



**Nyawiri v Judicial Service Commission & another (Petition 58 of 2020)  
[2020] KEELRC 13 (KLR) (16 December 2020) (Judgment)**

*Carilus Nyawiri v Judicial Service Commission & another [2021] eKLR*

Neutral citation: [2020] KEELRC 13 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 58 OF 2020  
M MBARŪ, J  
DECEMBER 16, 2020**

**BETWEEN**

**CARILUS NYAWIRI ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF JUSTICE PRESIDENT OF THE SUPREME  
COURT ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is seeking the following orders;
  - a) A declaration that the petitioner's fundamental rights and freedoms as enshrined under Article 47 of the Constitution of Kenya 2010, have been contravened and infringed upon by the 1<sup>st</sup> and 2<sup>nd</sup> respondents;
  - b) A declaration that the 2<sup>nd</sup> respondent's letter dated 31.05.2018 and the 1<sup>st</sup> respondent's letter dated 19.12.2019 are illegal, null and void ab initio for being in contravention of articles 25(c), 28, 41, 43, 47, 48, 50 and 236(b) of the constitution;
  - c) A declaration that the respondents infringed the petitioner's fundamental rights guaranteed under article 25(c), 28, 41, 47 and 50 of the constitution;
  - d) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated the provisions of article 236(b) of the constitution;



- e) An order for judicial review by way of certiorari to bring to the court for purposes of quashing the decision of the 2<sup>nd</sup> respondent as contained in the letter dated 31.05.2018 and that of the 1<sup>st</sup> respondent contained in the letter dated 19.12.2019;
- f) An order of prohibition and permanent injunction to issue to prohibit and permanently restrain the respondents from implementing/further implementing the decisions contained in the 2<sup>nd</sup> respondent's letter dated 31.05.2018 and the 1<sup>st</sup> respondent's letter of 19.12.2019 and from taking any adverse action pursuant to the said decisions.
- g) An order of Judicial Review by way of mandamus directing the respondents to reinstate the petitioner to his employment including the reinstatement of his salary and employment benefits;
- h) General damages for breach of the petitioners rights under articles 25(c), 28, 41, 47, 48 and 50 of the constitution;
- i) Award of general damages against the respondents for sufferings experienced by the petitioner as a result of their decisions;
- j) Costs of the petition be borne by the respondents in any event on indemnity basis; and
- k) Any other order the court may deem fit to grant.

### **The Petition**

2. The petition is that the petitioner is a male adult and the 1<sup>st</sup> respondent is independent commissions under Article 171 of the constitution with mandate to appoint, discipline and removes judicial officer. The 2<sup>nd</sup> respondent is the head of the judiciary and chairperson of the 1<sup>st</sup> respondent.
3. On 7<sup>th</sup> March, 2016 the petitioner was appointed as a magistrate by the 1<sup>st</sup> respondent and deployed to Makueni Law Courts as a Senior Resident Magistrate on 30<sup>th</sup> March, 2016.
4. On 10<sup>th</sup> October, 2016 the petitioner was promoted to head of Station Makueni Law Courts and later transferred to Malindi Law Courts.
5. On 31<sup>st</sup> May, 2018 without warning and before any disciplinary proceedings the petitioner was suspended indefinitely on various allegations and he was to receive no salary and was expected to report to the chief magistrate Malindi Law Courts where he had last been stationed every last Friday of the month until further notice. The petitioner was also required to hand over his duties and including accounting documents, court files and detailed report to the chief registrar through the chief magistrate Malindi Law Courts.
6. The suspension and the conditions imposed on the petitioner were illegal, unlawful, punitive, oppressive and without justification and in violation of fundamental rights and freedoms.
7. The proceedings commenced against the petitioner on 7<sup>th</sup> October, 2019 ere unprocedural, illegal, unfair and contrary to the principles of natural justice and the proceedings a sham and appeared to be a mere formality by the 1<sup>st</sup> respondent who by suspension had declared the petitioner guilty of the charges preferred against him. The 1<sup>st</sup> respondent commissioners could therefore be seen to be biased against the petitioner from the onset, biased and which prevailed during the hearing.
8. The decision to dismiss the petitioner from service vide letter dated 19<sup>th</sup> December, 2019 was without providing him with a ruling to the decision to dismiss him on the allegations that he had been found guilty of three (3) charges out of the 5 charges preferred against him. these were that the alteration of



revenue receipts in the court station headed by the petitioner was actualised within the petitioner's knowledge and authority; that the petitioner single sourced for catering services during the launch of Makueni High Court contrary to laid down Procurement law and regulations; and that the petitioner sanctioned the irregular and improper use of court fines in the sum of ksh.12,000 paid in Traffic Case No.95 of 2017 by directing the same to be utilised to facilitate staff attending the Judiciary Sports day in Nairobi.

9. The petitioner requested for a full ruling from the 1<sup>st</sup> respondent but this was ignored. The decision to dismiss him was without evidence. the petitioner was not guilty of the allegations made on the grounds that alternation of receipts to which the petitioner was being accused of began way back in 2015 and continued for years as indicated in the audit report whereas the petitioner became head off station on 10<sup>th</sup> October, 2016; the witness who testified that the petitioner was coercing them to alter receipts were the same ones who had been altering receipts on their own volition even before the petitioner became head of station; the allegation that the petitioner single sourced for catering services is allowed in law as provided by the Public Procurements Act since the petitioner was unable to request for the quotation from the other two available hotels as the station was not funded for the function to which the catering services was needed in advance; and there is no evidence that the petitioner instructed an offender in Traffic Case No.95/2017 to pay ksh.12,000 to a participant of Judiciary Sport Day in Nairobi since there is no evidence that the petitioner interacted with the offender.
10. The petition is also that the termination of employment was unfair and contrary to the Employment Act as the respondents were biased from the onset and did not follow fair procedure as set out under the Judicial Service Act for the reasons that there was suspension before the petitioner was given a hearing and without being given any reasons in breach of his rights; the suspension amounted to constructive dismissal and the disciplinary hearing was a sham and a mere formality; the 1<sup>st</sup> respondent failed to follow procedure under paragraph 25 of the Third Schedule of the Judicial Service Act; the petitioner's salary was unfairly withheld during the suspension period; and there was a travesty of justice.
11. The petition is also that the petitioner's rights under article 47, 10 and 50 of the constitution were violated for lack of fair administrative action and right to a hearing by an independent and impartial tribunal. The respondents acted in gross impunity and complete disregard of the law.
12. The petition is supported by the Supporting Affidavit and Supplementary Affidavits of the petitioner.

## **Response**

13. The respondent filed the Replying Affidavit of Ann Amadi in reply to the petition and avers that as secretary to the 1<sup>st</sup> respondent she has authority to reply herein.
14. The petitioner was employed by the 1<sup>st</sup> respondent and posted to Makueni Law Court and then Malindi Law Court until 9th December 2019 when he was dismissed on account of gross misconduct.
15. Ms Amadi also avers that in the period between 29th May and 2nd June 2017, a routine audit on Revenue, Deposits, Procurement and Expenditure Management was conducted at Makueni Law Courts by the Audit and Risk Management Directorate. The Audit covered the period July 2015 and April 2017 part of which the Petitioner was the head and AIE holder of the station. The Audit Report, revealed massive fraudulent activities in the management of revenue at the station which directly implicated the Petitioner and two other staff at the station.
16. The Petitioner conspired with two staff members to defraud the judiciary by instructing them in the presence of other station staff to alter receipts of fees collected with a promise that he would protect



them on account of being 'well connected'. In addition to the fraudulent activities in the management of revenue, the Petitioner engaged in other acts of gross misconduct which included:

- a) The Petitioner absconded duty without approved leave or reasonable cause on 24.05.2018 and 25.05.2018 and failed to communicate his whereabouts to his supervisors. The Petitioner, further and in full knowledge of the anxiety caused by his absence allowed the institution to be projected in bad light to the Ethics and Anti-corruption Commission and the general public;
  - b) contrary to the laid down procedures and without prior authority of the Chief Registrar of the Judiciary, the Petitioner authorized the construction of a pit latrine at the premises provided by the Ministry of Housing to house the High Court and he then instructed the Accountant to pay Kshs. 40,000/= to the prison officer in charge of the inmates of Makueni Prison who had constructed the latrine;
  - c) despite advice from the Procurement Officer on the procedures laid down by the Public Procurement and Asset Disposal Act 2015, the Petitioner, between January and February 2017 single-sourced for catering services during the launch of the Makueni High Court from Kusyombunguo Hotel in Makueni and went ahead to conspire to inflate the costs beyond the Kshs. 300,000/= allocated. That the Petitioner further ordered the Accountant to pay the excess of Kshs. 32,000/= directly to the hotel manager from the revenue collection account contrary to laid down regulations; and
  - d) In May 2017, the Petitioner instructed the office to facilitate the team proceeding for the Judiciary Sports day in Nairobi with Kshs. 12,000/= which the officer then asked that the same be paid directly to a participant via M-pesa by the offender in Traffic case No. 95 of 2017.
17. Ms Amadi also avers that based on the Audit Report and other acts of gross misconduct perpetrated by the Petitioner, the 2nd Respondent exercised its Constitutional mandate and initiated disciplinary proceedings against the Petitioner leading to his dismissal from employment. In dismissing the Petitioner, the 1st Respondent followed due process and strictly adhered to the tenets of procedure, including granting the Petitioner a right to fair hearing. In sum, the 1st Respondent conducted the disciplinary process leading to the Petitioner's dismissal fairly and according to the procedure spelt out under the governing laws.

#### **Whitten submissions**

18. The parties agreed by consent to forgo the interlocutory motions and address the petition. Parties also agreed and filed written submissions.
19. The petitioner submitted that his right to fair administrative action and right to due procedure were infringed. Article 47 and 236 of the constitution provides for fair administrative action and that a public officer should not be dismissed or removed from office or be subjected to disciplinary action without due process of the law.
20. Article 172(1) (c) of the constitution requires the 1<sup>st</sup> respondent to administer justice following complaints against judicial officers in the manner prescribed by the Judicial Service Act. the petitioner's disciplinary process commenced by application of a punitive suspension an before he was given a hearing as required under paragraph 25 and 17 of the Third Schedule of the Judicial Service Act. A committee should be formed to investigate, invite the officer and hearing defences before an adverse action is taken. The 2<sup>nd</sup> respondent may suspend the officer against whom proceedings for dismissal have been taken is as a result of those proceedings he considers that the officer ought to be dismissed. The suspended officer should be granted alimentary allowance in such amount and n such terms as



the 1<sup>st</sup> respondent may by regulations determine and which was not done with regard to the petitioner who was suspended before hearing and without any pay.

21. Section 32 of the Judicial Service Act requires the commission to form a committee or panel for purposes of disciplinary proceedings against a judicial officer. There should be preliminary investigations as held in *Bryan Mandila Khaemba versus Chief Justices and President of the Supreme Court of Kenya & another* [2019] eKLR. In this case the petitioner was suspended before being given a hearing and on nil salary contrary to finding in the case of *Peterson Ndung'u & 5 others versus Kenya Power and Lighting Company Limited* [2014] eKLR that forfeiture of salary should only abide the law and after a disciplinary process.
22. The petitioner submitted that he was not given a ruling following the hearing by the disciplinary committee as required under section 32 of the Judicial Service Act. The committee investigating the allegations made and before finding the officer guilty should be delivered to the full commission sitting and before a decision is taken as held in *Judicial Service Commission versus Gladys Boss Shollei & another* [2014] eKLR. The petitioner was denied the right to a fair hearing when the respondents failed to adhere to the Judicial Service Act and the third Schedule thereof. The hearing was biased and by being placed on suspension without pay the 2<sup>nd</sup> respondent had already formed an opinion that the petitioner ought to be dismissed before hearing or giving his defence.
23. The petitioner submitted that he is entitled to his right to fair labour practices, dignity, socio economic rights and which rights were violated when he was suspended on nil salary putting him under inhumane conditions and being unable to take care of self and family.
24. The petitioner submitted that he was suspended vide letter dated 31<sup>st</sup> May, 2018 without pay and required to report at his duty station every last Friday of the month. On 7<sup>th</sup> October, 2019 there was a disciplinary hearing before the Judicial Service Commission's Disciplinary Committee and on 19<sup>th</sup> December, 2019 he was issued with letter dismissing him from his employment. The disciplinary position was unfair and unlawful and in violation of his rights under articles 28, 41, 43, 47, 50, 172 and 236 of the constitution read together with the Judicial Service Act, Employment Act and Judicial Service Commission regulations under the Judicial Service Policies and Procedures Manual.
25. The suspension before disciplinary proceedings are taken is contrary to the Judicial Service Act and ultra vires as held in *Adrian Kamotho Njenga versus School of Law* [2017] eKLR that the court should as much as possible read an impugned statute or statutory provision in a way that gives fundamental value and should also examine the object and purpose of the Act so as to be in conformity with the constitution. In this regard, the action of suspending the petitioner before undertaking disciplinary proceedings led to a flawed decision as held in *Bryan Mandila Khaemba versus Chief Justice and President of the Supreme Court of Kenya & another* [2019] eKLR.
26. Where a judicial officer is suspended before disciplinary proceedings are taken, then the mandatory substantive and procedural safeguards will not have been followed and such decision must be quashed. The suspension without pay is tantamount to dismissal as held in *Peterson Ndung'u & 5 others versus Kenya Power & Lighting Company Limited* [2014] eKLR.
27. The petitioner also submitted that the ruling on his guilt by the whole judicial service commission as opposed to the disciplinary committee was in error and contrary to paragraph 25(9) of the Third Schedule of the Judicial Service Act as held in *Judicial Service Commission versus Gladys Boss Shollei & another* [2014] eKLR that a committee of the Judicial Service Commission should decide on the guilt of the judicial officer then the full sitting of the same decide on the punishment.



28. The petitioner was not accorded a fair hearing and the application should be allowed as prayed as held in *Judicial Service Commission versus Speaker of the National Assembly & another* [2013] eKLR; *Non-Governmental Organisations Co-ordination Board versus EG & 5 others* [2019] eKLR; and *Chief Land Registrar & 4 others versus Nathan Tirop Koech & 4 others* [2018] eKLR.
29. The respondents submitted that the petitioner was an employee of the 1<sup>st</sup> respondent until 9<sup>th</sup> December, 2019 following dismissal for gross misconduct.
30. For the period of 29<sup>th</sup> May and 2<sup>nd</sup> June, 2017 following a routine audit on revenue, deposits, procurement and expenditure management conducted at Makueni Law Courts and the audit covering July, 2015 and April, 2017 part of which time the petitioner was the head of AIE holder of the station and which audit revealed massive fraudulent activities in the management of revenue in the station and directly implicated the petitioner and two other staff in the station. The petitioner conspired with two other staff members to defraud the judiciary by instructing them to alter receipts of fees collected with a promise that he would protect them on account of being connected.
31. The fraudulent activities related to acts of gross misconduct and on the grounds that the petitioner absconded duty without reasonable cause on 24<sup>th</sup> and 25<sup>th</sup> May, 2018; without prior approval the petitioner authorised the construction of a pit latrine at the premises provided by the Ministry of Housing to the High Court and then instructed the payment of ksh.40,000 to the prison officer in charge of inmates of Makueni Prison; despite advice from the procurement officer on the procedures applicable under the Public Procurement Act and Asset Disposal Act the petitioner between January and February, 2017 single sourced for catering services during the launch of Makueni High Court from Kusyombunguo hotel in Makueni and went ahead to conspire to inflate the costs to ksh.300,000 allocated and further ordered the accountant to pay the excess Ksh.32,000 directly to the hotel manager from revenue collection account; and in May, 2017 the petitioner instructed the office to facilitate the team proceeding for judiciary sports day in Nairobi with Ksh.12,000 which officer then asked that the same be paid directly to a participant via MPesa by the offender in Traffic Case No.95 of 2017.
32. Based on the audit report and other acts of gross misconduct by the petitioner the 2<sup>nd</sup> respondent in exercising its constitutional mandate initiated disciplinary proceedings against the petitioner, there was due process and invitation to a hearing where the petitioner attended and defended himself and a decision taken to terminate his employment.
33. The respondents also submitted that the suspension of the petitioner was fair and lawful pursuant to paragraph 17(2) of the Third Schedule of the Judicial Service Act which allows the 2<sup>nd</sup> respondent to suspend an officer against whom proceedings for dismissal have been taken as held in *Judicial Service Commission versus Gladys Boss Shollei & another* [2014] eKLR. there is power to suspend an officer pending disciplinary hearing was held in *Donald C Avude versus Kenya Forest Service* [2015] eKLR and in this regard the JSC is an administrative measure meant to allow the employer conduct investigations and finalise the disciplinary process where an officer in engaged in misconduct as held in *Mary Chemweno Kiptui versus Kenya Pipeline Co, Limited* [2014] eKLR and *Shedd Dennings Simotwo versus Speaker, Narok County Assembly & another* [2015] eKLR.
34. The JSC Act allow the 2<sup>nd</sup> respondent to suspend an officer pending disciplinary proceedings and on conditions of paragraph 17(3) of the Third Schedule to the JSC Act. The petitioner was only entitled to his alimentary allowance and not full pay.
35. The respondents submitted that the disciplinary process leading to dismissal of the petitioner from employment was conducted in accordance with the law. The decision on the guilt of the petitioner was made by the human resource committee and not the whole body of the 1<sup>st</sup> respondent as alleged and



the whole commission ratified the decision of the committee. There was an investigation on the charges made against the petitioner and a report dated 2<sup>nd</sup> December, 2019 submitted to the 1<sup>st</sup> respondent on 6<sup>th</sup> December, 2019 where an appropriate punishment was passed based on findings to charges number 1 and 3 as framed against the petitioner.

36. The alleged discrimination was not proved and there was due process as outlined in the affidavit of Ann Amadi that the petitioner was served with charges against him and given 21 days to reply; the petitioner filed his responses thereof; there was notice for hearing and where the petitioner attended in person; the petitioner was served with witness statements and allowed cross-examination; the petitioner was allowed to urge his defence and in the letter terminating employment he was given reasons and right to representation.
37. The allegations that there are rights violations has no evidence and the reliefs sought should be dismissed with costs. The remedy of reinstatement is not available in a case where there are justified grounds for dismissal as held in Judicial Service
38. Commission versus Gilbert Mwangi Njuguna & another Civil Appeal No.34 of 2016 and Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & others [2014] eKLR.

### **Determination**

39. From the pleadings, the affidavits and written submissions the issues which emerge for determination can be summarised as follows;  
Whether the suspension of the petitioner was lawful;  
Whether there is violation of the constitution and the law; and  
Whether the remedies sought should issue.
40. The suspension of an employee by the employer is an administrative prerogative subject to the purpose being stated together with adherence to the laid down procedural requirements of the contract of employment, policy manual or regulations. In the case of Kenya Plantation & Agricultural Workers Union versus Finlays Horticulture Kenya Ltd (2015) eKLR the court held that;  

Suspension of an employee, within the employment relationship, generally under the common law must have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract. ...
41. In this regard, the petitioner as an employee of the 1<sup>st</sup> respondent and regulated in his employment under the Judicial Service Act was suspended vide letter dated 31<sup>st</sup> May, 2018 and on the grounds that;

### **Re: Suspension**

It has been brought to our attention that you absented yourself from duty without approved leave or reasonable cause on 24<sup>th</sup> May 2018 and 25<sup>th</sup> May 2018 and failed to communicate your whereabouts to your supervisors. ...

It has further been brought to my attention that during your absence you went ahead and requested the Principal Magistrate ... to handle your cause list without informing the head of station.

Additionally following the audit exercise on Revenue, deposits, procurement and Expenditure management of Makueni Law Court for the Financial Year 2016/2017 undertaken by the internal Risk and Audit unit, it has been brought to my attention that on diverse dates during the audited period, while working as head of station in the Makueni Law Court, you together with Mr Onesmus Kyalo and Mr Charles Mutua conspired and ...



Following these actions you are hereby suspended from performance and functions of your duties with effect from the date of this letter since proceedings which may lead to your dismissal are about to be taken. ...

42. The petitioner's case is that such action was unlawful and lacked constitutional basis as no disciplinary proceedings had commenced against him to justify his suspension before he was given a hearing and allowed to defend himself.
43. The petitioner was suspended to allow for disciplinary proceedings which may lead to termination of his employment. He was hence removed from the shop floor pending the conduct of investigations into the stated allegations and disciplinary hearing.
44. Under the Judicial Service Act, the Third Schedule at paragraph 15 provides that;
  - 1) The following disciplinary powers vested in the Commission are delegated to the Chief Justice –
    - a) The power to interdict an officer under paragraph 17;
    - b) The power to suspend an officer under paragraph 18;
    - c) The power to administer a severe reprimand or a reprimand to an officer.
  - 2) The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.
45. Paragraph 17 (2), (3) and (4) of the Third Schedule Act thereof provides that;
  - 2) The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.
  - 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.
  - 4) An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.
46. Further, pursuant to Regulation 26(1) of the Judicial Service Regulations the 2<sup>nd</sup> respondent is given mandate to commence disciplinary proceedings against a judicial officer by setting out the allegations made against such officer;

26 (1) Where the Chief Justice after such inquiry as he 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 his position justify dismissal, he shall frame a charge or charges against the officer and shall forward such 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 himself.
47. The 2<sup>nd</sup> respondent is therefore mandated under the law, Judicial Service Act to suspend an officer for good cause and with regard to an employee of the 1<sup>st</sup> respondent where disciplinary proceedings have



commenced and are likely to lead to dismissal from employment as held in *Bryan Mandila Khaemba versus Chief Justice and President of the Supreme Court of Kenya & another* [2019] eKLR.

48. In this case, the petitioner was made aware of the reasons leading to his suspension and the conditions thereof. He was to remain on nil salary and where such condition was found punitive, the petitioner waited until the end of the disciplinary proceedings and outcome thereof to assert his rights in employment secured under section 17 and 19 of the Employment Act, 2007 and which requires the employer to only deduct, withhold or reduce the wages paid to an employees for a lawful cause as held in the case of *Peterson Ndung'u & 5 others versus Kenya Power and Lighting Company Limited* [2014] eKLR;

... The only case where forfeiture of salary may be justifiable, other than the instances given under the Employment Act and the Labour Relations Act, is where after a disciplinary process, the Employer imposes the sanction of suspension on the Employee. The mutual obligations in the employment relationship become suspended. In effect, the Employee's contract is terminated for a period of time as a disciplinary sanction, during which the Employer has no obligation to continue paying the salary, and the Employee has no obligation to give his labour to the Employer. The Employee is effectively reinstated at the end of the penal suspension. Administrative suspensions however, should not result in the imposition of a pecuniary sanction against the Employee. The administrative suspension should be distinguished from the penal form of suspension.

49. While employment subsists there is no justifiable cause or specific legal provision under the Employment Act 2007 allowing forfeiture of a salary. The practice of the employer in suspending payment of a wage or salary while employment is still running and while the employee is on an administrative suspension has no justification under the constitution or any written law. Such is punitive and lack justification.
50. The Judicial Service Commission Act and the regulations thereof cannot negate the substantive provisions of the Employment Act, 2007 with regard to non-payment of wages without a lawful cause. Such Regulations are only subsidiary to the law.
51. In filing the petition, the petitioner also filed his Notice of Motion seeking various orders and among them the order of reinstatement back to his employment and payment of his wages/salaries and allowances withheld from 31<sup>st</sup> May, 2018 to 19<sup>th</sup> December, 2019. He has since withdrawn this application and opted to prosecute the petition.
52. While employment subsisted and for the period of 31<sup>st</sup> May, 2018 to 19<sup>th</sup> December, 2019 the petitioner is entitled to his pay together with the attendant benefits therefrom. Such payments are due unless these have already been paid to him.
53. On the alleged violations of the constitution and the law, the petitioner was petitioner was dismissed from his employment with the respondent vide letter dated 9<sup>th</sup> December, 2019 on the grounds that;

### **Re: Dismissal From Judicial Service**

Reference is made to the disciplinary proceedings as per the charges and suspension letter by the Hon. Chief Justice dated 31<sup>st</sup> May, 2018.

This is to notify you that the Judicial Service Commission in its meeting held on 6<sup>th</sup> December, 2019 deliberated on your case and after considering your representation, written responses and submissions to the charges and upon evaluating the evidence and information rendered before the JSC Human Resource management



Committee during the disciplinary hearing of your case, was satisfied that grounds of gross misconduct have been disclosed against you in the charges.

...

On the second charge, the commission was satisfied that the evidence led was sufficient to arrive at a conclusion that the alteration of the revenue receipt in the Court station, as pointed out in the audit report, was actualised within your knowledge and authority.

...

On the fourth charge, the Commission was satisfied that contract to the laid down procurement laws and regulations, you single sourced for catering services during the launch of the Makueni High Court.

In respect to the fifth charge, the Commission found that you sanctioned the irregular and improper use of Court fine in the sum of kshs.12000 paid in Traffic case No.95 of 2017 wherein you directed that the same be utilised to facilitate staff attending the judiciary Sports day in Nairobi. ...

54. Unlawful termination of employment occurs where the employer fails to follow the law with regard to procedures set for taking such action. Wrongful termination of employment occurs where the employer fails to follow contractual provisions with regard to termination of employment. a case of unfair labour practice must be anchored under the provisions of the Employment Act, 2007 as held in the case of George Onyango Akuti Versus Security Services Kenya Limited (2013) eKLR, where the court held that;

An unfair termination could be because no notice was given as required by Section 35 (1); no reasons were given or because the employee was not afforded a hearing as required by Section 41 of the Employment Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract...

55. Fundamentally, employment must terminate for a reasonable cause that is genuine and valid pursuant to section 43 and 45 of the Employment Act, 2007.

56. The petitioner submitted that on 31<sup>st</sup> May, 2018 he was suspended from duty. He was issued with statement of allegations made against him. He was allowed time to reply thereto. He was invited before the Judicial Service Commission Human Resource Committee for a hearing and allowed representation by his advocate.

57. There was due process accorded to the petitioner pursuant to sections 35, 47(5) and 41 of the Employment Act, 2007. He was notified of the allegations made, he was allowed to defend himself and he submitted written responses and participated in a hearing where he was informed of his right to representation.

58. On the reasons leading to termination of employment, of the 5 charges levelled against the petitioner, he was found culpable in 3 charges.

59. With regard to the allegations that the petitioner altered revenue receipts and actualised within his knowledge, his defence was that some of the alleged alterations happened before he was head of station. The audit report with regard to the alterations of revenue receipts in Makueni station related to the 2016/2017 financial years.

60. Paragraph 22 of the Petition, the petitioner avers that he was promoted to head station makueni on 10<sup>th</sup> October, 2016. This places him within the audit period and the defences that he was not the only officer responsible in this period is no defence at all. As head of station, the petitioner held responsibility and duty to ensure such malpractices did not occur.



61. With regard to allegations that the petitioner single sourced for catering services during the launch of the Makueni High Court, his defences were that he single sourced from Kusyombunguo hotel in Makueni because he was unable to request for the quotation from the other two available hotels as the station was not funded for the function to which the catering services was needed in advance. Such explanation only serves to implicate the petitioner. As head of station Makueni Law Court and aware of the procedures applicable under the Public Procurement Act and Asset Disposal Act the petitioner failed to comply. His defences cannot stand.
62. With regard to allegations that the petitioner sanctioned the irregular and improper use of Ksh.12, 000 Court fine paid in Traffic Case No.95 of 2017 when he directed the same be used to facilitate staff attending the Judiciary Sports day in Nairobi, his defences were that there was no evidence that he authorised such expenditure and he never interacted with the offender.
63. The charge was with regard to the petitioner authorising the irregular and improper use of court fine in Traffic Case No.95 of 2017. Being the head of station, to sanction the use of court fine without proper authorisation by the Chief administrator of the judiciary was irregular and improper. The defence that there was no evidence and he had never interacted with the offender cannot stand.

Section 43(2) of the Employment Act, 2007 provides that;

- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
64. Termination of employment is lawful where the reasons leading to termination of employment relates to matters that the employer genuinely believed to exist and leading to termination of employment as held in the case of Vincent Nyachibwede v Bob Morgan Services Limited [2018] eKLR.
65. In this case, the respondents/employer has demonstrated they genuinely believed that there were reasonable grounds and sufficient grounds to suspect that the petitioner had committed gross misconduct during his employment as head of station, Makueni Law Courts. Such acts of gross misconduct were substantially detrimental to the respondents.
66. The Court of Appeal in the case of Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR aptly captured the provisions of section 43(2) as follows;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. .... It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.

Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action subject to the requirements of procedural fairness that are statutorily required.



67. On the evidence before court, I find the respondents had a justifiable cause leading to termination of the petitioner's employment. The conduct of the petitioner cannot be justified under the provisions of the Constitution, 2010 or other law.
68. The hearing conducted before the Judicial Service Commission, Human Resources Committee was for and on behalf of the employer, and the 1<sup>st</sup> respondent and the employer received report and recommendations for termination of employment and issued the sanction to the petitioner. The decision to terminate employment is made by the 1<sup>st</sup> respondent. Such cannot be faulted.
69. On the remedies sought, on the findings above, to order reinstatement is not justice on the face of findings that termination of employment was lawful and justified. In the case of Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike, cited above the court held that;
- ... an employer who has reasonable cause to take disciplinary action against an employee and does so with scrupulous adherence to due process and fair, equitable treatment of the employee; and even imposes a normal termination with pay in lieu of notice when it could easily have summarily dismissed the employee reasonably suspected of attempted theft with ample evidence thereof availed, it cannot be right that orders [of reinstatement] such as issued in the instant case be given.
70. Termination of employment is justified and for good cause. The petitioner was taken through the due process of the law.
71. Accordingly, the petition is found without merit and is hereby dismissed; save the salary due for the period of suspension and leading to termination of employment is payable where such has not been received; each party shall bear own costs.

**DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2020.**

**M. MBARU**

**JUDGE**

