



**Mutoka v Judicial Service Commission (Judicial Review 24 of 2017)  
[2019] KEELRC 1459 (KLR) (17 May 2019) (Judgment)**

*Rosemelle Anyango Mutoka v Judicial Service Commission [2019] eKLR*

Neutral citation: [2019] KEELRC 1459 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW 24 OF 2017**

**NJ ABUODHA, J**

**MAY 17, 2019**

**BETWEEN**

**ROSEMELLE ANYANGO MUTOKA ..... APPLICANT**

**AND**

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

**JUDGMENT**

1. By a chamber summons dated 28<sup>th</sup> September, 2017 the applicant sought in the main an order of certiorari to remove into this Honourable court and quash the decision of the respondent made on 9<sup>th</sup> February, 2017 and confirmed on 13<sup>th</sup> July, 2017 dismissing the applicant from judicial service. The application was supported by the statutory statement and the applicant’s verifying affidavit in which she deponed on the main that: I was employed in the Kenya Judiciary with effect from 01.09.1986 in the capacity of District Magistrate II (Prof). I rose through the ranks to the rank of Chief Magistrate in a career spanning slightly over 30 years. Throughout my tenure of service in the Kenyan judiciary, I have never been subject to a disciplinary cause save for:
  - a. My subjection to the Vetting exercise by the Judges and Magistrates’ Vetting Board which was a constitutional/statutory exercise affecting all judicial officers who were in office as at 27.08.2010; and
  - b. The proceedings that are the subject of the present application. Like all other judicial officers who were serving as at 27.08.2010, I was subjected to the vetting process that was undertaken by the Judges and Magistrates’ Vetting Board. One of the complaints that I had to



confront before the Vetting Board was by an advocate known as Daniel Mathuva. The hansard of the Board of 13<sup>th</sup> February 2013 captures Mr Mathuva in the following words:

“ ... I remember Madam Mutoka at one time wanted to become a High Court Judge and the Law Society of Kenya had asked lawyers - members if they had any information concerning her and the Mombasa Branch, the Coast Branch - in fact specifically Madam. Mercy Ndeche, the advocate who was for the Defendant in this case called me to tell me that they are giving that information about her conduct during my case to the Law Society of Kenya because she was applying to become a judge and they were asking me as a branch, whether I am comfortable with that and I told them, ‘that is the truth, you saw what happened, you were for the Defendant not for the Plaintiff, please pass that information to the Judicial Service Commission.’

That I verily believe that there in the proceedings before the Judicial Service Commission that are the subject of the present application, there was a lack of requisite impartiality since, Madam Mercy Deche subsequently sat in the proceedings of the panel and was part of the decision that eventually recommended my from the service Judiciary. The process leading to my dismissal from the service of the judiciary in Kenya was thus tainted by the fact that Madam Mercy Deche was an undisclosed complainant in the proceedings of the Judicial Service Commission leading into the impugned decision. On 20<sup>th</sup> March 2013, the Judges and Magistrates Vetting Board delivered a determination that I was Unsuitable to continue serving as a magistrate citing delays in Nairobi Criminal Case Number 2729 of 2003 - Republic Vs Charles Ndungi Mungai & 2 Others and temperamental issues in Mombasa CMCC No. 1954 of 2009 - Ruth Mueni Mativo suing on behalf of the Estate of Benjamin Nzei Mativo Vs Kanji Aunali Gulamamabassi & Another. By its decision on application for review delivered on 24<sup>th</sup> March 2016, the JMVB overturned its earlier determination on the following grounds:

- a. There were errors apparent on the face of the record on the question of delay;
- b. The magistrate had expressed remorse over the issue of delay;
- c. The magistrate had tendered reasonable justification for the delay;
- d. The magistrate had had an almost impeccable and illustrious career.

On 22.01.2014, the Hon the Chief Justice, Dr Willy Mutunga (as he then was) wrote to me scheduling a meeting for me to shed light on the whereabouts of certain files that were allegedly missing. It is important to point out that this was after the decision of the Vetting of Judges and Magistrates Board of 20.03.2013 but before the decision of the said Board on review made on 24.03.2016. For all practical purposes, my day to day engagement with the judiciary had been impaired and getting data from the respective registries on the missing files was not as easy as it would have been if I was actively serving and operating from within the judiciary. At this meeting, the issue revolved around files from the following court stations:

#### Mombasa Law Courts

- a. CMCC No. 2090/07 - Stephen Blanchet Vs Nathan Co Ltd & Anor
- b. CMCC No. 1555/03 Manson Hart K Ltd Vs Patrick Mwangangi K
- c. CMCC No. 2387/ 09 Danson Mwazo Vs Elustone Mwasela
- d. CMCC No. 2347/10 Municipal Council of Ms a Vs Mfaki Bin KOmbo



- e. CMCC No. 2393/ 09 Allan O Madungu Vs Margaret Otieno
- f. CMCC No. 3500/07 MITcheal C Freight K Ltd Vs Benson Muange T/A Frabel Farm Produce
- g. CMCC No. 1708/08 LUDilla DAVydova Vs Patrick Charo & Another
- h. Tr No. 4833/05 Rep Vs Kinoti Victor Muriithi (Nairobi)
- i. CR No. 2124/ 06 Rep Vs David Kuria Waiyaki
- j. CR No. 2655/09 Rep Vs Christine Katumbe Maingi
- k. CR No. 2437/ 07 Rep Vs Julius Katana KIthi
- l. AC No. 3/ 07 Rep Vs Francisco NgutaKaoli

#### Kiambu Law Courts

- a. CMCC No. 1355/96
- b. CMCC No. 300/03
- c. CMCC No. 306/2007
- d. CMCC No. 181/2001
- e. CMCC No. 111 / 04
- f. CMCC No. 263/2003

#### The Mombasa Law Courts Files

That in the course of these proceedings I contacted the archivist Mombasa vide email dated 18.02.2015 requesting him to check for the twelve files. Vide email dated 19.02.2015, the said archivist informed me that he had indeed retrieved all the 8 civil case files on the list. The following day, 20.02.2015 the archivist informed me by telephone that he had found all the criminal case files listed as missing. Of concern was that one of the listed files, CR No. 2124/06, had different parties from those appearing on the list and the same had, in fact been handled by a different magistrate, the Hon T. Mwangi and judgment in the matter had been delivered even before I was transferred to Mombasa Law Courts. The only case file that the archivist did not trace was Anti- Corruption Case No. 3 of 2007 which he explained that the register for anti-corruption cases was missing and had been missing for over a year. He could not therefore trace the movement of the file. What surprised me was the explanation by the archivist to me that at no time had anyone asked him (the archivist) to check for the said files and that I was the first person to do so. Which begs the question, what was the basis of the conclusion that these files were missing to prompt the inquiry by the then Chief Justice? It is instructive to note that Mombasa CMCC No. 2393/09 Allan O Madungu Vs Margaret Otieno had been a subject of the proceedings at the Vetting of Judges and Magistrates Board which proceedings had, in the final analysis, vindicated me. I verily believe that further consideration of this matter and punishing me for the same amounts to double jeopardy. I had served at the Kiambu Law Courts for seven (7) months when I was abruptly transferred to the Judicial Training Institute (JTI) by the then Chief Justice Hon Evan Gicheru. On 24.03.2016, the Judicial Service Commission invited me for a hearing - which strangely stated that this was a hearing of my appeal - to be held on 11.04.2016. Following a simultaneous finding of SUITABLE to continue serving in the judiciary, I visited the Registrar in charge of Magistrates for my posting and



to my consternation, the said Registrar informed me that he had instructions from the JSC not to post me pending the conclusion of the issues set out in the Show Cause Letter above. It was, therefore curious, that in an informal discussion between me and the Chief Registrar of the Judiciary after one of my appearances before the JSC panel/ Human Resources Management Committee, that the same Registrar had informed her (the CRJ) that I had refused to be posted. This turn of events solidifies my conviction that the failure by the panel to grant me right to be present when witnesses appeared before the panel adversely affected me since the said witnesses may have given false testimonies to the panel to incriminate me and save their own skins in the process. Following my appearance before the JSC Human Resource Management Committee on 11.04.2016, everything official went quiet until 19.01.2017 when the JSC sent another letter requiring me to appear before the Human Resource Management Committee “for the oral hearing” of my disciplinary case. The hearing was scheduled for 24.01.2017. On 09.02.2017, the Judicial Service Commission conveyed its decision dismissing me from Judicial Service with effect from 09.02.2017.

2. The respondent through its Secretary who is also the Chief Registrar of the Judiciary, Anne A. Amadi respondent in the main as follows:
  1. That the ex-parte Applicant appeared before the Judges and Magistrates Vetting Board on 13<sup>th</sup> February 2013. The Board made a determination on 20<sup>th</sup> March 2013 that the ex-parte Applicant was unsuitable to continue serving as a Magistrate. The Board inter alia made a finding that she had delayed in delivering several judgments and her lack of concern despite several complaints on the delays was callous. A copy of the Judges and Magistrates Vetting Board’s determination is at pages 45-58 of the ex-parte Applicant’s verifying affidavit.
  2. That, the ex-parte Applicant filed an application for review dated 8<sup>th</sup> April 2013 against the Judges and Magistrates Vetting Board’s decision. The application is at page 87 to 98 of the verifying affidavit. By a decision delivered on 24<sup>th</sup> March 2016 the Judges and Magistrates Vetting Board allowed the application for review and set aside the initial determination of unsuitability of the ex parte Applicant to continue serving as a Magistrate. The decision is at page 267-270 of the ex-part Applicant’s verifying affidavit.
  3. That, after the Judges and Magistrates Vetting Board allowed the ex parte Applicant’s review, continued to earn a full salary and allowances but did not report back to Isiolo Law Courts for a period of more than three (3) years.
  4. That, by a letter dated 22<sup>nd</sup> January 2014, the Chief Justice informed the ex-parte Applicant that he had received complaints that some of the court files she had . handled in Mombasa, Nairobi and Kiambu law courts were not available at the respective court registries. The Hon. Chief Justice requested the ex-parte Applicant to call on his office on 28<sup>th</sup> January 2014 to shed more light on the whereabouts of the missing court files. Now produced and marked ‘AAA-7’ is a true copy of the letter dated 22<sup>nd</sup> January 2014.
  5. That, Mr. A.W. Wakasiaka the executive officer of Mombasa Law Courts by an undated letter to the Office of the Ombudsman gave the list of files that had been handled by the ex-parte Applicant that were pending rulings and judgments. Now produced and marked ‘AAA-8’ is a true copy of the letter to the Office of the Ombudsman.
  6. That, by a letter dated 13<sup>th</sup> February 2015, the Chief Justice issued the ex-parte Applicant with a Notice to Show Cause why she should not be punished severely for gross misconduct. It is instructive to note that in the Show Cause letter the Chief Justice refers to the undertaking



given by the Ex Parte Applicant that she would liaise with the respective court clerks to establish the position of each missing file and its availability.

7. That, the ex-parte applicant was granted fourteen (14) days to respond to the Notice to Show Cause. The ex-parte Applicant submitted her response by a letter dated 25<sup>th</sup> February 2015. Now produced and marked 'AAA-10' is a true copy of the letter dated 25<sup>th</sup> February 2015.
8. That, by a letter dated 8<sup>th</sup> March 2016, the Judicial Service Commission informed the ex-parte Applicant that it had deliberated on her disciplinary case and resolved that she appears before the Judicial Service Commission Human Resource Management Committee for an oral hearing of her case. Now produced and marked 'AAA-11' is a true copy of the letter dated 8<sup>th</sup> March 2016.
9. That, by a letter dated 24<sup>th</sup> March 2016, the Respondent invited the ex-parte Applicant for a disciplinary hearing on 11<sup>th</sup> April 2016. Now produced and marked 'AAA-12' is a true copy of the letter dated 24<sup>th</sup> March 2016.
10. That the hearing proceeded before the Judicial Service Commission Human Resource Management Committee on 11<sup>th</sup> April 2016 with the Applicant in attendance. At the hearing, the charges were read to the Applicant and she was asked to respond to the allegations. Now produced and marked 'AAA-15' is a true copy of the minutes of the Respondent's Human Resource Committee meeting held on 11<sup>th</sup> April 2016.
11. That, at the hearing the Applicant responded to the Charges as follows;
  - a) On failure to deliver judgments and rulings, the ex parte Applicant stated that she had written and concluded the judgments and rulings in all the matters. She however admitted that she was not able to deliver some of the judgments and rulings in Mombasa because there was need to first issue judgment and ruling notices to the parties. The ex parte Applicant confirmed that she left the pending files in her office as she proceeded for further studies in the U.S.A with the belief that any other officer in the station could deliver the judgments on her behalf.
  - b) That upon her return to the country in 2012, she was posted to Isiolo Law Courts and she was not informed that the judgments she left in Mombasa had not been delivered.
  - c) That she was surprised later when the Chief Magistrate Mombasa forwarded some files to her indicating that the judgments had not been delivered.
  - d) She stated in her evidence that she had returned the files with judgments but retained three (3) files where the vetting board had raised complaints against her. She confirmed that one of the files led to her being vetted out from serving in the judiciary.
  - e) She testified that all the files she was handling from Mombasa were returned and not a single file was missing. She claimed that there was a problem with the register for anti-corruption cases based on the information she was given by an archivist at the Mombasa Law Courts. She denied that Mombasa Anti-Corruption No. 3 of 2007 was missing as alleged. She testified that the office of the Judiciary ombudsman was not coordinating with the archivist in Mombasa to trace the files.
  - f) She testified that she did not date the judgments she returned to Mombasa because they were still awaiting to be delivered.



- g) She testified that she had a meeting with the Chief Justice to explain about the missing files in the matters she handled while at Kiambu Law Courts and gave an undertaking to trace the files.
  - h) She testified that she left Isiolo Law Courts without carrying the files and that she was under the presumption that the files she left on her desk would be sent back to Mombasa. She testified that the alleged missing Mombasa Traffic Case No. 4833 of 2005 was a non-existent file and was a number that had been cited in the absence of an actual file in existence.
  - i) On the missing files she handled in Kiambu Law Courts, she testified that she left Kiambu due to threats on her security and could not go back to the station. She testified that she had agreed to co-ordinate with the Head of Station Kiambu to have the files reconstructed.
  - j) She denied knowledge of any letters by parties complaining about delayed judgments.
12. That the Respondent's Human Resource Committee made the following recommendations;
- a) Before discussing and analysing the evidence the committee recommended that it required to establish whether there were any handing over reports by the ex parte Applicant at Mombasa, Kiambu and Isiolo Law Courts;
  - b) That it was important to establish from the Mombasa Traffic Case Register whether Mombasa Traffic Case No. 4833 of 2005 is an existent matter or a fictitious case;
  - c) That pending conclusion of the disciplinary process, the ex parte Applicant should immediately assist in the reconstruction of the missing files of the matters she had handled at Kiambu Law Courts to enable the parties proceed with their cases.
13. That, by a letter 19<sup>th</sup> January 2017, the Respondent invited the ex parte Applicant for the hearing of her disciplinary case on 24<sup>th</sup> January 2017. Now produced and marked 'AAA-13' is a true copy of the letter dated 19<sup>th</sup> January 2017.
14. That, the ex-parte Applicant appeared before the JSC Human Resource Committee on 24<sup>th</sup> January 2017 but the disciplinary hearing was adjourned. Now produced and marked 'AAA-14' is a true copy of the Hansard report dated 24<sup>th</sup> January 2017.
15. That, the following witnesses testified during the ex-parte Applicant's disciplinary hearing;
- 1. Mr. Martin Wainaina was the ex-parte Applicant's court clerk while she was stationed at Kiambu Law Courts. He produced an extract from the Kiambu Law Courts diary showing that the files in the subject matter of the investigation were with the ex-parte Applicant and that had been scheduled for judgment on several occasions between 24<sup>th</sup> October 2008 and 10<sup>th</sup> December 2008.
  - 2. Mr. John Njoroge an Executive Officer at Kiambu Law Courts testified that the files under investigation were not at the registry at the Kiambu Law Courts and that the last entry on the diary was that the files were with the ex-parte Applicant. He further testified that he had received complaints from lawyers and litigants over the delay of delivery of judgments in the files under investigation.
  - 3. Mr. Peter Mulwa the Registrar Magistrate's Court produced a letter from Hon. Charity Oluoch, seeking directions on the subject files since the judgments were



pending and the files were missing from the Registry and the lawyers and litigants had demanded communication on the outcome of their cases. The witness testified that the issue of missing files had been a subject of a meeting convened by the retired Chief Justice Willy Mutunga, in which the witness was present together with the ex parte Applicant, Hon. Bidali and Mr. Duncan Okello- the Chief of Staff at the office of the Chief Justice. The meeting took place after the issue of missing files and delayed judgments was referred to the Chief Justice by the Registrar Magistrates Court and the Judiciary Ombudsman. The ex parte Applicant agreed that the files were missing and proposed to have the files reconstructed.

4. Mr. Aggrey Wakasiaka who was the Executive Officer at Mombasa Law Courts produced a letter marked as annexure 'AAA-8' above addressed to the office of the Ombudsman regarding the judgments and rulings pending before the ex-parte Applicant. He confirmed that the files referred to in the letter were the same files listed in the letter by Hon. Justice Riech to the ex- parte Applicant. He also confirmed that he physically looked for the files but did not manage to trace them. Now
5. Mr. Nicholas Kaindi who was an archivist at the Mombasa Law Courts testified that the ex-parte Applicant gave him a handwritten letter addressed to the Executive Officer forwarding four (4) files that were pending judgments and rulings.
6. Mr. Amos Makuba who was the ex-parte Applicant's clerk while stationed at Mombasa Law Courts testified that the ex-parte Applicant had some judgments for delivery which had been delayed.
7. Hon. Justice Stephen Riechi a former Chief Magistrate at Mombasa Law Courts testified that he stumbled upon some files in the cabinet in his office when he took over as the then Chief Magistrate from the ex-parte Applicant at the Mombasa Law Courts and noted that the matters were previously handled by the ex-parte Applicant and were pending judgments. He called the ex- parte Applicant and they agreed that the files should be sent to her at the Isiolo Law Courts to enable her write the judgements.
16. Mr. Simon Wasilwa who was the ex-parte Applicant's court clerk in Nairobi Law Courts confirmed that he was aware of one file where the ex-parte Applicant had not delivered judgment.
17. That, the evidence given by all the witnesses confirms that the issue of missing files was only referred to the Commission after all attempts to resolve the matter administratively in the interest of the public and the litigants affected proved futile.
18. That, after the oral hearing of the ex-parte Applicants and the witnesses, the Judicial Service Human Resource Committee made a finding that the charges on delayed judgments and rulings and missing files had been proved against the ex parte Applicant.
19. That, the Judicial Service Human Resource Committee in its report established that the ex-parte Applicant failed to perform her duties in an efficient and competent manner as required by the Judicial Service Code of Conduct and Ethics and breached her constitutional duty of ensuring that justice is delivered without delay as required under Article 159 (2) of the Constitution.
20. That, such conduct went to the core of the Exparte Applicant's duty as a magistrate and the same amounted to dereliction of duty, negligence, lack of competence and diligence in discharge of her duties.



21. That, in a meeting held on 9<sup>th</sup> February 2017, the Respondent deliberated on the ex-parte Applicant's disciplinary case, representations and the evidence presented before the Judicial Service Commission Human Resource Committee during the disciplinary hearing. The Respondent made a finding that it was satisfied that the grounds of gross misconduct, incompetence and wilful negligence had been proved against the ex-parte Applicant in all the charges.
  22. That, a reading of the Hansard report demonstrates that the ex-parte Applicant's disciplinary hearing was conducted procedurally, reasonably and fairly. The ex-parte Applicant was informed of the allegations of gross misconduct against her in the Notice to show Cause letter dated 13<sup>th</sup> February 2015.
  23. That, the ex-parte Applicant was given an opportunity to submit her response to the charges and allegations of gross misconduct and was also given an opportunity to appear before the Judicial Service Human Resource Committee for an oral hearing of her disciplinary case. Further, the ex-parte Applicant was informed of the reasons for the Respondent's decision for dismissal by way of letter dated 9<sup>th</sup> February 2017.
  24. That, further in response to paragraph 3.1 of the Statutory Statement, the Respondent considered that some missing files at the Mombasa law courts had been traced but that alone could not exonerate the ex-parte Applicant as other files were still missing and judgments on the same had not been delivered therefore occasioning a miscarriage of justice to the affected litigants.
  25. That, in response to paragraph 3.2 of the Statutory Statement, the Respondent in arriving at its decision to dismiss the ex-parte Applicant from judicial service did not consider Mombasa CMCC No. 2329/2009 Allan O. Mandungu vs. Margaret Otieno as the ex-parte Applicant demonstrated that the complaint regarding that file had been raised before the Judges and Magistrates Vetting Board and a determination made.
  26. That, it is a practice adopted by the Respondent that in arriving at its decision on whether to dismiss a judicial officer, it does not consider issues that were already determined by the Judges and Magistrates Vetting Board if the judicial officer was found suitable to continue with judicial service. The Respondent in arriving at its final decision therefore excluded from its consideration, complaints in respect of Mombasa CMCC No. 2329/2009 Allan O. Mandungu vs. Margaret Otieno and therefore the claim of double jeopardy does not arise.
  27. That, in response to paragraph 3.3 of the Statutory Statement, the allegations of bias are unfounded. Any decision made by the Respondent is arrived at through consensus as provided for in section 22 (7) of the Judicial Service Act. The allegations of bias against Commissioner Deche as a member of the Respondent's Human Resources Management Committee are unfounded and should be dismissed.
  28. That, further, the ex-parte Applicant did not raise any complaint of bias against any member of the Respondent's Human Resource Committee during her disciplinary hearing and did not request that Commissioner Deche should recuse herself from sitting in the disciplinary hearing. The allegation of bias is therefore an afterthought.
3. In submissions in support of the application Ms Magiwa for the applicant submitted that the respondent in reaching the decision to dismiss the applicant failed to take into account relevant



- considerations that is to say the letter conveying the decision to dismiss the applicant did not take into account the detailed written explanations regarding the cases in question. That the files that had been found by the judiciary archivist at Mombasa were not taken as satisfactory explanation.
4. Counsel further submitted that there was double jeopardy concerning Mombasa CMCC No 2392 of 2009 Allan O. Mandugu Vs Margaret Otieno which was part of the showcause letter that formed the basis of the applicant's dismissal had been a subject of the proceedings at the vetting board which in the final analysis vindicated the applicant. Further consideration of this matter and punishing the applicant for the same amounted to double jeopardy.
  5. Counsel further submitted that one of the members of the Judicial Service Commission Human Resources Management Committee before which the applicant appeared had been mentioned as having instigated complaints against the applicant before the Vetting Board it followed that the said member remained an undisclosed complainant against the applicant. Her participation in the proceedings that culminated in the applicant's dismissal effectively vitiated the entire process.
  6. Counsel further submitted that this was in total violation of rule 24(5) of the 3<sup>rd</sup> schedule to the JSC Act in that the applicant was not given an opportunity of being present when any of the witnesses in her case were called. She was therefore not given an opportunity of putting question's to any of the witnesses that were called by the panel. Ms Magiwa further contended that the applicant was not supplied with documentary evidence that was used against her in the proceedings. This was contrary to rule 23(2) of the 3<sup>rd</sup> schedule to JSC Act which requires that such evidence be provided.
  7. Concerning the decision to dismiss, Counsel submitted that this was the most drastic remedy available under the JSC Act since it presupposed that the applicant was totally incorrigible in her judicial conduct. Taking into account the applicant's length of service in the Judiciary as well as the applicant's career growth and contribution to the Judiciary the decision to dismiss was too harsh in all the circumstances of the case.
  8. Counsel further submitted that there was incongruence between the charge and the determination. That is to say, the applicant was called upon to confront and deal with allegations of missing files particularly in respect of Mombasa yet her dismissal was on allegations of delayed judgements. The issue of delayed judgements had been considered by the Vetting Board and the Board found the explanation given by the applicant credible.
  9. The respondent on its part submitted that it followed the laid down procedures to the letter. According to counsel a reading of the hansard report demonstrated that the applicant's disciplinary hearing was conducted procedurally, reasonably and fairly. She was duly informed of the charges against her, served with a notice to showcause and accorded an opportunity to attend an oral hearing of her case. Ms Muga further submitted that it considered the explanations tendered and the fact that some missing files at Mombasa law Courts had been traced but that alone could not exonerate the ex-parte applicant as many other files were still missing and judgement on the same not delivered therefore occasioning miscarriage of justice to litigants.
  10. Regarding double jeopardy, counsel submitted that the applicant was not subjected to double jeopardy in arriving at the decision to dismiss her from service. According to counsel the respondent did not consider the issues that were already determined by the Vetting Board. The disciplinary process was independent of the vetting process and that the respondent only investigated and considered the charges in the notice to showcause. It was the respondent's contention that Mombasa CMCC No. 23291 of 2009 Allan O. Mandugu Vs Margaret Otieno although particularized in the Notice to showcause was excluded by the respondent's HR Committee in arriving at its final decision.



The committee only considered cases from Mombasa Law Courts where the applicant had written judgements but undated them and were delivered by other magistrates on various dates.

11. On the issue of bias with respect to one of the members of the HR Committee, counsel submitted that these allegations were unfounded and further that the applicant did not identify which member of the respondent's HR Committee who was allegedly biased against her. Further the applicant never raised any complaint on her apprehension of bias before the Committee during the hearing hence the allegation was an afterthought. In support counsel cited the case of *Eckervogt Vs British Columbia* where it was held that if during the course of proceedings a party apprehends bias he should put the allegation to the tribunal and obtain a ruling before seeking court's intervention. Ms Mugo further submitted that the decisions by the respondent are arrived at through consensus as provided under section 22(7) of the JSC Act.
12. On the question of procedural impropriety counsel submitted that the witnesses that gave viva voce evidence during the disciplinary hearing were called upon by the JSC HR committee to shed more light on the issue of missing files and delayed judgements. According to Counsel these witnesses were not the applicant's accusers or complainants but judicial staff who had previously worked with the applicant and who had been mentioned by the applicant during the disciplinary hearing in relation to the missing files and delayed judgements. Counsel further submitted that every administrative body is the master of its own procedure. The object is not to import into administrative proceedings the rigidity of the requirements of natural justice that must be observed by a court but rather allow administrative bodies to work out a system that is flexible and adapted to their needs and fairness.
13. On the question of denial of access to information, counsel submitted that the respondent provided the applicant with all the information one required and that she had not proved that she wrote any letter requesting for any information and that the request was denied. Regarding allegations of incongruence between the charges and allegations of misconduct. Counsel submitted that the notice to show cause letter of 9<sup>th</sup> February, 2015 was in tandem with reasons for dismissal provided in the dismissal letter of 9<sup>th</sup> February, 2017 hence there was no incongruence between the charge and the determination as alleged.
14. Concerning the purview of judicial review counsel submitted that as was held in the case of *Pastoli Vs Kabale District Local Government Council* [2008]J2EA 300 in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. According to Ms Mugo the ex-parte applicant did not demonstrate that the decision to dismiss her from service was illegal, irrational and tainted with procedural impropriety. On the contrary the respondent has demonstrated that the entire process was fair, rational and complied with laid down procedures. Counsel in support relied on the case of *Republic Vs Secretary TSC exparte Stephen Muthengi* [2013] eKLR where it was stated that Judicial Review was about the decision making process and not the merits of the decision. Once the court finds that the decision making process was in accordance with the law and in compliance with principles of natural justice, then the court should down its tools.
15. Having summarized the pleading and submissions in this matter as above, the issues which stand to be decided in order to resolve this dispute present themselves to me as follows: (a) was there double jeopardy? That is to say did the respondent in reaching a decision to dismiss the applicant from Judicial Service consider the same matters and issues as the Vetting of Judges and Magistrates Board (VJMB) which had vindicated the applicant? (b) was there procedural impropriety on the part of the Respondent's Human Resource management Committee in that did the Committee deny the applicant the right to confront her accusers and evidence against her? (c) If the above questions are resolved in favour of the applicant what is the appropriate order to make.



**(a) Double Jeopardy**

16. The applicant complained that the respondent in reaching the decision to dismiss her from service took into consideration matters which were subject of the proceedings at VJMB which had in the final analysis vindicated her. The applicant for example singled out Mombasa CMCC No 2393 of 2009 Allan Mandugu Vs Margaret Otieno. The respondent denied this allegation and stated that this case was excluded from its deliberations and eventual decision to terminate the applicant's service.
17. The court has perused the decision of the VJMB found from pages 50 to 58 of the applicants bundle of documents and more particularly at page 55 and noted that charges against the applicant concerned Nairobi CM Criminal case No 2729 of 2003 Republic Vs Charles Ndungi Mungai and Another, Mombasa CMCC No 2794 of 2009 Diamond Trust Bank Vs Inter Trans Express Line Limited and 2 Others and Mombasa CMCC No 2393 of 2009 Allan Odunga Madagu Vs Margaret Atieno Ogutu T/ A Kassel Luxury- Coach & Rapid Kafe Services. The common complaint in these three matters against the applicant before the VJMB was that she heard them and at the time of filing the complaint against her before the Board she had not delivered the judgements in respect of these files.
18. The Board in its review decision dated 24<sup>th</sup> March, 2016 (page 268 of applicants bundle of documents) observed as follows:

“The magistrate was found unsuitable on two main grounds. One of causing delay in delivery of judgement in a criminal case and the other was on grounds of temperament where it is alleged she refused to take evidence of a litigant on grounds that the litigant was stinking.

It is submitted that there is an error apparent on the face of the record where the determination holds that the Magistrate failed to write the judgement even after the issue of delay was brought to her attention by JSC. It is averred that the issue of JSC bringing the issue to her attention never arose at the vetting interview and she was never given an opportunity to respond to it.

The Board confirms that indeed the issue never arose and reference to it in the determination was an error apparent on the face of the record. Counsel submitted that the Board had treated the Magistrate unequally as in earlier cases a Judge who had 284 outstanding Judgements stretching back to periods of over eight years in some instances had been permitted to continue to serve. The Magistrate states that it is unfair discriminatory and harsh to find her unsuitable on the ground of one unfinished judgement. The magistrate states that she explained the circumstances arising from her being out of the country and the later misplacement of the file. The Board finds that it had earlier critiqued her attitude to the delay which it found deplorable. The Board however in light of the decision made in relation to the Judge who had 284 outstanding Judgments is willing to give the magistrate an opportunity to remedy the same. The Board also notes that the Magistrate has expressed remorse over the delay and explained that it was not intentional and tendered reasonable justification for the delay”.

19. The main reason for which applicant's service was terminated by the respondent was over delayed judgements. This was the selfsame issue for which the applicant was initially vetted out but later reinstated on account of the reason among others that the Board had in previous case permitted a Judge found to have had 284 pending cases stretching back to periods of over eight years, to continue in service. In order to avoid perception of being discriminatory the Board allowed the applicant to continue in service and granted her an opportunity to undertake remedial action. The board further



- noted that the applicant had expressed remorse over the delay and explained that it was not intentional and tendered reasonable justification for the delay.
20. The court has carefully perused the charges against the applicant as framed by the respondent and the material in support of those charges. The court has further considered the detailed response provided by the applicant over the charges and the thematic issue remain delayed judgements. The hearing before the respondent's HR Committee constituted albeit more elaborately, a rehearing of the issues before the MJVB and for which the applicant was granted a second chance to undertake remedial action.
  21. The applicant was issued with a show cause letter on 13<sup>th</sup> February, 2015 while the decision on review was still pending before the VJMB. The notice for disciplinary hearing was issued on 24<sup>th</sup> March, 2016 a day after the decision of the VJMB on the applicants review application in which the Board recalled its decision declaring the applicant unsuitable to serve. The disciplinary hearing proceeded nonetheless on 11<sup>th</sup> April, 2016 and the claimant once more called upon by the respondent's HR Committee to respond to accusations of missing files and delayed judgements.
  22. From humanitarian point of view one cannot help but feel the emotional and mental strain the applicant must have gone through defending herself over selfsame allegations against her and over which she successfully defended herself and offered what the VJMB described a remorseful and justifiable explanation. Whereas the mandate of the respondent include exercising disciplinary powers over magistrates, the VJMB was a special body created to inquire into and assess the suitability of serving Judges and Magistrates to continue in service. To that extent the Board momentarily took over the discipline function over Judges and Magistrates from the respondent. The respondent therefore could not try and find differently on the same facts or issues that were directly or indirectly in issue before the VJMB. To this extent the applicant was right to complain of double jeopardy. It is a sound principle of criminal justice which applies in equal force in these circumstances that a person cannot be tried and convicted on the same facts over which he or she has been previously convicted or acquitted (*autre fois acquit, autre fois convict*).
  23. On the first issue of double jeopardy, the court finds and holds that in trying the applicant afresh and too soon over the same issues she had just defended herself on and was granted a new lease of life to take remedial action by VJMB, the respondent subjected the applicant to double jeopardy.

#### **(b) Procedural Impropriety**

24. Counsel for the applicant complained that she was denied the right to confront her accusers and evidence against her. According to counsel the applicant was not given an opportunity of being present when any of the witnesses in her case were called. Further she was not given an opportunity of putting questions to any of the witnesses that were called by the Committee.
25. In response to this submission counsel for the respondent submitted that the judicial officers who were invited, were called to shed more light on the issue of missing files and delayed judgements. According to counsel they were not the applicant's accusers or complainants but judicial staff who had previously worked with the applicant and who had been mentioned by her during the hearing in relation to allegations of missing files and delayed judgements.
26. Section 24(5) of the Third Schedule to JSC Act provides:
  - (5) "If witnesses are examined by the Committee or Panel the Officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto".



27. The respondent does not seem to deny it never afforded the applicant the opportunity to cross-examine the various judicial officers called by the respondent's committee to shed light on the issue of the missing files and delayed judgements which was the only charge the applicant was facing and for which she was eventually dismissed. All the respondent stated was that the judicial officers concerned were not the applicant's accusers or complainants.
28. The applicant gave her version of the story in response to the charges against her. According to her some of the files stated as missing were actually concluded while others had judgements written but not delivered by her colleagues when she left for US for further studies. The law clerks and executive officers including Hon Justice Riechi who back then was a Chief Magistrate in Mombasa in their testimony before the Committee reacted to the applicant's account over what happened to the files which were claimed by the respondent to be missing or concluded but judgements delayed or not delivered.
29. The sum total of their evidence was that indeed the files stated as missing or having delayed judgements were with the applicant or rather she was responsible for their whereabouts. This information was used by the respondent's HR Committee in its deliberations and eventual recommendation that the applicant's service be terminated. This was crucial evidence which it was only fair to be adduced in presence of the applicant and or her legal representative and given an opportunity to question the witnesses.
30. Rule 24(5) of the Third Schedule to the JSC Act cited above is quite clear on this requirement hence it was erroneous for the respondent's committee on HR not call for the presence of the applicant or her representative when the Judicial Officers gave their testimony. Counsel for the respondent contended that failure to accord the applicant an opportunity to cross-examine witnesses could not be deemed to amount to procedural unfairness. In support he relied on the case of JSC Vs Justice Mbalu Mutava & Another. The court is however of the view that this decision is distinguishable from the present case. In the Mutava's case, the learned Judge complained that he was not given an opportunity to cross examine witnesses on three charges from which the JSC never exonerated him and over which a recommendation was being made to the President to form a Tribunal to inquire further and make its recommendations.
31. The court informed the learned Judge that he would have an opportunity to examine these witnesses once the Tribunal is formed and they were called to give evidence. The role of JSC process as it were at that stage was some sort of sieving process and analytical of the allegations against the Judge. If not satisfied that the complaint's met the required threshold for recommending a Tribunal to be formed to investigate further, the allegations would be dismissed and the matter ends there.
32. In the case before me, the respondent's HR Committee was the final decision making organ. Their recommendation to the respondent was on whether the officer concerned is found culpable or not. If culpable they recommend appropriate sanction to be handed down to the officer. There is no more opportunity for the officer to interact with the evidence adduced save for an appeal against the decision if adverse.
33. Failure to afford the applicant an opportunity to cross-examine the witnesses was therefore contrary to section 24(5) of the 3<sup>rd</sup> Schedule to JSc Act and amounted to procedural unfairness contrary to article 47(1) of the constitution and section 4(1) of the Fair Administrative Action Act.
34. The court having found as above concerning the decision of the respondent to terminate the applicant's service, the issue that needs to be addressed at this point is the appropriate remedy to grant under the circumstances. This question can be readily answered by simply stating that the applicant is under the circumstances entitled to an order of certiorari to remove into this court and quash the



decision of the respondent made on 9<sup>th</sup> February, 2017 and confirmed on 13<sup>th</sup> July 2017 dismissing the applicant from Judicial Service. However before that is finally done, the court would for avoidance of doubt, like to comment briefly on the scope and nature of judicial review orders especially as concerns employment and labour relations matters. There was the argument by counsel for respondent that judicial review is concerned only with the process of decision making and not the decision itself. However a review of decisions in this area# seem to reveal a rapid paradigm shift from this traditional view. The court of Appeal in the case of Suchawan Investment Ltd Vs the Ministry of National Heritage & Culture and Others has stated as follows:

“...Traditionally, Judicial review is not concerned with the merits of the case. However, section 7(2) (1) of the Fair Administrative Action Act provides for the proportionality as a ground for statutory Judicial review.... the test for proportionality leads to a greater intensity for review than the traditional grounds. What this means in practice is that consideration of the substantive merits of the case play a much greater role. Proportionality invites the court to evaluate the merits of the decision....In our view consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review application..”

35. In the old English case of Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation [1947] 2 All ER 680 at page 683 Lord Greene M. R. observed as follows:

“Theoretically it is true to say and in practice it may operate in some cases- that, if a decision on a competent matter is so unreasonable that no authority could ever come to it, then the courts can interfere”

36. The two authorities are among several which show that Judicial Review is no longer only concerned with the procedural dynamics of decision making but also the merit of the decision itself. In this particular case the applicant is justified in attacking the merit of the decision to terminate her service and the court does have power to entertain the arguments on the merit of the decision and if persuaded as the case here quash that decision.

37. In conclusion the court hereby issues an order of certiorari quashing the decision of the respondent made on 9<sup>th</sup> February 2017 and confirmed on 13<sup>th</sup> July, 2017 dismissing the applicant from Judicial service.

38. As I conclude and if my advice be sought and I say in obiter that being an employment relationship matter, reinstatement can be ordered but in the context of section 49 of the Employment Act. The section enjoins the court before making an order of reinstatement to consider the practicability thereof and the common law principle that there should be no order for specific performance in contract for service except in very exceptional circumstances.

39. This case presents itself to me as a possible case of exceptional circumstances contemplated under section 49 of the Act however, I do not have jurisdiction to make those orders since the application before me was a Judicial Review application and remedies thereunder does not include reinstatement. All I can do and which I have already done is to quash the flawed decision dismissing the applicant from Judicial Service. The parties are free to re-engage or mutually separate in accordance with the contractual document between the parties if such a separation is the best option it has to be done in accordance with the constitution, the law and rules of natural justice.

40. It is so ordered.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY, 2019**



**ABUODHA J. N.**

**JUDGE**

**DELIVERED THIS 17<sup>TH</sup> DAY OF MAY, 2019**

**ABUODHA J. N.**

**JUDGE**

In the presence of:-

.....for the Claimant

.....for the Respondent.

