



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karani v Judicial Service Commission (Petition 3 of 2021)  
[2022] KESC 37 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KESC 37 (KLR)

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

**PETITION 3 OF 2021**

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

**JULY 8, 2022**

**BETWEEN**

**DAVIS GITONGA KARANI ..... PETITIONER**

**AND**

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

*(Being an appeal from the Judgment of the Court of Appeal of Kenya sitting in Nairobi (Musinga, Kiage & Gatembu JJA) dated the 18th December 2020 in Nairobi)*

**Procedure to be followed in disciplinary proceedings against a judicial officer.**

Reported by Kakai Toili

**Constitutional Law** - commissions and independent offices - Judicial Service Commission (JSC) - disciplinary proceedings before the JSC - procedure to be followed in disciplinary proceedings against a judicial officer - what were the guiding principles in considering matters concerning disciplinary proceedings before the JSC - whether the mere overlap of roles by a statutory body carrying out quasi-judicial functions was contrary to the principle of *nemo iudex in causa sua* (the duty to reach a decision untainted by bias) - Judicial Service Act (cap 8A) Third Schedule rules 10, 11, 19 and 25(9).

**Constitutional Law** - Judiciary - Chief Justice - powers of the Chief Justice - interdiction of judicial officers - whether the Chief Justice was required to carry out an investigation before framing charges and interdicting a judicial officer - Constitution of Kenya, 2010, article 172; Judicial Service Act (cap 8A) section 32, Third Schedule rules 16 and 25.

**Judicial Officers** - doctrine of judicial immunity - nature and rationale of the doctrine of judicial immunity - whether the doctrine of judicial immunity applied where proceedings for a judicial officer's removal had been instituted before the Judicial Service Commission for delivery of judgment earlier than scheduled and in the presence of only one party.

**Civil Practice and Procedure** - appeals - appeals to the Supreme Court - appeals as of right in a matter involving the interpretation or application of the Constitution - what were the requirements for one to appeal to the Supreme



*Court under article 163(4)(a) of the Constitution as of right in a matter of interpretation or application of the Constitution - Constitution of Kenya, article 163(4)(a).*

**Evidence Law** - confessions and admissions - admissions in criminal vis a vis civil matters - what was the distinction between a confession and an admission - Evidence Act (cap 80) sections 17 to 24 and 25A; Civil Procedure Rules (cap 21 Sub Leg) Order 13 rule 2.

**Words and Phrases** - admission - definition of admission - any statement or assertion made by a party to a case and offered against that party; an acknowledgment that facts are true - Black's Law Dictionary.

### **Brief facts**

The appellant was a principal magistrate at the time of his dismissal. He delivered a judgment in a matter a day earlier than scheduled and in the presence of the defendant's counsel who emerged victorious. Counsel for the plaintiff in that case filed a formal complaint against the appellant through a letter addressed to the resident judge at Mombasa and copied to *inter alia* the Office of the Ombudsman. The Chief Justice instituted disciplinary proceedings against the appellant by interdicting him with immediate effect and forwarded two framed charges: delivery of a decision a day earlier than scheduled without notifying one of the parties and absenteeism.

The Chief Justice also annexed a brief statement of the allegations to the appellant. The appellant admitted to delivering the judgment a day earlier and termed it an honest mistake. On the charge of absenteeism, he gave a detailed account of his time at the station both on duty and off duty. After an oral hearing, the respondent, Judicial Service Commission (JSC) informed the appellant that it had resolved to dismiss him with immediate effect on grounds of misconduct which had been proved on the first charge leveled against him.

Aggrieved, the appellant challenged the decision at the Employment and Labour Relations Court. The appellant claimed that he was condemned unheard and that he was not accorded a chance to cross-examine persons who gave adverse evidence against him. The appellant asserted that the JSC did not have jurisdiction to exercise judicial or administrative authority over judicial officers' sittings in court while rendering judgments. The appellant contended that the fifteen (15) months it took to hear his disciplinary case violated his right to have expeditious and efficient administrative action. He thus prayed for, among others, the setting aside of his interdiction and eventual dismissal and compensation in damages for violation of his rights. The Court, having found no other breach of the Constitution other than that of the appellant's right to have an expeditious hearing infringed upon, awarded the appellant damages for that breach to the tune of Kenya Shillings one million (Kshs. 1,000,000).

Aggrieved by the decision of the Employment and Labour Relations Court, the JSC filed an appeal at the Court of Appeal challenging part of the judgment that awarded the appellant damages and costs. The appellant cross-appealed and prayed for reinstatement and payment of all back salaries, enhancement of the damages and costs of the cross-appeal. The Court of Appeal held that the appellant did not prove his case and was therefore not entitled to the compensation awarded to him. The court dismissed the cross-appeal. Aggrieved, the appellant filed the instant appeal as of right in a matter involving the interpretation or application of the Constitution of Kenya, 2010 (Constitution). The JSC filed a preliminary objection contending that the appeal did not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution and thus sought for the same to be struck out.

### **Issues**

- i. What was the procedure to be followed in disciplinary proceedings against a judicial officer?
- ii. What were the guiding principles in considering matters concerning disciplinary proceedings before the Judicial Service Commission?
- iii. Whether the Chief Justice was required to investigate framing charges and interdicting a judicial officer.
- iv. Whether the mere overlap of roles by a statutory body carrying out quasi-judicial functions was contrary to the principle of *nemo iudex in causa sua* (the duty to reach a decision untainted by bias).



- v. What was the nature and rationale of the doctrine of judicial immunity?
- vi. Whether the doctrine of judicial immunity applied where proceedings for a judicial officer's removal had been instituted before the Judicial Service Commission for delivery of judgment earlier than scheduled and in the presence of only one party.
- vii. What were the requirements for one to appeal to the Supreme Court under article 163(4)(a) of the Constitution as a right in a matter of interpretation or application of the Constitution?
- viii. What was the distinction between a confession and an admission?

**Held**

1. Article 163(4)(a) of the Constitution had to be seen as laying down the principle that not all intended appeals lay from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution could be entertained by the Supreme Court. The only other instance when an appeal could lie to the Supreme Court was one contemplated under article 163(4)(b).
2. It was not the mere allegation in pleadings by a party that clothed an appeal with the attributes of constitutional interpretation or application. The appeal had to originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant had to be challenging the interpretation or application of the Constitution, which the Court of Appeal used to dispose of the matter in that forum. Such a party had to be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it could not support a further appeal to the Supreme Court under article 163(4)(a) of the Constitution.
3. Where specific constitutional provisions could not be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate was that the court's reasoning, and the conclusions which led to the determination of the issue, put in context, could properly be said to have taken a trajectory of constitutional interpretation or application. The issues before the Employment and Labour Relations Court as well as the Court of Appeal involved the interpretation and application of the Constitution. The instant court had jurisdiction in respect of the appeal.
4. The right to fair hearing was enshrined under article 50(1) of the Constitution which stated that every person had the right to have any dispute that could 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. Article 25 of the Constitution stipulated that certain freedoms were so fundamental that they could not be limited, despite any other provision of the Constitution. The right to a fair trial was one of those fundamental, non-derogable rights under the Constitution. That right was applicable to both judicial and administrative cases.
5. The principles to guide the courts in considering matters concerning disciplinary proceedings before the JSC were as follows:
  - a. The JSC had to comply with the procedure set out in article 47 of the Constitution and the Fair Administrative Actions Act.
  - b. The JSC had to always give an employee reasonable time to defend himself or herself.
  - c. An employee had to be informed the basis of complaint(s) or who his or her accusers to enable the employee defend themselves.
  - d. The JSC had to furnish an employee with details of allegations against him or her.
  - e. The JSC had to always be clear from the start whether the administrative action against an employee was of an investigatory nature or of a disciplinary nature. Should an investigatory



- process turn into a disciplinary one, an employee had to be accorded fresh notice to prepare his/her defence.
- f. An employee had to be accorded a public hearing if he/she desired to have one. A decision to decline such a request had to be accompanied with reasons which should be given to the employee.
  - g. An employee had to be given detailed reasons for any administrative action/decision by the JSC. An employee should access and receive any relevant documents relating to his/her matter. Any decision to the contrary had to be accompanied by a written reason.
  - h. An employee had to be accorded opportunity to attend proceedings, in person or in the company of an expert of his/her choice.
  - i. An employee undergoing disciplinary proceedings had to be given an opportunity to call witnesses, be heard; cross-examine witnesses, and request an adjournment of the proceedings upon providing good reasons and where necessary to ensure a fair hearing.
6. The court may not have applied the principles to guide the courts in considering matters concerning disciplinary proceedings before the JSC as the JSC heard and determined the appellant's case before the instant court pronounced those guiding principles.
  7. What was filed before the Employment and Labour Relations Court was not a judicial review application filed pursuant to section 9 of the Fair Administrative Actions Act. Rather, the appellant filed a substantive suit by an employee against his employer challenging the terms of the dismissal. Further, as a first appellate court, the role of the Court of Appeal, pursuant to rule 29 of the Court of Appeal Rules, 2010, was to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
  8. Article 172(1)(c) of the Constitution provided that one of the JSC's functions was 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. The Judicial Service Act No. 1 of 2011 was the statute that was enacted by Parliament pursuant to article 172. The appointment, discipline and removal of judicial officers and staff was governed by section 32 of the Judicial Service Act together with the Third Schedule to the Act.
  9. The Chief Justice was not required to carry out an investigation before framing charges and interdicting the appellant. Rather, as rule 25 of the Third Schedule to the Judicial Service Act provided that the Chief Justice was to carry out an inquiry into allegations made against a judicial officer. Rule 16 of the Third Schedule which empowered the Chief Justice to interdict, made no reference to an investigation, only that the Chief Justice had to be satisfied that public interest required interdiction, provided that proceedings which could lead to their dismissal were being taken or were about to be taken.
  10. The Chief Justice on receiving a reply to charges framed, if not convinced by the defence raised by an officer, then forwarded the charges and reply, if any, to the JSC to determine whether or not to proceed with disciplinary proceedings. If the JSC elected to proceed with disciplinary proceedings, it then appointed a committee or panel. Therefore, it was the committee or panel of the JSC that carried out the investigation into a disciplinary case of an officer. Once the committee concluded its investigation, it prepared a report containing the charge, the evidence, the defence, its proceedings and its recommendations to the JSC to consider. The JSC then elected what to do with the report and if it concluded that a punishment was warranted, it chose appropriate sanctions from those provided under rule 19 of the Third Schedule to the Judicial Service Act. That was pursuant to rule 25(9), (10), and (11) of the Third Schedule.
  11. The principle of *nemo judex in causa sua*, the duty to reach a decision untainted by bias, was entrenched in the Constitution as the right to fair hearing and the right to fair administrative action, pursuant to



- articles 50(1) and 47(1) of the Constitution. A critical exception to the principle was where the overlap of functions was a creation of statute and as long as the constitutionality of the statute was not in issue. One of the justifications that legislatures had for allowing overlapping of functions, which in normal judicial proceedings would be kept separate, was to achieve efficiency when such a body had to undertake several activities, both in administrative and adjudicative capacities.
12. The appellant had not called to question the constitutionality of section 32 of the Judicial Service Act or the Third Schedule to the Act, on the JSC's functions of disciplining and removing judicial officers. In order to avoid running afoul the *nemo iudex in causa sua* principle, a statutory body had to comply with the requirements of impartiality and independence under article 50(1) and 47 of the Constitution. The mere overlap of roles by a statutory body carrying out quasi-judicial functions was not in itself contrary to the principle of *nemo iudex in causa sua*. Statutory bodies had to always apply and adhere to the requirements of impartiality and independence in carrying out its quasi-judicial duties.
  13. The JSC, through rule 25 of the Third Schedule to the Judicial Service Act, avoided a situation of being the accuser, the investigator, the judge and the appellate body, all rolled into one. Through rule 25, the JSC ensured that different actors took on the different roles: the Chief Justice framed the charges, a committee or panel of the JSC carried out the investigation, the JSC then played the role of judge, and finally an aggrieved party had a right of appeal to the judicial system, either by way of judicial review pursuant to section 9 of the Fair Administrative Act or substantive suit to the Employment and Labour Relations Court. In that way, there were inbuilt safeguards that ensured a judicial officer or staff had their right to fair administrative actions, and right to fair trial observed throughout the entire disciplinary process.
  14. The appellant had throughout admitted to his mistake. The law relating to admissions was found in sections 17 to 24 of the Evidence Act. Admissions in criminal matters were treated very differently from civil matters. Pursuant to section 25A of the Evidence Act confessions and admissions were both inadmissible unless made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of inspector of police, and a third party of the person's choice.
  15. A confession was a direct acknowledgement of guilt on the part of the accused while an admission was a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tended to prove his guilt, but which, of itself, was insufficient to found a conviction. Admissions were treated differently in civil matters, whereby pursuant to Order 13 rule 2 of the Civil Procedure Rules, 2010, judgment could be entered on the strength of an admission. Section 24 of the Evidence Act provided that admissions were not conclusive proof of the matters admitted, but they could operate as estoppels under the provisions thereafter contained.
  16. The appellant had all along admitted to making the mistake of delivery of judgment a day earlier than scheduled and in the presence of only one party who happened to be the victorious party. The circumstances of the appellant's error were interrogated fairly substantively by the committee of the JSC. The appellant, due to his own admission, was precluded from blaming the JSC for not calling witnesses who accused him or disallowing him from cross-examining them as the same proved unnecessary.
  17. Once the appellant admitted to the error, all that was left was for him to convince the JSC that the circumstances surrounding the mistake were defensible. Further, since admitting to his mistake, when required to explain to circumstances of the mistake, it was not an unfair shifting of the burden of proof. Pursuant to section 112 of the Evidence Act, in civil proceedings when any fact was especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact was upon that party. In the instant case, the circumstances of how the mistake occurred were within the



- appellant's knowledge and control as the judicial officer charged with hearing parties and rendering decisions on disputes.
18. The JSC followed the elaborate laid out procedure set out in article 172, section 32 of the Judicial Service Act and the rules under the Third Schedule to the Judicial Service Act. The appellant was afforded an opportunity for hearing and the same was reasonable. Consequently, the appellant was afforded the right to fair hearing, fair labour practices and fair administrative actions pursuant to articles 50, 41, and 47.
  19. Judicial immunity was meant to protect judicial officers from third parties' interference, influence or obstruction. Judicial immunity was also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. Under the doctrine of judicial immunity, a judicial officer was absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction and the protection or immunity of a judge also went into administrative acts. Judges and judicial officers remained unquestionably immune as long as they did not take actions that intentionally and plainly prevented litigants from enjoying their constitutional and statutory rights.
  20. While a party aggrieved by a judicial officer's decision or action could not sue them in their personal capacity, in either criminal or civil proceedings, they were not without recourse. Aggrieved parties could institute proceedings before the JSC seeking removal of judges and judicial officers. Which was the case therein. The appellant was not protected by judicial immunity in the circumstances of the case, as the complainant triggered proceedings for the appellant's removal when they lodged their complaint with the Ombudsman.
  21. It was a long-held practice that parties were precluded from arguing their cases piecemeal. They had to present the entirety of their case at the first instance to allow the courts or administrative bodies to make a full and final determination of all pertinent issues relevant to a case. The appellant should have used every defence in his arsenal at the first instance, being while he was before the committee of the JSC defending himself. When he failed to do so, he was precluded from raising preliminary arguments thereafter, more so on appeal to the Court of Appeal. The proceedings before the JSC were lawful and the determination, following due process, to remove the appellant were well within the confines of the Constitution.
  22. The Judicial Service Act did not prescribe a time within which the JSC had to hear and determine disciplinary cases. The Judiciary's Human Resource Policies and Procedures Manual also did not specify a time period for the conclusion of disciplinary cases. Delay, on its own did not lead the court to conclude that there was an infringement of rights. Where there was delay, the court had to interrogate whether the same was justifiable and thus excusable or not. In order to do that, the court had to interrogate the circumstances of the case.
  23. The reasons the JSC had put forward demonstrated both external and internal factors, some beyond its control. The JSC was a major employer of one arm of the government, managing numerous judges, judicial officers, and judicial staff stationed all over Kenya. A delay of fifteen (15) months, without knowing whether he would lose his job caused the appellant anguish, despair, and economic distress having half his salary taken away due to being on interdiction. The JSC, as the appellant's employee, was required to accord him disciplinary administrative action which was expeditious and efficient pursuant to article 47 of the Constitution. Indeed, the JSC owed that duty to each of its personnel, regardless of rank.
  24. The reasons forwarded by the JSC were not insubstantial. Key among them was the exercise of recruiting a chief justice to head the judiciary, which needed to rank exceedingly high on the JSC's obligations. The circumstances of the appellant's case were distinguishable from the cases of *Dennis Moturi Anyoka v Kenya Revenue Authority & 2 Others* and *Grace A Omolo v Attorney General & 3 others* as the employers in those cases had set timelines as part of their disciplinary policies, unlike



the JSC. The appellant's case could also be distinguished from *Judicial Service Commission v Daniel Ochenja* as the delay therein was 26 months, which was nearly a whole year more than in the appellant's case.

25. The delay in the appellant's case was not unreasonable as to warrant an award of damages. Due to having the question of its applicable administrative procedure questioned, the JSC should include a prescribed timeline for disposal of disciplinary cases after relooking at its policy on the reasonable period it was likely to take in hearing and expeditiously handling disciplinary cases.

*Appeal dismissed; preliminary objection dismissed.*

### **Orders**

*Each party to bear its own costs at the Employment and Labour Relations Court, Court of Appeal and the Supreme Court.*

### **Citations**

#### Cases

1. *Selle & another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 - (Explained)

#### **Kenya**

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *Anyoka, Dennis Moturi v Kenya Revenue Authority & 2 others* Petition 52 of 2014; [2015] KEELRC 409 (KLR) - (Applied)
3. *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* Application 50 of 2014; [2015] KESC 23 (KLR) - (Mentioned)
4. *Bellevue Development Company Ltd v Gikonyo & 3 others* Petition 42 of 2018; [2020] KESC 43 (KLR) - (Mentioned)
5. *Cassam & another v Sachania & another* Civil Appeal 63 of 1981; [1982] KECA 1 (KLR) - (Mentioned)
6. *Choitram & another v Nazari* Civil Appeal 8 of 1982; [1984] KECA 116 (KLR) - (Mentioned)
7. *Gatirau, Peter Munya v Dickson Mwenda Kithinji & 2 others* Application No 5 of 2014; [2014] eKLR - (Followed)
8. *Ideal Ceramics Limited v Suraya Property Group Ltd* Civil Suit 408 of 2016; [2017] KEHC 7184 (KLR) - (Explained)
9. *Jobo & another v Shabbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Followed)
10. *Judicial Service Commission v Njuguna & another* Civil Appeal 34 of 2016; [2019] KECA 1040 (KLR) - (Mentioned)
11. *Judicial Service Commission v Ochenja* Civil Appeal 312 of 2019; [2020] KECA 3 (KLR) - (Distinguished)
12. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] eKLR - (Mentioned)
13. *Khaemba, Bryan Mandila v Chief Justice and President of the Supreme Court of Kenya & another* Petition 100 of 2019; [2019] eKLR; [2019] KEELRC 917 (KLR) - (Mentioned)
14. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Mentioned)
15. *Matemu, Mumo v Trusted Society of Human Rights Alliance* Civil Appeal 290 of 2012; [2013] eKLR - (Mentioned)
16. *Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties)* Petition 204 & 218 of 2016 (Consolidated); [2020] KEHC 9225 (KLR) - (Distinguished)
17. *Mohamed, Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* Petition 7 & 9 of 2018; [2018] eKLR (Consolidated) - (Followed)
18. *Mureithi v Babu & 2 others* Petition 15 of 2018; [2019] KESC 63 (KLR) - (Mentioned)



19. *Muruatetu, Francis Karioko & another v Republic* Petitions 15 & 16 of 2015; [2017] eKLR (Consolidated) - (Mentioned)
20. *Mwangi, S Kimenyi v Attorney General & another* Civil Suit 720 of 2009; [2014] eKLR - (Mentioned)
21. *Nasra, Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* Petition 19 of 2018; [2018] eKLR - (Mentioned)
22. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Mentioned)
23. *Njibia, Daniel Kimani v Francis Mwangi Kimani & another* Application No 3 of 2014; [2015] eKLR - (Mentioned)
24. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Mentioned)
25. *Omolo, Grace A v Attorney General & 3 others* Petition 252 of 2011; [2012] eKLR - (Distinguished)
26. *Pop In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] KLR 609 - (Explained)
27. *Popat, Alnashir & 7 others v Capital Markets Authority* Petition 29 of 2019; [2020] eKLR; [2020] KESC 3 - (Followed)
28. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Followed)
29. *Rawal, Kalpana H & 2 others v Judicial Service Commission & 2 others* Civil Appeal 1 of 2016; [2016] eKLR; [2016] KECA 534 (KLR) (27 May 2016) (Judgment) - (Mentioned)
30. *Salat, Nicholas Kiptoo Korir v Independent Electoral and Boundaries Commission & 7 others* Petition 234 of 2014; [2015] eKLR; [2015] KESC 31 - (Distinguished)
31. *Shinyada v Judicial Service Commission* Petition E106 of 2020; [2021] KEELRC 5 (KLR) - (Mentioned)
32. *Shollei, Gladys Boss v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Followed)
33. *Sironka, Timothy Nchoe v Judicial Service Commission* Petition 20 of 2020; [2020] KEELRC 503 (KLR) - (Mentioned)
34. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Explained)
35. *Vehicle & Equipment Leasing Limited v Coca Cola Juices Kenya Limited Formerly t/a Beverage Services (K) Ltd* Civil Case 377 of 2016; [2018] KEHC 1828 (KLR) - (Mentioned)
36. *Wanderi, Martin & 106 others v Engineers Registration Board & 10 Others* Petition No 19 of 2015; [2018] eKLR; [2018] KESC 54 (KLR) (17 July 2018) (Judgment) - (Mentioned)

#### Texts

1. Geyh, CG., (Ed) (2006), *Rescuing Judicial Accountability from the Realm of Political Rhetoric* Bloomington: Indiana University Maurer School of Law
2. Mbobu, K., (Ed) (2011), *The Law and Practice of Evidence in Kenya* Nairobi: Law Africa Publishing (K) pg. 64
3. Public Service Commission (2016), *Discipline Manual for the Public Service* Nairobi: Government Printers
4. Public Service Commission (2016), *Human Resource Policies and Procedures Manual* Nairobi: Government Printers section K 3(4) p 150

#### Statutes

##### Kenya

1. Access to Information Act (cap 7M) section 9 - (Interpreted)
2. Constitution of Kenya, articles 2(4); 3(4); 10(2)(a)(b); 19(2); 20; 21; 22; 23; 25; 27(1); 28; 29(d)(f); 35; 41; 47; 50(1); 159; 160(1)(5); 163 (4) (a); 169(1)(5); 171(1)(2); 172; 232(c)(e)(f); 236(a)(b); 258; 260 - (Interpreted)



3. Court of Appeal Rules (cap 9 Sub Leg) In general - (Cited)
4. Employment Act (cap 226) sections 41, 44 - (Interpreted)
5. Evidence Act (cap 80) sections 17 - 24 - (Interpreted)
6. Fair Administrative Action Act (cap 7L) section 9 - (Interpreted)
7. Judicial Service Act (cap 8A) sections 32, 45; Schedule Third; rule 25 (1)-(11) - (Interpreted)
8. Magistrates' Courts Act (cap 10) In general - (Cited)
9. Public Officer Ethics Act (cap 185B) In general - (Cited)
10. Supreme Court Act, 2011 (cap 9B) In general - (Cited)
11. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 36(1) - (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

### **A. Introduction**

1. The appellant moved this court vide petition of appeal dated January 20, 2021 and filed on February 1, 2021. The same is filed as a matter of right pursuant to article 163(4)(a) of the Constitution, the Supreme Court Act and rule 36(1) of the Supreme Court Rules, 2020. The appellant is challenging the decision of the Court of Appeal delivered on December 18, 2020 on the interpretation and application of various provisions of the Constitution.

### **B. Background**

2. The appellant was a Principal Magistrate serving at the Mombasa Law Courts at the time of his dismissal. One of the files he handled was Mombasa CMCC No 974 of 2014 Issa Mganga Mwangunya & another v Macharia Karango & another in which he had reserved judgment for August 19, 2015. He delivered the judgment a day earlier than scheduled, being August 18, 2015 and in the presence of the defendant's counsel who emerged victorious. Counsel for the plaintiff in the case filed a formal complaint against the appellant through a letter dated August 25, 2015 addressed to the Resident Judge at Mombasa and copied to inter alia the Office of the Ombudsman. The appellant in his right of reply responded to the complaint through a letter dated September 21, 2015.
3. The Chief Justice (Rtd) Dr Willy Mutunga, through a letter dated November 16, 2015 instituted disciplinary proceedings against the appellant by interdicting him with immediate effect. Through the same letter, the Chief Justice forwarded two framed charges being: delivery of a decision a day earlier than scheduled without notifying one of the parties and absenteeism. He also annexed a brief statement of the allegations to the appellant.
4. The appellant then responded through a letter dated 30th November 2015 wherein he admitted to delivering the Judgment a day early on August 18, 2015. He termed it an honest mistake and/or oversight and stated that the same was not in any way geared at aiding one of the parties to the detriment of the other. On the charge of absenteeism, he gave a detailed account of his time at the station both on duty and off duty, as well as all his communication with both the Chief Magistrate and Resident Judge from the date of reporting to the station.
5. The respondent's Human Resource and Administration Committee (Disciplinary Committee) through a letter dated January 19, 2017 invited the appellant for an oral hearing scheduled for January 26, 2017, which was rescheduled to January 30, 2017. After the oral hearing, the respondent vide letter dated February 9, 2017, wrote to the appellant informing him that pursuant to their deliberations of



even date, its members had resolved to dismiss him with immediate effect on grounds of misconduct which had been proved on the first charge levelled against him.

### **i. The Employment and Labour Relations Court**

6. Petition No 116 of 2018 dated October 25, 2018 before the Employment and Labour Relations Court (ELRC) against the respondent.
7. The appellant contended that the interdiction letter lacked justification and was void for want of compliance with form and for suspending and violating his rights under the Constitution, the Employment Act, the Judicial Service Act and the Fair Administrative Action Act. Further, that he was condemned unheard against the rules of natural justice and the audi alteram partem rule adding that the Chief Justice failed to act in good faith by not hearing both sides before interdicting him. He asserted that the interdiction was summary in nature and was without notice, good reason or any due process safeguards as he was never given a chance to defend himself on the matter. In addition, he urged that there was no adherence to internal policy or the national values and principles of governance under article 10(2)(b) of the Constitution or the guiding principles of responsibilities of leadership under article 73 of the Constitution.
8. He further argued that he was not accorded a chance to cross-examine persons who gave adverse evidence against him as per sections 4(3) (f) and (4)(c) of the Fair Administrative Action Act. Further, that after the disciplinary hearing, the respondent refused to supply him with the proceedings and detailed report with reasons despite a demand note. He added that his right of access to information under article 35 of the Constitution and section 9 of the Access to Information Act was thus violated. He concluded that he was terminated based on his interdiction letter which was not a valid charge.
9. It was his further assertion that respondent had no jurisdiction to exercise judicial or administrative authority over judicial officers' sittings in court while rendering judgments. He thus contended that the respondent violated the doctrine of judicial independence under article 160(1) in dismissing him. Further, that the fifteen (15) months it took to hear his disciplinary case violated his right to have expeditious and efficient administrative action. He consequently prayed for inter alia setting aside of his interdiction and eventual dismissal, compensation in damages for violation of his rights, reinstatement and costs.
10. The court (Wasilwa J) framed three issues for determination: whether the appellant laid down his case for breach of his constitutional rights; whether the respondent breached any of the constitutional rights of the appellant as alleged; and whether the appellant was entitled to the remedies sought.
11. The court delivered its Judgment on April 30, 2019. On the first issue the court found that the appellant had clearly set out his case and cited the relevant law purportedly infringed upon by the respondent thereby meeting the requirement as set out in the cases of Mumo Matemu v Trusted Society of Human Rights Alliance (2013) eKLR and Anarita Karimi Njeru case (1999) KLR 154. The court based this finding on the fact that the appellant had filed his petition under articles 10, 19, 20, 21, 22, 23, 73, 160 (1), 5, 162(2)(a), 232, 258 and 260 of the Constitution. Further, that he alleged infringement of his rights under article 23(1), 41 and 47 of the Constitution. The court also noted that the appellant had pleaded that his interdiction was procedurally unfair for lack of compliance to internal due process as contemplated under section 41 and 44 of the Employment Act as well as section 32 and regulation 25 (1) to (11) of the third schedule of the Judicial Service Act respectively. The court also took cognizance of the fact that the appellant had alleged that he was not given notice and particulars before the summary interdiction and neither was he given a chance to be heard before his summary dismissal.



12. On the second issue, the court held that the appellant's rights under article 41 of the *Constitution* had not been infringed upon as he was served with charges dated November 16, 2015 signed by the Chief Justice, and afforded twenty-one (21) days to respond to the same. The court found that the appellant had complied with and responded to the charges as per his letter dated November 30, 2015 denying the said charges. The court noted that, from the verbatim recording of the proceedings, it appeared that the appellant not only knew the charges facing him but also had a chance to respond accordingly to all questions put to him and explain his own part of the case. The court consequently found that the disciplinary committee made its report on the disciplinary hearing to the entire Judicial Service Commission and recommended taking of disciplinary action against the appellant for gross misconduct on account of a Judgment he issued calculated to defeat the ends of justice. Wasilwa J. noted that the charge of habitual absenteeism was not proved and the appellant was acquitted in that respect.
13. On the third issue, the court found that the fifteen (15) months taken by the respondent breached the need to have an administrative process handled expeditiously. Wasilwa J further opined that a disciplinary process that took fifteen (15) months to handle was considered long, coupled with undue delay and painful to the employee who had to wait with uncertainty on the fate that awaited him.
14. The court having found no other breach of the *Constitution* other than that of the appellant's right to have an expeditious hearing infringed upon, thereby, went ahead to award the appellant damages for that breach to the tune of Kenya Shillings One Million (Ksh 1,000,000/-). The court further ordered the respondent to pay the costs of the petition.

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

15. Nairobi Civil Appeal No 305 of 2019, challenging part of the judgment that awarded the appellant the sum of Ksh 1,000,000/- as damages and costs. The respondent faulted the learned Judge for finding that the delay in the disciplinary proceedings was unreasonable, for awarding damages, and for awarding the appellant costs. The respondent prayed for setting aside of the Judgment of the trial court as well as setting aside of the damages and costs awarded to the appellant.
16. The appellant cross-appealed faulting the trial court for failing to consider all issues presented before it for determination, failing to consider the propriety of the charge, failing to consider the jurisdiction of the Chief Justice, and failing to find the respondent's actions were not in consonance with the *Constitution*, the *Judicial Service Act* and the *Fair Administrative Actions Act*. He further urged that the trial court failed to apply the presumption of good faith and accord him judicial immunity. He prayed for reinstatement and payment of all back salaries, enhancement of the damages and costs of the cross-appeal.
17. On the appeal by the respondent, the court determined that the only issue for determination was whether the delay in conducting the disciplinary proceedings was of such a character so as to attract compensation in damages and, if so, whether the sum of Kshs 1,000,000/- was justified.
18. From the cross-appeal the Court of Appeal identified four issues for determination: whether the learned judge failed or neglected to consider all issues for determination; whether natural justice was infringed for reading the ruling a day earlier; whether the respondent and the Chief Justice violated the rules of procedure set out in the 3rd schedule of the *Judicial Service Act* and thereby acted without jurisdiction; and who should have borne the costs
19. On the issue of delay in conducting the disciplinary proceedings, the Court of Appeal found that the trial court did not give consideration to the explanations given by the respondent and also failed to



make any mention of them in her analysis, even though she had partially made note of them in setting out the respondent's case. The Court of Appeal found that even though the appellant did not agree with the reasons given, he did not contest their factual basis thereby absolving the respondent from blame for its apparent tardiness and lassitude in dealing with his case.

20. Consequently, the court held that the trial court's conclusion that there was violation of the appellant's rights was untenable. The learned judges of appeal found that the reasons advanced by the respondent, that is, its meetings were capped at eight (8) per month by the Salaries and Remuneration Commission and that it was engaged in the priority exercise of hiring a new Chief Justice, were not unsubstantial and would, on a balance of probabilities, have provided a full answer to the complaint had the trial court considered them. The court further held that the appellant did not prove his case and was therefore not entitled to the compensation the trial court awarded him and thereby set it aside.
21. As to the adequacy or otherwise of the award of Ksh 1,000,000/-, the Court of Appeal found that the figure was without any legal justification. The court opined that the award of damages, though discretionary, was to be exercised judicially and judiciously on the basis of sound principle. It went on to find that without a reasoned basis for the award or reference to awards in similar cases for comparative purposes, the award could well be said to be ipso facto so inordinately high as to be a wholly erroneous estimate of the damage or harm done, even if it had been established.
22. On the cross-appeal, the court took note that the only issue the trial court did not consider was the appellant's contention that he was protected from disciplinary action on account of the doctrine of judicial immunity. The court noted that judicial independence invests with immunity, not every act of a judicial officer, but "the exercise of the judicial function itself," that is the procedural and substantive decision-making aspect of adjudication. The court was however not convinced that what the appellant was being disciplined for fell within the purview of judicial independence, thus found that nothing turned on the trial court's non-dealing with the issue in express terms.
23. On whether natural justice was infringed for reading the decision a day earlier than scheduled, the court stated that the appellant was not being disciplined for reading the decision rather that he was being disciplined for reading the decision a day earlier than scheduled and in the presence of only one party. The court noted that the appellant took issue with the fact that the charge he faced was that he "issued a ruling calculated to defeat the ends of natural justice". The court found what was determined by the respondent, was that the appellant's act was "deliberately calculated to subvert the cause of justice and give undue advantage to the winning party." Hence the use of 'natural justice' instead of 'justice' did not alter what was intended or in any way prejudice the appellant or deprive the respondent of jurisdiction to discipline him.
24. On the third issue of whether the respondent and the Chief Justice violated the rules of procedure, the court agreed with the finding of the trial court that there was compliance with the procedural safeguards for fairness in the process. Further affirming the trial court's findings, the court held that the report by the respondent's disciplinary committee was comprehensive enough to show that the appellant's case was given due and proper consideration. The court went on to agree with trial court that the appellant's dismissal had been justified and that it gave aspects of the case due and careful consideration warranting fair reasons for the dismissal.
25. As to the final issue of costs, the court having found that the appellant was not entitled to the Ksh 1,000,000/- award, the implication was that the appellant's petition had failed in its entirety. It therefore found that the order of awarding costs could not stand. In a decision delivered on December 18, 2020, the Court of Appeal (Musinga, Kiage & Gatembu JJA) allowed the appeal by the respondent setting aside the award of Kshs 1,000,000/- made in favour of the appellant as well as the order on costs.



The cross appeal by the appellant failed in its entirety and was thereby dismissed. The court directed that each party bears its own costs of the appeal.

### iii. Before the Supreme Court

26. Aggrieved by the judgment and orders of the Court of Appeal, the appellant has preferred the present petition of appeal, whereby he has set out twenty-eight (28) grounds of appeal. We understand the appellant's grounds as arguing that the Court of Appeal erred in law and in fact by:

- i. Failing to find that the appellant's right to expeditious and efficient administrative action and due process pursuant to article 47 as well as article 172(1)(a) respectively of the Constitution, and section 4 of the Fair Administrative Actions Act could not be limited or deprived by excuses by the respondent except as provided by article 24 of the Constitution.
- ii. Neglecting key submissions and evidence that in delaying in the appellant's disciplinary proceedings, the respondent breached its own internal policy to conduct and conclude disciplinary proceedings within six (6) months, thereby failing to assess and award damages for the violation of fundamental rights under article 47 of the Constitution.
- iii. Violating the appellant's right to fair trial and disciplinary proceedings with due process pursuant to article 25(c) and 236 respectively by adopting new points introduced by the respondent without leave of the court and conducting merit review using the materials and reports not furnished to the appellant in contravention of the 3<sup>rd</sup> schedule of the Judicial Service Act, article 47 and the Fair Administrative Actions Act.
- iv. Failing to fully address itself on the issues it framed from the appellant's cross appeal.
- v. Breaching article 163(7) of the Constitution by disregarding binding Supreme Court precedents placed before it in Bellevue Development Company Ltd v Francis Gikonyo & 3 Others (2020) eKLR and Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamud & 3 others (Ahmed Ali Mukta Interested Party) [2019] eKLR dissent by Lenaola SC.
- vi. Misapplying article 160(1) and (5) of the Constitution by finding that the doctrine of judicial immunity only applied to judgments and rulings and not all judicial actions by judges and magistrates, whether collectively or singly, carried out in good faith. Further finding that the defence of judicial immunity when not raised during the disciplinary proceedings could not be raised in subsequent court proceedings.
- vii. Breaching the principle of natural justice by shifting the burden of proof from the respondent to the appellant; sitting without evidence of the complaint; failing to allow the appellant to cross-examine witnesses; and allowing the respondent to sit as witness, prosecutor, judge, jury and appeal panel.
- viii. Failing to find that the charge was defective for lacking particulars, evidence and failing to point out law under the judicial code of conduct, statute or Constitution.

27. The appellant seeks the following reliefs:

- i. The petition herein be allowed;
- ii. The judgment of the Court of Appeal subject of this appeal dated and delivered on December 18, 2020 by the Honourable Kiage, Gatembu and Musinga be and is hereby set aside in its entirety;



- iii. A declaration be and is hereby issued, that the respondent violated the constitutional and fundamental rights of the petitioner under article 2(4), 10(2)(a), 47(1), 160(1)(5), 172(1)(c), 236(a) and the provision of the Judicial Service Act, the Fair Administrative Action Act and the Human Resource policies of the respondent. The impugned proceedings are therefore unconstitutional, unlawful and unfair – null and void ab initio and are hereby quashed.
  - iv. The judgment and award of the ELRC of Ksh 1,000,000 together with costs be partly affirmed and or enhanced as the court may deem just and efficient for violation of the respondents fundamental rights and freedoms is reinstated, and the order of refusal of reinstatement be set aside and back salaries be reinstated.
  - v. That the petitioner do resume his duties without break and or loss in salary and allowances since his interdiction.
  - vi. Cost of the ELRC, Court of Appeal and the SCORK be awarded to the petitioner.
  - vii. The honourable court be pleased to grant such further orders as may be just and appropriate to grant.
- 28 The petition of appeal is opposed by way of preliminary objection dated February 2, 2021 wherein the respondent contends that the same does not raise any matters of constitutional interpretation or application under article 163(4)(a) of the Constitution. The respondent thereby seeks for the same to be struck out and costs be borne by the appellant. The respondent has also filed a replying affidavit sworn on February 24, 2021 by Hon Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the respondent.

### **C. The Parties Respective Cases**

29. The matter came up before us for highlighting of submissions where learned counsel, Mr Okemwa appeared for the appellant while Ms Saina appeared for the respondent. The court directed parties to argue both the preliminary objection (PO) and main appeal. The court further directed that it would proceed to make a determination on the PO first and if the court found it sustainable would down their tools. In the event the court found the PO not sustainable would proceed with the appeal on merit.

#### **(a) The Appellant’s written submissions**

30. The appellant relies on his written submissions in opposition to the preliminary objection dated March 22, 2021, written submissions in support of his petition of appeal dated March 22, 2021 and written submissions in response to the respondent’s submissions dated March 27, 2021.

#### **Is the Preliminary Objection Merited?**

31. The appellant submits that a preliminary objection may be raised only on a pure point of law and when the pleadings are not in contest. He points out that the respondent filed a replying affidavit containing argumentative facts of the matter and prematurely argues the merits of the case.
32. He also submits that it is fundamental to the rule of law that parties are bound by their pleadings citing the case of Raila Amolo Odinga & another v IEBC & 2 others, Presidential Election Petition No 1 of 2017 [2017] eKLR. He argues that the preliminary objection defies the Respondent’s own pleadings, issues and submissions in the ELRC as well as its appeal before the Court of Appeal. He points out that in the affidavit by Hon Anne Amadi before the ELRC sworn on January 28, 2019 at various paragraphs 7, 24, 25, 26 and 86, the respondent pleads various provisions of the Constitution being articles 10, 159((2)(a), (b), (c), 160(1)(5), 171 (1)(c) and 232. He therefore contends that the



respondent cannot run away from its pleadings before the superior courts, as the same raised issues of constitutional interpretation and application.

- 33 He further argues that the preliminary objection is an abuse of court process, lacks any merit and is only meant to avoid judicial scrutiny while demanding accountability from others. He contends that his submissions are focused on at least three main constitutional articles, that is article 172(1) as read with the *Judicial Service Act*, article 47 as read with the *Fair Administrative Actions Act* and article 160(1)(5), adding that these provisions were extensively pleaded and explained by both himself and the respondent. He contends that both the ELRC and the Court of Appeal in their analysis and Judgments extensively identified and analyzed the same constitutional provisions. He concludes that the respondent's objection is not sincere and is meant to continue to frustrate him, cause anxiety and tire him from the course of justice.

### Submissions in support of Appeal

34. The appellant has addressed the court on several issues. The first is whether the Court of Appeal was within its jurisdiction to conduct a merit review. Relying on the decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others, Application No 2 of 2011* [2012] eKLR he submits that in judicial review, the jurisdiction of the courts does not allow merit review of facts but rather fairness, legality and the process taken. He submits that the Court of Appeal *suo motu* without jurisdiction embarked on merit review and unearthed "evidence of misconduct" in supporting the respondent's finding that the appellant did not take remedial measures. He argues that this finding lacked merit and offends the law in that once he, as a court, delivered judgment he was //functus officio thus the judgment was final and could not be revoked subject to any right of appeal. He further argues that the appellate court failed to take into account that no human right, fundamental freedom or natural justice is contravened by a judgment or ruling when there are options for review or appeal.
35. Secondly, he accuses the Court of Appeal of mutilating the charge by altering the same from making reference to "natural justice" to only referring to "justice". He contends that this was unlawful as the function of drawing of charges is the exclusive mandate of the Chief Justice under rule 25(1) of the third schedule of the *Judicial Service Act*. Further, that strict construction of the text of the charge is required. To buttress this point, he relies on the decisions in *Judicial Service Commission v Gilbert Mwangi Njuguna & Another* (2019) eKLR and *Francis Wambugu Mureithi v Owino Paul Ongili Babu & 2 Others* (2019) eKLR. He argues that the twin pillars of natural justice, audi alteram partem, the duty to give persons affected by a decision reasonable opportunity to represent their case and nemo iudex in causa sua, the duty to reach a decision untainted by bias, were not applied in the case and the charge was thus a non- starter. Further, that natural justice is also a legal question subject of an application by a court, which the respondent herein lacked. He adds that there was no particulars of ill will, bad faith or illegality in order to impeach his judicial actions or a presumption of good faith for his answer.
36. Thirdly, he alleges that the Court of Appeal in its Judgment offended article 163(7) of the Constitution when it misapplied binding precedents of the Supreme Court thus breaching his right to fair trial under article 25(c). He cites three cases in particular. The first *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamud & 3 others, Petition No 7 of 2018* [2019] eKLR which he contends that the Court of Appeal breached by declining to make a determination on issues he had raised regarding violation of rules 23(1) and 25(5) of the third schedule of the *Judicial Service Act* and section 4(3) of the *Fair Administrative Actions Act*. He adds that the Court of Appeal also disregarded the Supreme Court's finding in the case of *Francis Karioko Muruatetu & another v Republic, Petition No 15 and 16 of 2015* [2017] eKLR



that in “regards to access to justice and fair hearing, courts should ensure that all persons are able to ventilate their disputes”.

- 37 The second decision, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Petition 23 of 2014 [2015] eKLR, he urges that the Court of Appeal failed to apply its principles to find that the respondent cannot direct how and when judicial officers can sit to perform judicial duties. The third decision, *Bellevue Development Company Ltd v Francis Gikonyo & 3 others*, Petition 42 of 2018 [2020] eKLR he argues was delivered on May 15, 2020, just in time before he filed his SubmissionS and before the Court of Appeal in June 2020 and before the Court of Appeal rendered its final decision on December 18, 2020. He contends that the Court of Appeal ignored the directive on the need for credible evidence to impeach judicial immunity and further that judicial immunity extends to administrative actions.
38. Fourthly, he argues that the respondent’s actions were not in strict conformity with article 172(1)(c) and rule 25(1) of the third schedule the Judicial Service Act. Relying on the decision in the *Speaker of the National Assembly v The Hon James Njenga Karume* Civil Application No Nai 92 of 1992 [1992] eKLR, he asserts that the respondent, as a creature of the *Constitution* and statute, must comply with the constitutional command under article 172(1)(c) and the *Judicial Service Act*, otherwise its decisions are void by dictate of article 2(4) of the *Constitution*. Further, he submits that the charges were based on allegations; were defective for failing to cite with specificity the section creating the offence, particulars and evidence relied on; and were thus fatally incompetent. He alleges that the respondent breached rule 25(2) and (3) of the third schedule of the *Judicial Service Act* as the Chief Justice did not carry out an inquiry neither did he have any evidence apart from his answers. He points out that that there was no evidence of a full meeting by the respondent to consider his charge and to refer the matter to a sub-panel, being the disciplinary committee.
- 39 Fifthly, he further alleges breach of natural justice as the disciplinary committee played the role of presenting the charges, cross-examining, hearing the matter, producing evidence, making a determination and acting as an appellate panel. He contends that this was despite the respondent having the safeguard of employing prosecutors pursuant to rule 25(6). He contends that the Respondent having found no evidence of misconduct on the reading of the judgment on August 18, 2015, unprocedurally and unlawfully embarked on issues of August 19, 2015 which were outside the charge. He asserts that this was contrary to rule 25(8) of the Third Schedule of the *Judicial Service Act* which required any new issues that arose in the course of his hearing, be remitted to the Chief Justice for the matter to start afresh. He also submits that the disciplinary committee’s determination was not signed and that this was akin to an unsigned judgment which is void. He submits that the mandatory procedures under the *Judicial Service Act* were uncontested at the Court of Appeal. He therefore argues that they cannot be termed as new arguments before the Supreme Court.
40. Sixthly, on judicial immunity, he faults the Court of Appeal for two things. First, for finding that since he did not raise the defence before the disciplinary committee, he was therefore precluded from raising it anywhere else. He argues, judicial immunity being anchored in the Constitution and being a jurisdictional issue, is immutable and can be raised at any time, even on appeal. Secondly, for finding that judicial immunity only applied to the contents of rulings and judgments and not the act of reading such ruling or judgment. He submits that this goes against the Supreme Court decision in the *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* (*supra*) where the court found that all judicial and administrative acts enjoy judicial immunity. He contends that writing, transmitting and reading a judgment in open court at the seat of justice is an exercise of judicial function and in judicial capacity under articles 159 and 169 of the *Constitution*, as well as the *Magistrates Court Act*. He contends that pursuant to article 160(5) of the *Constitution*, there is a presumption of good faith attached to



performance of judicial functions. It is thus his contention that he accrued no personal liability from carrying out his actions in his capacity as the court. He argues that though article 172(1)(c) demands accountability, a judicial officer cannot wave article 160(1)(5) and snub summons from the respondent. It is his contention however, that in honouring such summons nothing precludes a judicial officer from explaining their actions as being a bonafide error or omission thereby attaching absolute immunity. He adds that this immunity attaches to subsequent court proceedings. It is his assertion that the onus of proving otherwise through the production of credible evidence lies with the respondent. The appellant however contends that this does not apply to the offences spelt out in the Judiciary Code of Conduct or the Judiciary Human Resource Policy Manual.

41. He submits that the presumption of good faith is analogous to the presumption of innocence which is a fundamental component of a fair trial in the criminal process. He argues that it is doubtful that the framers of the Constitution intended that suspected criminals would enjoy higher constitutional protections and preferential treatment than judicial officers. He submits that honest mistakes must be insulated from discipline and punishment due to the presumption that the judicial officer is competent in the absence of evidence to the contrary. He adds that unless one shows dishonesty and malice, a judicial officer is protected by that shield. He relies on the treatise *Judicial Accountability from the Realm of Political Rhetoric* where Charles G Geyh states that there must be extrinsic evidence of malice. He further argues that this was just a single issue that arose in his twelve (12) years of service.
42. He asserts that the respondent failed to adduce evidence of an investigation of the court diary or interviewing counsel from both sides or any form of evidence apart from him delivering the judgment a day earlier than scheduled. He submits that it was unfair to sanction him without evidence. He adds that as a judicial officer he was not infallible while making hundreds of decisions under pressure, where in less than five (5) months the team in the Mombasa station had cleared a backlog of about 4000 cases under the “Justice at Last Mile” Initiative. He urges that pleadings, answers in cross examination or submissions did not amount to evidence or defense. He argues that it was not enough for the respondent to allege that they afforded him a fair hearing in compliance with articles 47(1) and 5(1) by calling him and asking him questions. He asserts that the respondent needed to follow the law and procedure of fair hearing and furnish evidence as well as allow him cross-examination of witnesses.
43. He argues that the lack of evidence failed to meet the required standard of proof in impeaching judicial conduct which is ‘clear and convincing evidence,’ and which is higher than the standard of proof in civil law of preponderance of probability but lower than the criminal standard of beyond reasonable doubt. He urges that even if he did not enjoy judicial immunity, his actions were protected under article 160(1) and (5) of the *Constitution*.
44. Finally, he faults the respondent for failing to afford him expedient and efficient administrative action thereby failing in its duty as prescribed by article 172(1) of the *Constitution* and section 3 of the *Judicial Service Act*. He urges this court to affirm the finding by the ELRC that the delay frustrated his career and caused him and his family serious economic distress, anguish and despair. He argues that the Court of Appeal was wrongly sympathetic to the respondent’s excuses for the delay. He points out that the Court of Appeal in a similar matter *Judicial Service Commission v Daniel Ochenja* [2020] eKLR had rejected such excuses and even awarded the magistrate in that appeal Ksh 2,000,000/- for the delay in determining his matter.
45. He urges this court to uphold a legion of landmark cases where the courts have consistently held that a delay of one year to initiate and conclude a disciplinary case is inordinately high; constitutes a breach of statutory procedure; and is considered unfair labour practices contrary to article 41. Further, that such delays result in dignity being infringed. He relies on the decisions in *Dennis Moturi Anyoka vs Kenya Revenue Authority & 2 others* [2015] eKLR, *Timothy Nchoe Sironka v Judicial Service Commission*



[2020] eKLR, *Grace A Omolo v Attorney General & 3 others* [2012] eKLR and *Martin Wanderi & 106 others v Engineers Registration Board & 10 others SC Petition No 19 of 2015* [2018] eKLR

46. On the compensation, he argues that the award of Ksh 1,000,000 was reasonable and within range of comparable awards. He urges that it should even be enhanced to Ksh 5,000,000 taking into account lost promotions; earning capacity for the period; multiple gross violations of *the Constitution* and statute; *Judicial Service Commission v Daniel Ochenja* (*supra*), the Court of Appeal awarded Ksh 2,000,000 for a delay of twenty-six (26) months, while the Supreme Court in the case of *Martin Wanderi v Engineers Registration Board* (*supra*) awarded Ksh 300,000. He argues that he should not be faulted for the trial court failing to consider comparable precedents despite him having provided the same.
47. He urges that he should be reinstated as removal from a constitutional office is a grave and final decision that affects livelihoods, reputations, impinges characters and lowers esteem as well as erodes confidence in public bodies. He further urges that the court should not shy away from reinstating public employees who are victims of unlawful and unconstitutional conduct in their positions provided that the person is ready and willing to resume their employment. He asserts that reinstatement is one of the available remedies under article 23 and further that the Respondent has not shown that reinstatement is not practical. He also urges that he should be awarded costs of the Employment and Labour Relations Court, Court of Appeal and the present appeal before this court.

#### **(b) The Respondent's Case**

48. The respondent relies on its written submissions in support of its preliminary objection dated February 22, 2021 and written submissions in opposition to the petition of appeal dated March 26, 2021.
49. The respondent in its submissions in support of its preliminary objection reiterates the contents of the same as well as contents of its replying affidavit. In the replying affidavit, the respondent elaborates its preliminary objection that not all appeals emanating from the Court of Appeal are subject to appeal before this court. It asserts that the test under article 163(4)(a) is whether the appeal raises a question of constitutional interpretation or application. It is deponed that it is not enough for a party to cite constitutional provisions in abstract so as to invoke this court's jurisdiction. The respondent adds that the present appeal touches on article 25(c), 41 and 47 of the Constitution which are enforcement of rights questions and not issues on the interpretation or application of the Constitution. The respondent goes on to argue that it can be gleaned from the decision of the trial court delivered on 30th April 2019, that there were no issues on the interpretation and application of the Constitution. Further, that the conclusions that led to the ultimate decision of the Court of Appeal cannot be said to have taken a trajectory of constitutional interpretation or application.
50. On whether the Court of Appeal misapplied and misinterpreted article 47 of the *Constitution*, the respondent submits that, given its wide mandate, it made efforts to ensure that its processes were as expeditious as reasonably possible. It is further submitted that the *Judicial Service Act* does not prescribe a time for the hearing and conclusion of disciplinary cases, therefore what constitutes unreasonable delay is a question of fact and depends on the activity and all the surrounding circumstances. It reiterates that it is a part time commission with majority of its members engaged in gainful employment in other state/public officers as well as others in private entities where they are also expected to discharge official functions. The respondent urges that the decision of the Court of Appeal was proper as it considered the totality of the circumstances that resulted in the delay and was therefore correct in finding that the appellant was not entitled to compensation of Ksh 1,000,000.
51. On the alleged violation of the appellant's right to fair trial enshrined under article 25(c) of the *Constitution* as well as rule 25 of the third schedule of the *Judicial Service Act*, the respondent argues that



- the appellant was granted full opportunity to be heard and present his case. The respondent submits that the appellant was informed at all times of the nature and extent of the allegations that were levelled against him. Further, that it accorded him an opportunity to respond to the contents of the letter of interdiction, charges and statement of allegations. In addition, it is urged that he was duly notified of the disciplinary hearing and he appeared before the disciplinary committee. It is contended that even the trial court found that the appellant was not condemned unheard nor his rights under article 41 of the Constitution infringed upon. The respondent adds that the Court of Appeal on its own assessment also concurred that there was compliance with the procedural safeguards for fairness in the disciplinary process.
52. On the issue whether judicial immunity applies to proceedings before the respondent and whether presumption of good faith was impeached, the respondent submits that the issue was not fully engaged from the facts. The respondent contends that if it was, the appellant would have raised it as preliminary point when he first appeared before the disciplinary committee. It is asserted that that the appellant formulated these issues at this stage, consequently, it was not subjected to judicial determination by both the trial court and the appellate court, whether directly or otherwise. Accordingly, the respondent urges that the issue is not for determination by this court. The respondent contends that the appellant was not facing disciplinary action on account of the contents of the judgment, in which case the doctrine of immunity would apply. It is submitted that what the appellant was charged for, was his decision to deliver a judgment a day earlier from the scheduled date and in the presence of the victorious party, with the prejudiced party absent. It is further asserted that this was sufficiently proved as an act of gross misconduct.
53. The respondent further contends that this being an appeal, the appellant has a duty to point to the errors of law in the judgment of the Court of Appeal with clarity and precision. It relies on the decision in *Nasra Ibrahim Ibrin v Independent Electoral and Boundaries Commission & 2 others SC Petition No 19 of 2018* [2018] eKLR where this court held that the focal point of the petitioner’s grievances should be directed at specific portions of the Court of Appeal judgment. It is submitted that since the trial court and appellate court did not make a determination on these issues, they are not matters within the parameters set out in article 163(4)(a) of the Constitution. In relying on this court’s decision in *Bellevue Development Company Limited v Francis Gikonyo & 3 others (supra)* the respondent contends that, in any case, the impugned actions of the appellant were ‘devoid of good faith’ and thereby judicial immunity was not available to the appellant.
54. On the allegation that the Court of Appeal carried out merit review, the respondent contends that the same is misleading and misconceived. It is submitted that the Court of Appeal analysed the Report of the Disciplinary Committee and agreed with the findings of the trial court that the appellant’s dismissal was justified. It is urged that in reevaluating and reassessing the Hansard Report and making its own conclusions, the Court of Appeal was acting within its mandate under rule 29(1) of the *Court of Appeal Rules, 2010* as the first appellate court. The respondent adds that the appellant was not facing charges for the contents of his decision, therefore the respondent could not be accused of carrying out a merit review of the same. Further, that it is for the aforesaid reasons that the present case is distinguishable from *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Petition 23 of 2014 (2015) eKLR and *Apollo Mboya v Judicial Service Commission & another; Justice Kalpana Rawal & 4 others (interested parties)* HC Petition No 204 of 2016 (2020) eKLR.
55. On the alleged violation of article 163(7) and 172(1)(c) the respondent contends that the same is unmerited. The respondent submits that the appellant’s complaints of breach of article 163(7) and 172(1)(c) are founded on disagreeing with the Court of Appeal’s application of the law to the facts. Further, that a mere displeasure and dissatisfaction with the same is not sufficient reason to overturn a



- decision. It is contended this cannot be an exercise of an appellate jurisdiction by this court as there is no consideration of a lower court. Further, that any such consideration would be asking the Supreme Court to assume original supervisory jurisdiction over the Court of Appeal, which is contrary to article 163 of the Constitution. Further that it is akin to asking this court to expand its jurisdiction through judicial craft and innovation. The respondent relies on the case of *Daniel Kimani Njibia v Francis Mwangi Kimani & another, SC Application No 3 of 2014* [2015] eKLR to argue that this court has consistently held that it does not have the jurisdiction to entertain an application challenging the exercise of discretion of the Court of Appeal.
56. The respondent concludes that the Court of Appeal did not err in dismissing the appellant's cross-appeal in its entirety. Further that the respondent's appeal succeeded on its merits due to the fact that the Court of Appeal properly appreciated and re-evaluated the facts and clearly found that the trial court's decision to award damages of Ksh 1,000,000 was bad in fact and in law. It prays that the petition of appeal be dismissed in its entirety with costs to the respondent.
57. In brief rejoinder, the appellant filed his further affidavit sworn on March 1, 2021 where he reiterated his grounds and arguments as contained in the petition of appeal as well as his submissions. He further emphasizes that the excuses by the respondent for the delay are not justified. He adds that though the *Judicial Service Act* may not have timelines on conclusion of disciplinary processes, there are internal policies which raise legitimate expectation and have been utilized by the courts. He cites the examples of decisions by Majanja J. in the case of *Grace Omolo (supra)* and Wasilwa J in the case of *Dennis Moturi Anyoja (supra)*. He further contends that the Court of Appeal in the *Judicial Service Commission v Daniel Ochenja case (supra)* held that the respondent's activities cannot take precedence over the appellant's rights under article 47.
58. He agrees that the Supreme Court cannot interfere with the Court of Appeal's exercise of jurisdiction as held in the case of *Daniel Kimani Njibia Vs. Francis Mwangi Kimani & Another (supra)*. He however points out that it was not demonstrated how the Court of Appeal exercised its jurisdiction to excuse gross violation of *the Constitution* and statute. He also points out that the case of *Daniel Kimani Njibia v Francis Mwangi Kimani & another (supra)* is distinguishable as it was an appeal filed under article 163(4)(b) as a matter of general public importance and the present appeal has been filed as matter of right under article 163(4)(a). Further, that the Court of Appeal cannot purport to exercise its discretion where article 163(7) is concerned, as decisions from the Supreme Court are absolutely binding. Further, that there is no discretion in ignoring rules of statutory procedures which must be strictly applied. The appellant adds that there cannot be any excuses or discretion in denying application of a person's rights apart from the limitations set out under article 24 or contravention of any law.
59. He emphasizes that for the court to find that a judicial action was devoid of good faith, the Supreme Court in the *Bellevue Development Company Ltd v Francis Gikonyo & 3 others (supra)* found that there must be credible evidence. He reiterates that judicial actions that attract judicial immunity include reading judgments as a core function of the court as well as court orders, conversion of cash bail or acting on a file as duty judge as happened in the cases of *Judicial Service Commission v Daniel Ochenja (supra)*, *Kalpana H Rawal & 2 others v Judicial Service Commission & 2 Others* (2016) eKLR and *Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another* (2019) eKLR.
60. On the allegation of introducing new issues before this court the appellant submits that the issues of immunity and good faith pursuant to article 160(1) and were both identified and determined by the trial court and the Court of Appeal. He concludes that therefore these are not new issues being raised before this court.



## D. Issues for Determination

61. The following issues emerge for the court's determination:
- i. Whether this court is clothed with the requisite jurisdiction to determine this appeal;
  - ii. Whether the appellant was afforded the right to fair labour practices, administrative actions and fair hearing under articles 41, 47 and 50 of *the Constitution*;
  - iii. Whether the appellant's impugned action was protected by judicial immunity and presumption of good faith pursuant to article 160(1) and (5);
  - iv. Whether the fifteen (15) months it took the respondent to conduct the appellant's disciplinary proceedings was unreasonable and if so, whether the appellant is entitled to compensation;
  - v. Who shall bear the costs of the appeal?

### i. The question of jurisdiction

62. On the issue of jurisdiction, we stated in *Aviation & Allied Workers Union Kenya v. Kenya Airways & Others*; SC Application No 50 of 2014, [2015] eKLR that where a court's jurisdiction is objected to by any party to the proceedings, such an objection must be dealt with as a preliminary issue, before the meritorious determination of any cause. We must therefore evaluate whether the present petition of appeal meets the set jurisdiction principles under article 163(4)(a) of the *Constitution* which provides as follows:

“Appeals shall lie from the Court of Appeal to the Supreme Court;

- a. as of right in any case involving the interpretation or application of this Constitution; and
- b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)” [emphasis added].

63. This court is replete with jurisprudence on what amounts to a matter warranting appeal to this Court under article 163(4)(a) of the *Constitution*. In the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012 [2012] eKLR we delineated this Court's jurisdiction under article 163(4)(a) of the *Constitution* as follows:

“...This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the *Constitution* can be entertained by the Supreme Court. The only other instance when an appeal may lie to the Supreme Court is one contemplated under article 163(4)(b) of the *Constitution*. Towards, this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application.

- (28) The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the *Constitution*. In other words, an appellant must be challenging the interpretation or application of the *Constitution* which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting



the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4(a)).”

64. As we have stated before, the warning signaled by this court in the above decision is that the court should be wary of litigants who merely cite constitutional provisions in their pleadings with the intention of finally seeking an appeal to the Supreme Court, even when their case has nothing to do with constitutional interpretation and/or application. In determining whether it has jurisdiction, the court should keenly evaluate the Court of Appeal decision to determine, whether in disposing of the matter, there were elements of constitutional interpretation and/or application.
65. In Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others; SC Petition No 10 of 2013, [2014] eKLR, we were emphatic that a matter that directly involves an interpretation and/or application of a particular provision of the Constitution will constitute an appeal as of right under article 163(4)(a) of the Constitution. Subsequently, in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Application No 5 of 2014 [2014] eKLR, in determining whether we had jurisdiction under article 163(4)(a) of the Constitution we stated that:
- “The import of the court’s statement in the *Ngoge* case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.”
66. So then, does Petition No 3 of 2021, raise issues of constitutional interpretation and application. If so, have the same been canvassed in the superior courts and progressed through the normal appellate mechanism so as to reach this court by way of an appeal? We have extensively examined the record and it is apparent that the petition before the Employment and Labour Relations Court was brought under several articles of the Constitution namely articles 10, 19, 20, 21, 22, 23, 73, 160 (1), 5, 162(2) (a), 232, 258 and 260 of the Constitution. We also take note that the appellant alleged infringement of his rights under article 47, 41 and 23(1) of the Constitution, which guarantees every person the right to an administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair; right to fair labour practices; and the right of redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights respectively. Also, among the reliefs sought was a declaratory order that the respondent’s administrative decision, infringed the appellant’s rights as laid down under articles 2(4), 3(4), 10(2)(a)(b), 19(2), 21(1), 27(1), 28, 29(d)(f), 35, 41, 47, 73(1) (a)(i)(b)(d), 160(1)(5), 232(c)(e)(f), 236(a)(b), 171(1)(2), 172, section 41 of the Employment Act, the Fair Administrative Action Act and section 32 as read with regulation 25 of the third schedule of the Judicial Service Act.
67. The trial court interpreted and applied the provisions of articles 41, 47 and 172 of the Constitution as well as section 41 of the Employment Act, the Fair Administrative Action Act and section 32 as read with regulation 25 of the third schedule of the Judicial Service Act. The Court of Appeal interpreted and applied the provisions of article 47 of the Constitution as coupled with section 4(1), (2) and (3) of the Fair Administrative Action Act, as well as articles 159, 160, 169 and 172 of the Constitution.
68. Looking at the petition of appeal before us and from the above summary, we find little difficulty in concluding that the issues before the Employment and Labour Relations Court as well as the Court of Appeal involved the interpretation and application of the Constitution. In view of the reasons tendered,



we find that this court has jurisdiction in respect of this appeal. Having so found, we have no option but to dismiss the preliminary objection.

**ii. Was the Appellant afforded the right to fair labour practices and administrative actions under Article 41 and 47?**

69. The appellant contends *inter alia* that his rights to fair hearing and fair administrative action were breached when; the burden of proof was shifted from the respondent to him; when the respondent sat without evidence of the complaint; the respondent failed to allow the appellant to cross examine witnesses; and the respondent sat as a witness, prosecutor, judge and jury and appeal panel. Further, that the charge against him was defective for lacking particulars, evidence and failing to point out the law under the Judicial Code of Conduct, statute or the Constitution.

70. The right to fair hearing is enshrined under article 50(1) of the Constitution which states that; ‘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’. Article 25 of the Constitution stipulates that certain freedoms are so fundamental that they cannot be limited, despite any other provision of the Constitution. The right to a fair trial is one of these fundamental, non-derogable rights under the Constitution. This right is applicable to both judicial and administrative cases. This court in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Petition 7 of 2018 consolidated with Petition 9 of 2018 [2018] eKLR elaborated on the right to fair hearing. We held as follows:

[86] We are also minded that the interests of justice dictate that this court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the appellant’s right to a fair election as well as the right of the voters to non-interference with their already cast votes, the will of the people, so to speak. It is on this breath that we must consider whether the appellant’s right to a fair hearing and trial will be infringed upon by the denial of admission of new evidence. Q

(87) In the circumstances, was there a reasonable opportunity of hearing given to the appellant? In this regard, what then are the norms or components of a fair hearing? *In the matter of Indru Ramchand Bharvani & others v Union of India & others*, 1988 SCR Supl (1) 544, 555, the Supreme Court of India, found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v Collector of Customs, Calcutta & others*, AIR 1962 Cal 460). It is important to restate that a literal reading of the provisions of the Constitution of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context” [emphasis added.]

71. More recently, this court in the case of Gladys Boss Shollei v Judicial Service Commission & another Petition 34 of 2014 [2022] eKLR we highlighted the fact that due to the respondent being a major employer in one arm of the government, and further due to having the question of applicable administrative procedure arising, we saw it fit to lay down principles to guide the courts in considering matters concerning disciplinary proceedings before the respondent. These guiding principles are as follows:

- 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 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 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.
  - h. An employee shall be accorded opportunity to attend proceedings, in person or in the company of an expert of his/her choice.
  - i. 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.
72. We may not apply the principles herein as respondent heard and determined the appellant’s case before we pronounced these guiding principles. We however reiterate them as an aide-mémoire to the respondent, given its unique position as a major employer in one arm of the government, and whose disciplinary procedures are yet again called to question.
73. Turning back to the present dispute, the appellant framed five main questions for the court to answer: whether the Court of Appeal conducted merit review; whether there was violation of article 163(7), and the precedence of this honorable court; three, whether the administrative action was in strict conformity with article 172(1)(c) and *Judicial Service Act*; whether there was a violation of article 160(5); and whether there was a fair hearing and envisioned by article 47 and article 51
74. On whether the Court of Appeal conducted merit review, the appellant’s submission was specifically that in Judicial Review, the jurisdiction of the courts does not allow merit review of facts but rather fairness, legality and the process taken. We note that what was filed before the Employment and Labour Relations Court was not a judicial review application filed pursuant to section 9 of the *Fair Administrative Actions Act* which provides as follows:

“9. Procedure for judicial review

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*.”

Rather, the appellant filed a substantive suit by an employee against his employer challenging the terms of the dismissal. Further, we acknowledge that as a first appellate court, the role of the Court of Appeal, pursuant to rule 29 of the *Court of Appeal Rules*, 2010, was to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not



have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

75. This was buttressed by the Court of Appeal more recently in the case of *Peter M Kariuki v Attorney General* [2014] eKLR where it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

The Court of Appeal was therefore well within its mandate to carry out merit review of the appellant's case.

76. Another point of contention for the appellant was that the administrative action was not in strict conformity with article 172(1)(c) and *Judicial Service Act* and that he did not receive a fair hearing as envisioned by article 47 and article 51.

77. Article 172(1)(c) provides that one of the respondent's functions 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.” It is not contested that the *Judicial Service Act* No. 1 of 2011 is the statute that was enacted by Parliament pursuant to article 172 of the *Constitution*. The Act in its preamble, provides that it is:

An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.”

78. The appointment, discipline and removal of judicial officers and staff is governed by section 32 of the *Judicial Service Act* together with the third schedule of the Act. The appellant first took issue with the fact that the Chief Justice did not carry out an investigation before framing charges and interdicting the appellant. In this regard, we take note of rules 15, 16(1) and 25(1) of the third schedule of the *Judicial Service Act* which provide as follows:

“15. Delegation of powers



1. The following disciplinary powers vested in the Commission are delegated to the Chief Justice—
  - a. the power to interdict an officer under paragraph 17;
  - b. the power to suspend an officer under paragraph 18;
  - c. the power to administer a severe reprimand or a reprimand to an officer.
2. The Chief Justice, when exercising the powers delegated by this schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.

16. Interdiction

- (1) If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.

.....

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" [emphasis added].

79. Contrary to submission by the appellant, the Chief Justice is not required to carry out an investigation. Rather, as rule 25 provides, 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." Further rules 25(2) and (3) of the third schedule provide as follows:

- "(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.”

80. 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. These punishments include dismissal; stoppage of increment of pay; withholding of increment; deferment of increment; severe reprimand and reprimand; recovery of the cost or part of the cost of any loss or breakage caused by default or negligence. This is pursuant to rule 25(9), (10), and (11) of the Third Schedule of the Judicial Service Act which provide as follows

- “(9) The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include—
- a. a statement whether in the Committee or Panel’s judgement the charge or charges against the officer have been proved and the reasons therefor;
  - b. details of any matters which, in the Committee or Panel’s opinion, aggravate or alleviate the gravity of the case; and
  - 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.”

81. Save for the right of appeal, it these overlapping functions that the appellant calls to question for breaching the principle of *nemo iudex in causa sua*, the duty to reach a decision untainted by bias. This principle is entrenched in our Constitution, as the right to fair hearing and the right to fair administrative action, pursuant to articles 50(1) and 47(1) of the *Constitution*. In the case of *Alnashir Popat & 7 others v Capital Markets Authority*, SC Petition 29 of 2019 (2020) eKLR, we were confronted with the constitutionality of the overlapping role of the Capital Markets Authority in regards to the principle of *nemo iudex in causa sua*. In this case, we pronounced ourselves that a critical exception to this principle is where the overlap of functions is a creation of statute and as long as the constitutionality of the statute is not in issue. We found that one of the justifications that legislatures have for allowing overlapping of functions, which in normal judicial proceedings would be kept separate, is to achieve efficiency when such a body has to undertake several activities, both in administrative and adjudicative capacities.
82. The appellant has not called to question the constitutionality of section 32 of the *Judicial Service Act* or the Third Schedule of the Act, on the respondent’s functions of disciplining and removing judicial officers. Nevertheless, we must still balance our interpretation of the articles 47(1) and 50(1) against the multiple roles the respondent plays in interdicting, investigating and deciding whether a judicial officer is guilty of misconduct, and if found to be guilty, what punishment to mete out. In the case of *Alnashir Popat & 7 others v Capital Markets Authority* (*supra*) we found that in order to avoid running afoul the *nemo iudex in causa sua* principle, a statutory body must comply with the requirements of impartiality and independence under article 50(1) and 47 of *the Constitution*. We reiterate that the mere overlap of roles by a statutory body carrying out quasi- judicial functions is not in itself contrary to the principle of *nemo iudex in causa sua*. We however emphasis that statutory bodies must always apply and adhere to the requirements of impartiality and independence in carrying out its quasi- judicial duties.
83. Consequently, contrary to submissions by the appellant, the respondent, through rule 25 of the Third Schedule of the *Judicial Service Act*, avoids a situation of being the accuser, the investigator, the judge and the appellate body, all rolled into one. Through rule 25, the respondent ensures that different actors take on the different roles: the Chief Justice frames the charges, a Committee or Panel of the respondent carries out the investigation, the respondent then plays the role of Judge, and finally an aggrieved party has a right of appeal to the Judicial system, either by way of judicial review pursuant to section 9 of the *Fair Administrative Act* or substantive suit to the Employment and Labour Relations Court. In this way, there are inbuilt safeguards that ensure a judicial officer or staff has their right to fair administrative actions, and right to fair trial observed throughout the entire disciplinary process.
84. It is this process that the appellant underwent, whereby the Chief Justice framed his charges as he interdicted him. He was granted reasonable opportunity to respond to the allegations facing him and provide a reply. He then faced disciplinary proceedings before a Committee of the respondent, where it is evident that he was granted ample time to prepare and was well aware of the nature and extent of allegations he was facing.

Further, from the Hansard report, the appellant was granted ample opportunity to explain the circumstances occasioning the mistake he readily admitted to. Thereafter, the Committee then prepared a report which it submitted to the respondent, and after deliberation the respondent arrived at the decision to dismiss him.



85. Another point of contention is that the appellant's right to fair trial was infringed when the complainant did not avail herself before the Respondent and he was thus not able to cross examine his accuser. He further alleges that there was no evidence at all before the respondent and his answers to the respondent were never controverted at all.
86. The events of the disciplinary proceedings are contained in the Hansard Report and minutes attached the Record of Appeal appearing from page 234 to 264. The appellant while appearing before the respondent's Disciplinary Committee admitted to the mistake of delivering a judgment a day earlier that he had informed the parties and only in the presence of one party, who was the victorious party. He termed it an honest mistake on his part and due to the workload. In the Hansard, it is evident that the Appellant was put to task over the circumstances occasioning the mistake and how the same could have occurred. After the oral hearing, the respondent's Committee prepared a Report dated February 5, 2017 and submitted it to the respondent. The same is found from page 265 to 272 of the Record of Appeal.
87. The appellant has throughout admitted to his mistake. The law relating to 'admissions' is found in sections 17-24 of the *Evidence Act*. Section 17 defines an "admission" as:
- "...a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned."
88. Black's Law Dictionary, defines an admission as:
- "Any statement or assertion made by a party to a case and offered against that party; an acknowledgment that facts are true."
89. Admissions in criminal matters are treated very differently from civil matters. In the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar* (Interested Party) SC. Petition 7 of 2018 [2019] eKLR we attempted to distinguish the difference between confessions and admissions in criminal matters whereby we concluded pursuant to section 25A of the *Evidence Act*, cap 80, they are both inadmissible unless made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice. We further found that:
- "It can be surmised therefore, that a confession is a direct acknowledgement of guilt on the part of the accused while an admission is a statement by the accused, direct or implied, of facts pertinent to the issue which, in connection with other facts, tends to prove his guilt, but which, of itself, is insufficient to found a conviction."
90. However, admissions are treated differently in civil matters, whereby pursuant to order 13 rule 2 of the Civil Procedure Rules, 2020, judgment may be entered on the strength of an admission. Order 13 rule 2 provides as follows:
- "Judgment on admissions [order 13, rule 2]
- Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other



question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

91. The question has further been the subject of litigation, beginning with the landmark decision in the case of *Choitram v Nazari* [1984] KLR 237 that spelt the guiding principles of judgment on admission. Madan J stated:

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, eg in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself to the jungle of words even when faced with a plaint such as the one in this case. To analyze pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in our courts.....”

92. In the case of *Cassam v Sachania* [1982] eKLR 191, the court noted;

“Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where admission is clear and unequivocal... Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision.....the Judge’s discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment.”

93. In *Vehicle & Equipment Leasing Ltd v Coca Cola Juices Ky Ltd, formerly T/A Beverage Services (K) Ltd* HCCC No 377 of 2016 [2018] eKLR following the case of *Ideal Ceramics v Suraya Property Group Ltd* HCCC 408 of 2016 (unreported), Onguto J held:

“The law on summary judgment vide judgment on admission is now relatively clear. The purpose of the law laid out under order 13 of CPR is to ensure that a party whose entitlement is evidently due and admitted does not wait for determination by a court of a non-existent question. It is undesirable to litigate when there is no question or issue of fact or law. The summary process in this regard assists in ensuring that unnecessary costs and delays are not invited.”

94. We must mention that section 24 of the *Evidence Act* provides that; “Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter



contained.” Kyalo Mbobu in *‘The Law and Practice of Evidence in Kenya’* Law Africa Publishing (K) pg 64, explained the effect of admissions under section 24 of the *Evidence Act* when he stated:

According to section 24 of the *Evidence Act*, admissions are not conclusive proof of matters that they admit but they could operate as estoppels. Critics wonder why parliament enacted that provisions knowing that under the common law, admissions constitute conclusive proof of the admitted facts. But essentially, even though they are not conclusive they amount to estoppel. The idea of estoppel in admission is to prevent a person to assert things that are at variance with things they admitted before.”

95. Appellant in the present case has all along admitted to making the mistake of delivery of Judgment a day earlier than scheduled and in the presence of only one party who happened to the victorious party. The circumstances of the appellant’s error were interrogated fairly substantively by the Committee of the respondent. The appellant, due to his own admission, is precluded from blaming the respondent for not calling witnesses who accused him or disallowing him from cross-examining them as the same proved unnecessary. Once he admitted to the error, all that was left was for him to convince the Respondent that the circumstances surrounding the mistake were defensible. Further, since admitting to his mistake, when required to explain to circumstances of the mistake, it was not an unfair shifting of the burden of proof. Pursuant to section 112 of the *Evidence Act*, in civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon that party. In the present case, the circumstances of how the mistake occurred was within the appellant’s knowledge and control as the judicial officer charged with hearing parties and rendering decisions on disputes.
96. We arrive at the conclusion that the respondent followed the elaborate laid out procedure set out in article 172, section 32 of the *Judicial Service Act* and the rules under the third schedule of the *Judicial Service Act*. We also find that appellant was afforded an opportunity for hearing and that the same was reasonable. Consequently, it is our finding that the appellant was afforded the right to fair hearing, fair labour practices and fair administrative actions pursuant to articles 50, 41 and 47. We thus conclude that on this limb, the appellant’s appeal fails.

### **iii. Whether the Appellant’s impugned action was protected by judicial immunity and presumption of good faith pursuant to Article 160 (1) and (5)**

97. The Appellant submits that when article 160(5) is read with section 45 of the *Judicial Service Act*, there is constitutional and statutory presumption of good faith in all judicial activities. He argues that his error of reading a judgement a day earlier than scheduled was an honest mistake, consequently, the presumption of good faith was never impeached. He contends that it could only be impeached by evidence. He further submits that the finding of the Court of Appeal went against the Supreme Court decision in the *Bellevue Development Company case* (*supra*) where the court found that all judicial acts and administrative acts enjoy judicial immunity. He contends that writing, transmitting and reading a judgment in open court at the seat of justice in an exercise of judicial function and in judicial capacity under articles 159 and 169 and the *Magistrates Court Act*. He asserts that pursuant to article 160(5) of the *Constitution* there is a presumption of good faith attached hence his actions in his capacity as the court would have no personal liability accrue.
98. Appellant further submits that it was doubtful that the framers of the *Constitution* intended that suspected criminals would enjoy higher constitutional protections and preferential treatment than judicial officers. It is argued that honest mistakes must be insulated from discipline and punishment due to the presumption that the judicial officer is competent in the absence of evidence to the contrary.



Further, that unless one shows dishonesty and malice, a judicial officer is protected by that shield. He asserted that this was just a single issue that arose in his 12 years of service.

99. The respondent on the other hand relies on our decision in the *Bellevue Development case* (*supra*) to argue that judicial officers enjoy absolute immunity if they act in good faith and if the actions of the officer are not intentional and plainly to prevent litigants from enjoying the constitutional and statutory rights. The respondent adds that the court interrogated the definition of bad faith and concluded that it included malicious, fraudulent, dishonest or perverse conduct, concluding that the conduct of a judge who acts malafides or unlawfully may trigger proceedings before the respondent and this may ultimately lead to removal thus the need for extreme caution while enjoying judicial immunity. The respondent contends that the impugned actions of the appellant were ‘devoid of good faith’ and thereby judicial immunity was not available to the appellant.

100. Article 160 (5) of the *Constitution* provides as follows:

“ Article 160. Independence of the Judiciary

.....

(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

101. Further the appellant relies on article 236 which protects public officers from victimisation. The article provides as follows:

“ 236. Protection of public officers

A public officer shall not be—

- a. victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
- b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

102. Our finding in the decision of *Bellevue Development* case requires restating. We found that Judicial immunity ‘is meant to provide protection to judicial officers from third parties’ interference, influence or obstruction. Judicial immunity is also necessary to protect the reputation and perception of the Judiciary, to maintain the trust of the public and ensure transparency and accountability. A judge acting in his official judicial capacity thus enjoys immunity from liability for judicial acts performed within the scope of his or her jurisdiction’ [par 65]. We further found that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction, and further that the protection or immunity of a judge also goes into administrative acts. We concluded that Judges and judicial officers remain unquestionably immune as long as they do not take actions that intentionally and plainly prevent litigants from enjoying their constitutional and statutory rights.



103. However, in fortifying judicial immunity, we did not leave litigants or anyone aggrieved by the decision or actions of judicial officers without a remedy. We held as follows:

“(75) Fraud is a serious quasi-criminal imputation. A judge whose conduct is “fraudulent, dishonest or perverse”, is a disgrace to the cause of justice. A judge’s act of bad faith undermines his or her integrity and fidelity to the judicial oath of office. Under our law, the remedy for a litigant making allegations of fraud, dishonesty and/or perversity lies, not in a suit against such a judge but in a petition to the Judicial Service Commission for removal from office under article 168 of the *Constitution*. That article has an elaborate procedure which entitles both a complaining party and the subject Judge the opportunity, both at the Commission and in a tribunal set up under article 168(5) thereof, to a fair hearing. A suit directly against a judge for alleged misconduct or misbehavior was never, in our view, an expectation of the drafters of the *Constitution*. .....

(77) ..... But the conduct of a judge who acts mala fides or unlawfully may thus trigger proceedings before the Judicial Service Commission and may ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity.”

104. The implication of our decision is that while a party aggrieved by a judicial officer’s decision or action may not sue them in their personal capacity, in either criminal or civil proceedings, they are not without recourse. Aggrieved parties may institute proceedings before the respondent seeking removal of Judges and Judicial officers. Which was the case herein. The appellant was not protected by judicial immunity in the circumstances of this case, as the complainant triggered proceedings for the appellant’s removal when they lodged their complaint with the Ombudsman.

105. Further, the appellant faulted the Court of Appeal for finding that since he did not raise the defence before the respondent’s sub-panel, he was therefore precluded from raising it anywhere else. He argued, judicial immunity being anchored in the *Constitution* and being a jurisdictional issue is immutable and can be raised at any time, even on appeal. On this issue, we find we cannot fault the Court of Appeal. It a long-held practice that parties are precluded from arguing their cases piecemeal. They must present the entirety of their case at the first instances to allow the courts, or administrative bodies in this case, to make a full and final determination of all pertinent issues relevant to a case. On this issue, we are persuaded by the decision of the Court of Appeal in *Pop In (Kenya) Ltd & 3 others vs Habib Bank AG Zurich* (1990] KLR 609 where the court held that:

But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of res judicata is the judgment of Wigram VC in *Henderson v Henderson* (1843) Hare 00, 115, where the judge says:

‘Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their



case. The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time’.”.

106. In the present case, the appellant should have used every defence in his arsenal at the first instance, being while he was before the Committee of the respondent defending himself. When he failed to do so, he was precluded from raising preliminary arguments thereafter, more so on appeal to the Court of Appeal.
107. It is our conclusion and finding that the appellant’s actions though protected by judicial immunity pursuant to article 160(1) and (5) in regards to criminal and civil proceedings, were not immunized from proceedings seeking his removal. We therefore find that the proceedings before the respondent were lawful and the determination, following due process, to remove him were well within the confines of the Constitution. Consequently, on this ground as well, the appellant’s case fails

**iv. Whether the fifteen (15) months it took the Respondent to conduct the Appellant’s disciplinary proceedings was unreasonable and if so, whether the Appellant is entitled to compensation.**

108. The appellant faults the respondent for failing to afford him expedient and efficient administrative action thereby failing in its duty as prescribed by article 172(1) and section 3 of the *Judicial Service Act*. He urges this court to affirm the finding by the trial that the delay frustrated his career and caused him and his family serious economic distress, anguish and despair. He argues that the Court of Appeal was wrongly sympathetic to the respondent’s excuses for the delay. He points out that the Court of Appeal in a similar matter *Judicial Service Commission v Daniel Ochenja* [2020] eKLR had rejected such excuses and even awarded the magistrate in that appeal Ksh 2 million for the delay in determining his matter.
109. He urges this court to uphold a legion of landmark cases where the courts have consistently held that a delay of one year to initiate and conclude a disciplinary case is inordinately high. Further, that it constitutes a breach of statutory procedure and is considered an unfair labour practice contrary to article 41. On the compensation, he urges that the award of Ksh 1,000,000/- was reasonable and within range of comparable awards and should even be enhanced to Ksh 5,000,000/- taking into account lost promotions and earning capacity for the period, multiple gross violations of the Constitution and statute and that he did not contribute to the dismissal. He points us to the case of *Judicial Service Commission v Daniel Ochenja* (*supra*), where the Court of Appeal awarded Ksh.2,000,000/- for a delay of 26 months. He also points us to our decision in *Martin Wanderi v Engineers Registration Board* (*supra*) where we awarded Ksh 200,000/- plus interest to each petitioner for a delay of approximately five years.
110. The respondent on the other hand submitted that, given its wide mandate, it made efforts to ensure that its processes were as expeditious as reasonable possible. It reiterates that it is a part time commission with majority of its members engaged in gainful employment in other state/public officers and others in private entities where they are also expected to discharge functions. It is further submitted that the *Judicial Service Act* does not prescribe a time for the hearing and conclusion of disciplinary cases, therefore it is a question of the fact and depends on the activity and all the surrounding circumstances. The respondent urges that the decision of the Court of Appeal was proper as it considered the totality of the circumstances that resulted in the delay and was therefore correct in finding that the appellant was not entitled to compensation of Ksh 1,000,000/-.



111. As correctly pointed out by the appellant, the Court of Appeal in the case of *Judicial Service Commission v Daniel Ochenja* (supra) (Sichale, J Mohammed & Kantai, JJA) rejected the respondent’s reasons submitted to explain a delay of 26 months. These are the same reasons that the respondent relies on the present case, and which the Court of Appeal, though by a different bench (Musinga, Kiage & Gatembu, JJA), accepted as reasonable.
112. We did not address this in our decision of *Gladys Shollei v Judicial Service Commission* (supra).
113. The *Judicial Service Act* does not prescribe a time within which the respondent must hear and determine disciplinary cases. Contrary to submission by the appellant, the Judiciary’s Human Resource Policies and Procedures Manual also does not specify a time period for conclusion of disciplinary cases.
114. There are other decisions concerning the respondent’s timelines in handling disciplinary cases. In the case of *Timothy Nchoe Sironka v Judicial Service Commission* [2020] eKLR Wasilwa J found a delay of fifteen (15) months to be unreasonable. In the case of *Shinyada v Judicial Service Commission* (Petition E106 of 2020) [2021] KEELRC 5 (KLR) (Employment and Labour) (26 November 2021) (Judgment) Rika J adjudged a delay of 19 months as not unreasonable and further that it did not result in a significant breach of fair procedure, under the *Judicial Service Act*, the *Fair Administrative Action Act* and the *Employment Act*. He held as follows:

“The court is persuaded that delay was in the circumstances, not unreasonable. The respondent demonstrated there were external and internal factors, beyond its control, militating against a timeous disposal of the complaints against the petitioner. The record indicates, she was granted a hearing as soon as these impediments receded. Delay on its own, cannot in the view of the court, be interpreted as an abridgment of the petitioner’s article 47 rights. It would serve the respondent well however, to relook at its policy on the reasonable period it is likely to take, in hearing and expeditiously disposing of disciplinary cases. There are many cases against the respondent, brought by Judicial Servants, coming before this court, where delay is always shown to be present.”

115. In comparison to other branches of government and other government institutions there have decisions in that regard. In *Grace A Omolo v Attorney General & 3 others* Petition No 252/2011 [2012] eKLR Majanja J, then faced with a case of delay of one year, declared that failure to institute and commence disciplinary proceedings within a reasonable time infringed upon the petitioner’s rights under article 47 and went on to award Kshs 300,000/=. However, this case is distinguishable as the Public Service Commission in its *Human Resource Policies and Procedures Manual*, 2016 at section K 3(4) at page 150 and also in its *Discipline Manual for the Public Service*, 2016 in its General Provisions under part 4 (4.0.(i)) both provide that disciplinary cases must be finalized within 6 months. The provisions are identical and provide as follows:

“Disciplinary cases shall be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so the Authorized Officer shall report individual cases to the Public Service Commission explaining the reason for the delay.”

This is the standard upon which the court adjudged the delay.

116. In the case of *Dennis Moturi Anyoka v Kenya Revenue Authority & 2 others* Petition No 20 of 2013 [2015] eKLR the petitioner was placed under interdiction by the respondent for a period above the one prescribed by the law. Kenya Revenue Authority’s own discipline policy states as follows: “8.2.7- cases of interdiction will be determined within six months as much as may be possible.” The respondent



failed to conclude disciplinary inquiry and/or proceedings 2 years after their commencement. The court held that given the timeline of 6 months, a delay of an excess of three months or at most 6 more months would be acceptable but to extend proceedings for over 2 years is unreasonable and procedurally unfair and the respondent cannot be excused for their ineptitude.

117. The Parliamentary Service Commission in its Code of Conduct and Ethics, 2003 found under the Public Officer Ethics Act No 4 of 2003 does not provide for a timeline within which disciplinary cases must be finalized.
118. On what amounts to inordinate delay we persuaded by the finding in the case of Mwangi S Kimenyi v Attorney General & another (2014) eKLR where Gikonyo J held thus:

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. ”

119. 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. In the present dispute, there was a delay of 15 months from the date of interdiction to the day of hearing the appellant by the disciplinary Committee. The respondent explains this delay by submitting that it is a part time Commission with majority of its members engaged in gainful employment in other state/public officers and others in private entities where they are also expected to discharge functions. Further that that its meetings were capped at eight (8) per month by the Salaries and Remuneration Commission and that it was engaged in the priority exercise of hiring a new Chief Justice during the intervening period. We agree with the Court of Appeal, that the trial court in its decision failed to mention taking these circumstances into consideration when determining whether the delay was inordinate.
120. The appellant was interdicted with immediate effect *vide* letter dated November 16, 2015. During interdiction, the appellant was placed on half salary and was required to report to the Chief Registrar of the Judiciary every Friday, until further notice. The respondent through a letter dated 19<sup>th</sup> January 2017 invited the appellant for an oral disciplinary hearing to take place on January 26, 2017. This was however rescheduled to January 30, 2017. A period of 14<sup>th</sup> months had passed before he finally had his disciplinary hearing. He was then informed of the respondent’s decision to dismiss him *vide* letter dated February 9, 2017, on the 15<sup>th</sup> month since interdiction.
121. The reasons the respondent has put forward demonstrate both external and internal factors, some beyond its control. Further to our decision in Glady Boss Shollei Vs. Judicial Service Commission & another (*Supra*), we reiterate that the respondent is a major employer of one arm of the government managing numerous judges, judicial officers and judiciary staff stationed all over the country. A delay of fifteen (15) months, without knowing whether he would lose his job caused the appellant anguish, despair and economic distress having half his salary taken away due to being on interdiction. The appellant’s contention that this was his only issue in his twelve (12) years of service, was not contested by the respondent. The respondent as his employer was required to accord him disciplinary administrative action which was expeditious and efficient pursuant to article 47 of the Constitution. Indeed, the respondent owes this duty to each of its personnel, regardless of rank.



122. However, the reasons forwarded by the respondent are not insubstantial. Key among them was the exercise of recruiting a Chief Justice to head the Judiciary, which we take cognizance needed to rank exceedingly high on the respondent's obligations. The circumstances of the appellant's case are distinguishable from the cases of *Dennis Moturi Anyoka v Kenya Revenue Authority & 2 Others* (supra) and *Grace A. Omolo v Attorney General & 3 others* (supra) as the employers in those cases had set timelines as part of their disciplinary policies, unlike the respondent. The appellant's case can also be distinguished from *Judicial Service Commission v Daniel Ochenja* (supra) as the delay therein was 26 months, which was nearly a whole year more than in the appellant's case. It is for these reasons that we decline to find the delay in the appellant's case as unreasonable as to warrant an award of damages. We nevertheless note that due to having the question of its applicable administrative procedure questioned, the respondent should include a prescribed a timeline for disposal of disciplinary cases after relooking at its policy on the reasonable period it is likely to take, in hearing and expeditiously disposing of disciplinary cases.
123. On this limb of the appellant's appeal, we find that the respondent delayed in handling the appellant's disciplinary case, however in the totality of circumstances, we would not term the delay as unreasonable. We therefore decline to find that the appellant was entitled to compensation. Consequently, we find that the appellant's appeal fails in this regard.

**v. Who should bear the costs of the appeal**

124. As to the questions of costs in this matter, this court has previously settled the law on award of costs: that costs follow the event, and that the court has the discretion in awarding costs. This was our decision in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No 4 of 2012; [2014] eKLR.
125. Considering our findings above, and further considering that the Appellant had his judicial service spanning more than twelve (12) years come to abrupt end, we find it would be punitive to penalize him with costs. We thus find that there should be no order as to costs.

**E. Orders**

126. Consequent upon our findings above, the final orders are that:
1. The petition of appeal dated January 20, 2021 and filed on February 1, 2021 be and is hereby dismissed.
  2. Each party shall bear its own costs at the Employment and Labour Relations Court, Court of Appeal and the Supreme Court.
- Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY 2022.**

.....  
**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**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**

