



REPUBLIC OF KENYA



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**Shikwe v Judicial Service Commission (Petition E011 of 2024)  
[2025] KEELRC 1748 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1748 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**PETITION E011 OF 2024**  
**NZIOKI WA MAKAU, J**  
**JUNE 16, 2025**  
**IN THE MATTER OF: ARTICLES 10, 22, 23, 35, 41, 47, 48, 50,**  
**159 AND 232 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF THE CONTRAVENTION OF THE RIGHT TO**  
**INFORMATION, RIGHT TO FAIR ADMINISTRATIVE ACTION AND**  
**THE RIGHT TO FAIR HEARING AS PROVIDED FOR UNDER**  
**ARTICLES 35, 47 AND 50 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT**  
**AND**  
**IN THE MATTER OF THE EMPLOYMENT ACT 2007**  
**AND**  
**IN THE MATTER OF THE JUDICIAL SERVICES ACT**  
**AND**  
**IN THE MATTER OF THE JUDICIAL SERVICE HUMAN RESOURCE**  
**POLICIES AND PROCEDURES MANUAL**

**BETWEEN**

**ARTHUR SHIKWE ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**



## JUDGMENT

1. Through a petition dated 25<sup>th</sup> March 2024 the Petitioner seeks judgment against the Respondent in the following terms:
  - a. A declaration that the Respondent's action of denying him the chance to examine the audit report that formed the basis of the evidence adduced against him violated his right to a fair hearing as provided under Article 50(2)(k) of the Constitution.
  - b. A declaration that the failure to grant him sufficient time to access the financial records at Winam Law Courts in order to prepare his defence violated his right to a fair hearing as provided under Article 50(2)(d) of the Constitution.
  - c. A declaration that the decision to entirely halt his salary whilst still on interdiction before his termination violated his right to a fair hearing, fair remuneration and fair administrative action hence the same was illegal null and void.
  - d. A declaration that his disciplinary hearing as conducted on 24<sup>th</sup> June 2019 and 2<sup>nd</sup> March 2021 violated his right to a fair hearing, access to information and fair administrative action, hence the same was illegal, null and void.
  - e. A declaration that the outcome of the disciplinary hearing to the extent that the Respondent concluded that the Petitioner is to pay the sum of Kshs. 2,373,961.85 was based on a violation of his rights to a fair hearing, access to information and fair administrative action and was therefore illegal, null and void.
  - f. An order directing the Respondent to pay him any salary and benefits withheld as a result of the unlawful and unfair dismissal.
  - g. General damages for the violation of his right to fair hearing, access to information, fair remuneration and fair administrative action.
  - h. Exemplary damages for the continued and blatant violation of his Constitutional rights to fair hearing, access to information, fair remuneration and fair administrative action.
  - i. Damages for unlawful termination of employment.
  - j. Costs of the suit
  - k. Any further orders that this honourable court may deem fit and just to grant in the circumstances.
2. In support of the petition, the Petitioner states that he was employed by the Respondent on 28<sup>th</sup> August 2003 as Accountant II and posted to the Judiciary Headquarters. On 11<sup>th</sup> April 2006, he was confirmed on permanent and pensionable terms and deployed to Winam Law Courts as the Accountant-in-Charge, replacing one Thomas Opanga Ogaja. The Petitioner avers that an audit conducted in November 2012 for the first quarter of the 2012–2013 financial year raised certain queries. He contends that the Head of Station, to whom the queries were directed, implicated him without affording him an opportunity to examine or respond to the issues raised.
3. Notwithstanding the above, he avers that he continued discharging his duties until 29<sup>th</sup> April 2013, when he was interdicted on allegations of misappropriating Kshs. 388,300/- in respect of cash bail,



forfeitures, and recycled vouchers. He claims the interdiction was based on an audit report that was never made available to him, yet he was required to respond comprehensively to the allegations, thereby prejudicing his defence. He further avers that, by the time he joined the station, the voucher system had been discontinued and funds were being managed through the Judiciary's KCB Bank account. Upon eventually obtaining a copy of the audit report, he asserts that he discovered that the queries related to the 2004–2005 period—prior to his posting—and that the alleged misappropriated funds had already been spent at source. Additionally, the alleged recycled vouchers were reportedly in the custody of the District Treasury. The Petitioner maintains that upon submitting a response to the allegations, the Respondent remained silent for an unusually long protracted period spanning 2013 to 2015. He also asserts that the interdiction letter failed to indicate the reporting office during interdiction, contrary to section D.7.5.B(ii) of the Judiciary Human Resource Policy and Procedures Manual.

4. The Petitioner avers that he was later issued with a further show cause letter dated 24<sup>th</sup> October 2016, arising from a second audit conducted on 30<sup>th</sup> March 2016. He asserts that the audit was undertaken while he was on interdiction and after he had handed over his duties, yet he was still expected to respond to its contents. Despite repeated requests, the Respondent allegedly failed to provide him with the audit report. Upon securing a copy on his own, he claims it revealed no loss of funds.
5. It was his contention that subsequently in 2019, his salary was completely stopped. He was subsequently subjected to a disciplinary hearing on 3<sup>rd</sup> March 2021 and dismissed through a letter dated 8<sup>th</sup> July 2021. He contends that the hearing process was procedurally flawed and violated his constitutional rights to a fair hearing, access to information, and fair administrative action. He characterised the dismissal as premeditated and unlawful. Specifically, he avers that the withholding of his salary during interdiction prior to dismissal violated Article 41(2)(a) of the *Constitution* on the right to compensation for work done, the failure to grant him access to the audit report together with failure to avail evidence in support of the charges violated Article 50(2)(k) of the *Constitution* on right to fair hearing, the requirement to prepare a defence while having limited access to financial records violated Article 50(2)(d) of the *Constitution* on the right to ample time to prepare a defence and the delay of six years between interdiction and the hearing, violated Article 47(1) on expeditious resolution of cases.
6. In response to the petition, the Respondent filed a replying affidavit dated 17<sup>th</sup> May 2024, in which it acknowledged that the Petitioner was indeed its employee, having been posted to Winam Law Courts via a letter dated 3<sup>rd</sup> January 2011. To contextualize the events leading to the Petitioner's dismissal, the Respondent stated that an audit conducted around May 2011 had revealed several financial irregularities which implicated the Petitioner alongside three other officers. These included unauthorized expenditure at source amounting to Kshs. 525,296/-, unauthorized refund of Kshs. 901,512/- to depositors, unaccounted collections totalling Kshs. 423,096/-, exposure to risk due to Kshs. 264,965/- in cash being held in the office, and general weak supervision and management.
7. In response to the audit queries, the then Head of Station at Winam Law Courts confirmed that the unaccounted government revenue cited in the report had accrued during the Petitioner's tenure. It was further stated that a sum of Kshs. 388,300/- in unaccounted cash bail had also been incurred during this period. Additionally, recycled vouchers, some dating back to 2004–2005 and previously submitted and cleared as paid, were allegedly reintroduced into the system and used to offset unaccounted-for monies.
8. These anomalies prompted the issuance of a show cause letter dated 18<sup>th</sup> April 2013, followed by the Petitioner's interdiction effective 11<sup>th</sup> April 2013. Upon receiving the Petitioner's response, the Respondent submitted it to the Head of Station at Winam, who maintained that the Petitioner was responsible for presenting the recycled vouchers to the auditors. It was also averred that the Petitioner



had failed to prepare or maintain the station's vote book, did not submit financial returns, was uncooperative, and failed to perform his duties. Moreover, the respondent averred that the Petitioner allegedly refused to hand over after interdiction, defied instructions from the Head of Station, and held the station at ransom by absconding with the keys to the safe that contained critical accounting documents. In view of the foregoing, the Respondent stated that a meeting of the Human Resource Management Advisory Committee (HRMAC) was convened on 17<sup>th</sup> July 2014. The Committee resolved to summon the Petitioner to open the safe; seek professional advice from the Directorate of Internal Audit and Risk Management on the Petitioner's culpability; and defer the matter for resubmission upon the release of the audit report. As a result, a special audit was conducted in two phases—between 11<sup>th</sup> to 16<sup>th</sup> June 2015 and 17<sup>th</sup> to 18<sup>th</sup> December 2015—which culminated in a report dated 30<sup>th</sup> March 2016.

9. According to the Respondent, this special audit incorporated the views of the Petitioner as well as those of Mr. Silvester Olaki, the accountant in charge at the time. The audit concluded that the Petitioner had failed to: prepare a handover report or formally hand over to his successor contrary to section 6.11.8 of the Government Financial Regulations and Procedures; account for four fines receipt books and one fees receipt book as per the Kisumu East District Treasury CRB; account for revenue collections totaling Kshs. 2,920,403/-; account for Kshs. 140,271/- collected through three fines and three fees receipt books whose duplicates were still at Winam Law Courts; produce deposit receipt books with serial numbers 0227001–0227050 and 0230101–0230150; maintain cash books and monthly bank reconciliation statements; and record all collections in the Government Deposit Ledger (GDL) as required by Judiciary Circular JA/DB/2010/VOL.1 dated 15<sup>th</sup> April 2011.
10. The Respondent averred that these findings were confirmed by the internal auditors in a meeting on the 30<sup>th</sup> August 2016. Which also identified further malpractices, prompting the issuance of an additional show cause letter dated 27<sup>th</sup> February 2019. In the show cause letter, it was indicated that after consideration of all circumstances it had been resolved to charge the Petitioner with involvement in financial malpractices, misappropriation of Kshs. 388,300/-, and recycling of vouchers—conduct constituting gross misconduct.
11. Following these developments, the Respondent asserted that a disciplinary hearing was convened on 12<sup>th</sup> November 2019, during which the Petitioner was afforded ample opportunity to respond to the allegations. It emerged during the proceedings that the Petitioner was in possession of original treasury documents requiring verification, and that he was unable to reconcile issues of overbanking and under banking. This prompted a subsequent disciplinary hearing on 2<sup>nd</sup> March 2021, which found the Petitioner culpable for: failure to prepare a handover report; failure to clear books in the counter receipt book; failure to account for under banking amounting to Kshs. 2,920,403/-; failure to account for revenue collections of Kshs. 140,271/-; failure to maintain a cash book and bank reconciliation statements; and failure to post deposit receipts in the ledger. Based on these findings, the Respondent stated that it made the decision to dismiss the Petitioner from service on grounds of gross misconduct and dereliction of duty.
12. The Respondent further contended that the dismissal was effected in accordance with the principles of procedural and substantive fairness. It emphasized that the disciplinary process was necessarily protracted due to the complexity of the issues, which required input from multiple personnel and departments. The delay, the Respondent argued, was also attributable to administrative processes, including document authentication and verification, as well as the disruptions caused by the COVID-19 pandemic. Lastly, the Respondent argued that the petition offends the doctrine of constitutional avoidance, since the issues raised could be adequately addressed without recourse to



constitutional interpretation. Consequently, the Respondent averred that the Petitioner was not entitled to the reliefs sought.

13. In his rejoinder, through a further affidavit dated 29<sup>th</sup> July 2024, the Petitioner maintained that he was not supplied with the initial audit report dated 12<sup>th</sup> May 2011, nor was he consulted during its preparation. He contended that the auditors relied solely on the Head of Station's response without seeking his input, which was a demonstration of a pre-determined intention to deny him a fair hearing. With regard to the decision not to release the keys to the safe, the Petitioner averred that this was done out of an abundance of caution, to safeguard against any potential loss prior to a proper handover. He further asserted that the head of station had been non-committal on the exact date of handover, which was eventually effected on 10<sup>th</sup> September 2014, in the presence of his successor and the head of station.
14. Concerning the audit processes carried out between 11<sup>th</sup> to 16<sup>th</sup> June 2015 and again between 17<sup>th</sup> to 18<sup>th</sup> December 2015, the Petitioner stated that he was never contacted nor invited to participate in that audit. He further asserted that the Respondent's reluctance to furnish him with the resultant audit report dated 30<sup>th</sup> March 2016 left him with no option but to issue a general response to the show cause letter dated 24<sup>th</sup> October 2016.
15. On the allegation of failure to prepare a handover report, the Petitioner maintained that he had indeed prepared one dated 10<sup>th</sup> September 2014, rendering the accusations baseless. In relation to the issue of recycled vouchers, he reiterated that such a practice was impossible, as the Respondent had implemented a bank payment system by the time he was posted to Winam. Regarding the issue of overbanking, the Petitioner explained that this was satisfactorily addressed, noting that two accounts had been closed and funds deposited into one. As for the unaccounted sum of Kshs. 2,920,403/- he contended that the audit report failed to specify which account was used to determine the variance and pointed out that paragraph 56 of the Respondent's replying affidavit expressly acknowledged there was no under banking.
16. In further response to the replying affidavit, the Petitioner asserted that the show cause letter dated 27<sup>th</sup> February 2019 did not reference the audit report of 30<sup>th</sup> March 2016, meaning that his termination was merely a ploy to cover up the violation of his rights.
17. On 30<sup>th</sup> October 2024, directions were issued that the petition be canvassed through viva voce evidence. The Petitioner testified on his own behalf, while the Respondent called two witnesses.
18. In his testimony, the Petitioner stated that the 2011 audit covered the tenure of his predecessor, Mr. Thomas Opanga. He further testified that by the time he was posted to Winam in 2011, the Judiciary had already transitioned its payment accounts from the Central Bank of Kenya (CBK) to Kenya Commercial Bank (KCB). He reiterated that he was not consulted during the 2015 audits, as evidenced by the absence of his signature at either the commencement or conclusion of the audit reports. He produced exhibits marked 1 to 13, except for the draft revenue report dated 29<sup>th</sup> October 2020, whose admissibility was successfully challenged by the Respondent.
19. The Respondent's witness was Mr. Isaac Kamau (RW1), the Assistant Director of Human Resource Management and Development. He testified on the disciplinary process undertaken as outlined in the Respondent's replying affidavit. He testified that the process was conducted fairly and transparently. During cross-examination, he conceded that although the 2011 audit pertained to Mr. Opanga, the Petitioner was still held responsible for recycling vouchers and the alleged misappropriation of Kshs 388,000/-. He also admitted that the interdiction letter did not provide any guidance on whom the Petitioner was to report to during the period of interdiction.



20. The second defence witness was Mr. Ronald Wanyama (RW2) the Judiciary's Director of Audit and Risk Management. He testified that he conducted an audit covering the period during which the Petitioner was in charge and found him culpable for the issues raised in the dismissal letter. He stated that the Petitioner was interviewed during the audit process and that his responses were incorporated into the audit report dated 30<sup>th</sup> March 2016.
21. Upon the close of the hearing, both parties filed their respective written submissions.

### **Petitioner's Submissions**

22. The Petitioner identified the key issues for determination as:
  1. Whether his interdiction was justifiable.
  2. Whether the refusal to supply him with a copy of the audit report was justifiable.
  3. Whether the decision to suspend him was justifiable.
  4. Whether the decision to terminate his employment was logical and fair.
  5. Whether his constitutional rights were violated.
  6. Whether the orders sought should issue.
23. On the first issue, the Petitioner submitted that his interdiction was unsubstantiated. He pointed out that the interdiction was prompted by a letter dated 7<sup>th</sup> November 2012 from the head of station at Winam, which was in response to an earlier letter dated 15<sup>th</sup> October 2012 that was never produced in evidence. Moreover, the Petitioner asserted that the Respondent failed to avail the audit report dated 12<sup>th</sup> May 2012, which formed the basis for the interdiction, thereby undermining the justification for the decision to interdict. With regard to the second issue, the Petitioner submitted that the Respondent's failure to provide him with the audit report dated 30<sup>th</sup> March 2016 was a deliberate violation of his right to a fair hearing. He referred to his letter dated 11<sup>th</sup> November 2016 requesting the said report, which was ignored. He further relied on paragraph 33 of the Respondent's replying affidavit, which admitted that he had not been supplied with the report. The Petitioner further submitted that no credible evidence was produced to show that he participated in the audits, as alleged by the second defence witness Mr. Ronald Wanyama, drawing attention to the absence of relevant entry and exit forms that would have indicated his involvement in the process.
24. On the third issue, the Petitioner submitted that his suspension was in breach of section 17 of the Third Schedule to the *Judicial Service Act* and Section D(7.2) of the Judiciary Human Resource Policies and Procedures Manual, 2014, both of which set out the prerequisites for suspension. He asserted that unlike interdiction, suspension had more severe consequences as it deprived him of his entire salary and therefore had to be supported by evidence of compliance with the applicable legal framework. In support of his position, he affirmed that the identical nature of his suspension letter dated 27<sup>th</sup> February 2019 and his interdiction letter dated 18<sup>th</sup> April 2013 demonstrated bias and a lack of due process.
25. On the fourth issue, the Petitioner submitted that the Respondent had failed to demonstrate that his termination was lawful and procedurally fair. He relied on the decisions in the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR and Beatrice Nyambune v Judicial Service Commission [2019] eKLR, in which the courts emphasized that the burden of proving procedural fairness lay with the employer. He submitted that the Respondent's failure to produce minutes of the disciplinary meeting that led to his termination was fatal, as it left the court without any means of verifying whether due process was followed. To support this argument, he cited the decision



in the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR, where it was held that the Respondent's failure to produce minutes of the disciplinary hearing deprived the Court of evidence that the it had complied with the procedural strictures of the law.

26. In addition to the foregoing the Petitioner asserted that that the sum of Kshs. 388,300/- referred to in his interdiction and the amount of Kshs. 2,373,961/- mentioned in his termination were not supported by credible evidence. He further maintained that the allegations of under-banking and failure to maintain court records were vague and unsubstantiated, noting that it was unclear which books were not maintained or who banked the monies allegedly not banked by the Petitioner.
27. On the fifth issue the Petitioner submitted that the Respondent's failure to supply him with documents forming the basis of his interdiction, as noted in the interdiction letter, show cause letters and audit reports violated Article 47(1) and Article 50(2) of the *Constitution* as well as section 4 of the *Fair Administrative Action Act*. He asserted that once he was accused in the interdiction letter, he assumed the status of an "accused person" under Article 50(2), thereby entitling him to a fair hearing. He emphasized that the right to a fair hearing under Article 25(c) is non-derogable and is not limited to criminal proceedings. In support, he cited the case of Evans Odhiambo Kidero & 4 others v Ferdinand Waititu & 4 others [2014] eKLR, where the court rejected a narrow interpretation of Article 50(2) and affirmed the need for a broad, purposive construing of constitutional rights. He also relied on the Supreme Court's pronouncement in Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC (17 February 2022) where the Supreme Court held:

"JSC shall give an employee reasonable time to defend himself or herself, an employee shall access and retrieve any relevant documents relating to his or her matter and any decision to the contrary must be in writing and an employee undergoing disciplinary proceedings shall be given the opportunity to call witnesses be heard and cross examine witnesses. "

28. The Petitioner additionally cited the decision in the case of Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR, in which it was held that an employee must be given clear charges and sufficient time to prepare a defence, including access to documents in the employer's custody that may assist in their defence. Concerning the 8-year period between his interdiction and termination of employment, the Petitioner submitted that it was inordinately long and unexplained. He pointed out that COVID-19 began in 2019, yet between 10<sup>th</sup> September 2014 and 11<sup>th</sup> November 2016, there was no communication from the Respondent. He also highlighted the extended deferrals between 6<sup>th</sup> December 2016 and 27<sup>th</sup> February 2019. He affirmed that this delay violated Article 47(1) and Article 50(2) of the *Constitution*, which guarantee expeditious administrative action and the right to have proceedings concluded without unreasonable delay. In support of this position, he cited the decision in the case of Oyagi v Nairobi City County (Employment and Labour Relations Cause E654 OF 2021) [2024] KEELRC 736, in which the Claimant's prolonged 3-year interdiction on the pretext of awaiting the conclusion of criminal process was deemed unlawful and unfair.
29. The Petitioner further submitted that his suspension without pay based on the same facts as his earlier interdiction was manifestly unfair and violated his right to fair remuneration under Article 41(2) of the *Constitution*. On the final issue, the Petitioner urged the court to grant the orders sought based on the clear and consistent infringement of his rights. He submitted that he was entitled to general damages in the sum of Kshs. 3,000,000/- due to the Respondent's failure to comply with the *Judicial Service Act* and Judiciary Human Resource Policies and Procedures Manual, 2014. He also asserted that he was entitled to Kshs. 16,500,000/- in exemplary damages, noting that he had been on half salary for five years and entirely without pay for an additional three years. Lastly, the Petitioner prayed



for compensation equivalent to 12 months' salary on account of his unfair and procedurally defective termination of employment.

### **Respondent's Submission**

30. The Respondent opposed the petition, contending that it was an attempt by the Petitioner to cloak personal misconduct under the guise of constitutional violations. It argued that the Petitioner was seeking to shield himself from the consequences of his actions by invoking constitutional remedies without basis. The Respondent identified the following issues for determination:
- i. Whether the reasons for terminating the Petitioner's employment contract were valid and fair;
  - ii. Whether the Petitioner was dismissed procedurally;
  - iii. Whether the Petitioner's interdiction was lawful;
  - iv. Whether the Petitioner's suspension was lawful;
  - v. Whether the Respondent violated any constitutional rights of the Petitioner.
31. On the first issue, the Respondent submitted that the termination of the Petitioner's employment was justified by his gross misconduct, particularly financial malfeasance and dereliction of duty. It relied on section 44 of the *Employment Act* and cited the decision in *Judicial Service Commission v Mosiria* [2019] eKLR, where it was held that failure to respond to allegations of financial mismanagement constituted valid grounds for termination. The Respondent further submitted that the Petitioner failed to maintain proper accounting records, failed to account for financial discrepancies, and neglected to submit a timely handover report, in illustration of the Petitioner's gross misconduct. Regarding the issue of procedural fairness, the Respondent submitted that due process was followed in accordance with section 41 of the *Employment Act*. It submitted that the Petitioner was issued with show cause letters detailing the allegations against him, to which he responded—an indication that he was aware of the charges he faced. Thereafter, he was invited to appear before a disciplinary panel, was heard, and was found culpable. In support of its position, the Respondent cited the decision in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, where the court outlined the principles of procedural fairness, including the right to be informed of the charges, to be heard, and to prepare and present a defence.
32. On the issue of interdiction, the Respondent submitted that it was justified in line with Paragraph 16 of the third schedule of the *Judicial Service Act* that empowers the Chief Justice to interdict an officer. The Respondent further submitted that the interdiction was not based solely on the letter dated 7<sup>th</sup> November 2012, as claimed by the Petitioner, but was necessitated by serious financial irregularities that warranted immediate action. On the legality of the suspension the Respondent submitted that it was based on the Judicial Service Commission Resource Manual Section D.7.5.2 and Paragraph 17 of the Third Schedule of the *Judicial Service Act*. It asserted that these provisions did not restrict suspension to cases of criminal conviction only, but also extended to situations where the Chief Justice formed the view that dismissal may be warranted. It submitted that furthermore, suspension served as an essential administrative measure aimed at preserving the integrity of investigations by preventing potential interference with evidence and witnesses.
33. On the question of constitutional violations, the Respondent submitted that none of the Petitioner's rights were infringed. It contended that the issues raised were employment-related and could be effectively adjudicated under the *Employment Act*, without invoking constitutional jurisdiction. In support of this argument, it cited among others, the case of *Okoti v Parliamentary Service Commission & 2 others; Speaker of the National Assembly & another (Interested Parties) Petition E166 of 2022*



and Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C, (Consolidated)) [2015] KESC 15 (KLR) (5 January 2015) (Ruling), where the courts emphasized the principle of constitutional avoidance—urging courts to refrain from determining constitutional questions where alternative remedies exist. Specifically addressing the alleged violation of Article 50(2)(d) and (k) of the *Constitution*, the Respondent submitted that these provisions apply strictly to accused persons in criminal proceedings. It relied on Black's Law Dictionary, which defines an "accused person" as one facing criminal charges, a description that did not apply to the Petitioner in this suit.

34. With regard to the alleged infringement of Article 47 of the *Constitution* the Respondent submitted that the delay in the disciplinary process was reasonable and justifiable, given the complexity of the financial issues involved and the need for a comprehensive inquiry involving multiple officers and institutions. It asserted that the case of *Oyagi v Nairobi City Council* (supra) relied on by the Petitioner, was distinguishable from the circumstances in this case, as the delay in that case was purely attributable to the pendency of a criminal trial in the absence of the employer's independent disciplinary process. In conclusion the Respondent urged the Court to dismiss the petition in the interest of justice and to send a message that public officers cannot escape the consequences of dereliction of duty and mishandling of public funds.

### Disposition

35. The Petitioner was employed by the Respondent. It is apparent the Petitioner was terminated after a long drawn disciplinary process. The Petitioner asserts his rights were infringed upon by the Respondent. The crux of the dispute is that an audit was conducted in November 2012 for the first quarter of the 2012–2013 financial year. The said internal audit raised certain queries. It was asserted that the Head of Station implicated the Petitioner without affording him an opportunity to examine or respond to the issues raised. Notwithstanding the foregoing, the Petitioner continued discharging his duties until 29<sup>th</sup> April 2013 when he was interdicted on allegations of misappropriating Kshs. 388,300/- in respect of cash bail, forfeitures, and recycled vouchers.
36. The Petitioner was issued a show cause letter and he responded to the allegations. It was asserted the Respondent remained silent for an unusually long protracted period spanning the years 2013 to 2015. The Petitioner asserted that the letter of interdiction failed to indicate the reporting office during interdiction contrary to section D.7.5.B(ii) of the Judiciary Human Resource Policy and Procedures Manual. The Petitioner was later issued with a further show cause letter dated 24<sup>th</sup> October 2016 which followed a second audit conducted on 30<sup>th</sup> March 2016. He responded to the second show cause letter and was subjected to a further disciplinary process in 2019 resulting in his dismissal.
37. Despite the assertion by the Respondent that no infringement of constitutional rights occurred, it is my finding that the delay in concluding the disciplinary case violated Article 41 of the *Constitution*. Granted the assertions by the Petitioner that his Article 25 rights were violated, it is the finding of the Court that Article 25 which grants accused persons certain non-derogable rights does not apply in a case of an employee who is accused of misconduct or misappropriation of funds belonging to the employer. It only applies where criminal charges are preferred and no matter the wording of accusations levelled against an employee, Article 25 is never triggered in a work place dispute resulting in disciplinary action. If that were the case, every employee accused of gross misconduct would be required to face a quasi-criminal trial at the workplace. That would be ridiculous and extremely absurd. I find that Article 25 of the *Constitution* was not infringed in as far as the Petitioner's case goes.
38. The evidence before the Court demonstrates that in May 2011, an internal audit was carried out at Winam Law Courts by the Judiciary Internal Auditors on Revenue, AIA and Deposits at Winam



Law Courts. The Audit yielded an audit report dated 12<sup>th</sup> May 2011 which revealed that there was unauthorized expenditure at source amounting to Kshs. 525,296/-; an unauthorized refund of Kshs. 901,512/- to depositors at source; collections amounting to Kshs. 423,096/- that were unaccounted for; there was a high-risk exposure due to holding of cash in the office amounting to Kshs. 264,965/- inter alia. The blame for this sorry state of affairs was attributable to the Petitioner as well as two other staff including the predecessor of the Petitioner hence the show cause notices issued to the Petitioner.

39. The consequence of the audit carried out by the Respondent's internal audit department was the interdiction and suspension of the Petitioner. It was revealed in evidence that the Petitioner was interdicted in 2016 and after some long hiatus which was explained away by the Respondent as a transition period between the period when the former Chief Justice and his successor was appointed which ostensibly led to the inability of the Respondent to conclude the process timeously. It is the finding of the Court that the delays leading to a disciplinary hearing conducted in 24<sup>th</sup> June 2019 and 2<sup>nd</sup> March 2021 were evidence of laxity on the part of the Respondent in concluding the disciplinary process. I do not find that hearings conducted on those dates violated the Petitioner's right to a fair hearing, access to information and fair administrative action. The hearings were thus not either illegal, null or void.
40. One of the outcomes of the disciplinary hearing was the conclusion that the Petitioner is to pay the sum of Kshs. 2,373,961.85. The Court has nor found basis for the Petitioner to be called upon to reimburse the employer this sum which was the result of audit queries that involved not only the Petitioner but also another officer who was the main culprit and the source of the initial losses through recycling of vouchers. I would hold and find that the attempt at surcharge is misplaced and is one the Court vacates ex debito justitiae noting the Respondent has not availed the audit report that links the Petitioner to this loss in particular. I would therefore find and hold the surcharge was illegal, null and void.
41. That said, the audits undertaken covering the period the Petitioner was in post at Winam Law Courts showed there was financial malfeasance by the Petitioner and no matter how cleverly the misdeeds were covered in tonnes of paperwork using outmoded methods of accounting, overlaying the new system over the old and such, the Petitioner was culpable to some extent in perpetuating the scheme to defraud the Exchequer by improper accounting and also holding cash reserves beyond the stipulated amounts. It is my finding that there was reason for the termination. The only valid grouse was the failure by the Respondent to conclude the case speedily. The Court noted that COVID 19 pandemic was faulted for the delay but it is clear it had a minimal role since the period the interdiction taking place and final disciplinary hearing and eventual termination spanned a cool 8 years. Covid 19 only contributed to 1 year or so and the absence of a Chief Justice was only for a short duration of time not exceeding 8 months. For this manifest failure to ensure just and expeditious determination of an administrative process, the Respondent will have to pay the Petitioner a sum of Kshs. 500,000/-. As the period when the Petitioner was suspended after the interdiction was one partly under the dark cloud of non-payment of allowances or half salary, the Court will not make any award in respect of the sums claimed to have been withheld. It is comforting to note the situation has now changed to one where allowances and certain strictures are in place to ensure one is not made into a pauper or beggar once on interdiction or suspension. The Petitioner will also have costs limited to the sum awarded herein.
42. The Petitioner is not entitled to general damages nor is he entitled to any award of exemplary damages. In the final analysis it is the finding of this Court that the Petitioner was terminated for good cause albeit the termination was far drawn out resulting in a process that flew against the dictates of fair administration particularly offending Article 47 of the Constitution of Kenya for which the Respondent will pay Kshs. 500,000/- with a note to the Respondent to ensure that disciplinary



processes are never drawn out since the uncertainty, the manifest unfairness displayed will result in determinations such as this one.

43. A declaration be and is hereby issued that the Respondent infringed upon the rights of the Petitioner in terms of Article 47 of the Constitution in respect of the disciplinary process undertaken.
44. A declaration be and is hereby issued that the Respondent must pay Kshs. 500,000/- to the Petitioner for infringing on his constitutional rights. Interest to run at court rates upon the expiry of 30 days from today should the Respondent not settle the sum awarded to the Petitioner within 30 days of this judgment.
45. There be an order for costs limited to the award in paragraph 41 above.

Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF JUNE 2025**

**NZIOKI WA MAKAU, MCIArb.**

**JUDGE**

