



REPUBLIC OF KENYA



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**Okemwa & 8 others v Judicial Service Commission (Cause 16 of 2014)
[2016] KEELRC 244 (KLR) (2 December 2016) (Judgment)**

Nicholas Muturi Okemwa & 8 others v Judicial Service Commission [2016] eKLR

Neutral citation: [2016] KEELRC 244 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 16 OF 2014

L NDOLO, J

DECEMBER 2, 2016

BETWEEN

NICHOLAS MUTURI OKEMWA 1ST CLAIMANT
ANNE NYOKABI NG'ANG'A 2ND CLAIMANT
CHRISPINE MBUGUA KABIRO 3RD CLAIMANT
BRIGID JEPKEMBOI KONGA 4TH CLAIMANT
LUCY NYAMBURA WAWERU 5TH CLAIMANT
ANNE WAMAITHA MURIGI 6TH CLAIMANT
MARY MUTHONI NJUNGE 7TH CLAIMANT
JOSYLYNE KATHURE NDUBI 8TH CLAIMANT
LYNNETTE WAMBUI MWANGI 9TH CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. At the accrual of the cause of action herein, the Claimants were all employees of the Kenya Judiciary. In the course of time some of the Claimants left the Judiciary. The claim originates from the decision of the Judicial Service Commission do re-designate and re-deploy the Claimants effective January 2014.
2. The Claimants' claim is contained in a Statement of Claim dated 14th January 2014 and amended on 13th February 2014. The Respondent filed a Response and Counterclaim dated 6th March 2014 and amended on 31st July 2014 to which the Claimants responded on 25th September 2014. At the hearing,



the Claimants testified on their own behalf and the Respondent called Rose Ochieng, an Assistant Director in the Human Resource and Administration Directorate.

The Claimants' Case

3. When the cause of action herein arose, the Claimants were employed in various positions in the Judiciary as follows:
 - a) The 1st Claimant, Nicholas Muturi Okemwa was Legal Counsel (PLS 16). Further to his substantive appointment, he was appointed Secretary to the Rules Committee from 20th June 2012;
 - b) The 2nd Claimant, Anne Nyokabi Ng'ang'a was Administrator (PLS 16);
 - c) The 3rd Claimant, Chrispine Mbugua Kabiro was Senior Principal Performance Management Officer (PLS 14);
 - d) The 4th Claimant, Brigid Jepkemboi Konga was Senior Executive Officer (PLS 12);
 - e) The 5th Claimant, Lucy Nyambura Waweru was Senior Executive Officer/Assistant Bench Liaison Officer (PLS 12);
 - f) The 6th Claimant, Anne Wamaitha Murigi was Senior Executive Officer (PLS 12);
 - g) The 7th Claimant, Mary Muthoni Njunge was Assistant Legal Researcher (PLS 12);
 - h) The 8th Claimant, Joslyne Kathure Ndubi was Principal Bench Liaison Officer/Executive Officer (PLS 14);
 - i) The 9th Claimant, Lynette Wambui Mwangi was Assistant Legal Researcher (PLS 12);
4. The Claimants entered the Judiciary either on secondment or by direct employment. They state that they were formally employed in their respective positions in December 2012, following adoption of a report by the Respondent's Human Resource Management Committee on absorption of staff serving on secondment/temporary terms.
5. Pursuant to the Respondent's decision to formally employ the Claimants, they were issued with letters of offer of employment.
6. What was common among the Claimants was that they were all deployed in the office of the former Chief Registrar of the Judiciary, Gladys Boss Shollei.
7. The Claimants plead that on 18th October 2013, following the removal from office of Gladys Boss Shollei, the Respondent locked them out of their place of work. The Claimants were subsequently sent on leave by letters dated 29th October 2013 and were thereafter transferred by letters dated 25th and 27th November 2103 as follows:
 - a) The 1st Claimant was transferred to Meru Law Courts;
 - b) The 2nd Claimant was transferred to Kisumu Law Courts;
 - c) The 3rd Claimant was transferred to Homa Bay Law Courts;
 - d) The 4th Claimant was transferred to Nakuru Law Courts;
 - e) The 6th Claimant was transferred to Nakuru Law Courts;
 - f) The 7th Claimant was transferred to Milimani Law Courts;



- g) The 9th Claimant was transferred to Malindi Law Courts.
8. The Claimants state that they were given less than two weeks to report to their new stations.
9. In addition to being transferred, the Claimants were downgraded in position and their salaries reduced by memo dated 18th December 2013 and subsequent letters dated 19th December 2013.
10. The effect of the down grade was as follows:
- a) The 1st Claimant was downgraded from Job Grade PLS 16 to M6/R4
 - b) The 2nd Claimant was downgraded from Job Grade PLS 16 to PLS 12
 - c) The 3rd Claimant was downgraded from Job Grade PLS 14 to PLS 10
 - d) The 4th Claimant was downgraded from Job Grade PLS 12 to PLS 10
 - e) The 5th Claimant was downgraded from Job Grade PLS 12 to PLS 10
 - f) The 6th Claimant was downgraded from Job Grade PLS 12 to PLS 9
 - g) The 7th Claimant was downgraded from Job Grade PLS 12 to PLS 10
 - h) The 8th Claimant was downgraded from Job Grade PLS 14 to PLS 10
 - i) The 9th Claimant was downgraded from Job Grade PLS 12 to PLS 10
11. It is the Claimants' case that the Respondent's actions of transferring them en masse and downgrading them in position as well as reducing their salaries were unlawful and unfair. They aver that these actions amount to collective punishment of individuals who were working in the office of the Chief Registrar of the Judiciary during the tenure of Gladys Boss Shollei.
12. The Claimants state that the Respondent's actions go against the objects and purpose of the Judicial Service Commission. They add that they ought to have been consulted prior to the actions complained of, which in their view amounts to disciplinary action without due process.
13. The Claimants contend that the Respondent's actions amount to a violation of their rights to fair labour practices, right to administrative action that is lawful, procedurally fair and reasonable under Articles 41(1) and (2), 47 and 236 of the Constitution of Kenya, 2010.
14. The Claimants seek the following reliefs:
- a) A declaration that the Respondent's action of downgrading them in position and reducing their salaries and allowances vide the Respondent's letter dated 19th December 2013 is unlawful, null and void and of no consequence;
 - b) A declaration that the Respondent's action of transferring the Claimants en masse vide the Respondent's letters dated 25th and 27th November 2013 is malicious, oppressive and unfair;
 - c) An order quashing the decision of the Respondent to transfer the Claimants vide letters dated 25th and 27th December 2013;
 - d) An order quashing the Respondent's decision to slash the Claimant's salaries and allowances vide its letters dated 19th December 2013;
 - e) An order permanently prohibiting the Respondent from slashing, reducing or in any other way diminishing the Claimants' salaries and allowances;



- f) A declaration that the Respondent has violated the Claimants' rights to fair labour practices, right to administrative action that is lawful, procedurally fair and reasonable under Articles 41(1) and (2), 47 and 236 of the Constitution of Kenya, 2010;
- g) An order of compensation for violation of the Claimants' rights;
- h) Costs plus interest.

The Respondent's Reply

15. In its Response and Counterclaim as amended on 31st July 2014, the Respondent states that in its meeting held on 18th April 2011, the Judicial Service Commission resolved to expand the existing positions and create new additional ones in the Judiciary.
16. At the request of the former Chief Registrar of the Judiciary, Gladys Boss Shollei, the 1st and 2nd Claimants were seconded to the Judiciary on 14th October 2011. The Respondent states that the 1st and 2nd Claimants did not possess any special skills or experience to warrant secondment.
17. Regarding the 2nd Claimant, the Respondent states that by letter dated 26th September 2011, the National Council for Law Reporting confirmed that she was on secondment to the Interim Independent Electoral Commission and could not therefore be considered for secondment to the Judiciary.
18. On the obtaining procedure for secondment, the Respondent states that the targeted officers are required to apply. Further, secondment is only applicable to officers with special skills that are not available in the Judiciary.
19. The Respondent states that the 3rd -9th Claimants were employed on temporary terms and their recruitment was not based on a competitive and transparent process as required under Article 172 of the Constitution.
20. The Respondent further states that the 4th to the 9th Claimants joined the Judiciary as casual employees in the office of the former Chief Registrar of the Judiciary.
21. On 8th February 2012, the 2nd Claimant wrote a memo to the former Chief Registrar of the Judiciary requesting that the 4th and 9th Claimants be placed on temporary terms to assist in administrative and legal functions. It is the Respondent's position that the 2nd Claimant who herself was on temporary appointment in the office of the former Chief Registrar of the Judiciary had no authority to write this memo.
22. The Respondent goes on to state that at a meeting held on 1st December 2012 and at the request of the former Chief Registrar of the Judiciary, the Human Resource Management Committee of the Judicial Service Commission regularized the Claimants' appointment by the Judiciary.
23. On 3rd December 2012, the former Chief Registrar of the Judiciary wrote a memo to the Director, Human Resource and Administration directing him to implement the Respondent's decision to regularize the Claimants' appointments.
24. The Respondent states that in disregard of established Human Resource procedures at the Judiciary, the former Chief Registrar of the Judiciary personally wrote the Claimants' appointment letters on her letterheads. The Respondent's position is that these letters ought to have been issued on its letterheads by the Director, Human Resource and Administration.



25. The Respondent further states that the former Chief Registrar of the Judiciary, in violation of Section 21 of the Judicial Service Act, irregularly signed and issued letters of appointment to the Claimants contrary to the approval given by the Respondent.
26. The Respondent avers that although the Judicial Service Staff Regulations (JSSR) provides that the Chief Registrar of the Judiciary appends her signature on appointment letters in her capacity as Secretary to the Judicial Service Commission, the letters of appointment must be in conformity with the approval given by the Commission.
27. The Respondent adds that as a result, the 3rd-8th Claimants were irregularly and unlawfully issued with letters of appointment in variance with the recommendation by the Judicial Service Commission and the memo to the Director, Human Resource and Administration dated 3rd December 2012.
28. The Respondent maintains that from the outset, the Claimants' employment was tainted with illegality as the Respondent was misled into approving the Claimants' appointments based on misrepresentation by the former Chief Registrar of the Judiciary as to the claimants' qualifications. The information given was skewed to give the Claimants an unjust advantage. The positions were therefore not filled competitively as required under Regulation 10 of the Third Schedule of the Judicial Service Act.
29. In particular, the Respondent states that:
- i) The 4th Claimant, Brigid Jepkemboi Konga, was appointed as a Senior Executive Officer yet she was not qualified as she holds a Bachelor's Degree in Wildlife Management which is not relevant to and did not qualify her to the position to which she was appointed;
 - ii) The 5th Claimant, Lucy Nyambura Waweru, was appointed as a Senior Executive Officer yet to qualify for that position an officer must have served as Executive Officer I for a minimum period of three (3) years in addition to other qualifications. The 5th Claimant's academic certificates indicate that she has a Bachelor of Education Degree in Early Childhood Development (ECD) with a Master of Arts in Project Planning and Management. It is the Respondent's position that the 5th Claimant's qualifications and experience are not relevant and did not qualify her for the position to which she was appointed;
 - iii) The appointment of the 7th Claimant, Mary Muthoni Njunge as Assistant Legal Researcher on permanent and pensionable terms was irregular as the position does not exist in the approved structure in the Judiciary. In any event, Njunge was not qualified as the position of Legal Researcher is created under Section 7 of the of the Judicial Service Act and requires at least two (2) years post admission experience;
 - iv) The 9th Claimant, Lynnette Wambui Mwangi, was appointed on temporary terms as an Assistant Legal Researcher which position does not exist in the established structure of the Judiciary. Her appointment on permanent and pensionable terms was irregular as the Respondent only offers the position of Legal Researcher on a renewable contract of three (3) years. Further, the position is created under Section 7 of the of the Judicial Service Act which requires the applicant to have at least two (2) years post admission experience yet the Claimant was admitted as an Advocate in April 2013.
30. The Respondent pleads conspiracy and collusion between the Claimants and the former Chief Registrar of the Judiciary to accept appointments to positions for which they were not qualified and to be paid salaries and allowances to which they were not entitled.



31. The Respondent goes on to state that subsequent to the irregular appointments, the Claimants were irregularly and without approval from the Judicial Service Commission promoted by the former Chief Registrar of the Judiciary without following the stipulated procedures and provisions of the Judicial Service Act. Consequently, the salaries and allowances earned on the basis of the irregular promotions were illegal and amount to unjust enrichment.
32. The Respondent further pleads that the Claimants' promotions were irregular and contrary to the Judicial Scheme of Service which provides that an employee requires to have served for a minimum of three (3) years to qualify for promotion.
33. The Respondent cites the following as reasons for their averment that the Claimants' promotions were irregular:
 - a) The 1st Claimant did not have any special skills or experience to warrant his secondment to the Judiciary. On 27th December 2012, he was appointed as Legal Counsel at job grade PLS 17, which position does not exist. In January 2013, he was promoted to the position of Chief Court Administrator, a position which does not exist in the structure of the Judiciary;
 - b) The 2nd Claimant was appointed to the position of Executive Officer at Job Grade PLS 12 on 19th December 2012 and in February 2013 she was promoted to the position of Chief Court Administrator at Job Grade PLS 17;
 - c) The 3rd Claimant was offered an appointment to the position of Executive Officer II on 12th December 2011 at Job Grade PLS 9 and on 27th December 2012, he was appointed as Senior Principal Performance Management Officer at Job Grade PLS 14 on permanent and pensionable terms;
 - d) The 4th Claimant was appointed as Executive Officer II, Job Grade PLS 10 on 5th December 2011 on temporary terms and on 27th December 2012, she was appointed to the position of Senior Executive Officer, Job Grade PLS 12 on permanent and pensionable terms;
 - e) The 5th Claimant was appointed as a Data Entry Clerk, Job Grade PLS 8 on temporary terms and on 27th December 2012 she was appointed to the position of Senior Executive Officer (Assistant Bench Liaison Officer), Job Grade PLS 12;
 - f) The 6th Claimant was appointed as Executive Officer II, Job Grade PLS 10 on temporary terms and on 27th December 2012 she was appointed to the position of Senior Executive Officer, Job Grade PLS 12 on permanent and pensionable terms;
 - g) The 7th Claimant was appointed on temporary terms on 14th May 2012 at Job Grade PLS 8 and on 27th December 2012 she was appointed as an Assistant Legal Researcher, Job Grade M4/R2 on permanent and pensionable terms;
 - h) The 8th Claimant was appointed at Job Grade PLS 5 on temporary terms on 15th September 2011 and on 27th December 2012, she was appointed as Principal Executive Officer (Principal Bench Liaison Officer), Job Grade PLS 14;
 - i) The 9th Claimant was appointed as an Assistant Legal Researcher, Job Grade PLS 10 on temporary terms on 5th December 2011 and on 27th December 2012, she was upgraded to Job Grade PLS 12 (M4/R2).
34. In a meeting held on 5th and 6th December 2013, the Respondent, in accordance with Section 14 of the Third Schedule of the Judicial Service Act, reviewed the Claimants' appointments and other members



of staff and regularized their placement and grading in tandem with their qualifications and experience. Particulars were given as follows:



Name	Date of appointment	Date of appointment	Position	Job	Position	Job
		appointed to	Grade	commensurate	Grade	
	on	to academic				
temporary	permanent	qualification on				
basis	basis	experience				
Nicholas	15/09/2011	27/12/2012	Legal Counsel	PLS 17	Legal Counsel	M6/R4
Muturi						
Okemwa						
Anne	15/09/2011	19/12/2012	Administrator	PLS 12	Senior Executive	PLS 12
Nyokabi	Officer					
Ng'ang'a						
Chrispine	15/09/2011	27/12/2012	Senior	PLS 14	ICT Officer I	PLS 10
Mbugua	Principal					
Kabiro	Performance					
Management						
Officer						
Brigid	05/12/2011	27/12/2012	Senior	PLS 12	Executive	PLS 10
Jepkemboi	Executive	Officer II				
Konga	Officer					
Lucy	02/05/2012	27/12/2012	Senior	PLS 12	Executive	PLS 10
Nyambura	Executive	Officer II				



Waweru	Officer (Asst.
Bench Liaison	
Officer)	

Anne	01/08/2012	27/12/2012	Senior	PLS 12	HRM Officer II	PLS 9
Wamaitha	Executive					
Murigi	Officer					
Mary	14/05/2012	27/12/2012	Assistant Legal	M4/R2	Executive	PLS 10
Muthoni	Researcher	Officer II				
Njunge						
Joslyne	15/09/2011	27/12/2012	Principal	PLS 14	Executive	PLS 10
Kathure	Executive	Officer II				
Ndubi	Officer					
(Principal						
Bench Liaison						
Officer)						
Lynette	05/12/2011	27/12/2012	Assistant Legal	M4/R2	Executive	PLS 10
Wambui	Researcher	Officer II				
Mwangi						

35. The Respondent states that in transferring the Claimants, it was exercising its discretion as an employer. The Respondent avers that there is no basis for the Claimants to claim preferential treatment as employees of the Judiciary are routinely transferred.
36. The Respondent denies that it acted arbitrarily, unconstitutionally and unlawfully and states that the Claimants had been irregularly and unlawfully granted terms that were not commensurate with their qualifications and experience with some enjoying benefits that are only accorded to Judges.



37. The Respondent adds that the Claimants were neither demoted nor discriminated against as the Respondent regularized the grading of their otherwise irregular appointments and promotions.
38. The Claimants' salaries were adjusted to reflect their correct designations in accordance with the provisions of the Third Schedule of the Judicial Service Act and Section 5(4) of the Employment Act.
39. It is the Respondent's position that the re-designation and regularization of the Claimants' positions and salary scales was not unfair administrative action nor unlawful as alleged; on the contrary, it was the duty and obligation of the Respondent to rectify the irregular acts.
40. The Respondent states that there is no basis upon which the Claimants should continue enjoying the preferential and discriminatory terms not accorded to other staff. The Respondent avers that this would be a violation of Article 27(1) of the Constitution and Section 5(2) of the Employment Act.

The Respondent's Counterclaim

41. In its amended Counterclaim, the Respondent states that the Claimants were appointed irregularly and contrary to the provisions of Article 172 of the Constitution, the Third Schedule of the Judicial Service Act, the Employment Act, the Judiciary Scheme of Service for Para-Legal Staff and the Human Resource Policy.
42. The Respondent adds that it lawfully acted within its mandate as required by Section 3(g) of the Judicial Service Act in order to correct the irregularities and ensure there was parity within the Judiciary.
43. The Respondent further avers that the Claimants were irregularly conferred financial benefits that they were not entitled to and therefore claims the wages and benefits unlawfully paid to the Claimants between 1st July 2012 and 31st December 2013 as follows:

a)	Nicholas Muturi Okemwa	5,176,040
b)	Anne Nyokabi Ng'ang'a	6,703,436
c)	Chrispine Mbugua Kabiro	4,701,124
d)	Brigid Jepkemboi Konga	2,125,054
e)	Lucy Nyambura Waweru	1,753,200
f)	Anne Wamaitha Murigi	2,378,070
g)	Mary Muthoni Njunge	1,497,600
h)	Joslyne Kathure Ndubi	4,835,792
i)	Lynette Wambui Mwangi	2,748,352

44. The Respondent goes on to state that after further analysis carried out by its Audit Committee it was established that the Claimants had received unapproved benefits and allowances that were not



commensurate with their positions. The total sum paid to the Claimants for a period of twenty two (22) months was Kshs. 20,500,000.

45. The Respondent states that seventy percent (70%) of the payments were in the form of per diem for foreign travel. A colossal sum of money was also spent on imprests in purchasing goods in cash.

Findings and Determination

46. From the pleadings and evidence on record, the following have crystallized as issues for determination by the Court:
- a) Whether the Respondent's action of downgrading the Claimants' positions and the resultant salary review was lawful;
 - b) Whether the Claimants' transfer was lawful and fair;
 - c) Whether the Respondent has proved a counterclaim against the Claimants.

The Downgrade and Salary Review

47. This claim was triggered by the Respondent's decision to review the Claimants' positions and salaries downwards. The letter communicating this decision states as follows:

“Re: Review of Grade

Following the Judicial Service Commission (JSC) meetings that were held on 5th and 6th December, 2013, a resolution was made that you be re-designated from.....to.....with effect from 1st January, 2013.

The salary attached to your new post is in.....viz: Kshs.....per month.

You will be entitled to the following allowances:

House allowance Commuter allowance Leave allowance F.J. KOSGEI For: Acting Chief Registrar of The Judiciary”

48. The Claimants' entry into the Judiciary as set out in the foregoing parts of this Judgment was somewhat unique. The rate of their career progression and attendant salary increment was also unusual.
49. The Respondent's witness, Rose Ochieng took the Court through the procedure for filling of vacancies within the Judiciary as set out in the Judicial Service Staff Regulations (JSSR) as follows:
- a) Establishment of a vacancy;
 - b) Advertisement of the vacancy upon approval by the Judicial Service Commission;
 - c) Receipt of applications, shortlisting and interviews;
 - d) Notification of appointment by the Human Resource Department.
50. Regarding secondment, Ochieng stated as follows:
- a) Before seeking secondment of a staff, one must establish that the capacity for which the secondment is sought does not exist within the Judiciary;
 - b) All secondments are for a temporary period and must be approved by the Judicial Service Commission;



- c) The seconded staff remains an employee of the parent Department;
 - d) Recruitment of a seconded staff permanently must follow the normal recruitment process set out above.
51. The Respondent maintains that from the outset, the Claimants' employment in the Judiciary was tainted with illegality because the Claimants were not competitively recruited as required under Article 172(2) of the Constitution and the Third Schedule of the Judicial Service Act.
52. In particular, the 1st and 2nd claimants were appointed while still serving as employees of another Government Agency, the National Council for Law Reporting. Additionally, the 3rd to 8th Claimants testified that their recruitment was not preceded by any public advertisement of the positions to which they were recruited nor were they interviewed for these positions.
53. From the evidence on record, it is evident that the Claimants' recruitment, confirmation and progression in the Judiciary were outside the established systems. The question in the mind of the Court is how such a large scale irregularity happened and persisted. In order to answer this question, I must examine the roles played by the Judicial Service Commission, the Chief Registrar of the Judiciary and the professional staff working under her.

The Role of the Judicial Service Commission

54. The Judicial Service Commission (the Commission) is established under Article 171 of the Constitution and consists of:
- a) The Chief Justice who shall be the chairperson of the Commission;
 - b) One Supreme Court judge elected by the judges of the Supreme Court;
 - c) One Court of Appeal judge elected by the judges of the Court of Appeal;
 - d) One High Court judge and one magistrate, one a woman and one a man, elected by members of the association of judges and magistrates;
 - e) The Attorney General;
 - f) Two Advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by members of the statutory body responsible for the professional regulation of advocates;
 - g) One person nominated by the Public Service Commission; and
 - h) One woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly.
55. By the nature of its composition, the Judicial Service Commission is a part time Commission seeing that the majority of its members hold full time jobs either in the public service or private sector. Its functions and powers as defined in Article 172 of the Constitution and Section 13 of the Judicial Service Act range from promoting the independence and accountability of the Judiciary; recommending persons for appointment of judges; reviewing and making recommendations on conditions of service; dealing with disciplinary cases affecting judicial officers and judiciary staff; preparing and implementing programmes for continuing education and training for judges and judicial officers to advising the national government on improving the efficiency and administration of justice.



56. From the foregoing definition of functions coupled with the finding that the Judicial Service Commission is a part time Commission, it seems to me that the mandate of the Commission regarding judiciary staff recruitment and remuneration is policy direction oriented.

The Role of the Chief Registrar of the Judiciary

57. The role of the Judicial Service Commission must be juxtaposed with that of the Chief Registrar of the Judiciary who is at the centre of this case. The office of the Chief Registrar of the Judiciary is created by Article 161(2) (c) of the Constitution as “the chief administrator and accounting officer of the Judiciary.” [Emphasis added] By virtue of Article 171(3) the Chief Registrar of the Judiciary is the Secretary to the Commission.
58. Section 8 of the Judicial Service Act sets out further functions of the Chief Registrar of the Judiciary including taking responsibility over the overall administration and management of the Judiciary and efficient management of day to day operations and administration of human resources in the judicial service.
59. From this summary of functions, it appears that the Chief Registrar of the Judiciary is not an ordinary officer. In fact this office is created by the same Article that creates the offices of the Chief Justice and Deputy Chief Justice. It seems to me therefore that the intention of Kenyans was to create a top management and administrative position in the Judiciary. What then would be the level of supervision by the Judicial Service Commission over the holder of such a position?
60. In my estimation, the supervision relationship between the Judicial Service Commission and the Chief Registrar of the Judiciary falls within the category of ‘general direction’ with the latter receiving guidelines in terms policy, broad goals and objectives. From the evidence on record, the Commission had provided this supervision in the form of policy, regulations and schemes of service.
61. Counsels for the parties expended a lot of time on the format of the appointment letters issued to the Claimants but I think the real question is whether the former Chief Registrar of the Judiciary exercised the very wide work autonomy granted to the office within the approved policy framework and direction. There is glaring evidence that she did not.
62. Apart from the irregular manner in which the Claimants were recruited and the supersonic speed with which they rose in rank and remuneration, the Court was told that at some point a key control document in government known as Pay Change Advice (PCA) was thrown out of the window.
63. This brings me to the next question; where were the professional staff employed by the Judiciary when all this was taking place? In asking this question, the Court takes judicial notice that when the events forming the subject matter of this case took place, the Judiciary had fully fledged Finance and Human Resource and Administration Directorates. I will return to this point when considering the Respondent’s counterclaim against the Claimants.
64. So was the Respondent right in re-designating the Claimants? The Respondent’s witness told the Court that the positions and resultant salaries assigned to the Claimants irregularly had distorted the existing schemes of service and had created establishment anomalies within the Judiciary.
65. In the final submissions filed on behalf of the Respondent reference was made to the decision by Ongaya J in *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another* [2013] eKLR where the Court found recruitment undertaken outside established policy guidelines and regulations to be unlawful.



66. In my view, the Respondent was not only mandated but was in fact obligated to right the wrongs that had occurred. More importantly, a court of law cannot confirm actions taken illegally (see *Saunders v Edwards* [1987] WLR1116).
67. Regarding the Claimants' transfers, the only thing I will say is that the Court will not interfere with an employer's prerogative to transfer an employee unless it is demonstrated that the transfer is being employed as a punitive measure. No such evidence was led in the Claimants' case and I therefore find that their transfers were regular and lawful.
68. Overall, I find that by re-designating and transferring the Claimants the Respondent acted within the law and established policy. The result is that the Claimants' claim fails in its entirety.

The Counterclaim

69. In its amended counterclaim the Respondent claims the following sums being wages and benefits unlawfully paid to the Claimants between 1st July 2012 and 31st December 2013:

a) Nicholas Muturi Okemwa		5,176,040
b)	Anne Nyokabi Ng'ang'a	6,703,436
c)	Chrispine Mbugua Kabiro	4,701,124
d)	Brigid Jepkemboi Konga	2,125,054
e)	Lucy Nyambura Waweru	1,753,200
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g)	Mary Muthoni Njunge	1,497,600
h)	Joslyne Kathure Ndubi	4,835,792
i)	Lynette Wambui Mwangi	2,748,352

70. In claiming these sums, the Respondent takes the position that the Claimants colluded with the former Chief Registrar of the Judiciary to earn the said sums. I have already established the seniority of the position of the Chief Registrar of the Judiciary. I also take judicial notice that all the Claimants are young Kenyans who at the time of joining the Judiciary were at the bottom of their careers. The Court, applying its objective mind, could not fathom a situation where the holder of such a senior position in an arm of government could collude with junior officers in her office. The collusion theory advanced by the Respondent is therefore rejected.
71. That settled, I must now ask the question whether the Claimants knew or ought to have known that their appointments and some of the salaries and benefits earned were irregular. The Claimants' appointments were sanctioned by the Chief Registrar of the Judiciary who is the Chief Administrator and Accounting Officer of the Judiciary. For a Judiciary staff, the chain of command does not elevate any higher; the word of the Chief Registrar of the Judiciary is to be trusted.



72. In *Michael Mwalo v Board of Trustees National Social Security Fund* (CauseNo 1093 of 2012) this Court held that an employee dealing with a senior official of an organisation is not expected to go into the corporate boardroom to confirm whether the official has authority to do what he seeks to do.
73. The Court was referred to Section 19(1)(e) of the Employment Act, 2007 which allows an employer to deduct wages paid in excess of an employee's entitlement. It is my view however that this provision deals with clerical errors in salary computation and cannot be applied in cases of systemic long drawn wrongdoing occasioned by officers of an organisation without collusion from the receiving employee.
74. In light of the foregoing, the Respondent's counterclaim against the Claimants fails in its entirety.
75. I would have penned off this judgment at this point if the funds involved were not public funds but I must say more. In the foregoing parts of this judgment, the Court found fault with the actions taken by the former Chief Registrar of the Judiciary, Gladys Boss Shollei. I went further to take issue with the role played by professional staff in the Finance and Human Resource and Administration Departments. What does the law say on this issue?
76. Article 226(5) of the Constitution of Kenya, 2010 provides as follows:
- “If the holder of an office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”
77. In addition Section 202 of the Public Finance Management Act provides that:
- (1) A public officer is personally liable for any loss sustained by the national government that is attributable to-
 - (a) The fraudulent or corrupt conduct, or negligence of the officer; or
 - (b) The officer's having done any act prohibited by section 196,197 and 198
 - (2) The National Treasury may, by civil proceedings brought in a court of competent jurisdiction, recover damages from a public officer for any loss for which the officer is liable under subsection (1).
78. In *Kiriri Cotton Company Limited v Ranchhoddas Keshavji Dewani* (1960) AC192,204 it was held that if as between two parties the duty of observing the law is placed on the shoulders of one rather than the other, then parties are not in *pari delicto*. I have already determined that in the loss of public funds occasioned in this case the Claimants were not in *pari delicto* with the former Chief Registrar of the Judiciary who was under a legal duty to guard public funds disbursed to the Judiciary. I would therefore leave the overall responsibility over the loss of public funds in this case at the door step of the former Chief Registrar of the Judiciary, Gladys Boss Shollei.
79. I will go further to hold that responsibility must cascade down to every public officer who played a role in effecting the irregular payments. In reaching this conclusion I am guided by the Court of Appeal decision in *Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others* [2014] eKLR where it was held that a public officer who knowingly participates or acquiesces in wrongdoing must be personally held to account.
80. Before signing off this judgment I need to address an issue that though not raised by the parties, is an important one in employment litigation. In their pleadings, the Claimants produced some confidential documents belonging to the Respondent in the form of minutes of the Judicial Service Commission



and letters addressed to other employees of the Judiciary. The 1st Claimant, Nicholas Okemwa told the Court that these documents were obtained from the former Chief Registrar of the Judiciary.

81. While the Constitution of Kenya, 2010 guarantees the right to information, that information must be obtained through legal means and as held by Lenaola J (as he then was) in *Okiya Omtatah Okioti & 2 Others v Attorney General & 3 Others* [2014] eKLR a court of law will not rely on documents that are improperly obtained. An employee who requires a document in the employer's possession can access it by a production notice. The mode in which the Claimants obtained the aforesaid documents was therefore improper and must be firmly discouraged.
82. In the final analysis, I dismiss both the Claimants' claim and the Respondent's counterclaim and direct that each party will bear their own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF DECEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Muumbi for the 1st-4th; 6th-9th Claimants Lucy Nyambura Waweru (5th Claimant in person) Mr. Issa Mansur for the Respondent

