REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 20 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2020)

HON. TIMOTHY NCHOE SIRONKA.....PETITIONER

VERSUS

JUDICAL SERVICE COMMISSION.....RESPONDENT

JUDGEMENT

1. Hon. Timothy Nchoe Sironka filed a Petition dated 12th February 2020 and later filed an Amended Petition dated 26th May 2020 against Judicial Service Commission for the unfair and unlawful termination of his employment which he avers was in violation of the Constitution.

2. He avers he was employed on permanent basis by the Respondent as a Resident Magistrate and has served in several Stations with Makueni Senior Principal Magistrate's Court being his last station. That as a State Officer his employment is inter alia regulated by the Constitution, the Fair Administration Action Act, the Judicial Service Act, the Judicial Code of Conduct and Internal Policies and Manuals.

3. He contends that his charge, interdiction, disciplinary and termination failed the constitutional and statutory test, and the internal policies on Performance Measurement was thus unfair, unreasonable ultra-vires, invalid, null and void.

4. He avers he has a clean report of service, he discharged his duties diligently and prudently as per the core missions and values of the Judiciary and that he was a high performer basing on the returns he filed periodically, which necessitated promotion and a rise in his pay. That there were no complaints whatsoever concerning his performance and he further did not have any disciplinary issues save for the impugned disciplinary process subject of this Petition.

5. The Petitioner avers that in 2011/2012 he was posted to the Chief Magistrates Milimani Commercial Court, the busiest in Kenya with an annual backlog average of 25,000 cases per annum. That due to transfers, there was a shortage of Magistrates at some point and the workload piled up around 2014/2015. That with no Head of Station and him being the senior most, he also took charge of administrative responsibilities to add on to his judicial and professional duties. That when he was transferred to Makueni Law Courts on 13/07/2015 on a one month notice, he voluntarily disclosed he had Judgements and Rulings from Milimani Law Courts which he was working on and contends it was a challenge balancing matters in the new station and his old matters. He received a letter dated 17/07/2015 by the Registrar Magistrates Courts and after a meeting of 11/08/2015, he was given leave of only 20 days to finalize the "169" files.

6. He avers he was ambushed with a letter of interdiction and charge on 18/11/2015 accusing him of accruing 109 files which was a short cut to get rid of him taking into account that the internal mechanism on performance management had not been activated. That he had by then delivered all the 169 files under inquiry although some files that he had presided over were still being sent to him and that the charge was thus unfair and unreasonable. That he responded with a letter dated 04/12/2015 detailing his challenges and explaining that he was given a shorter notice instead of 3 months which time he still continued sitting. Further, that the said notice was not enough for him to adequately dispense with the backlog as he also dealt with a bout of Typhoid and running his family as a single father but he nevertheless apologized.

7. The Petitioner analyses the case backlog in Milimani Chief Magistrates Commercial Court from 2015 to 2018 as under the **SOJAR Reports** of the said financial years and avers that he had cases in his docket that were relatively younger being less than 2 years. Further, that the turnover of civil matters at the Milimani Commercial Law courts being 3 years means that to complete backlog would require the nine magistrates to attend to an average of 5,000 files per annum.

8. He avers that he stayed on interdiction for sixteen (16) months when he was called for a disciplinary meeting and subsequently terminated by a letter dated 7th February 2017. That he was notified of his termination by a call from the Chief Registrar of the Judiciary on 16th February 2017 and collected the said termination letter from the JSC offices on 17th February 2017.

9. He contends that the delay was inordinate and was never explained to him. That it is clear the termination was unlawful, procedurally unfair and unreasonable and not based on valid reasons as demonstrated hereinabove and further because:-

i) The Petitioner was not put under Performance Management (Performance Appraisal Plan) or Performance Improvement Plan (PIP) and statures in place under the Judiciary Transformation and neither were there mandatory training on case log management as per the mandatory Internal Judiciary Policy.

ii) There was no evaluation and at no time was his performance rated to be unacceptable.

iii) The Petitioner was accused of not giving feedback yet he had been advised by the Registrar Magistrates Court to concentrate on clearance rather than be fixated on correspondences; in any event, the returns of completed files were at all times copied to the Head of station Makueni, the Chief Magistrates Court Milimani and the Registrar Magistrates Court.

iv) The Respondent failed to understand the Petitioner's personal and systemic challenges in the station and further failed to assist him address the same.

10. It is averred by the Petitioner that the JSC receiving a Charge in contravention of internal Judiciary Policies on Performance, without the Judiciary testing his workouts, capacity or compatibility within the set parameters, structures, tools and policies and based on the operational requirements of the Judiciary was unconstitutional. That the Respondent violated his right to fair labour practices and reasonable working conditions under **Article 41 of the Constitution** when it transferred him contrary to Judiciary Human Resource Policies and Procedures Manual for Judiciary Service.

11. That the Respondent also violated his right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under **Article 47(1) of the Constitution** since it violated its internal policies in terminating his employment. Further, the Respondent did not apply the tools under the Performance Management or consider that he had completed all the 169 files in issue before issuing him with the Charge and that this Court is mandated to review such decision under **Section 7(2) of the Fair Administrative Action Act**.

12. He avers that the Chief Justice did not deploy organs and assistance within Judiciary before escalating the Charge and pre-emptively interdicting him in violation of the tenets of **Article 10 (2) (a) to (c)**, specifically the rule of law, good governance, accountability and equity. That good governance was contravened when the Judiciary and JSC did not activate the mechanism to measure performance against the policy of evaluation system. That accountability of administrative action is further constitutionally grounded in **Article 232(1) (e)** and he contends that it is inequitable to single out the Petitioner from 10 other parameters of Performance management. Further, that the ratio of files he held in relation to the overall Case Backlog in the station was negligible and manageable in the circumstances.

13. The Petitioner further avers that the Respondent contravened **Article 172 (1)(c) of the Constitution** which provides for the receipt of complaints, investigation and removal from office or discipline of judicial officers and judiciary staff as prescribed by an Act of Parliament, which in this case is the Judicial Service Act. That to that extent, the Respondent violated the mandatory disciplinary procedure set under **Rule 25 of the 3rd Schedule of the Judicial Service Act** as follows:-

a) The charge was defective and in want of mandatory statement separate and clear from the charge contrary to rule 25(1).

b) There was no investigation and Charge and neither was the Petitioner examined by the Judiciary Ombudsperson or any other person and a report drawn, at least he was not shown.

c) The nature of investigation would also need Performance Appraisal, Performance, Assessment and completion of performance management giving warning before it was a disciplinary issue.

d) There is no indication evidence when the Respondent met as a corporate body under rule 25(3) to escalate the charge and establish a sub panel, as the charge was escalated straight to the Human Resource Management Committee. Upon realizing the lack of exhaustion of such internal judiciary mechanism of performance management, the Respondent was constitutionally bound to reject or send back the charge.

e) Contrary to rule 25(4) and (5), the Petitioner was not given any prior evidence or document to be used at the hearing and neither was he afforded the right to cross-examine any person who gave adverse evidence in breach of natural justice.

f) The Respondent's panel failed to notify the Chief Justice of the new grounds that were outside the Charge contrary to rule 25(8) and in further breach of Article 159 of the Constitution.

g) Such report prepared and considered by the subpanel is not signed by the persons who made it.

14. He avers that the Respondent also violated **Article 236 (b)** and **Article 75(2) (a)** when it subjected him to an unlawful disciplinary action without due regard to the applicable disciplinary procedure for a State Officer and that his right to equal protection of the law under **Article 27(1)** was thus violated.

15. The Petitioner prays that Judgment be entered against the Respondent as follows:

a. A declaration that the termination of the Petitioner was premature, wrongful, unfair, irregular, unlawful,

unconstitutional invalid, null and void ab initio and of no consequences being in contravention of the constitution 2(4) Article 10(2)(a)(c); 27 (1); 41; 47(1); Article 75 (2) (a) 171 and 172(1)(c), 232(1)(e); 236 (a) & (b) Section 4.(1),3 & (4) of the Fair Administrative Action Act. Rule 25(1), (2), (3) 5, 8, 9,10,11 of the 3rd schedule of Judicial Service Act and internal judicial policies, tools and systems in regard to Performance Management under the Judiciary Transformation Framework (JTF) and Sustaining Judiciary Transformation (SJT) and breach of JSC policy requiring of exhaustion and investigation internally before escalation is hereby set aside and quashed.

b. A declaration that the charge dated 16th November 2016 purporting to charge the Petitioner on account of his performance without compliance with the Sustaining Judiciary Transformation principles and tools of performance Management under article 10(2)(b) (National Values and Principles) and article 232(1)(e) {Principles of Public Service) was unlawful null and void and all consequent determinations suffer the same fate.

c. Pursuant to article 23(3)(f) of the Constitution and Section 11 of the Fair Administrative Action Act, an order of Judicial Review of certiorari is hereby issued to remove into the Honorable Court for quashing and set aside the decision of the Respondent terminating relieving the Petitioner from Judicial Service.

d. In accordance to Article 236(a)(b) the Petitioner is entitled to remain in Judicial Service and to perform duties in accordance with the relevant provisions of the Constitution, statutes or as lawfully assigned, unless the petitioner otherwise lawfully ceases to hold office.

e. A declaration that the Petitioner be and is hereby reinstated to his Job (Senior Resident Magistrate Principal Magistrate) without loss of Rank and benefits and all accrued back pay, salaries and allowances applicable to his Rank since February 18th November 2015.

f. Half pay Salary, allowances during interdiction 18th November 2015 to 7th February 2017. (16 half (1/2) Months).

g. Full pay from termination 7th February 2017 to the time of the Judgement and payment in full.

h. Damages for violation of the Petitioner rights under Article 27(1); 41 and 47 and 236(b).

i. For avoidance of doubt termination of the Petitioner on account of Performance without demonstration of application laid down policy, tools and systems of Performance Management, and measures taken to address such poor performance, warning, notice, training to address performance, and timelines given before it is a disciplinary issue to be escalated to JSC, was unfair, unreasonable, unlawful, null and void.

j. Costs of this suit and interest at Court rates.

k. Any other relief this Honorable Court may deem just, lawful and equitable to grant.

16. In the Supporting Affidavit, the Petitioner avers that he was employed in 2010 as a Resident Magistrate and was acting as Senior Resident Magistrate for three years while earning a gross salary of Kshs. 200,000/= at the time of interdiction. He states that there was no indication or evidence submitted at the hearing that the Judiciary/JSC had any previous warning or previous work record of poor performance on him. That it is evident the perennial problem in Milimani Chief Magistrates Court is understaffing against the ration of Magistrates since it is only after he left that the Respondent deployed further Courts from 9 to 13 to deal with the backlog issues.

17. The Petitioner further states that the Respondent also breached his employment contract whose terms are heavily regulated by the Constitution and the Respondent's policies and that his request for a copy of the panel's determination and documents such as his returns were refused even after intervention by his advocates. He states that he has not gotten any meaningful job after his sacking and continues to suffer as a single parent but he is desirous to rejoin the judiciary since he had reasonable expectation to scale up and retire in service. He further prays for compensation for violation of his constitutional right as pleaded.

Respondent's Case

18. The Respondent filed a Replying Affidavit sworn by Anne Amadi, the Chief Registrar of the Judiciary and the Secretary of the Respondent. She avers that the Petitioner's cause of action is time barred since he has approached the Court more than 3 years after his termination on 7th February 2017, contrary to **Section 90 of the Employment Act**. That the Petitioner is escaping the statutory timelines by fashioning his claim as a Petition when it is in essence a Claim which should be presented and prosecuted as provided for in the Employment Act.

19. She further avers that **Section 32 of the Judicial Service Act, 2011** provides for the appointment, discipline and removal of judicial officers and staff as provided for in the **Third Schedule of the Act** through a Committee or panel and that the JSC Human Resource and Administration Committee has been mandated by the Commission to deal with all matters discipline. She annexes a copy of the letter dated 14/08/2015 as ***AA1*** which was issued to the Petitioner by the Registrar Magistrates Court showing the Petitioner was told to prepare a full report on compliance with the directive to write judgments and forward the same by 14/09/2015 when he was expected to resume duty. That when the 20 days period lapsed, the Petitioner still had 109 pending Judgments and Rulings and that owing to his failure to deliver, the Hon. Chief Justice was left with no option but to commence disciplinary proceedings on the premise of the officer's inability to discharge his judicial duties. The same is shown in the Charge, a copy of which she annexes as ***AA2***.

20. She avers that the Petitioner was interdicted by the CJ pursuant to **Paragraph 15 and 16 of the Third Schedule to the Judicial Service**

Act and that the Petitioner appeared before the JSC's Committee on 25th January 2017 for an oral hearing of his disciplinary case. That the Petitioner further confirmed in his response to charge that he had 109 pending rulings and judgments. That upon deliberating on the Petitioner's disciplinary case, representations and the evidence presented before it, the Respondent's Committee generated its report on the disciplinary proceedings making inter alia the following observations and findings:-

a) The Petitioner had admitted accumulating judgments beyond the stipulated timelines of 60 days as provided in Order 21 Rule 1 of the Civil Procedure Rules.

b) The multiple delay was inordinate and a clear breach of Article 159 (2)(b) of the Constitution which stipulates that justice should not be delayed.

c) The reasons for the delay were neither recorded nor was the Chief Justice informed.

d) The explanation of delay was varied and inconsistent; it changed from workload at Milimani to transfer and then to ailment even though none was convincing and was earlier communicated to the authorities.

e) The problem of delay was peculiar to the Petitioner as other Resident Magistrates delivered judgments and rulings on time.

f) Even at the time of the disciplinary hearing, there was before the committee a letter from the firm of Oraro & Co Advocates in the matter of NAIROBI RMCC 7558 of 2010: KAM Pharmacy Ltd vs. Julius Irungu Kahenu where judgment was pending for over 3 years. The said firm had written letters to complain. This delay was unexplained coming in the midst of a growing concern of case back-log. (See annexure marked as AA6 (a) and (b) being letters from the firm of Christine Oraro).

g) The delay to deliver the judgments and rulings was inordinate and inexcusable.

21. That the report was then submitted to the Respondent on 09/02/2017 indicating that grounds of gross misconduct had been disclosed against the Petitioner and recommending that appropriate disciplinary action and sanction be considered against the Petitioner. Then after deliberation, the Respondent was satisfied that grounds of gross misconduct had been proved against the Petitioner and resolved that the Petitioner be dismissed from Judicial Service. That the same was communicated to the Petitioner vide a letter dated 9th February, 2017 and he was also notified of the reason for dismissal in the letter of dismissal. She avers that the Petitioner being aware that delivery of judgments is time bound, failed to adhere to **Order 21 Rule 1 of the Civil Procedure Rules, 2010** and contends that case backlog in the judiciary is not an excuse for the Petitioner not to deliver the judgments and rulings on time as prescribed by law since unlike the other magistrates at Milimani, he had accumulated judgments since 2014 and allocated judgment dates 1 ½ years away.

22. She avers that the Respondent complied with the requirement that an officer on interdiction is entitled to half the basic pay and full medical and housing allowance and that the 1 year and 3 months period from the time of interdiction and charge to the time of dismissal is reasonable considering that:-

a. The Respondent's remunerable sittings were capped by the Salaries and Remuneration Commission until the decision of the High Court on 30th July 2018;

b. The Respondent being a part time Commission also discharged other Constitutional functions which are statutorily capped, specifically the recruitment of judicial officers;

c. It is a fact that the Respondent had a quorum deficit during the said period when it took time for 4 of its Commissioners to be appointed after prolonged litigation;

d. Time is relative depending on specific circumstances, noting that the Respondent was also considering other disciplinary cases.

23. She continues to aver that the Petitioner has not shown in what manner his disciplinary process has been different to any other disciplinary process and contends there has not been any unequal treatment to the Petitioner by the Respondent. That since there was no other witness who testified in the disciplinary hearing, the claim of failure to cross examine witnesses is misplaced and confirms that the only documents used at the hearing was the Charge and Petitioner's response. That the issue of performance appraisal was not raised in the Petitioner's response and during his hearing and that it has only been raised in the present proceedings.

24. She further contends that an Order of reinstatement cannot be justified since the termination of the Petitioner was fair and justified with a valid reason and that the same is not available as the Petitioner had been dismissed for more than 3 years before approaching this Court.

25. That the Petitioner is also not entitled to the claim for 'accrued salary' because a charge of gross misconduct was proved against him and has further failed to exonerate himself to warrant the payment of the accrued salary. She believes that the principle of no work no pay is a common principle in employment relationships, as such salary is normally paid for services rendered and that it would amount to unjust enrichment to pay the officer yet he has not rendered any services to the public in the years claimed. That the Commission did not violate any of the Petitioner's rights as alleged or at all but has duly afforded him a procedurally fair disciplinary process in accordance with the Constitution, the Judicial Service Act and all the other relevant laws and regulations. That the Petitioner is thus not entitled to any damages as his termination was fair and that the Petition is an abuse of the Court process, ought to be dismissed with costs.

26. The Petitioner in response filed a Further Affidavit dated 3rd July 2020 wherein he avers that the matter herein is not time barred because as a state officer, the terms of his employment are not subject to the Employment Act and that therefore Section 90 is not applicable.

27. He avers that he was not accused of breach of Order 21 (1) of the Civil Procedure Rules, or breach of Article 159 of the Constitution, which are issues that arose outside the charge and that JSC was bound to remit the matter to the Chief Justice for drawing of a proper charge.

28. He contends that there is no requirement in law that the disciplinary cases will be hinged on activities of the JSC and that he was not informed of any challenges of the Respondent as pleaded. He prays that the Court dismisses the Respondent's defense and uphold his Petition.

Petitioner's Submissions

29. As to whether the suit is statute barred, the Petitioner refers this Court to the finding in the cases of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015] eKLR** and **Reuben Kipngeno Koech v Permanent Secretary, Provincial Administration, and Internal Security & 2 Others [2020] eKLR**. That the court of appeal in the **Cecilia Wangechi Ndungu** was clear that the whole Employment Act is not applicable to state officers including and the Respondent's objection fails in that respect. Further, that a Constitutional Petition has no time limitation being that it is premised under **Articles 22, 23, and 258** on the violation of the constitution and fundamental human rights and that the Employment Act cannot limit the Supreme Law. That his letter of termination only took effect when he received it and not when it was written and that time starts running for purposes of limitation on receipt of the termination letter as held by the UK Supreme Court in **Newcastle Upon Tyne NHS Foundation Trusts V Haywood 2018 UKSC 22.**

30. The Petitioner submits that he extensively pleaded and particularized violations of **Articles 10, 41, 232(e) (f), and 236 of the Constitution** which the Respondent exercised its right of silence and that in the case of **Francis Angueyah Ominde v Cleophas Kiprop Lagat (Governor, Nandi County) & Another [2019] eKLR**, it was held that Article 10 and 236 are terms of Employment of a state officer.

31. That waiting for 15 months is not efficient or expedient or reasonable in any definition and is in violation of **Articles 47 and 258** and that the Respondent is using excuses already rejected by this Court in **Daniel Mudanyi Ochenja v Judicial Service Commission [2019] eKLR** and **Davis Gitonga v Judicial Service Commission [2019] eKLR.** That the Court in the ***Ochenja case*** above considered the decision in **Petition No. 252/2011 Grace A. Omolo vs AG & 3 Others** where Majanja J then faced with a case of delay of one year declared that failure to institute and commence disciplinary proceedings within a reasonable time infringed upon the petitioner's rights under Article 47 and went on to award Kshs 300,000/=. That it is the Respondent's policy to commence and complete a disciplinary case within six months and in case of delay beyond six months, a resolution to extend the same or a meeting with a quorum is required. That fair labour practice expects that the JSC secretariat would have communicated to him to calm the anxiety of the delay.

32. That it is further trite law that once a workplace policy is laid, it becomes a term of the contract that creates legitimate expectations and must strictly be complied with and that in **Bramuel Dibondo Musundi -v- Kenya Revenue Authority [2018] eKLR**, the Court of Appeal stated that an employer's failure to follow one's internal code of disciplinary policy is not only unfair labour practice but unlawful.

33. He submits that such delay is against, **Article 17 of the United Nations Basic Principles on the Independence of the Judiciary** which provides that:-

> ***"A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the witness in its initial stage shall be kept confidential unless otherwise requested by the judge.''***

34. The Petitioner submits that Performance Management is now recognized as one of the modern Management practices implemented by judiciaries around the world to improve court performance of as per the **Performance Management and Measurement understanding Evaluation Report 2016/2017** at ***page 119 of the Petitioner s bundle***. That the case of **Jane Samba Mukala v O1 Tukai Lodge Limited Industrial Cause Number 823 of 2010** was recently affirmed by the Court of Appeal in **National Bank of Kenya v Samuel Nguru Mutonya [20191 eKLR** thus:-

> ***a) The employer must show that in noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.***
>
> ***b) It is imperative on the part of the employer to show what measures were in place to enable them to assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.***
>
> ***c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would, in essence, be allowed to defend themselves or allowed to address their weaknesses.***
>
> ***d) In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."***

35. He submits that it was unfair for the Respondent to summarily interdict him upon the instigation of the RMC and that the Chief Justice was mandated to carry an investigation and a report done in compliance with rule 25(1). That such investigation was to be carried out following the policies and structures of Performance Management under the SJT and the CJ's stewardship, but the same was not done. He contends that a list of accumulated files pending judgments is not evidence of a misconduct per se but a matter of case management and housekeeping by Courts. That it was further the Respondent's burden to establish through independent evidence that such backlog was due to the willful, intentional, or negligence or inaction of the Petitioner. That his understanding of the Charge does not cure the want of statutory form as was held by the Court of Appeal in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6**

others [2015) eKLR.

36. The Petitioner adopts the position of the Court of Appeal in **Stephen S. Pareno v Judicial Service Commission of Kenya [2014] eKLR** that the Respondent is a public body and amenable to Judicial Review and once the matter is found to be in breach of the law and procedure, an order of Certiorari issues. That the Court of Appeal further held it will not be permitted for the High Court to engage other reasons to deny a relief once certiorari is merited.

37. He also submits that it is trite law and practice that with an order of reinstatement, the order of payment of back salaries comes upon such restoration. ***See*** **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers -vs- Timber Treatment International Limited [2013) eKLR**.

38. He urges the Court to award him Kshs. One Million on account of the delay of 15 months as similarly held in the **Davis Gitonga case *above*** and that other factors to enhance quantum include a finding of egregious illegalities and procedural impropriety and multiple gross violation of the fundamental rights and freedoms under the Constitution. He submits that a lump sum of Kshs 5,000,000 is fair over and above the remedy of Reinstatement as this case involves multiple violations of the constitution and is modest to meet the ends of justice.

39. The Petitioner further submits that Judicial Review is now a constitutional issue subsumed by **Article 23 and 47** and is not limited by the Employment Act. He reiterate the Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** thus:-

> ***"Par 54… "The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the Fair Administrative Action Act of 2015.***
>
> ***…. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in Articles 47 and 10 (2) (c) of the Constitution have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."***

40. That the Court of Appeal in **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR** held that if the process is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. That the Court of Appeal in **Speaker of the National Assembly v Karume [2008] KLR 425** was emphatic that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.

Respondent's Submissions

41. The Respondent submits that the Court has been emphatic that the timelines for filing an employment suit is strictly as prescribed in section 90 of the Employment Act and that in the case of **Justine S. Sunyai v Judicial Service Commission & another [2017] eKLR**, the court while striking out the suit for being time barred under Section 90, held that:-

> ***"…The effect of the provisions of section 4 of the Limitation of Actions Act and section 90 of the Employment Act is that this court has no jurisdiction to entertain a suit that is time barred. In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional***
>
> ***Application No. 2 of 2011; [2011] eKLR and in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012\2012] eKLR the Supreme Court stated that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent...***
>
> ***In the case of Peter Nyamai & Other v M. T. Clarke Limited that has been relied upon by the 1st Respondent the court held that this court has no jurisdiction to extend limitation period. The Court relied on the decision of the Court of Appeal in Divecon v Samani and the High Court decision in Timothy M. Mukalo v Reuben Alubale Shiramba & 3 Others. Again in the case of Charles Musa Kweyu v Wananchi Marine products and in Augustine Odhiambo Abiero v K.K. Security Ltd the Court held that a suit that is time barred is incompetent and bad in law."***

42. It is the Respondent's submission without prejudice to the foregoing that whereas it adhered to the provisions of the Judicial Service Act and Schedule 3 thereto, the rules therein are not an end in themselves but are meant to facilitate a fair administration action and a fair trial. That it is a general rule that administrative bodies are masters of their own procedure which may not conduct their proceedings in the same strict manner that a Court of law would. That this position was upheld in the case of **Republic v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi [2017] eKLR** where the Court noted with approval stating:-

[48] The fair hearing must be meaningful for it to meet the constitutional threshold. The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case…"

43. The Respondent submits that the Charge was drawn in accordance with the provisions of **Regulation 25(1) of the 3rd Schedule to the Act** and that the Charge as framed had sufficient particulars to enable the Petitioner respond. It further submits that the Petitioner is misleading the Court on the issue of the transfer timeline notice that Judicial Officers are issued with and refers to **Section B23, Transfer Guidelines in the Judiciary Human Resource Polices and Procedure** which provides that:-

> ***"Transfers shall be conducted in accordance with the provisions of the Transfer policy and Guidelines for Judiciary. The following guidelines will also apply:- i). Employees will be given at least one (1) month notice before proceeding on transfer."***

44. It is the Respondent's submission that the Petitioner has not substantiated the allegations that the Respondent flaunted his labour rights. It contends that in the unlikely event the Court arrives at a different finding, it should consider that firstly, it cannot substitute its decision with that of the Respondent as was held by the Court in the case of **Judicial Service Commission versus Gilbert Mwangi Njuguna & Another (2016) eKLR**. Further, that since it is the mandate of the Chief Justice to decide how to proceed, the Court can only determine whether or not the procedure has been complied with. Secondly, this matter can only be sent back to the Respondent with parties reverting to the status quo they were in before the disciplinary process commenced. To that end, it relies in the case of **Nkatha Joy Faridah Mbaabu versus Kenyatta University (2016) eKLR** where the Court stated that:-

> ***"[95] In the result, I find partially for the Petitioner. The Respondent's decision to discontinue the Petitioner's studentship will be and is to be quashed and the parties will revert to the position obtaining as of 4 February 2015.That is to say that the Petitioner will remain suspended and the disciplinary proceedings reconvened de novo."***

45. I have examined the evidence and submissions of the Parties herein. In the circumstances, the issues for this Court's consideration are as follows:-

> ***1) Whether this Petition is time barred.***
>
> ***2) Whether this Petition is before Court as a disguised claim.***
>
> ***3) Whether the Respondents breached the Petitioner's rights in the period proceedings his termination for service.***
>
> ***4) What appropriate remedies to grant.***

1. Time and (2) Claim vis-a-vis a Petition

46. The Respondents submitted that the Petition having been dismissed on 7/2/2017, this Petition is time barred due to the provision of Section 90 of the Employment Act 2017 which provide as follows:-

> "***Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted un less it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof".***

47. In relation to this, the Petitioner submitted that this being a Petition, the question of limitation does not arise. The Petitioner relied on **County Government of Nyeri & Another – vs – Cecilia Wangechi Ndungu (2015) eKLR** and **Eunice Jepkoech Siria – vs - County Secretary, Uasin Gishu County (2017) eKLR** where Onyango PJ held as follows:-

> ***"I agree with and adopt the decision of Nduma J. The case of County Government of Nyeri &***

issue of imitation in constitutional petition has been decided in several Petitions where Justice Lenaola (as he then was) in Njuguna Githiru vs Attorney General (2016) eKLR stated as follows:-

"The question of limitations of time in regard to allegations of breach of fundamental rights have in many cases been raised by the State and that is why in Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014 the Learned Judge observed that:-

"Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak'Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

I note also the sentiments of the Court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: 'Although there is no limitation period for filling proceedings to enforce fundamental rights and freedoms, the Court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim.'

In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim." (Emphasis added)

Notwithstanding the above position, I am also alive to the obita dictum in Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012 where it was stated that:-

"It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners' submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past."

In agreeing with the above decision, I must also agree with the Petitioner that the dictates of transitional Justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses, with Kenya being no exception. This Court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. Having so said however, it is imperative for a Petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance."

52. I do find that is the correct position for this Petition and I find it is not time barred.

53. The position adopted above also answer question 2 above that issues relating to state officers are not limited to the provision of the Employment Act 2007 and therefore this Petition is not a simple claim disguised as a Petition.

3. Breaches

54. The Petitioner has set out various incidences he avers were constitutional breaches of his rights. The Petitioner submitted that his rights under Article 47 of the Constitution was breached.

55. The Petitioner contends that he was subjected to an interdiction from 18/11/2015 and had to wait for a long period for the disciplinary process to be concluded before his dismissal on 17/2/2017, which was a period of about 15 months. He contended that the delay in finishing the disciplinary process was inordinate.

56. Article 47 of the Constitution provide as follows:-

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

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

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

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

b) promote efficient administration."

57. Coupled with this provision, the Fair Administrative Action Act at Section 4(1) provides as follows:-

> ***"Administrative action to be taken expeditiously, efficiently, lawfully etc;***
>
> ***"(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair……..."***

58. In **Daniel Mudanyi Ochenja vs Judicial Service Commission (2019) eKLR**, this Court considered a matter where the Petitioner raised an issue of delay. This Court had this to say:-

> ***"67. The Petitioner has submitted that he was subjected to a tedious 26 months of waiting while on interdiction before the disciplinary process was conducted.***
>
> ***68. In reply to this, the Respondent submitted that at the time, the Respondent was busy conducting interviews for the recruitment process of the Chief Justice and other Judges and had limited time to carry out the disciplinary process.***
>
> ***69. The explanation by the Respondent is on all fours unacceptable. There is no provision that a disciplinary process of a judicial officer will be defendant on other matters pending before the Judicial Service Commission. The Petitioner is an individual and his own rights cannot be subservient to other rights or activates of the Judicial Service Commission.***
>
> ***70. Article 47 of the Constitution is clear that there must be expeditious, efficient, lawful, reasonable and procedurally fair administrative action. Waiting for 2 years, 2 months is an unacceptable delay."***
>
> ***71. In Petition No. 252/2011 Grace A. Omolo vs AG & 3 Others, the High Court Justice D.S Majanja was faced with a case such as this and declared that failure to institute and commence disciplinary proceedings within a reasonable time infringed upon the Petitioner's rights under Article 47. In this case, the delay had been only 1 year 26 months far exceeds the 1 year above and I find the delay inordinate and unfair."***

59. In the case of Petitioner herein, he waited for 15 months before his disciplinary process was completed. This in my view was inordinate delay and breached his constitutional right under Article 47 of the Constitution.

60. The Petitioner has also submitted that the Respondent breached his right under Article 10(2) and 232 of the Constitution which underscores rule of law, equity, good governance and accountability in state and public service.

61. Section 10(2) of the Constitution provides for natural values and principles of good governance as follows:-

> *2) "**The national values and principles of governance include:-***
>
> ***a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***c) good governance, integrity, transparency and accountability; and***
>
> ***d) sustainable development".***

62. Article 232 of the Constitution on the other hand provides for values and principles of public service as follows:-

> **1)** *"**The values and principles of public service include:-***
>
> ***a) high standards of professional ethics;***
>
> ***b) efficient, effective and economic use of resources;***
>
> ***c) responsive, prompt, effective, impartial and equitable provision of services;***
>
> ***d) involvement of the people in the process of policy making;***
>
> ***e) accountability for administrative acts;***
>
> ***f) transparency and provision to the public of timely, accurate information;***
>
> ***g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;***

h) representation of Kenya's diverse communities; and

i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of:-

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

2) ***The values and principles of public service apply to public service in:-***

a) all State organs in both levels of government; and

b) all State corporations.

3) ***Parliament shall enact legislation to give full effect to this Article."***

63. In respect of the breach, the Petitioner has submitted that there are extensive procedures and structures of the SJT that were unsuited and/or sidestepped as pleaded in paragraph 1 to 43 of the Petition. He contends that his termination was unlawful and procedurally unfair and without valid reasons.

64. The Petitioner pleaded that he was put on a 30 day notice to leave Milimani against the Transfer Policy and therefore had to preside over new matters in Makueni.

65. He also pleaded that he had always submitted satisfactory returns and at no time was his performance found wanting, exceeding an overage of 20 judgements and rulings.

66. He contends that he was not placed on a Performance Improvement Plan (PIP) when the JTP and was also not trained on case log management as per the mandatory Internal Judiciary Policy. He avers he was not evaluated and at no time was his performance rated to be unacceptable.

67. On issue of transfer policy, the Respondent submitted that the policy provides for 30 days' notice before a judicial officer/staff is transferred. The Respondent cited the Human Resource Manual and indicated that transfer was to be effected after giving one months' notice.

68. I have had occasion to compare this with the transfer policy of the Judiciary 2015 which provides at annex III as follows:-

"Timing of Transfers:-

a. As far as possible, the ordinary transfer of Judicial Officers shall be effected by the 30th of September every year, and the Judicial Officers transferred in the annual chain shall be required to report to their new stations in January of the following year.

b. In cases of special transfers other than those in the annual chain as defined under Section 7 of this Policy, the reporting date shall be indicated in the Transfer letter to be issued by the Chief Justice."

69. My understanding of the provision of the Transfer Policy is that it should as much as possible include a 3 month notice. This is however dependent on whether it falls under the annual chain transfer or not. It is not clear under which category the Petitioner's transfer fell but he indicated that he was transferred on 13/7/2015. This was therefore not during the annual chain transfer envisaged above.

70. The reporting date was therefore as stated in the transfer letter from the Hon. Chief Justice. His contention then that the transfer was irregular is not the correct position.

71. On performance management, the Petitioner has submitted that there was no hearing or effort by the Respondent to appraise and evaluate his performance as per the Judiciary Policy of Performance Appraisal Plan (PAP) and Performance Improvement Plan (PIP) to determine the Petitioner's performance, capacity and compatibility.

72. He avers the lack of performance management is vested in Performance Management Directorate (PMD) and that the Performance Management and Measurement Steering Committee (PMMSC) and PMD had not been activated to help appraise and evaluate him and bind his Court to PM and M undertakings (PMMUS).

73. He contends that this process ought to have been exhausted after which, if there was failure, the Hon. Chief Justice should have drawn a charge and interdiction after several warnings and assistance to the Petitioner.

74. He also avers that the Hon. Chief Justice should have investigated and considered the conduct of the Petitioner and the report generated by the Petitioner's direct supervisors and the DPM in regard to his performance before drawing a charge and interdiction and this was done in contravention of Rule 25(1 and 2) of the Judicial Service Commission.

75. The Petitioner contends that there was no mutually agreed realistic targets between him and the Judiciary and Judicial Service Commission or his immediate boss and no proper performance measurements could be done and how many judgements and rulings against the huge backlog of over 25000. He therefore contends that the matter was unripe for a disciplinary hearing.

76. In respect of Performance Improvement Plan (PIP) and Performance Management and Measurement Steering (PMMS), the Judiciary Policy or Performance Management 2015 at 2.1.4 states as follows:-

> ***"……..the main objective of undertaking staff performance appraisal in the Judiciary is to establish and improve the performance of individual judge, judicial officer and staff with a view to improving overall performance of the judiciary. The appraisal process will involve identification of common goals of a Court or a directorate, setting of individual employee target, agreeing on strategies for implementation assessment of achievement, provision of feedback and administration of incentive system. The emphasis will be on mutual discussions between appraiser and appraise…..".***

77. At 1.3.4 the policy details as follows:-

> ***"……..Magistrates' Courts: Each Magistrate to deliver a minimum of 20 judgments and rulings per month excluding plea settlements in civil case. This translates to at least 220 judgments/rulings to be delivered by a Magistrate every year. This also applies to the Kadhis Courts…."***

78. There were therefore parameters to be applied in conducting Performance Management Appraisal (PMA). The parameters included setting targets for each Individual Court Magistrate and later an appraisal to confirm noncompliance.

79. In this case of the Petitioner, he avers that he was never subjected to a Performance Management Appraisal (PMA) system he never set any targets and also never failed to deliver judgments as expected.

80. Indeed there is no evidence that the Petitioner was subjected to a performance appraisal system. There is no indication that he failed to deliver as expected despite the judgements that were pending at the time which he attributes to backlog. The Respondent indeed failed to adhere to its own polices and practices which in effect let to breach of the Petitioner's rights.

81. In the Court of Appeal decision **National Bank of Kenya vs Samuel Nguru Mutonya (2019) eKLR,** The Learned JJA – Nambuye, Kiage and Ole Katai held as follows:-

> ***"The reason advanced by the Bank for terminating the Respondent's employment was poor performance. In Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the Court observed as follows:-***
>
> > ***a. "Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.***
> >
> > ***b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.***
> >
> > ***c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.***
> >
> > ***d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."***

82. In the case of the Petitioner herein, the authority from the Court of Appeal above would obligate the Respondent to prove the poor performance of the Petitioner and it is also imperative to prove that there are measures in place to enable them assess performance of the Petitioner and also measures undertaken to address poor performance. The Respondents have not demonstrated this existed or was undertaken.

83. Other than the above breaches, the Petitioner submitted that he was not given an opportunity to be heard fairly. He attributes this position to the fact that the Judicial Service Commission had already breached the PMMP. The Petitioner avers that Rule 25(1) of 3rd Schedule of Judicial Service Act was breached.

84. Rule 25(1) of the 3rd Schedule of the Judicial Service Act provides as follows:-

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

85. Rule 25(1) of the JSA envisages that where there are proceedings for dismissal, there must be an inquiry 1st then after consideration of the inquiry, the Hon. Chief Justice may institute disciplinary proceedings against an officer on the ground of misconduct. The Hon. Chief Justice is expected to frame a charge or charges against the officer and forward the statement of the charge to the officer.

86. The process is quite detailed where as the Petitioner aver that the Respondent breached these processes, the Respondents are categorical that they adhered to the law.

87. I have looked at the processes leading to the dismissal of the Petitioner. On 14/8/2015, the Registrar Magistrates Court (RMC) wrote the Petitioner concerning pending 109 judgements and rulings and requested the Petitioner to proceed on a 20 days leave from 17/8/2015 in order to write the said judgements and rulings and also prepare a report on compliance with the directive and forward to the Registrar Magistrates Court (RMC) by 14/9/2015 when he was expected to resume duty.

88. The Petitioner proceeded on leave as directed but at the end of the 20 days leave, he still had 109 pending rulings and judgements.

89. The Hon. Chief Justice proceeded thereafter to institute disciplinary proceedings against the Petitioner on the ground of his inability to discharge his judicial duties.

90. The Petitioner has averred that he delivered judgements and rulings as directed and at the time the disciplinary proceedings were conducted, he had no pending judgements or rulings.

91. On 14/11/2015 he was interdicted by the Hon. Chief Justice and the letter of interdiction made reference to the letter of 14/9/2015 from the Registrar Magistrates Court (RMC).

92. An interdiction is indeed a disciplinary process. Rule 25(1) of the Judicial Service Act envisages that such a process shall not be commenced with an Inquiry being done and a report being submitted to the Hon. Chief Justice. The Hon. Chief Justice will then consider the Inquiry report before commencing the disciplinary process.

93. There is no report of an inquiry conducted against the Petitioner by the Respondent which was then forwarded to the Hon Chief Justice.

94. The interdiction letter is also accompanied by a charge sheet against the Petitioner and this presupposes that an Inquiry had already been carried out and completed.

95. In this Court's view, the disciplinary process was commenced hastily without following the law and in effect breached the Petitioner's rights to a fair hearing and a fair disciplinary process under Article 47of the Constitution which provides as follows:-

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

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

6) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

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

d) promote efficient administration."

Remedies

96. Having found the Respondent guilty of breaching the Petitioner's rights under the Constitution, the Petitioner had sought for reinstatement, but 3 years having passed since the dismissal, reinstatement is not an option.

97. I find for Petitioner and return the following verdict:-

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

2) A declaration that the Petitioner is entitled to damages for the unfair and unlawful dismissal equivalent to Kshs. 5 million.

3) Payment of withheld half salary during the interdiction period being from 18th November to 7th February =14 months and seven days=14x200000 =2, 800000 plus seven days=44666.TOTAL -2, 846666

TOTAL AWARDED=7,846,666 Less statutory deductions

4) The Respondents will bear costs of this suit.

Dated and delivered in Chambers via zoom this **17th day of September, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okemwa for Petitioner – Present

Respondent – Absent