



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 92 OF 2019

IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 73, 75, 160(1),(5), 162(2)(a), 232, AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 2(5),(6) AND ARTICLE 159(2)(d) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION AND SECTIONS 3, 4, 5, 6, 7, 10, 11, 12 OF THE FAIR ADMINISTRATIVE ACTION ACT (2015) AND ARTICLE 159(2)(d) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 41 OF THE CONSTITUTION AND SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011 AND SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT

BETWEEN

HON. JRN

PETITIONER

v

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. Hon JRN (Petitioner) joined the Judiciary in 2004 and he served in various stations. He rose to the position of Principal Magistrate.
2. The Petitioner was vetted by the Judges and Magistrates Vetting Board and in a determination dated 19 December, 2013 was found unsuitable to continue serving as a Magistrate.
3. The Petitioner sought a review of the determination and on 22 January 2015, the Board allowed the review application and set aside its initial determination of unsuitability. The Board found that the Petitioner was suitable to continue in service.
4. Before the Board, the Petitioner had set out various grounds upon which he felt review was warranted.
5. Firstly, the Petitioner had contended that the jurisdiction of the Board to vet Principal Magistrates lapsed on 28 March 2013 and therefore vetting after the lapse of the mandate of the Board was unlawful. The Board rejected this ground.
6. Secondly, the Petitioner asserted that there were errors apparent on the face of the record and that there new and important matters which had emerged after the determination. The Board rejected this ground as well.
7. However, in granting/allowing the Petitioner's application for review, the Board held that it had taken into consideration matters that were brought to its attention after the effective date of 27 August 2010 (see paragraph 49 of the Review determination and *Judges* and the decision of the Supreme Court in *Magistrates Vetting Board v Kenya Magistrates and Judges Association & Ors* (2014) eKLR) (the Vetting Board decision).

8. The Board thus decided to refer these allegations to the Judicial Service Commission (Respondent) on 29 June 2016 (the reference cited some 151 judicial officers).
9. On 9 August 2016, the Secretary of the Respondent wrote to the Petitioner informing him that the Board had forwarded to it (Respondent) complaints it did not consider due to lack of jurisdiction and seeking his response to the complaints.
10. On 23 June 2017, the Chief Justice formally notified the Petitioner of some 6 charges and called upon him to show cause within 21 days.
11. The Petitioner responded to the charges on 3 July 2017 and 11 July 2017. On 21 August 2017, the Chief Justice placed him on interdiction.
12. The Secretary to the Respondent then invited the Petitioner to appear before the Human Resource Committee of the Respondent for an oral hearing on 23 April 2018. On 9 April 2018, the Secretary supplied the Petitioner with copies of witness statements.
13. The hearing was rescheduled to 23 July 2018, but it was eventually conducted on 24 July 2018 and on 10 December 2018.
14. Eventually, the Secretary of the Respondent wrote to the Petitioner 27 March 2019, to notify him that it had been decided to dismiss him from service for improperly and grossly misconducted yourself running a bar, an act which you admitted and which was found to have subordinated the office you were holding as a judicial officer and put you in a position of conflict. Your said actions were contrary to Article 172(1)(a)(iv) and Article 75 of the Constitution which requires that ...

The Commission in exercise of its mandate under Article 172(1)(c) of the Constitution and pursuant to the provisions of Paragraph 25(11), Part IV Third Schedule of the Judicial Service Act resolved to dismiss you...

15. The Petitioner sought legal advice culminating in the institution of these proceedings.

Petitioner's case

16. The Petitioner contended that charge leading to his dismissal (managing a bar) was part of the allegations addressed by and dismissed by the Board and that the complaint fell exclusively within the jurisdiction of the Board having occurred in 2005/2006.
17. The Petitioner, therefore, took the position that the Respondent had no jurisdiction to entertain the complaint/charge, its mandate having started to run from the effective date of 27 August 2010.
18. Accordingly, the Petitioner contended that the Chief Justice had no jurisdiction to charge him and any such charge violated the principle of legality/rule of law.
19. The Petitioner also challenged the decision of the Respondent on the ground that the charge(s) did not expressly set out the provisions of the Constitution and Judicial Service Act he allegedly breached, and therefore the process was unfair and unlawful.
20. In the same vein, the Petitioner asserted that no evidence was led in respect to the allegation that he ran a bar in Busia, and that his evidence on the circumstances which led him to run the bar remained uncontroverted.
21. The Petitioner also challenged the disciplinary process and the dismissal on the ground that the Respondent did not conduct any investigations as contemplated by its policies, and that the Board never escalated the complaint to the Respondent.
22. According to the Petitioner, the conduct of the Respondent violated his right to fair administrative action and fair labour practices as the process run over 19 months.
23. In the view of the Petitioner, the *dismissal letter* was not well reasoned and the Respondent had failed to furnish him copies of reports/proceedings despite the request, thus violating his right of access to information as envisaged by Article 35 of the Constitution.
24. The Petitioner also contended that the dismissal letter was fundamentally flawed as it made reference to Article 172 (1)(a)(iv) of the Constitution which does not exist and that in any case, the said Constitutional provision, as well as Article 75, was not in place in 2006.

Respondent's contentions

25. In opposing the Petition, the Respondent relied on a replying affidavit sworn by its Secretary, Anne Amadi.
26. It was deposed therein that although the allegation on running a bar was not one of those made against the Petitioner, the Board came across the matter during the questioning of the Petitioner, and that in light of the Supreme Court decision in *Judges and Magistrates Vetting Board* case, the Board decided to refer the question to the Respondent.
27. According to the affidavit, the Board did not clear the Petitioner on the charge of running a bar upon review, but only set aside its determination because of jurisdictional concerns.

28. In the view of the Respondent, it was lawful for it to deal with any complaints/charge which was not addressed by the Board.

29. It was further deposed that the Chief Justice framed the charges against the Petitioner and that he was afforded an opportunity to make representations in writing and orally, and that the Petitioner had admitted to operating a bar.

30. The Respondent submitted that the reference to Article 172(1)(a) in the dismissal letter was a typographical error instead of Article 73(1)(a)(iv) and that the error could not alter the substance of the decision (the Court accepts the explanation).

31. In respect to the right of access to information, the Respondent indicated that the request was made post dismissal and the documents were provided on 14 June 2019.

Evaluation

32. The Court has considered all the material placed before and condensed the Issues arising for a determination as examined hereinafter.

Whether Petitioner was afforded a fair hearing

33. The Petitioner was notified of the charges to confront and was afforded an opportunity to make written representations which he did. After the written representations, the Petitioner was invited for an oral hearing and he attended the sessions. He was also served with witness statements.

34. The Petitioner still contended that the process taken by the Respondent did not meet the fair administrative action threshold envisaged by Article 47 of the Constitution, the Fair Administrative Action Act and the Judicial Service Act.

35. In challenging the fairness of the process, the Petitioner was of the view that the 19 months it took from his interdiction to dismissal was inordinately long and therefore run afoul of the *fair administrative action* ingredients.

36. The Petitioner urged the Court to follow the footsteps of the Court in *Daniel Mudanyi Ochenja v Judicial Service Commission* (2019) eKLR.

37. The Respondent did not deny that the disciplinary process took 19 months. It, however, explained the delay by asserting that at the relevant and materials time, the *Salaries and Remuneration Commission* had capped its sittings to 8 per month, and that it was only on 30 July 2018 that the High Court made a determination that the cap was unlawful.

38. The Respondent also explained the purported delay by contending that it was involved in other constitutional mandated processes such as recruitment of judges, that it also suffered a deficit of quorum, and that an adjournment of the oral hearing was occasioned by the illness of one of the complainant/witnesses.

39. Questions of inordinate delay in concluding disciplinary cases should be examined on a case by case basis.

40. The Petitioner did not rebut the assertions by the Respondent that there was a cap on its sittings by the *Salaries and Remuneration Commission* or that quorum hitches due to vacancies occurred. He also did not challenge the fact that an adjournment was occasioned by the illness of a witness, or that the Respondent was performing other constitutionally required functions.

41. In the circumstances, the Court will depart from the holding in the *Ochenja* case and find that the 19 months it took to determine the Petitioner's case was not inordinate or an assault on the right to fair administrative action or a violation to the right to fair labour practices.

Jurisdiction of the Respondent

42. The Petitioner took the strong view that because the Board had made a determination on the complaints raised against him, it was not open to the Respondent to purport to disturb, appeal, review, recall, revise, revisit, open up or attempt to share jurisdiction with the Board.

43. In advancing the jurisdictional challenge, the Petitioner cited the decision of the Supreme Court in *Vetting Board* decision and section 22(4) & (5) of the Judges Magistrates Vetting Act to submit that the Respondent had no jurisdiction to purport to conduct the disciplinary proceedings.

44. According to the Petitioner, the Respondent's mandate was founded upon Article 172 of the Constitution and that mandate accrued from the effective date, 27 August 2010 as read with the Judicial Service Act which came into operation on 22 March 2011, and therefore the mandate could not be applied retrospectively.

45. The Petitioner drew the attention of the Court to the decision by the Court of Appeal in *Judges and Magistrates Vetting Board & Attorney General v Kenya Magistrates & Judges Association* (2014) eKLR.

46. In rebutting the validity of the grounds raised by the Petitioner on jurisdiction, the Respondent took the position that it drew its disciplinary mandate from Article 172(1)(c) of the Constitution as read with the section 32 of the Judicial Service Act, and that it was the Board which referred to it the complaints against the Petitioner because the complaints fell outside its (Board) mandate.

47. According to the Respondent, it was the Board and not it (Respondent) which had a time limitation, and therefore it could validly seize jurisdiction of pre-effective date complaints.

48. In the view of the Respondent, the Board had declined jurisdiction over the particular complaint which led to the dismissal of the Petitioner and therefore the question of merit did not arise.

49. In contending that it had jurisdiction, the Respondent also cited a passage in the decision of the Supreme Court in the *Vetting Board* decision that there would be no reason for JSC not to hold its hands until the officer in question has been vetted. In answer to the second and third hypothetical questions, there would be no reason as to why the Board should not report an officer to the Commission, for appropriate disciplinary action.

50. The Board, upon a review sought by the Petitioner, found him suitable to continue serving because of the finding by the Board that it had no jurisdiction.

51. What the Board was doing was washing its hand off the complaint, which it referred to the Respondent. The finding of suitability to continue serving was therefore not on merit, it was jurisdictional.

52. And if the Board washed its hand, it is not correct as submitted by the Petitioner that the Respondent was purporting to *disturb, sit on appeal, review, recall, revise, revisit, open up or share jurisdiction* with the Board.

53. In the view of the Court, and relying on the *Vetting Board* decision referred to in paragraph 49 above, it cannot be that the Respondent lacked jurisdiction to entertain a disciplinary complaint which the Board declined to deal with on merit, because of lack of jurisdiction.

54. The question of double jeopardy, therefore, also falls by the wayside.

Constitutionality of Regulation 23 of the 3rd Schedule to the Judicial Service Act

55. The Petitioner challenged the constitutionality of Regulation 23 of the 3rd Schedule to the Judicial Service Act in light of Articles 2(4), 10(2)(a), 35, 47(2), 232(e) & (f) of the Constitution and section 6 of the Fair Administrative Action Act on the ground that it restricted his right to the minutes, reports or the recorded reasons for his dismissal.

56. The Petitioner argued that the reasons given in the dismissal letter were not sufficient or considered, but a mere communication of the dismissal decision.

57. The Court notes that the Petitioner had in a letter dated 18 April 2019 sought for the following documents from the Respondent:

copy of determination by the Respondent, certified copies of proceedings/Hansard of the disciplinary proceedings, copy of determination by the Judges and Magistrates Vetting Board including the complaint, name of complaint, investigation report and witness statements.

58. The Respondent on its part urged that the prayer for a declaration of unconstitutionality was defective because the National Assembly and the Attorney General had not been cited as parties.

59. Further, the Respondent submitted that any limitation on access to information/records by regulation 23(2) was permissible in terms of Article 24 of the Constitution as read with section 6 of the Access to Information Act.

60. On 23 June 2017, the Respondent notified the Petitioner that it had received complaints from the Board and set out the charges.

61. In his responses dated 3 July 2017 and 11 July 2017, the Petitioner never sought for any records from the Respondent.

62. On 9 April 2018, the Respondent furnished the Petitioner with witness statements.

63. The Court is, therefore, unable to find that the Respondent had violated or contravened the Petitioner's right or entitlement to information. He never sought for the information/records until 18 April 2019.

64. It is correct as urged by the Petitioner that a party is entitled to information in order to exercise his rights including access to justice.

65. The Court is therefore left to address the request for information after the dismissal.

66. It is not in dispute that the Respondent did not respond to the Petitioner's request for information and only acted after the Court had given directions on 10 June 2019 (the Court notes that the Petitioner nevertheless filed some of the records he was requesting for at the time he filed the Petition).

67. The Court is therefore left with a theoretical complaint.

68. It is also correct as posited by the Respondent that the right to access to information can be restricted in terms of legislation.

69. The Constitutional architecture contemplates transparency, openness and accountability in public affairs.

70. However, in the view of the Court, that normative design is not an open license or permission for an open government. Public affairs cannot be run in public all the time hence the restrictions in various pieces of legislation.

71. Apart from setting out that the impugned regulation contravened the mentioned constitutional and statutory provisions, the Petitioner did not outline how the regulation was inconsistent with the said provisions.

Valid and fair reasons for dismissal

72. The Court has already addressed itself on the procedural fairness aspects of the Petitioner's dismissal.

73. In terms of sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove the reasons, and the validity and fairness of the reason(s) leading to the dismissal of the Petitioner.

74. The allegation that led to the dismissal was that the Petitioner failed to observe the principles in relation to your private interest by operating a personal business in the form of a bar, contrary to the Judicial Service Code of Conduct.

75. It is this charge which the Respondent was expected to prove, and prove as a valid and fair reason warranting dismissal.

76. The Petitioner admitted that he was running the bar and explained it away that it was at the request of the then District Commissioner. He asserted that he ran the bar for a limited period of time before he was transferred from Busia.

77. With the admission from the Petitioner, the only issue is whether the running of the bar was (is) inconsistent with the Petitioner's oath of office and Code of Conduct.

78. The Respondent did not place before the Court any evidence or material to demonstrate any inherent conflict of interest in the Petitioner running the bar.

79. Judicial Officers, just like other citizens are guaranteed several rights by the Supreme Law. The running and or operation of a bar by a judicial officer by itself does not violate any norm or conduct.

80. However, the judicial office is not like any other office. Judicial officers are expected to maintain/act in both private and public life with propriety. Propriety is a value.

81. Determining where the contours of a value lie is not easy. Objectivity may be difficult to discern.

82. The Court has looked and relooked at the proceedings before the Respondent.

83. There is no suggestion or attempt to demonstrate that there was any impropriety or apprehended conflict of interest on the part of the Petitioner in running the bar in Busia. Could the decision have been different if the Petitioner was running or managing a 3 or 4-star bar or hotel? That rhetorical question is best left to speculation.

84. The Respondent had other sanctions or penalties it could have imposed if it objectively found there was a breach of the Code of Conduct.

85. The dismissal of the Petitioner, in the view of the Court, may have been for valid reasons, but it was not fair.

Appropriate remedies

86. The Petitioner sought 3 declarations, compensation and an order reinstating him without loss of benefits to the office of Principal Magistrate.

87. In the view of the Court, compensation would adequately vindicate the legal injuries occasioned to the Petitioner.

88. The Petitioner served for about 15 years.

89. In consideration of the Petitioner's length of service, the Court assesses compensation equivalent to 10 months' salary.

90. Before concluding the Court wishes to observe that parties are now preferring the Constitutional Petition route to challenge unfair termination of employment instead of the normal route envisaged under the Employment and Labour Relations Court (Procedure) Rules, 2016.

91. In the view of the Court, such a practice should be discouraged as it puts the employer at a disadvantage. A disadvantage because more often than not, interrogation of each parties evidence on why termination of employment is unfair helps the Court to determine the credibility and weight of evidence.

Conclusion and Orders

92. From the foregoing, the Court finds and declares that the dismissal of the Petitioner was unfair, and awards him

(a) Compensation **Kshs 3,797,200/-**

93. Petitioner to have costs.

Delivered, dated and signed in Nairobi on this 22nd day of November 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Okemwa instructed by Okemwa & Co. Advocates

For Respondent Mr. Issa instructed by Issa & Co. Advocates

Court Assistant Lindsey