



**Ochenja v Judicial Service Commission (Petition 146 of 2018)  
[2019] KEELRC 1344 (KLR) (14 June 2019) (Judgment)**

*Daniel Mudanyi Ochenja v Judicial Service Commission [2019] eKLR*

Neutral citation: [2019] KEELRC 1344 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 146 OF 2018  
HS WASILWA, J  
JUNE 14, 2019**

**BETWEEN**

**DANIEL MUDANYI OCHENJA ..... PETITIONER**

**AND**

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

**JUDGMENT**

1. The Petitioner filed this Petition herein through the firm of Okemwa & Company Advocates on 20/12/2018 seeking enforcement of his fundamental rights and damages for violations thereof.

**Facts of the case:**

2. The Petitioner was engaged by the Respondent in 1993 as a Magistrate on permanent and pensionable terms and rose through the ranks to the position of Acting Chief Magistrate.
3. He avers that he served in various ranks in different stations of the Judiciary across the country and Milimani Chief Magistrate's Court was his last station. He avers that he performed his duties with utmost faith, fidelity to the law and diligence as evidenced by the outcome and findings of the Judges and Magistrates Vetting Board, which found him suitable to continue serving.
4. He avers that he was the Presiding Magistrate in Milimani Chief Magistrate's Court Criminal Case No. 1367 of 2014 as the Plea Court. Counsel for the accused in the matter wrote a letter to Court for change of Plea which letter was placed before the Petitioner for directions. The Petitioner directed that the matter be placed before his Court on 31<sup>st</sup> October, 2014, for change of plea.
5. That on the material day the Petitioner was informed by his Court Clerk that the file was missing from the Court Registry and he instructed him to check for the file as he went on to preside over his Court.



- That while the Court was in session, a Skeletal file was opened without his knowledge and the same was placed before him which was sneaked into Court by the Court Clerk, one Mr Okoth.
6. He avers that when he realised that the file, was a skeletal file, he adjourned the Court proceedings and summoned one Ruth Nyaga an officer in charge of registry who confirmed that she instructed Catherine a Registry Assistant to open the file.
  7. That after the change of plea, the Court duly convicted the accused and an application was made that the cash bail be converted into fine, which the prosecution had no issues with. However, 5 months down the line when he was served with an interdiction letter, the Petitioner learnt upon inquiry that the original cash receipt for bail could not be converted as fine by the accounts for unknown reasons.
  8. The Petitioner further avers that he was only discharging his duties as the matter before him was a fresh matter which he handled urgently during the week in which he was administratively in charge. The charges before him were incorrect and subjective but the Chief Justice did give him any hearing and the Respondents also ignored his explanations.
  9. He contends that he was on leave when he was interdicted and no one bothered to call him to seek an explanation or statement before being summarily dismissed.
  10. He avers that his interdiction was unlawful and unconstitutional as the Respondent it condemned him summarily violating his rights under Article 47, 50, 160(5), and 236 of the Constitution in particular that:-
    - a. It condemned the Petitioner unheard in a summary manner and it suspended the rules of natural justice.
    - b. The Respondent did not act in good faith and listen fairly to both sides before imposing adverse sanctions.
    - c. The summary interdiction letter suspended Article 41 which guarantees the right to fair labour practices.
    - d. The said interdiction letter dispensed with due process and protection enjoyed by the Petitioner under Article 236, which states that a Public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with this constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.
    - e. The said letter suspended and disregarded the need of an investigation, drawing and serving of a charge and consideration of right of exculpation by the Chief Justice as mandated by regulation in compliance of Section 32 of the Judicial Service Act hence procedurally unfair.
    - f. That such letter contravened the Judiciary Human Resource Policies and Procedures Manual hence unfair.
  11. The Petitioner also contends that his interdiction was tainted by procedural impropriety by failing to observe Rules that are laid down in legislative instruments by being escalated mysteriously and through a shortcut suspending all mandatory rules. That the charge was void for lack of accompanying statements as required by the mandatory rules of the empowering statute.
  12. He also avers that even before the hearing, the process was a nullity, unlawful and unconstitutional by failure to institute and commence disciplinary action within a reasonable time, it was not expeditious



and efficient as it took over 26 months to conclude in contravention of Article 47 of the Constitution and Section 4(1) of the Fair Administrative Action Act.

13. It is also his contention that after the hearing the Respondent failed to supply him with the proceedings, denied him an opportunity to cross-examine his accuser and it did not act transparently in the whole process.
14. That the mandatory statutory procedure for discipline of a judicial officer was not adhered to and therefore the process was flawed. He states that the Respondent breached Article 160(5) by condemning him for acts done in good faith and in the lawful performance of his judicial function.
15. He contends that the interdiction letter being tainted with illegalities and errors of law, the same could not confer jurisdiction to the Respondent to hear him and any subsequent proceedings based on it are unconstitutional, null and void.
16. Based on the foregoing violations the Petitioner prays for the following:
  1. A declaration that the purported summary interdiction and charge (without a hearing) of the Petitioner offended the strict and mandatory rules of Natural Justice, Section 41 of the Employment Act, Article 41, Article 47 of the Constitution as read with Section 4(1), (2) and (3) of the Fair Administrative Actions Act, and Article 236 of the Constitution and was therefore; illegal, ultra vires, unprocedural, unfair and unconstitutional null and void ab initio and are hereby condemned, revoked, quashed and or set aside and the consequent proceedings and determinations founded on the interdiction and charge suffer the same fate.
  2. That the impugned charge was void, defective, ultra vires and a nullity for non-conformity to the strict and mandatory statutory requirement as laid down under regulation 25(1) of the 3<sup>rd</sup> Schedule of the JSA being without an accompanying statement, and in so far as it purported to sanction a lawful judicial order conduct of the Petitioner the same was without jurisdiction/excess of jurisdiction, unconstitutional, ultra vires, null and void hence all consequent proceedings and determination were a none stator and without foundation and are hereby set aside and quashed.
  3. A declaration that the proceedings as conducted by the Respondent were procedurally unfair as the 1<sup>st</sup> Respondent violated its constitutional and statutory role strictly confirmed under Article 171 (2) to deal in a manner confirmed by statute under Section 32 (3) of the JSA, as read with Regulation 25(1-11) of the Third Schedule of the JSA as read together with Section 4(1), (2) and (3) (6) of the Fair Administrative Action Act and Article 47 and Article 236 of the Constitution, the rules of natural justice hence the proceedings and consequent determinations were unconstitutional, ultra vires, null and void ab initio and are hereby condemned revoked, quashed and or set aside.
  4. A declaration that the Respondent's acts jointly and severally were in gross abuse of the National values principles under article 10(2) and Chapter 6 of the Constitution, Principles of Public Service under article 232 and principle of natural justice and therefore unconstitutional and a nullity.
  5. A declaration that the Petitioner as a judicial officer as envisaged in Article 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 emanating from the lawful



performance of a judicial function and such action was illegal and unconstitutional, null and void ab initio.

6. A declaration that the Respondent and its agents violated the Petitioner's right to work as envisaged under Article 23(1) (2) (3) of the Universal Declaration of Human Rights and constitutional right to fair labour practices under Article 41 of the constitution of Kenya.
7. A declaration that the Respondents jointly and severally breached the constitutional rights and freedoms of the Petitioner under Article 27(1), Article 28, Article 29(d) and (f); Article 35, Article 41, Article 47 and Article 236 (a) and (b) the Petitioner be compensated a sum of Kshs.10,000,000 and or whatever sum the Honourable Court may deem just and reasonable to award.
8. A declaration that under Article 235 of the Constitution, the Petitioner is still the legitimate and lawful holder and remains a legitimate and lawful holder of a rank of Acting Chief Magistrate and a mandatory injunction do issue against the Respondent to unconditionally reinstate and deploy him with effect from the date of the judgment to her service without any break and loss of salary, benefits and privileges in a similar or equivalent rank/capacity within the judiciary forthwith.
9. That the Honourable Court do order forthwith release and payment of the petitioners accrued back salaries and arrears as a lump sum forthwith, and with interest as at times of their accrual from 22<sup>nd</sup> April, 2016 until full payment and a mention date be given to confirm full compliance of the Court's orders and directions as follows;  
  
Accrued salaries during the interdiction
  - a) Kshs. 297,141(gross) x 26 months x ½ = Kshs. 3,862,833/=.
  - b) Kshs. 297,141.70/= per month from 8<sup>th</sup> February 2017 until full compliance with the Honourable Court's judgment.
10. Twelve (12) months' gross salary compensation for unlawful termination of employment or as the Honourable Court shall deem fair and just to break the ceiling.
11. The Respondent be condemned to pay the costs and interest of incidental to these proceedings.
17. The Respondent filed a Replying Affidavit opposing the Petition wherein they state that sometimes in November, 2014, the JSC received a complaint against the Petitioner to the effect that the Petitioner had, in collusion with other Court Registry Officials caused a skeleton file to be opened on 31<sup>st</sup> October, 2014 in respect to Nairobi Criminal Case No. 1367 of 2014 Republic versus Abdullahi Mohaud Igal.
18. That the said Nairobi Criminal Case No. 1367 of 2014 involved a case where the accused, a British National had been charged with being in possession of passports which he could not properly give an account of contrary to section 54(1) (d) of the Kenya Citizenship and Immigration Act, 2011.
19. That the accused was charged on 23<sup>rd</sup> September 2014 in Court no. 6 at Milimani and had pleaded not guilty to the charges whereupon he was remanded for 3 days at the request of the prosecution at Industrial Area Remand Prison by Hon. Hannah Wamuyu Kaguru who was the Presiding Magistrate of the said Court 6.
20. The magistrate directed that the matter be mentioned before her for the purpose of confirming the status of the investigations by the prosecution and consideration of the issue of bail. The matter was



mentioned and the magistrate directed that the accused be released on a cash bail of Kshs. 200,000/= and slated the matter for hearing on 13<sup>th</sup> November, 2014, before the same Court.

21. That before the said hearing date, the Accused's Advocates wrote a letter requesting that the file be mentioned for the purposes of changing plea that the accused had taken. The letter from the accused's advocates was received in the registry and the Petitioner marked it for mention on 31<sup>st</sup> October, 2014, before another court No. 2, the Petitioner's Court.
22. That on 30<sup>th</sup> October, 2014, Hon. Hannah Wamuyu of Court No. 6 called for the file from the registry to be brought to her chambers which she retained in chambers contrary to set down procedures relating to the handling of Court files. That a case against the said Magistrate is the subject of a separate cause in ELRC No. 9 of 2018.
23. The Respondent avers that the Petitioner in total disregard of standard practice ordered that a skeleton file in respect of Nairobi Criminal Case No.1367 of 2014 be opened contrary to standard practice and walked out of Court and proceeded to Chambers.
24. While in Chambers, the Petitioner proceeded to deal with the matter in respect to change of plea with no quorum as his Court Clerk one Mr. Okoth was not in Chambers at the time when the matter was mentioned. Further that the change of plea was taken in the absence of the accused person.
25. That the Petitioner fined the accused person Kshs. 50,000/= for each of the four counts that the accused person had been charged with and converted the Kshs. 200,000/= cash bail previously paid by the accused person into fine. That that was irrespective of the fact that the cash bail could not be converted without the Petitioner having the benefit of seeing the file copy of the receipt of cash bail.
26. That on account of the complaint above the Chief Justice in accordance with Regulation 15, 16 and 25 of the Third Schedule to the Judicial Service Act, proceeded to interdict the Petitioner as disciplinary proceedings were about to be taken out against the Petitioner.
27. That the Petitioner by a letter dated 18.11.2014, responded to the issues raised in the letter of interdiction dated 12<sup>th</sup> November, 2014. Additionally the Chief Justice wrote to the Law Society of Kenya seeking information from the Advocates who represented the accused person who explained the same by a letter dated 3.12.2014.
28. That in order to commence proceedings the Chief Justice on 22.4.2015, framed charges against the Petitioner which charges were forwarded to the Petitioner to respond within twenty one (21) days. The Petitioner responded to the charges by a letter dated 3.5.2015 which response was considered by the Chief Justice and found that the Petitioner had failed to exculpate himself.
29. That the Respondent did not violate the Petitioner's judicial immunity as the allegations which were raised against the Petitioner and which formed the basis of his dismissal related to:-
  - a. Colluding with the Registry staff in opening a skeleton court file when they knew the whereabouts of the file. This was done with a view to engaging into corrupt activities.
  - b. Proceeding to make an order to have the accused person's cash bail converted to a fine without the original Court receipt.
30. That the Respondent followed due process in effecting the Petitioner's termination and further denies violating the Petitioner's constitutional rights or flouting any provisions of statute as alleged in the Petition as such, that the Petition lacks merit and ought to be dismissed.



### **Claimant's submissions**

31. It is submitted that there was no justifiable reason to dismiss the Petitioner as the Respondent has admitted to know who hid the file and action was taken against them. That the reason of the Petitioner failing to exculpate himself does not hold any water.
32. That the charge against the Petitioner was patently, incompetent in form and incurably defective, invalid, and void in want of specificity and of particulars contrary to rule 25(1) of the 3<sup>rd</sup> Schedule of the Judicial Service Act.
33. That his constitutional rights were violated as set out in his pleadings and as such the Court ought to allow the Petition. They cite the case of Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 it held that:-

“...Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability the administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.....”

34. The Petitioner further submits that due process in the process leading to his termination was not followed. He cites the Court of Appeal in County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, per 76 where it was held:-

“Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.”

35. As a result of loss of loss of employment in the manner set herein the Petitioner prays for the Petition to be allowed with costs.

### **Respondent's submissions**

36. The Respondent submits that the Court does not have jurisdiction to retry a case that was before it and cite the Court of Appeal Decision in Judicial Service Commission Vs Gladys Boss Shollei & Another (2014) where Okwengu JA, prescribed the limits of the Court in cases of this nature and said:-

“...the determination of the Respondent's Petition by the learned judge called for the interrogation of the process leading to the termination of the Respondent's employment with a view to determining the procedural fairness, reasonableness and legality of the Appellant's action in light of the Respondents constitutional right to a fair hearing, and right to fair administrative action... The Respondents complaint... questioned the procedural fairness and legality of the process. Therefore, it was not the merits of the



Appellant's decision, or the merit of the allegations made against the Respondent that were in issue, but the procedural fairness, legality of the process and the reasonableness of the Appellant's decision. The questions that needed to be addressed included the nature of the process subject of the Respondent's complaint, the jurisdiction of the Appellant in the process, and the application of the constitutional provisions relating to a fair hearing and right to administrative action".

37. They also rely on the South African Labour Appeal Court case of Nampak Corrugated Wadeville Vs Khoxa (JA14/98) (1998) ZALAC 24 where it was held:-

“A Court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the Court would have imposed the sanction imposed by the employer but whether in the circumstances of the case the sanction was reasonable.”

38. It is also submitted that the disciplinary process leading to the termination of the Petitioner from employment was conducted in accordance with law for the reasons that:-

1. The Petitioner was served with an interdiction letter which outlined the grounds of interdiction.
2. The Petitioner was accorded an opportunity to respond to the issues raised in the interdiction letter.
3. The Chief Justice made an informed decision to institute dismissal proceedings against the Petitioner after due consideration, including the petitioner's response to the interdiction letter.
4. The Chief Justice framed the charges against the Petitioner and subsequently forwarded the same to the Petitioner to respond within twenty one (21) days.
5. The Petitioner responded to the charges levelled against him but failed to exculpate himself.
6. The Petitioner was subsequently invited for the hearing.
7. The Petitioner's evidence was considered together with evidence from the other witnesses and a decision made by the Respondent”.

39. It is submitted that administrative bodies are masters of their own procedure and in the instant case the Respondent is guided by the Constitution, the Judicial Service Act and the schedules therein and the Fair Administrative Actions Act. That the overall requirement for an administrative body to frame the charges with sufficient details to be responded to, notify the accused person, give them an opportunity to be heard before an impartial and unbiased tribunal and communicate the decision arrived at as was held in the case of Republic Vs Commission on Administrative Justice, Ex parte Stephen Gathuita Mwangi(2017) eKLR.

40. On the allegation that the Petitioner was not provided with sufficient details of the charges against him it is submitted that the right to access information is not absolute as was held in the Supreme Court case of Njonjo Mue & Another vs Chairman Independent Electoral Commission & Others (2017)eKLR. That providing documents to aggrieved judicial officers, Section 23(2) Part IV of the 3<sup>rd</sup> Schedule to the Judicial Service Act is a legitimate restraint.

41. On the complaint on not being able to cross examine his accuser they submit that the hearing envisaged for disciplinary bodies does not have to be oral as was held in the Court of Appeal decision of Kenya Ports Authority Vs Fadhil Juman Kisuuswa (2017)eKLR.



42. Furthermore that no evidence has been set before the Court on how the failure to cross-examine witnesses vitiated the process.
43. The Respondent contend that the disciplinary process was timeous and expeditious noting that the commissioners of the Respondent work on a part time basis and therefore that 26 months is not a long period to conclude the process.
44. That judicial immunity does not protect officers who engage in acts of gross misconduct which are in clear violation of the law as was stated in the case of Dennis Mogambi Mong'are vs Attorney General & 3 Others (2014)eKLR where the Court of Appeal held:-
 

“...Independence on the part of the Judge is not absolute and whenever allegations of impropriety, breach of ethics, misconduct, arbitrariness, corruption or neglect of duty arise, decisional independence is not a shield... A judge can also be liable if he acts maliciously and without reasonable and probable cause.”
45. It is also submitted that in the conduct of the disciplinary process, the Petitioner’s fundamental rights with the right to dignity, the right to equal protection of the law and the right to legitimate expectations were not violated and as such he is not entitled to the remedies sought.

**Determination**

46. I have examined all the averments and submissions of both Parties. The issues for determination are as follows:-
  1. Whether the disciplinary process leading to the dismissal of the Petitioner was conducted in accordance with the law.
  2. Whether the disciplinary process was timeous and expeditious.
  3. Whether the Petitioner can plead Judicial Immunity as a defence to his actions.
  4. Whether the Respondent breached any rights of the Petitioner under the Constitution as pleaded.
  5. What remedies to grant in the circumstances”.

**(1) Disciplinary process**

47. The Petitioner has submitted that the disciplinary process he was subjected to was flawed. The Petitioner has averred that he was interdicted by the Hon. Chief Justice without being given any hearing.
48. He contends that after 26 months on interdiction, he was summoned to appear before the Judicial Service Commission to give evidence. He however avers that the case took a turning point when the Judicial Service Commission carried out other proceedings in his absence and behind his back and adopted documents and proceedings and interviewed witnesses after he had left.
49. The Respondent presented before Court the disciplinary proceedings the Petitioner was subjected to. Part of the proceedings relate to proceedings held on a date that is not indicated where the panel sitting to hear the complaints against the Petitioner was held. A witness one Mr. Okoth Were was present and he explained what he witnessed in relation to Criminal Case No. 1367 of 2014 presided over by the Petitioner.



50. There is no indication that the Petitioner was present or had an opportunity to cross-examine the said witness who gave adverse evidence against him and in his absence.
51. The Petitioner has submitted that indeed, he was condemned in his absence and the witnesses testified adversely against him and he had no chance to cross-examine them.
52. Rule 25(5) of the 3<sup>rd</sup> Schedule of the Judicial Service Act states as follows:-
- “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 witness and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto”.
53. From the proceedings referred to the Petitioner was indeed prejudiced as a witness testified against him and he had no opportunity to cross-examine the said witness. This breached the express provisions of the above stated rule 25(5) of 3<sup>rd</sup> Schedule of Judicial Service Act.
54. Section 4(3) and (4) of the Fair Administrative Action Act states as follows:-
- 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.
- 4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-
- a) attend proceedings, in person or in the company of an expert of his choice;
  - b) be heard;
  - c) cross-examine persons who give adverse evidence against him; and
  - d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
55. The above provisions of the law buttress the contention by the Petitioner that he was unfairly and unjustly condemned as witnesses testified in his absence and he had no opportunity to cross-examine them.



56. Article 47 (1) of the Constitution also provides that:-

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

57. The Petitioner also submitted that the Respondent relied on documentary evidence against him, which they never brought to his attention.

58. The Respondent have submitted that the Petitioner colluded with registry staff and opened a skeleton file and proceeded to make adverse orders illegally.

59. The Respondent in paragraph 62 of their Replying Affidavit state that:-

“.....Judicial Service Commission conducted separate disciplinary proceedings regarding the issue herein. Indeed most of the proceedings herein were on account of the matters that the Judicial Service Commission was investigation in respect to other judicial officers implicated in the same matter.....”.

60. It is in respect of this averment that the Petitioner allege unfairness as he was never given the reports alleged nor copies of the proceedings referred to. The Court proceedings in this criminal case have also not been produced before this Court for this Court to ascertain the allegations made against the Petitioner.

61. Indeed this also flouts the provisions of Section 4 (3)(g) of the Fair Administrative Action Act which states as follows:-

“(g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

62. It is therefore my finding from the explanation above that the disciplinary process leading to the dismissal of the Petitioner was not conducted in accordance with the law.

63. Other than the process itself, the Petitioner submitted that the charges levelled against him were not valid. He submitted that on the charge of none conversion of cash bail, this was not brought to his attention for remedial and that the state did not lose any cash.

64. The Petitioner also submitted that the charge of improper reconstitution of the Court file was also proper as he was the duty officer and had jurisdiction over the matter. He avers that the reconstruction was done with the consent of the Parties – the DPP and the Defence.

65. The factors surrounding the reconstruction of the skeleton file and the matter of conversion of cash bail into fine were subject to the disciplinary hearing and the witness who testified one Mr. Okoth testified in absence of the Petitioner. This evidence was not tested in cross-examination.

66. The same evidence of Mr. Okoth was contradicted by the evidence of the Counsel who represented the accused person in the criminal case. It cannot be conclusively stated that the wrongdoing on Petitioner’s part was therefore conclusively established in this matter.

## **(2) Delay in the disciplinary process**

67. The Petitioner has submitted that he was subjected to a tedious 26 months of waiting while on interdiction before the disciplinary process was conducted.



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

### **(3) Judicial immunity**

72. The Petitioner has also pleaded that he has judicial immunity against the charges levelled again him. The Petitioner contends that his rights under Article 160(1) and 5) and Article 172(2)(1)(c) and Section 45 of Judicial Service Act were infringed upon.
73. The Petitioner averred that he acted in good faith and expedited justice within his jurisdiction in the lawful performance of his duties as a duty Court.
74. The Petitioner cited Justice Kalpana H. Rawal vs Judicial Service Commission & 3 Others (2016) eKLR where the Supreme Court held that the Chief Justice has administrative guidance of the Court which must be directed to matters of case management and Court administration but should not refer to the exercise of the judicial function itself.
75. The Petitioner also cited Justice Kalpana Rawal vs Judicial Service Commission and 4 Others (2015) eKLR in which a 5 Judge bench of the High Court also emphasized the independence of a Judge when presiding over a case and cannot be subject to control of anyone except in cases of certain administration facts which the Chief Justice may consider as the Head of the Judiciary.
76. Article 160(5) of the Constitution also states as follows:-
- “(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function”.
77. Section 45 of the Judicial Service Act states as follows:-
- 1) “A member, the Chief Registrar, Registrar or judicial officers or a member of staff of the Commission shall not be liable to any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith as a member, Registrar, judicial officer or member of staff of the Commission.
  - 2) A member of the Commission or the Chief Registrar shall not be liable to arrest under civil process while participating in any meeting of the Commission or of any Committee thereof.



- 3) A person who appears before the Commission shall not, whether such appearance is in pursuance of any summons by the Commission under this Act or not, be liable to any criminal or civil proceedings, or to any penalty or forfeiture whatsoever in respect of any evidence or information given to the Commission by such person”.
78. Indeed all the cited law point to the fact that “Registrar or Judicial Officer or Member of the Commission shall not be liable to any civil action or suit for or in respect of any matter or thing done or omitted to be done in good faith.....”
79. The Respondent avers that whereas that is the law, the action of the Petitioner was not done in good faith but was done with a bad motive and in a corrupt way.
80. I have already discussed the issue of proof of the reasons for the disciplinary action against the Petitioner. The Respondent failed to prove that the action or omission of the Petitioner was tainted with illegality. The only witness whose evidence is before Court is Mr. Okoth who testified in Petitioner’s absence.
81. The evidence of Mr. Okoth was contradicted by that of the Counsel who appeared for the accused in the criminal case.
82. In the circumstances, there is no proof that what the Petitioner did or did not do was not in good faith and as such he cannot be held culpable in the actions he took in the normal cause of his work for which he has judicial immunity.

#### **(4) Breach of Petitioner’s rights**

83. Indeed, following my analysis above, it is evident that the disciplinary process meted against the Petitioner was met with illegality and unprocedural unfairness and his rights under various articles of the Constitution were breached. I have cited breach of Article 47, of the Constitution.
84. I also find breach in terms of Article 41 of the Constitution and other regulations including the Fair Administrative Action Act and the Employment Act.

#### **(5) Remedies**

85. Having found as above, I have considered the remedies sought by the Petitioner. The Petitioner sought to be reinstated to work. The Petitioner has been a career judicial officer from 1993 a span of close to 26 years. There is no evidence that he had not performed his duties diligently before. To expect him to get another employment at his age, which will be difficult, I therefore find that reinstatement will be the most plausible remedy, which will compensate him adequately.
86. I therefore order reinstatement of the Petitioner to the Judicial Service Commission to the position he occupied prior to the dismissal with immediate effect without loss of salary and benefits.
87. The Respondents will bear the costs of this Petition.

**DATED AND DELIVERED IN OPEN COURT THIS 14<sup>TH</sup> DAY OF JUNE, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Malenya holding brief Kubai for Respondent



Okenwa for the Petitioner

