



**Gitonga v Judicial Service Commission (Petition 116 of 2018)  
[2019] KEELRC 1752 (KLR) (30 April 2019) (Judgment)**

*Davis Gitonga v Judicial Service Commission [2019] eKLR*

Neutral citation: [2019] KEELRC 1752 (KLR)

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

**PETITION 116 OF 2018**

**HS WASILWA, J**

**APRIL 30, 2019**

**BETWEEN**

**DAVIS GITONGA ..... PETITIONER**

**AND**

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

**JUDGMENT**

1. The Petitioner, Davis Gitonga filed a Petition dated 25/10/2018 and thereafter filed an Amended Petition dated 07/11/2018 against the Respondent, the Judicial Service Commission.
2. He avers that he joined the Judiciary as a DM II Professional vide the letter dated 06/04/2005 and rose to the position of PM serving in different stations within Kenya. That Mombasa was his last station before he was unlawfully, unconstitutionally and unfairly interdicted on 16/11/2015 and dismissed from judicial service and that at the time of his interdiction, he was being paid a gross salary of Kshs. 329,500/=.
3. He further avers that he performed his duties with utmost faith and diligence at all times as evidenced by the findings of the Judges and Magistrates Vetting Board which found him fit to continue serving and was expecting to scale up the ladder in judicial service.
4. He also avers that in his judicial service spanning more than 12 years, he has been a firm believer and defender of the Constitution and a stickler of the rule of law and that his fundamental freedoms as enshrined in the Constitution were denied, suspended, violated and infringed.
5. That he presided over Mombasa Civil Suit No. 974 of 2014: Issa Mganga Mwangunya & Anor – v- Macharia Karango & Another, heard the parties, their witnesses and evidence tendered in Court



- before reserving judgment on 19/08/2015 before the Plaintiff and advocate engaged his Court without involving the other party in an attempt to interfere with the decision of the Court.
6. That he was barely 2 months into his transfer to the Mombasa station and never knew any litigant or advocate and that the said suit had been assigned to his Court administratively. That he stood firm and told them to wait for the judgment to be read and which judgment was then made on 18/08/2015 together with other completed judgments in the lawful cause of his judicial and administrative duties. That the judgment was made on the afternoon of 18/08/2015 which was a day earlier and when the Plaintiff arrived in the morning of the 19/08/2018, he was notified to pick a copy of the read judgment from the registry.
  7. That the Plaintiff's advocate behind the Petitioner's back then started ex parte communication with the office of the Chief Justice, the Ombudsman and that it is notable his letter acknowledged that he had options which they never pursued but wanted the Petitioner punished. That the Plaintiff's advocate hid a very material fact that he had acted for both litigants in a contract that gave rise to the disputed suit herein and that he later opted to act for one party in breach of Advocates' ethics.
  8. That after being given a letter of appreciation for exemplary work of reducing backlog in the Mombasa station, he was shocked to be ambushed with a summary interdiction letter and charge and ordered to leave the judiciary immediately just 5 months after reading the said judgment.
  9. The Petitioner gives a detailed explanation with particulars in his amended petition of how the Interdiction Letter lacked justification and was void for want of compliance with form suspending and violating his rights under the Constitution, the Employment Act, the Judicial Service Act and the Fair Administrative Action Act.
  10. Further, that he was condemned unheard against the rules of natural justice and the audi alteram partem rule and that the Hon. Chief Justice failed to act in good faith by not hearing both sides before interdicting him. That the said interdiction letter disregarded the need for an investigation, drawing and serving of a charge a mandatory procedure under Statute rules and also as against the Judiciary Human Resource Policies & Procedures Manual at D.6 (v) and (vi) was hence procedurally unfair.
  11. He contends that the interdiction was therefore summary in nature as he was never given a chance to defend himself on the matter. He avers that he was simply indefinitely interdicted for 15 months without any notice or good reason or any due process safeguards or adherence to internal policy and that his termination was an abuse of power by the interdicting authority. That the national values and principles of governance under Articles 10(2) B of the Constitution and Article 73 on authority of state officers and guiding principles of leadership and integrity were not adhered to.
  12. He avers that the Respondent was culpable of inexcusable undue delay in determining the disciplinary matter, frustrating his career and subjecting his family to despair and anguish for the said 15 months from 15/11/2016 to 09/02/2017 against his right to administrative action, which is expeditious and efficient.
  13. That after the hearing, the Respondent refused to supply him with the proceedings and detailed report with reasons despite a demand note and that he was also not given a chance to cross-examine persons giving adverse evidence against him as per Section 4(3) (f) and (4) (c) of the Fair Administration Action Act. That his right to access information under Article 35 of the Constitution and Section 9 of the Access to Information Act was thus violated and he was terminated based on his interdiction letter which was not a valid charge.
  14. That further, the Respondent has no jurisdiction to exercise judicial or administrative authority over judges' sittings in Court while rendering judgments and that it thus violated the doctrine of judicial



independence under Article 160(1). That his constitutional right to dignity under Article 19(2) was violated after he was hounded from work and subjected to serious economic hardship and that he is therefore entitled to compensation under Article 23(3) (e) of the Constitution for violation of his rights.

15. The Petitioner prays for the following:-

- 1) A declaration that the purported summary interdiction and eventual dismissal of the Petitioner offended the rules of natural justice, the procedural rules under Section 32 and Regulation 25 of the Third Schedule of the JSA as read with Section 4(1), (2) and (3) of the Fair Administrative Action Act and Article 47 and 236 of the Constitution and hence all consequent proceedings and determinations founded on it are unconstitutional, unprocedural, ultra vires null and void and are hereby set aside.
- 2) A declaration that the decisions, actions, omissions and proceedings of the Respondent and its agents taken or undertaken during the purported interdiction and dismissal of the Petitioner from judicial service violated the rules of natural justice, the constitutional rights of the Petitioner as laid down under Articles 2(4), 3(4), 10(2)(a)(b), 19(2), 21(1), 27(1), 28, 29(d) (f), 35, 41, 47, 73(1)(a)(i)(b)(d), 160(1)(5), 232(c)(e)(f), 236(a)(b), 171(1)(2), 172, Section 41 of the Employment Act, the Fair Administrative Action Act and Section 32 as read with Regulation 25 of the Third Schedule of the JSA and hence all consequent proceedings and determinations founded on it are unconstitutional, unprocedural, ultra vires null and void and are hereby set aside.
- 3) Compensation for the said violation of the Petitioner's rights and fundamental freedoms listed in prayer (2) herein be provided for and such quantum of damages be fairly assessed by the Honourable Court.  
  
3B A declaration that the Petitioner as a judicial officer as envisaged in 160(1) and 160(5) of the Constitution and Section 45 of the JSA, is only subjected to the constitution and the law and enjoyed absolute immunity and protection from personal and adverse actions and victimisation in cause of actions based on an act or omission in good faith (being reading a Court judgment) emanating from the lawful performance of a judicial function and such action was frivolous, vexatious, illegal and unconstitutional.
- 4) A declaration that under Article 236 of the Constitution the Petitioner is the legitimate and lawful holder and remains so of a rank of Principal Magistrate and a mandatory injunction do issue against the Respondent to unconditionally reinstate and deploy the Petitioner to his service with effect from the date of this judgment without any break and loss of salary, benefits and privileges in a similar or equivalent rank/capacity within the judiciary forthwith.
- 5) That the Honourable Court do order forthwith release and payment of the Petitioner's accrued back salaries and arrears as a lump sum forthwith, and with interest as at times of their accrual until full payment as follows:-
  - a) Withheld half salary from 16/11/2015 to January 2017 (Kshs.329,500 x 15 x 1/2) totalling to a gross sum of Kshs. 2,471,250/=.
  - b) Back and accrued salaries as a lump sum from February 2017 until the orders of the Court are fully complied with at a gross rate of Kshs. 329,500 per month until full compliance of Courts orders and directions.



- 6) 12 months gross salary as compensation for unlawful termination of employment (Kshs. 329,500 x 12) = Kshs. 3,954,000/=.
  - 7) An order for compensation for aggravated and exemplary damages.
  - 8) A declaration that a judicial officer does not serve at the pleasure of the Chief Justice and or the Respondent and that he/she must be removed in accordance to due process in the Constitution and the law.
  - 9) A mention date be given to confirm full compliance of Courts orders and further Court directions.
  - 10) The Respondent be condemned to pay the costs and incidental to these proceedings.
16. The Respondent filed its Replying Affidavit dated 28/01/2019 sworn by the Chief Registrar of the Judiciary and Secretary to the Respondent, Anne Amadi who avers that the Petition is shrouded with repetition and fails to specify the constitutional provisions allegedly infringed and how they were infringed.
  17. She avers that the Petitioner dismissed the Plaintiff's abovementioned suit on 15/07/2015 for non-attendance and proceeded to hear the Defendant's Counterclaim ex-parte and that he subsequently reserved judgment on the counterclaim for 05/08/2015. That the Plaintiff's advocate then filed an application to set aside the ex-parte proceedings and consequential orders and the Petitioner being the duty magistrate told them he could not hear the application because there was a pending judgment in the counterclaim.
  18. That on the said 05/08/2015, while the Defendant's advocates were absent in Court, the Petitioner directed that delivery of the judgment would be rescheduled to 19/08/2015 and directed the Petitioner's counsel to serve the Defendant's advocates with the judgment notice. That on the said 19/08/2015, the Plaintiff's advocate then discovered that the Court file in the subject suit had been returned to the registry and an entry made that judgment had already been delivered the previous day in the presence and in favour of the Defendant.
  19. That this decision by the Petitioner was aimed at defeating the ends of justice with an unfair advantage being given to the Defendant therein and that the Plaintiff's advocates then lodged a formal complaint against the Petitioner through a letter dated 25/08/2015 annexed as AA-1.
  20. That the Petitioner exercised his right of reply and communicated his position through the letter dated 21/09/2015 and that in line with statutory authority, the former Chief Justice Dr. Willy Mutunga interdicted the Petitioner on account of the subject suit and his habitual absenteeism. That the Hon. Chief Justice then instituted disciplinary proceedings against the Petitioner by forwarding the framed Charges (annexed as AA-4) accompanied by a brief statement of the allegations to the Petitioner through a letter dated 16/11/2015.
  21. That the Petitioner then responded through a letter dated 30/11/2015 and through the Respondent's Human Resource & Administration Committee, the Petitioner was invited for an oral hearing through a letter dated 10/01/2017. That the committee read the Charges to the Petitioner, all documents relied upon were availed to him and no witnesses testified in his case and that the Report on this oral hearing is annexed as AA-8. That the Petitioner never raised any objection to the manner in which the disciplinary hearing took place and that the Committee then forwarded its report to the Respondent concluding that it had established the grounds of misconduct against the Petitioner.



22. That the Respondent deliberated on the report from the Committee in its meeting held on 09/02/2017 and made a finding to subsequently dismiss the Petitioner from judicial service and further communicated the same to him as seen in the exhibit marked AA-10. That the Respondent thereafter considered the Petitioner's Appeal in its meeting held on 03/07/2017 and consequently disallowed the Appeal and upheld its decision which was also communicated to the Petitioner in a letter dated 13/07/2017.
23. It avers that Regulation 15 of the Third Schedule to the Judicial Service Act delegates to the Chief Justice the power to interdict, suspend and administer a severe reprimand to a judicial officer. That with regards to the disciplinary process, the Respondent was generally guided by Regulations 15-25 of the Third Schedule to the Judicial Service Act and that the Petitioner was bound by Articles 159(2)(a) (b) and (c) of the Constitution in administering justice to all irrespective of status.
24. Further, that it complied with due procedure during the disciplinary hearing and that at no point was the Petitioner condemned unheard. That the Petitioner was also expected to maintain high standards of professional ethics as per Article 232 and the Judicial Service Code of Conduct and that the Petitioner was not impartial when he read the judgment a day earlier. That interdiction is a stage in the disciplinary process and the Petitioner is wrong at looking at it separately and that the assertion it amounted to double jeopardy is unfounded.
25. That it being a part-time Commission, majority of its members are in gainful employment in other state and private offices apart from their sitting having been capped to only 8 per month and that the Respondent has however made efforts to ensure that its processes are expeditious determined. That the constitutional safeguards under Article 160(1) and (5) only extend to intended civil action lodged against judicial officers in the lawful performance of their duties and not to disciplinary action against them. That the right to access information under the Constitution and the Access to Information Act is not absolute and can be limited by any other written law and that it was in the process of supplying requested document to the Petitioner when it was served with this Petition.
26. The Respondent finally avers that the Petitioner cannot be paid accrued salary or be reinstated because a charge of gross misconduct was proved against him and he failed to exonerate him and that his termination was fair. That the Petitioner's requests for costs of this Petition are unfounded in law because the Court is only entitled to refer the Petitioner's disciplinary case back to the Respondent who is the decision maker. That since it has shown that it did not breach any of the Petitioner's rights as alleged, the Petition should be dismissed with costs.

### **Petitioner's Submissions**

27. The Petitioner submits that he exercised his discretion lawfully by virtue of Order 12 of the Civil Procedure Rules when he rendered judgment in the subject suit and even gave written reasons for such a judgment. That it was an honest mistake for him to have read the said judgment a day earlier because he is still human but that it was in lawful performance of judicial duty.
28. Further, that Justice Bosire concluded in the Court of appeal case of Jasbir Singh Rai & 3 others –v- Tarlochan Singh Rai & 4 others [2007] eKLR that allegations of bias should not ordinarily be raised against a judge after judgment in a matter before Court. He cites the case of Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others [2015] eKLR at Par. 78-110 where the Supreme Court majority Rawal, Tunoi, JB Ojwang held that the JSC lacks competence to direct or determine how, or when, (judicial officer) may perform his or her judicial duty, or when he or she may or may not sit in Court.



29. The Petitioner contends that he was further protected by judicial immunity under the Constitution and that it is for the JSC to take caution while exercising its powers under Article 172(1)(c). He also relies on the case of *Kalpana Rawal -v- Judicial Service Commission & 4 others* [2015] eKLR to advance his submissions on judicial immunity and independence of judicial officers.
30. He argues that it is trite law that no natural justice or human right is contravened when there is an option for Appeal or Review as held by the Court of Appeal in *Methodist Church in Kenya Trustees Registered & Anor vs. Rev. Jeremiah Muku & Anor* [2012] eKLR.
31. That it is the Chief Justice who was in breach of natural justice because he condemned him unheard thus violating Section 41 of the Employment Act. That the right to be heard is a mandatory constitutional imperative under Article 47 and 50 incorporating the rules of natural justice and overrides Rule 16 of the Third Schedule to the Judicial Service Act.
32. Further, that the Respondent has misled the Court by alleging that there is a brief statement attached to the charges which is a statutory requirement and the Petitioner invites the Court to peruse the Respondent's Annexure AA-4 to verify the same.
33. It is submitted by the Petitioner that there was no due process due to lack of reasonable notice as per *Ongaya J in Richard Bwogo Birir -v- Narok County Government & 2 Others* [2014] eKLR and that due process cannot exist in an environment where there is abuse of state power and violation of his constitutional rights. That there was also no investigation, hearing and exculpation to the Respondent and that it is trite law that no valid reason can emanate from such an unprocedural process. That the process lacked both substantive and procedural fairness and that such unfairness is a breach of legitimate expectation and unfair labour practices as per *Mbaru J in Reuvel Waithaka Gitahi & 2 others -v- Kenya Revenue Authority* [2016] eKLR.
34. He submits that he has demonstrated contravention of the rules of natural justice and his rights under the Constitution and that the Court in *Kenya Human Rights Commission & another -v- Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR held in para 56 and 57 that:-
 

“if a Petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course...that where there is breach of fundamental rights and abuse of power, this Court has the authority to grant compensation for it by exercising its jurisdiction under Article 23(3)(b) of the Constitution...”
35. The Petitioner herein submits he is entitled to Kshs. 15 Million as fair damages to meet all the heads of damages representing statutory rights, gross violation of the constitution and human rights, national values and principles, together with aggravated and exemplary damages among others.
36. He also seeks reinstatement stating that the judiciary is a large body with hundreds of judicial officers whom he does not report to and that this was similarly held by *Maureen Onyango J in Kisumu ELRC Cause 12/2015: Robin Nyamohanga -v- Judicial Service Commission* [2017] eKLR. As for the claim for back salaries, he relies on the case of *Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers -v- Timber Treatment International Ltd* [2013] eKLR at page 10-11. That he is therefore entitled to costs of the Petition.



## Respondent's Submissions

37. The Respondent submits that Odunga J in Republic –v- Public Procurement Administrative Review Board & 3 others [2017] eKLR in addressing himself as to whether Courts should interfere with the decision-making process of public bodies held that Courts will only interfere with such a decision if it is outside the band of reasonableness. That there is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down by statute are masters of their own procedures.
38. It submits that it accorded the Petitioner a fair hearing and that Lord Denning MR in Selvarajan –v- Race Relations Board [1976] 1 All ER 12 stated that the investigating body is under a duty to act fairly depending on the nature of the investigations and the consequence which it may have on the person affected by it. That it followed the statutory procedure under the Third Schedule to the Judicial Service Act and that the Hansard Report annexed in its list of documents shows how the disciplinary hearing involving the Petitioner. That it thus complied with the requirements under Article 47(1), 50(1) and 236(b) of the Constitution.
39. As to what amounts to inordinate delay, the Respondent cites the case of Utalii Transport Company Ltd & 3 Others –v- NIC Bank Ltd & Another [2014] eKLR where the Court stated that inordinate delay differed from case to case depending on the circumstances, subject matter, nature and explanation given in each case. That Courts should not take the word ‘inordinate’ in its dictionary meaning but in the sense of excessive as compared to normalcy.
40. It is submitted by the Respondent that for a successful claim of breach of legitimate expectation, one must fulfil the requirements outlined in the case of Republic –v- Advocates Disciplinary Tribunal Exparte Apollo Mbbuya [2019] eKLR.
41. That where judicial misconduct is so incompatible with the fundamental terms of the employment relationship then dismissal from judicial office is appropriate as was held in Michael Dowling –v- Workplace Safety & Insurance Board [2004] CAN LII 436 92 and cited in Judicial Service Commission & Gladys Boss Shollei & another [2014] eKLR.
42. The Respondent submits that the amounts in relief sought by the Petitioner are unfounded in law because even if he succeeds in the proceedings herein, this Court cannot oust the jurisdiction of the Respondent and determine the Petitioner’s disciplinary case on its merits. That it would only be entitled to refer the case back to the Respondent as was held in the case of Nkatha Joy Faridah Mbaabu –v- Kenyatta University [2016] eKLR.
43. That the Petitioner has failed to demonstrate how his right to fair labour practices was violated or how his right to human dignity has been infringed and that he cannot also claim accrued salary because gross misconduct was proved against him and he failed to exonerate himself.
44. That the Petitioner cannot be granted the prayer for reinstatement because the employer-employee relationship between him and the Respondent has been strained and that this Court has to consider the merits of this case before awarding reinstatement as was held in the case of Kenya Airways Ltd –v- Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR.
45. I have examined all the evidence and submissions of the Parties before me. The issues for this Court’s determination are as follows:-
  1. Whether the Petitioner herein has laid down his case for breach of his constitutional rights.
  2. Whether the Respondents breached any of the constitutional rights of the Petitioner as alleged.



3. Whether the Petitioner is entitled to the remedies sought.
46. The Petitioner filed this Petition under Articles 10, 19, 20, 21, 22, 23, 73, 160 (1), 5, 162(2)(a), 232, 258 and 260 of the Constitution. He alleges infringement of his rights under Article 47, 41 and 23(1) of the Constitution.
47. In the body of the Petition, the Petitioner avers that his right to fair labour practices was infringed upon under Article 41 of the Constitution in that he was never given a chance to be explained to the allegations in respect of which he was being summarily interdicted hence unfair in all respects.
48. He also avers that he was indefinitely interdicted for 15 months without any good reason and lawful justification or due process safeguards as contemplated under Article 41 and 44 of the Employment Act.
49. The Petitioner also avers that the Respondent did not adhere to its Internal Policy and due process and the mandatory compliance of Section 32 and Regulation 25 (1-11) of the 3<sup>rd</sup> Schedule of the Judicial Service Act and hence it was procedurally unfair.
50. The Petitioner has also submitted that Article 47 of the Constitution that provides for a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was breached coupled with Section 4(1), (2) and (3) of the Fair Administrative Action Act.
51. He avers that there was no notice and particulars before the summary interdiction and that he was not given a chance to be heard before his summary dismissal.
52. He also avers that the Respondent was culpable of inexcusable and undue delay in determining a single disciplinary matter and the process was not expeditious and efficient taking over 15 months in contravention of Section 47 of the Fair Administrative Action Act.
53. In view of what has been set out in the Petition I do find that the Petitioner clearly sets out his case and cites the relevant law purportedly infringed upon by the Respondent. This is as provided for in the *Mumo Matemba vs Trusted Society of Human Rights Alliance* (2013) eKLR and *Anarita Karimi Njeru case* (1999) KLR 154. That settles issue No.1.
54. On issue No.2, the Petitioner has averred that his rights under the Constitution were infringed upon. The Petitioner has averred that he was condemned unheard and subjected to long periods of waiting while on interdiction in breach of clear provisions of the Constitution in Article 41 and 47 of the Constitution.
55. To fully appreciate if assertion by the Petitioner is correct or not, I refer to the Petitioner's initial involvement with the disciplinary process.
56. On 25/8/2015 the firm of Christine Kipsang & Company Advocates wrote to Hon. Resident Judge of Mombasa complaining of the conduct of the Petitioner herein in handling CMCC 974 of 2014. The complaint related to the fact that the Petitioner sitting as a Principal Magistrate and presiding over this case had proceeded to direct he was going to deliver judgement in the case on 19.8.2015 but proceeded to deliver it on 18/8/2015 in the absence of the Plaintiffs represented by the Counsels complaining of the Petitioner's conduct.
57. The Counsel complained that the conduct of the Petitioner brought in his impartiality and needed to be subjected to an inquiry.
58. The letter by Counsel seem to have been placed before the Petitioner by the Hon. Resident Judge of Mombasa as he proceeded to respond in a letter to the Hon. Judge dated 21.9.2015.



59. In the letter the Petitioner admitted to having written the judgement in this case and delivering the same on 18/8/2015 when Counsel for the Respondent inquired of it believing that that was the correct date for delivering the same. He denied any impropriety in handling the matter nor having any close relation with the Parties in the case.

60. On 16/11/2015 the Petitioner received an interdiction letter penned off by the then Hon. Chief Justice Dr. Willy Mutunga stating as follows:-

“Interdiction

The following allegations have been brought to our attention:-

1) In civil suit No. 974 of 2014, heard before you at the Chief Magistrates Court at Mombasa, you issued a ruling that was calculated to defeat the ends natural justice. Specifically the Court ruling was scheduled for 19<sup>th</sup> August 2015 but you went ahead and delivered it on 18<sup>th</sup> August 2015 without notifying one Party. This act seems deliberate as the victorious Party was present on the date you delivered the ruling.

2) You initially absented yourself from office without prior approval from the Chief Magistrate.

Following this action you are hereby interdicted 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 made .....

61. This letter indeed set out two main reasons for which the Petitioner had been interdicted save that the particular dates for which the Petitioner was said to be habitually absent from office without permission were not indicated.

62. The letter did not ask the Petitioner to respond to the allegations. However, on 30/11/2015, the Petitioner wrote a letter to the Chief Justice explaining how he had dealt with Mombasa CMCC 974 of 2014 and why he had been away from duty explaining what had transpired.

63. The Petitioner contends that he was interdicted without any investigation and without being given a chance to present his case. The Petitioner submitted that the Respondent breached its own Internal dictates as provided by the Judicial Service Act. He cited Section 32 and Regulation 25(1-11) of the 3<sup>rd</sup> Schedule of the Judicial Service Act. Section 32 (1) of Judicial Service Act states as follows:-

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

64. The procedure governing the conduct of the said Panel is provided under the Third Schedule of the Judicial Service Act. Regulation 15(1) and (2) of the Third Schedule states as follows:-

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.
65. Regulation 16 of the Third Schedule also provides as follows:-
- 1) “If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.
  - 2) An officer who is interdicted shall receive such salary, not being less than half their salary, as the Commission may by regulations prescribe.
  - 3) Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this Schedule, the whole of any salary withheld under subparagraph shall be restored to them upon the termination of such proceedings.
  - 4) If any punishment other than dismissal is inflicted, the officer may be refunded such proportion of the salary withheld as a result of their interdiction as the Commission shall decide.
  - 5) An officer who is under interdiction shall be required to comply with such conditions as may by regulations be prescribed.(6) For the purposes of this paragraph and paragraph 18 of this Schedule “salary” means basic salary and, where applicable, includes inducements or overseas allowances”.
66. In exercising this discretion to interdict the Petitioner, the Hon Chief Justice was thus properly guided and the letter of interdiction indicated that proceedings which may lead to the Petitioner’s dismissal were being taken.
67. The Petitioner has indicated that the Hon. Chief Justice abused his powers by interdicting him in a manner not justifiable, reasonable and not subject to fundamentals of constitutionalism. This, the Petitioner avers is the position as he was condemned unheard before being interdicted.
68. I do not agree with the Petitioner on this aspect as the law expressly allows interdiction so long as other proceedings that may lead to dismissal are being conducted as was in this case.
69. Interdiction is also not a stand alone disciplinary event. It is part of a chain of disciplinary actions and this process must start somewhere. It would be absurd to expect that the Chief Justice would be so helpless as in a case where he is satisfied that in the public interest, an officer should be interdicted to first keep the officer on duty pending some investigations before an interdiction is meted out.
70. In my view, the action of interdiction in this case was based on some prima facie knowledge and information that there was some misconduct which warranted an interdiction.
71. The Petitioner also submitted that the interdiction letter violated and contravened the Judiciary Human Resource Policies and Procedure Manual. The Judiciary Human Resource Policies and Procedure Manual at Regulation D6 provides as follows:-

“The following principles will be followed when handling disciplinary matters.



- i) Good reason and clear adherence to the disciplinary procedures.
- ii) Actions shall be commensurate to the nature of the transgression.
- iii) Disciplinary action will be demonstrably fair and will be consistent with Procedures laid down in this manual.
- iv) The judicial officer/staff should be made to understand the actions that warrant Disciplinary action. However, ignorance of the required work standards and regulations will not be considered as credible defence.
- v) The judicial officer/staff shall be notified in writing the particulars of the misconduct and be given reasonable opportunity to respond. Judicial officers/staff shall have a right of appeal against any disciplinary Action that may be taken against them and shall be informed of the same.
- vi) An investigation will be carried out including granting the officer/staff a chance to defend him/her.....
- vii) The Judicial officer/staff should be made to understand the actions that warrant disciplinary action ....."

72. The above provisions deal with the entire disciplinary process and does not relate to an event like interdiction in the process. That still leads me to the conclusion that the actions of the Hon. Chief Justice were not unreasonable and unfair in the circumstances as submitted by the Petitioner.
73. After the interdiction of the Petitioner, he was also served with a charge containing the nature of the charges he was facing. The charges were also dated 16/11/2015 and were signed by the Chief Justice. The Petitioner was given 21 days to respond to the said charges. He indeed responded as per his letter dated 30<sup>th</sup> November 2015 denying the said charges.
74. From 2015, the Respondent never communicated to the Petitioner until on the 19<sup>th</sup> January 2017 when he was issued with a letter inviting him to appear before Judicial Service Commission Disciplinary Committee for a disciplinary hearing on 26<sup>th</sup> January 2016 at 9.30 am (Appendix AA6). The letter seemed to have a typographic error and a correction was made vide a letter dated 26<sup>th</sup> January 2017 rescheduling the disciplinary hearing to 30/1/2017.
75. The Respondent have provided the verbatim recordings of these proceedings explaining what transpired during the disciplinary hearing. From the proceedings before Court (Appendix AA8), it appear that the Petitioner knew the charges facing him and had a chance to respond accordingly to all questions put to him and explain his own part of the case.
76. The Petitioner had submitted that he was condemned unheard but I do not agree that he was not heard because the proceedings show he was heard and given an opportunity to respond to the charges against him which he did.
77. The disciplinary committee made its report on the disciplinary hearing to the entire Judicial Service Commission and recommended that disciplinary action should be taken against him for gross misconduct on account of a ruling he issued calculated to defeat ends of justice. The charge of habitual absenteeism was not proved and the Petitioner acquitted against it.
78. From my reading of what transpired in the disciplinary hearing and the decision arrived at after the disciplinary hearing, I do not find it proper to conclude that the Petitioner was condemned unheard nor his rights under Article 41 of the Constitution infringed upon.



79. On the issue of the infringement of Article 47 of the Constitution Article 47 of the Constitution provides 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.
80. Indeed every administrative action should be fair, expeditious, efficient, reasonable, and procedurally fair. This is also true as coupled with Section 4(1), (2) and (3) of the Fair Administrative Action Act which provides as follows:-
- 1) .”Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
  - 2) Every person has the right to be given written reasons for any administrative action that is taken against him.
  - 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-
    - a) Prior and adequate notice of the nature and reasons for the proposed administrative action;
    - b) An opportunity to be heard and to make representations in that regard;
    - c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
    - d) A statement of reasons pursuant to Section 6;
    - e) Notice of the right to legal representation, where applicable;
    - f) Notice of the right to cross-examine or where applicable; or
    - g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
81. In the case of the Petitioner, he was 1<sup>st</sup> interdicted on 16.11.2015. He was then taken through some disciplinary processes which culminated in his dismissal on 9.2.2017. This was about 15 months later from the time of interdiction.
82. The Petitioner submitted that the disciplinary process took long to determine and so his rights under Article 47 of the Constitution were infringed upon.
83. I do agree with the Petitioner that a disciplinary process that takes 15 months to handle is long, coupled with undue delay and painful to the employee who has to wait with uncertainty on the date that awaits him.



84. This breaches the requirement of Article 47 of the Constitution to have the administrative process handled expeditiously and in the evidence it turns out to be unfair as justice delayed is justice denied.
85. Other than this breach, under Article 47 of the Constitution, I do not find any other breach of the Petitioner's rights under the Constitution.
86. Given my findings above, I find that the remedies sought by the Petitioner alleging violation of his labour rights is not suitable. Having however found that he was subjected to slow disciplinary action process taking 15 months and having found that his right to an expeditious hearing was infringed upon, I will award him damages for this breach to the tune of 1 million Kshs.
87. The Respondent will pay costs of this Petition.

**DATED AND DELIVERED IN OPEN COURT THIS 30<sup>TH</sup> DAY OF APRIL, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Okemwa for Petitioner – Present

Kubai holding brief Karani for Respondent – Present

