Khaemba v The Supreme Court Of Kenya & another (Petition 100 of 2019) [2019] KEELRC 917 (KLR) (30 August 2019) (Judgment)

Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR

Neutral citation: [2019] KEELRC 917 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 100 OF 2019

B ONGAYA, J

AUGUST 30, 2019

BETWEEN

BRYAN MANDILA KHAEMBA ..... PETITIONER

AND

THE SUPREME COURT OF KENYA ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

Legal safeguards applicable to the suspension of a magistrate from duty for disciplinary purposes.

Reported by Beryl Ikamari

Constitutional Law*-institution of a constitutional petition-parties-joinder of parties-the Attorney-General as a party-effect of failure to join the Attorney-General as a party to a petition filed against the Government (the Judiciary)-Constitution of Kenya 2010, article 156.*

Employment Law*-contracts of service-contracts of service of judicial officers and other staff of the Judiciary -law applicable to the contract of service of judicial officers and other staff of the Judiciary-whether the Employment Act 2007 was applicable to such contracts of service.*

Constitutional Law*-constitutionality of statutory provisions-constitutionality of paragraph 15 of the third schedule to the Judicial Service Act-whether the delegation of powers to suspend or interdict judicial officers and other staff of the judiciary to the Chief Justice was constitutional.*

Employment Law*-employment contract-disciplinary action-suspension from duty-suspension of a magistrate-nature of legal safeguards applicable to the suspension of a magistrate under the Third Schedule to the Judicial Service Act-Judicial Service Act, No 1 of 2011, Third Schedule.*

Statutes*-interpretation of statutory provisions-hierarchy of laws-subsidiary legislation-nature of legislation that would constitute subsidiary legislation-whether the Third Schedule to the Judicial Service Act was a form of subsidiary legislation.*

***Constitutional Law**-fundamental rights and freedoms-right to fair labour practices-where a magistrate was suspended without pay-legality of suspension of an employee facing disciplinary action without pay-Constitution of Kenya 2010, article 41; Judicial Service Act, No 1 of 2011, Third Schedule, paragraph 17(3).*

***Employment Law**-employment contract-termination of an employment contract-termination of a magistrate's employment contract-validity of the reason for termination-where a magistrate, who was away on medical grounds but had recovered and was at the work premises, granted anticipatory bail to an applicant-where operational rules envisaged under section 20 of the Magistrate's Court Act and which would have provided guidance for such situations were not enacted-whether such termination of an employment contract was valid-Magistrate's Court Act, No 26 of 2015, section 20.*

Brief facts

The petitioner was employed as a magistrate in Kenya on July 1, 2010. On May 23, 2019, having explained that he was unwell, the petitioner was off duty. However, he later went to court and handled one matter - an application for anticipatory bail.

The 1st respondent asked him to explain why he handled that matter on a day he was off duty and without the requisite jurisdiction. He stated that he had been unwell in the morning and his condition had improved by the time he went to court. He added that he handled a particular matter after being informed by the relevant Head of the Criminal Registry of an impatient an advocate that was on record. He was suspended with no pay on grounds of alleged gross misconduct and was to face disciplinary action. After receiving the suspension letter, he explained why the suspension amounted to constructive dismissal from employment. He then went to court seeking various reliefs including damages and reinstatement.

Issues

i. What were the legal safeguards applicable to the suspension of a judicial officer or other staff of the Judiciary under the Third Schedule to the Judicial Service Act?
ii. Whether failure to join the Attorney-General as a party to a petition in which the Government had been sued would render the petition incompetent.
iii. Whether the Third Schedule to the Judicial Service Act was a form of subsidiary legislation.
iv. Whether the delegation of powers to suspend or interdict judicial officers and other staff of the judiciary to the Chief Justice under paragraph 15 of the third schedule to the Judicial Service Act was constitutional.
v. Whether it was lawful for an employer to suspend an employee on terms that the employee would not be paid during the suspension.
vi. Whether the Employment Act 2007 was applicable to the contracts of service of judicial officers and other staff of the Judiciary given that the primary applicable statute to their contracts was the Judicial Service Act.
vii. What was the effect of the absence of the operational rules envisaged under section 20 of the Magistrate's Court Act where conduct which required the guidance of those rules was undertaken with the consequence being that disciplinary action was commenced against a magistrate.
viii. What remedies were available for a judicial officer (magistrate) who had been suspended indefinitely without compliance to the applicable procedural requirements?

Held

1. There was no merit in the assertion that the petition was incompetent on grounds of failure to enjoin the Attorney-General as a party. No application had been made for such a joinder under article 156(5) of the Constitution and the respondents opted to appoint an advocate to represent them even though they were part of the Government. The respondents could therefore not benefit from their elective omission. Generally, the rule was that a petition would not be defeated by reason of misjoinder of parties.

2. The Constitution was the supreme law of the land and everyone had a duty to respect, uphold and defend it. Parliament and the Executive had a duty to ensure that legislation was consistent with the Constitution. When the constitutionality of legislation was questioned the Court had an obligation to consider the issue of constitutionality.
3. Section 32 of the Judicial Service Act provided for the appointment, discipline and removal of judicial officers and staff and the establishment of a committee or panel for such purposes. Further, the Third Schedule to the Judicial Service Act had provisions which served the same purpose. That Third Schedule was part of the Judicial Service Act and not subsidiary legislation.
4. Paragraph 15 of the Third Schedule to the Judicial Service Act provided for the delegation of powers, including those of interdiction and suspension to the Chief Justice. The petitioner did not identify a conflict between the Judicial Service Act and the Third Schedule to the Judicial Service Act. It was not shown that in enacting the provision on delegation Parliament acted irrationally or unreasonably or unconstitutionally.
5. The delegation of powers, including those of interdiction and suspension, entailed an administrative role which could efficiently and effectively be vested in the Chief Justice as the Head of the Judiciary. Therefore, there was no conflict between paragraphs 15 and 17 of the Third Schedule to the Judicial Service Act and sections 14 and 32 of the Judicial Service Act.
6. There was a mix-up in paragraph 15 of the Third Schedule to the Judicial Service Act as related to the correct numbering of the provisions on the power to interdict and the power to suspend an employee for disciplinary purposes. Those powers were provided for under the Third Schedule to the Judicial Service Act and power to interdict should be under paragraph 16 and not 17 while the power to suspend should be under paragraph 17 and not 18.
7. The Judicial Service Act and the Third Schedule to the Judicial Service Act did not have an enactment allowing for the suspension of a judicial officer or other staff with nil pay. There was no express or implied provision that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. Particularly, paragraph 17(3) of the Third Schedule provided for an alimentary allowance, the amount and terms of which were to be fixed under regulations enacted by the Commission, for a suspended employee.
8. While the Judicial Service Act was the primary Act for judicial officers and other staff of the Judiciary, the Employment Act 2007 was equally applicable where appropriate or necessary. The Employment Act was the primary legislation for the implementation of article 41 of the Constitution. There was no reason why it should not apply to the Judiciary's staff where statute or contract provided for terms and conditions of service that were not better than those imposed under the Employment Act 2007.
9. It was unconstitutional for an employer to suspend an employee without pay. That would amount to unfair labour practices under article 41 of the Constitution. In the absence of a contrary provision, a judicial officer or other staff of the Judiciary who had been suspended was entitled to full pay. During the disciplinary process such an employee should not suffer but should instead enjoy full pay. The provisions of paragraph 17(3) of the Third Schedule relating to the alimentary allowance for suspended staff and the Commission's failure to fix the amount and terms of that allowance did not mean that the employer's obligation to pay remuneration was discharged.
10. The suspension of the petitioner via a letter did not comply with the legal safeguards relating to such suspension. Those safeguards were that:-

1. the conditions attached to the suspension would have to be legally prescribed-the applicable provisions did not require suspension without pay, hand-over of all Government stores in the petitioner's possession and preparation of a detailed hand-over report;
2. the requirements for a valid suspension under paragraph 17 of the Third Schedule, which included commission of a serious crime or proceedings for dismissal where the Chief Justice was of the opinion

that the officer ought to be dismissed, were not met-the suspension letter was only a show-cause notice and the petitioner had not committed a serious crime;

3. disciplinary proceedings could not be commenced under paragraph 17(2) of the Third Schedule to the Judicial Service Act unless the 2nd respondent made a determination in accordance with paragraph 25(3) that the proceedings against that officer should continue-the suspension of the petitioner without that determination was premature; and,
4. there was a failure of pay the mandatory alimentary allowance provided for under paragraph 17(3) of the Third Schedule.

1. The petitioner was suspended indefinitely without the observance of legal safeguards attendant to that process and he was entitled to lament that he had been dismissed constructively.
2. On the question as to whether there was a valid reason for the termination, it was clear that the petitioner handled Miscellaneous Criminal Application No. 222 of 2019 while he was supposed to be off-duty on medical grounds but had resumed work after getting better. The operational rules that would have provided guidance as envisaged under section 20 of the Magistrate's Court Act 2015 were not available. To the extent that there was such an operational deficiency, the petitioner would not be held culpable if he was taking a positive initiative in good faith and towards good and responsive judicial service delivery. There were operational policies in place but such administrative policies could not substitute instances where statute required the making of rules, regulations and other statutory instruments.
3. The manner in which the petitioner was suspended infringed on his rights to fair labour practices and the protection offered to public offices under article 236 of the Constitution. The suspension was also premature in view of the prescribed legal regime and therefore the petitioner's rights to fair administrative action under article 47 of the Constitution were violated.
4. The petitioner established that the suspension was done in breach of the applicable law and that there were no internal mechanisms that could remedy the grievance. The petitioner was therefore entitled to move the Court for a remedy.
5. The prayer for punitive and aggravated damages would fail. The 1st respondent acted in good faith and it was not shown that the respondents released any information to the social or mainstream media.
6. There were violations of fundamental rights and freedoms in the suspension. Considering that, it was sufficient for the petitioner to be paid all salaries, allowances and benefits withheld throughout the suspension and to continue in employment without loss of rank, status, and all attached benefits.
7. The 1st respondent acted in good faith and section 45(1) of the Judicial Service Act, which shielded the members of the 2nd respondent from civil action relating to the performance of official functions in good faith, was applicable. For that reason, there would be no finding that the 1st respondent violated articles 10, 73, 232, and 236 of the Constitution.
8. As the suspension was unlawful, the petitioner was entitled to the orders of prohibition or a permanent injunction.
9. It was not established by the petitioner that paragraph 15 of the Third Schedule to the Judicial Service Act was in conflict with sections 13, 14, and 32 (1) and 32(3) of the Judicial Service Act and no declaration would be issued in that regard.

Petition partly allowed.

Orders

i. *The respondents were to pay the petitioner all salaries, allowances and all other due contractual and statutory benefits withheld throughout the suspension period to date and to allow him to continue in employment without loss of rank, status, and all attached benefits; and the respondents were to pay the petitioner the due sum of money by November 1, 2019, failing which interest at Court rates would be payable thereon from the date of the judgment till full payment; and further the petitioner was to report*

to the respondents forthwith and not later than September 9, 2019 for appropriate deployment and assignment of duty.

ii. *The respondents infringed the petitioner's fundamental rights as guaranteed under articles 41 and 47(1) of the Constitution of Kenya, 2010.*

iii. *The judicial review order of certiorari was issued to quash the decision of the 1st respondent as contained in the letter dated June 13, 2019.*

iv. *The order of prohibition and permanent injunction was issued to prohibit and permanently restrain the respondents by themselves, or by their officers or agents from implementing the decision contained in the 1st respondent's letter of June 13, 2019 and from taking any adverse action against the petitioner pursuant to the said decision.*

v. *The judicial review order of mandamus was issued to direct the respondents to reinstate the petitioner to his employment including the reinstatement of his salary and employment benefits.*

vi. *The petitioner was to serve the judgment upon the Attorney – General within 7 days towards the Attorney-General taking appropriate action within his constitutional and statutory roles to correct the anomaly the Court identified in the numbering of paragraphs as referred to in paragraph 15 of the Third Schedule of the Judicial Service Act.*

vii. *The respondents were to pay the petitioner's costs of the petition.*

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. The petitioner Bryan Mandila Khaemba is at all material times employed by the 2nd respondent, the Judicial Service Commission, as a judicial officer. At the material time to the present cause of action the petitioner was holding the office of Principal Magistrate and deployed at the Kiambu Law Courts.

2. The 1st respondent, the Chief Justice and the President of the Supreme Court of Kenya, addressed to the petitioner the letter dated 30.05.2019 as follows.

> " Dear Hon. Khaemba,
>
> RE: MISC. CR. APP. NO.222 OF 2019 FERDINAND N. WAITITU & ANOTHER – VS- DIRECTOR OF PUBLIC PROSECUTION & OTHERS
>
> It has come to my attention that in the morning of 23rd May, 2019 you reported that you were unwell and you were allowed to be away. Accordingly, the cases listed before you on that day were taken to another Magistrate who mentioned and adjourned them.
>
> However, in the afternoon, and not being the duty court, you went to court and only handled the above matter that had not been allocated to or listed before you.
>
> Please let me have your explanation within fourteen (14) days, under what circumstances you went to court in the afternoon to handle only that matter.
>
> Yours sincerely, signed,
>
> HON. JUSTICE DAVID K. MARAGA, EGH

CHIEF JUSTICE & PRESIDENT SUPREME COURT OF KENYA"

3. The petitioner replied the 1st respondent's letter by the petitioner's letter dated 06.06.2019 as follows.

" My Lord,

RE: MISC. CR. APP. NO.222 OF 2019 FERDINAND N. WAITITU & ANOTHER – VS- DIRECTOR OF PUBLIC PROSECUTION & OTHERS

I wish to refer to your Lordship's letter dated 30th May, 2019, requiring me to explain the circumstances under which I went to court in the afternoon of 23rd May, 2019, and only handled the above matter, an issue which has equally caused me and my family a lot of distress following media reports over the same.

My Lord, 0n 23rd May, 2019, I woke up in the morning and felt numbness on my right leg, which is a recurrent condition to me especially during cold seasons since I have a metal implant in situ on my hip joint following a road traffic accident that I was involved in, in the year 2015. Whenever such happens, I am required to perform a number of physiotherapy exercises to improve blood circulation at the operation site which will in turn reduce the numbness or pain. For that reason, when I felt the numbness that morning, I knew that I could not make it to court in good time to handle matters on my cause list. I therefore in formed my Head of Station, Hon. Patricia Gichohi, Chief Magistrate, that I was indisposed and asked her to arrange with a colleague to take out my matters.

My Lord, I proceeded with my exercises and at about 11 am I felt much better and I decided to go to the office to work on my Civil Judgments and Rulings that were due the next day, 24th May, 2019 and all the files were in my chambers. On arrival at the Station, I tried to call the Chief Magistrate to inform her that I was now in my chambers but I could not get through to her as I realized that she was in court. I then sent her a text message informing her of my presence.

My Lord, I then commenced writing my rulings and judgments, but in the process, the Head of the Criminal Registry, Ms. Dolly Amiani came to my Chambers with a file, which she brought to my attention that the advocate in that particular file had become inpatient even though he had filed a miscellaneous criminal application after the plea court (which court was also to handle all criminal applications) had finalised all pleas and applications which had been filed earlier in the morning and was now in session. Ordinarily in our Station, administratively, all applications both Civil and Criminal filed by mid-day are dealt with at 2pm. In this particular matter, Ms. Dolly informed me that at that moment all judicial officers were in session apart from myself. I then read through the file, dealt with it and wrote a note to the plea court informing her of the position even though she was still in session, for the purpose daily court returns. I equally signed the register of Miscellaneous Criminal Applications for accountability and then proceeded to complete my judgments and rulings which I delivered the next day. (Please see the attached certified copies of the said judgments and ruling for ease of reference). Later on I met the Chief Magistrate during her session break and informed her that I had felt better and was now working on my judgments and rulings in Chambers.

Thus, are the circumstances under which I handled the said case file.

Yours sincerely,

Bryan Mandila Khaemba"

4. The 1st respondent then addressed to the petitioner the letter dated 13.06.2019 through the Chief Magistrate, Kiambu Law Courts as follows:

> " Dear Hon. Khaemba
>
> RE: SUSPENSION GROSS MISCONDUCT
>
> Reference is made to my letter dated 30th May, 2019 whereby you were required to explain why in the morning of 23rd May 2019 whereas you had reported to be unwell and allowed to be away from duty thus necessitating the adjournment of all matters listed before you on that day, you went to court and handled only one matter, MISC. CR. APP. No. 222 of 2019, that had not been allocated to or listed before you.
>
> The explanation you gave dated 6th June, 2019, is unsatisfactory as you had no authority to handle the matter the same having not been allocated to you. In any case, you had no jurisdiction to entertain the matter.
>
> Your said acts amount to GROSS MISCONDUCT contrary to the Human Resources Policies and Procedures Manual Section D.7.2 (xvii) and a breach of the Judicial Service Code of Conduct and Ethics Rule 3 & 12.
>
> In view of the above, you are hereby required to show-cause why disciplinary action should not be taken against you for the offence. Your representation if any, should be received in this office within fourteen (14) days from the date of this letter, failure to which disciplinary proceedings will be instituted without any further reference to you.
>
> Meanwhile, you are hereby suspended from duty with effect from the date of this letter until your disciplinary case is heard and determined. While on suspension, you shall receive nil salary. Your transfer to Thika Law Courts is hereby cancelled. You are therefore required to report to the Chief Magistrate, Kiambu Law Courts every last Friday of each month.
>
> You are also required to handover all Government Stores in your custody and prepare a detailed hand over report to the Chief Magistrate, Kiambu Law Courts copying the same to the Chief Registrar of the Judiciary.
>
> Yours sincerely, signed
>
> HON. JUSTICE DAVID K. MARAGA, EGH
>
> CHIEF JUSTICE/PRESIDENT, SUPREME COURT OF KENYA"

5. The letter was copied to the Hon. Deputy Chief Justice & Vice President, Supreme Court of Kenya; the Chief Registrar of the Judiciary; the Chief Magistrate, Kiambu Law Courts; and the Director, HR & Administration; the Regional Assistant Director, HR & Administration.

6. The petitioner replied the 1st respondent's letter of 13.06.2019 by his letter dated 14.06.2019 addressed to the Secretary of the 2nd respondent as follows.

> " Dear Madam,
>
> RE: CONSTRUCTIVE DISMISSAL
>
> Your letter of 13th June, 2019 refers.

I wish to take this opportunity to thank the Commission for giving me an opportunity to serve my beloved country as a Magistrate, from 1st July, 2010, to date. I also appreciate the successive promotions that I was granted, the latest being the rank of Principal Magistrate.

As you may be aware, I was yesterday, 13th June, 2019 served with a suspension letter from the Hon. Chief Justice, which required me to vacate office and be on nil salary pending disciplinary processes. (Please see a copy of the letter enclosed). However, before I could put in a response within 14 days as directed in the letter, I have seen a media report in today's Daily Nation capturing all the contents of the said letter in addition to the alleged recommendations of the Judiciary Ombudsman which were hitherto unknown to me.

Further, in the said suspension letter, the Hon. Chief Justice indicated that I had no jurisdiction in handling Misc. Cr. Application No. 22 of 2019, yet precedents speak otherwise. In any case, matters of jurisdiction ought to be litigated upon, and not to be treated as misconduct.

The decision of taking to the media has caused me prejudice as it appears I have already been prosecuted in the media yet the practice has been that such communication is regarded as confidential. Indeed a few days ago five magistrates were suspended but the same was never broadcasted in the media.

The decision is not a suspension but a constructive summary dismissal for several reasons. First, the decision concludes without a hearing that I am guilty of gross misconduct. Second the decision determines that I acted without jurisdiction when no determination in that regard has been given in respect of the impugned decision I made. Third, the decision directs that I should receive nil salary contrary to regulations and labour law. The decision amounts to unfair termination and repudiation of my contract of service.

In the circumstances, I have treated the letter dated 13th June, 2019 from the Chief Justice as a constructive dismissal and not wish to participate in a disciplinary hearing in respect of which a decision has already been taken and which is intended to be publicised in the media to my prejudice. I reserve my right to take legal action to remedy the unfair termination.

Yours Sincerely, Signed

Bryan Mandila Khaemba

CC. The Chief Justice/President of the Supreme Court of Kenya

Supreme Court Building

Box 30041,

NAIROBI."

7. The petitioner being dissatisfied with the turn and flow of events against him by the respondents filed a petition on 17.06.2019 through Ochich T.L.O & Associates Advocates. The petitioner filed an urgent application alongside the petition. The application came up for interpartes hearing on 19.06.2019 and by consent of the parties it was ordered:

    1) That the petitioner is still a Judicial Officer but on suspension from discharging the duties as a judicial officer designated as a Principal Magistrate but the suspension therefore does not affect his membership in the Kenya Magistrates and Judges Association (KMJA) and the East African Magistrates and Judges Association (EAMJA) and related capacities as he may hold in the Associations.

2) That upon consent of the respondents and pending further orders in the case on hearing of the Application the respondent shall pay the petitioner half consolidated monthly remuneration.

3) That the respondent may file and serve a Replying Affidavit in 14 days and petitioner may file supplementary Affidavit in 7 days after service.

4) That parties to pursue compromise and mention on Thursday 27/06/2019 at 9.00am for further orders and direction including progress on compromise.

5) That parties' advocates to endorse signatures in so far as orders by consent are concerned.

6) That costs in the cause.

8. The parties failed to reach a compromise and instead the petitioner filed an amended petition on 27.06.2019 which is subject of the present judgment. The petitioner prayed for judgment against the respondents for:

a) A declaration that the 1st respondent's letter dated 13.06.2019 is illegal, null and void ab initio for being in contravention of Articles 25 (c), 28, 31, 41, 47, 48, 50, and 236 of the Constitution of Kenya, 2010.

b) A declaration that paragraph 17(3) of the 3rd schedule of the Judicial Service Act No.1 of 2011 contravenes Article 41 of the Constitution of Kenya, 2010 as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional.

c) A declaration that clause D.7.5.2 (iii) of the 2nd respondent's Human Resources Policies and Procedures Manual contravenes Article 41 of the Constitution of Kenya, 2010 as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional.

d) A declaration that there is no offence committed by the petitioner that warrants disciplinary action.

e) A declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 is in conflict with sections 13, 14, and 32 (1) and (3) of the Judicial Service Act No.1 of 2011.

f) A declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 and the provisions of clause D.7.2 (xvii) and D. 7.5.2 (ii) & (iii) of the Judiciary Human Resources Policies and Procedures Manual are unconstitutional.

g) The declaration that the respondents infringed the petitioner's fundamental rights guaranteed under Articles 25(c), 28, 31, 41, 47, and 50 of the Constitution of Kenya, 2010.

h) The 1st respondent violated Articles 10, 73, 232, and 236 of the Constitution of Kenya, 2010.

i) An order for judicial review by way of certiorari to bring to the Honourable Court for purposes of quashing the decision of the 1st respondent as contained in the letter dated 13.06.2019.

j) An order of prohibition and permanent injunction to issue to prohibit and permanently restrain the respondents from implementing the decision contained in the 1st respondent's letter of 13.06.2019 and from taking any adverse action pursuant to the said decision.

k) An order of Judicial Review by way of Mandamus directing the Respondents to reinstate the Petitioner to his employment including the reinstatement of his salary and employment benefits.

l) General damages for breach of the petitioner's rights guaranteed under Articles 25(c), 28, 31, 41, 47, 48, and 50 of the Constitution of Kenya, 2010.

m) Punitive and exemplary damages for constructive dismissal.

n) Costs of the petition.

o) Any other relief that the Honourable Court may deem fit and just to meet the ends of justice.

p) Interest.

9. The petition was based on the petitioner's supporting affidavit filed together with the petition and the petitioner's supplementary affidavit filed on 12.07.2019.

10. The respondents filed on 19.06.2019 a notice of appointment of Isaac J.M. Wamaasa Advocate to act for them in the matter. They opposed the petition by filing on 08.07.2019 the replying affidavit of Anne Atieno Amadi, the Secretary of the 2nd respondent; and also filed on 24.07.2019 her further replying affidavit.

11. The facts of the case leading to the petition are as set out in the letters reproduced earlier in this judgment. The petitioner's further case on the facts of the case is as follows:

1) The request to Hon. Patricia Gichohi, Chief Magistrate, to make her statement as exhibited in the replying affidavit has not been exhibited at all. Further the statement by Hon. Patricia Gichohi was not disclosed to the petitioner prior to the show-cause letter of 13.06.2019. However the general procedure in the statement is known to the petitioner but the statement did not specifically deal with the events of 23.05.2019 as related to Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another – Versus- Director of Public Prosecution & Others. Further the statement shows that the Hon. Patricia Gichohi, Chief Magistrate, was engaged in court the whole afternoon on 23,05.2019 until 5.00pm so that she could not have heard Miscellaneous Criminal Application No. 222 of 2019. Further the statement does not explain why Hon. Wilson Rading or Hon. Atambo could not attend to the application. In particular, the file was brought to the petitioner by the in-charge of the Criminal Registry owing to unavailability of Hon. Stella Atambo. Thus exhibit AA1, the statement by Hon. Patricia Gichohi is an attempt by the respondents to prosecute the disciplinary case before the Court. On 23.05.2019 the twin Courts in charge of urgent applications were engaged and the Chief Magistrate was equally engaged in Court leading to a unique situation that the petitioner handled the application. The petitioner did not interfere with the role of the in-charge of the Criminal Registry who brought the file to the petitioner in compliance with all protocols and appropriate returns made.

2) For any party dissatisfied with the orders in the application as given by the petitioner on 23.05.2019 at Kiambu, the proper action was to apply for review or revision or to appeal.

3) The firm of Ashioya, Mogire and Nkatha Advocates acted for the applicant in the case at Kiambu and not Mr. Havi Advocate.

12. The Court has considered the affidavits filed for the parties and the further facts surrounding the dispute between the parties and as urged for the respondents in their affidavits are as follows:

1) That sometimes in May 2019 the 1st respondent received information that the petitioner had issued an order of anticipatory bail in Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another –Versus- Director of Public

Prosecution & Others on 23.05.2019 a day when the petitioner was reported to have sought and obtained permission from the Head of Station to be away on account of being indisposed. That it was in public domain that the orders issued by the petitioner raised a lot of public concern.

2) The 1st respondent sought an explanation from Hon. Patricia Gichohi, the officer in charge of the Kiambu Magistrates' Courts and who recorded a statement and which was exhibited on the replying affidavit marked AA1. The statement is dated 30.05.2019 at 6.00pm. The statement states that the six Judicial Officers deployed at the Kiambu Courts at the material time included Hon. Patricia Gichohi CM, Court No. 1; Hon. Stella Atambo SPM, Court No.2; Hon. Theresah Bosibori Nyangema SPM, Court No.3; Hon. Bryan Khaemba PM, Court No.4; Hon. Wilson Rading SRM, Court No.5 and Deputy Registrar High Court; and Hon. Rita Orora RM, Court No. 6. Further, duty for applications under certificate of urgency was handled by Court 2, 3, 4, 5 and 6 each week and on rotational basis. All the six Courts were twined so that Court 1 twins with Court 2, Court 3 with Court 4, and Court 5 with Court 6. All pleas were handled by Court one unless the Chief Magistrate directed otherwise. The statement further states that on the morning of 23.05.2019 the petitioner sent a text message to Hon. Patricia Gichohi that the petitioner was unwell and Hon. Gichohi asked the petitioner about the fate of the cases that had been scheduled before the petitioner on that date, and, the petitioner asked the said Hon. Patricia Gichohi to organise for the matters to be taken out. Hon Patricia Gichohi instructed Hon. Theresah Nyangena, the petitioner's twin Court to handle the petitioner's matters and which was done accordingly. Hon. Patricia Gichohi further instructed Hon. Stella Atambo, her deputy, to handle all the pleas together with the Miscellaneous Applications for that day in view of Hon. Patricia Gichohi's workload for that date. The statement further states that Hon. Wilson Rading was on duty for certificates of urgency for that day and the whole of that week. The statement further states that in the afternoon of that date the petitioner passed by Hon. Patricia Gichohi's office and notified that he had come back to the office because he had felt better – and Hon. Patricia Gichohi informed the petitioner that his twin Court had already taken out his matters for the day. The statement states that thereafter, the petitioner left the office and Hon. Patricia Gichohi went back to Court up to around 5.00pm. The statement further states that on the evening of that date, Hon. Patricia Gichohi learnt that the petitioner had handled an application under certificate of urgency for anticipatory bail and had granted orders. The statement further states that ordinarily, the application under certificate of urgency would have either gone to Hon. Stella Atambo or to Hon. Wilson Rading, the duty Court on that day. Further, in alternative, such an application would have been taken to Hon. Patricia Gichohi if the two courts felt that they could not handle but it was not.

3) The petitioner had failed to reply the suspension letter dated 13.06.2019 and instead had filed the present petition.

4) At no time did the 1st respondent address the press and the 1st respondent never released the contents of the letter dated 13.06.2019 or the Ombudsman report to the media and the petitioner had not provided evidence of release of the letter and report to the media as alleged by the petitioner. Instead, the petitioner had been prosecuting his defence through the mainstream and social media.

5) The petitioner had not responded to the allegations made against him that the subject file was not listed before him and that he was not the duty Court.

6) That the manner in which the petitioner handled the subject matter was reckless and in violation of Chapter Six of the Constitution, his oath of office and the provisions of the Judicial Service Act.

7) That a close look at the plea form showed that the file had been diverted from the duty court to the petitioner's court without following due procedure. The Court has perused the proceedings and on the Coram of 23.05.2019 the Magistrate Hon. S. Atambo, SPM is crossed in ink and above it is written, "B. Khaemba (Mr.) PM". Further, the record shows that the prosecutor's name had been cancelled and the also cancelled for Court Assistant "ABDI" and replaced with "Teresia".

8) The disciplinary proceedings against the petitioner commenced with the letter of suspension dated 13.06.2019 and the suspension with nil salary is provided for in the law.

9) The information by Ms. Delly Amiani the In-charge of the the Criminal Registry at Kiambu was that the petitioner walked into the Registry and asked for the file as per her statement in exhibit AAA 1 on the supplementary affidavit. The statement is as follows:

> " My names are Delly Amiani in charge of the Criminal Registry. I remember on the 23rd May 2019. I received a Misc. Aplication and went to our Executive Officer Mr. Mbiu and asked him if I could register. He said it was Ok. I had the file registered under a Misc. Application number 222/19.
>
> After a while the Adv. Got impatient and said he wanted it be heard. Minutes later Mr. Khaemba walked in and asked what was happening. I then told him that the advocate was making noise cause his matter was taking long to be heard. He asked for the file. I took the file to him but I went to the plea Court and told Madam Atambo what was happening. She asked me if there was any judicial officer who was free and I told her Mr. Khaemba was in. She then told me to let him handle the matter.
>
> That's all.

13. Delly Amiani, signed, Pj. 10259." Further, exhibit AAA 2 on the further replying affidavit is the statement by Teresia Wanjiru Mwaura Pj. No. 35924. Paragraph 11 of the further replying affidavit states that, the exhibit AAA2 shows that the said Teresia Wanjiru Mwaura was not in Court as the Court Assistant as indicated on the Coram. The Court has perused the exhibit AAA2 and observes that it is incomplete as the only page filed is not dated and signed and that she did not attend Court as indicated on the Coram is not stated or referred to in the exhibited page.

10) That from the proceedings the petitioner appreciated and recognised that he did not have jurisdiction to issue anticipatory bail and that the applicant therein had in fact been arrested and therefore the issuance of anticipatory bail did not arise.

11) That a litigant had a right to engage counsel of their own choice but it was instructive to note that the petitioner herein and the applicant in the Miscellaneous Criminal Application he handled had instructed the same counsel, Mr. Havi Advocate, to act for them.

12) That the manner in which the applicant handled the Miscellaneous Criminal Application No.222 of 2019 at Kiambu violates Articles 73 and 75 of the Constitution and that the Honourable Court has no powers to interfere with the 2nd respondent's constitutional and statutory mandate as provided under Article 172 (c) of the Constitution as read with the Judicial Service Act No. 1 of 2011 and that the petitioner is hiding behind constitutional

interpretations to shield himself from the disciplinary process. The petition is premature and the disciplinary proceedings against the petitioner should be left to run its full course.

13) The petitioner has been given an opportunity to defend himself as provided for under the Fair Administrative Action Act No. 4 of 2015 as well as the provisions of Articles 41 and 47 of the Constitution.

14) The petitioner had not committed any serious criminal offence but proceedings for his removal had been commenced by the letter dated 13.06.2019 and the petitioner admitted receiving the letter as per his letter of 14.06.2019.

15) The action taken by the 1st respondent was based upon the information available to him as at the time of the suspension decision and that he has no personal interest in the matter neither does he have a personal vendetta against the petitioner.

16) The fact that another Magistrate issued similar orders in another Court does not exonerate the petitioner and that the action taken by the 1st respondent was on his own motion and was not initiated by EACC and, in that case, the suspect was not under arrest and the matter was heard inter-partes.

17) The manner the petitioner handled Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another –Versus- Director of Public Prosecution & Others cannot be resolved through an application for review, revision or an appeal but through a disciplinary process.

14. The Court has considered the parties' respective pleadings, affidavits and submissions.

15. The 1st and preliminary issue for determination is whether the petition should fail as irreparably incompetent because in view of the petitioner's claims and prayers on unconstitutionality of certain statutory provisions, the Attorney General was a mandatory party to the petition but was not enjoined accordingly. The respondents' case is that the petitioner has prayed for declarations that paragraph 17(3) of the 3rd schedule of the Judicial Service Act No.1 of 2011 contravenes Article 41 of the Constitution of Kenya, 2010 as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional; a declaration that clause D.7.5.2 (iii) of the 2nd respondent's Human Resources Policies and Procedures Manual contravenes Article 41 of the Constitution of Kenya, 2010 as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional ; and a declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 and the provisions of clause D.7.2 (xvii) and D. 7.5.2 (ii) & (iii) of the Judiciary Human Resources Policies and Procedures Manual are unconstitutional – but the petitioner has failed to enjoin the Attorney General as a respondent as provided by Article 156 (4) and (7) of the Constitution.

16. Article 156(4) provides that the Attorney-General shall have authority, with the leave of the Court, to appear as a friend of the Court in any civil proceedings to which the Government is not a party. Article 156 (7) provides that the powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

17. It was submitted for the respondents that under Article 156 of the Constitution the Attorney – General is the principal legal adviser to the Government and shall represent the National Government in Court or in any other proceedings in which the National Government is a party other than criminal proceedings. Further that Article 95(2) of the Constitution of Kenya provides that National Assembly enacts legislation in accordance with part 4 of the Chapter while Article 109 (1) of the Constitution provides that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President. It is submitted for respondents that since legislation is passed by the

National Assembly and assented to by the Executive, to challenge the constitutionality of a statutory provision as prayed for by the petitioner, the Attorney-General as the legal adviser to the Government and the legal representative of the National Government ought to have been enjoined as a party but which was not done. In the circumstances, the petition is bad in law and should fail.

18. For the petitioner it is submitted that the Superior Court enjoys original and unlimited jurisdiction to render an interpretation on any provision of the Constitution including declaring any provision of a statute unconstitutional without the need for reference to the Attorney – General or any other third party. It is further urged for the petitioner that rule 5(b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 is to the effect that a petition shall not be defeated by reason of the misjoinder of parties, and that the Court may in every proceeding deal with the matter in issue. Further the petitioner urged that he had not sued the National Government and even if he had done so, the respondents had opted not to instruct the Attorney – General to appear in the matter as envisaged in Article 156 of the Constitution. Further that Articles 156(4) and (7) were completely irrelevant to the matters in dispute.

19. The Court returns that the preliminary objection lacks merit. First, there was no application by the Attorney –General for leave to be enjoined as a friend of the Court as envisaged in Article 156 (5). Second, it is true that the respondents constitute part of the Government in the wider sense that they are part of the constitutional arrangements for running public affairs. However the respondents opted not to appoint the Attorney – General to represent them in the petition and instead appointed an advocate of their own choice. The Court considers that the respondents shall not be permitted to benefit out of their own elective omission. Third, as submitted for the petitioner, the applicable rule is clear that a petition shall not be defeated by reason of the misjoinder of parties, and that the Court may in every proceeding deal with the matter in issue. The Court considers that the rule implements Article 159 (2) which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles, inter alia, that justice shall be done to all irrespective status; justice shall not be delayed; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted. Fourth, Article 2 of the Constitution declares the supremacy of the Constitution and Article 3 of the Constitution provides that every person has an obligation to respect, uphold and defend the Constitution. Accordingly, the Court finds that the Parliament and the National Executive do not have better stakes than others in ensuring that the national legislation and indeed any other law are consistent and not in violation of the constitution so that in every case where constitutionality of a statute is questioned, it is the Court's obligation to decide the issue as urged for parties actually before the Court. The Court has already found that under Article 156 of the Constitution the Attorney – General is entitled to apply for leave but in the instant case that was not done. Was the Attorney – General aware of the instant petition? Under Article 171 (2) the Attorney – General is a mandatory member of the 2nd respondent and the Court returns that at all material time, the Attorney – General was aware of the present petition or ought to have been aware of the present petition and the petition may not fail for want of joinder of the Attorney – General in circumstances whereby the Attorney – General is therefore reasonably presumed to have opted not to apply for leave as envisaged in Article 156 relied upon by the respondents. Fifth, Article 10 of the Constitution is liberal in matters of interpretation of the Constitution when it provides that the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Thus the Court returns that there is no established constitutional or other provision of law that would bar the interpretation of the Constitution by the Court in view of the declarations as prayed for by the petitioner and the preliminary objection as urged for the respondents will therefore collapse.

20. The 2nd issue for determination is whether paragraphs 15 and 17(3) of the Third Schedule to the Judicial Service Act, Cap. 185B are unconstitutional. The petitioner has prayed for a declaration that paragraph 17(3) of the 3rd schedule of the Judicial Service Act No.1 of 2011 contravenes Article 41 of the Constitution of Kenya, 2010 as read together with Part IV and section 19 of the Employment Act, 2019 and is therefore unconstitutional. The petitioner has further prayed for a declaration that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 and the provisions of clause D.7.2 (xvii) and D. 7.5.2 (ii) & (iii) of the Judiciary Human Resources Policies and Procedures Manual are unconstitutional.

21. Subsection 32 (1) of the Judicial Service Act provides that 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. Subsection 32 (3) provides that the procedure governing the conduct of a Committee or Panel constituted under the section shall be as set out in the Third Schedule. Subsection 32(5) then provides that subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure. The Third Schedule to the Act is titled, "PROVISIONS RELATING TO THE APPOINTMENT, DISCIPLINE AND REMOVAL OF JUDICIAL OFFICERS AND STAFF". The Court has considered the provisions of section 32 of the Act and returns that in the hierarchy of laws, the Third Schedule is a direct enactment by the Parliament and therefore it does not amount to a subsidiary legislation but enjoys the status of a parliamentary enactment.

22. Part IV of the Third Schedule is titled "DISCIPLINE" and paragraph 15 on delegation of powers provides:

    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.

23. The Court observes that paragraph 16 thereof is on interdiction and paragraph 17 is on suspension so that paragraph 15(1) (a) and (b) will be construed accordingly. While making that observation the Court considers that the parties raised no issue about the mix-up in the reference in paragraph 15(1) (a) and (b) to paragraphs 17 and 18 respectively. It is the Court's directive that this judgment will be served upon the Attorney – General towards taking appropriate action within his constitutional roles to correct the anomaly identified in paragraph 15 of the Third Schedule.

    Paragraph 17 of the Third Schedule to the Act provides as follows:

    1) Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.

    2) The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.

3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.

4) An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.

24. It was submitted for the petitioner that Article 172 (1) (c) of the Constitution provides that the 2nd respondent shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an Act of Parliament. Further, section 14 of the Judicial Service Act on delegation by the 2nd respondent provides that subject to the provisions of the Constitution or any other law, the Commission may hire such experts or consultants, or delegate such of its functions as are necessary for the day-to-day management of the judicial service to subcommittees or to the secretariat (and the Court observes that the provisions clearly relates to agents of the 2nd respondent who may assist it to perform its work). Further, section 32 of the Act provides that the 2nd respondent shall constitute a Committee or Panel that is gender sensitive for purposes of appointment, discipline and removal of judicial officers and staff. Section 2 of the Act defines "Committee" as "a unit of the Commission formed to exercise any delegated power or perform any function of the Commission under the Constitution, this Act or any regulations made thereunder, and includes a Panel." Paragraph D.7.5.2 of the Judiciary Human Resource Policies and Procedures Manual reproduces paragraph 15 of the Third Schedule of the Act. In that regard it was submitted for the petitioner that provisions of paragraph 15 of the Third Schedule and paragraph D.7.5.2 of the Manual unconstitutionally delegate disciplinary powers and control to the 1st respondent who is not a party to the contract of employment. The provisions therefore contravene Articles 41 and 172 of the Constitution. Further, the Constitution and sections 14 and 32 do not envisage that an individual, the 1st respondent, can take disciplinary action against an officer but such should be undertaken by a group of persons, the Commission, a Committee, or a Panel as prescribed in the Act. It was submitted that the clear Parliamentary intention was that disciplinary function must be undertaken by a collective decision of the Committee or Panel as opposed to an individual. It was further submitted that the rationale in that regard was that a collective decision minimises the risks of arbitrary and unilateral actions and decisions, unreasonableness, indecision, bias, prejudice, error, mistake and misapprehension to which an individual is pre-disposed to have. Further, it was never the parliamentary intention that the Head of Judiciary be the first person and the final person (with conclusive findings like in the instant case) in a disciplinary process involving judicial officers and staff. By taking disciplinary action at the first instance, it was submitted that the 1st respondent in effect extinguishes and curtails the constitutional and statutory entitlement of an employee to an appellate process if they are ultimately aggrieved by the disciplinary action taken against them.

25. It was further submitted for the petitioner that the established principle was that a constitutional function cannot be delegated by statute or even worse an internal policy document. The impugned provisions in effect amended the Constitution of Kenya, 2010 through the back door and gave the 1st respondent who is a member and the Chairperson of the 2nd respondent the authority and functions of the 2nd respondent. It was submitted that the principle of law was that where provisions of a statute conflict with provisions in the body of the statute, then the provisions in the body of the statute should prevail. Thus, provisions of sections 14 and 32 of the Act must prevail over the provisions of paragraphs 15 and 17 of the Third Schedule to the Act. The petitioner relied on Timothy Njoya & 17 Others – Versus- Attorney General & 4 Others [2013]eKLR, where in resolving a conflict between the provision

of the statute and its Schedule, Warsame J followed Executive Council of the Western Cape Legislature and Others –Versus- President of the Republic of South Africa and Others (CCT27/95) [1995] where the Constitutional Court of South Africa held thus, "No doubt a schedule or rule attached to a Statute and forming part of it is binding, but in case of clear conflict between either of them and a section in the body of the Statute itself, the former must give way to the latter." And further, Constitutional Court of South Africa in that case cited with approval Craies, Statute Law (7th Ed. By Edgar, 1971) at 224 thus, "A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part, but if an enactment in a schedule contradicts an earlier clause the clause prevails against the schedule...." It was further submitted for the petitioner that in Alice Waithera Mwaura & 12 Others –Versus- Committee of Experts & 2 Others [2010]eKLR, it was held that where there is conflict between a schedule and the main body of the law, the main body of the law prevails. Thus, it was submitted that in exercise of the powers in the Third Schedule and without involvement of the Commission, the Committee or the Panel as envisaged in Article 172 and 32 of the Act, the 1st respondent had by himself punished the petitioner contrary to the Constitution and contrary to the Act. The suspension was based on unconstitutional provisions and should not be allowed to stand.

26. It was further submitted that paragraph 17(3) of the Third Schedule and paragraph D.7.5.2 (iii) of the Manual provide that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine. It was submitted that the petitioner was suspended without pay and though the provision prescribes for an alimentary allowance, the same was not awarded and the same lacked basis in Employment Act, 2007. It was submitted for the petitioner that the petitioner was entitled to payment of contractual remuneration under Article 41 of the Constitution as amplified in section 17 of the Employment Act, 2007 which requires the employer to pay an entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service. It was submitted that the right to be paid under Article 19(3) (a) of the Constitution attached to the petitioner as a human being and could not be abrogated or limited unless as contemplated in the Constitution. The petitioner cited Attorney General –Versus- Kituo Cha Sheria & 7 Others [2017]eKLR, thus, "The clear message flowing from the constitutional text is not that rights have inherent value and utility and their recognition, protection, and preservation is not an emanation of state largesse because they are not granted, nor are they grantable by the state. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely fall a constitutional command to obey."

27. It was further submitted for the petitioner that there was no provision in law that pay be withheld during suspension as a punitive measure and invoked the holding by Rika J in Peterson Ndung'u & 5 Others –Versus- Kenya Power and Lighting Company Limited [2014]eKLR, thus, "33. Are employees on suspension entitled to receive emoluments that are withheld during the period of suspension pending finalization of disciplinary outcome? The Court's understanding of the practice of withholding of employee's emoluments during the disciplinary process is that this is meant to be a procedural practice, not an imposition of a disciplinary penalty. This practice on close scrutiny indeed has no foundation in the Employment Act. It has no legal validity. The only legal provision of the Law under the Employment Act, 2007, which allows Employers not to pay Employees whose contracts of Employment have not been terminated their wages, is Section 18 (6) of the Employment Act, 2007. It states, "No wages shall be payable to an employee in respect of a period during which the Employee is detained in custody or serving a sentence of imprisonment imposed under any Law." Section 19 which allows for deduction from wages, does not have any provision which would permit an Employer to deduct any money from the Employee or withhold any money, as a disciplinary step or sanction...."

And further at paragraph 35, "Part IV of the Employment Act 2007 protects the emoluments of an employee. As long as the Employee's contract remains in place, there is no reason to deny the Employee his salary. A salary should have no penal element. It is not part of the disciplinary sanctions against the Employee. The only case where forfeiture of salary may be justified, other than in instances given under the Employment Act and the Labour Relations Act, is where after a disciplinary process, the Employer imposes the sanction of suspension on the Employee. The mutual obligation in the employment relationship becomes suspended. In effect, the Employee's contract is terminated for a period of time as a disciplinary sanction, during which the Employer has no obligation to continue paying the salary, and the Employee has no obligation to give his labour to the Employer. The Employee is effectively reinstated at the end of the penal suspension. Administrative suspensions however, should not result in the imposition of a pecuniary sanction against the Employee. The administrative suspension should be distinguished from the penal form of suspension...."

28. For the respondents it was submitted that that paragraph 15 of the Third Schedule of the Act as reproduced in paragraph D.7.5.2 (iii) of the Manual are not unconstitutional because the Third Schedule is part of the Act and the powers of the 2nd respondent are delegated to the 1st respondent by the Parliament. It was further submitted that Article 171(2) of the Constitution provides that the 1st respondent is the chairperson of the 2nd respondent and the 1st respondent is a unit of the 2nd respondent within the definition of a "Committee" in section 2 of the Judicial Service Act, as "a unit of the Commission formed to exercise any delegated power or perform any function of the Commission under the Constitution, this Act or any regulations made thereunder, and includes a Panel." The disciplinary control of the petitioner was regulated by the Judicial Service Act and not the Employment Act and the powers the 1st respondent exercised to suspend the petitioner mirror the powers delegated to the President to suspend a Judge from office and appoint a Tribunal for his removal as provided under Article 168(5) of the Constitution. It was further submitted that the powers delegated to the 1st respondent under paragraph 17 of the Third Schedule of the Judicial Service Commission Act were with nil salary and only entitling the petitioner to an alimentary allowance mirrored Article 168 (6) of the Constitution which provides that the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the Judge is removed from or reinstated in office. Further, it was submitted that paragraph 17(3) of the Third Schedule and paragraph D.7.5.2 (iii) of the Manual do not conflict provisions of the Judicial Service Act and do not derogate from constitutional provisions but they complement the provisions of Article 171 and 172 of the Constitution.

29. The Court has carefully considered the parties' respective submissions and returns as follows.

30. First, the Court has already found that the Third Schedule to the Judicial Service Act is a direct enactment by the Parliament. As submitted for the petitioner and in line with the authorities cited for the petitioner, the provisions of the Third Schedule properly constitute a parliamentary enactment just like the other provisions in the body of the Act.

31. Secondly, Article 172(1) is clear that the 2nd respondent shall exercise the disciplinary function as vested in it by the Constitution in the manner prescribed by an Act of Parliament. Further, Article 249(1) (2) provides that a constitutional commission like the 2nd respondent is subject only to the Constitution and the law; and is independent and not subject to direction or control by any other person or authority. Thus the Court returns that the Judicial Service Act was enacted by the Parliament in line with the cited constitutional provisions and unless it is shown that the statutory provisions inherently violate or are inconsistent with a constitutional provision, then the Parliament has properly enacted the law and it is binding accordingly.

32. Thirdly, the Court has carefully considered the submissions by the petitioner and returns that the law is as per the authorities cited for the petitioner that provisions in a schedule just like those in the body of a statute are enactments by the Parliament and in event of a conflict, the earlier provisions as set out in the body of the statute will prevail. The petitioner has not identified a constitutional provision that limited Parliament from enacting the delegation of the 2nd respondent's power to suspend an officer to the 1st respondent. Further, section 32 (2) of the Judicial Service Act by itself provides that the procedure governing the conduct of a Committee or Panel constituted under the section shall be as set out in the Third Schedule. Further section 32(5) is clear that subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure. In view of those provisions, the clear parliamentary intention is that the Third Schedule shall prevail in so far as the work and role of the Committee or Panel is concerned. Accordingly, the Court returns that whether the 1st respondent was a "unit" within the definition of "Committee" in section 2 of the Act or not, the delegation was imposed by the Parliament and there is no established inconsistency with constitutional provisions in that regard. Stretching the case to the principle of rationality and unreasonableness as was urged for the petitioner, the Court returns that it has not been shown that the Parliament may have acted irrationally or unreasonably or unconstitutionally in imposing the delegation upon the 1st respondent.

33. In particular, the Court has considered the nature of the imposed delegation and returns that within the safeguards in paragraphs 15 and 17 of the Third Schedule, the 1st respondent is vested with the delegated power to perform an administrative role, namely, to impose a suspension within the stipulated safeguards. To that extent, the Court returns that the imposed delegation is an administrative role that is efficiently and effectively performed by an individual executive and which in the opinion of the Court, is properly vested in the Chief Justice as the Head of the Judiciary as per Article 161 (2) (a) of the Constitution. The Court considers that in that way, the power to suspend is conveniently exercised, within the safeguards in a manner that is responsive to the needs of the Judicial service. Accordingly the Court returns that there is no conflict between paragraphs 15 and 17 of the Third Schedule to the Act and sections 14 and 32 of the Act or the definition of "Committee" under the Act.

34. Fourthly, turning to alleged unconstitutionality of paragraph 17 (3) of the third Schedule, the petitioner laments that the section imposes suspension with nil pay and further that the prescribed alimentary allowance had not been determined by the Commission. The respondents' position is that indeed paragraph 17 imposes payment of an alimentary allowance and nil salary but the Commission had not determined the allowance. Further, the respondents allege and urge that the Employment Act 2007 does not apply because the Judicial Service Act exclusively applies to the service of judicial officers such as the petitioner. The Court has carefully examined paragraph 17 (3) and the Third Schedule in its entirety and there is nowhere it is enacted by Parliament that a judicial officer or other staff may or shall be suspended on nil pay.

35. The Court returns that there is no such provision and the Court has searched and researched for such provision again and again in the Judicial Service Act but has not found it. The Court therefore returns that there is no express, implied or other provision or suggestion in the Act that the salary of a judicial officer or other staff on suspension would be withheld or not paid during the period of suspension. While making that finding the Court has carefully considered the safeguards in paragraphs 15 and 17 of the Third Schedule. In exercising the power to suspend, the 1st respondent in paragraph 15(2) is to act in accordance with the provisions of the Schedule and in accordance with any other appropriate regulation which may be in force. Paragraph 17(3) provides that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine. Further, paragraph 17(4) states that an officer who is suspended shall be required to comply with such conditions as may, by regulations

be prescribed. Paragraph 30 thereof provides that any case not covered by the Third Schedule shall be dealt with in accordance with such instructions as the Commission, the 2nd respondent, may from time to time issue. Section 47 of the Act then confers the 2nd respondent the power to make regulations for the better carrying out of the purposes of the Act. Thus the Court returns that the safeguards in imposing a suspension are that provisions of the Third Schedule must apply; an alimentary allowance must be paid; the regulations by the 2nd respondent prescribing conditions that may be imposed on an officer who is on suspension apply; and where the Schedule has not covered a given situation, the 2nd respondent must issue applicable instructions. To that extent, the Court returns that the provisions of paragraphs 15 and 17 have not been shown to be unconstitutional and they do not prescribe that an officer may be emplaced on suspension without pay or with nil pay.

36. Fifthly, the Court readily returns that whereas the Judicial Service Act is the primary legislation on the service of the judicial officers and other staff of the Judiciary, the Employment Act, 2007 equally applies as appropriate or necessary. The law is that the Employment Act, 2007 is the primary legislation for implementation of Article 41 of the Constitution and there is no established reason why it would not apply to judicial officers and other staff of the Judiciary especially where by statute or contract there are no better terms and conditions of service applicable than those prescribed in the Employment Act, 2007. The Court follows its decision in Margaret Lorna Kariuki –Versus- Embu County Government [2015]eKLR thus, "The second issue for determination is whether the office of the county secretary was excluded from the application of the Employment Act, 2007. The parties were in agreement that the office had not been excluded by the Minister under section 3 of the Act. The court finds as much and further holds that even if it had been excluded, the better or similar terms under the special arrangements as submitted for the claimant would need to be established so that the court would determine the case upon such special terms of service. Such better or similar terms, in the opinion of the court, would include the minimum safeguards of valid reasons; and notice and a hearing as provided in sections 43 and 41 of the Employment Act, 2007. In the opinion of the court, the import and scope of the proviso to section 3(5) of the Act is that if the terms and conditions of the special arrangement of an excluded office are inferior to the terms and conditions provided under the Act, then the provisions of the Act will swiftly apply to the case by default. The court further holds that if an office is excluded from terms of the Act under section 3 of the Act, the court's jurisdiction is not thereby ousted; the court will hear and determine that excluded employment dispute on the basis of the better terms of service as provided for in the special arrangement. Thus, the specific contractual terms would apply in determining the dispute."

37. Prior to the new Republic under the Constitution of Kenya, 2010, the relationship that accrued when a person was engaged in the public service in Kenya's circumstances was considered in the case of Mburugu Muguna Geoffrey – Vs- Attorney General Civil case No. 3472 of 1994 at Nairobi where Ojwang J (presently Judge of the Supreme Court) held that employment in the public service both provides a machinery of serving the public interest and benefits the individual employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. That it is in the interest both of the public, to whom services are rendered and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office be fulfilled. In that case, the court stated that the law will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices. Further, the Ojwang J held that the purpose of the law was to ensure a correct delivery of a good public service. In that case, the Court found that it would be a distortion of the quality of public service when self-interested individuals, purportedly in the name of public interest, jettison the law to the four winds and impose their subjective inclinations to the delivery process. The Court considers that the holding applies to the New Republic and in view of the

holding, the Court returns that judicial officers and other staff of the judiciary are clearly employees and where there is no specific constitutional, statutory, contractual or lawful policy provision applicable to their service and prescribing better or similar terms and conditions as the minimum prescriptions in the Employment Act, 2007, the minimum statutory provisions in the Act would apply as binding.

38. The Court further follows the holding by Rika J in Peterson Ndung'u & 5 Others –Versus- Kenya Power and Lighting Company Limited [2014]eKLR that the withholding of an employee's pay during the period of suspension has no basis and validity under the Employment Act, 2007. That principle applies as the minimum term and condition of service under the Employment Act, 2007. Needless to state, it is a principle within the purview of Article 41 of the Constitution on fair labour practices. Further, the Court considers that the minimum terms and conditions of service under the Employment Act, 2007 constitute such rights that are incorporated in the Bill of Rights when the Constitution provides in Article 19 (3) (b) that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Chapter 4 of the Constitution on the Bill of Rights.

39. Thus the Court returns that it is unconstitutional for an employer by policy or regulation to impose suspension with nil pay as an administrative or executive interlocutory disciplinary measure pending the finalisation of the disciplinary process. The Court considers that it amounts to unfair labour practices in contravention of Article 41 of the Constitution for an employer to impose suspension, more so an indefinite suspension, with nil pay. Thus the Court has held before that where an employer withholds salary during interdiction, then the employee would be entitled to recover at the end of disciplinary process and there cannot be a notion of suspension with nil pay. The court follows the holding in Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, in which the court stated thus, "The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."

40. In the present case the Court has found that paragraph 17(3) or other provision of the Third Schedule or regulations or instructions by the 2nd respondent have not been shown to have prescribed suspension with nil pay and to that extent, the petitioner has failed to show that the provision was unconstitutional as prayed for. Further, the Court therefore returns that in absence of a provision of law to the contrary (constitutional, statutory, or regulatory) a judicial officer or other staff of the Judiciary who is emplaced on suspension would be entitled to full pay. In the Court's opinion, the disciplinary regime in that regard is that by the time the officer is suspended, the alleged disciplinary case must have been processed and the Panel or Committee established per section 32 of the Act already seized of the disciplinary case towards expeditiously handling and determining the case as prescribed

in the Third Schedule. In that way, expeditious determination of the disciplinary case is the obligation vested upon the respondents which is within their power and the affected officer should therefore not suffer nil pay but enjoy full pay. While making that finding the Court finds that the mandatory alimentary allowance was not shown to have been determined by the Commission as envisaged in paragraph 17 (3) and in any event, as per the holding by Rika J in the cited case, such an allowance would not substitute the employer's obligation to pay remuneration which is at the core of the contract of employment as defined in the Employment Act, 2007.

41. To answer the 2nd issue for determination the Court returns that paragraphs 15 and 17(3) of the Third Schedule to the Judicial Service Commission Act, Cap. 185B are not unconstitutional. The Court has also found that there is no conflict between the provisions of paragraphs 15 and 17 of the Third Schedule and sections 14 and 32 or other provisions of the Judicial Service Act.

42. The 3rd issue for determination is whether the suspension of the petitioner by the letter dated 13.06.2019 was unlawful. The Court has already found that there are clear safeguards instituted by the Third Schedule of the Judicial Service Act to be observed by the 1st respondent in the exercise of the delegated power to suspend as provided for in paragraphs 15 and 17 of the Third Schedule. The Court finds that the suspension as imposed did not comply with the safeguards as provided for.

43. First, the suspension letter imposed conditions such as nil pay, handing over of all Government Stores in the petitioner's possession and preparing a detailed hand-over report to the Chief Magistrate and copying the same to the Chief Registrar of the Judiciary; and reporting to the Chief Magistrate, Kiambu Law Courts every last Friday of each month. It has not been shown for the respondents that such and other conditions in the suspension letter had been prescribed by the 2nd respondent's regulations and as mandatorily required in paragraph 17(4) of the Third Schedule.

44. Second, under paragraph 17 of the Third Schedule, an officer may be suspended if such officer has been convicted of a serious criminal offence; or if proceedings for dismissal have been taken against an officer, as a result of those proceedings, the Chief Justice considers that the officer ought to be dismissed. There is no dispute that as for the first precondition for suspension, the petitioner had not been convicted of a serious criminal offence and that provision was not available to justify the suspension. As for the second precondition, it is submitted for the respondents that the proceedings for dismissal of the petitioner had been taken by reason of the suspension letter which also amounted to a show-cause notice. Paragraph 25 of the Third Schedule provides for proceedings for dismissal. The big question is when (or at what point) the proceedings for dismissal of the petitioner commenced or were taken in view of the detailed and applicable provisions of the Third Schedule to the Act. The Court considers that the answer rests on a thin line and a careful consideration of the relevant statutory provisions is crucial.

45. The Court has considered section 32 of the Act and further considered paragraph 25 of the Third Schedule. The Committee or Panel under section 32 is said to be, inter alia, for purposes of discipline of judicial officers and staff. Paragraph 25 of the Third Schedule provides for framing of charges by the 1st respondent and forwarding the statement of the charges to the officer concerned together with a brief statement of the allegations in so far as they are not clear from the charges themselves and inviting the officer to reply in writing by a specified date the grounds on which the officer relies to exculpate; if in the opinion of the 1st respondent the officer fails to exculpate as per the written reply or the officer fails to reply within the allowed time, the 1st respondent shall lay before the 2nd respondent the statement of the charge, the reply if any, and the 2nd respondent shall decide if the disciplinary proceedings should continue or not; and if the Commission (2nd respondent) decides that the disciplinary proceedings should continue, the Commission shall appoint a Panel or a Committee being 3 persons to investigate the matter and the 1st respondent shall not be a member of the Committee or Panel. The Court has

carefully considered the flow of events as against the purpose of the Committee or the Panel in section 32 of the Act and returns that disciplinary proceedings are not taken or commenced against an officer for purposes of paragraph 17 (2) unless the 2nd respondent has decided in terms of paragraph 25(3) thereof that disciplinary proceedings should continue against the officer. Prior to that stage, the Court finds that the 1st respondent undertakes proceedings in the nature of a confidential preliminary inquiry and prior to the decision by the 2nd respondent that disciplinary proceedings should continue against an officer, there would be no ground for the 1st respondent to suspend the officer. Indeed, the Court has wondered, what purpose would it serve for the 1st respondent to suspend the officer at the stage of the preliminary inquiry and thereafter the 2nd respondent returns that disciplinary proceedings should not continue against the officer? In the opinion of the Court, such premature suspension, as was the case in the instant case, would not have served any purpose, would be unnecessary, and if imposed would be seriously prejudicial to the affected officer and by extension, the general reputation of the Judiciary. The Court finds that the Third schedule imposes protections that cultivate a sense of step by step patience prior to a decision to suspend a judicial officer or other staff of the Judiciary. The Court therefore finds that it was not open for the suspension to be imposed against the petitioner as was done prior to the matter being tabled to the 2nd respondent for appropriate decision by the 2nd respondent, one way or the other, as to whether disciplinary proceedings that may have resulted in the dismissal of the petitioner were to continue and, as was provided for and envisaged in paragraph 25 (3) of the Third Schedule. The mandatory substantive and procedural safeguard or protection of judicial officers and other staff of the Judiciary in that regard was not upheld in manner the petitioner was suspended.

46. Third and being a mere repetition, the Court finds that the mandatory alimentary allowance as enacted by the Parliament in paragraph 17(3) of the Third Schedule was not provided at all. The Court finds that the petitioner's entitlement in that regard was not diminished in any manner for want of regulations by the 2nd respondent in that regard and as was submitted or suggested for the respondents.

47. Fourth, the Court returns that as submitted for the petitioner, the petitioner was suspended indefinitely and in view of the absence of implementation of the cited safeguards in the entire process, the petitioner was entitled to lament that he had been constructively terminated. The Court follows the holding by Ndolo J in Joseph Ndungu –Versus- Mastermind Tobacco (K) Ltd [2014]eKLR, thus "An employee cannot be kept on suspension indefinitely and I agree with the Claimant that his continued suspension amounts to constructive dismissal amounting to unfair termination of employment."

48. Thus, to answer the 3rd issue for determination the Court returns that the suspension of the petitioner by the letter dated 13.06.2019 were unlawful.

49. In making that finding, the Court finds that in enhancing the safeguards or protections in the exercise of the delegated powers under paragraphs 15, 16, 17 and other powers and duties as imposed under the Third Schedule, the 2nd respondent is expected to promulgate regulations covering such matters as the maximum period of time an officer can be emplaced on a suspension; the period of time within which the Committee or Panel must conclude its investigations and findings in a disciplinary case before it; conditions that may be imposed against an officer who is emplaced on suspension or interdiction; release to an affected officer such payments or benefits that might have been withheld during interdiction or suspension; the fate of outstanding work as may have been assigned to an officer who is emplaced on suspension or interdiction; and a step by step procedure to be followed by the respondents in carrying out their functions and duties under the Third Schedule and the standard forms or instruments that may be used as necessary towards uniform delivery of the human resource functions of recruitment, selection, appointment, promotion, remuneration and motivation, removal including retirement, and others as envisaged in Article 172 of the Constitution as read with the Judicial Service Act and in particular sections 32 and 47 thereof.

50. As relates to payment of officers during the period of suspension, there are sufficient parliamentary enactments that may not be binding but may properly guide the 2nd respondent in prescribing the appropriate regulatory protections in line with emerging trends in the New Republic. One such latest enactment is section 71 of the Public Service Commission Act, 2017. Subsection 71(3) thereof provides that a public officer who has been suspended shall receive a half basic salary and full house allowance but other benefits shall be withheld, provided, an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case. Subsection 71(4) thereof provides that if the officer on suspension is not dismissed or otherwise punished, any salary, allowance or other benefit withheld under the section shall be restored to the officer upon conclusion of the disciplinary process. Subsection 71(5) thereof states that such withheld salary, allowances and other benefits shall not be restored in event a punishment, even if it is not a dismissal, is imposed upon the officer. In general, such provisions as in section 71 of the Act would enhance the exercise of disciplinary powers to suspend.

51. The 4th issue for determination is whether the grounds for suspension as set out in the suspension letter were genuine or valid. The Court has already found that the suspension was premature and free from the statutory safeguards that chained the exercise of the delegated power to suspend as was vested in the 1st respondent. Thus the Court considers that the less is said about the merits of the grounds of the suspension the better. Nevertheless, the parties spent considerable time on this issue in their pleadings and submissions as if the Court was being invited and urged to decide the disciplinary case on its merits one way or the other. The Court considers that it is always the employer's and not the Court's role to decide the disciplinary case against an employee and the proper jurisdiction of the Court is to judicially review the employer's decision in that regard. However, in view of the material before the Court and taking all the circumstances into account the Court will make two pertinent observations on the issue.

52. First, the material before the Court shows that throughout the events leading to the impugned suspension, the petitioner appears to have handled on 23.05.2019 Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another –Versus- Director of Public Prosecution & Others in circumstances whereby the applicable operational requirements were at large and the 2nd respondent had not instituted a step by step procedure by which a judicial officer is assigned duty. Thus whereas Hon. Patricia Gichohi stated that, in the circumstances, the matter ought to have been handled by either Hon. Stella Atambo or Hon. Wilson Rading as the day's duty Court, the officer in-charge of the Criminal Registry Delly Amiani stated that Hon Atambo had told her to let the petitioner who was the only free judicial officer to handle the case in which the advocate involved had been impatient. The inference is that there were no documented procedures for undertaking the business of the Magistrates' Courts at Kiambu. It is the Court's opinion that for efficient, effective, ethical and accountable delivery of judicial service, it is important that the respondents institute documented procedures of practice and service delivery such as in matters of allocation of files to judicial officers, dealing with sudden absence of an officer or urgent matter, conferencing procedures where a matter is to be handled by more than one judicial officer, and such other operational matters. While the Court takes judicial notice of the many and positive steps taken by the respondents in that regard, the Court observes that the present petition shows that much more needs to be done in that regard.

53. In particular, section 20 of the Magistrates Courts Act, No.26 of 2015 prescribes the making of rules generally for the effective organisation and administration of the Magistrates' Court and the rules may provide for, inter alia, procedure for handling claims relating to violation of human rights; general practice and procedure of Magistrates' Courts; supervision and inspection of Magistrates Courts; automation of Court records, case management, protection and sharing of Court information and

the use of information communication technology; form, style, storage, maintenance and retrieval of Court records; and procedure relating to contempt of Court.

54. The Court considers that such documented rules and procedures would serve several purposes including informing the officers the expected operational standards and procedures of service delivery. Thus, section 45 of the Employment Act, 2007 provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer; and the employment was terminated in accordance with fair procedure. In that regard and of deficient employer's operational systems or requirements the court upholds its opinion in GraceGacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR thus, "To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

55. Taking into account the material on record, the Court considers that the evidence is that the petitioner handled on 23.05.2019 Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another –Versus- Director of Public Prosecution & Others in circumstances whereby the operational requirements in the rules as envisaged in section 20 of the Magistrates' Court Act, 2015 appear not to have been available to provide the necessary documented operational requirements as a guidance to the officers in that regard. To the extent that such operational deficiencies may have existed, the Court returns that as per opinion in GraceGacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, the petitioner would not be held culpable so as to suffer adverse action if he was taking a positive initiative in good faith and towards good and responsive judicial service delivery.

56. Again the Court has observed that as relates to the operational system and requirements in the Magistrates' Courts, section 11 of the Magistrates' Court Act, 2015 provides that there shall be a court administrator in every station who shall be appointed by the 2nd respondent pursuant to Article 172(1) (c). Further, the section provides that a court administrator shall exercise such powers and perform such duties as may be conferred upon the court administrator by the rules of the court and directions of the Chief Registrar. The section provides that the court administrator shall act in accordance with the general directions of the Chief Registrar and shall be responsible for:

    a) the establishment and maintenance of the Registry;

    b) the acceptance, transmission, service and custody of documents in accordance with the rules of the court;

    c) the facilitation of the enforcement of decisions of the Magistrates' Courts;

    d) certifying any order, direction or decision is an order, direction or decision of the Magistrate's Court, as the case may be;

e) causing to be kept records of the proceedings and the minutes of the meetings of the Magistrates Court and such other records as the Magistrate's Court may direct;

f) the management and supervision of the staff of the Magistrate's Court;

g) the day to day administration of the Magistrates' Court;

h) the management of the library of the Magistrate's Court; and

i) undertaking any duties assigned by the Magistrates' Court.

57. It is the opinion of the Court that such are provisions that support a system of a good and documented operational systems and requirements in support and guidance of the working of the Magistrates' Courts.

58. While the Court has taken judicial notice and commended the respondents for the various policy documents and manuals that have been initiated towards clarity on operational policies, systems, and requirements, it is the Court's opinion that such administrative policies do not substitute the instances where statutory provisions expressly impose the making of rules, regulations, and other statutory instruments. The Court considers that the making of such rules, regulations, and other statutory instruments amounts to a deliberate statutory safeguard towards ensuring that those to be affected by the rules, regulations, and other statutory instruments, as the case may be, and experts, are involved in the making of the applicable provisions; and further that parliamentary approval is obtained, as provided for in the Statutory Instruments Act. Thus, to emphasis the position, section 47 (3) of the Judicial Service Act amplifies the provisions of the Statutory Instruments Act by providing that regulations made under section 47 of the Act shall be presented to the National Assembly for debate and approval before they take effect. Thus, the Court returns that the manner of undertaking of human resource functions by the respondents is so crucial that it must be governed by regulatory provisions which have a force of subsidiary legislation or a statutory instrument under the Statutory Instruments Act and cannot be merely an administrative undertaking based on administrative policies alone.

59. In that regard the Court follows its holding in the judgment delivered on 12.07.2019 in Teachers Service Commission (TSC) –Versus- Kenya National Union of Teachers (KNUT) and Another [2019]eKLR, thus, "Finally, the Court holds that by reason of the findings in this judgment, the delegation doctrine and the intelligible principle apply under the Constitution of Kenya, 2010 and the Parliament has not given out its constitutional legislation making powers and functions to constitutional commissions, independent offices and indeed any other authority. Conferment of one or other constitutional power and function to such commissions, independent offices or other authorities does not amount to conferment of the legislative powers and functions that are constitutionally vested in the Parliament. Subsidiary legislation must therefore comply with and be within the confines of the delegation doctrine and the intelligible principle. Within that holding, the Court advises that every constitutional commission, independent office and indeed any other authority should consistently caution themselves that administrative policy cannot substitute a prescribed statutory instrument such as regulations in the instant case." Taking that holding into account, the Court considers that the delegation doctrine and the intelligible doctrine are offended not only when the delegated legislation is shown to be ultra vires the boundaries of the enactment empowering the making of the subsidiary legislation, but also, when by omission, there is failure to make the required subsidiary legislation as was conferred and expected by the relevant enactment empowering the making of the subsidiary legislation.

60. Second, the Court has observed that the suspension letter stated that the petitioner lacked jurisdiction to handle on 23.05.2019 Kiambu Magistrates Court Miscellaneous Criminal Application No. 222 of 2019, Ferdinand N. Waititu & Another –Versus- Director of Public Prosecution & Others. The Court

observes that towards safeguarding the independence of the Judiciary, Article 160 (5) provides that 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. It is sufficient for the Court to hold that unless it is shown that a judicial officer has not acted in good faith in the lawful performance of a judicial function, the liability for anything done or omitted shall not accrue and that protection of judicial officers, in the opinion of the Court, spreads to liability in administrative disciplinary proceedings as appropriate or the case may be.

61. The 5th issue for determination is whether the petitioner's constitutional rights and protections were violated. To the extent that the suspension has been found to have been unlawful as found by the Court earlier in this judgment, the Court returns that the petitioner's right to fair labour practices as per Article 41 and the protection of public officers as per Article 236 of the Constitution were infringed.

62. In considering the alleged infringement of rights and freedoms, the Court finds that whereas the provisions of paragraphs 15 and 17 of the Third Schedule of the Judicial Service Act have been found not to have been unconstitutional and they were capable of being implemented in line with the relevant constitutional provisions (because the paragraphs in their content they had no rule that inherently breached a constitutional provision), the Court has also found that the manner in which the suspension was imposed infringed the petitioner's protections under Article 236 and Article 41 of the Constitution. The Court follows its opinion in the judgment in George Maina Kamau –Versus- The County Assembly of Murang'a and 2 Others [2016]eKLR, thus, "While addressing the 3rd issue for determination, the court is alert that in considering a case, a litigant may show that a provision of a statute as applied to that litigant is unconstitutional and if the court finds as much, the decision would apply to the parties to such litigation, such decision binds only the parties and the matter ends there. In the opinion of the court, in such cases, the statute does not thereby become unconstitutional generally and it remains good law to be applied constitutionally in future circumstances. However, if a statutory provision contains unconstitutional prescription or rule and the court finds as much, then the statute would not apply to any future circumstances as is a nullity as against every person. Such a statute or statutory provision would be incapable of ever being applied constitutionally. In such cases, where a statute is unconstitutional because it inherently contains a prescription or rule that is unconstitutional, it is the opinion of the court that the legislature should move with speed to repeal the statute so that the offensive provision does not remain on the statute book. In the opinion of the court, that is more so because by promptly repealing the unconstitutional statute or the offending unconstitutional provision, public officers and the general users of the statute or statutory provision would not be misled to apply it for the time it persists to exist on the statute book."

63. The Court has found that the suspension was premature in view of the statutory regime set out in the Third Schedule to the Judicial Service Act. To that extent the Court returns that the petitioner has established that his rights under Article 47(1) to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was thereby infringed.

64. To answer the 5th issue for determination, the Court returns that the petitioner has established that his rights, freedoms and protections were infringed against as enshrined in Article 41, 47(1) and 236 of the Constitution.

65. To answer the 6th issue for determination, the Court returns that the petitioner has established a case for the Court's intervention in the impugned disciplinary process. The Court finds that the petitioner has satisfied the criteria for justification of the Court's intervention as set out in the previous Court's decisions. In such cases seeking to interfere with the employer's human resource powers, the court follows its opinion in the ruling in Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, "The principles are clear.

66. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

67. In the present case, it has been established that the suspension was imposed in breach of the applicable statutory law and it has not been urged there existed internal mechanisms to remedy the grievance. Thus, the petitioner was entitled to move the Court to challenge the lawfulness or otherwise of the impugned suspension and surrounding circumstances of the administrative disciplinary process.

68. The 7th issue for determination is on remedies. The Court has already found that the suspension was not lawful and it is liable to being quashed and declarations would issue that it was illegal or unlawful. The petitioner prayed for the judicial review order of certiorari. The petitioner is entitled to the order as prayed and the order would issue accordingly.

69. The Court has considered the prayers for damages including for punitive and aggravated damages. The evidence was that the 1st respondent at all times acted in good faith and there was no evidence of bad faith. The replying affidavits were clear that the 1st respondent had not acted in bad faith but had acted honestly in delivery of the duties vested in the State office as duly held. Thus, paragraph 20 of the replying affidavit was clear and was not disputed that the 1st respondent took the decision based on the information available to him at the time and that he had no personal interest in the matter and he had no personal vendetta against the petitioner. The further evidence that was not rebutted was that the respondents never released the information about the disciplinary case to the social and mainstream media. In the circumstances the prayer for punitive and aggravated damages will fail.

70. The Court has also considered the extent of the breach of the fundamental rights and freedoms and returns that the breach is intertwined with the petitioner's right to continued employment with full pay. The Court has also considered the consent the parties recorded under which the respondents mitigated the injury as may have been caused to the petitioner. In the circumstances, the Court returns that it is sufficient that the petitioner is paid all salaries, allowances and benefits withheld throughout the suspension to date and to continue in employment without loss of rank, status, and all attached benefits as per the prayer for the order of mandamus.

71. Further, so far as the 1st respondent acted in good faith and has not been shown to have acted in bad faith or in interests outside his official roles, the Court returns that there shall be no finding that he violated Articles 10, 73, 232, and 236 as was prayed for. In that regard the Court is guided by section 45(1) of the Judicial Service Act that the members of the 2nd respondent, who include the 1st respondent, 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 of the 2nd respondent.

72. As the suspension was unlawful and unfair, the petitioner is entitled to the prayer for an order of prohibition or permanent injunction as prayed for.

73. For avoidance of doubt, it was not established for the petitioner that paragraph 15 of the Third Schedule of the Judicial Service Act, 2011 is in conflict with sections 13, 14, and 32 (1) and (3) of the Judicial Service Act No.1 of 2011 and a declaration in that regard will not issue.

74. As the petitioner has succeeded, the respondents will be liable to pay the costs of the petition.

75. The Court comments the Advocates who appeared (Mr. Isaac Wamaasa Advocate for the respondents and, Mr. Havi, Mr. Robbinson Kigen, Mr. Dennis Mureithi, Ms. Irene Kushindi and Mr. Titus Ochichi Advocates for the petitioner) for their effective participation in the proceedings and the elaborate submissions towards the just, expeditious, and proportionate resolution of the dispute and as provided for in section 3 of the Employment and Labour Relations Court Act, 2011.

76. In conclusion judgment is hereby entered for the petitioner against the respondents for:

a) The declaration that the 1st respondent's letter dated 13.06.2019 was illegal, null and void ab initio for being in contravention of Articles 41, 47(1) and 236 of the Constitution of Kenya, 2010.

b) A declaration that the respondents to pay the petitioner all salaries, allowances and given all other due contractual and statutory benefits withheld throughout the suspension period to date and to continue in employment without loss of rank, status, and all attached benefits; and the respondents to pay the petitioner due sum of money by 01.11.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment; and further the petitioner to report to the respondents forthwith and not later than 09.09.2019 for appropriate deployment and assignment of duty.

c) The declaration that the respondents infringed the petitioner's fundamental rights as guaranteed under Articles 41 and 47(1) of the Constitution of Kenya, 2010.

d) The judicial review order of certiorari bringing to the Honourable Court and quashing the decision of the 1st respondent as contained in the letter dated 13.06.2019.

e) The order of prohibition and permanent injunction prohibiting and permanently restraining the respondents by themselves, or by their officers or agents from implementing the decision contained in the 1st respondent's letter of 13.06.2019 and from taking any adverse action against the petitioner pursuant to the said decision.

f) The order of Judicial Review of Mandamus directing the Respondents to reinstate the Petitioner to his employment including the reinstatement of his salary and employment benefits.

g) The petitioner to serve this judgment upon the Attorney – General within 7 days towards the Attorney-General taking appropriate action within his constitutional and statutory roles to correct the anomaly the Court has identified in number of paragraphs as referred to in paragraph 15 of the Third Schedule of the Judicial Service Act.

h) The respondents to pay the petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED IN COURT AT NAIROBI THIS FRIDAY 30TH AUGUST, 2019.

BYRAM ONGAYA

JUDGE