



**Kamande v Judicial Service Commission (Petition E005 of 2025)  
[2025] KESC 48 (KLR) (Civ) (15 August 2025) (Judgment)**

Neutral citation: [2025] KESC 48 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**PETITION E005 OF 2025**

**MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**AUGUST 15, 2025**

**BETWEEN**

**ERIC KAMANDE ..... APPLICANT**

**AND**

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

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (Gatembu, Tuiyott & Gachoka, JJ.A.) delivered on 20th December 2024 in Civil Appeal No. E403 of 2019)*

**JUDGMENT**

Representation:

Mr. Jason Okemwa for the appellant (Okemwa & Co. Advocates)

Mr. Delbert Ochola for the respondent (G & A Advocates LLP)

**A. Introduction**

1. This appeal challenges the decision of the Judicial Service Commission, the respondent (the JSC), to terminate the services of the appellant, who until the termination, served in the judicial service as Principal Administration Officer, on the grounds of gross misconduct. The main question in this appeal is whether the process leading to the appellant's dismissal was lawful, in order to determine whether his constitutional right to fair administrative action guaranteed by Article 47 of the Constitution, the Fair Administrative Action Act, the Judicial Service Act, and the Employment Act was violated.



## **B. Background**

2. The appellant was employed by the JSC as a Principal Administration Officer and deployed in the Human Resource Directorate on permanent and pensionable terms. As part of his duties, the appellant was involved in the supervision of various outsourced security service providers in the Judiciary. On 24<sup>th</sup> November 2016, in that capacity and by dint of Sections 46 and 80 of the Public Procurement and Asset Disposal Act (PPAD Act), the appellant was appointed to the Tender Evaluation Committee to consider Tender No. Jud/028/2016-17 on the provision of security in the Judiciary. The Tender Evaluation Committee completed its task and awarded the tender to Lavington Security Services Limited. It communicated this outcome to the other bidders.
3. One bidder, Eric Okeyo, t/a Bedrock Security Services Limited, was, however, dissatisfied with the outcome and filed Application No. 111 of 2016 for review before the Public Procurement Administrative Review Board (the Board), alleging bribery by the appellant. By a ruling delivered on 20<sup>th</sup> December 2016, the Board recommended that the tender be re-advertised. It also found that the conduct of the appellant and another officer in the procurement process had raised questionable integrity issues. For the latter reason, the Board directed the procuring entity (the Judiciary) to conduct investigations into the allegations against the two members of the tender committee, including the appellant.
4. Thereafter, on 3<sup>rd</sup> February 2017, the Chief Registrar of the Judiciary wrote to the appellant conveying the recommendation of the Board for appropriate administrative action against him and one Fredrick Oboge. In his detailed response, the appellant denied all the allegations of impropriety. On 12<sup>th</sup> April 2017, a charge and interdiction issued by the Chief Justice was served on the appellant. The charge contained two counts of gross misconduct. In count I, it was alleged that the appellant had met one of the bidders at a restaurant in Nairobi contrary to Article 227 of the Constitution and Section 65 of the PPAD Act; and in count II, that he had failed to declare to the Tender Evaluation Committee the fact of this meeting. Again, in his response of 2<sup>nd</sup> May 2017, he denied the allegations. Disciplinary proceedings were conducted, the appellant was found culpable, and his employment terminated on 27<sup>th</sup> March 2019.

## **C. Litigation History**

### **i. At the Employment and Labour Relations Court (ELRC)**

5. Aggrieved, the appellant filed ELRC Petition No. 50 of 2020, wherein he urged procedural unfairness, as well as unfair and unlawful termination. It was the appellant's case that paragraphs 25(1-11) of the Third Schedule to the Judicial Service Act (JS Act) spell out a mandatory disciplinary procedure, and omission of any step invalidates the disciplinary proceedings. To the appellant, the JSC entirely disregarded paragraph 25 of the Third Schedule to the JS Act, as the Chief Registrar did not conduct an independent internal investigations into the appellant's alleged gross misconduct; that at no time was the appellant questioned by the Chief Justice or the Judiciary Ombudsman before the disciplinary proceedings were commenced; and that no report prepared pursuant to any investigations or in support of the charges leveled against him was served on him.
6. In addition, the appellant contended that, the charge and interdiction were issued prematurely as the principal complainant (Eric Okeyo, hereinafter referred to as Okeyo) did not file an affidavit or witness statement; that without any of these, the charge was unsupported; that without presenting Okeyo, the appellant was denied the opportunity to cross-examine him on his accusations; that the JSC presented two witnesses at the hearing, without recording and furnishing their statements to the appellant prior



- to the hearing; that there was no evidence that the appellant solicited for a meeting with any bidder; that conflict of interest was not proved; and that the disciplinary panel introduced a fresh charge outside the charges communicated by the Chief Justice, namely that the appellant was biased.
7. For the reasons foregoing, the appellant urged the trial court to find that the JSC had violated Articles 2(4), 10(2), (a) and (c), 22, 23(f), 27(1), 47, 172(1) (c), 236(b), 237(7) and 258 of the Constitution; Sections 25(5); paragraphs 25 (1-11) of the Third Schedule to the JS Act; and Sections 4(1) (c) (f) and (g) of the Fair Administration Act (FAA Act).
  8. The appellant further prayed for a declaration that the charge, disciplinary proceedings, and subsequent decision to terminate his employment were unfair, unlawful, unconstitutional; and that the process violated the provisions of paragraph 25 (1-11) of the Third Schedule to the JS Act, Sections 106, 107, 108 and 109 of the Evidence Act, Section 4 (1) (c) and 4 (4)(c) and (3)(g) of the FAA Act, Articles 2 (4) 10(2)(a)(c), 27(1), 41, 47, 172 (1) (c), 236 (b) and 259 (11) of the Constitution, hence null and void ab initio. In addition, the appellant sought compensation for the alleged violation of his fundamental rights and freedoms, and an order directing his reinstatement or redeployment within the judicial service, without loss of salary, allowances, or accrued benefits.
  9. In response, the JSC maintained that the termination of appellant's employment was lawful, fair, and procedurally sound; that the appellant's petition failed to meet the established threshold of a constitutional petition. To support this, the JSC outlined the disciplinary process it undertook, which it asserted was conducted in accordance with the Regulations set out in Part IV of the Third Schedule to the JS Act.
  10. The JSC explained, it commenced disciplinary proceedings against the appellant and his colleague following a recommendation by the Board; that by a letter dated 3<sup>rd</sup> February 2017, the Chief Registrar requested the appellant to explain his involvement in the disputed tender evaluation process; that the appellant responded, after which the matter was placed before the Chief Justice, who interdicted him pursuant to paragraph 16 of the Third Schedule. The appellant was subsequently served with a charge of gross misconduct under paragraph 25(1), the particulars being that, while serving on the Tender Evaluation Committee for Tender No. JUD/028/2016-2017(a), he met privately with one of the bidders outside office premises and working hours, and that he failed to disclose this fact, thereby placing himself in a position of conflict of interest.
  11. According to JSC, it was only after the appellant failed to sufficiently exonerate himself that the Chief Justice referred the matter, along with the charge and response, to JSC for further action. The Human Resource Management Committee of JSC undertook investigations in line with paragraph 25(2), by inviting the appellant to a disciplinary hearing. At the hearing, two witnesses testified and were cross-examined by the appellant, who was also allowed to make representations. The committee subsequently submitted its report to JSC, with a finding that the appellant was culpable on the two counts. The JSC, for its part, deliberated on the report, upheld the findings by the committee, and issued a dismissal letter on 27<sup>th</sup> May 2019. The JSC informed the appellant of his right of review. In conclusion, JSC stated that, in view of the foregoing, the disciplinary process complied with all applicable constitutional and statutory provisions.
  12. By a judgment dated 18<sup>th</sup> June 2021, the trial court (Rika, J.) framed four key issues for determination: the applicable law, procedural fairness, substantive fairness, and the appropriate remedies. On the applicable law, the court held that the Employment Act applied generally to all disputes arising from contracts of service, save for exceptions under Section 3(2). It further found that the FAA Act was applicable to the JSC, noting that the Act covers both state and non-state actors exercising administrative or quasi-judicial functions under the Constitution or any written law.



13. Regarding procedural fairness, the trial court interpreted paragraph 25(3) of the Third Schedule to the JS Act as requiring that a committee or panel tasked with investigating allegations of misconduct and the one conducting the disciplinary hearing must be distinct. The Judge emphasized that while the Employment Act may not expressly mandate investigations, where an applicable written law provides for it, as in the instant case, such investigations must precede the disciplinary hearing. The court found the JSC's process deficient, particularly for failing to secure the attendance, testimony, or sworn written statement of the principal complainant and other key witnesses. This omission, according to the learned Judge, rendered the proceedings unfair.
14. On the question of substantive fairness, the court was of the opinion that, since the charges against the appellant were unsupported by evidence, the termination was, in effect, substantively unfair and in contravention of both statutory and constitutional provisions. Although the court acknowledged the violation of the appellant's rights, it declined to award compensation in addition to reinstatement, finding that the latter was an adequate remedy in the circumstances.
15. Ultimately, the court allowed the petition, set aside the decision to dismiss the appellant, and accordingly granted the following reliefs:
  - i. A declaration that the disciplinary proceedings and the decision to dismiss the appellant were unfair, unlawful, unconstitutional.
  - ii. A declaration that the proceedings and dismissal violated Sections 41, 43, and 45 of the Employment Act; Paragraph 25 of the Third Schedule to the Judicial Service Act; the Fair Administrative Action Act; and Article 47 of the Constitution.
  - iii. An order directing the JSC to reinstate the appellant to the position of Principal Administrative Officer, Human Resource Directorate, without loss of benefits, allowances, or salary.
  - iv. In the alternative, an order for the appellant's re-engagement in a position equivalent to that of Principal Administrative Officer, on the same terms and conditions; and

The court did not award costs.

## **ii. At the Court of Appeal**

16. Aggrieved by the decision of the ELRC, the JSC lodged Civil Appeal No. E403 of 2021 in the Court of Appeal, anchored on thirteen grounds, among them: that the learned Judge erred in both law and fact by holding: that the Employment Act, the JS Act, and the FAA Act were the primary legal frameworks applicable to the dispute: that the appellant was right to bring a constitutional petition instead of a normal claim, and for holding that investigations under paragraph 25 of the Third Schedule to the JS Act were a mandatory prerequisite to a disciplinary hearing. The JSC further averred that the trial court failed to properly assess the appellant's conduct, particularly his undisclosed meeting with a bidder during the procurement process. Moreover, the JSC argued, the trial court disregarded the legal effect of the Board's findings, improperly interfered with the internal processes of the JSC, and failed to appreciate that the disciplinary process complied with constitutional and statutory standards. The JSC further faulted the trial court for directing the appellant's reinstatement without any legal basis.
17. On his part, the appellant filed a cross-appeal, premised on a single ground: that the trial court erred in failing to award compensation in the form of damages for constitutional violations, as envisaged in Article 23 of the Constitution, even after making a finding that his constitutional rights had indeed been violated.



18. In a judgment delivered on 20<sup>th</sup> December 2024, the Court of Appeal (Gatembu, Tuiyott & Gachoka, JJ. A) delineated five issues for its determination; whether the appellant filed the proper pleadings before the trial court; the procedural and lawfulness of the disciplinary proceedings; whether constitutional principles of fair hearing were upheld; whether the reasons for termination were valid; and whether the cross appeal was meritorious.
19. On the competence of pleadings, the learned Judges determined that the principles enunciated in *Anarita Karimi Njeru Vs Republic* [1979] eKLR were met as the appellant cited the relevant constitutional provisions he alleged to have been breached and detailed the particulars of such breach.
20. On the procedural and lawfulness of the disciplinary proceedings, the appellate court held that paragraph 16 of the Third Schedule of the JS Act gave the Chief Justice wide discretion to decide whether an inquiry ought to be conducted before instituting a disciplinary hearing. The paragraph, in the court's view, does not impose a mandatory requirement that an inquiry be conducted first. Instead, the court explained that the only requirement was for the Chief Justice to ensure that the constitutional principles of fair hearing are observed.
21. Regarding the question whether constitutional principles of fair hearing were upheld, the Court of Appeal found that the disciplinary process complied with the dictates of the Constitution, the FAA Act, Employment Act, JS Act and the JSC's Human Resource Manual. The court was satisfied that, from the Board's recommendation, the detailed charge and interdiction letter served on the appellant, together with his response, there was no doubt that the disciplinary hearing was conducted fairly and in accordance with the Constitution and the law.
22. As to the reasons for termination, the court ruled that the appellant had exemplified gross misconduct by meeting a bidder during the tendering process. By doing so and failing to disclose this information to the Procurement Evaluation Committee presented a lawful and fair ground for the termination of his employment. Having so found, the court saw no merit in the cross appeal, which it dismissed.
23. In the result, the Court of Appeal allowed the JSC's appeal, set aside the judgment of the ELRC, and substituted it with an order that the appellant's amended petition before the ELRC was dismissed with costs. On the other hand, the appellant's cross-appeal was likewise dismissed with costs.

## **ii. At the Supreme Court**

24. Aggrieved, the appellant has now filed the instant appeal against the entire decision of the Court of Appeal on five issues as follows:
  - i. Whether the appellant was accorded fair trial and procedural fairness under Articles 47 and 50 of the Constitution, Section 4 of the Fair Administration Act, Judicial Service Act and the Employment Act, without evidence of the accuser, cross-examination or reports of the investigations.
  - ii. What is the scope of the Chief Justice's discretion under Paragraph 25(1) of the Third Schedule of the Judicial Service Act in conducting preliminary investigations, considering:
    - a. The Chief Justice's action is administrative and is constricted by Articles 47 and 50.
    - b. The Board's ruling that the procuring entity carries out investigations, which investigations were not conducted.



- c. The Board was moved by a complainant, who was himself found to have falsified bid documents in contravention of Sections 176 and 177 of the Public Procurement and Asset Disposal Act.
  - d. A ruling by the Board made under Public Procurement and Asset Disposal Act cannot satisfy the requirements of a report under the Judiciary Service Act.
  - e. The JSC's policy is to act only after the Chief Justice's investigations.
- iii. Did the Court of Appeal exceed its jurisdiction, contravening canons of interpretation, infringe on the appellant's fair trial rights, and usurp the Chief Justice's and JSC's mandate by introducing bias claims outside the charge and pleadings.
  - iv. Whether the appellant's failure to complain about non-service of documents was a waiver, afterthought, or acquiescence to rights violations, and whether the complainant's non-cooperation, combined with the respondent's failure to summon witnesses, justified limiting the appellant's rights; and
  - v. Did the court err by treating reinstatement and compensation of fundamental rights as substitutes, ignoring their distinct jurisdictions, causes of action and remedies and that compensation is not aimed at addressing economic harm.
25. The appellant seeks the following reliefs:
- i. The petition be allowed with costs;
  - ii. A declaration that;
    - a. The appellant was denied a fair hearing without summons, evidence, and cross-examination of the accuser, inadequate notice, and lack of investigatory reports contravening Articles 252(3), 47 and 50 of the Constitution, the Judicial Service Act, Fair Administration Act, and the Employment Act;
    - b. That the Court of Appeal in paragraphs 57 and 58 exceeded its jurisdiction and violated the appellant's right to fair trial under Articles 50 by introducing issues of alleged bias not raised in the Chief Justices charge, pleadings, submissions, trial court's record, or notice to parties, rendering paragraphs 57 and 58 irregular, null and void;
  - iii. The Court of Appeal judgment dated 20<sup>th</sup> December 2024 in Civil Appeal No. 503 of 2019 Judicial Service Commissions Vs Eric Kamande be set aside;
  - iv. The ELRC judgment dated 18<sup>th</sup> June 2021 in Petition No. 152 of 2018, Eric Kamande Vs Judicial Service Commission be reinstated, with variations to award damages to the appellant for violation of his fundamental rights;
  - v. The Judiciary is ordered to compute and pay the appellant's withheld salaries, with interest at court rates from 2<sup>nd</sup> May 2017, within 30 days of this judgment.
26. In response, JSC has filed a Replying Affidavit sworn by Hon. Winfridah Mokaya, the Chief Registrar of the Judiciary (the CRJ), on 10<sup>th</sup> March 2025, in opposition to the appeal and affirmation of the Court of Appeal decision. In it, it is averred that the Court lacks jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution on the grounds that the appeal does not raise matters involving constitutional interpretation or application; the procedure set out under paragraph



25 of the Third schedule to the JS Act was strictly upheld; and the appellant was granted full opportunity to be heard and to present his case.

## D. Parties' Submissions

### i. Appellant's Case

27. The appellant filed submissions dated 10<sup>th</sup> April 2025, alongside rejoinder submissions dated 9<sup>th</sup> April 2025. He argues that the Supreme Court has jurisdiction under Article 163(4)(a) of the Constitution because the appeal raises substantive issues concerning the interpretation and application of Articles 47 and 50 of the Constitution. He asserts that the Court of Appeal itself framed the central issue as whether constitutional principles of a fair hearing had been observed. Its decision on the question directly implicates constitutional interpretation, thus anchoring the matter squarely within the Court's constitutional mandate. He further contends that the appeal also involves the interpretation of paragraphs 16 and 25(1)-(11) of the Third Schedule to the JS Act, which this Court in *Law Society of Kenya Vs Attorney General & 4 Others* [2023] KESC 19 (KLR) has affirmed to be a normative derivative of the constitutional principles under Articles 171 and 172.
28. On the alleged contraventions of Articles 47 and 50, the appellant submits that his rights to fair administrative action and a fair hearing were violated in multiple ways. He accuses the JSC of failing to summon the principal complainant, who was also the key witness, despite having the constitutional and statutory power to do so under Article 252(3)(b) of the Constitution and Sections 46 and 47 of the JS Act. This failure, he argues, denied him the constitutional right to cross-examine his accuser. He also faults the JSC for failing to conduct or produce investigation reports upon which the charges against him were based, as required by paragraph 25(9)-(11) of the JS Act, Section 47(2) of the FAA Act, and Article 50(2)(e) of the Constitution. Additionally, he cites violations of his rights under Article 50(2)(g), (h), and (k), that the JSC failed to provide adequate notice to his legal counsel; that it gave only eight (8) instead of fourteen (14) days hearing notice which was insufficient under the Third Schedule; and that there was inordinate and unreasonable delay of 23 months in concluding the disciplinary process. Moreover, the appellant submits that Article 25(c) guarantees the right to a fair trial as non-derogable and beyond limitation under Article 24 of the Constitution. He asserts that administrative discretion or procedural flexibility cannot override the rights under Article 50 of the Constitution.
29. To support these submissions the appellant relies on this Court's finding in *Ethics and Anti-Corruption Commission & another Vs Ojienda, SC t/a Prof Tom Ojienda & Associates Advocates & 2 others* [2022] KESC 59 (KLR) to the effect that the JSC as a quasi-judicial body has the power to summon and sanction attendance of proceedings before it; *Loiptip Vs Independent Electoral and Boundaries Commission & 2 others* [2019] KESC 67 (KLR) to urge that Article 50 mandates cross-examination for fairness; and *Mutava Vs Tribunal Appointed to Investigate the Conduct of Joseph Mbalu Mutava (Petition 15 "B" of 2016* [2019] KESC 49 (KLR) to urge that the absence of the principal complainant leaves the charges against the officer uncorroborated. We pause at this point to note that these three authorities, which are decisions of this Court, have erroneously been cited. They do not support the propositions presented. We would like to stress that before citing any authority to support a given argument, it is of utmost importance for counsel and parties before this Court, and indeed in any other court, to establish their accuracy and relevance in order to avoid misleading the court.
30. On JSC's power to issue summons, the duty to conduct investigations and the discretionary powers of the Chief Justice, the appellant contends that JSC has the power under Article 252(3)(b) of the Constitution to summon a witness, and was in breach of that duty when it failed to summon the principal witness. He cites *Independent Electoral and Boundaries Commission Vs Chege* [2023]



KESC 74 (KLR) to affirm the powers of all Chapter Fifteen Commissions and independent offices under the Constitution to summon witnesses.

31. It is the appellant's further submission that paragraph 25(1) of the Third Schedule implies a mandatory step or duty to conduct investigations prior to initiating disciplinary proceedings. Contrary to this duty, the JSC merely relied on the Board's findings even though the Board had recommended that the procuring entity conduct further investigations. At any rate, the appellant urges, the Board's pleadings and ruling were not produced in evidence or cited by the JSC in the disciplinary process.
32. On the introduction of unpleaded issues of bias, the appellant has challenged the Court of Appeal's sua sponte introduction of judicial bias as an issue against a non-judicial officer, claiming that it was not pleaded or argued by any party or addressed by the trial court and therefore fell outside the appellate court's jurisdiction. Moreover, it was erroneous for the court to rely on the "real likelihood of bias" test rather than the more appropriate "fair-minded observer" test.
33. On whether the court erred in treating reinstatement and compensation of fundamental rights as substitutes, it is the appellant's submission that the ELRC has jurisdiction to uphold and enforce the provisions of the Constitution under Articles 22, 23, 162(2)(a), 165(3)(b),(d), and 258. He maintains that the two superior courts below erred by rejecting his claim for compensation for violations of his constitutional rights on the ground that he could not claim compensation and reinstatement in the same cause. Citing *Wamwere & 5 others Vs Attorney General* [2023] KESC 3 (KLR) and *Gichuru Vs Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), he submits that while compensation serves as redress for constitutional violations, reinstatement restores an unlawfully terminated party to their former position.

## **ii. Respondent's Case**

34. In its submissions dated 2<sup>nd</sup> April 2025, the JSC challenges the jurisdiction of the Court to entertain the appeal as the appeal does not demonstrate, as required by Article 163(4)(a) of the Constitution, how the Court of Appeal misinterpreted or misapplied the Constitution. The mere reference to Articles 25, 47, and 50 by the superior courts below, cannot constitute their interpretation or application. To the contrary, according to the JSC, the issues raised relate to the enforcement of rights, not the interpretation or application of constitutional provisions. To that extent, the appeal does not meet the threshold established in *Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & Another* [2012] KESC 9 (KLR).
35. On the alleged contraventions of Articles 47 and 50, the JSC maintains that the appellant received both procedural and substantive fairness during the disciplinary proceedings. It asserts that the appellant was given sufficient notice to respond to the charges he faced. He was served with charges on 12<sup>th</sup> April 2017, responded on 2<sup>nd</sup> May 2017, and the hearing was held in 6<sup>th</sup> June 2018, a period of nearly one year after his response; and that no prejudice was shown to have been suffered. It concedes that the principal complainant was indeed summoned twice but failed to appear, and as a quasi-judicial body, the JSC could not compel his attendance in the same way a court of law or investigative agency would. The JSC contends that even in the absence of this witness, the Board had sufficiently evaluated the evidence against the appellant and expressed concern over his integrity; that in any event the appellant, by his own admission, conceded meeting with the complainant outside the work premises, after office hours and during the tender evaluation period, thereby breaching Section 65 of the PPAD Act.
36. On the JSC's power to issue summons, the duty to conduct investigations and the discretionary powers of the Chief Justice, it contends that under paragraph 25 of the JS Act, the use of the word "may" indicates discretion, not compulsion. The Chief Justice, therefore, had the discretion to determine



whether an inquiry was necessary based on the specific facts. It cites the persuasive decision of the Court of Appeal in *Cooperative Bank of Kenya Vs Banking Insurance & Finance Union* [2016] eKLR, where it was held that the use of the word “may” imports a discretionary rather than a mandatory meaning.

37. On the introduction of unpleaded issues of bias, JSC maintains that the Court of Appeal merely applied established legal standards to facts already on the record. The reference to perceived bias was a legitimate evaluation of the appellant’s conduct in relation to his role in the procurement process.
38. Finally, on whether the court erred in treating reinstatement and compensation of fundamental rights as substitutes, the JSC contends that the appellant’s rights were fully respected during the disciplinary proceedings, and no cause was presented to warrant his reinstatement or an award of compensation.

#### **E. Issues For Determination**

39. Having considered the pleadings, the impugned judgment, and the parties’ respective submissions and arguments presented by counsel before the Court, in our considered view, the following four issues fall for the final determination of this appeal:
  - i. Whether this Court has jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution;
  - ii. Whether the termination of the appellant’s employment was substantively and procedurally fair in accordance with the Constitution and the law;
  - iii. Whether the Court of Appeal erred in introducing and determining the issue of judicial bias, which was not pleaded or argued by the parties; and
  - iv. Whether the appellant was entitled to both reinstatement and compensation.

#### **F. Analysis And Determination**

##### **i. Whether this Court has jurisdiction to determine the appeal under Article 163(4)(a) of the Constitution.**

40. Under Article 163(4)(a) of the Constitution, an appeal lies to the Supreme Court as of right in any case that involves the interpretation or application of the Constitution. The appellant contends that the issues central to this appeal directly implicate Articles 47 and 50 of the Constitution, which were considered and applied by both the trial court and the Court of Appeal. In addition, he invokes the application of paragraph 25 of the Third Schedule to the JS Act, which he asserts derives from and operationalizes the constitutional principles under Articles 171 and 172 of the Constitution.
41. The JSC, on the other hand, maintains that the jurisdiction has been improperly invoked; that while the ELRC and the Court of Appeal made reference to Articles 47 and 50, they did not interpret or apply those provisions; that the question before the courts was the enforcement of the provisions; and that the two articles were not in real contention.
42. The courts in this country have consistently affirmed in a long line of cases, like *Macharia & another Vs Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) and the seminal pronouncement in *Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR), that jurisdiction is the lifeblood of judicial authority; without it, a court acts in vain and the resultant decision is worthless, with no legal effect. In *Lawrence Nduttu & 6000 others Vs Kenya Breweries Ltd & Another* (supra) and *Joho & another Vs Shahbal & 2 others*, (Petition 10 of 2013) [2014] KESC 34 (KLR), this Court crystallized the test for jurisdiction under Article 163(4)(a): it must be demonstrated



that the issues in dispute involved a constitutional question that was subject of judicial determination by interpretation or application in the courts below.

43. Applying that test to the present matter, a perusal of the appellant’s petition before the ELRC discloses that the appellant pleaded violation of Articles 2(4), 10(2)(a)(c), 27(1), 47, 172(1)(c), 232(7) and 236(b) of the Constitution. In determining the dispute, the ELRC interpreted Articles 47 and 252(3)(b) of Constitution having satisfied itself that the petition met the threshold in *Anarita Karimi Njeru Vs Republic* (supra) for petitions filed under the Constitution seeking the enforcement of the Bill of Rights. For its part, the Court of Appeal framed as a core issue, “whether the respondent observed constitutional principles for a fair hearing,” and in its judgment, the Court of Appeal directly addressed the answer to the question, engaging not merely in mechanical enforcement but in substantive application of Articles 47 and 50. Moreover, the appellant’s case raises broader questions concerning the procedural safeguards under Article 50, including the right to cross-examination and the obligation to conduct investigations prior to disciplinary proceedings, all of which were not only pleaded and argued but also formed the basis of the reasoning in the two judgments. These are not peripheral procedural complaints; they strike at the core of how constitutional fair trial guarantees are applied in quasi-judicial proceedings.
44. In light of the foregoing, and consistent with this Court’s jurisprudence, we are persuaded that the appeal falls within the ambit of Article 163(4)(a) and therefore the Court has jurisdiction to entertain it. The objection as to the jurisdiction of the Court is, for these reasons, overruled.

**ii. Whether the termination of appellant’s employment was procedurally and substantively fair in accordance with the Constitution and the law.**

45. The appellant moved to the ELRC to challenge the disciplinary process leading to his dismissal for the following reasons: that JSC disregarded paragraph 25 of the Third Schedule to the JS Act, as the Chief Justice did not conduct internal investigations on the allegations against him; that the charge and interdiction were prematurely issued; that the principal complainant did not file an affidavit or witness statement, neither did he present himself before the JSC; the JSC’s two witnesses did not record statements and if they did the appellant was not served; that the JSC withheld important evidentiary material and particulars of the charge; that there was no evidence that the appellant solicited for a meeting with any bidder; that conflict of interest was not proved; and that the disciplinary panel introduced a fresh charge outside the charges communicated by the Chief Justice, namely, that the appellant was biased. These complaints, in our considered view, can be clustered into two categories: those relating to the inquiry by the Chief Justice; and those relating to the disciplinary hearing by the JSC.
46. To begin with, the discipline of judicial staff as an administrative action by the JSC, is subject to provisions of Articles 47 and 50 of the Constitution. All appointments, disciplinary and removal proceedings of judicial officers and staff are governed by Section 32 of the JS Act as read with the Third Schedule to that Act.
47. Although *Shollei Vs Judicial Service Commission & another* [2022] KESC 5 (KLR), concerned the administrative disciplinary procedure against a judicial officer, the guiding principles enunciated by the Court in the passage below apply with equal force to judicial staff:

“Guiding principles on disciplinary proceedings before Judicial Service Commission.

- a. The JSC shall comply with the procedure set out in Article 47 of the Constitution and the Fair Administrative Actions Act.



- b. JSC shall always give an employee reasonable time to defend himself or herself.
- c. An employee shall be informed the basis of complaint(s) or who his or her accusers are to enable the employee defend themselves.
- d. JSC shall furnish an employee with details of allegations against him or her.
- e. JSC must always be clear from the start whether the administrative action against an employee is of an investigatory nature or of a disciplinary nature. Should an investigatory process turn into a disciplinary one, an employee must be accorded fresh notice to prepare his/her defence.
- f. An employee should be accorded a public hearing if he/she desires to have one. A decision to decline such a request must be accompanied with reasons which shall be given to the employee.
- g. An employee shall be given detailed reasons for any administrative action/ decision by JSC.
- h. An employee should access and receive any relevant documents relating to his/ her matter. Any decision to the contrary must be accompanied by a written reason.
- i. An employee shall be accorded opportunity to attend proceedings, in person or in the company of an expert of his/her choice.
- j. An employee undergoing disciplinary proceedings shall be given an opportunity to call witnesses, be heard; cross examine witnesses; and request for an adjournment of the proceedings upon providing good reasons and where necessary to ensure a fair hearing”.

48. The first category of the appellant’s complaint is that the JSC disregarded paragraph 25 of the Third Schedule to the JS Act, as the Chief Justice did not investigate the matter internally. He maintains that at no time was the appellant investigated and questioned by the Chief Justice, the CRJ or the Judiciary Ombudsman; that there was no report in support of the charges leveled against him; that JSC failed to conduct its own independent investigations, as recommended by the Board, and instead relied solely on the Board’s ruling.

49. For the full tenure and extent of paragraph 25 of the Third Schedule to the JS Act, it is reproduced here below in extenso because the appeal turns on it:

“25. Proceedings for dismissal

- 1. Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice’s opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing



should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.

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

Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel.
4. The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.
5. If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.
6. The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.
7. The Committee or Panel shall permit the accused officer to be represented by an advocate.
8. If during the course of the investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.
9. The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—



- a. a statement whether in the Committee or Panel's judgment the charge or charges against the officer have been proved and the reasons therefor;
  - b. details of any matters which, in the Committee or Panel's opinion, aggravate or alleviate the gravity of the case; and
  - c. a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.
10. The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.
  11. The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest." [Emphasis added].
50. According to the appellant, under paragraph 25(1) the Chief Justice was under an obligation to conduct a preliminary inquiry before framing charges against him. Secondly, the appellant blames the committee appointed under paragraph 25(3) by JSC for failing to conduct its own internal independent investigations as required by paragraphs 25(9)-(11) of the JS Act.
  51. What then is the role of the Chief Justice under paragraph 25(1)? Does that role require the Chief Justice, as demanded by the appellant, to conduct an inquiry or investigation into allegations of impropriety or misconduct before framing charges and forwarding the charges to the officer? Our plain reading of the paragraph is that there are four stages to be undertaken by the Chief Justice in the dismissal proceedings against an officer, all encapsulated in paragraph 25(1) and (2). First, the Chief Justice must conduct an inquiry; second, frame and forward the charge or charges to the officer, third, invite the officer to state his or her case; and fourth, if the officer fails to respond or responds but does not exculpate himself or herself, the Chief Justice's final role is to lay the charges and response, if any, before the JSC for its consideration and decision.
  52. The opening sentence in paragraph 25(1) that; "where the Chief Justice, after such inquiry as they may think fit to make...", in our opinion does not impose any mandatory duty on the Chief Justice to conduct any investigations, so long as from the information or material provided to him or her, the Chief Justice considers it necessary to institute disciplinary proceedings against the officer concerned. The use of phrases like "may think fit", "considers it necessary", and "in the Chief Justice's opinion" conveys a sense of discretion. In the exercise of that discretion, the Chief Justice is required to ensure that each of the four stages is fair and in accordance with the constitutional principles of a fair hearing.



53. This view is consistent with our previous pronouncement in the case of *Karani Vs Judicial Service Commission* (Petition 3 of 2021) [2022] KESC 37 (KLR), where we interpreted the powers of the Chief Justice under Paragraph 25(1) as follows:
- “(79) Contrary to submission by the appellant, the Chief Justice is not required to carry out an investigation. Rather, as rule 25 provides, the Chief Justice carries out an inquiry. We also take note that rule 16 which empowers the Chief Justice to interdict, makes no reference to an investigation, only that the Chief Justice must be satisfied that public interest requires interdiction, provided that “proceedings which may lead to their dismissal are being taken or are about to be taken.” [Our emphasis]
54. As correctly observed by the Court of Appeal in the present matter, prior to the charges being brought against the appellant, the Chief Justice had been made aware of the proceedings and the decision of the Board. It was on the basis of those proceedings and decision that the appellant was informed of the allegations against him and invited to respond. The Board’s decision dated 20<sup>th</sup> December 2016 was unequivocal that: first, the tender awarded to Lavington Security Services was irregularly issued and was annulled; second, the Judiciary was directed to re- advertise and commence a fresh procurement process; and third, the Board asked the Judiciary to investigate the conduct of the two evaluation committee members who had met a bidder contrary to Section 65 of the PPAD Act.
55. At this point, it ought to be noted that the Board is a statutory body established under Section 27(1) of the PPAD Act, with the mandate to review, hear, and determine procurement and asset disposal disputes. While in this appeal, the Board did not make specific findings regarding the appellant’s conduct in relation to the procurement in question, it expressly asked the procuring entity to conduct its own separate and independent investigations to establish for itself the allegations.
56. In compliance with the above recommendations, the tender was re- advertised, re-evaluated by a new panel, and Lavington Security Services was once again awarded the contract. The next phase was for the Judiciary to conduct investigations of the allegations against its implicated officers. The Chief Justice, in the capacity as Head of the Judiciary, and not as the Chairperson of the JSC, was expected, indeed required, to commence investigations which would end up with a referral to the JSC, depending on the allegation and the officer’s response thereto. The inquiry envisaged in paragraph 25(1) aforesaid only requires the Chief Justice, in making a preliminary decision, to be satisfied, *prima facie* that a complaint against an officer contains sufficient evidence to warrant further investigation by the JSC. The Chief Justice is not expected to play the role reserved for the JSC. After satisfying himself or herself, *prima facie*, that a reasonable ground has been established to warrant the dismissal of an officer, the Chief Justice yields to the JSC at that point. A full hearing, with presentation of evidence, cross-examination of witnesses, and representation by counsel, can only be had before the JSC.
57. To the extent, therefore, that there was a basis upon which, in the opinion of the Chief Justice, disciplinary proceedings could be initiated, no error was committed by the appellate court in finding that paragraph 25(1) aforesaid was complied with. It was not the function of the Chief Justice to undertake investigations, to question the officers concerned, or to compile reports, in order to substantiate the allegations. Rather, the Chief Justice’s role is limited to making inquiries by examining the preliminary facts without delving into the merits of the complaint.
58. Having so determined, the process moves to the next phase in terms of paragraph 25(2) of the Third Schedule onwards, when it transitions from the Chief Justice to the JSC, which relates to the second



category of the appellant's complaints. The next steps before the JSC were explained by this Court, as follows in *Karani Vs Judicial Service Commission* (supra):

“The Chief Justice on receiving a reply to charges framed, if not convinced by the defence raised by an officer, then forwards the charges and reply, if any, to the respondent to determine whether or not to proceed with disciplinary proceedings. If the respondent elects to proceed with disciplinary proceedings, it then appoints a committee or panel. It is therefore evident, that it is the Committee or Panel of the respondent that carries out the investigation into a disciplinary case of an officer. Once the Committee concludes its investigation, it prepares a report containing the charge, the evidence, the defence, its proceedings and its recommendations to the respondent to consider. The respondent then elects what to do with the report and if it concludes that a punishment is warranted, it chooses appropriate sanctions from those provided under rule 19 of the third schedule ”

59. The committee appointed by the JSC, armed with the Board's ruling, the charge, the show cause letter, the appellant's reply, and the interdiction letter, invited the appellant to appear for a disciplinary hearing. Although three witnesses were lined up to testify on the two counts, only two testified. They were cross-examined by the appellant, who also made his representations. The committee's role is circumscribed: to investigate. As a start, the committee must give the officer a written notice of not less than fourteen (14) days to appear and answer to the charges; it must call witnesses to provide proof of the charges; the witnesses must be cross-examined by the officer; and the officer is entitled to legal representation.
60. The committee subsequently submitted its report to the JSC. It found the appellant culpable on the two charges. The JSC deliberated on the report, upheld the findings, and issued a dismissal letter on 27<sup>th</sup> May 2019, informing the appellant of his right to seek a review of the decision.
61. The report submitted by the committee to the JSC is not on record. We suppose that it must have been done pursuant to what the JSC's secretary alluded to in her letter to the appellant dated 11<sup>th</sup> November 2019. According to her, by Section 23 Part IV of the Third Schedule to the JS Act, the JSC is barred from providing orders, minutes and reports of the JSC to third parties. Precisely ten days before that letter on 1<sup>st</sup> November 2019, Section 23, Part IV of the Third Schedule was declared unconstitutional by the ELRC in *Simon Rotich Ruto Vs Judicial Service Commission & another* [2019] KEELRC 523 (KLR). That decision was subsequently affirmed by this Court in *Shollei Vs Judicial Service Commission & another* (supra), that the Section cannot limit a constitutional right to access to information.
62. That being as it may, two witnesses drawn from the Judiciary's Supply Chain Directorate testified in the disciplinary proceedings. Their evidence in respect of the appellant was largely exculpatory, even though their statements had neither been recorded nor served on the appellant prior to the hearing. This constituted a breach of Article 50 of the Constitution.
63. Whereas the disciplinary process was triggered by the recommendation of the Board based upon the complaint by Okeyo, he did not file an affidavit or his statement with the committee. He did not present himself before the committee to prosecute his claim. The committee nonetheless proceeded to make an adverse finding against the appellant.
64. The appellate court, for its part, acknowledged that Okeyo's testimony was central to the just determination of the complaint by the committee. Because of his absence, the court noted, the committee was forced to adjourn the proceedings to give him another chance. On the next hearing date, Okeyo, having failed once again to attend, the committee proceeded to conduct the hearing.



The appellate court nonetheless ruled that, first, the absence did not weaken the charges against the appellant; and second, that if the appellant was aggrieved, he ought to have raised an objection to the committee proceeding with the hearing in Okeyo's absence. The court further held the view that the appellant ought to have applied for summons to issue to Okeyo.

65. The appellant was blindsided in the situation he found himself: the principal complainant was absent, having made serious allegations against him; no affidavit or witness statement recorded or served; and similarly, the JSC introduced two witnesses whose statements had neither been recorded nor served on the appellant prior to the hearing. How was he to defend himself? The *audi alteram partem* rule, as a basic but fundamental principle of natural justice and fair play, dictates that no one should have their rights negatively impacted without a fair hearing. Conversely, a person accused of a transgression is entitled to confront his or her accuser; to cross-examine the accuser under oath in order to test the veracity of the complaints.
66. The right to a fair hearing is firmly rooted in Article 50(1) of the Constitution, which states that;

“A50(1) Every person has the right to have any dispute that can be resolved 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.”

See the guiding principles in *Shollei Vs Judicial Service Commission & another* (supra) on the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

67. While the appellant was permitted to cross-examine the two witnesses presented by the JSC, the principle of a fair hearing demands more than procedural formality; it requires substantive fairness. The JSC based its entire decision on Okeyo's allegation that he met the appellant and another member of the Evaluation Committee, and that the two solicited kickbacks for a favourable consideration of his bid during tender evaluation. Not a witness, not a witness statement or affidavit evidence, or other form of evidence was provided to corroborate the allegations, contrary to Article 50(1) of the Constitution.
68. In the absence of any evidence from the principal complainant, the entire disciplinary hearing and the outcome thereof, were based on hearsay evidence; the Board's decision was itself inconclusive. Although the appellant admitted to meeting Okeyo, he gave a detailed account why they met: that Okeyo's firm, Bedrock Security Services Limited was already a security services provider for the Judiciary; that their staff guarding Mwingi Law Courts had staged a strike, due to unpaid wages; that it was Okeyo who requested to meet the appellant, in whose docket the matter fell to discuss the problem; and that Okeyo, without invitation or notice appeared at a restaurant where the appellant and his colleague, Oboge were having dinner. Okeyo introduced the issue of delayed payment to his guards. The appellant explained that at the time of that meeting, the Evaluation Committee had received all the requisite information to make a determination on the tender. Consequently, there was no conflict of interest or any appearance of impropriety.
69. The appellant's account was corroborated by Oboge, who was accused alongside the appellant. The only persons within whose knowledge the details of the meeting were could only be the trio: Okeyo, Oboge, and the appellant. The appellant's and Oboge's accounts were not rebutted by the JSC's witnesses.
70. It cannot be correct to argue, as the JSC has, that the appellant, having admitted to the meeting, by that fact alone, the charges against him were admitted and proved. In *Karani Vs Judicial Service Commission* (supra), this Court explained that Section 24 of the Evidence Act provides that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. The



admission as to the meeting taken with the explanation proffered by the appellant and in the absence of Okeyo's account was not sufficient to form the only basis of JSC's decision.

71. The Board, having found that the appellant and his confederate met Okeyo, "ordered the procurement entity to carry out investigations on the conduct of its officers who were in the evaluation committee of the tender.....in line with section 65 of the Act". The Board did not make a decision on the culpability of the two and rightly asked the Judiciary to conduct its own investigations. This was important because under Section 65 of the PPAD Act it is an offence for a bidder to make unsolicited communications after the deadline for the submission of tenders, to the procuring entity or any person involved in the procurement proceedings. Such a bidder would be disqualified, and any public officer involved shall face disciplinary action in addition to any other action under the Act.

"65(1). After the deadline for the submission of tenders, proposals or quotations—

- a. a person who submitted a tender shall not make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders; and
- b. a person shall not attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes the provisions of subsection (1) commits an offence and shall lead to the tenderer being disqualified and the public officer facing disciplinary action in addition to any other action under this Act.

(3) Upon completion of the evaluation process, a tenderer may communicate with the procuring entity on the procurement proceedings." [Emphasis added].

72. The mischief this Section seeks to address is the undue influence of the procurement process. It is not just the mere making of any unsolicited communications. The communication must be one that "might reasonably be construed as an attempt to influence the evaluation and comparison of tenders"; and a person shall not attempt, in any way, to influence that evaluation and comparison." Did Okeyo suggest that the meeting was intended to discuss and influence the outcome of the evaluation process of the security tender? It is on record that before the Board, Okeyo stated under oath in his affidavit of 11<sup>th</sup> January 2017 that:

"On 16th December 2016 at 7.45 am I received a call from Eric Kamande, the Principal Administration Officer of the Judiciary who requested for a meeting with me to discuss payment of a pending invoice which he indicated had a problem. I agreed to meet him at Ronalo Restaurant ....."

73. From the record, the committee acknowledged that the presence of the complainant before it was crucial to a fair hearing and made several unsuccessful attempts to secure Okeyo's attendance. Nonetheless, the committee, even after remarking that he "was unobtainable (sic) and had gone underground," dispensed with his attendance and proceeded with the hearing. The Court of Appeal, for its part, similarly missed the point when it ruled the charges could be sustained even in the absence of the principal complainant, and that the disciplinary committee was neither a court nor an investigative agency to compel the complainant's attendance before it.



74. The committee was appointed by the JSC and was therefore an organ and agent of the JSC, all the three members comprised commissioners of the JSC. It exercised powers delegated by the JSC. It was the JSC and therefore Article 252 of the Constitution, which vests in JSC the general powers to: "... conduct investigations on its own initiative or on a complaint made by a member of the public; ..... (b)...to issue summons to a witness to assist for the purposes of its investigations" applied to it. It had the power to issue summons to compel the complainant's attendance. It is only by Okeyo's attendance that the question of whether the meeting discussed how to influence the outcome of the evaluation process would have been resolved. The JSC being an independent Commission, could not rely wholly on evidence presented before a different body in order to arrive at its conclusion. It is its function to conduct fresh investigations and determine the question of impropriety based on its own independent evaluation of the evidence presented to it. The Court of Appeal therefore erred in holding that it was proper for the JSC to close proceedings without summoning the complainant. This was, no doubt, prejudicial to the appellant's right to a fair hearing.
75. The third phase of the disciplinary process of a judicial staff involves the Judicial Service Commission itself. Paragraph 25(9) of the Third Schedule describes the role of the JSC once the committee submits its report to it. The report of the committee shall include the decision of the committee, any matters which aggravate or alleviate the gravity of the case, and any other general comments as will indicate clearly the opinion of the committee on the matter being investigated. The committee is, however, prohibited from making any recommendation regarding the form of punishment to be inflicted on the officer, as this is a function of the whole plenary of the JSC.
76. If the JSC is of the opinion that the report should be amplified in any way or that further investigation is desirable, it may refer the matter back to the committee to conduct the investigation for a further report. Barring this, the JSC will consider the report and decide on the punishment, if any, which should be inflicted on the officer or whether he/she should be required to retire in the public interest. To fulfill its mandate under Article 172(1)(c) of the Constitution, the JSC in considering the committee's report, ought to have satisfied itself that the charges disclosed acts constituting gross misconduct. The JSC, in our respectful view, had two options: to remit the proceedings to the committee to have the complainant compelled to appear before it and/or substantiate his claims against the appellant, or to find that, without any evidence suggestive of any wrongdoing by the appellant, then the charges were not proved.
77. Having reached this conclusion, we turn our attention to the appellant's other complaints relating to failure to provide adequate notice of legal counsel contrary to Article 50(2)(g) and (h), Section 4(3)(c) of the FAA Act and paragraph 25(5) of the Third Schedule to the JS Act; insufficient hearing notice of only eight (8) days instead of the fourteen (14) days provided for under the Third Schedule; and the unreasonable delay of twenty three (23) months in concluding the disciplinary process. Save for the last complaint, the rest were not pleaded before the ELRC. They were also not canvassed before either the ELRC or the Court of Appeal. The two courts below made no findings on these complaints. This Court cannot, for these reasons, entertain new matters introduced for the first time in the proceedings before it by way of submissions. See *Muruatetu & another Vs Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* [2016] KESC 12 (KLR) and *Peter Oduor Ngoge Vs Francis Ole Kaparo & 5 Others, SC Petition No. 2 of 2012, [2012] eKLR*.
78. As pertains to the delay of 23 months in concluding the disciplinary process, the JSC concedes the delay, but justifies it on account of the fact that most of the committee members were judges or judicial officers who were involved in hearing election petitions in their respective courts; that such disputes are governed by strict legal timelines. While the ELRC declared the delay as inordinate and in breach



of Article 47(1) of the Constitution and the JSC's own policy to the effect that such proceedings must be concluded within six months, the Court of Appeal, on the other hand, acknowledged the delay but did not go beyond that. This Court in *Karani Vs Judicial Service Commission* (supra) expressed its dissatisfaction with the delay of fifteen (15) months. The Court declared that the delay went against the tenets of Article 47 of the Constitution. The Court, however excused the delay observing, one, that the delay was sufficiently explained, and two, that the JS Act does not prescribe a timeline within which the JSC must hear and determine disciplinary cases. Whereas it is correct that no specific period is prescribed for the disposal of complaints before the JSC, whenever there is a delay, the court will consider whether the delay was unreasonable, the length of the delay, the reasons for the delay and the potential prejudice to the other party. In *Karani Vs Judicial Service Commission* (supra) the Court explained that:

“Delay on its own, does not lead the court to conclude that there is infringement of rights. Where there is delay, the court must interrogate whether the same is justifiable and thus excusable, or not. In order to do that, the court must interrogate the circumstances of the case.”

79. The absence of a timeline within which to hear and determine complaints is no excuse or justification for a delay of 23 months. The Constitution guides as a general principle that;

“If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay ....” See Article 259 (8).

80. What constitutes “without unreasonable delay” will depend upon the peculiar circumstances of each case, as noted above, taking into account, among other factors, the length of the period of delay, the justifications proffered, and the prejudice suffered. Article 47(1) of the Constitution similarly guarantees expeditious determination of administrative actions as follows:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

81. The courts in this country, including this Court, have in their numerous decisions deprecated delays in concluding disciplinary hearings, emphasizing that prolonged processes undermine the principles of fairness, natural justice, and the right to expeditious resolution of such cases. The delays also prejudice the affected judges, judicial officers and staff and can lead to erosion of confidence in the JSC. See persuasive decisions in *Judicial Service Commission Vs Ochenja* (Civil Appeal 312 of 2019) [2020] KECA 3 (KLR), *Grace A. Omolo Vs Attorney General & 3 others* [2012] eKLR and *Timothy Nchoe Sironka Vs Judicial Service Commission* [2020] KEELRC 503 (KLR), from a long line of such decisions.

82. Whereas in the instant appeal, the JSC explained the delay, that some members of the Commission were involved in the determination of election disputes resolution, we are not satisfied that the explanation overrides the constitutional imperative for fairness to the appellant. Out of eleven Commissioners, only five are judges and judicial officers. We would like to emphasize here that the JSC, being the body mandated by the Constitution to receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and staff of the Judiciary, must show the way, by example. It cannot demand from judges and judicial officers higher standards than it can itself uphold in its oversight role. It would be difficult, for example, to discipline any of the categories of officers referred to above on account of, say, delayed judgment or ruling when the JSC is itself guilty of delay. Besides, the determination of election disputes within a strict timeline is an issue



that was expected at every election cycle and cannot of itself override the appellant's constitutional entitlement. A delay of nearly two years in the present appeal is certainly not only inordinate but undeniably prejudicial to the appellant who has to endure the waiting and anxiety, not to mention being out of work on interdiction and half salary. The prolonged judicial process itself has not eased the appellant's pain and endurance. It is today nearly eight years since his interdiction.

83. The sum of all these infractions and the answer to the main question in the appeal as the Court's jurisdiction under Article 163(4)(a) of the Constitution, is that the appellant's rights to a fair trial and fair administrative action were violated. The disciplinary process, for the reasons outlined in the foregoing paragraphs, failed to meet the minimum standards of fairness.
84. Our conclusion on Issue (ii), is that the JSC fell short of its mandate set out in Article 172(1)(c) of the Constitution, Section 32 of the JS Act, and the relevant paragraphs under the Third Schedule to the JS Act. The appellant was condemned without an opportunity to confront his accuser in violation of Article 50(1) of the Constitution. We also find that the JSC violated the appellant's right to fair administrative action under Articles 47(1) and 50(1) of the Constitution on account of 23 months delay without justification.

**iii. Whether the Court of Appeal erred in introducing and determining the issue of judicial bias, which was not pleaded or argued by the parties.**

85. This question has arisen from the holding of the Court of Appeal that the meeting of the bidder by the appellant, regardless of its purpose, inevitably raised a perception of bias, considering particularly that it took place during the evaluation period. The court emphasized that had the meeting been in good faith, the appellant ought to have disclosed it to the evaluation committee. In reaching this conclusion, the court invoked the principle of bias articulated in *Metropolitan Properties Co (FGC) Ltd Vs Lannon and Others* [1968] 3 All ER 304, noting that although the case referred to judicial officers, the underlying principle was equally applicable in the present context.
86. The appellant has been aggrieved by that statement, faulting the Court of Appeal for introducing sua sponte, the issue of judicial bias, and more so against a non-judicial officer, contrary to Article 50(1) of the Constitution. By doing so, the appellant submits, the appellate court exceeded its jurisdiction.
87. In determining whether the appellant's termination was unlawful, the Court of Appeal assessed whether the conduct of the appellant amounted to gross misconduct. The jurisdiction of the Court of Appeal, under Article 164 of the Constitution and the Appellate Jurisdiction Act, Cap. 9, on a first appeal includes the power to review the evidence, evaluate and draw its own conclusions, making allowance for the fact that, unlike the trial court, it has neither seen nor heard the witnesses. The second rule is that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not pleaded and canvassed by the parties. Evaluating whether the appellant's conduct met the legal threshold of gross misconduct squarely falls within this jurisdiction.
88. The Court of Appeal relied on the well-established principle from *Metropolitan Properties Co (FGC) Ltd Vs Lannon and Others* (supra) to illustrate, in the context of the meeting of appellant and a bidder, the "reasonable apprehension of bias" test. While that case dealt with a judge, the principle it enunciates applies equally to judicial officers and extends to administrative and quasi-judicial officers, including members of tender evaluation committees. These bodies, like courts of law, perform functions requiring impartiality and transparency. The perception of bias in a procurement process directly implicates the fairness and integrity of public procurement.
89. In view of this determination, we come to the conclusion that the Court of Appeal did not err in raising the issue of bias sua sponte nor in applying principles of judicial bias to a non-judicial officer.



Its intervention was consistent with constitutional principles and common law doctrines of fairness and natural justice, which are the central questions in the dispute. We find no merit in the appellant's arguments and this ground of appeal, must therefore, fail.

#### **iv. Whether the appellant was entitled to reinstatement and compensation**

90. It is the appellant's plea that we overturn the determination of the Court of Appeal in its entirety and reverse the conclusion of the ELRC to the extent that it failed to award him compensation. He maintains that he is entitled to both reinstatement and compensation as distinct and complementary remedies and cited *Wamwere & 5 others Vs Attorney General* [2023] KESC 3 (KLR) and *Gichuru Vs Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), to make the point that, whilst compensation serves as a remedy for constitutional violations, reinstatement, on the other hand, restores an unlawfully terminated party to their former position. The ELRC, in allowing the appellant's petition, declared that the proceedings and decision to dismiss him were unfair, unlawful, and contravened the Constitution. It accordingly set aside the decision of the JSC to terminate the appellant's employment. As a remedy, the court, relying on the Court of Appeal's decision in *Judicial Service Commission and another Vs Lucy Muthoni Njora*, [2021] eKLR, ordered the appellant's reinstatement to the position of Principal Administrative Officer without any loss of salary, allowances, or benefits. Alternatively, the JSC was directed to re-engage the appellant in an equivalent role, on similar terms. The court, however, found no justification for awarding compensation for violations of the appellant's rights under the Constitution in addition to reinstatement or re-engagement.
91. Having found that the appellant's termination was unlawful, unfair and unprocedural, what remedies are available to the appellant? The appellant prays that we consider an award for compensation in addition to an order of reinstatement or re-engagement. Compensation, it is settled in the context of employment, is a remedy intended to redress the economic loss suffered as a consequence of the unfair termination of employment. It is not intended to unjustly enrich a wronged employee. In the present appeal, we have determined that the proceedings culminating in the dismissal of the appellant were conducted in violation of the Constitution and that the appellant's rights were infringed. The remedies for constitutional violations are set out in Article 23(3) to include, a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review. The use of the word "including" in Article 23(3) aforesaid that a "court may grant appropriate relief, including...", suggests that the categories of remedies are not limited to those listed in Article 23(3). What constituted appropriate relief would self-evidently differ from case to case depending on the circumstances of the case under consideration. The court must weigh all alternative remedies before settling on the most efficacious one. Constitutional damages could still be the most effective remedy amidst other available remedies in a particular case. Since the categories of constitutional remedies are not closed, Section 12 of the Employment and Labour Relations Court Act, Cap. 8E, grants the court the power to make an order for reinstatement, subject to this being done within three years of dismissal, and on such conditions as the court thinks fit to impose.
92. In *Nyagol Vs Judicial Service Commission & another* (Petition E015 of 2024) [2024] KESC 69 (KLR), this Court declared that:

“ ... we find and hold that the provisions of the Employment Act (EA) and Employment and Labour Relations Court Act (ELRCA) apply. Section 49(3) of the EA, as read together with section 12(3)(vii) of the ELRCA, provides that the ELRC has the power to make a range



of orders, including reinstatement within 3 years of dismissal, subject to such conditions as the court thinks fit in line with any written law ” [Our emphasis]

93. Both remedies of reinstatement and compensation are discretionary and can be granted simultaneously, depending on the unique circumstances of every case. The primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or deter any future infringements. Indeed, in some cases, a declaration of a violation of a right only without more can be an appropriate vindication to meet the justice of the case. Such a declaration is itself a powerful statement from the court and serves as a warning against future violations. In deciding what remedy to issue, the court also considers public policy, the interests of society as a whole as against the victim’s interest. We expressed similar sentiments in *Musembi & 13 others Vs Moi Educational Centre Co. Ltd & 3 others*, (Petition 2 of 2018) [2021] KESC 50 (KLR) where we stated that;

“ ... Quantification of damages in such matters does not present an explicit consideration of the issues; other issues such as public policy considerations also come into play. A Court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations does not have an easy task; there is no adequate damage standard.”

94. In addition to reinstatement, the appellant seeks compensation for violations of his rights. Relying on the decisions in *Gichuru Vs Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), where this Court awarded Kshs. 2 million in damages for discrimination, in addition to 12 months’ salary for unfair termination. We note in the case *Gichuru Vs Package Insurance Brokers Ltd* (supra) that there was no order for reinstatement. In the case of *Judicial Service Commission Vs Ochenja* [2020] KECA 3 (KLR), the Court of Appeal awarded Kshs. 2 million for breach of constitutional rights, in addition to reinstatement. In *Nyagol Vs Judicial Service Commission & another* (supra), this Court awarded Kshs. 5 million for an unfair and unjustified dismissal that prematurely ended the appellant’s career. Just like in *Gichuru Vs Package Insurance Brokers Ltd* (supra), she too was not reinstated. On the basis of these precedents, the appellant seeks an award of Kshs. 2 million in damages.

95. We reiterate that what is sought in this prayer is the exercise of judicial discretion. Secondly, constitutional remedies are not compensatory or punitive but are meant to vindicate the rights violated; a declaration of a violation of a right per se may be sufficient vindication; and that public policy is a key factor to be taken into consideration. The ELRC reinstated the appellant to the position of Principal Administrative Officer without any loss of salary, allowances, or benefits. In the alternative, the appellant was to be re-engaged in a position equivalent to that of Principal Administrative Officer, on the same terms and conditions. Taking into consideration that the appellant’s employment was terminated on 27<sup>th</sup> March 2019 and the judgment having been delivered on 18<sup>th</sup> June 2021, reinstatement was an available remedy, and the ELRC properly made the order for reinstatement. We are inclined to adopt a similar course even though the period of 3 years under Section 12 (3) (vii) of the ELRC Act has lapsed. The delay in concluding the first appeal and this second appeal cannot be blamed on the appellant.

96. It is, however, not lost on us that in view of the length of time that has elapsed, the office the appellant occupied before his removal may not be available. In the first instance, we order that he be reinstated to the position of Principal Administrative Officer, Human Resource Directorate (if that position is available) without loss of benefits, allowances, and salary. As an alternative, and in the event the position of Principal Administrative Officer, Human Resource Directorate is not available, the JSC shall re-engage the appellant to a position equivalent to Principal Administrative Officer, without loss of benefits, allowances and salary.



97. Having declared, first, that the appellant's fundamental rights were violated; second, that he is entitled to reinstatement or re-engagement without loss of benefits; that he is entitled to payment of back-salaries, allowances and benefits, it is our humble view that an award of compensation, given these circumstances, would be superfluous.

### **G. Recommendation**

98. As we conclude this judgment, it is imperative and expedient, based on this decision and others before it, to make the following suggestion to the JSC to consider. Earlier on in this judgment, we stressed that the JSC, as a key constitutional organ, should lead by example. It can do so effectively by promoting self-scrutiny, continuous assessment and improvement of its operations. Based on the number of cases decided in favour of and against the JSC over time, it would be useful for it to establish internal, structured post-litigation case-review mechanisms for systematic self-assessment and reflection on court decisions in which it has been a party. Some of these cases impact not only the institution's legal standing but also its public image and institutional integrity. We also believe that there are numerous lessons to be drawn from past decisions that will help the JSC in its disciplinary processes and other aspects of its general decision-making practices. The suggested exercise should be able to guarantee that, going forward, the JSC shall endeavour to keep to the constitutional and legal expectations, in addition to reducing unnecessary litigation and delay.

### **H. Costs**

99. Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in *Rai & 3 others Vs Rai & 4 others* [2014] KESC 31 (KLR), we are inclined to award costs to the appellant.

### **I. Orders**

100. In light of the above, we order that:
- i. The Petition dated 22<sup>nd</sup> January 2025 be and is hereby allowed.
  - ii. The Judgment of the Court of Appeal is hereby set aside in respect of its findings that the appellant was properly, fairly and lawfully terminated from employment.
  - iii. We declare that the disciplinary proceedings were inconsistent with Article 172(1)(c) of the Constitution, violated Articles 47(1) and 50(1) of the Constitution, Section 32 of the JS Act and the Third Schedule to the JS Act. Consequently, the termination of the appellant's services was unprocedural, unfair, unlawful and in violation of the Constitution.
  - iv. The respondent shall reinstate the appellant to the position of Principal Administrative Officer, Human Resource Directorate, (if that position is still available) without loss of benefits, allowances and salary.
  - v. As an alternative to (iv), above and in the event the position of Principal Administrative Officer, Human Resource Directorate is not available, the respondent shall re-engage the appellant to a position equivalent to Principal Administrative Officer, without loss of benefits, allowances and salary.
  - vi. The respondent shall pay the appellant all withheld salary from the time of interdiction on 12<sup>th</sup> April 2017 to the date of this judgment.
  - vii. The respondent shall bear the costs of this appeal.



viii. We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal, be refunded to the depositor.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST, 2025.**

.....

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original.

**REGISTRAR**

**SUPREME COURT OF KENYA**

