REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Njoki & Ouko, SCJJ)

PETITION NO. 34 OF 2014

BETWEEN

GLADYS BOSS SHOLLEI.. APPELLANT

AND

JUDICIAL SERVICE COMMISSION..........................1ST RESPONDENT
COMMISSION ON
ADMINISTRATIVE JUSTICE...2ND RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (Okwengu, G.B.M Kariuki & Kiage, JJA) in Nairobi Civil Appeal No. 50 of 2014 delivered on 19th September 2014)

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JUDGEMENT OF THE COURT

A. INTRODUCTION

[1] This appeal arises from the Judgment of the Court of Appeal *(Okwengu, G.B.M Kariuki & Kiage, JJA)* which upheld an appeal against the decision of the Industrial Court (*now the Employment and Labour Relations Court*) in *Gladys Boss Shollei vs. Judicial Service Commission*, Petition No. 39 of 2013 (*formerly Nairobi Petition No. 528 of 2013*). The Court of Appeal (*Okwengu J.A, with G.B.M Kariuki and Kiage agreeing*), in allowing the appeal concluded that the trial Judge misinterpreted and misapplied the Constitution and the statutory provisions relating to the Judicial Service Commission (**JSC**)'s mandate, and the appellant's constitutional rights. The Court of Appeal also found that the Judge had misdirected himself in treating the disciplinary proceeding as a quasi-criminal process to which criminal law and procedure was applicable, and had failed to establish the circumstances upon which the allegations of bias were

anchored. The court concluded that as s a result of these flaws, the learned Judge arrived at wrong conclusions regarding the violation of constitutional rights of the appellant under ***Articles 27(1), 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution. The appeal is dated 31st October 2014, filed on an even date, and seeks to overturn the entire decision of the Court of Appeal.

B. BACKGROUND

[2] JSC through a letter dated 20th August 2013, sent the appellant on compulsory leave to allow investigations into allegations of procurement, employment, administration, finance, and corporate governance. Aggrieved by the decision to send her on compulsory leave, the appellant filed *Nairobi HC Petition No. 421 of 2013* to challenge the said action. A consent was then reached between the two parties to withdraw the petition and the appellant resumed office. Later, on 10th September 2013, JSC wrote to the appellant inviting her to respond in writing, to the allegations mentioned in the letter of 20th August 2013, within 21 working days. The details of the allegations were enclosed in the said letter.

[3] The appellant responded to the allegations through an Interim and Final Report. JSC then scheduled proceedings for hearing on 16th October 2013, at which hearing the appellant raised objections based on impartiality, bias, and JSC's jurisdiction to institute proceedings against her. JSC overruled the objections and set the proceedings for hearing on 18th October 2013. The appellant's effort to have the matter adjourned on that date to allow her to further prepare her defense and call witnesses bore no fruit. Counsel for the appellant then appeared before JSC and made "closing submissions under protest". On the same date, JSC, vide its letter dated 18th October 2013, resolved to terminate the appellant's appointment, and remove her from office as the Chief Registrar of the Judiciary. In that letter, JSC stated that following the disciplinary

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proceedings initiated by itself as per the allegations set out in its letter dated 10th September 2013, it was satisfied that the requirements set out under Section 12(1) (b), (c), (d), (f) and (g) of the Judicial Service Act (**the Act**) had been met.

[4] Aggrieved with JSC's decision, the appellant filed at the Constitutional and Human Rights Division in Nairobi, *Petition No. 528 of 2013, Gladys Boss Shollei vs. Judicial Service Commission*. At the High Court, the appellant alleged that JSC in terminating her employment, violated her constitutional rights to: a fair trial under Article 25(c), fair administrative action under Article 47(1) and (2); public hearing under Article 50(1), presumption of innocence, to be informed of charges in sufficient detail, and to have adequate time to prepare her defence under Article 50(2) (a), (b) and (c); to be heard by an impartial tribunal under Article 50(1); due process of the law under Article 236 (b); access to information under Article 35(1)(b); and human dignity under Article 28 of the Constitution. The appellant also pleaded that in reaching its decision, JSC exercised powers it did not have under Articles 79, 157, 226 (2) and (3) of the Constitution; the Public Finance Management Act, 2012; and the Public Procurement and Disposal Act, 2005.

[5] At the High Court, the appellant sought for: an order of certiorari to issue and quash the proceedings and letter of removal dated 18th October 2013; an order of mandamus to issue compelling JSC to comply with applicable law; and a prohibition to issue against JSC from, in any way, proceeding against her other than provided for in law. She also sought declaratory orders that: JSC violated her rights; the allegations against her and the reasons given for her dismissal did not exist in law and were void; and that the Act is void to the extent of its inconsistency with the Constitution. Finally, she prayed for an order of compensation for the violation of her rights, and the costs of the suit.

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[6] On 4th November 2013, by consent of the parties, the matter was transferred to the Industrial Court by *Mumbi Ngugi, J* (as *she then was*) on the ground that it related to employment and labour relations in terms of ***Article 162 (2)*** of the Constitution as read together with ***Section 12*** of the **Industrial Court Act, 2011**. Other than changing the petition number, the nature of the claim remained the same at the Industrial Court. In a Ruling delivered on 22nd November 2013, the court declined to reinstate the appellant to the position of Chief Registrar of the Judiciary pending hearing and determination of the petition, but found that a *prima facie* case of bias by JSC against the appellant had been established. The Commission on Administrative Justice was also admitted as *amicus curiae*.

[7] On 7th March 2014, when reaching its decision, the Court (*Ndumia J*,) delineated four issues for determination namely, *did JSC have jurisdiction to discipline the appellant? if the answer to 1 was correct, was the appellant given a fair and impartial hearing? was the appellant removed for a valid reason and in terms of a fair procedure? and what remedy, if any, was available to the appellant?* The court found that JSC had jurisdiction to institute disciplinary proceedings against the appellant; that the disciplinary process against the appellant 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 appellant; that JSC did not specify in its letter of dismissal the exact findings on each allegation made against the appellant; 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 appellant 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

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Commissioners ought to have stepped aside and a disciplinary tribunal of lesser members constituted; that the time given to the appellant to collect information from officers under her so as to defend herself was wanting; that the appellant was not given documents she required to defend herself; that the mandatory provisions of ***Section 32*** of the 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; and that the proceedings and decision of JSC was a nullity as it not only acted *ultra vires* the Act, but also violated the constitutional rights of the appellant under ***Articles 27(1) 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution.

[8] Ultimately, the learned Judge made an order of certiorari quashing the letter of removal dated 18th October 2013, thereby quashing the proceedings of even date; declared that JSC violated the appellant's rights under Articles 27(1), 35(1) (b), 47(1) & (2), 50(1) &(2) and 236(b) of the Constitution; ordered that the appellant was entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights, and that an inquiry into quantum be gone into; and that she be paid costs of the suit.

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[9] Aggrieved by the judgment of the Industrial Court, JSC filed *Nairobi Civil Appeal No. 50 of 2014, Judicial Service Commission vs. Gladys Boss Shollei & another,* seeking that the Court of Appeal do set aside the Judgment of the Industrial Court and dismiss the appellant's petition with costs. JSC raised sixteen grounds of appeal stating that the Learned Judge erred in law by: *failing to consider the core constitutional issue in the petition on its mandate under the Constitution and the Act, and instead dwelt on issues that were not pleaded or deponed to in the appellant's affidavit; failing to consider the provisions of Article 172 of the Constitution and Section 12 of the Act on the removal of the*

appellant; exceeding his jurisdiction by considering questions relating to violation of the appellant's constitutional rights which is a reserve of the High Court; failing to appreciate the appellant's assertion that she was not accountable to JSC; not appreciating the fact that Regulation 25 of Part IV of the Third Schedule of the Act is only applicable to disciplinary proceedings initiated by the Chief Justice in exercise of his authority under Regulation 15 of the said Schedule and not disciplinary proceedings against the Chief Registrar under Section 12 of the Act; assuming the role of defending and answering the allegations levelled against the appellant; misapplying criminal law and procedure in an employment matter; misapprehending the facts of the case and applicable law hence arriving at a wrong conclusion; demonstrating bias against JSC; and failing to apply his mind on the issues in the case before him, and addressing constitutional violations raised by the appellant.

[10] Having considered all the issues, the Court of Appeal on 19th September 2014, unanimously allowed the appeal, set aside the judgment of the Industrial Court and all consequential orders. In doing so, the Court listed the following issues for determination namely: *jurisdiction (that is, the extent of its jurisdiction in hearing the appeal; the jurisdiction of the Industrial Court if any, to hear a constitutional petition; and the jurisdiction of JSC in the disciplinary proceedings); the law applicable to the petition before the learned Judge, and whether the learned Judge properly identified and apprehended the law or whether he misapprehended 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 regarding the procedural fairness and legality of the process conclusions that could reasonably be drawn from the findings on the facts? Finally, was the learned Judge right in granting the orders issued in favour of the appellant?*

[11] On its jurisdiction to entertain the appeal, the Court of Appeal found that under Article 164(3) of the Constitution, as read with Section 17(2) of the Industrial Court Act, Section 3(1) of the Appellate Jurisdiction Act, and Rule 29 of the Court of Appeal Rules, it could only appraise and evaluate the learned Judge's interpretation of the Constitution, and Statutory provisions relating to JSC's mandate. It could also consider and assess the appellant's constitutional rights to the undisputed facts and evaluate the reasonableness of the conclusions of the learned Judge. Concerning the Industrial Court's jurisdiction to address the appellant's claim, the Court found that Article 162(2)(a) of the Constitution has provided for special courts with the "status" of the High Court to determine employment and labour relations disputes. Further, the fact that the Industrial Court has been given the "status of the High Court," enhances its power and discretion in granting reliefs. It concluded that the general power provided to the Industrial Court under Section 12(3)(viii) of the Industrial Court Act to grant reliefs as may be appropriate, read together with Article 23(3) of the Constitution, empowered the Industrial Court to grant the kind of reliefs that the appellant sought in her petition. On JSC's jurisdiction to conduct disciplinary proceedings against the appellant, it found that JSC had jurisdiction to initiate disciplinary proceedings against the appellant *suo moto* without any recommendation or report from any of the external oversight bodies, and that the learned Judge erred in making a contrary finding.

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[12] As to whether the disciplinary process undertaken by JSC was a quasi-criminal process, and if so, whether the criminal law and procedure was applicable, the court found that the same was *a quasi-judicial process as it involved JSC in an adjudicatory function which required it to ascertain facts and make a decision determining the appellant's legal rights under the Constitution and the Act, both of which provided for a fair hearing.* It also found that the disciplinary proceedings were anchored on a contractual

relationship, and JSC was not empowered to provide penal sanctions. Furthermore, the appellate Court found that notwithstanding the seriousness of the allegations made against the appellant, 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. Consequently, the learned Judge was found to have misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. In that regard, the court found that the Criminal Procedure Code had absolutely no application in the disciplinary proceedings, and the learned Judge erred in applying the same.

[13] The Court of Appeal also found that the learned Judge misdirected himself in finding that Section 32 of the Act, and the Third Schedule to that Act applied to the disciplinary process against the appellant. Therefore, Sections 25 and 26 of the Third Schedule to the Act which relates to disciplinary powers delegated to the Chief Justice, do not apply to the office of the Chief Registrar of the Judiciary. Additionally, under Section 12 of the Act, the issue of drawing of charges did not arise, as all that was required was for the appellant to be informed of the case against her in terms of the specific matters that were subject of the disciplinary proceedings. Also, that no format was necessary if the information was given for the appellant to understand the allegations and complaints against her. In this case, the learned Judges found that the allegations communicated to the appellant through the letter dated 10th September 2013, were clear and the appellant not only understand the case against her but also responded to it.

[14] The court also found that Article 50(2) of the Constitution provides for an accused's right to a fair trial in criminal proceedings hence, not applicable in disciplinary proceedings against the appellant, which proceedings were neither criminal nor quasi-criminal. Likewise, that what the appellant was entitled to,

was the right to a fair hearing as provided for under Article 50(1) of the Constitution which deals with any dispute that can be resolved by application of the law. Given the Court's finding, a fair hearing needs the adjudicator to be independent and impartial, and the hearing procedures adopted needs to be fair. The court found that 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. Also, that without the source of the emails having been disclosed, the authenticity of the emails remained doubtful.

[15] The Court of Appeal similarly found that the appellant was given sufficient time to respond to the case against her, and that although an extension of time by JSC's Chairman was declined, it was indeed extended. It also found that there was no trial *per se* upon which an automatic right of a public hearing could be anchored. Additionally, it was held that although the appellant's request for a public hearing was reasonable, 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 pre-judicial to both the appellant and any other subsequent investigations. The appellate court concluded that the appellant was informed of the case before her and allowed to defend herself through written and oral arguments made by her advocate. The court concluded that JSC's exercise of discretion in reaching the final decision was proper.

[16] On breach of the appellant's right to fair administrative action, the learned Judges of appeal agreed that the appellant's right to administrative action was not violated as the action taken was reasonable, procedurally fair, and lawful.

[17] Dissatisfied with the finding of the Court of Appeal, the appellant filed the present appeal presumably under Article 163(4)(a) of the Constitution as there seems to be no certification order that the same is filed under Article 163(4)(b) of the Constitution.

[18] The appeal raises 11 grounds of appeal which in summary faults the Court of Appeal for the following reasons: *holding that the procedure adopted by JSC in reaching its decision to terminate the appellant's appointment as the Chief Registrar of the Judiciary complied with the provisions of Article 47 of the Constitution; finding that JSC's procedure to terminate the appellant's appointment as the Chief Registrar of the Judiciary adhered to the rules of natural justice; finding that the appellant failed to show how the process of her removal from office employed by JSC fell short of the requirements of the law; holding that the appellant had admitted 33 of the 87 allegations made against her; holding that the appellant had failed to establish her allegations that some of JSC's members were biased against her, and she could not receive a fair hearing unless the tribunal was reconstituted; holding that the letter dated 18th October 2013 was concise and communicated the reasons for the removal of the appellant; finding that the appellant when being subjected to the disciplinary process was not entitled to a fair hearing as per Article 50 of the Constitution; failing to appreciate the nature of the office of the Chief Registrar of the Judiciary and having no regard to Section 12(2) of the Act; failing to appreciate that the termination of the appellant's employment complied with Article 236(b) of the Constitution; and failing to appreciate the import of Section 12(2) of the Act, and ought to have found that JSC contravened the Section as there was no evidence that the appellant had been told of any intention to remove her from office.*

C. PARTIES' SUBMISSIONS

a. The appellant's

[19] The appellant, in her submissions filed on 5th March 2015, condensed her grounds into three limbs. The first limb joined several grounds whereby she submitted that JSC violated her right to fair administrative action, and the rules of natural justice. She urged that the procedure adopted by JSC was unlawful, unreasonable, unfair, and contravened the provisions of Articles 47 and 236(b) of the Constitution, and Section 12(2) of the Act. To support her argument, the appellant urged that: JSC did not, as provided by law, inform her of the case against her in writing and give her reasonable opportunity to defend herself; she was not furnished with the details of the allegations made against her; JSC initiated an inquiry into her conduct through a press release which it later converted into a disciplinary proceeding; she was denied an extension of time to respond to the allegation labelled against her; and that JSC declined to give her a public hearing. Likewise, she maintained that despite her objections on JSC's lack of jurisdiction, and the presence of real, apparent and actual bias on the part of some of the Commissioners, JSC proceeded with the hearing thereby infringing her right to legitimate expectation, fair administrative action, and public hearing.

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[20] The appellant also urged that her request for an adjournment on 18th October 2013, to enable her to prepare her defence and call witnesses was declined. Further, that her employment was terminated on the same day without sufficient reasons, and without any indication whether her interim and final reports were considered in arriving at the decision. At the hearing, Counsel for the appellant urged that it was not enough for JSC to state that it was satisfied with the requirements set out in Section 12 of the Act had been met, and that the reasons ought to have been detailed. Accordingly, the appellant faulted the Court of Appeal's finding that JSC did not contravene Article 47 of the Constitution for

the following reasons: the 21 days she was given to respond to allegations against her were not sufficient to respond to 87 allegations while still discharging her duties as Chief Registrar of the Judiciary; she was granted an extension to file her response when she had already filed an interim response; JSC misled her that it was conducting an investigation when it was conducting a disciplinary proceeding; she was denied the right to call witnesses; JSC ignored her apprehension that some Commissioners were not impartial; and that JSC called for information from the public to assist in an inquiry which in reality was a disciplinary proceeding.

[21] The appellant faulted the Court of Appeal for finding that she admitted 33 out of the 87 allegations without any express and unequivocal admission from her side. To anchor her submissions, she cited ***De Smith's Judicial Review 6th Edition* at Page 365** on the need for procedural fairness to safeguard a person's rights and interests; the importance of sufficient notice to individuals being subjected to disciplinary processes, exercise of discretion in an application to call witnesses in an oral hearing, and the requirements for an oral hearing; granting of adjournments in oral hearings, and the need to give reasons for a decision reached. The Appellant also relied on the case of ***Regina vs. Medical Appeal Tribunal (Midland Region) ex parte Carrarin*** [1966]1W.L. R where *Lord Parker C. J* faulted the Medical Appeal Tribunal for declining to allow the applicant an adjournment to produce a medical report. The appellant also cited the case of ***Re Poyster and Mills Arbitration*** [1964]2 Q.B 467, to support her argument that JSC failed to give adequate reasons for the decision made to remove her from office.

[22] In the second limb of her submissions, the appellant urged that she was denied the right to a fair hearing under Article 50(1) of the Constitution which includes: the right of access to court or another tribunal or body; a requirement

that tribunals or bodies that determine disputes be independent and impartial; and a requirement that legal disputes are decided in a fair and public hearing. She maintained that any public body sitting as a judicial, quasi-judicial or disciplinary body, just like JSC did during her disciplinary proceedings, is bound by the requirements of Article 50(1) of the Constitution. She reiterated that she was not accorded sufficient time to prepare her defence; not allowed to call witnesses; denied a public hearing; documents and submissions in support of her defence were not considered; and that JSC disregarded the provisions of the law. Relying on the cases of ***Findlay vs. United Kingdom*** (1997) 24 EHRR 221 as cited in ***Regina v Boyd*** [2002] UHHL 31, ***Magil vs. Porter*** [2001] UKHL67, ***S and Others vs. Van Rooyen and others (General Council of the Bar of South Africa Intervening)*** (CCT21/01) [2002] ZACC 8 and ***R vs. Sussex Justices ex parte McCarthy*** [1942] 1 KB 256, the appellant urged that to be impartial, a tribunal or a body must be subjectively free from personal prejudice or bias and be impartial from an objective view. Towards that end, the appellant faulted the Court of Appeal in holding that when she was being subjected to the disciplinary proceedings, she was not entitled to the right to a fair hearing.

[23] The final limb of the appellant's submissions is that her right to access information under Article 35 of the Constitution was violated. She contended that despite requesting for minutes of JSC, Hansard reports, rulings, copies of media press releases, and reasons for her removal in her letter dated 25th October 2013, she was never supplied with the same. Therefore, she took issue with the Court of Appeal (*G.B.M Kariuki, JA (retired)*'s finding that her request for information was vague. The appellant added that a citizen is entitled to information held by the state, more so, the information that the state uses to make decisions affecting the person making the request. She relied on the ***Bill of Rights Handbook***, 6th Edition by Lain Currie & Jonah De Waal, on page 692, ***Legasi vs. Civil Service Commission*** G.R. No. L-721190, ***Brummer vs. Minister for***

Social Development (2009) (II) BCLR 1075 (CC), and ***SA Airlink (PTY) Limited vs. Mpumalanga Tourism and Parks Agency*** Case No. 01011/12, where it was held that the state should afford access to official records, documents and papers that have been used as a basis for policy development, and that access to information is at the core of the exercise and enjoyment of all other rights by citizens.

[24] In addition, the appellant submitted that JSC was under a constitutional duty to supply the information as requested promptly and could only refuse based on proper reasons addressed to her. The appellant contended that she was not accorded reasons for the refusal thereby infringing her other rights such as, the right to fair administrative action, and the right to a fair hearing. The appellant also submitted, in reply, that JSC's attempt to give reasons for not supplying the said information under the proviso to Section 23(2) of the Third Schedules to the Act in this Court, is a complete turn from its position at the Industrial Court, and at the Court of Appeal. She also submitted that she requested for information other than the exception listed in Section 23(2) of the Act but the same was not given.

[25] In reply to the JSC's submissions that her appeal is incompetent, the appellant submitted to the contrary, and argued that at the Industrial Court she alleged a violation of her rights to a fair hearing, fair administrative action, and access to information as enshrined under Articles 50(1) & (2), 47(1) & (2) and 35(1)(b) of the Constitution respectively. She maintained that even the Court of Appeal proceeded to entertain the same issues before it.

[26] Additionally, the appellant submitted that she is entitled to challenge any erroneous finding of a court of law before this Court. In that regard, she urged that when JSC's committee was deliberating on the complaints made against her

at the preliminary stage, it was exercising public power and therefore bound to act in a procedurally fair manner.

[27] Concerning the relief that can be available to the appellant should she succeed, her Counsel submitted that neither party has addressed the issue despite being pleaded at the Industrial Court. Further, that the Industrial Court had recommended that an inquiry be made on the issue. Counsel closed submissions by urging the Court to allow the appeal in its entirety.

b. The Respondent's

[28] In response to the appeal, JSC identified three grounds of appeal namely, an alleged violation of the appellant's right to fair administrative action; alleged violation of the appellant's right to a fair hearing; and alleged violation of the appellant's right of access to information.

[29] JSC contended that the appeal before us is a departure from the case that was made before the Industrial Court and therefore incompetent. JSC argued that the appellant's case against it before the High Court was that it lacked jurisdiction to remove her from office and that she was not answerable to JSC but to the National Assembly, the Auditor General, the National Treasury, the Public Procurement Authority, the Ethics and Anti-Corruption Authority, and the Director of Public Prosecutions. JSC also maintained that the case before the Industrial Court was premised on an employment dispute with no constitutional questions for determination, and that nowhere in the appellant's claim does the allegation of lack of fair disciplinary hearing appear.

[30] JSC argued that although the trial Judge correctly found that it had jurisdiction to discipline the appellant, it failed to consider the express provisions of Section 12 of the Act, and its application in the removal of process, and instead

considered irrelevant provisions of the Judicial Service Regulations inapplicable to the appellant, an error they agree was corrected by the Court of Appeal. During the hearing, learned Counsel for JSC pointed out that the appellant did not cross-appeal the Industrial Court's finding on its jurisdiction to entertain disciplinary proceedings against her. In response, Counsel for the appellant admitted that the appellant did not challenge this finding by the Industrial Court, and that she was bound by it. In supporting its argument that the alleged constitutional violations were never pleaded in the initial claim before the trial court, and that the trial Judge should not have considered the same, JSC relied on the following cases: ***Tanganyika Farmers Association Ltd vs. Unyamwezi Development Corporation*** [1960]EA 620; ***Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi*** [1961]767; ***Captain Harry Gandy vs. Caspair Air Charters Ltd*** [1956]EACA 139 Sinclair VP; ***Blay vs. Pollard and Morris***, (1930) 1KB682; and ***Nairobi City Council vs. Thabiti Enterprises*** [1995-98] EA 231. JSC urged that for this reason, this appeal should be dismissed for raising issues that were never the subject of determination in superior courts below.

[31] In response to the appellant's argument that her right to fair administrative action was violated, JSC submitted that the appellant had no legitimate right or expectation of being informed when the Committee was sitting to deliberate on the complaints levelled against her, since the Committee was discharging a statutory mandate at the preliminary stage of inquiry therefore, no right to be heard accrued. Furthermore, that the inquiry that took place in August 2013, and the proceedings of 16th October 2013, were never the subject of determination before the Industrial Court, and cannot be raised for the first time at the Supreme Court. Learned Counsel for JSC clarified that there was an aspect of fair administrative action at the proceedings before it, but it was mainly a disciplinary case. JSC cited two cases to support its argument that in determining the ground of the alleged violation of the right to fair administrative action, the statutory

provisions that govern the impugned act have to be considered namely, Canadian Supreme Court case in ***Syndicat des employes de production du Quebec et de l'acadie v. Canada (Canadian Huma Rights Commission)*** 1989 CanLII 44 and, the South African Case in ***Engen Petroleum Limited v. Commissioner of Conciliation Mediation and Arbitration and Others*** (JA12/05) [2007] ZALAC 5.

[32] Regarding the appellant's assertion that she was not informed of the allegations against her, it was JSC's submission that she was informed of the allegations although she did not need to know the identities of the complainants to enable her to defend herself. JSC maintained that the appellant admitted receiving a letter dated 10th September 2013, spelling out the allegations against her and allowing her 21 days to present a response which she did. It was also submitted that the appellant was given a further 39 days to file her responses which she did in detail; admitted understanding the case before her on 16th October 2013, and made oral submissions through her advocate on 18th October 2013. Counsel for JSC urged us not to rely on Article 236(b) as the same was never raised in the initial claim before the Industrial Court, and only applies to Public Service and not the JSC. Relying on Section 12 of the Act and Article 47 of the Constitution, the Canadian Supreme Court Case of ***Knight vs. Indian Head School Division*** No. 19[1990] 1 SCR 653, the Nigerian case of ***B.A. Imonikhe v. Unity Bank PLC*** S.C 68 OF 2003 and the case of ***Selvarajan v Race Relations Board*** [1976] 1 All ER, 12 at 19, JSC submitted that there was no violation of the appellant's right to fair administrative action.

[33] JSC further submitted that it was not under a mandatory duty to allow witnesses in the disciplinary proceedings as was held in the cited case of ***Regina vs. Metropolitan Police Commissioner ex Parte Parker*** [1953] 1 W.L.R 1150. Learned Counsel for JSC submitted that JSC's decision to proceed with the

hearing on 18th October 2013, and to decline adjourning the hearing to enable the appellant to call witnesses was discretionary. Further, that had the appellant been keen on calling her witnesses, she would have done so between 16th and 18th October 2013, therefore, there was no denial of a right to call witnesses. JSC further urged that the appellant's contention that she was not aware of the disciplinary proceedings is incorrect as she admitted at paragraph 18 of the Petition that she was made aware on 16th and 18th October 2013, that the proceedings against her were disciplinary. It was also submitted that having not raised any objection at that point, and before the Industrial Court, the appellant is barred from raising the same before us. The appellant's contention that JSC did not give her reasons for her termination were controverted by JSC in its submissions that the letter dated 18th October 2013, and a press release published on the Judiciary's website, gave reasons for the removal.

[34] In response to the appellant's contention that her right to a fair hearing as guaranteed under Article 50 of the Constitution was violated because the hearing was not impartial, JSC submitted that the appellant did not plead or state under oath, as provided in law, that the tribunal was biased to enable the court to decide. It also submitted that the appellant did not substantiate the emails she relied on to allege bias, and therefore, the learned Judge had no jurisdiction to delve into matters of facts not pleaded or deponed. To support its argument, JSC cited the case of ***Ndiritu vs. Ropkoi & Another*** [2005] 1 EA 334. Concerning the appellant's request for a public hearing which was declined by JSC, learned Counsel for the JSC clarified that the appellant was facing an internal disciplinary process that did not entitle her to a public hearing. Counsel concluded that none of the appellant's rights under Article 50(1) were violated as the disciplinary hearing was not a hearing before a tribunal.

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[35] Moreover, JSC submitted that the heavy reliance by the Industrial Court on the alleged emails was improper as there was no bias, real, or perceived on the part of the Commissioners, and that the allegation was made in bad faith to stop the disciplinary proceedings. It added that there was no application for recusal on the ground of bias and that the alleged bias was premised on the appellant's strained relationship with some Commissioners, and not on any issue of conflict concerning the allegations she was facing. In support of this submission, it relied on Section 12 of the Act, Articles 172(c) and 171(2) of the Constitution which provide for the composition of JSC with no provision on substitution. In response to these submissions, learned Counsel for the appellant clarified during the hearing that she did not need to ask any member to step down when the evidence was clear that the tribunal was biased. To support its argument, JSC relied on the cases of ***Eckervogt v. British Columbia*** [2004] BCCA 398 (CanLII) and ***Committee for Justice and Liberty v. National Energy Board***, 1976 CanLII 2 (SCC), [1978] 1 S.C.R 369, the High Court's decision in ***Diana Kethi Kilonzo & another vs. Independent Electoral & Boundaries Commission & 10 others*** [2013] eKLR, and ***Regina v. Amber Valley District Council ex parte Jackson*** [1985] 1 W.L.R 298.

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[36] JSC also urged that the appellant's contention of violation of her right to access to information as guaranteed under Article 35 of the Constitution is a new ground. Also, that there was no prayer before the Industrial Court seeking discovery or disclosure of any documents. It contended that the Appellant had all the documents she required to prosecute her claim before the Industrial Court. JSC further submitted that the right to access to information is not absolute, and that Article 24 of the Constitution limits this right unless shown that the information needed was for the protection of another right. JSC added that the appellant did not demonstrate how the documents sought would have aided her

case against it. Additionally, learned Counsel for JSC stated during the hearing that access to documents tendered in evidence after the proceedings are closed is granted upon payment of Kshs.5 per document tendered in evidence. However, there is a restriction in the proviso to Section 23 of the Act which provides that a judicial officer undergoing disciplinary proceedings shall not be entitled to copies of office orders, minutes, reports or recorded reasons for directions. Furthermore, Counsel for JSC clarified during the hearing that as at the time the disciplinary proceedings against the appellant were held, the Access to Information Act was not there and that the applicable law was Article 35 of the Constitution and the Act, which was a legitimate restriction to the right to access to information. Therefore, JSC concluded that it was precluded by law from supplying the documents sought by the appellant. It relied in its submissions, on the cases of ***Nairobi Law Monthly v Kengen,*** Nairobi High Court Petition No. 278 of 2011[Unreported] and the South African case of ***Unitas Hospital v. Van Wyk and Another*** [231/05] [2006] ZASCA 34. JSC also cited at the hearing the cases of ***Bildad Rogoncho Kamwele v Judicial Service Commission***; ELRC Petition No. 103 of 2019; [2020] eKLR (***Bildad Rogoncho Case***) **and** ***JNR vs. Judicial Service Commission,*** ELRC Petition No. 92 of 2019; [2019] eKLR (***JNR Case***), to buttress its submissions that Section 23 of the Third Schedule to the Act is proper and has never been declared unconstitutional.

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[37] In conclusion, JSC urged the Court to dismiss the appeal with costs and uphold the judgment of the Court of Appeal dated 17th September 2014.

[38] The Court takes judicial notice that the *amicus curiae,* Commission on Administrative Justice, did not participate in the proceedings before us.

D. ISSUES FOR DETERMINATION

[39] From the pleadings and submissions filed before us, the following issues manifest for determination:

a. *Whether the appeal before this Court meets the constitutional threshold under Article 163(4)(a) of the Constitution? If so,*

b. *Whether the appellant's right of fair administrative action under Article 47 of the Constitution was violated?*

c. *Whether the appellant's right to a fair hearing under Article 50 of the Constitution was violated?*

d. *Whether the appellant's right to access to information under Article 35 of the Constitution was violated?*

e. *What relief if any, should be granted to the appellant?*

E. ANALYSIS

a. Whether the appeal before this Court meets the constitutional threshold under Article 163(4)(a) of the Constitution?

[40] JSC submitted that the appellant's case against it before the High Court was that, it lacked jurisdiction to remove her from office and that she was only answerable to the National Assembly, the Auditor General, the National Treasury, the Public Procurement Authority, the Ethics and Anti-Corruption Authority, and the Director of Public Prosecutions. JSC also maintained that the case before the Industrial Court was premised on an employment dispute with no constitutional questions for determination. On the contrary, the appellant urged that the claim before the Industrial Court entailed a violation of her rights to a fair hearing, fair administrative action, and access to information as enshrined in Articles 50(1) & (2), 47(1) & (2) and 35(1)(b) of the Constitution respectively. She contended that the same issues were subject for determination at Court of

Appeal. In her appeal, the appellant has not indicated which appellate jurisdiction of the Court she is invoking.

[41] The Supreme Court's appellate jurisdiction is set out under Article 163(4) of the Constitution of Kenya which states as follows:

> **"(4) Appeals shall lie from the Court of Appeal to the Supreme Court –**
>
> > **a) As of right in any case involving the interpretation or application of this Constitution; and**
> >
> > **b) In any other case in which the Supreme Court, or Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)**
>
> **(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."**

[42] Section 15 (1) of the Supreme Court Act also provides that appeals to this Court shall be heard only with the leave of the Court. Sub-section 2 specifies that Sub-Section (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

[43] Additionally, this Court has set the guiding principles on its jurisdiction under Article 163(4)(a) of the Constitution in the case of ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another,*** SC. Pet. No. 3 of 2012; [2012] eKLR, where it stated at paragraph [28] that an appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which

the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal based on such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a).

[44] Further, in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others,*** SC. Pet. No. 10 of 2013 this Court observed as follows:

> [37]: **"In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, *is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163(4)(a) of the Constitution...*"** [emphasis added].

[45] This Court reiterated the same principle in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others,*** S.C App. No. 5 of 2014; [2014] eKLR (***Munya 1)*** and held at paragraph [16] that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

[46] Having perused the record (Volume I at pages 8 to 9, paragraphs 12 and 13), we note that in the petition before the High Court, which was later transferred to the Industrial Court without changing the nature of the claim, the appellant alleged that in terminating her employment, JSC violated her rights under

Articles 25(c), 47(1) & (2), 50(1) & (2) (a), (b) & (c), 236(b), 35(1)(b) and 28 of the Constitution. She also alleged that JSC exercised powers it did not have under Articles 226(2) & (3), 79 and 157 of the Constitution. A further perusal of the record (Volume IV of the Record of Appeal Page 1919-1923) indicates that the learned Judge interpreted and applied Articles 161, 226(2) 227, and 172(1) (c) of the Constitution to arrive at the conclusion that JSC had jurisdiction to institute disciplinary proceedings against the appellant. Also, at page 1953 Volume IV of the Record of Appeal, the learned Judge concluded that JSC not only acted *ultra vires* the Act and the Regulations thereunder, but also violated the Constitutional Rights of the appellant under Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b) of the Constitution.

[47] At the Court of Appeal, it is evident from the Record (Volume V at pages 2127 -2135) that the Court of Appeal interpreted and applied several Articles of the Constitution such as Article 164(3)(b), 162(2)(a), 23(1) & (3), 20(3), 165(3)(b) to arrive to the conclusion that the Industrial Court and the appellate court were conferred with the jurisdiction to determine the matter. The court also (at Page 2143) interrogated Articles 172(1)(c), 259(11), 252 to decide that JSC had jurisdiction to initiate proceedings against the appellant *suo moto* without any recommendations or report from any external oversight bodies. Further, (at pages 2152 to 2172) the Court of Appeal interrogated Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b) of the Constitution to find that the learned Judge erred in his finding regarding the violation of the Constitutional rights of the appellant.

[48] Considering all the above matters in context, we find that this appeal undeniably falls within the realm of Article 163(4)(a) of the Constitution and is therefore right before us.

b. Whether the appellant's right of fair administrative action under Article 47 of the Constitution was violated?

[49] It is the appellant's case that in conducting disciplinary proceedings against her, JSC violated her right to fair administrative action contrary to the provisions of Articles 47 & 236 (b) of the Constitution, and Section 12(2) of the Act. The appellant urged that the procedure adopted by JSC was *unlawful, unreasonable,* and *unfair*. The appellant contended that she: was not informed of the case against her in writing; was not given reasonable opportunity to defend herself; was not furnished with the details of allegations against her; was not informed whether the process was investigatory or disciplinary; was denied extension of time to respond to her case, was denied a public hearing, an adjournment to call witnesses, and prepare her defense; and denied reasons for her removal.

[50] On the contrary, JSC submitted that the appellant did not have legitimate expectation to be informed that the Committee was investigating allegations against her; that the inquiry leading to the disciplinary proceedings, and that the disciplinary proceedings were never the subject of determination before the Industrial Court; that the appellant was informed of the case before her although she did not need to know her accusers; that she was given 39 days to respond to her case which she did orally, and in writing; that although it was not obliged to allow the appellant to call witnesses, no one stopped her from doing so on the date fixed for hearing; and finally, that violation of Article 236 (b) was never raised at the Industrial Court.

[51] As we deliberate this issue, we are cognizant of the fact that the Fair Administrative Act No. 4 of 2015 was assented to on 27th May 2015, and came into force on 17th June 2015, almost 2 years after the cause of action. Therefore, we will make our finding premised on applicable law as at the time the cause of action arose. Concerning the right to fair administrative action, Article 47 of the Constitution guarantees every person the right to **administrative action that**

is **expeditious, efficient, lawful, reasonable, and procedurally fair**. Further that **if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action**. From the appellant's submissions, and her case before the superior courts below, we do not see any allegations concerning JSC's lack of expeditiousness or efficiency. So, we are only left to answer the following two questions: *was JSC's action lawful, reasonable, and procedurally fair? Was the appellant given written reasons for the actions?*

[52] On the aspect of ***lawfulness, reasonableness,*** and ***procedural fairness***, the appellant contended that JSC contravened Articles 47 and 236 (b) of the Constitution, and Section 12(2) of the Act. To begin with, Article 236(b) of the Constitution provides that **a public officer shall not be dismissed, removed from office, demoted in rank, or otherwise subjected to disciplinary action without due process.** Article 240 of the Constitution defines a Public Officer as any state officer; or any person, other than a State Officer, who holds a public office. It is obvious from the list provided under Article 240 that the appellant was not a State Officer. Did she then hold a public office? A public Office is defined under Article 240 to mean an office in the national government, a county government, or the public service, ***if the remuneration and benefits of the office are payable directly from the Consolidated Fund*** or ***directly out of money provided by Parliament***. Counsel for JSC urged the Court not to rely on Article 236(b) as the same was never raised at the Industrial Court. He also submitted that Article 236(b) only applies to Public Service, and that it has no application to JSC or the Judiciary on the removal of the Chief Registrar of the Judiciary, whose removal is governed under Articles 171, 172 of the Constitution and Section 12 of the Act. Counsel for JSC maintained that Article 234(1) which sets out the powers of the Public

Service Commission gives a constitutional rider in Clause 3, by stating that **Clauses 1 and 2 shall not apply to certain offices in the public service including, in paragraph (c), an office or position subject to the Judicial Service Commission.** Furthermore, Mr. Kiragu learned Counsel for the appellant, during his oral submissions conceded to the submissions made by Mr. Issa, learned Counsel for JSC, that Article 236(b) relates to public service to the exclusion of Judicial Officers. Having considered the above submissions and constitutional provisions, we find that although Article 236(b) was pleaded at the Industrial Court, the same is not applicable either to the appellant or to JSC.

[53] What about Section 12(2) of the Judicial Service Act? Did JSC comply with its provisions? The Section provides that before the removal of the Chief Registrar under Sub-section (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. The Black's Law Dictionary 9th Edition, defines reasonable to mean "fair, proper, or moderate under the circumstance."

[54] On the appellant's contention that she was not informed of the case against her, we have taken note of the Record of Appeal, (Volume I page 8) where it is pleaded that vide a letter dated 10th September 2013, the appellant was served with 18 pages of allegations that covered financial mismanagement; mismanagement in human resource; irregularities and improprieties in procurement; insubordination and countermanding decisions of the commission; and misbehavior. At page 14 of the Record, we note that the appellant confirmed, in an affidavit, receipt of the said letter of 10th September 2013. At Pages 36 to 54 of Volume I of the Record, we take note of the 18-page allegations made in writing and referred to, at page 8 of the Petition before the trial Court.

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Considering the above analysis, it is our finding that the appellant was duly informed of the case against her.

[55] As to whether the appellant was given *reasonable time to defend herself* against the allegations cited for her removal, we have perused the Record of Appeal (Volume I page 36), and taken note of the letter dated 10th September 2013, giving the appellant a period of *21 days to respond to JSC in writing*. We have also taken note of the 60-paged Interim Report filed by the appellant and dated 1st October 2013. We have also taken cognizance of the closing submissions by the appellant's advocate (at Pages 119 to 124 of the Record of Appeal Volume I); the Final Report (at pages 125-500 of the Record of Appeal Volume I), oral submissions by the appellant's advocate before JSC on 16th October 2013 *(at page 1489 of the Record Volume IV)* admitting that the appellant had filed her response and was ready to proceed subject to the grant of two requests that is, *to have the proceedings recorded and to submit on JSC's jurisdiction to handle the disciplinary proceedings*. In usual judicial proceedings, the reasonable timeline for filling a defense in courts is 14 days unless time is enlarged by a court. The above observations lead us to agree with the Court of Appeal's conclusions that the appellant was accorded a period of 39 days to respond to her claim which, in our opinion, was reasonable.

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[56] Was the appellant given *reasons for her removal from office*? Under Article 47 of the Constitution, a person against whom an administrative action is being taken has a right to be given written reasons for the action ***if*** a right or fundamental freedom of ***that person has been or is likely to be adversely affected by an administrative action***. It is the appellant's case that JSC did not give her adequate reasons for her removal as provided for in law or in the Constitution. In that regard, the appellant faulted the Court of Appeal's finding that the request for reasons was vague. The "*if*" in Clause 2 of Article 47 implies

that giving of written reasons for an administrative action is not an automatic right, it must be demonstrated that *a person has been or is likely to be affected by an administrative action*. But then, whose responsibility is it to demonstrate the effect of an administrative action? In our opinion, this burden lies with the person to whom the action has been taken against, and in the instant case, it was the appellant. We have perused the record at pages 23-24 and confirmed that the appellant discharged that burden vide a letter from her advocates asking for among other things, *reasons for the appellant's removal*. The letter further indicated that the demand was made pursuant to Article 22, 35, 48, 73 & 159 of the Constitution.

[57] In justifying JSC's refusal to grant the appellant's request for reasons for her removal from office, Counsel for JSC argued that the request for reasons could not be granted in view of Article 24 of the Constitution and the proviso to Section 23 of the Third Schedule to the Act which provides that **an officer in respect of whom disciplinary proceedings are to be held shall not be entitled to copies of office orders, minutes, reports, or recorded reasons for decisions**. Whereas the appellant's Counsel urged that that the proviso to Section 23 of the Third Schedule has since been declared unconstitutional by the courts below, learned Counsel for JSC was of the contrary opinion.

[58] We have taken note of the ***Bildad Rogoncho Case*** and ***JNR Case*** cited by JSC to anchor its submissions that Section 23 of the Third Schedule to the Act has been found proper and has never been found unconstitutional. In the ***JNR Case,*** the petitioner had challenged the constitutionality of Section 23 of the Third Schedule in light of Articles 2(4), 10(2) (a), 35, 47(2), 232 (e) & (f) of the Constitution and Section 6 of the Fair Administrative Action Act, on the ground that it restricted his right to the minutes, reports or recorded reasons for his dismissal. In that case, the records were sought after JSC had taken its decision

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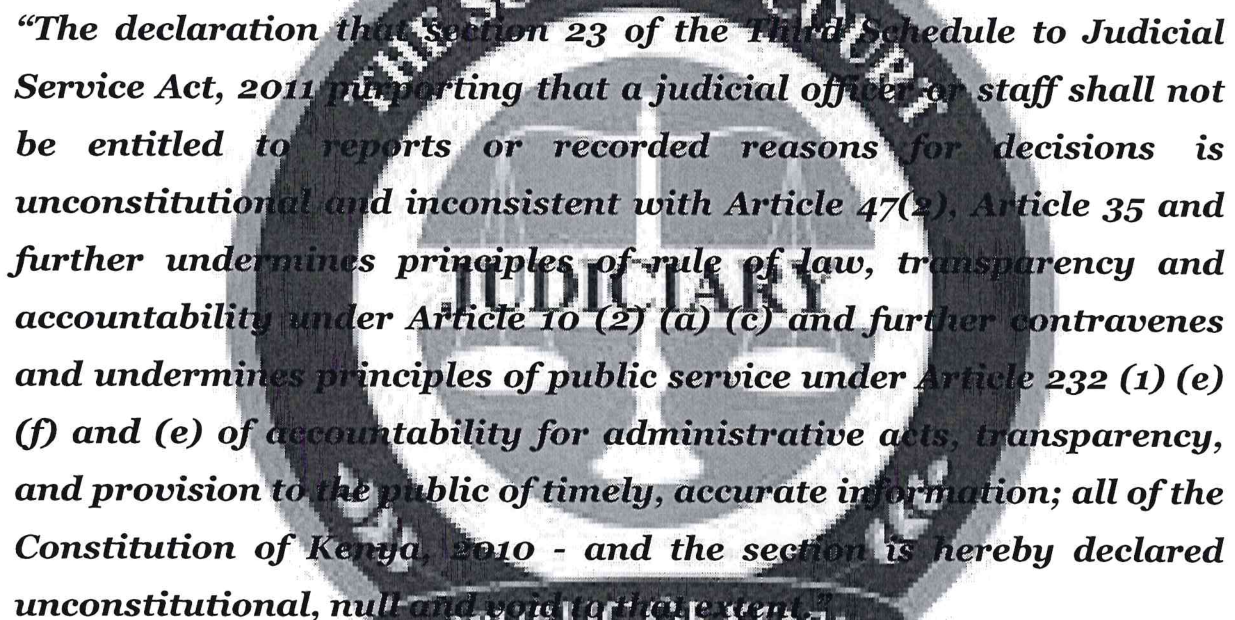
as was the case in the instant case, (where the request was made vide a letter dated 25th October 2013). However, the ***JNR Case*** can be distinguished from the instant case in that some records in the ***JNR Case*** were supplied by JSC to the petitioner after the Court had given directions unlike in the present case where there were no such orders. Furthermore, the Court found that the right to access to information can be restricted in terms of legislation, and that apart from setting out the impugned regulation, the petitioner did not outline how the regulation was inconsistent with the said provisions. It is therefore our finding that the circumstances in the aforementioned case is not applicable in the present case.

[59] In ***Bildad Rogoncho Case***, the Court found as follows as pertains Section 23 of the Third Schedule: "... ***I have perused and appreciated the finding of the Court in Simon Rotich Ruto v Judicial Service Commission & Another [2019] which declared the provisions of regulation 23 of the Third Schedule to the Judicial Service Act unconstitutional, and it is my view that the same did not extend to the provisions of section 6 (h) and (i) of the Access to Information Act which limits the right to access information under article 35 of the Constitution. The Respondent relied on paragraph 23(2) of the Third Schedule and section 6 (h) and (i) of the Act to withhold the Committee's Report. As such, the unconstitutionality of paragraph 23(2) notwithstanding, the Petitioner's right to access information was still limited under section 6 (h) and (i) of the Act."*** Equally, we find this decision distinguishable from the appellant's case because in the ***Bildad Rogoncho Case***, the court did not dispute the declaration of Section 23 of the Third Schedule as unconstitutional, but stated that notwithstanding the declaration, the Petitioner's right to access to information was still limited under Section 6(h) and (i) of the Access to Information Act. The Access to Information

Act came into force on 21st September 2016, way after the cause of action in the instant case. Once again, we find this authority inapplicable.

[60] We have further considered ***Simon Rotich Ruto v Judicial Service Commission & another***; Petition No. 48 of 2019: [2019] eKLR **(*Simon Rotich Case*)** where the learned Judge, contrary to JSC's submissions herein, declared Section 23 of the Third Schedule to the Act unconstitutional and stated *inter alia*:



"The declaration that section 23 of the Third Schedule to Judicial Service Act, 2011 purporting that a judicial officer or staff shall not be entitled to reports or recorded reasons for decisions is unconstitutional and inconsistent with Article 47(2), Article 35 and further undermines principles of rule of law, transparency and accountability under Article 10 (2) (a) (c) and further contravenes and undermines principles of public service under Article 232 (1) (e) (f) and (e) of accountability for administrative acts, transparency, and provision to the public of timely, accurate information; all of the Constitution of Kenya, 2010 - and the section is hereby declared unconstitutional, null and void to that extent."

[61] From the foregoing, it is clear to us that the courts below have made contradictory findings on the constitutionality of Section 23 of the Third schedule. This Court while setting the guiding principles for admitting an appeal as one of general public importance, in the case of ***Hermanus Phillipus Steyn -v- Giovanni Gnecchi – Ruscone,*** Supreme Court application No.4 of 2012, found that it can exercise its jurisdiction to clarify an uncertainty in the law arising from contradictory precedents of the Court of Appeal by either resolving the uncertainty, as it may determine, or referring the matter to the Court of

Appeal for its determination. Even though this matter was not filed under Article 163(4)(b) of the Constitution, we find it necessary for this Court to settle, with finality, the issue as to whether Section 23 of the Third Schedule to the Judicial Service Act is constitutional.

[62] Any limitation of the right to access to information under Article 35 of the Constitution may only be done by legislation under specific prescribed criteria. Article 24(2), expressly states that "**a provision in <u>legislation</u> limiting a right or fundamental freedom in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**"

[63] The impugned Section 23 is subsidiary legislation found in the Third Schedule of the Act which was enacted in 2011 (after the effective date). The Third Schedule is premised on Section 32 of the Act which makes provisions for appointment, discipline and removal of judicial officers and staff. Nowhere in the Parent Act, and in particular Section 32, is it specifically expressed that there is an intention to limit the right to information of **an officer in respect of whom disciplinary proceedings are to be held.** Neither, is there an explanation of the nature and extent of the limitation. It was not, in our opinion, the intention of the drafters of the Constitution that a vague provision in a schedule, such as the one in Section 23 of the Third Schedule to the Act, can limit a constitutional right or fundamental freedom, in a manner that is reasonable and justifiable in

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an open democratic society. In view of the set criteria under Article 24(2) of the Constitution, it is our finding that Section 23 of the Third Schedule *on its own* does not qualify as a legal basis for the purpose of justifying a limitation of a right or fundamental freedom under Article 24 of the Constitution.

[64] We therefore, find that JSC's reliance of the proviso in Section 23 of the Third Schedule to limit the appellant's right to access to information guaranteed in the Constitution was unfounded. JSC's refusal prejudiced the appellant who could not adequately challenge its decision to remove her from office. We agree with the learned Judge in the ***Simon Rotich Case*** that Section 23 of the Third Schedule to the Act is unconstitutional.

[65] Consequently, we fault the Court of Appeal's finding that it would have been impractical for JSC to give specific reasons regarding the 87 allegations in the termination letter and that a press statement issued by JSC on 19th October 2013 gave detailed reasons for the termination of the appellant's employment. The least that JSC would have done was to enclose its reasons in the removal letter, the same way it enclosed the allegations against the appellant in its letter dated 10th September 2013. It is therefore our finding that refusal to give the appellant reason(s) for her removal, was *without justification*. The appellant's right to fair administrative action under Article 47 of the Constitution, and the right to access to information was violated.

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c. *Whether the appellant's right to a fair hearing under Article 50 of the Constitution was violated?*

[66] It is the appellant's case that she was denied, the right of access to court or another tribunal or body; a requirement that tribunals or bodies that determine disputes be *independent and impartial*; and a requirement that legal disputes are

decided in *a fair* and *public hearing.* Further, that she was not accorded *sufficient time to prepare her defence; not allowed to call witnesses; denied a public hearing; documents and submissions in support of her defence were not considered; an investigatory procedure turned into a disciplinary one without notice, and that JSC disregarded the provisions of the law.*

[67] The right to a fair hearing is provided for in the Constitution as follows:
. "**Article 50(1) of the Constitution provides that:**

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

Article 25 of the Constitution stipulates that:

> **"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –**
>
> **(*a*) freedom from torture and cruel, inhuman, or degrading treatment or punishment.**
>
> **(*b*) freedom from slavery or servitude.**
>
> **(c) the right to a fair trial;**
>
> **(d) the right to an order of habeas corpus."** [emphasis added]

[68] In ***Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others,*** SC Petition No. 18 of 2014 as consolidated with Petition No. 20 of 2014; [2014] eKLR (*Njoki Ndungu, SCJ, Concurring*), this Court made the following finding concerning the right to a fair trial under Article 50(1) and 50 (2):

"[255] Article 50(1) refers to the right to a fair hearing for all persons, while Article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be *limited. Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that Article 50(1) deals with the right to fair hearing in any disputes including those of* a civil, criminal or quasi criminal nature *whereas Article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to* criminal matters. *This is not an acceptable interpretation or construction within the parameters of Articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect...*

[257] Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd *Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176*

and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that **"although the necessity of hearing is well established, its scope and contents remain unsettled.**

...

[261] ***It is important to restate that a literal reading of the provisions of the Constitution show that the right to a fair hearing is broad and*** **includes the concept of the right to a fair trial** ***as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that:*** **"it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court." (See** *Steel and Morris v. United Kingdom,* ***[2005] ECHR 103, paragraph 59).***

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[69] Concerning the appellant's allegations that *an investigatory procedure turned into a disciplinary one without notice,* we have perused the Record of Appeal (*volume IV page 1505*), and taken note of the submissions made by the appellant's advocate before JSC admitting that the appellant had prepared a report in response to the allegations against her. Further, that all she needed was a confirmation if the process was investigatory or disciplinary so that she could couch it to whatever direction during her oral submissions. *Does it then mean that the appellant was prepared to face either an investigatory or disciplinary*

process, whichever that came her way? In its finding at Page 1509 of the Record, JSC stated that the only process provided for under the Act is a disciplinary process. We take cognizance of the fact that although JSC's letter of 10th September 2013 referred to an earlier letter of 20th August 2013, that letter is not part of the record for unknown reasons. The letter of 20th August 2013 would have been useful to enable us to discern whether the process was without notice and turned from investigatory to disciplinary as alleged by the appellant. Therefore, from the above observations, we are inclined to agree with the Court of Appeal's finding that disciplinary proceedings against the Chief Registrar are not restricted to financial mismanagement and hence, need not be preceded by an investigatory process. We also agree with the learned Judges' finding that JSC had jurisdiction to initiate disciplinary proceedings against the appellant *suo moto* without any recommendation or report from any external oversight bodies.

[70] On her request for *a public hearing* before JSC on 16th October 2013, the appellant stated that she was entitled to a public hearing. This is because when the accusations against her began on 18th August 2013, they were done in public through the media, and therefore she was entitled to answer to the same in public. The *right to a public hearing* is provided for under Article 50(1) of the Constitution which provides "that every person has a 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". From the wording of Article 50(1), the right to a public hearing is only automatic when the matter being heard is before a court, otherwise, any other hearing be it before a tribunal or body, can only be allowed, ***if appropriate***. But then *who determines whether a public hearing before a body or a tribunal is appropriate?* This being a discretionary power, it can only be exercised by the body or tribunal conducting the proceedings. In this case, we see at page 1510 of the record, where JSC declined the request for a public hearing on the ground

that... "***this is an internal process in line with the provisions of the Judicial Service Act and does not in any way offend the letter and spirit of the Constitution. The Commission has handled other disciplinary processes in the manner it intends to handle this process. What is critical and the Commission is fully aware of it is that the principle of fairness and due process be observed, and the Commission assures CRJ that it will not deviate from those principles***" The JSC in its media release of 19th October 2013 (*at page 21 of the Record of Appeal Volume I*), invited the Ethics and Anti-Corruption Commission to commence investigations of all the matters in issue. The Court of Appeal at paragraph [89] found that "***... 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.***

...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."

We see that the reasons given by the Court of Appeal to uphold JSC's refusal to accord the appellant a public hearing are not the same as those given by JSC in its ruling of 16th October 2013. If those were JSC's reasons for denying the appellant a public hearing, they ought to have been reflected in JSC 's ruling. Consequently, we fault the learned Judges for arriving at this conclusion. Further, the JSC's

reasons for denying a public hearing on the basis that it was an 'internal' process, that was its common practice in other disciplinary matters is vague, and not sufficient basis to deny a specific request. Again, we find that, *without justifiable reasons for the refusal*, the appellant's right to fair administrative action through public hearing under Article 47 of the Constitution was violated.

[71] On the appellant's allegation that she was *not allowed to call witnesses*, and that her reports and submissions were not considered, JSC responded by stating that it was not under a mandatory duty to allow witnesses in the disciplinary proceedings, and that its decision to proceed with the hearing on 18th October 2013 and decline to adjourn the hearing to enable the appellant to call witnesses was discretionary. Further, that had the appellant been keen on calling her witnesses, she should have done so between 16th and 18th October 2013. The Court of Appeal in its finding on this issue stated at paragraph [89] as follows: ***"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."***

Without the Hansard Reports and minutes of JSC for 18th October 2013 on record, we are not able to confirm if the request to call witnesses was made. We are also not able to authenticate the appellant's allegations that JSC in violating her right to a fair hearing, did not consider the Reports and written submissions in reaching the final decision. Even if we were to presume that the issue of the appellant requesting for an adjournment on *18th October 2013* to call witnesses was raised, as it has not been controverted by JSC in its submissions, we are still

not able to conclusively determine the same without the copies of those proceedings. It is therefore our finding that in the absence of JSC's proceedings of 18th October 2013, it would have been impossible even for the Court of Appeal to conclusively determine the issue, and we therefore fault its finding on the same.

[72] It is the appellant's allegation that despite *the presence of real, apparent and actual bias* on the part of some of the Commissioners, the JSC proceeded with the hearing thereby infringing her right to an impartial hearing. So then, *should the tribunal have been reconstituted on account of the alleged perceived bias by the named Commissioners and the Chairman*? We don't think so. Having perused the Record at *pages 1494 to 1506* where the allegations of bias were raised before JSC, we have taken note of the response by Counsel for the appellant (*at page 1504*) admitting to JSC by stating that he could not authenticate the emails upon which the allegations of bias were made. In fact, Counsel stated that the same could be true or fake. For that reason alone, we are persuaded to agree with the appellate court's finding that without authenticating the emails, it was impossible to conclude that there was actual or reasonable apprehension of bias. We ultimately find that the appellant's right to a fair hearing regarding this aspect was not violated.

REPUBLIC OF KENYA

d. Whether the appellant's right to access to information under Article 35 of the Constitution was violated?

[73] It is the appellant's case that her right to access information under Article 35 of the Constitution was violated. She contended that despite requesting for minutes of JSC, Hansard reports, rulings, copies of media press releases vide her letter dated 25th October 2013, she was never supplied with the same. The appellant contended that the refusal to give her the information sought, affected her right to a fair hearing and the right to fair administrative action. She faults

the Court of Appeal's finding that the request for information was vague. On the contrary, JSC submitted that the appellant never sought discovery or disclosure of documents at the trial court; that the appellant had all the documents she needed to prosecute her case; the right to access to information is not absolute; Article 24 of the Constitution limits this right, unless shown that the information needed was for the protection of another right; and that there is a restriction in the proviso to Section 23 of the Third Schedule to the Act which provides that a judicial officer undergoing disciplinary proceedings shall not be entitled to copies of office orders, minutes, reports or recorded reasons for directions.

[74] Article 35 of the Constitution provides for the right to access to information in the following terms:

> **"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.**
>
> **(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
>
> **(3) The state shall publish and publicize any important information affecting the nation."**

[75] Article 24 of the Constitution provides for limitation of rights and fundamental freedoms as follows:

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on

human dignity, equality and freedom, taking into account all relevant factors, including-

a. **The nature of the right or fundamental freedom;**
b. **The importance of the purpose of the limitation;**
c. **The nature and extent of the limitation;**
d. **The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others; and**
e. **The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom-

a. **In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation; and**
b. **Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**
c. **Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

(3) The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied..."

[76] Article 25 of the Constitution stipulates that:

> **"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –**

(*a*) freedom from torture and cruel, inhuman or degrading treatment or punishment.

(*b*) freedom from slavery or servitude.

(c) the right to a fair trial;

(d) the right to an order of habeas corpus."

[77] In the case of ***Jack Mukhongo Munialo & 12 others v. Attorney General & 2 others***, HC Petition No. 182 of 2017; [2017] eKLR, *E C Mwita J*, observed as follows pertaining the limitation of rights under Article 24 of the Constitution

> ***"[69]...The Article is however permissive on limitation of rights and fundamental freedoms. The limitation is permissible on two conditions; first that a right or fundamental freedom in the Bill of Rights should only be limited by a law; and second, to the extent only that the limitation is reasonable and justifiable.in an open and democratic society. Even where the right or fundamental freedom has been limited by law, the yardstick for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society.***
>
> ***[70]. The court in considering the limitation under Article 24(1), must bear in mind that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights."***

[78] On this issue, we reiterate our finding on JSC's refusal to supply the appellant with reasons for removal. JSC did not state the importance or purpose for denying the appellant access to the documents requested through her

advocate vide a letter dated 25th October 2013. It is no doubt, that without the said reasons the appellant could not adequately challenge the decision to remove her from office in a court of law. For instance, her allegation that the JSC did not consider her reports and oral submissions in reaching its decision could not be verified without the ruling given on 18th October 2013 and the reasons for her removal. The burden to justify a limitation of a fundamental right or freedom lies with the person limiting the same. Having perused the record at page 23, we see that the appellant specified the documents she needed, and the date of the said documents. Consequently, we fail to find merit in the Court of Appeal's finding that the appellant's request for documents vide a letter dated 25th October 2013, was vague. We therefore find JSC's limitation of the appellant's right of information under Article 35 unreasonable and unjustifiable.

[79] We have considered that the question on the administrative procedure applicable in disciplinary proceedings before JSC (*being a major employer in one arm of the government*) have been recurring in different cases before this Court and in courts below. As a result, we are of the opinion that the following guiding principles ought to assist the courts when considering a matter concerning disciplinary proceedings before JSC.

Guiding principles on disciplinary proceedings before Judicial Service Commission

a. ***The JSC shall comply with the procedure set out in Article 47 of the Constitution and the Fair Administrative Actions Act.***
b. ***JSC shall always give an employee reasonable time to defend himself or herself.***
c. ***An employee shall be informed the basis of complaint(s) or who his or her accusers to enable the employee defend themselves.***

d. JSC shall furnish an employee with details of allegations against him or her.

e. JSC must always be clear from the start whether the administrative action against an employee is of an investigatory nature or of a disciplinary nature. Should an investigatory process turn into a disciplinary one, an employee must be accorded fresh notice to prepare his/her defence.

f. An employee should be accorded a public hearing if he/she desires to have one. A decision to decline such a request must be accompanied with reasons which shall be given to the employee.

g. An employee shall be given detailed reasons for any administrative action/decision by JSC

h. An employee should access and receive any relevant documents relating to his/her matter. Any decision to the contrary must be accompanied by a written reason.

i. An employee shall be accorded opportunity to attend proceedings, in person or in the company of an expert of his/her choice.

j. An employee undergoing disciplinary proceedings shall be given an opportunity to call witnesses, be heard; cross examine witnesses; and request for an adjournment of the proceedings upon providing good reasons and where necessary to ensure a fair hearing.

In order to achieve compliance with these guidelines, we direct that the JSC publish and publicize procedures for all its disciplinary and investigative

processes, and that such publication be undertaken and effected through the Kenya Gazette, within 90 days from the date of this Judgement.

[80] From the above finding, we find that the appeal, in part, succeeds.

e. What relief should be granted to the appellant if any?

[81] In her petition of appeal, the appellant sought the following reliefs: *the appeal is allowed; the judgment of the Court of Appeal in Civil Appeal No. 50 of 2014 be set aside and the judgment is entered as prayed in the petition dated 31st October 2013 filed in the High Court on 1st November 2013; the costs of this appeal, Civil Appeal No. 50 of 2014 before the Court of appeal and Industrial Court Petition No. 39 of 2013 (formerly High Court Petition No. 528 of 2013) be awarded to the appellant and award for compensation for the breach of the appellant's rights.*

[82] We take judicial notice that the issue of relief was not substantively addressed by any of the superior courts below. During oral submissions, Mr. Kiragu learned Counsel for the appellant submitted that neither party has addressed us on the damages, and that the same was pleaded before the Employment and Labour Relations Court. The trial court ordered for an inquiry on quantum but the same was never done. The Court of Appeal on the other hand did not render itself on the issue. It is trite that a matter coming on appeal to this Court must have first been the subject of litigation before the High Court and risen through the judicial hierarchy on appeal (See ***Erad Suppliers and General Contractors Limited v. National cereals and Produce Board***, SC Petition No. 5 of 2012; [2012] eKLR and ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 others***, SC Petition No. 2 of 2012; [2012]. We are therefore

sending the matter to the Employment and Labour Relations Court to conduct an inquiry as to the quantum of damages awardable to the appellant based on our finding herein.

[83] Concerning costs, the appellant sought the costs of this appeal, Civil Appeal No. 50 of 2014 before the Court of appeal and Industrial Court Petition No. 39 of 2013 (formerly High Court Petition No. 528 of 2013). The award of costs is a discretionary jurisdiction as decided by this Court in ***Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*** Petition No. 4 of 2012; [2014] eKLR. The appellant having not demonstrated why we should interfere with the superior courts' exercise of jurisdiction; we lack basis to interfere with the same.

[84] As for the costs before this Court, we note that the appellant has been partially, not fully, successful in this matter. We have also considered the fact that we are remitting the matter to the trial court to assess damages payable to the appellant. It is therefore our finding that there shall be no order as to costs.

F. ORDERS

[85] Consequently, we make the following orders.

a. ***The appeal dated 30th October 2014 is hereby allowed.***
b. ***The Judgment of the Court of Appeal dated 19th September 2014 be set aside.***
c. ***The Judgement of the Industrial Court is upheld to the extent that the appellant's right to fair administrative action and right to access to information was violated.***
d. ***These proceedings are hereby remitted to the Employment and Labour Relations Court, with instructions that appropriate reliefs be assessed and awarded in accordance with this***

Judgment and the Pleadings at the Employment and Labour Relations Court.

e. ***There shall be no orders as to costs.***

[86] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 17TH Day of **FEBRUARY** 2022

....

M.K KOOME
CHIEF JUSTICE AND PRESIDENT
OF THE SUPREME COURT

....	....
P.M MWILU	**M.K. IBRAHIM**
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
....	....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

THE SUPREME COURT
JUDICIARY
REPUBLIC OF KENYA

f.