

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(CIVIL DIVISION)**

**MISCELLANEOUS CAUSE NO. 106 OF 2023**

**NAKIBINGE LATIF ABUBAKAR ::: APPLICANT**

**VERSUS**

**ATTORNEY GENERAL ::: RESPONDENT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

[1] This application was brought by Notice of Motion under Sections 33, 36 & 37 of the Judicature Act Cap 13 (as amended), Rules 3(1)(a), (2) and 6(1) of the Judicature (Judicial Review) Rules S.I No. 71 of 2009, Order 52 rules 1 & 3 of the CPR seeking for;

- a) A declaration that the decision by the Judicial Service Commission to dismiss the Applicant from judicial/public service with immediate effect is illegal, irregular, disproportional, irrational, null and void.
- b) An Order of Certiorari quashing the said decision.
- c) An Order of Prohibition, prohibiting the Judicial Service Commission from implementing or otherwise taking further action on the impugned decision.
- d) An Order of Mandamus compelling the Judicial Service Commission to vacate and/or rescind the impugned decision.
- e) An order that the Respondent pays general and punitive damages to the Applicant.
- f) An order that Applicant may have any other relief as this Honourable Court may find appropriate.
- g) An order that the Respondent pays the costs of this application.

[2] The grounds of the application are set out in the Notice of Motion and the affidavit in support and rejoinder affirmed by **Nakibinge Abubaker Latiff**, the Applicant. Briefly, the grounds are that the Applicant has served as a Judicial Officer since the 8th day of May 2012, at the level of Magistrate Grade One and headed, as in-charge, over eleven Magistrate Courts as listed in the affidavit. He was currently stationed at Matugga Magistrates Court at the time of the present occurrence. He averred that he has diligently, honestly and professionally discharged his duties as a magistrate and manager at the named stations. He stated that sometime in the year 2017, while serving as Grade 1 Magistrate at the Chief Magistrates Court of Rakai, he granted a conditional reinstatement of a suit to the effect that the applicant therein deposits the costs that had been awarded upon dismissal of the suit as security for due performance of the ultimate decree after re-hearing of the main case. The costs had been taxed and awarded at UGX 7,088,700/= which the applicant therein deposited into the operations account of the court for onward transmission onto the security deposit account of the High Court.

[3] The Applicant stated that before he could hear the reinstated civil suit, the lawyers from M/S Matovu, Kamugunda & Co. Advocates that represented the plaintiff/respondent in the said suit demanded that the deposited money be paid out to them, instead of keeping it on the court account. Upon refusal to grant the above request, the said lawyers verbally complained to the Resident Judge of Masaka High Court who summoned the trial magistrate to appear with the case file. Upon perusal of the file, the Resident Judge advised the complainant to either appeal against the decision of the trial magistrate or seek the intervention of the Chief Magistrate for an administrative decision. The complainant then made a verbal complaint to the Chief Magistrate (His Worship Samuel Munobe) who verbally instructed the trial magistrate (the present Applicant) to withdraw the money and take it with the files to Masaka Chief Magistrates Court for further management; which the Applicant did. At

the Chief Magistrates Court at Masaka, the Office Supervisor and the Cashier respectively declined to receive the money citing lack of basis for the receipt and advised that the Chief Magistrate provides a written memo for the transfer of the money. The Applicant returned the files and the money to Rakai waiting for a formal communication from the Chief Magistrate. Upon a further complaint by the said lawyers, the Chief Magistrate wrote to the Applicant directing him to forward the case file for his perusal and directions. Upon receipt of the said letter, the Applicant delivered the file and the money to the Chief Magistrate's Chambers for him to acknowledge receipt since the substantive cashier at the court had left and had been replaced by a one Ms. Mabel (a daughter to the then Chief Magistrate), whom the Applicant did not believe to be a public servant at the time. The Applicant stated that the Chief Magistrate acknowledged receipt of the files and the money on a piece of paper which he attached and put on file at Rakai Court.

[4] The Applicant further stated that after sometime, the Chief Magistrate remitted the case files back to Rakai, but without the money and with no indication of his findings on the complaint or any further directions. Upon receipt of the files, the Applicant protested against further handling of the case files before the complaint and the scandalous accusations made against him by the lawyers were resolved. The lawyers had also written to the Chief Magistrate citing the same issues whereupon the Chief Magistrate re-called the files and the Applicant accordingly transferred the files back to Masaka. In December 2017, the Applicant was transferred from Rakai to Bundibugyo Chief Magistrates Court. On 4<sup>th</sup> September 2018, the Applicant received notice of a complaint from the Judicial Service Commission (hereinafter to be referred to as "**the Commission**" or "**JSC**") lodged by the same lawyers, accusing him of having misappropriated the said money. The Applicant responded to the complaint and after investigations by the JSC, he was charged together with

His Worship Munobe (the Chief Magistrate) upon allegations contained in the said complaint.

[5] The Applicant further stated that on 25<sup>th</sup> October 2021, he and His Worship Munobe were summoned for an interface with the Commission separately. He stated that during his interface with the Commission, he was encouraged by the members of the Commission to mediate and pursue an amicable settlement with the complainant so as not to miss out on the forthcoming promotional opportunities and that acting on the said encouragement, he held a negotiation with the complainant and agreed to pay the claimed monies in two installments with interest set by the Commission. He was subsequently directed to write a formal undertaking secured by two postdated cheques to which he obliged and the cheques are, to date, in custody of the Commission.

[6] Subsequently, the Applicant and the complainant were advised to execute a formal settlement and withdrawal of the complaint by the complainant. However, on 26<sup>th</sup> October 2021, when the Applicant went to deposit cheques arising out of his undertaking with the JSC, the Learned Attorney General advised the other members of the Commission not to accept the undertaking, but instead convict him arguing that the undertaking was evidence of guilt. The Applicant stated that acting on the above advice, the Commission retracted its earlier representations to him, declined to accept the undertaking and referred him to the Disciplinary Committee for trial. The Applicant was later summoned to appear before the Disciplinary Committee of JSC for plea taking and hearing, upon which he informed the Disciplinary Committee of the settlement and the withdrawal of the complaint by the complainant in writing and requested the Committee to close the matter under reconciliation. He stated that his undertaking to settle the complaint was not in any way an admission of the allegations against him in the complaint.

[7] The Applicant also stated that despite the fact that the Commission left the door for settlement of the complaint open and even shortlisted and allowed him to sit promotional interviews, he was on Friday 12<sup>th</sup> May 2023 called for an interface with the Commission and when he appeared, he was verbally informed that the JSC had made a decision to dismiss him from judicial service with immediate effect and that he was not entitled to say anything. The Applicant wrote, through his lawyers of M/S Fides Legal Advocates, requesting for a copy of the decision, which was only availed on 22<sup>nd</sup> May 2023.

[8] The Applicant averred that although the proceedings before the Disciplinary Committee of the JSC are required to abide the general principles of law applicable in Uganda, the entire process that led to his dismissal was tainted with illegality, irregularity, procedural impropriety, unfairness and injustice. He stated that the sentence that was imposed on him, without being heard in mitigation, was manifestly excessive, harsh and disproportionate in the circumstances. He concluded that a grant of the reliefs sought herein is necessary for not only remedying the injustices he has suffered, but also for the realization of fairness, equity, consistence and rationality in JSC's conduct of proceedings and decisions, and restoration of public confidence in the institution of the Judiciary and the JSC.

[9] The application was opposed through an affidavit in reply deposed by Mr. Mwebembezi Julius, the Registrar, Complaints, Investigations and Disciplinary Affairs of JSC, who stated that the decision of the Commission dismissing the Applicant from judicial service was arrived at lawfully, fairly and without any procedural irregularity or irrationality. He stated that on 28<sup>th</sup> August 2018, Mr. Fred Kamugunda of M/s Matovu, Kamugunda & Co. Advocates lodged a complaint with the JSC against the Applicant over refusing to release money amounting to UGX 7,088,700/= in relation to Civil Suit No. 1 of 2017 that had been handled by the Applicant at Rakai Court. It was indicated in the

complaint that the Applicant, being the trial magistrate, had ordered deposit of money on the operations account of the court which he had refused to release unless he had shared part of the money. The Commission wrote to the Applicant and asked him to respond to the allegations, which the Applicant did. The Applicant's response was communicated to the complainant and to His Worship Munobe who had been implicated in the response. The complainant reiterated his allegations and His Worship Munobe also made a response to the Applicant's allegations. The Commission then carried out investigations into the complaint, interfaced with the three persons concerned and referred the matter for handling by the Disciplinary Committee of the JSC.

[10] The deponent stated that when the matter came up before the Disciplinary Committee, the Applicant had no evidence that he had passed on the money to His Worship Munobe and the Committee found that a prima facie case had been established against the Applicant upon the charge of Abuse of Judicial Authority contrary to Regulation 23(m) of the Judicial Service Commission Regulations No. 87 of 2005. At the hearing of the complaint, the Applicant pleaded guilty to the charge, apologized to the Commission and informed the Disciplinary Committee that he had settled the matter amicably with the complainant. The deponent averred that the Applicant and the complainant reached the amicable settlement outside the Disciplinary Committee and without the participation of the JSC. He further stated that due to the gravity of the complaint, the Disciplinary Committee recommended to the Commission that the Applicant be severely reprimanded. However, upon consideration of the report of the Disciplinary Committee, the Commission unanimously decided to dismiss the Applicant from judicial service with immediate effect. He concluded that the decision to dismiss the Applicant was reached after according him a fair hearing.

[11] The Applicant made and filed an affidavit in rejoinder whose contents I have also taken into consideration.

### **Representation and Hearing**

[12] At the hearing, the Applicant was represented by **Mr. Abbas Kawaase Mukasa** and **Mr. Kassim Mpanga** while the Respondent was represented by **Mr. Mugisha Twinomugisha**. It was agreed that the hearing proceeds by way of written submissions that were duly filed by counsel. I have reviewed and considered the submissions in the course of determination of this matter. I will refer to the submissions as and when appropriate.

### **Issues for Determination by the Court**

[13] Two issues are up for determination by the Court, namely;

- a) Whether the application discloses any grounds for judicial review?**
- b) What remedies are available to the parties?**

### **Issue 1: Whether the application discloses any grounds for judicial review?**

[14] The amenability of this application for judicial review is not in issue. There is thus no dispute that the decision sought to be challenged is a decision made by a public body in a public law matter. Equally no contention was raised as to whether the Applicant had any alternative remedies under the law that he ought to have exhausted and he did not. As such, the application is properly before the Court for judicial review. Rule 7A (2) of the Judicature (Judicial Review) (Amendment) Rules 2019 provides that the “*Court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching the decision and that as a result, there was unfair and unjust treatment*”.

[15] In law, judicial review is concerned not with the decision but with the decision making process. Essentially, judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The duty of the court therefore is to examine the circumstances under which the impugned decision or act was done so as to determine whether it was fair, rational and /or arrived at in accordance with the rules of natural justice. See *Attorney General v Yustus Tinkasimmire & Ors, CACA No. 208 of 2013* and *Kuluo Joseph Andrew & Ors v Attorney General & Ors, HC MC No.106 of 2010*.

[16] It therefore follows that the court may provide specific remedies under judicial review where it is satisfied that the named authority has acted unlawfully. A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of procedural impropriety or unfairness). See: *ACP Bakaleke Siraji v Attorney General, HCMC No. 212 of 2018*.

[17] On the case before me, it is alleged by the Applicant that decision by the Judicial Service Commission (JSC) to dismiss him from judicial service was tainted with illegality, procedural impropriety and irrationality. I will consider each ground under a separate head.



## **The Ground of Illegality**

### **Submissions by Counsel for the Applicant**

[18] Counsel cited the case of *Matagala Valentine v Civil Aviation Authority & Another*, HCCM No. 100 of 2019 on the position of the law on what amounts to illegality and submitted that the JSC in purporting to continue with the disciplinary proceedings against the Applicant acted without jurisdiction, committed serious errors of law and acted ultra vires or contrary to Regulations 29 and 30 of the Judicial Service Commission Regulations, 2005. Counsel argued that Regulation 30(5)(a) requires discontinuation of proceedings and adopting the procedure under Regulation 29 where it appears at any stage of the disciplinary proceedings that the alleged offence if proved would justify a dismissal of the judicial officer. Counsel further argued that proceedings justifying dismissal of a judicial officer have to be commenced at the instance of either the Chief Registrar or Responsible Officer.

[19] Counsel for the Applicant further argued that upon withdrawal of the private complaint, the JSC arbitrarily skipped to comply with the requirement of **Regulation 30(5) (a) of S.I No. 87 of 2005**, which dictates for termination of the proceedings forthwith and reversion to the provisions of **Regulation 29 of S.I 87 OF 2005** which provide for such proceedings to be commenced by the Chief Registrar or the Responsible Officer. He argued that JSC could not proceed to apply their jurisdiction under Regulation 31 without complying with the preceding Regulations 29 and 30 of the same law under which they proceeded. Counsel prayed to the Court to find that the decision to dismiss the Applicant was in total disregard of the provisions and procedural steps under the Regulations.

### **Submissions by Counsel for the Respondent**

[20] Counsel for the Respondent cited the provisions of Article 148 of the Constitution of Uganda which grants the Judicial Service Commission powers to exercise disciplinary control over judicial officers and submitted that there was no need for further disciplinary hearing in the instant case on account that the Applicant had pleaded guilty and was convicted on his own plea of guilty. Counsel argued that the Applicant's contention that the Judicial Service Commission ought to have adopted the procedure set out under regulation 29 of the Judicial Service Commission Regulations 2005 to the effect that proceedings justifying dismissal of a judicial officer ought to be commenced at the instance of the Chief registrar or the Responsible officer was a deliberate misdirection by the Applicant. Counsel submitted that the provisions of regulation 29 of the Judicial Service Commission Regulations 2005 relate to where the judicial officer's misconduct is reported by the Chief Registrar or Responsible Officer whereas the complaint in the instant case was lodged by a member of the public.

[21] Counsel further submitted that the Judicial Service Commission is empowered to commence disciplinary proceedings against an officer under regulation 35 of the Judicial Service Commission Regulations 2005. Counsel stated that in the instant case there was evidence warranting the institution of disciplinary proceedings against the officer since it was evident that he withdrew money meant for a litigant and failed to hand it over or even account for it and that the subsequent withdrawal of the complaint after the Applicant had been proven guilty did not exonerate the Applicant. Counsel concluded that the Applicant's dismissal from judicial service was within the Judicial Service Commission's mandate and was not tainted with illegality.

### **Determination by the Court**

[22] Illegality has been described as the instance when the decision making authority commits an error in law in the process of making a decision or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. Lord Diplock in the case of *Council of Civil Service Unions v Minister for Civil Service (1985) AC 375*, made the following statement;

*“By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercised”.*

[23] A public authority or officer will be found to have acted unlawfully if he /she has made a decision or done something without the legal power to do so. Decisions made without legal power are said to be ultra vires; which is expressed through two requirements: One is that a public authority/officer may not act beyond its statutory power and the second covers abuse of power and defects in its exercise. See: *Dr. Lam –Lagoro James v Muni University, HC MC No. 007 of 2016*.

[24] In the instant case, the Applicant’s allegation is that the JSC acted contrary to the provision of rules 29 and 30 of the Judicial Service Commission Regulations, S.I No. 87 of 2005 in a situation where it became clear to them that the proceedings would lead to dismissal of a person from judicial office. It is argued for the Applicant that the Commission thereby assumed powers of the Chief Registrar or the Responsible Officer by commencing disciplinary proceedings against the Applicant where the initial complaint had been withdrawn.

[25] I will set out the provisions under Regulations 29 and 30 of the Judicial Service Commissions Regulations, S.I No. 87 of 2005 in as far as they are relevant to the argument raised by the Applicant. Regulation 30 of the said Regulations concerns institution of disciplinary proceedings in the Commission by the Chief Registrar or Responsible Officer in the case of a misconduct not justifying dismissal of a judicial officer. Regulation 30(5)(a) thereof provides that *“If at any stage during the proceedings taken under this regulation, it appears to the commission that the offence if proved would justify dismissal, the proceedings so taken shall be discontinued and the procedure prescribed in regulation 29 shall be followed”*.

[26] Regulation 29 provides for the procedure of institution of proceedings by the Chief Registrar or Responsible Officer in the Commission in the case of a misconduct justifying dismissal of a judicial officer. On the other hand, Regulation 35(1) provides that the “commission may, on its own commence disciplinary proceedings against a judicial officer”. Under sub-regulation (2), where the Commission opts to institute such proceedings on its own, it *“shall inform the Chief Justice before instituting disciplinary proceedings against a Judge or the Chief Registrar; and in the case of any other judicial officer, the commission shall inform the Chief Registrar or the Responsible officer”*.

[27] It is clear to me from the above provisions of the law that Regulations 29 & 30 of the Judicial Service Commission Regulations No. 87 of 2005 are applicable to proceedings in the Commission commenced by the Chief Registrar or the Responsible Officer. Complaints made to the Commission directly and proceedings instituted at the instance of the Commission on its own are governed by Regulation 35 of the Regulations which provides that the *“Commission may, on its own, commence disciplinary proceedings against a judicial officer”*. For purpose of managing the complaints in this category, among others, Regulations entitled *“The Judicial Service (Complaints and*

*Disciplinary Proceedings) Regulations S.I No. 88 of 2005*” were passed. The latter Regulations set out the procedure to be followed by the Commission in receiving and handling complaints.

[28] It is further clear to me that the procedure provided under regulations 29 and 30 on the one part, and under regulation 35 on the other, are exclusive of each other. The requirement under regulation 30(5)(a) is not and cannot be applicable where proceedings have been instituted pursuant to regulation 35 of thereof. It is also not true as perceived by the Applicant’s Counsel that the purpose of the requirement for the Commission to inform the Chief Registrar or Responsible Officer before instituting proceedings on its own is for the same proceedings to be taken over by the Chief Registrar or Responsible Officer. Neither is it correct that the said requirement has the effect of intersecting the procedures under regulations 29 and 30 on the one hand and regulation 35 on the other. It is, therefore, not true as submitted by Counsel for the Applicant that the present complaint ought to have been handled in accordance with regulations 29 and 30 of S.I No. 87 of 2005. The Commission acted within its jurisdiction and no instance of ultra vires or abuse of power has been proved to have been committed. The allegation by the Applicant based on the ground of illegality has not been proved by the Applicant and it fails.

### **The Ground of Procedural Impropriety**

#### **Submissions by Counsel for the Applicant**

[29] Counsel for the Applicant relied on the case of *Surgipharm (U) Limited v Uganda Investment Authority, HCCM No. 65 of 2021* and of *Council for Civil Service Unions & Others v Minister for Civil Service [1985] AC 374*, for the definition of what amounts to procedural impropriety. Counsel tailored their submissions on the four basic concepts that encompass procedural impropriety. Regarding the need to comply with the adopted (and usually statutory) rules for the decision making processes, Counsel argued that the

JSC acted illegally and irregularly by continuing with the proceedings leading to the applicant's dismissal in utter disregard of the statutory provisions of S.I 87 of 2005, thereby rendering itself the judge in its own case.

[30] Regarding the requirement for a fair hearing, Counsel submitted that the Applicant was dismissed without having his case heard, and was therefore deprived of his inherent right to a fair hearing. Counsel argued that despite having filed a written defence to the initial complaint, at the instigation of the JSC, the Applicant was encouraged to mediate and pursue an amicable settlement with the complainant which induced him to pause his lines of defence to the claim. Counsel stated that the Applicant never pleaded guilty but the JSC took his undertaking to amicably settle the complaint as evidence of guilt. When the Applicant was later summoned and appeared in expectation of a fair decision, he was only surprised to be told that the JSC had formed a decision to dismiss him in total contrast to the report of the Disciplinary Committee which recommended a lesser sentence of severe reprimand. Counsel argued that the Disciplinary Committee of JSC having convicted the Applicant on 24<sup>th</sup> May 2022, what was done on 17<sup>th</sup> May 2023 amounted to a fresh trial and change of the decision from severe reprimand to dismissal; without according the Applicant a fair hearing. Counsel further argued that the JSC was pre-occupied with a pre- informed decision to dismiss the Applicant based on an alleged and unproved plea of guilty as opposed to giving him an opportunity to substantiate his defence; which deprived him of his office without being heard on the merits of the case.

[31] On the requirement that the decision is made without any appearance of bias, Counsel submitted that the JSC, contrary to statutory procedures, acted as the judge in its own dispute and it naturally follows that JSC could not avoid being partial. On the requirement to comply with any procedural legitimate expectations created by the decision maker, Counsel submitted that

the impugned decision was vitiated by the unfair and prejudicial conduct of the JSC when it unduly reneged on its representations to the Applicant thereby depriving him of legitimate expectation of saving his name and career progress, causing him not only to lower his guard and abandon his written defence, but also exposing him to the double prejudice of losing his office and the monies paid as nuisance value for settlement of the complaint.

### **Submissions by Counsel for the Respondent**

[32] It was submitted by Counsel for the Respondent that the Applicant was accorded a fair hearing. Counsel submitted that the Applicant was duly informed of the complaint against him, given an opportunity to respond to it and an opportunity to interact with the Commission. Counsel stated that the Applicant voluntarily elected to settle the matter with the complainant amicably without the participation of the Commission. Counsel also stated that the Applicant pleaded guilty to the charge of Abuse of Judicial Authority contrary to Regulation 23 (m) of the Judicial Service Commission Regulations No. 87 of 2005.

[33] Regarding the requirement to comply with any procedural legitimate expectations created by the decision maker, Counsel submitted that the Judicial Service Commission is empowered to impose disciplinary penalties which among others include; dismissal, suspension, reduction in rank and that the penalty to be imposed by the Commission is prescribed by law and not an understanding between the Commission and the judicial officer. Counsel argued that the presumption that the Applicant had an expectation of some lesser sentence is gravely misconceived. Counsel further stated that the Commission considered the conduct of the Applicant in attempting to deny a member of the public the just benefits of the court's judgment by refusing to remit money that was deposited on the court's account and determined that it was conduct befitting of dismissal from judicial service.

[34] Counsel also submitted that the Applicant's amicable settlement of the matter was a cavalier attempt to subvert the ends of justice which the Commission surely took into account while arriving at the decision to dismiss him from judicial service. Counsel invited the Court not to unreasonably interfere with the exercise of discretion by the Judicial Service Commission as the same was exercised judiciously and with regard to established principles and public interest.

### **Determination by the Court**

[35] Judicial impropriety, as a ground for judicial review, has been defined to mean "the failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision." See: *Council of Civil Service Unions & Others v Minister for the Civil Service [1985] AC 374 Per Lord Diplock*. Under the law, procedural impropriety encompasses four basic concepts namely; (i) the need to comply with the adopted (and usually statutory) rules for the decision making process; (ii) the common law requirement of fair hearing; (iii) the requirement that the decision is made without an appearance of bias; (iv) the requirement to comply with any procedural legitimate expectations created by the decision maker. See: *Dr. Lam – Lagoro James Vs. Muni University (HCMC No. 0007 of 2016)*.

[36] The assertion by the Applicant is that he was not given a fair hearing and that the entire proceedings by the Commission did not adhere to the principles of natural justice. The record indicates that the charge that was communicated to the Applicant by way of a charge sheet dated 5<sup>th</sup> May 2021 was "Conducting yourself in a manner prejudicial to the good image, honor, dignity and reputation of Service" contrary to Regulation 23 (a) and principles 3.2 and 3.3 of the Uganda Judicial Code of Conduct (Annexure I to the affidavit in support). However, the Report of the Disciplinary Committee (Annexure K to the affidavit in reply) indicates that the Applicant was charged, tried and convicted of the



offence of “Abuse of Judicial Authority” contrary to Regulation 23(m) of the Regulations. I am aware that under regulation 29(7) of the Regulations, during proceedings before the Commission, a charge may be amended at any time of the proceedings as long as the amendment does not cause a miscarriage of justice. From the material before me, it not clear and is not stated anywhere how and when the charge was amended and whether the amendment was brought to the attention of the Applicant as is required by the rules of natural justice. There is, indeed, no evidence as to which charge the Applicant pleaded to. This raises an inference that the Applicant was convicted on a charge different from the one that was preferred against him. Such conduct amounts to breach of the principles of fair hearing and vitiates the resultant decision for being procedurally improper and un fair. This allegation by the Applicant succeeds.

[37] The Applicant further denied ever pleading guilty to any charge before the Commission. It was the duty of the Respondent to establish that the Applicant indeed pleaded guilty, as alleged, upon proper proceedings in that regard. No record of proceedings was produced by the Respondent to counter the Applicant’s denial that he pleaded guilty and that such a plea was ever taken and recorded by the Disciplinary Committee. Under the law, in absence of evidence to the contrary, the Applicant is entitled to be believed on his deposition. It follows, therefore, that in absence of evidence showing compliance with the procedure for plea taking, the subsequent proceedings would be procedurally flawed and improper.

[38] Rule 19 of the *Judicial Service (Complaints and Disciplinary Proceedings) Regulations S.I No. 88 of 2005* provides that “*Proceedings before the Disciplinary Committee shall be governed by general principles of law applicable in Uganda*”. Under the law, where a person is charged with an offence, the charge must be read to the person who must express that he/she has properly understood the

charge. Where a person pleads guilty to the charge, the court or tribunal must be satisfied that the plea is made voluntarily and is unequivocal. A plea of guilty is void if it is induced by promises or threats which deprive it of the character of a voluntary act. See: *Adan v Republic (1973) EA 445* and *Nsubuga Ali a.k.a. Cobra v Uganda, CACA No. 276 of 2017*. In *R v Cameron, 2014 ONSC 2093*, it was held that a court may accept a plea of guilty only if it is satisfied that the accused making it is making the plea voluntarily, and understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea and that the court is not bound by the agreement reached between the accused and the prosecutor.

[39] In the present case, despite the protest by the Applicant against having entered into any plea of guilty, no evidence by way of a record of proceedings was adduced to enable the Court ascertain the circumstances and manner in which the plea was taken in the present case. In absence of such evidence, I am unable to find that the law on plea taking was followed. The impression I pick from the Applicant's averments is that although he accepted to enter into a negotiation owing to a need on his part to participate in the promotional interview process, he did not unequivocally plead guilty to the charge against him. If this impression is wrong, it was supposed to be corrected by the Respondent who had access to the record of proceedings before the Disciplinary Committee. This did not happen. As pointed out above, even if the Applicant had pleaded guilty, which he denies, if the plea was motivated by a promise as alleged by the Applicant, it would still be a plea that was taken without compliance with the law on the subject. Such would still vitiate the proceedings as being procedurally flawed. This allegation by the Applicant also succeeds.

[40] The other alleged procedural flaw is that while the Disciplinary Committee that entertained the proceedings recommended a different sentence, without

any fresh trial, the JSC handed out a different sentence in breach of the rules of natural justice. Section 11 of the Judicial Service Act Cap 14 provides as follows;

***“Rules of natural justice.***

*In dealing with matters of discipline, and removal of a judicial officer, the commission shall observe the rules of natural justice; and, in particular, the commission shall ensure that an officer against whom disciplinary or removal proceedings are being taken is —*

- (a) informed about the particulars of the case against him or her;*
- (b) given the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose;*
- (c) where practicable, given the right to engage an advocate of his or her own choice; and*
- (d) told the reasons for the decision of the commission”.*

[41] The rules of natural justice require that a person who has been subjected to an inquiry by a particular body, in this case the Disciplinary Committee of the Commission, cannot be subjected to sanctions that were not part of the report of the relevant Committee without being notified, informed of the reasons of the departure and asked to respond to the circumstances leading to the departure. Such would tantamount to conducting proceedings by ambush which defies the rules of natural justice and the constitutional right to a fair hearing; both under common law and as provided for under Article 28 of the Constitution.

[42] In *Bakaluba Peter Mukasa v Nambooze Betty Bakireke, SC Election Petition Appeal No. 04 of 2009 [2010] UGSC 1 (31March 2010)*, quoting Black’s Law Dictionary, 6<sup>th</sup> Edition, the Court held that the right to a fair hearing connotes a hearing by an impartial and disinterested tribunal; a proceeding which hears

before it condemns, which proceeds upon inquiry, and renders judgment only upon consideration of evidence and facts as a whole. In my considered view, these tenets are supposed to be observed from the beginning to the end of the process. Rendering a decision that is not in consonance with the evidence and facts that were produced during the trial would constitute a breach of the right to fair hearing. This is what happened in the instant case which amounts to an instance of procedural impropriety and unfairness.

[43] The other allegation by the Applicant is that when he and the complainant appeared before the JSC, they were encouraged to explore alternative dispute resolution by way of mediation. Although the Applicant's averments to this effect were disputed by the deponent to the affidavit in reply, the latter did not indicate in his affidavit that he attended the particular proceedings. According to the Applicant, the said deponent did not attend the said proceedings. In absence of evidence showing that Mr. Mwebembezi Julius attended the said proceedings, he ought to have indicated in the affidavit the source of the information on which he based to dispute the fact that the Commission encouraged the parties to explore mediation. I am therefore persuaded to believe the Applicant's evidence in that regard.

[44] It follows, therefore, that the Commission having encouraged the parties to negotiate and reach an amicable settlement, and the parties having reached one, the Applicant operated under a legitimate expectation that the agreed settlement would be adopted or taken into account by the Commission. Indeed, the Disciplinary Committee in its report had taken the said settlement into account and had considered it as a mitigating factor leading to the sentence that they had imposed on the Applicant.

[45] In law, breach of legitimate expectation on the part of a party affected by a decision of a public body constitutes a ground of procedural impropriety or

unfairness. In *Bank of Uganda v Joseph Kibuuka & Others*, CACA No. 281 of 2016, the Court of Appeal, citing with approval the decision in *Council for Civil Service Unions & Others vs. Minister for Civil Service (supra)* held that the doctrine of reasonable expectation is ordinarily applicable in actions for judicial review. The Court held that in respect to the right to a fair hearing, the doctrine arises, among others, when a decision made by the decision maker affects another by altering rights or obligations of that person which are enforceable by or against him in private law, or depriving him of some benefit or advantage which he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do. The expectation inures until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment.

[46] Article 126(2)(d) of the Constitution provides that when adjudicating cases of a civil or criminal nature, the courts are, subject to the law, enjoined to promote reconciliation between parties. Application of alternative dispute resolution (ADR) is currently part of our law and is applied even in criminal cases of a capital nature through plea bargaining. In that regard, it should not be taken as strange that the Applicant agreed to hold a negotiation with the complainant towards reaching an amicable settlement of the matters subject of the disciplinary proceedings. This is especially so where the evidence by the Applicant, that has been believed by the Court, indicates that he was encouraged by the Commission to explore Alternative Dispute Resolution (ADR).

[47] As already pointed out, it is clear from the report of the Disciplinary Committee that the Commission was informed of the settlement and the fact that the Applicant had in fact met the terms of the settlement and the complainant had agreed to withdraw the complaint in the matter. The conduct

by the Commission of choosing to keep a blind eye on all these facts and circumstances amounts to a breach of the Applicant's legitimate expectation and constitutes a procedural impropriety. In that regard, therefore, I do not accept the submission by Counsel for the Respondent that the Applicant's amicable settlement of the matter was a cavalier attempt to subvert the ends of justice which the Commission surely took into account while arriving at the decision to dismiss him from Judicial Service. To the contrary, my finding is that the exploration and conclusion of an amicable settlement between the parties was well grounded both in law and on the facts. The amicable resolution process having featured prominently in the way the matter was conducted by the Commission, it could not be ignored or disowned at the tail end of the proceedings, and more so, without express reasons.

[48] In the premises, therefore, the Applicant has established that the decision by the JSC dismissing him from judicial service was reached in a procedurally improper and unfair manner upon the allegations that have been found by the Court as proved herein above. This ground for judicial review therefore succeeds.

### **The ground of Irrationality**

#### **Submissions by Counsel for the Applicant**

[49] It was submitted by Counsel for the Applicant that the decision to dismiss the Applicant from judicial service was devoid of justification, arbitrary, manifestly excessive and out of proportion thereby demonstrating irrationality and unreasonableness. Counsel cited the case of *Ndangwa Richard v Attorney General, HCCM No. 244 of 2017* to the effect that a decision is irrational if it is unreasoned, lacking in ostensible logic or comprehensible justification and offends the values of the rule of law. Counsel also cited the case of *Associated Provincial Picture Houses Limited vs. Wednesbury Corporation [1948]1 KB 223* on the elements of irrationality.

[50] Counsel submitted that in the instant case, the sentence meted out to the Applicant was disproportionate, harsh and unreasonable on account that the Applicant was never interdicted and/or suspended, he continued in service of the Judiciary with commendations of excellent performance from his supervisors. Counsel pointed out that the Disciplinary Committee had in its report acknowledged that it saw no need for the highest sentence of dismissal and recommended a severe reprimand premised on reasons expressed in their report. Counsel concluded that the JSC did not furnish any reasons for departing from the recommendations of its Disciplinary Committee which makes their decision unreasonable.

### **Submissions by Counsel for the Respondent**

[51] In response, it was submitted by Counsel for the Respondent that the decision of the Judicial Service Commission was reasonable and rational on account that the evidence adduced before the Commission showed that the Applicant withdrew the money from the court account and refused to hand it over and that his guilt was fortified by his amicable settlement of the complaint out of court by payment of the monies to the complainant and his subsequent plea of guilty to the Commission. Counsel argued that the circumstances of the case demanded that the Commission takes serious action to restore public trust in the institution of the Judiciary on account that the conduct of the Applicant was so injurious to the image of the Judiciary and any decision other than dismissal would have tainted the image of the judiciary. Counsel concluded that it was prudent that the judicial service commission issues a deterrent punishment that would prevent other judicial officers from engaging in duplicitous behavior.

### **Determination by the Court**

[52] In judicial review, irrationality refers to arriving at a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

person who had applied his mind to the question to be decided could have arrived at it. See: *Council for Civil Service Unions case (supra)*. In the *Dr. Lam – Lagoro case (supra)*, it was held that in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[53] In the present case, the decision of the Commission was attacked on this ground for having handed out a dismissal to the Applicant against the background of a recommendation by the Disciplinary Committee that the Applicant should be sentenced to a severe reprimand. Since the Disciplinary Committee exercises delegated authority of the Commission, there is no doubt that the Commission has the right and power to take or not to take a recommendation by the Committee. It is, however, expected under the law that where the Commission decides to depart from the findings and recommendation of the Committee that carried out the inquiry, the Commission does so with ample justification and transparency for such a decision to pass the test of reasonableness.

[54] Related to the concept of unreasonableness/irrationality is the doctrine of proportionality which has also been judicially accepted as part of the concept of judicial review. In *Ranjit Thakur v Union of India, 1987 AIR 2386*, the Indian Supreme Court held that proportionality as part of judicial review would ensure that even on an aspect which is otherwise within the exclusive province of the decision maker, if the decision as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. The Court held that all powers have limits and that irrationality and perversity are recognized grounds for judicial review. It further held that whereas the choice of punishment is in the jurisdiction and discretion of the tribunal, the sentence



has to suit the offence and the offender. It should not be vindictive or unduly harsh; it should not be disproportionate to the offence so as to shock the conscience and amount itself as conclusive evidence of bias.

[55] On the case before me, the Disciplinary Committee of the Commission appraised the mitigating factors in favour of the Applicant and in their exercise of discretion found and recommended that the Applicant (then offender) be sentenced to a severe reprimand. Without notice and in absence of a fresh hearing or assigning of any reasons, the JSC invited the Applicant and communicated to him not only a different sentence but the severest available under the applicable regulations. I agree with the Applicant and find that this was grossly disproportionate and would in the circumstances amount to irrationality or unreasonableness on account lack of proportionality of the impugned decision. The requirements that the sentence has to suit the offence and the offender; and that the sentence should not be vindictive or unduly harsh were breached by the Commission. This disproportionate exercise of power is sufficient to vitiate the decision of the Commission on the ground of unreasonableness. This ground of the application also succeeds to that extent.

## **Issue 2: What remedies are available to the parties?**

[56] In view of the above findings, the application by the Applicant has succeeded on grounds of procedural impropriety and irrationality or unreasonableness. The Applicant is thus entitled to the declaration and writs claimed in the Motion in the terms I will summarize hereafter. Let me, however, first pronounce myself on the question of general and punitive damages as prayed for by the Applicant.

[57] The law is that in judicial review, there is no right to claim for losses caused by the unlawful administrative action. Damages may only be awarded if the applicant, in addition to establishing a cause of action in judicial review,

establishes a separate cause of action related to the cause of action in judicial review, which would have entitled him or her to an award of damages in a separate suit. In that regard, *Rule 8(1) of the Judicature (Judicial Review) Rules, 2009* provides as follows;

*“8. Claims for damages*

*(1) On an application for judicial review the court may, subject to sub rule (2), award damages to the applicant if,*

*(a) he or she has included in the motion in support of his or her application a claim for damages arising from any matter which the application relates; and*

*(b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.”*

[58] In that regard, the position is that the additional cause of action which may be added to an application for judicial review may include a claim for breach of statutory duty, misfeasance in public office or a private action in tort such as negligence, nuisance, trespass, defamation, interference with contractual relations and malicious prosecution. See: *Three Rivers District Council v Bank of England (3) [2003] 2 AC 1; X (Minors) v Bedfordshire County Council [1995] 2 AC 633; and Fordham, Reparation for Maladministration: Public Law Final Frontiers (2003) RR 104 at page 104 -105.*

[59] In the instant the case, the reliefs available to the Applicant in the present circumstances are capable of being satisfied by grant of the orders made in judicial review. No additional cause of action that would warrant an award of any damages has been established. I do not find any reason for making any consideration over the claim for award of any damages. Regarding costs, however, given that the application by the Applicant has succeeded, the Applicant is entitled to costs of the application.

[60] In all, therefore, the Applicant has succeeded on his application and the following declaration and orders are accordingly granted;

- a) A declaration that the decision by the Judicial Service Commission dismissing the Applicant from judicial service with immediate effect was reached in a procedurally improper manner and was disproportionate in the circumstances.
- b) An Order of Certiorari quashing the said decision of the Judicial Service Commission.
- c) An Order of Prohibition, prohibiting the Judicial Service Commission or any other authority from implementing the impugned decision.
- d) An Order of Mandamus compelling the Judicial Service Commission to vacate and/or rescind the impugned decision and to reinstate the Applicant to his judicial office as at the time of the impugned dismissal.
- e) An order for payment of arrears of the Applicant's remuneration from the time of his dismissal until he is placed back on the Judiciary pay roll.
- f) An order that the Respondent pays the costs of this application to the Applicant.

It is so ordered.

***Dated, signed and delivered by email this 27<sup>th</sup> day of October 2023.***



**Boniface Wamala**

**JUDGE**