



**Wahome v Judicial Service Commission (Employment and Labour Relations Petition E094 of 2023) [2023] KEELRC 3058 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3058 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E094 OF 2023  
AN MWAURE, J  
NOVEMBER 28, 2023**

**BETWEEN**

**SAMUEL MUTHEE WAHOME ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed the Petition herein dated 24<sup>th</sup> May 2023.

**Petitioner's Case**

2. The Petitioner avers that he was employed as a judicial officer under permanent and pensionable terms earning a gross salary of Kshs 595,000 with all benefits.
3. The Petitioner avers that over a period of 19 years serving as a judicial officer, he did his assignments dutifully and diligently in various stations rising through the ranks to the designation of Chief Magistrate on account of his competence, professionalism and work ethics.
4. The Petitioner avers that the origin of the disciplinary proceedings against him was a complaint made on 18th July 2017 by Mr John Simiyu against Hon. Lady Justice Thripsisa Cherere (then trial magistrate) on grounds of professional misconduct and/or bribery related to the hearing and determination of Eldoret EACC Case No. 1 of 2012, *Republic v KeRRA, Simam & 9 others*.
5. The Petitioner avers that during the aforesaid disciplinary proceedings, it was alleged that on July 2016 while serving as the Chief Magistrate in Eldoret Law Courts, Hon. Lady Justice Cherere solicited for a bribe of Kshs 600,000 so she could dispose of the matter in favour of the accused persons. The complainant therein being the 3<sup>rd</sup> accused person together with the other accused persons allegedly



- made payment of Kshs 400,000 to the Petitioner as a conduit for onward transmission to Lady Justice Cherere.
6. The Petitioner avers that it was alleged the conspiracy to unlawfully obtain a favourable judgment through bribery was facilitated by himself and the accused persons counsel, James Namatsi.
  7. The Petitioner avers that on the basis of this complaint the Respondent summoned him and he appeared as Lady Justice Cherere's witness on 22<sup>nd</sup> March 2019.
  8. The Petitioner avers that during the proceedings, the nature of interrogation he was subjected to was suggestive of a predetermined indictment against him for charges levelled against the Judge. He nevertheless proceeded to give evidence to the best of his knowledge leading to the acquittal of Lady Justice Cherere and her subsequent promotion to judgeship.
  9. The Petitioner avers that to his shock, he received a letter dated 16<sup>th</sup> May 2019 from the Office of the Chief Justice communicating charges of gross misconduct levelled against him being:
    - i. That on or around July 2016 while working as a Chief Magistrate in Kakamega Law Courts, the Petitioner was in contact with litigants in an active case that was before his colleague and that he went ahead to give the; litigants the impression that he was in a position to be the conduit for bribery money from the accused persons to the then trial magistrate, Hon. Lady Justice Cherere;
    - ii. That on or around August 2016, the Petitioner received a bribe of Kshs 400,000 from Ms Pamela Muluti, on her behalf and other co-accused persons in Eldoret EACC Case No. 1 OF 2012, Republic v KeRRA, Simam & 9 Others after giving them the impression that he would hand it over to the trial magistrate so she could dispose the case promptly and in favour of the accused persons in breach of Articles 75(1)(a) and (b) of the *Constitution*; and
    - iii. That the Petitioner engaged in monetary transactions with M/s Namatsi Advocate who appeared before him in court, an act that is in breach of Section 45(1) and (4) Judiciary Code of Conduct.
  10. The Petitioner avers that the above charges were not premised on any independent investigation by the Respondent which would have been necessary to ascertain the veracity of the allegations raised against him but rather were lifted verbatim from prior proceedings in the disciplinary case against Hon. Lady Justice Cherere wherein he acted as a witness.
  11. The Petitioner avers that it is not clear whether the decision to initiate disciplinary proceedings was taken up by the Respondent on its own motion or through a formal complaint lodged against him and if so by whom. The Respondent has a constitutional and statutory duty to ensure that the Petitioner is informed the basis of the complaint or who his accusers are to enable him defend himself.
  12. The Petitioner avers that the Respondent placed him on immediate suspension without pay on 20<sup>th</sup> May 2019 based on allegations of gross misconduct.
  13. The Petitioner avers that the decision to suspend him did not meet the statutory threshold provided under paragraph 17(2) of the 3<sup>rd</sup> Schedule of the *Judicial Service Act*. Further, he had neither been convicted of any serious offence nor had any disciplinary proceedings taken against him therefore the power to suspend him by the Chief Justice was invoked unlawfully and injudiciously.
  14. The Petitioner further avers that his suspension without pay for nearly 4 years without any express or implied accusation under the *Judicial Service Act* and the *Employment Act* was illegal, unlawful and a violation of his rights to fair about practices.



15. The Petitioner avers that on 23<sup>rd</sup> October 2019, the Respondent called for his disciplinary case for hearing and served him with copies of documentary evidence on 4<sup>th</sup> November 2019 which included copies of the Hansard in the petition by John Simiyu against Hon. Lady Justice Cherere which the Petitioner objected to its production on grounds that such admission would be prejudicial to his right to a fair trial.
16. The Petitioner avers that despite his objection, the Respondent proceeded to allow for production of the Hansard vide its ruling dated 31<sup>st</sup> January 2022 and substantive determination of the hearing proceeded on even date.
17. The Petitioner avers that the Respondent failed to meet its legal obligation to ensure impartial and unbiased disciplinary proceedings.
18. The Petitioner avers that the Respondent terminated his employment on 27<sup>th</sup> February 2022, but however, it failed to provide him with reasons justifying its decision as required by law. The Petitioner maintains this and the deliberate non-compliance with the request for the Hansard for the proceedings violated his right to access to information protected under Article 35 of the *Constitution*.
19. The Petitioner avers that despite the Respondent notifying him of his right to appeal within 6 weeks of the decision, the Respondent failed to furnish him with the ruling and/or recorded reasons for the decisions and the Hansard of the proceedings despite the Petitioner having requested for the same thereby impeding any intended appeal and further violating his rights to fair administrative action.
20. The Petitioner avers that his suspension took approximately 3 years 9 months and 8 days whereby he was not under any other gainful employment and this was an inordinately long time taken to determine his case and this violated his right to expeditious administrative action under Article 47 of the *Constitution* and the *Fair Administrative Action Act*.

### **Respondent's Case**

21. In opposition to the Petition, the Respondent filed a replying affidavit dated 22<sup>nd</sup> June 2023.
22. The Respondent avers that on 18<sup>th</sup> July 2017, the Office of the Chief Justice received a complaint by John Simiyu, one of the accused in Eldoret EACC Case No 1 of 2012 Republic Vs Peris Simam & 5 Others against Hon. Lady Justice Thripsisa Cherere, then Chief Magistrate ("Presiding Magistrate") alleging professional misconduct and corruption. The complaint was supported by sworn statements by the complainant, Pamela Maluti and Silvia Kemunto.
23. The Respondent avers that the complainant alleged that the presiding magistrate received a bribe from the accused persons to expediate the hearing and deliver a favourable judgment in their favour. The complainant further alleged that instead of acquitting the accused persons she convicted them and sentenced them to pay fines between Kshs 700,000 to 500,000 for each of the ten counts or to serve a period of 20 years in jail in default.
24. The Respondent avers that pursuant to the Chief Justice's request, the complainant vide a letter dated 15<sup>th</sup> August 2017, provided particulars on how the funds were mobilized and passed over to the then presiding magistrate.
25. The Respondent avers in line with Article 168 (4) of the *Constitution* and section 32 of the *Judicial Service Act*, Judicial Service Commission formed a committee to consider the complaint and prepare a report on its findings for JSC's consideration. On 22<sup>nd</sup> March 2019, it held the hearing with John Simiyu, James Namatsi, the Petitioner and the presiding magistrate giving evidence.



26. The Respondent avers that the committee on conclusion of the hearing made the following findings:
- i. That there was consistency in written and oral evidence of the complainant, Pamela Maluti leading to the possibility that the Petitioner may have received money allegedly on behalf of the presiding magistrate to fast track the hearing and deliver a favourable judgment.
  - ii. That a series of communication and Mpesa transactions between James Namatsi Advocate and the Petitioner during the period in question lent credence to the assertion by the complainant that he delivered money to the Petitioner and that there was an attempt to refund the same after the complainant and his co-accused were convicted by the presiding magistrate.
  - iii. That no evidence had been adduced to prove that the presiding magistrate solicited, received or refunded any money allegedly paid to her by the complainant.
27. The Respondent avers that the committee then made the following recommendations:
- i. That the petition did not disclose any ground for the removal of the Hon. Judge under Article 168 of the *Constitution* and should be dismissed.’
  - ii. That disciplinary action should be initiated against the Petitioner on his role in the alleged soliciting and receiving of a bribe allegedly on behalf of the presiding magistrate.
28. The Respondent avers that it considered the aforementioned report and recommendations of the committee and resolved to initiate disciplinary proceedings against the Petitioner. On 16<sup>th</sup> May 2019, the Petitioner was issued with a Notice to Show Cause by the then Chief Justice Hon. David Maraga informing him of the charges preferred against him and the Petitioner responded vide a letter dated 14<sup>th</sup> June 2019 denying all the charges.
29. The Respondent avers that in line with section 17(2) of the 3<sup>rd</sup> Schedule of the *Judicial Service Act*, the Chief Justice suspended the Petitioner from his duties earning nil salary and the Petitioner was required to report to the Chief Registrar of the Judiciary every last Friday of the month. The Respondent maintains section 17 does not provide for paid suspension as alleged and any claim against his suspension is statute barred as it occurred nearly four years ago.
30. The Respondent avers that on 16<sup>th</sup> March 2020, the charges were amended to include breach of rule 10 of the Judicial Code of Conduct and Ethics, 2003. The Petitioner responded to the amended charges vide a letter dated 22<sup>nd</sup> April 2020 and adopted his response dated 14<sup>th</sup> June 2019.
31. The Respondent avers that the disciplinary hearing before its Human Resource Committee proceeded and at the start, the Petitioner was informed that it would not be efficient for the entire panel to sit as one and as such two panels were created and the Petitioner confirmed he had no issue with that arrangement. During the hearing, 5 witnesses being Lady Justice Cherere, James Namatsi, John Simiyu, Pamela Maluti and Silvia Kemunto gave their evidence.
32. The Respondent avers that paragraph 25(1) of the 3<sup>rd</sup> Schedule of the *Judicial Service act* requires that if the Chief Justice may think fit and considers it necessary to institute disciplinary proceedings against an officer which if proved will lead to dismissal, frame charges, serve it on the officer to respond. After receipt of the response, if in the opinion of the Chief Justice petitioner fails to exonerate themselves to the charges and reply will be laid before the Commission to decide whether to continue with the proceedings. On 23<sup>rd</sup> April 2019, the Respondent resolved to continue with the disciplinary proceedings and a panel was appointed to investigate the charges as required under paragraph 25(3) of the 3<sup>rd</sup> Schedule.



33. The Respondent avers that at the conclusion of the hearing, the committee considered the evidence and found there was sufficient evidence to prove the charges. The Petitioner had contacted litigants in an active case before his colleague and given them the impression that he was in a position to be the conduit for bribery money from the accused persons to the trial magistrate. The evidence also established the Petitioner was engaging in monetary transaction with Mr Namatsi advocate who appeared before him.
34. The Respondent avers that on February 2023, it considered and deliberated on the report and findings by the Human Resource Committee and unanimously adopted the same and resolved that the Petitioner be dismissed.

### **Petitioner's Submissions**

35. The Petitioner submitted that his disciplinary hearing was a continuation of the disciplinary hearing against Hon. Lady Justice Cherere as there was no effort to shield him against bias as the panel thwarted all efforts to have an objective hearing.
36. The Petitioner submitted that there is no complaint on record made against him, as such he was never served with any such complaint.
37. It was submitted for the Petitioner that the procedure under the 2<sup>nd</sup> Schedule of the *JSC Act* does not afford judicial officers the same benefit of automatic provision of concise reasons and decision for termination and this is discriminatory and in violation of the Petitioner's rights to equal treatment, right of information and the right to fair administrative action protected under Article 27, 35 and 47 of the *Constitution* respectively.
38. The Petitioner further submitted that the Respondent's non-service of recorded reasons and the Hansard proceedings which would have greatly aided in referring an appeal against his termination and therefore thwarted his right to fair administrative action and access to information under Article 35 of the *Constitution*. The Petitioner relied on *Shollei v Judicial Service Commission & Another* (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment).
39. The Petitioner submitted that there was inordinate delay in determining his disciplinary case which occasioned him grave prejudice as his career hung in the balance with no source of income in the intervening period. He relied on *Martin Situma Bakuli v African Express Airways* [2021] eKLR.
40. The Petitioner submitted that despite having admitted that there were some financial transactions between himself and James Namatsi in their personal capacity as friends and former schoolmates and further the funds were in furtherance of an agreement to purchase spare parts for his motor vehicle the committee did not listen to his explanation. It is the Petitioner who sent the money to Mr. Namatsi and not the other way round, therefore, the Petitioner maintains that the Respondent has not proved that it had valid reasons to terminate his employment.

### **Respondent's Submissions**

41. The Respondent submitted that it complied with section 41 of the *Employment Act* read together with Regulation 24 of the 3<sup>rd</sup> Schedule of the *Judicial Service Act* as:
  - i. The Petitioner was issued with a Notice to Show Cause letter dated 16<sup>th</sup> May 2019 informing him of all the reasons the JSC was considering his termination.
  - ii. The Petitioner responded to the allegations by a letter dated 14<sup>th</sup> June 2019 and did not protest the reasons for the disciplinary proceedings were not sufficiently explained to him.



- iii. The Petitioner was provided with reasons for his termination as set out in the dismissal letter dated 27<sup>th</sup> February 2023 which is clear the reasons for dismissal and explained the reasons of finding culpability in respect of the three charges to enable him lodge an appeal which he did on 30<sup>th</sup> March 2023.
42. The Respondent submitted that it provided evidence before this court demonstrating that it substantively complied with all the elements of procedural fairness as required under section 41 of the *Employment Act* and *Judicial Service Act*. It relied on the Court of Appeal decision, *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.
43. The Respondent submitted the Petitioner was supplied and acknowledged receipt of all documentary evidence relied upon during the hearing to enable him prepare his defence as required under regulation 23(1) of the 3<sup>rd</sup> Schedule of the *JSC Act*. Further, he was represented by an Advocate Mr. Felix Orege and was given an opportunity to cross examine all the witnesses.
44. The Respondent submitted that there was credible evidence that the Petitioner received money from accused persons on the pretext that it had been requested for by the presiding magistrate. The test to be applied and standard of proof is a reasonable standard as set out in the *Employment Act* and it is only required to establish that it genuinely believed that there was bribery or in this case a request for a bribe.
45. The Respondent submitted that during the disciplinary hearing, Mr. James Namatsi confirmed that he practiced in Kakamega where the Petitioner was stationed and there were Mpesa transactions between him and the Petitioner and Pamela Maluti was his client.
46. The Respondent submitted that the Petitioner failed to specifically plead the alleged bias by the disciplinary panel. Deputy Chief Justice Philomena Mwilu was not part of the committee that heard the Petitioner's case. Hon. Justice Majanja was not part of the committee that heard Hon. Lady Justice Cherere's case; and Commissioner Emily Ominde's term as a member of JSC lapsed on 4<sup>th</sup> December 2020 and ceased to be a member of the disciplinary committee and so the panelists who heard his case were not prejudiced.
47. The Respondent submitted that the Petitioner's complaint of bias on grounds that reliance of the Hansard proceedings arising from Hon. Lady Justice Cherere's disciplinary case was prejudicial to him is misplaced; the Petitioner's disciplinary case stems from the evidence tendered in the complaint against Hon. Lady Justice Cherere and is directly and substantially relevant to the Petitioner's case and had to be considered by the Respondent.
48. The Respondent submitted that it did not need a complainant to initiate disciplinary proceedings against the Petitioner as Article 252(1)(a) of the *Constitution* provides that each commission and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by a member of the public. The Respondent maintains it does not require an independent complaint to institute disciplinary proceedings and relied on *Sabina Chege vs Independent Electoral & Boundaries Commission*.
49. The Respondent submitted that the Petitioner was supplied with the Hansard proceeding of his disciplinary case vide an email dated 5<sup>th</sup> June 2021 and the Petitioner had all the documentary evidence to enable him lodge the appeal he did.
50. The Respondent submitted that the delay in finalizing the disciplinary hearing was occasioned by the effects of the government lockdown measures due to Covid 19, the Respondent is a part time commission with majority of its members engaged in gainful employment in other state offices and is involved in interviewing and recruitment of judges and other judicial officers, therefore, these reasons



and delays occasioned by the Petitioner himself, the delay was not inordinate. It relied on [\*Karani V Judicial Service Commission\*](#).

### **Analysis & Determination.**

51. The issues for determination are:
- i. Whether the disciplinary process violated the Petitioner's constitutional right to fair administrative action, fair labour practices and access to information.
  - ii. Whether the disciplinary process was marred by actual and/or implied bias.
  - iii. Whether there was inordinate delay in the determination of his disciplinary hearing
  - iv. Whether the Petitioner is entitled to the reliefs sought

### **Whether the disciplinary process violated the Petitioner's right to fair administrative action and fair labour practices.**

52. The Petitioner alleges his right to fair labour practices was violated as the disciplinary hearing was a mere continuation of the disciplinary hearing against Hon. Lady Justice Cherere and was not based on a complaint by a complainant on prior investigations.
53. This court observes that the Petitioner's disciplinary case was recommended by the JSC panel that heard Hon. Lady Justice Cherere disciplinary proceedings as the Petitioner was heavily implicated therein. Further, the Notice to Show Cause clearly set out the charges laid against him. As submitted by the Respondent, Article 252 (1) (a) of the [\*Constitution\*](#) states:
- “Each commission, and each holder of an independent office may conduct investigations on its own initiative or on a complaint made by a member of the public.”
54. Accordingly, the Respondent is not limited to institute disciplinary proceedings against the Petitioner based on a complaint made against him. The Hansard of the disciplinary proceedings against Hon. Lady Justice Cherere was enough to form a basis of inquiry against him.
55. On whether the disciplinary process was procedurally fair, paragraph 25 of the 3<sup>rd</sup> Schedule of the [\*Judicial Service Act\*](#) provides for the procedure to conduct disciplinary hearings against judges and judicial officers as stated hereunder:

“(1) Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.

(2) If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission,



and the Commission shall decide whether the disciplinary proceedings should continue or not.

- (3) If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the *Constitution*, delegate its powers:

Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the *Constitution*, they may be members of the Committee or Panel.

- (4) The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.
- (5) If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.
- (6) The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.
- (7) The Committee or Panel shall permit the accused officer to be represented by an advocate.
- (8) If during the course of the investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.
- (9) The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—
  - (a) a statement whether in the Committee or Panel’s judgement the charge or charges against the officer have been proved and the reasons therefor;
  - (b) details of any matters which, in the Committee or Panel’s opinion, aggravate or alleviate the gravity of the case; and
  - (c) a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.



- (10) The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.
- (11) The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest.”

56. Also section 41 of the *Employment Act* states:

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

57. The Respondent has proved before this court that it complied with the aforementioned procedure as:

- a. It issued the Petitioner with a Notice to Show Cause letter dated 16<sup>th</sup> May 2019 clearly setting out the charges preferred against him;
- b. the Petitioner responded to the charges vide a letter dated 14<sup>th</sup> June 2019;
- c. Vide letters dated 4<sup>th</sup> November 2019 and 6<sup>th</sup> December 2019, the Respondent informed the Petitioner of its decision to admit his case for disciplinary hearing and supplied him with documentary evidence in respect to his case to enable him prepare for the hearing;
- d. The disciplinary hearing against the Petitioner proceeded on 17<sup>th</sup> February 2020, 3<sup>rd</sup> March 2020 and 9<sup>th</sup> March 2020 respectively;
- e. The Petitioner was represented by an advocate one Mr. Felix Orege and was given an opportunity to cross examine the witness and defend his case; and
- f. The Petitioner was forwarded the Hansard proceedings on 5<sup>th</sup> June 2021 upon the Petitioner’s request on 27<sup>th</sup> May 2021. Upon the hearing the deliberations petitioner was served with a termination letter dated 27<sup>th</sup> February 20223

58. The petitioner among other reasons avers the respondent was guilty of unfair labour practices by using a biased tribunal who had participated in the procedure against Justice Cherere. He says secondly, he had not been informed of the charges against him and further he deserved to have charges specifically against him and not by extension voir dire.

59. The court has considered the evidence via replying affidavit by Hon. Anne Amadi the Chief Registrar of the Judiciary dated 12<sup>th</sup> June 2023. The court is satisfied as earlier stated that the respondent followed the right procedure to hear the petitioner starting from the amended notice to show cause of 16<sup>th</sup> March



- 2020 which lays down the charges levelled against the petitioner and the warning that if he did not respond within 14 days disciplinary action would be taken against him.
60. Disciplinary proceedings then proceeded from 17<sup>th</sup> February 2020 and panellists were Professor Olive Mugenda the Chair, Hon Emily Ominde a commissioner, Mr Patrick Gichohi a commissioner and Justice David Majanja a commissioner and Isaac Wainana director of legal services of JSC and Bernard Ochieng the Deputy Registrar.
  61. The chair Prof Olive Mugenda stated very clearly that they were constituted to hear the case against Hon. Wahome being a case that emanated from the proceedings related to the case against justice Cherere.
  62. Hon. Ominde a commissioner (as she then was) explained the mandate of the panel and in particular stated they were constituted as provided in the third schedule of the Judicial Service Act as JSC Human resource committee.
  63. The charges against Hon Wahome were read to him by Justice Majanja and he returned a plea of not guilty to all the charges. He was represented by his advocate.
  64. The director of legal services then proceeded to call their witnesses including justice Cherere, advocate Namasi and others were John Simiyu and Sylvia Kemunto and Pamela Mahili.
  65. The advocate for the claimant requested for JSC HR manual and Code of Ethics and the chair Prof Mugenda promised to provide the same.
  66. The petitioner's advocate at that point was asked by commissioner Ominde if he was ready to proceed and he assented that they were ready to proceed.
  67. Meanwhile, the requested documents were handed over to Mr Orege the advocate for the petitioner. The proceedings proceeded also on 3<sup>rd</sup> March 2020 and 9<sup>th</sup> March 2020 and the petitioner confirmed through his advocate that he had no objection to the panel as it was constituted.
  68. After considering the deliberations in the proceedings as deliberated by the Human resource committee JSC resolved to dismiss the petitioner.
  69. The respondent avers there was delay in the proceedings due to the Covid 19 Government lockdown. Hence the case proceeded on 3<sup>rd</sup> March 2021 and petitioner closed his case on 31<sup>st</sup> January 2022 and report was considered and decision to dismiss him as earlier said was made on 27<sup>th</sup> February 2023.
  70. The petitioner appealed the decision to terminate him on 27<sup>th</sup> March 2023 and on 13<sup>th</sup> June 2023 the appeal was dismissed as he was informed there were no new grounds raised.
  71. The court has considered the elaborate process undertaken by the respondent in the case against the petitioner and the valid reasons given for his dismissal which essentially are soliciting and receiving a bribe allegedly on behalf of Justice Cherere and in which Justice Cherere on her disciplinary hearing convinced the panel she neither asked for a bribe nor received the same and was found not culpable.
  72. In view of the foregoing, the respondent complied with the provision of the Employment Act in dismissal of the petitioner as they gave valid reasons to terminate him as provided in section 45(1) of the Employment Act. The same states as follows:

“No employer shall terminate the employment of an employee unfairly.”



73. The procedure adopted in these proceedings as earlier stated therein under section 41 of the *Employment Act* was followed by the respondent from the beginning to the point of dismissal of the appeal.
74. In view of the foregoing, the Respondent duly complied with procedural fairness in the conduct of the disciplinary hearing against the Petitioner as prescribed under the *Judicial Service Act* and the *Employment Act*.
75. Further, the Respondent did not violate the Petitioner's right of access to information as set out under Article 35 of the *Constitution*. The petitioner was availed the Hansard report and other requested documents as earlier set out.
76. To further elaborate on whether the respondent had justification to terminate the Petitioner's employment, Section 43 of the *Employment Act* 2007 which states as follows: -

“43. Proof of reason for termination

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. 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.”

77. Further, Section 45 (2) of *Employment Act* states as follows:

“(1) .....

2. A termination of employment is unfair if the employer fails to prove-

78. Accordingly, the Respondent has proved that it had valid reasons to dismiss the Petitioner as there was evidence in form of Mpesa transactions between the Petitioner and the accused persons' Advocate, Mr Namatsi in Eldoret EACC Case No. 1 of 2012, Republic v KeRRA, Simam & 9 others which gave credence to the allegations that he received a bribe as a conduit allegedly for onward transmission to the then presiding magistrate. Therefore, the Respondent had substantive justification to dismiss the Petitioner herein.
79. Having established, the Respondent's decision to dismiss the Petitioner was substantively justified and procedurally fair, this court holds the Petitioner's right to fair administrative action and fair labour practices was not violated and he was fairly terminated.

**Whether the disciplinary process was marred by actual and/or implied bias.**

80. The Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR observed:

“Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use



the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias.”

81. The Petitioner’s allegation of the Respondent’s bias is based on the fact that the Respondent introduced the Hansard of the disciplinary proceedings against Hon. Lady Justice Cherere’s case in his own proceedings. The Petitioner himself acknowledged that the genesis of his disciplinary case stems from the proceedings as the Respondent’s committee in its report recommended to the Respondent that disciplinary action should be initiated against the Petitioner on his role in the alleged soliciting and receiving of a bribe allegedly on behalf of the presiding magistrate.
82. The Petitioner’s allegation that the panel that was constituted to hear and determine his disciplinary case was similar to the one that heard the disciplinary proceedings against Hon. Lady Justice Cherere hence bias is far fetched as the Respondent only relied on evidence brought before it during the initial proceedings against Hon. Lady Justice Cherere. The petitioner affirmed he had no objection to the Constitution of the panel at the beginning of the proceedings. To raise such objections now is an afterthought and cannot be sustained.
83. For that reason, this court reads no bias in the Respondent’s conduct of the Petitioner’s disciplinary case. The Hansard was necessary as the inquiry into the Petitioner’s gross misconduct emanated from Hon. Lady Justice Cherere’s disciplinary proceedings.

#### **Whether there was inordinate delay in the determination of his disciplinary hearing**

84. This court relies in the Supreme Court case of Karani v Judicial Service Commission (Petition 3 of 2021) [2022] KESC 37 (KLR) (8 July 2022) (Judgment) which the court held:

“On what amounts to inordinate delay we are persuaded by the finding in the case of Mwangi S Kimenyi v Attorney General & another (2014) eKLR where Gikonyo J held thus:

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth”

Nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. ”
85. “Delay on its own, does not lead the court to conclude that there is infringement of rights. Where there is delay, the court must interrogate whether the same is justifiable and thus excusable, or not. In order to do that, the court must interrogate the circumstances of the case. In the present dispute, there was a delay of 15 months from the date of interdiction to the day of hearing the appellant by the disciplinary Committee. The respondent explains this delay by submitting that it is a part time Commission with majority of its members engaged in gainful employment in other state/public offices and others in private entities where they are also expected to discharge functions. Further that its meetings were capped at eight (8) per month by the Salaries and Remuneration Commission and that it was engaged in the priority exercise of hiring a new Chief Justice during the intervening period. We agree with the Court of Appeal, that the trial court in its decision failed to mention taking these circumstances into consideration when determining whether the delay was inordinate.”
86. As well in this case the Respondent herein has satisfactorily explained what necessitated the delay in determination of the Petitioner’s case from the above and also the effects of the government lockdown measures due to Covid 19 pandemic. Also the Respondent is a part time commission with majority of its members engaged in gainful employment in other state offices and some in private engagements and



were also involved in interviewing and recruitment of judges and other judicial officers. The petitioner was also locked out of Nairobi and so he also was part of the delay for that matter.

87. From the records of the proceedings, the Petitioner requested for an adjournment and was for a specific period locked outside Nairobi during the countrywide lockdown during the Covid 19 pandemic. Accordingly, the delay was justified.
88. Having established the Petitioner's suspension and dismissal was fair and did not violate the Petitioner's constitutional rights and provisions of the *Employment Act* and *Judicial Service Act*, this court hold the Petitioner is not entitled to most of reliefs sought and in particular the court holds the prayers, i, ii, iv, v and iv vii, viii and x are not merited and are all denied.
89. Having held so the court would wish to address the issue of prayer iii on suspension of the petitioner without pay for an in- definite period as per the suspension letter dated 30<sup>th</sup> May 2019. The petitioner says he was on suspension for nearly four years without any pay. (3 years and 9 months and 8 days).
90. The case that was similar to this one on all fours in relation to suspension of an employee by the Judicial Service Commission (JSC) was the case of *Byran Mandela Khaemba vs Chief Justice and President of Supreme Court* Cause No 100 Of 2019 where court held:

” section 17 *Judicial Service Act* did to allow suspension with no pay. No express or implied provisions that salary of a judicial officer or other staff under suspension would be withheld or not paid during the period of suspension. Particularly paragraph 17(3) of the third schedule of the act provided for alimentary allowance the amount and terms of which were to be fixed under regulations enacted by the commission for the suspended employee.

“Where case is for judicial staff or other staff of the judiciary *Employment Act* 2007 was equally applicable where appropriate or necessary. The *Employment Act* was the primary legislation of the implementation of article 41 of the *Constitution*. There was no reason why it should not apply to the judiciary staff where statute or contract provided for terms and conditions of service that were not better than those imposed under the *Employment Act* 2007.”

“It was unconstitutional for employer to suspend an employee without pay. That would amount to unfair labour practice under article 41 of the *Constitution* of Kenya. In the absence of a contrary proviso a judicial office or other staff of the judiciary who had been suspended was entitled to full pay.”

“The provision of paragraph 17(3) of *Judicial Service Act* Third Schedule relating to alimentary allowance for suspended staff and commissioner's failure to fix the amount and terms of that allowance did not mean that the employer's obligation to pay remuneration was discharged.”

91. Under paragraph 17(3) third schedule of *Judicial Service Act* therefore the employee under suspension is entitled to some payment. The above authority of Byan Mandela Khaemba make that clear.
92. The respondent says the suspension having taken place over four years ago is therefore time barred. The court dos not agree with that because suspension is not a ground for termination or dismissal.
93. The respondent should not have suspended the petitioner indefinitely without any pay. Since the law does not provide the amount to be paid during suspension the court will ask JSC to consider fairly what amount they should have paid the petitioner as alimentary allowance for the period he was under



suspension and advise the court within 90 days from today's date to enable court give final award. Mention on 29<sup>th</sup> February 2024 for that report.

94. As for the costs each party will meet their respective costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

