



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cheruiyot v Judicial Service Commission & another (Petition 2 of 2021)  
[2023] KEELRC 2282 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2282 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
PETITION 2 OF 2021  
DN NDERITU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**ROBERT CHERUIYOT ..... PETITIONER**

**AND**

**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF REGISTRAR OF THE JUDICIARY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. The Petitioner through Mongeri & Co Advocates commenced these proceedings by way of a petition dated 24<sup>th</sup> November, 2022 filed in court on 25<sup>th</sup> November, 2022 wherein he prays for –
  - a. A declaration that the act of the Respondents in instituting and conducting parallel proceedings based on the same issues that were determined in the Anti Corruption Case Number 5 of 2015 and appeal number 3 of 2017 were in breach of the Petitioner’s Constitutional Rights under Articles 27(1), (2) (3), 28, 41 & 50 of the Constitution and the same is null and void for all intent and purposes.
  - b. A declaration that the disciplinary proceedings conducted by the Respondents as against the Petitioner on 25<sup>th</sup> August, 2020 and the eventual dismissal of the Petitioner from service were disproportionate, unfair, lacked valid reason and therefore null and void.
  - c. An order of reinstatement of the Petitioner back to Judicial Service without loss of benefits.
  - d. An order directing the respondents to pay the petitioner all the withheld salary since 4<sup>th</sup> September 2015 when the petitioner was interdicted.
  - e. Damage for unlawful dismissal.



- f. Cost of the Petition.
2. The petition is said to be anchored on Articles 22, 23, 27, 28, 40, 47, 48, and 50 of the Constitution.
3. The petition is accompanied with a supporting affidavit sworn by the Petitioner on even date with several annexures thereto.
4. The facts and the law relied upon are set out in the body of the petition.
5. Upon service the Respondents entered appearance through G & A Advocates LLP on 9<sup>th</sup> March, 2022 and on 8<sup>th</sup> April, 2022 filed a joint replying affidavit sworn by Peter Bunde on 9<sup>th</sup> March, 2022 with several annexures thereto.
6. When the matter came up in court for directions on 31<sup>st</sup> March, 2022 it was by consent of counsel for both parties agreed that the petition be heard by way of viva voce evidence in open court.
7. On 18<sup>th</sup> July, 2022 the Petitioner testified and closed his case. On the same day the Respondents' case was also heard and closed. Peter Bunde testified for and on behalf of both the Respondents. It was then agreed and directed by court that counsel for both parties address and sum up their respective client's case by way of written submissions. Miss Moenga for the Petitioner filed her written submissions on 21<sup>st</sup> July, 2022 while Mr. Mwangi for the Respondent filed on 17<sup>th</sup> October, 2022.

## II. The Petitioner's Case

8. The Petitioner's case is based on the filed pleadings, his oral and documentary evidence tendered, and the written submissions by his counsel and the same is summarized as hereunder.
9. The Petitioner was engaged by the 1<sup>st</sup> Respondent, a constitutional commission, as a storekeeper II as per a letter of offer dated 26<sup>th</sup> November, 2012 on the terms and conditions stipulated therein. He was confirmed in that position vide a letter dated 15<sup>th</sup> November, 2016 with effect from 3<sup>rd</sup> December, 2012, being the date that he was placed on probation.
10. The 2<sup>nd</sup> Respondent is the Chief Registrar of the Judiciary and the Secretary to the 1<sup>st</sup> Respondent.
11. On 20<sup>th</sup> August, 2015 while serving at Kericho Law Courts the Petitioner was arrested by officers from Ethics and Anti-corruption Commission (EACC) on allegations that he had engaged in corrupt and unethical conduct which amounted to crimes under the Anti-corruption and Economic Crimes Act (ACECA). Subsequently, the Petitioner was arraigned in the Chief Magistrate's Court at Nakuru on 3<sup>rd</sup> September, 2015 in Criminal Case No 5 of 2015, jointly with another person, charged with various counts of alleged corrupt criminal conduct, including solicitation and receiving a bribe in the sum of Kshs 20,000/=.
12. Vide a letter dated 4<sup>th</sup> September, 2015 the Petitioner was interdicted on half pay and ordered to be reporting to the Head of Station, Kericho Law Courts, every Friday until further notice. Alongside the letter of suspension, the Petitioner was served with a show-cause letter of even date requiring him to respond thereto within 21 days. For clarity the said show-cause letter is reproduced –

PJ 59839 September 4, 2015

Robert Cheuiyot

(Store Keeper 1)

Thro'

The Chief Magistrate



Kericho Law Courts

Kericho

Dear Robert,

RE: Charge

That on 27<sup>th</sup> July and 29<sup>th</sup> August, 2015 at the Kericho Law Courts, as a Court Interpreter, you corruptly solicited for a benefit of Kshs 20,000 from Wilson Yegon, as an inducement so as to facilitate awarding of a favourable penalty in Kericho case file number 3140 of 2014 where the said Wilson Yegon was an accused person.

And that further to this, on 20<sup>th</sup> August, 2015 at the Kericho Law courts, as a Court Interpreter, you corruptly received for a benefit of Kshs 20,000 from Wilson Yegon, as an Inducement so as to facilitate awarding of a favourable penalty in a Kericho case file number 3140 of 2014 where the said Wilson Yegon was an accused person.

This is contrary to Section 39(a) as read with Section 48(1) of the Anti-Corruption and Economic Crime Act, No 3 of 2003.

Therefore, Take Notice that you are required to give a written response to the charge.

Yours Sincerely

Signed

Hon. Dr. Willy Mutunga, D.JUR. SC. EGH, SEGH

Chief Justice/President Of The Supreme Court

CC: Chief Registrar of the Judiciary The Ag. Director(HR &ADM)

Supreme Court Supreme Court,

Nairobi Nairobi

13. The Petitioner responded to the show-cause letter in his letter of 18<sup>th</sup> September, 2015 in which he denied the charge against him expressing his readiness and willingness to prove his innocence in the criminal court.
14. After a full hearing, the Petitioner was convicted of some of the offences and acquitted of others on 13<sup>th</sup> January, 2017. Consequently, the Petitioner was suspended from duty vide a letter dated 14<sup>th</sup> March, 2017 with effect from the date of the conviction.
15. However, the Petitioner lodged an appeal against the conviction in the High Court at Nakuru in Criminal Appeal No 3 of 2017 and in a judgment delivered on 26<sup>th</sup> November, 2019 the court (Ngugi J as he was then) set aside the conviction and sentence against the Petitioner and ordered a retrial. The orders by the court were based on the finding that the investigations carried out by the EACC on which the charges were founded were null and void as the said public body was not properly and lawfully constituted.
16. Subsequently, the Petitioner was recharged with the same offences in Nakuru CMC Criminal case No 4 of 2019 on 29<sup>th</sup> November, 2019. However, the Petitioner has posited that he did not take plea in the trial and as such he was not charged. On 27<sup>th</sup> May, 2020 the charges against the accused were dropped under Section 87(a) of the [Criminal Procedure Code](#) (CPC).



17. By way of a letter dated 6<sup>th</sup> August, 2020 the Petitioner was invited for a virtual disciplinary hearing. The said letter stated as follows –

PJ No 59839 The Judiciary August 6, 2020

Robert Cheruiyot – PJ 59839

Supply Chain Management Assistant

PO Box 69

Kericho

Tel: 0723 346 282

Dear Robert,

Invitation For Disciplinary Hearing/interview

Reference is made to our letters dated 4<sup>th</sup> September, 2015 and 14<sup>th</sup> March, 2017 and your responses thereof.

This is to inform you that, you have been invited for a virtual disciplinary hearing/interview. The disciplinary hearing/interview is scheduled for Tuesday, 25<sup>th</sup> August 2020 at 8.30 a.m. and particulars of the charge(s) were communicated to you in the above mentioned letters. A link for joining the interview will be sent to you and your representative, if any.

You are advised to scan and forward all supporting documents that you may wish to rely on during the hearing, via email [directorhrmd@court.go.ke](mailto:directorhrmd@court.go.ke) at least three(3) days before the hearing date.

You are also at liberty to have a witness or any other representative of your choice who must be a Judicial Staff to support you on the matter.

Kindly acknowledge receipt and confirm your availability to attend the hearing and if, you will have a witness or representative of your choice. Your confirmation should be made at least three (3) days before the date of interview.

18. The Petitioner was dismissed from employment vide a letter dated 4<sup>th</sup> January, 2021 which stated as follows –

Ref: No Date: 4<sup>th</sup> January, 2021

Robert Cheruiyot – PJ 59839

Supply Chain Management Assistant

PO Box 79797-00200

Nairobi

Dear Cheruiyot,

Dismissal From The Judicial Service

Reference is made to the show cause and suspension letters dated 4<sup>th</sup> September, 2015 and 14<sup>th</sup> March 2017 respectively, your response dated 18<sup>th</sup> September 2015 and the disciplinary hearing you attended on 25<sup>th</sup> August, 2020.



This is to convey the Judicial Service Commission's decision of its meeting held on 10<sup>th</sup> December, 2020 that you be Summarily Dismissed from the service on account of Gross Misconduct. This is in relation to corruptly soliciting for and receiving a bribe of Kshs 20,000.00 as an inducement to facilitate awarding of favourable penalty in Kericho Criminal Case No 3140 of 2014. The dismissal is with effect from 4<sup>th</sup> September 2015, being the date you were interdicted from duty.

In case you are not satisfied with this decision, you have a right of appeal to the Commission within six(6) weeks from the date of this letter.

You have a right of claim to your pension under *Retirement Benefits Act*.

You are hereby requested to surrender any Judiciary property in your possession including your Medical Insurance Card and those of your dependents to the Director, Human Resource Management & Development; Supreme Court Building – Nairobi.

Enclosed herewith, please find Forms normally completed on leaving the Judicial Service for your necessary action. You are expected to return the Forms to this Office for our retention.

- i. Declaration of Income, Assets and Liabilities Form – JSC 2b.
- ii. Clearance Form.
- iii. Judicial Service Staff Superannuation (Defined Benefits) Scheme Form.
- iv. *Official Secrets Act* Form.

Your faithfully

Anne A .amadi, Cbs

Secretary,

Judicial Service Commission

Copy to: Registrar, Judicial Service Commission

Reinsurance Plaza, Podium Floor

Nairobi

Director, Human Resource Management & Development

Supreme Court Building

Nairobi

Head of Station

Kericho Law Courts

PO Box 69

Kericho

Advance copy of Email to: rcheruiyot91@yahoo.com

19. The Petitioner appealed against the dismissal through a letter dated 15<sup>th</sup> February, 2021 on several grounds among them that he remained innocent of the charges against him in view of the fit of the criminal charges as enumerated above. He decried the unfair and unlawful dismissal which had been



backdated to 4<sup>th</sup> September, 2015. He viewed the retroactive dismissal as solely intended to deny him accrued benefits during his lengthy suspension.

20. In his testimony in court the Petitioner testified in line with the foregoing pleadings and supporting affidavit and produced as exhibits the documents mentioned in the foregoing paragraphs. He stated that he has not been able to locate another job since the dismissal.
21. He testified that after the High Court ordered for his retrial he was not charged and did not take plea and as such there was no case against him capable of being withdrawn as ordered by the retrial court.
22. He stated that although he attended the virtual disciplinary hearing he was not served with any documents, reports, or records that the Respondents were to rely on during the hearing or in making their decision; he has not been served with the minutes of the said meeting; and that he was not informed of the outcome of the appeal he filed against the dismissal.
23. Further, the Petitioner stated that he is not aware of any appeal against the decision of the High Court or that of the retrial court that set him free.
24. It is on the basis of the foregoing that the Petitioner has prayed that this court finds in his favour as pleaded in the petition. The submissions by his counsel shall be considered alongside those of counsel for the Respondent in the succeeding parts of this judgment.

### **III. The Respondents' Case**

25. The Respondents' case is entailed in the replying affidavit, the oral and documentary evidence adduced through RW1, and the written submissions by their joint counsel.
26. Except in few aspects, the factual foundations as presented by the Petitioner and analyzed in the foregoing part of this judgment are not disputed. For this reason, there is no need for redetailing the facts as presented by the Respondents through the said joint witness as it would amount to reproducing what has already been stated in the foregoing part of this judgment.
27. However, it is important to isolate the following factual issues on which the Respondents disagree with the Petitioner. The Respondents insist that the Petitioner was afforded both substantive and procedural fairness culminating in his dismissal; that the Respondent gathered evidence against the Petitioner based on the criminal trial; that the Petitioner was not acquitted of the criminal charges and can be prosecuted again; that the Respondents had genuine and reasonable grounds for taking disciplinary action against the Petitioner and even for dismissing him; and that the Petitioner was informed of the outcome of his appeal against the dismissal.
28. In his oral testimony in court RW1 reiterated the foregoing dispositions as pleaded and produced as exhibits documents attached to the replying affidavit. He stated that the Respondents relied on the evidence and the conviction in the criminal case in finding and concluding that the Petitioner was in gross misconduct. But in the same breath he stated that the disciplinary hearing and process was independent of the criminal proceedings against the Petitioner. He further testified that the disciplinary process was fair, efficient, and expeditious.
29. In cross-examination he alleged that the Respondents relied on documents and records that were in possession and knowledge of the Petitioner based on the criminal trial and that no witnesses were called by either side during the disciplinary hearing. He admitted that the charges against the Petitioner in the disciplinary hearing were the same as those that he had faced in the criminal trial.
30. He stated that the disciplinary hearing was handled by a committee formed by the Respondent based in the human resources department and that he was a member of that committee. He stated that the



said committee after the disciplinary hearing forwarded its report to the Respondents on a date that he could not establish. He stated that the committee recommended that the Petitioner be dismissed. He conceded that the Respondents had not availed a copy of the minutes of the disciplinary hearing by the committee and the letter forwarding its recommendation to the Respondents. He also admitted that no records were availed in regard to the appeal by the Petitioner on the dismissal including the proceedings, minutes, and the decision. He clarified that the Respondents were not bound by the decision of the committee.

31. It is on the basis of the foregoing that the Respondents are asking this court to dismiss the petition. The submissions by their counsel shall be considered alongside those by the counsel for the Petitioner in the succeeding parts of this judgment.

#### **IV. Issues For Determination**

32. The pleadings, the oral and documentary evidence by the parties have been ventilated and summarized above. The court has also gone through the able submissions by counsel for the parties. On the one hand counsel for the Petitioner has identified the following issues for determination –
  1. Whether the Petitioner’s right to a fair hearing were violated by the Respondents when the respondents dismissed him over charges that he had been acquitted of and others which were withdrawn in the criminal case.
  2. Whether the dismissal of the Petitioner from service was disproportionate, unfair, lacked valid reason and therefore null and void.
  3. Whether the petitioner was entitled to the orders sought.
33. On the other hand, counsel for the Respondents has identified the following issues for determination –
  - a. Whether the Court should apply the doctrine of Constitutional avoidance:
  - b. Whether Petitioner’s dismissal from employment was based on a valid and justifiable reason;
  - c. Whether the procedure was followed prior to the decision to terminate the Petitioner’s employment.
  - d. Whether the Petitioner has successfully impugned the disciplinary process.
  - e. Whether the Petitioner is entitled to the reliefs sought.
34. In the considered view of this court the following issues commend themselves to this court for determination –
  - a. Is this matter properly before the court filed as a constitutional petition or should the same have been filed as an ordinary cause?
  - b. Was the dismissal of the Petitioner wrongful, unfair, and unlawful?
  - c. If (b) above is in the affirmative, is the Petitioner entitled to the reliefs sought?
  - d. Costs.

#### **V. Constitutional Petition Or ordinary Cause?**

35. Counsel for the Respondents has urged this court to apply the doctrine of constitutional avoidance and consider this as an ordinary cause rather than one that raises constitutional issues. Counsel has submitted that the issues raised in the petition can and should be adequately addressed in the realm



- of the *Employment Act* (the Act) and the *Employment and Labour Relations Court Act* (ELRC Act) without resorting to the constitutional clauses cited in the petition. Counsel submits that his argument is fortified by the fact that the petition proceeded for hearing via viva voce evidence, which is axiomatic of an ordinary cause, as opposed to the traditional manner of hearing and disposal of constitutional petitions which is usually through affidavits and written submissions. Counsel for the Petitioner has not tackled this issue in her written submissions.
36. Counsel for the Respondents has not urged this court to dismiss or strike out the petition for being presented as a constitutional petition rather than a cause, but rather urges the court to apply the doctrine of constitutional avoidance and tackle and treat the petition as an ordinary cause. Counsel has at length cited *KKB v SCM & 5 others* (2022) eKLR.
  37. Of course, the *Constitution* is the grund norm of all laws and any law inconsistent with the *Constitution* is unconstitutional to the extent of the inconsistency— see supremacy of the *Constitution* in Article 2.
  38. However, the gist of a cause is found in the prayers or reliefs sought for. Although the petition is purported to be grounded on various Articles of the *Constitution* to wit 19 -27, 47 -50, and 171 & 172, there are no specific allegations and proof on how those specific constitutional provisions were threatened, breached, or violated and there are no prayers specifically relating to violation, threat, or breach of those constitutional provisions, except for an order of declaration of violation of the alleged constitutional provisions. Prayer (a) is in regard to breach of Articles 27, 28, 41, and 50. Constitutional violations, threat, or breach need to be specifically pleaded and proved – See *Anarita Karimi Njeru v Republic* (No 1) (1979) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR
  39. There is no specific prayer for award of damages based on the alleged breach of the specific constitutional provisions cited above. The damages pleaded for are those for the unlawful dismissal which can be determined under the various applicable statutes. In the circumstances, although the Petitioner opted to file his claim as a constitutional petition, the substance of the same and the prayers sought can and shall be considered under the statutory provisions that are capable of taking care of the cause as presented. There are no constitutional issues raised by the Petitioner to qualify this matter as a constitutional matter rather than a statutory one.
  40. However, this court shall consider the substance rather than the form of this matter. It has now become common for litigants to present their matters as constitutional petitions when in fact they should adequately be taken care of under various statutory provisions. Be that as it may, the Respondents fully participated in the proceedings and no prejudice has been suffered by the Respondents for the matter being presented as a constitutional petition rather than an ordinary cause.
  41. But it must be recommended to litigants and counsel that it is important to present a matter in the best possible forum, style, and manner to enable the parties and the court to fully appreciate the nature of the same and to facilitate a fair, just, expeditious, and efficient disposal of the same based on the actual issues in controversy and contest. It is correct that constitutional petitions, except in special circumstances, are heard by way of affidavits evidence as opposed to viva voce evidence. This matter proceeded by the latter method because the issues raised are truly of an ordinary cause as opposed to a constitutional petition. Of course, there is urgency in the matter for the expeditious disposal of the same in view of the orders sought, including an order of reinstatement.
  42. The court shall therefore proceed on the basis of the above understanding that this is an ordinary cause but presented as a constitutional petition as no prejudice has been occasioned to the Respondents who have fully participated in the proceedings. For that reason, the court shall be more concerned with substance rather than the form.



## VI. The Dismissal

43. The facts, circumstances, and events leading and culminating in the dismissal of the Petitioner are really not in contest. The Petitioner was engaged by the 1<sup>st</sup> Respondent as a store keeper II on 26<sup>th</sup> November, 2012 and as of 20<sup>th</sup> August, 2015 he was based at Kericho Law Courts in the same capacity. He was on 20<sup>th</sup> August, 2015 arrested by officers from EACC and charged as explained in an earlier part of this judgment. Of course, the charges in court did not succeed and he was discharged which in law is not an acquittal.
44. The other undisputed fact is that the Petitioner was dismissed based on what the Respondents viewed as gross misconduct based on the very criminal charges that were filed against the Petitioner by the EACC of which he was ultimately discharged. Further, it is not disputed that the Petitioner was at first interdicted upon being charged in court vide a letter dated 4<sup>th</sup> September, 2015, then suspended upon conviction vide a letter dated 14<sup>th</sup> March, 2017, and finally dismissed vide a letter dated 4<sup>th</sup> January, 2021.
45. In the most relevant part of the dismissal letter, the Respondents addressed the Petitioner as follows – “This is to convey the Judicial Service Commission’s decision of its meeting held on 10<sup>th</sup> December, 2020 that you be summarily dismissed from the service on account of Gross Misconduct. This is in relation to corruptly soliciting for and receiving a bribe of Kshs 20,000.00 as an inducement to facilitate awarding a favourable penalty in Kericho Criminal Case No 3140 of 2014. The dismissal is with effect from 4<sup>th</sup> September 2015 being the date you were interdicted from duty”. (Emphasis added).
46. The letters of interdiction and suspension have been reproduced verbatim in another part of this judgment and what is not in dispute is that the Petitioner was interdicted, suspended, and dismissed purely and solely based on the criminal charges that he faced in the criminal court. It is not in dispute that as at the time the Claimant was dismissed vide the letter dated 4<sup>th</sup> January, 2021, and even when the decision to dismiss him was made by the Respondents in the meeting of 10<sup>th</sup> December, 2020, the criminal charges against the Petitioner had already been withdrawn on 27<sup>th</sup> May, 2020. In fact, even at the time of the disciplinary hearing on 25<sup>th</sup> August, 2020, the criminal charges against the Petitioner had terminated without a conviction.
47. Further, the High Court in its judgment had clearly set aside the conviction and the sentence against the Petitioner based on the fact and evidence that the EACC was not properly constituted as at the time of investigating and preferring charges against the Petitioner. The court found that the charges were null and void and ordered for a retrial. The retrial did not take off and the Petitioner alleges that he did not even take the plea. The matter was ultimately withdrawn under Section 87(a) of the Criminal Procedure Code and the Petitioner has not been recharged to this day. If the investigations by the EACC were a nullity, and the High Court found and ordered so, and no other legal and lawful investigations were carried out, the Petitioner then remains innocent of the alleged charges.
48. Consequently, if the Respondents dismissed the Petitioner on the basis of the same investigations and charges that were declared a nullity by the High Court, they ought to have carried out independent investigations and charged the Petitioner, given him a fair and procedural hearing, to lawfully arrive at the decision to dismiss him.
49. The law is now settled on what constitutes substantive and procedural fairness. An employer has to have a lawful reason before initiating disciplinary process leading to termination, dismissal, or any other disciplinary action based on the provisions of Sections 40 (in case of redundancy), 43, 44, 45, 46, and 47 of the Employment Act (the Act). In particular Section 43(2) of the Act provides as follows –



- “The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.
50. In terms of the procedure that an employer shall apply before, during, and after the termination or dismissal the same has to be aligned with the provisions of Sections 35, 36, 38, 40 (in case of redundancy), 41, 45, and 48 of the Act.
  51. The two components of lawful substance and procedure described above are cumulative and for a termination or dismissal to be deemed fair and lawful an employer must comply with and apply both – See *Mary Chemweno v Kenya Pipeline Company Limited* (2014) eKLR, *Walter Ogal Anaro v Teachers Service Commission* (2013) eKLR, and *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR
  52. It is on the basis of the foregoing that the conduct of the Respondents culminating in the dismissal of the Petitioner must be viewed, scaled, weighted, and judged. The reason(s) for dismissal of the Petitioner have been reproduced above as mined from the letter of dismissal. The same are a replica of the criminal charges that the Petitioner faced in court. It has also been noted that as at the time of the disciplinary hearing and dismissal the Petitioner had been set free by the High Court and the subsequent retrial had been terminated. In those circumstances, if the Respondents were basing the termination on the investigations carried out by the EACC, which had been declared a nullity by the High Court, then the Respondents had no logical, genuine, honest, or reasonable grounds on which to found the disciplinary action and the subsequent dismissal. No evidence was availed in court to demonstrate and prove that the Respondents carried out independent investigations and arrived at the position that they had good and genuine grounds in proceeding against the Petitioner in the manner and style that they did.
  53. If the Respondents did carry independent investigations in the matter, where then is the report and the statements recorded? Who are the witnesses who were interviewed and where are their statements? Why were they not called as witnesses during the disciplinary hearing to testify and be cross-examined by the Petitioner? Why were they not called as witnesses during the hearing of this petition? All the foregoing questions find no answer in the evidence availed and presented by the Respondents. It is the considered opinion of this court that notwithstanding that the Respondents knew so well that the Petitioner had been discharged of the criminal charges they nonetheless and without due regard to the law proceeded to apply a conviction that had been set aside as evidence in dismissing the Petitioner. Yet the conviction had effectively been declared a nullity having been founded on investigations that were null and void.
  54. While the lack of a conviction did not of itself mean that the Petitioner may not have engaged in gross misconduct the Respondents were under lawful obligation to prove that they had genuine and honest basis in holding that view and the only way in so doing was through carrying out genuine and honest investigation in the matter and availing such evidence to the Petitioner before, during, and even after the disciplinary hearing for his scrutiny. Mere suspicion cannot found a basis for a claim that the Respondents had genuine and honest belief that the Petitioner had engaged in the alleged gross misconduct.
  55. For the foregoing reasons, this court holds and finds that the Respondents had no genuine, honest, and or lawful reason for dismissing the Petitioner. The Respondents carried out no independent investigations in the matter but relied on evidence from EACC which investigation and evidence had been declared null and void by the High Court.



56. In terms of procedure, while the Respondents invited the Petitioner for virtual hearing of the charges against him, the Respondents did not disclose what evidence they had against the Petitioner. There is no way that the Petitioner was expected to know or to be aware of the evidence or documents to be used in the disciplinary hearing, as alleged by the Respondents, as the only evidence he was aware of as collected by the EACC had been declared null and void by the High Court. The minutes of the disciplinary hearing have not been availed to enable the court to discern and or ascertain what transpired during the alleged hearing. The letter forwarding the decision and recommendation of the panel/committee to the Respondents has not been availed to court, the minutes of the meeting of the 1<sup>st</sup> Respondent that decided to dismiss the Petitioner have also not been availed. A letter that allegedly dismissed the appeal by the Petitioner against the dismissal has also not been availed and the minutes of the proceedings wherein the appeal was considered have not been availed to court.
57. The foregoing paragraph confirms that the Respondents failed to afford and accord the Petitioner procedural fairness as envisaged under Sections 41 and 45 of the Act – See [\*Kenfreight \(EA\) Limited v Benson K. Nguti\*](#) (2019) eKLR.
58. While the Respondents patiently waited for the criminal process to take its course as is required under Paragraph 18 of the Third Schedule to the [\*Judicial Service Act\*](#) before initiating the disciplinary process, they failed to carry out independent investigations over the charges that they preferred against the Petitioner but instead readily accepted and adopted the evidence obtained and gathered by EACC which evidence had been declared null and void by the High Court. This approach by the Respondents completely invalidated, nullified, and tainted the entire process rendering the same unreasonable, illogical, unfair, irregular, and unlawful. The pleadings, evidence adduced, and the submissions by their counsel confirm that the Respondent did not carry out any independent investigations but solely relied on the evidence and charges by the EACC during the disciplinary hearing and the ultimate dismissal of the Petitioner.
59. This court has said enough to demonstrate that the dismissal of the Petitioner by the Respondents lacked merit both in substance and procedure and it is so declared.

## VII. Reliefs

60. Having found and held that the dismissal of the Petitioner was wrongful, unfair, and unlawful the court shall now examine each of the reliefs sought as hereunder. The prayers sought have been set out in the introductory part of this judgment.
61. Prayer (a) asks for a declaration that by the Respondents conducting parallel disciplinary proceedings based on the same facts and circumstances as those in the criminal proceedings that Petitioner's constitutional rights under Articles 27, 28, 41, and 50 of the [\*Constitution\*](#) were violated. The court has found and concluded elsewhere in this judgment that although this matter was presented as a constitutional petition the issues raised are and should be considered and deliberated upon based on relevant statutes as the same adequately provide for the remedies. Although violation and or breach of the foregoing constitutional provisions is pleaded and a declaration sought as above, there is no evidence or prove on how the same have been breached or violated. This goes far below the threshold outlined in the [\*Anarita Karimi\*](#) and [\*Mumo Matemo\*](#) decisions cited above. In any event, other than the declarations sought there is no prayer for damages for the alleged violations.
62. In the foregoing circumstances, the court shall proceed and deal with prayer (b) which seeks for a declaration that the disciplinary proceedings and the dismissal were disproportionate, unfair, null and void which is a relief that is predicated on various provisions of the Act. It has already been concluded and held above that the dismissal of the Petitioner by the Respondents was wrongful, unfair, and



unlawful for lack of both substantive and procedural fairness. There is no need for reproducing what the court has said on the same in the foregoing paragraphs and as such a declaration is hereby issued in the foregoing terms.

63. Prayer (c) is for an order of reinstatement of the Petitioner in the position that he held prior to the dismissal without loss of benefits. Section 12(3)(vii) of the *Employment and Labour Relations Court Act* (ELRC Act) provides that the court may issue “an order of reinstatement of an employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law.”
64. Although the decision to dismiss the Petitioner was arrived at in a meeting held on 10<sup>th</sup> December, 2020 the letter of dismissal indicated that “The dismissal is with effect from 4<sup>th</sup> September, 2015 being the date that you were interdicted from duty.” The disciplinary hearing, whose minutes were not availed in court, was held on 25<sup>th</sup> August, 2020. Other than that the interdiction had taken place on 4<sup>th</sup> September, 2015, there is no explanation or reason as to why the dismissal was backdated. The court reads malice in this approach and position taken by the Respondents. The intention in my view was to deny the Petitioner any benefits accruing during the intervening period between interdiction and the wrongful, unfair, and unlawful dismissal. That approach was whimsical, capricious, malicious, draconian, punitive, unfair, wrongful, and unlawful. In any event, the court has already found and held that the dismissal was wrongful, unfair, and unlawful.
65. The 1<sup>st</sup> Respondent is a public body, a constitutional commission, offering judicial services across the country. The Petitioner was engaged as a storekeeper and he signed off to work at any of the stations of the 1<sup>st</sup> Respondent spread across the country. The 2<sup>nd</sup> Respondent and all the members of the disciplinary panel are based at Nairobi and in any event, nothing has been presented to demonstrate any personal interest or vendetta in the matter by the concerned parties. The operations of the 1<sup>st</sup> Respondent are financed by the taxpayer and any damages awarded amount to a burden on the taxpayer.
66. The decision for the wrongful, unfair, and unlawful dismissal was made on 10<sup>th</sup> December, 2020 and communicated to the Petitioner vide a letter of dismissal dated 4<sup>th</sup> January, 2021. It is still within three years of the dismissal as the court delivers this judgment and the remedy of reinstatement is still available to the Petitioner. The Respondents should face no particular hardship in reinstating the Petitioner and posting him to one of the many of the work stations spread across the country. It is practicable and ideal that the Petitioner be reabsorbed into the service of the 1<sup>st</sup> Respondent and he has pleaded and expressed his desire to continue serving.
67. The court has said enough to demonstrate that this is an appropriate case for an order of reinstatement. The Respondents are hereby ordered to reinstate the Petitioner to his employment and position without loss of benefits.
68. Prayer (d) is for an order directing the Respondents to pay to the Petitioner all the withheld salary since 4<sup>th</sup> September, 2015 when he was interdicted. Having found that the dismissal was wrongful, unfair, and unlawful this court has no difficulties in granting this prayer.
69. Prayer (e) is for damages for unlawful dismissal. The court has already found that the Petitioner was wrongfully, unfairly, and unlawfully dismissed and ordered for his reinstatement in the foregoing paragraphs of this judgment. What damage does an employee who has been wrongfully, unfairly, and unlawfully dismissed suffer? Is it not the loss of wages and benefits that he should have earned were it not for the dismissal, which Section 49(1)(c) of the Act caps at 12 months gross salary? The court has already ordered for reinstatement of the Petitioner without loss of benefits, including salary in arrears.



In my considered view that takes care of what is lawfully due to the Petitioner in the circumstances and hence an award over and above that would amount to unjust enrichment to the Petitioner at the expense of the taxpayer.

70. As noted elsewhere in this judgment the Petitioner has not pleaded and proved any specific threat, breach, or violation of the alleged constitutional provisions. The court has found that although presented as a constitutional petition this is purely and entirely a matter that is in the realm and purview of the statutory laws. Having ordered reinstatement and payment of all benefits, including salary arrears, this court is not persuaded to grant any damages for the wrongful, unfair, and unlawful dismissal. This is the position and reasoning that the Court of Appeal took in *Judicial Service Commission v Joseph Ritbo Ndururi* (2021) eKLR.
71. This petition is distinguishable from *Judith Achieng Nyagol v Judicial Service Commission & another* (2021) eKLR. In that petition the court did not order reinstatement but awarded damages for the wrongful, unfair, and unlawful dismissal.
72. Prayer (f) is for costs of the petition. Costs follow event and a successful litigant ought to be compensated for costs incurred in instituting and prosecuting a claim or in this matter a petition in court. The Petitioner is awarded costs of the petition to be agreed or taxed between the parties.
73. Before issuing the final orders, I wish to state the following. This petition is not a criminal trial. This court has dealt with the petition before it as a civil court. The criminal trial aborted on a technicality majorly for the reason that the EACC was not properly constituted as at the time it investigated and recommended prosecution of the Petitioner. The subsequent retrial did not take off as logically the evidence that was to be relied upon had been declared null and void by the High Court. It seems the EACC deemed it a tall order to engage in investigations afresh and hence opted to have the matter withdrawn and as such the Petitioner was discharged. In those circumstances the Petitioner was neither convicted nor acquitted of the charges.
74. The biggest mistake that the Respondents did, among others, is in failing to independently investigate the matter and obtain verifiable evidence of the facts and circumstances of the alleged solicitation and receipt of a bribe by the Petitioner. For example, it is not clear how the Petitioner who was engaged as a storekeeper ended up as a court assistant or an interpreter and how he was capable of influencing or determining the outcome of a criminal trial. It is on that very thin line that the Petitioner has earned a second chance to serve Kenyans in the position that he held prior to the dismissal. It is only the Petitioner who knows the truth as to whether the criminal allegations and charges against him are true or false. Be that as it may, it is now upon the Petitioner to single mindedly resolve to serve the people of Kenya with dedication, patriotism, integrity, and efficiency. I say no more.

#### VIII. Orders

75. Flowing from the foregoing, in disposal of this petition this court issues the following orders –
  - i. A declaration be and is hereby issued that the dismissal of the Petitioner by the Respondents was wrongful, unfair, and unlawful for lack of both substantive and procedural fairness.
  - ii. An order be and is hereby issued directing the Respondents to immediately reinstate the Petitioner in the employment of the 1<sup>st</sup> Respondent without loss of benefits.
  - iii. An order be and is hereby issued directing the Respondents to pay to the petitioner all the withheld salary arrears and other benefits that accrued from 4<sup>th</sup> September, 2015 to the effective date of reinstatement which shall be within 30 days of the date of this judgment.



iv. The Petitioner is awarded the costs of this petition.

v. All the other prayers are denied.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF  
SEPTEMBER, 2023.**

**HON. DAVID NDERITU**

**JUDGE**

