



**Wanderi v Judicial Service Commission (Cause 9 of 2017)
[2024] KEELRC 2484 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2484 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 9 OF 2017
NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

HANNAH WAMUYU WANDERI CLAIMANT

AND

THE JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant through her Memorandum of Claim dated 21st November, 2017 pleaded inter alia as follows: -
 - a. By a letter of employment dated 4th June 2012, the Claimant was retained by the Respondent as a Resident Magistrate till 10th November 2014 during which period the Claimant did not receive any warning letter or any negative appraisal from the Respondent regarding her work duties.
 - b. The Claimant averred that by a letter dated 11th November 2014, the Chief Registrar of the Judiciary notified the Claimant that the Claimant was required to offer an explanation regarding the disappearance of a court file from the court registry in relation to Criminal Case No. 1367/2014, Republic -Vs- Abdullahi Mohamed Igal and the subsequent tracing of the court file in the Claimant's chambers.
 - c. The Claimant averred that by a letter dated 20th November 2014, the Claimant responded to the letter dated 11th November 2014 by the Chief Registrar of the Judiciary and stated that:
 - i. The trial court in respect to Criminal Case No. 1367/2014 was court 6 which the Claimant was the presiding Magistrate. On or about 30th November 2014, the Claimant received a verbal report from the court clerk who had been assigned to Court 6 to the effect that the aforesaid file had been called for by another court (Ct. 2) which was not the trial court.



- ii. The court registry asked why the file was going to a different court notwithstanding the fact that the file had a subsisting hearing date before court 6. The court clerk in charge of court 6 took the file to the Claimant and notified the Claimant that the presiding Magistrate in charge of court 2 had called for the court file. The Claimant retained the court file so as to prevent any intended activities of a corrupt nature being undertaken with respect to the aforesaid suit. That the Claimant retained the file so as to ensure that no corrupt activities would take place in respect to the file since Court 2 would not act without the court file and prior to a skeleton file being opened the trial court would have to be involved in tracing the original file.
 - iii. The Claimant was given the file on 30th October 2014; however the following week the Claimant was informed that the file had been finalized as a skeleton file had already been opened. The skeleton file was opened without having sought the assistance of the court registry as well as the trial court in tracing the original file. The presiding Magistrate in court 2 hurriedly ensured that a skeleton file was opened so as to achieve his corrupt scheme.
 - iv. The Claimant made a report to the judiciary Ombudsman regarding the dealings in respect of the file, Criminal Case No. 1367/2014 in an attempt to ensure that a resolution would be reached. The Ombudsman opened an inquiry as a result of which the trial magistrate in charge of Ct. 2 was interdicted as well as the Executive Officer, the Court clerk of court 6 and the custodian of the subject file.
- d. The Claimant averred that upon providing the response as regards the court file in respect to Criminal Case No. 1367/2014, Republic –vs- Abdullahi Mohamud Igal to the Chief Registrar of the Judiciary, the Claimant continued performing her duties faithfully and diligently.
 - e. The Claimant further averred that she was subsequently issued with a letter of interdiction dated 13th February 2015 signed by the Chief Justice. The Claimant was informed that she had been placed under interdiction since she had unlawfully and unprocedurally retained Milimani Criminal Court file No. 1367 of 2014 between 31st October 2014 and 6th November 2014.
 - f. The Claimant averred that she was interdicted without being accorded an opportunity to be heard as regards the alleged allegations of retaining Milimani Court file No. 1367 of 2014.
 - g. The Claimant averred that she was issued with a charge dated 13th February 2015 and was required to respond to the Charge within 21 days to the effect that between 30th October 2014 and 6th November 2014, the Claimant had unlawfully for corrupt purposes retained Milimani Court file No. 1367 of 2014 being aware that the registry was looking for the file.
 - h. The Claimant averred that by a letter dated 3rd March 2015, she availed a response to the Charge dated 13th February 2015.
 - i. The Claimant averred that despite having provided a response on the allegations raised regarding her interdiction, the Chief Justice did not notify the Claimant if the response was satisfactory to warrant a lifting of the interdiction or if the matter was to be referred to the Respondent for the Respondent to make a decision whether the disciplinary proceeding ought to continue or not.
 - j. The Claimant averred that by a letter of 23rd September 2015, the Claimant requested the Chief Justice to inform her the status of her interdiction which letter elicited no response.



- k. The Claimant averred that on 20th January 2017 (Friday), the Claimant received a telephone call informing her that she was required to appear before the Respondent's human resource committee for a disciplinary hearing on 24th January 2017 at 9:30 am. (Tuesday).
- l. The Claimant averred that despite the Judicial Service Act having stipulated that any judicial officer who is to face disciplinary action ought to be given a written notice of not less than fourteen days specifying the day on which they are required to appear before the disciplinary committee to answer to any charges raised against the judicial officer, the Claimant was not given any written notice of 14 days as stipulated by law.
- m. The Claimant averred that the letter inviting her for the disciplinary hearing was presented to the Claimant on 27th January 2017 which was three days after the date of the disciplinary hearing and was dated 24th January 2017 informing the Claimant that the date of the hearing would be on 24th January 2017.
- n. The Claimant averred that by a letter dated 19th February 2017 which was presented to her on 27th January 2017, the Respondent informed the Claimant that she was required to appear for an oral hearing of her disciplinary case on 24th January 2017.
- o. The Claimant averred that at the disciplinary hearing, the Respondent did not adduce evidence regarding the allegations leveled against her despite Regulation 25 of the Third Schedule to the Judicial Service Act having provided that a committee appointed by the Respondent ought to investigate any disciplinary case and if witnesses are examined by the committee, the judicial officer undergoing disciplinary proceedings ought to be granted an opportunity of cross-examining the witnesses and no documentary evidence ought to be used against the judicial officer unless a copy has been supplied upon the judicial officer.
- p. The Claimant averred that at the disciplinary hearing, the Claimant was informed that investigations had been conducted regarding her disciplinary case. However, the Claimant was not provided with copies of any witness statements made by the Respondent's witnesses nor any documents or material in support of the charges leveled against her.
- q. The Claimant averred that she arrived at the Supreme Court Building on 24th January 2017 at 9:30 am for the disciplinary hearing. That at the time she was expectant and was due for delivery in a few months and requested to be heard in the morning hours. The Respondent declined her request and she was heard at 4p.m during which time she was too exhausted and weak to present any spirited defence. However, since she had waited 2 years for the disciplinary hearing, she attempted to adduce evidence before the committee in defence of the charges leveled against her.
- r. The Claimant averred that the Respondent did not consider the Claimant's response with regard to the claims raised in the interdiction letter and therefore the allegations raised in the letter were not proved.
- s. The Claimant further averred that the Respondent informed the Claimant that in a meeting held on the same date, the Respondent had deliberated on the Claimant's case and after considering the representations and evidence availed before the Respondent; a decision had been made to dismiss the Claimant from judicial service.
- t. The Claimant averred that she was not provided with the information, materials and evidence that was presented before the committee thus not accorded an opportunity to challenge the evidence that was presented neither granted an opportunity to cross examine the witness.



- u. The Claimant averred that that the Respondent took a period of 2 years prior to hearing and determining the purported disciplinary hearing case which was an inordinately long period to the detriment of the Claimant who was on half pay since February 2015 till January 2017.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. Declaration that the Claimant's dismissal was un procedural, unfair and unlawful
 - b. 12 months' salary compensation as damages for unlawful termination Kshs. 882,900/=
 - c. Salary arrears including allowances from the date of purported interdiction on 13th February 2015 to the date of purported dismissal on 15th February 2017 Kshs 3,359,700/=
 - d. Interest on b and c at court rates from the date of filing suit until payment in full.
 - e. Accrued Pension dues
 - f. Certificate of Service
 - g. Costs of the suit
3. The Respondent filed its Response to the Memorandum of Claim dated 2nd March,2018 and averred inter alia as follows;
- a. That the letter from the Chief Registrar to the Claimant requiring an explanation on the disappearance of the Court file for Criminal Case No. 1367/2014- Republic versus Abdullahi Muhamud Igal was informed by the allegation against the Claimant.
 - b. That prior to the letter dated 11th November 2014 to the Claimant, the Claimant had reported to the office of the Judiciary ombudsperson on the issues surrounding the file and upon investigation it emerged that the Claimant had unlawfully and for corrupt purposes detained the Criminal File being aware that the staff at the registry were looking for the file.
 - c. The Respondent averred that it followed due process as provided by law in the conduct of the disciplinary process against the Claimant by:
 - i) the Chief Justice interdicted the Claimant vide interdiction letter dated 13th February, 2015 in accordance with Paragraph 15,16 of the Third Schedule to the *Judicial Service Act*.
 - ii) After inquiring into the complaint against the Claimant, the Respondent initiated proceedings against the Claimant for gross misconduct in accordance with Paragraph 25 of the Third Schedule.
 - iii) The Respondent issued the statement of charge dated 13th February 2015 against the Claimant detailing allegations requiring the Claimant to respond to the Charges in 21days.
 - iv) The Respondent received a letter dated 3rd March 2015 from the Claimant responding to the charges.
 - v) The Honorable Chief Justice forwarded the Response to the Respondent for disciplinary action.
 - d. The Respondent averred that following the resolution by the Respondent, the JSC Human Resource Committee invited the Claimant for the oral hearing of her disciplinary case on 24th



January 2017 made by telephone conversation and a letter dated 19th February 2017 corrected through a letter dated 24th January 2017.

- e. The Respondent averred that the Claimant appeared before the JSC's Human Resource Committee on 24th January 2017 for the oral hearing of her disciplinary case. The charges were read to the Claimant and she responded to the allegations raised in the charge sheet supplied to her prior to the hearing.
- f. The Respondent averred that the Claimant admitted to withholding the file for purposes of preventing an irregularity on the file.
- g. The Respondent averred that the JSC Human Resource Committee allowed the Claimant to put in a Further Affidavit in support of her case and allowed her to call any witnesses that she desired to adduce further evidence in support of her case.
- h. The Respondent further averred that after the oral hearing, the Respondent decided that the charges leveled against the Claimant had been proved to the satisfaction of the JSC Human Resource Committee.
- i. The Respondent averred that the Claimant's defence that she was a 'whistleblower' and her explanation that she had kept the file in her custody to ensure there was no irregularity was unsatisfactory and not credible.
- j. The Respondent further averred that the Claimant despite admitting that she had kept the file to prevent corrupt practices being perpetuated on the same did not report the same to her head of station or the judiciary ombudsperson and only reported after the matter had been dealt with by another court and the accused discharged.
- k. The Respondent averred that the findings were contained in a Report from the JSC Human Resource Committee during the disciplinary hearing. The Respondent made a finding that the grounds of gross misconduct had been disclosed against the Claimant and recommended the Claimant faces disciplinary action.
- l. The Respondent averred that upon receipt of the Report from JSC Human Resource Committee, the Respondent in a meeting held on 15th February, 2017 deliberated on the Claimant's disciplinary case, representations and evidence before and during hearing. The Respondent made a finding that the grounds of gross misconduct against the Claimant had been proved as against the Claimant. That it proceeded to communicate the above decisions to the Claimant through a letter dated 15th February, 2017. That the Claimant was accorded a fair hearing and due process was followed in the process of dismissal from employment.
- m. The Respondent on the allegations of inhuman treatment averred that on the day for hearing the Claimant's case it had other items on its agenda which took long to conclude and the Claimant was asked to wait for her hearing later in the afternoon. The JSC Human Resource asked the Claimant whether she was ready to proceed and the Claimant indicated that she was comfortable with the hearing and never raised any issues.
- n. That the Claimant actively participated in the hearing and even requested for more time to put in a Further Response and call additional witnesses and the allegation that the Claimant was unable to put up a spirited defense are baseless.
- o. The Respondent on allegations of failure to exhaust internal mechanism averred that under Section D of the Judiciary Human Resource Manual, if the Claimant was dissatisfied with



the decision of the Respondent, she ought to have filed an Application seeking to Review the decision of the Respondent within six months of the decision.

- p. The Respondents averred that the Claimant moved to court without first exhausting the available internal mechanisms as provided for under the Judiciary Human Resource Manual.
4. The Claimant filed a reply to the statement of response dated 7th August, 2018 who relied on the Judicial Service Act and Judiciary Human Resource Manual to demonstrate that her disciplinary proceedings were not conducted in accordance with applicable laws, regulations and rules of natural justice. The Claimant maintained that the letter on enquiry of the file was not made as a result of any allegation made against her and that she made a report to the office of the Judiciary ombudsperson about the file and denied that she unlawfully and for corrupt purposes retained the file for irregular purposes.
 5. The Claimant reiterated that she was interdicted without being heard and that at the hearing she was not furnished with or allowed to access any documentary evidence tendered against her as per Regulation 23 of the Third Schedule of the Judicial service Act. That her response of 3rd March, 2015 elicited sufficient reasons to warrant lifting of the interdiction. That she was entitled to be informed of her status of her interdiction pursuant to rules of natural justice.
 6. The Claimant maintained that contrary to mandatory provisions of paragraph 25(4) of the Judicial service Act as read with Paragraph D.7.7.2 of the Judiciary Human Resource Policies and procedures Manual the Claimant was not given a written notice specifying the date on which she was required to appear before the disciplinary committee to answer the charges levied against her. That the Respondent did not investigate the disciplinary case and the Claimant was not supplied with the documentary evidence that the Respondent intended to rely on at the disciplinary hearing. That she tendered plausible reasons for withholding the file in question. That the Respondent did not consider her defence while dismissing her.
 7. The Claimant maintained that she had waited for the disciplinary hearing for two years hence she was constrained to proceed with her hearing that day. That the Respondent did not inform her of her right to seek review of the Respondent's decision or right to legal representation as per paragraph 25(7) of the Third schedule of the Judicial Service Act as read together with paragraph 6 (vii) of the Judicial Human Resource Manual.
 8. The Claimant maintained that she was not provided with its decision on time to enable her pursue further internal mechanisms nor was she notified of the right to appeal against the decision or seek review of the decision. That those avenues for review and appeal were not mandatory under Judicial Service Act and does not oust the jurisdiction of this court.

Evidence

9. The Claimant's case was heard on 22nd November, 2023. The Claimant testified and stated that the Respondent was her former employer and that she worked between 2012 to January 2017. CW1 also relied on her witness statement and documents filed with the claim as her evidence in chief.
10. CW1 stated that in 2014 she received a report from the court assistant that the file had been allocated to Court 2 which was not the trial court as requested by the advocate for the accused. She deemed it unprocedural and advised her assistant to bring the file to her chambers. According to her, the file had been allocated a hearing date and later learned the plea had been changed in Court 2 through a skeleton file. CW1 testified that there were markings by the registry officials but there were no orders allocating the matter to Court 2.



11. CW1 testified that she consulted the Ombudsman through a phone call and the latter advised her to retain the file until the hearing date. The Ombudsman never wrote to her but there was correspondence between the Ombudsman and the CRJ. CW1 testified that she received an interdiction letter in 2015 directing her to stop working and keep reporting to head of station and make a response to the interdiction letter.
12. CW1 further testified that she appeared for disciplinary hearing in January 2017 and the charges were read and she explained her case. That in February 2017, she was called and told a decision had been made to terminate her services. The court that handled the matter on skeleton file was also interdicted.
13. CW1 testified that through a letter dated February 2015 she was accused that she held the file for a corrupt scheme yet she never received any bribe over the file. That the JSC disciplinary manual was not followed and she never had a chance to cross-examine witnesses. The documents relied on were never shared. She was never given adequate time and informed of her right to be represented.
14. In cross examination CW1 confirmed that she wrote to CRJ stating that she had resigned but the resignation was not allowed and she wrote a letter to recall the resignation letter. The Claimant further stated that she was responsible for pleas at that time and as the Court that took pleas, she allocated the matters to various courts as was the practice at Milimani then.
15. CW1 confirmed that the accused could have changed the plea but no one came for the file and further that she wanted to correct the suspected irregularities and did not call the accused person. CW1 confirmed that the skeleton file was created because she retained the file and that she never reported the issue to the head of station because around that time there was tension between senior and junior magistrates.
16. CW1 admitted that she did not have evidence of the alleged corruption and that she was aware that witnesses appeared before the JSC but she was not given a chance to cross examine them. CW1 confirmed that she was given an opportunity to avail witnesses before the committee.
17. In re-examination CW1 clarified that she resigned but recalled the letter after consulting and was advised against it. CW1 clarified that the accused had pleaded not guilty to all the charges and was out on bail and the letter on change of plea was presented and parties were not brought before her to take the new plea. CW1 clarified that she was not accorded a fair hearing and was not given access to material used and the trial was an ambush.
18. The Respondent's case on the other hand was heard on 22nd November, 2023 where the Registrar of the Respondent testified and adopted the Respondent's documents, the affidavits and her statement filed in court as her evidence in chief.
19. RW1 testified that the Claimant was an officer serving as an RM and was interdicted on the charges which were disclosed to her. That the disciplinary hearing took place on 24/1/2017 and that the report and letter of dismissal were before the court. That the Respondent considered the charges and noted in the proceedings that in the file in question, the accused took plea and pleaded not guilty and later released on Kshs 200,000/= cash bail. That the Claimant allocated the file to herself, ordinarily the matter is usually referred to the head of station to allocate the trial court.
20. RW1 testified that the advocate for the accused wrote to Court informing the court that the accused intended to change plea. That the hearing for change of plea was allocated to Hon. Ochanja and the Claimant felt aggrieved and decided to retain the file because she got suspicious.



21. RW1 testified that Claimant did not turn up on 31/10/2014 when the matter was slated for plea. The Claimant never reported the issue to the head of station but to the ombudsman after 6th November 2014. RW1 testified that the Claimant was not served with notice as per JSC procedural rules but never raised the issue when she attended hearing and said she was okay proceeding. The Registrar further testified that there were no witnesses who testified as none were called by the JSC. The panel relied on court file and proceedings which the Claimant herself recorded and the Claimant's Response. That the Claimant attempted to resign which caused some delay and further that there was the issue of transition of the CJ after retirement of the previous one.
22. RW1 testified that Claimant called two witnesses and was engaged extensively on the report during the hearing. The dismissal letter was an extract of the investigation report.
23. In cross examination RW1 confirmed that the Claimant was an employee of the Respondent and was entitled to salary and allowances. RW1 confirmed that as of 13/10/2014 the file had not been allocated to Court 2. It had a hearing date of 6/11/2014 before Court 6. RW1 confirmed that the skeleton file was created to facilitate change of plea.
24. RW1 confirmed that there is procedure for creating a skeleton file and that there were disciplinary proceedings against Hon. Ochanja over the creation of the skeleton file. RW1 confirmed that the procedure for disciplinary hearing is set out in the 3rd Schedule of JSC Act and that the respondent applies *Fair Administrative Action Act*, *Employment Act* and the HR- Manual for the Judiciary. The JSC Act and the HR-Manual had no timelines
25. RW1 confirmed that she was aware that the report was made to the Ombudsman by the Claimant but could not recall when the first report was made.
26. In re-examination RW1 clarified that the skeleton file was opened because when the file came up the original file had been retained by the Claimant and the accused and his advocate needed to be attended to. RW1 clarified that the letter of change of plea was received on 30/10/2014. That the Ombudsman's report is from the CJ and forms part of the report of CJ to JSC.

Claimants' Submissions

27. The Claimant through her Counsel Mr. Makori, filed written submissions dated 30th January, 2024 and a rejoinder dated 3rd June, 2024 and on the issue of whether the Claimant's termination was lawful the Claimant submitted that the primary anchor on disputes regarding unfair termination of employment is in the *Employment Act*.
28. The Claimant's relied on the case of Walter Ogal Anuro vs Teachers Service Commission on both substantive justification and procedural fairness for termination to be lawful.
29. The Claimant submitted that on substantive justification, the Respondent had failed to prove the reasons for terminating the Claimant's services. The Claimant submitted that the registry staff knowingly retrieved the Criminal file from the registry and took it to the Claimant's chambers. That the file was not missing but had been left behind on 31st October 2014 when all the other matters were mentioned before Hon. Riany as the Claimant was absent due to indisposition.
30. The Claimant submitted that the Respondent did not justify the real reasons for terminating her services whereas all the witnesses before the panel conceded that the file had two dates and the Claimant was the trial court. Counsel further submitted that the employer must establish that the procedure adopted in effecting the termination was fair and legal. Claimant relied on the case of National Bank of Kenya v Samuel Nguru Mutonya(2019) eKLR. and submitted that the Respondent failed to comply



with the procedural dictates of Section 41 of the [Employment Act](#) as read together with Section 43 and 45 of the Act, the Judiciary Human Resource Manual, Regulation 25 and 26 of the 3rd Schedule of the [Judicial Service Act](#), the [Fair Administrative Action Act](#) and Articles 50 and 47 of [the Constitution](#) of Kenya.

31. It was Claimant's submissions that the notice given was inadequate since Regulation 25(2) of the Third Schedule to the [Judicial Service Act](#) required her to be given 14 days. The Claimant relied on Canadian case of Ahmad vs Procter & Gamble Inc(1991) O.J.NO 26 on the said notice. Counsel further relied on the case of Judicial Service Commission v Daniel Ochenja (2020) eKLR among others and submitted that the Respondent un-procedurally terminated the Claimant's service by failing to adhere to compulsory statutory provisions.
32. On the issue of whether the Claimant is entitled to the claims under the prayers in the statement of claim, Counsel submitted that her termination from employment by the Respondent was for no valid reasons thus being unfair and was in total defiance of the law which termination was detrimental to the Claimant. The Claimant submitted that she had suffered and continues to suffer loss and damage hence entitled to prayers in her claim.

Respondents' Submissions

33. The Respondent filed its submissions dated 19th March 2024 and submitted that on 30th October the Claimant through her court clerk requested that the file be brought from the registry to her chambers despite knowing that the accused wished to change his plea on 31/10/2014 and the registry personnel were looking for the file. The Claimant decision to retain the file was for unlawful and corrupt purposes.
34. The Respondent submitted that the decision of the Claimant to retain the file was unjustifiable. The Claimant did not make any report to the head of station of the suspicious corrupt activities or take any other actions but hid the file in the hope that the accused who had filed a letter for change of plea could not proceed with it until the day it was supposed to come for hearing before her on 6th November 2014.
35. It was the Respondent's submission that the Claimant's assertion that her actions fell within the realm of judicial immunity pursuant to Article 160 of [the Constitution](#) was wrong since the Claimant could not use judicial immunity to shield herself for retaining the file for unlawful corrupt purposes and relied on the case of Bellevue Development Company Ltd v Francis Gikonyo & 3 others.
36. On the issue of whether the procedure for termination of the Claimant was lawful, the Respondent submitted that the Charge by the Chief Justice was not void for lack of accompanying statements, the Third Schedule of the [Judicial Service Act](#) does not require the Chief Justice to attach any accompanying documents.
37. The Respondent submitted that the Claimant did not allege nor was there an indication throughout the disciplinary process that the charge against the Claimant was not clear.
38. The Respondent submitted that the Chief Justice was not obligated in law to notify the Claimant if her response was satisfactory or if the matter was to be referred to the Respondent. If the Chief Justice deems the Claimant's response inadequate, the Chief Justice was only obligated to cause copies of the charges and the reply of the Claimant to be laid before the Respondent. The Respondent relied on the case of David Karani v Judicial Service Commission (2022) eKLR while submitting on the proceedings for dismissal.
39. On the issue of whether the Claimant was given adequate notice before the Disciplinary hearing, the Respondent submitted that Paragraph 25(4) of the Third Schedule of the [Judicial Service Act](#) mandates



the committee to provide at least 14 days' notice to the Judicial Officer and the question is whether a shorter notice period put the Claimant at a disadvantage.

40. The Respondent submitted that the Claimant was aware of the case against her since she received the charges of 13th February 2015 and hearing on 24th January 2017 where she confirmed she was prepared to proceed. If she was not she could have requested for an adjournment.
41. The Respondent relied on the case of Sani v JSC above and submitted that the Claimant had not demonstrated any procedural prejudice suffered due to the failure. On the issue of whether the disciplinary hearing was conducted fairly and lawfully, the Respondent submitted that the Claimant attended the Respondent's Committee hearing for her disciplinary case and charges were read to her and she responded to the allegations. The Respondent did not call any witness.
42. The Respondent submitted that before the hearing concluded, the Committee asked the Claimant if she wished to call any witnesses and she called two witnesses and filed an Affidavit sworn on 8/2/2017. That the Claimant's hearing was conducted lawfully and fairly and that the case of Judicial Service Commission v Daniel Ochenja was distinguishable and not applicable in the instant case.
43. On the issue of whether the Claimant was subjected to inhuman treatment, the Respondent submitted that it consistently strived for a swift resolution and made all reasonable efforts to expedite the process. The Respondent submitted that upon suspension the Claimant tendered a resignation letter dated 1/12/2016 to which the Chief Registrar responded that it could not be processed due to the ongoing disciplinary matter and requested her to rescind the same. Almost a year later on 2/11/2016 the Claimant withdrew her resignation letter and disciplinary proceedings only commenced then.
44. The Respondent submitted that the Claimant's allegation of delay had not been demonstrated satisfactorily, how the delay occasioned injustice and relied on the case of Trishcon Construction Company Limited v Mohamed Salim Shamshudin & another.
45. The Respondent submitted that a mere delay in taking an action is insufficient ground for the remedy sought. The burden lies with the Claimant to demonstrate how this delay caused a miscarriage of justice and any resulting loss.

Determination

46. The court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The court has also considered authorities relied on by Counsel and has come up with two main issues;
 - i. Whether the Claimant's termination of employment was unfair and unlawful
 - ii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's termination of employment was unfair and unlawful

47. In this instant case, the Respondent alleged that they terminated the Claimant on grounds of retaining a court file without good cause. The court notes that the period of withholding was between 30th October, 2014 to 6th November, 2014.
48. It was the Claimant's case that she retained the file for Criminal Case No. 1367 of 2014- Republic vs Abdullahi Mohammed Igal so as to ensure that no corrupt activities would take place in respect of the file. On the other hand, it was the Respondent's case that the Claimant could not use judicial immunity to shield herself for retaining the file for unlawful corrupt purposes.



49. The events leading to the termination of the claimant's service as stated in CW1's testimony was over the retention of the file concerning Criminal Case No. 1367 of 2014- Republic vs Abdullahi Mohammed Igal leading to the creation of a skeleton file to facilitate the discharge of the accused in that matter who had changed his earlier plea of "not guilty" to a "guilty" plea.
50. According to the Respondent, the Claimant was required to report any suspicious happenings on the file to the Head of Station who was her immediate supervisor as was the standard procedure. The claimant did not do so and according to the respondent, this was a violation of Section 1.2 of the Internal Communications Guidelines of the Judiciary Human Resource and Procedures Manual.
51. Whereas the Claimant's reason of retaining the file may have been in tandem with article 160(5) of *the Constitution* relating to "an action or suit instituted in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function, the claimant herein, has not sufficiently demonstrated the existence or grounds for her suspicion of existence of the alleged corrupt activity over the file in issue. Besides its doubtful to the Court if the act of retaining or hiding a file is with the meaning of 'a judicial function' as contemplated under article 160(5). Custody and handling of Court files is an administrative function within the mandate of the various Registrars and Deputy Registrar's of the respective Courts. Save for cases where a file is pending a ruling or judgment, it is not the responsibility of a judge or a judicial officer to retain a file either in Chambers or any other place where only such judge or judicial officer has exclusive access to the file. In this particular case, the file in issue had just undergone plea and the same was according to the claimant, set for hearing on 6th November, 2014. The claimant had no business with the file until 6th November, 2014 when the same was to come up for plea. The file therefore ought to have been kept in relevant Registry.
52. The claimant stated that on 29th October, 2014, the accused Counsel wrote to the Court that the accused wanted to change the plea and that she advised the Court assistant bring the file to her Chambers since she felt there were suspicious activities about the file and when the file was brought, she decided to retain it and that she retained the file until 5th November, 2014. The claimant further informed the Court that she was away from 31st October, 2014, meaning she went away leaving the file in the exclusive custody of her Chambers leading to the creation of a skeleton file to process the accused person's change of plea.
53. The claimant alleged that she did not report the suspicious happenings around the file to the Head of Station due to the bad blood between the senior and junior magistrates. She however never elaborated on the cause and nature of such bad blood. She further alleged that she reported the issue to the Judiciary Ombudsman but never tabled evidence of any such report. Allegation of corruption is serious and one of the biggest concerns for the Judiciary administration. Any suspicion of corruption therefore ought to be taken seriously by any person suspecting the same a report be made and escalated through appropriate channels for timely action. It is not just enough to suspect and engage in a personally perceived contraption claiming it was intended to disrupt or whistle blow a corrupt activity.
54. Termination of employment would not be disturbed by this Court if found to have been for valid and fair reasons as required by section 43 of the *Employment Act*. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:

"There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47



(5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

55. From the foregoing, the Court is persuaded that there existed valid and justifiable reasons for the termination of the claimant’s service.
56. Regarding procedural fairness it is now an established principle that for termination to pass fairness test there should be both substantial and procedural fairness in carrying out the termination. The existence of a valid reasons for termination does absolve an employer from carrying out the termination following a fair procedure as set out under section 43 as read together with section 45 of the *Employment Act*. Failure to observe procedural fairness will lead to a finding that the termination was unfair even if the employer had valid reason for doing so. It is never the proverbial case of “give a dog a bad name and hang it”. The employee must still be taken through due process before the pronouncement of the termination. This has been echoed in the cases of Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR and Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
57. It is the appellant’s case that in conducting disciplinary proceedings against her, the Respondent did not adduce evidence regarding the allegations leveled against her. The Claimant complained that she was not accorded an opportunity to challenge the evidence against her and that she was not granted an opportunity to cross examine the witnesses. She contended that the provisions of Regulation 25 of the Third Schedule to the *Judicial Service Act* were not adhered to as regards her disciplinary hearing in that the JSC did not take into consideration her response before reaching the decision to terminate her from judicial service.
58. On the contrary, JSC submitted that the Claimant was issued with a charge and interdiction detailing allegations and was required to respond in 21 days. The Hon. Chief Justice was of the opinion that the Claimant had failed to exculpate herself and forwarded the Response to the Respondent for disciplinary action. The Claimant appeared before the Committee for oral hearing of her disciplinary case. The Respondent did not call any witness.
59. The Guiding principles on disciplinary proceedings before Judicial Service Commission as set out in the case of Shollei *v Judicial Service Commission & another (Petition 34 of 2014)* [2022] KESC 5 (KLR) (17 February 2022) (Judgment) are as follows:
- a. The JSC shall comply with the procedure set out in article 47 of *the Constitution* and the Fair Administrative Actions Act.
 - b. JSC shall always give an employee reasonable time to defend himself or herself.
 - c. An employee shall be informed the basis of complaint(s) or who his or her accusers to enable the employee defend themselves.
 - d. JSC shall furnish an employee with details of allegations against him or her.
 - e. JSC must always be clear from the start whether the administrative action against an employee is of an investigatory nature or of a disciplinary nature. Should an investigatory process turn into a disciplinary one, an employee must be accorded fresh notice to prepare his/her defence.
 - f. An employee should be accorded a public hearing if he/she desires to have one. A decision to decline such a request must be accompanied with reasons which shall be given to the employee.
 - g. An employee shall be given detailed reasons for any administrative action/decision by JSC.



- h. An employee should access and receive any relevant documents relating to his/her matter. Any decision to the contrary must be accompanied by a written reason.
 - i. An employee shall be accorded opportunity to attend proceedings, in person or in the company of an expert of his/her choice.
 - j. An employee undergoing disciplinary proceedings shall be given an opportunity to call witnesses, be heard; cross examine witnesses; and request for an adjournment of the proceedings upon providing good reasons and where necessary to ensure a fair hearing.
60. The parameters set out by the Supreme Court in the Shollei's case above need not all be present in all cases but a reasonable amount of them as the circumstances would permit would be sufficient.
61. It was the Claimant's case that the three days' notice given for disciplinary hearing was inadequate. Paragraph 25(4) of the Third Schedule of the *Judicial Service Act* required the disciplinary committee to provide at least 14 days' notice to the Judicial Officer facing disciplinary action. The Court however is in agreement with the findings in the case of *Sani v JSC (Cause 7 of 2019)* [2022] KEELRC 4000 (KLR) (26 September 2022) which has been relied on by both parties to the extent that the Claimant did not indicate throughout the disciplinary process that the charge against her was not clear. She did not challenge the inadequacy or incompleteness of the charges before the Disciplinary Panel and did not ask for more time. She has therefore not adequately demonstrated that the procedural lapses if any, occasioned her such prejudice that the outcome if the disciplinary process was a travesty of justice. In any event the claimant from interdiction knew that the accusation against her was the single issue of the retention of the criminal case file when she learnt that the file was required for purposes of changing the accused person's plea. She did not deny doing so but instead justified her reason for doing so which the respondent as an employer found unsatisfactory and initiated disciplinary process culminating in her dismissal from service. Furthermore, the respondent gave reasons for the lag in the procedure to have been occasioned by the attempt by the claimant to resign while the disciplinary process was going on and the changer over from the retired Chief Justice to the incoming one. These reasons, the Court finds, are plausible.
62. In the Court's view therefore, there may have been a lapse in procedure in terms of timelines in processing the disciplinary hearing but such lag did not occasion the claimant such prejudice as to vitiate the outcome of the disciplinary process.
63. In conclusion the Court finds and holds that the claimant's claim is found without merit and is hereby dismissed
64. Considering circumstances of this matter and observations made in paragraphs 61 and 62 above, each party shall bear their own costs.
65. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division.

