



**Ngaya v Judicial Service Commission & 3 others (Cause 398 of 2014)
[2020] KEELRC 1227 (KLR) (23 April 2020) (Judgment)**

George Mochumbe Ngaya v Judicial Service Commission & 3 others [2020] eKLR

Neutral citation: [2020] KEELRC 1227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 398 OF 2014
MA ONYANGO, J
APRIL 23, 2020**

BETWEEN

GEORGE MOCHUMBE NGAYA CLAIMANT

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR, JUDICIARY 2ND RESPONDENT

THE HON. MAXWEL GICHERU 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The 1st Respondent is a constitutional commission established under article 171 of the Constitution, mandated to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary. The 2nd Respondent is the Chief Registrar of the Judiciary whose office is established under Article 161(2) (c) of the Constitution and is the chief administrator and accounting officer of the judiciary. The 3rd respondent was the Senior Principal Magistrate, at Kakamega Law Courts at the material time. The 4th Respondent is the Attorney General and the chief legal advisor to the government, all its institutions, ministries and departments.
2. The Claimant was employed as a clerical officer by the 1st Respondent vide letter of appointment of 29th September 1997 and deployed to Kakamega Law Courts. His employment was confirmed to permanent and pensionable on 10th November 2000. He worked for the Respondent until 27th October 2006 when his employment was terminated.



3. The Claimant instituted this suit vide the plaint filed at the High Court in Kisumu on 19th October 2007. However, on 12th March 2014, Onyancha J. directed that the matter be transferred to this court. Subsequently, the Claimant amended his claim vide the Amended Memorandum of Claim filed on 31st March 2014 seeking the following prayers-
 - a. A declaration that the Claimant's interdiction and dismissal were wrongful, null and void ab initio.
 - b. Reinstatement back to duty or alternatively, payment of unearned income until the age of retirement.
 - c. General damages for unlawful, unprocedural and/or malicious termination.
 - d. Loss of earning during the period of the illegal interdiction and dismissal.
 - e. Kshs.30,000.00 erroneous deduction from the Plaintiff's salary and interest from the date of dismissal until payment in full.
 - f. Cost and interest.
 - g. Any further or other relief the court deems fit.
4. On 20th May 2014, the 1st, 2nd and 4th Respondents filed their reply denying the allegations set out in the claim or that he was entitled to the reliefs sought and sought to have the matter dismissed with costs. The 3rd Respondent filed a response on 30th May 2014, contending that the Claimant's dismissal was lawful and prayed for the suit to be dismissed with costs.
5. By an application dated 31st March 2015, the 3rd respondent successfully applied to be declared non suited which the court did by a ruling dated 6th November 2015.

Claimant's Case

6. The Claimant testified as CW1. It was his testimony that the 1st Respondent employed him in 1997, as a clerk and was deployed to Kakamega Law Courts. He was attached to Hon. Mutuka's Court until 11th January 2005 when he was transferred to the Traffic Registry upon the transfer of Hon. Mutuka.
6. It was his testimony that around 2:00 pm, on that day police officers brought charge sheets which he processed. At the same time, the relatives of one of the accused persons in file No. 61/2005 came to pay a fine of Kshs.500.00 to secure his release from the custody. He took the file to the accounts office. Once the fine was paid, he used the receipt to process the Release Order. The accused was thereafter released from custody. Since the said accused had served his prison term for some time, the fine was reduced to Kshs.300.
8. He testified that the following day, file No. 134 of 2005 was amongst the files he received at the Traffic Registry. File number 134 of 2005 was among those he had opened the previous day. In the said file, the accused was fined Kshs.3,000.00 or one month imprisonment. According to him, the receipts in files No. 61/2005 and 134/2005 were put together by mistake.
9. It was his testimony that on 17th February 2005, he received a letter from Hon. Gicheru, the Senior Principal Magistrate (SPM) who was the station in-charge, transferring him to the High Court. The transfer letter was written by the Executive Officer and was copied to the Registrar. He later learnt that the reason for his transfer was because he was accused of making wrong entries, replacing receipts and misplacing files.



10. The claimant testified that he responded to the accusations vide his letter dated 22nd February 2005, which he copied to the Registrar. On 11th October 2005 he received a letter from the Hon. Gicheru (SPM), informing him that he was not satisfied with his response. On 21st December 2005, he received two letters from the Registrar: a letter to show cause and an interdiction letter. The interdiction letter informed him that he would be on half salary which was backdated to 11th January 2005. On 22nd October 2006, he received a dismissal letter.
11. He lodged an appeal and requested for copies of the file and receipt to photocopy. He waited for the outcome of his appeal which never came. He therefore opted to seek court's redress and filed the present suit.
12. The Claimant testified that in the minutes of the meeting of his disciplinary hearing, some accusations made by the Hon. Gicheru (SPM) vide a confidential letter were considered but were never brought to his attention. He stated that he was never called to the meeting or for any hearing and stated the dismissal letter did not indicate any reason for dismissal.
13. During cross-examination, the Claimant stated that he was issued with the letter dated 16th February 2005 from Hon. Gicheru SPM. He admitted in his response to the letter that the receipt of case No. 134/2005 was used in another file. That he was later informed that the accused had not paid the fine.
14. He stated that he was accused of plucking out and amending the receipt in File No. 134/2005. It was his testimony that he did not obtain copies of file no. 134/2005 or produce documents proving that the accused in 134/2005 had been released after paying the fine. He further testified that he was not aware if the accused in file No. 134/2005 had not been released. He stated that that file No. 134/2005 had been paid for and that there was a clerical error.
15. The Claimant conceded that he had been informed that he had not satisfactorily explained what transpired on 11th January 2005. He maintained that file No. 134/2005 had no issues. He testified that it was his duty to confirm particulars of receipt and prepare a release order. He conceded to not applying for copies of file No. 134/2005.
16. The Claimant conceded that his appeal concentrated on case No. 67/2005.
17. He conceded that he had never complained that his salary was erroneously deducted. He stated that his half pay was KES. 5,000 and but that there was recovery of overpayment at KES. 3,000 per month for 18 months. According to him, the deduction of KES. 30,000 was to recover the payments made during the period between interdiction and the date of the letter of interdiction and that deductions in the payslip indicated purpose of deduction. He contended that he had no loan with the Judiciary.
18. He testified that he wrote a second letter on 23rd January 2012 as a follow up to the appeal and maintained that his letter was considered a second appeal. However, he never received any response from Chief Registrar. It was his testimony that he was not aware that Registrar could handle case of subordinate staff. According to him, it was mandatory for him to be given a hearing under the old regulations applicable in 2005.
19. During re-examination, he maintained that the accused in File No. 61 of 2005 was released on 11th January 2005 after paying KES. 300 and that the file never went missing. He clarified that the KShs.30,000.00 he is claiming was arrears recovered from the payslip at KES. 3,000 a month. It was his testimony that he had never received any letter from the in-charge, registry or executive officer as had been the procedure.



20. He testified that at the time of filing receipts, he thought that he had issued the receipt number, amount and case number though they were not compulsory in the registry. He further testified that the file was in the registry and the accused served one month in prison before he was released.

Respondent's Case

21. RW1, PETER BUNDE, an Assistant Director, Human Resource at the Judiciary, testified as RW1. It was his testimony that the Claimant was charged with gross misconduct for using a receipt, altering it to read KES. 3,000 and using it to release the accused.
22. It was his testimony the Claimant responded to the letter issued by Hon. Gicheru, SPM, claiming that the allegations were untrue. However, the explanation was found to be unsatisfactory.
23. It was his testimony that in his response to the letter to show cause issued by the Registrar, he asked to be pardoned as he had no intention to do wrong and apologised for the mistake of making the entries in the two files. This was a departure from the response he had given to the Hon. Gicheru (SPM).
24. He testified that the Human Resource Management and Advisory Committee met, considered the Claimant's case and found him guilty of gross misconduct. As such, he was dismissed via letter of 27th October 2006. He testified that the Claimant lodged an appeal on 8th November 2006 but the appeal was unsuccessful. He lodged a second appeal on 23rd March 2012 and a response was made on 7th January 2013. However, the second appeal was never considered because this case was already in court.
25. During cross examination, he testified that in cases such as this one an employee was given an opportunity to show cause by the Head of Station before it is referred to the Head Office. It was his testimony that there was a letter from the station to that effect. However, he did not have a report from the Executive Officer. It was also his testimony that the Senior Principal Magistrate is not a member of the Committee but initiates the disciplinary process.
26. He testified that the interdiction letter was backdated to the date of the offence. He testified that the Claimant was not called for a disciplinary hearing but contended that he did not have to be present as it was not a practice at the time and that it is response to notice to show cause that was considered.
27. He testified that the minutes of the disciplinary proceedings were not in the court file and that the Claimant was not served with a copy of the minutes. That the decision was communicated to the claimant and he was given a chance to appeal.
28. Upon re-examination, he testified that it was normal to back date an interdiction letter.

Claimant's Submissions

29. In his submissions filed on 13th September 2019, the Claimant submits that the termination of his employment was unlawful because he was not made aware of all the offences he was being accused of or issued with the documents relied upon in the proceedings to enable him mount his defence. That no investigations were carried out, that his case was not handled as per the procedure set out in the Repealed Constitution and the Service Commission Act. He submitted that he was not heard by the 1st Respondent yet there had been a disciplinary hearing. That his interdiction and dismissal were backdated and he never received a response to his appeal. Further, the disciplinary process was initiated by Hon. Gicheru (SPM), instead of the Registrar of High Court hence devoid of the 1st Respondent's authority.
30. It is his position that the 1st Respondent failed to observe procedural fairness hence violated his right to a fair hearing and fair administrative action. He relies on the on the case of Joseph Mutuura and Another



- vs. Jomo Kenyatta University of Agriculture and Technology [2013] eKLR where it was held that where the Court establishes that administrative proceedings were commenced with ulterior motives or the process was shrouded with illegalities, the Court shall intervene to stop the proceedings.
31. He further submits that the reason for his interdiction and dismissal was gross misconduct. However, without a description of the acts or omission alleged to have been committed, the same does not constitute a ground for termination.
 32. It is the Claimant's submissions that he is entitled to the claim for reinstatement having worked for the 1st Respondent for 2 years without pay. He relies on the case of Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers vs. Timber Treatment International Limited [2013] eKLR where the Court found that an employee is entitled to pay for the period he or she kept away from work due to unlawful and unfair suspension or termination. It further found that in such cases, the employee is entitled to at least partial reinstatement and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. He also cites the Court of Appeal decision in the case of Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR where it was held that the reinstatement was a discretionary remedy which should not be granted where granting the same will engender friction unless the employment relationship can withstand the friction.
 33. The Claimant submits that he is entitled to the salary of Kshs. 30,000.00 which was deducted from his salary during the period of interdiction as overpayments for loan. He further submits that he should be awarded general damages commensurate to payment of unearned income from the date of termination of his contract until the age of retirement, as an alternative remedy to reinstatement.

Respondents' Submissions

34. The Respondents submit that section 69 (1) of the Repealed Constitution grants the 1st Respondent the power to appoint, discipline and remove judicial officers from office. Further, section 69 (2) and (3) allows it to delegate its powers. It is their submission that since the constitution permitted delegation of the powers of the 1st Respondent, the Service Commissions Act and Regulations could not limit or alter the same hence was void to the extent of the inconsistency pursuant to section 3 of the Repealed Constitution.
35. It is submitted that Hon. Gicheru (SPM) had the constitutional mandate under Section 69(2) and (3) of the Repealed Constitution, to commence disciplinary proceedings against the Claimant and thereafter forward the same to the Registrar of the High Court who had the power to interdict the Claimant by dint of the same section. It is submitted that Hon. Gicheru only forwarded the matter and did not undertake the disciplinary action himself.
36. The Respondents submit that the termination of the Claimant's employment was lawful and complied with the provisions of the repealed Constitution and the Judicial Service Regulations. Further, it is submitted that the process was fair as the Claimant was given the opportunity to respond to the allegations levelled against him before he was dismissed. They submit that the lack of an oral hearing does not violate the requirement for procedural fairness and rely on the Court of Appeal case of Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR where the Court held that the fairness of a hearing is not determined solely by its oral nature and may be conducted through exchange of letters.
37. They further submit that it was not a requirement for the 1st Respondent to institute criminal proceeding against the Claimant, relying on the case of Mathew Kipchumba Koskei vs. Baringo Teachers Sacco [2013] eKLR where the Court held that where the employer is of the opinion that an



employee's misconduct amounts to a criminal offence, they may opt to only conduct administrative disciplinary proceedings without involving the relevant criminal justice agency.

38. The Respondents submit that the Claimant violated section 8 to Part III of the Public Officer Ethics Act which required him to avoid impropriety and act in a manner that promotes public confidence and integrity. That the Claimant admitted to the mistake in his letter of 30th December 2005. That the explanation given by the claimant was illogical. Further, the Claimant had committed similar offences in the past.
39. The Respondents submit that the Claimant was not issued with copies of office orders, minutes, reports or recorded reasons for decisions as Regulation 24(2) prohibited their availability to the Claimant.
40. The Respondents submit that the Claimant is not entitled to a declaration that his summary dismissal was unlawful as they have proved that the termination of the Claimant's employment was procedural. The Respondents submit the Claimant is not entitled to an award of reinstatement since at the time his employment was terminated, reinstatement was not a remedy. They rely on the case of Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & Others [SUPRA].
41. The Respondents submit that the Claimant is not entitled to payment of unearned income until the age of retirement and general damages for unlawful termination as his employment was not unlawfully terminated. They further submit that the Claimant is not entitled to loss of salary during the period of interdiction and erroneous deduction as he was put on half salary during that period since that was the requirement.

Analysis and Determination

42. Having examined the pleadings, the evidence adduced by the parties and their submissions, I am of the view that the following are the issues for termination-
 - a. What is the applicable law in this instance.
 - b. Whether the Judicial Service Commission had power to delegate its powers.
 - c. Whether the Claimant's employment was lawfully and fairly terminated.
 - d. Whether the Claimant is entitled to the reliefs sought.

Applicable Law

42. The claimant's employment was terminated by letter dated 27th October 2006. At the time of dismissal of the claimant, the applicable law was the Employment Act (No. 2 of 1976), repealed by the Employment Act No. 11 of 2007, the Service Commissions Act, 1985 (repealed), the Judicial Service Commission Regulations (repealed) and the repealed Constitution of Kenya.

Delegation of powers of Judicial Service Commission

43. The powers of the Judicial Service Commission (as it was at the time material to the suit) was provided for under Section 69 of the repealed Constitution as follows -
 - (1) The power to appoint persons to hold or act in an office to which this section applies (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall vest in the Judicial Service Commission.



- (2) The Judicial Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) to any one or more of its members or to any judge of the High Court or to any person holding or acting in an office to which this section applies: Provided that a power that relates to an office the holder of which is required to possess legal qualifications may not be delegated under this subsection except to one or more members of the Commission.
- (3) The offices to which this section applies are -
- (a) the office of Registrar or Deputy Registrar of the High Court;
 - (b) the office of the Chief Magistrate, the Principal Magistrate, the Senior Resident Magistrate, Resident Magistrate or District Magistrate;
 - (c) the office of any other person empowered to hold or be a member of a subordinate court exercising criminal jurisdiction;
 - (d) the office of Chief Kadhi and Kadhi; and
 - (e) such other offices of member of any court or connected with any court as may be prescribed by Parliament.
44. Further Section 68(3) of the repealed Constitution gave power to the Judicial Service Commission (JSC) to make regulations for its own procedure and to impose duties on any public officer. Section 68(3) is reproduced below –
- (3) Subject to this Chapter, the Commission may make regulations regulating its own procedure and, with the consent of the President, may confer powers or impose duties on any public officer or authority for the purpose of the discharge of its functions.
45. The claimant has submitted that the termination of his employment was unlawful for reasons that –
- a. He was not made aware of the offences he was being accused of to enable him respond to them in his defence.
 - b. The case was not handled through the procedure laid down by the Constitution of Kenya and the Service Commission Act.
 - c. The Claimant was not heard by the Judiciary Service Commission.
 - d. The interdiction and dismissal were both backdated with a view of punishing the Claimant.
 - e. The allegations levelled against the Claimant were pure lies which raised serious criminal liability but which were not investigated at all.
 - f. The Claimant’s fate was occasioned by extraneous matters.
46. Regulation 17(1) of the Judicial Service Commission Regulations under the Service Commissions Act (repealed) (the Regulations) provided for interdiction as follows –
17. 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 his office, he may interdict the officer from the exercise of those powers and functions, provided



proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.

47. According to the evidence on record, the claimant was first issued with a letter titled “Gross Misconduct” by Mr. Gicheru Senior Principal Magistrate, who was Head of Station at Kakamega Law Courts where the claimant was stationed. The letter is reproduced below –

“George Ngaya

Thro’

The Executive Officer

Kakamega Law Courts

Ref: Gross Misconduct

On the 11th January 2005 being a clerical officer in charge of traffic registry you intentionally entered wrong results in the register against Tr. Case No. 134/05 by indicating that the accused person had paid fine of Kshs.3,000.00 yet he did not pay any fine.

On the same day you took receipt No. 284542 used in another Tr. Case No. 61/05 to pay a fine of Kshs.300 and altered it to read Kshs.3000.00. You then colluded with the accused person in Tr. Case No. 134/05 and secured his release from lawful custody using the altered receipt.

Because of what happened, I have a reason to believe that you have knowledge of a missing Tr. Case No. 61/05 original file which went missing since 11th January 2005 and has not been traced to date.

This office is contemplating taking very serious disciplinary action against you but before that is done, you are called upon to show cause why serious disciplinary action should not be taken against you.

Your reply to this letter if any must be received in this office within seven days from the date of this letter.

Signed

M. N. Gicheru

SNR. Principal Magistrate

c.c. The Registrar High Court of Kenya

PO Box 30041

Nairobi”

48. As is evident from the letter, the charges against the claimant were clearly set out there. In his response dated 22nd February 2005 the claimant denied the accusations against him.

49. The SPM was not satisfied with the explanation by the claimant and by letter dated 11th October 2005 addressed to the claimant as hereunder –

PJ 23737 11th October 2005

George Ngaya

Thro’



The Executive Officer
Kakamega Law Courts
Ref: Gross Misconduct

Reference is made to your reply letter of 22nd February 2005 about the above subject.

You have not explained what happened on the 11th January 2005 pertaining Traffic Case No. 61/2005 original file. This is because you were unable to identify whom you gave the files, how many files you gave out and received back.

Furthermore in Traffic Case 134/2005, you have indicated that you counter checked the triplicate receipt issued in the file against court order in the file of fine of Kshs.3,000 and you confirmed that the two were tallying. When the receipt book for 11th January, 2005 was checked by the auditors it turned out that there was no fine of Kshs.3,000.00 paid in Traffic Case No. 134/05.

I have reason to believe that you have knowledge of what happened on the 11th January, 2005 about the disappearance of Traffic Case No. 61 of 2005 original file and the use of receipt No. 284542 in Traffic Case No. 61/2005 to secure the release of an accused person in Traffic Case No. 134/2005 from Lawful custody and thus I forward your case to the Registrar for appropriate action.

Signed

M. N. Gicheru

SNR. Principal Magistrate

c.c. The Registrar High Court of Kenya

PO Box 30041

Nairobi”

50. The case was thereafter referred to the Registrar who by two separate letters dated 2nd December 2005, interdicted the claimant while the other required him to show cause why severe disciplinary action should not be taken against him. In both letters the charges against the claimant are set out as follows –

“On the 11th January 2005 being a clerical officer in charge of traffic registry you intentionally entered wrong results in the register against Tr. Case No. 134/05 by indicating that the accused person had paid fine of Kshs.3,000.00 yet he did not pay any fine.

On the same day you took receipt No. 284542 used in another Tr. Case No. 61/05 to pay a fine of Kshs.300 and altered it to read Kshs.3000.00. You then colluded with the accused person in Tr. Case No. 134/05 and secured his release from lawful custody using the altered receipt.

Because of what happened, I have a reason to believe that you have knowledge of a missing Tr. Case No. 61/05 original file which went missing since 11th January 2005 and has not been traced to date.”

51. The claimant responded to the show cause letter by his letter dated 30th December 2005. In view of its importance, the fairly long letter is reproduced below –

Ref: Pj 23757 George M. Ngaya



C/o Kakamega Law Courts

PO Box 22

Kakamega

30. 12.2005

The Registrar

High Court Of Kenya

O BOX 30041

Nairobi

Thro'

The Senior Principal Magistrate

Kakamega Law Courts

O Box 22

Kakamega

Dear Sir

Re: Gross Misconduct

I acknowledge the receipt of your two letters both dated 2nd December 2005 which were forwarded by the Senior Principal Magistrate on 21.12.2005 and received by me through the Executive Officer Mr. A. Ondu on 29.12.2005.

On the 11th January, 2005 I entered the traffic cases register results for the previous day's files and opened other files which went to court on the same day among them traffic case No. 134/2005. On the 12th January 2005 I received the files from accounts office and the court clerk who had taken them to court the previous day and file No. 134/05 was among them. I entered the results in the case register and I did not intentionally indicate wrong results in the traffic case register for case No. 134/05 to assist anybody as the register could not be used in any way to secure the release of anybody from lawful custody. This was an erroneous entry and I do sincerely regret for the same.

The receipt for Kshs 300/= in traffic case No. 61/05 said to be plucked by me, altered to read Kshs3000/= and used to secure the release of the accused person in traffic case No. 134/05 is in the original court file No. 61/05 no alterations in it and it's original receipt was used to secure release of the accused person in Traffic case No. 61/05 from G.K prisons custody on 11.1.2005. The records from prisons indicates the same The prisons authority makes markings on the original receipt after the release of a prisoner making it impossible for it to be used twice.

The traffic case No. 61/05 has been established that the original file is safely in the traffic registry with it's entire proceedings, a carbon copy of committal release order and the triplicate receipt without any alterations. The same file was listed by the officers in the traffic registry as a closed filed a waiting collection to the archives long after I had been moved from that registry. I had nothing to do with it and it's available.

Sir, from the above explanation. I kindly request you to pardon me. I did not have any intention of assisting anybody by Indicating wrong results in the traffic case register. It was



an oversight which I did not realise in time. For the time I have served the department, this is my first mistake and I sincerely regret for the same. I am sorry for the inconvenience caused by my action and I promise to be more keen while discharging my official duties.

Thank you in advance.

Yours Obedient Servant

Signed

George Ngayah

PJ No. 23757”

52. It is notable from the letter that the claimant only addressed the issue of File No. 61 of 2005 but did not address the issues on File No. 134 of 2005 where the accused person was released without paying the fine of Shs.3,000 using receipt number issued in File No. 61 of 2005 and which was the main reason for the disciplinary proceedings. He however states in his response that –

“... I entered the results in the case register and I did not intentionally indicate wrong results in the traffic case register for case No. 134/05 to assist anybody as the register could not be used in any way to secure the release of anybody from lawful custody. This was an erroneous entry and I do sincerely regret for the same ...”

Further that –

Sir, from the above explanation. I kindly request you to pardon me. I did not have any intention of assisting anybody by Indicating wrong results in the traffic case register. It was an oversight which I did not realise in time. For the time I have served the department, this is my first mistake and I sincerely regret for the same. I am sorry for the inconvenience caused by my action and I promise to be more keen while discharging my official duties.”

53. As was explained in the letter by the Senior Principal Magistrate, the explanation given by the claimant in his letter did not make sense because the fine of Kshs.3,000.00 imposed in Traffic Case No. 134/05 was not paid. No fine was paid at all yet the claimant entered against the register that Kshs.3,000.00 had been paid and he quoted the receipt number of traffic case no. 67/05 against case no. 134/05. The Senior Principal Magistrate averred that the claimant caused the disappearance of case file no. 67/05 to conceal the truth and it was not until much later that the two files were traced. That there was no other person who dealt with the files and register in question except the claimant.
54. After responding to the show cause letter, the next communication to the claimant was the letter of dismissal.
55. According to Regulation 26 which provides for proceedings for dismissal, the Chief Justice was to frame charges in clear terms and invite the officer to respond to the charges. This was done through the letter to show cause dated 2nd December 2005. Thereafter the Chief Justice was required to lay copies of the charge and the response before the Commission to decide whether disciplinary proceedings should continue or not per Regulations 26(2). If a decision was made that the disciplinary process continue, the Commission would appoint a subcommittee to investigate the matter.
56. Regulation 26(4) to (11) provides for the procedure for the subcommittee as follows –
- (4) The sub commission shall inform the officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the submission so determine, shall be required to appear before it to defend himself.



- (5) If witnesses are examined by the sub commission, the officer shall be given an opportunity of being present and of putting questions on his own behalf to the witnesses, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.
 - (6) The Attorney-General shall if requested by the Commission direct a legally qualified officer from the Office of the Attorney-General to present to the sub commission the case against the officer concerned.
 - (7) The sub commission 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 as was adopted in framing the original charges.
 - (9) The sub commission, 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 sub commission shall include—
 - (a) a statement whether in the sub commission's judgement the charge or charges against the officer have been proved and the reasons therefor;
 - (b) details of any matters which in the sub commission'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 sub commission on the matter being investigated;

but the sub commission 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 sub commission, 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 sub commission for further investigation and 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.
57. The respondents have not stated what transpired from the time the claimant responded to the notice to show cause up to the time the decision to dismiss him was arrived at. The letter of dismissal does not state the grounds of dismissal.
58. From the foregoing, the averment by the claimant that the claimant was not made aware of the charges against him to enable him respond is not true as the letter of interdiction and the show cause letter were explicit on the charges.
59. The averment that the claimant was not heard by the Judicial Service Commission is also not true as the regulations only provide for a determination by a subcommittee of the Judicial Service Commission.
60. According to the evidence of RW1 the claimant's case was heard by the Human Resource Management and Advisory Committee. This does not offend the regulations as Regulation 16(2) permits the Chief



Justice, while exercising his delegated authority, to act in accordance with the Regulations or any other appropriate regulation which may be in force.

61. The averment that the allegations against the claimant raised criminal liability which were not investigated is not relevant as an employer is not required to engage the criminal arm of government before it commences disciplinary proceedings against an employee even where the offence committed by the employee constitutes both gross misconduct and a criminal offence.
62. The Court of Appeal distinguished disciplinary proceedings commenced by an employer from criminal proceedings in the case of *Attorney General and Another vs. Andrew Maina Githinji & another* [2016] eKLR and stated that,

"... a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required"
63. Further the court in *Mathew Kipchumba Koskei vs. Baringo Teachers SACCO*, Industrial Cause No. 37 of 2013 at Nakuru held that 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.
64. The averment that the respondent considered extraneous matters, in deciding the claimant's fate is not substantiated by the claimant. The same is also speculative as the proceedings of the subcommittee and Judicial Service Commission which would disclose the reasons for the dismissal have not been brought to the attention of the court and neither are those reasons in the know of the claimant. The proviso to Regulation 24(2) provides that an officer is not entitled to copies of office orders, minutes, reports or recorded reasons for decisions.
65. I however partly agree with the claimant's submission that the case was not handled through the procedure laid down by the Regulations only in so far as the claimant was not informed of the date when the subcommittee was to consider his case as required by Regulation 26(4) reproduced above.
66. The issue whether Section 69 of the Constitution applied to the claimant at all is debatable. Section 69(3) provides that –
 - (3) The offices to which this section applies are -
 - (a) the office of Registrar or Deputy Registrar of the High Court;
 - (b) the office of the Chief Magistrate, the Principal Magistrate, the Senior Resident Magistrate, Resident Magistrate or District Magistrate;
 - (c) the office of any other person empowered to hold or be a member of a subordinate court exercising criminal jurisdiction;
 - (d) the office of Chief Kadhi and Kadhi; and
 - (e) such other offices of member of any court or connected with any court as may be prescribed by Parliament.
67. Using the *eiusdem generis* rule of interpretation, I would opine that staff other than the categories set out under Section 69(3)(a) to (d) would not fall under Section 69(3)(e). I would opine that Section 69(3)(e) covers only judicial staff who would include say, members of quasi-judicial bodies but not



administrative staff like the claimant herein. I would opine that administrative staff are covered under the “other appropriate regulation” referred to under Regulation 16(2) which states –

(2) The Chief Justice when exercising the powers delegated to him by this regulation shall act in accordance with these Regulations and in accordance with any other appropriate regulation which may be in force. [Emphasis added]

68. The said “other appropriate regulation” in my view is what also would cover the preliminary investigation by the Head of Station/the immediate supervisor and the proceedings by Human Resource Advisory Committee.

69. I will say no more about the issue as parties did not address the matter in their submissions herein.

70. Relevant also is whether the Rules provide for an oral hearing. The respondent submitted that no oral hearing was necessary in view of admissions by the claimant relying on the decision in Kenya Airports Authority vs. Fadhil Juma Kisuwa. Further that lack of an oral hearing did not violate the requirements of procedural hearing relying on the decision of the Nigerian Supreme Court in the case of B. A. Imonikhe vs. Unity Bank PLC S. C. 68 of 2003 where the court held that –

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

71. The Court of Appeal in the case of Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR held as follows;

“The fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing.”

72. The Canadian Supreme Court in *Syndicat des employes de production du Quebec et de l'Acadie vs. Canada* (Canadian Human Rights Commission), 1989 CanLII 44 held as follows on the same issue –

“As pointed out by de Smith (*Judicial Review of Administrative Action* (4th ed. 1980), at p. 240), the aim is not to create “procedural perfection” but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board, the requirements of procedural fairness will be satisfied even if there was no structured “hearing” in the judicial meaning of the word. I would agree with Wade when he writes (*Administrative Law* (5th ed.), at pp. 482-83):

A ‘hearing’ will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance ‘hear’ them.”

73. In the case of *Selvarajan vs. Race Relations Board* [1976] 1 All ER 12 the English appellate court held as follows;

“The investigative body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that if a person may be adversely affected by the



investigation and report, he should be informed of the substance of the case against him and be accorded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end, the investigating body itself must come to its own decision and make its own report.”

74. Regulation 26(4) and (5) of the Regulations provide that –
- (4) The sub commission shall inform the officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the submission so determine, shall be required to appear before it to defend himself.
 - (5) If witnesses are examined by the sub commission, the officer shall be given an opportunity of being present and of putting questions on his own behalf to the witnesses, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.
75. In my view, the import of Regulations 26(4) and (5) are that an oral hearing is only to take place on the invitation of the Commission per sub regulation (4) or where a witness has been called to testify as per sub regulation (5). In the present case, there having been no invitation to the claimant and no witness called, it is my opinion that it was not necessary to have an oral hearing or prejudice caused to the claimant.
76. From the forgoing, I find that the disciplinary proceedings against the claimant substantively complied with the requirements of the law and where there was a deviation, there was no compromise to the fair determination of the case by the respondent.
77. I further find that there was justifiable reason for finding the claimant guilty of the misconduct based on the charges against him and his responses thereto.

Reliefs Sought

78. Having reached the conclusion that the dismissal of the claimant was not unlawful, he is not entitled to the remedy of reinstatement which in any event, as submitted by the respondent, was not available as a remedy to him at the time of his dismissal.
7. Again having not found the interdiction and eventual dismissal of the claimant unlawful, he is not entitled to any loss of earnings as prayed. Even had the court found otherwise, this remedy would still not be available to the claimant. As was pointed out by the court in the case of *Menginya Salim Murgani v Kenya Revenue Authority* by Ojwang J. (as he then was) this is a remedy not recognised by the law.
80. On the prayer of refund of Kshs.30,000 erroneously deducted from the claimant’s salary, I find that the respondent did not justify the same. As submitted for the claimant, he was interdicted on 21st December 2005 on half salary but the interdiction was to be effective from 11th January 2005. The deduction was a recovery of the half salary between January 2005 – the effective date of interdiction and December 2005, when the letter of interdiction was written.
81. Since the claimant was not on interdiction between January and December 2005 and earned whatever salary he was paid, there was no logic at all in recovery of the same from his salary. It was money he had worked for and earned before he was interdicted. Even the backdating of the interdiction was unlawful



as no employee can be on interdiction before the letter of interdiction is served upon him/her. Further, half salary is paid during interdiction because the employee is not supposed to report for duty. The salary cannot be recovered for days when the employee was on duty.

82. For these reasons the claimant is entitled to the salary recovered from his salary in the sum of Kshs.30,000/=.
83. In view of the fact that the recovery was most illogical as it was recovered from the half salary the claimant was being paid during interdiction, I will award the claimant interest on the same at court rates from the date of filing suit.
84. The claimant having not succeeded in the main prayer which was wrongful interdiction and dismissal, I order that each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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

