



**Nyagol v Judicial Service Commission & another (Petition E005 of 2020)
[2021] KEELRC 2423 (KLR) (7 October 2021) (Judgment)**

Neutral citation: [2021] KEELRC 2423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E005 OF 2020
HS WASILWA, J
OCTOBER 7, 2021**

BETWEEN

JUDITH ACHIENG NYAGOL PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

JUDGMENT

1. The petitioner, Judith Achieng Nyagol, was at all material times employed by the 1st Respondent as a magistrate on the 20th June, 2012 in the rank of Resident magistrate and deployed to Sirisia Law Court. That on 7th April, 2014 she was transferred to Kericho Law Court and held the same rank.
2. She stated that on 20th August, 2015 while serving at Kericho law Courts in the Rank of Resident Magistrate, she was arrested by EACC officers on allegation of having committed corruption offences.
3. She avers that she was charged with the said corruption offences in Nakuru Law Court under criminal; case number 5 of 2015, which charges read as follows;-

That on the 27th July 2015 at the Kericho Law Courts as the Resident Magistrate you corruptly solicited a benefit of Kshs. 20,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file Number 3140 of 2014 where the said Wilson Yegon was an accused person.

Further to this on the 20th August 2015 at Kericho Law Courts as the Resident Magistrate you corruptly received a benefit of Kshs. 10,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file Number 3140 of 2014 where the said Wilson Yegon was an accused person.



4. The Petitioner stated that upon being charged, she received a letter dated 4th September 2015 in which letter the Petitioner was interdicted from employment. Alongside the interdiction letter was the charge by the Respondents dated 4th September 2015.
5. She avers that on 15th September, 2016, the Petitioner was acquitted of the charges under section 210 of the CPC which ruling she presented before the Respondents who in response issued her with a letter dated 27th January 2017, requiring her to wait for the final judgement of the criminal case since her co-accused had been placed on his defence.
6. That on 22nd August, 2017, the petitioner received a letter from the respondents dated the same day of commencement of fresh charges against her which charges read as follows;-
 1. Charge 1.
Breach of Rule 6 of the Judicial Code of Conduct and Ethics, Legislative Supplement No. 24, Legal Notice No. 50.
Rule 6 of the Judicial Code of Conduct and ethics states that “a Judicial Office shall not knowingly convey or permit others to convey the impression that anyone is in a special position to influence him.”
That you knowingly permitted one Robert Cheruiyot to convey the impression to One William Yegon that he was in a special position as a staff of Kericho Law Courts to influence you to award a favourable penalty in Kericho CMC Criminal Case No. 3140/2014 Republic Vs William Yegon contrary to rule 6 of the Judicial Code of Conduct and Ethics, 2003.
Charge 2
Breach of Rule 5 of the Judicial Code of conduct as read together with Paragraph 9(a) Appendix1,Part III of the Public Officers Ethics Act 2003.
Rule 5 of the Judicial Code of Conduct and Ethics states that in all activities a Judicial Officer shall exhibits respect for the rule of law comply with the law avoid impropriety and appearance of impropriety and act in a manner that promotes public confidence in the integrity and the impartiality of the Judicial Service.
That in or the month of August 2015 the officers from the Ethics and Anti-Corruption Commission recovered Kshs. 10,000/= from your bag in your chambers at Kericho Law Courts, money believed to have been a bribe for you to give a favourable penalty to the accused person in in Kericho CMC Criminal Case No. 3140/2014, Republic Vs William Yegon.
7. The Petitioner states that she responded to the said letter vide the letter dated 30th August 2017.subsequently she was summoned by the Respondents via their letter dated 5th February 2018 for disciplinary hearing scheduled on 5th March, 2018.
8. She states that on 5th March, 2018, she appeared before the Judicial Service Commission for the hearing in company of her advocate one Wambey Makomere, who despite appearing before the commission was denied audience by the disciplinary committee.
9. That on 24th August 2018, the Petitioner received a letter dismissing her from judicial service on the ground that her conduct in the entire transaction leading to the criminal charges was not above board and exhibited impropriety and appearance of impropriety compromising the integrity and the impartiality of the Judicial Service.



10. The Petitioner being dissatisfied with the decision of the disciplinary committee filed a review vide her letters of 24th September, 2018 and 7th November, 2018 and another reminder for the appeal to be expedited by letters dated 25th September, 2020 and 2nd June, 2020, which the Respondent responded on 1st October, 2020 disallowing the review on the basis that culpability in criminal trial differs from culpability in a disciplinary process.
11. The Petitioner avers that the disciplinary process she was subjected to, grossly violated her fundamental freedoms and rights under *the constitution*. She contends that the charges preferred against her by the Respondent raised fundamentally similar issue which she was acquitted from by the Court. Also that she was subjected to parallel proceedings over the same subject matter which is against the principle of double jeopardy.
12. She contends that the Respondent did not disclose evidential material they allegedly relied upon during the disciplinary hearing. Further that there was no formal complaint or specific charges levelled against her to warrant the disciplinary hearing.
13. She averred that the Respondent ignored and or failed to consider the issues raised in the review application. Furthermore, her case took so long to be determined.
14. She further stated that the Respondents did not stipulate the nature of gross misconduct, the basis of her dismissal. She thus contends that she did not receive fair administrative action and prays for the following reliefs; -
 - a. A declaration that the act of the Respondents in instituting and conducting parallel proceedings based on the same issues that were determined in the Anti- Corruption Case Number 5 of 2015 were in breach of the Petitioners Constitutional Rights under Articles 27(1), (2), (3), 28, 41 & 50 of *the Constitution* and the same is null and void for all intent and purposes.
 - b. A declaration that the disciplinary proceedings conducted by the Respondents as against the Petitioner on 5th March 2018 and the eventual dismissal of the Petitioner from service were disproportionate, unfair, lacked valid reason and therefore null and void.
 - c. An order of reinstatement of the Petitioner back to Judicial Service without loss of benefits.
 - d. An order directing the respondents to pay the petition all the withheld salary since 4th September 2015 when the petitioner was interdicted.
 - e. Damages for unlawful dismissal.
 - f. Cost of the Petition.
15. The respondents filed on 11th December, 2020 a Notice of Appointment through G & A Advocate to act for them in the matter. They opposed the petition by filing on 21st January, 2021 the replying affidavit of Anne Atieno Amadi, the Secretary of the 1st respondent, and holder of the office of the 2nd Respondent herein.
16. The Respondents replied as follows; -
 - a. That the petitioner herein was employed by the Respondents on 20th June, 2012 following a competitive recruitment and deployed to Sirisia law Court as a resident magistrate which rank she sustained till her interdiction on 4th September, 2015 while working at Kericho law Courts.



- b. She stated that on 20th August 2015, while the petitioner was serving at Kericho law Court she was arrested by anti-corruption officer together with her clerk one Robert Cheruiyot following a tip off that the petitioner had, through her clerk, solicited some bribe.
- c. That charges of soliciting a bribe was preferred against the petitioner and her clerk and following the pressing of the charges the petitioner was interdicted on 4th September, 2015 and show cause letter was served upon the petitioner however disciplinary hearing was held in abeyance awaiting the outcome of the Anti-corruption case.
- d. That the petitioner was acquitted of the charges under section 210 of the *Criminal Procedure Code* and the disciplinary case was resubmitted to the 1st Respondent for consideration pursuant to paragraph 18(3) of the 3rd Schedule of the *Judicial Service Act*.
- e. She stated that the Respondent resolved to institute fresh charges against the Petitioner on account of her general conduct in the matter in accordance with provision of part IV, Third Schedule to the *Judicial Service Act* and on 22nd August, 2017 the Petitioner was served with the fresh charges which have already been captioned under paragraph *para_66* above.
- f. It is stated that the petitioner filed a response on the 30th August, 2017 and basically denied any involvement on the corruption allegation or any relationship whatsoever with Mr. Cheruiyot.
- g. That upon receipt of the petitioner response, the Respondent selected the Human resource committee to handle the issue and report back to the full commission of its' findings.
- h. That the matter proceeded for hearing on 5th March, 2018, before the Human Resource Committee where the petitioner appeared together with her counsel. That the petitioner was asked oral question and given time to respond as is appearing in the Hansard attached herein. Further that after the hearing the Petitioner was allowed to file her submission within the 7 days requested.
- i. That the committee deliberated over the issue and made a finding that all the charges had been proved to the satisfactory standard and recommended the 1st Respondent to take appropriate action against the petitioner.
- j. She contended that the committee acknowledged that there was no direct evidence linking the petitioner to the criminal charges but that there was overwhelming circumstantial evidence that she was aware of the events leading to the criminal charges.
- k. She stated that the 1st Respondent deliberated on the report by the Human Resource committee and agreed with their findings and subsequently dismissed the Petitioner from employment for gross misconduct disclosed in the charges and established during hearing.
- l. It is averred that the decision dismissing the petitioner from employment was communicated to her by a letter dated 24th August, 2018 citing the reasons for dismissal in accordance with paragraph 23 of part IV, Third Schedule to the *Judicial Service Act*.
- m. She stated that the Petitioner reviewed the decision but the same was dismissed after thorough consideration of the issue raised in the review.
- n. The Respondent contends that the petitioner has not demonstrated with precision how her constitutional right were infringed by the Respondent as envisage under the case of Anarita Karimi njeru –v- Republic [1979] KLR.



- o. She stated that nothing stopped the respondents from instituting disciplinary proceedings even when she has been acquitted of criminal charges. Also that the Courts have held that an acquittal in criminal charge does not render an employee immune to disciplinary action by its employer.
 - p. She stated that the documents which the commission relied upon during disciplinary hearing are, the letter of charge, petitioner's response to the charge, judgment in the criminal trial and proceedings thereof which were all forwarded to the petitioner.
 - q. She contends that the petitioner was accorded fair disciplinary process and none of her rights were infringed by the Respondents.
 - r. She therefore stated that the Petition herein is not merited, further that the prayer of reinstatement ought not be allowed as the Petitioner has been out of employment since 2015 during interdiction and 2018 during her dismissal to date which is more than 3 years.
17. In response to the replying affidavit, the petitioner filed a supplementary affidavit on 1st February, 2021 reiterating her supporting affidavit and petition and in addition stated that she did not contradict herself in her testimony as alleged by the analysis and findings of the committee. Also that the Committee based their findings on circumstantial evidence to dismiss her from employment when such evidence does not meet the threshold required in law to secure a dismissal.
18. The petition herein proceeded by way of written submission with the Petitioner filing her submission on the 6th July, 2021 and the Respondents on 26th July, 2021

Petitioner's submissions.

19. It was submitted for the petitioner that the disciplinary proceedings against her violated the doctrine of Double jeopardy as provided for under Article 50(2) of *the Constitution* and section 138 of the *Criminal Procedure Code* and reinforced in the case of R- v- Danson Mugunya Cr Appeal No. 21 [2016] eklr.
20. Accordingly, it was submitted that the petitioner herein was charged in Nakuru Law Court under Criminal case number 5 of 2015 for alleged corruption offence which she was acquitted of under section 201 of the CPC however the Respondent subjected her to disciplinary process with regard to the same charges which arose out of the same facts, circumstance and on reliance of the same evidence.
21. It was submitted that part IV, Paragraph 18(3) of the *Judicial Service Act* bars the Respondent from dismissing a judicial officer on a charge upon which he has been acquitted save for any other charge arising out of their conduct in the matter. The Petitioner reinforced her argument by citing the case of Mathew Kipchumba Koskei-v Baringo Teachers Sacco [2013] eklr. where the court held that;

“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:a) Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.b) If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate



and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.c) If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."

22. The petitioner submitted that the Respondent failed to adhere to the provisions of section 62(3) of the *Anti-corruption and Economic Crimes Act* when they failed to lift the suspension when she was acquitted of the charges against her. She cited the case of Joshua Muindi Maingi –v- National police service Commission & 2 others [2015] eKLR where the Court held that;

"The court considers that the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003 provided the clear legal regime to be followed by the employer in instances of criminal proceedings against a public officer under the Act so much so that the findings on the allegations as leveled against the petitioner under the Act was in the exclusive jurisdiction of the trial criminal court as prescribed in that Act. The court holds that it would defeat the purpose of that Act for the respondents to purport to reinvestigate or make alternative findings in view of the allegations that were leveled, found to fall under the provisions of the Act and for which the trial criminal court acquitted the petitioner. If such invention of administrative disciplinary procedure were to be allowed, then the whole purpose for which the Act was enacted would be rendered nugatory. It is the opinion of the court that for the offences under that Act that coincided the public officer's alleged misconduct or poor performance, the clear legislative provision and intention was that the same be conclusively investigated and concluded in accordance with the provisions of that Act. The legislative intention, in the opinion of the court, was to remove such cases from the administrative disciplinary powers and discretion of the individual employers in the public or state services. The court further holds that where legislation constitutes a framework of a path and flow of events in specified situations without ambiguity like in the instant case, it would be unlawful to act in contravention of the provisions of the statute."

23. Accordingly, it was contended that the respondent did not receive any complaint on the conduct of the petitioner, neither did it carry out any independent investigation as provided for under paragraph *para_25* 25(3) of the third Schedule of the *Judicial Service Act* to warrant the need for the disciplinary proceedings she was subjected to. In this she cited the case of Newton Muriu Muriuki –v- Judicial Service Commission [2017] eKLR.

24. The petitioner submitted that her employment was unfairly terminated since no reason was given for the said termination. She argued that the reason given for the termination was captioned that;

"The petitioner's Conduct in the entire transaction leading to the criminal charge was not above board"



25. According to the petitioner, the above caption statement made by the Respondent informing her of her dismissal from employment is not an act of gross misconduct as captioned under the Judicial Resource Manual which list acts that are tantamount to gross misconduct. In this she cited the case of Robi Stephen Nyamohanga –v Judicial Service Commission [2017] eklr which held that a description of the gross misconduct has to be given and should be one act contemplated under section 44(4) of the *Employment Act*.
26. On the circumstantial evidence relied upon by the Respondent in finding the petitioner culpable, the petitioner submitted that the narrative given did not meet the threshold laid out in Musili Tulo –v Republic Criminal Appeal No. 30 of 2013.
27. The petitioner submitted also that there was unreasonable delay in the determination of her disciplinary case, since the charges were preferred against her on 22nd August, 2017 and the final determination and subsequent dismissal communicated to her on 24th August 2018.
28. On the reliefs sought, the petitioner submitted that even though the prayer of reinstatement can be said to have passed the timelines for it to be allowed the Court in County Government of Nyeri & another –v- Cecilia Wangeci Ndungu [2015] eklr was of the opinion that reinstatement can be allowed after the set timeline when the employer caused the delay.
29. The Petitioner concluded by submitting that she was unfairly terminated from employment and urged this Court to allow the Petition as prayed.

Respondents Submissions.

30. The Respondent submitted from the onset that the petitioner’s petition does not meet the test of a constitutional Petition laid out in Anarita Karimi Njeru –v- Republic [1979] KLR and the case of Mumo Mutemu –v- Trusted Society of Human Rights Alliance & 5 others [2013] eklr. As the Petitioner had failed to set out with precision how the said provisions of *the constitution* have been violated by the Respondent rather that the said provisions of *the constitution* have been merely listed. It is contended that, the petitioner has merely alleged violation without backing the same with evidence.
31. On whether the Respondent violated the petitioner right to fair hearing, it was submitted that the Respondent subjected the petitioner to fair disciplinary hearing which was conducted in accordance with the applicable law. In this they cited the case of Republic-v- Commission on administrative Justice Ex-parte Stephen Gathuita Mwangi [2017] eklr and submitted that disciplinary process need not adhere to the strict rules of conducting hearing in a Court.
32. On whether the Disciplinary proceedings violated the doctrine of Double Jeopardy, it was submitted that paragraph 18, of part IV of the 3rd Schedule of the *Judicial Service Act*, does not bar the Respondent from conducting disciplinary proceedings rather that in empowers it to inquire into the conduct of the judicial officer and cited the case of Teachers service commission- v Joseph Wambugu Nderitu [2016] eklr where the Court cited the case of Kibe versus Attorney General Civil Appeal No. 164 of 2000 and held that;

“an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on



that employee going against the outcome does not by itself render the employer's decision wrongful or unfair".

33. It was submitted also that the petitioner was charged under the Judicial service code of conduct on her conduct and not the *Anti-corruption and Economic Crimes Act* which was based on corruption offence therefore ruling out the issue of double jeopardy. Further that the doctrine of double jeopardy only applies to criminal trials not disciplinary proceedings.
34. The respondent on the issue of delayed disciplinary proceedings, it was submitted that the Respondent is a part-time commission whose members are engaged in other employment and their sittings was capped to 8 in a month by the salaries and remuneration commission, thus discharging their duties in a timely manner has been impractical. Nevertheless, it was argued that the Respondent tried as much as possible to expedite the petitioner's disciplinary hearing and cited the case of Judicial service Commission –v- Davis Gitonga [2019] eKLR. Where the Court held that unless there are specific timeline the issue of expedition and efficient is a question of fact to be determined on each case basis.
35. On whether there was a valid reason by the Respondent to dismiss the Petitioner from employment, the Respondent submitted that the Human Resource committee that handled the disciplinary hearing found the Petitioner culpable of misconduct and therefore this Court ought not interfere with such determination unless it finds that the dismissal was unfair and cited the case of Nampak Corrugated wadeville –v Khoza 9JA 14/98) [1998] zalac 24.
36. The Respondent acknowledged that section 62 of the *Anti-corruption and Economic Crimes Act* provides that an employee who has been acquitted of a corruption offence under the said Act shall cease to be suspended, however that paragraph 18 of the 3rd Schedule to the *Judicial Service Act* reinforces the same provision however, with a Proviso that the Employer can still dismiss the said employer on being found guilty of misconduct.
37. Accordingly, the Respondent urged this court to rely on the *judicial service Act* provisions as they apply specifically to the judicial staff unlike the *Anti-corruption and Economic crimes Act* and cited the case of M J –N K & Another [2017] eKLR where the Court held that;
- “It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law...”The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the Legislature has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject.”
38. The Respondent on the prayers sought submitted with regard to reinstatement that the petitioner was dismissed from employment in the year 2018 more than 3 years later thus the prayer is untenable. On the other prayers sought for damages for unfair termination, it was submitted that the Petitioner was dismissed for gross misconduct in accordance with the law and urged this court to find as such and dismiss the petition together with costs.



39. I have examined the averments and submissions of the parties herein. The issues for this court's determination are as follows;-
1. Whether the petitioner was subjected to double jeopardy by facing 2 parallel processes of discipline – criminal and internal before the JSC.
 2. Whether there were valid reasons to warrant termination of the petitioner.
 3. Whether the petitioner was subjected to a fair disciplinary process.
 4. Whether the petitioner rights under *the constitution* were infringed upon.
 5. Whether the petitioner is entitled to the remedies sought.

Issue No. 1

40. On the 1st issue, the petitioner has submitted that she was subjected to double jeopardy is that she was subjected to a criminal process as well as an internal disciplinary process. In relation to this, the respondent submitted that they followed the law and didn't initiate any disciplinary process when the criminal proceedings were pending.
41. The respondents pointed out that paragraph 18, part IV of the 3rd schedule of the JSA *Act No.1 of 2011* provides the procedure to be followed when a criminal charge is pending as follows;
1. "When a preliminary investigation on disciplinary inquiry discloses that a criminal offence may have been committed by an officer, the Chief Justice shall act under either paragraph *para_26* or *para_27* as may be appropriate.
 2. If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of the appeal therefrom; provided that nothing in this paragraph shall be confirmed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such an officer.
 3. An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted but nothing in this paragraph shall prevent their being dismissed or otherwise punished or any other charge arising out of their conduct in the matter unless the charge raises substantially the same issues as those on which they have been acquitted.."
42. From the evidence before this court the petitioner was charged in criminal Case No. 5 of 2015 before the criminal court in Kericho in August 2018.
43. The petitioner was thereafter interdicted from duty vide a letter dated 4/9/2015. In the meantime, the criminal charges against the petitioner proceeded and the petitioner was acquitted on 15/9/16 under Section 210 of the CPC.
44. On 4/9/2015 when the criminal case was pending however the petitioner was served with charges by the Hon. Chief Justice for which she was expected to give a written response. The charges were similar to those she was facing before the criminal case and was expected to respond within 21 days.
45. The petitioner responded to the show cause letter via her letter dated 18/9/15. The fact that the respondent through the Hon. Chief Justice commenced an internal disciplinary process vide his letter of 4/9/2015 was an indication that the respondent breached their own processes and regulation under



Paragraph 18, part IV of the 3rd schedule of the JSA [Act No. 1 of 2011](#) Section (2) as stated above. Section (2) above indicates that no proceedings leading to dismissal may be instituted until the conclusion of the criminal proceedings.

46. The Hon. Chief Justice was allowed by law to interdict as he did but the law did not envisage any internal disciplinary process as was commenced against the petitioner.
47. Following the response of the petitioner on the show cause letter on 18/9/2015 the respondents didn't communicate to the petitioner again until 22/8/2017, almost 2 years down the line when they commenced fresh charges against her. The charges were not similar to those in the letter of 4/9/2015 an indication that the petitioner was being charged again whereas she had been charged before.
48. This in my view is a clear case of double jeopardy which is breach of the law.

Issue No.2 – Validity Of Reason

49. The petitioner was dismissed from service vide a letter dated 21/8/18 on grounds of gross misconduct following charges raised against her vide the letter of 4th September, 2015.
50. The charges vide the letter of 4/9/15 were as follows;

“ that on 27th July 2015 at Kericho Law Courts as Resident Magistrate you corruptly solicited a benefit of 20,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file Number 3140 of 2014 where the said Wilson Yegon was an accused person.

Further to this on 20th August 2015 at the Kericho Law Courts as the Resident Magistrate, you corruptly received a benefit of kshs.10,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file No. 3140 of 2014 where the said Wilson Yegon was an accused person.

This is contrary to Section 39 (a) as read with Section 48 (1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003...”

51. The petitioner may have responded to these charges but her response is not attached to the pleadings filed in court.
52. What transpired between then and 27/8/2017 is not known because on the 27/8/2017, she was issued with fresh charges which were as follows;

1. CHARGE 1:

1. Breach of Rule 6 of the Judicial Code of Conduct and Ethics, Legislative Supplement No.24, Legal Notice No. 50.

Rule 6 of the Judicial Code of Conduct and ethics states that “a Judicial Officer Shall not knowingly convey or permit others to convey the impression that anyone is in a special position to influence him.”

That you knowingly permitted one Robert Cheruiyot to convey the impression to one William Yegon that he was in a special position as a staff of Kericho Law Courts to influence you to award a favourable penalty in Kericho CMC Criminal Case No. 3140/2014, Republic –vs- William Yegon contrary to rule 6 of the Judicial Code of Conduct and Ethics, 2003.



2. CHARGE 2:

2. Breach of Rule 5 of the Judicial Code of Conduct as read together with Paragraph *para_9 9(a)*, Appendix 1, Part III of the Public Officers Ethics Act, 2003.

Rule 5 of the Judicial Code of Conduct and Ethics states that in all activities, a Judicial Officer shall exhibit respect for the rule of law, comply with the law, avoid impropriety and appearance of impropriety and act in a manner that promotes public confidence in, the integrity and the impartiality of the Judicial Service.

3. That in or the month of August, 2015 the officers from the Ethics and Anti-Corruption Commission recovered kshs.10,000 from your handbag in your chambers at Kericho Law Courts, money believed to have been a bribe for you to give a favourable penalty to the accused person in Kericho CMC Criminal case No. 3140/2014, Republic –vs- Wiliiam Yegon.

53. It is apparent these charges were different from those instituted on 4/9/2015. The petitioner responded denying culpability and explaining what transpired.
54. The claimant was later subjected to a disciplinary process and she explained that she was called by her sister and informed that she was needed urgently at her office. At the office, she was informed that money had been found in her bag.
55. The folly of the above information is that the money if really found was found in the claimant's office in her absence. The circumstances under which the money was found is not explained because the claimant had left her office locked up and she does not understand how anyone gained access to her office to put money in her bag.
56. If indeed the police suspected that the petitioner had money suspected to be proceeds of corruption, the prudent thing would have to wait for her to open her office and conduct a search in her presence. This was never done.
57. There is no witness who was called by the respondent to explain how the petitioner was found with corruptly received money.
58. The petitioner was arrested and charged before the anti-corruption court with the offence of corruption but even this court found her not culpable. There was no nexus between the petitioner and the person who is said to have given the bribe. It was not clear why the respondent concluded that the petitioner was culpable of corruption charges however.
59. The other omission from the respondent's evidence is the fact that the petitioner was dismissed following charges enumerated in the letter of 24th September, 2015.
60. The letter of such charge preferred against the claimant of 28/8/2017 set out new charges which charges were different from those in the letter of 24/9/2015. The petitioner was thereafter found guilty of charges in the letter of 24th September, 2015 which are not the areas for which the petitioner appeared before the JSC.
61. It is clear that the petitioner was found guilty of charges she didn't face and for which she was never given an opportunity to defend herself.
62. For this reason, I find that there were no valid reasons to warrant dismissal of the petitioner from the JSC.



Issue No. 3: Fair Disciplinary Process

63. On issue of fair disciplinary process, it is true that the petitioner was subjected to a disciplinary process. The charges preferred against her initially related to corruption.
64. Such charges were later commenced against her under the Judicial Code of Conduct and Ethics, Legislative supplement No. 24, Legal Notice No.50, Rules 6 & 5. She was however found guilty of the previous charges of corruption for which no opportunity to be heard was accorded to her.
65. The *fair Administrative Action Act* 2015 at Section 4 provides as follows;
- 4.
- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
 - (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 - (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of *the Constitution*, the administrator may act in accordance with that different procedure.



66. The law envisages that any administrative action against any person shall be taken expeditiously, efficiently and lawfully. Under (3) above, prior notice of the nature and reason for the administrative action is necessary. This was never done to the petitioner because she faced charges under the public officer Ethics Act 2003 but was dismissed for totally different reason under the Ethics and Anti-Corruption Act.

67. It is therefore my finding that the petitioner was not given a fair disciplinary process as envisaged also under Section 41 of the Employment Act 2007 which states as follows:

“41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

68. The petitioner submitted that her constitutional rights under the constitution were breached. She claimed that Article 47 & 50 of the Constitution were breached. Article 47 of the constitution provides as follows;

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

69. Article 50 (1) on the other hand provides as follows;

“50. Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.



70. As submitted by the petitioner, and as per issue No. 3 above the disciplinary process that the petitioner was subjected to was not fair. She was charged with different charges and convicted on a different charge.
71. This is proof of failure by the respondent if not subjecting the petitioner to a fair disciplinary process as per Article 47 of *the Constitution*. The petitioner was also subjected to 2 different charges and the fate of any disciplinary hearing on the 1st charges is not known.
72. It is my finding that the petitioner was not subjected to a disciplinary process that is fair and therefore her rights constitution were infringed upon.

5. Remedies

73. Having found as above, I find for the petitioner and I award her as follows; -
1. A declaration that the dismissal of the claimant was unfair and unjustified as provided under Section 45(2) of the *Employment Act* 2007.
 2. The respondent to pay the petitioner Five Million Kenya Shillings as damages for the unfair and unjustified dismissal which cut off the petitioner career prematurely.
 3. The respondent to pay the petitioner all withheld salary from the time of interdiction on 4th September, 2015 to time of dismissal on 21/8/2018.
 4. The respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgement.

DATED AND DELIVERED VIRTUALLY THIS 7TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Saina for 1st & 2nd Respondent

Chepngetich holding brief for Otieno for Petitioner – present

Court Assistant - Fred

