



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 116 OF 2019**

**IN THE MATTER OF: ARTICLES 10, 22, 23, 28, 31, 41, 47, 48, 50, 73, 75,**

**159, 160 AND 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 10, 22, 23, 28, 31,**

**41, 47, 48, 50, 73, 75, 159, 160, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: THE JUDICIAL SERVICE ACT NO. 1 OF 2011**

**AND**

**IN THE MATTER OF: THE JUDICIAL SERVICE HUMAN**

**RESOURCE POLICIES AND PROCEDURES MANUAL**

**AND**

**IN THE MATTER OF: JUDICIAL CODE OF CONDUCT AND ETHICS**

**BETWEEN**

**MAUREEN CHERONO NYIGEL.....PETITIONER**

**-VERSUS-**

**CHIEF JUSTICE AND PRESIDENT OF**

**THE SUPREME COURT OF KENYA.....1<sup>ST</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner was employed by the 2<sup>nd</sup> respondent on 4<sup>th</sup> June 2012 as a Resident Magistrate and later rose to the rank of Senior Resident Magistrate. Vide a letter dated 5<sup>th</sup> January 2018, the 1<sup>st</sup> respondent notified the petition of an allegation that she had cancelled a Notice of Appeal with instructions from Honourable Justice Martin Muya. The letter also asked her to confirm whether indeed she had cancelled the said Notice of Appeal, and whether she did so with instructions from the Judge. Finally the letter asked her to forward the court file relating to the subject matter to the 1<sup>st</sup> respondent. The petitioner forwarded the original court file plus certified copies of typed proceedings by her letter dated 12<sup>th</sup> January, 2018 but declined to respond to the allegation.

2. Again, the 1<sup>st</sup> respondent served the petitioner with a Show Cause letter dated 8<sup>th</sup> February, 2018 charging her with breach of Rule 5 of the judicial Service code of Conduct and ethics. The particulars of the charge were that, while serving as a Deputy Registrar of the High Court of Kenya at Bomet, she ordered court orderlies to call back the clerk from the firm of Onyinkwa and Company Advocates who had just filed a Notice of Appeal against the ruling of the court issued on 30<sup>th</sup> May, 2017 in **Bomet HCC No.4 of 2016, Alfred Kipkoril Mutai & another v NIC Bank Limited**, and subsequently proceeded to un-procedurally cancel the Notice of Appeal. The letter gave her 21 days to respond to the charge.

3. By another letter also dated 8<sup>th</sup> February, 2018, the 1<sup>st</sup> respondent interdicted the petitioner pursuant to Paragraph IV, Third Schedule of the Judicial Service Act (JSA), 2011. The letter also required her to report to her Supervisor once per week during the period of the interdiction, which was not specified. The letter, also entitled her to half basic salary, full house allowance and medical cover during the period of interdiction. Finally, the letter directed her to hand over all the matters under her custody and a detailed handing over report to the Resident Judge.

4. The petitioner responded to the Show Cause letter on 27<sup>th</sup> February, 2018 but received no reply from the respondents until 7.6.2018 when she wrote to the 1<sup>st</sup> respondent raising the issue of inordinate delay of her case. Again she received no response and on 4<sup>th</sup> July, 2019, she decided to file this Petition seeking the following reliefs:

#### **Declarations**

- a. *The 1<sup>st</sup> Respondent's letter dated 8.2.2018 is illegal null and void ab initio for being in contravention of Articles 25 (c), 28, 31, 41, 47, 48, 50, 160 (5) and 236 of the Constitution of Kenya, 2010.*
- b. *Paragraph 17 (3) of the Third Schedule of the Judicial Service Act, No. 1 of 2011 contravenes Article 41 of the Constitution of Kenya as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional.*
- c. *There is no offence committed by the Petitioner that warrants disciplinary action.*
- d. *Paragraph 15 and 16 of the Third Schedule of the Judicial Service Act, 2011 is in conflict with sections 13, 14 and 32 (1) and (3) of the Judicial Service Act, No. 1 of 2011.*
- e. *The Respondents infringed the Petitioner fundamental rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48 and 50 of the Constitution of Kenya, 2010 particularly for subjecting the Petitioner to an indefinite interdiction.*
- f. *The 1<sup>st</sup> Respondent violated Articles 10, 73, 232 and 236 of the Constitution of Kenya, 2010.*

#### **Orders/Reliefs**

- g. *An order for Judicial Review by way of Certiorari to bring to bring to this Honourable Court for purposes of quashing the decision of the 1<sup>st</sup> Respondent as contained in the letter dated 8<sup>th</sup> February, 2018.*
- h. *An order for Prohibition and/or Permanent injunction do issue to prohibit and permanently restrain the Respondents from implementing the decision contained in the 1<sup>st</sup> Respondent's letter of 8<sup>th</sup> February, 2018 and/or from taking any adverse action pursuant to the said decision.*
- i. *An order for Judicial Review by way of mandamus directing the Respondents to reinstate the Petitioner to her employment including the reinstatement of her full salary and employment benefits.*

#### **Damages**

- j. *General damages for breach of the Petitioner's rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48, 50, 160 (5) and 236 of the Constitution of Kenya, 2010.*
- k. *Punitive and exemplary damages for unlawful, indefinite interdiction.*

#### **Other reliefs**

- l. *Costs of the Petition*
- m. *Any other relief that this Honourable Court may deem fit and just to meet the ends of justice.*

*n. Interest.*

5. The petitioner also filed an application for conservatory orders simultaneously with the petition but the order was not granted and the application was abandoned in order to Fast-track the petition.
6. The Respondents opposed the Petition vide a Replying Affidavit sworn by Anne Atieno Amadi, the Chief Registrar of the Judiciary and Secretary of the 2<sup>nd</sup> Respondent, on 18.7.2019. She denied the allegations in the Petition and deposed that the 1<sup>st</sup> Respondent was exercising his constitutional powers bestowed upon the 2<sup>nd</sup> Respondent but delegated to him; that paragraph 16 of Part IV of the Third Schedule of the Judicial Service Act provides that an officer who is interdicted shall receive salary not less than half their salary and that the withheld salary is to be restored if the officer is not dismissed upon termination of the proceedings.
7. She deposed that the delay in hearing the Petitioner's case was caused by challenges which the Commission had experienced in 2018 when nearly half of its commissioners retired and the process of replacement was slowed down by petitions filed in court challenging the nomination or election of new commissioners.
8. She stated that since the Commission was fully operational, all the disciplinary cases including that of the Petitioner would be processed and therefore there was no legal basis for terminating the Petitioner's disciplinary process on account of the alleged delay in prosecuting the case.
9. She deposed that the Employment Act does not apply in the circumstances as the Act was overtaken by the promulgation of the Constitution. She further averred that Articles 25 (c), 28, 31, 41, 47, 48 and 50 of the Constitution do not apply to internal disciplinary hearings between an employer and employee.
10. In a rejoinder, the Petitioner filed a Further Affidavit in response to the Replying Affidavit in which she deposed that the Replying Affidavit was full of mere denials and did not answer the facts raised in the Petition.
11. On 24<sup>th</sup> September 2019, the parties agreed to dispose of the petition by written submission. On 22.10.2019 the parties confirmed that they had filed written submissions and I fixed the matter for highlighting of the submissions on 20.11.2019 and judgment on 20.12.2019.

**New developments**

12. After making the foregoing directions, the petitioner's counsel informed that court that the petitioner had been summoned for a disciplinary hearing before the 2<sup>nd</sup> respondent on 28.10.2019 and asked the court to stay the proceedings before the 2<sup>nd</sup> respondent pending judgment herein. The counsel for respondents opposed the oral application for stay and the petitioner's counsel agreed to file a formal application, which he did on 23.10.2019, one month later. The application was fixed for hearing on 24.10.2019 but the respondents sought time to respond to the application and opposed granting of any interim order. The application was fixed for hearing on 11.11.2019 but the petitioner and her counsel failed to attend court and the same was dismissed upon request by the respondents.
13. On 20.11.2019, the counsel did not highlight their submissions and the judgment date was rescheduled to 31.1.2020. However, on the said date the respondents' counsel asked the court to arrest the judgment because the petition had been overtaken by events since the disciplinary proceedings had been concluded in favour of the petitioner. The petitioners counsel denied knowledge of the said outcomes and the case was fixed for mention on 5.2.2020 when it was confirmed that indeed the petitioner had been reinstated but her counsel insisted that the court has a duty to render judgment on the outstanding issues in the petition.
14. The court directed the parties to file further affidavits and submissions to set out the outstanding issues for determination in the petition. The petitioner contended that the petition is not overtaken by events even after the decision to reinstate her and maintained that the issue of violation of her fundamental rights is still outstanding since as at the time of filing the Petition, there was a delay of 17 months in inviting her to a disciplinary hearing. She further maintained that the actions by the 1<sup>st</sup> Respondent were *ultra vires* to the provision of sections 13, 14 and 32 (1) of the Judicial Service Act and a violation of Articles 2, 10 (1) & (2) (a), 160 (1) & (5), 172 (1) (c), 253 and 255 (1) (a), (c), (d) & (g) of the Constitution.
15. The petitioner also introduced new matters which were not in the petition including averment that the finding of guilt against her and the sentence of Severe Reprimand and forfeiture of the withheld salary during the interdiction period was erroneous, unlawful, un-procedural and violates the right to fair hearing under Article 47 and 50 of the Constitution, rules of natural justice and further, it violated the independence of judiciary as protected under article 160(5) of the Constitution. She avers that the severe reprimand was not based on the charges made against her as there was no complaint and that the charge against her was that of ordering the court orderlies to call back the clerk from Onyikwa & Co. Advocates who had filed a Notice of appeal against the Ruling of the Court and proceeded to cancel the Notice. The said new matters were raised without any amendment to the petition.
16. In response to the said new matters, the Respondents filed an Affidavit sworn by Paul Ndemo Maina, the Deputy Chief Registrar of the Judiciary on 15.7.2020 stating that the Petitioner in her letters dated 27.2.2018 and 7.6.2018, admitted that she had cancelled the Notice of Appeal and had made a genuine and honest mistake without any ill will.
17. He averred that the Petitioner was invited to appear for the hearing of her disciplinary case but she rushed to file this petition; that the disciplinary process has since been finalised, she was reinstated and allowed to resume her duties but was reprimanded and made to forfeit her half salary that was withheld during the period of her interdiction.
18. He averred that the Petitioner expressed her dissatisfaction with the Respondent's decision and has lodged an appeal against the said decision and is under consideration by the 2<sup>nd</sup> Respondent. He further averred that the Petitioner cannot continue performing her duties as a

judicial officer and exercising her right of appeal against the decision of her employer while prosecuting the petition.

19. According to him, it would be superfluous to deliver a judgment as the substratum of the Petition being the disciplinary process against the Petitioner, has already been finalised and the Petitioner has accepted the Respondent's decision save for the appeal.

20. He contended that this Court has no jurisdiction to interfere with the internal disciplinary processes between an employer and its employee except on exceptional circumstances which have not been demonstrated by the petitioner. He maintained that the Petitioner admitted the offence of cancelling the subject Notice of Appeal even before filing the instant petition and urged that in the event the Court is inclined to deliver a judgment, then the same should be in favour of the Respondents by dismissing the Petition with costs because it was filed prematurely before the disciplinary process was finalised.

#### **Petitioner's submissions**

21. The Petitioner submitted that the draft Code of Conduct should not have been the basis of a punitive suspension since the Judicial Training Institute in a Memo dated 20.3.2018, it acknowledged that the Judicial Code of Conduct and Ethics gazetted vide Legal Notice No. 132 of 2016 had been revoked.

22. She relied on **Fredrick Saundu Amolo v Principal Namanga mixed Day Secondary School & 2 Others [2014] eKLR** where the Court held that a punitive interdiction would issue where the employment contract, code of conduct, the CBA or the law allows for it as a sanction.

23. She submitted that in cancelling the Notice of Appeal, she was guided by the provisions of Order 42 Rule 15 of the Civil Procedure Rules, and in doing so, she was conducting her constitutional mandate of judicial interpretation. Consequently, she submitted that the 1<sup>st</sup> Respondent had no valid reason for taking any adverse action against her, and that her interdiction was unfair under section 43 (1) of the Employment Act.

24. She argued that section 14 of the Judicial Service Act (JSA) provides for the circumstances under which power can be delegated thus the actions of the 1<sup>st</sup> Respondent are ultra vires to the provisions of sections 13, 14 and 32 (1) of the JSA. She further argued that sections 15 (1) and 17 (3) of the Third Schedule to the JSA which was applied by the 1<sup>st</sup> Respondent in suspending her from duty is unconstitutional since it limits the power to the 2<sup>nd</sup> Respondent to discipline its employees under Article 172 of the Constitution. For emphasis, she further relied on the **Fredrick Saundu case (supra)** where the Court held that sanction is to be issued to an employee after the close of a hearing.

25. She submitted that under paragraph 16 of the Third Schedule to the JSA, there are only two circumstances when the 1<sup>st</sup> Respondent can validly interdict a judicial officer or staff which are; if the proceedings for dismissal are being taken or about to be taken, and if criminal proceedings have been instituted against the accused.

26. She argued that she has not been convicted of a serious criminal offence and that no proceedings for dismissal had been taken against her to have her interdiction fall under paragraph 16 (1). She further submitted that she could not interfere with investigations as the allegations against her were straightforward.

27. She argued that no complaint was raised against her and as such there was no valid case to answer. She further argued that the Respondent failed to establish any guilt or culpability or link her to the charges made against her and therefore chose to reprimand her. In her view the said sentence was illegal and unconstitutional as it contravenes not only the legal principles of fair hearing under Articles 47 and 50 (1) of the Constitution, but also the principle of judicial independence under Article 160 (5) which provides that a member of the judiciary is not liable in an action or suit in respect of anything done in good faith in the performance of a judicial function.

28. For emphasis, she relied on the case of **Republic v Board of Governors Our Lady of Victory Girls School Kapnyeberai & another ex-parte Korir Kipyego Joseph & ano [2015] eKLR** where the Court cited the decision in **Nyogesa & 4 Others v Egerton University College (1990) KLR 962** that court would be hesitant to interfere with decisions of domestic bodies and tribunals but will quash the decisions that are manifestly unfair and unjust and where due process is not followed.

29. She submitted that Section 41 (2) of the Employment Act was not followed by the 1<sup>st</sup> Respondent by first hearing her explanation before the interdiction. She also submitted that the indefinite manner in which the interdiction was done, with a view to being an end to itself was not expeditious. She relied on **Joseph Ndungu v Mastermind Tobacco (K) Ltd [2014] eKLR** and **Bryan Mandila Khaemba v The Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR** where the courts held that an indefinite suspension amounts to constructive dismissal.

30. With respect to the reliefs sought, she submitted that court gave the same in other cases such **Kizito M. Lubano v Kemri Board of Management and 8 others [2015] eKLR**. She further submitted that this Court is clothed with powers under Article 23 (3) (a) & (d) of the Constitution to issue declaration of rights as an appropriate remedy where there are constitutional breaches.

31. She submitted that the Court should consider the provision of paragraph 17 of the Third Schedule to the JSA and her robust response to the show cause letter dated 27.2.2018 and direct that she did not commit any offence that warranted action.

32. She submitted that the circumstance of this case warrants an order of *certiorari* for purposes of quashing the decision of the 1<sup>st</sup> Respondent as contained in the letter dated 9.12.2019. She further submitted that this Court should issue an order of prohibition and permanent injunction to prohibit and permanently restrain the Respondents from implementing the decision contained in the 1<sup>st</sup> Respondents letter dated 8.2.2018.

33. She submitted that the withholding of her salary was not only unfair but an illegality that amounts to unjust enrichment by the Respondents. She sought damages for breach of her fundamental rights and relied on the Court of Appeal decision in **John Gakuo & Ano v County Government of Nairobi, Governor & 2 Others [2018] eKLR** where it set aside the award for compensation granted under the Employment Act and substituted it for an award for damages for violation of their right to fair administrative action. She also relied on the Court of Appeal decision in **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**.

34. She submitted that this Court in **Ezekial Nyangoya Okemwa v Kenya Marie Fisheries Institute [2016] eKLR** awarded the Petitioner KShs. 20,000,000 as damages for violations of fundamental rights and freedoms.

35. She urged the Court to find that the Respondents' actions were arbitrary and oppressive against her hence she is entitled to an award of damages. To fortify that argument, she relied on **Julius Ndumba Mbogori & ano v Nairobi City County [2018] eKLR** and **Obonyo and ano v Municipal Council of Kisumu [1971] EA 91** where the Courts held that exemplary damages are different from ordinary damages and that they are appropriate in two classes of cases where there is oppressive unconstitutional conduct by servants of the government and if the conduct by a defendant is calculated to make a profit for himself.

36. In conclusion, she submitted that the 1<sup>st</sup> Respondent failed to consider the dimensions for interdiction set out in **Judith Mbayah Tsisiga v Teachers Service Commission [2017] eKLR**. She therefore urged the Court to dismiss the allegation that the petition is overtaken by events and proceed to allow her petition with costs.

### **Respondents' submissions**

37. The Respondents submitted that under Article 172 (1) of the Constitution, the JSC has power to appoint, receive complaints against, investigate, remove from office or discipline registrars and judicial officers and other staff as prescribed by an Act of Parliament. In this case, they argued that the interdiction of the Petitioner was both fair and lawful since it was done pursuant to the provisions of Article 172 (1) of the Constitution, and paragraphs 15 and 16 of the Third Schedule of the Judicial Service Act, after the Petitioner admitted that she cancelled a Notice of Appeal.

38. Consequently, they urged the court not to interfere with the disciplinary process and relied on the **Judith Mbaya case supra**, where the Court declined to interfere with the disciplinary process as it did not find proof of injustice, a danger of injustice or any exceptional circumstances for it to do so.

39. They denied breaching the Petitioner's rights under Articles 28,50, 41, 47, 160 and 236 of the Constitution and relied on **Judicial Service Commission v Gladys Boss Shollei & ano [2014] eKLR** where the Court of Appeal held that the allegations against the Petitioner were clear and detailed and that she had been duly notified of the allegations against her.

40. They submitted that the facts in the present petition falls on all fours with the facts in the **Gladys Shollei case**. They argued that the Petitioner has failed to prove that her rights or freedoms have been violated by them.

41. They submitted that neither the Constitution nor the JSA provide for the time limit within which a disciplinary process must be heard and determined and contended that the Petitioner had already appeared before the 2<sup>nd</sup> Respondent's panel on 1.10.2019 for the hearing of her case.

42. With respect to the unconstitutionality of paragraph 15 (1) of the Third Schedule of the JSA, the Respondents argued that the Petitioner's interpretation of these provisions is misplaced. They further argued that by delegating powers under Part IV of the Third Schedule of the JSA, Parliament was alive to the fact that the Chief Justice was the Chairperson of the JSC, President of the Supreme Court and the link between the judiciary and other arms of government.

43. They submitted that in **Petition No. 154 of 2012 Commission for the implementation of the Constitution v Parliament and 5 Others**, Majanja J in setting out the principles for determining whether or not an impugned Act was unconstitutional stated inter alia that, the overall object and purpose of the act must be considered, the Constitution must be given a purposive liberal interpretation, and that provisions of the Constitution must be read as an integral whole without any particular provision destroying the other but sustaining each other.

44. In their supplementary submissions, they argued that since the disciplinary process, which was the basis of the petition has been heard and determined by reprimanding the Petitioner, the suit herein has been overtaken by events save for the prayers relating to certain provisions of the JSA. They maintained that that the Petitioner's interdiction and disciplinary process was finalised and relied on **Olive Mugenda & Ano v Okiya Omtatah & 4 others [2019] eKLR** where the Court of Appeal held that a court should never make orders in vain. Therefore they prayed for the Petition be dismissed with costs since it overtaken by events.

### **Issues for determination**

45. Upon consideration of the pleadings, evidence and the submissions by the parties and their counsel, the undisputed facts are that the Petitioner was charged by the 1<sup>st</sup> respondent vide a letter dated 8.2.2018 with breach of Rule 5 of the Judicial Service Code of Conduct and Ethics as read with paragraph 9 (a) , Appendix 1, Part III of the Public Officers Ethics Act on allegation that she cancelled a Notice of Appeal filed by a lawyer; that she was also interdicted by the 1<sup>st</sup> Respondent vide another letter dated 8.2.2018; that she responded to the charges against her by admitting that she indeed cancelled the subject Notice of Appeal but contended that she did so honestly on the basis of her interpretation of the law while exercising judicial mandate; that the respondents did not communicate again with her for over a year prompting to file this petition; that while the petition was pending judgment, the respondents heard the petitioner's disciplinary case and sentenced her to Severe Reprimand and forfeiture of her withheld half salary; and that the petitioner was dissatisfied with the sentence and appealed, which appeal is still pending before the 2<sup>nd</sup> respondent.

46. The issues for determination are:

- a) *Whether the Petition has been overtaken by events.*
- b) *Whether the Petitioner's interdiction was unlawful and in breach of her constitutional rights*
- c) *Whether the Petition is entitled to the reliefs sought*

#### **Whether the Petition has been overtaken by events**

47. The Respondents objected to the court rendering judgment in the petition contending that it is already overtaken by events since the impugned disciplinary process has been concluded and the petitioner reinstated to her job. According to them it would be superfluous for the Court to deliver judgment while the substratum of the Petition is non-existent. However the petitioner's contention is that despite the lifting of her interdiction and reinstatement to work, she still maintains that the interdiction was unlawful and the court should make a determination of all the issues raised in the Petition.

48. Having considered the rival contentions on the question at hand, I must agree with the petitioner that despite the destruction of the substratum of the petition by lifting of her interdiction, the entire Petition has not been fully overtaken by events. In my opinion circumstances can be overtaken by events but constitutional violations cannot be overtaken by events considering that human rights and freedoms under the Bill of Rights exist in order to preserve the dignity of individuals. Therefore, an entire petition challenging violation of rights and freedoms cannot be overtaken by events.

49. I gather support from **Kitale Shuttle Ltd & 5 others v County Government of T/Nzoia [2015] eKLR** where Karanja J. held that:

*“To begin with, the contention that the petition has been overtaken by events is far-fetched for reasons that a matter touching on fundamental rights, in the opinion of this court, cannot and will never be overtaken by events as that would curtail the Constitutional right to access to justice provided under Article 48 of the Constitution and also encourage public organs to flout the constitutional provisions with impunity knowing too well that by the time the matter reaches court the action complained of would have come to pass and be given legal justification by the phrase “Overtaken by Events.”*

50. Similarly, in **Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR** Odunga J, held that:

*“It must always be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the grounds which are not clear and which are contested would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues... Consequently, I decline to terminate these proceedings on the ground that the subject matter of this petition has been resolved.”*

51. In this case also, it is my opinion that the Court needs to examine whether or not the Petitioner's rights were violated by the impugned interdiction. However, caution needs to be exercised in order to avoid getting to new matters that have arisen after the filing of the petition, and also prejudicing the appeal pending before the 2<sup>nd</sup> respondent.

#### **Whether the Petitioner's interdiction was unlawful and in breach of her constitutional rights**

52. The Petitioner submitted that her interdiction and reprimand were unlawful for reason that the Respondents failed to prove the allegations levelled against her. She urged the Court to consider her response to the notice to show cause and direct that she did not commit any offence. The respondents have maintained that the petitioner committed the offence charged and admitted in writing vide her response to the Show Cause letter.

53. As observed above, the Court is cognizant of the fact that the Petitioner has lodged an appeal against the decision by the 2<sup>nd</sup> Respondent to reprimand her and forfeit her half salary that was withheld during the interdiction period. I will eschew going there and only state that it is indeed true that the petitioner admitted the offence that she cancelled the subject Notice of Appeal during a process that accorded her an opportunity to defend herself first in writing and later orally.

54. It is notable from the record that before the interdiction, the 1<sup>st</sup> respondent served her with a letter dated 5.1.2018 asking her to confirm the allegation that she cancelled the subject Notice of Appeal, and whether or not she did the cancellation with instructions from the Resident Judge, Honourable Justice Martin Muya, but she said nothing in response to the said query. Thereafter she was served with a Show Cause Letter dated 8.2.2018 by the 1<sup>st</sup> respondent under Paragraph 26 (1) of the Third Schedule to the JSA, together with an interdiction letter dated even date under Paragraph 16 of the said Schedule. Finally, she was accorded a chance to defend herself orally by appearing before a committee of the 2<sup>nd</sup> respondent.

55. This Court, as a general rule, has no mandate to interfere with the employers' disciplinary role and endeavours not to usurp an employers' function save where there is justification or for reason of procedural impropriety. This position was aptly stated by Ndolo J in **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** that:

*“However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities*

*or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right.”*

56. Having made a finding that the petitioner was accorded a hearing before her interdiction and thereafter, and that she admitted the offence of cancelling a Notice of Appeal, I must hold that the reason for the impugned disciplinary process was valid and the procedure followed was fair within the meaning of Article 47, 50 and 236 of the Constitution, and Paragraph 16 and 26 of Third Schedule to the JSA,

57. Turning to the issue of delayed administrative action by delaying the disciplinary process and keeping the petitioner on interdiction for over 17 months, I wish to state that it is not the first time the court is being invited to make a determination. In **Joseph Riitho Ndururi v Judicial Service Commission [2019] eKLR**, this court did not find 19 months to be inordinate delay since the Respondent explained that the delay was occasioned by inter alia, its involvement in other constitutionally mandated processes and it had suffered a deficit of quorum due to vacancies in commission. On appeal the Court of Appeal recently held that (see **Judicial Service Commission v Joseph Riitho Ndururi [2021] eKLR**):

*“On whether the process took too long and thus compromised the respondent’s right to speedy administrative action, our view is that the explanation given for the delay by the appellant was plausible.”*

58. It is therefore my finding that the delay in hearing the Petitioner’s disciplinary case which resulted in her indefinite interdiction was unavoidable. In the instant case the Petitioner averred that she was placed on indefinite interdiction and as such the Respondents infringed her rights to fair labour practices, access to justice and fair administrative action. However, the Respondents averred that the delay in determining the Petitioner’s case was occasioned by the challenges faced by the 2<sup>nd</sup> Respondent as nearly half of the Commissioners had retired and suits were instituted challenging the nomination of new commissioners.

59. The circumstances of the said precedent is on all fours with the instant petition. Consequently, I find that the explanation given by the respondents for not concluding the petitioner’s disciplinary case promptly is plausible and hold that the delay of 17 months was not unreasonable since the 2<sup>nd</sup> respondent must have the quorum required under the law before it can deliberate on a response to a Show Cause letter and make a resolution whether or not to invite the concerned judicial officer to a formal disciplinary hearing.

#### **Whether the Petitioner is entitled to the reliefs sought**

60. The petitioner seeks declaratory orders, judicial review orders, reinstatement to work and damages for alleged violations of her rights under the constitution and the statute law. However the declaration that the 1<sup>st</sup> respondent’s letter dated 8.1.2018 is illegal, null and void for contravening Article 25(c), 28,31,41,47,48,50,160(5) and 236 of the Constitution is declined because I have already made a finding of fact that the interdiction and procedure adopted in the impugned disciplinary process was fair within the meaning of Article 47,50 and 236 of the Constitution, Paragraph 16 and 26 of the Third Schedule to the JSA.

61. The Petitioner sought a declaration that paragraph 17 (3) of the Third Schedule to the JSA contravenes Article 41 of the Constitution and section 19 of the Employment Act. This paragraph relates to alimentary allowance which is granted to a suspended officer and which is not relevant herein as petitioner was not suspended but interdicted on half basic pay plus full house allowances and medical cover. It is not clear the intention of the Petitioner in seeking to have this paragraph declared unconstitutional nor did she prove the alleged unconstitutionality. Consequently, I decline to grant the declaratory order sought.

62. I further decline to make declaration that the petitioner had committed no offence warranting disciplinary action, because the evidence on record shows that she admitted that she cancelled a Notice of Appeal filed by a litigant under the provision of the law and the 1<sup>st</sup> respondent formed the opinion that disciplinary proceedings should be commenced against her. Considering the said admission by the petitioner, I am satisfied that the opinion by the 1<sup>st</sup> respondent to charge her was not baseless.

63. The Petitioner sought a declaration that paragraph 15 and 16 of the third Schedule to the JSA are in conflict with sections 13, 14 and 32 (1) and (3) of the JSA. This Court dealt with the same question in **Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others [2020] eKLR** and **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR**.

64. In the latter case Ongaya J expressed himself as follows:

*“In particular, the Court has considered the nature of the imposed delegation and returns that within the safeguards in paragraphs 15 and 17 of the Third Schedule, the 1st respondent is vested with the delegated power to perform an administrative role, namely, to impose a suspension within the stipulated safeguards. To that extent, the Court returns that the imposed delegation is an administrative role that is efficiently and effectively performed by an individual executive and which in the opinion of the Court, is properly vested in the Chief Justice as the Head of the Judiciary as per Article 161 (2) (a) of the Constitution. The Court considers that in that way, the power to suspend is conveniently exercised, within the safeguards in a manner that is responsive to the needs of the Judicial service. Accordingly the Court returns that there is no conflict between paragraphs 15 and 17 of the Third Schedule to the Act and sections 14 and 32 of the Act or the definition of “Committee” under the Act.”*

65. I concur with the learned judge in the foregoing holding and wish to add that the same position applies to the power by the 1<sup>st</sup> respondent to interdict under paragraph 16 of the Third Schedule to the JSA. Consequently, I decline to make the declaration that the said provisions are in conflict.

66. As regards the declaration that the Respondent infringed the Petitioner’s rights under Articles 25 (c), 28, 31, 41, 47, 48 and 50 of the Constitution for subjecting her to an indefinite interdiction, I reiterated that the explanation for delay given by the respondents was plausible

and exonerates them from the declaration sought.

67. The prayer for order of certiorari to quash the 1<sup>st</sup> respondent's decision contained in the letter dated 8.2.2018 is declined because I have already held herein above that the decision to commence disciplinary process against the petitioner was not baseless and it was done within the provisions of the law.

68. As regard the order of prohibition and injunction to bar the respondents from taking adverse action against the petitioner, and order of mandamus to compel the respondents to reinstate her, it is common ground that the respondents have already taken adverse action against her and that is the subject of an appeal pending before the 2<sup>nd</sup> respondent. Consequently, I withhold any comments on the same and decline to grant the judicial review orders sought.

69. As regards the prayer for general as well as punitive and exemplary damages, my view is that the same is without basis considering my finding herein above that there was no violation of the Petitioner's rights by the 1<sup>st</sup> respondent's Interdiction and Show Cause letters dated 8.2.2018, and also by the delay of 17 months before finalization of her disciplinary process.

70. In the end, I dismiss the petition with no order as to costs.

**DATED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**In the presence of:**

Nasimyu holding brief for Osundwa Advocate for the Petitioners.

Wamaasa Advocate for the Respondents.

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**