.
50. I am aware that the committee submitted its report on the Disciplinary proceedings to the full JSC Meeting on 15th February, 2017 whereupon considerations the JSC in its meeting held on 15th February, 2017 made a finding that the petitioner was guilty of gross misconduct. Consequently, the JSC in accordance with section 25(ii) part IV of the Third Schedule of the Judicial Service Act, resolved to dismiss the petitioner from employment. Attached and marked AAA-12 is a copy of the letter dated 15th February, 2017 dismissing the petitioner from employment.”
14. Of the respondent's appeal and dismissal, the CRJ deponed that appeal and review are rights donated to each employee in the Manual which every employee is expected to familiarize themselves; that in the absence of express notice in the letter of dismissal as to right of appeal a dissatisfied employee can still invoke the provisions of the Manual and file an appeal or review – that in the instant case the respondent filed an appeal which was considered and there was therefore no prejudice suffered by the respondent at all. The appeal was dismissed. The CRJ denies that the respondent was served with insufficient notice of hearing contending that there was a period in excess of 14 days and complied with Regulation 25(4) of the Third Schedule to JSA. On a complaint by the respondent in the petition that he was not allowed to call witnesses or receive documents the CRJ responds at paragraphs 61-65 (inclusive) of the affidavit:
61. Regarding, the allegation in paragraph (53) of the Supporting Affidavit that the petitioner was unable to call any witnesses in support of his case, I wish to state that the JSC did not bar the Petitioner from calling any witnesses to testify on his behalf during the hearing. There is indeed no evidence to suggest that the petitioner requested to be allowed to call any witnesses and that this request was refused by the JSC.
62. In response to paragraph (56) on the allegations that the JSC called other witnesses in the petitioner's absentia, I wish to state that the JSC conducted separate disciplinary proceedings regarding the issue herein. Indeed, most of the proceedings herein were on account of the matters that the JSC was investigating in respect to other Judicial Officers implicated in the same matter.



63. Further to the foregoing, the petitioner did not, during his disciplinary hearing raise the above issues complained of, and having failed to do so, he is estopped from raising the same at this juncture.
 64. In response to paragraph (58) of the Supporting Affidavit, I wish to state that the Court proceedings were all along part of the proceedings as they were central to the issue. Court proceedings are in public domain. In any event, nothing prevented the petitioner from bringing forth the proceedings as evidence at the time when he appeared before the JSC.
 65. In response to paragraph (59) of the Supporting Affidavit, I wish to state that the JSC has never denied the petitioner any documents. Indeed, Regulation 23 of the Third Schedule provides that a Judicial Officer in respect to whom disciplinary proceedings are to be taken shall be entitled to receive a free copy of any documentary evidence relied on for the purposes of the proceedings. In the instant case, the petitioner was not denied any such document.”
15. On the complaint by the respondent that there was inordinate delay by the appellant in concluding the case, the CRJ responds that the appellant is a part-time Commission majority of whose members are engaged in gainful employment in the state/public offices as well as in private entities; that the appellant at all times made efforts to ensure that its processes were expeditious as reasonably possible; that the period of 26 months to conclude the respondent’s case was not unreasonable; that the Salaries and Remuneration Commission had capped remunerable meetings of the appellant to 8 per month; that at the material time the (former) Chief Justice retired (in the month of June, 2016) and the appellant was engaged in recruiting a new Chief Justice, a Deputy Chief Justice and a Judge of the Supreme Court, a process that is dotted with strict timeliness – this took priority.
 16. Of the respondent’s allegation regarding his judicial independence, the CRJ responds that for the judicial officer to enjoy such independence he must have discharged his duty within the limits of the Constitution and statutes and must have acted in good faith and that the law does not preclude the appellant from taking disciplinary action against a judicial officer on account of gross misconduct in the course of performance of his duties. In conclusion and in praying that the petition be dismissed, the CRJ deponed that allegations of gross misconduct on the part of the respondent had been proved and that the employer-employee relationship between the appellant and the respondent and the ties emanating therefrom had been strained.
 17. The respondent filed a further affidavit in response to the CRJ’s replying affidavit. It goes into 73 paragraphs – its essence is already captured in the case we have summarized made by both sides. We note that the respondent depones that he was not interviewed by the appellant and documents attached to the replying affidavit of the CRJ were not availed or served on him; that he was seeing those documents for the first time including the letter from the lawyer for the accused in Criminal Case No. 1367 of 2014 written to the Chief Justice and was also seeing for the first time a report by Mr. Bidali, the Judiciary Ombudsman; that he was not notified of proceedings where a Mr. Okoth Were had testified before the panel of the appellant or other proceedings by other judicial officers against him. The respondent also deponed that there were other proceedings by the Magistrate who presided over Court No. 6 (Hon. Kaguru), a Clerk (Selina) and other witnesses and all this was not brought to his attention contrary to requirements of Article 50 of the Constitution and the FAAA. At paragraphs 26-28 of the further affidavit:
 26. That these admission by the respondent in par 20 aids my case. And it is unfair, unlawful and double jeopardy for the respondent to punish Hon. Kaguru “for retaining the file contrary to set down rules,” and on the other hand punish me for alleged misconduct to have acted on a



constructed file. There is no any prejudice at all for the administration of justice. Or lost justice, neither is the same the respondent's contention. Then what is?

27. That in reply to par 21, there was no order of reconstruction of the file, as stated the opening of the file was initiated by defense counsel and upon the Registry file missing a file was reconstructed by the registry staff to conduct proceedings, when the file was brought to my attention the prosecution had no objection. All concurred. Everything was lawful and procedural and above board.
28. That in reply to par 23, that the cash bail could not be converted in absence of original receipt, the same was not brought to my attention for dealing, afterwards Mr. Bidali okayed the retaining the file with the original receipt. At all times money was with the state and could be converted any time after the file was found where it is, however the respondent hid this information and dragged me to disciplinary to answer it, very well knowing that Mr. Bidali ordered the file to be kept away.”
18. It is further deponed in the further affidavit that the prosecutor in the criminal case (No. 1367 of 2014) was not interviewed at all; that the charge had no particulars and at paragraph 71 of the further affidavit:
 71. That as a Christian I harbor no grudge with anybody, the said commissioners most of whom have left by attrition neither do I report to the respondent, on a day to day basis administratively. The findings of misconduct are not justifiable in law and procedure and I pray the court to set it aside and reinstate me as I am still desirous to serve.”
19. The case was heard by Wasilwa, J., who in a Judgment delivered on 14th June, 2019 found for the respondent. The Judge found that the respondent was a career judicial officer for a period of 26 years; that there was no evidence that he had not performed his duties diligently; that:

“.... To expect him to get another employment at his age, which will be difficult, I therefore find that reinstatement will be the most plausible remedy, which will compensate him adequately.”
20. The Judge therefore ordered that the respondent be reinstated by the appellant to the position he occupied prior to dismissal with immediate effect.
21. Those findings did not sit well with the appellant which filed a Memorandum of Appeal drawn by its lawyers, **M/S Gumbo & Associates, Advocates**, where seven grounds of appeal are taken which we summarize as: that the Judge erred in law in engaging in a merit review of the appellant's disciplinary case that was before the appellant by conducting a retrial of the case – that the Judge assumed the jurisdiction of the appellant and proceeded to make a finding on the innocence or otherwise of the respondent; that the Judge substituted the appellant's decision with her own; that the Judge erred in law and fact in finding that the appellant's disciplinary process was not conducted in accordance with the law and in making findings in accordance with the FAAA; that the Judge erred in law and fact in finding that there was undue delay in the conclusion of disciplinary process; that the Judge erred in law and fact in finding that the respondent was protected by judicial immunity; that the Judge erred in law in finding that the appellant had failed to supply the respondent with documents relating to the disciplinary proceedings; that the Judge erred in law and fact in making the order for reinstatement when there were no exceptional circumstances to warrant making such an order, and, finally:

“The learned Judge erred in law even after finding in favor of the Respondent by issuing the remedy of reinstatement of the Respondent instead of sending the matter back to the decision maker in this case the Judicial Service Commission.”



22. We are therefore asked to allow the appeal, set aside the judgment of the trial court and award costs to the appellant.
23. The respondent filed a Cross-Appeal asking that the Judgment “be varied or reversed to the extent and in the manner and on grounds that, having found that the appellant breached the respondent’s fundamental rights and freedoms the Judge erred in law in failing to award damages in addition to other reliefs”. It is therefore proposed that the Judgment of the trial court be affirmed; that we award compensation for violation of the respondent’s fundamental rights and give costs to the respondent.
24. When the appeal came up for hearing before us on 8th June, 2020 through Virtual “GO-to-Meeting” due to the prevailing global Covid-19 pandemic both sides had filed written submissions which were highlighted by learned counsel, **Mr. Kubai** for the appellant and **Mr. Okemwa** for the respondent.
25. It was Mr. Kubai’s submission that the role of the Judge of the ELRC was limited to an examination whether the appellant had followed due process in making its determination on the case against the respondent. According to counsel the Judge exceeded her jurisdiction in engaging in a merit review of the case when her role was to establish whether the process had been followed. According to counsel, it was wrong for the Judge to find that the respondent was innocent. Counsel cited the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others [2016] eKLR** where it was held that the essence of merit review is the power to substitute a decision and that under the FAAA there is no power for the reviewing Court to substitute the decision of the administrator with that of the court. In further submissions Mr. Kubai faulted the Judge for reaching the decision that the respondent be reinstated to office – counsel submitted that the Judge should have returned the decision to the panel of the appellant for reconsideration. On the issue of judicial immunity and independence, counsel faulted the Judge for finding that the respondent was protected by the immunity when, according to counsel, the respondent had engaged in corruption which was not protected by judicial immunity.
26. On reinstatement, counsel conceded that the Court could issue an order for reinstatement but he submitted that the Court must look at the duration the employee had been out of employment (counsel said that the respondent was dismissed in June, 2014). In final submissions Mr. Kubai faulted the Judge for applying rights donated by **Article 50** of the **Constitution** and provisions of FAAA which, according to counsel, should not apply in proceedings before tribunals and other quasi-judicial bodies.
27. It was then Mr. Okemwa’s turn to reply. He began by stating that the respondent was terminated from employment in February 2017, a period of less than 3 years from the date of Judgment of the ELRC.
28. Counsel cited **rule 25(5)** of **JSA** where there is provision that where documents are to be used by the appellant against a judicial officer such documents should be availed to the officer and if witnesses are called, the officer should be present and be accorded the opportunity to cross-examine such witnesses. He also cited **Section 4** of the **FAAA** which is to the same effect. Further, that **Article 172** of the **Constitution** requires the appellant to strictly comply with JSA. Counsel submitted that the appellant breached all these provisions and, therefore, the proceedings were a nullity. He cited the case of **Onyango Oloo v Attorney General [1986-1989] EA 456** in support of the proposition that a decision made in breach of rules of natural justice cannot be cured by holding that it would be right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at – it renders any decision made null and void ab initio.
29. It was Mr. Okemwa’s further submissions that the respondent had acted within jurisdiction under the Magistrate’s Courts Act when he entered a consent order arrived by the parties in the criminal case and



that there was no misconduct in handling the case in a skeleton file. According to counsel there were no rules under JSA on how a magistrate should handle a file and it was wrong to suspect corruption without evidence. Counsel disputed the submission by counsel for the appellant that the Judge had found the respondent innocent, submitting, instead, that the Judge was right to quash the appellant's decision.

30. On the cross-petition Mr. Okemwa submitted that, having found breaches of articles of the Constitution, the Judge should have awarded damages – he asked us (in written submissions) to award a sum of Kshs.15,000,000. Counsel submitted that there was no plea before the trial court for remission of the matter to the appellant and he reminded us that we could not, on appeal, take up a matter that was not before the trial court. Counsel concluded his submissions by stating that the Judge did not go into the merits of the case but examined the process under JSA and FAAA.
31. In a brief rejoinder Mr. Kubai submitted that after nullification of the proceedings the parties should revert to the position at interdiction.
32. We have considered the record, the written submissions made as highlighted by counsel and the law and this is our view of the appeal.
33. The first ground of appeal taken is that the Judge in engaging in a merit review of the respondent's disciplinary case that was before the appellant erred by conducting a retrial of the respondent's case and thus assumed the jurisdiction of the appellant and proceeded to make a finding on the innocence or otherwise of the respondent; that the Judge substituted the appellant's decision with her own decision.
34. Judicial review is concerned with an examination by the court of the process undertaken by an administrator in reaching a finding. It is not the function of such a Court to go to the merit of that decision and the court should not substitute the decision of the administrator with that of its own – it was held in the persuasive case of Republic v Public Procurement Administrative Review Board & Another ex parte Gibb Africa Limited and Another [2012] eKLR:

"There is always a temptation to descend into the arena and substitute the Judge's decision with that of the public body whose decision is under attack. A Judge should, however avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals."

35. Okwengu, JA, had this to say of the power of a Judge seized of a judicial review matter in the case of Judicial Service Commission v Gladys Boss Shollei & Anor [2014] eKLR:

(49) "...the determination of the Respondent's petition by the learned Judge called for interrogation of the process leading to the termination of the respondent's employment with a view to determining the procedural fairness, reasonableness and legality of the appellant's action in light of the respondent's constitutional right to a fair hearing, and right to fair administrative action.The respondent's complaint..... questioned the procedural fairness and legality of the process. Therefore, it was not the merits of the appellant's decision or the merit of the allegations made against the respondent that were in issue, but the procedural fairness, legality of the process and the reasonableness of the appellant's decision. The questions that needed to be addressed included the nature of the process subject of the respondent's complaint, the jurisdiction of the appellant in the process, and the application of the constitutional provisions relating to a fair hearing and right to administrative action."



36. In the case of **Commissioner of Lands v Kunste Hotel Limited [1997] eKLR** this Court stated:
- "But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."
37. The respondent complained before the Judge of the ELRC that a witness, Mr. Okoth Were, and other witnesses were called and testified before the panel established by the appellant to examine the disciplinary case and that he (the respondent) was not invited to attend those hearings and could therefore neither participate in the hearing nor cross-examine the witnesses.
38. The CRJ deponed in the replying affidavit that the panel of the appellant held a meeting on 22nd January, 2016 where the respondent's disciplinary case was considered and where it was resolved that the respondent be invited to an oral hearing which resolution was ratified by a full a meeting of the appellant on 17th February, 2016. Further, that by a letter dated 24th March, 2016 the respondent was invited for an oral hearing on 11th April, 2016. At paragraph 48 of the replying affidavit:
48. "I am aware that in accordance with the decision made by the JSC inviting the petitioner for oral hearing, the JSC HRM Committee indeed held sittings on the oral hearing on 11th April 2018 as had been communicated to the petitioner in the letter of invitation. In its sitting, the JSC also invited other persons who were involved in the issue leading to the disciplinary case involving the petitioner. Attached and marked as AAA-10 is a copy of extract of the minutes of the Human Resource Committee for the meeting of 11th April 2016."
39. The CRJ states that the panel of the appellant submitted its report on the disciplinary proceedings to a full meeting of the appellant on 15th February, 2017 where, upon consideration, it was found that the respondent was guilty of gross misconduct and it was resolved that the respondent be dismissed from employment.
40. We have perused the "**report of the Human Resource & Administration Committee, JSC on the disciplinary case for hon. magistrates**" dated 13th February, 2017. The report was about disciplinary cases for four magistrates (including the respondent) and two Clerical Officers. It details summarized interviews of Hon. Hannah Wamuyu Kaguru (Magistrate Presiding Court No. 6); Ruth Nganga (the in-charge, Criminal Registry); Selinah Silpah Aoko (Clerk, Court 6); Catherine Nasimiyu Mutali (Higher Clerical Officer) And Okoth Were (Clerk, Court 2 presided by the respondent).
41. The CRJ also attached to her replying affidavit "**Committee hearings of complaints against Hon. Mr. D.M. Ochenja**". This is not dated or signed and is at pages 202-213 of the record of appeal. The hearings were presided by a Chairperson, was attended by six Commissioners of the appellant and by the Registrar of the appellant. A witness, Okoth Were, the Clerk, Court 2, was in attendance and he gave testimony on oath in the meeting that started at 5.20 p.m. and ended at 5.35 p.m. He was questioned at length by the Chairperson and by the Commissioners. That testimony was in relation to the way Criminal Case No. 1367 of 2014 had been handled by the respondent and others. There is no indication that the respondent was invited to this meeting and he in fact emphatically says that he was not invited; he was not aware of the meeting and he could not, therefore cross-examine either this witness or the other witnesses we have referred to as set out in the report that was presented to the appellant on the disciplinary case of the respondent.
42. Article 50 of the Constitution of Kenya, 2010 commands that a person accused be accorded a fair hearing. It says:



- 50(1) "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."
43. Under **Article 47** of the said **Constitution** every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
44. The appellant is established by **Article 172** of the said Constitution. Under that article the appellant shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice, and shall 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.
45. The Act of Parliament contemplated by the said **Article 172** of the **Constitution** is the Judicial Service Act which provides for appointment, discipline and removal of the said judicial officers. The powers and functions of the appellant are set out *inter alia* in **Section 13** of **JSA** and **Section 32** provides for appointment, discipline and removal of judicial officers and staff.
46. Regulations 25 and 26 of the Third Schedule of JSA has an elaborate procedure for dismissal of Registrars, Magistrates and other judicial staff. The procedure is as follows:
- "25. Where the Chief Justice, after such inquiry as they may think fit to make,
- (1) 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.
4. The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they



may be required to appear before it to answer to the charges made against them.

5. If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.
6. The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.
7. The Committee or Panel shall permit the accused officer to be represented by an advocate.
8. If during the course of the investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.
9. The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—
 - a. a statement whether in the Committee or Panel's judgement the charge or charges against the officer have been proved and the reasons therefor;
 - b. details of any matters which, in the Committee or Panel's opinion, aggravate or alleviate the gravity of the case; and
 - c. a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.
10. The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.
11. The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest.



26. (1) Where the Chief Justice, after preliminary investigation, considers it necessary to institute disciplinary proceedings against an officer to whom this paragraph applies but is of the opinion that the misconduct alleged, if proved, would not be serious enough to warrant dismissal, he shall forward to the officer a statement of the charge or charges against them 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 within the period specified or does not, in the opinion of the Chief Justice, 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.
 3. If, on consideration of the report, including the grounds, if any, on which the officer relies to exculpate themselves, the Commission is of the opinion that no further investigation is necessary, it shall forthwith decide on the punishment, if any (other than dismissal), which should be inflicted on the officer.
 4. If the Commission is of the opinion that the matter should be further investigated, it shall request the Chief Justice to cause further investigations to be made.
 5. Any such investigation shall normally be undertaken by the Registrar or by an officer senior to the officer accused.
 6. In an investigation under this paragraph an officer to whom this paragraph applies shall be entitled to know the whole case against them and shall be given an adequate opportunity of making their defence.
 7. The Chief Justice shall bring the result of any such investigation before the Commission, and unless the Commission requests the Chief Justice to make yet further inquiry, the Commission shall decide on the punishment, if any (other than dismissal), which should be inflicted on the officer, or whether he should be required to retire in the public interest.
 8. Notwithstanding this paragraph, if at any stage during the proceedings taken under it before final submission to the Commission—
 - a. it appears to the Chief Justice that the offence, if proved, would justify dismissal; or
 - b. the Chief Justice considers that proceedings for the retirement of the officer on grounds of public interest would be more appropriate, such proceedings shall be discontinued and the procedure in paragraph 26 or 28, as the case may be, shall be followed.



9. Where a reference is made to the Commission under this paragraph, it shall, if it considers that proceedings should be instituted under paragraph 26, direct the Chief Justice accordingly and thereupon the proceedings under this paragraph shall be discontinued.”
47. That is to say that where the Chief Justice is satisfied that a judicial officer has engaged in misconduct that may lead to dismissal, he shall frame a charge or charges with sufficient particulars and shall invite the officer, if they so wish, to give their side of the story. If there is a reply and the Chief Justice is not satisfied that the officer has exculpated themselves, he shall forward the charge(s) and the reply to the appellant which shall decide whether disciplinary proceedings shall continue. If the proceedings are to continue the appellant shall appoint a Committee or Panel which shall give the officer written notice (not less than 14 days) to appear and answer the charge(s). It is provided in mandatory terms that if witnesses are to be examined by the Committee or Panel, the officer shall be given an opportunity of being present to cross-examine such witnesses and, again in mandatory terms, no documentary evidence shall be used against the officer unless such documents had, prior to the hearing, been served on the officer. The officer may be represented by a lawyer and the Committee or Panel shall thereafter compile its report which it shall present to the appellant and it is the appellant to decide the appropriate punishment to be meted out against the officer who has been found guilty of misconduct. If, after preliminary investigations, the Chief Justice thinks misconduct by an officer may not lead to dismissal he shall still follow the procedure set out in **Regulation 26**.
48. We have already spoken to **Article 47** of the **Constitution**.
49. The **Fair Administrative Action Act, 2015** is “**An Act of Parliament to give effect to Article 47 of the Constitution, and connected purposes.**” It provides for fair administrative action – the right to administrative action that is expedient, efficient, lawful, reasonable and procedurally fair.
50. The Judiciary “**Human Resource Polices and Procedures Manual**” referred to by the CRJ in her replying affidavit repeats, at Section D, the same disciplinary procedure set out in the JSA and the Schedule thereto.
51. The Judge of the ELRC found that the appellant had breached the JSA and FAAA when it called witnesses and obtained documents which it used in the proceedings but the appellant was not accorded an opportunity to cross-examine those witnesses or see documents that were used against him.
52. As we have shown the Committee or Panel of the appellant called a witness, Okoth Were, who was the Court Clerk who served in Court 2 presided by the respondent. That witness was questioned at length on the matter concerning Criminal Case No. 1367 of 2014, the subject of disciplinary proceedings against the respondent. The respondent was not notified of this meeting and was not accorded an opportunity to cross-examine this witness and was not availed documents used by the Committee or Panel. Other witnesses including the magistrate in charge of Court No. 6 and staff of the Criminal Registry were similarly examined by the committee in the absence of the respondent.
53. The appellant submits that the JSA has precedence over other statutes on matters disciplinary for judicial officers. Even if this was true, as we have shown, the appellant clearly breached **Regulation 25** of the **Third Schedule** of the said Act which contained the procedure to be followed in a disciplinary case as was before the appellant. In addition, **Article 47** of the **Constitution** has elevated fair administrative action to a constitutional right and administrators, dealing with citizens or other persons, can no longer ignore procedure or act in a way that is not administratively fair. Doing so would be in breach of the Constitution.



54. In the premises we do not agree that the Judge of ELRC exceeded her jurisdiction in any way; we do not agree that she found the respondent innocent. The Judge carefully examined the process followed by the appellant and found that due process had been breached which violated the respondent's rights. It was not a fair process as it ignored the Constitution, the JSA, and the FAAA and the Human Resource Manual.
55. On the issue of delay – that the proceedings took 26 months to be concluded – as we have seen, **Article 47** of the **Constitution** and provisions of FAAA demand administrative process that is expeditious, efficient, lawful, reasonable and procedurally fair.
56. The respondent was served with an interdiction letter dated 12th November, 2014 and he was dismissed from the Judiciary by letter dated 15th February, 2017, a period which the respondent believes was inordinate and unreasonable.
57. Amongst the reasons advanced by the CRJ for the proceedings taking that long was that the appellant is a part time Commission whose members serve other public or private bodies; that the then Chief Justice retired and the appellant was involved in time-specific process of recruiting a new Chief Justice, a Deputy Chief Justice and a Judge of the Supreme Court. Also that remunerative meetings of the appellant had been capped at 8 meetings a month by the Salaries & Remuneration Commission. The Judge of the ELRC considered the reasons advanced by the CRJ and found that the respondent was an individual whose rights could not be superseded by other rights or activities of the appellant. She considered relevant cases like **Petition No. 252 of 2011 Grace A. Omolo v Attorney General & 3 Others** where the High Court found a delay of 1 year to be unreasonable.
58. Interdiction of an employee must visit such employee with a lot of anxiety. He does not know what will befall him. Will he retain his job?
59. The respondent had served the appellant for 26 years rising to the position of Acting Chief Magistrate. There is no evidence that his record was not good; there was evidence that he had been vetted by the Judges and Magistrates Vetting Board which, by the Report dated 13th January, 2016 found him suitable to continue serving as a Magistrate.
60. We find that the Judge of ELRC was right to find that the period from interdiction (12th November, 2014) to dismissal (15th February, 2017) was unreasonable and did not accord with the constitutional imperative in **Article 47** of the **Constitution** which required administrative action which was expeditious, efficient, lawful, reasonable and procedurally fair.
61. On the issue of judicial immunity, the Judge found that there was no evidence to show any impropriety on the part of the respondent.
62. Article 160(1) and (5) of the Constitution is to the following effect:
 160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
 2.
 3.
 4.
 5. A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”



63. The judicial officer is protected in law for acts or omissions done in good faith in the lawful performance of a judicial function.
64. We have walked the path, in detail, to show that there was breach by the appellant of the Constitution, the JSA and FAAA in the way the disciplinary proceedings were conducted. There was no evidence that the respondent acted in breach of The Magistrates Courts Act against or any other law in the way he handled Criminal Case No. 1367 of 2014. In the absence of misconduct, the respondent was entitled to deal with the said file as his was the duty court that week.
65. On the complaint by the appellant that the Judge erred in holding that the respondent was entitled to documents, the answer is, as seen, in Article 47 of the Constitution. **Regulation 25 of the Third Schedule of JSA** requires in mandatory terms, that if the Committee or Panel of the appellant is to use any documents against a judicial officer the same shall be availed to him prior to the hearing. This was not done and the appellant clearly ignored the law or chose to act in breach of the law, conduct which the law cannot countenance.
66. The appellant submits on the issue of reinstatement that the Judge of ELRC erred in making that order when there were no exceptional circumstances to warrant making such a relief and that there was no justification to do so. It is submitted that even if the Judge found breach of procedure leading to dismissal, the appropriate remedy was to send back the proceedings to the panel.
67. In a reply to that submission the respondent argues that **Article 236 of the Constitution** declares that a public officer cannot be victimized or removed from office for performing functions of his office without due process.
68. The facts in the case of **Stephen Pareno v Judicial Service Commission [2014] eKLR** are quite interesting considering the facts in the petition before the ELRC Judge in this appeal. Stephen Pareno, a magistrate, was accused by his employer, Judicial Service Commission of certain impropriety. He was served, by letter of the Registrar of the High Court with a notice to show cause why disciplinary action should not be taken against him. He responded to that letter, a response which was found unsatisfactory, and he was served with a dismissal letter. Aggrieved, he filed a petition at the High Court praying for, amongst others, an order of certiorari to quash the decision of JSC. The petition was dismissed. On appeal to this Court the Court summarized the procedure in **Regulations 25 and 26 of the Third Schedule of JSA** which it found must be followed in disciplinary proceedings against a judicial officer. The appeal was allowed; an order for certiorari issued quashing the decision of JSC.
69. Prayer 8 of the petition before the ELRC Judge prayed that there was a breach of **Article 236 of the Constitution**; that the respondent was the legitimate and lawful holder of the office of Acting Chief Magistrate and that a mandatory injunction do issue against the appellant to unconditionally reinstate him to office and deploy him accordingly. The Judge agreed and gave orders reinstating the respondent to office.
70. We are aware of the factors to consider on employment matters on the issue of reinstatement. (**Section 49(3) and 50 of the Employment Act**).
71. It was held by this Court in the case of **Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**:

"As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the Employment Act and Section 12(3) (viii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own



merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took the action against him will be minimal. (emphasis ours)

72. So the Employment Act recognizes reinstatement as one of the remedies available to an employee who has been dismissed from employment.
73. The respondent had been interdicted by letter dated 12th November, 2014 and he was dismissed from employment on 15th February, 2017, a period less than 3 years. The appellant is a large organization with many employees and there is minimal personal contact between a judicial officer and the appellant or its Commissioners – (see Kenya Airways (supra)). The Judge of ELRC considered that reinstatement had been prayed for; the respondent was a career judicial officer for 26 years that there was no evidence that he had not performed his duties diligently; that it would be difficult for the respondent, at his age, to get alternative employment.
74. We fully agree with the factors and reasoning employed by the Judge in ordering reinstatement.

Cross Appeal

75. In the cross-appeal the respondent faults the Judge for not awarding him damages when she had found that his rights had been breached. He therefore prays that we affirm the Judgment and award compensation for violation of the respondent's rights. In prayer 6 of the petition, the respondent stated that the appellant had breached his rights under **Articles 27(1), 28, 29, 35, 41, 47 and 236** of the **Constitution** and he asked to be:

.... Compensated a sum of Kshs.10,000,000.00 and or whatever sum the Honourable Court may deem just and reasonable to award.”

76. The Judge analyzed the case and made the following finding at paragraphs 83 and 84 of the Judgment:
 83. Indeed, following my analysis above, it is evident that the disciplinary process meted against the Petitioner was met with illegality and unprocedural unfairness and his rights under various articles of the Constitution were breached. I have cited breach of Article 47, of the Constitution.
 84. I also find breach in terms of Article 41 of the Constitution and other regulations including the Fair Administrative Action Act and the Employment Act.”
77. Having made those findings the Judge did not make any finding whether the respondent was entitled to damages for those breaches.
78. We have found, as did the Judge, that the appellant flouted various laws in the way it conducted the disciplinary case against the respondent.
79. We are asked in written submissions, to re-open the case and consider the matter of assessment of damages and counsel for the respondent submits that we should award Kshs.15,000,000. He cites the case of **Peter M. Kariuki v Attorney General [2014] eKLR** in support of that prayer.
80. Counsel for the appellant submits that the appeal be allowed and the cross appeal be dismissed.



81. As we have seen, there was a consistent breach of various laws in the way the appellant handled the respondent's disciplinary hearing. The respondent prayed in the petition that he be awarded Kshs.10,000,000 for breach of constitutional rights. The Judge found that the law had been breached but made no mention on what remedy the respondent was entitled to in that regard. Having found breaches the Judge was duty bound to make a finding that damages were or were not available. We are thus, in this first appeal, entitled to make a finding on the issue of compensation.
82. In the **Peter Kariuki (supra)** case the appellant was a former Commander of Kenya Air Force. He was charged of various offences; sentenced to imprisonment which he served in full. He filed a case many years later claiming breach of fundamental rights. The High Court awarded him compensation Kshs.7,000,000. He appealed to this Court and compensation was enhanced to Kshs.15,000,000 in addition to other reliefs. This did not include reinstatement to office.
83. In the instant case the respondent's rights were violated. The Judge of the ELRC reinstated him to office, a finding which we agree with. He was out of office for about 26 months but he got his office back.
84. For breach of his rights we think that a sum of Kshs.2,000,000 compensation is appropriate in the circumstances.
85. Just before signing off we note that this Court in Stephen Pareno (supra) case found that JSC was entitled in law to commence fresh disciplinary proceedings against the appellant if it so decided, proceedings to comply with the statutory provisions.
86. These, then, are our final orders:
 1. The appeal has no merit and is dismissed.
 2. The cross appeal is allowed.
 3. We award the respondent a sum of Kshs.2,000,000 for breach of his rights.
 4. The respondent will have costs of the appeal, the cross appeal and costs below.
 5. For avoidance of doubt, the appellant is entitled in law to commence fresh disciplinary proceedings against the appellant, if it so decides, which proceedings comply with statutory provisions.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2020

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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



Signed

Deputy Registrar

