



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwai v Teachers Service Commission (Petition E179 of 2021)  
[2023] KEELRC 1313 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1313 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E179 OF 2021  
NZIOKI WA MAKAU, J  
MAY 17, 2023**

**BETWEEN**

**JAMES MURIITHI MWAI ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner is a former employee of the Respondent, which is a commission established under Article 248(2)(i) as read with Article 253 of the *Constitution of Kenya*. In the Petition dated November 12, 2021 supported by the Affidavit of the Petitioner is seeking the following Orders against the Respondent Commission:
  - i. A declaration that the Respondent has violated the rights of the Petitioner as protected under Articles 41(1), 47, 48 and 50 of the *Constitution of Kenya*.
  - ii. A declaration that the decisions of the Respondent's disciplinary committee dated November 8, 2019 and of its review panel dated June 5, 2020 are unlawful, unconstitutional, null and void.
  - iii. General damages for violation of the Petitioner's constitutional rights.
  - iv. An Order that the Respondent be reinstated to employment with no loss of benefits.
  - v. Cost of the Petition.
2. The Petitioner avers that he was employed by the Respondent on January 2, 2009 and was posted to Nyansiongo Boys High School in Nyamira County up to March 2015. That he was then transferred to Kangaru School in Embu County where he taught mathematics and was the Assistant Boarding Master. On the facts of the case, he narrates that on Thursday February 28, 2019 during the first lesson of the day at the school, he verbally cautioned three students (KFN, MMM and DMN) for coming to



class late and instructed them to see him later, but did not follow up on the issue. He was later informed that K (hereinafter “the student”) had reported to the school nurse on Friday March 1, 2019 with a painful knee and informed the nurse that he had been injured while playing in the field. That although the student was attended to and went back to class, he still complained of pain in his left knee and he could barely walk but a trip for an x-ray to two hospitals in Embu returned no anomaly and he was simply bandaged and returned to school by the nurse.

3. It is the Petitioner’s averment that the student’s pain however persisted on Monday March 4, 2019 and the nurse informed them that the orthopedic had advised for the knee to be plastered. That they had unsuccessfully contacted the student’s guardian but went to hospital after the principal gave Mr. Ng’ang’a, (the Boarding Teacher) the required funds. It is his position that the cast was applied on the student and they took him back to school at around 8.00pm. That on Tuesday March 5, 2019, he and Mr. Ng’ang’a picked walking clutches from the hospital for the student and again tried to contact his guardian without success. That on March 7, 2019, the student was brought by fellow students to the boarding office, in apparent pain and complaining of tightness in the cast or plaster and severe pain in the chest and right shoulder. That Mr. Ng’ang’a attended to the student since the Petitioner was busy attending to parents who had come for an academic clinic and that he was informed that the student’s guardian had finally contacted and picked the student.
4. The Petitioner further avers that on the morning of March 8, 2019, he received a letter from the Chief Principal with information that the student’s guardian had left a complaint in his office about the Petitioner having been responsible for the injury on the student’s leg. That he responded to the complaint in writing and at around 2100 hours on Saturday March 9, 2019, the Principal called to inform him that the student had been brought back to school with apparent troubled breathing problem and he had sent them to hospital under the watch of the school Matron. Further, the Principal wanted him to go to school the following day and clarify on his involvement since the student’s relatives had stuck to their allegations. That he reported to school on Sunday as requested and the Deputy Principal briefed him that the student was reportedly in ICU. The Petitioner avers that at around 0930 hours on March 11, 2019, he was shocked when Mr. Ng’ang’a informed him of the student’s demise at 0248 hours. That his colleagues then advised him to first seek a lawyer’s advice due to the nature of the allegations that had been levelled against him. He asserts that on March 12, 2019, news outlets and social media hubs were awash with news of ‘student beaten to death’.
5. It is the Petitioner’s averment that the school’s BOM and Subcounty/County TSC met and summoned him to question him over the incident and that the Police were also present to conduct their investigations. That he gave his responses both verbally and in writing and clarified that he had nothing to do with the student’s death and was then instructed to go to the station to record a statement. He avers that together with the school’s Principal, they recorded statements on March 13, 2019 and he was arrested and put in custody from 1030 hours to 1630 hours on murder accusations. That he was however released on cash bail and instructed to report back to the station on the following Monday but he was not to set foot in school until the following week, as investigations were being conducted. The Petitioner further avers that on March 14, 2019, he received an invitation letter to appear before the County TSC Disciplinary Panel to answer to charges of corporal punishment against the three students. That after the postmortem examination was carried out on the deceased in his absence, the autopsy revealed that the student had succumbed to severe pulmonary tuberculosis and clarified there was no evidence of beating, fracture or tissue injury at the place where he had allegedly caned the deceased. That however as instructed by the OCS, he continued reporting to the police on 21<sup>st</sup> and March 27, 2019, April 11, 2019, 9<sup>th</sup> and May 23, 2019, and July 2, 2019.



6. It is the Petitioner's averment that on March 21, 2019, he was summoned to the County TSC office to answer to the charges of corporal punishment. He went together with the Principal, the Boarding Teacher, the remaining two students he had allegedly also caned, and four other students from the class. That he and the students were asked to write fresh statements and the student wrote their statements as a group. He avers that he received an interdiction letter over the same allegations on March 28, 2019 and was instructed to respond to within seven (7) days, which he did on April 4, 2019. That later on August 13, 2019, he received an amended interdiction letter that cited a different clause he had allegedly breached that was different from the initial one and on September 16, 2019, he received an invitation letter to appear before the TSC Panel for hearing at Kang'aru School. That all the witnesses that had attended the case at the county level were summoned and the students were questioned over their statements. Thereafter on November 8, 2019, he received a letter dated October 8, 2019 informing him that the Commission had decided to dismiss him on grounds of corporal punishment and that he had 90 days within which to appeal the decision.
7. He further avers that he submitted his Appeal to the Commission on December 11, 2019 and received a call on February 16, 2020 to appear before the TSC Review Panel for hearing on February 19, 2020. That whereas the Panel informed him that they would communicate their decision to him within a month, he did not receive a response from the Respondent on the same. That when his advocates wrote to the Respondent seeking to be supplied with the proceedings and decision thereof, the Respondent in a twist of events responded through a letter dated June 10, 2021 purporting to have furnished him with the decision dated June 5, 2020. On its instructions, he personally requested and was supplied with the proceedings on October 13, 2021 and noted they were not signed, no technical officers were present, and the panel had not considered the issues he raised in his Appeal. He asserts that failure by the Respondent's Review Panel to furnish him with its decision for a period of over eight (8) months was unlawful and a violation of his right to access to information under Article 35 of the Constitution. That he was not in a position to file appropriate action to safeguard and/or protect his rights since he did not have the said material information.
8. It is the Petitioner's averment that the conclusion made by the Disciplinary Committee on 21<sup>st</sup> March 2019 was irrational, illogical, unfair and unlawful since it blatantly contradicted the observations the Committee had made in its determination and the statement recorded by the students. That the Respondent's failure to inform him that he had a right to representation during the disciplinary proceedings and to accurately record his evidence was and is unfair labour practice contrary to Article 41(1) of the Constitution. That this violation also included the Respondent's failure to furnish him with relevant information through his advocate. Furthermore, contrary to Article 47 of the Constitution, the Respondent's failure to properly constitute the Disciplinary Committee and to determine the review and/or appeal process within reasonable time made the same not expeditious, efficient or lawful. In addition, that it was wrong for the Respondent to find him culpable of corporal punishment while no such offence exists under section 36 of the Basic Education Act.
9. Respondent's Case  
In response, the Respondent filed a Replying Affidavit sworn on 3<sup>rd</sup> June 2022 by Evaleen Mitei who avers that pursuant to section 47(2) of the Teachers Service Commission Act (hereinafter "the TSC Act"), the Respondent has published a Code of Regulations for Teachers (the CORT) and the Code of Conduct and Ethics (COCE). That these Regulations/guidelines outline the general Rules of Conduct for those in the teaching profession and provide the procedures and penalties when incidents of breach are reported. That accordingly, the Respondent upholds the best interest of the child as directed by Article 53 of the Constitution and that statute law expressly prohibits corporal punishment against learners in schools. That section 36(1) of the Basic Education Act provides that no learner shall



- be subjected to torture and cruel, inhuman, or degrading treatment or punishment in any manner whether physical or psychological with section 4 of the Act identifying the best interest of the child in carrying out its functions. That it has regularly distributed the CORT and COCE to schools and issues Circulars to create awareness and warn against the meting out of corporal punishment on learners.
10. It is the Respondent's case that sometime in February 2019, it received reports that the Petitioner had used corporal punishment to punish three (3) students and it went on to take the following steps:
    - a. The Respondent investigated the adverse allegations against the Petitioner and preliminary findings pointed to him having committed an offence under the CORT as shown in the Investigation Report dated March 21, 2019.
    - b. The Petitioner was subsequently interdicted by the Interdiction Letter dated April 4, 2019 that specified the grounds and reasons for interdiction and the charges against him. The Petitioner was also informed therein of his right to defend himself, write and/or make representations in rebuttal.
    - c. After the Petitioner wrote a Defence Statement dated April 4, 2019, he was invited together with other witnesses to appear before the Disciplinary Committee.
    - d. At the Discipline Committee Hearing, the charges were read to the Petitioner and he was granted an opportunity to present his case in person and he cross examined witnesses to his satisfaction as shown in the Disciplinary Proceedings dated September 18, 2019.
    - e. The Committee considered all the evidence before it and found the Petitioner culpable and following the seriousness of the offence, the Committee reached a decision to dismiss him.
    - f. The decision was communicated to the Petitioner through the Dismissal Letter dated 8<sup>th</sup> October 2019, which stated the reasons for his dismissal.
    - g. Upon the Petitioner applying for review of the decision, the Respondent's Review Panel upheld the decision to dismiss him as no new evidence was submitted for consideration. The same is recorded in the Review Committee Proceedings and the decision thereof, dated February 19, 2020.
  11. The Respondent avers that the actions of the Petitioner were outside his scope of duty, against public policy and therefore illegal. That the decision that followed was therefore fair, just and appropriate based on the merits of the case, the evidence adduced before it and the nature of the offence he had committed under provisions of the CORT. That the death of the student KFN, for whatever reason, cannot in any way diminish or take away the fact that the Petitioner inflicted corporal punishment on him and two others. It is the Respondent's further averment that it charged the Petitioner with the professional offence of using corporal punishment of learners under the TSC Act and the CORT and not 'causing death', which was under investigation by other agencies under the conventional criminal justice system.
  12. According to the Respondent, the Petitioner has misdirected himself on the probative value of the Post-mortem Report and related Medical Report to the Respondent's administrative processes by insinuating that the Reports ought to take precedent or influence the Respondent's process. It believes that it acted within the confines of law, principles of Natural Justice and Public Interest and that its decision to dismiss the Petitioner from service was fair, procedural and lawful.
  13. The Petition was disposed of by way of written submissions.
  14. Petitioner's Submissions



It is the Petitioner's submission that the facts in dispute are that K's guardian (N) initiated the allegations of corporal punishment were by putting up various posts on Facebook, inciting netizens to believe that he had administered corporal punishment to the student leading to death (evidence of said posts at pages 42 to 59 of the Petitioner's Bundle). The Petitioner submits that the investigations carried out did not prove any of the elements that constitute corporal punishment under section 36(1) of the TSC Act and that all the witnesses who appeared before the Disciplinary Committee in fact confirmed that he used a folded manila paper to tap the legs of the students. That further evidence of the Post Mortem Report shows that there were no signs of assault or injuries suffered by the deceased student. In addition, Mitch Marvin confirmed at the hearing that he did not take the punishment wrongly because he deserved it. To this end, the Petitioner submits that there was no evidence presented before the Disciplinary Committee to warrant his employment to be terminated on disciplinary grounds.

15. He also submits that the Respondent based the hearing on the Witness Statements dated March 21, 2019 yet the Disciplinary Committee's decision was extensively based on the Statements dated March 11, 2019, which statements had ceased to be in evidence when the fresh statements were written. That this did not constitute a fair hearing and the decision made was thus against the provisions of Article 50 of the Constitution. That the Respondent also failed to consider the recommendation of the DCI in the letter dated 3<sup>rd</sup> July 2019 (page 83 of the Petitioner's Bundle) stating thus:

“Since the inquest can take time to be concluded, and so far the teacher hasn't been found culpable, I kindly recommend that he be reinstated to his teaching duties, even as the inquest continues.”

16. The Petitioner relies on the case of *Kenya County Government Workers' Union v County Government of Nyeri & another* [2015] eKLR wherein the Court referred with authority to the case of *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2013] eKLR in which the Court upheld its opinion obiter dicta thus:

“...it is the opinion of the court that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”

17. The Petitioner submits that according to sections 43 and 45 of the *Employment Act*, the employer has the burden of proving that the reason for terminating the employee's contract of employment was valid and fair. That however in the instance case, the Review Panel rubbished off his new evidence of the Autopsy and Police Reports without giving a valid reason. On this submission, he relies on the Court of Appeal's decision in *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR. He thus prays that the decisions of the Respondent's Disciplinary and Review Panels be found unlawful, unconstitutional, null and void having failed to meet the required standard of proof.
18. On whether he is entitled to general damages for the violation of his constitutional rights, it is the Petitioner's submission that Article 23 of the *Constitution* provides the court with powers to grant appropriate reliefs for infringement of rights, inclusive of compensation orders. In awarding damages for unfair administrative action, he urges this Honourable Court to consider the case of *John Gakuo*



Ɖ another v County Government of Nairobi, Governor Ɖ 2 others [2018] eKLR wherein the Court of Appeal held thus:

“We have come to the conclusion that the appellants were entitled to compensation for violation of their right to fair administrative action and not under the Employment Act as the learned judge proceeded. We therefore set aside the award of Kshs 904,448.00 and substitute therefore an award of Kshs 1,500,000.00 to each appellant as damages for violation of their right to fair administrative action.” (emphasis by Petitioner)

19. In regards to the unfair labour practices and unfair termination, the Petitioner relies on the judgment in the case of Soita Wasike v Ethics And Anti-Corruption Commission Ɖ 3 others [2018] eKLR in which the Court awarded the petitioner compensation equivalent to 12 months' salary for unfair termination from employment. He submits that this Court ought to therefore award the Petitioner Kshs. 1,500,000.00 and the equivalent of 12 months' salary as compensation.
20. On the issue of reinstatement, the Petitioner submits that section 12 of the Employment and Labour Relations Court Act empowers this Honourable Court to make an order for reinstatement of a terminated employee within three years of the termination from employment. That section 49(3) of the Employment Act also provides for reinstatement of an employee who in the opinion of a labour office had been unfairly summarily dismissed or terminated from employment. It is the Petitioner's prayer that this Court looks at the circumstances under which his employment was terminated in order to grant this prayer.
21. As regards costs of the suit, he submits that section 27 of the Civil Procedure Act is clear that costs shall follow the event unless the court or judge orders otherwise for good reason. He relies on Ethics and Anti-Corruption Commission v Nderitu Wachira Ɖ 2 others [2016] eKLR wherein Mativo J. (as he then was), with approval, referred to the holding in the cases of Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd that the issue of costs is the discretion of the court and that the principle “costs follow the event” should not to be used to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the case. The Petitioner submits that it is imperative for this Court to also appreciate the trouble he has taken to file the suit before it and award costs to the Petitioner so that justice is not only done but is seen to be done. He believes he has met the onus set out in sections 107, 108 and 109 of the Evidence Act.
22. Respondent's Submissions  
The Respondent submits that discipline is a prerogative of the employer and accordingly, the court should scarcely interfere with it where it can be shown that the discipline process was unfair and hence the resulting decision unlawful and cotes the South African case of Nampak Corrugated Wadeville v Khoza (JA14/98) [1998] ZALAC 24. The Respondent submits that fairness within the meaning of section 45(2) of the Employment Act requires the employer to demonstrate both substantive justification and procedural fairness in dismissing the employee, as held by the Court of Appeal in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR referring with approval to the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR. That in dismissing the Petitioner, the Respondent acted in a just and fair manner as it had valid and fair reasons for his dismissal which it genuinely believed to exist pursuant to section 43 of the Employment Act.
23. It submits that the relationship between the Petitioner and the Respondent was governed by his letter of appointment, the Code and COCE. That the relationship was further based on mutual trust with an aim to uphold the best interest of learners where the Petitioner was considered as loco parentis to



the learners. That other than section 36(1) of the *Basic Education Act*, clause 9 of COCE provides that teachers shall be entrusted with the duty of care of a child and shall ensure the child is protected inter alia from abuse, all forms of violence, inhuman treatment, and corporal punishment and exposure to hazardous or exploitative labour. That an objective evaluation of the above facts together with the evidence of all the witnesses led the Respondent to believe that the Petitioner had instituted corporal punishment on the three named students, which belief was rational, reasonable, valid and based on the evidence on record. That it therefore had reasonable and justifiable grounds to conclude that the Petitioner had offended the provisions of COCE and the *Basic Education Act* and to subsequently dismiss him. That it has proved its case on a balance of probability as a subjective test and cites the case of *Kenya Revenue Authority v Reuel Waitbaka Gitahi & 2 others* [2019] eKLR. It further submits that the Petitioner's allegation that he was wrongly dismissed because the National Police Service had exonerated him has no merit as the Respondent is a quasi-judicial body deriving its mandate from Article 237(2) of the *Constitution* and section 33 of the *TSC Act* and has no obligation to follow or adopt the findings of the Police executing a typical mandate under the criminal justice system. That in the end, it has discharged the burden required under section 43 of the *Employment Act*.

24. On procedural fairness, it submits that Part XI of CORT outlines the procedure to be followed by the Respondent in discipline cases against errant teachers and the said Regulations are in tandem with the Constitution or the rules of natural justice and fair hearing. The Respondent believes that the disciplinary proceedings against the Petitioner adhered to its Regulations. That the matter was first placed before a County Disciplinary Panel before which the Petitioner testified pursuant to Regulation 146 of CORT. That he was thereafter heard before a Disciplinary Committee in accordance with Article 47 of the *Constitution* and section 41 of the *Employment Act* before the Panel considered the evidence and made a decision that was communicated to him. That he was further allowed to prosecute his appeal and the Review Panel upheld the decision of the Disciplinary Panel. It is the Respondent's submission that it adhered to procedure as it informed the Petitioner of the allegations against him and the right to defend himself, invited him before the disciplinary panel and communicated to him its decision. On this submission it relies on the cases of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR; *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR; *Bett Francis Berngetuny & another v Teachers Service Commission & another* [2015] eKLR; *Lydia Moraa Obara v Tusker Mattresses Limited* [2021] eKLR; and *Godfrey Barasa Ochieng v Security Guards Services Limited* [2022] eKLR. It urges the Court to find that the Petitioner was accorded a fair hearing and that all procedural requirements under the *Employment Act* were adhered to the latter.
25. The Respondent submits that the Petition as drawn does not raise any constitutional question. The primary issue for determination in the Petition is whether the Petitioner was fairly and lawfully dismissed within the meaning of section 45 of the *Employment Act*. That even if there were any constitutional questions advanced by the Petitioner, he ought to have done the same through a Claim pursuant to Rule 7(3) of the Employment & Labour Relations Court (Procedure) Rules. That where a right is regulated by a statute as is the case herein, the same ought to be enforced through the statute. That accordingly, the alleged infringed rights to fair labour practice, fair administrative action and fair hearing as alleged in the Petition are regulated by the *Employment Act*, the *Labour Relations Act*, and the Fair Administrative Act. It cites the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR wherein the court held:

“Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right,



becomes the primary means for giving effect to the constitutional rights. In the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, this Court observed:-

“Citing the case of Alphonse Mwangemi Munga & Others v African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of ad of them moving to the constitutional court and making constitutional issues of what is not...”

26. Further, that it is now trite that a Constitution Petition must satisfy a threshold of what constitutes a Constitutional Petition as stated in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. That the Petitioner has failed to illustrate through facts and evidence with precision how the Respondent has allegedly infringed on his rights under the various Articles he has listed in the Petition and accordingly, the declaratory orders as sought in the Petition cannot ensue. It further submits that the relation between the Respondent and the Petitioner being regulated by a contract of service and the *Employment Act*, the same does not qualify to be considered as a Constitutional Petition warranting declaratory orders. That this Court can thus only issue remedies under section 49 of the *Employment Act*.
27. It is the Respondent's submission that an award for reinstatement is not an automatic right for an employee but rather discretionary depending on the unique set of facts brought out in the case as contemplated under section 49(3) and (4) of *Employment Act* and section 12(3)(vii) of the *Employment and Labour Relations Court Act*. That the instant case is one where the dismissal was purely caused by the conduct of the Petitioner and therefore to ensure safety in our schools, it is only fair that the award of reinstatement is denied. That reinstatement of the Petitioner will set a bad precedent where teachers will tend to believe that they are immune to disciplinary action. It urges the court to find that the prayer for reinstatement is unattainable as the Petitioner has not illustrated any exceptional circumstances to warrant an award of the prayer as held in *Gladys Chelimo Bii v Kenya Power and Lighting Company Limited* [2021] eKLR. The Respondent submits the reinstatement will set a bad precedent and thus urges it not to be allowed. It reiterated that the termination of the Petitioner was fair, lawful and in accordance with the law and submits that the prayers sought are unattainable thus the Petition should be dismissed with costs.
28. The Petition as has emerged, should ideally have been articulated as a suit since there are no specific allegations of infringement of the Constitution that rose to the threshold of what would qualify for a constitutional petition. The real controversy is whether the Petitioner's contract of service was fairly and lawfully severed within the meaning ascribed under section 45 of the *Employment Act*. The Petitioner was accused of meting out corporal punishment resulting in the death of a student. The evidence adduced before the Court indicated that the Petitioner did indeed cane the 3 students and sadly, Kenneth the deceased student died, albeit, from unrelated causes being tuberculosis. The death of the student was not a fault of the teacher neither was it connected to the canning the young men received. As such, the Petitioner was not responsible for his death.
29. However, under the law, corporal punishment is not permitted for any reason in learning institutions – see section 36(1) of the *Teachers Service Commission Act*. The evidence presented before the Disciplinary Committee and the testimony adduced before this Court warranted the Petitioner's employment being terminated on disciplinary grounds for the use of corporal punishment against learners. As such, the Petition was not well grounded and is accordingly dismissed. However, granted the teacher has suffered the worst punishment by the Respondent in having his name removed from



the Register of Teachers as well as the stigma he suffered on account of the demise of the student, there shall be no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

