



**Nyamohanga v Judicial Service Commission (Cause 12 of 2015)  
[2017] KEELRC 93 (KLR) (2 November 2017) (Judgment)**

*Robi Stephen Nyamohanga v Judicial Service Commission [2017] eKLR*

Neutral citation: [2017] KEELRC 93 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 12 OF 2015  
MA ONYANGO, J  
NOVEMBER 2, 2017**

**BETWEEN**

**ROBI STEPHEN NYAMOHANGA ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The Claimant is a former employee of the Judicial Service Commission, the Respondent herein. He was employed as a clerical officer by letter dated 7<sup>th</sup> August 2001 and the appointment was effective from 14<sup>th</sup> June 2001. He was posted to Migori law courts where he worked without incident until 10<sup>th</sup> August 2010 when he was arrested and later charged in the Anti-Corruption court in Kisumu Criminal Case No. 375 of 2010 with the offence of soliciting for a bribe contrary to section 39(3)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. There was a second charge of receiving a bribe contrary to section 39(3)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The Claimant was interdicted by letter dated 30<sup>th</sup> August 2010 titled “Interdiction”. The grounds for interdiction were that he was arrested and arraigned before the Anti-Corruption court at Kisumu on 10<sup>th</sup> August 2010 with the offence of corruption. By another letter of the same date under the title “gross Misconduct” the Claimant was informed that the charges against him constitute gross misconduct rendering him liable for disciplinary action including dismissal. The Claimant was required to show cause within 21 days why disciplinary action should not be taken against him.
2. The Claimant responded to the show cause letter on 17<sup>th</sup> September 2010. In the letter he stated that it is true he was arrested and arraigned in court but over issues that he totally didn’t know. He stated that he was 100% sure that given time to give his defence before the court he cannot be condemned.



3. There was no further correspondence between the Claimant and the Respondent until 18<sup>th</sup> September 2012 when the Claimant wrote to the Respondent informing it that the criminal case against him had been concluded with his acquittal and asking for reinstatement. He enclosed copies of the proceedings. On 4<sup>th</sup> April 2013 the Claimant received a letter of dismissal. The first paragraph of the letter of dismissal reads as follows:

I wish to inform you that the Human Resource Management Advisory Committee meeting held on 5<sup>th</sup> February 2013 deliberated on your pending disciplinary case in relation to gross misconduct and decided that you be dismissed from the service with effect from 10<sup>th</sup> August 2010. In arriving at this decision, the Committee also considered the circumstances under which you were acquitted in the criminal case that you were facing.

4. The letter informed the Claimant that he had a right to appeal within six (6) weeks.
5. The Claimant lodged an appeal by letter dated 8<sup>th</sup> May 2013. His grounds of appeal are reproduced below:
  1. Your office did not and has never sent me any communication or notice to show cause why any disciplinary action should be taken against me. If notice to show cause has been issued by your good self I would have explained my case to you and your committee could have reached a different verdict.
  2. I was not represented in your Human Resource Management Advisory Committee meeting held on 15<sup>th</sup> February, 2013. The proceeding were conducted without my knowledge and in my absence and hence I was condemned unheard, which is a breach on my fundamental rights as enshrined in the Constitution and also Labour Laws of Kenya.
  3. I was tried before Kisumu Chief Magistrates Court Criminals Case Number 375 of 2010 and I was acquitted of the charges levelled against me. The court was satisfied that I did not commit whatever was alleged by the complainant. The allegations were not proved against me.
  4. The Human Resource Management Advisory Committee has never levelled any charges against me. I am not aware of any charges, save that I was interdicted pending determination of the Criminal Case No. 375 of 2010. It was incumbent upon the committee to frame charges if any against me for, determination by the committee, with notice to me.
  5. You have dismissed me from service retrospectively (with effect from 10<sup>th</sup> August, 2010). It is unlawful to terminate services retrospectively, in my view; it has been so done to prevent me from accessing my accrued deductions as I have been on half – pay from the year 2010.
  6. I have been dismissed without notice, without benefits, without due process and hence I pray for reinstatement and/or my benefits and accrued deductions.
  7. Your letter dated 4<sup>th</sup> April, 2013 did not contain
    - i. Official Secrets Act Forms
    - ii. Wealth Declaration Forms

The same shows serious omissions on the part of the committee and also your office and I shall further contend that no due process was followed towards my termination.
8. I would wish to be present during deliberations of this appeal or any other proceedings herein.
6. By letter dated 24<sup>th</sup> January 2014 the Claimant was informed that the appeal was disallowed. He was informed of the right to lodge a second appeal within one (1) year.



7. Unhappy with the turn of events the Claimant filed the suit herein on 19th January 2015. In the Claim he avers that no disciplinary action was taken against him before the dismissal and that the dismissal breached the fundamental rules of natural justice and his right to fair hearing. He prays for the following orders:
  - a) A declaration that the Claimant was unfairly dismissed by the Respondent.
  - b) Reinstatement.
  - c) Salary and Allowances thereto accruing from the date of dismissal till settlement.
  - d) Terminal Allowances and/or Retirement Benefits.
  - e) Costs of this suit.
  - f) Any other relief that this Honourable Court deems just and reasonable.
8. The Respondent filed a Statement of Response denying the allegations of the Claimant. The Respondent avers that the Claimant's dismissal was guided by the provisions of the Constitution, Judicial Service Act and the Code of Conduct for Judiciary Staff. It prays that the suit be dismissed with costs.
9. The case was heard on 27<sup>th</sup> March 2017. The Claimant testified on his behalf while the Respondent called one witness, Peter Bunde, an Assistant Director Human Resource. The parties thereafter filed and exchanged written submissions. The Claimant's submissions were filed on 18<sup>th</sup> May 2017. The Respondent filed submissions on 21<sup>st</sup> June 2017.
10. At the hearing the Claimant was unrepresented while the Respondent was represented by Ms. Mugo instructed by Issa & Company Advocates of Nairobi.

#### **Claimant's Case**

11. In his evidence in chief the Claimant recounted the facts of the case as set out above. Under cross examination the Claimant testified that he worked at Migori Law Courts throughout the period he was in employment and at the material time he was in charge of Civil Registry. That he was arrested in the office on 10<sup>th</sup> August 2010, that a few days earlier he was seated at his desk when a lady came with a divorce cause looking for a Mr. Onchuki, the office messenger who was not present at the time. He asked the lady what she wanted and she told him she was looking for proceedings. The Claimant looked for the file which was traced in the bundle for 2009. He noted that the typed proceedings were in the file. He counted the pages and informed the lady that she was to pay Kshs.1500. There was a letter requesting for proceedings in the file but no assessment had been done. The lady paid Kshs. 500 deposit and a receipt was issued.
12. He testified that in 10<sup>th</sup> August 2010 the lady came with the balance of Kshs. 1000. He pulled out the file and asked her for the money which he pinned on the file and called a clerk by the name Ben Kidero to send to the cashier who was seated behind him. Just then somebody in plain clothes entered the office, held him by the hand and told him to stand up. The person alleged that he was collecting bribes. The person took a piece of paper and held the money with it. He was later charged in court. He denied asking the complainant in the case, one Grace Adhiambo, for a bribe to fast-track the proceedings. He testified that judgment was delivered on 27<sup>th</sup> February 2012. He stated that he did not deny handling the money, and that handling the money was not taking a bribe.



13. The Claimant testified that his last working day was in 2015 when he was invited for transformation workshop in Nakuru. He stated that he was transferred to Ndhiwa law courts in 2012 before the judgment but only worked for 2 days then got permission from the Executive Officer on grounds that he was unable to concentrate because of the pending court case. The Claimant testified that he also attended a workshop at KCB Leadership Centre in Karen, Nairobi. He testified that during interdiction he was reporting twice a week.
14. In the written submissions filed by the Claimant he states that he did not solicit for a bribe. He further submits that the Respondent did not prove the reason for termination as provided under section 43 of the Employment Act or comply with section 45 and his dismissal was unlawful.

### **Respondent's Submissions**

15. The Respondent's witness Peter Bunde testified that the Respondent was informed by the DCIO Migori that the Claimant had been arrested and charged with the offences in the charge sheet. The Claimant was interdicted and issued with notice to show cause. During interdiction the Claimant was on half pay and was not to leave the duty station. He was to report twice a week to his duty officer. He testified that after the case was concluded the Claimant wrote to the Respondent asking for reinstatement. Mr. BUNDE testified that he was not part of the Committee that deliberated on the Claimant's case.
16. Under cross examination Mr. Bunde testified that when a person is charged he is not guilty, that the Respondent waited for determination of the criminal case before concluding the disciplinary case.
17. In the written submissions filed on behalf of the Respondent it is submitted that it has mandate to discipline staff that is derived from Article 172(1)(c) of the Constitution, section 32 of the Judicial Service Act 2011 and the Regulations under the Third Schedule to the Act specifically regulations 15, 17(2), 18(1), (2) and (3), 19 and 28.
18. It is submitted that the standard of proof in criminal proceedings is beyond reasonable doubt while in disciplinary proceedings the test is on a balance of probability and that an employer is not bound by the outcome of criminal proceedings in determining the disciplinary action to be meted on an employee. The Respondent relied on the case of Attorney General & Another v Andrew Maina Githinji & Another where the Court of Appeal stated:

‘...a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required’

19. The Respondent submitted that in the case of David O. Owino v Kenya Institute of Special Education quoted in Kibe v Attorney General (Civil Appeal No. 164 of 2000) (unreported) the Court of Appeal held that:

An acquittal in a criminal case does not does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.



The court further held as follows;

‘The Court has taken the position in the past that the employer may nonetheless opt to expressly made its disciplinary decision, dependent on the outcome of the police investigations, or on a Court decision in a criminal trial. In such a case, such as where the employer advises the employee that he is suspended pending the outcome of police investigations or decision of the Criminal Court, then it may be taken that the employer has forfeited the right to steer the disciplinary process, and subordinated the managerial prerogative in disciplining the employee, to third parties. To base a disciplinary process on the outcome of a criminal trial is risky, as the employer has no control over the criminal proceedings. If the criminal trial fails, as a good number of them do, the underlying disciplinary action would fail. Employees given assurances that their fate lies with the criminal proceedings normally do not cooperate with any disciplinary processes the employer may initiate. The Respondent in this case had no say for instance, in the shoddy manner in which the Police chose to prosecute the criminal case leading to the acquittal of the Claimant. The Respondent was not the complainant, and even if it was, would have limited influence on the direction the Police chose to move the prosecution of the Claimant in.’

20. It is the Respondents submission that the acquittal of the Claimant did not automatically mean that the disciplinary proceedings were determined.

21. The Respondent further relied on the Court of Appeal decision in the case of *Geoffrey Kiragu Njugu v Public Service Commission & 2 others* [2015]eKLR in which the court held as follows:

‘...there is nothing in the Public Service Commission Regulations which suggest the disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials.’

22. The Respondent submits that Regulations 18 (2) of the Third Schedule to the Judicial Service Act, 2011 provides that;

‘If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom. Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer.’

23. The Respondent further relied on the case of *Mathew Kipchumba Koskei v Baringo Teachers SACCO* where the court discussed the issue of disciplining an employee for conduct that constitutes both misconduct and criminal offence.

### **Determination**

24. I have carefully considered the pleadings, evidence on record and the written submissions filed by both parties. The issues for determination herein are the following-

1. Whether the Respondent carried out disciplinary proceedings against the Claimant;



2. Whether the Respondent complied with the Anti-Corruption and Economic Crimes Act in handling the Claimant's disciplinary case;
  3. Whether the Respondent complied with the judicial service Act and Regulations thereunder in handling the Claimant's disciplinary case;
  4. Whether there was valid reason for dismissal of the Claimant;
  5. Whether the Claimant is entitled to the orders sought.
25. Whether the Respondent carried out disciplinary proceedings against the Claimant
  26. According to the evidence on record the Claimant was interdicted upon being charged in court. The letter of interdiction is dated 30<sup>th</sup> August 2010. The letter of interdiction does not give any details other than informing the Claimant that he would be on half salary during the period of interdiction and requiring him not to leave his duty station without permission and to report to his superior every Friday until further notice.
  27. On the same date, that is 30<sup>th</sup> August 2010 the Respondent sent a letter with the title "Gross Misconduct" requiring the Claimant to show cause why disciplinary action should not be taken against him. The Claimant responded on 17<sup>th</sup> September 2010. After that there is no further communication until the Claimant wrote a letter dated 18<sup>th</sup> September 2012 seeking reinstatement after the conclusion of the criminal case against him. The next Communication received by the Claimant was the letter of dismissal which informed him that at the meeting of the Human Resource Management Advisory Committee held on Friday 15<sup>th</sup> February 2013 it was decided that he be dismissed from service with effect from 10<sup>th</sup> August 2010, being the date of his arrest.
  28. The provisions for removal of judicial officers and staff of the Judicial Service Commission is provided for under the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff in the Third Schedule of the Judicial Service Act, as follows-
    18. Where criminal charge pending
      - (1) When a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed by an officer the Chief Justice shall act under either paragraph 26 or 27, as may be appropriate.
      - (2) If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom:  
  
Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer.
      - (3) An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted.
    25. Proceedings for dismissal
      - (1) Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or



charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.

- (2) If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not.
- (3) If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the Constitution, delegate its powers:

Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel.

- (4) The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.
- (5) If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.
- (6) The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.
- (7) The Committee or Panel shall permit the accused officer to be represented by an advocate.
- (8) If during the course of the investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.
- (9) The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—
  - (a) a statement whether in the Committee or Panel's judgement the charge or charges against the officer have been proved and the reasons therefor;
  - (b) details of any matters which, in the Committee or Panel's opinion, aggravate or alleviate the gravity of the case; and [Rev. 2012] No. 1 of
  - (c) a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the



Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.

- (10) The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.
- (11) The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest.

29. These provisions are very elaborate. No charges were framed against the Claimant as required under Regulation 25(1). He was never given a written notice as to appear before the Committee as provided in Regulation 25(4) or called to be present at the hearing as provided in Regulation 25(5). There is further no indication that any report was prepared in terms of Regulation 25(9) which was considered as a basis for the decision to dismiss the Claimant. He was never even informed of the existence of the Committee. The Claimant was in fact never subjected to any disciplinary proceedings at all.
30. Being an employee the Claimant is also subject to the provisions of section 41 of the Employment Act which provides that an employee must be given a hearing before a decision is made to terminate his employment on grounds of misconduct, poor performance or physical incapacity.
31. In the present case the Claimant was not given any hearing at all and his summary dismissal was clearly in violation of the provisions of the Judicial Service Act, the Employment Act and Article 236 of the Constitution which provides that  
236. A public officer shall not be—
  - (a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
  - (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
32. The Claimant was subjected to unfair labour practice forbidden under Article 41 of the Constitution. The summary dismissal of the Claimant was thus not only unlawful but also unconstitutional.
33. Whether the Respondent complied with the Anti-Corruption and Economic Crimes Act in handling the Claimant's disciplinary case;
34. The Claimant was charged with an anti-corruption charge in the Anti-Corruption court with the offence of soliciting for a bribe contrary to section 39(3)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. There was a second charge of receiving a bribe contrary to section 39(3)(a) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Section 62 of the Anti-Corruption and Economic Crimes Act provides as follows-  
62. Suspension, if charged with corruption or economic crime
  - (1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.
  - (2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.



- (3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.  
[Emphasis added]
- (4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.
- (5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney-General—
- (a) this section does not apply to the charge unless permission is given by the court or the Attorney-General to prosecute or the proceedings are taken over by the Attorney-General; and
  - (b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.
  - (6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.
  - (7) This section does not apply with respect to a charge laid before this Act came into operation.

35. By dismissing the Claimant after his acquittal the Respondent violated the provisions of section 62 of the Anti-Corruption and Economic Crimes Act and paragraph 18 of the Provisions Relating to the Appointment, Discipline and Removal of Judicial Officers and Staff in the Third Schedule of the Judicial Service Act. The termination was thus unlawful to the extent of such violation.

#### **Whether there was valid reason for dismissal of the Claimant**

36. The reason given in the Claimant's letter of dismissal is gross misconduct. There is no offence known as gross misconduct. Gross misconduct is a description of a number of acts or omissions which are enumerated under section 44(4) of the Employment Act. The words "gross misconduct", without a description of the acts or omissions alleged to have been committed by an employee do not constitute a ground of termination. If looked at from this point of view then the Claimant's letter of dismissal does not disclose any ground for dismissal as the acts that the Claimant is alleged to have committed or omitted that constitute the gross misconduct is not stated in the letter.
37. The letter of dismissal states that the Committee considered the circumstances under which the Claimant was acquitted. I have read the judgment in Kisumu Criminal Case No. 375 of 2010 and in my opinion the judgment acquitting the Claimant is very clear on the culpability of the Claimant. The relevant portion of the judgment is reproduced below:

From the defence of the accused, he does not deny the receipt of Kshs.1,000/- except that it was not a bribe, but the balance of the fee required for the proceedings.

The following is what PW1 told court in her evidence in chief.

"He asked me for Kshs.1,000/- for the proceedings to be typed fast. He would have it typed outside for there was a lot of work in court. I said I had no money"

On being cross-examined, PW1 said the following:



“I was to pay Kshs.1,500/- I paid Kshs.500/-. The balance was Kshs.1,000/- from the letter. I was not told the balance was Kshs.1,000/-.”

The letter dated 12/7/2010 which is in the original divorce cause file together with its copy which was produced as defence exhibit.

D1 shows on the face of the letter writings – “to pay 1,500/- deposited 500/- balance of Kshs.1,000/- 12/7/2010 I signed.”

The receipt for Kshs.500/- which was produced as exhibit P3 by the prosecution and defence exhibit D1 shows that the amount was paid as a deposit, when money is paid as a deposit it means it is not in full settlements of the account.

There is unchallenged evidence from the Migori Divorce Cause file No. 12 of 2009 that the proceedings were assessed to cost Kshs.1,500, that Kshs.500 was deposited, that the proceedings were 25 pages in all and that each page would cost Kshs.60/- and that total cost was Kshs.1,500/-.

Nahashon Kimbero who produced the court testified in court as follows:

“Grace Adhiambo the defendant applied for proceedings. The pages are 25, 60 per page. She was supposed to pay Kshs.1,500/- it was assessed she only paid shs.500/- deposit, Kshs.1,000/- was not paid.”

38. This begs the question: what part of the proceedings did the Committee consider to justify a dismissal?
39. From the facts and the judgment it would appear that when the Claimant asked the Complainant’s brother the balance of Kshs. 1000 for typed proceedings she mistook the court fees for a bribe. The Claimant was found with the money on his desk pinned to the file. He testified that he was taking the file with the money to the cashier to issue a receipt for the same.
40. From the foregoing the Claimant was not at fault at all. He was only performing his work. He was dismissed for no reason at all.

#### **Whether the Claimant is entitled to the orders sought**

41. This is a case of double jeopardy. Not only was the Claimant accused, arrested and charged with an anti-corruption offence that he did not commit, but he was in addition punished by his employer by dismissal without a hearing for unspecified charges of gross misconduct and in complete disregard of the constitutional and statutory procedure.
42. It is my considered opinion that the action of the Respondent in dismissing the Claimant in violation of the express provisions of the Constitution and statutory procedure was a nullity. The law is intended to be complied with and where there is such gross violation the law must be enforced. In this case the Respondent disregarded the provisions of Article 41 and 236 of the Constitution, section 41, 43 and 45 of the Employment Act, section 62 of the Anti-Corruption and Economic Crimes Act and Regulations 18 and 25 of the Judicial Service Act. These are not a few violations by a statutory body whose mandate is to uphold the Rule of Law like the Respondent.
43. Fortunately in the circumstances of this case the law is prescriptive and self-acting. Both section 62 of the Anti-Corruption and Economic Crimes Act and Regulations 18 (3) of the Judicial Service Act prescribe what should have been done in such circumstances of this case. For clarity I will again reproduce those provisions.

62. Suspension, if charged with corruption or economic crime



- (1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.
- (2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.
- (3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

Regulation 18. Where criminal charge pending

- (1) When a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed by an officer the Chief Justice shall act under either paragraph 26 or 27, as may be appropriate.
- (2) If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom:

Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer.

- (3) An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted.

44. These provisions are couched in mandatory terms. They are not to be disregarded. I believe it is in order and the duty of the court to give effect to the provisions of the law as stated above. For these reasons I declare the decision of the Respondent dismissing the Claimant to be null and void and in place thereof order that the Claimant be reinstated as provided in Section 62 of the Anti-Corruption and Economic Crimes Act and Regulation 18 of the of the Judicial Service Act. I further order that the withheld salary of the Claimant be released to him.

45. I am guided by the decision of the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014]eKLR cited by the Respondent where the court stated-

‘As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49 (3) as read with Section 50 of the Employment Act and Section 12(3)(vii) of the Industrial court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal.’

46. The Respondent herein is a large employer, indeed a Constitutional Commission where friction is not an issue. The circumstances of the dismissal of the Claimant were also such as there was no relationship issue involved as it arose from a report made by a litigant, which was the Respondent’s only ground for dismissing the Claimant following his arraignment in court and subsequent acquittal.



47. On the issue of costs I award the Claimant Kshs. 50,000. The Claimant was unrepresented at the hearing. This is based on the fact that the claim was filed through an advocate who however failed to prosecute the case after being ordered to personally bear Respondent's costs on 30<sup>th</sup> November 2016. The said costs may be recovered by the Respondent as a debt due from the said advocates M/S Abisai & Company Advocates.

**DATED AND DELIVERED IN KISUMU THIS 2ND DAY OF NOVEMBER, 2017.**

**MAUREEN ONYANGO**

**JUDGE**

