



**Gitonga v Judicial Service Commission & 3 others (Petition E192 of 2021)
[2023] KEELRC 2365 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2365 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E192 OF 2021
JK GAKERI, J
SEPTEMBER 28, 2023**

BETWEEN

CHARITY GITONGA PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

**DIRECTOR OF HUMAN RESOURCE AND ADMINISTRATION 3RD
RESPONDENT**

**HUMAN RESOURCE MANAGEMENT ADVISORY COMMITTEE
(HRMAC) 4TH RESPONDENT**

Section 32 of the Judicial Service Act empowers the Judicial Service Commission to delegate its disciplinary powers to a committee or panel

The petition revolved around the dismissal of the petitioner from employment by her employer, the Judicial Service Commission (the JSC). The court found that section 32 of the Judicial Service Act empowered the JSC to delegate disciplinary powers to a committee or panel. Thus, the court held that the JSC had the requisite mandate to delegate its functions to the secretariat and noted that the JSC delegated disciplinary powers to the Human Resource Management Advisory Committee. The court also highlighted the guiding principles on disciplinary proceedings before the JSC.

Reported by Kakai Toili

Constitutional Law – constitutional commissions – Judicial Service Commission (JSC) - powers of the JSC – powers to discipline judicial staff- guiding principles on disciplinary proceedings before the JSC - whether the JSC could delegate its disciplinary powers – Judicial Service Act, Cap 8A, sections 2, 14 and 32.

Brief facts

The petitioner was an employee of the Judiciary from 2010 to the date of termination in 2021. After Jacob Waka (the petitioner’s husband/friend) was transferred to Maua Law Courts, he requested the petitioner



to avail her Kenya Commercial Bank (KCB) account details allegedly for purposes of facilitating refunds to undisclosed people who had no accounts with KCB and she provided the details unconditionally which her husband used to deposit cheques between 2015 and 2018. The petitioner disclosed that her husband would direct her on how the monies would be disbursed.

The petitioner averred that she was summoned by the Directorate of Criminal Investigations regarding her KCB account and recorded a statement. The Chief Registrar of the Judiciary (the 2nd respondent) demanded an explanation from the petitioner on the dealings in her KCB account and was later on suspended. It was the petitioner's case that her husband exonerated her from blame. The petitioner claimed that she attended a hearing on March 9, 2020, and was compelled to repay the sum of Kshs.720,000 which she did. The petitioner stated that two colleagues in a similar predicament were not suspended. According to the petitioner, there was no investigation report of any person or evidence of the charge of collusion and the hearing was unfair. The petitioner stated that the 3rd and 4th respondents dismissed her on December 10, 2020.

The petitioner contested the standing of the 4th respondent as it was not a committee of the 1st respondent, the Judicial Service Commission (JSC) or a unit of the JSC. It was the petitioner's case that the respondents contravened the Constitution in that; disciplinary powers in the instant case were vested in the JSC as an independent commission and body; and the 2nd, 3rd and 4th respondents usurped the powers of the Chief Justice under the 3rd Schedule to the Judicial Service Act. The petitioner sought for among other orders; a declaration that the JSC had no jurisdiction to sub-contract and or confer disciplinary powers under the Constitution to the 2nd, 3rd and 4th respondents; and an order of judicial review to quash, annul and or set aside the charge and suspension and letter of dismissal.

Issues

- i. Whether the Judicial Service Commission could delegate its disciplinary powers.
- ii. What were the guiding principles on disciplinary proceedings before the Judicial Service Commission?

Relevant provisions of the Law

Judicial Service Act, Cap 8A

Section 2 - Interpretation

"judicial staff" means persons employed in the Judiciary but without power to make judicial decisions, and includes the staff of the Commission;

Held

1. Equality and equity were some of the salient national values and principles of governance enshrined in article 10(2) of the Constitution. Article 27 of the Constitution guaranteed the right to equal protection and outlawed, in a mandatory tone, direct or indirect discrimination by the State or any other person. The allegations made by the petitioner on discrimination was not backed by any shred of supportive evidence. In the absence of essential particulars, the respondents had nothing to respond to or disprove. The allegation of bias or discriminatory treatment of the petitioner by the respondent was unsustainable.
2. The JSC had the constitutional mandate to discipline judicial officers or other staff. Section 2 of the Judicial Service Act defined judicial staff. The petitioner was a member of the judicial staff and thus subject to the disciplinary procedures prescribed by the Judicial Services Act, 2011. The Judicial Service Act empowered the JSC to delegate or sub-delegate in fairly broad terms as provided by section 14 of the Act. There was nothing in the Constitution to suggest that the JSC could not delegate its functions. Since the commissioners were not employees of the JSC and transacted all business of the JSC and the Judiciary through meetings of the JSC committees or sub-committees, it was imperative for the JSC to delegate functions for efficiency, effectiveness and expedition.
3. The secretariat referred to in section 14 of the Judicial Service Act, 2011 comprised the Office of the Chief Registrar of the Judiciary and other judicial staff involved in the administration of the Judiciary. Section 32 of the Judicial Service Act, 2011 empowered the JSC to delegate disciplinary powers to a



- committee or panel. Strangely, although section 32 provided that disciplinary matters be handled by a committee or panel, paragraph 15 of the Third Schedule to the Act delegated certain disciplinary powers to the Chief Justice, such as interdiction, suspension and administration of severe reprimand or a reprimand to an officer.
4. Section 32 of the Judicial Service Act, 2011 which was couched in mandatory terms required the JSC to appoint a committee or panel on matters discipline. The JSC had the requisite mandate to delegate its functions to the secretariat and the JSC approved the Judiciary's Human Resource Policies and Procedures Manual which established the Human Resource Management Advisory Committee with powers to handle disciplinary issues of certain cadres of judicial staff, the JSC delegated disciplinary powers to the Human Resource Management Advisory Committee, the provisions of paragraph 15 of the 3rd Schedule to the Judicial Service Act notwithstanding.
 5. Whereas section 32(1) of the Judicial Service Act, 2011 addressed the removal of judicial officers and staff, paragraph 15 of the 3rd Schedule to the Act used the term "officer" and whereas the Act defined both judicial offices and judicial staff, it had no definition of the term officer. It was unclear whether the term officer in paragraphs 15 – 28 of the 3rd Schedule to the Act encompassed both judicial officers and other staff or judicial officers only. While the head note of paragraph 15 was "delegation of powers", that of section 14 of the Judicial Service Act was clear that it was "delegation by the Commission". Similarly, section 32 of the Judicial Service Act, 2011 was unambiguous that on matters of appointment, discipline and removal of judicial officers and other staff, the JSC must constitute a committee or panel.
 6. The respondents had demonstrated that JSC's Human Resource Management Advisory Committee was a committee constituted by the JSC with disciplinary powers and acted within its mandate. The petitioner's submission that the 2nd, 3rd and 4th respondents usurped the powers of the Chief Justice was unsustainable.
 7. According to the provisions of the Employment Act, 2007, for a termination of employment to pass muster, there must be substantive justification and procedural fairness. The provisions of sections 41, 43, 44, 45 and 47(5) of the Employment Act were explicit on those requirements and the burden of proof. The provisions applied to the instant petition as were the provisions of article 47 of the Constitution, section 4 of the Fair Administrative Action Act, 2015 and the Judicial Service Act, 2011.
 8. The Employment Act, 2007 imposed an onerous burden on the employer to establish that it had a valid and fair reason relating to conduct, capacity or compatibility or operational requirements to terminate the employee's employment, failing which the termination was deemed to have been unfair in the context of section 45 of the Employment Act.
 9. From the documents on record, it would appear that there was a devious scheme by judicial staff to siphon funds from the Judiciary. It was unclear how and why an employee would, without anyone's authority or knowledge use another employee's account ostensibly to facilitate refunds to people with no KCB accounts. The court wondered who those people were and why they were depositing the money.
 10. The respondents were not duty bound to prove collusion beyond reasonable doubt, the standard in criminal cases, a preponderance of probabilities was sufficient in the instant case. The petitioner played an essential role in bringing the scheme to fruition. The petitioner appeared to have been aware of the devious scheme and having been the main architects, friend or spouse, collusion may be inferred from her conduct. The JSC had a valid and fair reason to terminate the petitioner's employment as it did.



11. The guiding principles on disciplinary proceedings before the Judicial Service Commission included:
 1. Compliance with the procedure in article 47 of the Constitution and the Fair Administrative Action Act.
 2. Reasonable time to defend him or herself.
 3. Employee to be notified of the basis of the complaint(s) or who his or her accusers were.
 4. Details of the allegations against the employee.
 5. Clarity on whether the administrative action taken was of an investigatory nature or disciplinary nature and if it turned disciplinary, a fresh notice was necessary to prepare his or her defence.
 6. Public hearing be accorded if the employee desired to have on or reasons given for denial.
 7. Detail reasons for any administrative action/decision.
 8. Access and receive any relevant documents relating to the matter.
 9. Opportunity to attend proceedings in person or in the company of an expert of his/her choice.
 10. Opportunity to call witnesses, be heard, cross-examine witnesses, request for adjournment of proceedings upon providing good reasons.
12. The court directed the JSC to publish and publicize procedures for all its disciplinary and investigative processes through a gazette notice within 90 days from the date of judgement.
13. The petitioner was afforded two distinct opportunities to interact and respond to the charge and did so. The totality of the documentary evidence availed revealed that the respondents complied with the requirements of the Constitution, provisions of the Fair Administrative Action Act, the Judicial Service Act, 2011 and the Judiciary Human Resource Policies and Procedures Manual, 2014 on both substantive justification for the dismissal and procedurally.

Petition dismissed.

Orders

No orders as to costs.

Citations

Cases

Kenya

1. *Anuro, Walter Ogal v Teachers Service Commission* Cause 955 of 2011; [2013] KEELRC 386 (KLR) - (Explained)
2. *Attorney General v Independent Policing Oversight Authority & another* Civil Appeal 324 of 2014; [2015] KECA 734 (KLR) - (Mentioned)
3. *Baraza v Judicial Service Commission & 9 others* Petition 23 of 2012; [2012] eKLR; [2012] 1 KLR 313 - (Mentioned)
4. *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 2 others* Civil Appeal 296 & 301 of 2016; [2018] KECA 718 (KLR) - (Explained)
5. *Center for Rights Education and Awareness & another v Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 101 (KLR); [2012] 2 KLR 261 - (Followed)
6. *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* Civil Appeal 3 of 2014; [2015] KECA 919 (KLR) - (Explained)
7. *Judicial Service Commission v Ochenja* Civil Appeal 312 of 2019; [2020] KECA 3 (KLR) - (Mentioned)
8. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Followed)
9. *Kenafic Industries Limited v John Gitonga Njeru* Civil Appeal 184 of 2014; [2016] KECA 67 (KLR) - (Applied)
10. *Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others* Petition 150 of 2019 (Formerly Nairobi HC Petition 150 of 2019); (2020) eKLR - (Mentioned)



11. *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* Civil Appeal 79 of 2016; [2017] KECA 446 (KLR) - (Explained)
12. *Keroche Industries Ltd v Kenya Revenue Authority & 5 others* Misc Civ Appli 743 of 2006; [2007] eKLR - (Mentioned)
13. *Khaemba v Chief Justice and President of the Supreme Court of Kenya & another* Petition 100 of 2019; [2019] KEELRC 917 (KLR) - (Mentioned)
14. *Khamis, Naima v Oxford University Press (E.A) Ltd* Civil Appeal 15 of 2015; [2017] KECA 480 (KLR) - (Applied)
15. *Macharia & another v Kenya Commercial Bank* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Mentioned)
16. *Mambo, Rose Wangui & 2 others v Limuru Country Club & 15 others* Constitutional Petition 160 of 2013; [2014] eKLR - (Explained)
17. *Mareri, Kepha Oseko v Republic* Anti-Corruption and Economic Crimes Appeal E006 of 2021; [2021] KEHC 990 (KLR) - (Followed)
18. *Odolo, Issabella Linet v Judicial Service Commission & 3 others* Petition E096 of 2020; [2022] KEELRC 443 (KLR) - (Followed)
19. *Popat & 7 others v Capital Markets Authority* Petition 29 of 2019; [2020] KESC 3 (KLR) - (Mentioned)
20. *Republic v University Of Nairobi Ex Parte Maxwell Magawi Odhiambo* Judicial Review Miscellaneous Application 6 of 2019; [2019] KEHC 6926 (KLR) - (Mentioned)
21. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Explained)
22. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22 - (Followed)
23. *Waweru v Judicial Service Commission* (Cause 376 of 2019) [2020] KEELRC 20 (KLR) - (Applied)

United Kingdom

Vine v National Dock Labour Board [1956] 3 All ER 939; [1957] AC 488; [1956] 1 QB 658; [1957] 2 WLR 106 - (Applied)

Texts

The Judiciary (2014), *Human Resource Policies and Procedures Manual* The Judiciary

Statutes

Kenya

1. Constitution of Kenya articles 2(4); 10 ; 23(a); 27(1); 25(a)(c); 28; 41; 47; 50(1); 161(2)(a); 163(7); 172(1)(c); 236(a)(b); 249(2)- (Interpreted)
2. Employment Act (cap 226) sections 5(7); 41(1); 43 ; 44; 44(3)(4); 45(2); 47(5) - (Interpreted)
3. Evidence Act (cap 80) sections 62 , 63, 106- 109- (Interpreted)
4. Fair Administrative Action Act (cap 7L) section 4 - (Interpreted)
5. Judicial Service Act (cap 8A) sections 2, 14, 17(1)(c); 32; Schedule 3 rule 11, 15, 16, 17, 25(1)- (Interpreted)
6. Proceeds of Crime And Anti-Money Laundering Act (cap 59A) In general- (Cited)
7. Public Officer Ethics Act (cap 185B) In general- (Cited)
8. Retirement Benefits Act (cap 197) In general - (Cited)

Advocates

None mentioned



JUDGMENT

1. The petitioner Charity Gitonga, filed the Petition herein on December 1, 2021 seeking the following orders:
 - a. 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 and is without jurisdiction, null and void *ab initio*.
 - b. A declaration that under article 172(1)(c) of the Constitution empowers the Judicial Service Commission as the only mandated body to appoint, receive complaints, 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, 2011.
 - c. A declaration that the Judicial Service Commission has no jurisdiction to sub-contract and or confer disciplinary powers under the Constitution to the 2nd, 3rd and 4th respondents or other body or person(s) outside the strict confines of the Constitution and the Judicial Service Act and such action was unconstitutional and offends article 2(40), null and void *ab initio* and is hereby quashed together with all antecedent actions, proceedings and determinations founded on it.
 - d. A declaration that the respondents' action contravened and was inconsistent with the decree of the Supreme Court under article 163(7) in Alnashir Popat (*supra*) 60, 63, 65, 73), Martin Wanderi (*supra*) page 124-129) which edit vertically bind all the courts and administrative bodies.
 - e. A declaration that the respondents Violated and usurped the delegated mandate of the honourable Chief Justice and their action was in gross violation of article 259(?); as read with article 161(2)(a) and article 2(4) rule 15-17 and rule 25(1) of the 3rd respondent Schedule of the Judicial Service Act and was null and void *ab initio*.
 - f. An order of Judicial Review under article 23(3)(f) to bring into the honourable court to condemn, quash 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. A declaration that under article 2(4) and 236(a)(b) the petitioner is a lawful employee of the Judiciary unless removed in compliance of the law and the Constitution and a mandatory injunction do issue for her unconditional reinstatement and payment of all withheld/accrued salaries, back pay and benefits from her suspension until full compliance.
 - h. A declaration that the Judiciary Human Resource Policies and Procedures Manual to the extent that it prescribes disciplinary procedures not in strict conformity with article 17(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. A declaration that the respondents contravened the petitioner's fundamental rights and freedoms under article 27(1), 28, 41, 47, 50(1) as read with 25(a) and (c); and compensation under article 23(a) do issue as a distinct constitutional imperative relief/remedy in the vindication.
 - j. Aggravated and exemplary damages.



- k. Costs of suit and interest.

Background

2. The petitioner avers that she was employed by the 1st respondent in June 2010 as a Secretarial Assistant II and posted to Garissa Law Courts for 7 years and later to Mavoko Law Courts in May 2017 until October 2019 when she was suspended by the respondents after having served the Judiciary for 9 years.
3. That owing to her diligence and dependability, she was promoted to Personal Secretary III 2014 and Office Administrator in 2017.
4. It is the petitioner's case that she had a relationship with one Mr. Waka who she met in Garissa working as an Accountant and who was transferred to the Maua Law Courts in 2014.
5. The petitioner avers that sometime in 2015, Mr. Waka enquired whether the petitioner had a KCB account to enable him pay refunds to persons who had no KCB accounts, request the petitioner acceded to and a total of Kshs.720,000/= was paid into the petitioner's account between 2015 and 2018. Each time Mr. Waka deposited a cheque, he would call the petitioner and instruct her on how the amount would be dispersed and the petitioner obliged. That due to terrorists attacks, the petitioner stayed indoors and transacted through her mobile phone.
6. The petitioner avers that she was conscripted into a scheme she was unaware of and did not use the money for her benefit.
7. That Mr Waka was at all material times based at the Maua Law Courts.
8. The petitioner further avers that on December 3, 2019, she was summoned by the DCI regarding her KCB account and recorded a statement on March 26, 2019. That the 2nd respondent by letter dated May 14, 2019 demanded an explanation of dealings in her KCB account and responded by letter dated May 22, 2019 reiterating the contents of the statement to the DCI and was suspended by the 2nd respondent on October 24, 2019 and had to relocate to her rural home owing to financial challenges but had to report to Mavoko Law Courts every Friday of the month.
9. It is the petitioner's case that Mr. Waka exonerated her from blame.
10. That she attended a hearing on March 9, 2020, was compelled to repay the sum of Kshs.720,000/= which she did on 15th May, 2020.
11. That one Lilian Wambui Waigwa PJ 35615 and Rose Murima Wanjohi stationed at the Nakuru Law Courts and Meru Law Courts in a "similar predicament" and having been mentioned in the Audit Report respectively were not suspended.
12. The petitioner avers that the hearing was presided over by the 3rd and 4th respondents and took less than 10 minutes, a scenario repeated on August 20, 2020 when she was called upon to explain receipt of the cash.
13. According to the petitioner, there was no Investigation Report of any person or evidence of the charge of collusion and the hearing was cosmetic, unconstitutional and unfair.
14. That the 3rd and 4th respondents communicated their decision to the 1st respondent who dismissed the petitioner on December 10, 2020. The petitioner contests the standing of the 4th respondent as it was not a committee of the 1st Respondent or a unit of the Judicial Service Commission.



15. That it was double jeopardy since the matter had been referred to the DCI and no charges were preferred against the Petitioner and the direction by the 1st respondent to file an appeal was unconstitutional and breach of natural justice and the same was dismissed by letter dated June 28, 2021.
16. It is the petitioner's case that the respondents contravened the Constitution in that;
 - i. Disciplinary powers in this case are vested in the 1st respondent as an independent commission and body.
 - ii. The 2nd, 3rd and 4th respondents usurped the powers of the Chief Justice under the 3rd Schedule to the Judicial Service Act. Thus violating article 172(1)(c) of the Constitution.
 - iii. The mandate of the 3rd and 4th respondents is unclear in the constitutional terrain.
 - iv. Other persons in similar situations not suspended.
 - v. Right to fair labour practices was violated.
 - vi. The provisions of article 28 were violated

Respondent's Case

17. The respondents filed a replying affidavit sworn on April 1, 2022 by Anne Amadi, Chief Registrar of the Judiciary and Secretary to the Judicial Service Commission.
18. The affiant deposes that the 4th respondent is a Committee constituted by the 1st respondent to handle disciplinary matters under delegated powers as provided by section D4 of the Judiciary Human Resources Policies and Procedures Manual, 2014 and the procedures therein are based in the provisions of the Judicial Service Act, 2011.
19. That the 3rd respondent is the Director, Human Resource and Administration.
20. That in accord with the provisions of sections 14 and 32 of the Judicial Services Act, the Judicial Service Commission delegated disciplinary powers to the 4th respondent in order to streamline management of discipline in the Judiciary by expanding its mandate to handle discipline matters of Judicial Staff in PLS 12.
21. The affiant confirms that the Petitioner was an employee of the Judiciary appointed on June 18, 2010 until her dismissal on October 24, 2019.
22. That an audit conducted on the Maua Law Courts accounts for the period 15th and October 26, 2018 revealed that the petitioner had received the sum of Kshs.720,000/= from the bank deposit account of the Maua Law Courts between October 22, 2015 to July 26, 2018.
23. The affiant deposes that by letter dated May 14, 2019, the petitioner admitted having received the cash and implicated Mr Jacob Waka, then an Accountant at the Maua Law Courts.
24. As regards the disciplinary proceedings, the affiant states that the disciplinary hearing slated for March 3, 2020 was rescheduled to March 9, 2020 and the petitioner stated that she was aware of the charges and admitted having received the sum of Kshs 720,000 from one Jacob Waka which she was instructed to send to Chari Shama Guyo, Judy Kendi (an Mpesa Agent) and Mr Jacob Waka.
25. That since depositors were demanding their money, the 4th respondent deferred the proceedings for the petitioner to refund the cash which she did and proceedings resumed virtually on June 5, 2020 and subsequently deferred to await the outcome of Mr Jacob Waka's hearing.



26. That the 4th respondent recalled the petitioner for a further hearing on August 20, 2020 and the petitioner admitted receipt of the cash and that she was aware that the cash was part of the Judiciary Funds and emphasized on her relationship with Mr Jacob Waka with whom they had a son.
27. That the 4th respondent, after deliberations found the petitioner culpable as she was aware of the illegality and chose to co-operate with Mr Jacob Waka, funds were deposited over along period of time and could not disprove the apparent collusion with her friend Mr Jacob Waka and recommended dismissal effective October 24, 2019, which recommendation were forwarded to the Judicial Service Commission's Human Resource Management Committee which recommended dismissal from service effective May 14, 2019 for gross misconduct which recommendation was approved by the Judicial Service Commission on December 10, 2020 and a letter dated January 4, 2020 was issued to the Petitioner.
28. According to the respondents, the employer had a reason to terminate the petitioner's employment and genuinely believed it had a valid reason as *inter alia* the petitioner was truthful.
29. That the Judicial Service Commission considered the petitioner's appeal and dismissed the same for want of sufficient grounds and the petitioner was notified by letter dated June 28, 2021.
30. The respondents argue that the Judicial Service Act provided for discipline of Judicial Officers and Staff and under the Judiciary Manual, there were two disciplinary committees, one constituted by the Judicial Service Commission under section 32 of the Act and the 4th respondent for Staff in grade PLS 9 under the new grading system.
31. That under section 14 of the Judicial Service Act, 2011, the JSC constituted the 4th respondent to handle disciplinary matters under section D4 of the Judiciary Human Resource Manual and the petitioner fell under staff in Grade PLS 9.
32. That the 4th respondent was a recognized body duly authorised to conduct disciplinary proceedings in the Judiciary.
33. That the 2nd respondent is established under article 161 of the Constitution, the duly authorised officer of the Judiciary responsible for efficient management of day-to-day operations of Human Resource in the organization and is the Secretary to the JSC but did not terminate the Petitioner's employment as it was a JSC decision. The 2nd respondent communicated the same to the Petitioner.
34. The affiant states that the procedures set out in the Judiciary Human Resource Manual were duly complied with.
35. The affiant denies that the petitioner was denied the right to cross-examine witnesses or interrogate documents.
36. The affiant deposes that the petitioner is not entitled to the reliefs prayed for as the dismissal was lawful, as she was found guilty of gross misconduct and the remedy of reinstatement was unavailable.
37. In summary, the affiant states that the petitioner was accorded the opportunity to explain the circumstances under which she received Kshs 720,000, admitted having received the cash from the Maua Law Courts Deposit Account, was issued with a notice to show cause, accorded oral hearings at which she participated, accorded right to call a witnesses and informed of the right to appeal.

Petitioner's Submissions

38. Counsel isolated several issues including;



- i. Whether the 3rd respondent had jurisdiction to charge, interdict or suspend staff and fate of action.
 - ii. Whether the 4th respondent is a Panel/Committee or unit of the JSC under section 2 and 14 of the [Judicial Service Act, 2011](#).
 - iii. Whether JSC can delegate its constitutional and statutory powers to interdict/suspend and discipline a judicial officer or staff to the 3rd and 4th respondent.
 - iv. Compliance with the [Constitution](#), [Judicial Service Act](#) and [Fair Administrative Action Act](#)
 - v. Whether dismissal was procedural, fair, valid and reasonable.
 - vi. Entitlement to the reliefs sought.
39. On jurisdiction, counsel relied on article 172(1) of the [Constitution](#) of Kenya to urge that the power to make inquiries, interdict, suspend or charge was vested in the Chief Justice as head of the Judiciary under article 161(2)(a) and rules 15, 16 and 25(1) of the 3rd Schedule to the [Judicial Service Act, 2011](#) and the [Judiciary Human Resource Manual](#).
 40. Reliance was made on the decisions in *KMJA V JSC & 2 others* (2020) eKLR and *John Muikiria Waweru V JSC* [2020] eKLR among others to urge that the 3rd respondent had no jurisdiction as her designation was neither mentioned in the [Constitution](#) or the law, manual or pleadings.
 41. That in such a case, the action was unconstitutional and thus null and void.
 42. The decisions in *Alnashir Popat & 7 others v Capital Market Authority* [2020] eKLR, *Keroche Industries Ltd v Kenya Revenue Authority & 5 others* (2007) eKLR, *Samuel K. Macharia & another V Kenya Commercial Bank* [2012] eKLR among others were cited to urge that delegated authority must be strictly exercised and without jurisdiction a person had no power to make one more step.
 43. Counsel urged that the court has no jurisdiction to interrogate the merits or fairness of an unconstitutional act.
 44. As to whether the 4th Respondent was a committee or panel, counsel submitted that the JSC had power to appoint, receive complaints, investigate and remove from office employees in the Judiciary as prescribed by an Act of Parliament, the [Judicial Service Act](#) which defines “a Committee”.
 45. Counsel relied on section 14, 32(1), 33(3) and rule 25(3) of the 3rd Schedule to submit that the 4th Respondent was not a delegate of the JSC and was thus an alien body citing [Judicial Service Commission v Gladys Boss Shollei & another](#) [2014] eKLR and [Judicial Service Commission v Daniel Ochenja](#) [2020] eKLR.
 46. As regards delegation of constitutional and statutory powers, counsel urged that the 3rd and 4th Respondents had no powers to act in the manner they did in this case.
 47. Articles 10, 249(2) of the [Constitution of Kenya, 2010](#) and Section 5(7) of the [Employment Act](#) were cited to urge that Human Resource Manuals cannot override the [Constitution](#) or statutory powers as held in [Issabella Linet Odolo v Judicial Service Commission & 3 others](#) [2020].
 48. That delegation to the Judicial Service Commission committee or its Secretariat and Human Resource Manual was a mere guideline and must not be in conflict with the [Judicial Service Act, 2011](#) and was not part of legislation.



49. That an internal code inconsistent with a statute must give way and disciplinary powers can only be delegated by statute. (See *Vine v National Dock Labour Board* [1956] 3 All ER 939).
50. As to whether the Respondents acted in consonance with the law, counsel relied on the decision in *Speaker of the National Assembly v James Njenga Karume* [1992] KLR to urge that the procedures prescribed by the *Constitution* and statutes had to be complied with strictly.
51. It was submitted the conduct of the respondents violated articles 47, 172(1)(c) of the *Constitution*, sections 2, 14 and 32(1) of the *Judicial Service Act* and rules 15, 16, 17, 25(1) and (11) of the 3rd Schedule to the *Judicial Service Act, 2011* and section 4 of the *Fair Administrative Act* in that the Chief Justice did not inquire or investigate the allegations or suspend the petitioner, due process not followed.
52. That articles 41, 10, 27(1 – 4) and 159(2)(a) were violated because one Lilian Wambui Waigwa was paid money through her account analogous to the petitioner’s case but was neither suspended nor dismissed. That one Rose Murima Wanjohi was mentioned in the Audit Report but no action was taken, hence the Respondents were biased and discriminatory.
53. As regards the reasons for dismissal, counsel submitted that the charge had no foundation, hearings were unconstitutional, violated the principles of natural justice, no cross-examination of witnesses, no evidence that the petitioner retained any money.
54. Counsel submitted that the charges were not proven as who alleges must prove as per section 62, 63 and 106 – 109 of the *Evidence Act*, section 45(2) and 47(5) of the *Employment Act*, use of parallel investigation reports and proceedings not supplied rendered the termination unfair.
55. Counsel also faulted the online “technical appearances” by the Petitioner without her counsel or fellow employee.
56. That the respondent did not avail copies of the proceedings.
57. Counsel submitted that collusion referred to a secret agreement between the two or more persons and the element of agreement was indispensable as held in *Kepha Oseko Mareri v Republic* [2021] eKLR.
58. On the reliefs sought, counsel urged that the Petitioner was entitled to all the reliefs sought on account of the unconstitutional acts of the Respondent and violation of the Petitioner’s rights.
59. In her further submissions, the Petitioner embellished the earlier issues of reasons, jurisdiction and delegation and introduced a few new judicial authorities such as *Attorney General v Independent Policing Oversight Authority & another* (2015) eKLR and *Republic v University of Nairobi Ex Parte Maxwell Odbiambo* (2019) eKLR to reinforce the submissions.

Respondents’ Submissions

60. Counsel for the respondent isolated six (6) issues similar to those identified by the petitioner’s counsel.
61. On the jurisdiction of the 4th respondent, counsel submitted that it derived its powers from sections 2, 14 and 32 of the *Judicial Service Act, 2011* and section D4 of the Judiciary Human Resource Manual, 2014.
62. That the 4th respondent was one of the committees constituted by the 1st respondent to handle disciplinary matters and thus the Committee had jurisdiction to deal with the claimants disciplinary matter as mandated by the Judicial Service Commission.
63. No judicial authority was cited to buttress the submission.



64. On delegation by resolution, counsel urged that the 3rd and 4th respondents were legally empowered to discipline Judicial Officers or Staff.
65. That the 4th respondent was a subcommittee constituted under section 32 of the [Judicial Service Act, 2011](#) for purposes of discipline and removal of Judicial Officers and Staff as held in [Nancy Makhoba Baraza v Judicial Service Commission & 9 others](#) [2012] eKLR.
66. Reliance was also made on the decision in [Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another](#).
67. That the 4th respondent's decision was subject to the approval of the JSC.
68. Counsel urged that the JSC had power to delegate powers by resolution to discipline Judicial Officer or Staff.
69. On conformance with the provisions of the [Constitution of Kenya Judicial Services Act](#) and the [Fair Administrative Action Act](#), counsel submitted that actions were in conformity with articles 41, 47 of the [Constitution](#) and section 41(1) of the [Employment Act, 2007](#).
70. Counsel submitted that the respondents acted in accordance with the [Constitution](#), law and Judiciary Human Resources Manual, 2014.
71. That the petitioner responded to the notice to show cause, was invited for a hearing, was heard and found culpable by the 4th respondent and the Judicial Service Commission terminated her employment.
72. Counsel submitted that disciplinary process was fair and the requisite documents such as receipts, bank statement were availed.
73. As to whether the respondents had valid reasons to terminate the petitioner's employment, counsel submitted that the respondent genuinely believed that petitioner had colluded with her friend, Mr. Jacob Waka to defraud the Judiciary and thus had reasonable and sufficient grounds to suspend her for purposes of the disciplinary process.
74. Reliance was made on the Court of Appeal decision in [Kenya Power and Lighting Company Ltd v Aggrey Lukorito Wasike](#) (2017) eKLR on the reason for termination which the court appreciated was partly subjective.
75. In that case, the employee could not explain an anomaly to the satisfaction of the Superior or disciplinary committee.
76. Counsel urged that in the instant case, the Petitioner was unable to explain the payments made to her and the Respondents did not violate her constitutional rights or the provisions of the statutes or the Human Resource Manual.
77. Also cited was the decision in [Issabella Linet Odolo v Judicial Service Commission & 3 others](#) (*Supra*) where the court found the termination of employment procedural.
78. It was submitted that being a judicial staff, as defined by section 2 of the [Judicial Service Act](#), the petitioner was bound by the (Judicial Service Code of Conduct and Ethics) Regulations and was aware that her account was being used as a conduit of illegally misappropriated Judiciary money.
79. Counsel urged that the petitioner's conduct violated the principles of good governance, integrity, transparency and accountability under article 10 of the [Constitution of Kenya, 2010](#) as well as the provisions of the [proceeds of Crime and Anti-Money Laundering Act](#).



80. Counsel submitted that the petitioner ought to have known that she received the payments irregularly.
81. Urging the case further, counsel submitted that the petitioner violated the provisions of the *Public Officer Ethics Act*.
82. Counsel invited the court to construe the articles of the *Constitution of Kenya, 2010* purposively as held by the Court of Appeal in *Centre for Human Rights Awareness v John Harum Mwau & 6 others* [2012] eKLR.
83. Reliance was also made on the sentiments of the court in *CFC Stanbic Bank Ltd v Danson Mwashako Mwakuwona* [2015] eKLR to urge that termination of the petitioner's employment was substantively justifiable and procedurally fair as she was guilty of financial malpractices.
84. On reliefs, counsel submitted that the Petitioner was not entitled to any as the termination was lawful and the suit ought to be dismissed with costs.

Findings and Determination

85. It is common ground that the petitioner was an employee of the Judiciary from 2010 to the date of termination in 2021 having worked at the Garissa and Mavoko Law Courts, and risen from Secretarial Assistant II to Office Administrator.
86. It is equally not in dispute that the Petitioner and one Jacob Waka an Accountant working at the Judiciary were close friends and regarded themselves as husband and wife and had a son together.
87. It is also not in contest that after Mr. Jacob Waka was transferred to Maua Law Courts, he requested the petitioner to avail her Kenya Commercial Bank (KCB) account details allegedly for purposes of facilitating refunds to undisclosed people who had no accounts with the Kenya Commercial Bank and she provided the details unconditionally which Mr. Jacob Waka used to deposit cheques between 2015 and 2018.
88. The petitioner further disclosed that Mr Jacob Waka would then call to direct her on how the monies would be disbursed either to Mr. Jacob Waka, Shama Guyo Chari and a colleague at the Maua Law Courts or a Mpesa Agent named Judy Kendi.
89. The petitioner admitted that she provided the account details to her friend or spouse voluntarily since she trusted him and refunded the sum of Kshs 720,000 transacted through her account.
90. In the court's view, the issues for determination are;
 - i. Whether termination of the petitioner's employment was in conformity with the provisions of the *Constitution of Kenya, 2010*, *Fair Administrative Action Act*, *Judiciary Service Act* and the Judiciary Human Resource Policies and Procedures Manual.
 - ii. Whether the petitioner is entitled to the reliefs sought.
91. Before delving into the above-mentioned issues, it is essential to dispose of the peripheral issue of whether the respondent was biased or treated the petitioner in a discriminatory manner or unfairly.
92. In her supporting affidavit (paragraphs 19 and 20), the petitioner alleges that other members of staff in similar circumstances were neither suspended nor dismissed by the 1st respondent.
93. The petitioner deposes that one Lillian Wambui Waigwa, PJ No. 35615 stationed at the Nakuru Law Courts was in a similar predicament and repaid the money and was neither suspended nor dismissed.



94. That one Rose Murima Wanjohi stationed at the Meru Law Courts was mentioned in the Audit Report but her name was missing in the list of suspended staff.
95. There is no gainsaying that equality and equity are some of the salient national values and principles of governance enshrined in article 10(2) of the [Constitution of Kenya, 2010](#).
96. Similarly, article 27 of the [Constitution](#) guarantees the right to equal protection and outlaws, in mandatory tone, direct or indirect discrimination by the state or any other person.
97. In [Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 2 others](#) [2018], the Court of Appeal adopted the definition of the term discrimination in [Rose Wangui Mambo & 2 others v Limuru Country Club & 15 others](#) (2014) eKLR as follows;
- “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions . . . whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description . . . Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
98. Applying the foregoing definition to the allegations made by the petitioner, it is clear that the allegation is not backed by any shred of supportive evidence.
99. First, the petitioner did not avail a copy of the Audit Report to enable the court appreciate the circumstances of the alleged Lilian Wambui Waigwa or Rose Murima Wanjohi. Secondly, the petitioner tendered no evidence of how the respondents addressed the two cases.
100. The allegation that Lilian Wambui Waigwa paid back the money and was not suspended, details of which were not canvassed does not *ipso facto* establish discrimination or unfair treatment.
101. Similarly, the allegation that one Rose Murima Wanjohi’s name was mentioned in the Audit Report, without setting out the circumstances in which the name was mentioned does not, in the court’s view suggest unfair treatment.
102. In the absence of essential particulars, the respondents had nothing to respond to or disprove.
103. In sum, the allegation of bias or discriminatory treatment of the petitioner by the respondent is unsustainable.
104. As regards termination of the petitioner’s employment, it requires no emphasis that the Judicial Service Commission has the constitutional mandate to discipline judicial officers or other staff.
105. Article 172 of the [Constitution of Kenya, 2010](#) provides;
1. The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall;
 - a. . . .
 - b. . . .



- c. Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary in the manner prescribed by an Act of Parliament.”
106. The relevant Act of Parliament is the [Judicial Service Act, 2011](#) whose preambular provision is emphatic that it is;
- “An act of Parliament to make provision for Judicial Services and administration of the Judiciary; to make further provisions with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; . . .”
107. Section 2 of the [Judicial Service Act](#) defines Judicial Staff to mean
- “Persons employed in the Judiciary but without power to make judicial decision and includes the staff of the Commission.”
108. The Petitioner was a member of the judicial staff and thus subject to the disciplinary procedures prescribed by the [Judicial Services Act, 2011](#).
109. Contrary to the petitioner’s argument that the Judicial Service Commission cannot delegate or sub-delegate, the [Judicial Service Act](#) empowers the Commission to do so in fairly broad terms as provided by section 14 of the Act as follows;
- “Subject to the provisions of the [Constitution](#) or any other law, the Commission may 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 to the secretariat.”
110. In the court’s view, there is nothing in the [Constitution of Kenya, 2010](#) to suggest that the Judicial Service Commission cannot delegate its functions.
111. More significantly, since the Commissioners are not employees of the Commission and transact all business of the Commission and the Judiciary through meetings of the Commission Committees or sub-committees, it is imperative for the Commission to delegate functions for efficiency, effectiveness and expedition.
112. Noteworthy, the Secretariat referred to in section 14 of the [Judicial Service Act, 2011](#) comprises the Office of the Chief Registrar of the Judiciary and other Judicial staff involved in the administration of the Judiciary.
113. In addition, section 32 of the [Judicial Service Act, 2011](#) provides;
1. For purposes of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a committee or panel which shall be gender representative.
 2. . . .
 3. The procedure governing the conduct of a committee or panel constituted under this section shall be set out in the Third Schedule.
 4. Members of the Committee shall elect a Chairperson from amongst their number.
 5. Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure.



114. Clearly, this provision empowers the Judicial Service Commission to delegate disciplinary powers to a Committee or Panel.
115. Strangely, although section 32 of the *Judicial Service Act, 2011* provides that disciplinary matters be handled by a committee or panel, paragraph 15 of the Third Schedule to the *Act* delegates certain disciplinary powers to the Chief Justice, such as interdiction, suspension and administration of severe reprimand or a reprimand to an officer.
116. Section 32 of the *Act* which is couched in mandatory terms requires the Commission to appoint a Committee or Panel on matters discipline.
117. In their replying affidavit, the respondents deposed that under their Human Resource Policies and Procedures Manual, there were two disciplinary committees, one constituted by the Judicial Service Commission in consonance with section 32 of the *Judicial Service Act* and the Human Resource Management Advisory Committee for staff in grade PLS 9.
118. That the latter was constituted pursuant to the provisions of section 14 of the *Act*.
119. Having established that the Judicial Service Commission has the requisite mandate to delegate its functions to the Secretariat and the Judicial Service Commission approved the Judiciary's Human Resource Policies and Procedures Manual which establishes the Human Resource Management Advisory Committee with powers to handle disciplinary issues of certain cadres of judicial staff, the court is persuaded that the Judicial Service Commission delegated disciplinary powers to the Human Resource Management Advisory Committee, the provisions of paragraph 15 of the 3rd Schedule to the *Judicial Service Act* notwithstanding.
120. It is also notable that whereas section 32(1) of the *Judicial Service Act, 2011* addresses the removal of "Judicial Officers and Staff", paragraph 15 of the 3rd Schedule to the Act use the term "officer" and whereas the Act defines both judicial offices and judicial staff, it has no definition of the term officer. It is unclear to the court whether the term officer in paragraphs 15 – 28 of the 3rd Schedule to the Act encompasses both judicial officers and other staff or judicial officers only.
121. Significantly, while the head note of paragraph 15 is "Delegation of Powers", that of section 14 of the Act is clear that it is "Delegation by the Commission".
122. Similarly, section 32 of the *Judicial Service Act, 2011* is unambiguous that on matters of appointment, discipline and removal of judicial officers and other staff, the Commission must constitute a committee or panel.
123. In the circumstances, the court is satisfied that the respondents have demonstrated that the 1st respondent's Human Resource Management Advisory Committee (HRMAC) is a committee constituted by the 1st respondent with disciplinary powers and acted within its mandate.
124. In a nutshell, the petitioner's submission that the 2nd, 3rd and 4th respondents usurped the powers of the Chief Justice is in the court's view unsustainable.
125. Having demonstrated that the Judicial Service Commission has general powers to delegate its functions to the Secretariat as well as Sub-Committees and has done so, through its Human Resource Policies and Procedures Manual, I will now proceed to determine whether termination of the Petitioner's employment was conducted in accordance with the law.



126. The pith and substance of the petitioner’s case is that her termination from employment was in contravention of the law. In essence, the dispute discernible to the court is that of an employer and employee.
127. According to the provisions of the *Employment Act, 2007* as construed by the Employment and Labour Relations Court and the Court of Appeal, for a termination of employment to pass muster, there must be substantive justification and procedural fairness. The provisions of sections 41, 43, 44, 45 and 47(5) of the *Act* are explicit on these requirements and the burden of proof.
128. These provisions apply to the instant petition as are the provisions of article 47 of the *Constitution of Kenya, 2010*, section 4 of the *Fair Administrative Action Act, 2015* and the *Judicial Service Act, 2011*.
129. These requirements were aptly captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as follows;

“However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.”
130. The Court of Appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR and *Kenafic Industries Ltd v John Gitonga Njeru* [2016] eKLR among others.

Reasons for Termination

131. The *Employment Act, 2007* imposes an onerous burden on the employer to establish that it had a valid and fair reason relating to conduct, capacity or compatibility or operational requirements to terminate the employee’s employment, failing which the termination is deemed to have been unfair in the context of section 45 of the *Act*.
132. From the documents on record, it is evident that the Petitioner was issued with two (2) letters signed by the Chief Registrar of the Judiciary and the 3rd respondent for the Chief Registrar.
133. By letter dated May 14, 2019, the 2nd respondent required the petitioner to explain the circumstances under which she had received the sum of Kshs 720,000 from the deposit bank account of Maua Law Courts on diverse dates from October 22, 2015 to July 26, 2018. The letter demanded evidence of case number, accused person, deposit of the cash into court station and copies of deposit slip.
134. The Petitioner by letter dated May 22, 2019 admitted that one Mr Jacob Waka, a former Accountant at the Maua Law Courts deposited the cash into her account to assist depositors who had challenges with accounts and he was in a better position to explain the details required and Mr Waka was to provide the details.
135. According to the petitioner, since the cash was from a Deposit Account, it was refundable.
136. In sum, the petitioner did not deny having received the money.
137. The notice to show cause dated October 24, 2019 accused the petitioner of collusion with Mr Jacob Waka to defraud the Judiciary the sum of Kshs 720,000.
138. The petitioner responded by letter dated December 3, 2019 and denied having colluded with Mr. Waka.
139. The termination letter dated January 4, 2019 had only one ground of dismissal, namely; Gross misconduct: This is in relation to collusion to defraud Judiciary funds amounting to Kshs.720,000/= from Maua Law Courts Deposit Account . . .”



140. The salient question is whether the petitioner colluded with one Mr Jacob Waka to defraud the Judiciary.
141. In the supporting affidavit sworn on November 24, 2021, the petitioner stated that sometime in 2015, Mr. Jacob Waka asked her if she had a KCB account and she gave the details.
142. In her statement to the police availed by her, the petitioner states as follows;
- “While Jacob Waka was at Maua Law Court, he called me to confirm whether my KCB Account was still active and I confirmed to the affirmative . . .”
143. Evidently, Mr. Jacob Waka was aware that the petitioner had a KCB Account. Relatedly, the request came only after Mr Jacob Waka had been transferred from Garissa to the Maua Law Courts.
144. Similarly, the petitioner admitted that she and Mr Jacob Waka were close friends, had along distant relationship and had a baby together.
145. In her statement to the police, the petitioner admitted that her KCB Account was Number 1134XXXX56 and started receiving money on October 22, 2015 and after the first cheque, it became a routine whereby Mr Jacob Waka would deposit cheques after the petitioner had provided the Account number as Mr Jacob Waka had not saved the number, possibly by design.
146. The petitioner admitted having received 15 payments ranging between Kshs 20,000 and Kshs 60,000 between October 2015 and July 2018.
147. That Jacob Waka would instruct her on how to disburse the amount deposited including the amount to be deducted which vacillated between Kshs 1,000 - Kshs 4,000 and the deposit stopped after Jacob Waka was transferred from the Maua Law Courts to the Embu Law Court.
148. The petitioner admitted that Mr Jacob Waka often instructed her to send the money to cell phone numbers.
1. 0727XXXX81 – Judy Kendi
 2. 0723XXXX12 – Shama Guyo Chari
 3. 0721XXXX46 – Jacob Waka
 4. 0725XXXX36 – Judy Kendi
149. Instructively, on May 30, 2018, of the Kshs 50,000 deposited in her account, Mr Jacob Waka instructed the Petitioner to send Kshs 25,000 to him and the balance of Kshs 25,000 to herself and on July 26, 2018, of the Kshs 60,000 deposited, the petitioner was instructed to send Kshs 45,000 to Judy Kendi. The balance was unaccounted for.
150. If the petitioner is to be believed, she allowed her friend to use her KCB account to facilitate refunds to people who had no KCB accounts.
151. Regrettably, the petitioner adduced no scintilla of evidence to show that any of the alleged persons received the cash she sent to Mr Jacob Waka, Shama Guyo or Judy Kendi. In any case, Mr Jacob Waka had the information and being the Petitioner’s friend or spouse, this would have been relatively easy.
152. If they were refunds, how was the amount Kshs 4,000 – Kshs 15,000 per transaction retained accounted for in the station’s account.



153. Equally, in at least three instances, the petitioner retained Kshs 10,000, Kshs 25,000 and Kshs 15,000 respectively, with consent of Mr Jacob Waka. The petitioner’s allegation that this was a “transaction account” was not supported by any evidence of a letter to that effect or a statement to show it was created for that purpose bearing in mind that the Petitioner was a public officer bound by the provisions of the *Public Officer Ethics Act*.
154. The bank statement availed by the petitioner reveal that on October 22, 2015, the sum of Kshs 20,000 was deposited in her account but there is no corresponding withdrawal of a significant sum until 5th November, 2015 when Kshs 8,000 was withdrawn.
155. A review of the bank statement reveals that the petitioner retained more money than she is willing to admit.
156. As adverted to elsewhere in this judgement, it is clear that Mr. Jacob Waka was aware that the petitioner had a KCB Account but for unknown reasons did not use it while based in Garissa.
157. From the documents on record, it would appear to the court that this was a devious scheme by judicial staff to siphon funds from the Judiciary.
158. It is unclear to the court how and why an employee would, without anyone’s authority or knowledge use another employee’s account ostensibly to facilitate refunds to people with no KCB accounts. Who were these people and why were they depositing the money?
159. In the court’s view, the explanation allegedly given by Mr Jacob Waka to the petitioner was nothing but a smoke screen to camouflage Mr Jacob Waka’s scheme with his colleague Shama Guyo, Judy Kendi and the petitioner to defraud the Judiciary.
160. Relatedly, the petitioner’s argument that Mr Jacob Waka absolved her from blame cannot avail her on account that the two were very close friends. They may have agreed to have one of them crucified to save the other as opposed to both.
161. The petitioner adduced no evidence to show that the two had a commercial relationship under which Mr Jacob Waka would use her bank account to enable him discharge his duties efficiently as an employee of the Judiciary. In the absence of such evidence, the allegation that the KCB account was a transactional account remains hollow.
162. The 1st respondent communicated the outcome of the appeal by letter dated June 28, 2021.
163. By further letter dated August 2, 2021, the petitioner appealed to the respondent for another chance on the ground that she had been an obedient, trustworthy and good performance.
164. Significantly, the petitioner regretted and apologised for having been involved in wrong doing, albeit unwillingly. It is unclear as to what the term ‘unwillingly’ meant. She begged the 1st respondent to forgive her and promised not to repeat or engaged in mistakes in future.
165. The contents of this letter leave no doubt that the petitioner was all along aware of her wrong doing and was to blame for having permitted his friend to use her private KCB Account to defraud the Judiciary.
166. Contrary to the petitioner’s submission, the respondents are not duty bound to prove collusion beyond reasonable doubt, the standard in criminal cases, a preponderance of probabilities is sufficient in this case.
167. The petitioner played an essential role in bringing the scheme to fruition. The only thing Mr. Waka and his colleagues needed was a KCB account held by a confidant and perhaps one who was in another



station to conceal the scheme. The petitioner's conduct cannot pass as that of an innocent account holder who was oblivious of the real intentions of Mr Jacob Waka, the spouse or boyfriend.

168. More significantly, the petitioner was a beneficiary of the scheme as her statement to the police reveals.
169. Puzzlingly, the petitioner adduced no evidence to show that she ever questioned Mr Jacob Waka's motives from 2015 to 2018 or disclosed to his bank about his arrangement with Mr. Waka.
170. The court would perhaps have arrived at a different finding if the Petitioner demonstrated that only one or two deposits were made by Mr Waka and happened within a short duration.
171. Disconcertingly, the Petitioner's KCB Account received a total of 15 cheques which is a huge number and over a duration of almost 3 years.
172. In the court's view, the Petitioner appears to have been aware of the devious scheme and having been the main architects, friend or spouse, collusion may be inferred from her conduct.
173. For the foregoing reasons, it is the finding of the court that the 1st respondent had a valid and fair reason to terminate the Petitioner's employment as it did.
174. It is the further finding of the court that termination of the petitioner's employment was fair.

SUBDIVISION - Procedure

175. In *Shollei v Judicial Service Commission & another* (2022) KESC 5 (KLR) 17, the Supreme Court held that the operative principles on disciplinary proceedings before the Judicial Service Commission included section 47 of the *Constitution of Kenya, 2010* and the provisions of the *Fair Administrative Action Act* among other laws.
176. In relation to article 47 of the *Constitution of Kenya, 2010*, the Supreme Court stated as follows;

“Under article 47 of the *Constitution*, a person against whom an administrative action was being taken had a right to be given written reasons for the action if a right or fundamental freedom of that person had been or was likely to be adversely affected by an administrative action. The “if” in clause 2 of article 47 implied that giving written reasons for an administrative action was not an automatic right, it had to be demonstrated that a person has been or was likely to be affected by an administrative action. The burden to demonstrate the effect of an administrative action lay with the person against whom action had been taken . . .”
177. The guiding principles on disciplinary proceedings before the Judicial Service Commission include;
 - i. Compliance with the procedure in article 47 of the *Constitution* and *Fair Administrative Action Act*.
 - ii. Reasonable time to defend him or herself.
 - iii. Employee to be notified of the basis of the complaint(s) or who his or her accusers are.
 - iv. Details of the allegations against the employee.
 - v. Clarity on whether the administrative action taken is on an investigatory nature or disciplinary nature and if it turns disciplinary, a fresh notice is necessary to prepare his or her defence.
 - vi. Public hearing be accorded if the employee desires to have on or reasons given for denial.
 - vii. Detail reasons for any administrative action/decision.



- viii. Access and receive any relevant documents relating to the matter.
 - ix. Opportunity to attend proceedings in person or in the company of an expert of his/her choice.
 - x. Opportunity to call witnesses, be heard, cross-examine witnesses, request for adjournment of proceedings upon providing good reasons.
178. The court directed the Judicial Service Commission to publish and publicize procedures for all its disciplinary and investigative processes through Gazette Notice within 90 days from the date of judgement.
 179. The petitioner faults the procedure employed by the respondents on the premise that there was no investigation report or cross-examination of any person or any evidence of the charge of collusion.
 180. That the hearing was cosmetic, unconstitutional and unfair and the 3rd and 4th respondents conveyed their decision to the 1st respondent who dismissed her.
 181. I will now proceed to apply the foregoing propositions and provisions of section 4 of the *Fair Administrative Action Act* to the facts of the instant suit.
 182. As adverted to elsewhere in this judgement, the first letter dated May 14, 2019 directed the petitioner to explain the circumstances in which she had received the sum of Kshs 720,000 and provide evidence. The letter identified the cheque number, claimant's account number 1134XXXX56 at KCB, branch and the amount.
 183. The petitioner admitted the allegations but did not provide the evidence requested but still directed the respondent to the spouse or friend, Mr Jacob Waka.
 184. The second letter dated October 24, 2019 was a show cause and suspension letter and accused the petitioner for gross misconduct specifically collusion with one Jacob Waka to defraud the Judiciary funds. The letter cited section D7.2 of the Judiciary Human Resource Policies and Procedures Manual, 2014 and sections 44(3) and (4) of the *Employment Act, 2007*.
 185. The letter signed on behalf of the Chief Registrar of the Judiciary required a response within 14 days.
 186. By letter dated November 6, 2019, the 1st respondent granted the petitioner's request to respond to the notice to show cause within 30 days effective November 30, 2019 and date extended to December 9, 2019.
 187. By letter dated December 3, 2019, the petitioner responded to the notice to show cause denying the alleged collusion with Mr. Jacob Waka.
 188. The petitioner attached a table revealing the date of the transaction, Account, cheque number, money in and out, mobile number and name of the recipient for the 15 payments.
 189. The petitioner also attached Mpesa and bank statements to demonstrate the flow of the money received.
 190. The petitioner admitted that the inappropriate actions were caused by Mr. Jacob Waka.
 191. Evidently, the petitioner did not request the respondent to avail any document, information or witness. She merely requested to be afforded another chance to work for the Judiciary and would do so diligently.
 192. The petitioner's response to the notice to show cause leave no doubt that she clearly understood the charges.



193. It is not in dispute that by letter dated February 17, 2020, the 1st respondent invited the petitioner for a disciplinary hearing scheduled for March 3, 2020 at 8.30 am. The letter made reference to the notice to show cause dated October 24, 2019 regarding the charges.
194. The letter informed the petitioner that she was free to bring the supporting documents she wished to rely on including the right to a witness or a representative of her choice. The petitioner was accorded a 14 days notice of the disciplinary hearing.
195. By an email dated April 3, 2020, the 3rd respondent intimated that owing to the challenges occasioned by the COVID-19 Pandemic, the petitioner had the opportunity to repay the amount siphoned through her account which she paid in May 2020 and an official receipt dated May 22, 2020 was issued by the 1st respondent.
196. Email communication show that the petitioner was invited for an online meeting on June 5, 2020 and a disciplinary hearing on August 20, 2020 at 9.00 am. The petitioner admitted that both meetings took place.
197. The petitioner deposes that during the hearing, she reiterated the statement to the 2nd respondent. The fact that the petitioner reiterated an earlier response is sufficient evidence that she understood the charges and had responded to the same to the best of her knowledge and required neither further documentary evidence nor witnesses.
198. The allegation that there was no Investigation Report does not avail the petitioner as she was aware of the Final Internal Audit Report on Revenue Deposits Procurement & Expenditure Management at Maua Law Courts dated April 8, 2019
199. In the court's view, the Audit Report was sufficient. The petitioner neither challenged its veracity nor authenticity.
200. Closely related to the foregoing, the allegation that there was no cross-examination or evidence of the charge of collusion are equally to no avail as the respondents were relying on documentary evidence and the Final Internal Audit Report. The petitioner did not request that the Auditor who prepared the report be availed for cross-examination on it or indeed any other person or piece of evidence.
201. The charge of collusion cannot also be proved by oral evidence as none of the respondent's employee or other person witnessed the discussion which the court could only surmise was between Mr. Jacob Waka, his colleague, one Judy Kendi and the petitioner, with Jacob Waka as the Chief architect.
202. As already observed, there is sufficient circumstantial evidence for the court to make an inference that there was collusion based on how the monies deposited was disbursed, duration of the scheme and overall conduct of the petitioner.
203. Finally, the allegation that the hearing was cosmetic is difficult to sustain as the petitioner was accorded sufficient time to respond to the notice to show cause and time to appear for the disciplinary hearing scheduled for August 20, 2020.
204. On its part, the respondents offered to assist the petitioner with internet connection if she had challenges of connectivity and accorded her the necessary safeguards including the right to be accompanied by a witness or representative of her choice.
205. In addition, the petitioner was at liberty to avail documentary evidence in support of her case.



206. The petitioner neither requested for documents nor the presence of any witness for cross-examination and appear to have been satisfied with her response to the notice to show cause which she, depones was ‘uncontroverted.’
207. Finally, the letter of dismissal dated January 4, 2021 notified the petitioner that she had the right to appeal the decision within 6 weeks as well as the right to claim pension under the provisions of the Retirement Benefits Act. The petitioner appealed via letter dated February 8, 2021 raising various issues.
208. In summary, the petitioner was furnished with specific details of the charges he was facing at the inquiry stage in May 2019 and admitted the charge with no evidence to obviate the inference of collusion.
209. The notice to show cause issued more than 5 months’ later affirmed the same charge. The petitioner was thus afforded two distinct opportunities to interact and respond to the charge and did so.
210. In the court’s view, the totality of the documentary evidence availed reveal that the respondents complied with the requirements of the Constitution of Kenya, 2010, provisions of the Fair Administrative Action Act, the Judicial Service Act, 2011 and the Judiciary Human Resource Policies and Procedures Manual, 2014 on both substantive justification for the dismissal and procedurally.
211. In the circumstances, it is the finding of the court that the 1st respondent has demonstrated that it had a valid and fair reason to terminate the petitioner’s employment and did so in accordance with a fair procedure.
212. Having found that termination of the petitioner’s employment by the 1st respondent was substantively justifiable and procedurally fair, the issue as to whether the petitioner is entitled to the reliefs sought does not arise for determination.
213. In the upshot, the Petition herein is unsustainable and it is accordingly dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

