



**Njora v Judicial Service Commission & another (Petition 50 of 2018)
[2019] KEELRC 861 (KLR) (20 September 2019) (Judgment)**

Lucy Muthoni Njora v Judicial Service Commission & another [2019] eKLR

Neutral citation: [2019] KEELRC 861 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 50 OF 2018
NJ ABUODHA, J
SEPTEMBER 20, 2019**

BETWEEN

LUCY MUTHONI NJORA PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

JUDGMENT

1. By a petition filed on 6th June, 2018 the Petitioner herein averred among others that on 27th May, 2016 Lady Justice Kalpana Rawal and Justice Philip Tunoi SCJJ were expected to contest the outcome of the Court of Appeal in the matter in which the two judges contested their retirement age. The retired Chief Justice Mutunga issued instructions to the Registrar Supreme Court (Ms Nyaiyaki) and copied to all Supreme Court Judges. The notice was to the effect that any application or appeal emanating from the decision of the Court of Appeal in Civil Appeal No 1 of 2016 should be placed before him for directions as a singly Judge. Ms Nyaiyaki being absent relayed the Chief Justice's instructions to the petitioner. According to the petitioner, she relayed the Chief Justice's directions to Lady Justice Njoki Ndungu.
2. The petitioner then took the Chief Justice's copy of his file to his chambers and prepared a coram sheet. The Chief Justice further informed her to tell Lady Justice Njoki Ndungu that the applications would be handled by the Chief Justice as a single judge. The petitioner proceeded to Lady Justice Ndungu's chambers to inform her of the same but found Mr Kilukumi advocate in chambers addressing the Judge on the application whereupon she whispered to the Judge the Chief Justice's directions but the Judge did not take the interruption kindly and sternly warned her and ordered her to leave her chambers as she was conducting proceedings. According to her, she returned to the Chief Justice



chambers to inform him of the development and the Chief Justice told her she would write to the Judge.

3. All went well thereafter and the petitioner continued working and on 16th June, 2016 helped the Chief Justice handover upon retirement. According to her the Chief Justice even praised her good work and encouraged her to give the incoming Chief Justice the necessary assistance as she had done to him. In a surprise turn of events the petitioner received a letter containing a charge and interdiction from Rtd Chief Justice Mutunga dated 15th June, 2016. The letter accused her of committing an act of gross misconduct by fixing application Nos. 11 of 2016 for hearing without consultation with the Hon. Chief Justice and in complete disregard to the Chief Justices directions. She was required to give a written response to the charge within 21 days and proceeded to indefinite interdiction.
4. According to the petitioner the Supreme Court proceedings of 27th May 2016 with lady Justice Ndungu as presiding Judge (duty judge) indicate that she was the one who fixed the hearing date for the applications 11 and 12 of 2016 and not the petitioner as alleged by the charge. On 17th June, 2016 four judges of the Supreme Court held a meeting to discuss the contents of the letter dated 15th June 2016. The meeting was chaired by Hon. Ibrahim SCJ as Acting President of the Court. They unanimously agreed that the petitioner would do a response to the Acting Supreme Court President Hon. Mohammed Ibrahim as she continues to carry out her duties.
5. According to the petitioner, there was no formal complaint to Judicial Service Commission (JSC) as the disciplinary body for Registrars. Further conclusion by all Judges present was that the matter revolving around the charge had been conclusively dealt with and marked resolved. On 21st June, 2016 the President of the Supreme Court wrote to the Chief Registrar requesting that the matter be placed before the new Chief Justice once appointed and further that the petitioner continues to serve in her official capacity. However in her response the 2nd respondent (CRJ) resisted that she did not have the powers to hold the letter in abeyance and that the petitioner continues with the interdiction pending action by the incoming Chief Justice.
6. On 24th October, 2016 she sent a letter inquiring about her status to the incoming Chief Justice Maraga but received no response. The situation persisted until 25th January, 2017 when the petitioner received a call from the Supreme Court to collect a letter. While there she was served with another letter at 3.00 p.m. for a hearing on 26th January, 2017 at 8.00 a.m. This according to her was contrary to regulation 25(4) of the 3rd Schedule to JSC Act which requires such conditions to be 12 days.
7. Despite the extremely short notice, on 26th January, 2017 the petitioner presented herself before the committee and sought adjournment to seek legal counsel. The hearing began on the 27th April, 2017 and the petitioner chose to rely on her earlier written detailed statement and the committee members to turns to cross-examine her in what she considered a hostile and judgemental manner.
8. The committee called four witnesses to testify on the material day and did not provide the petitioner with prior access to witness statements and exhibits which was unprocedural and contrary to regulation 25(5) of the 3rd schedule to JSC Act which requires prior access to documents and statements. The petitioner was issued with statement of each witness as they took to testify despite her advocate's protest that it was unfair and oppressive.
9. On 3rd of July 2017 the petitioner filed her submissions and did not hear from the 1st respondent for seven months until a letter dated 26th January, 2018 was received by her notifying her of the decision to dismiss her from judicial service with effect from 15th June, 2016 without furnishing any detailed reasons.



10. The respondent filed a replying affidavit through the CRJ Anne Amadi who deponed in the main that:
- 1) The Petitioner joined the Judiciary as a District Magistrate II (Professional.) on 2nd May 2001 and rose through the ranks to the position of Senior Principal Magistrate. She was appointed as the Deputy Registrar of the Supreme Court on 10th January 2014 and was serving in that capacity until her interdiction on 15th June 2016 and her subsequent dismissal from service on 26th January 2018.
 - 2) Through this Petition, the Petitioner seeks to challenge the 1st Respondent's disciplinary process and her subsequent dismissal from the Judiciary on account that the same was un-procedural, unconstitutional and illegal.
 - 3) The Respondents will at the earliest opportunity, raise a Preliminary Objection to these proceedings on account that the Petitioner had not exhausted or even attempted to utilize the Appeal/ Review mechanisms available to her and has presented her Petition inviting the Court to sit on Appeal or retry the case that was before the 1st Respondent on its merit; an invite that is alien to the jurisdiction of this Honorable Court and expressly contravenes the applicable law.
 - 4) On the 27th May, 2016 the Court of Appeal delivered its Judgements in Nairobi Civil Appeal No 1/2016 filed by the Hon. Lady Justice (Retired) Kalpana Rawal and Nairobi Civil Appeal No. 6/2016 filed by the Hon. Justice (Retired) Philip Tunoi. The Appeals were challenging the decision of the High Court on the retirement age of Judges appointed before the promulgation of the Constitution of Kenya 2010. (Annexed herein and marked as 'AA-1' is a copy of the Judgment)
 - 5) I am aware, from the information presented before the JSC that upon the delivery of the decision of the Court of Appeal, the retired Chief Justice called the Registrar of the Supreme Court Hon. Esther Nyaiyaki through her mobile phone and instructed her to inform the Deputy Registrar (the Petitioner) who was the Registrar on duty, that should an Application arising out of the decision of the Court of Appeal be filed in the Supreme Court, the Application should be placed before him (The Chief Justice) to issue appropriate directions on the hearing and disposal of the Application. (Annexed herein and marked as 'AA-2' is a copy of the statement of Hon. Esther Nyaiyaki)
 - 6) I am further advised by the statement in paragraph 27 (above) that Hon. Esther Nyaiyaki conveyed the retired Chief Justice's directions to the Petitioner and further, the retired Chief Justice later called the Petitioner reiterating the same information and following up on whether she had been informed of his directions. To which information the Petitioner gave an affirmative response.
 - 7) Subsequently, Justice Kalpana Rawal (the then Deputy Chief Justice) and Justice Phillip Tunoi filed their Applications on 27th May, 2016 in the Supreme Court, Supreme Court Application No. 11/2016, Justice Kalpana Rawal -Vs- JSC & Others and Supreme Court Application No. 12 /2016, Justice Phillip Tunoi & Another -Vs- JSC & Others. The Applications prayed for conservatory orders to suspend the decision of the Court of Appeal pending the hearing and the determination of the Application and the intended Appeal to the Supreme Court among other orders.
 - 8) I am aware from the Statements filed by the Registry Staff in the Petitioner's disciplinary case that the Applications were received at the Supreme Court Registry, processed and contrary to the Retired Chief Justice's directions, placed before the Hon. Lady Justice Njoki Ndungu



who heard the Applications ex parte and issued interim conservatory orders which inter alia suspended the decision of the Court of Appeal, allowing the Applicants to continue discharging their constitutional, judicial and administrative duties; restraining the Chief Registrar of the Judiciary from issuing retirement notices and advertising for vacancies in the office of the Deputy Chief Justice and that of the Judge of the Supreme Court; and scheduling the inter parties hearing of the Applications for 24th June, 2016.

- 9) I am aware from evidence submitted by Hon. Esther Nyaiyaki that on the material week when the two Applications were filed, specifically the week from of 23rd to 27th May, 2016 the Hon. Esther Nyaiyaki was out of the office on other official duties and had therefore designated the Petitioner, as the Registrar on duty for that week.
- 10) I am aware that in addition to the directions issued by the retired Chief Justice on phone on the 27th May, 2016, to Hon. Esther Nyaiyaki and to the Petitioner, the retired Chief Justice had earlier on 8th January, 2015 addressed an email to the Registrars of the Supreme Court, including the Petitioner and copied to the retired Deputy Chief Justice Kalpana Rawal. The subject of the email was 'Handling of Application for certification or urgent matters'.
- 11) The email of 8th January, 2015 attached herein as 'AA-7' contained directions to the effect that copies of Applications filed at the Supreme Court would be furnished to all Supreme Court Judges and that allocation of the said Applications to particular Judges would only be done by the Chief Justice and the Deputy Chief Justice (DCJ). (Annexed herein and marked 'AA-8' is a copy of the email print out).
- 12) It is clear from the above averments that as at the time of the filing of the two Applications Supreme Court Applications No. 11 & 12 of 2016, the directions obtaining on who among the Judges would hear the Applications were the specific directions issued by the Chief Justice on phone on the 27th May, 2016 and the directions issued on e-mail on the 8th January, 2015.
- 13) The Petitioner was consequently dismissed from judicial service after the 1st Respondent conducted the disciplinary process and found her guilty of gross misconduct by fixing Supreme Court Applications No. 11 & 12 of 2016 for hearing without consultation with the retired Chief Justice and in complete disregard of the Chief Justice's directions. The decision of the 1st Respondent to dismiss the Petitioner from service was communicated to the Petitioner vide a letter dated 26th January 2018.
- 14) The Hon. (Rtd) Chief Justice, in accordance with Section 16 of Part IV to the Third Schedule of the Judicial Service Act, interdicted the Petitioner from service on 15th June 2016 on account of gross misconduct for allegedly fixing Supreme Court Applications No. 11 & 12 of 2016 for hearing without consultation with the Hon. Chief Justice and in complete disregard to the specific directions issued by the Chief Justice in respect to the two subject Applications.
- 15) I am also aware that simultaneously with the interdiction, the Chief Justice in accordance with Section 25 (1) of Part IV to the Third Schedule of the Judicial Service Act formulated charges on 15th June 2016 and which charges were served upon the Petitioner on the same day. The Petitioner was required to respond to the charges within 21 days from the date of the letter communicating the charges as follows:

'That in the matter of Supreme Court Application No. 11 & 12 of 2016, she committed an act of gross misconduct by fixing the subject matters for hearing without consultation with the Hon. Chief Justice and in complete disregard of the Chief Justice's directions'.



- 16) The Petitioner subsequently responded to the charges vide a letter dated 17th June 2016 addressed to the then-Acting President of the Supreme Court.
- 17) After receipt of the Petitioner's response, the 1st Respondent in accordance with Section 25 (3) of Part IV to the Third Schedule of the Judicial Service Act resolved that the Petitioner appears before the Judicial Service Commission's Human Resource Management & Administration Committee hereinafter 'the JSC's Committee' for an oral hearing of her disciplinary case. The Petitioner was then invited to appear for an oral hearing of her case before the JSC's Committee on 26th January, 2017. (Attached herein and marked as AA-13 is a copy of the invitation for hearing).
- 18) I am aware that on 26th January 2017, a date scheduled for hearing of the Petitioner's oral hearing before the JSC's Committee, the Petitioner requested for an adjournment to enable her adequately prepare for the case. The request for adjournment was allowed by the Committee to allow her time prepare for her case in line with the fair trial principle. The JSC Committee had thus complied with Section 25 (4) of Part IV to the Third Schedule of the Judicial Service Act by granting the Petitioner sufficient notice to enable her prepare for the hearing.
- 19) In line with Section 25 (7) of Part IV to the Third Schedule of the Judicial Service Act, the Petitioner subsequently appeared before the JSC's Committee on 27th April 2017 in the company of her Counsel, Mr. George Oraro, Senior Counsel and were present throughout the hearing and were given an opportunity to cross examine all the witnesses who appeared before the Committee. The scheduled hearing on 26th January 2017, thus took place 4 months later which gave the Petitioner more than sufficient time to prepare her case.
- 20) The JSC's Committee took written and oral testimony from 8 witnesses who were cross-examined and their evidence tested by the Petitioner's Advocate in accordance with Section 25 (5) of Part IV to the Third Schedule of the Judicial Service Act.
- 21) I am aware that based on the proceedings averred to in paragraph 44 (above) that all the documents and statements relied upon and produced by the witnesses were availed in advance to the Petitioner and her counsel to enable them prepare adequately for the defence. In most instances the JSC's Committee confirmed whether the Petitioner and her Advocates were ready for the hearing and they did confirm they were ready.
- 22) At the close of the hearing, the Petitioner through her counsel requested for more time to file her written submissions. She was granted 14 days to file her submissions which she did on 3rd July 2017.
- 23) I am also aware that after the oral hearing and in accordance with Section 25 (9) of Part IV to the Third Schedule of the Judicial Service Act the JSC's Committee submitted its report to the full sitting of the JSC indicating that grounds of gross misconduct had been disclosed against the Petitioner and recommended that appropriate punishment be meted on the Petitioner.
- 24) That in a meeting held on 26th January, 2018, the full JSC in accordance with Section 25 (11) of Part IV to the Third Schedule of the Judicial Service Act deliberated on the Petitioner's disciplinary case, representations and the evidence presented before the JSC's Committee during the disciplinary hearing. The 1st Respondent made a finding that it was satisfied that the grounds of gross misconduct had been proved against the Petitioner in the Charge and resolved that the Petitioner be dismissed from Judicial Service.



11. In his closing submissions Mr Okemwa for the petitioner submitted that it was not in dispute that the substantive duty judge according to the duty roster was Njoki Ndungu during the week May 23 -27, 2016. According to Counsel, upon arrival of the applications at the Supreme Court registry they are handled and processed as per the rules and standing directions pertaining any such applications made to the court. The procedure was that parties file a soft copy and eight hard copies of pleadings. After receipted processing of these the soft copies are immediately sent to the judges by email and hard copies labelled Judge 1-7 and are distributed to the judges in order of seniority, Judge 1 being the Chief Justice. If the application is under certificate of urgency such as the application in question, the duty judge hears the matter and then transmits his/her original handwritten script to the registry file and seven copies are produced and distributed to the other judge's files for their record.
12. According to counsel the role of the petitioner as a Deputy Registrar was specified under Section 9 of the supreme court Act and being on duty to handle such applications was at the tail end of the chain of the being the certified filed pleadings and ensure compliance and lodge them as filed. According to counsel the petitioner processed the application in issue as required by Supreme Court rules and gave every judge a copy of his or her physical file as required and relayed the Chief Justice's directions. This has not been disputed by the respondent.
13. Counsel further submitted that the circumstances under which the duty Judge (Ndungu SCJ) heard the matter was well captured in the petitioners affidavit and section 24 of the Supreme Court Act as read together with rule 4(3) of Supreme court (Amendment) Rules 2016 which empowered her as a duty court to make any interlocutory orders and give any directions as she deemed fit.
14. According to counsel, the petitioner took the CJ's copy to and handed it to his secretary as per instructions and upon hearing the judge was proceeding she returned swiftly to her chambers and performed an extra-ordinary act of talking to the judge in the course of her proceedings an action which the judge did not take kindly and reprimanded her and ordered her to leave the judges chambers immediately. Regarding disciplinary hearing, counsel submitted that it was premature since the Chief Justice had not considered the matter and recommending the formation of JSC panel to hear the charge and make recommendations as required by the rules.
15. Mr Okemwa further submitted that there was inconsistency in the panel hearing the petitioner's case. According to counsel, the hearings were walk in walk out at the pleasure of the Commissioners and it varied and had inconsistent compositions without notice to the parties or explanations.
16. Mr Malenya for the respondents submitted that the court did not have jurisdiction to retry the case or sit on appeal of a disciplinary case that was before the 1st respondent as the court is to be concerned only with the process that led to the dismissal and whether the process met the requirements of article 41 and 47 of the Constitution.
17. According to counsel the petitioner never attempted to pursue either an appeal or review as the case may be but preferred instead to institute the present suit. Mr Malenya submitted that whereas the petitioner has a right to institute the suit this court and superior courts have held that where other means of dispute resolution have been provided for by law, then those other means have to be persuaded and exhausted first before intervention by the court.
18. According to counsel, since the petitioner never explored the mechanisms to address the issue in dispute which arose from the disciplinary hearing she could not invite the court to determine the same issue which would have otherwise been raised on appeal or view.
19. Regarding access to information and documents, counsel submitted that the respondent furnished the petitioner with all the necessary documents permissible by law. Before the institution of the suit vide



the separate letters including one dated 30th May, 2018 the respondent supplied the petitioner with letter of interdiction and charges report of the committee on disciplinary proceedings, dismissal letter, harsard report and all witness statements.

20. Concerning exoneration by SCOK Judges, counsel submitted that the judges lacked the mandate to discipline judicial officers and further at no point did the judges sit to determine the petitioner's case. The mandate to discipline is only exercised by the 1st respondent. Regarding the charges, counsel submitted that the Chief Justice had issued specific and express directions on how applications in relation to Supreme Court Applications 11 and 12 of 2016 relating to reinstatement age of judges could be dealt with more so because the applications and cases related to serving judges of the Supreme Court which were that these applications be dealt with by him. These directions were given prior in writing and instructions were ignored by the petitioner.
21. Concerning violation of constitutional rights, counsel submitted that the petitioner had not shown the manner in which she was discriminated. She faced charges relating to the events of 27th May, 2018. She was the Registrar on duty and was the one who issued instructions on what was to happen. The clerks in the Registry worked under her. Quite contrary to the averment of discrimination the petitioner applied for the position of Judge to ELC but her interview was deferred pending the conclusion of this matter. It therefore could not be that the 1st respondent discriminated against the petitioner and then considered her application for a Judge and shortlisted her.
22. The petition as filed seeks several orders most of which are repetitive. Before consideration of whether any of the orders can be granted the court needs to be satisfied that the petitioner has proved the claim to the required evidentiary standards set by the civil process and the Employment Act. Under section 47(5) of the Act the onus of proof that unfair termination has occurred rests on the employee. In this case the petitioner on the other had under section 43(1) the burden of proof of reason or reason for termination is cast upon the employer in this case the 1st respondent. Under subsection (2) of the said section the reason for termination are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
23. In determining the justification for dismissal, several decision by this court has stated that the test is usually that of reasonable employer. That is to say would a reasonable employer confronted with the acts or omissions the employee has been accused of consider dismissal as the most effective or proportionate measure to take against such employee. If the answer is in the affirmative the court would not interfere.
24. The petitioner was terminated from employment for reasons of gross misconduct. The nature of the misconduct as stated in the dismissal letter dated 26th January, 2018 was as follows:

“The commission found that you acted against the direct and specific instruction of the Hon. Chief Justice issued to you on 27th May, 2016 to the effect that Supreme Court Application No 11 and 12 of 2016 be placed before His Honour for directions. That you deliberately failed to obey lawful directions of the Hon. Chief Justice and proceeded to facilitate and have the matter heard which action amounted to insubordination”.
25. In disputing the accusation, the petitioner stated that as directed by the Chief Justice concerning application Nos 11 and 12 she prepared a copy for each of the Supreme Court Judges as was the procedure under Supreme Court Rule and took the Chief Justices' copy to his chambers. She further stated that she went to Justice Njoki Ndungu's chamber to relay the Chief Justice's directions on the matters but found Mr Kilukumi Advocate arguing the applications before the Judge. She attempted



to alert Justice Ndungu of the Chief Justice's directions but was sternly warned by the Judge not to interrupt her because she was conducting proceedings. The learned Judge consequently ordered her out of her chambers.

26. By an email dated 8th January, 2015 (exhibit LMNT) the former Chief Justice Willy Mutunga gave the following directions to Supreme Court Judges.

“with immediate effect these application will be processed as follows: Copies of application will be furnished to all Supreme Court Judges. Allocation of application to a Judge to hear it will be my responsibility and DCJ other Judges of the Supreme court will comment on the application (if possible) and give their views to the Judge seized of the matter. The CJ or DCJ will have discretion to call a conference on the application if they are convinced that this is necessary”.

27. This was the operating direction as at 27th May, 2016 when application Nos 11 and 12 were filed and heard in the first instance by Lady Justice Njoki Ndungu. The learned Lady Justice must have been aware of the CJ's direction when she became seized of the application as the duty Judge during the material time.

28. The petitioner was charged and indicated for failure to obey lawful directions of the Chief Justice and proceeded to facilitate and have the applications heard by Lady Justice Ndungu. Strange as the charge may sound, apart from drawing the attention of Lady Justice Ndungu's to the Chief Justice's direction which in any event a learned Judge was aware of but proceeded all the same, what more was the petitioner supposed to do?

29. In her affidavit sworn on 6th June, 2016 (LMN 11) Lady Justice Njoki Ndungu states as follows concerning the application No 12.

“That the application was placed before me as I was the duty Judge on the material date and I duly dealt with the same sitting as a single Judge as provided in Section 24 of the Supreme Court Act:.

30. Further the following email exchange between the retired Chief Justice and Lady Justice Ndungu is important to note.

On Saturday may 28, 2016 Chief Justice Mutunga wrote to Njoki Ndungu copied to other Supreme Court Judges as follows:

Judge,

I have asked the Registrars to tell me what exactly happened. I gave directions to them as people in charge of the registry. I have also asked for duty roster so that I can confirm you were the duty Judge. I will get in touch with you and other colleagues on Monday”

31. In response to the email. Lady Justice Ndungu wrote as follows: “With utmost respect chief Justice, I do not understand your angry tone – which I find inappropriate to me in this email

1. Not relevant
2. Not relevant
3. The first email from you to me arrived in my inbox at 2:31 pm when I had already started listening to the matters. I saw your email after I had disposed of the application.



4. Justice Ojwang who was the only other judge not affected by the matter who was in chambers at the time and we consulted and agreed I should proceed hear the matters.
 5. I am not aware that there is anything wrong or untoward with the manner I handled the matters.
 6. Did you have a specific outcome in mind? It appears to me, that once again you are having issues with the decisional independence of Judges in your court particularly myself.....
32. The foregoing email exchange between the retired Chief Justice and Lady Justice Ndungu clearly display an issue which was beyond the administrative control of the petitioner. There was evidently nothing she could do to prevent Lady Justice Ndungu entertaining the applications even if as alleged it was contrary to the Chief Justice's directions.
33. The court would be restrained in commenting on the retired Chief Justices' directions on the two applications however the directions smacked of control and interference with decisional independence of fellow Judges as correctly observed by Lady Justice Njoki Ndungu in her response to the retired Chief Justice. The appropriations of these direction is not the subject matter before me but the accusations that the petitioner refused and or ignored to enforce them is the issue for me to decide. As observed, the extent to which the petitioner tried to draw the attention of Lady Justice Ndungu to the Chief Justice's direction on the two matters earning the petitioner reprimand from the learned Judge was the best she and indeed any reasonable Deputy Registrar put in her place could have done. Her dismissal for these reasons was therefore disproportionate, unreasonable and without any valid justification.
34. In the circumstances the court hereby declares that the disciplinary proceedings involving the petitioner and eventual termination from service were unfair, lacked valid reason, therefore null and void and the petitioner is hereby ordered reinstated back to judicial service without loss of benefits.
35. The petitioner is further awarded the costs of the petition.
36. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2019

Abuodha J. N.

Judge

Delivered this 20th day of September, 2019

Abuodha J. N.

Judge

