



Case Number:	Petition 48 of 2019
Date Delivered:	01 Nov 2019
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Byram Ongaya
Citation:	Simon Rotich Ruto v Judicial Service Commission & another [2019] eKLR
Advocates:	-
Case Summary:	<p><b>Paragraph 23 of the Third Schedule to the Judicial Service Act that took away judicial officers' entitlement to reports or recorded reasons for decisions rendered against them declared unconstitutional</b></p> <p><b>Simon Rotich Ruto v Judicial Service Commission &amp; another [2019] eKLR</b></p> <p><b>Petition 48 of 2019</b></p> <p><b>Employment and Labour Relations Court at Nairobi</b></p> <p><b>B Ongaya, J.</b></p> <p><b>November 1, 2019</b></p> <p><b>Reported by Moses Rotich</b></p> <p><i><b>Constitutional Law</b> - constitutionality of statutory provisions - constitutionality of paragraph 23 of the Third Schedule to the Judicial Service Act - whether paragraph 23 of the Third Schedule to the</i></p>

*Judicial Service Act denying judicial officers facing disciplinary proceedings copies of office orders, minutes, reports or recorded reasons for decisions against them, infringed on their constitutional rights - Constitution of Kenya, 2010, articles 10, 35 and 47*

**Constitutional Law** - *fundamental rights and freedoms - enforcement of fundamental rights and freedoms - doctrine of waiver - whether the doctrine of waiver could apply to an employee who participated in his own disciplinary hearing, admitted some or all of the charges leveled against him and raised no issue of procedural impairment*

**Statutes** - *interpretation of statutory provisions - hierarchy of laws - subsidiary legislation - nature of legislation that would constitute subsidiary legislation-whether the Third Schedule to the Judicial Service Act was a form of subsidiary legislation.*

**Labour Law** – *employment - employment contract - disciplinary action - interdiction of judicial officers - where a senior principal magistrate was interdicted by the Chief Registrar to the judiciary - whether the Chief Registrar to the Judiciary had the mandate to draw a charge and interdict a senior principal magistrate - Judicial Service Act, Third Schedule, paragraph 16(1), 17(2) and 25(1)*

### **Brief facts**

The petitioner was serving as a Senior Principal Magistrate in the Judiciary. He was interdicted from duty on January 17, 2015 for being habitually drunk during working hours. His interdiction was, however, lifted on July 8, 2015, and the petitioner was sternly warned against involving himself in acts of gross misconduct or conducting himself in a manner that did not portray proper decorum of an officer of the court.

On September 2, 2016, the Chief Registrar of the Judiciary accused the petitioner of reporting for duty while under influence of alcohol forcing his removal from the cause list. The petitioner, in a written reply, denied the charge. On January 19, 2016, the Chief Registrar informed the petitioner

that the Judicial Service Commission Human Resource Management Committee (the Committee) had deliberated his response to the show cause notice and directed the petitioner to attend a disciplinary hearing before the Committee on January 25, 2016. At the hearing, the petitioner admitted to have been drunk during office hours and while attending to court users in his chambers. The petitioner further admitted that he had a drinking problem but was undergoing treatment. On February 9, 2017, the Judicial Service Commission dismissed the petitioner in a letter signed by the Chief Justice.

Aggrieved, the petitioner filed the instant petition and sought various declarations, *inter alia*, that the Chief Registrar of the Judiciary (2<sup>nd</sup> respondent) had no jurisdiction under the law to draw and commence a charge and interdiction of a judicial officer. He also asked the court to find that the proceedings leading to his dismissal were unprocedural, illegal and unconstitutional for contravening articles 171(2)(c) and 236(b) of the Constitution and section 32 (3) of the Judicial Service Act.

### **Issues**

- i. Whether the Chief Registrar of the Judiciary had powers to draw a charge and interdict a judicial officer in the rank of a senior principal magistrate.
- ii. Whether paragraph 23 of the Third Schedule to the Judicial Service Act that took away judicial officers' entitlement to reports or recorded reasons for decisions rendered against them was inconsistent with;
  - a. article 47 of the Constitution entitling every person to a written reason to every administrative action that adversely affected them;
  - b. article 35 of the Constitution providing for the right to access of information; and,
  - c. principles of rule of law, transparency and accountability provided under article 10(2)(a)(c) of the Constitution;
- iii. Whether the doctrine of waiver could apply

to an employee who participated in his own disciplinary hearing, admitted some or all of the charges leveled against him and raised no issue of procedural impairment.

**Relevant provision of the law**

**Judicial Service Act**

**Third Schedule**

**23. Copies of proceedings**

*(1)An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it.*

*(2)The officer may also be given a copy of the evidence (including documents tendered in evidence) after the proceedings are closed, on payment of five shillings per page of each document tendered in evidence:*

*Provided that they shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions.*

**Held**

1. The power to interdict a judicial officer such as the petitioner who held the position of Senior Principal Magistrate was vested in the Chief Justice under paragraph 16(1) of the Third Schedule to the Judicial Service Act and within the circumstances or safeguards mentioned in that section. The power to suspend a magistrate was vested in the Chief Justice under paragraph 17(2) of the Third Schedule and within the prescribed safeguards. The power to draw charges against a magistrate or judicial officer was vested in the Chief Justice under paragraph 25(1) of the Third Schedule to the Judicial Service Act. Accordingly, the Chief Registrar (2<sup>nd</sup> respondent) acted

*ultra vires* those provisions by issuing the charge and interdiction against the petitioner. The charge and interdiction were invalid.

2. To the extent that the interdiction was empty of the requisite authority and was *ultra vires*, and invalid, the petitioner was entitled to the withheld pay during the interdiction. The invalid interdiction could not operate to validly withhold the petitioner's half salary during the interdiction period. The legal basis of withholding the pay was not established.
3. Paragraph 23 of the Third Schedule to Judicial Service Act purporting to take away judicial officers' entitlement to reports or recorded reasons for decisions rendered against them was unconstitutional and inconsistent with article 47(2) entitling every person to a written reason to every administrative action that adversely affected them; article 35 providing for the right of access to information; and article 10(2)(a)(c) of the Constitution on principles of rule of law, transparency and accountability. Paragraph 23 of the Third Schedule to Judicial Service Act further contravened principles of public service under article 232(1)(e) and (f) of the Constitution on accountability for administrative acts, transparency and provision to the public of timely, accurate information.
4. The provisions of the Third Schedule to the Judicial Service Act were enactments by Parliament and were not subsidiary legislation. They could not be found *ultra vires* section 6 of the Fair Administration Action Act and section 4 of Access to Information Act, 2016 as urged for the petitioner because they ranked at parity in the hierarchy of legislation and law.
5. The petitioner had a helpless problem of drunkenness which seriously affected his performance. The 1<sup>st</sup> respondent had given him a chance to improve and allowed him to attend a rehabilitation centre on full monthly pay when a previous interdiction was lifted in that regard. Consequential to the lifting of the

interdiction, the petitioner promised to improve and he did so in his personal written undertaking to the Chief Justice. The petitioner appeared not to have been able to uphold his personal and written undertaking and hence the disciplinary and the subsequent dismissal. The 1<sup>st</sup> respondent had taken all necessary steps to assist and reasonably support the petitioner but he failed to improve. In that sense, the respondents had a valid reason to dismiss the petitioner as at the time of the dismissal and as envisaged in sections 43, 45 and 47(5) of the Employment Act, 2007.

6. Despite delegation of certain aspects of disciplinary control to the Chief Justice under the Third Schedule to the Judicial Service Act, nothing precluded the 1<sup>st</sup> respondent by itself taking appropriate steps and by itself undertaking the disciplinary proceedings. Thus, paragraph 20 of the Third Schedule provided that, subject to the Constitution and the Schedule, the Commission could regulate its own procedure and the procedure of any of its Committees. Nothing in the Schedule limited or otherwise affected the inherent power of the Commission to make such decisions as was necessary for the ends of justice or to prevent abuse of the process of the Commission. Thus, even if the charge and the interdiction were *ultra vires*, and invalid, the 1<sup>st</sup> respondent exercised the inherent power as was conferred.

7. The petitioner admitted the gross misconduct before the Committee of the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent, at a full house meeting, deliberated the Committee's findings and made the decision to dismiss the petitioner. Throughout the hearing, the petitioner did not advance the issue of procedural impairment in the manner the charge and interdiction had been imposed. The doctrine of waiver applied. It could not be said that the petitioner had not been accorded fairness or due process in terms of article 236 of the Constitution because

he attended the hearing; he was informed and he knew the case that confronted him; he answered the case by admitting the leveled gross misconduct; and, he requested to be given another chance to improve so that all his testimony was taken while having subjected himself to an oath before the Committee.

8. Despite the *ultra vires*, and invalid charge and interdiction as imposed by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent by itself, in its Committee proceedings read the allegations to the petitioner; the petitioner understood the allegations; made a reply; and, was heard extensively. There was no omission or action to impair the petitioner's capacity to present his case towards exculpation, the Committee was well constituted and suffered no deficiency, and the petitioner admitted the charge (which was straightforward and not requiring documents and detailed background material to reply) and he requested another chance to improve despite having previously squandered such a chance. In such circumstances, the petitioner failed to establish a case for breach of rules of natural justice or denial of due process. Moreover, nullifying the dismissal of the petitioner would serve no purpose as the petitioner admitted the gross misconduct and offered no plausible line of action to improve his future behaviour in view of the identified alcoholic addiction.

9. The decision in *Kenya Aviation Workers Union –Versus- Kenya Airways Limited [2019] eKLR*, was distinguishable in that the employer had failed to afford the employee the prevailing employee assistance programme leading that court to find that that failure amounted to unfair labour practice and thus unfair termination of employment. In the instant case, the respondents embraced the best human resource practice towards work-life balance when they gave the petitioner a chance for rehabilitation and to resume work after the initial interdiction. After lifting of that interdiction, the petitioner did not

deny that he continued to have impaired performance resulting from continued alcoholic addiction.

10. Once an employer has afforded a needy employee a reasonable chance to benefit out of the prevailing employee assistance programme but the employee fails to improve, the employer's obligation for fair labour practice in that respect should thereby get discharged. The tenets of justice and proportionality demanded that such an employer was, thereby, freed accordingly from the burden of continued retention of an employee who had shown that he could not benefit and help himself to improve from such employer's assistance and support. Accordingly, the petitioner's constitutional rights were not breached as alleged and the petitioner was undeserving of compensation and reinstatement.

*Petition partly allowed.*

*Orders:-*

- i. A declaration that the 2<sup>nd</sup> respondent acted ultra vires the provisions of paragraph 16 and 25 of the Third Schedule to the Judicial Service Act, 2011 by issuing the charge and the interdiction both dated on September 9, 2016 against the petitioner; and the charge and interdiction declared null and void ab initio.*
- ii. A declaration that paragraph 23 of the Third Schedule to Judicial Service Act, 2011 was unconstitutional for being inconsistent with articles 47(2), 35, 10(2)(a)(c) and 232 (1) (e) (f) and (e) of the Constitution of Kenya, 2010.*
- iii. Petitioner directed to serve the Judgment upon the Attorney General within seven (7) days of the date of delivery of Judgment.*
- iv. The respondents ordered to pay the petitioner a sum of Kshs.1,275,501.00 (less PAYE) by December 12, 2019, failure to which interest would be payable thereon at court rates from the date of judgment until payment in full.*
- v. Half of the petitioner's costs were to be*

	<i>borne by the respondents.</i>
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Claim partly allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 48 OF 2019**

**IN THE MATTER OF ARTICLES 2(5) (6); 10; 19; 20; 21; 22; 23; 27; 28; 29; 160;  
162(2); 165; 172; 236; 258; 259(1) (3) AND 260 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA**

**AND SECTIONS 3,4, 5,6, & 7 OF THE FAIR ADMINISTRATION ACT 2015**

**AND ARTICLE 159(2) (d) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ACCESS TO INFORMATION ACT; ARTICLE 23(1) OF  
THE UNIVERSAL DECLARATION OF RIGHTS; INTERNATIONAL COVENANT ON  
CIVIL AND POLITICAL RIGHTS (ICCPR); THE INTERNATIONAL COVENANT ON  
ECONOMIC AND SOCIAL RIGHTS (ICESR); ARTICLE 25.1 OF THE UNIVERSAL  
DECLARATION OF HUMAN ROGHTS (UDHR); AND THE AFRICAN CHARTER**

**ON HUMAN AND PEOPLE’S RIGHTS (ACHPR)**

**AND**

**IN THE MATTER OF SECTION 12, 41, 43, 45 OF THE EMPLOYMENT AND LABOUR  
RELATIONS COURT ACT NO.20 OF 2011; AND THE EMPLOYMENT AND**

**LABOUR RELATIONS COURT RULES**

**AND**

**IN THE MATTER OF JUDICIAL SERVICE ACT SECTION 5, 8, 32(3)**

**AND THE RULES 25(1-11) OF THE THIRD SCHEDULE**

**-BETWEEN-**

**HON. SIMON ROTICH RUTO.....PETITIONER**

**-VERSUS-**

**JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT**

**CHIEF REGISTRAR OF THE JUDICIARY.....2ND RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2019)

**JUDGMENT**

The petition was filed on 22.02.2019 through Shako & Company Advocates. The amended petition was filed on 17.05.2019 through Okemwa & Company Advocates.

The petitioner is an Advocate of the High Court of Kenya and was employed in the Judiciary of Kenya initially as a District Magistrate II (D.M II) Professional. He rose through the ranks to the position of Senior Principal Magistrate.

The evidence is that the petitioner was interdicted from duty sometimes back on 17.01.2015 for being habitually drunk during working hours and which compromised the petitioner's integrity and capacity to perform judicial duty. The 1st respondent considered the medical report which amongst other things stated that the petitioner had developed potentially a serious ailment due to excessive intake of alcohol and abuse of substance. The 1st respondent was considerate and humane and lifted the interdiction by the letter dated 08.07.2015. In lifting the interdiction, the petitioner was sternly warned against involving himself in acts of gross misconduct or conducting himself in manner that does not portray proper decorum of an officer of the court. The petitioner was to be transferred to another station for a new environment to prove him-self and his performance was to be monitored for the first six months with a view of ensuring his performance was above board. The letter lifting the suspension was signed by the Hon. Chief Justice and the petitioner was required to signify in writing that he had read and understood the contents and that it was a final chance for him to prove himself.

The petitioner replied by his letter dated 23.07.2015 addressed to the Hon. Chief Justice. He confirmed to have read and understood the letter of 08.07.2015 and that he would fully comply with the terms of the letter lifting the interdiction. On 02.09.2016 the Chief Registrar of Judiciary addressed a charge to the petitioner thus, **“On Thursday, 25th and Friday, 26th August 2016 you reported on duty to work while under influence of Alcohol hence forcing the Chief Magistrate to remove you from the cause list and assign your matters to your colleagues. This is despite discussions with various officers on desisting from this conduct and you having been interdicted over a similar behaviour on 17th February 2015 and subsequently re-instated by the Hon. Chief Justice on 8th July 2015, but with a stern warning against conducting yourself in manners that do not portray proper decorum of an officer of the court.”** The petitioner was required to give a written reply to the charge within 21 days from 02.09.2016. The petitioner replied the charge by his letter dated 08.09.2016 denying the charge thus, **“I hereby deny the charges and state that I performed my duties diligently my record and returns can attest to that fact.”** The claimant was as well interdicted from duty by the letter dated 02.09.2016 signed by the Chief Registrar of the Judiciary, Anne A. Amadi.

By the letter dated 19.01.2017 the Chief Registrar informed the petitioner that the Judicial Service Commission Human Resource Management Committee had deliberated his response to the show-cause notice and directed that the petitioner attends a disciplinary hearing before the Committee on 25.01.2016. The petitioner attended as was scheduled and the Hansard of the oral proceedings is filed. The Committee of the members of the 1st respondent read the charges to the petitioner.

The petitioner admitted that on 24.08.2016 he finished with his court for the day by lunch time and unfortunately went and drank 4 tots of Smirnoff Vodka. He then went back to work at his chamber. There was an urgent matter placed before the petitioner and he felt he was not comfortable to handle the matter and also on looking at the application he felt that there was need for the other party to be served. The petitioner admitted that it worried him that he could not serve a member of the public because of drunkenness, that he was drunk during office hours, and that he was drunk and in his chambers. The petitioner further confirmed that by reason of the events of 24.08.2016 the Chief Magistrate directed that he would not be on the cause list of 25th and 26th August 2016.

The petitioner testified before the Committee that he had seen his doctor and his drunkenness problem was actually a disease which would not be resolved by merely going through the rehabilitation centre he had already attended but that the doctor had mentioned that there was some medicine which had been discovered which he could take advantage of if it could be implanted in the petitioner

to assist him. At another point in the proceedings the petitioner told the Committee he was willing to change. He also told the Committee that he had already had the implant known as “**Naltrexon implant insertion**” put just next to the umbilical cord and the urge to drink was completely not there. Of that implant and how it works the petitioner stated, “**...There is a history of someone who was implanted and he went and took alcohol again and he had to be hospitalised in a very serious condition.**” He also stated that he had had the implant on 25.08.2016 and that he had not been drinking since then (whereas the present interdiction was on 02.09.2016). When asked why he had the implant, he replied, “**To stop me completely from drinking.**” The petitioner pleaded with the Committee to give him another chance because otherwise, he would be completely devastated.

The petitioner was subsequently dismissed at the Commission meeting held on 09.02.2017 and effective 09.02.2017. The letter conveying the decision was dated 09.02.2017 and signed by the Hon. Chief Justice. The dismissal was by the 1st respondent in exercise of the mandate under Article 172(1) (c) of the Constitution and pursuant to section 25 (11) Part IV Third Schedule of the Judicial Service Act.

The petitioner was dissatisfied with the turn of events and he filed the present petition. The amended petition was filed on 17.05.2019 through Okemwa & Company Advocates. The petitioner prays for:

a) A declaration that the 2nd respondent has no any jurisdiction under the Constitution and the Judicial Service Act and its 3rd Schedule in purporting to draw and commence charge and interdiction of the petitioner, a judicial officer, hence the impugned charge and interdiction letter both dated 2nd September 2016 concerning the petitioner were unconstitutional, illegal, un-procedural, null and void *ab initio* and all consequent proceedings and determinations founded on them for all intent and purposes suffer the same fate, and are hereby condemned, revoked, quashed and or set aside, and declared a nullity *ab initio*.

b) A declaration that the 2nd respondent’s action in usurping the powers of the Honourable Chief Justice under the Constitution and the Judicial Service Commission Act was in gross violation of the Constitution and in violation of Articles 2(1) (4), Article 3(1), Article 10(2) (a) (c); Article 73(1) (a) (iv) (2) (d); Article 259 (11); Article 236 (a) (b); Article 41; and Article 47(1) of the Constitution and constituted gross misconduct and gross violation of the Constitution and section 12(1) (c) (f) of the Judicial Service Act and therefore all consequent proceedings and actions, determinations founded on them for all intents and purposes inherit the same fate, and are hereby condemned, revoked, quashed and or set aside and declared nullity.

c) A declaration that the respondents in purporting to remove the petitioner from judicial service violated, infringed and contravened the Constitution of Kenya and the Judicial Service Act and mandatory procedural commands under Article 171 (2) (c) to only deal in a manner in strict conformity with mandatory procedure under section 32 (3) of the Judicial Service Act and 3rd schedule of the Judicial Service Act and Article 236(b) of the Constitution, hence the impugned proceedings were un-procedural, illegal and unconstitutional and all consequent actions and determinations therefrom, were without lawful foundation, were unconstitutional, *ultra vires*, null and void.

d) A declaration that the respondents decisions, actions and omissions jointly and severally in respect of the removal and dismissal of the petitioner from judicial service constituted conduct in gross violation of the Constitution and in gross abuse of the National Values and Principles under Article 2(4), 3(1), 10(2) (a) (b) (c) and chapter 6 of the Constitution, Principles of Public Service under Article 73, 129 and Article 236 and principles natural justice and therefore null and void *ab initio*.

e) A declaration that the commencement, proceedings, and termination from judicial service of the petitioner was in breach of Article 23 of the Universal Declaration of Human Rights, was wrongful, improper, procedurally unfair, and not in strict conformity with the established laws and the Constitution and due process and rule of law hence null and void.

f) A declaration that the respondents jointly and severally breached the constitutional rights and freedoms of the petitioner under Article 27(1), Article 28, Article 29 (d) and (f), Article 40, Article 41, 43, 47(1) (2), 236 (a) (b) and the petitioner be compensated damages for such violations the Honourable Court may deem just and reasonable to award.

g) A declaration that regulation 23 of the third schedule of Judicial Service Act purporting that a judicial officer shall not be entitled to reports or recorded reasons for decisions is unconstitutional and *ultra vires* Article 47(2), article 35 and section 6 of the Fair Administration Action Act and section 4 of access to Information Act 2016 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and principles; and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; and the same is hereby declared *ultra vires*, unconstitutional, null and void to that extent.

- h) A declaration that under Article 236 of the Constitution the petitioner is still the legitimate and lawful holder and remains a legitimate and lawful holder of a rank of Senior Principal Magistrate (SPM) and a mandatory injunction do issue against the respondents to unconditionally reinstate and deploy him with immediate effect from the date of the judgment to his service without any break and loss of salary, benefits and privileges in a similar or equivalent rank or capacity within the judiciary forthwith.
- i) That the Honourable Court do order forthwith release and payment of the petitioner's accrued back salaries and arrears as a lump-sum forthwith and with interest as at times of their accrual from 2nd of September 2016 until full payment and a mention date be given to conform full compliance of the courts orders and directions as follows: (a) interdiction gross Kshs.425, 167.00 x ½ months=Kshs.1, 275,501.00; (b) gross Kshs.425, 167.00 per month from February 2017 to judgment of court.
- j) An order for compensation for aggravated and exemplary damages over and above constitutional violations.
- k) Costs and interest.

The respondents opposed the petition by filing on 21.06.2019 the draft replying affidavit of Anne A. Amadi, the Chief Registrar of the Judiciary. The draft affidavit is a draft because it was not signed and commissioned. It is liable to being struck out and the Court will not place weight or reference to it accordingly. The petitioner filed a further affidavit on 28.06.2019. The Court returns that the facts of the case are as per the account earlier stated in this judgment and are therefore not controverted as set out in the petitioner's pleadings, supporting affidavits and exhibits.

The parties filed their respective submissions. The Court has considered the material on record and makes the following findings on the matters in issue.

**First**, the respondents admit that the power to interdict a judicial officer such as the petitioner who held the position of Senior Principal Magistrate is vested in the Chief Justice under section 16(1) of the 3rd schedule to the Judicial Service Act, 2011 and within the circumstances or safeguards mentioned in that section. Further, the respondents admit that the power to suspend a Magistrate is vested in the Chief Justice under section 17 (2) of the 3rd schedule and within the prescribed safeguards. The respondents further admit that the power to draw charges against a Magistrate or judicial officer is vested in the Chief Justice under section 25(1) of the 3rd schedule. To answer the 1st issue for determination the Court finds that the 2nd respondent acted *ultra vires* the provisions of sections 16 and 25 of the 3rd schedule to the Judicial Service Act, 2011 by issuing the charge and the interdiction against the petitioner and both dated on 02.09.2016. The charge and interdiction are liable to a finding that they were null and void *ab initio*. While making that finding the Court follows the holding by Radido J in N.M.I –Versus-Judicial Service Commission and Another Petition 152 of 2018 thus, “**37. The Court, therefore, finds the suggestion by the Respondents that the Chief Registrar, being number 3 in the judicial administrative chain and also serving as Secretary to the Judicial Service Commission could perform functions delegated to the Chief Justice during a vacancy in the office, unattractive. Not only unattractive but repulsive. 38. In interdicting the Petitioner and framing the charges, the Chief Registrar was acting ultra vires her Constitutional and statutory mandate, and the Court so finds.**” The Court finds that in the instant case it was not said that the office of the Chief Justice was vacant and on the basis of the holding by Radido J, it is clear that the authority to interdict or suspend a judicial officer was at all times vested in the Chief Justice to be exercised within the safeguards prescribed in the third schedule to the Judicial Service Act, 2011.

To the extent that the interdiction was empty of the requisite authority and was *ultra vires*, null and void *ab initio*, the petitioner is awarded the withheld pay during the interdiction and as prayed for at **Kshs.1, 275, 501.00**. The Court finds that the null and void interdiction could not operate to validly withhold the petitioner's half salary during the interdiction period and the legal basis of withholding the pay was obviously not established.

**Second**, as urged for the petitioner, Article 47 of the Constitution entitles every person to reasons where an adverse administrative decision is made against the person. As submitted for the petitioner, provision of all information in a disciplinary case would be necessary to satisfy the constitutional provisions on transparency, accountability, enforcement of rights and access to information. The Court therefore returns that the petitioner has established that he was entitled to the declaration that section 23 of the third schedule to Judicial Service Act purporting that a judicial officer shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article 35 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; and the same is liable to be declared unconstitutional, null and void to that extent.

While making that finding, the Court returns that the provisions of the third schedule to the Judicial Service Act, 2011 are enactments by the Parliament and are not subsidiary legislation so that they may not be found *ultra vires* section 6 of the Fair Administration Action Act and section 4 of Access to Information Act 2016 as urged for the petitioner because they rank at parity in the hierarchy of legislation and law. Thus in **Bryan Mandila Khaemba –Versus- Chief Justice and President of the Supreme Court of Kenya and Another [2019]eKLR**, the Court held thus, “**First, the Court has already found that the Third Schedule to the Judicial Service Act is a direct enactment by the Parliament. As submitted for the petitioner and in line with the authorities cited for the petitioner, the provisions of the Third Schedule properly constitute a parliamentary enactment just like the other provisions in the body of the Act.**”

**Third**, the petitioner laments that he was not accorded due process in terms of Article 236 of the Constitution and the safeguards in the provisions of the 3rd Schedule because the interdiction and the charges were drawn by the 2nd respondent. The Court has carefully re-examined the material before the Court. There is enough evidence that the 1st respondent’s relevant Committee summoned the petitioner. The Petitioner attended. He was given an elaborate hearing. The questions were put and the petitioner responded. The Committee members were also members of the 1st respondent. There is no reason to doubt that the 1st respondent’s full meeting deliberated the petitioner’s case at the meeting held on 09.02.2017 and as communicated in the Hon. Chief Justice’s letter of the same date. The Court has carefully re-evaluated the Hansard record of the disciplinary hearing at the Committee proceedings and which was subsequently considered at the full meeting of the 1st respondent held on 09.02.2017. The evidence is that the petitioner had a helpless problem of drunkenness which seriously affected his performance. The 1st respondent had given him a chance to improve and allowed him to attend a rehabilitation centre on full monthly pay when a previous interdiction was lifted in that regard. Consequential to the lifting of the interdiction, the petitioner promised to improve and he did so in his personal written undertaking to the Hon. Chief Justice. The petitioner appears not to have been able to uphold his personal and written undertaking and hence the disciplinary case leading to the present petition.

The Hansard further shows that the petitioner admitted he had fallen short of the requisite decorum, integrity and suffered serious impairment of capacity to perform in the high office of Senior Principal Magistrate. From his own words, even in view of the alleged implant to stop his thirst for excessive and uncontrollable consumption of alcohol, he had already been given a chance to improve but instead found himself in the present predicament of the disciplinary case. The Court finds that the 1st respondent had taken all necessary steps to assist and reasonably support the petitioner but he failed to improve. In that sense the respondents have established that they had a valid reason to dismiss the petitioner as at the time of the dismissal and as envisaged in sections 43, 45 and 47(5) of the Employment Act, 2007.

The Court is alert to the menace of substance abuse and the devastating effects on the helpless victims. The Court is further mindful that employers would be expected to take reasonable steps to assist their helpless employees who may be victims towards care, rehabilitation, and resumption of normal life including proper performance of the contract of service. The Hansard record shows that the members of the Committee considered that the petitioner had been assisted and given a reasonable chance through rehabilitation, treatment and full pay while on rehabilitation but by his own conduct in the instant case he demonstrated dim chances of ever improving. The Committee considered the very important position the petitioner held of Senior Principal Magistrate and wondered how much more the petitioner should continue being exposed to the unsuspecting members of the public in the all crucial judicial service delivery that depended upon the petitioner. The 1st respondent decided to dismiss the petitioner. The Court finds that the respondents gave the petitioner a good chance to redeem himself and offered all the reasonable support expected of a good, caring and compassionate employer but the petitioner failed to awaken to that prime opportunity. The respondents must be commended and not condemned for their deliberate efforts to help the petitioner without the petitioner arising to do his part towards improvement.

The Court further finds that despite delegation of certain aspects of disciplinary control to the Chief Justice under the third schedule to the Judicial Service Act, nothing precluded the 1st respondent by itself taking appropriate steps and by itself undertaking the disciplinary proceedings. Thus section 20 of the third schedule provides that subject to the Constitution and the Schedule, the Commission may regulate its own procedure and the procedure of any of its Committees; and nothing in the Schedule shall limit or otherwise affect the inherent power of the Commission to make such decisions as may be necessary for the ends of justice or to prevent abuse of the process of the Commission. Thus, even if the charge and the interdiction were *ultra vires*, null and void as earlier found by the Court, the 1st respondent in the instant case is found to have exercised the inherent power as was conferred.

Looking at the evidence, it is clear that the petitioner admitted the gross misconduct before the Committee of the 1st respondent and the 1st respondent at a full-house meeting deliberated the Committee’s findings and made the decision to dismiss the petitioner. Throughout the hearing the petitioner did not advance the issue of procedural impairment in the manner the charge and interdiction had been imposed – and the Court returns that the doctrine of waiver will apply. The Court finds that the circumstances are such that the 1st respondent addressed itself to the petitioner’s case in the proper exercise of the disciplinary mandate in Article 172(1) (c) of

the Constitution. It cannot be said that the petitioner had not been accorded fairness or due process in terms of Article 236 of the Constitution because he attended the hearing, he was informed and he knew the case that confronted him, he answered the case by admitting the levelled gross misconduct and he requested to be given another chance to improve so that all his testimony was taken while having subjected himself to an oath before the Committee. The 1st respondent being the ultimate holder of constitutional disciplinary powers over the petitioner, in the circumstances of the case, the Court finds that manifest injustice did not occur both in procedure and merits in the manner the 1st respondent by itself undertook the disciplinary proceedings against the petitioner. The Court finds that despite the *ultra vires*, null and void charge and interdiction as imposed by the 2nd respondent, the 1st respondent by itself, in its Committee proceedings reported in the Hansard, read the allegations to the petitioner, the petitioner understood the allegations, the petitioner replied, the petitioner was heard extensively, there was no omission or action to impair the petitioner's capacity to present his case towards exculpation, the Committee was well constituted and suffered no deficiency, and the petitioner admitted the charge (which was straightforward and not requiring documents and detailed background material to reply) and he requested for another chance to improve despite having previously squandered such a chance. In such circumstances the Court returns that the petitioner has failed to establish a case for breach of rules of natural justice or denial of due process. The Court has considered the benefit and practical consequences of nullifying the dismissal so the process may commence afresh and returns that such recommencement will serve no purpose in this case the petitioner admitted the gross misconduct and offered no plausible line of action to improve his future behaviour in view of the identified alcoholic addiction. Accordingly the Court finds that the dismissal would not be set aside as null and void *ab initio*. The Court further finds that the petitioner has already been awarded the release of the half payment withheld during the *ultra vires*, null and void interdiction and in the opinion of the Court, the findings should balance justice for the parties.

The Court finds that the present case would be distinguishable from Kenya Aviation Workers Union –Versus- Kenya Airways Limited [2019]eKLR where the employer had failed to afford the employee the prevailing employee assistance programme and the Court held, **“The Court has considered that evidence and returns that the claimant has established that in the circumstances of the case, the grievant had established a case for invoking of the respondent’s EAP but which was not done by the respondent’s Human Resources Department as had been done for other staff in similar circumstances. The Court finds that the failure to invoke the EAP and deciding to instead terminate the claimant from employment amounted to unfair labour practice which would justify the Court’s interference with the otherwise not unfair termination; in strict consideration of procedure and the reason for termination. Once the respondent undisputedly instituted an EAP, it is the Court’s view that it was thereby bound to apply it equally to all employees who deserved it. The grievant had a clean record of service and there was no good reason advanced why the EAP was not invoked in her favour and even after she took efforts to go for counselling on her own initiative and expense, the respondent failed to take action and to reconsider the case within its EAP. The Court finds that it was unfair and not proportionate.”**

The Court has considered its opinion in Peter Wambugu Kariuki and 16 others –Versus- Kenya Agricultural Research Institute [2013]eKLR, thus **“Secondly, it is the opinion of the court that the right to “fair labour practices” encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work.”**

In this case the respondents have established that they embraced the best human resource practice towards work-life balance when they gave the petitioner a chance for rehabilitation and to resume work after the initial interdiction. After lifting of that interdiction the petitioner did not deny that he continued to have impaired performance resulting from continued alcoholic addiction. The Court finds that once an employer has afforded a needy employee a reasonable chance to benefit out of the prevailing employee assistance programme but the employee has failed to improve, the employer’s obligation for fair labour practice in that respect must thereby get discharged and the tenets of justice and proportionality demand that such an employer is thereby, freed accordingly from the burden of continued retention of an employee who has shown that he could not benefit and help himself to improve from such employer’s assistance and support.

**Fourth**, in view that the 1st respondent has been found to have addressed the disciplinary case in exercise of its constitutional function and in a manner that the petitioner was accorded a fair hearing before the 1st respondent’s relevant Committee and no established injustice resulted in that process, the Court returns that the petitioner’s constitutional rights were not breached as alleged and as was urged for the petitioner. Accordingly the petitioner is undeserving of compensation and reinstatement as was prayed for.

**Fifth**, as the petitioner has partially succeeded in his claims and prayers, the respondents will pay 50% of the petitioner’s costs.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- 1) The declaration that the 2nd respondent acted *ultra vires* the provisions of sections 16 and 25 of the Third Schedule to the Judicial Service Act, 2011 by issuing the charge and the interdiction both dated on 02.09.2016 and against the petitioner and the charge and interdiction are hereby declared null and void *ab initio*.
- 2) The declaration that section 23 of the Third Schedule to Judicial Service Act, 2011 purporting that a judicial officer or staff shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article 35 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; all of the Constitution of Kenya, 2010 - and the section is hereby declared unconstitutional, null and void to that extent.
- 3) For purposes of appropriate legislative interventions in view of the declaration in (2) above, this judgment shall be served by the petitioner, within 7 days, , upon the Hon. Attorney General.
- 4) The respondents to pay the petitioner a sum of **Kshs.1, 275, 501.00 (less PAYE)** by 15.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 5) The respondents to pay 50% of the petitioner's costs of the petition.

**Signed, dated and delivered in court at Nairobi this Friday, 1st November, 2019.**

**BYRAM ONGAYA**

**JUDGE**



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