IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 305 OF 2019

BETWEEN

JUDICIAL SERVICE COMMISSION.....APPELLANT

AND

DAVIS GITONGA KARANI.....RESPONDENT

(An appeal from part of the decision contained in the Judgment of

the Employment & Labour Relations Court at Nairobi (Wasilwa, J.)

***dated 30th April 2019* in ELRC Petition No. 116 of 2018)**

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JUDGMENT OF KIAGE, J.A.

By this appeal, the Judicial Service Commission (JSC) challenges that part of the judgment of the Employment & Labour Relations Court (Wasilwa, J.) rendered on 30th April 2019 that awarded the respondent **Davis Gitonga Karani** the sum of Kshs. 1,000,000 as damages and costs. The damages were on the basis that he was *"subject to a slow disciplinary action process taking 15 months"* by the JSC thereby infringing or breaching his right to an expeditious hearing.

The learned Judge dismissed as 'unsuitable' the respondent's claimed remedies for alleged violation of his labour rights. At the end of his 30-page petition as amended, the respondent had sought declarations that his purported summary interdiction and eventual dismissal was unconstitutional, unprocedural *ultra vires*, and void; that the actions and proceedings of the JSC offended the rules of natural justice, the Constitution and various of his constitutional rights; that he was a judicial officer subject only to the Constitution and the law and enjoyed absolute immunity and protection from personal adverse action for the lawful performance of his judicial functions; that he remained a lawful holder of the rank of Principal Magistrate entitled to unconditional reinstatement and that judicial officers do not serve at the pleasure of the Chief Justice or JSC and must be removed in accordance with due process, the Constitution and the law. He had also sought release of back salaries and arrears; 12 months gross salary and compensation for unlawful termination of employment; and an order for aggravated and exemplary damages as compensation.

The rejection of those claims is the subject of a cross-appeal filed by the respondent.

In its appeal, the JSC contends that the learned Judge erred

in law and fact by;

· Finding that the delay in conducting the disciplinary proceedings was unreasonable despite the uncontroverted evidence tendered by JSC.

· Awarding damages of Kshs. 1,000,000 for the alleged delay without rendering legal justification therefor.

· Awarding the respondent costs yet the remedies sought were unsuitable.

Its prayer to this Court is that the award of Kshs. 1,000,000as damages for alleged delay in the hearing and conclusion of the respondent's disciplinary proceedings and the order for costs be set

aside.

As we have said, the bulk of the respondent's claims were rejected by the learned Judge and, in a rather prolix 14-ground amended notice of cross-appeal he complains, in summary, that the learned Judge erred by;

· Failing to consider that the respondent was protected and immunized by the doctrine of judicial independence and immunity.

· Failing to appreciate that the JSC had no jurisdiction to determine the complaint about the respondent's 'honest mistake' of reading of a judgment a day earlier than scheduled.

· Failing to consider that breach of natural justice was not proved against the respondent.

· Failing to make a finding that the JSC committed fatal

'procedural improprieties' rendering its decision illegal, unconstitutional, null and void.

· Neglecting to consider that judicial acts invested judicial officers with immunity and could not be directed or controlled by the Chief Justice, the JSC or any other unity or person.

· Failing to find that the complaint had other avenues for correcting the respondent's errors.

· Failing to find that the JSC violated the Constitution and the respondent's fundamental rights and freedoms.

The respondent therefore seeks a slew of prayers including his reinstatement without loss of benefits, enhancement of the Kshs. 1,000,000 award, and a reproduction of the prayers contained in the petition before the court below.

The parties' advocates on record filed written submissions which they highlighted at the hearing for the appeal which was conducted virtually by virtue of the ongoing Covid-19 Pandemic.

For JSC, **Mr. Malenya** pointed out that the learned Judge dismissed the bulk of the respondent's petition having found that the grounds for his dismissal were sound and his termination valid.

He, however, faulted the learned Judge for finding that the 14 months it took to start and complete the disciplinary process amounted to inordinate delay. He blamed the learned Judge for failing to consider the reasons the JSC advanced for the delay, namely;

(i) It is a part-time commission which does not sit on a daily basis.

(ii) The Salaries and Remuneration Commission (SRC) capped its sittings to 8 per month.

(iii) It was involved in the recruitment of the Chief Justice which greatly hampered its operations.

According to counsel, had the learned Judge considered those reasons which were uncontroverted, she would have come to the conclusion that the delay was justified and was not inordinate in the circumstances, which include the JSC's very wide mandate.

Counsel cited in aid the case of ***REPUBLIC vs. KENYATTA UNIVERSITY & ANORTHER Ex PARTE WELLINGTON WAMBURU [2018] eKLR.*** He also referred to the persuasive decision of ***TELECOMMUNICATIONS RESEARCH & ACTION CENTRE vs. FCC F 2nd 70 (D.C. Civ. 1984)*** on the factors to consider when determining whether there has been inordinate delay. These include;

(i) The time taken to make the decision.

(ii) Whether Parliament has provided a statutory timetable.

(iii) Reasonability of the delay in the context of each case.

(iv) Effect of expediting the action in light of other activities of higher priority.

(v) The extent of prejudice occasioned by the delay.

(vi) Whether any impropriety lurks behind the lassitude.

It was counsel's urging that the 15 months taken was not inordinate in the circumstances of the case. Moreover, the Judicial Service Act, which is the applicable statute, does not prescribe a time for the hearing and conclusion of disciplinary cases. As a result, the Kshs. 1 million awarded for the delay was wholly unjustified and not based on evidence. Counsel drew our attention to ***KEMFRO AFRICA LTD t/a MERU EXPRESS SERVICES [1976]*** & ***ANOR vs. LUBIA & ANOR (No. 2) [1985] eKLR*** and invited us to interfere with the award as it proceeded from the learned Judge's capricious and whimsical exercise of her discretion in the matter. He also cited our decision in ***KIAMBAA DAIRY FARMERS CO - OPERATIVE SOCIETY LIMITED vs. RHODA NJERI & 3 OTHERS [2018] eKLR*** in which we emphasized the need for a trial court to give justification for the damages it awards.

Regarding costs, it was counsel's submission that as the respondent had failed in the substance of his petition, he was not entitled to costs as the same follow the event meaning the successful party gets the costs. He opined that the learned Judge was duty bound to offer justification for departing from that position and erred in not doing so. A passage from Richard

Kuloba's **Judicial Hints On Civil Procedure** 2nd Ed Nairobi; Law Africa 2011 p. 94 was referred to as were the cases of ***SUPERMARINE HANDLING SERVICES LTD vs. KENYA REVENUE AUTHORITY [2010] eKLR,*** and ***JOSEPH ODUOR ANODE vs. KENYA CROSS SOCIETY***, Nairobi HCCC 66 of 2009, which was approved of by the Supreme Court in ***JASBIR SINGH RAI & 3 OTHERS [2014] eKLR.***

On the cross-appeal, **Mr. Malenya** contended that it should fail since it was clear from the Hansard recording of the proceedings before JSC that the respondent was afforded an opportunity to defend himself. He was notified of the charges against him and was given a fair hearing.

We were urged to allow the appeal and to dismiss the cross-appeal with costs.

Opposing the appeal, **Mr. Okemwa,** the respondent's learned counsel posited that the constitutional requirement for expedited administrative action was violated as 15 months for proceedings to be concluded was certainty not efficient and expedient. To him, the explanation that he SRC had capped JSC's meetings to 8 per month was neither here nor there, and went on to suggest that its

motivation for more meetings was its members' remuneration and not service. Moreover, it still had a chance to prioritize and determine the respondent's cease in timely fashion but failed to do so. Referring to ***DANIEL MDANYI OCHENDA vs. JUDICIAL SERVICE COMMISSION [2019] eKLR,*** he contended that the disciplinary process of a judicial officer should not have been made dependent on other matters pending before the JSC.

He also countered JSC's argument that it was engaged in the recruitment of a new Chief Justice by contending that Mutunga, CJ. left office on 15th June 2016 and his replacement was in office on 3rd October 2016 meaning the process took just over 3 months and should not be an excuse for JSC's tardiness. The fact that JSC did not communicate with the respondent during that period showed, in counsel's view, that it was merely making excuses.

Regarding the damages awarded, counsel admitted, as he had to, that no submissions were made before the learned Judge on the issue, but went on to defend the Kshs. 1 million award as having been within the court's jurisdiction to issue an appropriate remedy under **Article 23** of the Constitution.

He urged us to dismiss the appeal.

Turning to the cross-appeal, **Mr. Okemwa** submitted that as JSC had not filed or made submissions thereon, it remains unanswered and should be considered as uncontested. As to the merits of the cross-appeal, he first faulted the learned Judge for failing to consider all issues presented before her for determination as she ought to have. For that proposition, he cited the decision of Lenaola, J. (as he then was) in ***MOHAMED ABDI MAHAMUD vs. AHMED ABDULLAHI MOHAMUD & 3 OTHERS, (AHMED ALI MUKTA INTERESTED PARTY) [2019] eKLR.*** Counsel in particular contended that the learned Judge failed to make a determination on whether the respondent's impugned act of reading a judgment a day before its scheduled delivery date amounted to a violation of natural justice.

Counsel next urged that the disciplinary process under the Judicial Service Act was not followed by JSC. He pointed to **Rule 25(5)** of the 3rd Schedule to that Act, which is couched in terms equivalent to **section 4** of the **Fair Administrative Act** that requires, *inter alia*, that the evidence in support of the charges against the person undergoing a disciplinary process be availed to him. In this case the complainant against the respondent did not testify for the truthfulness of his allegations to be tested by cross-examination and JSC failed to ensure there was full oral hearing considering that the respondent's career and reputation were at stake. References were made to ***NJUE NGAI vs. EPHANTUS NJIRU NGAI & ANOR [2016]eKLR***. ***POSTAL CORPORATION OF KENYA vs. ANDREW KITANUI [2019]eKLR***, and ***GEORGE KINGI BAMBA vs. NATIONAL POLICE SERVICE COMMISSION [2019]eKLR.***

Mr. Okemwa further submitted that whereas it was not contested that the respondent read the judgment a day earlier than scheduled, the learned Judge should have sought proof through evidence that such reading was calculated to defeat natural justice (sic) and not an honest mistake. He castigated JSC for proceeding without evidence and thus indulging in "infinite predispositions, interpretations, biases, speculations and absurdities" indicative of arbitrariness in dealing with the respondent's matter. And counsel cited our decision in ***BELLEVUE DEVELOPMENT COMPANY LTD vs. FRANCIS GIKONYO & 7 OTHERS [2018] eKLR*** in which we stated that there is a commonsensical presumption of good faith for a judge acting in a judicial capacity and exercising his usual discretion. He sought to extend that presumption to magistrates as well, which the respondent is.

Urging that there has to be credible evidence before a judicial officer can be accused of misconduct justifying dismissal, counsel pointed out that his client did offer a reasonable explanation that he read the subject judgment earlier than scheduled as an honest mistake that he made under pressure of work. He maintained that the respondent's explanation was uncontested, and no evidence was tendered to prove bad faith on his part. Moreover, the complainant was able to take a copy of the judgment the next, day, on which it had been scheduled for delivery, and so he did not suffer any prejudice.

Mr. Okemwa charged that JSC did not give a valid reason for dismissing the respondent, an act he described as *"harsh, disproportionate and unconscionable."* Further, it breached the strict rules of procedure that it was bound to follow being a quasi-judicial body, which therefore rendered its action unlawful. He urged us to uphold the cross appeal.

Making a reply to those submissions, **Mr. Malenya** reiterated the point that the respondent does not deny having read the subject judgment a day earlier than scheduled which, to him, amounted to gross misconduct. He posited that there was a presumption that the respondent acted in a manner that was partial in reading the judgment a day earlier and in the presence of the winning party only.

I have given due consideration to the record of appeal, the submissions for and against both it and the cross-appeal together with the authorities cited by counsel, cognizant that a first appeal proceeds by way of re-hearing where we subject all the material that was before the learned Judge to a fresh and exhaustive scrutiny before arriving at our own independent conclusions on the matters in dispute. We do pay due respect to the conclusions of the first instance court and will not lightly depart from them, but will not hesitate to do so if they were based on no evidence, or proceed from a misapprehension of the evidence, or the applicable law, or are vitiated by a consideration of matters that should not have been taken into account, or the opposite, which is a failure to consider a relevant matter or matters or, on a consideration of the case as a whole, the decision is plainly wrong and unsustainable. These are the principles we bear in mind where, as here, the first instance court did not take *viva voce* evidence and decided the case, as we must, on the basis of affidavits and documents filed and submissions made, without the added advantage of hearing and observing live testimony by witnesses.

Starting with the appeal by JSC, I think that the sole issue for our determination is whether the delay in conducting the disciplinary proceedings was of such a character as to attract compensation in damages and, if so, whether the sum of Kshs. 1,000,000 was justified. It is not disputed that the respondent was interdicted on 16.11.2015 and that he was dismissed at the end of the disciplinary process on 9.2.2017, which was one week shy of 15 months. The learned Judge in dealing with this issue found that this was the only one of the respondent's complaints that had merit, as follows;

"83. I do agree with the petitioner that a disciplinary process that takes 15 months to handle is long, coupled with undue delay and painful to the employee who has to wait with uncertainty on the date that awaits him.

84. This breaches the requirement of article 47 of the Constitution to have the administrative process handled expeditiously and in the evidence it turns out to be unfair as justice delayed is justice denied.

85. Other than this breach, under article 47 of the Constitution, I do not find any other breach of the petitioner's rights under the Constitution."

Now, it cannot be gainsaid that there is a constitutional and statutory command, expressed in terms too clear to admit successful disputation, that every person has the right to administrative action that is, among other things, expeditious and efficient. See **Article 47(1)** of the Constitution which is reproduced in **section 4(1)** of the **Fair Administrative Act**. An action or process is said to be expeditious when it is fast, quick, prompt, swift, rapid or speedy, which are synonyms of the term. There is a close connection between expeditious and efficient as seen from the Merriam Webster dictionary definition of the former as including the latter thus; *"marked with prompt efficiency."* And efficient in the context in which it is employed really denotes performing or functioning or proceeding in the best possible manner with the least waste of resources, including time.

From the very nature of those terms, it follows that, unless there are specified timelines, what is expeditious and efficient is a question of fact and depends on the activity, matter or proceeding. It is a matter to be determined by a reasonable weighing of all the surrounding circumstances while not losing sight of the principle of alacrity that is commanded and expected. So, in determining whether indeed there has been a breach of the rule of expedition, and a consideration whether indeed there has been unreasonable delay I would respectfully adapt the persuasive sentiments and checklist suggested by the American Court in ***TELECOMMUNCATIONS RESEARCH & ACTION CENTER vs. FCC*** (supra);

"In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus." The court then enumerated several factors, to consider when answering this question. These are-

(i) The time agencies take to make decisions must be governed by a "rule of reasons."

(ii) Where Parliament has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for his rule of reason.

(iii) Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.

(iv) The court should consider the effect of expediting delayed action of agency activities of a higher or competing priority.

(v) The court should also take into account the nature and extent of the interests prejudiced by delay, and,

(vi) The court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

It seems to me clear that the time taken in days and months is a crucial, and perhaps the most important, consideration in determining whether a process has been expeditious and efficient.

It is by no means the only one, and does not trump every other consideration. The matter should not be looked out as one of strict liability so that if the time elapsed on the face of it is long and inordinate the conclusion is reached that the right has been reached. All the surrounding circumstances must be taken into account and in particular the reasons given for the delay, if any, must be interrogated.

In this case JSC complains, and with ample justification from my consideration of the record and the judgment, that the learned Judge did not give any consideration to the reasons it proferred for the delay. Those reasons, which I have already stated earlier in the judgment, include that its commissioners work part-time, its meetings were capped to 8 per month by the SRC; and that it was engaged in the priority exercise of hiring a new Chief Justice. Even though the respondent does not agree that those reasons absolve the JSC from blame for its apparent tardiness and lassitude in dealing with the respondents' case, he does not contest their factual basis.

The learned Judge not only did not give consideration to the reasons and explanations given by JSC, she made absolutely no mention of them in her analysis even though she had made note of part of them in setting out JSC's case. It is also noteworthy that JSC had cited before the learned Judge, as before us, the case of ***UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS vs. NIC BANK LTD & ANOR*** (supra) which, she understood thus;

"The Court stated that inordinate delay differed from the case to case depending on the circumstances, subject matter, nature and explanation given in each case. That Courts should not take the word 'inordinate' in its dictionary meaning but in the sense of excessive as compared to normalcy."

I think, with respect, that the learned Judge's failure to consider the reasons advanced was a serious non-direction that tainted her exercise of discretion in that it consisted in a failure to consider relevant matters, which is a reversible error. Her conclusion that there was violation of the respondent's rights is therefore untenable, given that the reasons advanced by the JSC were not unsubstantial and would, on a balance of probabilities provide a full answer to the complaint had she considered them. I am of the firm persuasion, therefore, that taking all the circumstances into consideration, the respondent did not prove his case and was not entitled to the compensation the learned Judge awarded him. I would set it aside.

I need only add that even were the respondent entitled to compensation, and he was not, it behoved the learned Judge to state in her judgment the legal justification for the tidy sum of Kshs. 1,000,000 she awarded. As things stand, and I mean no disrespect by this, that figure was literally plucked from the air.

Such an approach to the award of damages, though they be in the discretion of the court, is clearly erroneous and amounts to abuse of discretion. The discretion the court has is a judicial one to be exercised judicially and judiciously on the basis of sound principle. I need only repeat what we said, though in the context of **section 49** of the Employment Act, in ***KIAMBAA DAIRY FARMERS CO-OPEATIVE SOCIETY LTD vs. RHODA NJERI & 3 OTHERS*** (supra) to show that the award of Kshs. 1,000,000 should not stand and I would set it aside as a matter of principle, for non-justification;

"Much as the trial court does have a discretion in the quantum of damages to award for unfair termination of employment, those statutory considerations constitute the guiding principles and parameters within which such discretion is to be exercised. It behooves a court to undertake a deliberate and visible-on-the- record consideration of the various matters. Absent evidence that the matters requiring consideration were so considered or, put another way, unless a proper basis is laid in the judgment, the trial court's decision lies exposed to the charge of being capricious and whimsical inviting our intervention and interference."

Moreover, I think that without a reasoned basis for the award, and without 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 had it been established.

Turning now to the cross-appeal, I think it is best that I deal with it in the sequence that the respondent's counsel have done in the written submissions. The first issue they raise is that the learned Judge failed or neglected to consider all issues for determination. I have perused the record and noted that the respondent proposed some six issues for determination in his written submissions while JSC proposed to some seven issues. There was a commonality in those issues and they all revolved around the lawfulness of the respondent's interdiction, process of discipline and the decision to terminate his services. I note that even though the learned Judge did not expressly make reference to the issues proposed by the parties, she identified the issues for determination as;

"1. Whether the Petitioner herein has laid down his case for breach of his constitutional right.

2. Whether the Respondents breached any of the constitutional rights of the petitioner as alleged.

3. Whether the Petitioner is entitled to the remedies sought."

I do not apprehend that a Judge is bound to adopt the issues for determination that the parties propose. It is enough that the Judge, in identifying the issues and in proceeding to address and determine them, ensures that the main matters in contention, and which are relevant to the determination of the dispute, get to be addressed and decided. I note from the record that in the analysis that follows the extraction of the issues, the learned Judge conducted an in-depth and exhaustive analysis of everything that transpired from the respondent's interdiction to his eventual dismissal and in the process made findings on whether he was condemned unheard; whether his case was properly investigated and dealt with in accordance with the Judicial Service Act; whether the Chief Justice abused his powers in interdicting the respondent; whether his rights under **Article 47** of the Constitution were infringed, and whether the remedies he sought were available to him.

I think, from a consideration of the record, that the learned Judge substantially did justice to the issues that were before her. The only issue that she did not address directly is the respondent's contention that he was protected from disciplinary action on account of the doctrine of judicial immunity. Even though this argument was made, I entertain serious doubts whether it was an issue fully engaged from the facts of the case. Indeed, had it been, nothing would have been easier than for the respondent to raise it as a preliminary point when he first appeared before JSC. Were it the case that the respondent was facing disciplinary action on account of the *contents* of his judgment, I have no doubt that judicial independence, which judicial immunity seeks to protect, would have been implicated. That was not so, however, and the investigation and eventual termination of the respondent was based on gross misconduct in the form of a ruling he delivered a day earlier, in the presence of the victorious party, and in the absence of the losing party, under circumstances alleged to have been indicative of a calculated move to defeat the ends of justice.

This Court has spoken firmly, consistently and unequivocally on the need to jealously guard judicial independence (see ***BELLEVUE DEVELOPMENT LTD vs. FRANCIS GIKONYO & 7 OTHERS*** (supra). I am quite clear in my mind that such independence invests with immunity, not every act of a judicial officer, but *"the exercise of the judicial function itself,"* i.e the procedural and substantive decision making aspect of adjudication." See ***JUSTICE KALPANA H. RAWAL vs. JUDICIAL SERVICE COMMISSION & 3 OTHERS [2016] eKLR*** (per Mutunga CJ and Ojwang JSC.) I am far from persuaded that what the respondent was being disciplined for fell within the purview of judicial independence, not just for not involving the decision making process, but for also being, in the entire circumstances of the case, arguability devoid of good faith.

I, therefore, think that nothing turns on the learned Judge's non-dealing with the issue in express terms since the real controversy lay in the other matters which she properly addressed.

The next issue the respondent addresses is whether natural justice was infringed for reading the ruling." The first thing to mention is that the respondent was not being disciplined for reading the ruling. It was rather for reading the ruling a day earlier than scheduled and in the presence of one party only. The respondent seems to make heavy weather of the fact that the charge he faced was that he *"issued a ruling calculated to defeat the ends of natural justice."* (sic), about which he launches into the meaning and application of

natural justice. I think, with respect, that what was determined by the JSC, as is clear from the findings of the Committee and the dismissal letter signed by Chief Justice Maraga on 9th February 2017, is that the respondent's act was *"deliberately calculated to subvert the cause of justice and give undue advantage to the winning party."*

I do not accept that use of 'natural justice' instead of 'justice' altered what was intended or in any way prejudice the respondent. I think that criticism that the learned Judge failed to appreciate the twin pillars of natural justice and so to hold that the charge against the respondent was defective, thus depriving the JSC of jurisdiction to discipline him is neither here nor there.

On the next issue flowing from the last, that the JSC 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, I am unable to discern much substance in it. The majority decision in the Supreme Court case of ***NICHOLAS KIPTOO ARAP SALAT vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2015] eKLR*** sought to be relied on is of no assistance, the circumstances being so clearly different and distinguishable.

The respondent's submissions have dwelt at length on the question of whether his disciplinary process was in conformity with the Constitution and statutory procedure, which he answers in the negative. He contends that **Rule 25(1)** of the 3rd Schedule to the Judicial Service Act as well as **Rule 25(4) 25(5)** and **25(6)** thereof were violated by non-investigation by the Chief Justice, issuance of telephone calls and *"short erratic notices"* which showed "*lack of seriousness*" on the part of the JSC, and an improper exclusion of attendance and cross-examination of the complainant. The respondent takes issue with the JSC's conclusion that his reading the ruling a day earlier was calculated to defeat the cause of justice which he termed as *mere speculation* thus arbitrary and that it was an exercise in futility for the JSC *"to engage in a mental/psychiatric assessment exercise"* to establish his fault. For this was quoted the old English case of ***GREENE vs. QUEEN [1468]*** in which Brian, CJ, quoted Cicero's quip that *"The thought of man is not triable, for the devil himself knows not the intendment of man."*

I think, with respect, that the criticism levelled against the learned Judge for allegedly not paying due attention to those matters is hardly justified. Having perused the Hansard recording of the JSC proceedings respecting the respondent's case, it appears quite plain that there was compliance with the procedural safeguards for fairness in the process. I am persuaded that the learned Judge was correct and had a sound basis for concluding thus on this pivotal aspect of the case; which I quote *in extenso*;

"72. The above regulations of the Judiciary Human Resource Policies and Procedure Manual provisions deal with the entire disciplinary process and does not relate to an event like interdiction in the process. That still leads me to the conclusion that that the actions of the Hon. Chief Justice were not unreasonable and unfair in the circumstances as submitted by the petitioner.

73. After the interdiction of the petitioner, he was also served with a charge containing the nature of the charges he was facing. The charges were also dated 16/11/2015 and were signed by the Chief Justice. The petitioner was given 21 days to respond to the said charges. He indeed responded as per his letter dated 30th November 2015 denying the said charges.

74. From 2015, the respondent never communicated to the petitioner until on the 19th January 2017 when he was issued with a letter inviting him to appear before Judicial Commission Disciplinary Committee for a disciplinary hearing on 26th January 2016 at 9.30 am (Appendix AA6). The letter seemed to have a typographic error and a correction was made vide a letter dated 26th January 2017 rescheduling the disciplinary hearing to 30/1/2017.

75. The respondent have provided the verbative recordings of these proceedings explaining what transpired during the disciplinary hearing. From the proceedings before Court (Appendix AA8), it appears, that the petitioner knew the charges facing him and had a chance to respond accordingly to all questions put to him and explain his own part of the case.

76. The petitioner had submitted that he was condemned unheard but I do not agree that he was not heard because the proceedings show he was heard and given an opportunity to respond to the charges against him which he did.

77. The disciplinary committee made its report on the disciplinary hearing to the entire Judicial Service Commission and recommended that disciplinary action should be taken against him for gross misconduct on account of a ruling he issued calculated to defeat ends of justice. The charge of habitual absenteeism was not proved and the petitioner acquitted against it.

78. From my reading of what transpired in the disciplinary hearing and the decision arrived at after the disciplinary hearing, I do not find it proper to conclude that the petitioner was condemned unheard nor his rights under article 41 of the Constitution infringed upon."

Given these findings, which are borne by the evidence, it would follow that there was ample justification for the JSC's action of dismissing the respondent. I think that the Report of the JSC Human Resource & Administration Committee on the respondent's case was comprehensive enough to show that the appellant's case was given due and proper consideration. I, like the learned Judge, do not find anything on the basis of which the conclusion drawn by that Committee, accepted and acted upon by the entire JSC as well as the Chief Justice, could be impeached. The findings were as follows;

· ***"The Committee noted that Hon. Karani admitted that he delivered the ruling on 18th August, 2015 a day before the scheduled date of 19th August, 2015.***

· ***There was no notice to the parties that the judgment would be delivered earlier than scheduled and therefore the presence of the defendant's lawyer in Court in whose favour the judgment was ruled was is suspicious.***

· ***The coincidence of the defendant's advocate being present in Court on the day when the magistrate happened to carry to the open court a file that was not scheduled for judgment on that day is equally suspicious and negates the defence that this was a honest mistake.***

· ***Assuming that it was true that the defendant prompted the magistrate about the judgment and that the magistrate had carried the file by mistake to court he should have noted that the judgment date was different and asked the defendant's lawyer to come on the scheduled date 19th August 2015.***

· ***The Committee noted that the magistrate did not take any remedial measures when he discovered on***

19th August that he had delivered the ruling a day

prior to the scheduled date. Ordinarily the magistrate should have called for the file and record what had happened and advise the parties o set aside the contested orders or cause the same to be set aside to avoid any party to serve prejudice. This particular matter it's the plaintiff who filed an application for set aside the said rule and the same was granted by another Magistrate. (Refer to pg 8 of the Hansard Report.)

· ***The reading of the judgment a day earlier was deliberately calculated to subvert the cause of justice and give undue advantage to the winning party."***

Once the learned Judge accepted those conclusions as well-founded, it was inevitable that she would find the respondent's dismissal to have been justified, and I would agree. That means, inevitably, that the respondent's complaint that the Judge erred in not considering that there were no valid and fair reasons to terminate the respondent" (sic) is not supportable from the record. It is apparent that the learned Judge gave this aspect of the case due and careful consideration and had a proper basis for concluding that valid and fair reasons did exist for the dismissal.

That finding necessarily disposes of the respondent's complaint that the learned Judge should have ordered his reinstatement. She could not. Nor can we. The same fate befalls the respondent's claim for enhancement of the damages.

Regarding costs, I note that the learned Judge, even after dismissing the bulk of the respondent's petition, nevertheless ordered JSC to pay the costs of the petition. JSC has appealed against that order but the respondent considers himself entitled to costs not only before the court below, but for the appeal and cross appeal as well.

As costs follow the event, now that I have found that the respondent was not entitled to the Kshs. 1 million award, it means his petition fails in its entirety. That being so, the order of the learned Judge awarding costs cannot stand, and I would set it aside.

The upshot is that the appeal succeeds, and I would allow it, setting aside the award of Kshs. 1,000,000 made in favour of the respondent and the order on costs.

The cross appeal fails in its entirety and I would order it dismissed.

Given the antecedents of the appeal and cross-appeal, the order on costs that commends itself to me is that each party shall bear its own costs.

As Musinga and Gatembu JJ.A, agree, it is so ordered.

Dated and delivered at Nairobi this 18th day of December, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 305 OF 2019

BETWEEN

JUDICIAL SERVICE COMMISSION ..... APPELLANT

AND

DAVIS GITONGA KARANI ..... RESPONDENT

(An application for stay of execution of the part of the decision contained in the Judgment of the

Employment and Labour Relations Court at Nairobi (Wasilwa, J.) dated 30th April, 2019 **in ELRC Petition No. 116 of 2018)**

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CONCURRING JUDGMENT OF D.K. MUSINGA, J.A.

I have had the benefit of reading in draft, the judgment of my Brother, P.O. Kiage, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

Dated and delivered at Nairobi this 18th day of December, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 305 OF 2019

BETWEEN

JUDICIAL SERVICE COMMISSION..... APPELLANT

AND

DAVIS GITONGA KARANI..... RESPONDENT

(An appeal from part of the decision contained in the Judgment of the Employment &

***Labour Relations Court at Nairobi (Wasilwa, J.) dated 30th April, 2019* in ELRC Petition No. 116 of 2018)**

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JUDGMENT OF GATEMBU, JA

I have had the benefit of reading in draft, the judgment of my brother P.O. Kiage, JA. I entirely agree with the reasoning and conclusion and I have nothing useful to add.

Dated and delivered at Nairobi this 18th day of December, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL