



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 39 OF 2013**

**GLADYS BOSS SHOLLEI ..... PETITIONER**

**Versus**

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

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... AMICUS CURIAE**

Donald Kipkorir for the Petitioner

Senior Counsel Paul Muite, assisted by

Issa Mansour for the Respondent

Vincent Chahale for the *Amicus Curiae*

**JUDGMENT**

1. The Petitioner, Gladys Boss Shollei is the erstwhile Chief Registrar of the Judiciary (hereinafter 'CRJ') whereas the Respondent is the Judicial Service Commission (hereinafter 'JSC').

The Petition dated 31<sup>st</sup> October 2013 was filed on 1<sup>st</sup> November 2013 at the Constitutional Division of the High Court.

The Petitioner sought various orders pursuant to *Article 23(3) of the Constitution* against the Respondent as follows:-

- a. *that, order of Certiorari to issue to quash the letter of removal dated 18<sup>th</sup> October, 2013.*
- b. *that, order of Certiorari to issue to quash the proceedings of 18th October 2013.*
- c. *that, an order of Mandamus to issue compelling the Respondent to comply with the applicable law.*
- d. *that, prohibition do issue against the Respondent from in any way proceeding against the Petitioner other than as by law provided.*

- e. that, Declaratory orders to issue that the Respondent violated the Petitioner's rights as set out.
- f. that Declaratory orders to issue that the allegations against the Petitioner and the reasons given for her dismissal do not exist in law, and thereby void.
- g. that, Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.
- h. that, an order of compensation do issue for violation of the Petitioner's rights and an inquiry to Quantum be gone into.
- i. that, such further orders or relief do issue pursuant to Article 23(3) of the Constitution.
- j. that, costs be provided for the Petitioner.

2. The Petition together with an Interlocutory Application dated 31<sup>st</sup> October, 2013 seeking various interim orders were transferred by **Honourable Mumbi Ngugi J.** pursuant to *Article 162(2)* of the Constitution as read with *Section 12 of the Industrial Court Act, 2011*.

The matter was heard interparties on 15<sup>th</sup> November 2013, and a ruling was made on 22<sup>nd</sup> November 2013 where the Court;

- i. declined to reinstate the Petitioner to the position of CRJ pending the hearing of this petition;
- ii. found that a prima facie case of bias by JSC against the Petitioner had been established.

3. The Commission on Administrative Justice was admitted as *Amicus Curiae* and directed by the Court to file *Amicus Curiae* written brief, which brief was filed on 6<sup>th</sup> December 2013.

The Respondent sought leave to file supplementary response to the petition. The leave sought was not opposed by the Petitioner and the same was granted.

Accordingly, the Respondent relies on the initial Replying Affidavit deposed to by **Winfred Mokaya** dated 14<sup>th</sup> November 2013 and filed on the same date and the Supplementary Affidavit dated 23<sup>rd</sup> January 2014 and filed on 24<sup>th</sup> January 2014 deposed to by the said Winfred Mokaya.

#### **4. Facts of the case**

That the Respondent resolved to terminate the appointment and remove the Petitioner from office as the CRJ vide a letter dated 18.10.13 with immediate effect.

That though the letter of termination did not contain the reasons for the decision to terminate, a media release of the same date by The Hon. The Chief Justice (hereinafter 'The CJ') set out that they had removed the Petitioner for:

- i. incompetence;
- ii. misbehavior;
- iii. violation of prescribed code of conduct for Judicial Officers;
- iv. violation of Chapter 6, and Article 232 of The Constitution; and

v. insubordination.

5. The letter of termination and removal reads thus;

**“RE: Removal from office as the Chief Registrar of the Judiciary:**

*“Following the disciplinary proceedings initiated against you by the Judicial Service Commission as per the allegations set out in the Commission’s letter dated 10<sup>th</sup> September, 2013, and having considered your written and oral responses, the Commission has deliberated on the same and reached a decision.*

*The Commission is satisfied that the requirements set out under Section 12(1)(b)(c)(d)(f) and (g) of the Judicial Service Act 2011, have been met.*

*Accordingly, the Commission in its sitting of 18<sup>th</sup> October, 2013 in exercise of its mandate as set out in Article 173 of the Constitution has UNANIMOUSLY resolved to terminate your appointment and remove you from office as the Chief Registrar of the Judiciary with effect from 18<sup>th</sup> October, 2013.*

*Hon. Dr. Willy Mutunga,*

*D. Jur, Sc, EGH*

*Chairman Judicial Service Commission.”*

6. That on 20<sup>th</sup> August 2013, the Petitioner was sent on compulsory leave and the public was invited to lodge complaints against her. This followed a meeting of the JSC held at Mombasa on 17<sup>th</sup> August 2013 in which it is common cause that The CJ, The CRJ, and The Hon. The Attorney General (hereinafter ‘The AG’) who are members of the JSC were absent.

It is also common cause that on 7<sup>th</sup> August 2013, the Registrar of JSC **Winfrida B. Mokaya** notified all the Commissioners of the proposed JSC members retreat scheduled for the 15<sup>th</sup> to 18<sup>th</sup> August 2013 via an Email. In that email, she noted that the Petitioner had already travelled out of the country and would therefore not be available during the period of the retreat. The email ended thus;

*“In view of the discussions and for team building during the retreat, the Hon. Chairman has advised that we consult Commissioners if the retreat should proceed in the absence of the Secretary.”*

The email is attached to the supplementary affidavit of the Respondent.

7. As it came to pass, the retreat went on as scheduled in the absence of the Petitioner and on 17<sup>th</sup> August, 2013, members present resolved to suspend the Petitioner from her office. That there was no Agenda circulated to the members nor to the Petitioner prior to the retreat to discuss the Petitioner’s conduct or intended removal from her office.

That upon return to Nairobi, a full meeting of JSC was convened on 18<sup>th</sup> August, 2013 and the Mombasa decision was ratified by a majority of five(5) members out of the nine(9) at the meeting.

8. Following the ratification of the Mombasa decision, and at a press conference held after the meeting on 18<sup>th</sup> August, 2013, which was a Saturday, it was announced that the Petitioner had been suspended from office.

On 20<sup>th</sup> August, 2013 the Petitioner was sent on compulsory leave pending investigations into her conduct and the members of the public were invited to lodge complaints against her.

Two committees of JSC were tasked by JSC to investigate the Petitioner's conduct and make a report to the JSC.

### **9. The Charge Sheet**

By a letter dated 10<sup>th</sup> September, 2013, JSC sent the Petitioner a charge sheet comprising of 87 specific allegations under five heads as follows;

1. financial mismanagement;
2. mismanagement in Human Resource;
3. impropriety in procurement
4. insubordination; and
5. misbehaviour.

The charge sheet spreads over 18 pages from page 17 to 34 of the Petitioner's supporting affidavit.

In addition the document refers the Petitioner to many annexures in most of the counts.

**10.** The CJ via the forwarding letter of 10<sup>th</sup> September, 2013, gave the Petitioner 21 days within which to respond to the allegations aforesaid.

The Petitioner on 1<sup>st</sup> October, 2013, submitted an interim response to the allegations under protest contained in the covering letter of the same date.

The substance of the protest was that due to the nature of allegations made, she required reports from the various Directors and the Procurement Committee on the specific allegations.

On 12<sup>th</sup> September 2013, two days after receiving the allegations, she had requested for extension of time to enable her gather information from the Directorates of Procurement, Finance, Human Resources and the Tender Committee. The Directors had themselves requested for four (4) weeks to submit their reports.

The rationale was that the CRJ managed the Judiciary by proxy and relied most of the time on these officers.

The Petitioner did not receive a response to her request until she wrote again on 29<sup>th</sup> September 2013 and got a response from the CJ via an email dated the same date in which the Petitioner's request for extension of time was refused.

The Petitioner indicated that, given more time she was in a position to make a comprehensive response to the allegations made against her.

It is noteworthy that by this time, the petitioner had resumed her duties from compulsory leave by consent of the parties following an urgent Application filed by the Petitioner at the High Court.

The Petitioner requested to be allowed to submit her final response by 15<sup>th</sup> October, 2013. She also requested to be allowed to make oral presentation at the hearing and since the allegations against her were made to the public and the matter had generated a lot of public interest, the hearing be

held in public to allow Kenyans to judge the matter for themselves.

On 3<sup>rd</sup> October, 2013, the Respondent issued a press release indicating that upon considering the response by the Petitioner to the allegations of impropriety leveled against her, a hearing was scheduled to take place on 16<sup>th</sup> October 2013.

Indeed on 15<sup>th</sup> October, 2013, the Petitioner submitted a final report comprising 73 typed pages.

**12.** On the 16<sup>th</sup> October, 2013, Petitioner appeared before the full JSC accompanied by her advocate, **Donald B. Kipkorir**. Preliminary objections to the proceedings were raised by counsel for the Petitioner to wit;

- i. that JSC had no jurisdiction to discipline CRJ;
- ii. that some of the Commissioners had previous issues with the Petitioner and thus, the Petitioner had real apprehension of likelihood of bias by the named Commissioners.
- iii. that there was a trove of emails to and from the CJ (sources not disclosed) which shows that the fate of the Petitioner had already been decided by persons within and out of the Judiciary who had designated themselves as a ‘war council.’ That it was up to the CJ to decide if his conscience allowed him to sit in judgment of the Petitioner given this background.
- iv. that the Petitioner required at least one(1) week to prepare for the hearing because the Petitioner was not aware of the nature of the proceedings up until that moment in that they were not sure whether this was a Preliminary Inquiry or if it was a disciplinary hearing;

The JSC considered the objections by the Petitioner, summarily dismissed them to be without merit, and granted the Petitioner two days more to prepare for the disciplinary hearing which was then scheduled for the 18<sup>th</sup> August 2013.

**13.** On the 18<sup>th</sup> October 2013, Counsel, Donald B. Kipkorir again appeared before the JSC with the Petitioner and presented what was referred to as **“Closing submissions under Protest.”** The five (5) page document signed by the counsel was presented to the Court on page 99 – 104 of the Petitioner’s supporting affidavit.

**14.** The disciplinary hearing did not proceed on the substantive issues because again on the 18<sup>th</sup> August 2013, the Counsel for the Petitioner reiterated the objections raised on 16<sup>th</sup> August 2013 as follows:

- i. **The JSC had no jurisdiction to conduct a disciplinary process against the CRJ on the allegations made because;**
  - a. **CRJ reports only to and is accountable to the National Assembly and Auditor General on financial matters pursuant to Articles 226(2) and 229 of the Constitution;**
  - b. **That by the provisions of *The Public Finance Management Act 2012; The Public Procurement and Disposal Act (PPDA) 2005, The Public Officer Ethics Act, 2003 and Economic and Anti-corruption Commission (EACC) Act, 2011, the CRJ is subject to oversight by the National Assembly, PPOA and EACC.***

That were the CRJ in breach of any provisions of the law, it is these statutory bodies who will carry out investigations and make recommendations to the JSC to initiate disciplinary proceedings. That the JSC needed to determine this issue of jurisdiction before proceeding any further with the disciplinary hearing.

15. The JSC was not impartial and would not give the Petitioner a fair hearing because;

- a. CRJ has demonstrated in the final Report that Commissioners Christine Mango, Emily Ominde, Ahmednassir Abdullahi, and Mohammed Warsame were biased against her due to past incidents between each one of them and the Petitioner. The Petitioner pointed out that JSC does not make a corporate decision removed from the alleged bias, as it acts by individual votes, in favour or against a decision;
- b. The CRJ had filed a bundle of emails running into nearly 200 pages emanating from and to the CJ demonstrating that the removal of the CRJ is a continued conspiracy by a 'war council' to which the CJ is a member. The CJ is thereof presiding over a process tainted with ulterior motive and illegality. That moral conscience, if not anything else demands that the CJ should not sit in these proceedings.

16. The disciplinary process is Quasi-criminal in nature and must have the following basic elements that were lacking in the present case;

- a. a complaint and charge setting out the offence and the particular provisions of the law broken;
- b. particulars of the offence;
- c. names and statement of the complainants; and
- d. sufficient time for the accused to prepare adequately and be allowed to gain access to all exculpatory evidence.

That none of the above was provided to the CRJ, therefore the allegations as they stood were embarrassing, cannot possibly be addressed in two(2) days provided by the JSC to ventilate the matter. Accordingly the whole procedure was in contravention of *Articles 27(1), 35(1)(b), 47(1)&(2) and 50(1)&(2) and 236(b) of the Constitution* in that it had contravened the Petitioner's right to fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair.

Furthermore, the Petitioner had been denied the right to a fair hearing by resolving the dispute at hand;

**"by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."** (emphasis mine); in that she was not presumed innocent until proved guilty, had no access to essential information and had been denied adequate time to prepare for her defence.

18. The Petitioner's counsel concluded, as he did before Court that the purported disciplinary hearing was tainted with malice, political scoring, tribalism and vendetta and nothing to do with the law. That it was instructive that none of the statutory organs aforementioned had complained against the Petitioner.

19. The Court as had the JSC prior, was asked to find that none of the allegations against the Petitioner had been substantiated. That the same lacked factual and legal basis and in pursuit of this process JSC may have played mortician to the Judiciary.

With regard to the specific allegations made against CRJ, the Final Report from page 105 to page 178 responded blow by blow to each and every of the allegations made against the Petitioner. She denies having admitted any of the offences as alleged by the Respondent.

## **20. Response**

As said earlier, the Respondent filed a replying affidavit of **Winfrida Mokaya**, a Registrar of JSC.

The Respondent has attached to the reply to the Petition a comprehensive matrix of 138 pages comprising JSC allegations; CRJ Responses and JSC findings and observations.

Page I of the annexure to the reply is the letter of removal dated 8<sup>th</sup> October 2013 followed on page 2 by a document titled: “**A working summary.**”

The document summarises the process JSC took in this matter and concludes that Mrs Shollei admitted 33 allegations and denied 38 others and that responses to the other 16 allegations remaining were equivocal and qualified.

**21.** The Respondent through its counsel **Paul Muite** and **Issa Mansur** has strenuously submitted that the Petitioner was accorded fair administrative action and was indeed given a fair hearing. That JSC is satisfied that due process was followed and in the final analysis Mrs Shollei admitted allegations that account for losses valued at Ksh. 1,696,000,000/=, those denied stood at a value of Ksh. 250,400,000/= and those with mixed responses stood at Kshs. 361,000,000/=.

That JSC accorded the Petitioner 21 days within which to respond and this period was extended by a further 18 days.

**22.** Counsel submitted that the disciplinary process was fair, transparent, impartial and was in accordance with the law.

Counsel, urged the Court to find that allegations of incompetence, misbehaviour, violation of the prescribed code of conduct for Judicial Officers, violation of *Chapter 6, and Article 232 of the Constitution of Kenya, 2010* and insubordination had been proved against the Petitioner. That this Petition has no merit and same should be dismissed with costs to the Respondent.

**23.** In the Matrix aforesaid on page 3, it is alleged that JSC has invited the Ethics and Anti-corruption Commission to launch inquiry into the various issues highlighted by the initial disciplinary investigation.

#### **24. Analysis of Facts**

It is apposite to note that CRJ was not involved in the Preliminary investigations even though the same became the basis of the raft of allegations against her.

The JSC indicates that it has “*undertaken to engage the public and other Government agencies including Parliament, to explain the profundity of the issues at hand.*” This is an acknowledgement by JSC that up to the time the Petitioner was removed from the office, none of these agencies had been involved of their own motion, or through invitation by JSC in the issues at hand.

**25.** The documentation presented by the Respondents before Court do not show what allegations upon consideration by JSC was the Petitioner found guilty of and in respect of which she was not found guilty.

If the Court is meant to assume that CRJ is guilty of the allegations she is said to have admitted, that does not follow in law or in fact. The JSC had in its decision to determine if these facts admitted in the light of the law applicable constitute an offence and if so what administrative penalties are available and therefore applicable to the Petitioner.

The Court is yet to receive any such evidence from the Respondent, documentary or otherwise.

**26.** As a matter of fact, the letter of removal dated 18<sup>th</sup> October, 2013, does not indicate whether

the Petitioner was found guilty of any of the 87 (33 + 38 +16) allegations preferred against her and if so, in respect of which allegations she had been acquitted.

The letter says:

**“The Commission is satisfied that the requirements set out under Section 12(1)(b)(c)(d)(f) and (g) of the Judicial Service Act 2011, have been met”** and no more.

As at the time of hearing this matter the Petitioner had no way of knowing what specific offences she had committed and the reasons for the Respondent arriving at that conclusion especially whether her defence as contained in the final report was taken into account in arriving at that conclusion.

27. Before I embark on delineating the issues that fall to be determined emanating from the aforesaid analysis of facts and the law applicable in the circumstance of this case, it is apposite to examine briefly, the additional evidence introduced by the Respondent by way of a supplementary affidavit filed on 24<sup>th</sup> January 2014.

The affidavit deposed to by Winfrida Mokaya attempts largely to dispel the specific allegations by the Petitioner that made her to have a reasonable apprehension or suspicion that certain Commissioners including The Hon. Chief Justice; Commissioner Ahmednasir Abdullahi; Hon. Emily Ominde and Christine Mango were biased against her and would therefore not give her a fair hearing.

28. It is instructive to note that none of the Commissioners against whom specific allegations of personal interest were made found it fit to put in their own affidavits denying the specific allegations made against them. The accusations made are largely matters that are said to have arisen as between the Petitioner and the named Commissioners. With regard to Commissioner Ahmednasir Abdullahi, he is alleged to have started a witchhunt against the Petitioner following her refusal to accede to his request with regard to the purchase of a building for the Judiciary in Mombasa, and Eastleigh in Nairobi. He was also alleged to have prodded the Petitioner to let him provide the Judiciary with ICT infrastructure and the Case Management System for the Judiciary which overtures were rebuffed by the Petitioner. Indeed an email from Commissioner Ahmednasir Abdullahi providing his contact person for the purchase of Eastleigh building has been attached to the supporting affidavit of the Petitioner.

29. Hon. Mr. Justice Mohammed Warsame is alleged to have approached the Petitioner with a view to get employment for his acquaintances, which request was severally refused by the Petitioner.

30. Regarding Commissioner Honourable Emily Ominde she is said to have had bad blood with the Petitioner from the word go and this was exacerbated by the Commissioner questioning the deployment of pupils and interns by the Petitioner to the Kibera Law Courts where she was serving as the Chief Magistrate.

Commissioner Christine Mango is said to have developed bad blood against the Petitioner after she questioned and stopped payment of Per diem to her whenever she was in Nairobi contrary to the Public Finance Management Act and regulations which prohibited an officer to earn Per diem for more than 30 days.

In the supplementary affidavit, M/s Winfrida Mokaya does not attest to any personal knowledge or information from the said Commissioners on these issues. It would have been more helpful for the named persons to directly place their perspective on the allegations of personal nature made against them before Court.

31. There was no attempt by the deponent to respond to allegations made against Commissioner

Christine Mango.

### **32. The war council**

Regarding the very serious allegation that the disciplinary process against the Petitioner was contrived and pre-determined by the 'war council', as stated earlier, a trove of emails nearing 200 pages to and from the Hon. CJ while communicating with the alleged members of the war council Hon. Justice Joel Ngugi, Mr Dennis Kabaara, Mr Duncan Okello and Mr. Makokha Kwamuchetsi, Counsel for the Petitioner Mr. Donald B. Kipkorir extensively submitted on the matter stating that these members of the 'war council' conceived and executed 'a war strategy' to frame and remove CRJ from her office. Accordingly, the raft of allegations set out against Gladys and the purported disciplinary hearing was a farce and a facade aimed at covering the real reason for her removal. The authenticity of these emails is strongly refuted by the Respondent.

**33.** Counsel submitted that out of the Group of Generals in the 'war council', only the Hon. The Chief Justice and Hon. Justice Ngugi were employees of the Judiciary.

That the council had agreed that the Chief Justice had a short time before he left office and he must leave a legacy.

That the Executive represented by Gladys Shollei was on his way to leave this lasting legacy.

That the council advised him to take back the Judiciary from the Executive and they designated themselves as Generals.

The Council agreed that Gladys must be removed and the way to do that was not to say she stood in the way of transformation as that would not sell, but she should be alleged of being in charge of a criminal enterprise.

**34.** That a thirty (30) point plan was developed and she was named '*Darth Vader*' a leading character in star wars movie about clash of the '*Gods*' in Outer Cosmos. That only one '*God*' and not two could succeed to do that and thus it was either the CJ or the CRJ to survive.

The CJ was given an ultimatum and the process to deliver. That the road map was followed to the letter to ensure only one '*God*' survived.

Counsel submitted that the die had been cast long before the disciplinary process began.

**35.** In further elucidation of how the strategy was implemented, counsel submitted that, the council said they would engage Gladys in public, and they did to make the public believe that she headed a criminal enterprise. That they would intellectually and morally terrify any officer seen to be in her support and they did. They said they would not give her a public hearing and they did. They said time was of essence to execute the plan and would deny her time to defend herself, and they did. The CJ was told to call meetings to reclaim his Judges and support their cause and he did.

**36.** A strategy called '*Mbwa*' was adopted to ensure that the CJ was visible within the Judiciary and get the support of the non-judicial staff officials and he did exactly that among other steps taken.

The high watermark of the strategy was the 1<sup>st</sup> October 2013, which was called the "**bloodbath.**" This was the day the CRJ was to be dismissed and the CJ to take over as the commander-in-chief. Counsel told the Court that this evidence illustrates clearly that CRJ had no fair hearing and that her removal was a foregone conclusion.

**37.** The Respondent has responded to these allegations in the supplementary affidavit of Winfrida Mokaya. The registrar denies the existence of a "war council" and the allegation of a pre-

determined outcome and reiterated that the Petitioner was removed from office on the basis of the charges proved against her as contained in the report. That the disciplinary process was in accordance with the law and there was no influence from any other third party real or imaged.

**38.** Though the Registrar deposes that none of the Commissioners of the Respondent is mentioned in the trove of emails of “**dubious origin**” the fact of the matter is that all the emails are purported to be written or copied to the CJ.

In the preliminary objections made by counsel Donald B. Kipkorir and the JSC on 16<sup>th</sup> October, 2013 and on 18<sup>th</sup> October 2013 (*see closing submissions on page 101 Vol. I – supporting affidavit*) wherein counsel states:

**“the CRJ has filed the bundle of emails emanating from and to the CJ demonstrating that her removal is a continued conspiracy.**

**The Chief Justice is thereof presiding over a process tainted with ulterior motive and illegality. The trove of emails running into nearly 200 pages set out the *raisond’etre* for her removal. It is not what the public is being told. Moral conscience, if not anything else demands that the CJ should not sit in these proceedings.”**

**39.** It is important to note that on 16<sup>th</sup> October 2013 and 18<sup>th</sup> October 2013, the Petitioner and her counsel objected to the sitting of the named Commissioners and the proceedings of 16<sup>th</sup> October 2013 on page 1350 of the supporting affidavit of the Petitioner is attached minutes detailing the various preliminary objections made on that day including the specific facts on which the application for recusal was based, *see pages 1360 – 1361*.

The Court has taken note of these complaints against the named Commissioners and the responses made in the supplementary affidavit by the Respondent.

The Court also notes that JSC dismissed the allegations of bias but the CJ did not take the invitation to comment on the trove of emails though Commissioner Ahmednasir Abdullahi vehemently contested the authenticity of the emails and demanded the source of the documents from the Petitioner and her counsel.

**40.** In its ruling, JSC gave the Petitioner two days extension to prepare for the hearing which extension was accepted by the Petitioner under protest; decided that JSC had jurisdiction over the matter; found there was no basis that any of the named Commissioners would be biased in the process as JSC was acting in its corporate capacity and the decision arrived at would only be based on material before JSC; that it was not necessary for the accusers of CRJ to be named as CRJ knew the case facing her well and had submitted an interim report and that JSC was not in possession of the trove of emails nor were they availed to the Commission as of that date. Furthermore the source of the emails was unknown and that the matter was under police investigations and that the emails would not affect the fairness of the process.

**41.** The Respondent persists in the denial of knowledge of these emails in both the replying affidavit and the supplementary affidavit recently filed but there is no reference in the affidavits to the alleged police investigations on the matter.

**42.** The Court notes the following from a perusal of those emails attached in *Vol. II of the supporting affidavit from page 1187 to 1316*:

1. all of them are marked “Hide” at the top.
2. most of them are from the named members of the ‘war council’ to each other and/or to the Chief justice.

3. a few of them are copied to Gladys Shollei, Abdul Omar, Katras. Martha K. Mueni, and K. Bidali and Frida Mokaya. *See pages 1287, 1294, 1295, 1280,1268,1263.*
4. The one on page 1263 copied to Frida Mokaya is from Duncun Okello to CJ dated 21/8/2013 forwarding the TORs for Dennis and his CV to be tabled before JSC the following day for his formal appointment to take effect.
5. One on page 1268 dated 17/8/2013 at 1:45 p.m. is from the CJ copied to Duncan Okello, Joel Ngugi, Kwamuchetsi Makokha and Gladys Shollei upon receipt of the Resolution of JSC meeting at Mombasa on CRJ. Contents are as follows:

*“I cannot believe this! I cannot believe Smokin, Lenaola and Kobia did not bring sanity to JSC. We must meet immediately to discuss this looming crisis for the Judiciary.”*

**43.** It is not for the Court to act sleuth and determine the authenticity of the trove of emails. However common sense demands, in a matter of this nature, with consequences so dire to the Petitioner, the Court goes a little further into the matter than JSC thought the documents deserve. The Court will recall these observations shortly in the legal analysis of the issue at hand. The Court also notes that the copying of some of the emails to Gladys Shollei possibly exposed the entire trove to her though she does not own up to this.

At this stage, the Court will say no more but observe that the CJ was the chairman of the disciplinary tribunal conducted against the Petitioner and has not placed before Court, an affidavit or oral evidence to elucidate on these allegations by the Petitioner touching on his person and on matters the deponent of the Respondent’s replying and supplementary affidavit clearly has no knowledge of.

#### **44. The issues and the law**

The Court has made an extensive analysis of the evidence presented by the Petitioner vis a vis that presented by the Respondent and has delineated the following issues for determination:

1. **Did the JSC have jurisdiction to discipline the Petitioner?**
2. **If the answer to 1 is correct, was the Petitioner given a fair and impartial hearing?**
3. **Was the petitioner removed for a valid reason and in terms of a fair procedure?**
4. **What remedy, if any, is available to the Petitioner?**

#### **45. Jurisdiction**

It is the Petitioner’s case that The JSC lacked jurisdiction to proceed against the CRJ in that;

- i. The office of the CRJ is a Constitutional one and is established under *Article 161* which creates the office of the Chief Justice and the Deputy Chief Justice. As such the office is only one of the three judicial offices established under the Constitution.
- ii. That the office was not one of the ordinary registrars to be subjected to disciplinary action by JSC under *Section 12 of the Judicial Service Commission Act*.
- iii. That CRJ being the Chief Accounting and Administration Officer of the Judiciary is only accountable to the National Assembly on financial management matters in terms of *Article 226(2) of the Constitution* which reads:

**“The accounting officer of a national public entity is accountable to the National**

Assembly for its financial management.....” and in terms of Clause (3) which reads:

“Subject to *Clause (4)*, the accounts of all Governments and state organs shall be audited by the Auditor General.”

That matters of procurement are governed by *Article 227* of the Constitution which provides for an *Act of Parliament* to prescribe a framework with which policies relating to procurement and asset disposal shall be governed and therefore JSC has no business questioning her on these matters.

In this regard, the Public Procurement and Disposal Authority established in terms of *Section 8 of The Public Procurement and Disposal Act No. 3 of 2005* has oversight on matters of procurement in terms of *Section 9* thereof and not the JSC.

In particular, *Section 27(1)* provides:

“A public entity shall ensure that this Act, the regulations and the directions of the Authority are complied with respect to each of its procurements.”

Whereas *Sub-Section (2)* provides:

“The Accounting Officer of a Public entity shall be primarily responsible for ensuring that the public entity fulfills obligations under subsection (1).”

Furthermore, under *Sections 66 to 74 of the Public Finance and Management Act, 2012* is set out powers and responsibilities of Accounting Officers and the reporting line including “*The Judiciary, Parliament and Independent offices.*”

46. In terms of *Section 74*, the Accounting officers, like the Petitioner are subject to the Constitution and the Public Officers Ethics Act, as read with the *Ethics and Anti-Corruption Act, 2011*.

It was the Petitioner’s submission, which was denied by the Respondent that JSC could only deal with CRJ upon referral from any of the above cited bodies and could not act *suo moto* as it did in this matter.

47. The Court benefitted from submissions of *Amicus Curiae* on this issue to whom the Court is very grateful as follows:

*Article 172(1) of the Constitution requires in mandatory terms the JSC to “promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.”*

That in terms of *Clause (c)* the JSC is to;

“appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary in the manner prescribed by an *Act of Parliament.*”

48. It was the submission by counsel for the Respondent and the Amicus Curiae that the term registrar under *Article 172* includes the Chief Registrar of the Judiciary for the reason that there is no other provision of the constitution that provides for the manner in which the Chief Registrar of the Judiciary may be disciplined or removed from office. That had there been such intention, then a different provision for that purpose would have been provided under *Article 172(1)*.

49. Furthermore, in terms of the *Judicial Service Act in Section 12*, is provided as follows:

**“(1) The Chief Registrar may at any time, and in such manner as may be prescribed under this Act, be suspended or removed from the office by the Commission for:**

- a. *Inability to perform the functions of the office, whether arising from infirmity of body or mind;*
- b. *Misbehaviour;*
- c. *Incompetence;*
- d. *Violation of the prescribed code of conduct for Judicial officers;*
- e. *Bankruptcy;*
- f. *Violation of the provisions of Chapter six of the Constitution; or*
- g. *Any other sufficient cause.*

50. It was the submission by *Amicus Curiae* that it would be absurd to hold that the use of the term registrar under *Article 172(1)(c)* does not include the CRJ. That would amount to shielding CRJ from any disciplinary proceedings since there is no other provision in the Constitution providing for the same.

The Court agrees with this proposition by the counsel for *Amicus Curiae* which is in tandem with that advanced by counsel for the Respondent.

The Court accordingly finds that JSC had jurisdiction to institute disciplinary proceedings against the CRJ in terms of *Article 172(1)(c)* of the Constitution as read with *Section 12(1) of the Judicial service Act*.

**51. Was the petitioner accorded a fair and impartial hearing?**

From the submissions by counsel for the Petitioner before the JSC and this Court, there are specific aspects of this matter that arise as follows;

- i. firstly, there is the issue as to whether there were proper charges facing the CRJ;
- ii. if so if the tribunal ought to have been reconstituted on account of the alleged perceived bias by CRJ by the named Commissioners including the chairman.
- iii. if the answer to item (ii) above is in the affirmative, what was the effect to the said proceedings and the subsequent decision.

**52. The charges**

The allegations communicated to CRJ via a letter by the CJ dated 10<sup>th</sup> September 2013 found on *page 16 Vol. I* of the supporting affidavit by Gladys Shollei span from *pages 17 to 34* of the same document.

As pointed out earlier in this judgment, there are 87 allegations categorised into;

- a. allegations of Financial mismanagement;
- b. allegations of mismanagement in Human Resources;

- c. irregularities and improprieties in procurement;
- d. insubordination and countermanding decisions of the Commission;
- e. misbehaviour.

53. It was submitted by counsel for Petitioner that this raft of allegations did not amount to charges in law in respect of which CRJ was capable of addressing. That the manner the same were presented was meant to embarrass the CRJ as it was not possible for her to know what specific offences she was alleged to have committed.

That this defeated the purpose of the entire process as it was impossible for one to defend him/herself properly in the circumstances.

54. That the itemized allegations do not amount to counts known in our law in that framing of the same is vague and non specific. That the same do not disclose violation of any particular provisions of the law; the complainants; the date when they were alleged to have been committed and the specific actions and/or omissions by the Petitioner. In the final analysis, this resulted in a gross miscarriage of justice, especially because these were quasi-criminal proceedings with the potential of tainting the reputation of CRJ forever and effectively ending her ability to hold any public or private position of responsibility in future.

55. That as at the time of going to court, no one knows whether any public funds were misappropriated and/or got lost at all as that is not evident from the framed allegations nor were any witnesses called to substantiate the blank allegations.

That CRJ's attempt to call as witnesses before the JSC, the senior officers, including the respective Directors and the members of the procurement committee and the Judiciary that evidently were responsible factually and in terms of the law and actually carried out most of the transactions the subject of most of the charges and counts fell on deaf ears.

Accordingly the so called disciplinary process was a non starter and a nullity and the court should find so.

56. At this stage, the court agrees that the seriousness of the allegations made against the CRJ effectively made the disciplinary process a quasi-criminal affair. The JSC assumed a responsibility equivalent to if not equal to a Judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hang in the balance.

The nature of the allegations if proved were likely to paint the CRJ as a criminal then and henceforth effectively killing her career spanning over many years in high and respected positions in Public Service, at the Independent Electoral and Boundaries Commission (IEBC) and the Law Reports Commission of Kenya respectively among other Public Service CRJ had offered the country.

57. It is appropriate to note that *Section 12(2) of the Judicial Service Act* under which JSC acted provides:

***“Before the Chief Registrar is removed under subsection (1), the Chief Registrar shall be informed of the case against him or her in writing and shall be given reasonable time to defend himself or herself against any of the grounds cited for the intended removal.”***

58. In this regard, the Court has found it useful to seek guidance from the *Provisions of the Criminal Procedure Code Cap 75 of the Laws of Kenya* with **regard to the framing of charges under Section 37 as follows:**

**“the following provision shall apply to all charges and informations and, notwithstanding any rule of law or practice a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code:**

**(a)(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence.**

**(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.**

**(iii) after the statement of the offence particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.”**

The Second schedule to the Act, has forms which conform to the manner of framing charges and informations.

**59.** It is noteworthy in summary that a count of a charge commences with a statement of offence followed by particulars and where a charge has more than one count, each count commences with statement of offence followed by the particulars seriatim.

The court also notes that counts in one charge must be related and emanating from same or related conduct otherwise the counts must be framed as separate charges.

The court further notes that, in framing of charges, the accuser must avoid splitting of charges and duplicity likely to embarrass the accused thereby defeating the ends of justice.

These high standards are usually required in criminal proceedings but glaring deviations from the accepted form must be avoided in Quasi-criminal proceedings especially before statutory tribunals with powers to mete out punitive measures, with far reaching consequences to those who appear before them.

**60.** It is also apposite for the court to note that the general rule as to description in a charge requires the accuser to use ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to. It is not necessary to state the intent of the accused.

See *Section 137(f) and (g)*.

**61.** The court does not impose on the Respondent herein the strict requirements under the criminal procedure code, but specific objections to the manner in which the allegations against CRJ were framed were made to the JSC by the counsel of the Petitioner although in not very clear terms. It was said that CRJ could not from the raft of allegations tell whether she was faced with an investigation or a disciplinary hearing as this was not clear on the face of the statement of information. It was also not clear under what provisions of the law, the allegations were based and whether specific infractions of those specific provisions was alleged.

Counsel reiterated those submissions with more clarity before court hence the consideration by the court.

**62. The court finds as follows:**

With specific reference to the allegation of;

**“failure to exercise prudence in expenditure of public funds resulting into loss of**

**approximately 1,200,000,000/= (One Billion two hundred million).”**

- a. The charge is split into very many counts which, if properly consolidated and framed would have resulted in very few counts. Some other counts would have been the subject of separate charges;
- b. Many of the counts do not start with a statement of offence followed by particulars and therefore do not in law disclose any offence capable of being p
- c. The most serious failure discernible on the face of the lengthy charge sheet is that in numerous counts different allegations constituting or capable of constituting different offences are made resulting in debilitating duplicity.

**63.** In the case of **Dande Vs. Republic, High Court Appellate side, Nairobi (1977). The Kenya Law Reports Page 71 at 79. Trevelyan and Todd JJ** upon reviewing numerous English and Local Authorities stated thus;

“On the authority of **Cherere s/o Gakuhi VR (1955) EACA 478** where two or more offences are charged in the alternative in one count, the count is bad the defect being not merely formal, but substantial, for where an accused is so charged he does not know exactly with what he is charged , and if he is convicted, he does not know exactly of what he has been convicted. The charge, as laid is then, incurably bad.”

**64.** Counts 1, 2, 3, 4, 5, 7, 9, 11, 12 under charge ‘A’ i.e. failure to exercise prudence of expenditure of Public Funds resulting into loss of approximately Ksh. 1,200,000,000/= (Kenya shillings one billion two hundred million) all fall in this category and are therefore incurably bad.

Count 10 titled ‘**irregular earning of sitting allowances**’ does not disclose any offence in its opening statement which reads;

**“you irregularly caused yourself to be \*sitting allowances .....**”

**65.** The court observes that in high pressure work, that conduct of Judicial and Quasi-Judicial proceedings are, certain errors do occur especially typographical errors which the court or tribunal is permitted by the rules to later on correct *suo moto* or at the instance of either party. However, the omission above with regard to a count is incurable once the proceedings have been concluded. The effect of omitting the word “**paid**” is fatal to this count in my view. It is not a formal error but it goes to the substance of the charge and the same is therefore bad in law.

**66.** With regard to count 13 titled: “**Audit Report 2012/2013 Financial year,**” no offence is disclosed therein.

That leaves us with counts 6 with regard to irregular payment of Ksh.29,934,975/= to one **Francis Simiyu Werunga** for security services rendered to Judges and senior Judicial Officers and staff and count 8 irregular medical expenditure of Ksh. 39,284.80 in November 2012, in respect of one **Benedict Abonyo Mollo** while still in the employment of one Biblical Organization, his former employer.

The Court notes that the provisions of the law alleged to have been infringed in these two counts, as is in many other counts is not disclosed.

**67.** Under *charge 13* titled: “**Allegations of mismanagement in Human Resource,**” the following counts are bad for duplicity and failure to disclose the provisions of the law or regulations contravened by the Petitioner; **14, 15, 17, 18, 19, 20, 21, 22.**

This leaves us with count 16 in which the specific provisions of the law alleged to have been

contravened are disclosed but the count is bad for duplicity in that it relates to alleged engagement of services of students interns, casuals and temporary staff not named. Each of these actions constitutes a different alleged offence and this would in the word of the learned Judges in **Dande case, (supra)**, make it difficult for the Petitioner to **“know exactly with what she is charged, and if she is convicted, she does not exactly know of what she has been convicted.”** (I have substituted he for she in the quotation).

**68. With respect to charge C “irregularities and improprieties in procurement.” Count 23 “Authorising irregular procurement processes:”**

arises from authorizing **”the irregular procurement of services and works for partitioning and furnishing the Elgon Place premises in breach of the law and without authorization of the Commission in that:”**

This count arises from procurement of the same premises the subject of count 3 which we have already found is bad for serious duplicity as it has got items a to h most of which constitute separate offences. Indeed under item 3(h) the Petitioner is accused of irregularly paying in advance Ksh. 177,955,376.95 in four instalments on **“account of the premises for partitioning works.”**

This is the same offence charged under count 23 above among other offences contained in the same count.

**69.** *Count 23* therefore is not only bad for duplicity but is an example of serious splitting of charges by the Respondent against the Petitioner making it almost impossible for the Petitioner to defend herself. Splitting of charges is a serious infraction in criminal justice system and I dare say in Quasi-criminal proceedings the subject of this suit. It is akin to a person facing accusations from all sides, not knowing which one to listen to and which to respond to as it were. The result is suffocation and failure of justice.

**70.** To illustrate the duplicity and splitting of charges under *count 23*, the Petitioner is said to have procured irregularly;

a. without authorization of the Commission;

i. by single sourcing

ii. by paying without certificate of works

iii. by furnishing the premises without authorization by authorizing consultancy services from one **Evans Simiyu Weruga** an entity not known in law for security services. (Note this is the subject of count 6)

(c) by single sourcing a generator and accessories.

(d) by direct procurement of goods and repair works for CJ’s parking area and refurbishment of a kitchen for the Supreme Court.

(e) by direct procurement of Case Management System from one DewCis.

(f) by not availing for scrutiny of the result of the works.

(g) by allowing Joworld Agencies Ltd to provide 20 IBM Servers, 20 medium enterprise servers and 40 data cabinets without authorizing any procurement for a presidential swearing in dais.

i. by failure to provide JSC with critical information to make an informed decision on the

purchase of the premises to house the CJ.

(J) by, without the authorization of the Commission put in place mechanisms of purchasing a building in Mombasa, a process that was to cost the Judiciary hundreds of millions of shillings.

(Note these are not quoted verbatim but have been summarised).

It is difficult to discern whether these are separate charges or constitute counts under charge number 23 under item D.

**71. The last category of charges under Item E is misbehavior.**

It is alleged that “on 19<sup>th</sup> August, 2013, you addressed the media and publicly referred to the Commission’s resolution among others as “**irresponsible” thereby exhibiting open contempt for the Commission.**”

It is noteworthy that this press address was in response to the Commission’s decision to suspend the Petitioner and in the process JSC had issued a public statement on the decision it had taken, hence the rejoinder from the Petitioner. I will say no more on this charge at this stage except to say that the text of the alleged address to the media referred to as annex 28 in the charge was not placed before the Court to allow an objective evaluation of the same. Similarly, all the other annexes referred to in the various charges and counts were not placed before the Court for evaluation of content

**72. Decision of JSC on the specific charges and counts.**

The Decision of JSC on the 87 allegations touching on financial mismanagement, mismanagement in Human Resources, irregularities and illegalities in procurement, insubordination and countermanding decisions of the Commission; and misbehavior was communicated via a statement by the chairperson on *page 2 to 3 of Vol. I* of the Petitioner’s supporting affidavit. The statement is undated. In *Paragraph 10* of the replying affidavit, Respondent confirms that this was the decision by JSC giving reasons for dismissal in terms of *Section 24 of the JSC Act* and to remove her from office. The letter of removal is cited in full elsewhere in this Judgment.

For the avoidance of doubt the letter does not contain specific findings on the 87 allegations made against her. The Respondent told the Court the full decision was uploaded to the Judiciary website where everyone including the Petitioner had access.

In the statement communicating the decision to the public however, it is alleged inter-alia, that;

**73. (a) “In her responses, filed on 1<sup>st</sup> October 2013 and subsequently amended on October 15<sup>th</sup> Mrs Shollei admitted 33 allegations and denied 38 others. Responses to the balance were equivocal evasive and contradictory.”**

74. The Petitioner has denied admitting or pleading guilty to any of the allegations as alleged by the Respondent.

She has stated that though she was denied adequate time to prepare her defence she made sufficient rebuttal of the allegations made against her.

75. After a careful reading of both the interim and final Response by the Petitioner to the charges, and the matrix presented by the Respondent the court has been unable to find any unequivocal admission or plea of guilty to any of the 87 allegations made against her.

Where she has confirmed that a certain action or omission occurred, it has been followed with an

explanation justifying the action or omission. This to my mind cannot be admission or plea of guilty to these occurrences.

76. Again, though the disciplinary hearing is not a criminal prosecution in the strict sense of the word the requirements of a plea of guilty is equally applicable in a Quasi-criminal disciplinary hearing such as this one.

In this regard in the **Case of Lusiti Vs. The Republic, the High Court, Appellate side, Nairobi (1977) Kenya Law Reports 143, Kneller and Sachdera JJ found;**

**“on a Plea of guilty being received by the Court notwithstanding the proviso to Section 207(2) of the Criminal Procedure Code, should ensure that the defendant wished to admit without any qualification each and every essential ingredient of the charge especially if he is not asked to admit or deny the facts outlined by the prosecution.”**

77. In the present case, JSC did not, during the hearing read over to the Petitioner the 87 allegations and explain all the ingredients of the alleged offences to her.

78. In **Adan Vs. The Republic (1973) EA 445, the Court of Appeal of East Africa** considered the manner in which plea of guilty should be recorded and the steps which should be followed. It laid down the following guidelines:

**“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in the language which he understands (ii) the accused’s own words should be recorded and, if they are an admission, a plea of guilty should be recorded; (iii) the prosecution should then immediately state the facts and the accused should be given opportunity to dispute or explain the facts, or to add any relevant facts; (iv) if the accused does not agree with the facts or raises any question of his guilty his reply must be recorded and change of plea entered; and (v) if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”**

79. In the present case, it is obvious on the face of the responses by the Petitioner, she did not intend to admit any of the allegations or offences set out against her. It was therefore incumbent on the Respondent to embark on a proper hearing to have the offences proved on a balance of probabilities, which it did not do. The matrix attached to the Replying Affidavit of the Respondent containing three columns of; Allegations by JSC; Response by CRJ and observation by JSC clearly shows that the Petitioner in her written response did not in respect of any of the offences make unequivocal admission at all and therefore the findings by JSC that 33 offences were admitted is preposterous and therefore untenable.

80. To finalise the court’s analysis of the pronouncement by JSC on the 87 allegations made against the Petitioner, no verdict was made in the undated communication on each and every allegation but instead, JSC said:

**“the Chief Registrar of the judiciary is hereby removed from office with immediate effect for:**

1. **Incompetence**
2. **misbehavior**
3. **violation of the prescribed code of conduct for Judicial Officers**
4. **violation of Chapter 6, and article 232 of the Constitution of Kenya 2010**
5. **insubordination”**

**81.** This was done without any record of decision or verdict on the specific charges preferred against her. No such verdicts are evident from the matrix referred to earlier titled:

**“JSC allegations; CRJ responses and JSC findings and observations – A working summary.”**

Furthermore, the said document is undated and there is no telling whether the matrix was compiled prior to the date of the receipt of the final report by the petitioner or prior to the date of the disciplinary hearing. This observation is apposite because, the deponent to the replying affidavit did not make any comment at all on the matrix in the replying affidavit.

**82.** From the observations made by the JSC, it would appear the matrix was made in preparation of the hearing as a working document because on page 29 for example it reads;

**“The Commission notes the need to seek for clarification from the CRJ on why there were two different documents over the same premises and whether by looking at the documents one should tell which of the documents is outdated and which is not.”**

This document cannot comprise final decision by JSC on the face of it.

### **83. Allegations of Bias by members of the Tribunal**

The Court need not restate the competing allegations on this issue which we have herein before set out in this judgment.

The Court now will make a decision whether on the facts presented, JSC ought to have reconstituted another disciplinary tribunal in terms of *Section 32* and *Regulation 25* of the schedule to the JSC Act, 2011 on grounds of the alleged bias and by necessary implication whether by proceeding to hear this matter the result is a nullity for violating *Articles 2(4), 27(1), 47(1)&(2), 50(1)&(2), 72(1) and 236(b)* of the Constitution; the *JSC Act* and the regulations thereunder and the rules of natural justice *Nemo iudex in causa sua*, and *audi alteram partem* by sitting in their own cause and denying the Petitioner a fair hearing.

**84.** In my ruling on the interlocutory Application that sought reinstatement of the Petitioner pending the hearing and determination of the Petition, I found as follows:

**“There is an arguable case though not tested at this stage, that some of the Commissioners of JSC had a personal interest in the removal of the Chief Registrar and that a strategy had been developed through connivance with persons in and out of JSC to implement the strategy. The Court at this stage is satisfied that a prima facie case in this respect has been made out by the Applicant.”**

**85.** Now the Court has had the benefit of examining all the evidence placed before it with regard to this matter.

In particular, the Respondent has with the Leave of Court filed a supplementary affidavit to augment what it had hitherto placed before Court.

As a matter of fact, as I observed in my ruling, the Respondent in its initial replying affidavit had chosen to remain silent on the very serious allegations made by the Petitioner against the chairman of JSC, Commissioners Ahmednasir Hussein Abdullahi, Professor Christine Mango; Hon. Justice Mohammed Warsame; and Hon. Emily Ominde.

**86.** The particulars of matters that made the Petitioner to believe that the said Commissioners were biased against her are well articulated in the Final Report of the Petitioner to the JSC; and in the initial oral submissions made by counsel Donald Kipkorir to the JSC on 16<sup>th</sup> October 2014; in the final submissions made to the JSC on 18<sup>th</sup> October 2014; the supporting affidavit of the Petitioner

and the various annexures on the issue; and in the lengthy submissions before Court by counsel Donald Kipkorir and Dr. Ekuru, Aukot at the interlocutory stage and during the final hearing of this matter.

**87.** The Respondent has in paragraphs 4 and 5 (a) – (g) denied the allegations of personal interest made by the Petitioner against the four Commissioners.

The deponent of the affidavit Winfrida Mokaya, has in paragraph 5(a) and (b) denied that Commissioner Ahmednasir Abdullahi had personal interest in the purchase of a building for the Judiciary in Mombasa and Eastleigh in Nairobi and in the procurement of ICT infrastructure or the case management system of the Judiciary as alleged by the petitioner. That he had engaged the Petitioner on such matters only in his capacity as the chair of the Respondent’s Finance and Administration Committee whose mandate is to ensure prudence in the utilization of Judiciary funds.

**88.** Under paragraph 5(c), she states that Hon. Mr. Justice Mohammed Warsame had not been involved in the appointment or employment of any member of staff as alleged. That it was not true that the Hon. Judge of Appeal was biased against the Petitioner for failure to employ his relatives and the allegation is outrageous.

**89.** With respect to Commissioner Hon. Emily Ominde she deposes that the Commissioner had no personal interest in the recruitment of pupils or interns in the Judiciary and had not questioned the placement of such staff by the Petitioner at Kibera Law Courts, where she served as the Chief Magistrate.

That CRJ’s office was not involved in the interviews or placement of pupils in the Judiciary and therefore there is no merit in the allegation.

**90.** Under sub-paragraph (e) and (h), the Registrar denies in toto the serious allegation that the disciplinary process against the Petitioner was connived and pre-determined by the so called “**war council.**” That the Respondent considers the allegations to be an insult to the distinguished members of the JSC. That to suggest that such distinguished members of the legal profession would be party to such a plot is outrageous.

The Respondent denies the existence of the so-called “war council” or the allegation of pre-determined outcome and reiterates that the Petitioner was removed from office on the basis of the charges proved against her as contained in the report.

That the disciplinary process was in accordance with the law and there was no influence from any other third parties, real or imagined

**91.** That none of the Commissioners of the Respondent are mentioned in the trove of emails of dubious origin attached to the Petitioner’s supporting affidavit. That the Petitioner has not disclosed the source of the emails and how they were obtained, and the Court is duty bound to reject such evidence.

**92.** This is a case where the Chairman and the named Commissioners are accused of having a direct interest in the removal of the Petitioner and the Petitioner is apprehensive of the likelihood of bias.

**93.** It is now established that in assessing whether or not there was apparent bias, regard is to be had to a reasonable person. See the decision of **Hon. Justice Majaja in Ajay Shah Vs. The Attorney General and others. H.C. Commercial and Admiralty Division Civil Suit No. 1243 of 2001.** In **Republic Vs. David Makali and others, CA Criminal application No. NAI 4 and 5 of 2005, cited therein, Tunoi JA.** stated that:

*“the test is objective and the facts constituting bias must be specifically alleged and established.*

*It is my view that where such allegation is made, the Court must carefully scrutinize the affidavit on either side .....*”

94. Likewise in **Attorney General of Kenya Vs. Professor Anyang’ Nyong’o and 10 others EACJ Application No. 5 of 2007** the East Africa Court of Justice stated that:

**“We think that the objective test of “reasonable apprehension of bias” is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable, apprehension in the mind of a fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances.”**

95. The test of a ‘reasonable person’ was adopted by the Supreme Court of Kenya in the case of **Jasbir Singh Rai and 30 others Vs. Tarlocha Singh Rai and 4 others; S C Petition No. 4 of 2012 [2013] e KLR**. The Court cited with Approval **the American case of Pery Vs. Schwarzenegger 671 F. 3d 1052 (9<sup>th</sup> Circ. February 7, 2012)** where it was held that the test for establishing a Judge’s impartiality is the perception of a reasonable person this being a **“well-informed, thoughtful observer who understands all the facts” and who has “examined the record and the law”**, and thus, **“Unsubstantiated suspicion of personal bias or prejudice”** will not suffice.

**Justice Majaja in Ajay shah (supra) relied on the case of R vs Bow Street Metropolitan Stipendiary Magistrate, exparte Pinochet (No. 2) as follows;**

**“it is not a question of whether or not the learned Judge was actually biased, she might as well have been as impartial and as fair as one can get but if the circumstances are such that a reasonable person with the full knowledge of the facts would discern an appearance of bias, then the evidence of actual bias is a superfluous ingredient.”**

96. The Court also noted that the obligation to be impartial also brings with it the duty to disclose any facts that may call into question a Judge’s impartiality.

On the facts of this case, it is clear that the allegations made especially against the CJ and Commissioner Ahmednasir Abdullahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances.

**“Public perception of the possibility of even subconscious bias is a relevant determinant. The Judge could actually be as fair as can be but that is only relevant in case of actual bias ..... what matters is whether a fair minded reasonable person knowing of the facts could conclude that there was likelihood of bias”** concluded Justice Majanja in the Trust Bank case (Supra).

On the facts of this case, the apprehension of likelihood of bias by the petitioner appears to be well founded from a reasonable by stander’s point of view.

97. This finding does not necessarily mean that the allegations made against each of the Commissioners and the Chairman have been found to be truthful since in Civil proceedings, the test is on a balance of probabilities. However, the Commissioners mindful of the law regarding perceived bias ought to have stepped aside and reconstituted another disciplinary tribunal of probably lesser members of the JSC or otherwise within the confines of *Section 32 to the JSC Act, 2011 and regulation 25 in the Third Schedule*.

98. It must be remembered that *Article 35(1)* provides:

**“Every citizen has the right of access to;**

- b. information held by another person and required for the exercise or protection of any right or fundamental freedoms.”**

This right was affirmed in the case of *Nairobi Law Monthly Co. Ltd. Vs. Kenya Electricity Generating Co. Ltd. and 2 others (2013 e KLR)*.

99. The time lines given to the Petitioner to collect information from many officers under her so as to properly defend herself against a raft of 87 allegations was wanting and indeed she submitted her responses under protest due to the time constraint.

Her attempt to get those officers to appear personally to table the necessary evidence on her behalf before the JSC was refused.

100. The requirement to observe the requirements of natural justice were formulated inter-alia in **Desouza Vs. Tanga Town Council, (1961) EA 377** to include;

- a. if circumstances so require, adjournment of the proceedings to enable him or her to prepare adequately for the proceedings;
- b. to be given clear charges;
- c. to be supplied with witness statements to be used at the hearing;
- d. to cross examine the makers of the statements;
- e. to be supplied with all the relevant documents needed in his or her defence;
- f. to call witnesses in support of his or her case; and
- g. to make submissions

See also **Geothermal Development Co. Ltd. Vs. Attorney General and Another, H.C.C. Petition No. 352 of 2012.**

101. In the Case of **Oliver Vs. University of Stellenbosch, contemporary Labour Law Vol. 14 No. 9, April 2005**, a forensic Investigation report implicated Oliver in certain irregularities at the University. He was given notice of a disciplinary hearing and the right to be represented by an external representative.

Six days before the hearing was due to begin, the employee requested documents he needed for the hearing and gave notice that he would be requesting further clarity on the charges. He also requested that the hearing be postponed.

The application for the required documentation and for the postponement were not granted as the University believed that the employee had been given all the documents he needed. The employee was also not given further clarity on the charges. On an application to the High Court, it was held:

- i. the employee had not been given sufficient time to prepare and the University’s decision not to postpone was wrong;
- ii. it was presumptuous of the employer to decide what documents the employee would need;

iii. The charges against the employee were vague.

**102.** In an article by **Ivan Israelstan** titled **“Do employees have the right to prepare for a disciplinary hearing?”** dated **2<sup>nd</sup> April 2012 – Skills Portal. Co. za**; the author observed, which observation the Court fully embraces,

*“The employee’s right to prepare for a disciplinary hearing is sacrosanct; formulating charges that are general or vague will not assist the employer’s cause, but will instead, be seen to be unfair. Formulating charges clearly, legally and in a manner useful both to the employee and to the employer is difficult. This should not be done without the assistance of a Labour Law expert.”*

**103.** This problem is envisaged under regulation 25(b) of the JSC Act, 2011 which provides:

**“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.”**

Drafting of complex charges is a highly skilled and regulated affair and should not be taken for granted. I have no doubt if JSC had availed itself of the services of an officer from the office of the Director of Public Prosecutions, the process would have been different.

These standards were clearly not met with respect to the time given to the Petitioner to prepare a defence against 87 serious charges involving alleged loss of 1.2 billion Kenya Shillings; with respect to the framing of the charges which are vague and embarrassing and fraught with the ills of duplicity within the counts and splitting of charges. The standard was also not met with respect to availing requested documentation and in a timely manner and the requests for more time and to have own witnesses attend the hearing were denied. No wonder, the final submissions by counsel were made under protest as the document clearly shows.

**104.** The Court particularly observes that under *Section 32 of the JSC Act 2011*, JSC is mandated to constitute a committee or panel which shall be gender representative for the appointment, discipline and removal of Judicial Officers and staff. Sub-section 3 thereof provides that the conduct of such a committee or panel under this section shall be as set out in the Third Schedule. (emphasis mine).

**105.** *Part IV* of the Third Schedule provides for Discipline and under *Regulation 15(1)* the disciplinary powers vested in the JSC are delegated to the Chief Justice which include, power to interdict, suspend or administer a severe reprimand or a reprimand provided the CJ in exercise of such powers shall act in accordance with the provisions of this schedule.

**106.** Regulation 25 titled **“proceedings for dismissal”** was applicable to the case of the Petitioner upon the institution of an inquiry that led to framing of charges against the Petitioner. The charges were served on the Petitioner and she was informed to exculpate herself in writing within 21 days.

The CJ then placed the charges and the interim response before the JSC who upon consideration decided to continue with a disciplinary hearing.

**107.** So far all was well, but serious failings occurred with respect to observation of regulation 25(3) which states:

**“If it is decided that the disciplinary proceedings should continue, this 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 panel.”** (emphasis mine).

**108.** The JSC had major failings with regard to its mandatory obligations under this clause in that;

- i. It was mandatory for the JSC to appoint a disciplinary committee of at least 3 persons from its ranks;
- ii. It only required at least 3 members to hear the disciplinary case and therefore it was unreasonable to insist on the sitting of members against whom objections had been made. The enthusiasm for the entire commission to hear the matter is confounding.
- iii. The Chief Justice, is prohibited in mandatory terms to sit in a disciplinary panel. The Court fails to understand why the CJ insisted on chairing the panel even after allegations of bias had been made against him and was specifically requested to consider recusing himself.

**109.** Regulation 25(5) provides for examination of witnesses and it was therefore a violation of this regulation to refuse the Directors and members of the procurement committee whom the Petitioner intended to call to appear before them to be examined by the counsel for the Petitioner and the panel.

The sub-rule also expressly prohibits the panel from using any documentary evidence against the Petitioner unless the same has previously been supplied with a copy thereof or given access thereto. JSC also violated this regulation in many respects demonstrated in the correspondence between the Petitioner and the JSC.

If there was any doubt that it is not contemplated under the *JSC Act*, and the Regulations thereunder that the entire JSC may constitute itself into a disciplinary committee or panel, *Regulations 25(9); 25(10) and 25(11)* makes it very clear as follows;

**110. “25(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 judgment, the charge or charges against the officer have been proved and the reasons therefore;**
- b. **details of any matters which, in the committee or panel’s opinion, aggravate or alleviate the gravity of the case; and 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 shall not make any recommendation regarding the form of punishment to be inflicted on the officer.”**

**111. 25(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.**

**112. 28(1) 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.”**

### **113. Fatal Deviation**

The Deviation from the mandatory procedure set under *Regulation 25*, by JSC is so gross in

material terms that it is an understatement to say that the disciplinary hearing was a complete none starter.

**114.** *Section 32 and Regulation 25* under which the disciplinary committee or panel is established is couched in such mandatory terms that there is no room for deviation.

**115.** It is very clear from the provisions that the Commission is separate and distinct from the disciplinary committee or panel. It is very clear that the Disciplinary Committee or panel is supposed to hear the disciplinary case completely independent of the Commission and only after it has made its findings in writing does it report to the Commission.

**116.** That the disciplinary Committee or panel has no authority to recommend or mete out any punishment to the accused.

**117.** That the committee or panel is to make a judgment stating what charges have been proved and the reasons for that.

**118.** The panel is also to indicate any aggravating or mitigating circumstances in the case.

**119.** The role of the Commission only kicks in after receipt of this report which is to:

(a) Consider the report of the Committee or panel and make a decision on;

- i. whether to refer the matter back to the Committee or panel which shall conduct further investigation and make a further report or;
- ii. the punishment, if any, to be meted out on the accused officer or;
- iii. whether the officer should be retired in the public interest.

**120.** Following this further exegesis, it is clear that the proceedings and the decision by the Commission was not only a nullity due to failure to observe the rules of natural justice but it was also conducted in total disregard of its own Regulations and the *JSC Act* and therefore *ultravires* and null and void.

The Court refers to the decision of the **Retired Judge Jeanne Gacheche in Nairobi High Court Miscellaneous Application No. 920 of 2005 Joyce Manyasi Vs. Evan Gicheru, Charles K. Njai, The Judicial Service Commission and the Honourable Attorney General;**

**to affirm the proposition that JSC is bound by the provisions of the *JSC Act*, and the regulations thereunder in the conduct of disciplinary proceedings.**

**121.** I affirmed this proposition in the **Industrial Court of Kenya at Nairobi Petition No. 17 of 2013 Gilbert Mwangi Njuguna Vs. The Attorney General** and in so doing made reference to the words of the **Court of Appeal in Republic Vs. Commissioner of Co-operatives (1998) 1 EACA, 245 at 249** as follows:

*“It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.”*

Accordingly, JSC not only acted *ultravires* the *JSC Act* 2011 and the Regulations thereunder, but also violated the Constitutional Rights of the Petitioner under Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b) of the Constitution of Kenya 2010. The end result was a total failure of justice. The decision by JSC was a nullity *abinito* as it was made in excess of jurisdiction and in gross violation of the rules of natural justice. The decision is accordingly quashed by this Court.

## **122. Remedy available to the Petitioner**

In the case of **Kenya National Examination Council Vs. Republic, exparte Geoffrey Gathenji Njoroge and others, Court of Appeal, Civil Appeal No. 266 of 1995**, the Court had this to say of the efficacy and scope of mandamus, prohibition and certiorari:

**“To conclude this aspect of this matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

123. During the final hearing of this matter, counsel for the petitioner did not push for reinstatement of the Petitioner and instead argued for payment of damages to be quantified and submitted to Court for consideration and approval.

Clause 23(3)(a) permits the Court to make declaration of rights and an order for compensation under *Clause 23(3)(e)*.

The Court has also made a specific finding that the said removal was in violation of the Petitioner’s rights protected under *Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b) of the Constitution*, and the Petitioner is entitled to redress in terms of *Article 23(3) of the Constitution*; and the provisions of *Section 12 of the Industrial Court Act, 2011 and Section 49 of the employment Act, 2007*.

124. The privy council in the case of **the Attorney General of Trinidad & Tobago Vs. Ramawop** stated as follows;

**“The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate that right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.**

**But in this case, the contravention was as the judge said, calculated to affect the appellant’s interests and it did so.**

**On the Judge’s findings, it was a deliberate act in violation of the constitution to achieve what the time consuming procedures of the Commission could not achieve. He rejected the submission that it was an innocuous administrative act. The desire was to get rid of the appellant quickly.”**

125. This decision profoundly, speaks to the facts of this case. It is difficult to understand the short cut taken by very eminent members of the legal profession in a situation where the mandatory procedure that should have been followed speaks so loudly from the express **provisions of Section 32 and Regulation 25 of the Judicial Service Act 2011 (revised Edition 2012)**.

126. I say no more but refer to our charter, *Article 27* as follows:

**“(1) every person is equal before the law and has the right to equal protection and equal benefit of the law.”**

The Respondent gravely failed Gladys Boss Shollei in her hour of need in this respect yet Article 2(1) of the same Constitution provides;

**“this Constitution is the supreme law of the Republic and binds all persons and all State**

**organs at both levels of government.”**

**127. In the final analysis the Court makes the following orders:**

- a. that, an order of certiorari is issued to quash the letter of removal dated 18<sup>th</sup> October, 2013.
- b. that, an order of certiorari is issued to quash the proceedings of 18<sup>th</sup> October, 2013.
- c. that, the Respondent violated the Petitioner’s rights under *Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b)*.
- d. that, the Petitioner is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry to quantum be gone into.
- e. that, the Petitioner is to be paid the costs of this suit.

***Dated and delivered at Nairobi this 7<sup>th</sup> day of March, 2014***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**