Judicial Service Commission v Njuguna & another (Civil Appeal 34 of 2016) [2019] KECA 1040 (KLR) (25 January 2019) (Judgment)

Judicial Service Commission v Gilbert Mwangi Njuguna & another [2019] eKLR

Neutral citation: [2019] KECA 1040 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 34 OF 2016

PN WAKI, SG KAIRU & JO ODEK, JJA

JANUARY 25, 2019

BETWEEN

JUDICIAL SERVICE COMMISSION .... APPELLANT

AND

GILBERT MWANGI NJUGUNA .... 1ST RESPONDENT

THE HON ATTORNEY .... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. Nduma Nderi J.) dated and delivered on 28th January 2014 in ELRC Petition NO. 17 of 2013)

JUDGMENT

1. Gilbert Mwangi Njuguna, the 1st respondent was employed on 1st September 1986 by the Judicial Service Commission as District Magistrate II (Prof). He was interdicted from service on 27th October 2006 and subsequently retired in public interest on 23rd June 2008 having attained the position of Acting Senior Principal Magistrate. At the time of interdiction, he was serving at Chuka Law Courts.

2. By Petition dated 4th May 2009, as amended on 15th July 2010, the 1st respondent moved the High Court for declaratory orders *inter alia* that his purported interdiction by the Judicial Service Commission on 27th October 2006 was illegal, null and void. In the Petition, it was contended that upon interdiction, Mr. Njuguna was required to report every Friday to the resident Judge at Meru, a distance of seventy kilometers from Chuka Town and that such requirement was akin to holding him in servitude and an inhuman and degrading treatment, contrary to section 71,73 and 74 of the retired *Constitution*.

3. The 1st respondent prayed for an order for reinstatement and full salary as well as general and exemplary damages. In terms of special damages, he prayed in the alternative for compensation for the following:

   (a) Ksh. 167,605,339/= on the basis that he would have been elevated to the position of Senior Principal Magistrate in September 2006; to the position of Chief Magistrate in September 2009 and to the office of Judge of the High Court in 2012 where he would remain until retirement in 2019 at the age of 74 years or compensation of Ksh. 21,605,389/- on the assumption that he remained in the grade of Acting Senior Principal Magistrate until he attained the age of 60 without any increment or being promoted to the office of Judge or

   (b) Ksh. 30,890,782//= on the basis that he was promoted to the grade of Chief Magistrate and retired at that grade or

   (c) Ksh. 164,857,653/= on the basis that he was promoted to the office of Judge of Appeal in 2002 where he would have served for 11 years until retirement at the age of 74 years having served as a judge of the High Court for 10 years or

   (d) Such salary as is due to a judge of the Court of Appeal with annual increments for 11 years.

4. The Judicial Service Commission opposed the Petition contending that during his tenure with the judiciary, Mr. Njuguna involved himself in several cases of gross misconduct hence his retirement in public interest. The particulars of the gross misconduct were inter alia that: on 12th October 1987, the Principal Magistrate at Mombasa Law Courts reported that his performance was unsatisfactory on the ground that he was disorganized, un-cooperative and unwilling to take advice; On 28th August 2003, the Chief Magistrate at Kiambu Law Courts reported that the 1st respondent was always complaining about his career progression, he was an average worker, did not attend court in the afternoons and could not work under pressure; On 10th April 2006, he wrote a protest against a senior magistrate being posted at Kiambu Law Courts to supervise him; On 13th October 2006, the Permanent Secretary Ministry of Justice and Constitutional Affairs forwarded to the Hon. Chief Justice various complaints lodged against the Petitioner by the National Security Intelligence Service as follows:

   (a) That he did not take his work seriously and made technical appearances at work.

   (b) That he was reluctant to take pleas resulting in congestion at Tharaka Police Station.

   (c) That he was committing prisoners to jail late in the evening thus risking the lives of the officers escorting them to Meru Prison.

   (e) That the local DCIO and OCPD had threatened to boycott his court and present cases elsewhere.

   (f) That he had poor interpersonal relation with colleagues.

   (g) That his conduct had slowed down the wheels of justice and reflected the judiciary in bad light.

5. By letter dated 27th October 2006, the 1st respondent was given a Notice to Show Cause why disciplinary action including retirement in public interest should not be taken against him for gross misconduct. On 11th November 2006, the 1st respondent wrote his response and defence to the Notice to Show Cause. On 13th June 2008, the Commission considered his defence and resolved to retire him in public interest. The decision to retire the 1st respondent was conveyed to him on 23rd June 2008. As already stated, the 1st respondent contends that his retirement from judicial service in public interest was null and void as the procedure used violated his fundamental rights and freedoms.

6. Upon hearing the parties, the trial judge in a judgment dated 28th January 2014 allowed the Petition and made the following orders:

(a) The purported interdiction of the Petitioner from judicial service on 27th October 2006 is illegal, null and void.

(b) The purported retirement in public interest of the Petitioner from judicial service on 23rd June 2008 is illegal, null and void.

(c) The Petitioner be paid salary arrears including allowances due to him from the date of purported interdiction on 27th October 2006 to the date of purported retirement on 23rd June 2008.

(d) The petitioner be paid general damages for contravention of his right under Section 77 (9) of the Constitution in the sum of Ksh. 2 million.

(e) The Judicial Service Commission to re-engage the Petitioner at a level not lower than Senior Principal Magistrate with effect from the date of this judgment without loss of his accrued pension with respect to past service.

(f) The JSC to pay the costs of the suit.

7. Aggrieved by the judgment and orders of the trial court, the appellant has lodged the instant appeal on the following grounds:

(i) The trial judge erred in misinterpreting and applying Section 77 (9) of the repealed Constitution to disciplinary proceedings before the Judicial Service Commission.

(ii) The judge having established that the appellant had complied with the Judicial Service Regulations to the letter, the judge erred in holding that the Petitioner's interdiction was illegal, null and void.

(iii) The judge erred in holding that the 1st respondent was entitled to a hearing before retirement in public interest contrary to Regulation 28 of the Judicial Service Regulations.

(iv) The judge erred by wrongly applying the provisions of Regulation 26 of the Judicial Service Regulations which were not applicable in the Petitioner's retirement in public interest.

(v) The trial court erred in failing to appreciate that retirement in public interest is to be determined by the Judicial Service Commission as the employer and the judge erred in substituting his decision with(sic) that of the Commission.

(vi) The judge erred in compelling the appellant to re-engage the Petitioner.

(vii) The judge erred in disregarding the uncontroverted affidavit evidence of the Registrar of the High Court indicating the grounds upon which the Petitioner was retired in public interest.

(viii) The judge erred in finding that the Petitioner's constitutional rights were violated and further erred in awarding general damages of Ksh. 2,000,000/= without any basis in law and fact.

(ix) The judge erred in applying and considering the provisions of the Employment Act 2007 which were not applicable in a case of retirement in public interest."

8. The 1st respondent lodged a cross-appeal urging the following grounds:

(i) The judge erred in not holding that in addition to his right to a fair hearing under Section 77 (9) of the former Constitution, the 1st respondent's fundamental rights under Section 73, 74 and 82 of the repealed Constitution were violated.

(ii) The judge erred in not awarding the 1st respondent exemplary damages of Ksh. 2.5 million and further erred in not awarding vindicatory damages in the sum of Ksh. 6 million i.e. Ksh 2 million for each constitutional right contravened under Sections 73 or 74, 77 and 82 of the repealed Constitution. The judge further erred in not awarding compensatory damages.

(iii) The judge erred in not holding that the Privy Council decision in *Angela Innis v Attorney General of St. Christopher* and the decision in *Fraser v Attorney General* were of persuasive value and applicable to this case.

(iv) The judge erred in not holding that if the appellant had not contravened the rights of the 1st respondent, then the 1st respondent's judicial career would have progressed to the office of judge in the superior courts.

(v) The judge erred in not allowing the amended petition dated 15th July 2010 as prayed."

9. At the hearing of this appeal, learned counsel Mr. Mansur Issa and Ms Muthoni Mugo appeared for the appellant while Senior Counsel Dr. Gibson Kamau Kuria appeared for the 1st respondent. Both counsel filed written submissions and list of authorities. Counsel informed this Court the dispute in this appeal is largely between the appellant and the 1st respondent and the 2nd respondent has not been attending court proceedings.

10. The appellant in rehashing the background facts submitted that the key issue in this appeal relates to how the trial judge interpreted and applied Regulations 28 and 26 of the *Judicial Service Regulations*. It was submitted that the Judicial Service Commission retired the 1st respondent in public interest pursuant to Regulation 28 of the *Judicial Service Regulations*; that the trial judge erred in invoking and applying Regulation 26 of the *Judicial Service Regulations*; that the Commission in retiring the 1st respondent did not base its decision on Regulation 26.

11. For ease of reference, the two Regulations stipulate as follows:

" Regulation 28:

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(1) If the Chief Justice, after having considered every report in his possession made with regard to an officer, is of the opinion that it is desirable in the public interest that the service of such officer should be terminated on grounds which cannot suitably be dealt with under any other provision of these regulations, he shall notify the officer in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the officer.

(2) If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the Chief Justice is satisfied that the officer should be required to retire in the public interest, he shall lay before the Commission a report on

the case, the officer's reply and his own recommendation and the Commission shall decide whether the officer should be required to retire in the public interest.

(3) When an officer is retired in the public interest, the Pensions Branch of the Treasury shall be furnished with full details of the case by the Chief Justice.

Regulation 26:

26

(1) Where the Chief Justice after such inquiry as he 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 his position justify dismissal, he shall frame a charge or charges against the officer and shall forward such 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 himself.

(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 himself, the Chief Justice shall cause copies of the statement of charge or charges and reply, if any, of the officer to be laid before the Commission and the Commission shall decide whether the disciplinary proceeding should continue or not.

(3)

(a) If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a sub-commission to investigate the matter consisting of two or more persons who shall be persons to whom the Commission may under section 69 (2) of the Constitution delegate powers.

(b) ……

(4) the sub-commission shall inform the officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the sub-commission so determine, shall be required to appear before it to defend himself……"

12. The appellant submitted that Regulation 26 of the *Judicial Service Commission Regulations* contemplates a disciplinary hearing before a sub-Commission of the Judicial Service Commission (JSC). In contrast, Regulation 28 which was the applicable regulation in this case neither provides nor contemplates a hearing before an officer is retired in public interest. Counsel submitted that Sections 45 and 47 of the *Employment Act* cited by the trial judge were inapplicable because hearing before a sub-Committee is not contemplated under Regulation 28.

13. In further faulting the trial court, the appellant submitted that the 1st respondent was informed of his right to appeal the decision to retire him in public interest; that despite being so informed the 1st respondent did not exercise that right. Counsel cited the decision of *Geoffrey Kiraga Njogu v Public Service Commission & 2 others*, [2015] eKLR where it was stated that a person who opts not to exercise his right of appeal cannot turn around and allege he was never heard. Counsel also cited the case of *Mwangi Mutahi Ruga v Municipal Council of Nyeri* [2014] eKLR.

14. It was submitted that the trial judge erred in finding that the 1st respondent's right to a fair hearing under the provisions of Section 77 (9) of the retired *Constitution* had been violated. The Section provided:

> "77 (9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

15. Elaborating on Section 77 (9), the appellant submitted that the right to fair hearing in the section is limited to cases before a court or adjudicating authority. The provision does not include the scope of disciplinary proceedings which arise out of a contract of service and whose parties are employer and employee. Counsel cited dicta in *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR where this Court held that Section 77 (9) of the repealed *Constitution* was inapplicable to disciplinary proceedings. This Court expressed:

> "Section 77(9) even on its own wording clearly applies where a court or other adjudicating authority has been established by a law. The section applies only where a law has prescribed the manner of determination of the existence of a civil right or obligation and does not apply to contractual tribunals…With respect, the superior court's importation and application of the concept of fair hearing as defined in the context of the Constitution was a clear misapprehension of the law.
>
> The section does not and was not intended to apply to contracting parties at all or for that matter to a contract of service unless the parties themselves have specifically stated so in their contract."

16. Guided by this decision, the appellant urged us to find that the trial judge erred in applying Section 77 (9) to the facts of this case.

17. Counsel submitted that pursuant to Regulation 28, the 1st respondent was given a Notice to Show Cause dated 27th October 2006. The Notice indicated the complaint against the him and he was required to Show Cause why he was not to be retired in public interest. On 11th November 2016, the 1st respondent submitted his response to the Notice to Show Cause. The appellant complied with all the procedural steps stipulated in Regulation 28 and the trial judge erred in failing to appreciate that the applicable provision was Regulation 28 and not Regulation 26.

18. The appellant further faulted the trial judge in failing to appreciate that retirement in public interest is to be determined by the JSC as the employer and not the court; that a court cannot substitute a decision of the JSC with its own decision. Counsel urged that under Regulation 28, it was the mandate of the Chief Justice to decide how to proceed with the complaint against the 1st respondent; it was the Chief Justice to decide whether to proceed under Regulation 26 or Regulation 28; that once the Chief Justice elected to proceed under Regulation 28, it was not open for the trial court to find that the Chief Justice ought to have proceeded under Regulation 26. The power to elect is with the Chief Justice and not the court. Counsel submitted that the duty of the trial court in considering the Petition was to determine if the appellant complied with the provisions of Regulation 28 and whether the appellant acted fairly. Counsel cited dicta from *Selvarajan v Race Relation Board* [1976] 1 All ER12 and *Nampak Corrugated Wadeville v Khoza* (JA 14'98) [1998] ZALAC 24 where it was held that the determination of an appropriate sanction against an employee is a matter which is at the discretion of the employer

and the discretion should be exercised fairly. By substituting its own opinion that Regulation 26 was the appropriate Regulation, the trial court usurped the power and mandate of the Chief Justice under Regulation 28.

19. The appellant concluded its submissions by urging that the trial court erred in compelling it to re-engage the 1st respondent. It was urged that re-instatement is a discretionary remedy and the trial court disregarded the reasons why the Judicial Service Commission resolved to retire the 1st respondent in public interest. The trial judge failed to consider in its entirety the complaints against the 1st respondent more particularly that he frequently absented himself from duty.

20. On damages awarded to the 1st respondent, the appellant submitted that the trial judge erred in finding that the 1st respondent's constitutional right in Section 77 (9) was violated. In light of this error, there was no basis for the Court to award general damages in the sum of Ksh. 2 million.

21. The 1st respondent in opposing the appeal urged that the key issue relate to independence of the judiciary and security of tenure of judicial officers. Counsel submitted that protection of fundamental rights by the Constitution is against contravention by all three arms of government; that the 1st respondent's claims relate to contravention of his fundamental rights by the judicial arm of government; and that the 1st respondent's right to a fair hearing and his right to livelihood in the legal profession were violated. In support, counsel cited Privy Council decisions in *Hinds v Queen* (1976) 1 All ER 353 and *Maharaj v Attorney General* (1978) 2 All ER 670.

22. Counsel for the 1st respondent submitted that Sections 69 and 77 (9) of the retired *Constitution* as read with the *Service Commissions Act*, Cap 185 of the Laws of Kenya and Rules 14, 26, 27 and 28 of the *Judicial Service Commission Regulations* confer on the magistrate, judicial independence whose components are analogous to those formulated by the Supreme Court of Canada in The Reference of Judges of the Provincial Courts (1997) 3 Supreme Court (of Canada) Reports 3 namely: security of tenure, institutional independence and financial security.

23. It was submitted that in the instant case, Regulation 28 of the *JSC Regulations* was not complied with. First, the letter of Interdiction dated 27th October 2006 written to the 1st respondent made it abundantly clear that the Chief Justice was considering combining proceedings under Regulations 28 with proceedings under Regulations 26 and 27. The letter contains a misdirection on the part of the Chief Justice for he did not make up his mind whether he will deal with the 1st respondent under Regulation 28 or any other Regulations. Counsel submitted that the Chief Justice cannot combine the Regulations as he purported to do. Due to this misdirection, it was submitted that everything that was done after the misdirection was a nullity.

24. Counsel submitted that the complaints if proved, would entitle the appellant to dismiss the 1st respondent under Regulation 26; that retirement of a public officer in public interest cannot be resorted to where other regulations can apply. It was submitted that the Chief Justice did not comply with Regulation 28 because all reports in his possession were not given to the 1st respondent. Counsel cited *Roberts v Parole Board* [2005] AC 759 where it was held that the rules of natural justice demand that the person whose conduct is being investigated should be availed all reports which are in possession of the disciplining authority. It was submitted that the 1st respondent was not disciplined in any manner known to law; he finds himself without a job and benefits because the law was not followed; he did not get a fair hearing.

25. In further submission, the 1st respondent contends that Regulation 28 is *ultra vires* Section 77 (9) of the *Constitution* and is null and void; that the Regulation purports to allow the appellant to rely on prejudicial information which it has not disclosed to the 1st respondent; that such a procedure is

contrary to the rules of natural justice as enunciated in *De Souza v Tanga County Council* [1964] EA 377; and that the procedure in Regulation 28 denies a judicial officer an opportunity to know what prejudicial material is contained in the report forwarded to the appellant.

26. The 1st respondent while referring to Sections 73 and 74 of the retired *Constitution* submitted that the appellant subjected him to servitude and inhuman and degrading treatment; that the letter interdicting the 1st respondent contained harsh and inhuman conditions namely: half-salary and the requirement that the 1st respondent must stay at his station of duty and never to leave without knowledge of the resident judge in Meru to whom he was to report every Friday. Counsel cited the case of *Felix Marete Njagi v Attorney General* (1987) KLR 690 to support the submission that these conditions amounted to inhuman and degrading treatment; that to require the 1st respondent to stay at the duty station for over one year and to report to the duty judge in Meru seventy kilometers away every Friday was a gross violation of the right not to be kept in servitude.

27. In his cross-appeal, the 1st respondent faulted the trial judge for not awarding damages for violation of the right not to be held in servitude and treatment in inhuman and degrading manner.

28. It was further submitted that the purported retirement of the 1st respondent in public interest contravened Sections 77 (9) and 82 of the former *Constitution* with the consequence that the 1st respondent's career in the judiciary was brought to an abrupt end; that the 1st respondent is entitled to compensation for loss suffered and destruction of his career. Counsel urged that instead of being awarded Ksh. 2 million by the trial court, this Court should award him Ksh. 8 million which represents Ksh. 2 million for every Section of the Constitution that was violated namely Sections 73, 74, 77 (9) and 82.

29. Counsel concluded his submission by urging us to appreciate the importance of job security. Counsel cited *Woolley v Hoffman- La Roche, Inc.* 101 NJ 499 A.2d. 515 (1985) where it was stated:

> " Job security is the assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily: it can be cut off only "for good cause, fairly determined."

30. We have considered the grounds of appeal as well as submissions by counsel and the authorities filed in the matter. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle v Associated Motor Boat Co*. [1968] EA 123, it was expressed:

> " 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270)."

31. The gist of this appeal is the contestation that the trial court erred in finding the 1st respondent's right to fair hearing pursuant to Section 77 (9) of the retired *Constitution* was violated. In arriving at this finding, the trial court expressed:

> " It is the court's considered view that the respondent in electing not to prefer charges against the Petitioner under Regulation 26,….and instead hide under Regulation 28 to retire him in

public interest without giving him an opportunity to appear before a tribunal to ventilate his case grossly violated the rights of the Petitioner to a fair hearing under Section 77 (9) which obliges an adjudicating authority when exercising its disciplinary powers under Section 69 of the Constitution to give a judicial officer a fair hearing within a reasonable period.....

It is the court's considered decision that Sections 69 and 77

(9) of the repealed constitution read together with the relevant Judicial Service Regulations made it mandatory for the JSC to accord the Petitioner a fair hearing before terminating his employment."

32. It is manifest from the above paragraph that the trial judge based his decision on the reasoning that Regulation 26 of the JSC Regulations requires an officer to appear before a sub-Committee of JSC for hearing. The judge held that JSC was hiding behind Regulation 28. We shall revert to the issue whether the trial judge erred in applying Regulation 26 and not 28 of the JSC Regulations.

33. In the meantime, the first issue for our determination is whether the 1st respondent was given a fair hearing as required by the rules of natural justice. The House of Lords in *Ridge v Baldwin* [1964] AC 40 clarified that the right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. Lord Hodson identified three features of natural justice as:

1) the right to be heard by an unbiased tribunal.

2) the right to have notice of charges of misconduct

3) the right to be heard in answer to those charges.

On his part, Lord Reid expressed:

> " There, I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

34. The 1st respondent contends, that in his response to the Notice to Show Cause, he requested for an oral hearing. In *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR, this Court expressed that fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters. Comparatively, in the Canadian case of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, it was held that "the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient. It cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations." In *Xwave Solutions Inc. v Can*. (2003), 310 N.R. 164 (FCA), the Canadian court held that:

> " fairness does not necessarily require a Tribunal to hold an oral hearing on the issue and its failure to do so did not deny an individual a reasonable opportunity to establish the validity of its complaint."

35. In the instant case, the evidence on record reveals that the 1st respondent was given a Notice to Show Cause vide letter dated 27th October 2006. The letter contained the complaints against him and the grounds upon which the Chief Justice sought to retire him in public interest. The 1st respondent gave his detailed response to the Notice to Show Cause by letter dated 11th November 2006. There was exchange of letters between the Chief Justice and the 1st respondent. Based on these exchange of

letters, we are satisfied that the 1st respondent was given an opportunity to be heard in relation to the complaints leveled against him. In this context, we are reminded of Lord Denning's dicta in Selvarajan's [1976] 1 All ER 12 where he expressed:

> "The investigating body is however, the master of its own procedure. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end the investigating body itself must come to its own decision and make its own report."

36. We take further cognizance of the decision in *R v Immigration Appeal Tribunal Ex-Parte Jones* [1988] I WLR 477, 481 where it was held: -

> "the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. ....
>
> Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..."

37. Persuaded by the sound dicta of Lord Denning and upon our examination and analysis of the contents of the letter from the Chief Justice to the 1st respondent dated 27th October 2006, we are satisfied that the 1st respondent was given details of the complaints against him and he was given an opportunity to be heard in relation to those complaints. Indeed, and as already stated, the 1st respondent by letter date 11th November 2006 gave detailed response to the complaints. In addition, the evidence on record reveals that the 1st respondent was given an opportunity to appeal against the decision to retire him in public interest. He chose not to appeal. We re-affirm the decision of this Court in *Geoffrey Kiraga Njogu v Public Service Commission & 2 others*, [2015] eKLR where it was stated that a person who opts not to exercise his right of appeal cannot turn around and allege he was never heard.

38. The next pivotal issue for our determination is whether the trial court erred in arriving at the determination that the appellant should have been given the opportunity to appear before a JSC sub-committee as required by Regulation 26 of the JSC Regulations. The appellant contends that the 1st respondent was retired in accordance with the procedure laid down in Regulation 28; that the Commission duly complied with all the mandatory steps in Regulation 28. Conversely, the 1st respondent contends that the procedure in Regulation 28 was not followed and in the alternative Regulation 28 is *ultra vires* the Constitution as it purports to allow JSC to rely on prejudicial information which it had not disclosed to the 1st respondent; that such a procedure is contrary to the rules of natural justice as enunciated in *De Souza v Tanga County Council* [1964] EA 377.

39. We have considered the rival submissions on the issue. It is indisputable that the procedural steps under Regulations 26 and 28 are different. The power to elect which Regulation to follow is vested upon the Chief Justice. Under Regulation 28, it is the Chief Justice who has to form the opinion that it is desirable in the public interest that the service of the 1st respondent should be terminated on grounds which cannot suitably be dealt with under any other provision of the Regulations.

40. In the instant case, the trial judge expressed that in his considered opinion, the appellant was hiding under Regulation 28 instead of applying Regulation 26. The judge erred as he was now delving into

the merits of the decision by the Chief Justice on whether to apply Regulation 26 or 28 of the JSC Regulations. The Chief Justice had chosen Regulation 28. The trial judge erred in finding that the choice of Regulation 28 was wrong and that Regulation 26 was the most appropriate regulation. In arriving at this finding, the trial court usurped the power and discretion of the Chief Justice to elect whether to proceed under Regulation 28 or any other Regulation. In usurping the powers of the Chief Justice, the trial court exercised its jurisdiction beyond the purview and parameters of a constitutional application. As was correctly stated in *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited* Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR, in a judicial review, the court cannot substitute its own decision with that of the Respondent.

41. In the Cross-appeal, the 1st respondent contends that the trial judge erred in failing to find that the constitutional rights of the 1st respondent as enshrined in Sections 73, 74 and 82 were violated. Conversely, the appellant contends even under Section 77 (9), no constitutional right of the 1st respondent was violated. Our finding and determination on whether these Sections of the *Constitution* were violated disposes the issue of liability and entitlement to general damages and compensation by the 1st respondent. If we find that any of the Constitutional Sections was violated, the 1st respondent will be entitled to assessment of general, vindicatory or compensatory damages.

Despite the appellant's submissions, we are doubtful if there is a category of damages known as vindicatory damages.

42. The trial court held that Sections 73, 74 and 82 of the *Constitution* were not violated vis a vis the1st respondent. Conversely, the 1st respondent in cross appeal cites the case of *Felix Marete Njagi v Attorney General* (1987) KLR 690 to support the submission that the treatment meted to him was inhuman and degrading deserving of liability on the part of the appellant and entitlement to compensation for the 1st respondent. The trial court in finding that Sections 73 and 74 of the retired *Constitution* were not violated stated:

> " The court is unable to arrive at the conclusion that the interdiction of the Petitioner on half pay, the requirement to remain at his duty station and the requirement to regularly report to the Resident Judge, Meru station amounted to subjecting him to servitude and forced labour."

43. In further support of its findings, the trial judge correctly referred to Regulation 17 (2) of *JSC Regulations* which provide that an officer who is interdicted shall receive such salary not being less than half of his salary as the Chief Justice shall think fit. Regulation 17 (5) stipulates that an officer who is under interdiction may not leave his station without the permission of the Chief Justice or any officer who is empowered to give permission on behalf of the Chief Justice.

44. On our part, we find no fault with the trial court's finding that Sections 73 and 74 of the retired *Constitution* were not violated. An officer interdicted on half pay is entitled to full pay if the allegations are later found not to be true. There is no violation of the right to full pay because an officer's right to full salary is preserved until the allegations against him are proved or disproved. Suspension on half pay while preserving the right to full pay is not punitive, oppressive, arbitrary, inhuman or degrading treatment.

45. The appellant contends that the trial judge erred in applying the provisions of the Employment Act. In applying Sections 45 and 47 of the *Employment Act*, the trial judge expressed:

> "It is opportune to note that the cause of action in this matter arose in 2008 after the enactment of the Employment Act 2007."

46. The effective date of the Employment Act 2007 is 2nd June 2008. The letter interdicting the 1st respondent is dated 27th October 2006; the decision to retire the 1st respondent was made on 13th June 2008 and conveyed to the 1st respondent on 23rd June 2008.

47. The legal question is whether the cause of action in this matter arose on 27th October 2006 being the date of the letter of interdiction or 13th June 2008 when JSC made the decision to retire the 1st respondent in public interest. If it is the former date, the provisions of the *Employment Act* 2007 would be inapplicable; if it is the latter date, the provisions of the *Employment Act* 2007 would be applicable.

48. The trial court in applying Sections 45 and 47 expressed as follows:

> "This court has no hesitation to find that the right of the Petitioner to a fair hearing under Section 77 (9) of the constitution was violated by the respondent. The result of this omission, as often is the case, resulted in an unlawful and unfair termination contrary to Section 45 of the Employment Act 2007. This is clearly demonstrated by the failure by the respondent to show that it had a fair reason to retire the Petitioner in public interest. Not an iota of evidence save for bare allegations has been placed before court in terms of Section 47 (5) of the Employment Act 2007 to justify the decision of the respondent."

49. In our considered opinion, the 1st respondent's cause of action arose when the decision to dismiss him in public interest was made on 13rd June 2008. The letter of interdiction was simply a procedural step in the process leading to retirement in public interest. The 13th June 2008 is the effective date when the cause of action arose. In our view, the trial court did not err in citing the provisions of the *Employment Act*. However, it is quite another thing as to whether the trial court erred in applying the provisions of Section 45 and 47 of the *Employment Act*.

50. The Uganda Supreme Court in *Omunyokol v Attorney General*, Civil Appeal No. 06 of 2012 expressed as follows on retroactivity of the Employment Act:

> "The Court of Appeal relied on the provisions of the Employment Act in upholding the decision of the trial court, not to order reinstatement of the appellant in his job. The appellant has submitted that the Court of Appeal erred in so doing because the said Act which came into force on 24th May 2006 was not in operation when the appellant was dismissed on 8th June 1998. It was his contention that the Act could not apply retrospectively to him.
>
> I entirely agree with the appellant's submission that the Court of Appeal erred in applying the Employment Act 2006 to this case, when the Act did not have a retrospective effect. The Employment Act Cap.219 was the equivalent law in existence at the time the appellant was dismissed but it was not referred to nor does it have similar provisions.
>
> Secondly, the appellant contends that the Employment Act applies only to contract employment and not statutory public employment which is governed by the Constitution, the Public Service Act and Public Service Regulations among others. The respondent submitted that the Employment Act 2006, embodies principles of common law regarding

employment. That may be so, but it seems to me that the Employment Acts were intended to apply to employees on fixed contracts who earn wages. In my view the appellant is correct in maintaining that the Employment Act does not apply in this case. (Emphasis supplied).

51. In our considered view the reasons for termination of employment as stated in paragraph 4 and 5 of this judgment are fair reasons for termination and the trial judge cannot be faulted in finding that the employment Act was applied to the facts of this case.

52. The appellant urged that the trial judge erred in ordering reinstatement of the 1st respondent. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR this Court expressed that reinstatement is a discretionary remedy. In *Omunyokol v Attorney General*, Civil Appeal No. 06 of 2012, the Uganda Supreme Court on the issue of reinstatement observed as follows:

> " In his judgment the trial judge gave two reasons why he found that reinstatement was not the most appropriate remedy in the circumstances of the case. For the first reason the judge stated:
>
> "The plaintiff prayed to be reinstated in employment. There is no evidence from the defendant that the plaintiff would be welcomed to resume his former job. Court has therefore come to the conclusion that the defendant as employer does not want to have back the plaintiff as employee. This, therefore, is one of the cases, where the Court has to apply the common law principle that an employer should not be forced to retake an employee, the employer no longer wishes to continue to engage: See *Bank of Uganda v Betty Tinkamanvire*, Civil Appeal No 1 of 1998 (SC) and *Barclays Bank of Uganda v Godfrey Mubiru*. Civil Appeal No 1 of 1998 (SC) (unreported)."
>
> The second reason the learned High Court Judge gave was stated as follows:
>
> "Even as a matter of practicality, it is not appropriate, in this case, to order reinstatement It is almost 13 years ago since the plaintiff lost his employment. A lot of has happened by way of promotions and placements in the Ministry of Foreign affairs according to evidence availed by the plaintiff. This makes reinstatement of the plaintiff in his former employment to be not the best option. The Court declines to order reinstatement of the plaintiff."
>
> "The main thrust of the appellant's grievances against the findings of the trial judge, as I understand it, is that the trial judge ought to have ordered his reinstatement in his job……
>
> Ultimately the question which remains to be answered is whether the Court of Appeal erred in upholding the decision of the trial judge not to reinstate the appellant in his employment………
>
> The appellant was dismissed on 8th June 1998 and the High Court delivered its judgment on 9th March 2010, a lapse of 13 years. During this period many things had changed in terms of posting and promotions, and it would have been difficult to find an appropriate placing for the appellant. As the appellant himself testified, some of his colleagues were now occupying higher posts. What then would become of him? Further, the Court of Appeal delivered its decision on 29th March 2012 and this appeal was heard on 10th September 2014. The appellant who was born in 1961 is now 53 years of age and would have to retire in seven years' time, on reaching the retirement age of 60 years.
>
> In conclusion, I am unable to fault the Court of Appeal for upholding the order of the trial Judge not to reinstate the appellant in his employment, I find that the two Courts below were justified in holding that the most appropriate remedy for the appellant was the award

of damages to compensate him for the loss of his employment. Accordingly, I find no merit in these grounds of appeal which should fail."

53. Borrowing from the persuasive dicta of the Uganda Supreme Court, in this matter, the record shows that the 1st respondent will attain the retirement age of 60 years in 2019. He was retired in public interest in 2008 which is 10 years ago. We are persuaded that during this period many things have changed in terms of posting and promotions, and it would be difficult to find an appropriate placing for the appellant. We adopt the analysis and reasoning in the persuasive decision of the Uganda Supreme Court and find that in the instant case, the trial court erred in making an order for re- instatement of the 1st respondent.

54. The 1st respondent in his cross appeal urged that the trial court erred in not awarding him special, exemplary or vindicatory damages as pleaded in the amended Petition. The principles governing award of exemplary or punitive damages were set out by Lord Delvin in *Rooks v Barnard* (1964) AC 1131, as applied in *Cassel & Co Ltd v Broome* (1972) A.C. 1027. It was decided that there are three cases where exemplary damages might be justified were:

    i. Where the government servants had been guilty of "oppressive, arbitrary or unconstitutional action".

    ii. Where the "defendant's conduct had been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff" and

    iii. Where such an award was sanctioned by Statute.

55. Furthermore, Lord Delvin stated that where exemplary damages are awarded, three considerations were to be borne in mind, namely:

    i. The plaintiff cannot recover exemplary damages unless he was a victim of punitive behaviour.

    ii. Restraint is to be exercised, for an award of exemplary damages can be used as a weapon both for or against liberty.

    iii. The means of the parties while irrelevant in the assessment of compensation are relevant to the award of exemplary damages.

56. Applying the above principles to the instant case, we find that the conduct of the appellant in issuing a Notice to Show Cause and interdicting the 1st respondent was not oppressive, arbitrary or unconstitutional as it was entitled to do so in order to allow the 1st respondent an opportunity to answer complaints laid against him. There is no evidence on record to show that the appellant's conduct was arbitrary or that the appellant behaved in a punitive manner. For this reason, we agree with the trial court's conclusion that the rights of the 1st respondent in Sections 73 and 74 of the retired *Constitution* were not violated and in overall, we find that the 1st respondent is not entitled to exemplary or vindicatory damages (if at all).

57. We now consider the finding by the trial court that the complaints in the Notice to Show Cause and the intelligence report from the National Intelligence Service were bare allegations. The complaints against the 1st respondent originated from various independent sources namely the Chief Magistrate at Mombasa, the Chief Magistrate at Kiambu and the National Intelligence Service. All these complaints came from independent, unrelated persons and at different times from different stations. The complaints have one thing in common – they depict the appellant's work performance as unsatisfactory. The officers who wrote the complaints did so in the course of duty. There is no evidence on record that the officers were biased, colluded or acted mala fides. The complaints corroborate each

other and the trial judge failed to appreciate the corroborative nature of the complaints against the 1st respondent. To this extent, the finding that the complaints against the 1st respondent were bare allegations is not supported by the evidence on record.

58. Notwithstanding the foregoing, of great concern is the trial court's casual dismissal of the complaint from the National Intelligence Security Service as bare allegations devoid of facts. The trial judge expressed:

> " Furthermore, what appears to the Registrar to be the last nail on the coffin of the Petitioner, the National Security Intelligence Service (NSIS) complained through the Permanent Secretary Ministry of Justice and Constitutional Affairs...... The Hon. Chief Justice in his letter interdicting from service the Petitioner.... relied entirely on the six (6) allegations contained in the letter of the Permanent Secretary dated 13th October 2006......No iota of evidence save for bare allegations had been placed before the court ...to justify the decision of the respondent (to retire the Petitioner in public interest.) (Emphasis supplied)

59. The National Intelligence Security Service is established by Act No. 28 of 2012. It is a professional outfit that gathers and verifies data and information. It provides internal and external intelligence and detects threats to security of the country. Its reports must be accorded the weight they deserve. To nonchalantly dismiss a report or complaint from the National Intelligence Security Service epitomizes failure to appreciate the nature and role of the intelligence in socio-economic and political stability of a country. We abhor such nonchalant and dispassionate disregard of intelligence reports. The trial judge erred in equating the complaint from the National Intelligence Service as bare allegations

60. An issue urged in cross-appeal is that the trial court erred in not awarding special damages as pleaded in the amended Petition. In our understanding, the 1st respondent contends that he was not awarded the following sums as pleaded:

(a) Ksh. 167,605,339/= on the basis that the Petitioner would have been elevated to the position of Senior Principal Magistrate in September 2006; that the Petitioner would have been elevated to the position of Chief Magistrate in September 2009 and finally elevated to office of Judge of the High Court in 2012 where he would remain until retirement in 2019 at the age of 74 years.

(b) The 1st respondent claims in the alternative Ksh. 21,605,389/- on the assumption that he remained in the grade of Acting Senior Principal Magistrate until he attained the age of 60 without any increment or being promoted to the office of Judge or in the alternative a claim for Ksh. 30,890,782//= on the basis that he was promoted to the grade of Chief Magistrate and retired at that grade or

(c) Ksh. 164,857,653/= on the basis that the 1st respondent was promoted to the office of Judge of Appeal in 2002 where he would have served for 11 years until retirement at the age of 74 years having served as a judge of the High Court for 10 years or

(d) Such salary as is due to the petitioner as a judge of the Court of Appeal with annual increments for 11 years.

61. The sums claimed in the Petition as itemized above are akin to claim for damages for loss of chance and opportunity for career advancement. A claimant's loss of his opportunity or chance for career progression may itself be actionable damage. However, the claimant must prove this loss on balance of probability. Upon proof on balance of probability, the court will measure this loss as best as it may.

The lost chance and opportunity for career progression is to be ignored if it is merely speculative, but evaluated if it is substantial. In *Davies v Taylor*, [1974] AC 207, it was stated:

> "You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent; sometimes virtually nil. But often it is somewhere in between."

62. In *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, when an employer negligently supplied an inaccurate character reference, the employee did not need to prove that, but for the negligence, he would probably have been given the new job. The employee only had to prove he lost a reasonable chance of employment. In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 a solicitor's negligence deprived the claimant of an opportunity to negotiate a better bargain. The Court of Appeal applied the 'loss of chance' approach. In *Herring v Ministry of Defence* [2003] EWCA Civil 528, [2004] 1 All ER 44 the Court of Appeal stated loss of chance claims do not replace the conventional means of assessing future loss of earnings but are more appropriate in cases where the chance to be assessed is where the career of the claimant would take a particular course leading to significantly higher overall earnings.

63. Lord Diplock in *Mallet v McMongale* (1970) AC 166 at176 succinctly stated:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards. (See also *Brown v Ministry of Defence* [2006] EWCA Civil 546).

64. In the instant case, the claims for special damages were based on speculation that the 1st respondent would have been appointed as Judge of the High Court and even retired as a Judge of Appeal. What about the vagaries of life, the concept of mitigation of damages and alternative employment, if any? The special damages claimed in the Petition are founded on 100% assumptions. Such 100% assumptions make the claim in the Petition speculative bordering on imponderables. In our considered view, these speculative claim for special damages has no merit.

65. In addition, the 1st respondent further submitted that the judge erred in not awarding him vindicatory damages in the sum of Ksh. 6 million i.e. Ksh 2 million for each constitutional right contravened under Sections 73 or 74, 77 and 82 of the repealed *Constitution*. We have already considered this submission and the basis upon which the claims were founded and concluded that the same have no merit. This ground of cross-appeal has no merit.

66. In penultimate, while we agree with Senior Counsel for the 1st respondent that independence of the judiciary is paramount, we are not persuaded that in the circumstances of this case, that independence was negated.

67. In totality, our re-evaluation of the evidence on record and consideration of applicable law is that the cross-appeal has no merit and is hereby dismissed. Conversely, we are satisfied that the appeal has merit.

The final orders of this Court is that this appeal is hereby allowed. The judgment of the Employment and Labour Relations court dated 28th January 2014 be and is hereby set aside in its entirety.

68. In view of the fact that this is an employer and former employee dispute, we order that each party is to bear his/its own costs before the trial court in this appeal. Orders accordingly.

DELIVERED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2019

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR