



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E097 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: CONTRAVENTION OF ARTICLE 10, 19, 20, 21, 22, 23,
28, 29(d) & (f), 35, 41, 47, 48, 50, 73, 172, 232, AND 236 OF THE CONSTITUTION**

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, NO. 11 OF 2007

AND

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

AND

**IN THE MATTER OF: THE JUDICIAL SERVICE HUMAN
RESOURCE POLICIES AND PROCEDURES MANUAL**

BETWEEN

SOLOMON STALLONE AKANGA.....PETITIONER

VERSUS

THE CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA...1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

JUDGMENT

1. The Petitioner was until his resignation by letter dated 29th July 2019, an employee of the 2nd Respondent, having been engaged as a Regional Principal Human Resource and Administration Officer on 20th June 2013 following a competitive recruitment and selection process. He was deployed at Marsabit Law Courts upon engagement. He later worked at Malindi Court. His last station was Kisii Law Courts.
2. The 1st Respondent is the Chairperson to the 2nd Respondent and President of the Supreme Court of Kenya appointed under Article 166 of the Constitution of Kenya, 2010.
3. The 2nd Respondent is established under Article 171 of the Constitution, with its mandate set out under Article 172 of the Constitution

being inter alia: to receive complaints, investigate and remove or otherwise discipline Registrars, Magistrates, other Judicial Officers and Staff of the Judiciary, in the manner prescribed by the Judicial Service Act.

4. Section 3 of the Judicial Service Act vests in the 2nd Respondent the mandate to manage the judicial services including the administrative functions thereof. In so doing, the 2nd Respondent regulates its own processes through the application of the principles in the Constitution and other relevant laws.

5. In addition, the 2nd Respondent is guided by the Judiciary Human Resource Policies and Procedures Manual (the "Judiciary Human Resource Manual") which sets out the principles, guidelines and procedures for the smooth functioning of the Judiciary's Human Resource and Management.

6. The process of discipline and removal of Registrars, Magistrates, other Judicial officers and staff of the Judiciary is set out in Section 32 of the Judicial Service Act as read with Part IV of the Third Schedule thereto.

7. Following complaints against the Petitioner made to the Office of the Judiciary Ombudsman, one Mr Kennedy Bidali, from the Office wrote to the Magistrate then in charge of Kisii Law Courts, Mr. Njoroge Muniu as follows –

“From: Kennedy Bidali

Date: February 11, 2015 at 2:20:15 PM GMT+3

To: Vincent Mugendi

Subject: Solomon Akanga

Your Honour,

My office has received complaints on the subject officers touching on;

- habitual absenteeism, including this week when his colleague Lawrence informed me that he was in Nakuru attending an IT workshop
- sending threatening texts to colleagues
- Sending official communication to colleagues on text after official hours and not keeping communication records
- Harassment

Kindly let us have your comments on the above plus any other incidents of misconduct by the officer. Treat as *urgent*

Kind regards

Kennedy Bidali”

8. By letter dated 12th February, 2015, Hon. Muniu responded confirming that the Petitioner had been absent from work for many days without seeking leave. He cited in particular the whole month of December 2014 and again from 9th February 2015 to 12th February 2015 when the Petitioner was absent from work. Hon. Muniu further wrote that the Petitioner engaged in the following acts of misconduct:

- a. arbitrarily transferring staff without consulting the head of the station thus creating confusion and affecting operations;
- b. threatening staff with punitive transfers and using abusive language to members of staff who did not agree with dictatorial directions;
- c. sexually harassing female members of staff in exchange for transfer or stay the transfers; and
- d. photocopying court proceedings without authority and making disparaging comments on judicial pronouncements in public.

9. Following the said allegations, the 1st Respondent interdicted the Petitioner from service on 13th February 2015 and the following charges were framed and served upon the Petitioner:

- a. Absence from duty without leave; that in the month of December 2014 he was absent from duty without giving reason of having permission.
- b. That from 9th February 2015 to 13th February 2015, the officer absented himself from duty without permission.

10. The Petitioner responded to the charges on 9th March 2015. After considering the response, the 1st Respondent escalated the matter to the 2nd Respondent who constituted a Committee to consider the matter and submit its findings.

11. The Petitioner was invited and appeared before the Committee for the hearing of his case on various dates being 6th September 2017, 6th March 2018, 10th April, 2018, 7th June 2018, 11th December 2018, 11th February and 26th July 2019.

12. On 29th July 2019, the Petitioner tendered his resignation, giving one month's notice.

13. It is the Petitioner's averment that the interdiction Letter was summary in nature as the Petitioner was never issued with an opportunity to defend himself or give a response before being interdicted. The Petitioner avers he was condemned against the procedure outlined in the Judicial Service Act, particularly Rule 25(1) and the rules of natural justice.

14. It is further his averment that despite the interdiction letter being issued on 13th February 2015 and served upon the Petitioner on 24th February 2015, the Petitioner was kept in the dark about the fate of his disciplinary case without any communication from the Respondent.

15. The Petitioner avers that his disciplinary case subjected him to untold suffering, frustrations, despair and anguish and exposed him to shame, embarrassment and ridicule from all spheres.

16. It is the Petitioner's further averment that he received the notification for the hearing of his disciplinary case two years and four months after interdiction, on 15th June 2017 and the hearing was not concluded until he tendered his resignation. That throughout the interdiction he dutifully reported to the in charge, Kisii Law Courts in compliance with the directions in the interdiction letter.

17. It is the Petitioner's contention that the Petitioner's resignation from employment was prompted by unlawful manner in which the Respondent conducted the disciplinary case which made the Petitioner's working environment intolerable to the extent of leaving him with no option other than resignation.

18. The Petitioner further avers that his constitutional rights to fair labour practices and fair administrative action were contravened and trampled upon by the Respondent.

19. In his petition dated 20th December 2020, the Petitioner seeks the following reliefs –

a. A declaration that the interdiction letter dated 13th February 2015 by the Chief Justice and President of the Supreme Court to the Petitioner herein was illegal, unlawful, null and void ab initio, for being in contravention of Articles 41, 47 and 236 of the Constitution of Kenya, 2010 and Section 32 of the Judicial Service Act

b. A declaration that the Petitioner's interdiction by the Respondent from his employment was without lawful cause and was in breach of the Petitioner's contract of employment.

c. A declaration that the disciplinary process that was ongoing against the Petitioner was flawed and the Respondent breached the Petitioner's rights under Articles 41 and 47 of the Constitution, Rule 25(1) under the 3rd Schedule of the Judicial Service Act and the Fair Administrative Action Act 2015.

d. A Declaration that the Petitioner's employment contract continued to be in existence throughout the period of his interdiction and was only terminated on 28th August 2019 upon the acceptance of his Letter of resignation by the Respondent.

e. An Order compelling the 1st and 2nd Respondents to release to the Petitioner all the unpaid half salary that was due to him from the date of his interdiction to the date of termination of his Contract, amounting to Kshs.654,307.75

f. An order compelling the Respondent to pay the Petitioner his entire accrued but withheld half (½) salary from the date of his interdiction to the date of termination of his contract amounting to Kshs.8,474,525.75.

g. An order compelling the 1st and 2nd Respondents to pay to the Petitioner his Unpaid Airtime Allowance from the date of his interdiction to the date of termination of his *contract, amounting to Kshs.224,000.00.*

h. An order compelling the 1st and 2nd Respondents to pay to the Petitioner all the earned but unutilized Annual Leave days from the date of his interdiction to the date of termination of his contract, amounting to Kshs.1,500,267.31

i. An order compelling 1st and 2nd Respondents to pay to the Petitioner all the accrued earned but unpaid Leave Allowance from the date of his interdiction to the date of termination of his Contract, amounting to Kshs.46,666.67.

j. General damages for breach of the Petitioner's contract of employment and contravention of his fundamental rights to fair administrative action and fair labour practices.

k. Costs and interests of the suit.

l. Any other or further remedy as this Honourable Court thinks fit and appropriate.

20. The Respondents opposed the petition through the replying affidavit of Anne A. Amadi, the Chief Registrar of the Judiciary in which the

Respondents substantially deny violating the Petitioner's rights as alleged in the petition. It is the contention of the 2nd Respondent that it complied with the relevant legal and procedural requirements and observed the tenets of fair administrative action in the disciplinary process against the Petitioner.

21. The petition was disposed of by way of written submissions. The parties filed and exchanged written submissions.

Determination

22. I have considered the pleadings and the submissions. I have further considered the authorities filed by the parties. In my view the issues for determination are the following –

- i. Whether the Respondents violated the Petitioner's constitutional rights;
- ii. Whether the interdiction of the Petitioner complied with the provisions of the Judicial Service Act;
- iii. Whether the delay in commencing disciplinary process against the Petitioner amounted to infringement of his rights to fair administrative action;
- iv. Whether the Petitioner is entitled to the remedies sought.

Whether the interdiction of the Petitioner contravened Article

41, 47, 236 of the Constitution of Kenya 2010 and Section 32 of the Judicial Service Act

23. Interdiction is provided for at Section D.7.5.1 of the Judiciary Human Resources Policies and Procedures Manual as follows: -

D.7.5.1 Interdiction

- i. The Chief Justice may interdict an officer/staff from the exercise of the powers and functions of their office provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.
- ii. An officer/staff on interdiction shall be paid half of basic salary, full house allowance and medical benefits while all other benefits and allowances will stand suspended.
- iii. While on interdiction, an officer/staff shall be expected to report to a designated office as shall be determined by the Chief Justice.

24. Section 32 of the Judicial Service Act provides for discipline of staff as follows –

32. Appointment, discipline and removal of judicial officers and staff

1. For the purposes of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a Committee or Panel which shall be gender representative.

2. Notwithstanding the generality of subsection (1), a person shall not be qualified to be appointed as a magistrate by the Commission unless the person—

- a. is an advocate of the High Court of Kenya;**
- b. has high moral character, integrity and impartiality;**
- c. has demonstrable management skills;**
- d. has proficiency in computer applications; and**
- e. has no pending complaints from the Advocates Complaints Commission or the Disciplinary Committee.**
- f. The procedure governing the conduct of a Committee or Panel constituted under this section shall be as set out in the Third Schedule.**

3. Members of the Committee shall elect a chairperson from amongst their number.

4. Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure.

25. The Third Schedule provides for interdiction at paragraph 16 as follows –

16. Interdiction

1. If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.

2. An officer who is interdicted shall receive such salary, not being less than half their salary, as the Commission may by regulations prescribe.

3. Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this Schedule, the whole of any salary withheld under subparagraph (2) shall be restored to them upon the termination of such proceedings.

4. If any punishment other than dismissal is inflicted, the officer may be refunded such proportion of the salary withheld as a result of their interdiction as the Commission shall decide.

5. An officer who is under interdiction shall be required to comply with such conditions as may by regulations be prescribed.

6. For the purposes of this paragraph and paragraph 18 of this Schedule “salary” means basic salary and, where applicable, includes inducements or overseas allowances.

26. Further paragraph 25 provides for disciplinary action where dismissal is contemplated as follows –

25. Proceedings for dismissal

1. Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice’s opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.

2. If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not.

3. If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the Constitution, delegate its powers: Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel.

4. The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.

5. If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.

6. The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.

7. The Committee or Panel shall permit the accused officer to be represented by an advocate.

8. If during the course of the investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.

9. The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—

a. a statement whether in the Committee or Panel’s judgement the charge or charges against the officer have been proved and the reasons therefor;

b. details of any matters which, in the Committee or Panel's opinion, aggravate or alleviate the gravity of the case; and

c. a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.

10. The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.

11. The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest.

27. Paragraph 21 further specifically provides for absence from duty without leave as follows –

21. Absence from duty without leave

Where an officer is absent from duty without leave or reasonable cause for a period exceeding twenty-four hours and the officer cannot be traced within a period of ten days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from them within ten days after the dispatch of the charge to them, the Commission may summarily dismiss them.

28. In the instant case, the 1st Respondent received information that the Petitioner was absent from duty and sought confirmation from the Officer's immediate Supervisor who confirmed that indeed, the Petitioner had been absent from duty without permission. In my view this and the other allegations against the Petitioner was sufficient information for the 1st Respondent to interdict the Petitioner under paragraph 16 of the Third Schedule. It was also sufficient to interdict under Section D.7.5.1 of the Human Resource Policies and Procedures Manual. The Respondent was not required to give the Petitioner an opportunity to defend himself before interdiction as alleged by the Petitioner. All that the 1st Respondent was required to do under paragraph 25 of the Third Schedule was to make such inquiry as he may think fit, which he did through the Petitioner's immediate Supervisor.

29. I find that the interdiction complied with both the Third Schedule of the Judicial Service Act and the Human Resource Policies and Procedures Manual.

30. With regard to compliance with Articles 41, 47, 50 and 236 of the Constitution, the 1st Respondent framed charges against the Petitioner in the letter dated 12th February 2015 which he was required to respond to within 21 days. The Petitioner indeed responded to the charges which were forwarded to the 1st Respondent by his letter dated 9th March 2015. It is after receiving the Petitioner's response that the 1st Respondent escalated his case to the 2nd Respondent for commencement of disciplinary proceedings. This therefore means that the Petitioner was first required to respond to the charges against him before a decision to commence disciplinary proceedings against him was made.

31. The foregoing was in compliance with paragraph 25 of the Third Schedule to the Judicial Service Act. The 1st Respondent first made inquiries from the Petitioner's Supervisor then framed charges and asked the Petitioner to respond to the charges before forwarding the matter to the 2nd Respondent to commence disciplinary process against the Petitioner.

32. Having been required to respond to the charges framed against him before a decision to commence disciplinary proceedings against him was made, I find that the 1st Respondent complied with the provisions of Article 41, 47 and 236 of the Constitution and the Fair Administrative Action Act.

Delay in commencement of the disciplinary hearing

33. Under Section 25 of the Third Schedule to the Judicial Service Act the disciplinary process commences when the Chief Justice causes copies of the statement of charges and the reply thereto to be laid before the Commission as provided under paragraph 25(2). It is not clear from the proceedings when this happened.

34. It is however clear that between the time that the Petitioner responded to the charges against him by his letter dated 9th March 2015, to the time he was invited for the disciplinary hearing by letter dated 15th June 2017, a period of about 26 months had elapsed. The reason for the delay in commencing the disciplinary hearing is explained at paragraphs 49 to 52 of the replying affidavit of Anne A. Amadi as follows –

49. The 2nd Respondent is a part time commission with most of its members engaged in gainful employment in other state/public offices and others in private entities where they are as well required to discharge the functions of those offices and the same time sit as members of the Commission. With a very elaborate and expansive mandate under the law, exercising disciplinary control being just one among the many functions, the commission, in the circumstances has made efforts to make its processes as expeditious and reasonably possible.

50. I am aware that the Hon. Rtd. Chief Justice Willy Mutunga retired in the month of June 2016 at the time the disciplinary proceedings against the Petitioner were still pending. The 2nd Respondent immediately embarked on recruitment process for the position of the Chief Justice, Deputy Chief Justice and Supreme Court Judges. This process is dotted with strict timelines and once it

has started, it has to run continuously until completion —meaning the 2nd Respondent had to slow down on other activities of the Commission.

51. The process was completed in November 2016 and immediately thereafter the Commission began the process of dealing with the disciplinary cases which by then had piled up. Further, during the pendency of the Petitioners disciplinary case the Salaries and Remuneration Commission had also capped the remunerable meetings of the Commission to eight (8) sittings per month which in effect affected the efficiency of the Commission.

52. Furthermore, during the material period, the Commission was forced to operate with limited number of members owing to the delay in the appointment and swearing in of four (4) members of the Commission and the prolonged litigation that curtailed the appointment of the four (4) Commissioners.

35. In the case of **Eustace Muriithi Njeru v Energy Regulatory Authority [2020] eKLR**, the Court expressed itself inter alia as follows;

"Interdiction is punishment to an employee as in the first place, the employee is placed on half of his basic pay. This invariably causes financial strain to an employee. The employee is further removed from exercising the duties of his office hence is subjected to both psychological and financial embarrassment. Interdiction should therefore not be resorted to unless it is necessary as it exerts punishment on an employee who has not been proved to be guilty of misconduct. That is why it should only be resorted to after giving the employee an opportunity to respond to the charges against him through a notice to show cause, or where investigations have been carried out and the employee has already been engaged and has responded to the charges during investigations."

36. In the case of **Josephine Washifutswa Nambiro v Energy & Petroleum Regulatory Authority [2020] eKLR**, where the Petitioner had challenged his interdiction on the basis that the same was undertaken before first according her a chance to be heard, the Court reiterated the observations in the case of **Eustace Muriithi Njeru (supra)**.

37. Neither the Judicial Service Act nor the Judiciary Human Resources Policy and Procedures Manual provides for timelines between the interdiction of an employee and the commencement of the disciplinary hearing.

38. In **Kenya Magistrates and Judges Association v Judicial Service Commission and & others [2020] eKLR**, this Court observed as follows –

"With respect to prayer (f) that – "A declaration that the indefinite and unrestricted periods of interdiction and/or suspensions as per paragraph 15 and 16 of the Third Schedule of the Judicial Service Act, 2011 is in flagrant violation to article 25(c), 28 and 50 of the Constitution thus null and void." I agree with the Petitioner that indefinite suspension or interdiction amounts to a violation of Article 25(a) and (c), Article 28 and Article 50. It is recommended that this is addressed administratively by the Respondent by providing for the duration of any suspension or interdiction, and for extension thereof with reasons on a case by case basis."

39. This Court can only reiterate that the 2nd Respondent ought to as a matter of serious concern delimit the period between an interdiction (or suspension) and the commencement of disciplinary hearing.

40. I however note that during this period the Petitioner appears not to have prompted the Respondents by a reminder, to hasten his case or complained about the delay in the commencement of disciplinary hearing of his case. Although this is not to shift blame on him, perhaps this would have supported this averment that he was anguished by the delay in commencing the disciplinary hearing.

41. Perhaps this is explained by the averments at paragraph 29(d) of the replying affidavit of the Chief Registrar that -

a. ...;

b. ...;

c. ...;

d. he was practicing law in his own firm — Akanga Matende & Company Advocates while at the same time earning half salary from the Judiciary (page 27 of the Hansard), a fact he did not disclose to the 2nd Respondent;

42. On the averments of the Petitioner that the disciplinary hearing took too long, the Petitioner did not contest the averments in the replying affidavit of the Chief Registrar of the Judiciary that the adjournments of 6th September 2017, 6th March 2018, 13th February 2019, 10th April 2019 and 26th July 2019 were at the behest of the Petitioner.

43. I therefore find that although there was delay in the commencement and conclusion of the disciplinary process against the Petitioner, the evidence does not point to his averment that he was "*subjected to untold suffering, frustrations, despair and anguish and exposed to shame, embarrassment and reduce from all spheres*" as pleaded at paragraph 16 of the petition.

Was the Petitioner constructively dismissed?

44. The Petitioner has averred that his resignation from employment was prompted by the unlawful manner in which the Respondent conducted the disciplinary hearing which made his working environment intolerable to the extent of leaving him with no option other than

resignation.

45. The **Black's Law Dictionary (Tenth Edition)** defines constructive dismissal or discharge as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

46. In **Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR** the Court held as follows:

“On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.”

47. In **Osman Eggae Egaal v John Philip Tilley & Others, Petition No. 90 of 2012** as cited with approval in **Lear Shighadi Sinoya v Avtech Systems Limited** (supra) the Court in addressing the issue of constructive dismissal relied on the case of **David Potter v New Brunswick Legal Aid Services Commission, Supreme Court of Canada, 2015 SCC 10**, where Wagner J held that;

“The test for constructive dismissal has two branches. The court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. ... first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of the contract.

Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of act that, taken together, show that the employer intended to no longer be bound by the contract. In all cases the primary burden is on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer ...”

48. In **Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344**, as cited with approval in **Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR** Lord Denning stated as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

49. In the Petitioner's letter of resignation, he wrote –

“Your Ref.

Our Ref.: AMA 7292019

July 29, 2019.

Solomon Stallone Akanga PJ No. 64698

P.O. Box 52162-00200

Nairobi, Kenya.

Mobile Phone Number: 0721932514

Chief Registrar of the Judiciary — “Judicial Service Commission

Nairobi, Kenya.

Dear Hon, Registrar,

RE: RESIGNATION.

The above subject refers.

I take this opportunity to thank the Judiciary for an opportunity to serve.

By this notice and pursuant to clause K.3 of the Human Resources Policies and Procedures Manual, I wish to give one Month Notice of my intention to resign from Employment of the Judiciary. For avoidance of doubt, this notice shall be with effect from today July 29, 2019.

SIGNED

Thank you.

SOLOMON AKANGA”

50. The tone of the letter of resignation does not express anguish. It does not accuse the Respondents of mistreating the Petitioner or making his working conditions intolerable. It does not express frustration at all. He in fact thanks the Registrar for giving him an opportunity to serve at the Judiciary.

51. The circumstances leading to the resignation are also material. The Petitioner’s disciplinary hearing had progressed and was nearing conclusion. As narrated in the replying affidavit at paragraph 32:

32. On 26th July 2019, the Petitioner appeared before the JSC in the company of a friend Mr. Evans Otieno Opiyo. However, he did not attend the hearing with his witness as was expected. He requested for a further adjournment but the Committee declined because the case had been adjourned many times at the instance of the Petitioner. Consequently, the Committee closed the proceedings and informed the Petitioner that he will be notified of the decision of the Committee.”

52. The Petitioner resigned on 29th July 2019, three days after his case was closed and he was informed that he would be notified of the decision of the Committee.

53. It is my finding that the Petitioner has not proved that his resignation amounted to a constructive dismissal.

Is the Petitioner entitled to the remedies sought?

54. As I have already stated above, the interdiction letter complied with the Judicial Service Act and the Judiciary Human Resources Policies and Procedures Manual. The Petitioner has therefore not proved that the interdiction letter violated Articles 41, 47 and 236 of the Constitution or Section 32 of the Judicial Service Act.

55. I have further found that the interdiction and the consequent disciplinary process was not legally or procedurally flawed and did not violate Articles 41 and 47 of the Constitution, Rule 25(1) of the Third Schedule to the Judicial Service Act or the Fair Administrative Actions Act.

56. The Petitioner has prayed for a declaration that his employment contract continued throughout the period of interdiction until it was terminated on 28th August 2019 upon acceptance of his letter of resignation. This is not contested by the Respondents. Indeed, the Petitioner’s employment contract terminated on 29th August 2019 upon the lapse of his resignation notice of one month from 29th July 2019. I declare accordingly.

57. The prayer for release of the Petitioner’s withheld salary during interdiction in the sum of Kshs.8,474,525.75 fails because under paragraph 16 of the Third Schedule to the Judicial Service Act, he is only entitled to the same if disciplinary proceedings against him are concluded and he is neither dismissed nor otherwise punished.

58. In this case, the Petitioner resigned immediately after the conclusion of the disciplinary proceedings but before a determination was made which would have determined whether or not he would become entitled to the withheld half salary. Indeed, at that time, all indications were that the decision would be against him, based on his admissions as set out in paragraph 29 of the replying affidavit being that the Petitioner admitted that –

- a. he was absent from work on 9th February 2015 without seeking permission;
- b. he was a student at Mt. Kenya University between 2012 and 2015 (page 23 of the Hansard);
- c. he had not reported to work for one and a half months;
- d. he was practicing law in his own the firm — Akanga Matende & Company Advocates while at the same time earning half salary from the Judiciary (page 27 of the Hansard), a fact he did not disclose to the 2nd Respondent;
- e. he undertook his judicial attachment without authority at the expense of his official duties (page 59 of the Hansard); and

f. he did not inform his supervisor about his sick off

59. The same would apply to the prayers for unpaid airtime allowance, which is payable only to an employee to facilitate work. The Petitioner was not working while under interdiction.

60. The Petitioner did not adduce any evidence on the number of leave days to his credit at the date of termination of his employment. He did not explain how he arrived at a figure of Kshs.1,500,267.31 for unutilised leave or Kshs.46,666.67 for leave allowance. The prayers for leave and leave allowance **fail** for want of proof.

61. Having not proved the violation of his constitutional or statutory rights, the prayer for general damages also fails.

Conclusion

62. The upshot is that I find that the Petitioner has not proved any of the averments against the Respondents or the prayers sought with the result that the entire petition fails and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER, 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE