



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**PETITION NO. 103 OF 2019**

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ARTICLE 10, 19, 20, 21, 22, 23, 73, 160(1), (5); 169(2)(a), 232, 258**

**AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 2(5), (6) AND ARTICLE 159(2d) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION AND SECTIONS 3, 4, 5, 6 AND 7 OF THE FAIR ADMINISTRATION ACTION ACT (2015), AND ARTICLE 159(2d) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 12 OF EMPLOYMENT AND LABOUR RELATIONS COURT**

**ACT NO. 20 OF 2011, SECTION 12 AND THE EMPLOYMENT AND LABOUR RELATIONS RULES**

**AND**

**IN THE MATTER OF: JUDICIAL SERVICE ACT SECTION 32 AND THE RULES 25(1-11) OF Third Schedule**

**BETWEEN**

**BILDAD ROGONCHO KAMWELE.....PETITIONER**

**VERSUS**

**JUDICIAL SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

The Petitioner was employed by the Judiciary in October 2013 as a Resident Magistrate on permanent and pensionable terms, and was stationed at Wajir Law Courts. At the time of his termination he was still serving in the same capacity at Narok Law Courts, after a transfer, at a gross monthly salary of Kshs.150,250.00.

The Respondent is a body corporate established under Article 171 (1) (c) of the Constitution with the mandate of promoting and facilitating the independence of the judiciary and the efficient, effective and transparent administration of justice. It is also 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 Petitioner was served with a suspension letter dated 18<sup>th</sup> April 2016. He was also issued with the two charges levelled against him which were: releasing on bond pending appeal, 6 accused persons who had been sentenced to a fine of Kshs.200,000.00 and in default were to serve

24 months' imprisonment in Criminal Case No. 434 of 2015, and kept the case file in his custody. The second charge was for receiving a bribe of Kshs.50,000.00 from a member of the public as "cash bail" for the release of her relative who had been charged with defilement.

The Petitioner responded to the charges and the same was forwarded by the Chief Justice together with the framed charges, to the Respondent for consideration. It was resolved that the Petitioner had a case to answer and should appear before the Respondent's Human Resource Management and Administration Committee for an oral hearing of his case.

The Petitioner's case was heard on 30<sup>th</sup> and 31<sup>st</sup> January 2017 and the report of the proceedings forwarded to the Respondent indicating that grounds of misconduct had been established. The Respondent deliberated upon the report and found that grounds of gross misconduct had been proved against the Petitioner on account of the first charge hence it was resolved that the Petitioner be dismissed from the Judicial Service. The decision was communicated to the Petitioner vide the letter of 9<sup>th</sup> February 2017.

**On 13<sup>th</sup> February 2017**, the Committee invited one additional witness to testify upon consideration of the evidence of the witness, was found that the evidence proved that the Petitioner was culpable for bribery and corruption. The findings were forwarded to the Respondent who deliberated on the evidence and held that the grounds of gross misconduct in the second charge had been proved. The decision was then communicated to the Petitioner vide the letter of 15<sup>th</sup> February 2017.

The Petitioner appealed against the decision, the appeal was considered and it was resolved that the same did not raise any new facts to warrant a review and the same was disallowed.

Aggrieved by the said termination and the procedure adopted prior to the termination, the Petitioner filed this petition on 21<sup>st</sup> June 2019 which is supported by his Affidavit sworn 21<sup>st</sup> June 2019. He seeks the following remedies—

a. A declaration that the dismissal and the disciplinary proceedings were procedurally unfair, unlawful and offended the strict and mandatory rules of natural justice, contravened Article 2(4); 10(2)(a) & (c); 27; 28; 41; 47(1) & (2); 160(1) & (5); 172(1)(c) and 236 (a) (b) of the Constitution as read with section 4(1), (2), (3) and (4)(c) of the Fair Administrative Action Act and regulation 17 and 25(1-11) of the Third Schedule to the Judicial Service Act and were therefore invalid, null and void *ab initio* and are hereby condemned, annulled, revoked, quashed and/or set aside.

b. A declaration that the Respondent breached the constitutional rights and freedoms of the Petitioner under Articles 27(1), 28, 35, 41, 47 and 236(a) and (b) and the Petitioner be compensated for the violation of such rights.

c. In relation to charge 1, the Respondent violated the Petitioner's constitutional rights under article 160(1), (5) and 236 (a) and section 45 of the Judicial Service Act.

d. A declaration that the Petitioner was entitled to an alimentary allowance as provided for under rule 17 of the Third Schedule of the Judicial Service Act equivalent to half pay therefore Kshs.150,250 (gross) x 22 months x ½ = Kshs.165,270.00 (sic).

e. That the Court do order forthwith the release and payment of the Petitioner's accrued back salaries and arrears as a lumpsum forthwith, and with interest as at times of their accrual from 22<sup>nd</sup> April 2016 until payment in full and a mention date be given to confirm full compliance of the Court orders and directions as follows; accrued salaries during the suspension.

Kshs.150,250 x 22 months = Kshs.3,305,500.00.

f. Compensation for unlawful termination of employment or as the Court shall deem fair and just to break the ceiling due to the tortious conduct of the Respondent and multiple violations of statute as pleaded.

g. The Respondent be condemned to pay the costs and interest incidental to these proceedings.

The Respondent opposed the Petition vide the Replying Affidavit of the Chief Registrar; Anne Amadi sworn on 20<sup>th</sup> September 2019, contending that the Petitioner was afforded a fair disciplinary process which adhered to the provisions of the law. The Respondent further contended that the claim for payment of salary and alimentary allowance was unsustainable as the Petitioner was suspended and terminated on grounds of gross misconduct. The Respondent denied violating the Petitioner's rights and urged this Court to dismiss the Petition with costs.

### **The Petitioner's Case**

The Petitioner avers that on 28<sup>th</sup> October 2015, he received a bail application under a certificate of urgency in his capacity as the presiding magistrate since the head of station was on leave preparing for his vetting and whose whereabouts were unknown.

He was the only judicial officer in the station at that time with lawful authority to preside over matters in the absence of his superior hence exercised lawful jurisdiction over the matter and granted the accused persons bond upon presenting a Kenyan surety, having considered all the factors outlined in the Judiciary Bail and Bond Policy Guidelines. Further, the accused persons raised compelling grounds that were unopposed by the prosecutor.

The Petitioner avers that he acted judicially and in good faith hence insulated by Article 160(1) and (5) of the Constitution and section 45 of the Judicial Service Act, from any form of disciplinary action. However, the Petitioner was suspended without pay and thereafter dismissed

for handling the file.

The Petitioner avers that he does not know who his accuser on the bribery charge was and was never given a chance to cross examine anyone who testified on the matter.

He avers that the proceedings violated the provisions of article 10(2)(a) and (c) of the Constitution, the provisions of the Fair Administrative Action Act and the principles of natural justice. For instance, the proceedings were not transparent as he was sent away and deliberately shut out from consequent proceedings. He was not given the opportunity to cross examine a witness who gave adverse testimonies. He did not qualify to be suspended as he had not been convicted of a criminal offence, and was denied alimentary allowance. Lastly, the Respondent deliberately protracted the proceedings without giving him any explanation.

He also avers that his right under Article 27(1) of the Constitution was infringed. He was denied protection of the Respondent's policy to only deal with disciplinary cases in which The Hon. Chief Justice had commenced disciplinary proceedings and conducted preliminary investigations. He was also denied an opportunity to have his disciplinary proceedings concluded within 6 months as opposed to the 22 months it took.

He avers that his right under Article 41 of the Constitution was violated as outlined above. He further avers that his rights under Article 47 of the Constitution and section 7 of the Fair Administrative Action Act were violated as he was charged for carrying out his lawful duties in the absence of his superior and that the charges were not accompanied by a statement or particulars.

It is averred that the Petitioner's right to access information was violated as he did not have prior access to the documents or witness statement of witnesses who were going to give adverse testimonies against him. Further, the Respondent refused to provide the report prepared under paragraph 25(9) and (10) of the Third Schedule to the Judicial Service Act. Further, that the respondent has not been accountable for its administrative acts or provided information within the statutory guidelines.

The Petitioner avers that the Respondent violated the provisions of article 172(1) and (c) of the Constitution by violating the provisions of section 32 of the Judicial Service Act and paragraphs 17 and 25 (5) of the Third Schedule to the Judicial Service Act. The Petitioner further avers by charging him for exercising his judicial authority, the Respondent violated the provisions of Articles 160(1) & (5) and 236(a) & (b) of the Constitution as well as section 45 of the Judicial Service Act.

Lastly, the Petitioner avers that by sending him on 22 months' suspension without payment of an alimentary allowance, his right to human dignity was infringed as he was unable to provide for his family during that period.

### **The Respondent's Case**

The Affiant contends that on 18<sup>th</sup> April 2019, the Respondent received a letter from the Respondent's advocates requesting for several documents. The documents were forwarded to the Petitioner vide the Respondent's Advocates' letter of 26<sup>th</sup> July 2019. However, the Petitioner's advocate was notified of the provisions of paragraph 23 (2) Part IV to the Third Schedule whose effect was that the Petitioner was not entitled to copies of office orders, minutes, reports or recorded reasons or decisions.

It is the Affiant's contention that the rights under Article 35 of the Constitution are not absolute as Section 6(1)(h) and (i) of the Access to Information Act allows for the withholding of information if it may infringe professional confidentiality or damage a public entity's position in any actual contemplated legal proceedings.

The Respondent avers that the disciplinary proceedings took a period of 10 months and contends that the same was a reasonable time and not inordinate if all the circumstances were considered. The Affiant clarified that the Respondent is a part-time commission whose remunerable meetings were capped to 8 sittings thus affecting its efficacy. Further, the Petitioner's disciplinary proceedings were still pending at the time Hon. Rtd. Chief Justice Willy Mutunga retired hence was delayed by the recruitment process for another Chief Justice.

The Respondent denies summarily suspending the Petitioner and contends that the same was done in accordance with paragraph 17 (1) Part IV of the Third Schedule to the Judicial Service Act. The Respondent contends that the letter outlining the Petitioner's charges was detailed, and that the written reason for the Respondent's decision were never withheld from the Petitioner as they were stated in the dismissal letter.

It is contended that the Petitioner was not questioned on the merits of his decisions as regards the first charge, but in the irregular manner he handled the approval of the surety and bond terms. It is averred that the Respondent had the obligation to consider whether the Petitioner's actions were sanctioned in good faith or whether there was misconduct calculated to defeat the ends of justice. The Respondent reached a decision confirming the latter.

### **The Petitioner's Rejoinder**

The Petitioner filed his Further Affidavit sworn on 1<sup>st</sup> November 2019, in response to the Respondent's Replying Affidavit. He contends that the Respondent's affidavit is evasive, elusive and feigns compliance with the law. In particular, he avers that the Respondent called as witnesses, Hussein Saddam, Aisha Ibrahim and Fatuma Hussein yet he was not present and was denied the chance to participate and cross examine them despite their adverse testimonies. It is his averment that this was the same scenario on 13<sup>th</sup> February 2017, when Hon. Chirchir Cheronu testified yet the Petitioner had a complaint against him. He contends that he only attended the hearing on 30<sup>th</sup> January 2017, not that of 31<sup>st</sup> January 2017.

The Petitioner contends that approval of bond terms did not form part of the charges he was facing and avers that the prosecutor was in Court at the time the bond was issued and if the prosecution was aggrieved, they had the recourse of an appeal. It is thus his averment that the

Committee misinformed itself in its report to the Commission.

The Petitioner contends that the powers to suspend a judicial officer were not arbitrary and ought to have adhered to section 4 of the Fair Administrative Action Act. He avers that section 6 (1) (h) and (i) of the Access to Information Act is inapplicable in his case since the basis for the dismissal is a constitutional right thus, he ought to have been furnished with the determination because **his dismissal letter was vague.**

### **The Petitioner's Submissions**

The Petitioner submits that the first charge was unlawful, unreasonable, unconstitutional hence null and void. It is his position that being charged with an in-existent offence was a gross abuse of the process. He further submits that the disciplinary procedure breached the provisions of paragraph 25 (5), (8), (9) and (11) of the Third Schedule to the Judicial Service Act, section 4 (4) of the Fair Administrative Action Act and article 47 (2) of the Constitution. It is his submissions that introducing the issue of bond terms approval amounted to introduction of new charges hence a breach of the rules of natural justice.

He relies on the case of **National Cereal Produce Board v John Kirui Torongei [2017] eKLR** and **Republic v County Director of Education, Nairobi & 4 Others ex parte Abdukadir Elmi Robleh [2018] eKLR** where it was observed that a party must be given the opportunity to present their case and have the decision affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.

It is submitted that in issuing the impugned order, the Petitioner was exercising his judicial authority and should not have been penalized for the same. It is the Petitioner's position that he might have been ignorant on the law or acted outside his jurisdiction but as long as he was in lawful exercise of judicial authority with the perception that he was doing the right thing, then he had immunity. To support this position, he has relied on a myriad of cases being **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2007] eKLR**, **Kalpna H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR** and **Nicholas Kiptoo Arap Korir Salat v Independent Electoral Boundaries Commission & 7 Others [2015] eKLR**.

The Petitioner avers that the Respondent usurped the provisions of article 165 (6) of the Constitution, section 362 of the Criminal Procedure Code and the role of the High Court by interrogating the criminal proceedings. He relies on the case of **Republic v James Kiarie Mutungei [2017] eKLR** where it was held that the High Court has supervisory jurisdiction over all matters of the lower court to correct any error in judgment making.

The Petitioner submits that there was no conclusive proof to establish that he was guilty of the 2nd charge as he never cross examined the witnesses, and relies on the cases of **Bhandari v Advocates Committee [1956] 3 All ER 742** and **Re a Solicitor [1993] QB 69** to fortify this position. He further submits that by punishing him for exercising his judicial authority and for an act done in good faith, the Respondent acted unreasonably and irrationally.

Lastly, the Petitioner submits that he has established a case to warrant an award of each of the orders sought.

### **The Respondent's Submissions**

The Respondent submits that it had the mandate to undertake disciplinary proceedings against the Petitioner. It is the Respondent's contention that the immunity conferred by Article 160(5) is not absolute as Article 172(1) and (c) gives the Respondent the power to discipline judicial officers for misconduct. The Respondent relies on the Court of Appeal case of **Bellevue Development Company Limited v Francis Gikonyo & 7 Others [2018] eKLR** where it was observed that judicial immunity is not for the personal benefit of judges and its true intention was the protection of administration of justice.

It is the Respondent's submissions that the disciplinary process was **not a merit appeal from the decision of the Petitioner** as it did not interrogate the merits of the Petitioner's decision. It is submitted that the Petitioner did not appreciate the gravity of disregarding the provisions of the Judiciary Bail and Bond Policy Guidelines by releasing 6 convicted persons on the strength of one Kenyan surety who did not deposit any security and on the basis of his knowledge of that surety alone.

The Respondent submits that no witness was called to testify on account of this charge and the Committee solely relied on the criminal proceedings in Criminal Case 434 of 2015 and the Petitioner's own admission. The respondent further submits that though it overlooked the requirement of allowing the Petitioner to cross examine witnesses on account of the second charge, the same did not impugn the correctness of the decision of his misconduct as the same was corroborated by the Petitioner's admission and the contents of the court file.

The Respondent submits that the proceedings before it was procedurally fair as they complied with the provisions of regulation 25 of the Third Schedule to the Judicial Service Act. The Petitioner was informed of the charges against him, he was given adequate time to respond and was accorded an opportunity to be heard.

It is submitted that the proceedings substantively complied with the provisions of article 47 of the Constitution as the Petitioner was given the reasons for the termination decision. The Respondent denies violating the Petitioner's right to access information as the same is limited pursuant to article 24 of the Constitution, section 6 (h) and (i) of the Access to Information Act and paragraph 23 (1) and (2) of the Third

Schedule to the Judicial Service Act.

The Respondent submits that the disciplinary proceedings against the Petitioner were concluded timeously bearing in mind the challenges it faced at the time, and how elaborate the Respondent's disciplinary process is.

The Respondent submits that the Petitioner was suspended in accordance with the provisions of paragraph 17(2) of the Third Schedule to the Judicial Service Act and exercised its discretion under paragraph 17 (3), to suspend the Petitioner on a nil alimentary allowance since the charges against him were grave and serious.

It is submitted that the Respondent has proved that the Petitioner was subjected to a fair disciplinary process and was lawfully dismissed hence not entitled to the declaratory orders and compensation for unlawful termination as sought. The Respondent submits that if the Court adopts a contrary view that the deviation regarding the 2<sup>nd</sup> charge affected the fairness of the process, then the matter should be remitted to the Commission for the Petitioner to have an opportunity to cross examine the additional witnesses.

The Respondent submits that the Petitioner was lawfully dismissed hence not entitled to back-pay of any salary or payment of an alimentary allowance. It is submitted that the Petitioner is not entitled to a reinstatement as the same was not pleaded in the Petition and more than 3 years have passed since his dismissal.

### **The Petitioner's Rejoinder**

On 26<sup>th</sup> May 2020, the Petitioner filed Further Submissions in response to the Respondent's submissions which was majorly a reiteration of his initial submissions.

The Petitioner submits that the offence of abuse of judicial authority, bias, impartiality, incompetence and contravention of the judicial code of conduct did not form part of the charges against him and were only outlined in submissions. He also submits that the Respondent failed to consider that the application for bond pending appeal was not opposed by the prosecution.

The Petitioner submits that there is constitutional presumption of good faith hence he is innocent until proved otherwise. He relies on the case of **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & Another [2019] eKLR**.

It is the Petitioner's submissions that a judicial officer who acts in good faith and in the honest belief that he had jurisdiction notwithstanding any error in his reason for so acting has absolute immunity even when he acts in excess of his jurisdiction. He relies on the case of **Bellevue v Justice Gikonyo; Supreme Court Petition 42 of 2018 [2020] eKLR**. He further submits that there was no evidence that he lacked good faith, had been biased or contravened of the litigants' fundamental rights.

### **Determination**

I have carefully considered the pleadings filed by the parties, the evidence annexed thereto as well as their submissions and find the issues for determination before this Court are –

- a. Whether the Petitioner's employment was unlawfully and unfairly terminated.
- b. Whether the petitioner's fundamental rights were violated by the respondent
- c. Whether the Petitioner is entitled to the reliefs sought.

### **Termination**

Regulation 19(1) of Part IV to the Third Schedule of the Judicial Service Act, outlines dismissal as one of the sanctions which may be inflicted upon an officer as a result of disciplinary proceedings under that Part. The Petitioner's dismissal letter dated 9<sup>th</sup> February 2017 reads as follows–

“This is to formally inform you that the Judicial Service Commission in its meeting held on 9<sup>th</sup> February 2017, deliberated on your discipline case and after considering your representation and evidence availed before the Judicial Service Commission Human Resource Committee during the disciplinary hearing of your case, was satisfied that grounds of gross misconduct have been proved against you in the first charge.

The Commission found that you failed to exercise due diligence, care and caution in the manner that you conducted the proceedings in Wajir Criminal Case No. 434/2015 resulting in the release of 6 accused persons on an alleged Kenya surety without first and foremost ascertaining and complying with the first part of the bond terms which was bond of Kshs.300,000.00 and was a clear testimony of recklessness in the exercise of power and authority entrusted to you.

The Commission also found that having set and approved bond terms in the matter, you were bound to comply and abide by them and your failure thereof amounts to incompetence and outright subversion of the course of justice.

Accordingly, and in the exercise of its mandate under Article 172(1)(c) of the Constitution and pursuant to section 25 (11). Part IV Third Schedule of the Judicial Service Act, the Commission resolved that you be

*dismissed from Judicial Service for the shortcomings communicated to you in the show cause letter dated 18<sup>th</sup> April, 2016.*

This is to convey the decision of the Judicial Service Commission to the effect that you are dismissed from judicial service with effect from the date of this letter.

It is the petitioner's averment that the grounds for his dismissal were invalid because he was exercising a judicial function, even though he may have been ignorant of the law of acted outside his jurisdiction. That what the respondent was interrogating a criminal offence and therefor the respondent usurped the provisions of Article 165(6) of the Constitution and Section 362 of the Criminal Procedure Code (CPC).

Article 165(6) provides that –

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

Section 362 of the CPC provides that –

**362. Power of High Court to call for records**

**The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

As submitted by the respondent, the immunity conferred by Article 160(5) which provides that –

**(5) The High Court shall not have jurisdiction in respect of matters—**

**a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**b. falling within the jurisdiction of the courts contemplated in Article 162 (2).**

As was held in *Bellevue Development Company Limited v Francis Gikonyo and 7 Others* (supra), judicial immunity is not for the protection of a judicial officer but rather, the protection of administration of justice.

Having considered the Hansard of the disciplinary proceedings, it is clear that the decision of the petitioner was sent to the Judge at Garissa High Court who reviewed the same under Article 165(6) of the Constitution. What the respondent considered was the conduct of the Petitioner. He admitted that by granting the bond he failed to consider the bail bond policy guidelines.

He further admitted that by so doing he overturned the decision of the presiding Magistrate who was his superior. The charge was clear that –

“CHARGE 1- The petitioner sat in Criminal Case No. 434/2015 that had been concluded and which the court had become *functus officio* and went ahead to release on bond pending appeal, 6 accused persons who had each been sentenced to a fine of Kshs.200,000,00 and in default to serve 24 months' imprisonment. It is further alleged that you then took the case filed and kept it in your custody, instead of in the registry as is expected. ”

As submitted by the respondent, the reason given by the Petitioner the disciplinary hearing proved that he was not acting in good faith but that it was an act of judicial misconduct. This was actuated by the Petitioner's self-interest and excitement as admitted in handling a novel case. It was not an act of good faith in the due administration of justice. At page 22 of the Respondent's replying affidavit the Petitioner responded as follows:

“For the. time that I have been in Wajir, this is the only appeal that has succeeded, the records are there, I believe that I am sharp legal mind and I made an error in this one. I admit I was a bit excited and I do not run away from challenges. I thought that this is an application I have never heard before, this is an application that maybe I would hear. That is why maybe I did not even take a keen look at Section 356. My interpretation of the same had I had enough time to maybe reflect on it, I would have arrived at the same decision that the Honourable Justice Dulu arrived at.”

The Petitioner approved and released six convicted persons out on bond of Kshs.300,009.00 all with one Kenyan surety instead of one surety for each accused person. Despite the surety not did not deposit any security in court. At pages 27 – 30 of the Respondents replying affidavit, the Petitioner further admitted that the medical documents and report he relied upon to release the six convicted persons on the basis of illness, were dated April and March 2015, six (6) months earlier and did not have any certification or official stamp.

The Petitioner admitted that he relied on his personal knowledge of the surety to release the six accused persons. The one Kenyan surety did not deposit any security in court to ensure that the six (6) convicted persons would attend Court but had only left a copy of his national identification card. Pages 31 – 32 of the Respondent’s replying affidavit is minuted as follows:

**“Com. Hon. Mr. Justice Mohamed Warsame:** So you did not consider the first part of your bond which was 300,000 bond? You did not satisfy that this person who was the surety was able to raise 1.8 in the event these people do not appear? One Surety? It was only one surety in respect of all of them.

**Hon. Bildad Rogoncho:** *Yes. This surety if you look at the proceedings—in fact I personally know him.*

**Com. Hon. Mr. Justice Mohamed Warsame:** *You know hint?*

**Hon. Bildad Rogoncho:** *He has appeared in that court appearing as a surety for so many people, he is a prominent business person.*

**Com. Hon. Mr. Justice Mohamed Warsame:** *There was a warrant of arrest, if we give you that warrant of arrest will you be able to arrest him?*

**Hon. Bildad Rogoncho:** *forget about the warrant of arrest, even summons to him, he will come to court.*

**Com. Hon. Mr. Justice Aggrey Muchelule:** You are saying, you know this man, he stood surety for many people—

**Hon. Bildad Rogoncho:** Yes

**Com. Hon. Mr. Justice Aggrey Muchelule:** - and you trusted him. How many accused persons were here? Six?

**Hon. Bildad Rogoncho:** Yes

**Com. Hon. Mr. Justice Aggrey Muchelule:** You trusted one man to stand surety for all of them?

**Hon. Bildad Rogoncho:** As I have stated the, Muslims do not lie and—"

Regulations 12 and 13 of Part III of the Code of Conduct and Ethics for Judicial Officers, which the Petitioner was bound, provide for the principle of judicial independence and impartiality. It provides as follows:

**(2) A judicial officer shall exercise the judicial authority independently on the basis of the judicial officer's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason,**

**(3) A judicial officer shall not deviate from the law to appease public clamour, to avoid criticism, or to advance an illegitimate interest.**

**(4) A judicial officer shall not be improperly influenced by —**

**a. the race, sex, gender, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, political association, culture, dress, nationality, socio-economic status, language or place of birth, or other irrelevant ground of a victim of crime, witness, accused person, plaintiff or defendant;**

**b. the judicial officer’s personal feelings concerning a victim of crime, witness, accused person, plaintiff or defendant;**  
**or**

**c. control, direction or pressure from any person or authority claiming to have an interest in a particular case.**

**(5) A judicial officer shall be independent in relation to society in general and in relation to the particular parties to a dispute that the judicial officer has to adjudicate and shall resist and reject any external influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and shall have unfettered freedom to decide a case impartially, in accordance with his or her conscience and the application of the law to the facts.**

**(6) A judicial officer shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.**

**(7) In performing judicial duties, a judicial officer shall be independent of judicial colleagues in respect of decisions that the judicial officer is obliged to make independently.**

**(8) A judicial officer shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.**

**(9) A judicial officer shall exhibit and promote high standards of judicial conduct in order to enhance public confidence in the judiciary, which is fundamental to the maintenance of judicial independence.**

### **13. Impartiality**

**1. Impartiality is essential to the proper discharge of rite judicial office and a judicial officer shall promote impartiality not only to the decision itself but also to the process by which the decision is made.**

**2. Impartiality requires that a judicial officer shall make decisions based on objective criteria, rather than on the basis of bias, prejudice or conferring the benefit to one person over another for improper reasons,”**

As was stated in the letter of dismissal, the respondent found that the petitioner failed to exercise due diligent, care and caution in the manner he conducted the proceedings. Further that his actions amounted to impotence and outright subversion of the course of justice.

The Commission on Judicial Conduct in the State of New York in considering a charge where a judge dealt with a matter exceeding his jurisdiction but made in good faith, imposed the sanction of removal. The Commission held as follows in the case of **Curtis w. Cook** –

“The Respondent has engaged in a course of conduct prejudicial to the administration of justice. He repeatedly abused his judicial powers and violated the law by presiding over cases over which he had no jurisdiction. Matter of Jutkofsky, unreported (Com. on Jud. Conduct, Dec. 24, 1985). He disregarded well- established, fundamental rights of defendants so as to create an appearance of bias and damage public confidence in the impartiality and integrity of the judiciary.

...

Such a pattern of misconduct shocks the conscience and indicates that the respondent poses a threat to the proper administration of justice.”

I find that the grounds upon which the petitioner was dismissed did not usurp the provisions of Article 165 (6) of the Constitution or Section 363 of the CPC. I further find that the grounds for dismissal of the petitioner were valid under Article 168(1)(d) and (e).

The Petitioner has further averred that he was not afforded ample time to prepare for the hearing as he was only given a 7-day notice period. However, the letter dated 26th January 2017 and marked as BRK9B indicated that the hearing would now take place on 30th January 2017 and not 26th January 2017 as had earlier been communicated. This was still not in compliance with paragraph 25(4) of Part IV to the Third Schedule which provides as follows–

**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.**

Article 47(1) of the Constitution provides that every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where the law prescribes procedure for any action to be undertaken, non-compliance with such prescribed procedure would constitute a violation of the procedure and therefore a violation of the right to fair administrative action.

No reason was given for such violation which also formed the basis of the Petitioner’s appeal against his dismissal. It is therefore my considered view that the termination of the Petitioner’s employment, to this extent, was procedurally unfair and unlawful on that ground.

As regards the second charge, the Respondent averred that there had been disciplinary hearings on 31<sup>st</sup> January and 13<sup>th</sup> February 2017 where witnesses testified. There is no record of any invitation to the Petitioner to attend the said proceedings and neither did the Respondent controvert the Petitioner’s evidence that he was not given the opportunity to cross examine the witnesses. I have perused the Hansard and confirm that it corroborates the Petitioner’s averment that he was not present at the said proceedings. Further, the Respondent did not give an explanation as to why the Petitioner was not informed of the hearings or why it was decided to entertain another witness after the Petitioner had been heard and in his absence.

This violated the Petitioner’s rights under Article 47 of the Constitution and Section 4(3)(a) & (f), and (4)(a) & (c) of the Fair Administrative Action Act and is therefore unlawful and unfair. However, since the Petitioner had already been dismissed on 9<sup>th</sup> February 2017, the hearing of 13<sup>th</sup> February in his absence and the second dismissal letter of 15<sup>th</sup> February 2017 are inconsequential as he was no longer an employee of the respondent at the time.

### **Reliefs Sought**

The Petitioner sought a declaration that the dismissal and the disciplinary proceedings were procedurally unfair, unlawful and offended the strict and mandatory rules of natural justice, contravened article 2(4); 10(2)(a) & (c); 27; 28; 41; 47 (1) (2); 160 (1) (5); 172(1)(c) and 236 (a)

(b) of the Constitution as read with section 4(1), (2), (3,) (4)(c) of the Fair Administrative Action Act and paragraph 17 and 25 (1-11) of the Third Schedule to the Judicial Service Act and were therefore invalid, null and void ab initio and are hereby condemned, annulled, revoked, quashed and/or set aside.

Having observed that the first dismissal letter related to the first charge only and that the second dismissal and the hearings pertinent thereto were inconsequential, it therefore follows that this Court will only examine the orders sought against the disciplinary proceedings relating to the first charge and the first dismissal letter.

As regards article 27 of the Constitution, the Petitioner did not demonstrate how the provisions of the law had been applied subjectively to his detriment. Similarly, the Petitioner did not demonstrate how Articles 10(2)(c), 47(2) and 172(1)(c) had been contravened by the Respondent. As regards article 160(1)(5) and 236 (a), the evidence adduced by the Petitioner did not sufficiently demonstrate how these articles had been contravened. Article 160(1) relates to the judiciary and not its judicial officers. Additionally, the Petitioner did not demonstrate how releasing 6 convicted persons on the strength of one Kenyan surety who did not provide any security was an act of good faith where bond terms had been initially set by another judicial officer more senior than him or how he had been victimized for carrying out his duties.

Paragraph 17(2) gives the Chief Justice the power to suspend an officer from the exercise of the functions of their office where proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed. It is my considered view that the Petitioner misguided himself by presuming that a judicial officer could only be suspended under paragraph 17(1). As such, the procedure for suspending the Petitioner was adhered to on this end.

The issue of violations of section 4 (2) (3) and 4 (4) (c) of the Fair Administrative Action Act as well as paragraph 25 (5) of the Third Schedule to the Judicial Service Act are inconsequential since they relate to the proceedings regarding the second charge which have been established to be inconsequential.

After examining the said provisions and the evidence placed before this Court, I find that the following provisions were violated 2(4); 10 (2) (a); 28; 41 (1); 47 (1) and 236 (b) of the Constitution as read with section 4 (1) of the Fair Administrative Action Act and paragraph 17(3) and 25(4) of the Third Schedule to the Judicial Service Act. However, this Court declines to declare the dismissal and the disciplinary proceedings invalid, null and void ab initio and thereby annul, revoke, quash and/or set aside the same. A nullification, revocation or setting aside has the implication that the Petition ought to be reinstated yet it has been more than three years since the termination of his employment. Further, the Petitioner in his further submissions (paragraph 125 to 128 at page 25), indicated that he would not wish for a remission of the disciplinary proceedings to the Respondent or a retrial on the merit of his case. Issuing the said orders would therefore be issuing them in vain.

In light of the foregoing, this Court declares that the Respondent breached the Petitioner's constitutional rights and freedoms under Articles 28, 41, 47 and 236 (b). It is my view that the Petitioner's right to access to information was not violated as the same has been limited by section 6(h) & (i) of the Access to Information Act. I have perused and appreciated the finding of the Court in **Simon Rotich Ruto v Judicial Service Commission & Another [2019]** which declared the provisions of regulation 23 of the Third Schedule to the Judicial Service Act unconstitutional, and it is my view that the same did not extend to the provisions of section 6 (h) and (i) of the Access to Information Act which limits the right to access information under article 35 of the Constitution. The Respondent relied on paragraph 23(2) of the Third Schedule and section 6 (h) and (i) of the Act to withhold the Committee's Report. As such, the unconstitutionality of paragraph 23(2) notwithstanding, the Petitioner's right to access information was still limited under section 6 (h) and (i) of the Act.

I find that the Petitioner has not established special circumstances to warrant compensation for the violations set out above.

The petitioner further prayed for alimentary allowance as provided I paragraph 17(3) of the Third Schedule to the Judicial Service Act.

Paragraph 17(3) provides that –

**(3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.**

The wording of the Section is couched in mandatory terms. The respondent's position that it exercised discretion not to pay the same is contrary to the provisions of paragraph 17(3) which do not give such discretion.

That the Petitioner was entitled to an alimentary allowance as provided for under rule 17 of the Third Schedule of the Judicial Service Act. Notwithstanding the Petitioner's alleged misconduct being grave and serious, the Respondent had no basis for denying the Petitioner his alimentary allowance. The Petitioner however did not provide a basis for his tabulation. The tabulation made by him did not refer to the justification for the figures relied upon by the Petitioner and is therefore rejected. The Respondent is therefore directed to tabulate the alimentary allowance payable to the Petitioner from the date of his suspension until the termination of his employment as required by Regulation 17 and file the same within 30 days for adoption by this Court.

The claim for Petitioner's accrued back salaries and arrears has no basis in law or in contract and is rejected.

The Petitioner is also awarded 4 months' salary as compensation for unlawful and unfair termination. In granting the same, I have considered

his length of service to the Respondent and the fact that he was found guilty of for misconduct on account of the first charge which had been the basis for his termination, the court having found that the second termination was void as there was no employment capable of being terminated by the second letter of termination at the time of the issue thereof.

The Respondent shall bear the costs of this petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF AUGUST 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**