Kamande v Judicial Service Commission (Petition 50 of 2020)
[2021] KEELRC 1537 (KLR) (18 June 2021) (Judgment)

Eric Michael Karanja Kamande v Judicial Service Commission [2021] eKLR

Neutral citation: [2021] KEELRC 1537 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 50 OF 2020

J RIKA, J

JUNE 18, 2021

BETWEEN

ERIC MICHAEL KARANJA KAMANDE ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

Rika J

Court Assistant: Emmanuel Kiprono

Okemwa & Company Advocates for the Petitioner

G & A Advocates LLP, Advocates for the Respondent

The Petition

1. In his Petition, amended on 19th October 2020, the Petitioner states that he was employed by the Respondent, a Constitutional Commission, as a Principal Administration Officer, Human Resource Directorate, in the year 2013.

2. The Petition rests on 2 Affidavits sworn by the Petitioner on 3rd March 2019 and 19th March 2019.

3. He worked until 27th March 2019, when he states, his contract was unfairly terminated.

4. His role included supervision of various outsourced security service providers in the Judiciary. He was on 24th November 2016, appointed member of the tender committee relating to provision of security to the Judiciary, under tender number Jud/028/2016-17.

5. A bidder, Eric Okeyo, t/a Bedrock Security Services Limited, was dissatisfied with the tender outcome, and filed for review of the tender, with the Public Procurement Administration Review Board, Application Number 111 of 2016. The Board recommended that the tender is investigated and re-advertised.

6. On 3rd February 2017, the Chief Registrar Judiciary, wrote to the Petitioner advising that the Review Board had recommended disciplinary action / appropriate administrative action against the Petitioner and other involved Officers. He made a detailed response dated 7th February 2017.

7. On 12th April 2017, the Petitioner received a letter of charge and interdiction from the Hon. The Chief Justice. The Petitioner replied to the letter of charge and interdiction, on 2nd May 2017.

8. His contract was terminated on 27th March 2019.

9. He holds that termination was unfair, unlawful and unreasonable. Judiciary was aware at all material times, that Bedrock was a continuing service provider and the Petitioner was involved in supervision of complaints and welfare from 2015, yet Judiciary went ahead and appointed him to the tender committee; it was unfair to accuse the Petitioner of wrongdoing, while this information was within the Respondent and the Judiciary; and the investigations recommended by the Review Board, did not warrant charge and interdiction of the Petitioner.

10. It is the position of the Petitioner that the Respondent has an obligation under Article 172 [1] [c] to investigate, discipline and remove from office, Judicial Officers and other Staff of the Judiciary, in a manner prescribed by an Act of Parliament.

11. The Petitioner states that the Respondent disregarded Rule 25 of the Judicial Service Act [not Judiciary Service Act as stated at paragraph 15 of the Amended Petition]. The Chief Registrar did not investigate the matter internally and reach a definite conclusion; at no time was the Petitioner investigated and questioned by the Chief Justice or the Judiciary Ombudsman and a report generated to support the charge; charge and interdiction was premature; the complainant Bedrock Security did not file an affidavit or witness statement; the charge was unsupported; the Petitioner was not given the opportunity to cross-examine anyone; the Respondent presented 2 witnesses at the hearing, without recording and furnishing of their statements prior to hearing; there was no determination; and the panel introduced a fresh charge, alleging that the Petitioner had solicited for a bribe, which was not among the charges communicated by the Chief Justice.

12. The Petitioner states that his fundamental rights under Article 47 of the Constitution were dishonoured. Among the violations under this submission include: lack of notice and right to cross-examine; withholding of evidential material and particulars of the charge; it was not shown that the Petitioner exerted inappropriate influence on the tendering process; there was no evidence that the Petitioner solicited for a meeting with any bidder; the alleged meeting was after evaluation had been done, and committee handed its report; conflict of interest was not shown; being a member of the tender committee did not preclude the Petitioner from discharging his role as the Principal Administration Officer; and procedure was null and void from failure to conform to Article 47 as well as Article 236 of the Constitution of Kenya.

13. Further, the Petitioner holds that the decision was unreasonable and unfair. He states, that his Co-Accused, Fredrick Oboge, corroborated his position. The Respondent did not establish the charges against the Petitioner, in tandem with Section 109 of the Evidence Act, and Sections 42,43, 45 and 47[5] of the Employment Act. The reason given in justifying termination - that the Petitioner met a bidder when tender process was ongoing – was speculative. The Petitioner's previous interaction with

the bidder Bedrock Security Services, was within the Petitioner's role, and the Respondent was fully aware about this. The second interaction between the bidder and the Petitioner was on 16th December 2016 after evaluation was concluded and report handed over. Award was on 23rd December 2016. The loser Bedrock Security Services, did not place before the tender committee, evidence of invoices generated monthly at Kshs. 10,000,000, under the tender specification.

14. The Petitioner states that his meeting with Bedrock was not pre-planned. Oboge confirmed he did not hear the Petitioner solicit for a bribe. Termination was harsh and excessive, the Petitioner having served the Judiciary for 6 years without disciplinary complaints. The disciplinary process took 23 months, which was in contravention of Article 47[1].

15. In underscoring the Petition, the Petitioner relies on Submissions dated 12th January 2021, Further Submissions dated 12th February 2021, and a Digest of Authorities dated 22nd January 2021.

16. The Petitioner prays for the following orders:

    i. Declaration that the charge, proceedings, determination to dismiss the Petitioner was unfair, unlawful, unconstitutional, null and void ab initio and is hereby quashed and set aside.

    ii. Declaration that the charge, proceedings, determination to dismiss the Petitioner was in violation of Rule 25 [1-11] of the 3rd Schedule of the Judicial Service Act, Sections 106, 107,108 and 109 of the Evidence Act, Section 4 [1] [c] and 4[4][c] and 4[3][g] of the Fair Administrative Action Act, Article 2 [4] 10[2][a][c], 27[1], 41, 47, 172 [1] [c], 236 [b] and 259 [11] hence null and void ab initio.

    iii. Compensation for violation of the Petitioner's fundamental rights and freedoms as pleaded.

    iv. An order for reinstatement to his post or deployment within the Judicial Service without loss of accrued benefits, allowances and back -salaries.

The Response

17. The Petition is answered through the Replying Affidavit sworn by the Hon. Chief Registrar Judiciary on 19th May 2020. The Respondent holds that the Petitioner's contract was terminated fairly and lawfully.

18. He was employed as Principal Administration Officer by the Respondent. On 18th November 2016, the Judiciary advertised for provision of security services for a period of 1 year. The Petitioner was appointed a member of the evaluation committee, in his capacity as the Principal Administrative Officer, under Sections 46 [4] and 80 of the Public Procurement and Asset Disposal Act, 2015. His appointment was specific to evaluation of the tender.

19. Evaluation started on 8th December 2016, concluding on 10th December 2016. It was concluded that Bedrock Security Services Limited had provided inaccurate and falsified documents, and was therefore disqualified.

20. Bedrock was dissatisfied. It applied for review with the relevant Board in Application Number 111 of 2016. The Application contained allegations which touched on the Petitioner's integrity and professionalism in conducting the evaluation. The Board rendered its Ruling on 20th December 2016. It was a finding of the Board that the Petitioner and his colleague Oboge, met an Employee of Bedrock Security, at night and outside normal working hour, which would raise questions of integrity. The law prohibited the 2 from making any contact with potential bidders.

21. The Board directed that the Respondent, through the Office of the Chief Registrar, to take administrative action, including investigating the concerned officers where necessary. The Respondent initiated disciplinary action against the Petitioner, in accordance with the Regulations contained in Part IV, Third Schedule of the Judicial Service Act. The process culminated in termination of the Petitioner's contract.

22. On 3rd February 2017, the Chief Registrar wrote to the Petitioner requiring him to explain his role in the disputed evaluation. He replied on 7th February 2017. The 2 letters were placed before the Chief Justice, who upon review, interdicted the Petitioner in accordance with Regulation 16 of the Judicial Service Act. He was served with a charge of gross misconduct, in accordance with Regulation 25[1]. Particulars of the charge were that: The Petitioner, while serving as a member of the tender evaluation committee for tender number JUD/028/2016-2017, a] allegedly met one of the bidders for a meal before the conclusion of the tender evaluation process; and b], failed to declare to the tender evaluation committee that his previous interaction would put him in a position of conflict of interest. He did not exculpate himself in his letter of 3rd May 2017. The Chief Justice therefore forwarded the charge and the Petitioner's response to the Respondent for consideration.

23. The Respondent exercised its discretion, by determining that disciplinary proceedings against the Petitioner are instituted.

24. The Respondent referred the matter to its Human Resource Committee for investigations in accordance with Regulation 25[2]. The Petitioner was invited for hearing on 6th March 2018. Disciplinary hearing was held on 6th March 2018. 2 witnesses, Jeremiah Nthusi and David Kigen, gave evidence and were cross-examined by the Petitioner. Okeyo, who was an accomplice of the Petitioner, and who had given adverse evidence against the Petitioner at the Board, was invited to the disciplinary hearing but failed to show up, compelling the closure of proceedings. The Petitioner was allowed to make his representations.

25. The committee submitted its report to the Respondent on 12th March 2019. It found the Petitioner guilty on both counts. It was recommended that the Respondent metes out appropriate punishment under the Judicial Service Act.

26. The Respondent deliberated on the report and accompanying evidence against the Petitioner, in its meeting of 12th March 2019. It affirmed the findings against the Petitioner. The Respondent decided in accordance with Regulation 25 [11], that the petitioner is dismissed from employment.

27. The Petitioner was served with the letter of dismissal dated 27th May 2019, and advised of his right of review. He elected not to seek review. He instead wrote to the Respondent on 22nd October 2019, asking for documents in relation to the disciplinary hearing, after the hearing. The documents had no bearing on findings already made against the Petitioner.

Final Arguments

28. The Petitioner submits that he was a Public Officer. His employment was statutorily and constitutionally underpinned. His is a public law action of judicial review and remedy, not a case of unfair termination under the Employment Act. He cites a 1994 decision J. Makokha & 4 others v. Lawrence Sagini & 2 others [1994] e-KLR in advancing this position.

29. The Petitioner, relying on Judicial Service Commission v. Gilbert Mwangi Njuguna & another [2019] e-KLR, submits that, the Court has a duty to construe the charge against the Petitioner as drawn and cannot redraw the same or entertain peripheral matters as was done by the disciplinary committee.

30. It is submitted for the Petitioner that the Regulation 25 [1-11] spell out mandatory disciplinary procedure, and omission of any one of the steps, dents and invalidates the entire process. The statutory statement must conform with the charge. It matters not, as held in County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] e-KLR, that the accused understands the charge; the notice must comply with statutory requirements where the same are provided.

31. There was no investigation or investigation report. The mere fact that the matter emanated from the Review Board, did not dispense with the need for investigation by the Respondent. The Respondent relied on conjecture. Regulation 25 [1] requires the Chief Justice to investigate the allegations. There was no evidence of his investigations. Witnesses called at the hearing by the Respondent had not recorded any statements. The Petitioner was not supplied with such statements.

32. The right to a fair hearing does not envisage a situation where the investigator [the Respondent herein] is also the judge in the same matter as held in Apollo Mboya v. Judicial Service Commission & another; Justice Kalpana Rawal & 4 [Interested Parties] [2020] e-KLR.

33. In Timothy Nchoe Sironka v. Judicial Service Commission [2020] e-KLR, the Court emphasised the obligation of administrators to conduct investigations and to avail investigation reports prior to hearing, failing which is violation of Article 47. In George Kingi Bamba v. National Police Service Commission [2019] e-KLR, it was stressed that the administrator has the power to bond relevant witnesses. The Respondent was wrong in closing its proceedings without compelling attendance of all the relevant witnesses. Investigation report forms the basis of the Chief Justice's decision to press charges or not, and forms the basis of inculpation or exculpation of the relevant Officer

34. The Petitioner submits that whenever there is a violation of the Constitution, the Court must intervene and grant reliefs including declarations and compensations as a matter of course, as held in Kenya Human Rights Commission & Another v. Non-Governmental Organizations Co-ordination Board and Another [2018] e-KLR.

35. The Court should not make declaratory orders without compensation, and the Petitioner proposes that damages in the range of Kshs. 2 million would redress his constitutional violations.

36. On the remedy of reinstatement, the Petitioner relies on the Ugandan Supreme Court decision, Omunyokol v Attorney- General [Civil Appeal No. 06 of 2012] [2012] UGSC 4 [8th April 2015], [Dr. Kiseka] where it was held: -

> '' Courts should guard against a culture of impunity in employment, where 'errant' public officers deliberately ignore set procedures, and use unconstitutional methods to kick out their juniors unlawfully, well knowing that their only remedy, after protracted legal battles such as the one the appellant has gone through, will be monetary compensation, that is if the unlawfully dismissed employee survives through it.
>
> In my view, Courts should not shy away from reinstating public employees who are victims of unlawful and unconstitutional conduct into their positions, where the affected employee is ready and willing to resume his/ her employment. For us, to do so, we will be encouraging a culture of impunity. ''

37. Upon reinstatement, the Petitioner is entitled to restoration of full benefits and back pay. He relies in this submission, on National Bank of Kenya v. Anthony Njue John [2019] e-KLR.

38. The Petitioner affirms the applicability of Fair Administrative Action Act, citing Judicial Service Commission v Mbalu Mutava & Another [2015] e-KLR where is was held: -

> '' FAAA is enacted pursuant to Article 47 [3] of the Constitution. Article 47 [1] lays a constitutional foundation for control of the powers of state organs, public bodies, but also entrenches the right to fair administrative action in the Bill of Right. It is also a reflection of Article 10 values such as rule of law, human dignity, social justice, good governance, transparency and accountability. It guides such bodies in whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law of makes, or implements public policy decisions.''

39. The Petitioner submits finally that although he was not a state officer, as described in Article 20 of the Constitutional, his contract has constitutional and statutory underpinnings. He submits that Fair Administrative Action Act, compliments Judicial Service Act, and the Employment Act. It does not limit his range of remedies. Relying of the decision of this Court in Mohammed Sheria & 2 others v. Simon Kipkorir Sang & 5 others [2018] e-KLR, the Petitioner posits that it is not helpful of the Respondent to cite Anarita Karimi Njeru v the Republic, submitting that the Respondents have not shown what Rule, has not been complied with, to warrant rejection of the Petition for lack of specificity. He asks the Court to endorse its own view in this decision - that continued reliance of Anarita Karimi Njeru amounts to legal ancestor worship, as the decision relates to the retired Constitution.

40. The Respondent submits that the Petition should have been brought as a Claim. The Petitioner was not a state officer, whose removal is underpinned by the Constitution. He ought not to have moved the Court by means of a constitutional provision. He has not met the threshold of Constitutional Petition under the celebrated decision in Anarita Karimi Njeru v. Republic [1978] KLR, 1978.

41. It is submitted for the Respondent that the Respondent, in exercising disciplinary mandate over staff, is not regulated by the Fair Administrative Action Act; it is regulated by an entirely independent legal regime from the Fair Administrative Action Act and the Employment Act 2007. It is regulated by the Judicial Service Act.

42. The Respondent anchors this argument of comparative jurisprudence from South Africa. In Pertonella Nellie Chirwa v. Transnet Ltd [2007] ZAAC 23, where it was held that Protection of Administrative Justice Act [equivalent of Fair Administrative Action Act], should not detract from the pre-eminence of the Labour Relations Act [read Employment Act in this Petition] and its specialized labour disputes mechanism.

43. The result, in the view of the Respondent is that this dispute is to be considered entirely within the provisions of the Judicial Service Act.

44. In the Ruling of the Review Board, it was ordered that the Procuring Entity [Judiciary] carries out investigations on the conduct of its officers. The Respondent was obligated therefore, to initiate disciplinary proceedings.

45. In determining whether an administrative body has accorded fair hearing, the Court must look at the peculiar facts of each case. The Respondent relies on Judicial Service Commission v Mbalu Mutava & Another [2015] e-KLR, where the Court, citing the English decision in Wiseman v Bornean [1969] 3 All ER, 275, said that, the investigating body is under duty to act fairly, but that which is fairness, depends on the nature of the investigations and the consequences which it may have on the person affected by it.

46. Administrative bodies operate within acceptable limits of flexibility. In Republic v Public Procurement Administrative Review Board & 3 others [2017] e-KLR, it was established that Courts will only interfere, with decisions of public bodies, if the decisions are outside the bounds of reasonableness. The Court must not impose its own view, replacing its own decision with that of the administrator.

47. On standard proof, it is submitted for the Respondent, relying on Attorney- General & Another v Andrew Maina Githinji & Another, [2016] e-KLR, that disciplinary proceedings are anchored on balance of probability, while in criminal proceedings the standard is, beyond reasonable doubt. The Respondent discharged its burden, on a balance of probability. The Petitioner should not confuse a disciplinary process, which is a private process between the Employer and the Employee, whose aim is to ensure the Employer' business is not harmed by delinquent Employee's behaviour, with a criminal trial, which is a public process, where prosecution is carried out by the State, and is purposed on securing the safety of the general population, and on maintenance of a stable social order.

48. The Respondent submits that it was established that the Petitioner was involved in an act of gross misconduct. The right of access to information is not absolute. Section 23 of the Judicial Service Act, does not require the Respondent to avail to the Petitioner, office orders, minutes, reports or recorded reasons for the decision.

49. Even if the Court finds fault with the disciplinary proceedings, it cannot substitute the decision of the Respondent, with its own; it can only remit the matter back to the Respondent, as the decision-maker.

50. The issues as suggested by the Parties, and understood by the Court are: -Applicable law.Procedural fairness.Substantive Fairness.Remedies.

The Court Finds:

51. The history of employment, between the Parties, the terms and conditions or service, and the fact that the Petitioner's contract was ended by the Respondent, are not contested.

Applicable Law .

52. The Respondent submits that the Petition is wholly misconceived. It should have been filed as an ordinary Claim. The Fair Administrative Action Act has no applicability. The Employment Act similarly is inapplicable. It is submitted that in exercising disciplinary control over Judicial Staff, the Respondent is guided exclusively by the Judicial Service Act, which derives its enactment from Article 171 of the Constitution.

53. The Petitioner's position is that he was a Public Officer, and his contract had statutory and constitutional underpinnings. His removal required certain stringent statutory and constitutional imperatives are met. This is a public law dispute, where remedies under judicial review regime are sought. The Petitioner, while invoking certain provisions of the Employment Act elsewhere, submits that his Petition, is not a case of unfair termination.

54. The Court is of the respectful view that, the Employment Act 2007, applies in general, to all Employees, employed by any Employer, under a contract of service, whether in the public or private sector. Section 3[2] of the Act, however, excludes certain Employees from the reach of the Employment Act. These are: -

    a. the armed forces or the reserve as respectively defined in the Armed Forces Act [Cap.199];

    b. the Kenya Police, the Kenya Prisons Service or the Administration Police Force;

c. the National Youth Service; and,

d. an Employer and the Employer's dependants, where the dependants are the only Employees in the family undertaking.

55. Under subsection 4 of the above law, the Cabinet Secretary for Labour, may, after consultation with the National Labour Board and after taking account of all relevant conventions and other international instruments ratified by Kenya, by order exclude from the application of all or part of this Act, limited to categories of Employees in respect of whom special problems of a substantial nature arise.

56. Subsection 5, offers another possible category of excluded Employees in applying the Employment Act. The Cabinet Secretary may, after consultation with the National Labour Board, by order exclude the application of all or part of the Act, categories of employed persons whose terms are governed by special arrangements: provided, those arrangements afford protection that is equivalent to or better than that part of the Act from which those categories are being excluded.

57. There was no material placed before this Court, showing that Employees of the Judiciary, come within any of these excluded categories. There is nothing on record to indicate that the Cabinet Secretary for Labour, in consultation of the National Labour Board, has excluded the application of all or part of the Employment Act, to Judicial Staff.

58. The disciplinary process against Judicial Staff prescribed under the 3rd Schedule to the Judicial Service Act, the substantive and procedural standards of fairness, must therefore be weighed against the basic standards of fairness, set under the Employment Act 2007.

59. Section [3] 6 of the Employment Act pronounces itself on the primacy of the Act, in application to all contracts of service, stating: -

> '' subject to these provisions [above], the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an Employee, and any agreement to relinquish, vary or amend the terms herein shall be null and void.''

60. Section 26 of the Employment Act restates the primacy of the Employment Act in all contracts of service, emphasizing that the provisions of Part V and V1, constitute basic, minimum, terms and conditions of contract of service. Section 26 [2] states: -

> '' Where the terms and conditions of a contract of service are regulated by any regulations as agreed in any collective agreement or contract between the parties, or enacted by any written law, decreed by any Judgment, Award or Order of the Industrial Court are more favourable to an Employee than the terms provided in this Part [V] or Part V1, then such favourable terms and conditions of service shall apply.''

61. The Petitioner had a judicial contract of service, and the Employment Act applied to this contract. The Employment Act is the basic employment law. It sets the minimum employment standards, against which all other legislations and labour instruments, must be validated. It is the golden standard, or the 'grund norm' so to speak, in all employment contracts, except those specifically excluded from its reach, under Section 3 of the Act. It affords the basic standard, against which all contracts of service, except those which are excluded by the Act itself, must be weighed.

62. The Respondent is an Independent Constitutional Commission, created under Article 171 of the Constitution. It is mandated to among other responsibilities, appoint, receive complaints against,

investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff, in a manner prescribed by an Act of Parliament.

63. Employees under the disciplinary control of the Respondent are not excluded under Section 3 of the Employment Act. Their contracts fall within the reach of the Employment Act. While the Judicial Service Act applies in employment and regulation of judicial servants, it does not apply to the exclusion of the Employment Act as suggested by the Respondent. It must in its application offer equivalent, or superior terms and conditions of service, to the standards set out in the Employment Act.

64. The Judicial Service Act makes provision for judicial services and administration of the Judiciary, with specific provisions on appointment and removal of Judges, and the discipline of other Judicial Officers and Staff.

65. It applied in the appointment of the Petitioner and in termination of his contract. But in its application, it would have to be gauged against the basic standards prescribed by the Employment Act 2007.

66. The Fair Administrative Action Act No. 4 of 2015, applies to all state and non-state agencies including any person, exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affect the legal rights or interest of any person to whom such action, omission or decision relates. This Act has a wide scope, as was restated in Judicial Service Commission v. Mbalu Mutava & Another [2015] e-KLR.

67. It clearly applied to the Respondent, in its dealing with the Petitioner. It is hard to agree with the Respondent, in its submission that the Fair Administrative Action Act did not apply to the Petitioner's disciplinary case.

68. The Fair Administrative Action Act, ensures that the principles set out under Article 47 of the Constitution are actualized. Where an Administrator is empowered by any written law, to follow a procedure which conforms to Article 47, the Administrator may act in accordance with that different procedure. The Act does not limit aggrieved parties from seeking such remedies as may be available under any written law. The Act also embraces principles of common law and rules of natural justice, stating under Section 12, that it applies in addition to, and not in derogation from the general principles of common law and the rules of natural justice.

69. In the view of the Court therefore, the Petitioner's contract was governed by the basic standards set out in the Employment Act; it was governed by the Judicial Service Act; and by the Fair Administrative Action Act. It is incorrect to posit that any one Act of Parliament, applied to the Petitioner's contract, to the exclusion of the others.

Applicable Procedural Law.

70. In this Court's view, the argument that a Claim, rather than a Petition, should be the accepted mode of initiating a dispute before this Court, has been rendered redundant by legal practice. The Courts too, appear to have accepted that it is entirely in the discretion of the litigants, how to approach the Court.

71. The Petitioner opted to approach the Court through a Petition rather than a Statement of Claim, and he cannot be faulted for that. This liberal approach on procedure is encouraged by the Employment and Labour Relations Court [Procedure] Rules. Rule 7, while requiring Parties desirous of instituting Petitions, to adopt The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2012; and, while it requires that Judicial Review proceedings are initiated in accordance with Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules [appears oblivious to the Fair Administrative Action Act]; the Rule states that,

notwithstanding anything contained in this Rule, a Party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision, in a Statement of Claim.

72. The Court is not aware of any decision, where a Party was turned away by the Court, because of presenting a Petition rather than a Statement of Claim. The Rules of Procedure are permissive. Unless the Court was shown that a Party has chosen one procedure over the other to avoid some requirement of the law, for instance on time-bar, there is no reason to disallow a Claim or Petition simply on the ground that one should have been filed instead of the other. The Respondent has not brought it to the attention of the Court, any Rule in the E&LRC [Procedure] Rules, 2016 or the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013, which makes the Petition herein procedurally untenable. In Court of Appeal decision, Judicial Service Commission & Another v. Lucy Muthoni Njora [2021] e-KLR, it was explained that the Constitution of Kenya 2010, changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act to Article 22[3] of the Constitution, which recognized judicial review as an appropriate relief for human rights violations. Superior Courts in Kenya, the Court of Appeal held, have spoken with near unanimity that existing constitutional and statutory landscape called for a more robust application of judicial review to include in appropriate cases, merit review of the impugned decision.

73. Rule 7 of the E&LRC [Procedure] Rules, 2016 recognizes this current constitutional and statutory landscape.

74. The Court is satisfied that the Petition is procedurally sound.

Procedural fairness .

75. The Petitioner worked as Principal Administration Officer, Human Resource Directorate. In this capacity, he was appointed a member of the tender committee, which was involved in evaluation of tender for security provision No. Jud/028.2016-2017.

76. Problem arose when one of the failed bidders, Erick Okeyo t/a Bedrock Security Services Limited, successfully applied to the Public Procurement Administration Review Board in Application No. 111 of 2016 for the decision of the Respondent herein, awarding the tender to Lavington Security Services Limited, to be set aside.

77. In his 2 Affidavits before the Procurement Review Board, Erick Okeyo made allegations specific to the Petitioner, which allegations formed the core of charges relating to gross misconduct before the Respondent. Okeyo alleged that on 16th December 2016, the Petitioner requested to meet Okeyo, to discusss payment of a pending invoice which was payable to Okeyo's firm by the Judiciary. Okeyo allegedly met the Petitioner and Petitioner's colleague and co-accused in the disciplinary proceedings Fred Oboge, at Ranalo Restaurant, at night, 7.40 p.m. The Petitioner and Oboge allegedly asked for Kshs. 200,000 to facilitate satisfaction of Okeyo's invoice. The 2 Judicial Staff also demanded that Okeyo, t/a Bedrock Services, pays inducement equivalent of 1-month invoice, to be awarded the tender for provision of security services, which they stated they had full control over.

78. The Board agreed with Okeyo and allowed his Application setting aside the Respondent's decision to award the tended to Lavington Security Services. The Board directed that tendering is redone, and the Procuring Entity [Judiciary], to carry out investigations on the conduct of its Officers who were in the evaluation committee.

79. The Chief Registrar Judiciary, wrote to the Petitioner on 3rd February 2017, asking the Petitioner to explain his role in the invalidated tendering process.

80. The Petitioner wrote back on 7th February 2017. He explained that he had contacted Okeyo in the morning of 16th December 2016, because Okeyo's Security Guards, deployed at Mwingi Law Courts, had threatened to go on strike over delayed salaries. Okeyo assured the Petitioner that the Guards would be paid. In the evening of the same day, Okeyo called the Petitioner and requested for a meeting at Nairobi Club, at 7.00 p.m. This time, Okeyo sought to consult the Petitioner over Okeyo's pending invoice. The Petitioner had a prearranged dinner with his friend Oboge at Ranalo. He advised Okeyo they would meet the following week, but while at Ranalo, Okeyo walked in and joined the pair.

81. The Petitioner explained in summary that he did not initiate this meeting; by 15th December 2016 the evaluation committee had all the requisite information and had generated a draft tender evaluation report; the allegations about inducement by Okeyo were meant to discredit the Petitioner; and those allegations were not in the initial Affidavit in support of the Application by Okeyo before the Review Board, but contained in his second Affidavit; and that being a member of the evaluation committee, did not preclude him from discharging his substantive role, which included overseeing security service providers. The Petitioner nonetheless regretted in his reply to the Chief Registrar, that his meeting with Okeyo was inadvertent, unplanned, and resulted in accusation that he lacked integrity.

82. On 12th April 2017 the Chief Justice interdicted the Petitioner having evaluated his response above. At the same time, the Chief Justice presented the Petitioner with a charge sheet. There were 2 counts: that on 16th December 2016, the Petitioner met one of the bidders at a restaurant in Nairobi, contrary to Article 227 of the Constitution of Kenya and Section 65 of the Public Procurement and Asset Disposal Act, a meeting which raised questions about the Petitioner's integrity; and, the Petitioner failed to declare to the tender committee about his previous interactions with the bidder, which put him in a position of conflict of interest.

83. The Respondent then constituted a committee, pursuant to Section 32 of the Judicial Service Act, to hear the charges against the Petitioner. The provision requires that the procedure of this committee is in accordance with the 3rd Schedule, Judicial Service Act.

84. It is not clear from the Judicial Service Act, if the committee or panel such as was appointed in the Petitioner's case, is a disciplinary committee or investigation/ enquiry committee.

85. The Chief Justice proceeded under Rule 25 of the 3rd Schedule in instituting disciplinary action against the Petitioner. This is apparent in the letter of interdiction where he advises the Petitioner that proceedings, which may lead to Petitioner's dismissal, are about to be taken. The Rule requires the Chief Justice to frame charges, which as seen above was done. The charges were forwarded, with statement of allegations. But even before he does this, the Chief Justice is required to make such enquiry as he thinks fit. The Petitioner complains he was not availed any internal enquiry report. There is no investigation/ enquiry report, attributed to the Chief Justice or any of the Officers under him, relating to the alleged acts of gross misconduct committed by the Petitioner.

86. Rule 25 [3] of the 3rd Schedule is problematic. It states that: -

> ''If it is decided that the disciplinary proceedings shall continue, the Commission shall appoint a committee or panel to investigate the matter....''

87. What is intended by this Rule? The Court understands that the Commission must appoint a committee or panel to investigate, which in the view of the Court, would be different from a committee or panel to conduct the hearing.

88. The procedural rights of an Employee under investigation, are not the same as the rights while under hearing. The distinction must be made clear. The right to be accompanied by a colleague or a trade

union representative for instance, under the minimum standards of fair hearing contained in section 41 of the Employment Act, cannot be read into an investigatory process. Investigation is carried out to establish if there is a case to be defended; gather information from all relevant witnesses; record witness statements including the statement of the accused Employee; and determine what should happen next. The Judicial Service Act does not contemplate that investigation and disciplinary hearing are merged into a single process.

89. The Employment Act does not compel Employers to investigate Employees suspected of employment wrongs, before hearing; it requires that Employers prove that there was valid reason, or reasons justifying termination.

90. Where however the contract of employment, collective agreement, labour instrument, human resource policy and procedure manual, disciplinary code, or applicable written law, provide for investigation separate from the disciplinary hearing, then this is a standard superior to the provisions of the Employment Act, and there must be an investigation, preceding the hearing.

91. The 3rd Schedule of the Judicial Service Act, specifically refers to a committee or panel to investigate. It also mandates the Chief Justice, to carry out preliminary investigation. This preliminary investigation, if the process moves beyond it, logically would be followed by a full investigation. It must have been intended that once the matter has come from the Chief Justice, there should be convened a committee or panel to Investigate. At the time of hearing, the accused Employee must be availed, if he so wishes, the preliminary investigation report from the Chief Justice and the report of the committee or panel appointed to investigate.

92. The committee or panel which is mandated to investigate under Rule 25[3], is turned into a disciplinary hearing committee under Rule 25[4]. The committee is required to give a written notice of not less than 14 days, specifying the date on which the accused may be required to answer the charges. From here on, the investigation is turned into a full blown disciplinary hearing, complete with the potential of having the Employee prosecuted by the Director of Public Prosecutions.

93. The committee went on to hear the Petitioner on 6th March 2018 and 6th June 2018, culminating in the decision to terminate his services on 27th March 2019.

94. The Petitioner complains that there was no investigation preceding disciplinary hearing. He was not furnished with any report concerning investigation. The Ruling of the Review Board recommended that the Procuring Entity, the Respondent herein, takes appropriate administrative action, including carrying out investigation of the Officers concerned...investigation of Officers who were in the evaluation committee.

95. The 3rd Schedule to the Judicial Service Act demanded that there is internal investigation, after the matter came from the Review Board. There was none, just a hearing. There was no report generated internally by the Respondent, an Independent Commission. There is a catena of judicial authorities, including Timothy Nchoe Sironka v. Judicial Service Commission [2020] e-KLR, which underscore the obligation of Administrators to carry out investigations, before taking out disciplinary proceedings against Officers.

96. In Judicial Service Commission v. Mbalu Mutava & Another [2015] e-KLR, as submitted by the Respondent, that which is fair depends on the nature of investigation and the consequences it may have on the person affected by it. Without investigations report of any form, it is difficult to know the nature of investigations carried out by the Respondent. The process ended in dismissal of the Petitioner.

97. The hearing was itself, if it can be characterized as such, flawed and did not meet the standards of fairness, under the Employment Act, the Judicial Service Act, and the Fair Administrative Action Act.

98. The glaring defect in the hearing revolved around failure to obtain evidence from the star witness at the Review Board, Erick Okeyo.

99. The centrality and nature of this witness can be read from the proceedings of the investigation/ disciplinary committee or panel.

100. At page 30 of 33 in the proceedings of 6th March 2018, the committee decided to adjourn hearing, because Okeyo was not present to present evidence. Commissioner Mercy Deche who chaired the session assured that the committee would endeavour to secure the attendance of Okeyo, to ensure the hearing was ''as fair as it can get.'' When Fred Oboge, Petitioner's co-accused complained that he wished to go on with the hearing and clear his name as soon as possible, the Chair assured him that: ''you understand the principal person who is complaining, is Mr. Okeyo.''

101. The Respondent as seen above, considered Okeyo the principal complainant or witness in the proceedings, instituted against the Petitioner. The Respondent also acknowledged the proceedings would be lacking in fairness, without the evidence of Okeyo. Hearing was adjourned, to allow the committee call Okeyo. The committee repeatedly advised that Okeyo was its witness, not a witness for the Petitioner.

102. Hearing was adjourned to 6th June 2018. Commissioner Aggrey Muchelule was in the chair. Okeyo was absent again.

103. Commissioner Muchelule expressed himself as follows: -

> ''Today we were expecting a witness from Bedrock Security Services and we were made to believe that he is unobtainable. Is that the position? We were the ones who were calling him, but he has gone underground. So we will dispense with his attendance unless there is something you wish to say, Kamande?''

104. The witness was not available and as stated above, was a witness lined up by the Respondent, and who was principal to the establishment of the charges against the Petitioner, and in guaranteeing fair hearing. In the end can it be said that the charges against the Petitioner were established, and the requirement of a fair hearing met, in the absence of Okeyo? How did the Respondent terminate the contract of the Petitioner, based mainly of the information of a potential witness who had gone underground?

105. Okeyo did not swear an Affidavit before the committee. He did not record any statement before the committee. There was no internal investigation carried out by the Respondent as observed elsewhere in this Judgment. It was Okeyo who had averred before the Review Board, that the Petitioner and Oboge, solicited for a bribe to facilitate award of tender to Okeyo's firm Bedrock. These were the allegations against which the charge surrounding the lack of integrity on the part of the Petitioner rested. Without Okeyo, what would be the basis of sustaining the charge?

106. If the Respondent is able to utilize the services of the Director of Public Prosecutions to prosecute Judicial Staff at the workplace, it is not beyond the Respondent to compel attendance of any witness before it, with the aid of other Public Agencies. Article 252 [3] [b] of the Constitution empowers the Respondent specifically, to issue summons to a witness to assist for the purpose of investigations. The committee did not disclose if any summons were served on Okeyo. If there was defiance of summons issued under the command of the Constitution of Kenya, very grave consequences to Okeyo would have followed. There was no justification for the Respondent to fold up, and take the position that this key witness, had irreversibly gone underground. This was after all, a witness with an ongoing contract with the Respondent, and whose physical address must have been within the records of

the Respondent. In Court of Appeal decision George Kingi Bamba v. The National Police Service Commission [2019] e-KLR, it was held that the Police Service Commission, could utilize services of Public Officers, Investigative Agencies and Experts for purposes of conducting investigation. It was improper for the Respondent to close proceedings without summoning Okeyo. The Respondent assigned high value to Okeyo's evidence. Why was his attendance not procured, or at the very least his witness statement or affidavit, to support his allegations against the Petitioner?

107. The Court is convinced that hearing did not meet the minimum legal standards of fairness.

Substantive Fairness .

108. There were 2 charges or counts, against the Petitioner as discussed elsewhere in this Judgment. The 2 charges were broadly presented under the title '' Gross Misconduct,'' with the counts giving particulars of the gross misconduct. The letter of dismissal stated the offences and details as contained in the charges drawn by the Chief Justice at the outset. There was no deviation or redrawing of the charges as alleged by the Petitioner in his Submissions. The Respondent did not act contrary to the principle in Judicial Service Commission v. Gilbert Mwangi Njuguna & Another [2019] e-KLR, by redrawing charges or going into peripheral matters.

109. However, the 1st charge on lack of integrity could not in the absence of Okeyo's evidence, be sustained. The Petitioner, while acknowledging there was contact with Okeyo, explained it was not a planned meeting, and evaluation of bids had closed and draft report already generated by the evaluation committee. There had earlier in the same day, been contact between Okeyo and the Petitioner over Bedrock Security Guards, who were threatening industrial action at Mwingi Law Courts, over unpaid salaries. Bedrock was an existing security services provider to the Judiciary. There was routine contact between the Petitioner and Okeyo, given that the Petitioner supervised existing security service providers, and Bedrock was an existing security service provider.

110. The 2 witnesses Jeremiah Nthusi and David Kigen who gave evidence at the disciplinary hearing, were not party to any meeting involving the Petitioner and Okeyo. Nthusi told the committee he was freshly appointed and did not know about solicitation of a bribe by the Petitioner. Kigen from Lavington Security Services, denied ever meeting Judiciary Staff over the tender. He also explained that he had interacted with the Petitioner in the past, Lavington Security having been a security service provider. Kigen provided a sworn Affidavit to the committee, unlike Okeyo who gave the committee nothing. Nthusi testified there would be no issue, if the Petitioner discussed with the service providers matters on the service already being delivered. From the Affidavits of Okeyo at the Review Board, he stated he met the Petitioner to discuss payment of a pending invoice, and that the Petitioner asked for Kshs. 200,000 for facilitation. This act of gross misconduct does not seem to have been part of the charges against the Petitioner. Okeyo stated also that the Petitioner asked for payment of equivalent of 1-month invoice, to be granted the tender for provision of security services. What was payment of 1-month invoice? Without the evidence of Okeyo, there was no support for the charges. Pressed by Commissioner Muchelule on his answer relating to the Petitioner's contacts with security service providers, Nthusi argued, it would be imperative for the Petitioner to avoid meetings that would be interpreted as interference with the tender process. How would the Petitioner avoid this, while some bidders were past and ongoing service providers under his supervision?

111. There was no witness at the hearing who implicated the Petitioner on the allegations made by Okeyo, concerning tender manipulation.

112. The 2nd count on failure to disclose past interactions with the bidder, which placed the Petitioner in a position of conflict of interest, was similarly not supported by evidence.

113. The Petitioner was Principal Administrative Officer. His role included day-to-day supervision of security service providers. He interacted with these providers. He interacted with Okeyo for instance, when Bedrock Security Guards threatened to down their tools at Mwingi Law Courts. Kigen testified before the committee that Lavington Security, had interaction with the Petitioner, through the Petitioner's oversight of implementation of past contract Lavington held, with the Respondent, for provision of security services.

114. The bidders, Bedrock Security Services and Lavington Security Services, were not fresh service providers; they had past, or on-going contracts with the Judiciary. The Petitioner as the Principal Administrative Officer, supervised these service providers. He interacted with them. There was nothing therefore, for him to declare. If the Petitioner was in a position of conflict of interest, he was placed there by the Respondent. The Respondent, if it was of the view that there would be conflict of interest, ought not to have appointed the Petitioner to the evaluation committee.

115. The Respondent appears to have wrongly been influenced by the proceedings and outcome before the Review Board. Yet, the Respondent makes a clear distinction between internal disciplinary proceedings and other legal proceedings, citing James Mugeria Igati v Public Service Commission [2014] e-KLR. It should not have disregarded its own statutory and constitutional obligations, and relied almost entirely on the process and outcome at the Review Board. It ought to have made its own independent investigations, called evidence of all relevant witnesses, and arrived at its own conclusions.

116. The Court is satisfied that the Respondent did not establish the 2 charges preferred against the Petitioner. There was no valid reason or reasons, in justifying termination, under Section 43 and 45 of the Employment Act 2007, read together with Rule 25 [10] and 25[11] of the 3rd Schedule, Judicial Service Act. The decision arrived at by the Respondent cannot be said to have been within the bounds of reasonableness, as understood in the case of Republic v. Public Procurement Administration and Review Board and 3 Others [2017] e-KLR. The decision was not based on investigation/ enquiry reports generated by the Respondent. Witness lined up by the Respondent, upon whom the charges relating to tender corruption rested, did not give evidence in any form. Allegations about conflict of interest had no foundation, the Respondent having placed the Petitioner in a position of perceived conflict of interest.

117. Termination was legally infirm, for want of fairness of procedure, and substantive justification.

Remedies.

118. The proceedings went against the Employment Act, the Judicial Service Act, the Fair Administrative Action Act and Article 47 of the Constitution.

119. The Petitioner seeks that they are declared null and void, quashed and set aside. The Respondent submits that even if the Court finds gaps in the proceedings before the committee, it cannot oust the jurisdiction of the decision-maker and replace it with its own. The Respondent urges the Court to adopt the decision in Nkatha Joy Faridah Mbaabu v. Kenyatta University [2016] e-KLR, where the Court, while faulting the disciplinary proceedings against the Petitioner, ordered that the Respondent reconvenes proceedings de novo.

120. The Court does not endorse this. The proceedings against the Petitioner were not only flawed in procedure; the decision was arrived at without valid reason or reasons. The Respondent was aware of the importance of calling Okeyo as a witness and adjourned hearing initially, against the wishes of the accused Employees, to enable Okeyo give evidence. He did not give evidence even at the 2nd hearing.

121. Rule 25 [10] of the 3rd Schedule, allows the Respondent, if it is of the view that the report of the committee or panel needs amplification in any way, to refer the matter back to the committee or panel for further action.

122. There was opportunity for the Respondent to impress upon the committee, to have the evidence of Okeyo on record.

123. The Court would be exposing the Petitioner to double jeopardy and vexation, were it to remit the matter back to the Respondent. It would be compounding the violation already inflicted against the Petitioner, relating to Article 47 of the Constitution, which entitles the Petitioner to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

124. It is noted also that the process against the Petitioner went on for 23 months, while it is the policy of the Respondent that such process is concluded within 6 months. The committee acknowledged that there was delay, explaining that most committee members, were Judges or Judicial Officers, who were involved in election petitions in their respective Courts, an exercise which is governed by strict legal timelines, holding them back from expediting the process against the Petitioner. This argument however, may be countered by the principle of equality before the law: The Petitioner rightly expected a just and expeditious process, as much as the politicians whose electoral disputes, part of the Commissioners devoted their whole time to unravel. There is also a time-limit, under the Employment Act, on granting of the remedy of reinstatement.

125. The totality of the evidence persuades the Court to declare that proceedings and determination to dismiss the Petitioner were unfair, unlawful and unconstitutional and are hereby set aside.

126. It is declared that the proceedings and determination violated Sections 41, 43 and 45 of the Employment Act; Rule 25 of the 3rd Schedule, Judicial Service Act; the Fair Administrative Action Act; and Article 47 of the Constitution.

127. The Petitioner prays for compensation as well as an order of reinstatement or re-engagement.

128. Compensation is a remedy meant to redress the economic loss suffered by an Employee, as a consequence of the unfair action taken by the Employer. If an Employee accesses the remedy of reinstatement with back-salaries and benefits, then there is a very weak argument to be made in seeking compensation.

129. In the Court of Appeal decision Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] e-KLR, it was held that employment remedies are not meant to unjustly enrich wronged Employees; they are intended to redress economic injury in a proportionate way.

130. There is no justification is awarding compensation in addition to reinstatement or re-engagement.

131. The Claimant was in permanent and pensionable judicial service. He states in his Supporting Affidavit sworn on 3rd March 2019, that he had an impeccable record. He had worked for 6 years. He did not have disciplinary issues. He was always diligent and professional. He had been nominated and facilitated by the Respondent to sharpen his skills at ILO Training Centre in Turin, Italy. He was promoted. He expected to go on serving until retirement. Termination was on 27th March 2019, slightly over 2 years ago.

132. In Parliamentary Service Commission v Christine Mwambua [2018] e-KLR, the Court of Appeal upheld the decision of the E&LRC reinstating an Employee who was unfairly dismissed. It was held that reinstatement was in the circumstances a feasible remedy. The Supreme Court of Uganda in Omunyokol v The Attorney –General [cited by the Petitioner above], gave firm reasons why Courts

should not shy away from availing the remedy of reinstatement to public officers, in particular. In a most recent and progressive decision of the Court of Appeal of Kenya, Judicial Service Commission & Another v. Lucy Muthoni Njora [2021] e-KLR, the Court of Appeal upheld the decision of the E&LRC, ordering the Respondent herein, to reinstate Lucy Muthoni Njora as Deputy Registrar of the Supreme Court of Kenya. The Court was emphatic that once dismissal decision involving a state officer was adjudicated unlawful, null and void, reinstatement was an automatic remedy. The Petitioner herein was not a state officer, as described under Article 260 of the Constitution, but there is no reason, why this landmark and binding decision on reinstatement should not apply to him. He was a Judicial Servant, who like Judicial Officers, such as Lucy Muthoni Njora, was subject to the disciplinary process initiated under Section 32 of the Judicial Service Act. The Judicial Service Act does not have a separate disciplinary regime for Judicial Staff and Judicial Officers. It however has a separate process for removal of Judges. The Petitioner's reinstatement, his dismissal having been adjudged as unlawful, unfair, null and void, ought to be automatic. The Court of Appeal in this decision also emphasized it is not proper to grant an order of reinstatement simultaneous with monetary compensation, concluding that reinstatement with back-pay, afforded the Employee adequate compensation.

133. It is ordered that the Respondent shall reinstate the Petitioner to the position of Principal Administration Officer, Human Resource Directorate without loss of benefits, allowances and salaries.

134. Alternatively, the Respondent shall re-engage the Petitioner to a position equivalent to Principal Administration Officer, without loss of benefits, allowances and salaries.

135. No order on the costs.

In sum, it is ordered: -

a. It is declared that proceedings and determination to dismiss the Petitioner were unfair, unlawful and unconstitutional, and are hereby set aside.

b. It is declared that proceedings and determination violated Sections 41, 43 and 45 of the Employment Act; Rule 25 the 3rd Schedule, Judicial Service Act; the Fair Administrative Action Act; and Article 47 of the Constitution.

c. The Respondent shall reinstate the Petitioner to the position of Principal Administrative Officer, Human Resource Directorate, without loss of benefits, allowances and salary.

d. Alternatively, the Respondent shall re-engage the Petitioner to a position equivalent to Principal Administrative Officer, without loss of benefits, allowances and salary.

e. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 18TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE