



**Sani v JSC (Cause 7 of 2019) [2022] KEELRC 4000 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4000 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE 7 OF 2019**  
**S RADIDO, J**  
**SEPTEMBER 26, 2022**

**BETWEEN**

**JARED SANI NYANGENA ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. Hon Jared Sani Nyangena (the Claimant) was appointed and posted to Ukwala Law Courts as a District Magistrate on or around September 10, 2010 by the Judicial Service Commission (the Commission).
2. On March 18, 2011, the Commission transferred the Claimant to Siaya Law Courts.
3. On February 13, 2015, the Honourable Chief Justice wrote to the Claimant to inform him of a decision to interdict him after receiving a confidential report from the Directorate of Criminal investigations.
4. The interdiction letter indicated that it was anticipated that the Claimant would be charged with a criminal offence(s) and further that complaints about his conduct as a judicial officer had also been received.
5. The Claimant was warned that proceedings likely to lead to dismissal were about to be taken.
6. On the same day, the Chief Justice brought to the Claimant's attention three charges:

Charge 1

Involvement in Criminal Activities

On or about December 20, 2014, it is alleged that together with others, you violently robbed Mr Samson Owino Ogeda of Kes 10,000/- and a Nokia mobile phone worth Ksh 5,000/- a matter that is currently under police investigations.

Charge 2



## Habitual Absenteeism

You have been habitually absent from your station without reason and permission of the Head of Station. One such incident was on August 4, 2014, when you were absent without permission or reasonable cause and in complete disregard of the provisions of the *Judicial Service Act* and your offer of employment.

7. The Claimant was requested to respond to the allegations within 21-days.
8. The Claimant responded on a date that is unclear from the record and was invited to appear before the Commission's Human Resource Management & Administration Committee for an oral hearing.
9. The disciplinary hearing took place on 25 January 2017, and the Committee prepared a report that made a finding:
  - (a) That notwithstanding the acquittal in Criminal Case No 680 of 2015, the Committee found that Hon Sani had, through his conduct in the matter, failed to uphold himself to the highest standard of integrity, decorum, and professional ethics expected of a public servant and in particular a judicial officer.
  - (b) That Hon Sani's conduct on the night of December 21, 2014 thereafter, including ferrying fare-paying passengers and the incidental consequences, prejudiced his status as a member of the judicial service and brought the judicial service into disrepute. This was in total disregard of the standard set by the Judicial Service Code of Ethics.
  - (c) That the above conduct by Hon Sani amount to gross misconduct warranting punishment.
10. The Committee found the second charge not supported by evidence.
11. On February 9, 2017, the Commission notified the Claimant of dismissal from the judicial service.
12. The Claimant appealed against the dismissal on February 22, 2017, and on July 13, 2017, the Commission responded, indicating that the appeal had been disallowed.
13. The Claimant was aggrieved, and he sued the Commission on January 30, 2019, alleging unfair termination of employment, breach of contract, and violation of the rights to fair administrative action and labour practices.
14. The Commission filed a Response on March 27, 2019, prompting the Claimant to file a Reply to the Response on 15 April 2019.
15. The Cause was heard on December 16, 2021, February 22, 2022, and May 9, 2022. The Claimant and an Assistant Director, Human Resources with the Commission, testified.
16. The Claimant filed his submissions on June 28, 2022, and the Commission's submissions were not on record by September 21, 2022, the date scheduled for delivery of the judgment.
17. An advocate who appeared for the Commission during the session informed the Court that his instructions were limited to taking the judgment and that he could not confirm whether the Commission had filed its submissions.
18. Nevertheless, without the courtesy of seeking leave, the Commission filed the submissions later in the day. The Court expunges the submissions from the record.
19. The Court finds the failure by the Commission to file submissions most callous and regrettable.



20. The Court has considered the pleadings, evidence, and submissions.

### **Fair hearing**

21. The cornerstone of the Claimant's case was that he was not accorded a fair hearing, and he made his submissions based on the ingredients or elements of a fair hearing.

22. The Court will generally adopt the subthemes of a fair hearing as submitted by the Claimant.

23. Since the Commission dismissed the second charge against the Claimant (absenteeism, the Court will not consider its ramifications to the dispute).

### **Fair hearing: Incomplete charges**

24. The Claimant took the position that his right to a fair hearing was prejudiced because the details in the charge were incomplete since it did not specify the sections of the law he had violated or created the charge/offence.

25. The framing of disciplinary charges against judicial officers and staff is outlined in paragraph 25(1) of the Third Schedule of the *Judicial Service Act* in the following words:

Where the Chief Justice, after such inquiry as they (sic) 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.

26. The provision, in the view of the Court, requires the Hon Chief Justice to frame a charge clearly such that the judicial officer can sufficiently understand the charge and particulars. This is consistent with the rule of natural justice that one should understand the charge they are facing to enable them to prepare adequately to defend themselves.

27. However, the Court does not decipher a technical legal requirement for the charge to meet the threshold expected of charges in criminal cases under sections 134 and 137 of the *Criminal Procedure Code*. The charge should be in a form and language the employee understands.

28. The Court is of the view that a disciplinary hearing or process should not be turned into a mini-court or criminal trial. Employers are not skilled legal practitioners or draftsmen to warrant a requirement for such a technicality.

29. The Labour Appeal Court of South Africa faced the question of framing charges in *OH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Ors* (2019) 40 ILJ 2477.

30. The Court opined:

One of the key elements of fairness is that an employee must be made aware of the charges against him. It is always best for the charges to be precisely formulated and given to the employee in advance of the hearing in order to afford a fair opportunity for preparation. The charges must be specific enough for the employee to be able to answer them. The employer ordinarily cannot change the charge or add new charges after the commencement of the hearing, where it would be prejudicial to do so. However, by the same token, courts and arbitrators must not adopt too formalistic or technical an approach. It normally will be sufficient if the employee has adequate notice and information to



ascertain what act of misconduct he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance. Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place, he is alleged to have acted wrongfully or in breach of applicable rules or standards.

31. The Claimant herein was charged with involvement in criminal activities. The specific date was indicated in the charge. The conduct was also mentioned, and the subjects of the conduct were enumerated in the particulars of the charge.
32. The Claimant did not object to the framing of the charges in his written response to the Commission. He did not challenge the inadequacy or incompleteness of the charges before the Disciplinary Panel. He did not ask for more time. He has not proved any prejudice before this Court.
33. The Court finds the charge was not incomplete or defective.

#### **Fair hearing: Additional charges**

34. The Claimant also challenged procedural fairness on the ground that he was not served or notified of the additional charge upon which he was found guilty.
35. He further contended that he was not allowed to respond to the additional charge.
36. To buttress the challenge, the Claimant also contended that he was found culpable of the following charge, which was given in the dismissal letter:

your representation and evidence availed before the Judicial Service Commission Human Resource Management Committee during the disciplinary hearing of your case found that notwithstanding your acquittal in Kisumu CMC Criminal Case No 680 of 2015, and in accordance with section 18(3) of the *Judicial Service Act* your conduct in the matter did not uphold to the highest standard of integrity, decorum and professional ethics expected of a public servant and in particular a judicial officer.
37. According to the Claimant, he was dismissed on this additional charge that had not been framed as required by paragraph 25(8) of the Third Schedule to the *Judicial Service Act*.
38. The Court has examined the dismissal letter within the context of the charge as framed against the Claimant, the Hansard, and the Disciplinary Panel report.
39. The context is that the Claimant's conduct on the night of 20 December 2014 was in the spotlight and whether there was sufficient evidence to conclude that the conduct fell short of what was expected of him as a judicial officer.
40. Put in perspective the long narration in the dismissal letter, which was lifted from the report of the Disciplinary Panel, was that despite the acquittal in the criminal case, the Claimant's conduct on the night in question did not meet the expectations envisaged by the *Judicial Service Act*.



41. In the Court's view, the long narration was not an additional charge. It was an exegesis of the finding of misconduct based on the events of December 20, 2014. It was the reasoning behind the finding.

#### **Fair Hearing: Hearing notice**

42. The Claimant also asserted that he was not given adequate notice to appear for the oral hearing as contemplated by paragraph 25(4) of the Third Schedule of the *Judicial Service Act*. The paragraph requires the Disciplinary Tribunal to give the judicial officer at least 14 days' notice of the physical hearing.
43. The Claimant had contended in the Reply to the Response that he was called on the evening of January 22, 2017 and requested to appear for the hearing on January 25, 2017.
44. The Commission was therefore under notice long before the hearing of this Cause that the Claimant was asserting the right to adequate facilities and time to defend himself.
45. Despite being put on notice, the Commission did not place a copy of the letter giving the Claimant 14-days' written notice to appear for the oral hearing.
46. The Commission's witness, when challenged, conceded that a copy of the letter inviting the Claimant for the oral hearing had not been filed in Court.
47. It is therefore not speculative to conclude that the Commission did not comply with the mandatory provisions of paragraph 25(4) of the Third Schedule to the *Judicial Service Act*.
48. The next question, therefore, is whether the Claimant was put at a procedural fairness disadvantage. The Claimant did not establish that his oral defence was procedurally impaired, considering that he had been aware of the case to meet for more than a year before the oral hearing.

#### **Fair hearing: Hearing process**

49. Still challenging the fairness of the disciplinary hearing, the Claimant urged the Court to find in his favour because the Commission did not summon any witnesses/complainants (Mr Samson Owino Ogeda and Head of the Station, Siaya Law courts) so that he could cross-examine them as envisaged by paragraph 25(5) of the Third Schedule to the *Judicial Service Act*.
50. The Claimant invited the Court to look at page 2 of the Report of the JSC Human Resource & Administration Committee on the Disciplinary Proceedings against Hon Jared Sani – Resident Magistrate, dated February 5, 2017.
51. The paragraph relied on by the Claimant provides:  
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.
52. The Court has relooked at the provision, and it is apparent that the right to cross-examine witnesses is qualified or contingent upon the Disciplinary Panel opting to rely on such witnesses.
53. In the Claimant's case, the Disciplinary Panel did not opt to call any witness. In the Court's view, considering the nature of disciplinary proceedings within the employment context, failure to call witnesses for cross-examination by itself would not render the disciplinary hearing process unfair. But each case would have to be considered based on its unique circumstances.



54. The Court has also considered the narrative on procedures adopted by the Disciplinary Panel. The proceedings suggest that the Disciplinary Panel handled several (19) distinct disciplinary cases.
55. Although the interpretation advanced by the Claimant that witnesses were heard in his absence is possible, it is also probable that the procedures were to be applied appropriately and disjunctively in respect of the 15 out of 19 disciplinary cases presented before the Disciplinary Panel.
56. The Court finds that the Claimant did not prove that the hearing process adopted by the Disciplinary Panel prejudiced his case.

### **Fair hearing: The dismissal verdict**

57. The Claimant further objected to the fairness of his dismissal on the ground that the Disciplinary Panel report did not conform to the standard required by paragraph 25(9) of the Third Schedule to the *Judicial Service Act*.
58. According to the Claimant, the Report indicated that witnesses had been summoned, but the testimonies/evidence were not included in the Report and did not include documentary evidence stated to have been perused, such as the complainant's evidence under oath or criminal court proceedings.
59. In brief, paragraph 25(9) of the Third Schedule to the *Judicial Service Act* expects the Report from the Disciplinary Panel to include a statement of whether the charges have been proved and reasons why details of any aggravating or alleviating the gravity of the case and a summing up or general comments outlining the opinion of the Disciplinary Panel but not a recommendation on punishment.
60. The Court has looked at the Disciplinary Panel Report.
61. The Report set out the charges the Claimant had faced on page 4, a statement that charge 1 had been proved on pages 11-12 and aggravating material and summing up on page 11.
62. The Report, the Court finds, was in substantial compliance with the statutory requirements.

### **The appeal**

63. The last ground of challenge presented by the Claimant was with respect to the appeal. These were that the dismissal letter did not inform him of a right of appeal and that he was not allowed to prosecute the appeal on July 3, 2017 orally.
64. The Claimant further assailed the appeal process on the ground that the Commission had declined to supply him with minutes and proceedings of the appeal despite a request from his advocate and that the Commission's decision talked of a review and not an appeal.
65. Lastly, the Claimant complained that he was not notified timeously of the outcome of the appeal.
66. The *Judicial Service Act* and the Third Schedule to it do not contemplate a right of appeal to the Commission from its decision dismissing a judicial officer from service.
67. The general law of employment, the *Employment Act*, 2007, equally does not envisage a right of appeal.
68. The Claimant did not disclose the legal source or foundation of his claim that the failure to process his appeal through an oral presentation violated any principle of law or custom.
69. Consequently, the Court cannot find that the Claimant's right(s) of appeal were violated in the way the Commission handled the appeal when there was no explicit right of appeal.



## **Conclusion and Orders**

70. The Court has concluded that the Commission failed to prove that it complied with the requirement to give the Claimant 14-days' notice of the oral hearing. But the Claimant did not demonstrate any procedural prejudice suffered due to the failure.
71. The Commission did not file its submissions within the timelines agreed with the Court. It had a duty to cooperate and assist the Court in fulfilling the judicial objective of expeditious, proportionate delivery of justice.
72. The Commission did not offer any explanation for failing to file its submissions within the agreed timelines. The Court, therefore, has not only not had the benefit of the submissions but was also forced to suspend the delivery of the judgment.
73. With the above in mind, the Court dismisses the Cause but with an order that the Commission bears the Claimant's costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant N.E. Mogusu & Co. advocates

For Respondent Gumbo & Associates

Court Assistant Chrispo Aura

