IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & KIAGE JJA.)

CIVIL APPEAL NO. 50 OF 2014

BETWEEN

JUDICIAL SERVICE COMMISSION …….....APPELLANT

AND

GLADYS BOSS SHOLLEI ……...1ST RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE…....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Mathews N. Nduma, J.) dated 7th day of March, 2014

in

Petition No. 39 of 2013 (formerly Nairobi Petition No. 528 of 2013)

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JUDGMENT OF OKWENGU JA

Introduction

[1] The ***Judicial Service Commission*** (*hereinafter referred to as the "appellant"*) is a Constitutional Body established under ***Section 171(1)*** of the Constitution of Kenya 2010 (*herein the "Constitution").* The main function of the appellant as provided under ***Section 172(1)*** of the Constitution is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

[2] The position of the Chief Registrar of the Judiciary is established under ***Article 161(2)(c)*** of the Constitution, in which the holder of the office is designated as the Chief administrator and accounting officer of the Judiciary. Under ***Article 171(3)*** of the Constitution, the holder of the office of the Chief Registrar of the Judiciary is also the Secretary to the appellant. ***Gladys Boss Shollei***, (*hereinafter referred to as the "respondent*") is the first holder of the office of the Chief Registrar of the Judiciary having been appointed through Gazette Notice No.13095 duly signed by the Chairman of the appellant and published on 21st October 2011.

[3] The appeal before us is the culmination of an industrial dispute pitting the respondent against the appellant in the performance of their respective functions. Following what the appellant termed "disciplinary proceedings", against the respondent, the appellant terminated the respondent's employment as Chief Registrar of the Judiciary through a letter dated 18th October 2013. Being aggrieved by the disciplinary proceedings and her termination of employment, the respondent moved to the High Court and filed a constitutional petition on 1st November 2013 seeking orders of Judicial Review and Declaratory orders in regard to violation of her constitutional rights.

The Pleadings

[4] The specific orders sought by the respondent in the petition were as follows:

> ***"a) That, order of certiorari to issue to quash the letter of removal dated 18.10.13.***
>
> ***b) That, an order of certiorari to issue to quash the proceedings of 18.10.13.***
>
> ***c) That,an order of mandamus to issue compelling the Respondent to comply with the applicable law.***
>
> ***d) That, prohibition do issue against the Respondent from in any way proceeding against the Petitioner other than as by law provided.***
>
> ***e) That, Declaratory orders do issue that the Respondent violated the Petitioner's right as set out.***
>
> ***f) That, Declaratory orders to issue that the allegations against the Petitioner in the reasons given for her dismissal do not exist in law, and thereby void.***
>
> ***g) That, Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.***
>
> ***h) That, an order of compensation do issue for violation of the Petitioner's rights and an inquiry to quantum be gone into.***
>
> ***i) That, such further orders or relief do issue pursuant to Article 23(3) of the Constitution.***

j) That, costs be provided for the Petitioner."

[5] Filed contemporaneously with the petition, was a notice of motion under ***Article 23(3)*** of the Constitution and ***Rules 4, 11, 13*** and ***23*** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, for *inter alia* interim orders of certiorari to temporarily quash the respondent's letter dated 18th October 2013; and a conservatory order reinstating the respondent to office.

[6] On the 4th of November, the Notice of Motion, which had been certified urgent, came up for hearing before ***M. Ngugi, J***. who transferred the suit to the Industrial Court for hearing and determination. This was upon indication by the parties that the Industrial Court would be best suited to deal with the matter as the dispute was basically between an employee and an employer. Thereafter the matter came before ***Nduma,J.*** who upon hearing the notice of motion, delivered a ruling on 22nd November 2013, in which he found that the respondent had established a *prima facie* case against the appellant with regard to the issue of bias and violation of the rules of natural justice. However, noting that the respondent had not specifically pleaded for reinstatement in the petition, and that it was not in the public interest for the office of the Chief Registrar of the Judiciary that plays a key role in the judiciary administration and accounting to remain vacant, the learned judge declined to issue a temporary order for reinstatement of the respondent or to issue orders restraining the occupation of the office of the Chief Registrar.

[7] Before the hearing of the main petition commenced the ***Commission on Administrative Justice***, a Commission established pursuant to ***Article 59(4)*** of the Constitution, was granted leave to appear in the suit as an *Amicus Curiae*. This was in light of the recognition that the decision of the Court on the jurisdiction of the Commission, and the administrative process, would impact on disciplinary disputes within the public sector.

The Affidavit Evidence

[8] In support of the petition, the respondent swore an affidavit in which she outlined the circumstances leading to her dismissal. Paragraph 9 of her affidavit sums up her grievances as follows:

a) ***I have not to-date been informed of a case against me, as provided in law***

b) ***That I was not afforded or given reasonable time to prepare my defence.***

c) ***I was not allowed to call witnesses to rebut the allegations.***

d) ***That I denied all the allegations and showed that I didn't break any law.***

e) ***The power of JSC to institute any disciplinary process against me is only referral and never suo moto as it did.***

f) ***The respondent didn't have any power to proceed as it did.***

g) ***The trove of emails from and to the Chief Justice demonstrates a contrived mission dubbed "The war strategy' to remove me and that it was agreed that for the public to accept my removal, it had to be designed to be a fight against a criminal enterprise in the judiciary.***

h) ***That the existence of the "War Council" and the "War Strategy" is real as all the steps set out therein to remove me have been followed to the letter.***

i) ***That the reasons given for my removal in the Media Release are at variance with the allegations made against me.***

[9] On its part the appellant responded to the petition through an affidavit sworn by its Registrar ***Ms Winfrida Mokaya (*Mokaya*)*** on 14th November 2013, and a supplementary affidavit also sworn by the same Registrar on 23rd January 2014. In a nutshell Ms Mokaya deposed that the respondent's employment was properly terminated following disciplinary proceedings conducted in accordance with the provisions of the Constitution, the Judicial Service Act, and the rules of natural justice; that the appellant acted in its corporate capacity and the allegations of bias against individual commissioners which were in any case denied, did not affect its decision; and that there was no "War Council" or any predetermined plan against the respondent.

The Judgment of the Industrial Court

[10] In his judgment, the learned judge having heard oral arguments and the benefit of the submissions of the *amicus curiae*, identified the issues for determination as follows:

"(i) Did the appellant have jurisdiction to discipline the respondent?

(ii) If the answer to (i) is correct, was the respondent given a fair and impartial hearing?

(iii) Was the respondent removed for a valid reason in terms of fair procedure?

(iv) What remedy if any is available to the respondent?"

[11] The learned judge found *inter alia*, that the appellant had jurisdiction to institute disciplinary proceedings against the respondent; that the disciplinary process against the respondent was a quasi-criminal affair because of the serious allegations laid against her; that the allegations were not properly framed as the charges were vague,

duplex and embarrassing to the respondent; that the appellant did not specify in its letter of dismissal its specific findings on the allegations made against the respondent; that none of the commissioners against whom the allegations of bias was made, nor the Chief Justice who was alleged to have been involved in the "War Council" scheme to remove the respondent, filed any affidavits denying the allegations; that the allegations especially against the **Chief Justice** and **Commissioner Ahmednassir** were of such a serious nature that there was reasonable apprehension of the likelihood of bias; that the commissioners ought to have stepped aside and a disciplinary tribunal of lesser members constituted; that the time given to the respondent to collect information from officers under her so as to defend herself was wanting, and the respondent was not given documents she required to defend herself; that the mandatory provisions of ***Section 32*** of the Judicial Service Act as read with ***Regulation 25*** of the Third Schedule to the Act (Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff) with regard to proceedings for dismissal were not complied with; that the proceedings and decision of the appellant was a nullity as the appellant not only acted *ultra vires* the Judicial Service Act but also violated the constitutional rights of the respondent under ***Article 27(1) 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution.

[12] The learned judge therefore made orders as follows:

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

The Appeal

[13] Being aggrieved by the judgment of the Industrial Court, the appellant has moved to this Court seeking to have the judgment set aside and the respondent's petition filed on 1st November 2013, dismissed with costs. In the memorandum of appeal, the appellant has cited Gladys Boss Shollei as 1st respondent and the Commission on Administrative Justice as 2nd respondent. This is a misnomer as the Commission on Administrative Justice was enjoined in the petition as amicus curiae to assist the Court. It was not therefore *strictu sensu* a party to the proceedings such as to be made a respondent to the appeal. For ease of reference, I shall continue to refer

to Gladys Boss Shollei as respondent and the Commission on Administrative Justice as amicus curiae.

[14] In its memorandum of appeal the appellant has raised sixteen grounds, which in a nutshell are that the learned judge of the Industrial Court failed to consider the core constitutional issue in the petition, which was the mandate of the appellant under ***Article 172*** of the Constitution and ***Section 12*** of the Judicial Service Act on the removal of the respondent; that the learned judge erred in assuming the role of defending and answering allegations levelled against the respondent by creating grounds for the respondent, and misapplying criminal law and procedure, in an employment petition; that the learned judge took into account irrelevant matters, made contradictory findings and showed open bias against the appellant; that the learned judge failed to properly address the constitutional violations alleged by the respondent, or to appreciate the nature of the dispute between the appellant and the respondent; that the learned judge misinterpreted the Constitution and the Judicial Service Act and thus arrived at a decision not supported by pleadings and facts before him.

[15] The appellant was represented in this appeal by ***Mr. Mansour Issa*** led by ***Mr Paul Muite Senior Council***. The respondent was represented by ***Mr. Donald Kipkorir***, and the amicus curiae by ***Mr. Chahale***, whose brief was held by ***Mr. Angima***. Following directions given by the Court, written submissions and supporting authorities were duly filed and highlighted before the court. I wish to record my sincere appreciation to all counsel for their industry, patience and co- operation. The contending arguments were extremely useful in helping me identify the law, sift and distil the issues in a bid to resolve this dispute.

Appellant's Submissions

[16] For the appellant, it was submitted that the Industrial Court had no jurisdiction to hear and determine a constitutional petition for redress of fundamental rights and freedoms; that jurisdiction was by virtue of ***Article 165(3)*** as read with ***Article 23(1)*** of the Constitution, vested in the High Court; that although the Industrial Court has the same status as the High Court, the jurisdiction conferred on the Industrial Court under ***Section 12*** of the Industrial Court Act does not extend to determining matters for redress of violation or infringement of a right or fundamental freedom in the Bill of Rights.

[17] It was argued that the core issue raised by the respondent in its petition was that the appellant did not have jurisdiction to remove her as the Chief Registrar of the Judiciary as she was not answerable to the appellant; that the respondents assertions that she was not accountable to the appellant in regard to the allegations of mismanagement leveled against her, betrayed a fundamental dereliction of duty and a gross act of insubordination that was a sufficient ground for removal of the respondent. In this regard, the following passage from the Canadian case of

Michael Dowling v Workplace Safety & Insurance Board [2004] CAN LII 436 92 was relied upon:

> ***"It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct."***

[18] Further, the learned judge was criticized for framing the issues on the basis of an employment dispute and not a constitutional issue; that having found that the appellant had jurisdiction to institute disciplinary proceedings against the respondent, the judge erred in failing to apply the provisions of ***Section 12*** of the Judicial Service Act which governs the removal of the respondent, and instead erred in applying ***Regulations 25*** in the Third Schedule to the Act; that in any case ***Regulations 25*** which was applied by the judge was *ultra vires* ***Section 12*** of the Judicial Service Act and therefore could not be given preference over the substantive provision. In this regard the following statement from ***Maitha v Said & Another*** ***[1999]2EA***, was relied upon:

> ***"Rules must be read together with the relevant Act; they cannot contradict express provisions in the Act from which they derive their authority. If the act is plain, the rules must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act."***

[19] Counsel for the appellant further submitted that the learned judge determined the petition on issues which were not pleaded as the respondent had not alleged violation of ***Section 32*** of the Judicial Service Act or ***Regulations 25*** of the Third Schedule to the Act; that the appellant had powers to receive and investigate complaints and remove judicial officers and staff; that the Chief Registrar of the Judiciary being a Registrar, was subject to the jurisdiction of the appellant; that the removal proceedings were undertaken by the appellant under ***Section 12*** of the Judicial Service Act as disciplinary proceedings; that the disciplinary proceedings could not be equated with criminal proceedings nor was the criminal law or the Criminal Procedure Code applicable; that the appellant complied with ***Section 12*** of the Judicial Service Act to the extent that it informed the respondent the case against her in writing and gave her reasonable time to respond; and that the respondent did in fact submit responses to the allegations made against her.

[20] In regard to the issue of bias in the disciplinary proceedings, it was maintained that the allegations of bias made against the appellant's Chairman and Commissioners were not substantiated and the learned judge had no jurisdiction to consider matters of

fact that were neither pleaded nor deposed under oath; that contrary to the position taken by the respondent in her petition, the respondent had confirmed during the disciplinary proceedings that there was no bias real or apparent on the part of the Chief Justice; that the allegations of bias were a red herring intended to scuttle the disciplinary proceedings which would have aborted due to lack of quorum if the respondent's bias complaint was acceded to; that the trove of emails relied upon by the learned judge were of dubious origin whose authenticity or source the respondent could not vouch for; that the learned judge exhibited outright bias in the way in which he ignored incriminating evidence against the respondent, and discredited the appellant by relying on submissions from the Bar on matters of fact.

[21] In addition, it was submitted that the learned judge erred in going into the merits of the allegations raised against the respondent at the disciplinary proceedings and in effect substituted the decision of the appellant with his own contrary to the holding in the South African case of ***Nampak Corrugated Wadeville v Khoza (JA14/98) [1998] ZALAC 24*** that:

> ***"A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"***

[22] Finally, it was submitted that the finding of the learned judge that there was violation of the respondent's right to a fair hearing and fair administrative action was baseless and contrary to the evidence on record as the disciplinary proceedings revealed that the respondent was not only informed of the allegations against her but was given reasonable time to respond to the same. In this regard several authorities were cited. Suffice to mention two cases in which the right to fair hearing was discussed.

[23] In the Nigerian Supreme Court decision ***BA Imonikhe v Unity Bank PLC S.C 68 of 2001*** it was held:

> ***"Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed***."

[24] In ***Selvarajan v Race Relations Board [1976] 1 ALL ER 12 at 19*** *Lord Denning* held that:

> ***"…in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons***

affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."

Submissions by the Amicus Curiae

[25] The *Amicus Curiae* relied on ***Section 2(1)*** of the Commission on Administrative Justice Act 2011, in submitting that the appellant's decision to terminate the respondent's employment as Chief Registrar of the Judiciary was an administrative action falling within the purview of ***Article 47*** of the Constitution; and that such an action had to be conducted in a lawful, reasonable and procedurally fair manner. Drawing from a South African Statute, the "***Promotion of Administrative Justice Act" (No. 3 of 2000)***, the Court was urged to adopt ***Section 3*** of that Act that requires a procedurally fair process in administrative action to include the following:

a) adequate notice of the nature and purpose of the proposed administrative action,

b) reasonable opportunity to make representation,

c) clear statement of the administrative action,

d) adequate notice of any right of review or internal appeal where applicable and,

e) adequate notice of the right to request reasons in terms of section 5.

[26] The *Amicus Curiae* further contended that the term "Registrar" as used in ***Article 172 (1)(c)*** of the Constitution and in the Judicial Service Act includes the Chief Registrar of the Judiciary; that since there was no other provision dealing with the disciplinary process for the Chief Registrar ***Article 172(1)(c)*** of the Constitution which mandates the appellant to discipline Registrars should apply; that the appellant therefore had the mandate to terminate the respondent's employment subject to compliance with the Constitution and ***Section 12*** and ***32*** of the Judicial Service Act; that the right to fair hearing under ***Article 50*** of the Constitution applies to disciplinary proceedings exercised by judicial or quasi- judicial authority; that the right to a fair hearing includes the right to a public hearing and can only be denied in very exceptional circumstances as specified under ***Article 50(8)***.

[27] The amicus Curiae argued that a fair, just and transparent process requires that where appropriate,external bodies mandated to conduct investigations should carry

out their investigations and present their findings before any disciplinary action is taken; that investigations by an independent body would avert allegations of bias as the decision would be based on an independent report; that any termination carried out before investigations by an independent body could only be anchored on allegations that do not require investigations; that before the appellant could terminate the respondent's employment, she had to be informed of the case against her and given reasonable time to defend herself, and that the Industrial Court had jurisdiction to grant reinstatement under the Industrial Court Act. The *Amicus Curiae* noted that there was an ambiguity in the law with regard to the removal process for the office of the Chief Registrar of the Judiciary.

Respondent's Submissions

[28] For the respondent it was pointed out that the party who was sued by the respondent was the appellant and not the Chief Justice who was only involved in the suit in his capacity as the chair of the appellant; that although ***Article 165(3) (b)*** of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of the Industrial Court to deal with such issues; that in any case ***Article 20*** of the Constitution gives all courts and bodies powers to deal with constitutional matters; that the appellant had admitted the jurisdiction of the Industrial Court to deal with the petition and could not approbate and reprobate on the jurisdiction of the court; and that the Industrial Court has jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes. The decision in the cases of ***Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012*** (Unreported); ***U.S.I.U v A.G &Others (2012) eKLR*** and ***Seven SeasTechnologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013*** (Unreported) were relied upon.

[29] It was argued that the jurisdiction of the Court of Appeal was restricted by ***Rule 29(1)*** of the Court of Appeal Rules, to re-appraising evidence and drawing inferences of fact and therefore the Court of Appeal could only interfere with the decision of the superior court if it found that the finding of the court was based on no evidence or that the court misapprehended the evidence and/or acted on wrong principles; that the appellant had failed to show that the trial court acted on wrong principles; that the Industrial Court was sitting both as a High Court and an Industrial Court; that the Court of Appeal should confine itself to issues of law only; and that the appellant had not demonstrated that the trial judge based his findings on no evidence. Relying on the decision in the case of ***Mbogo & Anor v Shah (1968) EA 93*** counsel urged that there was no justification for the Court to interfere with the judgment of the learned judge as he exercised his discretion properly.

[30] Counsel further submitted that ***Section 12*** of the Judicial Service Act did not provide the procedure for removal of the Chief Registrar and therefore it had to be read together with ***Section 32*** and the ***Third schedule*** to the Judicial Service Act, as

well as ***Article 172*** of the Constitution; that the removal of the respondent had to comply with ***Chapter 4*** of the Constitution; that the learned judge had not equated the disciplinary process to a criminal process, but was merely adopting the best practice in the criminal procedure and expounding the law, to give effect to the Bill of Rights in accordance with ***Article 20*** of the Constitution; that the charges/allegations made against the respondent were not framed in a clear and coherent manner. To fortify his submissions, counsel relied on the case of ***Hon. Martin Nyaga Wambora & Others v The Speaker of the Senate & Others-Kerugoya HC Petition No. 3 of 2014 (Unreported)*** .

[31] On the ground of fair hearing, it was argued that the respondent was not contesting the merits of the decision to remove her, but the process leading to her removal; that there was no proper hearing conducted during the disciplinary proceedings, that the respondent was only informed that the proceedings were disciplinary proceedings after the proceedings had commenced; that despite the respondent's objection to the proceedings on grounds of bias, lack of jurisdiction and impartiality, the appellant insisted on continuing with the proceedings; that the appellant did not object to the production of the trove of emails in the trial court, and that the emails showed a contrived process to remove the respondent from office; that the appellant refused to give the respondent copies of the disciplinary proceedings; that the respondent never admitted any allegations made against her; that as the accounting officer of the Judiciary, the respondent was answerable in financial matters to Parliament and the Auditor General under ***Article 266*** of the Constitution; that while the respondent was answerable to the Chief Justice, she was not answerable to the appellant and therefore there was no insubordination in the respondent asserting her powers and independence as provided under the law. Finally the respondent also raised an issue with regard to the competence of the appeal contending that ***Rule 75*** of this Court's Rules had not been complied with,as they were not served with a Notice of Appeal.

The Facts

[32] From the affidavit evidence that was before the learned judge the following facts were not disputed:

(i) That the appellant served the respondent with a letter dated 10th September 2013 seeking her response to eighty seven allegations categorized as financial mismanagement; mismanagement in human resource; irregularities and improprieties in procurement; insubordination and countermanding decisions of the appellant and misbehavior; that the respondent was given twenty one days to respond to the allegations; that the respondent requested for extension of time to enable her gather appropriate information; that the respondent submitted an initial interim report on 1st October 2013 and reiterated her request for extension of time; that having been

informed that no further extension of time would be granted and that the hearing would proceed on 16th October 2013, the respondent submitted under protest a further response to the allegations entitled "final report" on 15th October 2013.

(ii) That the respondent appeared before the appellant for a "hearing" on 16th October, 2013, when upon inquiry, the appellant informed the respondent that the hearing was not an investigative process, but was a disciplinary process.

(iii) That the respondent raised a preliminary objection to the disciplinary proceedings contending that the appellant had no jurisdiction to question the respondent on matters pertaining to finance, human resource or procurement because she was only accountable to Parliament, the Auditor General, and the Secretary to the National Treasury; this objection was overruled by the appellant who maintained that it had jurisdiction under ***Article 171*** and ***172*** of the Constitution, and ***Section 12*** of the Judicial Service Act to undertake the disciplinary process.

(iv) That the respondent raised further objections to the disciplinary process contending: that four members of the appellant would not be impartial in handling the allegations against her because of the attitude that they had demonstrated towards her; that her right to fair hearing and right to fair administrative action was compromised as she had not been informed who her accusers were nor was she told the allegations against her from the time she was suspended on 18th August up to 10th September; that she had come across exchange of e-mails between the Chief Justice and people designated as "war council" members which revealed that there was a plan to have her removed from her position, hence, her legitimate expectation of a fair hearing was compromised.

(v) That the respondent sought more time to prepare for the disciplinary proceedings, a right to call witnesses, and a public hearing as accusations against her had been made in public through the media, and she wanted an administrative process that was open and transparent.

(vi) That the objections raised by the respondent were all overruled by the appellant as having no substance, while the request for a public hearing was rejected on the ground that a public hearing was not necessary, as the disciplinary process was an internal process subject only to the principles of fairness and due process, the respondent was nonetheless granted two days adjournment to enable her prepare for the disciplinary hearing which was adjourned to 18th October, 2013.

(vii) That on 18th October 2013, the appellant's counsel submitted written submissions entitled "closing submissions under protest" in which he reiterated his objections to the disciplinary proceedings maintaining that the appellant lacked jurisdiction to entertain the proceedings; and that the respondent's rights to administrative action and fair hearing had been violated; and that the entire process was a sham and the allegations against the respondent spurious and lacking legal and factual basis.

(viii) That subsequently the appellant served the respondent with a letter dated 18th October 2014 communicating its resolution to terminate her employment pursuant to **Article 172** of the Constitution and **Section 12** of the Judicial Service Act.

The following allegations of facts were contested:

(i) That four of the appellant's Commissioners had differences with the respondent that compromised their impartiality towards the respondent.

(ii) The authenticity of a trove of emails allegedly circulating from and to the Chief Justice.

(iii) The presence of a "war council," or a contrived scheme by the Chief Justice and persons in and outside the Judiciary to have the respondent removed from office.

The issue of Jurisdiction

[33] Several issues arise in this appeal. First is the issue of jurisdiction which is threefold; the extent of the jurisdiction of this Court in hearing the appeal; the jurisdiction of the Industrial Court if any to hear a constitutional petition such as that of the respondent; and the jurisdiction of the appellant in the disciplinary proceedings. The jurisdiction of this court to hear and determine appeals is provided under ***Article 164(3)*** of the Constitution under which this court has jurisdiction to hear appeals from:

"(a) the High Court;

(b) any other court or tribunal as prescribed by an Act of Parliament"

[34] ***Section 17*** of the Industrial Court Act provides for a right of appeal from the Industrial Court to this court on matters of law only. This is consistent with Article 164(3)(b) of the Constitution, as well as ***Section 3(1)*** of the Appellate Jurisdiction Act that states as follows:

"3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal as prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law…"

[35] The question is how can this right of appeal which is limited to matters of law, be reconciled with ***Rule 29*** of the Court of Appeal Rules that states as follows:

> ***"(1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-***
>
> (a) ***To re-appraise the evidence and to draw inferences of fact;***
>
> ***and***
>
> (b) ***In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.***
>
> ***(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent…"*** (emphasis added).

[36] In my view to the extent that this Rule empowers the court to reappraise evidence, draw inferences of fact, and take additional evidence, it is inconsistent with ***Section 17(2)*** of the Industrial Court Act which limits the jurisdiction of this court in hearing appeals from the Industrial Court to matters of law only. However, this inconsistency is easily resolved by ***Article 164(3)(b)*** of the Constitution which provides that the jurisdiction of this Court where the right is conferred by an Act of Parliament must be "as prescribed" by that particular Act. Therefore **Rule 29** of the Court of Appeal Rules must be read together with the **Section 17(2)** of the Industrial Court Act such that the power of the court in re-considering and re- evaluating evidence is limited to matters of law only. As this court (differently constituted) stated in ***Timamy Issa Abdalla v Swaleh Salim Imu & Others, Civil Appeal No. 36 of 2013:***

> ***"…Although the court has jurisdiction to re-consider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because, the jurisdiction of this court to draw its own conclusion can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met. Firstly that the conclusions are conclusions of law, and secondly that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts…"***

[37] Further, in ***Petition No. 2B of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & Others [2014] eKLR,*** the Supreme Court considered ***Section 85A*** of the Elections Act, which like ***Section 17(2)*** of the Industrial Court Act limits the right of appeal to this Court to matters of law only. After reviewing comparative jurisprudence

from several jurisdictions on the question of matters of law and matters of fact, the Supreme Court provided an appropriate guideline in identifying matters of law as follows:

> ***"From the forgoing review of the comparative judicial experience, we will characterize the three elements of the phrase "matters of law" as follows:***
>
> **(a)*The*** *technical element****: involving the interpretation of the constitutional or statutory provision.***
>
> **(b)*the*** *practical element****: involving the application of the Constitution and the law to a set of facts or evidence on record.***
>
> **(c) *the*** *evidential element:* ***involving the evaluation of the conclusion of the trial court on the basis of the evidence on record***
>
> ……..
>
> ***Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standard of knowledge, technical competence, and probity in electoral dispute adjudication , on the other hand. "***

[38] Thus, the jurisdiction of this Court in this appeal as circumscribed by the Constitution and the Industrial Court Act, requires the appraisal and evaluation of the learned Judge's interpretation of the Constitution and statutory provisions relating to the appellants mandate, and the respondent's constitutional right; the application of these laws to the undisputed and established facts; and the evaluation of the reasonableness of the conclusions of the learned Judge.

[39] As regards the jurisdiction of the Industrial Court, the court has been established under ***Section 4*** of the Industrial Court Act 2011 (Cap 234) pursuant to ***Article 162(2)(a)*** of the Constitution, as a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. The jurisdiction of the Industrial Court has been extensively prescribed under ***Section 12*** of the Industrial Court Act. Of relevance to this appeal is ***Section 12(1)(a)*** which grants the Industrial Court exclusive original and appellate jurisdiction to hear disputes relating to or arising out of employment between an employer and an employee. Under ***Section 12(3),*** the Industrial Court has powers to make interim preservatory injunctive orders, prohibitory orders, orders of specific performance, declaratory orders, award of compensation or damages, an order for reinstatement, and any other relief as the court

may deem appropriate. As already observed at paragraph 3 & 4 (supra), the reliefs sought by the respondent in her petition were orders of Judicial Review and Declaratory Orders in regard to violation of her constitutional rights. To that extent, the application was a constitutional reference. Nonetheless, the violations alleged by the respondent arose from a dispute in the employment relationship between the respondent and the appellant. Indeed, it was this acknowledgement that informed the consensus before the High Court to have the matter transferred to the Industrial Court for determination.

[40] ***Article 23(1)&Article 165(3)(b)*** of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, ***Article 23(2)*** provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, ***Article 23(3)*** does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers "a court" to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is ***Article 20(3)*** that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.

[41] Under ***Article 162(2)(a)***, the Constitution has provided for special Courts with the "status" of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the "status" of the High Court enhances the power and discretion of the Court in granting relief. In my considered view, the general power provided to the Industrial Court under ***Section 12(3)(viii)*** of the Industrial Court Act to grant relief as may be appropriate, read together with ***Article 23(3),*** empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition. Indeed I concur with the position taken by *Majanja,J.* in ***United States International University (USIU) v Attorney General & 2 Others [2012] eKLR*** that:

> ***"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in*** *Section 12* ***of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would***

give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.

[42] In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights "applies to all law and binds all state organs and persons", and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

[43] From the respondent's petition, it was evident that although the dispute between the appellant and the respondent was anchored on the employment labour relationship, the respondent's claim arose from the alleged violation of her fundamental rights in the disciplinary process. In particular paragraph 12 of the petition states as follows:

"12 In purporting to terminate the employment of the Petitioner, the Respondent violated the Petitioner's right and freedoms as follows:-

(i) ***Her right to fair trial was violated in contravention of Articles 25(c), 47(1) and (2) of the Constitution.***

(ii) ***Her right to public hearing was denied in violation of Article 50(1) of the Constitution.***

(iii) ***Her right to presumption of innocence, to be informed of the charges in sufficient detail and to have adequate time to prepare her defence were denied in contravention of Article 50 (2) (a) (b) and (c) of the Constitution.***

(iv) ***Her right to be heard by an impartial tribunal was violated in contravention of Article 50(1) of the Constitution.***

(v) ***Her right to due process of the law has been violated in contravention of Article 236 (b) of the Constitution.***

(vi) ***The Respondent has refused to give material copies of the proceedings and related documents in contravention of Article 35(1) (b) of the Constitution.***

(vii) ***The entire process against the Petitioner violated the Petitioner's right to inherent dignity pursuant Article 28 of the Constitution"***

[44] The above pleading is consistent with the prayers for orders of Judicial Review and declaratory orders that were sought by the respondent in her petition. In this regard, the respondent's position is distinguishable from that in ***Prof. Daniel M.***

Mugendi v Kenyatta University & Others (supra) where although the claim filed in the Constitutional Court sought to enforce fundamental rights, only breaches of the contract of employment were set out in the petition and no concise or specific allegations of violations of rights under the Constitution were pleaded. I would nonetheless reiterate what this court (differently constituted) stated in the Mugendi case whilst setting aside the High Court order striking out that petition for want of jurisdiction and directing that the petition be transferred to the Industrial Court for determination, that the Industrial Court can determine Industrial and labour relation matters alongside claims of fundamental rights ancillary and incidental to those matters.

[45] In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent's claim.

Other Issues

[46] With regard to the issue of the jurisdiction of the appellant, the same may be appropriately disposed of in dealing with the substantive issues remaining for determination in this appeal. These are first, what was the law applicable to the petition before the learned judge and did the learned judge properly identify and apprehend the law or did he misapprehend the law such as to arrive at a wrong decision or miscarriage of justice? Were the conclusions of law arrived at by the learned judge in regard to the procedural fairness and legality of the process, conclusions that could reasonably be drawn from the findings on the facts? And finally was the learned judge right in granting the orders issued in favour of the respondent?

[47] As what was before the Industrial Court was a constitutional reference which sought the intervention of the court through *inter alia*, orders of Judicial Review, to redress violation of constitutional rights, the position is similar to what was stated by *Chaskalson, J.* in the South African Case ***Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674:***

> "***Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of***

administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."

[48] The following often quoted passage from the Ugandan case of ***Pastoli v.Kabale District Local Government Council and Others*** ***[2008] 2 EA 300*** remains relevant in determining such a reference.

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety***
>
> ***...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.***

[49] Thus, the determination of the respondent's petition by the learned Judge called for the interrogation of the process leading to the termination of the respondent's employment with a view to determining the procedural fairness, reasonableness and legality of the appellant's action in light of the respondent's constitutional right to a fair hearing, and right to fair administrative action. Although anchored on the employer-employee relationship, the respondent's complaint was not that of a claim in contract for unlawful dismissal that would have required consideration of the merit of the appellant's decision, but it questioned the procedural fairness and legality of the process. Therefore, it was not the merits of the appellant's decision, or the merit of the allegations made against the respondent that were in issue, but the procedural fairness, legality of the process and the reasonableness of the appellant's decision. The questions that needed to be addressed included the nature of the process subject of the respondent's complaint, the jurisdiction of the appellant in the process, and the application of the constitutional provisions relating to a fair hearing and right to administrative action.

Jurisdiction of the appellant

[50] As already stated the respondent was employed by the appellant pursuant to its mandate under ***Article 172(1)(c)*** of the Constitution which states as follows:

"172 (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall-

(a) …

(b) …

(c) 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;

[51] Pursuant to the above provision, the Judicial Service Act 2011 has been put in place. This Act provides substantive provisions for the operationalization of the appellant's mandate. It is worthy of note that although the Constitution establishes the office of the Chief Registrar of the Judiciary under ***Article 161(1) (c),*** it has not provided any specific provisions for appointment or removal in regard to that office. This notwithstanding, the appellant appointed the respondent as Chief Registrar of the Judiciary. The appointment could only have been made pursuant to the appellant's mandate under ***Article 172 (1)(c)*** of the Constitution that gives the appellant general powers to appoint, investigate and discipline officers of the Judiciary, read together with ***Section 9*** of the Judicial Service Act which provides for qualifications for appointment of Chief Registrar of the Judiciary. This is in sync with the argument that was made by the *Amicus Curiae* that the use of the term "Registrar" in ***Article 171(1)(c)*** of the Constitution includes the Chief Registrar of the Judiciary, and therefore empowers the appellant to appoint and discipline the respondent.

[52] Of importance is ***Section 12*** of the Judicial Service Act that provides for the removal of the Chief Registrar as follows:

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

(a) ***inability to perform the functions of the office, whether arising from infirmity of body or mind;***

(b) ***misbehavior;***

(c) ***incompetence;***

(d) ***violation of the prescribed code of conduct for judicial officers;***

(e) ***bankruptcy;***

(f) ***violation of the provisions of Chapter Six of the Constitution; or***

(g) ***any other sufficient cause.***

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

[53] The respondent has maintained that the appellant had no jurisdiction to initiate disciplinary proceedings against her as she was not answerable to the appellant but was answerable to Parliament and the Auditor General in financial matters, and that she was only answerable to the Chief Justice in administrative matters. This argument is not supported by any statutory provision. While ***Article 226 (2)*** of the Constitution provides that the accounting officer of a national public entity is accountable to the national assembly for its financial management, this is in actual fact external accountability of the public entity through its accounting officer, for the public funds allocated to it. The external accountability is mandatory. It does not however absolve the accounting officer from internal accountability within the public entity, nor does it remove the accounting officer from the authority of the public entity. Indeed, such internal accountability is not only prudent but also imperative in facilitating the achievement of the appellant's objectives as set out in ***Section 3*** of the Judicial Service Act. That Section provides wide powers to the appellant and the Judiciary for the management, accountability and facilitation of the efficient, effective and transparent administration of justice.

[54] Moreover, it stands to reason that an employer must of necessity have control over its officers and the operations of its establishment. As the chief administrator and accounting officer, the respondent had to answer to the "Chief Executive and the board," which in this case was a role played by the Chief Justice as the head of the Judiciary, and the appellant as the oversight body. In the absence of any specific provisions in the Constitution, it must be inferred that the Constitution contemplated that the appellant shall handle the discipline of the respondent. I come to the conclusion that the learned judge was right in concluding that the disciplinary process was a function that was within the mandate of the appellant.

[55] The argument that the appellant could not initiate disciplinary proceedings against the respondent on its own motion, without having first obtained an investigations report from either Parliament or Auditor General or Public Procurement Oversight Authority or the Anti-Corruption Commission, appears to be anchored on Article 259(11) of the Constitution that states as follows:

"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with another person, the function may be performed on the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."

[56] In this regard it is remarkable that, ***Article 172(1)(c)*** of the Constitution as read together with ***Section 12*** of the Judicial Service Act, does not provide the disciplinary process of the Chief Registrar of the Judiciary as a function or power of the appellant that is restricted by the Constitution in terms of ***Article 259(11).*** It cannot therefore be a function that is exercisable only on the advice or recommendation or in consultation with another person. In addition the argument for an investigation report, presupposes that the disciplinary proceedings must relate to financial mismanagement, yet under ***Section 12*** of the Judicial Service Act the grounds for removal from office are not restricted to financial mismanagement. In my view although a report from the external oversight bodies may be a necessary prerequisite in criminal proceedings, it is not a prerequisite in the disciplinary function of the appellant. This position is reinforced by ***Article 252*** of the Constitution that gives general powers to the appellant as a commission as follows:

> ***"252 (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;***
>
> (a) ***has the powers necessary for conciliation, mediation and negotiation;***
>
> (b) ***shall recruit its own staff; and***
>
> (c) ***may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution".***

[57] Therefore, the appellant had jurisdiction to initiate the disciplinary proceedings against the respondent *suomoto* without any recommendation or report from any of the external oversight bodies, and the learned Judge erred in making a contrary finding.

Applicability of the Criminal law and Procedure

[58] In his judgment, the learned judge devoted a lot of space in considering the format and substance of the allegations made against the respondent. At paragraph 56 and 57 of the judgment, the learned judge rendered himself as follows:

> ***"56. At this stage, the court agrees that the seriousness of the allegations made against the CRJ effectively made the disciplinary process a quasi-criminal affair. The JSC assumed a responsibility equivalent to if not equal to a judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hang in the balance.***
>
> ***…***
>
> ***57. It is appropriate to note that Section 12 (2) of the Judicial Service Act under which JSC acted provides:***

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

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

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

…

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

[59] It is noteworthy, that the learned judge then proceeds to examine the specific allegations that were made against the respondent noting that in many of the "charges" there was no statement of the offence, or specific provisions of the law infringed and that many of the counts were bad for duplicity. At paragraph 76, 77, 78 and 79 the learned judge further states:

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

…

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

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

79. In the present case, it is obvious on the face of the response by the Petitioner, she did not intend to admit any of the allegations or offences set out against her. It was therefore incumbent on the Respondent to embark on a proper hearing to have the offences proved on a balance of

probabilities, which it did not do. The matrix attached to the Replying Affidavit of the Respondent containing three columns of; Allegations by JSC; Response by CRJ and observations by JSC clearly shows that the Petitioner in her written response did not in respect of any of the offences make unequivocal admission at all and therefore the findings by JSC that 33 offences were admitted is preposterous and therefore untenable.

[60] The extracts of the judgment quoted above reveal that contrary to the statement of the learned judge at paragraph 61 of the judgment, that he was not imposing on the appellant the strict requirements under the Criminal Law Procedure, that is precisely what the learned judge proceeded to do by applying the criminal procedure rules relating to framing of charges, taking of plea, and recording an unequivocal plea of guilty. The question is was the disciplinary process undertaken by the appellant a quasi-criminal process? And if so, was Criminal Law and Procedure applicable to the disciplinary process such that it can be said that the process was flawed without observance of such procedure?

[61] The disciplinary process undertaken by the appellant was a quasi- judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with the Constitution and the Judicial Service Act, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be imposed in the disciplinary proceedings did not include penalties or forfeitures akin to those that could be applied in a criminal trial. Thus the learned Judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned Judge erred in applying the provisions of the Criminal Procedure Code.

The Applicable Procedure

[62] The respondent having been appointed by the appellant pursuant to powers under ***Section 172(1)(c),*** it follows that the disciplinary process against her had to be undertaken in accordance with the manner provided under the Judicial Service Act. In this regard, it is only ***Section 12*** of the Judicial Service Act that provides for the disciplinary process against the respondent. It was argued that this section ought to be read together with ***Section 32*** which provides as follows:

> ***"32. (I) For the purpose of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a Committee or Panel which shall be gender representative.***

(ii) Notwithstanding the generality of subsection (i) a person shall be qualified to be appointed as a magistrate by the Commission unless the person-

(a) …

(b) …

(c) …

(d) …

(e) …

(iii) The procedure governing the conduct of a Committee or Panel constituted under this section shall be as set out in the Third Schedule.

(iv) Members of the Committee shall elect a chairperson from amongst their number.

(v) Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure. *(emphasis added)*

[63] The Third Schedule is entitled "Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff." This Schedule provides a more elaborate procedure at ***Section 23*** to ***25*** for disciplinary proceedings leading to dismissal of judicial officers and staff. Judicial officer is defined under ***Section 2*** of the Judicial Service Act to include: "*a registrar, deputy registrar, magistrate or Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament…"* Judicial staff is defined in the same section as "*persons employed in the Judiciary but without power to make judicial decisions and includes the staff of the Commission*". As per ***Section 8(b)*** **of** the Judicial Service Act the functions of the Chief Registrar includes performing judicial functions. Therefore, the Chief Registrar does not therefore fall within the definition of judicial officer or judicial staff as defined in ***Section 2*** of the Judicial Service Act.

[64] The position of Chief Registrar has been defined under ***Section 2*** of the Judicial Service Act as "*Chief Registrar of the Judiciary"*. That position has neither been included under section 32 of the Judicial Service Act nor the Third Schedule to that Act which provides general provisions applicable to judicial officer and judicial staff as defined in section 2 of the Judicial Service Act. In my view the definition in Section 2 of the Judicial Service Act must be distinguished from the definition of judicial officer in ***Article 172(1)(c)*** of the Constitution that I have accepted to include the Chief Registrar of the Judiciary as the definition in the Constitution is applicable to the Constitution only. Unlike the Judicial Service Act, which defines Chief

Registrar, the Constitution does not define the Chief Registrar hence the adoption of the definition of Judicial Officer in the Constitution.

[65] In light of ***Section 12*** of the Judicial Service Act that makes clear reference to the position of the Chief Registrar, it is clear that the legislature intended to create a special provision for the removal of the Chief Registrar of the Judiciary. This is understandable given the senior position that the office occupies.***Section 12*** of the Judicial Service Act (See Paragraph 51 above) provides for procedural safeguards that include the establishment of specific grounds for removal of the respondent; the respondent being informed of the case against her in writing; and the respondent being given reasonable opportunity by the Commission to defend herself. For reasons stated in the preceding paragraph, ***Section 32*** of the Judicial Service Act, and the ***third Schedule*** to that Act, which provides for a preliminary inquiry and investigation by a Committee or a Panel before the matter is referred to the Commission is not applicable to the respondent. Thus the learned judge misdirected himself in finding that ***Section 32*** of the Judicial Service Act and the ***third Schedule*** to that Act were applicable to the disciplinary process against the respondent. In particular sections 25 and 26 of the Third Schedule to the Judicial Service Act which relates to disciplinary powers delegated to the Chief Justice are not applicable to the office of the Chief Registrar of the Judiciary.

[66] Under Section 12 of the Judicial Service Act, the issue of drawing of charges did not arise, as all that was required was for the respondent to be informed of the case against her in terms of the specific matters that were subject of the disciplinary proceedings. No particular format was necessary as long as the information given was sufficiently clear for the respondent to understand the allegations and complaints against her. In this case the allegations communicated to the respondent through the letter dated 10th September 2013, were clear, and the respondent not only understood the case against her, but also specifically responded to the case against her according to the leaned Judge, "blow by blow'.

Right to Fair Hearing

[67] ***Article 50*** of the Constitution provides as follows:

"50

(1) ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.***

(2) ***Every accused person has the right to a fair trial, which includes the right-…***

(3) ***If this Article requires information to be given to a person, the information shall be given in language that the person understands.***

(4) ***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.***

(5) **…** (6) **…**

(7) **…**

(8) ***This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.***

(9) **…"**

[68] Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with "any dispute that can be resolved by application of law." I will address this right in two parts. First is the need for the adjudicator to be independent and impartial, and the second is the requirement for fairness in the hearing procedures adopted.

Independence and Impartiality

[69] As a Commission established under the Constitution, the appellant is under Article 249(2) firstly, subject only to the Constitution and the law, and secondly is an independent body not subject to the control or direction of any person. The concept of impartiality is deeply engrained in the Constitution. Some of the constitutional provisions that apply the concept of impartiality include:

a) Article 10(2)(b) of the Constitution that reflects impartiality as one of the national values and principles of governance adopted in the Constitution as "human dignity, equity,social justice, inclusiveness, equality,human rights,non-discrimination,and protection of the marginalized" (Underlining added);

b) Article 20(4) of the Constitution makes it mandatory for the Court to promote amongst other things "human dignity, equality and equity" in the interpretation of the Constitution;

c) Article 159 enjoins the court in the exercise of judicial authority to be guided by amongst other principles, the principle that "justice shall be done to all, irrespective of status;"

d) Article 50(1) of the Constitution which has already been referred to reflects impartiality as a key attribute in the

administration of justice by providing for hearing before an "independent and impartial tribunal or body" as a fundamental right in the resolution of legal disputes.

[70] Bias is the nemesis to impartiality. Black's law Dictionary 9th Edition has the following definitions in regard to bias.

> ***"Bias-Inclination; prejudice; predilection;***
>
> ***Actual bias - genuine prejudice that a judge, Juror, witness, or other person has against some person or relevant subject;***
>
> ***Implied bias – prejudice that is inferred from the experiences or relationship of a judge, juror, or other person"***

[71] The following passage from the judgment of the Court of Appeal in England in ***Medicament and related Classes of Goods (2001) 1WLR 700*** bring insight in understanding bias:

> "***Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."***

[72] The constitutional provisions quoted at paragraph 66 (supra) confirm that bias and prejudice have no room in the administration of justice. Indeed for the requirement of impartiality to be achieved the proceedings must be free from bias or appearance of bias. This is reiterated in the constitutional oath of office that all judicial officers are obliged to take in accordance with the third Schedule to the Constitution, before assuming office, undertaking *inter alia* to:

> ***"impartially do justice ……without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence…"***

[73] Drawing from comparative jurisprudence, I note the position in England where the debate regarding the test to be applied in determining apparent bias has taken twists and turns revealing the complexities in this area. The test applied for a long time was that set out in ***R v Gough [1993] AC 646*** reflected in the following statement made by Lord Goff of Chieveley at page 670:

"I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…"

[74] The test laid down in **R v Gough** (supra) has been the subject of sharp criticism, with Australia specifically rejecting it in ***Webb v the Queen (1994) 181 CAR 41*** as follows:

> ***"Both the parties to the case and the public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of 'reasonable likelihood' or 'real danger' of bias tends to emphasize the court's view of the fact. In that context the trial judges acceptance of the explanation becomes of primary importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident…. In light of the decision of this court which hold that the reasonable apprehension or suspicion test is the correct test for determining a case of alleged bias against a judge, it is not possible to use a 'real danger' test as a general test for bias without rejecting the authority of those decisions."***

[75] In the ***Medicaments and related Classes of Goods*** case (Supra), the Court of Appeal in England suggested modification of the test of real danger as applied in the **R v Gough** (Supra), putting forward the following proposal:

"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same that the tribunal was biased.

The material circumstances will include any explanation given by the judge under review to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review, it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the view point of the fair minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

[76] The House of Lords rose to the occasion and set the debate to rest in ***Magill v Porter Magill v Weeks [2001] UKHL 67***. Lord Hope of Craighead having reviewed

the test as applied in previous House of Lord's decisions, and jurisprudence from the European Court of Justice, and the proposal of the Court of Appeal in The ***Medicaments and related Classes of Good*** (Supra) stated at paragraph 103 of the judgment as follows:

> ***"I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test, which is in harmony with the objective test, which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test, which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*** (emphasis added)

[77] Nearer home in ***Attorney-General v. Anyang' Nyong'o & Others [2007]1E.A. 12***, the court identified the test for bias as follows:

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

[78] Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias.

[79] In regard to the issue of bias the learned Judge had made the following findings in his ruling in the interlocutory application:

> "***There is an arguable case though not tested at this stage, that some of the Commissioners of JSC had a personal interest in the removal of the Chief Registrar and that a strategy had been developed through connivance with persons in and out of JSC to implement the strategy. The Court at this stage***

is satisfied that a prima facie case in this respect has been made out by the applicant."

[80] In the judgment subject of this appeal, the learned Judge directed himself on the issue of bias at paragraph 83 as follows:

> ***"The Court need not restate the competing allegations on this issue which we have herein before set out in this judgment.***
>
> ***The Court now will make a decision whether on the facts presented, JSC ought to have reconstituted another disciplinary tribunal in terms of section 32 and Regulation 25 of the Schedule to the JSC Act, 2011 on grounds of the alleged bias and by necessary implication whether by proceeding to hear this matter the result is a nullity for violating Articles 2(4), 27(1), 47(1)&(2), 50(1)&(2), 72(1) and 236(b) of the Constitution; the JSC Act and the regulations thereunder and the rules of natural justice Nemo judex in causa sua and audi alterram partem by sitting in their own cause and denying the petitioner a fair hearing."***

[81] The learned Judge then made reference to his afore quoted finding in the interlocutory application, and noted that none of the Commissioners had personally sworn any affidavit in response to the serious allegations made against them, but that all relied on denials made in an affidavit sworn by Mokaya the appellant's Registrar. After referring to several authorities on bias, the learned Judge concluded on this issue as follows:

> ***"96. The Court also noted that the obligation to be impartial also brings with it the duty to disclose any facts that may call into question a Judge's impartiality.***
>
> ***On the facts of the case, it is clear that the allegations made especially against the CJ and Commissioner Ahmednasir Abdillahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances.***
>
> ***"Public perception of the possibility of even subconscious bias is a relevant determinant. The Judge could actually be as fair as can be but that is only relevant in case of actual bias…what matters is whether a fair minded reasonable person knowing of the facts could conclude that there was likelihood of bias" concluded Justice Majanja in the Trust Bank case (supra).***
>
> ***On the facts of this case, the apprehension of likelihood of bias by the petitioner appears to be well founded from a reasonable by standers point of view.***
>
> ***97. This finding does not necessarily mean that the allegations made against each of the Commissioners and the Chairman have been found to be truthful***

since in civil proceedings the test is on a balance of probabilities. However, the Commissioners mindful of the law regarding perceived bias ought to have stepped aside and reconstituted another disciplinary tribunal of probably lesser members of the JSC or otherwise within the confines of section 32 to the JSC Act 2011 and regulations 25 in the Third Schedule."

[82] At paragraph 8 of her affidavit sworn in support of the petition, the respondent complained of the absence of impartiality on the part of the appellant, real and apparent bias. The circumstances upon which the respondent's complaint was anchored are not specifically deposed to in the affidavit but are stated in documents entitled interim report, final report, closing submissions and trove of emails which were annexed to the respondents affidavit as annextures GBS 10, GBS 12, GBS 11, and GBS 13 respectively. Of note here is Order 19 Rule 3 of the Civil Procedure Rules 2010 that which provides that affidavits must be confined to facts that the deponent is able of her own knowledge to prove.

[83] This Court as a first appellate court has the obligation to defer to the findings of the trial court on matters of facts. In this case however an issue of law arises in regard to the conclusions of the learned Judge on matters of law drawn from findings of facts which are in turn derived from the affidavit evidence anchored on contents of annextures to the affidavit, whose veracity are not parts of the oath sworn in the affidavit. For instance the respondent has not specifically sworn in her affidavit the specific allegations made in her reports (annexture GBS 10 and 12) against Commissioner Ahmednassir Abdillahi or any of the other Commissioners. In the case of the trove of emails the respondent not only declined to reveal the source of her information but also conceded during the disciplinary proceedings of 16th October 2013 that she could not vouch for the authenticity of the emails. The issue here is not simply one of credibility of the witness and the facts alleged in the annexture, but whether these allegations of facts which are grave and crucial, are facts which the respondent could of her own knowledge prove, or sources of which has been revealed such as to form part of the facts established through the affidavit. To this extent there is need to address these circumstances.

[84] From the afore-quoted extract of the judgment, it is evident that the learned judge properly considered and accepted the test in determining bias as ***"reasonable apprehension in the mind of a fair minded and informed member of the public."*** The learned judge did not however, apply his mind to the need to ascertain the circumstances under which the allegation of bias arose. The circumstances, upon which the alleged animosity between the respondent and Commissioner Ahmednassir, and the alleged communication between the Chief Justice and some members of "a war council" was anchored, needed to be established. In this regard, the learned judge observed that in the initial affidavit the appellant did not respond to the allegations of bias, and that denials of the allegations were only

subsequently made through an affidavit sworn by the appellant's Registrar. The learned judge without establishing the circumstances merely concluded that the allegations made against the Chief Justice and Commissioner Ahmednasir Abdillahi, were of such a serious nature that any reasonable person would have reasonable apprehension of bias. In my view, the learned judge erred in failing to ascertain the facts or circumstances upon which the allegations were anchored. True the allegations were of a serious nature. However, it is one thing to allege facts and another to establish the facts. The perception of bias can only be based on established facts. In this case the circumstances giving rise to the respondent's allegations were not established and therefore could not be the basis of the perception of a reasonable man. For, if every allegation made by a party were to be the subject of disqualification without verification, litigants would have a field day avoiding judges they did not, for any reason, like. That is a situation which would be inimical to justice.

[85] Further, the learned judge appears not to have addressed his mind to the issue of actual bias. Indeed at paragraph 97 of the judgment, he makes it clear that his concern is that of perceived bias and not necessarily the truth of the allegation made against the Chairman and commissioners of the appellant. The allegations of outright animosity towards the respondent by Commissioner Ahmednassir, and the allegations that there was a scheme to remove the respondent from office, inferred that there was actual bias against the respondent. Strict proof of the alleged circumstances revealing actual bias was imperative, as it rendered the Chief Justice and the Commissioners involved in the scheme subject to automatic disqualification from the disciplinary proceedings. Surprisingly the respondent's reaction during the proceedings of 16th October implied that she did not believe the allegations against the Chief Justice.

[86] The trove of emails that were exhibited revealed an ingenious scheme that formed curious and alarming reading. The concept of the independence of the Judiciary has been clearly adopted in the Constitution as reflected under Article 160 of the Judiciary, and therefore a situation where people in and outside the Judiciary are alleged to direct or manipulate the Chief Justice in decision making in the affairs of the Judiciary, must be one of concern. However, without the source of the emails having been disclosed, the authenticity of the emails remained doubtful. It was not enough for the respondent to say, "I have come across these documents" without revealing where and how she has come across the documents. The respondent needed to demonstrate her good faith and the accuracy of her complaint, by coming clean and giving all information in her possession. Otherwise how could one rule out the appellant's contention that the emails were a red herring coined to scuttle the disciplinary proceedings against the respondent? Without establishing the reliability of the source and the authenticity of the trove of emails they remained no more than rumours, hearsay or conjecture. In the circumstances a fair minded and informed member of the public could not have been swayed by such intrigues into concluding that there was actual bias or reasonable apprehension of bias. I find that the

conclusion of the learned Judge on the issue of bias and impartiality was clouded by his failure to properly address and establish the circumstances upon which the allegations were anchored.

Hearing Procedures

[87] Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent's complaints were that she was not informed of the case against her; that she was not given adequate time to present her defence; that she was not accorded an opportunity to call witnesses; that she was not accorded a public hearing; and that she was not given any reasons for the appellant's decision to terminate her employment.

[88] A perusal of the respondent's affidavit which was sworn in support of her petition reveals that at paragraph 8(iii) and (iv) of the affidavit, the respondent conceded that she was served with the allegations against her; that she responded to the said allegations; and that she did appear before the appellant with her lawyers on 16th October, 2013. The allegations that were served on the respondent and her responses to the allegations were all annexed to her affidavit. A perusal of these annextures reveals a detailed list of 87 allegations to which the respondent has provided a comprehensive response, demonstrating that she clearly understood the case against her. This negates the respondent's contention that she was not informed of the case against her or given sufficient time to respond to the case against her. Further, in the letter of 10th September, 2013 the respondent was initially given 21 days to respond to the allegations against her. She responded through two reports. The first response to the allegations was sent to the appellant on 1st October, 2013 and the second and final response was received by the appellant on 15th October, 2013. The truth of the matter is that although the appellant indicated through its Chairman a reluctance to extend time, time was actually extended as by 15th October 2013, the respondent had the benefit of a total of 35 days within which she responded to the allegations. Given the nature of the allegation against the respondent, 35 days was reasonable time within which to respond to the allegations against her.

[89] In regard to the respondent's request for a public hearing and a right to call witnesses, the proceedings before the appellant being disciplinary proceedings of a quasi judicial nature, there was no trial per se upon which an automatic right of public hearing could be anchored. Subject to compliance with basic fairness procedures, and taking into account the nature of the complaints and the peculiarities of the

matter before it, the appellant was at liberty to determine whether the hearing should be public or private. To the extent that the respondent was in charge of public funds allocated to the Judiciary, and that some of the allegations against her involved misuse and misappropriation of the public funds entrusted to her, the disciplinary process was a matter of public interest and the request for a public hearing to enable the respondent clear her name appeared reasonable. Nevertheless, in light of the fact that the issue of external auditing of the judiciary accounts and misappropriation of public funds was still subject to action by other specialized bodies, a public hearing and the calling of oral evidence would have been pre-emptive and prejudicial to both the respondent and any subsequent investigations. The rejection of both the request for a public hearing and the calling of oral evidence cannot therefore be faulted. All that was mandatory was to ensure that the respondent was informed of the case against her and given an appropriate opportunity to present her defence. It is evident that this was done and that the respondent exploited the opportunity by presenting written representations and appearing before the disciplinary committee with her advocate. The respondent chose not to argue her substantive defence before the appellant but pursued what she called objections to the proceedings. Nonetheless, the appellant had sufficient information regarding the respondent's substantive defence in her detailed written responses, and properly exercised its discretion in assessing the defence.

Right to Fair Administrative Action

[90] The right to fair administrative action in Kenya is now enshrined as a fundamental right under ***Article 47*** of the Constitution, which provides as follows:

"47

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

(2) ***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for the action.***

(3) ***Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***

(a) ***provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***

(b) ***promote efficient administration. "***

[91] The critical question is what constitutes the right to fair administrative action? Since the legislation envisaged under Article 47(3) of the Constitution has not yet been put in place, it is apt to borrow from the equivalent South African Statute the Promotion of Administrative Justice Act (Act No.3 of 2000) which was cited by the *amicus curiae*. At Section 2 of this Statute "administrative action" is defined to mean:

any decision taken, or any failure to take a decision, by –

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, Which adversely affects the rights of any person and which has a direct, external legal effect, …

[92] Prior to the enactment of the Promotion of Administrative Justice Act 2000, the Constitutional Court of South Africa gave guidance in the case of ***President of The Republic of South Africa & Others v South Africa Rugb Football Union & Others***, ***(CCT 16/98) [1998] ZACC 21,*** as follows:

"the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the Executive arm of Government… what matters is not so much the functionary as the function. Further, that the purpose of the inquiry as to whether conduct is administrative action is not on the arm of Government to which the relevant actor belongs but on the nature of the power he or she is exercising."

[93] The functions and powers of the appellant as provided under ***Article 172*** of the Constitution as read with ***Sections 3*** and ***12*** of the Judicial Service Act, reveal that the appellant exercises powers that are administrative in nature and which involve decision making process that may affect the rights of judges and officers of the Judiciary. In this regard there is no doubt that the right of the respondent was likely to be adversely affected by the exercise of the appellant's disciplinary powers, and therefore it was necessary for the appellant to comply with ***Article 47*** in the exercise of such powers. I have already addressed the issue of procedural fairness and will therefore not dwell on that aspect of the administrative action. Suffice to mention as stated by *Majanja, J.* in ***Dry Associates Limited v Capital Market Authority & Another [2012] eKLR***, that the element of procedural fairness in ***Article 47*** must be balanced against reasonableness, expediency and efficiency in the decision making process. Of further relevance is whether the respondent was given reasons for the administrative action taken by the appellant.

[94] It is not disputed that following the disciplinary proceedings of 16th and 18th October 2013, the appellant served the respondent with a letter communicating its resolution to terminate the respondent's employment. The letter stated as follows:

"October 18th 2013

Dear Gladys,

RE: REMOVAL FROM OFFICE AS THE CHIEF REGISTRAR OF THE JUDICIARY

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

The Commission is satisfied that the requirement set out under Section12 (1)(b) (c) (d)(f) and (g) of the Judicial Service Act have been met.

Accordingly the Commission in its sitting of 18th October 2013 in exercise of its mandate as set out under Article 172 of the Constitution has unanimously resolved to terminate your appointment and remove you from office as the Chief Registrar of the Judiciary with effect from 18th October 2013

Yours Sincerely

HON DR WILLY MUTUNGA, D Jur, SC. EGH CHAIRMAN

JUDICIAL SERVICE COMMISSION"

[95] The issue is whether the letter reproduced above communicated reasons for the action taken by the appellant against the respondent. This letter read together with Section 12 of the Judicial Service Act (see paragraph 52 supra) conveys the reason that the respondent had been removed on the grounds of ***misbehavior, incompetence, violation of the prescribed code of conduct for judicial officers, violation of the provisions of Chapter Six of the Constitution, and any other sufficient cause.*** Although the last ground of "any other sufficient reason" is vague, the letter has identified the other grounds clearly. No doubt the letter could have been more explicit in giving specific reasons in support of the identified grounds. Nonetheless, taking into account that there were a total of 87 allegations, it would have been impractical for the appellant to give specific findings in regard to the 87 allegations in the letter of termination. The letter was not a judgment of a court such as to contain findings on each allegation and a verdict. It suffices that the letter of 18th October, 2013 was concise and effectively communicated the reasons for the removal of the respondent. Indeed, section 12 of the Judicial Service Act does not

require all the grounds mentioned in that section to be established. Any single ground if sufficiently demonstrated is enough to justify the dismissal of the Chief Registrar of the Judiciary. Moreover, the appellant issued a press statement which gave detailed reasons for the termination of the respondent's employment.

[96] Given the attitude displayed by the respondent that she was not answerable to the appellant, and her refusal to deal with the substantive issues, it cannot be said that the decision taken by the appellant was outrageous or had no rational basis.Thus in my view the respondent's right to administrative action was not violated as the action taken was reasonable, procedurally fair, and lawful.

[97] The respondent raised an issue with regard to the propriety of the appeal contending that the same was fatally defective and ought to be struck out for want of service of the notice of the appeal as required under ***Rule 77*** of the Court of Appeal Rules. However, under ***Rule 84*** of the Court of Appeal Rules, the respondent ought to have brought an application for striking out the notice within thirty days from the date of service of the record of appeal. The respondent not having brought such an application, she is caught up with time. Secondly, the failure of service of the notice of appeal has not caused any injustice to the respondent nor is it one that goes to jurisdiction. It is the kind of technicality of procedure that ***Article 159(2)(d)*** of the Constitution enjoins the court not to pay undue regard to.

Conclusion

[97] I come to the conclusion that the learned Judge misinterpreted and misapplied the Constitution and the statutory provisions relating to the appellant's mandate, and the respondent's constitutional rights; misdirected himself in treating the disciplinary proceeding as a quasi criminal process to which criminal law and procedure was applicable; and failed to establish the circumstances upon which the allegations of bias were anchored. As a result of these flaws the learned Judge arrived at wrong conclusions regarding the violation of the constitutional rights of the respondent under ***Article 27(1) 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution.

[98] In my view the judgment of the learned Judge cannot stand. I would therefore allow this appeal, and set aside the judgment and all consequential orders. As my two brother Judges GBM Kariuki JA, and Kiage JA, are of the same view, this appeal shall be allowed with costs, and the judgment of the learned Judge and all the consequential orders set aside and substituted with an order dismissing the respondent's petition with costs. Those shall be the orders of this Court.

Dated and delivered at Nairobi this 19th day of September, 2014.

H. M. OKWENGU

……

JUDGE OF APPEAL

JUDGMENT BY JUDGE G.B.M. KARIUKI SC

1. This judgment is in relation to the Appeal from the decision of the Industrial Court in which the learned trial Judge, (Nduma, PJ) held, *inter alia,* that the appellant, Judicial Service Commission, wrongfully terminated the employment of the 1st respondent, Glady's Boss Shollei, and removed her from office, and that in doing so the appellant violated the 1st respondent's rights under Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b) of the Constitution. The Industrial Court also ordered that certiorari would issue to quash both the letter by the appellant dated 18th October removing the 1st respondent from office as Chief Registrar of the Judiciary and the proceedings of 18th October 2013. It further ordered that the 1st respondent is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry as to quantum be gone into. The appellant was ordered to pay the costs of the suit.

2. The record of appeal shows that the 1st respondent, was employed in 2011 as the Chief Registrar of the Judiciary following her recruitment by the appellant. On 18th October 2013 the appellant unanimously terminated her appointment and removed her from office with effect from 18th October 2013. The action followed disciplinary proceedings initiated by the appellant against the 1st respondent.The allegations against the 1st respondent were set out in the appellant's letter to the 1st respondent dated 10th September 2013.They ranged from allegations of financial mismanagement, mismanagement in human resource, irregularities and improprieties in procurement, insubordination and countermanding decisions of the appellant and misbehavior. These allegations indicated that failure by the 1st respondent to exercise prudence in expenditure of public funds resulted in loss of approximately Shs.1.2 billion. It was alleged that the 1st respondent, as the Accounting Officer of the Judiciary, failed to ensure that public funds in the Judiciary were utilized prudently and in accordance with the provisions of Chapter 12 of the Constitution, the Public Finance Management Act, the Judicial Service Act, the Government Financial Regulations and directions given by the appellant, resulting in misuse of public funds to the tune aforestated.

3. The record of appeal further shows that the appellant set out in writing the grounds for the removal of the 1st respondent from office which were in tandem with those stipulated in Section 12(1) of the Judicial Service Act. It also framed the allegations in support of those grounds with apparent clarity.

The 1st respondent was initially given 21 days to respond but the period was enlarged to 39 days.

4. The 1st respondent responded prolifically to the allegations and was also accorded the right to attend the hearing of the disciplinary proceedings and she appeared on 16.10.2013 and again on 18.10.2013 in company of her advocate, Mr. B.K. Kipkorir, and made oral representation but got miffed when her request for the proceedings to be kept open to the public was turned down.Of her own volition, the respondent left the hearing prematurely on 18.10.2014 thereby forfeiting her right to be present throughout.

5. Citing the interest of transparency and public accountability, and in accordance with the Judicial Service Act 2011, the appellant issued a statement on the allegations against the 1st respondent giving reasons for the 1st respondent's dismissal which was uploaded to the Judiciary website where everyone was able to access it.

6. The record of appeal shows that the statement was titled *"JSC ALLEGATIONS, CRJ RESPONSES AND JSC FINDINGS AND OBSERVATIONS"*. It read –

"On September 9, 2013, the Judicial Service Commission served the Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei, with 87 allegations touching on financial and human resource mismanagement, irregularities and illegalities in procurement, and misbehavior. In her responses, filed on October 1, 2013 and subsequently amended on October 15, Mrs. Shollei admitted 33 allegations and denied 38 others. Responses to the other 16 allegations balance were equivocal. And qualified.

Although time stopped for the former CRJ on October 1, the JSC bent over backwards to accommodate her amended responses, which were filed several weeks after the deadline. They considered these extra responses and took into account what was submitted. It is noteworthy that the CRJ responded to the 31 pages of allegations with 73 pages of her own. The initial 21 days allowed for responses were extended by a further 18 days. JSC is satisfied that due process was followed.

In the final analysis, the financial outlay in the allegations against Mrs. Shollei stands at Kshs.2,2007,400,000: Those she admitted to are estimated to be valued at Kshs.1,696,000,000 while those she denied stands at a value of Kshs.250,400,000 and Kshs.361,000,000 where there are mixed responses.

On Friday October 18, 2013, the JSC unanimously resolved to remove the CRJ from office on the grounds of:

1. ***Incompetence***

2. Misbehavior

3. Violation of the prescribed code of conduct for judicial officers

4. Violation of chapter 6, and Article 232 of the Constitution of Kenya, 2010

5. Insubordination"

7. On 19th August 2013, the 1st respondent proceeded to address the media and publicly referred to the appellant's resolution, among others, as "irresponsible" which the appellant's counsel later described as an exhibition by the 1st respondent of open contempt for the appellant. Being aggrieved by the appellant's decision, the 1st respondent moved to court to challenge it. She filed a Petition (No. 528 of 2013) in the Constitutional and Human Rights Division of the High Court at Milimani, Nairobi.

8. In the petition, the 1st respondent contended that the disciplinary action by the appellant against her and the decision to terminate her employment and remove her from office as the Chief Registrar of the Judiciary violated her rights and freedoms in that:

(i) her right to fair trial was violated in contravention of Articles 25(c)and 47(1) & (2) of the Constitution.

(ii) her right to public hearing was denied in violation of Article 50(1) of the Constitution

(iii) her right to presumption of innocence to be informed of the charges in different detail and to have adequate time to prepare her defence were denied in contravention of Article 50(2) (a) (b) and (c) of the Constitution

(iv) her right to be heard by an impartial tribunal was violated in contravention of Article 50(1) of the Constitution.

(v) her right to due process of the law was violated in contravention of Article 236(b) of the Constitution

(vi) the appellant refused to give material copies of proceedings and related documents in contravention of Article 35(1)(b) of the Constitution

(vii) the entire process against the 1st respondent violated her right to inherent dignity pursuant to Article 28 of the Constitution.

9. In paragraph 13 of her petition the 1st respondent contended that the appellant exercised powers it did not have because:

(i) The offence of the Chief Registrar of the Judiciary as the Accounting Officer of the Judiciary is accountable to the National Assembly pursuant to Article 226 (2) of the Constitution

(ii) The accounts of the Judiciary are subject to audit by the Auditor General pursuant to Article 226(3) of the Constitution

(iii) Further, oversight of the Judiciary is by the National Treasury pursuant to the Public Finance Management Act 2012

(iv) Further, oversight of the Judiciary is subject to oversight by the Public Procurement Authority (PPOA) pursuant to the Public Procurement and Disposal Act, 2005

(v) On allegations of corruption, or corrupt practices, the mandate belongs to the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution.

(vi) On allegations of any crime, it is the exclusive preserve of the Director of Public Prosecutions, pursuant to Article 157 of the Constitution.

10. With regard to allegations of crime, the 1st respondent contended that this was the exclusive preserve of the Director of Public Prosecutions, pursuant to Article 157 of the Constitution.

11. It was the 1st respondent's case that the appellant had no jurisdiction to take disciplinary action against her as it did and that the appellant could only deal with the 1st respondent upon referral from any of the government agencies or bodies but could not act *suo moto* as it did.

12. The 1st respondent prayed for the following orders:

a. THAT, order of certiorari to issue to quash the letter of removal dated 18.10.13

b. THAT order of certiorari to issue to quash the proceeding of 18.10.13.

c. THAT an order of mandamus to issue compelling the Respondent to comply with the applicable law.

d. THAT, prohibition do issue against the respondent from in any way proceeding against the petitioner other than as by law provided.

e. THAT declaratory order to issue that the respondent violated the petitioner's rights as set out.

f. THAT Declaratory orders to issue that the allegations against the petitioner in the reasons given for her dismissal do not exist in law, and thereby void.

g. THAT Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.

h. THAT an order of compensation do issue for violation of the petitioner's rights and on inquiry to quantum be gone into.

i. THAT such further orders or relief do issue pursuant Article 23(3) of the Constitution.

j. THAT costs be provided for the petitioner.

13. It is patent that the 1st respondent resorted to judicial review to compel performance by the appellant of what the 1st respondent viewed as a public duty, but it seemed debatable whether this was a judicial review matter and it is no surprise that after a careful scrutiny of the matter, the learned Judge of the Constitutional and Human Rights Division at the High Court, the Hon.Lady Justice Mumbi Ngugi, correctly ascertained and made a finding that it was in fact a labour relations dispute falling under the mandate of the Industrial Court and accordingly transferred it to the Industrial Court in terms of Article 162(2) of the Constitution as read with Section 12 of the Judicial Service Act (Act No. 1 of 2011) following a consent recorded by the parties to that effect. The petition in the Industrial Court was re-numbered No. 39 of 2013. It was not amended following the transfer. It remained intact.

14. The 1st respondent also applied in the Industrial Court for interim orders to enable her to remain in office pending the hearing and determination of the matter.She specifically sought two orders, namely, that she be reinstated and in the alternative, that the office be kept vacant until her petition was heard and determined. In short, she prayed that she should not be replace. However, on 22nd November 2013 the Industrial Court declined to do so and ordered that –

> ***"it is in public interest that, that office (of CRJ) which is critical to the functioning of the Judicial Arm of Government does not remain vacant. That is where the balance of convenience falls with regard to this matter. The application is therefore not allowed and costs will be in the cause.."***

15. I take judicial notice of the fact that as at the time of the hearing of this appeal, the office of the Chief Registrar formerly held by the 1st respondent had been filled.

16. The Industrial Court had before it the 1st respondent's Petition and the documents in its support as well as the appellant's replying and supplementary affidavits and the supporting documents annexed thereto. I have perused them. No oral evidence was adduced.

17. The petition came up for hearing before M.N. Nduma, PJ. On 5.11.2013, 14.11.2013, 15.11.2013, 22.11.2013 and 24.1.2014 and learned counsel **Mr. Donald Kipkorir** appeared for the 1st respondent while learned Senior Counsel **Mr. Paul K. Muite** assisted by learned Counsel **Mr. Issa Mansur**

appeared for the appellant. Counsel for both parties made submissions before the learned Judge.

18. The Industrial Court determined the petition (No. 39 of 2013) and delivered its judgment on 7th March 2014 and ordered –

(a) ***that an order of certiorari would issue to quash the letter of removal dated 18th October 2013***

(b) ***that an order of certiorari would issue to quash the proceedings of 18th October 2013***

(c) ***that the respondent violated the petitioner's (respondent in this appeal)right under Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b)***

(d) ***that the petitioner (1st respondent in this appeal) is entitled tocompensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry to quantum be gone into***

(e) ***that the petitioner should be paid the costs of this suit."***

19. Dissatisfied with the judgment of the Industrial Court the appellant gave notice of appeal pursuant to Rule 75 of this Court's Rules on 11th March 2014 manifesting its intention to appeal against part of the said decision and on 25th March 2014, lodged the record of appeal.

20. The Memorandum of Appeal contained 16 grounds of appeal which can be summarized into 5 grounds as follows:-

(i) ***That the learned Judge erred in law in failing to consider the mandate of the appellant under the Constitution and the Judicial Service Act and in particular Article 172 of the Constitution and Section 12 of the Judicial Service Act on the removal of the Chief Registrar and whether the latter was accountable to the appellant.***

(ii) That the learned Judge erred in law in applying criminal law principles in a matter of a contract of employment and failed to appreciate that the dispute before him related to employer- employee relationship largely requiring the Judge to consider the circumstances in which the removal of the 1st respondent from office took place.

(iii) That the learned Judge dwelt on issues that were not pleaded and labored under gross misapprehension of the facts of the case and the law applicable and failed to apply the law correctly and to direct his mind properly to the issues on the allegations of constitutional violations.

(iv) The learned Judge showed open bias against the appellant and erred not only in taking into consideration irrelevant matters and in failing to

consider relevant matters but also in making contradictory findings while descending into the arena of conflict between the parties and in defending and answering the allegations leveled by the appellant against the 1st respondent.

(v) The learned Judge erred in law in failing to appreciate that Regulation 25 of Part IV of the Third Schedule of the Judicial Service Act is only applicable to disciplinary proceedings initiated by the Chief Justice while exercising delegated authority pursuant to Regulation 15 of the said Schedule and not disciplinary proceedings against the Chief Registrar under Section 12 of the Judicial Service Act.

21. The appellant sought the following orders: (1) ***that the appeal be allowed***

(2) ***that the judgment of the Industrial Court dated 7th March 2014 be set aside and the Petition datd 31st October 2013 be dismissed with costs***

(3) ***that such further orders and relief be made as this court may deem necessary***

22. The duty of this court as the first appellate Court has been articulated in many decisions including **Kenya Ports Authority V Kuston (Kenya) Limited** (2009) 2 EA 212 in which this court stated that –

"on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

23. When the appeal came up for hearing before us on 10th April 2014, learned Senior Counsel **Mr. Muite** assisted by learned Counsel **Mr. Issa Mansour** appeared for the appellant while learned Counsel **Mr. Donald Kipkorir** appeared for the 1st respondent. The 2nd respondent, Commission on Administrative Justice, was an *amicus curiae* and was represented by the learned Counsel **Mr. Angima** who held brief for learned Counsel **Mr. Chahale** who was on record. The Court gave directions for filing of written submissions and on 16.5.2014 the appellant's counsel filed submissions as did counsel for the *amicus curiae* while the 1st respondent filed submissions on 15.5.2014.

24. On 17th May 2014, counsel highlighted their written submissions. **Mr. Muite** told the Court that insubordination by the 1st respondent went to the core of the matter. He submitted that the Judiciary has only one head and

referred to Articles 161, 161(2) (a) & (c) of the Constitution on the basis of which he contended that the Chief Registrar was Accounting Officer in Financial management only and that this entailed the need by the National Treasurer to know who was responsible and would be accounting for finances. In no way did Article 161 confer power to the 1st respondent to be head of the Judiciary along with the CJ and the JSC, contended Mr. Muite who submitted that the Chief Registrar was adamant that she was not answerable to the CJ or the JSC on finances and that she was answerable only to Parliament and Treasury and that she saw herself as the head in relation to finances in respect of which she took the position that she had sole mandate. According to the 1st respondent, he said, the Judiciary had two heads. But nothing could be further from that, contended Mr. Muite, who referred the Court to the responses given by the 1st respondent in which the stance the latter took is reflected. In particular, he referred to allegations on **Libra House** and wondered how the appellant could work with the 1st respondent who maintained that she was not answerable to the CJ or the JSC. This, contended, Mr. Muite, clearly demonstrated insubordination on the part of the 1st respondent who refused to give information on acquisition of a building where funds were being expended. The 1st respondent even publicly called the JSC irresponsible, pointed out Mr. Muite. It was Mr. Muite's submission that the 1st respondent made it impossible for an employee/employer relationship to subsist between her and the appellant. On this ground alone, Mr. Muite urged that the appeal ought to succeed because the 1st respondent did not recognize the authority of her employer.

25. With regard to removal of the Chief Registrar, **Mr. Muite** submitted that the relevant provisions of the law were contained in Article 172(1)© of the Constitution and Section 12 of the Judicial Service Act. He criticized the learned trial Judge for resorting to Regulation 25 and Section 32 of the Judicial Service Act which deal with removal of other staff and judicial officers. With regard to the right to be heard, Mr. Muite pointed out that the allegations were in writing and were forwarded on 10th September 2013 to the 1st respondent who was given 21 days to respond. This period was later enlarged by a further 18 days. The allegations were very serious, said Senior Counsel, and the particulars of the allegations were given with considerable clarity. It was Mr. Muite's submission that the learned trial Judge misdirected his mind when he held that criminal law applied to the disciplinary proceedings against the 1st respondent and that he erroneously failed to have regard to the provisions of Section 12 of the Judicial Service Act. Mr. Muite urged the Court to have regard to the appellant's written submissions and the list of authorities and allow the appeal.

26. **Mr. Donald Kipkorir**, the learned counsel for the 1st respondent, started highlighting his submissions by making a statement to the effect that the 1st respondent did not want to be Chief Registrar again and did not want to come back to the Judiciary. All that the 1st respondent wanted, he said, was to tell her side of the story.

27. It was Mr. Kipkorir's submission that the Industrial Court had jurisdiction to deal with constitutional matters and that the High Court does not have exclusive jurisdiction to deal with constitutional issues. He pointed out that the case was filed as a constitutional matter in the High Court and was subsequently transferred to the Industrial Court. He told the Court that the findings made by the Industrial Court were supported by evidence and that the learned Judge of the Industrial Court did not refer to extraneous matters and that the issues he crystallized were from evidence. It was Mr. Kipkorir's submission that it was fallacious to state that a Judge cannot go beyond what is brought before him. The Judge can look up new case law, he opined. Mr. Kipkorir submitted that Section 12 of the Judicial Service Act does not provide for procedure of removal of the Chief Registrar. In his view, it is the Third Schedule to the Act that provides the road map.

28. With regard to the application of criminal law by the learned Judge to the disciplinary proceedings, Mr. Kipkorir submitted that the Judge was expanding the law as required by the Constitution by applying in the proceedings best practices from criminal law. He alluded to Wambora's case.

29. Mr. Kipkorir conceded that the 1st Respondent had been served with written allegations to which she responded but contended that she did not admit any of them. In the High Court, said Mr. Kipkorir, the 1st respondent argued about the process of dismissal and not about dismissal *per se.* He lamented that the disciplinary proceedings were a closed-door-affair when it should have been open to the public. Moreover, it was not clear whether the proceedings were investigatory or disciplinary, contended counsel. He urged the Court to dismiss the appeal with costs.

30. Before delving into the issues for determination in this appeal, a look at the legal structures as they relate to the office of the Chief Registrar of the Judiciary vis-à-vis Judicial Service Commission, the appellant, might illuminate and enhance appreciation of the matter falling for resolution.

31. The Judiciary consists of the Judges of the Superior Courts, Magistrates, other Judicial Officers and Staff **(See Article 161(1)** of the Constitution).

32. The office of the Chief Registrar of the Judiciary (CRJ) to which the respondent was appointed in 2011 is established under **Article 161(2)(c)** of the Constitution which states –

"161(2) (c) there is established the Office of the Chief Registrar of the Judiciary who shall be the Chief Administrator and Accounting Officer of the Judiciary."

33. Though created by the Constitution, the Office of the Chief Registrar of the Judiciary, unlike that of Judges of the Superior Courts, has no security of tenure. It is however a public office and the holder thereof is bound by the National values and principles of governance enshrined in **Article 10** of the Constitution.

34. The Judiciary Fund which constitutes the resources for running the Judiciary is established under **Article 173 (1)** of the Constitution. It is administered by the Chief Rgistrar of the Judiciary. It is required under Article 173(2) of preparing estimates of expenditure for the following year and submitting them to the National Assembly for approval as required by Article 173 (3) of the Constitution to be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.

35. The role of the Chief Registrar is to support and facilitate judicial officers in the discharge of their constitutional mandate to administer justice to Kenyans. The functions and powers of the Chief Registrar, in addition to the Constitution, are set out in Section 8 of the Judicial Service Act. They show clearly that the Chief Registrar is in charge of support services in the Judiciary.

36. The Judicial Service Commission (appellant) is established under **Article 171** of the Constitution and its functions and mandate are set out in **Article 172** of the Constitution. The mandate vested in the Appellant by Article 172 is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and to appoint, receive complaints, investigate and remove from office or otherwise discipline Registrars, Magistrates, other Judicial officers and other for inability to perform the functions of the office, misbehavior , incompetence, violation of the prescribed code of conduct for judicial staff of the Judiciary.

37. The Judicial Service Act (No.1 of 2011) was enacted to make provisions with regard to judicial services and administration of the Judiciary; the appointment and removal of Judges and the discipline of other Judicial Officers and staff; regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.

38. The Judicial Service Commission (JSC) has power under Section 12 of the Judicial Service Act to **suspend** or **remove** the Chief Registrar from office officers,bankruptcy, violation of the provisions of Chapter six of the Constitution or for any other sufficient cause.

39. Before the Chief Registrar of the Judiciary is removed under Section 12(1) of the Judicial Service Act, Section 12(2) of the said Act requires the CRJ **be informed** of the case against him/her **in writing** and be given **reasonable time to defend** herself against any of the grounds cited for the intended removal.

40. As stated earlier, the pleadings before the Industrial Court were the Petition by the 1st respondent together with its annextures and the appellant's Replying and supplementary Affidavits sworn on 14th November 2013 and 23rd January 2014 respectively.

41. In the answer filed by the appellant to the petition, the latter had a comprehensive reply including the allegations against 1st respondent and the grounds for her removal and the latter's responses and the findings made by appellant. It shows that out of 87 allegations, the 1st respondent admitted 33 and denied 38 and that 16 were equivocal and qualified. The admitted allegations accounted for loses valued at Kshs.2,696,000,000/=; those denied were valued at 250,400,000/=; and those with mixed responses stood at 361,000,000/=.

42. The 1st respondent acknowledged in paragraph 7 of her petition that she was served with a written statement of allegations constituting the grounds for 12 of the Judicial Service Act (No.1 of 2011). She also confirmed in paragraph 8 of her petition that she responded to the allegations in her interim and final reports with supporting documents. In addition, she confirmed in paragraph 9 of her petition that she was given the right to be heard and that on 16.10.2013 she attended the hearing at which she appeared with her counsel who raised objections on jurisdiction of the appellant to institute the disciplinary proceedings against her and on alleged bias against some of the Commissioners of the Appellant. However, the appellant overruled the objection and the hearing proceeded on 18.10.2013. In paragraph 13 of his judgment, the learned Judge of the Industrial Court acknowledged that on 18.10.2013, the 1st respondent and her counsel appeared in the disciplinary proceedings and counsel presented what was referred to as *"closing submissions under protest"* after which counsel applied for adjournment which was declined and the hearing proceeded whereupon the 1st respondent "excused herself from the proceedings" and resorted to Court action in which she alleged violation of her constitutional rights and lack of powers on the part of the appellant to discipline or remove her from office. In the circumstances, the hearing of the disciplinary proceedings continued and the appellant made the decision to remove the 1st respondent from office.

43. After perusing the material before it and hearing counsel for all the parties, the learned Judge of the Industrial Court (M.N. Nduma, PJ) crystallized issues for determination as follows:

(***1) Did the (appellant) JSC have jurisdiction to discipline the petitioner***?

(2) If the answer to 1 is correct, (sic) (meaning "is in the affirmative") was the petitioner given a fair and impartial hearing?

(3) Was the petitioner (1st respondent) removed for a valid reason and in terms of a fair procedure?

(4) What remedy if any, is available to the petitioner

44. Although the matter before the Industrial Court was with regard to termination of employment in respect of which pleadings and documents annexed to them were placed before the Court, the Court expressed its desire for and lamented lack of more evidence by way of affidavit from the commissioners of the appellant who the 1st respondent alleged were biased against her. The Court stated in this regard:-

"In the supplementary affidavit, Ms Wilfrida Mokaya does not attest to any personal knowledge or information from the said commissioners on these issues. It would have been more helpful for the named persons to directly place their perspective on the allegations of personal nature made against them before….."

45. There was no case before the Industrial Court against any of the individual Commissioners. The appellant as a corporate body had been sued by the 1st respondent on account of the latter's removal from office. There was no legal requirement for individual Commissioners to respond to accusations not touching on or relating to the grounds for the removal of the 1st respondent and which, at any rate, were not shown to be admissible in law. It was a misdirection on the part of the Court to purport to place on the individual Commissioners the burden of disproving the allegations which had not been established by evidence and were clearly inadmissible. In any case, the burden of proving that her employment was wrongfully terminated reposed on the 1st respondent could not be shifted or discharged or diminished by attack on individual Commissioners. Bias, as I shall show below, was not established.

46. The first issue decided by the Industrial Court which had far reaching implication on the decision on the entire petition was that the disciplinary process against the 1st respondent was quasi-criminal and that the threshold required in framing and proving the grounds for removal of the Chief Registrar was that obtaining in criminal law. The learned Judge applying criminal law standards held that the removal of the Chief Registrar was that obtaining in criminal law. The learned Judge applying criminal law standards held that the removal of the Chief Registrar from office did not meet such standards. In his judgment, the learned trial Judge stated –

"the disciplinary process is quasi-criminal in nature and must have the following basic elements that were lacking in the present case;

a) A complaint and charge setting out the offence and the particular provisions of the law broken;

b) Particulars of the offence;

c) Names and statement of the complainants; and

d) Sufficient time for the accused to prepare adequately and be allowed to gain access to all exculpatory evidence.

47. The learned trial Judge then proceeded in paragraphs 24, 25 & 26 of his judgment to make the following findings:

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

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

The documentation presented by the Respondent before court do not now show what allegations upon consideration by JSC was the Petitioner found guilty of and in respect of which she was not found guilty.

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

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

As a matter of fact, the letter of removal dated 18th October, 2013, does not indicate whether the Petitioner was found guilty of any of the 87 (33+38+16) allegations preferred against her and if so, in respect of which allegations she had been acquitted.

The letter says:

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

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

48. The burden of proving the allegations in the petition reposed not on the appellant but on the 1st respondent who was enjoined to satisfy the Court that either the allegations constituting the grounds for her removal from office were not in consonance with the grounds stipulated in Section 12 of the Judicial Service Act or had no basis or lacked veracity; that 1st respondent was not given a fair hearing; that in any case the appellant had no jurisdiction to remove her from office as it did.

49. It is patent that the 1st respondent was an employee of the Judiciary and the appellant's action and decision to remove her from office was an administrative action within the meaning of Article 47 of the Constitution. The rationale of **Article 47** of the Constitution is to promote and protect administrative justice with regard to administrative action affecting individuals.

50. As any student of law knows, the indicia of a contract of service include the employer's power of selection of his employee and the right to suspend or dismiss an employee. It is not disputed that, the 1st respondent was hired by the appellant. The Judicial Service Act gives the appellant the power to remove the Chief Registrar from office. The 1st respondent asserted that the appellant had no power over her. It is axiomatic that whether the relation between the parties to a contract is that of an employer and employee or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of employer and employee, *"it is irrelevant that one of the parties has declared it to be something else"* **(see Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QBD 497; see also Mersey Docks & Harbour Board [1946] 62 TLR 427; **Yewens** [1880] 6 QBD 530

51. All the Indicia of the contract of service between the appellant and the 1st respondent clearly showed that the 1st respondent as an employee of the Judiciary was answerable under the law to the appellant which under the Judicial Service Act is charged with the constitutional mandate of running the Judiciary. I so find. The assertion to the contrary by the 1st respondent (namely that she was not answerable to the appellant) seems from the evidence to have been rightly described by counsel for the appellant as a action as required by **Article 47** of the Constitution. However, the invocation of Article 50 of the Constitution by the 1st respondent and its endorsement by the Industrial Court was misplaced. The right to fair hearing in Article 50 relates to hearing before a **Court** i.e. a court of law (as defined by the interpretation and general provisions Act Cap 2) or, if appropriate, another independent and impartial tribunal or body. In the instant appeal, the disciplinary process against the 1st respondent was not a proceeding before a court of law. It did not relate to a criminal proceeding. It was a civil matter between an employer and an employee.

53. Did the appellant have power to remove the 1st respondent from office? The answer is not far to seek. The appellant, Judicial Service Commission, is a body corporate with perpetual succession and a seal by dint of Article 253 of the Constitution and it is capable of suing and being sued in its corporate name. Its functions include appointing, receiving complaints against, investigating and removing from office or otherwise disciplining registrars, magistrates, other judicial officers and other staff of the judiciary in the manner prescribed by an Act of Parliament. The Chief Registrar of the Judiciary is one of the registrars referred to in Article 172(1)(c) of the costitution

54 The removal of the 1st respondent from office is regulated by the provisions of Section 12 of the Judicial Service Act (No. 1 of 2011). Needless to repeat, the process of removal is an administrative action within the meaning of Article 47 of the Constitution which confers on every person the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The tenets of fair administrative action are spelt out in Section 12(2) of the Judicial Service Act. They are that before the Chief Registrar is removed from office pursuant to Section 12(1) of the said Act, the Chief Registrar must (1) be informed in writing of the case against him/her and (2) be given reasonable time to defend himself/herself against any of the grounds cited for the intended removal. Section 2(1) of the Commission on Administrative Justice Act 2011 defines an administrative action as *"an action relating to matters of administration and includes a decision made or an act carried out in the public service."*

55. Perusal of Section 12 of the Judicial Service Act shows that the appellant was vested, as it still is, with power to remove the holder of the office of the Chief Registrar from office on any of the grounds set out in the Section and that the exercise of that power is of civil nature. In exercising it, criminal law did not come into it. The 1st respondent's rights as an employee were a verdict in a criminal trial and a decision in Civil or disciplinary disciplinary proceedings, unlike criminal proceedings, were not designed to establish the guilt or innocence of the 1st respondent in relation to criminal offences nor were they initiated with a view to criminal sanction. While criminal proceedings are normally mounted to determine the guilt or innocence of a person in relation to specific criminal offence/s the culpability of which results in punishment as may be provided in a given statute, disciplinary proceedings are of civil nature between an employer and an employee and where the employee is not vindicated, the outcome is normally dismissal from employment. This does not, of course, stop law enforcement agencies from pursuing criminal proceedings where criminal offences have been committed.

56. Although disciplinary proceedings and professional proceedings are not the same as they serve different purposes, the point that in neither is criminal law applied is relevant.

57. This point has been discussed in a number of cases in several other jurisdictions. For instance, in **Sinha and General Medical Council** (Neutral citation number [2009] EWCA Cir 80] the Court of Appeal (Civil Division) in London, observed that it is often very difficult for highly intelligent people who are not lawyers to understand the difference between protected in the context of principles of natural justice and administrative action (under Article 47) the requirements of which were that the disciplinary process would be reasonable, fair, lawful and efficient. The proceedings. The Court further observed that –

*"**criminal proceedings are designed to establish guilt or innocence of a member of the public with a view to punishment by society if the verdict is guilty, and acquittal if the verdict is not guilty. Proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standards expected of their profession; whether or not the professionals concerned should remain members of the profession concerned and if so, on what terms."***

58. In **Dr Anil Mussani** and **College of Physicians and Surgeons of Ontario** (reported at (2003)), 64 O.R. (3d)641 the Court of Appeal for Ontario, Canada, referred to a plethora of authorities to demonstrate that:

"professional disciplinary hearings are not criminal or quasi- criminal in nature because despite their potentially serious sanctions, they do not result in true penal consequences. Rather, they are administrative and regulatory in nature, designed to maintain ……., professional integrity and professional standards and to regulate conduct within the profession in question."

58. In the administrative action leading to the removal of the 1st respondent from office the appellant was enjoined, in public interest, to act fairly. In addition, the principles of natural justice also applied to the administrative action (see **Cooper v Wilson [1937] 2 All ER 726.** The heresy that rules of natural justice apply only to judicial proceedings and not to administrative action was scotched in **Ridge v Baldwin** [1963] 2 All ER 66 [1964] AC the Judicial Service Act were complied with and the principles of natural justice were adhered to for the simple reason that the 1st respondent was afforded reasonable time to answer the charges. The grounds for her removal were set out with clarity and the 1st respondent responded copiously to them. She was also invited by the appellant to appear before it ostensibly to highlight or amplify her answers. She instead left huffily when her request for public hearing was disinclined. Her appearance before the appellant on 18.10.2013 was not necessary nor would her absence prejudice her rights as she had been heard on her written answers. It is difficult to see the basis or the justification for the allegation that the 1st respondent was not answerable to the appellant or was not accorded a fair administrative action or that bias existed as alleged. There was no substance in these allegations.

60. The issue of criminal charges or application of criminal law and procedure which the learned trial Judge introduced did not arise. The learned trial Judge went into error when, without interrogating the matter, made a finding that the disciplinary process against the 1st respondent was quasi-criminal to which criminal law and procedure applied. He referred to authorities in criminal law including **Dande v Republic** [1977] KLR 71, and **Cherere s/o Gakuhi** [1955] EACA 478 on framing of criminal charges. He also referred to **Lusiti v The Republic** [1977] KLR 143 on admission of offence and plea and its unequivocability. **Adan v The Republic** [1973] EA 445 on recording of plea was also followed by the learned trial Judge. Yet clearly, criminal law had no application to the disciplinary proceedings against the 1st respondent which gave rise to the suit before the Industrial Court whose decision provoked this appeal.The learned Judge fell into error in this regard.

61. The learned trial Judge in paragraph 58 of his judgment stated with regard to allegations against the 1st respondent –

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

62. The learned Judge then preceded to analysis the allegations and their non- conformity with the criminal law and practice and reached the conclusion that they were not drafted in conformity with criminal law standards. In short, that they were bad in law. As to the allegations which the 1st respondent had admitted, the trial Judge found that the admission did not conform to the standards required in a plea of guilty in criminal cases. In the words of the learned Judge at paragraph 75 of his judgment:

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

63. In effect, the learned trial Judge came to the conclusion that under criminal law, the respondent had not admitted any of the allegations. He held the view that the disciplinary proceedings were quasi-criminal and that the admissions of the allegations by the 1st respondent were not in tandem with an unequivocal plea of guilty and therefore were invalid. He stated in paragraph 80 of his judgment:-

"to finalize the court's analysis of the pronouncement by JSC on the 87 allegations made against the petitioner (1st respondent), no verdict was made in the undated communication on each and every allegation but instead, JSC said:-

"the Chief Registrar of the Judiciary is hereby removed from office with immediate effect for:

- ***Incompetence***
- ***Misbehavior***
- ***Violation of the prescribed code of conduct for Judicial officers***
- ***Violation of Chapter 6 and Article 322 of the Constitution***

64. The learned trial Judge went on to hold in paragraph 81 of his judgment that:

"this was done without any record of decision or verdict on the specific charges preferred against her. No such verdicts are evident from the matrix referred to earlier…."

65. At the end of paragraph 82 of his judgment the learned Judge stated:

"this document (meaning the allegations made against the 1st respondent) cannot comprise final decision by JSC on the face of it."

respondent alleged bias against members of the appellant although it was raised in other documents and submissions. The learned Judge also alluded in paragraph 83 of his judgment to *competing allegations."* Yet this was an employment matter in which the appellant *qua* employer had instituted disciplinary proceedings and furnished evidence for the grounds of removal of the 1st respondent. The learned Judge stated that *"the Court will make a decision whether on the facts presented, JSC ought to have constituted another disciplinary tribunal in terms of Section 32 and regulation 25 of the schedule to the JSC Act 2011 on the grounds of the alleged bias and any necessary implication whether by proceeding to hear this matter the result is a nullity for violating Articles 2(4), 27(1), 47(1), 50(1) & (2) and 236 (b) of the Constitution."* For starters, Section 32 (supra) did not relate to removal of the Chief Registrar. It is Section 12 of the Judicial Service Act that does. In addition, the burden of proving bias reposed on the 1st respondent. That burden was not discharged. Bias not having been proved, the issue was dead in the water. As an employer, the appellant could not be disqualified from discharging its mandate on a mere allegation of bias. The Court fell into error by finding that bias and breach of the respondent's constitutional rights and been proved In the effect, the 1st respondent alleged violation of constitutional rights in relation to Articles 47(1) & (2); 50(1), 50(2) (a) & (b), 236(b), 35(1) (b) and 28 in the context of her removal from office. Allegations of violations of constitutional rights are viewed seriously by courts which are enjoined to enforce such rights. Indeed, courts of law are enjoined to

vigorously enforce the fundamental rights and freedoms of the individual guaranteed by the Constitution which is the voice of the people of Kenya who gave it to themselves on 27th August 2010 with the intent that all sovereign power belonging to them shall be exercised by, *inter alia,* the judiciary and other State organs in accordance with the Constitution. The Constitution is the supreme law and it binds all persons and all State organs at County and National levels of government. There is no limitation in the enforcement of fundamental rights and freedoms. As a Superior Court of record, the Industrial Court is bound by the decisions of the Supreme Court by dint of Article 163(7) of the Constitution which provides that –

"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court"

68. In view of this, the Industrial Court was bound by the Supreme Court decision in **Mumo Matemu V Trusted Society of Human Rights** the case of ANARITA KARIMI set the threshold to be met in a petition alleging constitutional violations and opined that it should define the dispute to be decided by the court and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of.

69. There was submission that the Industrial Court has no jurisdiction to deal with issues of Constitutional violations. But that argument does not hold good not least because the Industrial Court, though not entitled to handle Constitutional petitions that should otherwise go to the High Court Constitutional and Human Rights Division has power to determine constitutional issues arising in and intertwined with labour relations litigation before it. This question has been addressed by the High Court which has rightly held that constitutional issues arising in labour relations cases before the Industrial Court can be determined by the Industrial Court which has (under Article 162(2) of the Constitution) the status of the High Court notwithstanding that its powers under Article 162(2) of the Constitution relates to hearing and determining labour disputes. Section 12(1) (Part III) of the Industrial Court Act (Act No. 20 of 2011) defines the jurisdiction of the court as follows:

(i)**12.** (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(ii)

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organization and a trade unions organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union; (g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

70. The orders that the Industrial Court is empowered to make in exercise of its jurisdiction under Section 12(1) (supra) are spelt out in Section 12(3) of the Act. The Section States -

12 (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) Interim preservation orders including injunctions in cases of urgency

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

71. In considering whether the Industrial Court has jurisdiction to determine issues of violations of fundamental rights under the Constitution, the High Court (Majaja, J) observed in the case of **United States International University (USIU) versus Attorney General [2012] eKLR** that labour and employment rights are part of the Bill of Rights as they are protected under Article 41 of the Constitution and proceeded to hold that –

> *"In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from employment relationship would defeat the intention and spirit of the constitution in establishing special courts to deal with the employment and labour disputes. Indeed, such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights "applies to all law and binds all state organs and persons" and enjoins a court to promote the spirit, purport and objects of the Bill of Rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom."*

72. Clearly, that is sound reasoning and the argument that the Industrial Court cannot determine issues of violations of constitutional rights interwoven with employment and labour relations does not hold good as it would be antithetical to the letter and spirit of the Constitution. The Industrial Court had jurisdiction to determine the 1st Respondent's petition alleging wrongful termination of her employment and whether the 1st Respondent's fundamental rights and freedoms were breached in the process of the termination of the latter's employment. The Court held that the 1st Respondent's constitutional rights were violated in relation to Articles 25(c); 47(1) & (2); 50(1); 50(2) (a), (b) & (c); 236(b)' 35(1)(b) and 28. The 1st respondent pleaded the violations in the petition and relied on affidavit evidence as proof of the alleged violations. Did the Articles referred to apply to her employment case and if so were they breached in relation to her?

73. The invocation of Article 50(2)(a)(b) & (c) of the Constitution was misplaced. In the context, it did not apply to the 1st Respondent who faced disciplinary proceedings and removal from office as Chief Registrar of the Judiciary A careful perusal of the Constitution shows that Article 50(2)(a),(b) &(c) applies to criminal trials and not to civil litigation or disciplinary proceedings. That this is so is clear from the plain reading of Article 50(2)(a) to (q). There can be no argument that on correct interpretation of the Article, it does not apply to disciplinary proceedings and the learned trial judge misdirected his mind in reaching the conclusion that it applied to the case before him. So too with regard to Article 25(c) relating to the constitutional right to fair trial, the learned trial judge failed to appreciate that the disciplinary proceedings were not a trial and the issue of fairness in the proceedings was addressed by Principles of natural justice and Article 47 which enjoined the appellant in the disciplinary proceedings to ensure that the

1st Respondent's right to administrative action was observed. With regard to Articles 35(1)(b) which reads

35(1) Every citizen has the right of access to -

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

proceedings and related documents" did not specify the particulars of the materials or the related documents." It was far too vague. It was bereft of particulars. The appellant and indeed any person in the shoes of the appellant could not tell what "material copies and related documents" the 1st respondent required. Applying the principle in ANARITA KARIMI'S case, the claim was bound to fail on the grounds that it lacked specificity.

75. With regard to Article 236(b) which states: *236: "A public officer shall not be*

(a) (not applicable)

(b) dismissed,removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law."

The affidavit evidence by the respondent did not establish the violation alleged. The disciplinary action followed the law and in pursuance with Section 12 of the Judicial Service Act (No. 1 of 2011) the grounds for the 1st respondent's removal from office were given in writing as required by Section 12(2) of the Act and the 1st respondent was accorded a total of 39 days to respond to the allegations made against her. The 1st respondent gave long and detailed answers to the allegations.The requirements of Article 47 of the Constitution was adhered to and disciplinary proceedings cannot be said not to have been reasonable and procedurally fair, expeditious, efficient and lawful. The 1st respondent did not show the process fell short of the requirements of the law. That allegation too must fail.

76. As regards Article 28, the 1st respondent alleged that "the entire process violated the 1st respondent's right to inherent dignity." Again this allegation did not specify in what way or manner the dignity of the 1st respondent was violated by the disciplinary proceedings. The proceedings were lawful. They were initiated in accordance with the provisions of the law. That allegation too must fail. Yet the learned Judge took the view that there was violation even before he had interrogated the matter fully. He misdirected his mind and exhibited ostensible bias in purporting to decide whether the JSC (the appellant) ought to have reconstituted another *"disciplinary tribunal"* because, in his conclusion, the JSC was biased.

77. The House of lords in **Porter v Nagill [2002] All E R 465** held that in determining whether there had been apparent bias on the part of a tribunal, the court should no longer simply ask itself whether, having regard to all the relevant circumstances, there was a real danger of bias. Rather, the test was whether the relevant circumstances, as ascertained by the court, would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. In that case, Lord Hope of Craighead stated –

"I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavor, the case of a party to the issue under consideration by him…."

78. In the instant appeal, the alleged bias is pegged to "a trove of emails" which the 1st respondent has attributed to several of the members of the appellant body. But the genesis of the emails was not established and no evidence was adduced or presented to link any of the members of the appellant to the emails. As the basis for the alleged bias was the "trove of emails" and their origin and authenticity not having been established, the allegation must fail. I so find and hold.

79. The judgment of Lord Denning M.R. in **Selvarajan v Race Relkations Board [1976] 1 All ER 12 at pg 19 letters** (a) to (e) is relevant in relation to the issue of disciplinary process. The learned Judge opined that in cases of administrative action,

"the investigative body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution of proceedings, or deprived of remedies or redress or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave

much to them. But in the end, the investigating body itself must come to its own decision and make its own report."(the underlining is mine).

80. To the extent to which the learned trial Judge of the Industrial Court dealt with and evaluated the evidence relating to the disciplinary proceedings against the 1st respondent on the basis that they were quasi-criminal and that criminal law principles and procedures applied, he was clearly wrong. The threshold adopted by the Industrial Court on the burden and standard of proof on the part of the appellant and the decision arrived at was erroneous. While the standard of proof in the disciplinary proceedings was not beyond the balance of probabilities, the test in quasi-criminal proceedings is much higher.

81. In conformity with Article 47 of the Constitution on fair administrative action and **Section 12(2)** of the Judicial Service Act, the appellant (before removing the 1st respondent from office) informed her in writing of the case against her and accorded her a total of 39 days to defend herself against any of the grounds cited for the intended removal. That period cannot be said not to be reasonable. In addition, the 1st respondent was accorded the right to be heard and not only did she respond prolifically to the allegations but also attended the disciplinary hearing. The appellant therefore conformed to the requirements of Article 47 of the Constitution and Section 12 of the Judicial Service Act and to the national values and principles of governance enshrined in Article 10 of the Constitution as well as to principles of natural justice.

82. The 1st respondent's contention that the appellant did not have jurisdiction to remove her from office as the Chief Registrar or that the 1st respondent was not answerable to the appellant had no support in law.

83. On the material on record in this appeal, this contention was glaringly incorrect in law and it smacks of impunity and disregard for accountability. Clearly, it went against Article 10 of the Constitution not least because it violated the national values and principles of governance especially integrity, transparence and accountability

84. On the only issue whether the disciplinary exercise was conducted fairly asrequired by law the learned trial Judge stated in paragraph 125 of the judgment, the learned Industrial Court Judge sated:

"…..it is difficult to understand the shortcut taken by very imminent members of the legal profession in a situation where the mandatory procedure that should have been followed speaks so loudly from the express provisions of Section 32 and Regulation 25 of the Judicial Service Act (revised edition 2012)."

85. The learned trial Judge also stated at paragraph 50 of the judgment that:

"…….the court accordingly finds that JSC (the appellant) had jurisdiction to institute disciplinary proceedings against the CRJ (the 1st respondent in

terms of Article 172(1)(c) of the Constitution as read with Section 12(1) of the Judicial Service Act.

86. Clearly these are contradictory positions taken by the Judge in the same judgment. Needless to re-emphasize, Regulation 25 of Part IV of the Third Schedule of the Judicial Service Act and |Section 32 of the Act apply to discipline and removal of judicial staff and judicial officers other than Judges of the Superior Courts and the Chief Registrar of the Judiciary. The latter's removal from office is provided in Article 172(1)(c) of the Constitution and Section 12 of the Judicial Service Act while the former's removal is provided for in Article 168 of the Constitution.

87. It is quite clear the appellant had the jurisdiction to discipline the petitioner and to remove her from office as it did. The allegation that the appellant had violated Section 32 of the Judicial Service Act was raised by the learned Judge in his judgment as it had not been pleaded in the petition. In doing so, he ignored accepted principles in civil practice that the essence of pleading issues is to ensure that all the parties in a litigation are informed of the case against them to enable to prepare and defend the same, should they wish to do so. Counsel for the appellant drew the attention of the Court to the following authorities on the point which serve to buttress the proposition:

"Captain Harry Gandy v Caspair Air Charters Ltd. [1956] EACA 159; Nairobi City Council v Thabit Enterprises Ltd. [1995-98] EA 231;*and* ***BLAY V POLLARD & MORRIS [1930] 1 KB 682."***

88. The 1st respondent alleged in paragraph 12 of her petition violation of her constitutional rights alleged that the disciplinary process was not fair. The learned trial Judge held –

"At this stage, the Court agrees that the seriousness of the allegations made against the CRJ (the 1st respondent) effectively made the disciplinary process a quasi-criminal affair. JSC assumed a responsibility equivalent to if not equal to a judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hand in the balance."

89. I know of no law that supports the proposition that where in disciplinary proceedings the allegations against an employee are serious, that, *ipso facto*, coverts the proceedings which are essentially non-criminal into quasi-criminal proceedings.

90. It is patent from the petition initially filed in the constitutional and Human Rights Division of the High Court that the 1st respondent sought Judicial review order of certiorari to quash the dismissal letter and the proceedings thereof and orders of mandamus and prohibition to stop the appellant from dismissing her.

91. But it was glaringly that the relationship between the appellant and the 1st respondent was that of an employer and an employee and it thus imported the existence of power in the appellant as employer to demand information from the 1st respondent as the employee in discharge of the latter's duties and that relationship was characterized by a contract of employment and inherent in it was the principle that misbehavior inconsistent with the faithful discharge of the employee's duties was good cause for dismissal as was also breach of the prescribed code of conduct for judicial officers and disobedience of lawful and reasonable order as these were in tandem with the grounds stipulated in section 12(1) of the Judicial Service Act for removal of the Chief Registrar.

92**.** With great respect, and at the risk, unfortunately, of appearing uncharitable to the learned Judge, his judgment was somewhat convoluted, not least because it was difficult without great circumspection to discern the findings of the Court and the reasoning thereof as opposed to submissions of counsel and pleadings in the case.

93. The learned trial Judge was enjoined to be dispassionate and was required to be guided by the facts emerging from the evidence in the case and to apply correctly the law to such facts. He was bound to adhere, inter alia, to the national values and principles under Article 10 of the Constitution. It was not in the purview of his jurisdiction to engage in speculation or conjecture, much less to show partiality in the dispute. A Judge should never take sides or be guided by extraneous matters. A Judge is required to be guided by the evidence before him from which facts emerge to which he/she should properly apply the law. A Judge should not be intimidated or be influenced in his decision by the status, wealth, power or influence of a party and a weaker party does not have greater rights by dint of his/her station in life though the Court may be more sympathetic to such party. In a nutshell, litigants are equal in the eyes of the law and none has greater rights than the other. The Constitution enjoins every judicial officer to be fair and to serve justice to all without discrimination.

94. The learned Judge erred in that he:

(i) *applied criminal law principles to the civil dispute before him and arrived at the conclusion that as criminal law and procedure was not followed, the allegations on which the removal of the 1st respondent was predicated could not hold good and was null and void.*

(ii) found that the 87 allegations against the 1st respondent were not drafted in conformity with the requirements of criminal procedure code, Chapter 75 of the Laws of Kenya, and were therefore bad in law.

(iii) rejected the admission of the 33 allegations by the 1st respondent on the ground that the admission was not in tandem with the requirements of plea taking in criminal cases and therefore was not unequivocal and consequently was bad in law.

(iv) found that the disciplinary process against the 1st respondent was "judicial process in every respect" and that "the proceedings were quasi-criminal."

(v) found that the standards in criminal law were not met with regard to the time given to the 1st respondent to prepare for her defence in relation to the allegation which the Judge termed "serious" involving as they did, loss of 1.2 billion Kenya Shillings. He termed the allegations "charges" that were "vague, embarrassing, and replete with duplicity." He erred in finding that the 1st respondent's constitutional right to a fair hearing under Article 50 was violated.

(vi) after finding that the appellant had jurisdiction to discipline and remove the 1st respondent from office, also made a finding that the 1st respondent had made allegations against one of the Commissioners of the appellant which the concerned Commissioners had not responded to and that there was ostensible bias against the 1st respondent by the appellant which resulted in violation of the former's constitutional right .

(vii) found that the allegations made by the 1st respondent against some of the Commissioners in the Appellant (body) though denied, were serious and this, ipso facto, was a basis for reasonable apprehension notwithstanding that the Court had concluded, rightly in my view, that the veracity of the allegations against the named Commissioners was not established. Nevertheless, the Court held the view and erred in so doing, that the appellant should not have heard the matter itself.

(viii) made a finding that standards under criminal law were not met with regard to the time given to the 1st respondent to prepare her defence to the allegations which led to her removal from office

(ix) held that the appellant should have delegated the disciplinary exercise to a Committee because, in his view, the relevant procedure for the disciplinary process was that set out in Regulation 25 and Section 32 of the Judicial Service Act (No.1 of 2011). It was his finding that "the role of the Commission (appellant) only kicks in after receipt of this (committee) report" which would be considered by the Appellant before making any decision.

(x) had regard to the emails relating to what was termed as the "war council" although their existence was denied by the appellant and they (emails) were not proved and did not relate to or form the basis of the

allegations on which the 1st respondent was removed from office. In his own words, the learned trial Judge expressed the view that "it is not for the Court to act sleuth and determine the authenticity of the trove of emails. However, common sense demands, in a matter of this nature, with consequences so dire to the 1st respondent, the Court goes a little further into the matter than JSC thought the documents deserve. The Court will recall these observations shortly in the legal analysis of the issue at hand…"

95. The 1st respondent failed to prove the allegations in her petition and the learned trial Judge erred in his conclusions, findings and application of the law and his decision was clearly wrong. The petition was devoid of merit and the trial Judge was wrong in upholding it and in giving the orders as he did.

96. It is my finding that the appeal is meritorious. I allow it. The judgment of the Industrial Court dated 7th March 2014 is hereby set aside in its entirety and the 1st respondent's petition dated 31st October 2013 is hereby dismissed with costs. As costs follow the event, the costs of this appeal shall be borne by the 1st respondent. The appeal is disposed of as per the orders of my learned sister the Hon. Lady Justice Hannah Okwengu, JA.

Dated and delivered at Nairobi this 19th day of September, 2014.

G. B. M. KARIUKI

SC

……

JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE J.A.

The background, pleadings, issues, procedural history and the submissions made by the parties to this matter have been succinctly captured in the judgment of my sister Hon. Okwengu J.A which I had the advantage of reading in draft. I will therefore make no attempt to rehash them herein. This appeal arises from the litigation relating to the acrimonious removal of Gladys Boss Shollei (the 1st Respondent) from the position of Chief Registrar of the Judiciary. That removal was by the Judicial Service Commission (the Appellant) and was the culmination of a very public and depressing controversy of epic proportions that called into serious question the goings-on in the Judiciary. That institution had just embarked on a

transformative path, its tentative first steps aimed at raising it, aided by the spirit and letter of the new Constitution, from a past of prurient public mistrust into a new dawn of public confidence that it can be trusted to deliver justice, with integrity. What damage the war between these two parties, be it clean or dirty, has done to the institution and what deleterious effects it will continue to have, both in terms of morale and a renewed public mistrust manifesting in skepticism or downright cynicism, will be left to historians of a later day.

What is before us is an appeal by the 1st Respondent against a judgment of the Industrial Court of Kenya (Ndima Nderi J) by which he issued the following orders, in the appellant's perception erroneously, as captured at **Ground 14** of the **Memorandum of Appeal**;

"(i) That an order of certiorari to issue to quash the letter of removal by the appellant dated 18th October 2013

(i) ***That an order of certiorari to issue to quash disciplinary proceedings of 18th October 2013***

(ii) ***That the Appellant violated the 1st Respondent's rights under Articles 27 (1), 35 (1) (b), 47 (1) & (2), 50 (1) and (2) and 236 (b) of the Constitution***

(iii)***That the 1st Respondent is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an enquiry into quantum be gone into***

(iv) ***That the 1st Respondent be paid the costs of the Petition."***

It is worth noting that even though the impugned decision was ultimately made by the Industrial Court following proceedings before it, the claim had initially been instituted as a Petition before the High Court's Constitutional and Human Rights Division for the enforcement of and redress for violation of the 1st Respondent's rights and freedoms as enshrined in the Constitution.

When counsel for the parties appeared before Majanja J of that Division, it was observed and agreed that the main issue raised in the Petition was an employer/employee relationship falling under the jurisdiction of the Industrial Court. The matter was therefore ordered transferred to that court where it was heard and determined culminating in the orders I have already set out herein.

The appellant has taken the view, which I need to dispose of presently, that the transfer of the Petition from the High Court to the Industrial Court was for the limited purpose of the real issue in controversy, namely the employment dispute, being adjudicated upon by the latter court as the forum specialized in and invested with the jurisdictional wherewithal to determine that issue. It is

the appellant's contention that the Industrial Court crossed the jurisdictional red line when it proceeded to adjudicate on the Petition as a whole and in particular to enquire onto allegations of violation of rights and freedoms found in the Constitution. The appellant's specific grievance is captured in paragraph 3 of its Memorandum of appeal as follows;

"3. THAT the learned judge erred in law by exceeding his jurisdiction in purporting to determine questions as to whether the 1st Respondent's rights or fundamental freedoms had been denied, violated, infringed or threatened which jurisdiction is reserved for the High Court".

In its submissions, the appellant has elucidated and expanded upon that theme by asserting that under **Article 23 (1)** of the **Constitution**,the High Court,and it alone, has jurisdiction, in accordance with **Article 165,** to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. The appellant is emphatic that the Constitution did not intend to extend the jurisdiction on interpretation of the Constitution to the courts created under **Article 161(2)** of the **Constitution**. Superior courts the latter may be, it contends, but they have no jurisdiction in matters of enforcement of the Constitution.

With great respect to the appellant, its assertions, though attractive, do not at all persuade me. I am far from convinced that the Constitution that the people of Kenya passed through a popular,participatory process, created an exclusive interpretation and enforcement jurisdiction in the High Court. It seems to me, rather, that the High Court holds a central and pre-eminent place in the scheme of things but other judicial authorities are not thereby barred from interpreting and enforcing the Constitution. The language of the Constitution is not an esoteric tongue known, spoken and expressed only by the High Court. Rather, the Constitution itself essentially breaks and tears down the middle wall of partition and invites all organs and all persons to the high table of constitutional discourse. The new Constitution is the handwork of all and its ethos is inclusivity not exclusivity. I would be loathe to accept for the briefest moment that the constitutional text, meanings and interpretations are the exclusive property and treasure of a single court, which, from the nature of the division of labour and convenience at the High Court, would translate to a single division manned by a few Judges, eminent though they may be.

In this I propound no constitutional heresy. My reading of the Constitution persuades me that its aim is to create a constitutional culture in Kenya. It declares its own supremacy **(Article 2)** and imposes an obligation on 'every person' to respect, uphold and defend it **(Article 3(1)).** Another of its defining features is a progressive Bill of Rights **(Chapter 4)** which it declares to be an integral part of Kenyas' democratic state and a framework for social, economic and cultural policies **(Article 19 (1))** with the recognition and protection of human rights a clear

desideratum for the preservation of individual and community dignity as well as the promotion of social justice.

The application of the Bill of Rights is a duty that falls on all courts while the interpretation of the same falls on **"a court, tribunal or other authority"** which must promote the values that underline an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and objects of the Bill of Rights **(Article 20)**. The Constitution does not limit or reserve this task to the High Court. It is telling that **Article 22** of the **Constitution** which deals with the enforcement of the Bill of Rights declares every person's right to institute court proceedings where a right or fundamental rights has been denied, violated, infringed or is threatened. The court at which such person, whether acting on his own behalf or on behalf of a person unable to act on his own behalf or of an association or in the public interest is not specified to be the High Court. Nor is any court excluded from contemplation.

Article 23 of the **Constitution**, which is the bedrock of the appellant's exclusivity thesis, warrants full reproduction;

"(1) ***The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

(2) ***Parliament shall enact legislation togiveoriginal jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

(3) ***In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

The provision of **Section 165** that is cross-referenced above is **sub-rule 3** which lists and states the various jurisdictions of the High Court as including;

> ***"(c) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."***

There is nothing in **Article 165** that is exclusive in character. That Article only lists the various aspects of the High Courts' jurisdiction. It does not by investing the High Court with a Bill of Rights enforcement jurisdiction thereby bar other courts from dealing with the subject any more than the declaration of its unlimited original jurisdiction in criminal and civil matters would bar other courts from dealing with criminal and civil matters. It does not and cannot, without doing violence to language, logic and reality.

There is, in fact, a tacit recognition that superior courts do have an original jurisdiction in appropriate cases, as I shall shortly demonstrate, to deal with questions of alleged denial, violation, infringement or threat to the corpus of the Bill of Rights. The Constitution goes further and commands Parliament to further disperse this judicial function to subordinate courts;

> ***"2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

It is clear from the foregoing that far from limiting this Bill of Rights- enforcement jurisdiction to the High Court or to superior courts, the Constitution expects that such jurisdiction be found in subordinate courts as well. It matters not that the jurisdiction-donating legislation is yet to be enacted. It is enough for the point to be made that the Constitution does not commit its application and enforcement to a narrow and rarefied forum. It would therefore be a misdirection for argument to be made that the superior courts contemplated by **Article 162** must consider the Constitution and its application and interpretation, even when touching on matters fundamentally within the special competence of those courts, as anathema. The law, as I understand it, is that whereas those courts may not embark on a generalized handling of Bill of Rights disputes, they would definitely be entitled and are jurisdictionally empowered to address such constitutional issues as arise directly and in relation to the matters within their jurisdictional competence and specialization.

We had occasion to recently pronounce ourselves on this precise point in **PROF. DANIEL N. MUGENDI –VS- KENYATTA UNIVERSITY & OTHERS CIVIL APPEAL NO. 6 OF 2012, [2013] e KLR**. There, as here, questions had been raised whether the Industrial Court had jurisdiction to address questions of violation of constitutional rights and we held that it did, when such violations are raised as matters

incidental and connected to the employer-employee dispute that is properly to be resolved before that court. In doing so we approved the decision of Majanja J. on the same point in **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) -VS- THE ATTORNEY GENERAL & OTHERS H.C. PETITION NO. 170 OF 2012, [2012]eKLR.**

I am firmly of the view that this remains the correct position, for it is not uncommon for allegations of violation of constitutional rights to be made out within the context of and related to the employment relationship. It would be absurd and quite inimical to the self-evident duty of efficient, timely and cost-effective delivery of justice were a complaining party to be required to deal with the contractual aspect proper before the Industrial Court and then file separate proceedings at the High Court with regard to the violation of rights.

I therefore hold that the Industrial Court did have jurisdiction and this particular point of grievance by the appellant, itself a complete reversal of its position in the court below where it either consented to or at any rate did not protest the transfer of the petition from the High Court to the Industrial Court, must fail.

The gravamen of this appeal as I see it concerns the learned Judge's consideration and application of the law relating to the mandate of the appellant in the matter of the removal or discipline of the Chief Registrar of the Judiciary. The criticism of the learned Judge's handling of this issue is variously expressed in **Grounds 1, 2, 5, 9** and **15** of the Memorandum of Appeal where the appellant complains that the learned judge misapprehended the applicable law on the subject with the result that he arrived at an erroneous decision.

The centrality of this issue was fully appreciated by the learned Judge himself who captured it in three of the issues he delineated for determination thus;

> **"(1) Did the Judicial Service Commission have jurisdiction to discipline the Petitioner?**
>
> **(2) If the answer to 1 is correct, was the Petitioner given a fair and impartial hearing?**
>
> **(3) Was the Petitioner removed for a valid reason and in terms of a fair procedure"**

On jurisdiction, the learned Judge upheld the submissions made by the appellant and the 2nd respondent who had appeared as *Amicus Curiae,* that the appellant did have jurisdiction to discipline the Chief Registrar of the Judiciary, for to hold otherwise would be absurd. Such jurisdiction, the learned Judge held, flowed from **Article 172 (1) (c)** of the **Constitution** as read with **Section 12(1)** of the **Judicial Service Act**.

Having found that the appellant was seized of jurisdiction to discipline the 1st respondent, the learned judge proceeded to make certain critical and definitive

findings as to the process that should be followed. The first was that the appellant was guilty of a fatal deviation from the statutory procedure that it was obligated to observe. Said the Judge:-

> ***"The deviation from the mandatory procedure set under Regulation 25, by Judicial Service Commission is so gross in material terms that it is an understatement to say that the disciplinary hearing was a complete none starter.***
>
> ***Section 32 and Regulation 25 under which the disciplining committee or panel is established is (sic) couched in such mandatory terms that there is no room for deviation."***

He also listed in his judgment what he referred to as the appellant's major failings with regard to its 'mandatory obligations under **Regulation 25 (3)'** as follows;

> (i) ***"It was mandatory for the Judicial Service Commission to appoint a disciplinary committee of at least 3 persons from its ranks.***
>
> (ii) ***It only required at least 3 members to hear the disciplinary case and therefore it was unreasonable to insist on the sitting of members against whom objections had been made. The enthusiasm for the entire Commission to hear the matter is confounding.***
>
> (iii) ***The Chief Justice, is prohibited in mandatory term to sit (sic) in a disciplinary panel. The court fails to understand why the Chief Justice insisted on chairing the panel even after allegations of bias had been made against him and was specifically requested to consider recusing himself."***

It is clear from the phraseology employed by the learned Judge that he took an extremely dim view of the manner in which the appellant dealt with the disciplinary process that led to the removal of the first respondent. The learned Judge considered the entire process as fatally flawed and contrary to law. He saw this as symptomatic of an enthusiastic and insistent, overzealous even, attempt by the Appellant and its chairman, in the person of the Hon. the Chief Justice, to hear the matter and deal with the 1st Respondent in a partial manner even if it meant breaching the law in the process. With respect to the learned Judge, he appears to have floundered in the same marshy bog of erroneous zeal with which he charged the appellant and this is why: the learned Judge collapsed and conflated two separate and distinct disciplinary processes and mistakenly used the statutory markers of one to test the other with the inescapable consequence of erroneous conclusions.

I have no doubt in my mind that whereas the office of Chief Registrar of the Judiciary is established by **Section 161 (2) (c)** of the Constitution as the Chief Administrator

and Accounting Officer of the Judiciary, that office is subject to the Judicial Service Commission. The Chief Registrar of the Judiciary is the first among registrars, which offices may be established by the Judicial Service Commission under **Article 161 (3)** of the Constitution as may be necessary. The office of Chief Registrar of the Judiciary is established by the Constitution, but the holder, *qua* administrative chief of the Judiciary, is neither a judge nor a judicial officer. The holder is a member, foremost though he or she be, of the judicial staff complement of the Judiciary. The office is not a tenured one under the Constitution and the mode and process of removal of its holder is not governed by the Constitution save as to the need for the application of the appropriate constitutional principles and safeguards that apply to other public officers or employees generally. I consider this understanding to be key to a proper appreciation of the nature, status, role and accountability paths of the office of the Chief Registrar of the Judiciary, the bottom line of which is that the office is accountable to the Judicial Service Commission. It is an office perched atop a bureaucracy whose *raison d'etre* is to facilitate the judicial function of the Judiciary. The bureaucracy is not an end in itself and owes its existence only to the necessity for oiling of the machinery by which judicial officers are to render timely and efficient justice to the people who are the fountain head from which judicial authority is derived (See **Article 159 (1)** of the **Constitution**).

Article 172 of the Constitution lists the functions of the Judicial Service Commission. These include 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 Act of Parliament that deals with these matters is of course the **Judicial Service Act, No.1** of **2011**. At **Section 9** it makes provision for the qualifications that a person must have in order to qualify to hold the office of Chief Registrar of the Judiciary. It also sets out the functions and powers of the Chief Registrar of the Judiciary at **Section**
>
> **8**. The Chief Registrar of the Judiciary is also constituted Secretary of the Judicial Service Commission and his or her functions as such are set out in **Section 21** of the **Act**. On the specific question of suspension or removal of the Chief Registrar of the Judiciary, **Section 12** of the **Act** provides as follows:-
>
> ***"12. (1) The Chief Registrar may at any time, and in such manner as may be prescribed under this Act, be suspended or removed from office by the Commission for:-***
>
> (a) ***Inability to perform the functions of the office, whether arising from infirmity of body or mind;***
>
> (b) ***Misbehaviour;***

(c) ***Incompetence;***

(d) ***Violation of the prescribed code of conduct for judicial officers;***

(e) ***Bankruptcy;***

(f) ***Violation of the provisions of Chapter Six of he Constitution; or***

(g) ***Any other sufficient cause."***

Of significance, as far as this appeal is concerned, is the fact that the **Act** ordains that it is ***the Commission*** that is to take action. It further stipulates six specific grounds upon which the Chief Registrar of the Judiciary may be suspended or removed from office. The grounds are however not exhaustive for the seventh ground **"any other sufficient cause"** opens wide the reasons for removal or suspension rendering the list inclusionary, as opposed to exclusionary. It is also noteworthy that this section, though not heavy on procedural detail, does nonetheless constitute a design and structure that meets the due process requirements for fair administration action. The possible grounds for removal are known in advance. A Chief Registrar of the Judiciary must be informed of the case against him or her in writing. Reasonable time shall be given for the Chief Registrar of the Judiciary to defend himself or herself against the grounds cited.

The question that must however be decided in this appeal is whether the Judicial Service Commission can, properly and without violation of the law, proceed with the process of a Chief Registrar of Judiciary's removal under **Section 12** without reference to and compliance with the detailed procedure set out in **Part IV** of the **Third Schedule** to the **Act**, with specific reference to **paragraph 25** of the said **Schedule.** I answer in the affirmative.

I have spent long hours anxiously going through the Act and the Third Schedule thereto. It has not been a particularly enjoyable undertaking as I find that there are all manner of typographical errors, errors of cross-referencing and a general inelegance about the legislation manifesting in ponderous and disharmonious gender mix- ups and other grammatical and syntactical annoyances. All that notwithstanding, it is quite plain to me that the disciplinary process set out in **Part IV** of the **Third Schedule** relates to judicial officers and staff of the judiciary other than the Chief Registrar of the Judiciary. This conclusion in inevitable for a number of reasons of which I will cite but a few.

First, the Legislature in its wisdom made two distinct and separate references to the process of discipline and removal by which it made clear that the removal of the Chief Registrar of the Judiciary stands alone and apart from that of other officers and staff of the Judiciary. The Chief Registrar of the Judiciary is dealt with under the already quoted **Section 12** ***(suspension or***

removal of the Chief Registrar) while that of all the other staff is under **Section 32** ***(appointment, discipline and removal of judicial officers and staff).***

Under **Section 12** which deals with the removal or suspension of Chief Registrar of the Judiciary the statute is very specific that action shall be taken by ***the Commission***, meaning the entire Judicial Service Commission. In contrast, **Section 32 (1)** provides that:-

"For the purpose of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a committee or panel which shall be gender representative".

(my emphasis)

Given these express provisions of the statute, I am of the firm persuasion that it was never open to the Judicial Service Commission to substitute one process for the other and the learned Judge's criticism of the appellant for having sat as a full Commission in dealing with the 1st respondent's removal was a patent misdirection. It is also noteworthy that the statutory foundation for the detailed provision for the discipline and removal of judicial officers and staff as contained in the **Third Schedule** is expressly stated to be **Section 32**. There is no mention of **Section 12** as part of that underpinning for the process under the Schedule. And there is no corresponding set of rules or regulations created under **Section 12** of the **Act** which means, to my mind, that Parliament considered the section sufficient without further elaboration or expansion. And so it is.

A careful analysis of **paragraph 25** of the **Third Schedule,** which deals specifically with the proceedings for dismissal of judicial officers and staff, shows that disciplinary proceedings are initiated by the Chief Justice who frames a charge or charges which he forwards with a brief statement thereon to the concerned officer, who is invited to respond to the charges. If the officer does not exculpate himself, the Chief Justice lays the matter with all the relevant material before the Judicial Service Commission, which then decides whether disciplinary proceedings should continue. If it decides that the proceedings should continue, the Judicial Service Commission appoints a committee or panel to investigate the matter. That committee or panel exercises delegated powers on behalf of the Judicial Service Commission and must not include the Chief Justice. It conducts a hearing with the assistance of legal counsel from the office of the Director of Public Prosecutions, if need be, and the accused officer is entitled, as of right, to be represented by an advocate. At the end of the hearing the Committee or Panel reports to the Judicial Service Commission indicating its clear opinion on whether the charge or charges have been proved and whether there are any matters aggravating or alleviating the gravity of the case. This report is then considered by the full Judicial Service

Commission whose role is limited to deciding on the punishment, if any, to be inflicted on the officer or whether he should be required to retire in the public interest.

It seems clear to me that a disciplinary process under the control of a committee or panel, being a part only of the Judicial Service Commission, with the full Judicial Service Commission's role being that of determining punishment only, is appropriate for other judicial officers and staff of the Judiciary as the Third Schedule decrees. It is not, and cannot be appropriate for proceedings that may lead to the suspension or removal of the Chief Registrar of the Judiciary. The status and importance of the office of the Chief Registrar of the Judiciary, in the thinking of Parliament, and correctly so in my view, must require the participation of the entire Judicial Service Commission at all stages and not merely at the tail and limited end of inflicting punishment. At any rate, the punishment contemplated under the **3rd Schedule** at **paragraph 19** is clearly different and inappropriate for the Chief Registrar of the Judiciary for whom only removal or suspension are open for imposition by the full Judicial Service Commission once the stipulated grounds are established.

Given due consideration after a holistic and exhaustive perusal and analysis of the provisions of the **Act**, the Judicial Service Commission's approach to the 1st respondent's case was statutorily sufficient. The learned Judge's importation and attempted superimposition of the **Section 32** and **3rd Schedule** process into the determination of the matter before him was an error of law that calls for reversal. All of the criticism directed at the Judicial Service Commission proceeded from that misapprehension by the learned Judge of the statutorily-ordained procedure for removing or suspending the Chief Registrar of the Judiciary. It starts and ends with **Section 12** of the **Act**. If the Judicial Service Commission is to be faulted, it would be, in my opinion, not for non compliance with **Section 12,** which it substantially did, but rather for attempting, in a misapprehension of its obligation under the **Act**, to comply with the **Third Schedule**. The result of such a gratuitous attempt is to create a hybrid process unintended and unlegislated by Parliament that succeeds only in inviting the kind of criticism that the learned Judge leveled against the Judicial Service Commission.

Having found that the learned Judge fell into error in equating the removal procedure for the Chief Registrar of the Judiciary to that other officers and staff of the Judiciary and eventually subordinating **Section 12** of the **Act** to **paragraph 25** of the **Third Schedule**, I turn to a troubling feature of the learned Judge's judgment; namely his having equated the disciplinary and removal proceedings against the 1st respondent to a criminal trial. Proceeding on that assumption, the learned Judge proceeded to test the several steps and elements of that process against the provisions of the **Criminal Procedure Code Cap 275,** with the inevitable consequence that he found the process to have been woefully inadequate and inconsistent with the provisions of that **Code**.

Predictably, that handling of the case by the learned Judge is the subject of the potent complaint by the appellant as captured in **Ground 8** of the **Memorandum of appeal**;

> ***"THAT the learned Judge erred in law by misapplying criminal law and procedure in an employment petition and failing to apply the relevant law".***

I have no hesitation in finding that this ground of appeal has full merit. The dispute between the 1st respondent and the appellant was, shorn of all niceties, an employment dispute. The learned Judge came to be seized of the matter precisely because it was an employment dispute. It is therefore quite remarkable how the learned judge dealt with the matter before him and treated it as if he was exercising some appellate, review or revisionary jurisdiction in testing procedural compliance with the **Criminal Procedure Code,** a statute entirely alien to the handling of employment disputes between employees and their employers.

It is also apparent that the learned Judge proceeded from the understanding, erroneous in my view, that a fair and impartial hearing in the context of an employment disciplinary hearing must accord with or mirror the hearing of a criminal case. I do not see that such a view is supported by the law. I am unable to find constitutional, statutory or other legal backing for the learned Judge's approach as expressed in the following portion of his judgment;

> ***"At this stage the court agrees that the seriousness of the allegations made against the Chief Registrar of the Judiciary effectively made the disciplinary process a quasi-criminal affair. The Judicial Service Commission assumed responsibility equivalent to, if not equal to, a judicial process in every respect. The entire career of the Chief Administrator and Accounts Office (Sic) of the Judiciary hang on the balance."***

With the greatest respect to the learned Judge, no employer, not even the Judicial Service Commission, assumes the responsibility equivalent to, less still equal to, a judicial process when it conducts a disciplinary hearing. In the case of the Judicial Service Commission, its constitutive and governing statute does not impose such an obligation and the learned Judge was clearly in error in assuming that the 1st appellant was on trial on criminal charges. Well may it be that the long catalogue of alleged misconduct by the 1st appellant may straddle both the disciplinary and criminal realms, but in deciding to remove a Chief Registrar of the Judiciary under **Section 12** of the **Act**, the Judicial Service Commission does not, and can never purport to make a definitive finding of guilt in the sense reserved for a criminal court at the conclusion of a criminal trial. It is rather puzzling that the learned Judge equated the two distinctly separate and decidedly different processes.

Indeed, even a cursory look at certain provisions of **Part IV** of the **Third Schedule** to the **Act,** which deals with discipline, would show beyond disputation that the Act

conceives of disciplinary and criminal proceedings as totally different. Indeed, paragraph 18, side – noted ***"where criminal proceedings are pending",*** which I set out for purposes only of dispelling the notion that disciplinary proceedings before the Judicial Service Commission are criminal or quasi criminal, and without detracting from my earlier finding that the Schedule does not apply to **Section 12** proceedings in respect of a Chief Registrar of Judiciary, provides as follows;

> "***18. (1) when a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed by an officer the Chief Justice shall act under either paragraph 27, as may be appropriate.***
>
> ***(3) An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted."***

It follows from what I have stated so far that the learned Judge was clearly wrong in ***"seek[ing] guidance from the provisions of the Criminal Procedure Code, Cap75 of the Laws of Kenya with regard to the framing of charges under Section 37(Sic)".*** The Judge set out the provision of **Section 137** of the **Criminal Procedure Code** on the framing of charges and informations in criminal trials before going into a detailed exposition of the rules and rationale for drafting charges then adopting them thus;

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

The learned Judge here made a sweeping statement of a general character quite unsupported by any law. He cited no authority for such a re-writing of the law and I would find it to be a misdirection. If anything, what authorities there are posit the contrary position. The decision of the British Columbia Court of Appeal in **LANDRY –VS- LEGAL SERVICES SOCIETY [1986] CanLII (1165) (BC CA)**, for instance, provides an excellent exposition of the distinction between criminal and disciplinary proceedings.

The learned Judge proceeded on that erroneous path in passing judgment on the propriety or otherwise of the allegations leveled against the 1st respondent in *inter alia*, the following manner;

> ***"With specific reference to the allegation of failure to exercise prudence in expenditure of public finds resulting into the loss of approximately 1,200,000,000 (One billion two hundred million);***

(a) ***The charge is split into very many counts which, if properly consolidated and framed would have resulted in very few counts. Some*** *other counts* ***would have been the subject of separate charges;***

(b) ***Many of the counts do not start with a statement of offence followed by particulars and therefore do not in law disclose any offence capable of being pleaded to;***

(c) ***The most serious failure discernible on the face of the lengthy charge sheet is that in numerous counts different allegations constituting or capable of constituting different offences are made resulting in debilitating duplicity."***

It is obvious from the foregoing that the learned Judge wholly misapprehended the case before him. He treated the removal proceedings as if they were full-fledged judicial proceedings, of a criminal kind. He dealt with the matter as would a judge sitting in the Criminal Division of the High Court scrutinizing the record of proceeding of a subordinate court to determine their legality, propriety or correctness. This approach cannot be described as anything but an aberration and a totally unwarranted foray into an area that had no place in the employment dispute that was before the learned Judge.

Those reversible errors are only compounded by the learned Judge's reliance on the judgment of Trevelyan and Todd JJ in **DANDE – VS- REPUBLIC [1977] KLR 71**, in which the learned Judges, sitting on a criminal appeal had cited the old case of **CHERERE S/o GAKUHI – VS- R [1955] EACA 478** on defective charges as a basis for purporting to find that ***"Counts 1, 2, 3, 4, 5, 7, 9, 11, 12 under charge 'A' (relating to the KShs. 1.2 billion … are therefore incurably bad."***

The learned Judge then took the matter to the realm of the surreal, in my view, when he purported to state that **"count 10 titled irregular earning of sitting allowances does not disclose any offence"** because the work **"paid"** was omitted in the sentence **"you irregularly caused yourself to be sitting allowances"**.

The Judge found that;

"However the omission above with regard to a count is incurable once the proceedings have been concluded. The effect of omitting the word 'paid' is fatal to the count in my view. It is not a formal error but it goes to the substance of the charge and the same is therefore bad in law."

The learned Judge's judgment is replete with many such misdirections and errors of law in subjecting the **Section 12** proceedings to the law of drafting criminal charges. He purports to hold various **"counts"** as being bad for duplicity and failure to disclose the provisions of the law or regulations contravened by the 1st Respondent and appears wholly oblivious of the flagrant irony of quoting the **DANDE** case in stating

that it was difficult for the 1st respondents to "know exactly with what she is charged, and if she is convicted she does not exactly know of what she has been convicted".

The irony is obvious in that the language of 'charges' and 'convictions' is language that is indicative and reserved to criminal proceedings and has no place in proceedings under **Section 12** of the **Judicial Service Act**.

That same paradox of the learned Judge's absolute misapprehension of the character of the matter before him relates to his dealing with the allegation that the 1st Respondent irregularly paid some KShs.177,955,376.95 in advance on account of some partitioning works. Here the learned Judge stated, again dealing with the matter as a purely criminal proceeding;

> ***"Count 23 therefore is not only bad for duplicity but is an example if serious splitting of charges by the Respondent against the Petitioner making it almost impossible for the Petitioner to defend herself. Splitting the charges is a serious infraction in criminal justice system and I dare say in quasi-criminal proceedings the subject of this suit…"***
>
> (my emphasis)

If I have taken long on this aspect of this appeal, it is because it is constitutes a most striking and rare departure from a court's proper mandate and involves a wholesale importation of a totally different regime of law with rather strange consequences. The learned Judge went into a remarkably detailed analysis of the matters that were before the Judicial Service Commission in a manner that leaves the unmistakable impression, that he was on a mission to exonerate the 1st respondent without the benefit of a proper enquiry into grave allegations by the proper investigative agencies. Even where the Judicial Service

Commission considered that the 1st respondent had admitted to some of the allegations made against her, the learned Judge, again using the specialized and unique jurisprudence of the criminal bench, went well out of his way to reverse those findings. It was a case of the Judge substituting the Judicial Service Commission's findings with his own and most improperly so. In doing so, he quoted the criminal case of **LUSITI –VS- REPUBLIC [1977] KLR 143;**

> ***"On a plea of guilty being recorded by the Court, notwithstanding the proviso to Section 207 (2) of the Criminal Procedure Code, it should ensure that the defendant wished to admit without any qualification each and every essential ingredient of the charge especially if he is not asked to admit or deny the facts outlined by the prosecution".***
>
> The phraseology and nomenclature employed by the two judges and the context of that case all show that it was wholly inapplicable to the matter

before the learned Judge and it was a gross misdirection for him to use that criminal law analysis in an employment dispute. His quoting our predecessor Court's decision in **ADAN –VS- REPUBLIC [1973] EA 445**, the *locus classicus* on the procedure for taking of an efficacious plea of guilty in a criminal trial, only goes to show how wrong the learned Judge was in dealing with the case before him. His conclusion that in the present case it is obvious on the face of the responses by the Petitioner she did not intend to admit any of the offences against her and his characterization of the Judicial Service Commission's finding that 33 of the allegations, (which the Judge christens offences) were admitted as **"preposterous and therefore untenable"** is as mind- boggling as it is unfortunate.

There is absolutely no requirement and no contemplation that the provisions of the **Criminal Procedure Code** with regard to the drafting or framing of charges should apply. For the avoidance of doubt I do not for a moment understand the fact that the Judicial Service Commission may request the Director of Public Prosecutions to direct a legally qualified officer to present to the Committee or Panel the case against the officer concerned under paragraph **25 (b)** of the **Third Schedule** to the **Judicial Service Act** converts the proceedings into a criminal trial. Nor does it require that the said counsel should draft the charges. The framing of charges, a wholly non-criminal undertaking, is to be done by the Chief Justice under the express provisions of **paragraph 25 (1)** and **(8)** of the **Third Schedule**. At any rate, this relates to the discipline of other officers and staff under **Section 32** of the **Judicial Service Act** and not to the Chief Registrar of Judiciary.

What I have held so far should suffice to dispose of various others of the appellant's grounds of appeal including:-

> "***6. THAT the learned Judge seriously erred in law by going on a frolic of his own and citing legal provisions in the Judicial Service Act on behalf of and in aid of the 1st Respondent when the same had not been pleaded or in any manner referred to in the Petition or in the 1st Respondent's supporting affidavit.***
>
> ***7. THAT the learned Judge seriously erred in law by descending into the arena of conflict and assuming the role of defending and answering the allegations leveled against the 1st Respondent in the course of judgment, thus violating all known rules of judicial conduct."***

The applicable law and procedure for the removal of the Chief Registrar of the Judiciary aside, the appellant has taken exception to the manner in which the learned Judge dealt with the action it took against the 1st respondent. The appellant in **Ground 13** of its Memorandum of appeal complains thus;

"13. THAT the learned Judge failed to appreciate that the nature of the dispute before him was that of an employer and employee and largely requiring the judge to consider the circumstances in which the termination or removal from office took place, including the extent to which the employee caused or contributed to the termination."

In support of this ground and others to like effect, the appellant in its written submissions as well as in the address by its learned Senior Counsel Mr. Muite, laid great emphasis on the fact the 1st Respondent had by her conduct rendered her further holding of the position of Chief Registrar of the Judiciary both untenable and impossible. The appellant contended that by declaring herself not answerable and not accountable to the appellant in her response to allegations of mismanagement, the 1st Respondent had betrayed a fundamental dereliction of duty and a gross act of insubordination that on its own, without any other ground, justified her removal as Chief Registrar of the Judiciary.

In making this submission, the appellant pointed to the 1st Respondent's Petition itself where she pleaded at **paragraph 13** that in taking disciplinary action against her, the appellant **"exercised powers it did not have"** because in essence, her accountability was to other bodies and organs and not the appellant, namely:-

(i) ***as accounting officer the Chief Registrar of the Judiciary is accountable to the National Assembly***

(ii) ***the Judiciary's accounts are subject to audit by the Auditor – General***

(iii) ***further oversight of the Judiciary is by the National Treasury***

(iv) ***in procurement the Judiciary is subject to oversight by the Public Procurement Authority***

(v) ***the mandate to investigate corruption allegations falls on the Ethics and Anti-Corruption Commission.***

The Petition cited the various constitutional and statutory provisions underpinning the 1st Respondent's position as to where the Chief Registrar of the Judiciary's accountability lay while the supporting affidavit at **paragraph 9 (v)** and **(iv)** had the 1st Respondent repeating that the appellant was devoid of powers to institute any disciplinary proceedings against her as the only power it was possessed of was **"only referral"**, presumably to those other agencies and organs, ***"and never suo moto as it did".***

It was Mr. Muite's submission that the attitude displayed by the 1st Respondent was the root and cause of the problems between the parties because she somehow regarded herself as the head of the Judiciary and in no way answerable to the

appellant, which he, rather graciously or perhaps tongue in cheek, ascribed to a possible genuine misunderstanding of the Constitution and the law. Whatever the basis for her belief, however, the record shows that the appellant did consider some aspect of the conduct of the 1st Respondent as amounting to insubordination. Indeed, paragraph 23 of the allegation against her was titled **"INSUBORDINATION AND COUNTERMANDING DECISIONS OF THE COMMISSION"**and detailed at some length some NINE specific instances of the same.In the end, insubordination was one of the Grounds upon which the decision to remove the 1st Respondent was based, as communicated by the letter of 18th October 2013 from the Chief Justice. Mr. Muite urged us to treat as gross insubordination the 1st Respondent's press–conference on 19th August, 2013, given moments after the Chief Justice and other members of the appellant announced the disciplinary action commenced against her, in which she termed the said action as "irresponsible". This particular allegation is listed under **misbehavior** on the appellant's case against the 1st Respondent.

The idea that an employee, no matter how good at one's work and no matter how important and critical one's office, can declare oneself unaccountable and unanswerable to her employer appears to me so contrary to reason, good sense and the practical realities of life as to be a fantastic oxymoron. It is in the nature of life that no one is indispensable and no one is immutably immune from a vertical accountability to one's employer. Anything else would seem to stand reason on its head and to create a halo of invincibility about an individual that cannot possibly be productive of a healthy working relationship.

Nowhere in my reading of the **Constitution**, and the **Judicial Service Act** do I see even a whispered hint that the Chief Registrar of the Judiciary is a special kind of public officer hoisted upon the Judiciary, of and from whom no accountability is to be expected. Such impunity cannot be arrived at by some process of reasoning and by mere declaration or attempted exercise of it by the person who claims it. Nothing short of an express declaration of it, largely and conspicuously writ in the law, would convince me of its existence. No such provision exists.

To the contrary, our entire constitutional make up proceeds from certain clear principles and values that must inform the holding and exercise of public office and from which the office of Chief Registrar of the Judiciary is not exempt. The *national values and principles of governance*, which are binding on all State Officers and Public officers, in **Article 10 (2)** of the Constitution include good governance, integrity, transparency and accountability. These are echoed in **Chapter Six** which deals with "Leadership and Integrity" under which the authority assigned to a State Officer is a public trust to be exercised in a manner that, *inter alia*, promotes public confidence in the integrity of the office and also constitutes a responsibility to serve the people rather than to rule them **Article 73 (1).** The guiding principles of

leadership and integrity include accountability to the public for decisions and actions as well as discipline and commitment in service to the people.

Viewed with these values and principles in mind, it is clear to me that it sounds ill for it to fall from the mouth of any public officer that he or she is not answerable to his employer. That cannot be an emanation or a demonstration of accountability or discipline or selfless service. At any rate, the fact that under **Article 172 (1) (c),** the Judicial Service Commission has power to receive complaints against, investigate and remove Registrars, Magistrates and other Judicial Officers should of itself dispel any notion that the Chief Registrar of the Judiciary is not accountable to the Judicial Service Commission.

That the Chief Registrar of the Judiciary may be accountable to all those other agencies and bodies in certain specific respects is additional to and not exclusive of that office's accountability to the Judicial Service Commission as the body charged with the promotion of the independence and accountability of the Judiciary. **Section 21** of the **Judicial Service Act** in fact expressly makes provision for the functions of the Chief Registrar of the Judiciary as its secretary and these include:-

(b) the enforcement of decisions of the Commission….

(e) undertaking any duties assigned by the Commission. In addition, the Chief Registrar of the Judiciary under **Section 8(1)** of that Act has various functions spelt out and they include:-

(a) giving effect to the directions of the Chief Justice and

(m) perform such other duties as may be assigned by the Chief Justice from time to time.

It seems to me clear quite beyond peradventure that not only is the Chief Registrar of the Judiciary's accountability to the Chief Justice and the Judicial Service Commission a matter of statutory and constitutional requirement, but such accountability and responsibility is in no way lessened or diluted by any other responsibility to account and answer to other organs, offices or institutions as may be by law required. Being of that mind, I would consider a denial, defiance, violation or repudiation of such accountability and answerability to the Judicial Service Commission on the part of the Chief Registrar of the Judiciary to be an insufferable act of insubordination inviting appropriate disciplinary measures.

The modern law on the meaning and consequence of insubordination has ancient antecedents and has always had at its heart willful disobedience. In **LAWS –VS- LONDON CHRONICLE LTD [1959] 1 WLR 690, Lord Evershed M.R.** put it thus;

"It is generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally".

A more contemporary expression of this notion, with the "master- servant" phraseology having fallen by the wayside in the intervening half century, is to be found in the Canadian case of **MICHAEL DOWLING -VS- WORK PLACE SAFETY AND INSURANCE BOARD [2004] CAN LII 43692** cited to us by the appellant. There, the Ontario Court of Appeal stated the test to be applied as:

"… It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct".

That court was following the decision of the Canadian Supreme Court in **Mc KINLEY –VS- B.C. TEL [2001] 2 S.C.R 161** in which the standard to be employed in determining whether an employees' misconduct (in that case dishonesty) gives rise to just cause for dismissal. I consider the test there propounded to be sound and am persuaded to apply it;

"[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the

employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could *say,* ***for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."*** *(My emphasis)*

Speaking for myself, and having conducted a careful analysis, and re-appraisal of the evidence on record so as to draw my own inferences of fact as obligated by **Rule 29** of the **Court of Appeal Rules**, I have come to the unhesitating conclusion that the 1st Respondent's conduct in denying and defying the appellant's oversight authority over her, and in declaring herself immune to its demand for accountability and

answerability, was a total if audacious repudiation of the employer- employee relationship. Her characterization of the decisions and actions of the appellant in attempting to rein her in as irresponsible was so far beyond the pale of what is permissible of an employee to say of an employer if the relationship is to subsist that, on the facts of the case, the appellant was presented with ample and irresistible cause for her dismissal.

I am of the respectful view that the learned Judge unduly diminished the gravity of the allegations of misconduct, defiance and misconduct that were not only leveled, but quite clearly proved as well, against the 1st Respondent in the proceedings against her. I am quite clear that the 1st respondent's action, attitude and utterances as against the appellant wholly and fatally compromised her position as an employee thereof and rendered her continued holding of the office of Chief Registrar of the Judiciary both untenable and intolerable. On the law and the facts the learned Judge should have so found. In failing to do so, he erred and misdirected himself.

It is worth noting that courts ought to be slow to make determinations that are on the face of them, unrealistic and bordering on the cynical. Courts do intervene in employer-employee disputes but even as they do so, they must appreciate that the work-place must be allowed and enabled to operate in a manner that is productive and harmonious. Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector. It is thus clear to me that a judge oversteps his mandate when he fails to give due and grave consideration to the intractable difficulty an employer faces when faced with insubordination which is really a form of headstrong defiance and open rebellion to lawful authority. In such instances, the act of firing the employee properly taken should not invite the courts' quashing power by way of certiorari as happened herein.

In this respect I fully agree with the decision of the South African Labour Court in **NAMPAK CORRUGATED WADEVILLE –VS- KHOZA (JA 14/98)[1998] ZALAC 24** in which **Ngcobo** JA stated;

> **"33] The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was *reasonable."***

Justice Ngcobo proceeded to quote a passage from the decision of **BRITISH LEYLAND UK LIMITED –VS- SWIFT [1981] IRLR 91** at **93** on the approach that a court should take in assessing the reasonableness of the action taken by an employer suggestive that there is quite a wide spectrum of actions that would

nonetheless qualify as reasonable and there is a huge element of subjectivity, and I agree:-

> ***"There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."***

From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer.The dismissal therefore passes with ease the test propounded by Lord Denning in the same **BRITISH LEYLAND** case (ibid.);

> *"**Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair."***
>
> *(my emphasis)*

The dismissal was fair and the orders by the learned judge quashing the proceedings and the dismissal cannot be countenanced.

What I have said is enough to show that this appeal is for allowing. A few matters more call for my comments, however. For the first, which relates to whether the appellant violated the 1st respondent's constitutional rights, the learned Judge's holding was as follows;

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

It seems to me that the learned Judge placed the stamp of judicial approval on what I see as a clear misapprehension of the nature, extent and context of the right to fair trial as enshrined in the Constitution. Under the heading **"D. NATURE OF INJURY"** the 1st respondent had in her Petition pleaded as follows;

"12. In purporting to terminate the employment of the Petitioner, the Respondent violated the Petitioner's right (sic) and freedom as follows:-

Her right to fair trial was violated in contravention of Articles 25(c), 47(1) and (2) of the Constitution.

(i) ***(sic) Her right to public hearing was denied in violation of Article 50 (1) of the Constitution.***

(ii) ***Her right to presumption of innocence, to be informed of the charges in sufficient detail and to have adequate time to prepare her defence were denied in contravention of Article 50 (2) (a) (b) and (c) of the Constitution,***

(iii) ***Her right to be heard by an impartial tribunal was violated in contravention of Article 50 (1) of the Constitution.***

(iv) ***Her right to due process of the law has been violated in contravention of Article 236 (b0 of the Constitution …"***

The right to a fair trial is of course one of the inalienable, non-non- deragable super-rights and fundamental freedoms protected from abrogation or limitation under **Article 25** of the **Constitution**. It is in a special category that cannot be constricted or denied regardless of any other provision of the Constitution and regardless of circumstances. As long as our Constitution endures, it never can be permissible that the right to a fair trial can be denied, suspended or in any other way limited.

That being said, the right itself must be properly understood. It is provided for under **Article 50** but this needs careful reading. **Article 50** deals with two related but distinct fundamental rights. **Article 50(1)** provides as follows;

"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."

This provision of law clearly refers to legal proceedings. It decrees that legal proceedings should be heard fairly and held in public. It is because they are legal proceedings that the locus is identified as a court. Courts are to hear disputes in the manner prescribed. Since they are disputes determinable by the application of law, they are generally disputes that would fall under the wider rubric of civil proceedings. In appropriate cases the disputes may be heard in the same fair and public manner, before tribunals which must, even as courts are (or ought to be), both independent and impartial.

This right to fair hearing as enshrined in **Article 50 (1)** relates to legal proceedings in courts and other judicial tribunals. There is nothing in the constitutional text that

suggests that the right applies to internal disciplinary hearings whether or not they should lead to dismissal, touching on the conduct of an employee. Employers and their disciplinary panels are not courts or judicial tribunals and it is therefore a huge misdirection to assess their conduct of disciplinary hearings using the judicial paradigm. It is for this reason that in the case of **GEORGES BROSSEAU –VS THE ALBERTA SECURITIES COMMISSION [1989] & R.C.S 301**, the Canadian Supreme Court took the view that a non- judicial body was not bound by the strict rules as to impartiality that are expected of a court of law and which provide an answer to some at least, of the complaints by the 1st Respondent about bias and improper motive, repeated by her learned counsel Mr. Kipkorir in submissions before us:

> ***"Securities Commission, by their nature, undertake several different functions.The Commission's empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities, which might otherwise be considered 'biased', from an integral part of its operations…"***

As to the application of **Article, 50 (2)** of the **Constitution**, which is the content and essence of the right to a fair trial envisaged in **Article 25**, I wish to state quite categorically that it relates solely to criminal proceedings before a court of law and has absolutely no application in an employee's disciplinary hearing. It definitely does not apply to the removal or suspension of a Chief Registrar of the Judiciary under **Section 12** of the **Judicial Service Act, 2011**. That much is clear from the Sub-Article itself which states in language too plain for mistaking:

"(2) Every accused person has a right to a fair trial which includes the right "

The elements of a fair trial that are then enumerated, running to nearly a score all, without exception, relate to a criminal trial before a court. The language is straight out of criminal jurisprudence: it speaks of an accused person; the presumption of innocence; the right to remain

silent; a public trial before a court established under the Constitution; the right to be present when being tried; the prosecution as the other party; refusal to give self-incriminating evidence; conviction for offences and crimes; reference or allusion to the concepts of *autrofois acquit* or *autrofois convict*; the benefit of least severe sentence; the right of appeal or review to a higher court on conviction and the exclusion of tainted evidence. This paraphrase I have penned is all indicative that **Article 50(2)** spells out the right to a fair trial as one that is enjoyed by persons charged with criminal offences in courts of law within the criminal justice system. It has absolutely no application to the proceedings the subject of this litigation and the learned Judge's attempt to

christen them as 'criminal' or 'quasi criminal' was a grave and reversible error and misdirection. I am not persuaded by Mr. Kipkorir's submission that the Judge was exhibiting admirable industry and developing the law in importing criminal law.

Reference by the1st respondent to **Articles 47** of the Constitution was proper in that she was entitled to fair administrative action which the Constitution provides for thus;

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action."

The Article imposes an obligation on Parliament to enact legislation to give effect to the right and among other things provide for appeals, but such legislation is yet to be enacted. I have noted the 2nd Respondent's useful reference to such legislation in South Africa, namely the **Promotion of Administrative Justice Act, No. 3 of 2000** which is worthy of our own legislation's borrowing. The bottom line however, is that the 1st respondent was entitled to a process that was fair and this resonates with **Article 236 (b)** of the **Constitution** which protects public officers from dismissal, removal from office, demotion in rank or other disciplinary action without due process of law.

Having given due consideration to these constitutional provisions, I am unable to agree with the learned Judge that they were flouted as against the 1st respondent. She was notified of the allegations against her. The use of the term 'charges' in the statute means no more than a formal notification of the accusation that was leveled against her and has nothing to do with **Section 137** of the inapplicable **Criminal Procedure Code**, as I have already stated. The allegations were clear and detailed, if numerous, the multiplicity being a reflection more of the audacity with which certain things are alleged to have been done than anything else. She was given 21 days to respond in writing. She was given 18 days thereafter for an oral hearing. She was represented by very able counsel. I am satisfied that the requirements of both the **Constitution** and **Section 12** of the **Judicial Service Act** were satisfied. The decision of the appellant cannot therefore be properly impugned and the learned Judge, in my respectful view, did not have a proper basis for doing so. I am therefore unable to agree with Mr. Kipkorir that the entire process was **"constrived and a sham".** I accept as good law, persuasive to me, the decision of the English Court of Appeal in **SELVARA JAN –VS- RACE RELATIONS BOARD [1976] 1 ALL ER 12** on the manner in which boards and committees should

conduct investigation to satisfy the requirement of fairness. I agree with the holding by Lord Denning MR, as captured in the case summary:

"What the duty to act fairly requires depends on the nature of the investigation and the consequence which it may have on the person affected by it. The fundamental rule is that, if a person may be adversely affected by the investigation and report, he should be informed of the substance of the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure." (my emphasis)

In all the circumstances of this case, the learned Judge ought to have been extremely circumspect and avoid getting into a semblance of a merit determination of the myriad allegations of impropriety that had been leveled against the 1st respondent. That was not his remit as a court being invited to exercise its certiorari powers. He ought to have confined himself to the process of the 1st respondent's removal to determine its procedural fairness. In going into a detailed analysis of the minutiae comprising the allegations and purporting to exonerate the 1st respondent, the learned Judge went way beyond his legitimate sphere and was in error.

The final matter I will comment on is the learned Judge's wholesale acceptance of submissions on behalf of the appellant that some of the members of the appellant were biased against her. The appellant complains that the learned Judge was remiss to entertain and give weight to that aspect of the matter yet the same was never part of the 1st respondent's case as pleaded. The complainant is not without substance. The Petition was neither premised nor predicated on the ground of bias. No evidence by way of affidavit under oath was tendered. It being trite that parties are bound by their pleadings, **(See NAIROBI CITY COUNCIL –VS- THABITI ENTERPRISES LTD [1995-98] 2EA 231)**, it was improper for the learned Judge to have permitted an issue not properly before him by way of pleadings to intrude upon the decision of the matter to the extent that it did. In the absence of clear proof by proper evidence, I consider it a misdirection for the learned Judge to have stated that;

> ***"On the facts of this case, it is clear that the allegation made especially against the Chief Justice and Commissioner Ahmednassir Abdullahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances."***

I do not accept the thesis that bias is established merely by the seriousness or the stridentness of the allegations. What is required is proof by evidence, the

burden being borne by he or she that alleges. It is not difficult to see what mischief would arise were courts to hold that seriousness of allegations, as opposed to their proof, is the proper basis for apprehending bias. Such apprehension, in my respectful view, is regrettable, not reasonable.

For all the reasons I have stated, I find this appeal to be meritorious and would allow it. I hold that the appellant was perfectly entitled to proceed against the 1st respondent as it did and that her removal was in accordance with the Constitution and the law. I would set aside the judgment of the Industrial Court in entirety.

The appeal shall be disposed of as proposed by my learned sister Hon. Okwengu JA.

Dated at Nairobi this 19th day of September 2014.

P. O. KIAGE

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JUDGE OF APPEAL