



Waka v Judicial Service Commission & 3 others (Petition E190 of 2021) [2023] KEELRC 1569 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1569 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E190 OF 2021**

J RIKA, J

JUNE 30, 2023

IN THE MATTER OF: DENIAL OF RIGHTS, VIOLATIONS AND INFRINGEMENT OF ARTICLES 2[4], 10, 22, 23, 24, 25, 27, 28, 41, 47, 48, 50, 75, 236, 258 AND 259 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: SECTIONS 3,2,4 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

IN THE MATTER OF: JUDICIAL SERVICE ACT SECTION 32 AND RULES 25 [1-11] OF THE 3RD SCHEDULE.

AND

IN THE MATTER OF: RULES 3[4], 4, 11, 13, 19, AND 23 OF THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS] PRACTICE AND PROCEDURE RULES, 2013.

AND

IN THE MATTER OF: SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011 AND THE EMPLOYMENT AND LABOUR RELATIONS COURT RULES.

BETWEEN

JACOB WAKA PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

DIRECTOR HUMAN RESOURCE AND ADMINISTRATION 3RD RESPONDENT



JUDGMENT

Petition.

1. The Petitioner filed his Petition on 30th November 2021.
2. He states that he was employed by the Judiciary in the year 2001. He was employed as a Process-Server, and later, as an Accountant stationed at Mau Law Courts.
3. Following audit queries at his Station, he was unlawfully and unconstitutionally suspended by the 3rd Respondent, purporting to act on behalf of the 2nd Respondent.
4. He was called before the 4th Respondent and dismissed from service, a decision which was endorsed by the 1st Respondent.
5. He explains in his Supporting Affidavit, sworn on 5th November 2021, that the audit took place in October 2018, in his absence. He had already been moved from Mau to Embu Law Courts. He did not have an input in the audit process.
6. He was ambushed with a letter from the 3rd Respondent, suspending him, and stopping his salary. He was not served with the Audit Report or any Investigation Report.
7. He responded to the suspension letter, on 17th May 2019 and 31st May 2019, protesting that he was not involved in the process, and was not supplied with the resultant Audit Report. He states that the Respondent supplied further charges to him, on 22nd October 2019. The piecemeal charges were indicative of an erratic process. On 29th October 2019, yet another set of further charges was forwarded to the Petitioner, with a hearing date scheduled for 12th November 2019. The charges were not specific.
8. He applied for alimentary allowances on 5th November 2019, pursuant to Rule 17 of the 3rd Schedule to the *Judicial Service Act*. The application was refused. This adversely affected the Petitioner and his family, particularly his son, who suffered cerebral palsy. The Petitioner was paid the allowances in arrears a year later in August 2020, which was too late. He was denied a request to be reporting to the Chief Magistrate's Court at Nakuru which was nearer his home, and instead ordered to continue reporting to Embu, over 250 kms away, which was an expensive trip, considering that the request for alimentary allowance had been declined, and salary stopped. This was unreasonable and in abuse of power.
9. The matters subject of the audit query, were referred to the Police for investigation. The Petitioner was not advised on the outcome.
10. Eventually, he was invited to a disciplinary hearing through a letter dated 26th June 2020. Hearing was to take place on 14th July 2020. Invitation was made by the 3rd Respondent. He was to appear before the 4th Respondent. He was asked to provide evidence at the hearing, in contravention of Section 4 of the *Fair Administrative Action Act*. It was the responsibility of the Respondents to supply evidence, and that of the Petitioner, to challenge such evidence.
11. His contract was terminated on 4th January 2021 by a resolution of the 1st Respondent, communicated to him by the 2nd Respondent, after adopting the determination of the 4th Respondent. He was advised he could appeal to the 1st Respondent, notwithstanding that the 1st Respondent made the resolution



- leading to termination. This was contrary to rules of natural justice. He was advised he could seek review from the 1st Respondent, within 6 months of the decision.
12. There was no evidence to support the charges. The Petitioner was denied the right to cross-examine the Auditor or other relevant Witnesses. No Judicial Staff had the courage to accompany the Petitioner to the hearing. The Petitioner was not advised of his right to be represented by an Advocate. The 1st Respondent reported the matter to the Police, but did not wait for the outcome of the criminal process, before disciplining the Petitioner. There were no criminal charges against the Petitioner. All payments at the Station were approved by the Head of the Station, yet the Petitioner was targeted for disciplinary action.
 13. His position is that the 2nd and 3rd Respondent acted *ultra vires*. The Respondents actions were unconstitutional, unlawful, without jurisdiction and merit, and null and void.
 14. He submits that the 1st Respondent is mandated under Articles 171 and 172 [c] of the [Constitution](#), to appoint, receive complaints against, investigate and remove from office or otherwise discipline Registrars, Magistrates, other Judicial Officers and other Staff as prescribed by an Act of Parliament. This authority is delegated to the Hon. The Chief Justice, under Rules 15, 16 and 17 of the 3rd Schedule to the [Judicial Service Act](#).
 15. The [Judicial Service Act](#), gives force to the Articles above. It defines the terms ‘Judicial Staff’ ‘Commission’ and ‘Committee.’ Section 32 [1] of the Act requires the 1st Respondent to constitute a Committee or Panel for appointment, discipline and removal of Judicial Officers and Staff. The Committee’s procedure is set out in the 3rd Schedule to the Act.
 16. The 4th Respondent is not a Panel, Committee or Unit of the Commission under Section 32 [2] and Rule 25[3] of the Act. The 4th Respondent acted without jurisdiction, unconstitutionally and its actions against the Petitioner were null and void.
 17. The 2nd Respondent is the Secretary to the 1st Respondent, under Article 171 [2] [3] of the [Constitution](#). She is the Chief Administrator and Accounting Officer, with no power to discipline a Judicial Officer or Staff, draw charges, investigate, exculpate, interdict or suspend. The 2nd Respondent could not purport to delegate to the 3rd Respondent, powers she does not possess.
 18. The Petitioner submits that this position was upheld, in [Simon Rotich Ruto v. Judicial Service Commission & Another](#) [2019] e-KLR; [LMN v. Judicial Service Commission & Another](#) [2019] e-KLR; and [John Muikiria Waweru v. Judicial Service Commission](#) [2020] e-KLR. The 2nd and 3rd Respondents, in purporting to exercise powers they do not have, usurped the powers of the Hon. Chief Justice over Judicial Officers and Staff.
 19. This mandate of the Hon. Chief Justice is contained in Article 161 [2] [a], Rules 15, 18 and 25 [1] of the 3rd Schedule. Where a Statute delegates a function, such delegation must be strictly complied with. [Supreme Court of Kenya in [Alnashir Popat & 7 others v. Capital Markets Authority](#) [2020] e-KLR].
 20. The 1st Respondent sidestepped the mandate of the Hon. Chief Justice, and purported to act on the recommendation, investigation and determination of the 2nd and 3rd Respondents.
 21. There was no investigation, charge and decision by the Hon. The Chief Justice as contemplated by Rules 25 [1] and 25 [3] of the 3rd Schedule.



22. The 1st Respondent contravened its own policy publicized in ‘The J.S.C Report submitted to the Kenya Magistrates and Judges Association 2018,’ at page 11 and 12 stating:
- “ Based on the delegation of disciplinary powers, it is important to note that the Commission [J.S.C] only deals with disciplinary cases escalated by the Chief Justice to the Commission [JSC], after he has commenced disciplinary proceedings and conducted preliminary investigations, and is of the opinion that the misconduct if proved, would be serious enough to warrant dismissal, [or] the retirement of an Officer in the public interest.”
23. The 4th Respondent cannot explain its place in the Constitutional set up under Article 1782 [1] [c] and the Judicial Service Act. Its masquerading as a unit of the 1st Respondent, contravenes Article 10 of the Constitution.
24. The Petitioner’s right to fair labour practices under Article 41 of the Constitution was violated. He was denied his right to inherent human dignity and natural justice under Articles 28, [1], 50[1] of the Constitution and Rule 25[c] of 3rd Schedule. The 1st Respondent expressed an opinion through its resolution, bypassing the Hon. Chief Justice, and therefore lacked impartiality over the matter. It is submitted for the Petitioner that the Respondents violated Article 75 [2] [a] of the Constitution, which demands that a State/ Public Officer shall be subjected to the applicable disciplinary procedure, relevant to the Office occupied.
25. It is the Petitioner’s position that the Judiciary Human Resource Policies and Procedures Manual [Manual] is not an instrument under Article 94 of the Constitution, and the 1st and 2nd Respondents cannot, through a resolution, administrative craft or fiat, override the express procedure laid down in Article 172[1] [c] of the Constitution and the Judicial Service Act.
26. The Petition is founded on Articles 22 and 258 of the Constitution. Where administrative action is *ultra vires*, it is *void ab initio*, and the enquiry stops there, as there is an outright violation of the Constitution, as held by the Supreme Court in Martin Wanderi & 106 others v. Engineers Registration Board & 10 others [2018] e-KLR.
27. Section 7[2] [a] [i] [ii] and [iii] of the Fair Administrative Action Act, empowers the Court to judicially review administrative action or decision, made in excess of jurisdiction, unfairly or contrary to the law.
28. The Petitioner prays the Court to grant the following orders against the Respondents: -
- a. Declaration that the action of the Respondents was inconsistent and in contravention of the Constitution, the Judicial Service Act, and the Fair Administrative Action Act, without jurisdiction and therefor null and void.
 - b. Declaration that Article 172[1] [c] of the Constitution empowers the 1st Respondent as the only body to appoint, receive complaints against, investigate and remove from office, or otherwise discipline Registrars, Magistrates, other Judicial Officers and other Staff of the Judiciary, in a manner prescribed by the Judicial Service Act.
 - c. Declaration that the 1st Respondent has no jurisdiction to subcontract, delegate and or confer disciplinary powers under the Constitution to the 2nd, 3rd and 4th Respondents or any other body or persons, outside the strict confines of the Constitution and the Judicial Service Act, and such action was unconstitutional, and offends Article 2[4], is null and void, and is hereby quashed together with all antecedent actions, proceedings and determinations founded on it.



- d. Declaration that the Respondents' action contravened and was inconsistent with the decree of the Supreme Court under Article 163[7] in *Alnashir Popat* [supra] and *Martin Wanderi* [supra], which edict vertically binds all the Courts and Administrative Bodies.
 - e. Declaration that the Respondents violated and usurped the delegated mandate of the Hon. Chief Justice and their action was in gross violation of Article 259 [1] as read with Article 161[2][a]; 172[1] and Article 2[4] of the *Constitution*; rule 15-17 and Rule 25[1] of the 3rd Schedule., and was null and void.
 - f. An order of judicial review to bring into this Court, to condemn, quash, revoke, annul and/ or set aside the charge and suspension and letter of dismissal concerning the Petitioner, and all proceedings and determinations and resolutions founded on them.
 - g. Declaration that under Article 2[4] and 236[a] and [b], the Petitioner is a lawful Employee of the Judiciary and unless removed in compliance with the law and the *Constitution*, and a mandatory injunction does issue for his unconditional reinstatement and payment of all withheld/ accrued salaries, back pay and benefits from his suspension until full compliance.
 - h. Declaration that the Judiciary Human Resource Policies and Procedures Manual to the extent that it prescribes disciplinary procedures not in conformity with Article 172[1][c] and the *Judicial Service Act* is unlawful, unconstitutional, null and void to that extent and the offending sections are hereby struck out.
 - i. Declaration that the Respondents contravened the Petitioner's fundamental rights and freedoms under Articles 27[1]; 28; 41; 47; and 50[1] as read with [Rule] 25[a] and [c] [of the 3rd Schedule] and compensation under Article 23 [a] do issue as a distinct constitutional imperative / relief/ remedy in their vindication.
 - j. Aggravated and Exemplary damages.
 - k. Costs and interest.
29. The Petitioner submits that his family suffered as a result of the wrongful actions of the Respondents, and he has no opportunity of securing a comparable job, taking into account the adverse reference from the 1st Respondent.
30. He supplemented his position with a Further Affidavit, sworn on 2nd June 2022, and Further Affidavit sworn on 23rd February 2023. He restates that he was not availed the Audit Report. Transactions from February 2018 to September 2018 were authorized by the Head of the Station. The action taken against the Petitioner was based on a Draft Audit Report, and was therefore premature. He appealed against the decision to dismiss him. The appeal was declined summarily. Staff who were alleged to have acted in concert with the Petitioner, were never suspended or dismissed. They were instead required to pay back the money, subject matter of the audit query.

Response.

31. Anne Amadi, the Hon. Chief Registrar Judiciary, and Secretary to the 1st Respondent, filed a Replying Affidavit, sworn on 1st April 2022. The Affidavit is supplemented by that of Ronald Wafula Wanyama, Director, Audit and Risk Management, sworn on 17th March 2023.
32. The Chief Registrar explains that the 1st Respondent is a Constitutional Commission, established under Article 171 of the *Constitution*. The 4th Respondent is a Committee constituted by the 1st Respondent to handle disciplinary matters under delegated powers, under Section D4 of the Judiciary



- Human Resources Policies and Procedures Manual, 2014 and Sections 14 and 32 of *Judicial Service Act*. The 4th Respondent handles disciplinary matters of Staff in job grade JSG 4 to 11.
33. The Chief Registrar confirms that the Petitioner was employed by the Judiciary, as pleaded.
34. She confirms that the Internal Audit Department undertook financial audit of books of account of Maua Law Courts, for the period July 2015 to September 2018. It generated a Report, dated 2nd November 2018. The Report uncovered several irregularities, and misappropriation of funds belonging to the Judiciary. The Report recommended that the Petitioner is held accountable.
35. The Petitioner was suspended on account of gross misconduct. He was issued a letter to show cause, dated 17th May 2019. The charges were specified as follows: -
- i. Fraudulent alteration of revenue receipts, leading to loss of Kshs. 87,970.
 - ii. Under banking of deposits totalling Kshs. 1,344,190.
 - iii. Failure to reconcile revenue collection and banking during the audit period, to ascertain and account for under banking of revenue collection totalling Kshs. 165,293.
 - iv. Failure to surrender deposits collected using 6 receipts, No. 0342815 to 0342820 totalling Kshs. 150,000.
 - v. Paying deposit refunds totalling Kshs. 100,000 to persons who did not make the deposits, without any Supporting Affidavits.
36. He replied on 31st May 2019 denying liability, but noted that there were several financial malpractices.
37. He was further charged on 22nd October 2019, with colluding with other Staff to defraud the Judiciary. He deposited the following sums irregularly: -
- i. Kshs. 220,000 to Edwin Odhiambo Ongaro, PJ 68684.
 - ii. Kshs. 720,000 to Charity Gacheri Gitonga, PJ 51467.
 - iii. Kshs. 770,000 to Laura Muthoni Mukinyo, PJ 68969.
 - iv. Kshs. 240,000 to James Githaiga Wangui, PJ 43896.
 - v. Kshs. 100,000 to George Odongo Ongaro, PJ 69313.
 - vi. Kshs. 270,000 to Joseph Angayo Temu, PJ 31954.
38. These Employees were all suspended and subjected to disciplinary hearing. The Petitioner denied further charges.
39. The 4th Respondent heard the disciplinary case involving the Petitioner's Assistant, one Chari Shama Guyo. It was noted that the Petitioner was negligent in his supervisory role, and that he misappropriated Kshs. 200,000, which was deposited as cash bail, in Criminal Case Number 4 of 2018, Republic v. Hassan Kuno. The Petitioner failed to post the amount in the Judiciary Ledger. He blamed the Assistant, while he himself was in position to complete the process.
40. The Petitioner was invited for hearing on 9th March 2020. He failed to appear. The 4th Respondent deliberated, and was of the view that the Petitioner masterminded the fraud at Maua Law Courts. The full hearing was however deferred to 14th July 2020. He admitted to various malpractices, while denying liability. He shifted blame to colleagues. He was found to have paid deposits through his relatives and friends. The 4th Respondent recommended his dismissal.



41. The findings and recommendations were adopted by the 1st Respondent's Human Resource Management Committee, on 7th December 2020. The decision was approved by the 1st Respondent on 10th December 2020. The letter dismissing the Petitioner issued on 4th January 2021.
42. The Chief Registrar states that the 1st Respondent through the 4th Respondent, established valid reason to justify dismissal of the Petitioner. He admitted there was malpractices. He was largely involved in these malpractices. There was conflict of interest, the Petitioner having paid deposits through his relatives and friends. The only logical conclusion was that the Petitioner was a recipient and beneficiary of the proceeds of crime against the Judiciary.
43. He filed an Appeal on 25th January 2021. He never raised any ground on the jurisdiction of the 2nd -4th Respondents to conduct the disciplinary proceedings. On 28th June 2021 the Human Resource Management Committee considered and disallowed the Appeal. He was informed of the decision through a letter dated 28th June 2021.
44. The 4th Respondent is mandated to handle matters for Staff in grade PLS9, which the Petitioner belonged to, under Section D4 of the Judiciary Human Resource Policies and Procedures Manual. The 4th Respondent is duly recognized in law, as a body that is duly authorized to handle disciplinary matters for the 1st Respondent.
45. The 2nd Respondent states that her Office is authorized under Article 161 of the Constitution to oversee efficient management of the Judiciary and day-to-day operations and administration of human resources in the Judiciary. She is also the Secretary to the 1st Respondent, which constituted the 4th Respondent. It is her mandate to communicate resolutions of the 1st Respondent. She did not dismiss the Petitioner. She communicated the decision of the 1st Respondent, as recommended by the 4th Respondent. Due procedure was followed.
46. It is not true that the Petitioner requested, and was denied the opportunity to cross-examine anyone, or to interrogate any document. No constitutional right was violated. Article 47 of the Constitution, the Fair Administrative Action Act, the Judicial Service Act and the Employment Act, were strictly adhered to.
47. The Chief Registrar urges the Court to dismiss the Petition with costs.
48. Wanyama confirmed that the Directorate of Audit and Risk Management conducted financial audit of the Maua Law Courts, and prepared the Final Audit Report dated 18th April 2019. The Petitioner was at all material times, the Accountant in-charge at Maua Law Courts. The Audit disclosed serious irregularities, including the manner in which deposit refunds were processed by the Petitioner.
49. Review of sample case files, revealed alteration of court fees receipt resulting in loss of revenue in the sum of Kshs. 87,950. The handwriting on the altered receipts was similar to the Petitioner's. The Station collected deposits totalling Kshs. 50,781,392, but only Kshs. 49,437,202 was credited in Judiciary's account, with a shortfall of Kshs. 1,344,190.
50. Further, the Petitioner did not surrender deposits collected using 6 receipts, amounting to Kshs. 150,000. He failed to reconcile revenue collection and banking during the audit period, failing to account for Kshs. 165,293. Deposit refunds must be supported by complete documentation, in accordance with the Judiciary Finance Policy and Procedures Manual. The audit showed refund of deposits was made to persons who did not make the deposits. Some payments in excess of Kshs. 2 million, were made to Judicial Staff, who like the Petitioner were subjected to disciplinary process.



Others paid were close relatives of the Petitioner. No documents were availed to establish whether Judicial Staff had deposited funds, and orders made for them to be refunded such funds.

51. Wanyama handed his report to the Accounting Officer, Judiciary, the 2nd Respondent herein.
52. The Respondents' Submissions are fourfold: the 4th Respondent is a Panel/ Committee of the 1st Respondent envisaged under Sections 2 and 14 of the Judicial Service Act; the 3rd Respondent has jurisdiction to charge, interdict, suspend Judicial Officer and Staff; the 1st Respondent has power to delegate some of its powers to the 3rd and 4th Respondents; and the Respondents' actions were in conformity with the Constitution and the pleaded Statutes.
53. It is submitted that the 4th Respondent draws its jurisdiction from Sections 2, 14 and 32 of the Judicial Service Act, and Section D4 of the Judiciary Human Resources Policies and Procedures Manual.
54. It logically follows that the 3rd Respondent, being the person who oversees the human resource functions of the 1st Respondent, has the mandate to communicate the decisions of the 1st Respondent and its Committees. The 3rd and 4th Respondents are therefore legally empowered to discipline Judicial Officers and Staff, through delegation by the 1st Respondent. The 1st Respondent's power to delegate under Section 14 of the Judicial Service Act, was approved in Nancy Makokha Barasa v. Judicial Service Commission & 9 Others [2012] e-KLR; and, Bryan Mandila Khaemba v. Chief Justice & President of the Supreme Court of Kenya & Another [2019] e-KLR. Delegation is necessary in the day-to-day management of Judicial Service. The decision of the 4th Respondent is subject to the approval of the 1st Respondent, which in this dispute, was given.
55. Hearing was fair and conformed to the requirements of Article 47 of the Constitution. Dismissal was fair and lawful. Valid reason was established in justifying termination. In Kenya Power & Lighting Company v. Aggrey Lukorito Wasike [2017] e-KLR, all an Employer is required to show under Section 43 of the Employment Act, is that the Employer genuinely believed circumstances existed, causing the Employer to terminate the Employee's contract. It is submitted by the Respondents that, in Isabella Linet Odolo v. Judicial Service Commission & 3 Others [2022] e-KLR, similar issues obtained as in current Petition, and the Court returned a finding that procedure was fair and lawful, in conformity with the Judiciary Human Resources Policies and Procedures Manual, and the Employment Act.
56. The issues, as understood by the Court, are whether the Judiciary Human Resource Policies and Procedures Manual is inconsistent with the Judicial Service Act; whether the Respondents had the mandate to discipline the Petitioner; whether termination was executed fairly in accordance with the Constitution and applicable Statutes; whether it was substantively justifiable; and whether the remedies sought are merited.

The Court Finds: -

57. The Petitioner was employed by the Judiciary in 2001, as a Process-Server. He later became an Accountant. He was the Accountant In-Charge at Maua Law Courts in 2018.
58. An audit was carried out by the 1st Respondent's Directorate of Audit and Risk Management, covering the period July 2015 to September 2018. It disclosed various financial irregularities at Maua Law Courts, in which the Petitioner was implicated.
59. He was subsequently required to show cause, suspended, presented with charges, and required to explain his position, before he was taken through a disciplinary hearing, and dismissed on 14th May 2019. He unsuccessfully appealed on 25th January 2021, against the decision to dismiss him.



60. Procedure; The Judiciary Human Resource Policies and Procedure Manual, 2014; and The *Judicial Service Act*. The Manual states in its preamble that it lays down the principles, guidelines and procedures that will ensure the smooth functioning of the Judiciary, in terms of human resource and administration management. It is applicable to all Employees of the Judiciary. It includes Judges, as Employees of the Judiciary, and states that it applies to all Employees, which appears at odds, with the prevailing constitutional position of Judges, as State Officers.
61. It states that it incorporates provisions of the *Constitution* and Statutes governing employer-employee relationships, and shall be read in conjunction with the *Judicial Service Act*.
62. The Manual grants the 1st Respondent an oversight role on its implementation, but states that the responsibility for its implementation, is with the Hon. Chief Justice, and the Hon. Chief Registrar.
63. And again, although the prevailing constitutional position is that Judges are not Employees, the Manual, under appendix B.1 distributes the power of appointment of Employees working in the Judiciary, including Judges and even the Chief Justice. Every State Officer, Judicial Officer and Staff, is characterized as an Employee, governed by the Manual.
64. It indicates that the power to appoint the Chief Justice and other Judges, the Magistrates, Kadhis and Members of Tribunals, is non-delegable. The 1st Respondent may delegate the power of appointment, for Judicial Staff in PLS 10 and above [approved by the 2nd Respondent], and all Staff in PLS 9 and below.
65. Section D of the Manual, governs discipline. It proposes that the disciplinary procedures are based on the *Constitution*, the *Employment Act*, the *Judicial Service Act* and any other relevant Legislation in force.
66. Clause D.4 states that disciplinary matters shall be handled by the following Committees: -
- I. A Committee / Panel constituted by the Judicial Service Commission.
 - II. Human Resource Management Advisory Committee [4th Respondent].
67. The disciplinary procedure provides that where a complaint has been lodged against an Officer, the Chief Registrar [2nd Respondent] will issue a notice to show cause, detailing the nature of the offence, and giving the Officer not less than 14 days from the date of service [to respond]. The Officer's response will be submitted to the Commission for consideration. The Officer will be required to appear before the Commission in person, and may be accompanied by an Advocate.
68. This procedure, under clause D.7.2.2, does not make it clear what the Commission is to do after its consideration. It refers to a report from the Officer's immediate supervisor, without correlating the requirement, with the Officer's appearance in person, before the Commission. The clause suggests that other disciplinary proceedings could have been going on, involving the Officer and his immediate Supervisor, complete with accusations, statement of defence and recommendation on the course of action or punishment. The procedure moves on to interdiction and suspension under clause D.7.3 a mandate exercised by the Hon. Chief Justice. This part of the procedure states that the actions by the Chief Justice, are undertaken to allow for full investigations of gross misconduct.
69. What is the purpose of the procedure in clause D.7.2.2 which precedes D.7.3? Why would the Hon. Chief Justice be interdicting or suspending an Officer, to allow for full investigations, while the Officer has already appeared before the Commission, probably in the company of his Advocate, and the matter considered by the Commission? The Officer has not only appeared before the Commission,



- but has been subjected to disciplinary proceedings by his immediate supervisor, and recommended for punishment. How are these procedures to match the procedure in the 3rd Schedule?
70. The Manual provides for summary dismissal under clause D.8 and Appeal under clause D.9.
 71. Unlike the clause on distribution of power of appointment under appendix B.1, Section D offers no guidance on distribution of disciplinary control. The Manual does not distinguish between Judges, Judicial Officers and Judicial Staff, applying wholesale to Employees of the Judiciary.
 72. The *Judicial Service Act*, is enacted pursuant to Article 172 [1] of the *Constitution* of Kenya. It provides for among other things the mandates of the 1st Respondent, the Chief Justice, and the Chief Registrar. It mandates the 1st Respondent to appoint, receive complaints against, investigate and remove from office, or otherwise discipline Registrars, Magistrates, other Judicial Officers and other Staff of the Judiciary.
 73. The principal functions of the Hon. The Chief Justice, under Section 5 of the *Judicial Service Act* is to give general direction and control over the Judiciary; assign duties to the Judges below him and the Chief Registrar; and deliver an Annual Report to the nation on the state of the Judiciary. The Chief Registrar's functions under Section 8 of the Act, include overall administration and management of the Judiciary; account for money allocated to the Judiciary by Parliament; and take responsibility for efficient management of the day-to-day operations and administration of human resources in the judicial service. The Judicial Service Commission is a body corporate established under Article 171 [1] of the *Constitution*. It can contract, borrow and lend money, and perform such other things or acts necessary for the proper performance of its functions under the *Constitution* or the *Judicial Service Act*, which may be lawfully done or performed by a body corporate.
 74. Section 14 of the *Judicial Service Act*, allows the Commission, subject to the *Constitution*, or other law, to hire such experts or consultants, or delegate such of its functions as are necessary for the day-to-day management of the judicial service to Subcommittees or the Secretariat.
 75. The 2nd Respondent serves as the Secretary to the 1st Respondent. Her functions as the Secretary, are defined under Section 21 of the *Judicial Service Act*, to include custody of the 1st Respondent's records, enforcement of 1st Respondent's decisions, and undertaking duties assigned by the 1st Respondent.
 76. The appointment, discipline and removal of Judicial Officers and Staff is governed by Section 32 of the Act. It requires the 1st Respondent to constitute a Committee or Panel, which shall be gender sensitive, for purposes of disciplining and removing Judicial Officers and Staff. Section 32 is implemented through the 3rd Schedule to the *Judicial Service Act*.
 77. The disciplinary procedure in the Manual, must logically conform to the provisions of the 3rd Schedule.
 78. Under paragraph 15 of the 3rd Schedule, the 1st Respondent delegates certain disciplinary powers to the Hon. Chief Justice. They include the power to interdict, suspend and administer severe reprimand.
 79. Paragraph 16 requires the Chief Justice to interdict an Officer, provided proceedings that may lead to the Officer's dismissal, are being undertaken, or criminal proceedings are being instituted against the Officer.
 80. Paragraph 17 allows the Chief Justice to suspend an Officer who has been convicted of a serious criminal offence, or suspend an Officer against whom proceedings for dismissal have been undertaken, if as a result of those proceedings, he considers that the Officer ought to be dismissed.
 81. Paragraph 25 regulates proceedings for dismissal. It begins with an enquiry by the Chief Justice. If he considers it is necessary to institute disciplinary proceedings against an Officer, on the ground of



misconduct, which if proved, would in his opinion justify dismissal, he shall frame the charge or charges against the officer and shall forward a statement of the said charge or charges, together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the Officer to state in writing should he so desire, before a day to be specified, any ground on which he relies to exculpate himself.

82. If there is no response from the Officer, the Chief Justice shall place the record before the 1st Respondent, who then determines if disciplinary proceedings shall continue.
83. If the 1st Respondent determines that the proceedings shall continue, the 1st Respondent shall appoint a Committee or Panel to hear the Officer. The Committee shall allow the Officer to be represented by an Advocate. The Committee hears the Officer and makes a report, which is placed before the 1st Respondent which determines the actions to be taken against the Officer.
84. The Respondents did not, in the Replying Affidavits of the Chief Registrar and the Director, Audit and Risk Management on record, as well as their Closing Submissions, discuss the disciplinary procedure contained in the 3rd Schedule, and persuade the Court that the procedure in the Manual, is consistent with the 3rd Schedule.
85. The role of the Chief Justice, on discipline and removal of Judicial Officers and Staff, as regulated under the 3rd Schedule, was not highlighted by the Respondents. The 3rd Schedule applies to all Judicial Officers and Staff, and the least the Respondents could have done, is explain to the Court why the Chief Justice had no role whatsoever, in the process leading to dismissal of the Petitioner.
86. It appears to this Court that there are two parallel procedures, on disciplining and removal of Judicial Staff and Officers, as highlighted above. The processes are discordant, with the Manual appearing to cut and paste the delegated powers of the Chief Justice to interdict and suspend, without attempting to sustain progression and consistency, in the disciplinary processes.
87. Whereas the 1st Respondent is allowed to delegate certain disciplinary functions to the Chief Justice, the Court has not been able to find any law which allows the sub-delegation or re-delegation of disciplinary powers from the Chief Justice to other Offices.
88. The 1st Respondent's power to delegate, has been upheld in *Nancy Makokha Barasa v. The Judicial Service Commission & 9 Others* [2012] e-KLR and *Bryan Mandela Khaemba v. The Chief Justice & President of the Supreme Court & Another* [2019] e-KLR, as submitted by the Respondent. The Respondents have however failed to establish that the 1st Respondent delegated its disciplinary functions to the 2nd and 3rd Respondents, or persuade the Court that the functions could be delegated through Section D of the Manual, which appears inconsistent with the *Judicial Service Act*. The Respondents did not submit with any degree of persuasion, on the effect of the Supreme Court of Kenya decision, *Alnashir Popat & 7 Others v. Capital Markets Authority* [2020] e-KLR, which underscored that where a Statute delegates a function, delegation must strictly be complied with.
89. The Chief Registrar has no power to issue notices to show cause, or initiate disciplinary proceedings, against Judicial Officers and Staff, under the *Judicial Service Act*, and in particular the 3rd Schedule. There is no instrument of delegation in favour of the 2nd Respondent. Her letter to show cause to the Petitioner, dated 17th May 2019, and the subsequent letters containing further charges, did not cite any provisions of the *Judicial Service Act*, but cited the Manual and the *Employment Act*, suggesting that in the mind of the Chief Registrar, her Office could act outside the disciplinary procedures provided under the *Judicial Service Act*.



90. The mandate conferred on the Chief Registrar under Section 8 of the *Judicial Service Act*, in particular the responsibility for overall administration and management of the Judiciary and responsibility for the efficient management of the day-to-day operations and administration of human resources in the judicial service, does not extend to initiation of disciplinary proceedings. The 3rd Schedule would have prescribed a disciplinary procedure initiated by the Chief Registrar against an Officer or Staff, if Parliament intended that the Chief Registrar exercises such a mandate.
91. The Court finds resonance in the decisions invoked by the Petitioner, *Simon Rotich Ruto v. The Judicial Service Commission & Another* [2019] e-KLR; *LMN v. The Judicial Service Commission & Another* [2019] e-KLR; and *John Muikiria Waweru v. The Judicial Service Commission* [2020] e-KLR, which restated that without establishing delegation from the delegator, 1st Respondent herein, on disciplinary control of Judicial Officers and Staff, an Officer alleging to exercise such control, acts in usurpation of the delegated power of the Chief Justice.
92. Delegation of powers is essential in large Organizations such as the Judiciary. Although decisional power is frequently concentrated in one centre, the volume of decisions to be made is too large, to be left to one centre of power. Power therefore needs to be dispersed, through delegation.
93. The 1st Respondent is within its mandate to delegate, as it has done through the *Judicial Service Act*, to the Chief Justice, on disciplining of Judicial Officers and Staff. Unless it can be shown that the governing Statute is capable of any other interpretation, power must be exercised by its repository, under the maxim *delegatus non potest delegare*. This is the principle in the Alnashir Popat decision cited above. The 1st Respondent has expressly delegated disciplinary power, to the Chief Justice. There is no indication in the *Judicial Service Act*, in its language, scope or object, that this power can be sub-delegated or re-delegated. The Court has not read any express or implied power to delegate disciplinary power to other centres, beyond that which has been delegated to the Hon. Chief Justice under the *Judicial Service Act*. The Manual is not capable of amending or repealing, the *Judicial Service Act*.
94. The 3rd Respondent is an Officer serving under the 2nd Respondent. If the 2nd Respondent has no constitutional and/ or statutory mandate to discipline Officers, it follows that the 3rd Respondent has no such mandate. The Respondents incorrectly submit, at paragraph 22 [b] of their Submissions dated 17th April 2023, that the 3rd Respondent, because he is the Director of Human Resource and Administration, logically has jurisdiction to charge, interdict and suspend Judicial Officers and Staff. There is no express, implicit or delegated power under the law, allowing the 3rd Respondent to discipline Judicial Officers and Staff.
95. There is a significant risk, that in alleging to confer multiple Administrative Staff the disciplinary control over Judicial Officers and Staff, the Manual abrogates the delegated disciplinary control conferred on the Chief Justice by the *Judicial Service Act*. The 4th Respondent is an Employee of the 1st Respondent, and it is doubtful that he is indeed properly brought to this Petition as a Respondent. He was not an Employer of the Petitioner, he did not have any disciplinary control over the Petitioner, and cannot be called upon to remedy any employment violation against the Petitioner, arising from the employer-employee relationship existing between the 1st Respondent and the Petitioner.
96. The lines of disciplinary control of Judicial Officers and Staff must remain clear, as drawn under the *Judicial Service Act*. The power of the 1st Respondent to investigate and charge, hear and make findings, and make final disposition and resolution, ought not to be blurred through delegation, sub-delegation or re-delegation. The disciplinary system created under the *Judicial Service Act*, ought to be sustained, in its unitary nature.



97. The 2nd and 3rd Respondents did not establish that they had disciplinary power over the Petitioner. They did not point the Court to any Article of the Constitution or provision in the Judicial Service Act, granting to them such power, or even show any delegation, sub-delegation or re-delegation of powers, from those upon whom disciplinary control of Judicial Officers and Staff, is reposed. They instead, entirely relied on the Human Resources Policies and Procedures Manual, an instrument which the Court has concluded, is inconsistent with the Judicial Service Act.
98. The 4th Respondent is a Committee with a place in the Judicial Service Act. It is a Committee contemplated under Section 19 [4] of the Judicial Service Act. The 1st Respondent is mandated to constitute such Committees or Panels for the effective discharge of its mandate.
99. Section 32 of the Act requires the 1st Respondent to constitute a Committee or Panel, for purposes of appointment, discipline and removal of Judicial Officers and Staff. The procedure governing the conduct of this Committee or Panel, is set out in the 3rd Schedule.
100. The Committee exercises its mandate, under paragraph 25 of the 3rd Schedule. There is no suggestion that it will deal with disciplinary matters, originated by any other person, other than the Hon. Chief Justice.
101. The procedure involves: -
- a. Chief Justice inquires, and determines if an Officer should face disciplinary proceedings.
 - b. If in the affirmative, the Chief Justice will draw charges, and forward the charge and details of the offence to the Officer.
 - c. The Officer is required to furnish a reply within a specified period.
 - d. If there is no reply, or in the opinion of the Chief Justice the reply is unsatisfactory, the file is forwarded by the Chief Justice to his delegator, the Commission, which determines if disciplinary proceedings should continue.
 - e. If in the view of the Commission Proceedings should continue, the Commission appoints a Committee or Panel, to hear the Officer.
 - f. The Committee or Panel issues a notice of hearing, not less than 14 days to the Officer.
 - g. The Committee or Panel hears the Officer, and then forwards its Report to the Commission.
 - h. The Committee or Panel does not make any recommendation, regarding the form of punishment to be inflicted on the Officer.
 - i. The Commission determines if the matter should be reinvestigated, whether punishment if any should be inflicted, or the Officer retired in the public interest.
102. The Committee or Panel under Section 32 of the Act and paragraph 25 of the 3rd Schedule, can only take cognizance of a disciplinary matter originated by the Chief Justice.
103. A record of disciplinary proceedings against the Petitioner, does not disclose that the matter was placed before the 4th Respondent, following the procedure under paragraph 25 of the 3rd Schedule.
104. The 3rd Schedule does not segregate Judicial Officers and Staff under disciplinary proceedings, on the basis of their job grades. It applies to all Judicial Officers and Staff. The 3rd Schedule cannot be amended or repealed, through a Human Resource Instrument.



105. The 4th Respondent recommended on 14th July 2020, that the Petitioner is dismissed from service with effect from 14th May 2019, for gross misconduct.
106. Paragraph 25 [9] [c] of the 3rd Schedule states that the Committee or Panel, shall not make any recommendation regarding the form of punishment to be inflicted on the Officer.
107. The mandate of the 4th Respondent to hear disciplinary cases involving Judicial Officers and Staff, cannot however be doubted. It is a Committee of the 1st Respondent duly constituted under the Judicial Service Act. It heard the Petitioner. It did not however, receive the charges against the Petitioner, in accordance with the law. Its recommendation, that the Petitioner is dismissed for gross misconduct, was made in excess of its mandate.
108. The Court is sceptical about the capacity of the 4th Respondent, like that of the 3rd Respondent, to be sued. The 4th Respondent as observed earlier, is an Employee of the 1st Respondent. The 4th Respondent is not a corporate body. It does not have the capacity to sue, to be sued, to contract or to hold property. It is unincorporated. It is merely a Committee of the 1st Respondent. The 1st Respondent alone, is the corporate body, with the power to purchase or otherwise acquire, hold, charge and dispose of movable or immovable property; borrow and lend money; enter into contracts; and do or perform all such other things for the proper performance of its functions under the Constitution and the Judicial Service Act. The 1st Respondent is the corporate body against whom litigation should be brought, not its Committees.
109. The 3rd and 4th Respondents were not in any employment contract with the Petitioner. They cannot bear employment liability over an employer-employee relationship they were not privy to. The Petitioner ought to have been contented with suing the 1st Respondent and its Secretary, and Judiciary Chief Administrator, the 2nd Respondent. The Petition against the 3rd and 4th Respondents is declined.
110. The 1st Respondent does not seem to be unaware about the problems occasioned to Judicial Officers and Staff, through its adoption of the disciplinary procedures contained in the Manual, parallel with the procedure in the 3rd Schedule. The Petitioner submitted, without any response from the Respondents, that in its publication titled, “ The J.S.C Report Submitted to Kenya Magistrates and Judges Association, 2018.” Page 11 and 12, the 1st Respondent states: -
- “Based on the delegation of powers, it is important to note that the Commission [JSC] only deals with disciplinary cases escalated by the Chief Justice to the Commission [JSC] after he has commenced disciplinary proceedings and conducted preliminary investigations, and is of the opinion that the misconduct alleged, if proved, would be serious enough to warrant dismissal, the retirement of the Officer in the public interest.”
111. Officers and Staff confronted with disciplinary matters need to know from the inception, what procedures will apply; what to expect; which officers have disciplinary control over them; how investigation and charging will take place; and how their matters will be determined. This is not possible under the current disciplinary system for Officers and Staff, of the Judiciary
112. Procedure was unfair and unlawful.
113. Validity of Reason. The Petitioner was the Accountant at Maua Law Courts. He was in-charge of accounts. Very grave financial improprieties, took place at Maua Law Courts, while the Petitioner was in-charge.
114. The Audit Reports for July 2015 to September 2018, unearthed the financial improprieties, and placed the Petitioner in the middle of the sleaze, which resulted in colossal loss of funds to the Judiciary. The



Reports were explained in clear language, by Director, Audit & Risk Management Ronald Wafula Wanyama, in his Affidavit. The Reports are indicated to be Final Reports, and there is no merit to the Petitioner's position, that the 1st Respondent relied on Draft Audit Reports, in dismissing him from service.

115. The Petitioner was confirmed to have fraudulently altered revenue receipts occasioning the Judiciary loss; he failed to reconcile revenue collection and banking; he was involved in under banking; he failed to surrender deposits collected using 6 receipts; and paid deposit refunds to persons without supporting affidavits or other documents.
116. He colluded with other Judicial Staff, to deposit funds in their names, without accounting documents. All the other Staff were taken through disciplinary proceedings. He failed to render supervision of his Assistant Guyo, leading to further loss of revenue to the Judiciary. Appallingly, the Petitioner involved his relatives in payment of deposits. This was confirmed in the Audit Reports.
117. From the time he received the charges, the Petitioner admitted these financial improprieties took place, but attempted to pass the buck to other Staff and Officers, including his Station head. He blamed everyone except himself. He told the Disciplinary Committee that he could not adequately provide accounting documents, because of time constraints. He blamed other Staff, without naming any, for falsification of receipts. The persons he paid deposits to were not all his relatives, he stated. He did not think there was conflict of interest, in engaging his kin and kith. He had limited office space at Maua Law Courts, and documents could easily be moved from one office to another.
118. The above responses by the Petitioner, to very grave accusation of financial impropriety, bordered on the frivolous. The Petitioner as an Accountant by profession, ought to have answered to the accusations through accounting documents and hard monetary figures. The Claimant did not dispute that financial irregularities took place, leading to massive loss sustained by the Judiciary. He only protested that he was not solely to blame. The Court is satisfied that in light of this admission by the Claimant, and considering that he was the Accountant In-Charge, the Respondent had valid reason to terminate the Claimant's contract, under Section 43 of the *Employment Act*.
119. The 1st Respondent established valid reason, in justifying termination of the Petitioner's contract, as required under Sections 43 and 47[5] of the *Employment Act*.
120. Remedies. The 3rd and 4th Respondents are Employee and Committee of the 1st Respondent respectively. They do not have the capacity to sue or be sued in their own names. They did not have a contract of employment with the Petitioner, and cannot be called upon to meet any employment liability. The Petition against the 3rd and 4th Respondent is declined.
121. It is declared that dismissal of the Petitioner from Judicial Service was procedurally unfair and unlawful.
122. It is declared that the disciplinary procedure under the Judiciary Human Resource Policies and Procedures Manual, is inconsistent with the disciplinary procedure applicable to Judicial Officers and Judicial Staff, under the *Judicial Service Act*.
123. The Petitioner was shown throughout the Audit Reports, to have engaged in fraud and abuse of his accounting office. His name loomed large, at every turn, in the intricate web of fraudulent activities at Maua Law Courts. The Judiciary lost huge amounts of public funds, owing to the Petitioner's abuse of office, trust and confidence reposed in him. He was in an egregious conspiracy, drawing in his friends and relatives, which resulted in financial loss to the Judiciary. The substantial economic harm inflicted on the Judiciary by the Petitioner, by far outweighs the procedural harm suffered by the Petitioner. The Court does not buy his argument that, where procedure is fundamentally flawed,



proceedings leading to the disciplinary sanction must be declared null and void, with the result that the Petitioner is reinstated or compensated. The Court must consider the gravity of the employment offence, and whether the Petitioner admitted to any extent, that the offence was committed, and whether the Judiciary sustained monetary loss. The mandate of the Disciplinary Committee has been affirmed, notwithstanding that there were flaws, in the manner the Committee took cognizance of the disciplinary hearing. The Petitioner did not dispute that the Judiciary was massively defrauded, at the Maua Law Courts, under his watch. His defence was that he was not solely responsible. In remedying employment wrongs, the *Employment Act* binds the Court to examine holistically, the role of the Employee, in the circumstances leading to termination of the contract of employment. There is no justification for the Court to exercise its discretion in favour of the Petitioner, by granting any form of damages.

124. No order on the costs.

It is ordered: -

- a. The Petition against the 3rd and 4th Respondents is declined.
- b. It is declared that dismissal of the Petitioner from Judicial Service was procedurally unfair and unlawful.
- c. It is declared that the disciplinary procedure, under the Judiciary Human Resource Policies and Procedures Manual, is inconsistent with the disciplinary procedure applicable to Judicial Officers and Staff, under the *Judicial Service Act*.
- d. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF JUNE, 2023.

JAMES RIKA

JUDGE

