IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, NAMBUYE & MURGOR- JJ.A)

CIVIL APPEAL NO. 120 OF 2004

BETWEEN

STEPHEN S. PARENO.....APPELLANT

AND

JUDICIAL SERVICE COMMISSION OF KENYA..RESPONDENT

(Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Nyamu, J) Dated 18th March, 2004
in

H.C.Misc. Civil Appl. No. 1025/2003)
****

JUDGMENT OF THE COURT

The appellant ***Stephen S. Pareno*** was in the year 1993 employed by the respondent as a Magistrate. In the course of such employment, he toured Kibera (1993-1999), Kericho (1999-2000) and Machakos Law Courts (2000 upto 15/8/2003) respectively.

The chain of events culminating in this appeal were triggered on 27th February, 2003 when the appellant was tasked to read a judgment in Criminal Case No. 2586 of 2001 on behalf of a colleague a ***Mr. Soita*** who had proceeded on transfer to Kisii Law Courts. The said Judgment is stated to have been in hand written. As deposed by the appellant in the affidavit in support of the petition for judicial review filed on 12th September, 2003, the appellant had difficulty reading the colleagues hand writing. On account of this, the appellant only outlined the charges facing the accused as set out at the beginning of the said Judgment and the reading of the last line which was to the effect that "***I do find him innocent and acquit him under Section 215 of the Criminal Procedure Code***. The appellant deposes that he honestly believed that the acquittal applied to all the charges that the accused had faced.

It is not clear how the appellant realized that he had committed an error. He is however sure that when he learned of the error, he moved swiftly through the Senior Principal Magistrate then in charge, to correct the error by causing the file to be placed before the Resident Judge for revision. The orders of outright acquittal were accordingly revised and set a side and substituted there with an order for 18th months probation. The Senior Principal Magistrate was accordingly informed of that reversal vide an internal memo dated 7th April, 2003. The rectification of the error and subsequent notification of the fact of

rectification of the error did not put the matter to rest. Instead, it provoked a notice to show cause letter dated 10th July, 2003 emanating from the then Registrar ***William Ouko*** (as he then was) directed to the appellant. In a summary, the Registrar claimed in the said notice to show cause that the appellant's conduct amounted to professional dishonesty, misconduct and dereliction of duty. The appellant was to show cause as to why disciplinary action should not be taken against him in connection thereto.

The appellant responded vide a letter dated the 22nd day of July, 2003 addressed to the Registrar High Court through the Senior Principal Magistrate Machakos. The appellant's explanation was not accepted by the respondent, -the Judicial Service Commission resulting in a dismissal letter dated the 9th day of August, 2003 dismissing the appellant from his employment. The content read as follows:-

"I wish to convey the decision of the Judicial Service Commission of its meeting of 31st July, 2003 that you be dismissed from the Government Service with effect from 31st July, 2003 on grounds of gross misconduct.

On dismissal you forfeit all your retirement benefits that you would otherwise have enjoyed had you retired in the normal manner.

You are hereby informed of your right of appeal, which must be lodged within six (6) weeks with effect from the date of this letter.

Enclosed here with please find the official secrets Act forms on leaving the Government service for your completion, thereafter return a copy to this office for our retention"

The appellant was aggrieved by that dismissal order. He moved to the High Court and filed Misc. Civil Application No.1025 of 2003. In it, the Appellant presented a chamber summons dated 15th day of September 2003 seeking leave of Court to apply for an order of certiorari to quash the decision of the Judicial Service Commission of Kenya dated 31st July, 2003. Leave was accordingly granted, paving the way for the presentation of the Notice of Motion dated 15th day of September, 2003 seeking an order of certiorari to remove into the High Court and quash the decision of the Judicial Service Commission of Kenya dated 31st July, 2003 and contained in the letter dated 9th August, 2003 ordering the dismissal of ***Stephen S. Pareno*** the Appellant herein from his employment with the respondent. The Motion was grounded on the content of the statement, verifying affidavit, a supporting affidavit as well as annextures annexed thereto. The Motion was opposed by the replying affidavit of ***William Ouko*** deposed on the 15th day of December, 2003 as well as annextures annexed thereto.

Merit argument resulted in the ruling of ***J.G. Nyamu, J*** (as he then was) of 18th day of March, 2004 vide which the appellant's judicial review application was dismissed with costs. The appellant was aggrieved by that dismissal order. He has appealed to this Court citing four (4) grounds of appeal. These were subsequently condensed into two by the appellant in their written submissions namely:-

"(a) That the learned Judge erred in law and in fact when after finding that the process leading to the dismissal of the appellant from service was flawed and in breach of clear statutory provisions engaged in abstract legal discourse in order to deny the appellant relief.

(b) That the learned Judge erroneously delved into the merits and or otherwise of the decision of the Judicial Service Commission in an attempt to justify his denial of relief to the appellant despite his clear findings that the Judicial Service Commission acted in an arbitrary and unreasonable manner.

In his oral submissions to Court, ***Mr. Mogikoyo*** for the appellant submitted that the appellant was as at the material time an employee of the Judicial Service Commission; the Judicial Service Commission had been set up pursuant to the provisions of Section 13 of the Public Service Commission Act Cap 185 laws of Kenya; being a creature of statute, the respondent was obligated to operate within the mandate donated to it vide regulations 26, 27 and 28. These regulations, argued ***Mr. Mogikoyo,*** are couched in mandatory

terms meaning that non-compliance would render any action undertaken by the appellant in respect thereof being declared null and void.

Mr. Mogikoyo argued further that the appellant as an employee of the respondent was subject to disciplinary measures initiatable under these regulations in the event of any breaches of duty obligations to his employer. Likewise, the respondent as the appellant's employer was not only bound but obligated to follow the dictates of the said regulations in the event it wished to terminate the appellant's contract of employment with it on disciplinary grounds.

To ***Mr. Mogikoyo,*** it is clear from the record that the respondent admitted in its submissions to the High Court that it had not followed the dictates of the said regulations when it moved to terminate the appellants' employment with it; the learned trial Judge also acknowledged this fact and found specifically that the procedure followed by the respondent in dismissing the appellant from its service was flawed; and instead of terminating the proceedings upon that finding went on his own volition to delve into the merits and other extraneous matters to justify his denial of relief to the appellant. To ***Mr. Mogikoyo***, the learned Judge made a grave mistake and in the process denied justice to the appellant a situation this Court has been urged to reverse.

The respondent has opposed the appeal and urged us to dismiss it as lacking in merit. ***Miss Mutua*** for the respondent while reiterating the content of the respondents written submissions, argued that the learned trial Judge was right in his finding that **one,** an employer/employee relationship had been established to exist between the appellant and the respondent; **two**, that the said relationship (employer/employee) was the preserve of private law; **three**, that the remedy of Judicial review was not available to the appellant in the circumstances.

Miss. Mutua argued further that although they agree that the learned trial Judge applied a wrong test in holding that the magistrates too enjoy some protection by virtue of the detailed and difficult process set out in regulations 26,27 and 28 of the Judicial Service Commission Regulations, that finding did not alter the position in law that the relationship between the appellant and the respondent was purely contractual and therefore not a subject of public law adjudication in the event of any dispute arising from the engagement of the parties pursuant to that relationship. To this end, argued ***Miss Mutua***, the appellant's remedies if any lay in civil law remedies.

Alternatively, added ***Miss. Mutua***, if we find that the appellant/respondent relationship had any statutory underpinning, we should accept, the respondents' assertion that, the conduct leading to the appellants' dismissal from his employment with the respondent operated to disentitle him to any discretionary relief from the High Court in the form and nature of judicial review.

On case law, the appellant urged us to be persuaded by the decision in the High Court in Misc. Application No.220 of 2005 in the matter of ***Republic Versus Evans Gicheru (Hon) & 3 others exparte Joyce Manyasi*** for the propositions that (i) the remedy of judicial review is not concerned with the merits or demerits of the decision in respect of which the application for Judicial review is made, but rather, it is concerned with the decision making process itself, and if that process is flawed, the decision reached is equally flawed and will not be allowed to stand; (ii) that where a regulation is couched in mandatory terms, it demands strict compliance. Non-compliance with the spirit and letter of such a regulation is fatal to any action taken in pursuance thereof.

The respondent on the other hand relied on the case of ***Republic versus Professor Mwangi S.Kimenyi Civil Appeal No. 24 of 2001 (UR)*** for the proposition that the termination of contracts of employment that have no statutory underpinnings are a matter of private law and the remedies available to an aggrieved party to such a contract are private law remedies; the case of ***Republic versus British Broad Casting Corporation Ex-parte Lavelle [1983] 1WLR 1302*** for the proposition that, in a situation of employer/employee relationship, where disciplinary procedures are initiated pursuant to a contract of employment, such initiation of disciplinary procedures is purely private and domestic in character and as such does not entitle such an employee to a relief by way of judicial review; the case of ***Republic versus East Berkhire Health Authority Exparte Walsh [1984] 3ALLER 425*** for the proposition that whether a

dismissal from employment by a public Authority was subject to public law remedies depended on whether there were specific statutory restrictions on dismissal which underpinned the employee's position and not on the fact of that employment by a public authority per se. Also the case of ***Municipal Council of Mombasa versus Republic Nairobi Civil Appeal No. 24 of 2001 (UR)*** for the proposition that the procedure of judicial review has no application whatsoever to disputes arising out of contractual relationships.

This being a first appeal, our mandate is as set out in Rule 29(1) of this Court' Rules namely, to re appraise the evidence and to draw inferences of fact. See also the case of ***Selle and another versus Associated Motor Boat Company Limited and others [1968] EA 123***. At page 126 paragraph ***G-1 Sir Clement De Lestang, V.P.*** had this to say *inter alia*:-

"***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 Judges findings of fact if it appears either that he has already failed on some point to take account of particular circumstances or probabilities material to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.***

The grounds in support of the judicial review petition were set out in the statement and the supporting affidavit deposed by the appellant. The appellant had contended that the respondent's decision to terminate his employment was in breach of the principles of Rules of natural justice in that the respondent purported to dismiss the appellant from the service without according him a proper opportunity to defend himself against the allegations made against him; the respondents' decision was also in total contravention of the Judicial Service Commission Regulations that govern the discipline of officers in its service and lastly, that the proceedings conducted by the respondent were conducted in an oppressive, unfair and in an unjust manner which was in total abuse of the due process of the law as they led to the respondent dismissing the appellant unprocedurally.

In response thereto, the then Registrar High Court disposed in his replying affidavit that the appellant's conduct whilst reading the judgment in criminal case No. 2586 of 2001 constituted a case of professional dishonesty, misconduct and a breach of trust; the charges the appellant faced were contained in the, Notice to Show Cause which the appellant admitted to have received; the right to be heard was accorded to the appellant who utilized the same by responding to the Notice to Show Cause; the appellant was also given a right of appeal which he failed to utilize. On account of the above, the respondent maintained that the appellant was fairly processed out of his employment with the respondent and on that ground urged for the dismissal of the judicial review application.

Upon assessing and analising the rival arguments before him and applying the relevant principles of law to those facts, the learned trial Judge made observations *inter alia* that, the appellant's right to lodge an appeal against his dismissal but which the appellant did not utilize, was not a bar to judicial review; in the light of the Attorney General's admission that the disciplinary procedure outlined in Regulation 26 was not followed, the main issue for determination before the Court was whether the admitted non compliance with the procedures set out in Regulation 26 entitled the appellant to the relief claimed as a matter of right; regulations 26, 27 and 28 of the Judicial Service Commission had been made pursuant to Section 13 of the Public Service Commission Act Cap 185 Laws of Kenya, which provision relate to discipline only; there was nothing in the Public Service Commission Act (supra) which could prevent magistrates from being dismissed from their employment notwithstanding that magistrates enjoyed some measure of protection by the said Regulation borne out by the elaborate procedures on the removal from office set out therein; the Judicial Service Commission regulations invoked by the respondent in its bid to terminate the appellant's employment with them were indeed flouted.

The learned Judge did not end his determination there, but went further to draw out certain principles he believed were peculiar to the office of a magistrate and which in his view operated to disentitle the

appellant from the relief of Judicial review. These may be summarized as follows:-

1. ***Regulations applicable to the terms of employment of magistrates have statutory underpinnings whose intention and spirit was to give magistrates a special status because of the nature of their work which needs independence and protection. This is conditional to the affected magistrates performing their official functions with integrity in which case if the statutory body purports to discipline or dismiss them without giving reason or arbitrarily or without following the procedure outlined in the Regulations or without substantively adhering to the procedure and to rules of natural justice, in such circumstances the relief of certiorari would be available to them provided the relief is promptly sought.***

2. ***Where reasons are given for discipline or dismissal the Court ought to apply the Wednesbury principle to determine whether or not an appropriate order in judicial review ought to be given. An order for judicial review can only be granted where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.***

3. ***Where the decision reached is supported by evidence it should not be interfered with.***

4. ***A court of law has no jurisdiction to usurp power in an alleged bid to prevent abuse of power in the exercise of discretion by the body concerned.***

5. ***Where issues raised by affidavits of either side are in contest, this is not a proper candidate for judicial review. It would be a proper candidate for civil claims for damages for wrongful dismissal.***

6. ***Certiorari as a discretionary remedy may be withheld even in circumstances where it may be warranted.***

7. ***There is no jurisdiction in a court of law to grant a relief not sought in a statement of claim.***

8. ***Where an officer has been out of employment for sometime the proper remedy is a civil claim for damages, reinstatement or specific performance.***

9. ***A public law remedy may be available to a litigant even in instances where it would have arisen as a collateral issue in a claim laid under private law.***

10. ***The relief of compensation is available in a judicial review on condition that it be pleaded and supported by evidence. Protection guaranteed to the magistrates by the Regulations is lost the moment perception is lost (possibly of integrity).***

The relief the appellant sought from the High Court was simply for the learned Judge to issue -"***an order of certiorari to remove into the High Court and quash the decision of the Judicial Service Commission of Kenya delivered on and dated 31st July, 2003 and contained in the letter dated 9th August, 2003 ordering the dismissal of Stephen S. Parano, the Applicant herein."***

Our revisit of the record reveals that the learned trial Judge did in fact interrogate that process and arrived at the conclusion *inter alia* that:-

"This Court is on the other hand absolutely certain that the process leading to the dismissal was clearly flawed in not setting up a commission to inquire and in denying the applicant a hearing."

It is the appellant's contention that one, the learned trial Judge found that Regulation 26 ought to have been followed, the learned trial Judge should have terminated the proceedings there, and penned off. The appellant has therefore in this regard asked us to confirm that the learned trial Judge was right in making a finding that Regulation 26 of the Judicial Service Commission in so far as it was purportedly invoked by

the respondent to terminate the appellant's employment with them was flaoted, and upon so finding to proceed to grant the relief that the learned trial Judge erroneously withheld from the appellant, namely, the quashing of the dismissal letter issued by the respondent.

The Judicial Service Commission (JSC) is a public entity envisaged in the definition in section 2 of the Public Service Commission Act, Cap 185 Laws of Kenya. As mentioned in the said Act, the Judicial Service Commission as it was then constituted was a creature of the Constitution established under Section 68 of the retired Constitution as read with Section 69 of the same retired constitution. A perusal of both of these provisions reveals that Section 68 entrenched the then Judicial Service Commission as a constitutional entity, and then prescribed its membership. Vide sub Section 68 (3) there was jurisdiction to delegate functions and duties to any public officer; authority to self regulate its procedures and the mode of decision making (by a majority vote). Section 69(1) vested in the Judicial Service Commission disciplinary powers over officers appointed to hold office under it. Vide Section 69(2) delegation of any of the Judicial Service Commission's powers and duties had to be authorized in writing. Section 13 of the Public Service Commission Act (supra) also devolved powers for self regulation achieved vide L.N. 163/1960. These were the regulations in operation as at the time the appellant's grievance arose.

Regulation 26, 27 and 28 have featured prominently both in the Judicial review proceedings and in this appeal. We find these were extensively interrogated by the learned trial Judge. We have revisited them and find as the learned Judge did that regulations 27 and 28 deal with retirement in the public interest and on cessation of office consequent upon conviction for a criminal office which have no application to issues in controversy herein. That leaves us with Regulation 26. It reads:-

"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 grounds of misconduct which , if proved would in his opinion justify dismissal, he shall frame the 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 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 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. ***(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 by virtue of section 69(2) of the constitution delegate its powers.***

(b) The Chief Justice shall not be a member of the sub-commission, but if puisne Judges of the High Court have been designated as members of the commission under Section 68(1) of the Constitution they may be members of the sub-commission.

(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 determines, shall be required to appear before it to defend himself.

(5) If witnesses are examined by the sub-commission, the officer shall be given an opportunity of being present and of putting questions on his own behalf to the witness, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(6) The Attorney- General shall if requested by the commission direct a legally qualified officer from the office of the Attorney General to present to the sub -commission the case against the officer

concerned.

(7) The sub commission shall permit the accused officer to be represented by an advocate.

(8) If during the course of the investigations grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure as was adopted in framing the original charges.

(9) The sub commission 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 sub-commission shall include:-

> **a)** ***A statement whether in the sub-commissions judgment the charge or charges against the officer have been proved and the reasons therefor.***
>
> ***b) Details of any matters which in the sub-commissions' opinion aggravate or alleviate the gravity of the case; and***
>
> ***c) a summing up and such general comments as will indicate clearly the opinions of the sub-commission on the matter being investigated but the sub-commission 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 sub commission, 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 sub-commission for further investigation and 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.

Applying the above conditionalities to the rival arguments herein, it is clear that the central actor in the mandate donated to the respondent in so far as disciplinary proceedings initiated under the subject regulation is concerned was the Hon the Chief Justice. It was the Chief Justice who was required to receive the complaint, peruse it and then determine whether the complaint required to be investigated. Being so convinced the Chief Justice would frame the charge or charges forming the alleged misconduct on the part of the particular officer. Accompanying the charge or charges would a statement of facts relied upon as a basis for the charge or charges. The Chief Justice would then on the basis of the statement of facts and the charge and or charges framed (the Chief Justice) invite the officer to state in writing if he so wished and by a specified date the grounds on which he intends to exculpate or exonerate himself from the charge (s) leveled against him/her. It is only after the compliance or non compliance with this requirement that the matter would be forwarded to the Judicial Service Commission for consideration. The primary duty of the Judicial Service Commission was first of all to determine whether the disciplinary proceedings were to continue or not. It was only upon the Judicial Service Commission deciding that disciplinary proceedings should continue that the Judicial Service Commission would appoint a sub commission to investigate the matter.

Once seized of the matter, the sub-commission would then inform the officer concerned that on a specified date the charge (s) against the officer would be investigated. There was liberty on the part of the officer concerned to appear before it to defend himself. All documentation to be relied upon by the sub-commission in the conduct of its investigations required to be made known to the officer concerned. If deemed fit, the proceedings could be accusatorial whereby the Attorney General could designate an officer to present the case against the officer. The officer could elect to appear in person or be represented by an advocate. In the event of any new matter arising concerning the same officer which would likely form part of the ongoing disciplinary process, the process was required to be restarted a fresh by the Chief Justice with regard to the newly disclosed matter(s).

Upon conclusion of the investigations the sub-commission was required to submit the entire record of

proceedings to the full Judicial Service Commission for necessary action. The sub-commission had no mandate to make any recommendation as to the nature of the form of punishment that may be meted out against the particular officer. Upon a receipt of the report from the sub-commission the commission would then refer the matter back to the sub-commission for consideration or proceed to take appropriate action within the regulations.

From record it is apparent that the above outlined procedure was not followed in the appellant's case and the learned trial Judge rightly concluded that the Attorney General was right in conceding that Regulation 26 (supra) had been flaoted. The question is whether the learned trial Judge should have put the matter to rest there and then. It is common ground as borne out by the record that the learned trial Judge did not put the matter to rest at that point in time. He went a head to justify why the appellant was not entitled to the relief sought. In addition to what we set out earlier on, the learned Judge was also of the view that (i) since the subject regulations allowed removal, dismissal or retirement in the public interest, the law applicable to employment contracts applied to the appellants grievance;(ii) the relief of certiorari by way of judicial review would have been available to the appellant if the same would have first been applied for promptly; (iii) and second, if it had related to the respondents dismissal of the appellant from his employment on account of the appellant being independent, or impartial in the performance of his duty or for breach of the rules of natural justice; (iv) the right to intervene was lost where a reprieve was not sought promptly before the employer and employee parted ways; (v) since the officer (appellant) had had left the office for sometime, it would not have been possible to force the parties together again as this would have been contrary to the policy of public interest and the principle of master and servant; (vi) reasons having been given for the appellant's dismissal, the statutory protective underpinning in the applicable regulations could not *per se* prevent the learned Judge from making a finding that at the end of the day, there was a contract for personal service and the most efficacious remedy in such circumstances would be an award for damages; (vii) that since the statement of claim filed by the appellant sought only an order for certiorari to quash the decision of the respondent, there was no way any other alternative relief could have been granted to the appellant.

We have on our own, considered the above findings in the light of the facts and principles of law applicable and we find that the appellant was genuinely aggrieved not only by the learned trial Judge's reasoning but also by his digression from the core business he had been invited by the appellant to adjudicate upon which was namely to issue an order of certiorari by way of Judicial review. Instead he digressed into other extraneous issues which according to the appellant were calculated to justify the withholding of a relief which had in fact crystallized in his favour. Our reasons for saying so are as follows:-

1. The pleadings before the learned trial Judge as fronted by the appellant and the respondent made no invitation to the learned judge to interrogate the law relating to master and servant. Indeed the Attorney General belatedly raised those issues in their submissions. With respect, submissions are not pleadings. In the absence of a counter application by the respondent to that effect, the learned trial Judge should not have moved *suo moto* to interrogate those issues, or to dug into issue that were beyond the Court's mandate.

2. The learned trial Judge's reasoning in support of withholding the relief of an order of certiorari by way of judicial review that it would have been available to the appellant had the appellant applied for this relief promptly before the relationship of master and servant had been brought to an end is not well supported by both facts and the law. It is evident that the appellant sought to access the relief sought vide order LIII rules 1(2) (3) (4) of the Civil Procedure Rules. Rule 2 reads as follows;-

"***2 Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of being quashed unless the application for leave is made not later than six months after the date of the proceedings or such stated period as may be prescribed by any Act; and where the proceedings is subject to appeal and a time as limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing is expired."***

From the above provision, the only limitation binding on the appellant was the six months period provided by Order LIII Rule 2. Neither the Constitutional provisions which created the respondent, nor the Public Service Commission Act which donated the power to promulgate the governing regulations provide any limitation on time within which to seek relief. The minutes of the respondent's deliberations of 31st July, 2003. Clearly indicate when the decision was taken to dismiss the appellant from service. The letter of dismissal is dated 9th August, 2003. Paragraph 14 of the appellant's supporting affidavit to the judicial review application read thus:-

"14 That I was therefore surprised to receive a letter of dismissal from the respondent on 15th August, 2003. Annexed hereto and marked SSP4 is a copy of the letter"

Leave to apply for judicial review was sought by the appellant, and which was granted on 15th September, 2003. The substantive motion was presented on 16th September, 2003. From 31st July, 2003 when the decision to dismiss the appellant from the respondent's service was made, to 15th September, 2003 when the judicial review application was presented, is a period of 46 days. Whereas from 15th August when the appellant received the respondent's dismissal letter, to the 15th day of September, 2003 when the appellant moved to seek judicial review, was a period of thirty (30) days. Both of these periods fall within the stipulated time frame in order LIII rule 2. We therefore find the learned trial Judge fell into an error when he ignored the period stipulated in order LIII rule 2 as binding on the appellant, only to impose his own time frame that was not stipulated by any provision of law.

3.. The learned trial Judge stated in his judgment that the granting of the relief of certiorari in the manner sought by the appellant was conditional to demonstration that there had been no severance of the master/servant relationship. Meaning that the appellant ought to have moved to seek remedial measures before 31st July, 2003. We fault this finding because first, as mentioned, this was not a pre condition of order LIII rule 2 (supra); second the decision of this Court in the case of ***Kenya National examination council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others [1997]eKLR*** is clear that "***certiorari"*** only lies to remedy an action already wrongly done. It is only an order of "***prohibition"*** which lies to forestall the intended happening of an event. In the absence of proof that indeed the appellant knew that disciplinary proceedings had been initiated against him by the respondent beyond the Registrar High Court's administrative action through the issuance of a Notice to Show Cause, there was no way the appellant could have been accused of having slept on his rights. The appellant therefore moved at the right moment and with speed to seek the most appropriate relief in the circumstances, namely, an order of certiorari by way of judicial review. It was directed at a public body (the Judicial Service Commission) on account of alleged breaches of its public duty to award the appellant, a public officer, by unprocedurally relieving him of his employment with it.

4. Likewise we wish to find fault with the learned trial Judge's finding that the relief of judicial review would only have been available to the appellant if he had been dismissed from his service on account of being independent and impartial in the discharge of his duty. This precondition is not backed by the prescriptions in order LIII rule 2 (Supra) or the ***Kenya National Examination council case (supra).***

5. We however agree with the finding of the learned trial Judge that the relief of judicial review by way of certiorari is available where breach of rules of natural justice is proven. Having said so, we find it strange that the learned judge withheld this relief from the appellant despite agreeing with the appellant's contentions that regulation 26 of the Judicial Service Commission Regulations had been flouted. We have already set out above elements of Regulation 26. Key in all these elements is the need for the accused officer's full participation in the disciplinary process right from the time they are initiated by the ***Hon. the Chief Justice*** upto the time the decision is finally rendered by the respondent, a process which was not accorded to the appellant. There was therefore a clear breach of the Rules of Natural justice. This formed a sound basis for the appellant laying a claim to an order of judicial review by way of certiorari.

6. As mentioned above, the issue of severing the relationship of master and servant did not arise as neither party to the proceedings before the learned trial Judge had fronted it vide their pleadings as one of the issues for interrogation by the learned trial Judge. The appellant's grievance in the judicial review proceedings was not that reasons had not been given by the respondent for his dismissal, but that a wrong process had been employed to relieve him from his employment service with the respondent. In other words, he alleged excess jurisdiction by a public body which is a criteria for one to seek the relief of judicial review by way of certiorari. What the appellant moved to attack was the process leading to the decision reached and not the merits of the decision reached. He should have therefore been accorded the relief sought.

7. We agree that the statutory underpinnings in the Judicial Service Commission Regulations to which the appellant was both subject and subjected to could not per se prevent the learned trial Judge from making a finding that at the end of the day, there was a contract for personal service. It is also correct that the learned trial Judge had been approached by the appellant with a view to according him (appellant) the most efficacious remedy for the relief sought namely the faulting of the process by which the respondent brought to an end that contract of personal service and not an efficacious remedy by way of an award of damages.

8. It was correctly opined by the learned trial Judge that there was no jurisdiction to award a relief which had not been sought for by a party to any proceedings. However this notwithstanding, the learned trial Judge failed to appreciate that this principle binds both the litigant and the court (judge). As mentioned earlier On, what the learned trial Judge Had been invited to decide on was whether both the grievances and factual base fronted by the appellant to the Court justified the grant or the withholding of the relief of Judicial review sought from the Court. By his own words as displayed in the judgment, the learned Judge had no business wandering off into areas of jurisprudential issues he had not been invited to decide on by either party, their plausibility notwithstanding.

The upshot of the above assessment is that, there is merit in the appellant's appeal. We reiterate that the Judicial Service Commission was and still is a public body and therefore amenable to the Judicial Review process. It had initiated a disciplinary process against the appellant with a view to terminating the appellant's employment with it in its capacity as a public body and the appellant as public officer. We also reiterate that from his pleadings, the appellant sought to attack the process employed by the public body (the respondent) in bringing an end to his public service, a matter capable of interrogation by way of a judicial review process. Issues of master and servant having been introduced extraneously by the respondent should not have been given considerable weight as done by the court.

We therefore allow the appellants appeal it in its entirety, set aside the orders of the learned trial Judge dated and delivered on the 18th March, 2004 and substitute thereto with an order of certiorari quashing the decision of the respondent dismissing the appellant from his employment dated the 31st July, 2003 contained in a letter dated 9th August, 2003 ordering the dismissal of **Stephen S. Pareno** the appellant herein from his service with the respondent. For avoidance of doubt, the respondent is entitled in law to commence fresh displinary proceedings against the appellant, if it so decides, which complies with the statutory provisions.

2. The appellant will have costs both on appeal and the High Court.

Dated and delivered at Nairobi this 17th day of October, 2014.

E.M.GITHINJI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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