



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome, CJ & P; Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E040 OF 2024

– BETWEEN –

JUDICIAL SERVICE COMMISSION.....1ST APPELLANT
CHIEF REGISTRAR OF THE JUDICIARY.....2ND APPELLANT

-AND-

LMN.....RESPONDENT

*Being an Appeal from the Judgment of the Court of Appeal at Nairobi
(Gatembu, Lesiit and Ngenye- Macharia, JJA.) delivered on 11th October 2024
in Nairobi Civil Appeal No. 551 of 2019)*

Representation:

Mr. Delbert Ochola & Mr. Crispus Kitale for the Appellants
(G & A Advocates LLP)

Mr. Jason Okemwa for the Respondent
(Okemwa & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] We begin this judgment by declaring that the fairness of any disciplinary process is today a constitutional imperative, irrespective of the status of the officer

involved. The process must uphold all the tenets of fair administrative action under Article 47 and the right to a fair hearing under Article 50 of the Constitution. In addition to these constitutional safeguards, by the provisions of the Judicial Service Act (JSA), Cap 8A, and the Fair Administrative Action Act, Cap 7L, the disciplinary bodies, including the Judicial Service Commission (JSC), are bound to ensure that any disciplinary action against a judge, judicial officer and staff must strictly comply with both constitutional and statutory requirements.

[2] This appeal, brought pursuant to Article 163(4)(a) of the Constitution, stems from a judgment of the Court of Appeal which upheld the findings of the Employment and Labour Relations Court (the ELRC) and, in partially allowing the respondent's cross-appeal, held that the disciplinary process and eventual dismissal from employment of the respondent were *ultra vires*, unconstitutional and in breach of the principles of natural justice.

B. FACTUAL BACKGROUND

[3] The respondent was employed by the JSC on 14th May 2001 as a District Magistrate II. She served in various stations across the Republic of Kenya, rising through the ranks to the position of Senior Principal Magistrate. On 22nd August 2016, she was interdicted and subsequently dismissed on 9th February 2017. Prior to her interdiction, the then Registrar of Magistrate Courts, Hon. P. N Mulwa, now a Judge, by a letter dated 22nd May 2014, wrote to her directing that she prepares a report of all the pending judgments and rulings in all the court stations she had previously served in. In the same letter, she was directed to proceed on leave for 30 days. The respondent heeded these instructions; forwarded the list of pending judgments and rulings by a letter dated 30th May 2014, and took leave.

[4] Almost two years later, the Chief Registrar of the Judiciary (the CRJ), the 2nd appellant herein, wrote two letters to the respondent, both dated 22nd August 2016. The first was a 'charge'. It was alleged that the respondent was in custody of 204 files, pending delivery of judgments or rulings. She was required to respond to the

charge within 21 days from the date of the letter. The second was a letter of 'interdiction', placing her on half salary and requiring her to report to the CRJ every Friday until further notice. She was also directed to hand over all Government property in her possession.

[5] In compliance, the respondent responded to the two letters with her letter dated 13th September 2016. Thereafter, she received a one-day notice through a telephone call to attend the disciplinary hearing before the panel constituted by the JSC on 25th January 2017. The panel recommended her dismissal. The decision to dismiss her was communicated in a letter dated 9th February 2017. She sought a review, which was rejected. The JSC then communicated its decision to dismiss her by a letter dated 13th July 2017.

C. LITIGATION HISTORY

i. Proceedings at the Employment and Labour Relations Court (ELRC)

[6] Aggrieved by that decision, the respondent moved to the ELRC with ***Petition No. 152 of 2018***, challenging the JSC's decision. According to her, the JSC failed in the performance of its functions under Article 172(1)(c) of the Constitution. As a result of that failure, the proceedings leading to her dismissal from employment were a nullity. Further, it was pleaded that the appellants jointly violated the mandatory provisions of Section 32(3) of the JSA by supplanting the CRJ to perform the functions of the Chief Justice who solely has the power to interdict, charge and reprimand a judicial officer in terms of Paragraph 15(1) of the of the Third Schedule to the JSA.

[7] It was the respondent's case that in the absence of a substantive Chief Justice in office, JSC's remaining commissioners grossly violated the Constitution, suspended the JSA, the Employment Act, Cap 226, the Fair Administrative Action Act, the rules of natural justice, and, in particular, the principle of *audi alteram partem*. The CRJ failed to observe the procedural rules laid down under Part V of

the Third Schedule of the JSA and breached the rules of natural justice by condemning her before hearing her side of the story. She asked the trial court to declare that Article 41 of the Constitution on the right to fair labour practices and Sections 45, 41, 43, and 47(b) of the Employment Act were violated by the decision of the JSC to terminate her employment. In addition, the respondent further pleaded that she was discriminated against on the grounds of health, and that the JSC failed to extend an opportunity to her to rehabilitate and improve her capacity.

[8] Consequently, the respondent sought 15 different declaratory orders, in addition to several other orders, among them, an order for; the release and payment of her accrued back salaries and arrears from 22nd August 2016 until payment in full; 12 months gross salary compensation for unlawful dismissal; unconditional reinstatement and deployment to the rank of Senior Principal Magistrate (SPM); an order for compensation for aggravated and exemplary damages; costs; and interest incidental to the suit.

[9] In response, the appellants deposed that the powers to discipline judicial officers and staff is vested on the JSC by dint of Article 172 of the Constitution; that the power is only delegated to the Chief Justice by Paragraph 15(1) of the Third Schedule to the JSA for purposes of initiation of the disciplinary process; and that in the absence of the Chief Justice and the Deputy Chief Justice, the disciplinary powers revert to JSC.

[10] On the alleged summary interdiction, the appellants took the position that the respondent was not condemned unheard as alleged; that she was served with the charge that was accompanied by her interdiction letter which she responded to before being invited to an oral hearing; that the hearing was followed by the eventual dismissal; that the respondent's health was not one of the issues considered at the time of her interdiction; that the question of her health was raised for the first time during the disciplinary hearing; that even before her HIV status diagnosis, the respondent had failed to deliver on her duties; and that she had

introduced her health status to cover her misconduct. The appellants urged the trial court to find that the respondent was accorded a procedurally fair disciplinary process which was in accordance with the relevant laws.

[11] In a judgment delivered on 11th October 2019, the trial court (*Radido, J*), interrogated the functional jurisdiction of the CRJ in the discipline of judicial officers. The court expressed the view that the initial disciplinary control of judicial officers rests with the Chief Justice, a power directly delegated by statute, and that the statute reserves no role for the CRJ to exercise in the absence of the Chief Justice. Even assuming that disciplinary control is ultimately a function of the JSC and even applying the principle that a principal can exercise its delegated authority, there was no evidence that the JSC, being aware of the vacuum in office, had delegated or required the CRJ to exercise the functions. Therefore, in interdicting the respondent and framing the charges, the CRJ acted *ultra vires* her constitutional and statutory mandate.

[12] As a result, the court declared that since the CRJ had no powers to interdict and frame charges against the respondent, the entire process leading to the respondent's dismissal was *void ab initio*. The court ordered for fresh disciplinary process to be commenced within 60 days from the date of the judgment. Costs were awarded to the respondent.

ii. Proceedings at the Court of Appeal

[13] The appellants, being dissatisfied with that outcome, instituted in the Court of Appeal ***Civil Appeal No. 551 of 2019*** on the following five grounds: that the learned Judge erred both in law and fact:

- i. By misinterpreting the disciplinary process of judicial officers as provided for under Part IV of the Third Schedule to the Judicial Service Act and in so doing: -*

- a. *Failed to appreciate the power of the Judicial Service Commission to initiate disciplinary proceedings in the absence of the Chief Justice;*
 - b. *Failed to appreciate that the 2nd appellant, as the Secretary to the Judicial Service Commission, can transmit and communicate decisions of the 1st appellant.*
- ii. *By failing to appreciate the fact that the appellants' disciplinary process met the requirements of a fair administrative action in accordance with Article 47 of the Constitution and Paragraphs 15, 16, 17, and 25 of Part IV of the Third Schedule to the Judicial Service Act;*
 - iii. *In making an order for reinstatement of the respondent when she had not demonstrated a sufficient basis to merit such an order under the Employment Act, and that no exceptional circumstances were provided to warrant such relief;*
 - iv. *In awarding costs which were neither proved nor justified in the circumstances;*
 - v. *By failing to consider the appellants' response to the petition, written submissions, and authorities.*

[14] The appellants applied to have the appeal allowed and the impugned judgment and decree of the ELRC set aside.

[15] On her part, the respondent filed a cross-appeal premised on eight grounds summarized as follows:

- a) *Having found that the respondent's interdiction was illegal ab initio, the court erred in law and in fact by denying the respondent a relief of full reinstatement, back salaries and allowances, in failing to accord her full protection, benefits, enjoyment, and protection of the law.*

- b) *Having found that disciplinary procedure was unconstitutional, null and void, the learned Judge failed to consider and declare an award of damages for the vindication of the uncontested constitutional violations of Articles 26(1), 27, 28, 29(d) & (f) and 43 (1) (a), (b), and (c) of the Constitution.*
- c) *The learned Judge failed to declare the violation of the rights under Articles 41, 47, and 236(b) and 259(11) of the Constitution as pleaded.*
- d) *The learned Judge failed to award compensation for aggravated and exemplary damages for the violation of the respondent's rights.*
- e) *The learned Judge failed to interrogate the constitutionality of Regulations 22 and 23 of the Third Schedule of the Judicial Service Act.*
- f) *Regarding the respondent's HIV/AIDS status, the learned Judge failed to determine and declare: whether the same are workplace disability or impairment as defined under Article 260 of the Constitution; whether the appellants and all employers need to put policies to give and ensure 'reasonable accommodation' to such infected and affected employees; whether the respondent was discriminated against on account of her HIV/AIDS status and should have been accorded reasonable accommodation having regard to her health and her right to health as envisaged under Articles 26, 27 (1) and 43 of the Constitution; and that by interdicting and eventually dismissing the respondent, the 2nd appellant disentitled the former of her medical card.*

[16] The respondent sought: a declaration that the appellants jointly and severally violated her fundamental rights and freedoms under Articles 10(2)(a), Article 26(1), 27, 28, 29(d) & (f), 41, 43, 47, 236(b), 161(2)(c), 171(2)(a) and 259 (11) of the Constitution, the JSA, the Fair Administrative Actions Act and the Employment Act; a declaration that Paragraphs 22 and 23 of the Third Schedule of the JSA are

unconstitutional and *ultra vires* to Articles 10(2)(a) & (c), 40, 43(1)(e), 3, 47(2), 35 and 232(1)(e), (f) and (e) of the Constitution, right to social security and Section 5 (1) of the Pension Act. She further sought an order of reinstatement to the rank of Senior Principal Magistrate (SPM) with all back pay, accrued benefits, allowances, and interest since August 2016 until payment in full; an award of general, exemplary, and punitive damages; and costs of the suit in the trial court and the Court of Appeal.

[17] In a judgment delivered on 11th October 2024, the Court of Appeal (*Gatembu, Lesiit & Ngenye, JJ. A*) delineated three issues for determination; on the main appeal, *whether the respondent was accorded a fair disciplinary process in light of the conduct of the 1st appellant and notification to the respondent on the hearing*. On the respondent's cross appeal, the appellate court was to answer *the propriety of reinstatement to employment and the terms thereof of the respondent; and whether damages, if any, were awardable to her*.

[18] On the *first issue*, the learned Judges, guided by Paragraph 25 of the Third Schedule to the JSA, agreed with the trial court and reiterated that only the Chief Justice has the power to frame a charge against a judicial officer under investigation. The court found that even assuming that the JSC had the powers to prepare the charge, it was not for the CRJ as the secretary to JSC under Article 171(3) of the Constitution to take the action without authorization. The appellate court therefore rejected the argument that under Paragraph 25, the powers delegated to the Chief Justice by the JSC reverted to the latter. In the circumstances, the court concluded that the action of the CRJ to commence disciplinary proceedings against the respondent was *ultra vires* and amounted to usurpation of the powers of the Chief Justice.

[19] In addition, the court observed that Paragraph 25(4) is couched in mandatory terms and requires the Committee or Panel to give notice of not less than 14 days in line with Article 47 of the Constitution, and it matters not that the respondent

did not complain of the short notice. In the court's view, the respondent was not given sufficient time to prepare her defence, yet this is a cardinal right underpinned by Article 50 of the Constitution.

[20] Turning to the *cross appeal*, the appellate court ruled that the procedure having been outrightly flawed, it was only proper to reinstate the respondent with full pay and benefits. As for the award of general, exemplary, and punitive damages, the court held that the respondent did not make a case for it. In any event, the court held that she would eventually be paid the other withheld half of her salary, including the period of 4 years when she was not at work, which, in the court's view, would be adequate compensation.

[21] Ultimately, the court dismissed the appeal with costs to the respondent; the cross-appeal partially succeeded with half costs to the respondent. For the avoidance of doubt, the respondent was reinstated to her position of Senior Principal Magistrate with accrued salary and benefits from the date of interdiction, which was 22nd August 2016; and the 1st appellant was at liberty to commence fresh disciplinary proceedings if they so wished.

iii. Proceedings at the Supreme Court

[22] Unrelenting, the appellants once again moved this Court and filed ***Supreme Court Petition No. E040 of 2024***, dated 22nd November 2024, praying for orders that:

- a. *The petition be allowed.*
- b. *The judgment of the Court of Appeal at Nairobi delivered on 11th October 2024 in Nairobi Civil Appeal No. 551 of 2019 by Hon. Justice S. Gatembu Kairu, Hon. Justice J. Lessit, and Hon. G. W. Ngenye- Macharia, and the judgment of the Employment and Labour Relations Court in ELRC Petition No. 152 of 2018 be set aside; and*
- c. *The costs of the petition be provided for.*

[23] Broadly speaking, the arguments on which the judgment of the Court of Appeal is assailed may be summarized as follows:

- i. *Whether the Court of Appeal correctly interpreted and applied the provisions of Article 172(1)(c) in relation to the inherent power to discipline judicial officers being vested in the Judicial Service Commission;*
- ii. *Whether a court interpreting and applying the provisions of Article 172(1)(c) of the Constitution can halt and/or fault the constitutional and lawful prerogative of disciplinary action being instituted against a judicial officer on the basis that there is no substantive holder of the office of either the Chief Justice or Deputy Chief Justice;*
- iii. *Whether the Court of Appeal correctly interpreted Article 171(3) of the Constitution in relation to the mandate of the Chief Registrar of the Judiciary, who serves as the secretary to the JSC, in ensuring the continuity of the functions of the JSC of disciplining judicial officers under Article 172(1)(c) of the Constitution;*
- iv. *Whether a court interpreting and applying the provisions of Article 171(3) of the Constitution can fault the Chief Registrar of the Judiciary in ensuring the continuity of the functions of the JSC of disciplining judicial officers under Article 172(1)(c) of the Constitution;*
- v. *Whether the Court of Appeal correctly interpreted and applied the provisions of Articles 47 and 50 of the Constitution in relation to the right to fair administrative action and fair hearing in the context of proceedings under Paragraph 25 of the Third Schedule to the JSA.*

[24] In opposing the appeal, the respondent has filed an affidavit sworn by herself on 13th December 2024 wherein she affirmed the decision of the Court of Appeal to the extent that the actions of the CRJ in the disciplinary proceedings were in

gross violation of the Constitution and the JSA and that one days' notice *via* a telephone call to appear for the disciplinary hearing denied the respondent adequate time to prepare or instruct counsel. She also urged, *inter alia*, that this Court lacked the jurisdiction to determine the question whether JSC has inherent powers to discipline judicial officers, as the same was not determined by the superior courts below.

[25] The respondent also filed a cross-appeal premised on the following grounds:

- i. *The ELRC and Court of Appeal erred by neglecting violations of the respondent's rights and dismissing claims for general and exemplary damages without considering their binding nature, inalienability, interconnectedness, purposes and uncontested pleadings, affidavit and submissions;*
- ii. *The Court of Appeal wrongly equated reinstatement and payment of withheld salary with compensation for fundamental rights violations, ignoring that these are distinct jurisdictions, actions, purposes, and remedies;*
- iii. *The superior courts below committed judicial overreach by;*
 - a. *The ELRC, after ruling that the 2nd appellant had unlawfully usurped the Chief Justice's powers, made the same error by placing the respondent on continued interdiction and ordering half pay without jurisdiction;*
 - b. *The Court of Appeal, despite delivering a well-reasoned judgment, erred by advising the 1st appellant on alleged administrative options and strategies after affirming the unconstitutionality of these actions, disregarding established legal boundaries.*

[26] On the cross-appeal, the respondent seeks the following reliefs:

- i. *The petition of appeal dated 22nd November 2024 be dismissed, and the respondent's cross-appeal dated 13th December 2024 be allowed with costs to be borne by the 1st appellant.*
- ii. *The decisions of the ELRC and the Court of Appeal be upheld to the extent explained below;*
 - a. *The charge and interdiction of the respondent violated the Constitution and the JSA, and any actions or determinations based on them were ultra vires, unconstitutional, null, and void ab initio.*
 - b. *The respondent's fundamental rights under Articles 26, 27, 28, 29, 41, 43(1)(a), 47, and 50 were violated, justifying such a declaratory relief and compensation;*
 - c. *The respondent is entitled to aggravated damages, and the court should determine the appropriate quantum;*
- iii. *The ELRC order deeming the respondent to be on interdiction be set aside for lack of jurisdiction*
- iv. *The Court of Appeal orders be affirmed, a mandatory injunction be issued directing the respondent's immediate reinstatement by the 1st appellant and prompt payment of withheld salaries, benefits, and compensation, restoring the status quo ante.*

[27] However, in her submissions, the respondent appears to be seeking different reliefs as follows;

- i. *Declaration that the ELRC exceeded its jurisdiction by imposing half salary and retaining interdiction.*
- ii. *Damages assessed at Kshs. 10,000,000/=for violations of fundamental rights;*
- iii. *Reinstatement with full salary, allowances, and benefits;*

- iv. *Award of Kshs. 5,000,000/= in aggravated damages for gross human rights violations or an amount the Court deems appropriate;*
- v. *Immediate payment of all withheld salary with interest;*
- vi. *Costs of the suit.*

[28] In response to the cross-appeal, the appellants have filed a replying affidavit sworn by *Winfrida Mokaya* on 4th March 2025, wherein they restate their case in the appeal, mainly that; the inherent powers to discipline judicial officers is vested in the JSC and delegated to the Chief Justice and in the absence of the Chief Justice, the powers revert to the JSC; the CRJ only acted on behalf of JSC; the disciplinary process leading to the dismissal of the respondent from employment was initiated on substantiated grounds, that she failed to discharge her mandate; and due process was followed throughout the disciplinary process.

[29] In a rejoinder, the respondent swore and filed a further affidavit dated 5th March 2025, wherein she reiterates her arguments in opposition to the appeal and in support of the cross-appeal.

D. PARTIES' SUBMISSIONS

i. The appellants' case

[30] The appellants filed their submissions dated 20th January 2025 in support of their appeal and opposition to the cross-appeal. In support of the appeal, the appellants submit on all five grounds of appeal. On the issue of *JSC's inherent powers to discipline judicial officers and delegation of the same to the Chief Justice*, the appellants fault the superior courts below and submit that by dint of Article 172 of the Constitution, the JSC has inherent powers to discipline judicial officers and the said powers are delegated to the Chief Justice under Paragraph 15 of the Third Schedule. It is the appellants' case that, despite this delegation, residual powers are retained by the JSC.

[31] To support this argument, they cite this Court's decision in ***Karani Vs Judicial Service Commission*** [2022] KESC 37 (KLR), wherein the Court affirmed that under Article 172(1)(c), one of the powers of the JSC is to discipline registrars, magistrates, other judicial officers and staff of the Judiciary, in the manner prescribed by an Act of Parliament.

[32] On whether, *in the absence of the Chief Justice, the power to discipline judicial officers reverts to the 1st appellant*, the appellants submit that Paragraph 25 empowers the Chief Justice to institute disciplinary proceedings against a judicial officer, to frame and forward a charge or charges to the judicial officer on behalf of JSC. It is contended that in the absence of the Chief Justice, these powers revert to JSC, the original donor. To support the proposition, the appellants rely on this Court's decisions in ***In the matter of Council of Governors & 47 others*** [2020] KESC 65 (KLR); ***National Land Commission Vs Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)*** [2015] KESC 3 (KLR); and ***Capital Markets Authority Vs Popat & 8 others*** [2019] KECA 592 (KLR) to the effect that in the absence of a specific office holder, delegated powers revert to the delegating body.

[33] On whether the *2nd appellant acted within her mandate, functions, and capacity*, the appellants maintain that when the disciplinary powers reverted to the JSC, it, in turn, considered the complaint raised against the respondent, and found it necessary to constitute the disciplinary proceedings against the respondent. The JSC then directed the CRJ to cause the interdiction and charge of the respondent. It was the appellants' further case that, in the circumstances, the CRJ simply issued a show cause notice, the charge and interdiction letter in her capacity as the secretary to the JSC, as envisioned under Article 171(3) of the Constitution as read with Section 21 of the JSA. In their view, the CRJ's role was aimed at ensuring continuity of disciplinary functions of the JSC and therefore did not amount to usurpation of the powers of the Chief Justice.

[34] On *whether the proceedings against the respondent were in violation of Articles 47 and 50 of the Constitution*, the appellants assert in the negative. They maintain that due process was followed throughout the proceedings: from the time the respondent was served with a show cause notice, charge, and interdiction letter to the time she was invited to appear before the committee, where she was given adequate opportunity to defend herself, both in writing and orally at the hearing. They have further cited the cases of ***Kenya Power & Lighting Company Limited Vs Aggrey Lukorito Wasike*** [2017] KECA 446 (KLR) and ***Fredrick Oduor Lamba Vs Kenya Electricity Generating Company PLC***. [2023] KECA 118 (KLR), to argue that due process only requires that an employee be given a fair and reasonable opportunity to respond to the allegations made against them.

[35] Regarding the *cross-appeal*, the appellants submit that since the disciplinary proceedings were conducted in accordance with the law, the respondent's rights were not violated and therefore, she is not entitled to any form of compensation. Without prejudice to this, the appellants contend that, in any event, the respondent was reinstated and the Court of Appeal ordered that she be paid accrued salary and benefits from the date of interdiction, which was sufficient compensation.

[36] On the respondent's reinstatement, the appellants point out that its practicality is doubtful, considering the strained relationship between the JSC and the respondent; that the relationship is likely to impair any future prospective relationships beyond the parties in this appeal. Accordingly, they urge the Court to set aside the order of reinstatement whose effect may amount to subjecting the JSC to servitude, as was explained in the case of ***Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 others*** [2014] KECA 404 (KLR). In their opinion, an award of damages would suffice as opposed to reinstatement. They proposed that the award, if considered, should be appropriate, just, rational, and proportional given the circumstances of the case,

relying on the decision in ***Gitobu Imanyara & 2 others Vs Attorney General*** [2016] KECA 557 (KLR). They have asked that we find no basis for awarding exemplary, punitive, or aggravated damages as the institution of disciplinary proceedings against the respondent and her eventual dismissal were premised on substantiated grounds.

[37] On *judicial overreach*, the appellants submit that, without prejudice to their appeal and submissions, the superior courts below did not go beyond their respective jurisdictions, and based their determination on the evidence and the relevant law. Finally, the appellants have prayed that we allow the appeal with costs, set aside the judgments of the courts below, and dismiss the cross-appeal with costs.

ii. The respondent's Case

[38] The respondent has filed two sets of submissions, both dated 22nd January 2024 and filed on 12th February 2025, in opposition to the appeal and in support of the cross-appeal, respectively. On this *Court's jurisdiction to determine the question whether JSC has inherent powers to discipline judicial officers*, the respondent, citing the case of ***Rutongot Farm Ltd Vs Kenya Forest Service & 3 others*** [2018] KESC 27 (KLR), submits that the Court lacks jurisdiction under Article 163(4)(a) of the Constitution on the grounds that the appellants introduced "*inherent powers*" and the interpretation of Article 172 of the Constitution for the first time in their submissions before the Court of Appeal, which issue was not in contest or addressed by the trial court.

[39] Regarding the *1st appellant's inherent powers*, the respondent submits that JSC's powers are not inherent but are limited by the law. The doctrine of inherent powers or implied power by public bodies does not have a place in the Kenyan legal system. ***In the Matter of the Interim Independent Electoral Commission (Applicant)*** [2011] KESC 1 (KLR), this Court emphasized that commissions operate strictly within the Constitution and statutory limits, unlike courts that

possess inherent powers as the Court observed in ***Board of Governors, Moi High School, Kabarak & another Vs Bell & 2 others*** [2013] KESC 12 (KLR).

[40] On whether, in the *disciplinary process, the 2nd appellant exercised delegated powers*, the respondent submits that disciplinary powers are non-delegable unless the delegation is expressly provided for in law. For the purposes of this appeal, the respondent argues that disciplinary actions of judicial officers and staff must originate from the Chief Justice. The CRJ could not claim to have acted on behalf of the Chief Justice. The claim that the CRJ stepped in so as to fill a void and ensure efficiency and continuity was baseless. Public interest cannot excuse constitutional breaches.

[41] On the *violation of Articles 47(1) and 50(1) of the Constitution*, the respondent contends that based on the conclusions of the superior courts below, the appellants breached Articles 25(c), 47(1) and 50(1) of the Constitution by giving the respondent only one day's notice to appear for the disciplinary hearing, as opposed to the 14 days' notice provided for in Paragraph 25(4) of the Third Schedule to the JSA; that the charge and letter of interdiction under the hand of the CRJ was unconstitutional and usurped the Chief Justice's powers granted by Paragraphs 15, 16 and 25(1) of the Third Schedule; and that consequently, the proceedings were in breach of fair administrative rights guaranteed by Article 47 of the Constitution.

[42] To support the *cross-appeal*, the respondent submits on four issues, namely: that the court failed to address all issues raised by the parties; that it failed to award damages for constitutional violations; that both superior courts below made grave errors in suggesting to the JSC that it was at liberty to commence the disciplinary action afresh against the respondent.

[43] On the *failure to address all issues raised by the parties*, the respondent submits that, upon finding that the disciplinary proceedings were *ultra vires*, the

superior courts downed tools and failed to determine the other issues raised by the respondent, arguing that it would not be legally prudent to address its mind to some of the questions posed and submitted by the parties to avoid tying the hands of the respondents or prejudicing the petitioner. The respondent contends that this failure undermined the administration of justice. She cites ***Mahamud Vs Mohamad & 3 others; Muktar (Interested Party)*** [2019] KESC 70 (KLR) and ***Kenya Tea Growers Association & 2 others Vs The National Social Security Fund Board of Trustees & 13 others*** [2024] KESC 3 (KLR) to the effect that courts must fully address all issues pleaded and argued.

[44] On the *failure to award damages for constitutional violations*, the respondent contends that it ought to have followed, as a matter of course, that she was entitled to compensation, following the finding that her rights had been violated. The respondent cites this Court in ***Mitu-Bell Welfare Society Vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*** [2021] KESC 34 (KLR) and ***Muruatetu & another Vs Republic; Katiba Institute & 5 others (Amicus Curiae)*** [2017] KESC 2 (KLR) to demonstrate the interdependence of constitutional rights.

[45] On the *alleged errors by the superior courts directing that the appellants were at liberty to commence fresh proceedings against the respondent*, the respondent maintains that, despite finding that the disciplinary process was unlawful, the ELRC remitted the matter back to the JSC, legitimizing unconstitutional actions. Further, that despite the finding that the CRJ's actions were *ultra vires*, the ELRC directed that the respondent would continue to draw only half salary, violating the principle that nothing can stand on a nullity. The respondent cites the case of ***Chief Justice and President of the Supreme Court of Kenya & another Vs Khaemba*** [2021] KECA 322 (KLR) to the effect

that an illegal process, being void *ab initio*, leaves no valid proceedings for remission.

[46] The ELRC further erred in finding no cause for the award of damages, even after being satisfied that the respondent's rights had been infringed. The Court of Appeal, on its part, according to the respondent, erroneously equated reinstatement with compensation, ignoring their distinct purposes, where the former restores employment and the latter remedies violations of fundamental rights.

[47] On *judicial overreach*, the respondent contends that the Court of Appeal improperly proposed to JSC, if it wished to commence disciplinary proceedings against the respondent even after being satisfied that the latter's rights had been violated, exceeding its judicial mandate as an umpire in an adversarial setting.

[48] Regarding *the reliefs available*, the respondent reiterates that since there was unanimity that the disciplinary process was unconstitutional *ab initio*, and that her constitutional rights had been violated, then she was entitled to reliefs both under the Employment Act and the Constitution. She submits that, apart from reinstatement, she was also entitled to an award of damages, in addition to aggravated and exemplary damages on account of oppressive, arbitrary, and unconstitutional actions of the appellants.

E. ISSUES FOR DETERMINATION

[49] From our consideration of the pleadings and the arguments by counsel representing the parties, we consider the following five issues as falling for our determination:

- i. *Whether this Court is properly seized of jurisdiction under Article 163(4)(a) of the Constitution*
- ii. *Whether JSC has inherent powers to discipline judicial officers pursuant to Article 172(1)(c) of the Constitution*

- iii. *Whether the proceedings against the respondent violated Articles 47 and 50 of the Constitution*
- iv. *Whether the superior courts below engaged in judicial overreach*
- v. *What reliefs are available to the respondent, if any?*

F. ANALYSIS AND DETERMINATION

i. Whether this Court is properly seized of jurisdiction under Article 163(4)(a) of the Constitution

[50] In the case of ***Aviation & Allied Workers Union Kenya Vs Kenya Airways Limited & 3 others*** [2015] KESC 23 (KLR), this Court stressed that where an objection to the jurisdiction of the Court is raised, the objection must be addressed *in limine* or at the earliest opportunity, before any consideration of the merits of the case. Article 163(4)(a) and (b) of the Constitution provides that appeals from the Court of Appeal to the Supreme Court lie as of right in cases involving the interpretation or application of the Constitution; and secondly, that the Supreme Court will exercise jurisdiction in any case in which the Court or the Court of Appeal certifies to involve a matter of general public importance.

[51] This present appeal is expressed to be brought under the first limb, as of right, that it involves the interpretation and application of the Constitution. In her cross appeal, however, the respondent has challenged the jurisdiction of the Court to determine the question whether the JSC has inherent power to discipline judicial officers. According to her, the issue having been raised by the appellants for the first time in their submissions before the Court of Appeal cannot be an issue for determination in this Court. In ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR), the Court defined the scope of its jurisdiction under Article 163(4)(a) and emphasized, among other principles that, an appeal to this Court must originate from the Court of Appeal where issues in contestation revolved around the interpretation or application of the Constitution,

and that those issues were substantively addressed by the superior courts and progressed through the ordinary appellate channels so as to properly reach this Court.

[52] It is evident to us from the record that the petition filed before the Employment and Labour Relations Court was anchored on multiple provisions of the Constitution. She sought specific declaratory reliefs. The trial court undertook an interpretation and application of Articles 47, 50, and 172 of the Constitution, in conjunction with Section 32 and Paragraph 25 of the Third Schedule to the JSA, as did the Court of Appeal. This being the case, we are satisfied that the Court is properly seized of jurisdiction to hear and determine this appeal under Article 163(4)(a) of the Constitution. The issue of the inherent power of the JSC is considered next on its own.

ii. Whether JSC has inherent powers to discipline judicial officers pursuant to Article 172(1)(c) of the Constitution

[53] This question seeks to answer the respondent's argument that the CRJ could not exercise the disciplinary authority reserved for the Chief Justice. It seeks to interrogate the appellants' answer that the CRJ was acting on behalf of the JSC, which delegates the disciplinary powers to the Chief Justice; and that Article 172 of the Constitution vests inherent powers in the JSC to discipline judicial officers.

[54] The respondent takes issue with the introduction of the notion of "*inherent powers*" and the interpretive question surrounding Article 172 of the Constitution. She has argued that the question of inherent power was introduced for the first time in the appellants' submissions before the Court of Appeal. In any event, the respondent maintains that disciplinary powers are non-delegable unless there is express statutory authority.

[55] We confirm upon our perusal of the two judgments that the question of inherent power was introduced for the first time by learned counsel for the

appellants in the Court of Appeal. Counsel argued that the JSC in exercise of its inherent power, through the CRJ, issued a charge and an interdiction letter to the respondent in the absence of the Chief Justice.

[56] An inherent power, speaking generally, would refer to an implied or incidental power; a power that is not explicitly provided for in the Constitution or legislation. Does the JSC, as a constitutional commission, possess such powers? As far as 1959, it was considered trite that a judicial or quasi-judicial tribunal has no inherent powers except those expressly conferred on them. See *Gullamhussein Sunderji Virji Vs Punja Lila and Another* HCMCA No. 9 of 1959[1959] EA 734. This was followed in 1972 by the decision of Madan, J (as he then was) in the case of *Choitram Vs Mystery Model Hair Salon* [1972] EA 525, to the effect that powers must be expressly conferred; they cannot be a matter of implication.

[57] This principle has today found expression in the Constitution. For instance, Article 2 of the Constitution decrees that the Constitution is the supreme law of Kenya and binds all persons and all State organs at both levels of government; and that:

“(2) No person may claim or exercise State authority except as authorised under this Constitution.”

See Article 260 of the Constitution for the meaning of the terms “State”, “State office” and “State officer”, and “State organ”.

[58] Flowing from the above constitutional edict, this Court in *In the Matter of the Interim Independent Electoral Commission* (*supra*) observed that:

“...these Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the “independence clause” does not accord them

carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.”

[59] Similarly, Article 259(11) requires that if a function or power conferred on a person under the Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or in consultation of another person, that function or power is only exercisable on that advice, recommendation, with that approval or consent, or after consultation.

[60] Whereas, it is settled that no executive body or authority can assert the existence of inherent powers; and that all such powers must be explicitly conferred by law and cannot be inferred, the question we must answer is whether the submission that the JSC has inherent power was made to convey the message that the JSC can exercise some implied power or some power that is not explicitly defined or provided for in the Constitution or law? The answer, based on what we have said above, is in the negative. The JSC can only exercise those powers vested in it by the Constitution or statute. What we, however understand counsel for the JSC to have been saying is that the JSC has some residual power under Article 172(1)(c) of the Constitution and the Third Schedule to the JSA, which it has donated by delegation to the Chief Justice; that in the absence of the Chief Justice, the power reverts to it. It is that power it claims to have exercised through the CRJ, as there was no one occupying the office of the Chief Justice at the time. It was argued that the mere delegation of functions does not amount to the transfer of those functions. To that extent, counsel was right. And we explain why.

[61] Article 172(1)(c) vests in the JSC the power to, among other things, receive complaints against, investigate and remove from office or discipline registrars,

magistrates, other judicial officers and staff of the Judiciary, in the manner prescribed by an Act of Parliament. An elaborate procedure for the exercise of this authority was enacted into law and is now contained in the JSA, specifically in the Third Schedule made pursuant to Section 32 of the JSA. By Paragraph 15 of the Schedule, JSC expressly delegates some of its disciplinary powers to the Chief Justice. These include the power to interdict, suspend, and reprimand an officer in the circumstances outlined in the Schedule.

[62] It must naturally follow that a delegation under an express power to delegate, while enabling the latter to exercise delegated powers in their own right, does not result in the power being removed from the delegating body. The delegating body retains and can still exercise the residual powers, as necessary. In relation to the matter before us, nothing stops the JSC, being the delegating authority, in the absence of the Chief Justice, from exercising those very powers it has delegated to the Chief Justice. In other words, the Chief Justice acts on the authority of the JSC, just as accountability remains with the JSC. That should suffice to answer the question of inherent power as we understood the argument in the Court of Appeal. Indeed, the Court of Appeal agreed with the respondent that there was no evidence that the CRJ acted on behalf of the JSC. With that conclusion, we cannot find any justification for the respondent to have raised this ground. Whether the question was the inherent power in the way she understood it or in the meaning we have ascribed to it, the determination was in her favour.

[63] Bearing in mind our understanding of inherent power as explained above, how it was pleaded, argued, and decided in both courts below, did the JSC recall the delegated powers from the Chief Justice and itself exercised them through the CRJ? In answer to the respondent's petition before the ELRC, the JSC, through its then Registrar, Hon. Winfrida B. Mokaya, swore in an affidavit dated 6th February 2019, that *"...in the absence of the Chief Justice and the Deputy Chief Justice, the*

disciplinary powers revert to the JSC until when a substantive office holder is appointed”.

[64] Under Section 21(2) of the JSA, the CRJ, as the secretary to the JSC, can dispose of procedural or administrative matters in accordance with the Act, and only with the authorization of the JSC can she claim to perform any functions on behalf of the JSC. Did the JSC authorize the CRJ to frame charges and issue an interdiction letter to the respondent? The trial court found from the CRJ’s affidavit that the CRJ, on her admission, had *“reached the decision to charge and interdict”* the respondent. Looking at both the charge and the letter of interdiction, no reference is made to the JSC as having directed the CRJ to act in the manner complained of. Both are signed off by the “Chief Registrar of the Judiciary” and not the Secretary of the JSC. There is no resolution of the JSC to recall and exercise for itself, through the CRJ, the powers delegated to the Chief Justice. Under Section 14 of JSA, the JSC can hire such experts or consultants or can *“delegate such of its functions as are necessary for the day-to-day management of the judicial service to subcommittees or to the secretariat”*. The charge and interdiction, we reiterate, are not signed by the CRJ in the capacity of Secretary to the JSC.

[65] Where a statute confers an express power of delegation on a person, that power can only be delegated to any other person, in the absence of the original delegatee, in writing, specifying the new delegatee and the scope, period, and extent of the delegated authority. This is important when, as here, the exercise of such a power may have serious consequences. From our holistic reading of the relevant Articles of the Constitution and the JSA, it is evident to us that the power under Paragraph 15 was intended to be exercised by the Chief Justice personally as the administrative head of the Judiciary. The intention could not have been that such power be delegated to an officer who may herself undergo discipline by the exercise of those powers. With respect, we agree with the trial court that even with

the mistaken assumption that the CRJ is the third in command in the Judiciary's administration hierarchy, there was no authority extended to her by the JSC to charge and interdict the respondent.

[66] In the initial disciplinary control over judicial officers and staff, the Chief Justice exercises powers that are directly conferred by statute, and the said powers cannot be delegated. The role of the CRJ is strictly ring-fenced by Article 161 (1)(c) of the Constitution as the chief administrator and accounting officer of the Judiciary. By Article 171(1) of the Constitution, the CRJ is designated the secretary to the JSC, in addition to other administrative statutory roles under Section 8 of the JSA. In light of this, the CRJ has no role in the discipline, interdiction, or administering a reprimand to a judicial officer. The CRJ could not play the role of the Chief Justice under Paragraphs 15 and 25 of the aforesaid Third Schedule.

iii. Whether the proceedings against the respondent violated Articles 47 and 50 of the Constitution

[67] The respondent has urged that the appellants breached her right to fair administrative action and right to a fair hearing protected under Articles 47 and 50 of the Constitution. The appellants, on the other hand, insist that due process was followed. The discipline of the respondent as a judicial officer, holding the rank of Senior Principal Magistrate, is governed by the provisions of Section 32(1) of the Act and the Third Schedule to the Act.

[68] Paragraph 25 of the Third Schedule stipulates as follows:

“25. Proceedings for dismissal

(1) Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges

against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves;

(2) If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not.

(3) If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the Constitution, delegate its powers:

Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel”.

[69] Our plain reading of Paragraph 25 is that there is a four-stage process to be undertaken by the Chief Justice before the dismissal of a judicial officer: the initiation of an inquiry; the commencement of disciplinary proceedings through the framing of the charge(s); an invitation to the officer to respond; and finally,

where the officer fails to satisfactorily exculpate himself or herself, the charges together with the officer's response, if any, are laid before the JSC for the final determination by the whole Commission.

[70] The genesis of the disciplinary proceedings was the failure of the respondent to render judgments and rulings in a number of cases in her previous court stations. She was sent on compulsory leave after preparing a report detailing all pending judgments and rulings. Almost two years later, the CRJ framed a 'charge' outlining details of 204 files that were pending delivery of judgments or rulings by the respondent for a period of over one year. She was asked to respond to these claims within 21 days of the date of the letter. The second document was a letter of 'interdiction' in which the decision was to place her on half salary and to report to the CRJ every Friday until further notice was communicated. The respondent responded to the charge and interdiction. Thereafter, she received a one-day notice through a telephone call to attend the disciplinary hearing before the panel constituted by the JSC on 25th January 2017. The JSC upheld the decision of the committee and subsequently conveyed its decision to dismiss the respondent by a letter dated 9th February 2017.

[71] Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. In furtherance of this constitutional imperative, and pursuant to Article 47(3), Parliament enacted the Fair Administrative Actions Act to provide the necessary legislative framework for its implementation. This Court has had occasions to interpret or apply Article 47 of the Constitution and the Act in appeals involving judges, judicial officers, and staff on one hand and the JSC on the other hand. It became necessary for the Court in ***Shollei Vs Judicial Service Commission & another*** [2022] KESC 5 (KLR) to lay down certain principles to

guide not only the courts but also the JSC in matters concerning disciplinary proceedings involving judicial officers and staff. These are the principles:

- 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 the 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.”*

[72] What is not in dispute is that the respondent was given only a single day’s notice to appear before the disciplinary hearing. The notice was made by a telephone call. While the appellants have advanced a rather alluring argument that the respondent did not expressly object to the short notice given, this contention cannot override the clear dictates of the law. Paragraph 25(4) is couched in mandatory terms, employing the words “**shall**” and “**not less than fourteen days.**”

“The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.” [Our emphasis].

[73] There is a strict obligation on the Committee or Panel to afford a minimum notice period of fourteen days, which must be in writing. It is immaterial that the respondent proceeded without raising an objection. Failure to comply with a mandatory timeframe renders the proceedings procedurally unfair. This is a principle of constitutional due process. The Court of Appeal in ***Judicial Service Commission Vs Mbalu Mutava & another*** [2015] KECA 741 (KLR) stressed the importance of compliance with due process in disciplinary matters, especially

where the Constitution and Statute so demand. The procedure adopted by the appellants violated the Constitution and went against the guidelines in ***Shollei Vs Judicial Service Commission & another*** (*supra*). We so hold, answering the question under consideration positively, that the disciplinary proceedings violated Articles 47 and 50 of the Constitution.

iv. Whether the superior courts below engaged in judicial overreach

[74] Although the term “judicial overreach” has traditionally been used to describe instances where the Judiciary is perceived to exceed its constitutional jurisdiction and to encroach on the powers of the other two branches of Government, it has been used in this appeal in a different context. The respondent contends that both the ELRC and the Court of Appeal improperly advised the JSC on administrative options, and that this was contrary to the courts’ mandate as an impartial umpire in an adversarial setting. The appellants, for their part, have defended the two courts, arguing that both acted within their jurisdiction.

[75] The ELRC, after concluding and declaring that the CRJ had no jurisdiction to interdict and/or frame a charge against a judicial officer; that the process leading to the dismissal of the respondent was *void ab initio*, went on to direct that:

“.....the Judicial Service Commission and the Chief Justice do commence and conclude afresh the disciplinary process against the Petitioner within 60 days”

[76] Similarly, the appellate court, while affirming the decision of the trial court, dismissing the appellant’s appeal and ordering the reinstatement of the respondent to the position of Senior Principal Magistrate with accrued salary and benefits, made the following astounding order:

“The 1st appellant may commence disciplinary proceedings if it so wishes”.

[77] Did the two orders amount to judicial overreach? Although the Court in the passage below extracted from the *Mitubell case* (*supra*) was concerned with structural interdicts, the caution is relevant generally to the question of judicial overreach:

“122. Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy.....”

[78] While it is the function of the courts to interpret and apply the law, they must refrain from overstepping their constitutional role by going outside what parties have sought or directing parties on how to act beyond the specific legal issue at hand. To suggest to a party how to proceed post judgment, like the two courts did in this case, amounts to giving an “advisory opinion” or giving strategic guidance to litigants. It undermines the principle of impartiality. We take the view that it was unwarranted for the two superior courts below to grant the JSC the option of initiating fresh disciplinary proceedings, having already found that the CRJ acted *ultra vires* and that the disciplinary process was fundamentally flawed from the outset.

v. What reliefs are available to the respondent?

[79] The appellants contend that the superior courts erred in their assessment of the practical implications of granting the remedy of reinstatement. In their view, the working relationship between the JSC and the respondent has become so strained that reinstatement would likely undermine any prospects of a functional future relationship. Conversely, the respondent maintains that, having found the disciplinary process to be unconstitutional and violated her rights, she was entitled to appropriate remedies for the violation of those rights. In addition to compensatory relief, the respondent seeks aggravated and exemplary damages, citing the oppressive, arbitrary, and unconstitutional conduct perpetrated by the appellants.

[80] Section 49(1)(c) of the Employment Act provides for payment of compensation not exceeding an equivalent of twelve months' gross salary as an alternative remedy to reinstatement. In awarding damages, or ordering reinstatement or re-engagement, the court must take into account factors such as the practicability of reinstatement or re-engagement and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances. The other restriction on reinstatement is contained in Section 12(3) of the Employment and Labour Relations Court Act. Reinstatement of an employee can only occur within three years from the date of dismissal.

[81] Secondly, the award of damages for the violation of constitutional rights by the State or its agents falls within the realm of public law remedies and lies within the discretion of the trial court. However, that discretion is not unfettered; it is circumscribed by the requirement that any such award must be appropriate and just in light of the particular facts and circumstances of the case. The principal aim of a constitutional remedy is neither compensatory nor punitive; it is primarily to

vindicate the infringed rights and to deter future violations. The determination of the appropriate remedy must therefore be guided by the principles of rationality and proportionality. In certain instances, a declaratory order alone may suffice to achieve justice, serving as a powerful acknowledgment of the breach and, in some cases, offering adequate redress on its own. In others, the justice of the case may warrant an award of reasonable damages in addition to a declaration. Importantly, public policy considerations are equally important factors to bear in mind. The remedy granted should not only address the party's grievance, but also promote the broader interests of society by reinforcing constitutional norms and upholding the rule of law. See ***Gitobu Imanyara case*** (*supra*).

[82] Having so said, and while the principle in the award of damages is that it lies within the court's discretion, such discretion must be exercised judiciously and on sound legal reasoning. In assessing the appropriate remedy, choosing from a host of remedies under the Constitution and statutes, key to that assessment is the respondent's prospects of securing alternative employment. It is also part of that consideration to bear in mind that it has been almost six (6) years since the decision of the ELRC, directing that the respondent be reinstated, and only nine (9) months since a similar order was issued by the Court of Appeal. The respondent has not played any part in the failure to reinstate her within three years. Like the courts below, we are persuaded that reinstatement of the respondent to her former position as Senior Principal Magistrate with accrued salary and benefits from the date of interdiction, which was 22nd August 2016, is what is most mete and just in the unique context of this case.

k. COSTS

[83] Costs follow the event but are at the discretion of the Court. We are guided by ***Rai & 3 others Vs Rai & 4 others*** [2013] KESC 20 (KLR) to award to the

respondent costs of this appeal, similar awards having been given by both the ELRC and the first appellate court.

I. FINAL ORDERS

[84] Consequently, upon our conclusion above, we order that:

- i. The Petition of Appeal dated 22nd November 2024 is hereby dismissed.*
- ii. The respondent's cross-appeal dated 13th December 2024 partially succeeds to the extent explained herein.*
- iii. The respondent is hereby reinstated to her position of Senior Principal Magistrate with accrued salary and benefits from the date of her interdiction, which is 22nd August 2016, to date.*
- iv. The respondent's costs in the ELRC, Court of Appeal, and before this Court are to be borne by the 1st appellant.*
- v. We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellants.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th Day of August 2025

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

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

