



**Chianda v Judicial Service Commission & another (Petition
49 of 2020) [2022] KEELRC 1297 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1297 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 49 OF 2020**

MN NDUMA, J

MAY 19, 2022

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION AND SECTIONS
3, 4, 5, 6 AND 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT (2015),
AND ARTICLE 159(2) (D) NO 4 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT NO 20 OF 2011, SECTION 12
OF THE EMPLOYMENT AND LABOUR RELATIONS COURT RULES**

AND

**IN THE MATTER OF THE JUDICIAL SERVICE ACT AND
THE 3RD SCHEDULE OF THE JUDICIAL SERVICE ACT**

BETWEEN

VICTOR OTIENO CHIANDA PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF JUSTICE 2ND RESPONDENT

Lifting the judicial immunity accorded to a judicial officer and dismissing them from service for negligent action or omission done in good faith and acting within jurisdiction is unlawful

The petitioner was dismissed from judicial service on charges of gross misconduct for signing an order which was not issued by the court and issuing ex parte orders which had the effect of reviewing earlier orders issued by the trial court of concurrent jurisdiction. The court found that there were no particulars in the charge and/or in the evidence adduced that the petitioner acted without jurisdiction. The court held that the charges and the evidence tabled did not meet the threshold demanded by the Constitution for the impeachment of the constitutional immunity a judicial officer was clothed with under article 160(5) of the Constitution. The court further held that negligent action or omission without evidence of bad faith and acting without jurisdiction did not suffice.



Reported by Kakai Toili

Judicial Officers - *judicial immunity - factors to consider when determining the existence of judicial immunity - whether a judicial officer had immunity against disciplinary action or removal from judicial service for wrongful or negligent action or omission done in good faith and within his/her jurisdiction - Constitution of Kenya, 2010, articles 160(5) and 172(1)(c); Judicial Service Act, 2011, Third Schedule, section 25.*

Labour Law - *employment - unlawful dismissal from employment - remedies for wrongful dismissal - reinstatement - whether the removal of a judicial officer from judicial service for negligent action or omission without evidence of bad faith amounted to an exceptional circumstance for the reinstatement of the judicial officer - Constitution of Kenya, 2010, articles 159 and 160(1) and (5); Employment Act, 2007, section 49(4).*

Brief facts

The Chief Justice framed the charges against the petitioner, who was a Senior Resident Magistrate, suspended him and referred the matter to the 1st respondent, the Judicial Service Commission (JSC) for consideration and processing. The charges included; charge 1 on gross misconduct the particulars of which were that in Naivasha CMCC No 1 of 2018 *John Maina Mburu v Evans Kageche Boro* the petitioner signed an order which was not issued by the court; and charge 3 on gross misconduct particulars of which were that the petitioner as the duty court presided over Naivasha CMCC No 741/2016 *ARN Security Consultants and Training service Limited v Kika Lodge and Hotels* and issued *ex parte* orders which had the net effect of reviewing earlier orders issued by the trial court of concurrent jurisdiction. The petitioner deposed that he signed the erroneous court order honestly, in good faith believing it had been extracted and verified by the executive officer.

JSC considered the matter and having decided that there was sufficient cause to institute disciplinary hearing against the petitioner constituted Judicial Service Commission Human Resource Management Committee (the Committee) to hear and determine the charges laid against the petitioner. The petitioner submitted that the JSC did not have jurisdiction to discipline him for decisions made by himself in execution of judicial duties done in good faith.

The petitioner sought for among others; a declaration that the interdiction, charge, proceedings, determination to dismiss the petitioner was unconstitutional; that the action and conduct of the JSC of lifting the judicial immunity accorded to judicial officers and holding the petitioner personally liable for judicial acts and/or omissions honestly and in good faith in the discharge of his judicial work is inconsistent with and in contravention of the *Constitution of Kenya, 2010 (Constitution)* and the *Judicial Service Act*; and an order of reinstatement to his post or deployment within the judicial service.

Issues

- i. Whether a judicial officer had immunity against disciplinary action or removal from judicial service for wrongful or negligent action or omission done in good faith and within his/her jurisdiction.
- ii. Whether the removal of a judicial officer from judicial service for negligent action or omission without evidence of bad faith amounted to an exceptional circumstance for the reinstatement of the judicial officer.

Held

1. An employee who had been dismissed from employment by their employer was presented with a vexing decision to take, whether to approach court with a statement of claim under the provisions of the Employment Act, 2007 (the Act), which Act, permitted the court not only to review the propriety of the process followed by an employer in disciplinary process preceding a dismissal as provided under section 41 of the Act, but also, the court was fully permitted and in a robust manner to consider and determine in terms of section 43(1) and (2) as read with section 45(1) and (2) of the Act whether the employer had a valid reason to dismiss the employee from employment.
2. A party who sought to approach the court by way of constitutional or judicial review had to weigh carefully the merits and demerits of the type of proceedings they elected to file before court and the pros and cons inherent in either of the procedures before court. Indeed, under section 43(1) and (2) of



- the Employment Act, the burden of proof lay with the employer to prove that they had a valid reason to dismiss the employee and that the action they took was justified considering all the circumstances of the case as per section 47(5) of the Employment Act.
3. Whereas a judicial officer was only subject to the Constitution and the law and should not be subjected to the control or direction of any person or authority, the Judicial Service Commission (JSC) under article 172(1)(c) of the Constitution had the mandate to discipline a judicial officer, for misconduct in the course of duty in terms of the procedure set out under section 25 of the third schedule to the Judicial Service Act.
 4. A purposive interpretation of article 160(5) read with article 172(1)(c) of the Constitution contemplated that where a judicial officer had committed an act or omission for which he could be subjected to a disciplinary action leading to removal or otherwise in the first place, then the judicial officer had a lawful defence to the wrongful action or omission by demonstrating that the same was done in good faith in lawful performance of a judicial function and therefore the judicial officer had immunity against any disciplinary action or removal for the wrongful action or omission.
 5. There was lacking any evidence that the petitioner acted dishonestly or that he had any intent to defraud or to seek, unconscionable advantage for himself and or/any of the parties in Naivasha CMCC No 1 of 2018 when he signed the impugned court order which formed the basis for charge 1.
 6. The petitioner was guilty of negligent conduct, wholly admitted by him. A careful perusal of the entire Hansard did not disclose any evidence adduced by the complainant and his witnesses that the petitioner did not act in good faith and that the said orders were not issued in lawful performance of a judicial function.
 7. In the letter of dismissal dated February 7, 2019, the JSC did not make any finding that the petitioner had acted in respect of charge 1 and 3 in bad faith and/or with intent to defraud or to seek unconscionable advantage. As a matter of fact, the two charges preferred against the petitioner did not disclose any such particulars or statement of fact in the first place. Charge 1 and 3 did not contain any particulars of lack of good faith on the part of the petitioner.
 8. There were no particulars in the charge and/or in the evidence adduced by the complainants that the petitioner in the two occasions acted outside the lawful performance of a judicial duty without jurisdiction. The charges and the evidence tabled did not therefore meet the threshold demanded by the Constitution for the impeachment of the constitutional immunity a judicial officer was clothed with under article 160(5) of the Constitution. That was arrived at upon a purposive interpretation of article 160(5) read with article 172(1)(c) of the Constitution avoiding destruction of either of the articles by the other. The petitioner in the circumstances disclosed in the case, was protected by article 160(5) from the disciplinary action and dismissal by JSC.
 9. At the beginning of the disciplinary hearing, the petitioner had at page 75 of the Hansard raised the issue that he was performing constitutional functions which were protected under article 160 of the Constitution and under section 6 of the Judicature Act. The petitioner wished to be heard on that matter before the disciplinary hearing commenced on the merits. That was a preliminary matter of law which ought to have been heard and determined at the outset since it touched on the jurisdiction of the Committee to proceed with the disciplinary hearing.
 10. The matter could be also considered by the JSC on its own motion before making a decision whether to charge the judicial officer in the first place, and if so ensure that those charges were well supported and particularized to meet the threshold contemplated within the meaning of article 160(5) as read with article 172(1)(c) of the Constitution. Negligent action or omission without evidence of bad faith and acting without jurisdiction did not suffice.
 11. Section 49(4) of the Employment Act, 2007 provided for matters to be taken into account in deciding whether to reinstate an employee. The supremacy of the Constitution and the command under article 159, that the court was to only exercise judicial authority as commanded by the Constitution led the



- court to find that article 160(1) and (5) of the Constitution presented the court with exceptional circumstances within the meaning of section 49(4)(d) of the Employment Act, to find that the instant matter was a suitable case for the court to accept the wishes of the petitioner to be reinstated to the judicial service despite his admission in respect of charge 1.
12. Judicial service was well guided by the Constitution, the law and all policy documents, that ensured that judicial officers remained in the straight and narrow while discharging their services. It was practical to reinstate the petitioner to judicial service to be deployed as JSC deemed it suitable. The petitioner was a young man and had only served the Judiciary for about nine (9) years. The petitioner had a long career path before him up to the retirement age of 60 years and/ or 70, should he in future find favour with JSC and be appointed a judge of a superior court.
 13. The Judiciary as guided by the Constitution and the Judicial Service Act, had developed a raft of policy and procedure documents to manage, and develop the human resource in the Judiciary. The JSC had the wherewithal to take positive remedial measures on judicial officers and staff, including performance improvement programmes (PIP); performance measurement; monitoring and evaluation; targeted training programmes; relevant reward and sanction system and where appropriate, informed deployments among others.

Petition allowed.

Orders

- i. *The action and conduct of the respondents of lifting the judicial immunity accorded to the petitioner and dismissing him from service violated article 160(1) and (5) of the Constitution and the decision was unlawful, null and void ab initio.*
- ii. *The respondents were directed to reinstate the petitioner to his post or deployed elsewhere within the judicial service without loss of rank, remuneration and/or any other accrued benefits from date of suspension and in progression.*
- iii. *The records of the charges and disciplinary proceedings instituted by the respondent against the petitioner were quashed.*
- iv. *The orders in (i) (ii) and (iii) above sufficed to compensate the petitioner in respect of the proved violation of his constitutional protection under article 160(1) and (5) of the Constitution.*
- v. *The respondents to meet the costs of the petition.*

Citations

Cases

Kenya

1. *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* Petition 42 of 2018; [2020] KESC 43 (KLR) - (Explained)
2. *Judicial Service Commission v Gladys Boss Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
3. *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* Civil Appeal 46 of 2014; [2014] KECA 403 (KLR) - (Followed)
4. *Naima, Khamis v Oxford University Press (EA) Ltd* Civil Appeal 15 of 2015; [2017] KECA 480 (KLR) - (Explained)
5. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Followed)

United States

State of Kansas v Dustin D Walker No 116,174 - (Mentioned)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Publishing Company 9th Edn p 713

Statutes



Kenya

1. Civil Procedure Act sections 1, 1A, 3, 3A, 18, 99, 100 - (Interpreted)
2. Constitution of Kenya articles 2(4); 10; 22; 23; 27(1); 47(1); 159; 160(1)(5); 172(1)(c); 236(a)(b); 258 - (Interpreted)
3. Employment Act, 2007 (Act No 11 of 2007) sections 41, 43(1)(2); 45(1)(2); 47(5); 49(4); 50 - (Interpreted)
4. Employment and Labour Relations Court Act, 2011 (Act No 20 of 2011) In general - (Cited)
5. Evidence Act (cap 80) sections 106, 107, 108, 109, 129 - (Interpreted)
6. Fair Administrative Action Act, 2015 (Act No 4 of 2015) sections 4(1)(4); 11(1)(e)(h) - (Interpreted)
7. Judicature Act (cap 8) sections 6, 47(2) - (Interpreted)
8. Judicial Service Act, 2011 (Act No 1 of 2011) sections 3, 25 (1-11); 45 - (Interpreted)
9. Magistrates' Courts Act, 2015 (Act No 26 of 2015) In general - (Cited)
10. Statutory Instruments Act, 2013 (Act No 23 of 2013) In general - (Cited)

Advocates

Okemwa & Co Advocates for Petitioner

G & A Advocates LLP for Respondents

JUDGMENT

1. The petition was filed on April 2, 2020 by the petitioner seeking the following reliefs:-
 - (a) A declaration that the interdiction, charge, proceedings, determination to dismiss the petitioner was contrary to the respondents' policy, invalid, unfair, unreasonable, unlawful, unproportionate, unconstitutional, null and void *ab initio* and an order of *certiorari* do issue to quash and set aside.
 - (b) The action and conduct of the respondent of lifting the judicial immunity accorded to judicial officers and holding the petitioner personally liable for judicial acts and/or omissions honestly and in good faith in the discharge of his judicial work is inconsistent with and in contravention of articles 2(4); 27(1); 47(1); 159; 160(1)(5), 172(1)(c) and article 236(a) (b) of the Constitution and section 45 of the Judicial Service Act.
 - (c) A declaration that the interdiction, charge, proceedings, determination to dismiss the petitioner was in violation of article 2(4), 10(2) (a); 41, 47(1); 75(2); 159; 160(1)(5); 172(1) (c) 236(a) (b); Judicial Service Act, {section 45, rule 25(1-11) of the 3rd schedule}; The Fair Administrative Action Act section 4(1) and (4). Section 106, 107, 108, 109 and 129 of the Evidence Act, the tenets natural justice unconstitutional null and void *ab initio*.
 - (d) Compensation for the violation of the petitioner's fundamental rights and freedoms as pleaded in prayer (c) above.
 - (e) An order of reinstatement to his post or deployment within the Judicial Service without loss of rank, accrued benefits, allowances and back salaries in progression.
 - (f) An order to quash and expunge from the respondent's records the charges and disciplinary proceedings instituted by the respondent against the petitioner.
 - (g) A declaration that the Registrar Magistrates Court has no role in supervision or questioning a magistrate's exercise of judicial powers.



- (h) Within 12 months of this judgment, the respondents do present to parliament for enactment rules to operationalize the Magistrates' Court Act, Statutory Instruments Act and article 94 and section 47(2) of the Judicial Service Act.
- (i) Costs of the suit and interest.

Facts of the Petition

2. The petitioner joined the Judiciary in July, 2010 as a resident magistrate and has served in Nyeri, Mwingi, Mukurweini and Naivasha Law Courts. The petitioner worked continuously, and was promoted to the position of Senior Resident Magistrate. The petitioner was by a letter by the Hon Chief Justice of Kenya dated October 3, 2018 interdicted and charged with three offences arising from his employment to wit;

Charges

Charge 1 gross misconduct.

That on or about the February 13, 2018 in Naivasha CMCC No 1 of 2018 you signed an order which was not issued by court placing the Judiciary/court in bad repute.

Charge 2 gross misconduct

You engaged in unethical conduct by unlawfully retaining court file No 1 of 2018 to defeat the cause of justice.

This charge was dismissed before the respondent and is therefore for record purposes only and not relevant to the petition.

Charge 3 gross misconduct

That on or about the May 29, 2018 as the Duty Court you presided over Naivasha CMCC No 741/2016 *ARN Security Consultants and Training service Limited v Kika Lodge and Hotels* and issued *ex parte* orders which had the net effect of reviewing earlier orders issued by the trial court of concurrent jurisdiction.

3. The charges related to two court files being:-

- (a) Naivasha CMCC 1/2018 – *John Maina Mburu v Evans Kageche Boro* and
- (b) Naivasha CMCC 741/2016 – *ARN Security Consultants Limited v Kika Lodge and Hotels Ltd.*

4. The petitioner was placed on half salary during the period of interdiction.

5. The petitioner responded to the notice to show cause stating with respect to charge 1 that on January 5, 2018, while acting as a duty court handled Naivasha CMCC No 1/2018 where injunction orders were sought stopping the burial of one Beth Wamuyu over a disputed parcel of land being Naivasha LR 398. The petitioner granted the injunction stopping the burial. A further application was filed seeking to commit the respondents to civil jail for willfully disobeying court orders and an order for exhumation of the body of the deceased.



6. That by a ruling dated February 13, 2018, the petitioner held:-

“the application would be allowed if the petitioner who is hereby summoned with a notice to show cause to appear in court on a date to be agreed by the parties does not show cause that he willfully disobeyed court orders.”

The ruling was delivered in the presence of both counsel for the parties.

7. The petitioner then deposes at paragraphs 6(h) and (i) of the petition

“(h) That however the plaintiff’s advocate went ahead to extract orders that were correct on the first part but misleading on the second part and which read in the first part that the respondent Evans Boro appear before the court for NTSC (the correct position) but in the second limb omitted the NTSC and suggested that an immediate order of exhumation had issued.

(i) That the said order was brought to the petitioner to sign while he was busy in open court acting as the duty magistrate and concealed within a bunch of about 20 documents for the petitioner’s signature, including routine matters such as summons, committal warrants for prisoners and the petitioner having read the correct first part of the order proceeded to mistakenly sign it, honestly, in good faith believing it has been extracted and verified by the Executive Officer who presented it in person in open court. He was fatigued and under pressure from long cause list, not knowing that the second limb was wrongly extracted to order the immediate exhumation of the body of the deceased Beth Mugo from the disputed land.” [Emphasis made]

8. In short, the petitioner herein admits that he signed an order of the court which did not in material respects reflect the ruling he had delivered in that the order he signed directed the body of the deceased be exhumed with immediate effect contrary to the ruling delivered on February 13, 2021 by the petitioner.

9. The petitioner deposes that he had signed the erroneous court order honestly, in good faith believing it had been extracted and verified by the Executive Officer who presented it in person to him for signing in open court.

10. The petitioner deposes further that the mistake was mitigated by the fact that the order was presented to him by the Executive Officer while he was in the midst of open court proceedings and the order itself was concealed within a bunch of about 20 documents for the petitioner’s signature, including routine matters such as summons, committal and warrants for prisoners.

11. The petitioner admits that he had read the first part of the order but did not read the second part hence mistakenly signing it.

12. The petitioner further deposes that at the time he made the mistake, he was fatigued and under pressure from the long cause list and sought to be pardoned for the honest mistake in the cause of judicial work. The order wrongly signed was presented before court and the same according to the petitioner was surreptitiously prepared by the plaintiffs M/s Makori and Company Advocates and not by the court typists as is the norm and this shows that this was a genuine mistake.

13. Furthermore, the said order was inexplicably brought before Hon Bidali, the Chief Magistrate by the OCS Naivasha Police Station and the Chief Magistrate proceeded to ‘verify’ the order was genuine



- without looking at the short ruling inside hence also failed to notice the discrepancy between the two. The petitioner deposes that he did not understand why the order was not taken to him for verification in chambers as is the norm.
14. The petitioner deposes further that he realized the mischief the next day after he was notified that an exhumation had taken place. That the petitioner immediately informed all the parties in writing of the mischief that had taken place and sought to mitigate the damage by moving his court suo moto under the provisions of section 99 and 100 of the [Civil Procedure Act](#) and later advised the parties to seek further/other appropriate Legal remedies.
 15. The petitioner deposes that he was acquitted of the 2nd charge by Judicial Service Commission and states that with regard to charge No 3 in respect of which he was found guilty, that while acting as the duty court in Naivasha CMCC, an application dated May 28, 2018 was brought to him under certificate of urgency in CMCC 741/2016, *Security Consultants v Kika Lodge and Hotels Limited* seeking an extension of time within which to deposit a decretal sum of Kshs 1,031,195 which had been awarded by the trial court, Hon Zainab Abdurahman.
 16. That on May 22, 2018, the trial magistrate Hon Abdirahman had on an application for stay pending appeal allowed an extension of seven (7) days for a deposit of the decretal sum in court.
 17. That the petitioner allowed the application dated May 28, 2018 in terms of prayers one (1) and two (2) certifying the application as urgent and extending the time for deposit of the decretal sum and gave a date for inter partes hearing before the trial magistrate for September 4, 2018 after consultation with the court clerk, one Japheth Marambe who was familiar with the trial magistrate's diary and leave schedule.
 18. The petitioner deposes that, the judgment – creditor, one Andrew Ngure was aggrieved by the date insisting that no more than 14 days should have been allowed on an application of this nature.
 19. The petitioner deposes that there was a distinction between an application for stay pending appeal under order 40, rule 4 and an application for stay under order 42 rule 6 which the 14 day rule applies.
 20. The petitioner brought the petition under articles 22 and 23 and 258 of the [Constitution of Kenya 2010](#), alleging violation of his rights and fundamental freedoms under articles 2(4), 10(2)(a); 27; 41; 47(1); 75(2) 159; 160(1)(5); 172(1)(c); 236(a)(b) of the [Constitution](#) and section 45, rule 25 (1-11) of the 3rd schedule to the [Judicial Service Act](#); section 4(1) and (4) of the [Fair Administrative Action Act, 2015](#) and sections 106, 107, 108, 109 and 129 of the [Evidence Act](#) cap 80 laws of Kenya.
 21. The petitioner under paragraphs 9 to 37 set out in greater detail the nature of violations committed against him in arriving at a decision to terminate his employment as a senior resident magistrate by a letter dated December 9, 2019.
 22. The petitioner was by a letter dated June 19, 2019, invited to attend an oral hearing before the Judicial Service Commission Human Resource Management Committee to answer to the charges set out in the show cause letter dated October 3, 2018. The date was to be communicated.
 23. The petitioner responded to the letter of June 19, 2019 by a letter dated July 7, 2019, requesting to be supplied with all relevant statements, particulars of witnesses, complaints and documentary exhibits to be relied on by the Judicial Service Commission Human Resource Management Committee at the hearing.
 24. By a letter dated September 3, 2019, Judicial Service Commission promised to forward requested documentation to the petitioner.



25. The petitioner states that Judicial Service Commission violated rule 25(1) in that the charges were lacking in form as they had no particulars and statement of allegations.
26. That there was no investigation and report by the Chief Justice neither is any investigation report produced in court for the petitioner's answer and the court to consider. That the Registrar Magistrates' Court has no jurisdiction in the disciplinary process or judicial function and wrongly assumed that role.
27. That without particulars, there was no material for exculpation in violation of rule 25(2).
28. That rule 25(3) was violated since there was no mandatory meeting of the full Judicial Service Commission to receive and consider the charges and form a sub-panel. The petitioner was simply called by the Chief Registrar of the Judiciary to attend a hearing.
29. That the full Judicial Service Commission making a finding against this petitioner was irregular in violation of rule 25(3).
30. That there was no evidence or particulars that the petitioner's actions were in bad faith, favour, bias, affection or ill will nor was there any evidence of undue influence to and from any party or for any ulterior purpose other than the lawful discharge of the petitioner's judicial duties.
31. The petitioner deposes therefore, Judicial Service Commission violated article 171(2)(c) of the Constitution for failing to act only in the manner prescribed by an Act of Parliament, being Judicial Service Act. The conduct by Judicial Service Commission was therefore unlawful and violated the rights of the petitioner.
32. That the Chief Justice and Judicial Service Commission cannot override constitutional protection of a judicial officer under article 160(1) & (5) of the Constitution. The petitioner deposes that he was immune from punishment for actions done in good faith in the cause of his judicial work.
33. That the petitioner had acted judicially in exercise of judicial powers under article 159 and 160 of the Constitution and the inherent powers of the court under section 1, 1A, 3, 3A of Civil Procedure Act and any errors and honest mistakes are exclusive preserve of the courts within the Judiciary hierarchy to correct but not the Judicial Service Commission or the Chief Justice.
34. That in any event, the petitioner, to meet the ends of justice, had jurisdiction to recall and correct typographical errors or in the order errors arising therein from any accidental slip or omission or mischief as he did.
35. The petitioner deposes further that he did not contravene any law since as a duty court he had administrative and judicial powers to give orders and directions on urgency and direct hearing which functions are not within the respondent's mandate. Judicial Service Commission and Chief Registrar of the Judiciary therefore lacked jurisdiction to proceed in the manner they did to the loss and detriment of the petitioner.
36. That the decision by Judicial Service Commission was unreasonable, irrational and unfair with respect to charge No 3 since there was no evidence to prove any misconduct at all. That the petitioner has a duty and judicial discretion to grant urgent orders as prayed for as at all times the courts worked in collegiality, and at no time did the petitioner reverse the orders of the trial court and no law is shown to have been contravened at all.



37. That there was no prejudice at all to the plaintiff/decree holder who continued to earn interest pending disposal of the matter interparties. That the only recourse the petitioner had if aggrieved was to apply for review and/or appeal the ruling of the court to a superior court.
38. That the petitioner herein acted within his jurisdiction and cannot be punished accordingly.
39. That in sum Judicial Service Commission violated articles 2(4), 10(2)(a); 27(1), 41 and 47(1) by acting beyond their mandate, unfairly, unreasonably and unprocedurally. The conduct also violated articles 236(a) and (b).
40. The petitioner prays the court to grant the orders sought.

Response

41. The respondents filed a replying affidavit sworn to by Anne Amadi, the Chief Registrar of the Judiciary on May 29, 2020 in which she opposes the petition and depones that the dismissal of the petitioner was lawful, justified and procedural as per the reasons given in the letter of dismissal dated December 6, 2019.
42. That the petitioner was found guilty of gross misconduct on his part while discharging judicial duties as a senior resident magistrate at Naivasha Law Courts, particularly in handling of Naivasha CMCC No 1 of 2018; *John Maina Mburu v Evans Kageche Boro* and Naivasha CMCC No 741 of 2016; *ARN Security Consultants and Training Services Limited v Kika Lodge and Hotel*.
43. That the respondents followed the laid down procedure as provided under paragraph 25 of the third schedule to the [Judicial Service Act](#), in the conduct of the disciplinary process and that the respondents had the jurisdiction to institute disciplinary process against the petitioner and did not violate any of his rights and/or fundamental freedoms protected under the [Constitution](#) and deny the raft of alleged violations set out in the petition and supporting affidavit and prays that the petition lacks merit and it be dismissed as such.
44. That the petitioner was given a show cause letter bearing the three charges laid against the petitioner already set out in this judgment and the petitioner was given opportunity to respond severally in writing against the charges; was provided with all documents he required to defend himself; was given adequate notice to attend an oral hearing before the Judicial Service Commission Human Resource Management Committee; was given opportunity to be represented by a person of choice; was given opportunity to listen to the complaints and witnesses called in support of the complaints; was given opportunity to cross-examine the witnesses; was given opportunity to state his case verbally before the disciplinary committee and was finally given opportunity to file written submissions before the disciplinary committee.
45. That the Judicial Service Commission Human Resource Management Committee freely and fairly listened to the complaint and the defence proffered by petitioner. That the committee considered the oral and documentary evidence presented by both sides before fairly and independently considering the merits of the case.
46. That the committee arrived at a fair and well considered finding that the petitioner was guilty of charges, 1 and 3 contained in the notice to show cause and the petitioner was acquitted of the 2nd charge for lack of adequate prove.
47. The court was provided with the record of proceedings before the Judicial Service Commission Human Resource Management Committee and has considered the entire record of proceedings before the committee. The court has also considered all the documentary evidence relied upon by the



complainants and that by the petitioner. The respondent prays that the petition be dismissed with costs for lack of any merit.

Submissions by the Petitioner

48. The petitioner filed written submissions in which the gist of his case is aptly captured in the submissions dated July 26, 2021.
49. The respondents filed their written submissions dated September 20, 2021 restating their factual and legal positions.
50. The court has carefully considered the same and will highlight the salient features in the actual determination of the suit.

Determination

51. The issues for determination are as follows:-
 - (a) Whether the dismissal of the petitioner from his position as a senior resident magistrate was lawful, procedural and fair within the context of the provisions of the *Constitution of Kenya, 2010* and the provisions of *Judicial Service Act*; *Fair Administrative Action Act, 2015*, *Judicature Act*; and the *Employment Act, 2007*.
 - (b) Whether the petitioner is entitled to the reliefs sought.
52. On October 3, 2018 the Hon Chief Justice framed the charges facing the petitioner and the Hon the Chief Justice suspended the petitioner on half pay and referred the matter to Judicial Service Commission for consideration and processing.
53. Judicial Service Commission considered the matter and having decided that there was sufficient cause to institute disciplinary hearing against the petitioner constituted Judicial Service Commission Human Resource Management Committee to hear and determine the charges laid against the petitioner.
54. The petitioner had meanwhile been requested to respond in writing to the charges laid against him which he proceeded to do upon requesting to be provided with the necessary documentation.
55. The petitioner faults the process firstly in that the Judicial Service Commission did not first constitute a small panel of a few of its members to investigate the matter, prepare a report and proceed to hear the complaint against the petitioner so that in the event the petitioner was found guilty by the constituted disciplinary panel, then he could apply for review/appeal of the decision to the larger Judicial Service Commission.
56. The petitioner faults the process further by stating that the charges laid against him did not bear particulars and statement of offence to enable him to adequately answer the charges facing him
57. The petitioner further submits that the Judicial Service Commission had no jurisdiction to discipline him for decisions made by himself in execution of judicial duties done in good faith by the petitioner.
58. That the entire process was therefore a nullity ab initio for lack of jurisdiction and violation of article 160 of the *Constitution* read with section 6 of the *Judicature Act*, and the procedure followed was in violation of section 25, 3rd schedule to the *Judicial Service Act*, and was therefore unlawful and unfair.



Accordingly, the petitioner did not get a fair hearing nor a fair administrative action and the entire process be invalidated by the court.

59. It was submitted by the respondents citing the case of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR that where a party has challenged a disciplinary procedure by way of a constitutional or judicial review procedure, the duty of the court is limited to:-

“interrogation of the process leading to the termination of the respondent’s employment with a view to determining the procedural fairness reasonableness and legality of the appellants’ action in light of the respondents constitutional right to a fair hearing and right to fair administrative action.”

60. The respondent also relied on the case of *Suchan Investments Limited v Ministry of National Heritage and Culture & 3 others* [2016] eKLR where the Court of Appeal stated:-

“there is no power of the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)(e) and (h) of the *Fair Administrative Action Act* permits the court in a judicial review petition to set aside the administrative action or decision and/or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

61. While agreeing with the above statement of law by the Court of Appeal, it is opportune for the court to note that an employee who has been dismissed from employment by his/her employer is presented with a vexing decision to take, whether to approach court with a statement of claim under the provisions of the *Employment Act, 2007*, which *Act*, clearly permits the court not only to review the propriety of the process followed by an employer in disciplinary process preceding a dismissal as provided under section 41 of the *Employment Act*, but also, the court is fully permitted and in a robust manner to consider and determine in terms of section 43(1) and (2) as read with section 45(1) and (2) whether the employer had a valid reason to dismiss the employee from employment.

62. A party who seeks to approach the court by way of constitutional or judicial review must weigh carefully the merits and demerits of the type of proceedings they elect to file before court and the pros and cons inherent in either of the procedures before court.

63. Indeed, under section 43(1) and (2) of the *Act*, the burden of proof lies with the employer to prove that they had a valid reason to dismiss the employee and that the action they took was justified considering all the circumstances of the case as per section 47(5). The Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR had the following to say:-

“On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.

64. The petitioner in particular submits relying on the Supreme Court decision in *Bellevue Development Company Limited v Francis Gikonyo & 3 others* [2020] eKLR (67) that there is no evidence adduced in both charges, that the petitioner was found guilty to warrant Judicial Service Commission to invoke its authority of discipline under the *Constitution* or the *Judicial Service Act* since the petitioner had immunity from being disciplined for any action taken or omission in the cause of judicial work.



65. Section 160(1) reads:-

“In the exercise of judicial authority, the judiciary, as constituted by article 161, shall be subjected only to this constitution and the law and shall not be subject to the control or direction of any person or authority.”

66. Whereas subsection (5) reads:-

“A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

67. The petitioner invoked the provisions of article 160 during the disciplinary hearing and in this petition. The considered finding by the court is that whereas a judicial officer is only subject to the Constitution and the law and shall not be subjected to the control or direction of any person or authority, Judicial Service Commission under article 172(1)(c) has the mandate to discipline a judicial officer, for misconduct in the course of duty in terms of the procedure set out under section 25, 3rd schedule of the Judicial Service Act

68. Article 172(1)(c) reads:-

“(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-

(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;” (Emphasis added)

69. The provisions of article 160(5) relate to

“an action or suit instituted in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.” [Emphasis added]

70. It was incumbent therefore on the part of the complainants to adduce evidence to demonstrate that the petitioner did not act with respect to matters complained of in charges 1 and 3 in good faith in lawful performance of a judicial function.

71. The petitioner from the Hansard persistently raised this defence in the proceedings before the Judicial Service Commission. The petitioner admitted that with respect to charge 1, he did sign the impugned order which partially differed with the ruling made by himself earlier on the same day but preferred a defence that the typed order was presented to him in open court, and was placed in a bundle of other routine documents for signing and that in the circumstances he did not fully and carefully peruse the entire order before signing it especially because the Executive Officer who presented the order for signature had the responsibility of extracting an accurate order upon comparing the same with the written ruling of the magistrate. In short, the petitioner admitted he was negligent in signing the order in the circumstances but he did so in good faith oblivious that the last part of the extracted order materially differed from his written ruling.



72. The petitioner stated that if he had any ill motive, and was partisan in the matter, he would have simply made a ruling in the first place for the exhumation of the body but did not do so. That he had given the parties opportunity to be heard which was indicative of his good faith in the matter.
73. The petitioner stated that he was in hind sight tricked to sign the order while he was in the middle of hearing other matters in open court and this was sharp practice on the part of the plaintiff's advocates.
74. The question the court must now answer is whether the admission by the petitioner that he was negligent in the course of lawful performance of his judicial function is synonymous with lack of good faith within the meaning of article 60(5) so as to compromise the immunity from any action in respect of anything done, or omitted to be done in the lawful performance of his judicial function afforded to the petitioner by the Constitution in terms of article 60(5).
75. A purposive interpretation of article 60(5) read with article 172(1)(c) contemplates that where a judicial officer has committed an act or omission for which he may be subjected to a disciplinary action leading to removal or otherwise in the first place, then the judicial officer has a lawful defence to the wrongful action or omission by demonstrating that the same was done in good faith in lawful performance of a judicial function and therefore the judicial officer has immunity against any disciplinary action or removal for the wrongful action or omission.
76. The Supreme Court in Petition No 42 of 2018 – Bellevue Development Company v Hon Justice Francis Gikonyo and 3 others, stated while quoting the Black's Law Dictionary, that:-
- “Article 160(5) grants judicial officers immunity if they act in “good faith.” What therefore is ‘good faith’? According to the Black's Law Dictionary Ninth Edition at page 713, ‘good faith’ is defined as:-
- “A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligations, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.” [Emphasis added]
77. Upon a very careful perusal of the Hansard and the entire evidence placed before court, there is lacking any evidence that the petitioner acted dishonestly or that he had any intent to defraud or to seek, unconscionable advantage for himself and or/any of the parties in Naivasha CMCC No 1 of 2018 when he signed the impugned court order which formed the basis for charge 1.
78. It is apparently clear to the court that the petitioner was guilty of negligent conduct, wholly admitted by him.
79. With regard to the 3rd charge emanating from CMCC 741 of 2016, whereas it is not in dispute that the petitioner whilst sitting as a duty magistrate, granted orders which had the effect of reviewing earlier orders issued by the trial court of concurrent jurisdiction; evidence adduced by the complainant is that he had been granted orders for the judgment debtor to deposit the decretal sum in court within 7 days but the petitioner had while sitting as a duty court *ex parte*, granted orders of stay pending interpartes hearing on September 4, 2018 before the trial court which was more than four (4) months away to his loss and detriment.
80. The petitioner proffered the defence that he was sitting as a duty magistrate when he considered the application for extension of time within which to deposit the decretal sum *ex parte* and granted the orders sought and set a hearing date of the application interpartes to September 4, 2019 a date which was more than four (4) months away.



81. The petitioner stated this was the available date given to him by the court clerk who was familiar with the diary of the trial magistrate. That he had no interest in the matter but granted the said orders in good faith and in furtherance of lawful judicial function.
82. A careful consideration of charge 3 is that the conduct complained of was issuing an order that had the effect of reviewing earlier orders issued by the trial court of concurrent jurisdiction.
83. The charge did not have anything to do with the date which the petitioner set for *inter partes* hearing since it was not particularized in that manner.
84. Again, the question the court must answer is whether the action done by the petitioner in issuing the *ex parte* order was done in good faith and in the lawful performance of the Judicial function so as to clothe the petitioner with immunity against the disciplinary process commenced against him leading to his dismissal from judicial service by Judicial Service Commission.
85. A careful perusal of the entire Hansard does not disclose any evidence adduced by the complainant and his witnesses that the petitioner did not act in good faith and that the said orders were not issued in lawful performance of a judicial function.
86. The petitioner submitted to Judicial Service Commission and to this court that if he had erred in issuing the impugned orders, the recourse the complainant had was to apply for review of the order and/or file an appeal against it.
87. That the complainant did not apply for review of the orders nor did he proffer any appeal against the decision made by the petitioner whilst sitting as a duty magistrate.
88. In the letter of dismissal dated February 7, 2019, Judicial Service Commission did not make any finding that the petitioner had acted in respect of charge 1 and 3 in bad faith and/or with intent to defraud or to seek unconscionable advantage.
89. As a matter of fact, the two charges preferred against the petitioner did not disclose any such particulars or statement of fact in the first place.
90. The Supreme court in *Bellevue* case (*supra*) went on to stay:-
 - “(67) The antithesis to acting in good faith would be to act in bad faith, with a willful intent to act dishonestly or unfaithfully in the performance of judicial acts. The *Constitution* does not define bad faith. In *Public Protector v South African Reserve Bank* [2019] ZACC 29, Mogoeng, CJ however defined bath faith as including:-
 - “Malicious or fraudulent, dishonest or perverse conduct [as well as] gross illegality. “In other words, he added, “bad faith exists only when the offence – bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably interfered and bad faith presumed.”
91. In the final analysis, the court is satisfied that charge 1 and 3 in respect of which the petitioner was found guilty of and dismissed from judicial service did not contain any particulars of lack of good faith on the part of the petitioner as defined above.



92. There was also no particulars in the charge and/or in the evidence adduced by the complainants that the petitioner in the two occasions acted outside the lawful performance of a judicial duty, that is to say without jurisdiction. See the Supreme Court of the State of Kansas No 116, 174, *State of Kansas, Appellee, and v Dustin D Walker*.
93. The charges and the evidence tabled did not therefore meet the threshold demanded by the *Constitution* for the impeachment of the Constitutional immunity a judicial officer is clothed with under article 160(5) of the *Constitution*. This the court has arrived at upon a purposive interpretation of article 160(5) read with article 172(1)(c) avoiding destruction of either of the articles by the other.
94. The court therefore returns that the petitioner in the circumstances disclosed in this case, was protected by article 60(5) from the disciplinary action and dismissal by Judicial Service Commission.
95. Accordingly, the petition has merit and is allowed.
96. The court notes that at the beginning of the disciplinary hearing, the petitioner had at page 75 of the Hansard raised the issue that he was performing constitutional functions which are protected under article 160 of the *Constitution* and under section 6 of the *Judicature Act*. The petitioner wished to be heard on this matter before the disciplinary hearing commenced on the merits.
97. It is the considered finding by the court, that, this was a preliminary matter of law which ought to have been heard and determined at the outset since it touched on the jurisdiction of the committee to proceed with the disciplinary hearing. The matter may be also considered by Judicial Service Commission on its own motion before making a decision whether to charge the judicial officer in the first place, and if so ensure that these charges are well supported and particularized to meet the threshold contemplated within the meaning of article 160(5) as read with article 172(1)(c) of the *Constitution of Kenya, 2010*. Negligent action or omission without evidence of bad faith and acting without jurisdiction does not suffice in the court's considered finding.

Remedies

98. Judicial independence is paramount in safeguarding the pivotal role the judiciary plays in securing justice for all. Article 160 is the bastion upon which that independence is anchored and protected.
99. The petitioner seeks *inter alia* to be reinstated to his post or deployed within the judicial service without loss of rank, accrued benefits, allowances and back salaries in progression.
100. The best guide we resort to on matters of reinstatement is section 49(4) of the *Employment Act, 2007* which provides that in deciding whether to reinstate an employee the court is to take in account any or all of the following:-
 - (a) The wishes of the employee;
 - (b) The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) The practicability of recommending reinstatement or re-engagement;
 - (d) The common law principle that there should be no order for specific performance in contract for service except in very exceptional circumstances;
 - (e) The employee's length of service with the employer;



- (f) The reasonable expectation of the employee as to the length of time for which his employment with the employer might have continued but from the termination;
- (g) The opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) The value of any severance payable by law;
- (i) The right to press claims or any unpaid wages, express or other claims owing to the employee;
- (j) Any expenses reasonably incurred by the employee as a consequence of the termination;
- (k) Any conduct of the employee which to any extent caused or contributed to the termination;
- (l) Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) Any compensation including *ex-gratia* payment, in respect of termination of employment paid by the employer and received by the employee.

101. The particulars of employment of the petitioner and his performance and previous record prior to the occurrence of the matters which led to his dismissal have not been contested.
102. The petitioner was employed as a resident magistrate in July, 2010 and has served in Nyeri, Mwingi, Mukurweini and finally Naivasha Law Courts. The respondent did not table the previous record of performance by the petitioner. However, the petitioner stated in his petition that he had performed his duties with utmost good faith, fidelity to the law and diligence.
103. The petitioner stated also that he had continued to upgrade his academic qualifications by obtaining a masters degree from the University of South Africa and was presently undertaking doctorate studies at the University of Nairobi. That the petitioner was already a member of the Chartered Instituted of Arbitrators, Kenya Chapter and a certified professional mediator.
104. The court observes that the petitioner is a well-focused individual and would if he so wished be in a position to advance his career in different sectors where his apparent expertise lies.
105. The petitioner however specifically wishes to be retained as a judicial officer. The circumstances leading to his dismissal have been well captured in this judgment.
106. The petitioner no doubt contributed to his dismissal and has readily admitted that he was negligent in respect of charge one (1) but the court has found that he had acted in good faith, the opposite having not been alleged and /or proved. With respect to charge three (3) the petitioner purely exercised his judicial authority and discretion in a manner which no doubt did not please one party who nonetheless had a right to seek review and/or appeal the decision by the petitioner which he had opted not to do.
107. The supremacy of the Constitution and the command under article 159, that we are to only exercise judicial authority as commanded by the Constitution leads us to find that –

Article 160(1) and (5) present the court with exceptional circumstances within the meaning of section 49(4)(d) of the Employment Act, to find that this is a suitable case for the court



to accept the wishes of the petitioner to be reinstated to the judicial service despite his admission in respect of charge 1.

108. Judicial service is well guided by the *Constitution*, the law and all policy documents, that ensure that judicial officers remain in the straight and narrow while discharging their services. The court therefore finds it practical to reinstate the petitioner to Judicial Service to be deployed as Judicial Service Commission deems it suitable.
109. The petitioner is a young man, and had only served the judiciary for about nine (9) years. The petitioner has a long career path before him up to the retirement age of 60 years and/ or 70, should he in future find favour with Judicial Service Commission and be appointed a Judge of a superior court.
110. Having considered these, and other factors, set out herein, and including the guidelines given by the Court of Appeal in *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others* [2014] eKLR, as follows:-
- “ As I have said, in Kenya, reinstatement is one of the remedies provided for in section 49(3) as read with section 50 of the *Employment Act* and section 12(3) (vii) of the Industrial Court Act. That the court can grant reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them, that will engender friction, which is not healthy for business, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.”
111. The court finds this a suitable case to answer the prayer by the petitioner to be reinstated to judicial service.
112. It is not lost to the court that the judiciary as guided by the *Constitution* and the *Judicial Service Act*, has developed a raft of policy and procedure documents to manage, and develop the human resource in the Judiciary.
113. No doubt, Judicial Service Commission has the wherewithal to take positive remedial measures on judicial officers and staff, including performance improvement programmes (PIP); performance measurement; monitoring and evaluation; targeted training programmes; relevant reward and sanction system and where appropriate, informed deployments among others.
114. In the final analysis, the court makes the following orders in favour of the petitioner as against the respondent:-
- (a) The action and conduct of the respondents of lifting the Judicial immunity accorded to the petitioner and dismissing him from service violates article 160(1) and (5) of the *Constitution* and the decision was unlawful, null and void ab initio.
 - (b) The respondents are directed to reinstate the petitioner to his post or deployed elsewhere within the Judicial Service without loss of rank, remuneration and/or any other accrued benefits from date of suspension and in progression.



- (c) The records of the charges and disciplinary proceedings instituted by the respondent against the petitioner are quashed.
- (d) The aforesaid orders in (a)(b) and (c) above suffices to compensate the petitioner in respect of the proved violation of his constitutional protection under article 160(1) and (5) of the Constitution.
- (e) The respondents to meet the costs of the petition.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

MATHEWS N NDUMA

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 March 15, 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N NDUMA

JUDGE

Appearances:

Okemwa & Co Advocates for the petitioner.

G & A Advocates LLP, for the respondents.

Ekale –Court Assistant.

