REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E015 OF 2024

–BETWEEN–

JUDITH NYAGOL ..... APPELLANT

–AND–

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

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

(*Being an appeal from the Judgment of the Court of Appeal at Nakuru (**P. Nyamweya, F. Ochieng & W. Korir**, JJ. A) in Civil Appeal No. E097 of 2021 dated **23rd February, 2024**)*

Representation

Mr. Jason Okemwa for the Appellant
(*Okemwa & Co. Advocates*)

Mr. Moses Kipkogei and Mr. Mwangi Kangu for the 1st & 2nd Respondents
(G&A Advocates LLP)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Appellant, Judith Nyagol, filed the appeal dated 4th April 2024, which was amended on 15th May 2024 pursuant to a consent Order dated 14th May 2024. The appeal is brought under Article 163(4)(a) of the Constitution. The Appellant

challenges the judgment of the Court of Appeal *(P. Nyamweya, F. Ochieng & W. Korir, JJ.A)* delivered on 23rd February 2024 in **Civil Appeal No. E097 of 2021** wherein the Court of Appeal overturned the decision of the Employment and Labour Relations Court *(Wasilwa, J.)* in **ELRC Petition No. E005 of 2020** and held that the Respondents followed due procedure when dismissing the Appellant from employment. The Court of Appeal also dismissed the Appellant's Cross-Appeal where she sought reinstatement.

[2] Notably, before this Court the 1st and 2nd Respondents filed a notice of preliminary objection dated 6th June 2024 challenging this Court's jurisdiction to hear the appeal on grounds that it does not raise questions touching on the application or interpretation of the Constitution.

B. BACKGROUND

[3] The Appellant was employed by the 1st Respondent on 20th June 2012 as a Resident Magistrate and deployed to Sirisia Law Courts. She was later transferred to Kericho Law Courts, where she served in a similar capacity. It was at this station that she was arrested on 20th August 2015 by officers from the Ethics and Anti-Corruption Commission (EACC) on allegations of corruption.

[4] Subsequently, she was charged with the offence of corruptly soliciting for benefit contrary to Section 39(3) of the Anti-Corruption and Economic Crimes Act (ACECA). The particulars were that on 27th July 2015, while serving as a judicial officer at Kericho Law Courts, she corruptly solicited for a benefit of Kshs.20,000/= from Wilson Yegon, for purposes of securing a favourable penalty in Kericho Case No. 3140 of 2014 wherein Wilson Yegon was the accused person. She was also charged with corruptly receiving a benefit contrary to Section 39(3) of ACECA. The particulars were that the Appellant received a benefit of Kshs.10,000/= from Wilson Yegon as an inducement to deliver a favourable outcome in the said Criminal Case.

[5] Meanwhile, the Appellant received a letter dated 4th September 2015 interdicting her from employment and a charge of similar date. The charge read as follows:

> ***"That on 27th July 2015 at Kericho Law Courts as Resident Magistrate you corruptly solicited a benefit of 20,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file Number 3140 of 2014 where the said Wilson Yegon was an accused person.***
>
> ***Further to this on 20th August, 2015 at the Kericho Law Courts, as the Resident Magistrate, you corruptly received a benefit of Kshs.10,000/= from Wilson Yegon through Robert Cheruiyot as inducement so as to award a favourable penalty in a Kericho case file No. 3140 of 2014 where the said Wilson Yegon was an accused person.***
>
> ***This is contrary to Section 39(a) as read with Section 48(1) of ACECA."***

[6] Upon hearing the prosecution's 12 witnesses, the Anti-Corruption Court held that there was no evidence: to show that the Appellant either asked Robert Cheruiyot (1st accused), to solicit the bribe on her behalf or that she contacted anyone to solicit for a bribe; or that the Appellant received the bribe from the 1st accused. Furthermore, that it was not established beyond reasonable doubt that the money recovered from the Appellant's purse was not planted there, especially considering that the door to her chambers was open and there was no one inside at the time of the search conducted by the EACC officers. In any event, Wilson Yegon was eventually convicted. Consequently, on 15th September 2016, the Appellant was acquitted under Section 210 of the Criminal Procedure Code.

[7] Subsequently, the Appellant presented proof of her acquittal to the 1st Respondent who in turn, informed her by a letter dated 27th January 2017, to await

the final judgment of the criminal case since the 1st accused had been placed on his defence. On 13th January 2017, the Appellant's co-accused was convicted of soliciting for benefit contrary to Section 39(3) as read with Section 48(1) of ACECA and corruptly receiving a benefit contrary to Section 39(2) as read with Section 48(1) of ACECA. He was fined Kshs.100,000/= and in default to serve 1-year imprisonment for each count.

[8] On 22nd August 2017, the Appellant received a letter of similar date titled "*COMMENCEMENT OF FRESH CHARGES AGAINST YOU*" from the Office of the Chief Justice communicating the following charges:

> ***Charge 1***
>
> ***Breach of Rule 6 of the Judicial Code of Conduct and Ethics, Legislative Supplement No. 24, Legal Notice No. 50.***
>
> ***Rule 6 of the Judicial Code of Conduct and Ethics states that "a judicial officer shall not knowingly convey or permit others to convey the impression that anyone is in a special position to influence him." That you knowingly permitted one Robert Cheruiyot to convey the impression to one William Yegon that he was in a special position as a staff of Kericho Law Courts to influence you to award a favourable penalty in Kericho CMC Criminal Case No. 3140/2014 Republic vs William Yegon contrary to Rule 6 of the Judicial Code of Conduct and Ethics, 2003.***
>
> ***Charge 2***
>
> ***Breach of Rule 5 of the Judicial Code of Conduct as read together with Paragraph 9(a) Appendix 1, Part III of the Public Officers Ethics Act, 2003.***
>
> ***Rule 5 of the Judicial Code of Conduct and Ethics states that in all activities a Judicial Officer shall exhibit respect for the rule***

of law, comply with the law, avoid impropriety and appearance of impropriety and act in a manner that promotes public confidence in, the integrity and the impartiality of the Judicial Service.

That in or the month of August 2015, the officers from the Ethics and Anti-Corruption Commission recovered Kshs.10,000/= from your bag in your chambers at Kericho Law Courts, money believed to have been a bribe for you to give a favourable penalty to the accused person in Kericho CMC Criminal Case No. 3140/2014, Republic vs William Yegon.

[9] We note at this early stage that the interdiction letter which attached charges of the 4th September 2015 referred to a 'Wilson Yegon', and yet the Respondents letter to the Appellant of the 22nd August 22017 referred to a 'William Yegon', However, we can glean from the record that the name "William" was inadvertently or otherwise mistakenly used in the place of "Wilson". Nonetheless, the Appellant responded and denied the allegations in a letter dated 30th August 2017. She was later summoned by the Respondents through a letter dated 5th February 2018 for a disciplinary hearing scheduled for 5th March 2018. The Appellant appeared before the disciplinary committee on the material date with her advocate, Wambeyi Makomere. According to the Appellant, her advocate was denied audience.

[10] Later, on 24th August 2018, the Appellant received a dismissal letter based on her conduct during the events leading up to the corruption case. According to the letter, the Appellant's conduct was deemed improper and exhibited a lack of propriety. Dissatisfied with the decision, the Appellant applied for a review, through her letters dated 24th September 2018 and 7th November 2018, as well as reminders dated 25th September 2020 and 2nd June 2020. By a letter dated 1st October 2020, the 1st Respondent declined to review its decision stating that the Appellant had not presented new material facts which would warrant a review and

further, the acquittal in the criminal case could not be the basis for her reinstatement.

C. LITIGATION HISTORY

i. Proceedings at the Employment and Labour Relations Court

[11] Aggrieved by the Respondents' decision, the Appellant filed **Constitutional Petition No. E005 of 2020** in the ELRC at Nakuru, dated 14th November 2020. She posited that the disciplinary process leading to the termination of her employment violated her right to a fair trial. In the same vein, she urged that it violated the principle of double jeopardy since the charge before the 1st Respondent was strikingly similar to the charge from which she had been acquitted in the criminal case. In addition, the Respondents failed to disclose the evidentiary material they relied upon during the disciplinary hearing, there was no formal complaint or specific charges against her, the Respondents took an inordinate amount of time to try her, and the nature of gross misconduct was not clearly spelt out. She therefore sought the following reliefs:

a. *A declaration that the act of the Respondents in instituting and conducting parallel proceedings based on the same issues that were determined in the Anti-Corruption Case Number No. 5 of 2015 were in breach of the Appellant's constitutional rights under Articles 27(1), (2), (3), 28, 41 and 50 of the Constitution and the same is null and void for all intents and purposes.*
b. *A declaration that the disciplinary proceedings conducted by the Respondents as against the Appellant on 5th March, 2018 and the eventual dismissal of the Appellant from service were disproportionate, unfair, lacked valid reason and therefore null and void.*
c. *An order of reinstatement of the Appellant back to Judicial Service without loss of benefits.*

d. *An order directing the Respondents to pay the Appellant all the withheld salary since 4th September, 2015 when the Appellant was interdicted.*
e. *Damages for unlawful dismissal.*
f. *Costs of the petition.*

[12] The Respondents opposed the petition arguing that since the Appellant was charged with various criminal offences touching on corruption, of which she was acquitted, they proffered fresh charges against her on account of her conduct during the ordeal. They contended that this process afforded her a fair trial. Further, the dismissal letter bore the reasons for her termination in line with Part IV, Third Schedule of the Judicial Service Act (JSA).

[13] On reinstatement, the Respondents deponed that it was an untenable prayer given that 3 years had lapsed from the Appellant's date of interdiction and dismissal. Lastly, the Respondents urged that the Appellant had not clearly outlined which constitutional rights were violated.

[14] Upon hearing the parties, in a Judgment delivered on 7th October 2021, the court *(Wasilwa, J.)* held that the petition turned on the following issues: *whether the Appellant was subjected to double jeopardy by facing two parallel processes of disciple – criminal and internal before the JSC; whether there were valid reasons to warrant termination of the Appellant's services; whether the Appellant was subjected to a fair disciplinary process; whether the Appellant's rights under the Constitution were infringed upon; and whether the Appellant is entitled to the remedies sought*.

[15] On *whether the Appellant was subjected to double jeopardy by facing two parallel processes of discipline- criminal and internal before the JSC*, the court noted that while the Chief Justice could interdict an officer, Section 18(2) of Part III of the Third Schedule of the JSA prohibits the institution of such an action until the criminal proceedings are concluded. Therefore, the Respondents breached the law by writing the letter dated 4th September 2015. In addition, after responding

to the show cause letter on 18th September 2015, the Respondents replied on 22nd August 2017 and levelled fresh charges, different from the earlier charges dated 4th September 2015. By doing so, the Appellant was being charged again, despite having already been charged, which constituted double jeopardy.

[16] On *whether there were valid reasons to warrant the termination of the Appellant's employment*, the ELRC held that the charges levelled on 4th September 2015 differed from those of 27th August 2017. Moreover, considering that the money was recovered from the Appellant's handbag in her absence, yet she had left her handbag in her unlocked office, the court held that the circumstances under which the money was recovered were not established, and the Respondents did not call any witnesses to explain that anomaly. Additionally, there was no nexus between the Appellant and the person who allegedly gave the bribe. Likewise, the Anti-Corruption Court had found her not culpable of corruption.

[17] The ELRC further noted that the Appellant was dismissed on account of the charges of 4th September 2015 while her hearing proceeded on the basis of the charges of 22nd August 2017. This meant that the Appellant was condemned for charges she had not been tried on, contrary to Article 47 of the Constitution, Section 4(3) of the Fair Administrative Action Act (FAAA) and Section 41 of the Employment Act (EA). What is more, the fate of the first charge dated 4th September 2015, remained unknown. Accordingly, based on the foregoing, the ELRC concluded that the disciplinary process was unfair.

[18] Ultimately, the ELRC issued the following orders:

1. *A declaration that the dismissal of the Appellant was unfair and unjustified as provided under Section 45(2) of the Employment Act, 2007.*
2. *The Respondent to pay the Appellant Five Million Kenya Shillings as damages for the unfair and unjustified dismissal which cut off the Appellant's career prematurely.*

3. *The Respondent to pay the Appellant all withheld salary from the time of interdiction on 4th September, 2015 to the time of dismissal on 21st August, 2018.*
4. *The Respondent to pay costs of this suit plus interest at court rates with effect from the date of this Judgment***.**

ii. Proceedings at the Court of Appeal

[19] Dissatisfied with the decision of the ELRC, the Respondents appealed to the Court of Appeal in **Civil Appeal No. E097 of 2021.** The appeal was anchored on 10 grounds which were crystallized into two: *whether the termination was unjust*; and *whether the compensation was adequate*. Equally, the Appellant lodged a cross-appeal praying for reinstatement, which the Court of Appeal addressed with the above-mentioned issues since they were closely intertwined.

[20] On *whether the Appellant's termination was just*, the Court of Appeal underscored that although there are different standards of proof in criminal cases and civil actions, an acquittal in a criminal case does not necessarily bar the institution of a civil case based on the same facts. That being so, and placing reliance on the case of ***James Mugera Igati vs Public Service Commission of Kenya*** [2014] eKLR, the court held that the criminal process and disciplinary process are distinct, each with its own standard of proof. By the same token, that Section 62 (4) of ACECA, allows for a disciplinary process to take place under the other statutory regimes applicable. Therefore, it was the court's view that regardless of an earlier acquittal, one may still be found guilty where the disciplinary case is proved on a balance of probabilities. Subsequently, the Court of Appeal found that double jeopardy principle did not apply since the Appellant's dismissal was not based on her criminal culpability.

[21] On *whether the Appellant was subjected to a fair disciplinary process*, the Court of Appeal held that whilst the termination letter referred to the charges of 4th September 2015, the Appellant demonstrated, by her conduct, that she was

aware that the charges for which she was heard and dismissed were those of 22nd August 2017. The Court noted that the Appellant's application for review to the 1st Respondent referred to the fresh charges of 22nd August 2017, and she made reference to those charges in her petition, indicating that the error of the dates did not in any way raise any confusion to her. Additionally, the disciplinary committee's report, the subject of the hearing and her ultimate dismissal, was based on the 22nd August 2017 charges. Furthermore, bearing in mind that the Respondents gave the following reasons for their decision: overwhelming circumstantial evidence incompatible with the Appellant's innocence, inconsistent responses by the Appellant, and the fact that the standard of proof in the disciplinary case was lower than that in criminal cases; it was the Court of Appeal's conclusion that the Respondents indeed followed procedure in terminating the Appellant's employment.

[22] On *reinstatement*, the court stated that 3 years having lapsed since the Appellant's termination, it was not an available remedy. Ultimately, the appeal was allowed while the Appellant's cross-appeal was dismissed.

D. PROCEEDINGS BEFORE THE SUPREME COURT

[23] Aggrieved by the decision of the Court of Appeal, the Appellant filed the instant appeal premised on the following grounds:

i. *The Court of Appeal's error was deeming the Respondents' actions compliant with Sections 41, 44 and 45 of the Employment Act (EA) overlooking the judicial review power of the Court, the primacy of the mandatory, statutory and Constitutional procedures under Articles 47 & 50, FAAA, and Section 25(c) of the JSA. (sic)*

ii. *Further, whether Section 49 of the EA remedies override the doctrine of constitutionality, constitutional remedies under the state officers' employment terms domiciled in Articles (2)4) and 23 of the Constitution. (sic)*

iii. *Whether the Court of Appeal disregarded established precedents set by the Supreme Court under Article 163(7) of the Constitution.*

iv. *The Court of Appeal's failure to apply the principle of double jeopardy, especially concerning the Respondents' actions under Sections 50(2)(o) and Section 18 of the Third Schedule of the JSA, is also questioned. (sic)*

v. *Whether the Court of Appeal overlooked principles outlined in the Mathew Kipchumba Koskei Case regarding how employers should handle situations involving both criminal and civil cases to ensure fair trial/hearing, avoid double jeopardy, and adhere to fair administrative and labour practices.*

vi. *The Court of Appeal's neglect to address the Appellant's contention that her fair trial rights, as a state officer defined in Article 260, were violated, and her entitlement to reinstatement and/or compensation under Articles 50, 25(c), 236 and 2(4) of the Constitution is questioned. (sic)*

vii. *Whether the Appellant received a fair trial and whether the evidence presented met the clear and convincing threshold in cases of alleged judicial misconduct and violation of fundamental rights and freedoms.*

[24] As a result, the Appellant seeks the following orders:

a. *The Honourable Supreme Court set aside the entire judgment and decree of the Court of Appeal in Nakuru Civil Appeal No. E097 of 2021 (P. Nyamweya, F. Ochieng' and W. Korir, JJ.A) delivered on 23rd February, 2024.*

b. *The Supreme Court upholds the Appellant's cross-appeal and prayers in the Court of Appeal in Nakuru Civil Appeal No. E097 of*

2021 filed on 1st September 2022 partially affirming the judgment of the ELRC (Wasilwa, J) on a declaration that the actions of the Respondents were irregular, unlawful, and in contravention of the Constitution and the Appellant's fundamental rights to a fair hearing under Articles 50, 47 of the FAAA, and the JSA. As a result, and therefore null and void, and is hereby set aside. (sic)

c. *The Supreme Court affirm and reinstate the award of Kshs.5,000,000/= as compensation for the violation of the Appellant's fundamental rights. Additionally, since the action is declared null and void, the Appellant should be reinstated to her rank without any loss of salaries and benefits.*

d. *A declaration that in matters where employee terms of service are governed by the Constitution, fundamental rights and freedoms, and principles of fair administration and natural justice, no statute (whether the EA, or the Employment and Labour Relations Act ("ELRCA")) do limit/derogate actions and remedies for violations of the Constitution and fundamental rights, as outlined in Articles 19(3) (c), 23, 24 and 25, or Article 2(4). (sic)*

e. *Award costs of the suit to the Appellant in the Supreme Court and all superior Courts below.*

E. PARTIES' RESPECTIVE CASES

iii. The Appellant's Submissions

[25] In her unsigned revised submissions dated 14th June 2024, and a replying affidavit sworn on 7th June 2024 in rejoinder to the Respondents' response, the Appellant crystallized the following as the issues for determination before this Court:

a. *Whether the Employment Act and Employment Labour Relations Court Act supersede constitutional and statutory*

procedures and remedies. [Articles 2(4), 23, 47, 50, 165)3) (b), (d) (ii), 172 (1) (c), Judicial Service Act and Fair Administrative Action Act]

i. *Limits on Constitutional Petitions.*

ii. *Whether filing a Petition deprived the Appellant of the remedy of reinstatement.*

b. *Whether the Court of Appeal erred in failing to hold that the Respondents contravened Articles 47, and 50(2)(o) of the Constitution, the FAAA Act and Rule 18(3) of the Third Schedule of the JSA.*

c. *Whether the Supreme Court should expand and develop the* ***Koskei vs Baringo SACCO Case*** *principles that criminal proceedings and civil proceedings are different.*

d. *Whether the Court of Appeal erred in stating that the dismissal letter inadvertently bore the wrong date, and whether this violated the Appellant's right to a fair hearing.*

e. *The Court of Appeal is shifting the burden of proof to the Appellant and applying the wrong standard of proof, i.e., beyond reasonable doubt.*

f. *Whether the Court of Appeal contravened Article 163(7) of the Constitution.*

g. *What remedies the Honourable Supreme Court should issue?*

[26] The Appellant submitted that the appeal had met the requisite appellate jurisdictional threshold, on grounds that: from the onset, the original suit was a constitutional petition alleging violation of her constitutional rights by the Respondents; and the Court of Appeal's judgment further violated her rights by overturning the ELRC's decision and declining to reinstate her.

[27] The Appellant argued that the Court of Appeal supplanted constitutional provisions with statutory provisions, specifically Sections 41, 45 and 47 of the EA,

erroneously, applied the rationale in private law and issued the rigid remedies under the EA. According to the Appellant, the 1st Respondent, as a constitutional commission, is bound by the national values and principles, bills of rights and principles of public service including Article 236(b) of the Constitution which prohibits the termination of one's employment without due process. Secondly, the Appellant contended that while diverse sectors like the military, judiciary, county government, police and public service have different statutes applying to them, the EA operates only as a baseline, and, only where other superior terms do not exist. Thirdly, the Appellant posited that the Court of Appeal's decision contradicted its previous decision in ***Narok County Government vs Richard Bwogo Birir & Another***; Civil Appeal No. 74 of 2014; [2015] eKLR where it held that the terms of state officers are governed by the Constitution and specific statutes, not the EA. Lastly, the Appellant did not plead the statutory provisions of the EA, and so, the Court of Appeal deviated from the Appellant's pleadings.

[28] The Appellant also faulted the Court of Appeal for finding that the *remedy of reinstatement* was not automatic because she filed a constitutional petition, and 3 years had lapsed from the date of her dismissal. She maintained that there are no time limitations for filing constitutional petitions; Furthermore, she argued that the court failed to recognize that the ELRC's judgment was delivered within 3 years of her dismissal, and the delay by the court registry and the Respondents led to the effluxion of the 3-year timeline. The Appellant added that the Court of Appeal ought to have considered when time started running to establish when the cause of action arose. Additionally, she asserted that once a dismissal is deemed unlawful, reinstatement is automatic, as established in ***Judicial Service Commission & Another vs Lucy Muthoni Njora*** [2021] eKLR.

[29] Furthermore, she maintained that the Court of Appeal had the power to order reinstatement. She cited this Court's decision in ***Gitobu Imanyara & 2 Others vs Attorney General***, SC Petition No. 15 of 2017, in support of that submission, wherein this Court cited the case of ***Major Peter Kariuki vs Attorney***

General (2014) eKLR. In that matter, the court had made an order for reinstatement and payment of salaries for the period the Appellant's fundamental rights were violated.

[30] The Appellant posited that the ELRC's findings on merit were not challenged and therefore, the Court of Appeal had no basis to overturn the same, and further that the Court of Appeal erred in failing to hold that the Respondents violated Articles 47 and 50, the FAAA and JSA. There was also no evidence that the Chief Justice or the Respondents conducted a preliminary investigation or inquiries under Section 18(1) of the Third Schedule of the JSA and the JSC policy. In addition, the submissions filed were not evidence and therefore violated the fair trial requirements. Similarly, unless they are admissions, answers in cross-examination did not amount to a defence case, and the Appellant faulted the Court of Appeal for failing to find that the Respondents did not comply with Section 25(5) of the Third Schedule of the JSA which provides that evidence should be produced and cross-examination, much like Section 4 of the FAAA. She also posited that the Court of Appeal entertained new allegations and new evidence to the extent that the Respondents submitted that they indicated the wrong charges in the dismissal letter. The Court of Appeal did so without following due process. Given the foregoing, the Appellant urged that being an aggrieved party, she was entitled to assistance by this Court, regardless of the merits of the allegations as was held by this Court in ***KRA vs Export Trading Company Limited***, SC Petition No. 20 of 2020; [2022] eKLR.

[31] The Appellant submitted, in addition, that since the Respondents relied on the first charge of 4th September 2015, the Anti-Corruption Court's proceedings and judgment, they were bound by the said judgment. It also behooved the Respondents to prove that the disciplinary process complied with the law but had failed to do so. In support of that submission, the Appellant cited the case of ***Muya vs Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya***, SC Petition No. 4 of 2020; [2022] eKLR, where this Court

emphasized the importance of complying with clear constitutional and legislative frameworks and objective standards. The objective standard involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights" as per this Court's decision in ***Bellevue Development Company Limited vs Francis Gikonyo & 3 Others***, SC Petition No. 42 of 2018; [2020] KESC 43 (KLR).

[32] On *double jeopardy*, the Appellant urged that double jeopardy is proved where the offences are similar or of the same nature or substantially the same conduct or same contravention as stated in ***Kulawiec, Joshua- "Double Jeopardy in the Regulatory State" [2001] ALRC Ref JI 14; (2001) 78 Australian Law Reform Commission Reform Journal 60.*** In the same vein, that charges preferred against the Appellant were substantially similar to the charges in the Anti-Corruption Court, and as such, constituted double jeopardy. She posited that the Respondents therefore violated Section 18(3) of the Third Schedule of the JSA, Article 50(2)(o) of the Constitution and Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR"). Further, she compared and equated Rules 18(1-3) of the Third Schedule of the JSA to the practice in the UK where a criminal acquittal that resolves all pertinent factual and legal matters bars subsequent administrative penalties, and relied on ***The application of Coke-Wallis vs Institute of Chartered Accountants in England and Wales*** [2011] UKSC 1, to buttress the point. The Appellant thus faulted the Court of Appeal for failing to apply the foregoing and holding that there should be an element of prejudice for double jeopardy to apply. In any event, according to the Appellant, requiring her to defend a charge for which she has previously been acquitted was in itself prejudicial and in violation of her right to human dignity.

[33] On *stare decisis*, the Appellant submitted that the Court of Appeal went afoul this Court's decision in ***Shollei vs Judicial Service Commission & Another***

(Petition 34 of 2014) [2022] KESC 5 (KLR) on the principles of a fair trial and fair hearing.

[34] On the *remedies*, the Appellant prayed that the ELRC's judgment be reinstated and sought her reinstatement to the rank she held prior to dismissal. She posited that the remedy is available to her since her suit was premised on a constitutional petition, as opposed to the EA.

ii. The Respondents' Submissions

[35] In opposition to the appeal, the Respondents filed a preliminary objection dated 6th June 2024 contesting this Court's jurisdiction to hear and determine the appeal, a replying affidavit sworn by the 2nd Respondent on similar date and submissions dated 27th June 2024. The Respondents contended that the appeal does not meet the appellate jurisdictional threshold contemplated under Article 163(4)(a) of the Constitution. In addition, the Respondents summarized the following as issues for determination before this Court:

a. *Whether the terms of employment of a State Officer appointed under Article 260 of the Constitution such as the Appellant are subject to the provisions of the EA;*
b. *Whether the Appellant was afforded a fair hearing;*
c. *Whether there was double jeopardy; and if so, whether it barred the Appellants from instituting internal disciplinary measures against the Appellant following her acquittal in Nakuru Chief Magistrate's Anti-Corruption Case No. 5 of 2015;*
d. *Whether the Court of Appeal misapprehended the standard of proof in the appeal; and*
e. *Whether the Appellant's rights as a State Officer under Article 260 of the Constitution were violated.*

[36] The Respondents submitted that the 1st Respondent's legal mandate under Articles 171 and 172 of the Constitution, the JSA and the Judiciary Human

Resource Policies and Procedures Manual, includes the discipline of judicial officers and judicial staff. The Respondents reiterated the background as set out by the Appellant save to state that after her acquittal by the Anti-Corruption Court, her pending disciplinary case was resubmitted to the 1st Respondent for reconsideration in line with the Third Schedule of the JSA. Subsequently, fresh charges dated 22nd August 2017, were instituted against the Appellant under the provisions of Part IV, of the Third Schedule of the JSA, and served upon her.

[37] The Respondents further submitted that this Court's appellate *jurisdiction* was not properly invoked since the appeal did not raise a question touching on the interpretation or application of the Constitution as espoused in the case of ***Lawrence Nduttu & 6000 Others vs Kenya Breweries Limited & Another***, SC Petition No. 3 of 2012; [2012] eKLR. At best, they added, the issues raised were never presented before the superior courts below, for instance, which legislation applied in the removal of a State Officer.

[38] Furthermore, the Respondents contended that the EA, other specific legislations and the Constitution apply to all disputes between employers and employees and as such, the EA applied to the instant suit. In addition, that the Appellant was the 1st Respondent's employee in line with the EA's definition of 'employee' thus ushering in the application of the EA in addition to the JSA. Besides, the Appellant does not fall within Section 3(2) of the EA which lists the categories of persons exempted from its application. Equally, the EA is the default statute applicable in employment matters unless the Constitution provides better terms, cautioning that the Appellant's argument bordered on removing the ELRC's jurisdiction from matters of employment of State Officers, thereby discriminating against non-State officers. In any event, the Appellant relied on the provisions of the EA in her suit before the ELRC and was, therefore, estopped from claiming that the same was now inapplicable.

[39] On *double jeopardy*, the Respondents submitted that the same only applied to criminal proceedings and not to the instant suit. In addition, Article 50(2)(o) of

the Constitution and Section 138 of the Criminal Procedure Code envisage a trial before a court or judicial tribunal and not disciplinary proceedings. They cited the case of ***R (On the Application of Coke- Wallis) vs Institute of Chartered Accountants of England & Wales***, [2011] UKSC1 in support of that submission.

[40] The Respondents also contended that the Appellant was afforded a *fair trial* which followed the dictates of Section 25 of the Third Schedule of the JSA, Articles 47(1), 50(1) and 236(b) of the Constitution and this Court's decision in the ***Evans Kidero Case,*** SC Petition Nos. 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR) and the ***Shollei Case***.

[41] The Respondents submitted that the *remedy of reinstatement* was not available to the Appellant since 3 years had lapsed as per Section 49(4) of the EA. Further, reinstatement being an order for specific performance can only be granted within specific circumstances, which the Appellant had not pleaded.

[42] On the *standard of proof and the Court of Appeal relying on circumstantial evidence*, in making its decision, the Respondents urged that the appellate court correctly applied the standard of *on a balance of probabilities* applicable in civil matters since the instant dispute was civil in nature. The 1st Respondent also relied on the investigations conducted by the EACC, the evidence presented in the criminal case and the Appellant's testimony that was largely inconsistent with the presumption of innocence. In any event, the Respondents were only expected to demonstrate that they believed the Appellant was part of the corruption scandal, which they did. Further, the Respondents submitted that going by the Appellant's allegations in the appeal, this Court would have to evaluate the sufficiency or adequacy of the evidence placed before the Superior Courts below, and therefore, venture away from its mandate.

F. ISSUES FOR DETERMINATION

[43] Upon hearing the submissions by the parties and upon perusal of the record of appeal, the following issues have crystallized for determination by this Court:

i. ***Whether the appeal meets the jurisdictional threshold under Article 163(4)(a) of the Constitution; and if so,***
ii. ***Which legislation applies to the employment matters of judicial officers and staff: the Judicial Service Act or the Employment Act?***
iii. ***Whether the Appellant's right to a fair trial under Article 50 of the Constitution was violated and if so, how.***
iv. ***If the answer to (iii) above is in the affirmative, whether the remedy of reinstatement is available to the Appellant.***

G. ANALYSIS

(i) Whether the appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution

[44] This Court's jurisdiction is set out in Articles 58, 140 and 163 of the Constitution and the Supreme Court Act, Cap 9B of the Laws of Kenya. The instant appeal is anchored on Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act and Rules 38(2) and 39 of the Supreme Court Rules, 2020 and the Appellant has claimed that issues of constitutional interpretation or application have been raised.

[45] There are numerous decisions touching on this subject, ***Lawrence Nduttu & 6000 Others vs Kenya Breweries Ltd & Another,*** SC Petition No. 3 of 2012 being the leading authority. Further, given our finding in ***Rutongot Farm Ltd. vs Kenya Forest Service & 3 Others,*** SC Petition No. 2 of 2016; [2018]

eKLR, and considering the pleadings, history and trajectory of the matter as well as the parties' submissions, we find that the present appeal raises questions centred on the interpretation and application of the Constitution. Specifically, the appeal is pegged on the alleged violation of the Appellant's rights under Articles 47 and 50 of the Constitution. We also note that the dispute presented before the ELRC was similarly anchored on whether there was any violation of the Appellant's constitutional rights. This invariably will entail an exercise of evaluation of questions around the interpretation and application of the Constitution.

[46] We therefore find this Court has jurisdiction to hear and determine the appeal. The preliminary objection by the Respondents is therefore unmerited and dismissed.

ii) Which legislation applies to the employment matters of judicial officers and staff: the Judicial Service Act (JSA) or the Employment Act (EA)?

[47] *On this question*, the Appellant contends that the Court of Appeal erred in applying Section 41 of the EA as opposed to Articles 47 and 50 of the Constitution, or even Section 4 of the FAAA and the JSA. She further urged that different benches of the Court of Appeal have in the past, taken different positions as relates to this issue.

[48] The Respondents, on the other hand, contended that the issue was raised before this Court for the first time and was not the subject of consideration by the Superior Courts below. In any event, that both the EA and the JSA apply to the present appeal. They further supported this submission by stating that the Appellant heavily relied on the provisions of the EA at the ELRC and was therefore estopped from claiming that the EA does not apply.

[49] We have considered the contents of the petition before the ELRC. The Appellant relied on various Articles of the Constitution, Sections 43(1) and 47(5)

of the EA, the JSA and the Judiciary Human Resource Policies & Procedures Manual, in that order. In the body of the petition, however the Appellant focused primarily on the constitutional provisions. Equally, the ELRC (*Wasilwa, J.)* relied on Sections 41 and 45(2) of the EA, the JSA, FAAA and the Judiciary Human Resource Policies and Procedures Manual and held that the Appellant was not subjected to a fair disciplinary process, which meant that her dismissal was also unfair. Similarly, at the hearing of the appeal, the Appellant relied on the EA and submitted that the Respondents' actions contravened the JSA, the Evidence Act, the EA, and various Articles of the Constitution.

[50] The question as to which legislation applies to the termination of a judicial officer's employment, though not expressly raised before the superior courts below, is an issue that has transmuted from the natural course of the proceedings.

[51] It is the rule of thumb in statute interpretation that a specific law governing a matter should be applied instead of a general law touching on the matter, *lex specialis derogat legi generalis*. In India, for instance the Supreme Court applies a harmonious construction of the law, that is, general and specific statutes will generally be considered to give effect to a legal policy. However, if the two cannot be reconciled, a general law is impliedly repealed, to the extent that a special law provides for an issue. ***(See Commercial Tax officer, Rajasthan vs Binani Cement Ltd. & Another***, Civil Appeal No. 336 of 2003) This position is founded on the Latin maxim *generalia specialibus non derogant* which means that general law yields to special law where they operate in the same field and on the same subject. The exception however, is where it is clear from the language employed that the Legislature intended for a general law to prevail over a special law, in which case, a special law would have to yield to a general law.

[52] In ***St. Stephen's College vs University of Delhi,*** (1992) 1 SCC 558, Kasliwal J., in his partial dissent to the majority judgment, stated as follows:

> ***"140. ...The golden rule of interpretation is that words should be read in the ordinary, natural and grammatical***

meaning and the principle of harmonious construction merely applies the rule that where there is a general provision of law dealing with a subject, and a special provision dealing with the same subject, the special prevails over the general. If it is not constructed in that way the result would be that the special provision would be wholly defeated. The House of Lords observed in Warburton v. Loveland, (1824-34) All ER Rep 589 as under:

> ***"No rule of construction can require that when the words of one part of statute convey a clear meaning … it shall be necessary to introduce another part of statute which speaks with less perspicuity, and of which the words may be capable of such construction, as by possibility to diminish the efficacy of the first part." (Anandji Haridas and Co. (P) Ltd. v. S.P. Kasture, (1968) 1 SCR 661, Patna Improvement Trust v. Lakshmi Devi, 1963 Supp (2) SCR 812, Ethiopian Airlines v. Ganesh Narain Saboo, (2011) 8 SCC 539, Usmanbhai Dawoodbhai Memon v. State of Gujarat, (1988) 2 SCC 271, South India Corpn. (P) Ltd. v. Secy., Board of Revenue, Trivandrum, (1964) 4 SCR 280, Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27)"***

[53] This rule has gained notoriety so much so that Lord Cooke of Thorndon in ***Effort Shipping Co. Ltd. vs Linden Management, SA [1998] AC 605*** stated that "***… it represents simple common sense and ordinary usage".*** Bennion, **Statutory Interpretation**, 5th Ed. (2008) also explains that it is a rule that is based ***"… on the rules of logic, grammar, syntax and***

punctuation, and the use of language as a medium of communication generally." This rule also applies to general provisions in one statute and the special provisions in another, and also in resolving a conflict between general and special provisions in the same legislative instrument.

[54] Applying the principle of *generalia specialibus non derogant* to the present context, the JSA, being a special law for matters of appointment, removal and discipline of judges, judicial officers and staff supersedes the EA, to the extent that it specifically provides for certain matters. The EA, on its part, will apply in matters relating to the employment and other consequential aspects of judges, judicial officers and staff generally and where there are gaps in the JSA.

iii. Whether the Appellant's right to a fair trial was violated, and if so, how

[55] Under this head, the Appellant raised several issues that we have summarized as follows:

a. The extent of the applicability of circumstantial evidence in disciplinary proceedings for judicial officers;
b. Whether there was sufficient evidence to overturn the ELRC's decision;
c. Application of the doctrine of double jeopardy in matters relating to disciplinary proceedings for judicial officers and whether there was indeed double jeopardy in the present case;
d. Whether in denying the Appellant's counsel the opportunity to address the 1st Respondent's disciplinary committee breached the Appellant's right to fair trial;
e. Whether the Appellant was dismissed on account of the charges dated 4th September 2015 or those dated 22nd August 2017;
f. Whether the delay in communicating the Respondents' decision prejudiced the Appellant's right to a fair trial; and

g. Should the Supreme Court expand the principles in ***Mathew Kipchumba Koskei vs Baringo Farmers***, ELRC Cause No. 37 of 2013; [2013] eKLR?

[56] On *circumstantial evidence*, the Appellant stated that if indeed there was any, it was disparaged by the judgement of the Anti-Corruption Court. The Respondents, on the other hand, stated that there was overwhelming circumstantial evidence incompatible with her evidence of innocence, and her responses to the questions raised were inconsistent thus diminishing her credibility. The report from the 1st Respondent at paragraph 77 reads as follows:

> ***"77. That upon deliberation the Committee notes that despite there being no direct evidence linking Hon. Nyagol to the criminal charges brought against her, there is however circumstantial evidence that she was aware of the events leading to the criminal charges. As such her conduct exhibited impropriety and compromised the integrity and impartiality of Judicial Service. In the circumstances it can be said that she knowingly conveyed and permitted Mr. Cheruiyot to convey an impression that she was in a special position to influence the judgment."***

The Court of Appeal, on its part, merely adopted and reiterated the reasons given by the Respondents and did not therefore test the alleged circumstantial evidence. To our minds and in the circumstances, it is obvious to us that the Court of Appeal abdicated its primary role as a first appellate court, to re-analyze and re-evaluate the evidence placed before the trial court.

[57] In finding as above, we take cognizance of our decision in the case of ***Mutava vs Tribunal Appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya***, SC Petition 15" B" of 2016; [2019] KESC 49 (KLR), wherein at paras. 203-205, we held as follows:

"203. … We need to state that once a standard of proof has been agreed upon, the evidence on record whether circumstantial or direct must be tested against that accepted standard…

204. … To our mind therefore, all the cases cited by the petitioner, including the case of R v. Taylor, speak to one thing: they reaffirm the principle that circumstantial evidence is the use of reasoning and logic to get to a conclusion. When relying on circumstantial evidence, a Court or Tribunal is presented with a set of facts through which an inference may be drawn to prove an existence of a fact that inference, must be supported by the facts presented. Since both parties agree on the applicable standard of proof, the evidence on record must then be tested against that standard. In this case, the inference should not go beyond reasonable doubt but should be higher than a balance of probabilities. In essence, it is not enough that an alleged fact is more likely to have happened but there should be a level of certainty or real possibility that it must have happened.

205.The Supreme Court of Papua New Guinea in the case of Nara v. State [2007] PGSC 54; SC1314 (28 November 2007) aptly captured the principles guiding the application of circumstantial evidence as follows:

> ***"What these principles say in simple terms is that where a case against an accused person is only circumstantial, he must be acquitted unless such a person's guilt is the only rational and reasonable inference open within the four corners of the***

<u>circumstantial evidence</u> that is actually before the Court on the required standard of proof, beyond any reasonable doubt. This means the Court must consider only the evidence properly adduced and presented before the Court and nothing else." [Emphasis ours]

[58] We note that in the above context, by its judgment delivered on 13th January 2017, the Anti-Corruption Court held that no evidence was adduced to establish that the Appellant had directed the 1st accused to solicit any money on her behalf. Neither was there any evidence indicating that the Appellant had solicited for the bribe directly from Wilson Yegon. In addition, the said Wilson Yegon, was ultimately convicted in the criminal case, contrary to the expectation of an acquittal upon giving the bribe. The EACC investigating officers also confirmed they did not interrogate Yegon to verify who actually received the money. Secondly, at the time of the alleged recovery of Kshs.10,000/= from the Appellant's handbag, the door to the Appellant's chambers was slightly open, the handbag's contents were strewn on the floor and the Appellant was not in the chambers. Thirdly, the inventory was compiled in the Appellant's absence and the handbag was taken to the police station from her office in her absence. Fourthly, the evidence tendered was contradictory as to whether the Appellant's fingers were swabbed to confirm whether she had handled the recovered money or not. The Anti-Corruption Court ultimately held that there was no thread in the evidence for it to follow and there was no evidence that the Appellant solicited for money through the 1st accused, to give a favourable outcome. There was also no evidence that she received the money, given that Wilson Yegon was asked by the 1st accused to wait in Court 4, as he delivered the bribe. The ELRC reiterated these findings and, on its part, held that there was no reason to terminate the Appellant's employment.

[59] Looking at the record, we note that the Anti-Corruption Court went to great lengths to describe the loopholes in the case against the Appellant, which loopholes

we have outlined above. We also note that when put on his defence, the Appellant's co-accused claimed that the Appellant sent him to solicit money on her behalf from Yego, and further that he was informed at the police station that he would be released if he cooperated and said that he gave the Appellant the money. In addition, we have considered the report of the JSC Human Resource & Administration Committee on the disciplinary proceedings against the Appellant dated 4th June, 2018, the minutes of the disciplinary case heard on 5th March, 2018, the judgments of the superior courts below and the Respondents' response.

[60] To our minds, the circumstantial evidence relied on by the Respondents was:

a. The Appellant left her handbag and phone in her chambers without alerting the Magistrate-in-Charge which inferred that she left her chambers in a hurry to evade the EACC officers.
b. The Appellant walked to a nearby hospital instead of using her car.
c. The Appellant could not explain who opened her chambers, (despite the spare key being in the custody of the Executive Officer who would also share it with the cleaners and court clerks).
d. The Appellant could not explain how the money got into her handbag.
e. She was inconsistent as to whether she left her handbag on the table or in the drawer of her chambers.

[61] To our minds, the facts as outlined above cannot reasonably lead to the inference of guilt on the part of the Appellant. The Respondents seem to allege that the offence likely occurred without establishing a tangible level of real possibility. We are therefore inclined to agree with the ELRC that, cognizant of the decision of the Anti-Corruption Court and noting the chronology of events, there was nothing indicative that the Appellant's involvement was the only possible inference to be made in the circumstances. There was a notable and vital break in the chain of events that invariably deconstructs any notion that the Appellant's guilt was the only reasonable inference to have been made either by the trial court, the ELRC or even the JSC.

[62] Further, we note that in her application for review, the Appellant attached an affidavit sworn by Robert Cheruiyot on 21st September 2018 wherein he confirmed the Appellant's narrative. Considering that the Respondents indicated in the charge that the Appellant and Robert Cheruiyot were in agreement in soliciting a benefit from Wilson Yegon, we cannot fathom how this affidavit was said not to adduce any new or persuasive evidence speaking to the Appellant's innocence, or at the very least, call for further inquiry by the Respondents. The Respondents ought to have considered the evidence contained in the Appellant's application for review and reached a different finding.

[63] Closely related to the question of circumstantial evidence, is whether the Court of Appeal properly appreciated or applied the doctrine of double jeopardy. The Court of Appeal held that double jeopardy did not apply because the disciplinary process was not based on the Appellant's criminal culpability. The Respondents on their part submitted that it only applies to criminal proceedings, not civil or administrative proceedings. The Appellant, on her part contended that the two charges as framed by the Respondents have a common root with the criminal case and they raise substantially similar issues. She further submitted that Sections 18(1) to (3) of the Third Schedule of the JSA are normative derivatives of Article 50(20)(0) of the Constitution, which Article applies to civil, criminal and quasi-criminal disputes.

[64] The Black's Law Dictionary, 9th Edition defines 'double jeopardy' as ***"... being prosecuted or sentenced twice, for substantially the same offence."***

[65] In the *United States of America*, double jeopardy is captured in the Fifth Amendment to the US Constitution which reads as follows:

> ***"No person shall be held to answer for a capital, or otherwise <u>infamous crime</u>, unless on a <u>presentment</u> or <u>indictment</u> of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service***

in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is also provided for in the American Convention on Human Rights in the following terms:

"Article 8. Right to a Fair Trial

4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause."

[66] In the European context, prohibition against double jeopardy is enshrined in Article 4 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.117). It has been ratified by all Member States, save for Germany, the United Kingdom and the Netherlands. The Protocol reads:

"Right not to be tried or punished twice

1. ***No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.***

2. ***The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is***

evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. ***No derogation from this Article shall be made under Article 15 of the Convention."***

[67] In *Canada*, the Constitution Act, 1982 under the Canadian Charter of Rights and Freedoms provides for double jeopardy in the following terms:

"11. Any person charged with an offence has the right

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;"

[68] In ***R v. Van Rassel***, [1990] 1 S.C.R. 225, the Supreme Court of Canada held that double jeopardy is a principle of general application with more specific rules. They are:

a. *Autrefois acquit*-this is a special plea that rests with the plea of *autrefois convict* and pardon under Section 535 of the Criminal Code. It is established once the following conditions are proved:
    i. *The matter is the same, in whole or in part*; and
    ii. *The new count must be the same as at the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible then to make the necessary amendments. The charges need not be absolutely identical.* (See Section 537 of the Criminal Code)

b. The rule in the decision of the Supreme Court of Canada, *Kienapple v. R [1975] 1 S.C.R 729* is based on the broader principle of res judicata. It applies when two separate charges are based on the same

delict or cause so that one cannot be convicted of the second charge if they had been convicted on the first charge. Issue estoppel bars a court from deciding a matter that has already been the subject of a judicial decision.

[69] In *India*, double jeopardy is recognized in Article 20(2) of the Constitution, Section 300 of the Criminal Procedure Code, Section 40 of the Indian Evidence Act, Section 71 of the Indian Penal Code and Section 26 of the General Clauses Act, 1897. The elements of double jeopardy are also set out in the case of ***Vijayalakshmi vs Vasudevan (1994) 4 SCC 656*** as follows:

i. ***The accused has been tried by a competent court for the same offence or one for which he might have been charged or convicted at a trial, on the same facts;***
ii. ***The accused has been convicted or acquitted at the trial; and***
iii. ***Such conviction or acquittal is in force.***

[70] The Supreme Court of India reiterated the foregoing in the case of ***TP Gopalakrishnan vs The State of Kerala, Criminal Appeal Nos. 187-188 of 2017.*** In paragraph 28 of the decision, the Court considered what "same offence" means and held:

> ***"28. ... The term 'same offence' in simple language means, where the offences are not distinct and the ingredients of the offences are identical. Where there are two distinct offences made up of different ingredients, the embargo under Article 20 of the Constitution of India, has no application, though the offences may have some overlapping features. The crucial requirement of Article 20 is that the offences are the same and identical in all respects, vide State (N.C.T. of Delhi) vs. Navjot Sandhu (2005) 11 SCC 600."***

[71] In addition, in the case of ***Sangeetaben Mahendrabhai Patel vs State of Gujarat (2012 (7) SCC 621***, the Supreme Court of India held:

> "***24. In view of the above, the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 Cr.P.C. or Section 71 IPC or Section 26 of General Clauses Act, ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence."*** [Emphasis ours]

[72] Section 35(3)(m) of the Constitution of *South Africa* is similar to our Article 50(2)(o) of the Constitution, both speaking to the rights of an accused person. They both provide that "**every accused person has the right to a fair trial, which includes the right—not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."**

[73] In the case of the ***S vs Basson (CCT 30/03A) [2005] ZACC 10: 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC); 2007 (1) SACR 566 (CC),*** the Constitutional Court of South Africa cited the case of ***R v Manasewitz, 1933 A 165 at 173-4*** where the Court set out the 3 elements that establish the plea of *autrefois acquit*:

> ***"... I accept, for the purpose of these reasons, the following requisites to establish a plea of autrefois acquit, namely that the accused has been previously tried (1) on the same charge, (2) by a Court of competent jurisdiction and (3) acquitted on the merits. Obviously, an accused so tried must have been in jeopardy. The proposition is sometimes stated slightly differently thus: That the accused has been***

previously indicted on the same charge, was in jeopardy, and was acquitted on the merits." [Emphasis ours]

[74] This position was also applied in the case of ***S v Basson (CCT 30/03) [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC); 2004 (1) SACR 285 (CC)***.

[75] Article 14(7) of the ICCPR (1966) provides that **"[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".**

[76] *William Blackstone* in his ***Commentaries on the Laws of England*** *(Vol. 1V 18th Ed. 1829, Chapter XXVI)* states:

"First the plea of autrefois acquit or a former acquittal, is grounded on the universal maxim of the Common Law of England that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

[77] In the Kenyan context, Article 50 (2) (o) of the Constitution and Section 138 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya provide for the plea of *autrefois acquit and autrefois convict* which are founded on the doctrine of double jeopardy, that is, one must not be tried for an offence for which they have been previously acquitted or convicted. This doctrine of double jeopardy is based on the Latin maxim *nemo debet bis vexari pro una et eadem causa* which means that no man shall be put in jeopardy twice for the same offence. It is also founded on public policy that there ought to be an end to the same litigation. The High

Court (*Odero, J.*) in ***Nicholas Kipsigei Ngetich & 6 Others vs Republic***, Criminal Case No. 123 of 2010 [2016] KEHC 1507 (KLR) expounded it to be a protection afforded to an accused person from the prejudice of going through a second trial after the State is made privy to his/her entire defence and to also protect citizens from undue oppression by the State. The importance of double jeopardy cannot be overemphasized. In this connection, the High Court (*Gikonyo, J.*) in ***Johnson Kobia M'Impwi vs Director of Public Prosecutions***, Criminal Case 333 of 2018; [2020] KEHC 4685 (KLR) described it not only as a procedural defence but a *constitutional protection* against subsequent trial based on a prior acquittal or conviction. This Court has also had occasion to weigh in on this discourse in the case of ***Steyn vs Ruscone***, SC Application No. 4 of 2012; [2013] KESC 11 (KLR) where we posited that a party cannot present their dispute before one forum or court and subsequently present the exact dispute over the same subject matter before another forum, even where both fora have jurisdiction. Further, in ***Wetangula & Another vs Kombo & 5 Others***, SC Petition No. 12 of 2014 ;2015] KESC 12 (KLR), we held that Section 87(1) of the Elections Act Cap 7 of the Laws of Kenya, allows for electoral malpractice with a criminal underpinning to be prosecuted under the relevant criminal law process. This in itself does not violate double jeopardy since election proceedings are not in the same category of "trial for an offence" and are *sui generis* nature.

[78] Applying the foregoing to the issue at hand, we note that the ELRC, on its part, interpreted the fresh charges of 22nd August 2017 which it found to be dissimilar to those of 4th September 2015, to amount to double jeopardy. We disagree with the ELRC's exposition of double jeopardy. According to our reading and understanding of the Constitution, double jeopardy applies when there has been a previous conviction or an acquittal on a charge, not when 2 proceedings over the same cause are subsisting.

[79] Ordinarily, criminal proceedings may be prosecuted alongside civil proceedings. See ***Section 93A of the Criminal Procedure Code, Cap. 75 of***

the Laws of Kenya. However, Section 18(2) of the Third Schedule of the JSA provides as follows:

> ***"If criminal proceedings are instituted against an officer, proceedings for their dismissal upon any grounds involved in the criminal charge shall not be taken until the conclusion of the criminal proceedings and the determination of any appeal therefrom:***
>
> ***Provided that nothing in this paragraph shall be construed as prohibiting or restricting the power of the Chief Justice to interdict or suspend such officer".***

Against this background, the case of ***Mathew Kipchumba Koskei vs Baringo Teachers SACCO***, Cause 11 of 2012; [2013] eKLR lays outs the general principles applicable where there is a criminal element in a disciplinary case. However, given the specific provisions in the JSA, the said principles do not apply. To that end, we decline the Appellant's invitation to develop the said principles, which in any event emanate from a court of first instance.

[80] Furthermore, our understanding of Section 18(2) of the Third Schedule of the JSA is that the above provision prohibits the commencement of disciplinary proceedings during the pendency of criminal proceedings. The Black's Law Dictionary, 9th Edition at page 1324 defines proceeding as ***'the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.'*** The author further writes that *'proceeding'* concerning the court may include-

1. The institution of the action.
2. The appearance of the defendant.
3. All ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*.
4. The pleadings.

5. The taking of testimony before trial.
6. All motions made in the action.
7. The trial.
8. The judgment.
9. The execution.
10. Proceedings supplementary to execution, in code practice.
11. The taking of the appeal or writ of error.
12. The *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court.
13. The enforcement of the judgment, or a new trial, as may be directed by the court of last resort. Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 3-4 (2d ed. 1899).

In the charge of 4th September 2015, the Chief Justice directed the Appellant to give a written response to the charge within 21 days. Preparing a response is part of the disciplinary proceedings in view of the definition above. To that extent, therefore, we find and hold that disciplinary proceedings were indeed commenced against the Appellant contrary to the law. To this end, we agree with the Appellant and the ELRC, that the Chief Justice violated Rule 18(2) of the Third Schedule of the JSA.

[81] We have also set out above the offences in the criminal case and the charges drawn by the Respondents. Are they similar? To answer this question, the ingredients of the offences must be set out. In this connection, we find guidance in the ***TP Gopalakrishnan Case (Supra)*** and ***Sangeetaben Mahendrabhai Patel Case (Supra)*** where the Supreme Court of India held that ***"... The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence."***

[82] In the instant case, the charges in the criminal court were corruptly soliciting for a benefit, corruptly receiving a benefit and conspiracy to commit an economic crime. The Respondents, on the other hand drew charges to the effect that the

Appellant knowingly conveyed or permitted Robert Cheruiyot to convey the impression that he was in a special position to influence her as a Judicial Officer; the Appellant failed to exhibit respect to the rule of law, comply with the law, avoid impropriety and appearance of impropriety and acted in a manner that did not promote public confidence in the integrity and impartiality of the Judicial Service.

[83] The war against Corruption in Kenya has been incorporated in key government policies over the last three decades and several statutes have been enacted in consequence. Corruption under Section 2 of the Anti-Corruption and Economic Crimes, is defined as follows:

> *"'corruption' means-*
>
> *a) an offence under any of the provisions of sections 39, 44, 46 and 47; (Sections 44, 46 and 47 refer to bid rigging, abuse of office and dealing with suspect property respectively)*
> *b) bribery;*
> *c) fraud;*
> *d) embezzlement or misappropriation of public funds;*
> *e) abuse of office;*
> *f) breach of trust; or*
> *g) an offence involving dishonesty—*
> *(i) in connection with any tax, rate or impost levied under any Act; or*
> *(ii) under any written law relating to the elections of persons to public office;"*

Section 2 of ACECA defines economic crime to include laundering the proceeds of corruption, acting dishonestly or fraudulently with regard to the maintenance or protection of public revenue or public property, and failure to pay taxes, fees, levies or charges due to a public body. In addition, for purposes of going after unexplained assets, Sections 47(3) and 55(1) of ACECA define *corrupt conduct* as conduct that constitutes corruption or economic crime, whether it took place

before or after the commencement of the Act for as long as it constituted an offence at all material times.

[84] To our minds, the charges dated 22nd August 2017 read against the facts of the case constitute the same issue as the subject of the criminal charges. Considering the definitions set out above, we do not doubt that the offences/ issues in the cases are similar and we, therefore, agree with the Appellant that the Respondents contravened the principle of double jeopardy.

[85] On whether the *Appellant's counsel was denied a chance to be heard*, we note that neither of the Superior Courts below handled this issue despite it being raised in Petition No. E005 of 2020. Mr. Wambeyi Makomere represented the Appellant before the Respondents' disciplinary committee. The Respondents recognized his presence. The record reads:

> ***"Com. Ms. Mercy Deche: ...then the Commissioners will ask you any questions that they deem fit, which you will answer and after that, your lawyer need not say anything because you will have an opportunity to file submissions...***
>
> ***Hon. Judith Nyagol: Yes.***
>
> ***Com. Ms. Mercy Deche: ...but we welcome you to this session. However, if you need any clarification, you are not gagged from clarifying anything. So, Hon. Nyagol, tell us, we have not sworn you in as yet, sorry....***
>
> ***Hon Judith Nyagol: It is okay...***

The record further reads:

> ***"Com. Ms. Mercy Deche: Thank you. You wanted to say something, Counsel?***
>
> ***Mr. Wambeyi Makomere: Yes, Madam Chair, I just wanted to see if I can consult with her (Appellant) concerning that***

question because there are a few things that are – Probably to assist her finish.

Com. Ms. Mercy Deche: You can consult her at the end. Is that okay?

Mr. Wambeyi Makomere: Very well."

[86] Subsequently in the proceedings, although this excerpt may be construed to mean that Counsel was given a very limited role in the process, he was given the opportunity to address the disciplinary committee on the timelines for filing submissions. Could the foregoing reasonably be read to mean that the Appellant's counsel was denied audience? We think not. The Appellant's counsel was given audience. Further, he did not register any opposition to the directions issued by the committee.

[87] This then brings us to the next limb of the aspect of fair trial, and that is whether it was *prejudicial to fail to avail the witnesses*. It would appear that the Respondents relied predominantly on the judgment of the criminal court which was also the basis of the 'complaint'. They did not call any witnesses and did not produce any evidence. While it was upon the Respondents to elect which witnesses to call if any, it was upon them to prove their case and not leave it to conjecture or even worse, to shift the burden of proof to the Appellant. To that extent, we find that failure to avail witnesses was fatal to the Respondents' case, trial and ultimate decision.

(iv) Whether the Appellant was prosecuted for the charges of 4th September 2015 or those of 22nd August 2017.

[88] The Respondents' report on the disciplinary proceedings reads that the trial was on account of the charges dated 22nd August 2017. In addition, the proceedings of the disciplinary hearing held on 5th March 2018, the application for review dated 24th September 2018 and 'further' application for review dated 7th November 2018 indicate that the charges read out to the Appellant were those dated 22nd August

2017. The termination letter dated 24th August 2018, however read that the Appellant was dismissed based on the charges dated 4th September 2015.

[89] The Court of Appeal held that the Appellant was all along aware that she was facing a disciplinary hearing on account of the charges of 22nd August 2017 and that the Respondents erroneously indicated that they dismissed the Appellant from employment on account of the charges of 4th September 2015 as opposed to the charges of 22nd August 2017. Further, the court observed that, going by the chronology of events, the Appellant suffered no prejudice on account of the Respondents indicating that she was dismissed from employment on account of the charges of 4th September 2015.

[90] We disagree. The right to a fair hearing and a fair trial, as provided under the Constitution and the relevant laws, including the FAAA is clear. A person has a right to know the exact case, including charges, they are facing. This enables them to mount a defence, decide which witnesses to call, if any, and prepare adequately for the hearing. In the instant case, our understanding is that the disciplinary hearing was based on the charges dated in August 2017 but the Appellant was subsequently dismissed based charges dated in September 2015. While the Respondents indicate that the dismissal letter had an error in terms of the date of the charge, it is notable that to date, they have not issued an amended version. Secondly, the letter communicating the charges dated August 2017, spoke to 'fresh charges' but did not specifically speak to the fate of the charges of September 2015, which could still be pending, there being no evidence to the contrary. The Appellant was therefore, at best, left in limbo, not knowing which exact set of charges she was facing. The same was prejudicial to the Appellant's rights to a fair hearing or a fair trial.

(v) Whether the remedy of reinstatement is available to the Appellant.

[91] The JSA does not speak to the remedies available to a judicial officer who, after termination from employment, successfully challenges the said termination

before a Court of law. In line with the Latin maxim *generalia specialibus non derogant* and to allow for harmonious interpretation of the statutes, we find and hold that the provisions of the EA and ELRCA apply. Section 49(3) of the EA, as read together with Section 12(3)(vii) of the ELRCA, provides that the ELRC has the power to make a range of orders, including reinstatement within 3 years of dismissal, subject to such conditions as the Court thinks fit in line with any written law. A reading of Section 12(3)(vii) of the ELRCA provides that reinstatement is pegged on the court's discretion. In the case of ***Ferdinand Ndungu Baba Yao Waititu vs Republic***, SC Petition No. 2 of 2020; [2021] KESC 11 (KLR) we relied on the case of ***Mbogo vs Shah***; [1968] EA 93 to the effect that a court's discretion should only be interfered with where the court misdirected itself in some matter or where it is manifest from the whole case that the court was wrong in the exercise of its discretion.

[92] The Court of Appeal declined to issue an order of reinstatement because the statutory timelines had lapsed, a valid consideration set out in the ELRCA and the EA. The Appellant did not set out how, if at all, the Court of Appeal failed to exercise this discretion judiciously. We, therefore, shall not interfere with this finding.

[93] In the circumstances, the appeal is partially successful. In line with our decision in ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others,*** SC Petition Application No. 4 of 2012; [2014] eKLR, we are inclined to award costs to the Appellant.

H. ORDERS

[94] As we give our final orders, we note that the ELRC's orders referred to the *Respondent* as opposed to Respondents or, either the 1st or 2nd Respondent. That said, a perusal of the record reveals that there was no contest from the Respondents before the ELRC, the Court of Appeal or this Court with regard to which of the Respondents ought to have been sued or which Respondent was

required to make good the ELRC's judgment, as the 2nd Respondent is the Secretary of the 1st Respondent and acts on instructions of the 1st Respondent. Consequently, we make the following Orders:

1. ***The Amended Appeal dated 15th May 2024 succeeds in the following terms–***
    a. ***The Judgment of the Court of Appeal dated 23rd February, 2024 is hereby set aside*** **to the extent that it set aside the judgment of the Employment and Labour Relations Court.**
    b. ***The judgment of the Employment and Labour Relations Court dated 7th October, 2021 is hereby reinstated in the following terms:***
        i. ***A declaration is hereby issued that the dismissal of the Appellant was unfair and unjustified as provided under Section 45(2) of the Employment Act.***
        ii. ***The 1st Respondent shall pay the appellant Kenya Shillings Five Million (Kshs.5,000,000/=) for the unfair and unjustified dismissal which cut off the appellant's career prematurely.***
        iii. ***The 1st Respondent shall pay the appellant all withheld salary from the time of interdiction on 4th September, 2015 to the time of her dismissal on 21/8/2018.***
        iv. ***The 1st Respondent shall pay the costs of the suit plus interest at court rates with effect from the date of the judgment.***
2. ***The 1st Respondent shall bear the costs in the Court of Appeal and in this Court.***

3. ***For the avoidance of doubt, all other prayers in the appeal are dismissed.***

4. ***We hereby direct that the sum of Kshs.6,000/= deposited as security for costs upon lodging of this appeal, be refunded to the Appellant.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **22nd** day of **November, 2024.**

.....

M. K. IBRAHIM
JUSTICE THE SUPREME COURT

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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