



REPUBLIC OF KENYA



KENYA LAW
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**Rotich v Judicial Service Commission (Cause E772 of 2022)
[2023] KEELRC 2760 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2760 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E772 OF 2022
B ONGAYA, J
NOVEMBER 3, 2023**

BETWEEN

TIMON KIPKEMEI ROTICH CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Claimant filed the instant application dated 05.05.2023 through the firm of Sky Advocates LLP. The application is brought under Articles 35, 50 and 159 (2) of *the Constitution* of Kenya, 2010, Order 40, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. The claimant prays for the following orders:
 - a. That this application be certified urgent and service hereof be dispensed with in the first instance (Spent).
 - b. That the Honourable Court be pleased to compel the respondent to unconditionally release to the claimant proceedings of 22nd September, 2021, 9th December, 2021 and or file the same in Court.
 - c. That the Honourable Court be pleased to grant leave to the claimant to file in Court the proceedings in (b) above and any other document before the suit herein is certified ready for hearing.
 - d. That the costs of this application be in the cause.
2. The application is based on the supporting affidavit of Timon Kipkemei Rotich sworn on 05.05.2023 and upon the following grounds:



- a. That the claimant has on several occasions made formal requests to be furnished with the proceedings in respect to the notice to show cause and the sessions conducted by the respondent on the 22.09.2021 and 09.12. 2021 to no avail.
 - b. The claimant believes that he was exonerated of any wrong doing in the proceedings but was still unlawfully terminated from his employment with the respondent thus its refusal or failure to release the proceedings as requested.
 - c. The claimant maintains that unless the orders sought in the instant application are granted his right to information and fair hearing will be denied.
 - d. The claimant remains apprehensive that unless the Honourable Court intervenes and grants appropriate orders he stands to suffer irreparable loss and damages.
 - e. He maintains that granting of the orders sought is in the interest of justice.
3. The respondent opposed the application by filing the replying affidavit by Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the Judicial Service Commission sworn on 10.05.2023 in which she urged as follows:
- a. It is noted that the claimant is seeking an order to compel the respondent to furnish him with minutes of the disciplinary proceedings of 22.09.2021 and 09.12.2021.
 - b. The claimant has never requested for the information being sought either in person or in writing as alleged.
 - c. The claimant alleges to have witnesses who are willing to testify in the present matter but he has not annexed a list of the said witnesses or their draft statements. Further, he has not sought and obtained leave of Court to introduce the said witnesses and their statements.
 - d. The suit was filed in December 2022 and the claimant has proceeded without the information now sought.
 - e. The application is an afterthought, a fishing expedition by the claimant and was filed way after pre-trial direction had been issued by the Court and a hearing date fixed in the matter.
 - f. The requested information is privileged and as such cannot be released to the claimant.
 - g. The claimant cannot allege to have been vindicated at the disciplinary hearing yet the respondent reached a decision to terminate his employment and also issued him with a letter of dismissal of his appeal to the decision to terminate.
 - h. It is on this basis that the respondent argues that the instant application is without merit and therefore urged the Court to dismiss it with costs to the respondent.
4. The claimant filed a further affidavit sworn on 11.05.2023. He stated that he made a personal request to the respondent to be furnished with the documents in question but none were supplied to him.
 5. That he subsequently requested his advocates on record to make the written request on his behalf. The advocates filed the instant application.
 6. The information as applied for will assist the Court to arrive at a just decision.
 7. He further averred that he has witnesses who have agreed to testify on his behalf in this matter and that the said witnesses only came forward after the matter had been fixed for hearing. He has exhibited witness statements by Hassan N. Lakicha Advocate who states in his statement that the complaint to



the respondent's Director, Human Resource Department was withdrawn as had been made against the claimant. The other exhibited witness statement is by Purity Gakii Murangiri Advocate stating that by a letter dated 11.01.2022 it was clarified to the respondent that the money in the alleged bribery was to enable facilitate service of process in the involved proceedings. Further, the two witnesses had come forward after the suit had been fixed for hearing. He was only interested in proceedings as related to his matter and no party will be prejudiced. The claimant stated that the documents were not privileged and he was entitled to access them as leading to his dismissal.

8. The claimant stated that the matter failed to proceed for hearing on 2nd May, 2023 owing to the fact that the Court was not sitting.
9. Parties did not make oral or written submissions but relied on the affidavits and the grounds in the application. The Court has considered the parties' respective positions and returns as follows.
10. To answer the 1st issue, the Court returns that it is vested with power to make an order in the nature of the prayers in the instant application. Section 20(4) of the [Employment and Labour Relations Court Act](#), 2011 provides that for purposes of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to:
 - a. furnish in writing or otherwise, such particulars in relation to such matters as it may require;
 - b. attend before it;
 - c. give evidence on oath or otherwise;
 - d. produce any relevant documents.

Subsection 20(5) provides that an order under subsection (4) may include a requirement as to the date on which or time within which the order is to be complied with. Further, the Court observes that Article 35(1) of [the Constitution](#) of Kenya, 2010 provides that every citizen has the right of access to information held by the State and, information held by another person and required for the exercise or protection of any right or fundamental freedom. It appears to the Court that the applicant is pursuing his rights to a fair hearing under Article 50; the right to fair labor practices under Article 41 and the [Employment Act](#) within his pleadings; and, the right of access to justice under Article 48 of [the Constitution](#). By that finding and the suit having not been heard, the Court finds that the claimant has not moved the Court belatedly as the proceedings are live before the Court and the claimant is entitled as prayed for.

11. To answer the 2nd issue, the Court returns that the respondent has not established that the information required by the claimant is privileged. Whether the respondent should provide the information, the Court follows its holding in Hon. [Simon Rotich Ruto -Versus- Judicial Service Commission and Another](#) [2019] eKLR thus, "Second, as urged for the petitioner, Article 47 of [the Constitution](#) entitles every person to reasons where an adverse administrative decision is made against the person. As submitted for the petitioner, provision of all information in a disciplinary case would be necessary to satisfy the constitutional provisions on transparency, accountability, enforcement of rights and access to information. The Court therefore returns that the petitioner has established that he was entitled to the declaration that section 23 of the third schedule to [Judicial Service Act](#) purporting that a judicial officer shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article 35 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; and the same is liable to be declared unconstitutional, null and void to that extent." The Court then issued a declaration thus "2. The



declaration that section 23 of the Third Schedule to *Judicial Service Act*, 2011 purporting that a judicial officer or staff shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article 35 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; all of *the Constitution* of Kenya, 2010 - and the section is hereby declared unconstitutional, null and void to that extent.”

12. The issue has been authoritatively considered and with finality by the Supreme Court holding in *Gladys Boss shollei –Versus- Judicial Service Commission & Another* Petition No. 34 of 2014 [2022]KESCC5(KLR)(17 February 2022) (Judgment) (Koome CJ &P, Mwilu DCJ, &V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ). Thus:

“(61) From the foregoing, it is clear to us that the courts below have made contradictory findings on the constitutionality of Section 23 of the Third schedule. This Court while setting the guiding principles for admitting an appeal as one of general public importance, in the case of *Hermanus Phillipus Steyn -vGiovanni Gneccchi – Ruscone*, Supreme Court application No.4 of 2012, found that it can exercise its jurisdiction to clarify an uncertainty in the law arising from contradictory precedents of the Court of Appeal by either resolving the uncertainty, as it may determine, or referring the matter to the Court of Appeal for its determination. Even though this matter was not filed under Article 163(4)(b) of *the Constitution*, we find it necessary for this Court to settle, with finality, the issue as to whether Section 23 of the Third Schedule to the *Judicial Service Act* is constitutional.

(62) Any limitation of the right to access to information under Article 35 of *the Constitution* may only be done by legislation under specific prescribed criteria. Article 24(2), expressly states that “a provision in legislation limiting a right or fundamental freedom in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.” SC. Petition No. 34 of 2014 32

(63) The impugned Section 23 is subsidiary legislation found in the Third Schedule of the *Act* which was enacted in 2011 (after the effective date). The Third Schedule is premised on Section 32 of the *Act* which makes provisions for appointment, discipline and removal of judicial officers and staff. Nowhere in the Parent *Act*, and in particular Section 32, is it specifically expressed that there is an intention to limit the right to information of an officer in respect of whom disciplinary proceedings are to be held. Neither, is there an explanation of the nature and extent of the limitation. It was not, in our opinion, the intention of the drafters of *the Constitution* that a vague provision in a schedule, such as the one in Section 23 of the Third Schedule to the *Act*, can limit a constitutional right or fundamental freedom, in a manner that is reasonable and justifiable in an open democratic society. In view of the set criteria under Article 24(2) of



the Constitution, it is our finding that Section 23 of the Third Schedule on its own does not qualify as a legal basis for the purpose of justifying a limitation of a right or fundamental freedom under Article 24 of the Constitution.

(64) We therefore, find that JSC’s reliance of the proviso in Section 23 of the Third Schedule to limit the appellant’s right to access to information guaranteed in the Constitution was unfounded. JSC’s refusal prejudiced the appellant who could not adequately challenge its decision to remove her from office. We agree with the learned Judge in the Simon Rotich Case that Section 23 of the Third Schedule to the Act is unconstitutional.”

13. The impugned section 23 of the Third schedule to the Judicial Service Commission Act that has been found with finality as being unconstitutional provided:

“(1) An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it.

(2) The officer may also be given a copy of the evidence (including documents tendered in evidence) after the proceedings are closed, on payment of five shillings per page of each document tendered in evidence: Provided that they shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions.” The section was found unconstitutional to the extent that the proviso thereto was unconstitutional.

14. In the circumstances, the Court returns that the claimant is entitled to the documents as prayed for. While making that finding, the material on record appears to be that the respondent has decided that the documents will not be provided when it was stated at paragraph 9 of the replying affidavit thus, “9. I am aware that the requested information is privileged and cannot be released to the Applicant.” It therefore appears to the Court that without the assistance by way of the orders sought in the application being allowed, the claimant will be prejudiced as the information or documents needed to effectively and completely prosecute the suit, being in the respondent’s custody, will not be available for the claimant’s use.

In Conclusion, the application dated 05.05.2023 and filed for the claimant is hereby determined with orders:

a. The respondent to release to the claimant the certified copy of record of proceedings or minutes of 22.09.2021 and 09.12.2021 as far as they relate to the disciplinary case herein as was initiated and continued against the claimant and, the claimant to file the same in Court by way of a further list and copies of documents by mention date on 30.11.2023 at 9.30am or soon thereafter for further directions towards expeditious hearing and determination of the suit.

b. The costs of the application in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 3RD NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

