



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO.16 OF 2016

IN THE MATTER OF ARTICLES 2, 22, 23 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 27(1), (2),(4), 28,29(d), 35(1), 47(1),(2) AND 50 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JAPHET JESANGA SONGOK.....PETITIONER

AND

THE DIRECTOR GENERAL

NATIONAL INTELLIGENCE SERVICE.....RESPONDENT

JUDGMENT

1. **JAPHET JESANGA SONGOK** (the petitioner) was until his dismissal was an officer at **National Intelligence Service (NIS)**, he had prior worked with the police service, and later with Special Branch. He filed this petition against **THE DIRECTOR GENERAL**

NATIONAL INTELLIGENCE SERVICE (the respondent) is the overall in-charge of the National Intelligence service.

2. The petitioner states that he has travelled overseas for both presidential security duties and other assigned duties. His passport was tampered with without his knowledge and a fake stamp was affixed thereto. The same was discovered when he got arrested at **ARMSTERDAM, SCHIPOL AIRPORT** as he was being cleared to join a connecting flight to **GERMANY** and later to **ITALY**. He got detained for three days before being deported. This incident gave rise to disciplinary proceedings against him. He lost in the first hearing and appealed against the said decision, having dispatched his appeal to the respondent via G4S courier services. He lost his job after the disciplinary proceedings and since he could not gain access to the NIS he had to get a response from the respondent by petition.

The Petition

3. It is his petition that failure of the respondent to release the results has created anxiety and he cannot seek for the certiorari order if time lapses. He averred that his rights had been violated more specifically Article 27(1), (2), (5), 28, 29(d) &(f), 35(1) and 50 of the Constitution.

4. He prayed for the following reliefs pursuant to Article 20 & 22 as read with 23(3) of the constitution:

a) That an Order of Mandamus do issue compelling the Respondent to release the petitioner's results and/or verdict of the second appeal without further delay.

b) That declaratory orders do issue to the effect that the date on which the decision on appeal is released to the petitioner be the date time starts to run for the purpose of obtaining prerogative Orders if any irrespective of the date of the decision.

c) That Declaratory Orders do issue that the rights and freedoms of the Petitioner under Articles 27(1), (2), (5), 28,29(d), 35(1), 47(1), 47(2) and 50 of the Constitution of Kenya 2010 have been violated.

d) That an order for compensation do issue and that inquiry as to the quantum thereof be gone into.

e) That this honorable court do exercise its powers under Article 23(3) of the constitution of Kenya, 2010 to issue any other appropriate relief it shall deem just and expedient to grant.

f) Costs of this petition be awarded to the petitioners.

5. The said petition was supported by his statement where he deposed further that his dismissal from office was harsh, malicious and was a miscarriage of justice. This undue delay has caused anxiety to his family and that it amounts to psychological torture. He had lodged his second appeal on time having lost the first. The continued silence has violated his inherent dignity as nobody wants to associate with him. He has been denied access to the NIS headquarters and his phone calls to the Director of Administration remain unanswered. The only way to get a response was through filing of this petition.

RESPONSE

6. The respondent through its Human Resource Officer Christopher Okello averred that he also handles disciplinary cases. The petitioner was appointed on 1.7.2001 subject to him accepting the terms and conditions and the regulations of the NSIS Act no.11 of 1998. The National Security Intelligence Service Disciplinary Rules and Regulations (DRR) established the procedure in dealing with disciplinary issues and even dismissal for officers found guilty of the offence. The petitioner affixed fake stamps to be attached to his passport and the allowance issued to him was never returned. He was arrested and detained on 12.4.2015 in Germany when he had gone for official duties.

7. Upon coming back disciplinary proceedings were commenced. The petitioner chose to request for early retirement but the same was not considered. He was dismissed from work after considering all evidence and his defence. He was found guilty of the following:

a) Fraudulently obtaining funds contrary to section 2.1(xi) of DRR.

b) Signing, forging and making false statement in an official document contrary to section 2.1(xiv) of DRR.

c) Breach of service Code of conduct contrary to section 2.1(xv) of DRR.

d) Engaging in gross misconduct contrary to section 2.1(xx) of DRR.

The petitioner was notified of the dismissal and right of appeal vide a letter dated 31.7.2015. The petitioner appealed against the decision of the Divisional Disciplinary Committee to the Service Appeal Board who upheld the dismissal and the same was communicated to the petitioner vide a letter dated 28.9.2015. The petitioner appealed against the second appeal but still his request was declined since he had not raised any new evidence to set aside the decision. He further averred that the petitioner was occasioned a fair hearing in accordance with the NIS Act, Service Disciplinary Rules and Regulations and the NIS Terms and Conditions of Service. Finally he urged the petition be dismissed. His further affidavit dated 5.9.2017 he deposed that the petitioner's advocate was supplied with documents used to reach the decision in dismissing the petitioner.

8. The petitioners further affidavit is based on allegations that there was no fair hearing. The offence in question was committed by Mr. Abuga Mosoti. He was not given time to prepare and respond to the notice to show cause. His second appeal has never been heard since the same was directed to the Director General NIS, and the dismissal has caused him to lose his pension.

Petitioner's submission

9. It was counsels submission that the respondents action not to release the results on time may paralyse his capability to seek for further legal redress such as certiorari. Under Article 27(1) he was equal before the law and has a right to equal protection. He has been unable to seek employment elsewhere since the potential employers want the outcome of the appeal. Under Article 27(2) equality includes the full and equal enjoyment of all rights and fundamental freedoms, he is yet to receive the certificate of service which shall enable him to get employment elsewhere.

10. In addition to the above, Article 27(5) prohibits discrimination against a person, the results of Mosoti Abuga have been released but his not yet. Under Article 28 his dignity should be respected and protected which is not the case, the silence from the respondent on the results is in violation of this and the common man cannot associate with him because of having an issue with the NIS. He has been subjected to psychological torture contrary to Article 29(d). He has been treated in a cruel manner contrary to Article 29(f). Under Article 35(1) his right to access information has been violated since he does not know the outcome of the second appeal. Further that no service Appeals Board was ever constituted to hear his second appeal implying his second appeal did not reach the Director General NIS.

11. The petitioner sneaked in judicial review submissions averring that he was not involved in the fake stamping but his colleague Abuga Mosoti and Mr. Bore the finance officer, but went ahead to dismiss him. He was not given the disciplinary Rules and Regulations (DRR) 2007 contrary to section 25 of the NIS Act, 2012. This was so because of the restriction by section 79(2) which prohibits the regulations from being published.

12. In addition to this that any offence involving the Kenyan passport is punishable under the Kenyan Citizenship and Immigration Act, 2011 under section 54(1)(c) which states as follows:

“A person who knowingly uses or has in his possession a forged passport, certificate of registration, visa, foreign person certificate work permit, residence permit, pass, written authority, consent or approval or a which has been altered or issued without lawful authority, or a passport or travel document or similar document in which a visa, or endorsement has been forged, or altered or issued without lawful services.” commits an offence and the punishment for such is a fine not exceeding five million

shillings or to imprisonment for a term not exceeding five years or both. He urged that the offence he was found guilty was not related to the passport issue.

13. In addition to this his right to Article 25(c) had been infringed on and his right to be presumed innocent unless the contrary is proved was breached.

14. Finally counsel urged the court to issue an order of mandamus to compel the respondent to consider and determine the second appeal as it is a public body and has a duty as imposed by section 14(10) of the NSIS Disciplinary Rules and Regulations of 2007. The court was referred to *Kenya National Examination Council v. Republic* (1997) eKLR where the court stated,

“the order for mandamus is of a most extensive remedial nature and is in form of a command issuing from the high court of justice, directed to any person, Corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Respondent’s submission

15. Counsel urged the petition did not raise issues in relation to violation of one’s breach of constitutional rights. When there is breach of these rights one has to specifically plead and prove. In *Anarita Karimi Njeru v. The Republic* (1976-1980) KLR 1272, Trevelyan and Hancox JJ (as they were then) stated as follows;

“ If a person is seeking redress from the high court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed.”

16. The same sentiments were upheld in the court of appeal decision in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Ors* [2013] eKLR and in *Northern Nomadic Disabled Person’s Organization (NONDO) v. Governor County Government of Garissa & Anor* (2013) eKLR. The petitioner failed to provide the particulars of violations against him. The result of the second appeal which he called nature of injury, he did not give evidence in support of the same. The decision of the second appeal was sent to the petitioner vide a letter dated 1.7.2016 which the petitioner denies having received. The address on this letter is the address used by the petitioner in his petition and other correspondence letters as shown. The postal rule in *Bryne v. Van Tienhoven* (1880) LR 5 CPD 344 applies where the contract becomes complete the moment the letter accepting the offer is posted. The declaratory order cannot be granted since the result of the second appeal was sent to the appellant’s advocate on 18.4.2017 if the court was to grant the order and time started running.

17. Compensation and inquiry into quantum could not be granted since that comes only if the court finds there was violation of right.

18. Finally that parties are bound by their pleadings and it was necessary for the court to refer to *Adetoun Oladeji (Nig) Ltd v. Nigeria Breweries plc* S.C 91/2002 where the Supreme Court of Nigeria stated that parties were bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

ANALYSIS

19. The court has referred to the petition, the statement in support, the replying affidavits; further affidavits, the submissions and authorities relied on and has formed the following issues.

- a) *Whether a judicial review order can be granted in a petition*
- b) *Whether the petitioner’s right have been violated*
- c) *If so is he entitled to compensation and the reliefs sought?*

Violation of rights and freedom in the Constitution

20. The petitioner herein filed a petition alleging that his fundamental right to information had been breached and that it was causing him psychological torture. For a petitioner to succeed in such a petition, one has to demonstrate the provisions of the Constitution that have been violated and the manner of the violation as established in *Annarita Karimi Njeru v. The Republic* (Supra).

Whether there was violation of Article 27

21. The petitioner contends that clause 1,2 and 5 of Article 27 was violated.

Equality and freedom from discrimination

- (1) *Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

22. The petitioner in regards to Article 27(1) contends that he could not plan his affairs for the reason that the respondent was withholding his results of the appeal. The respondent in their replying affidavit annexed a letter dated 31.7.2015 informing the petitioner of his dismissal. Also there is a letter dated 1.7.2016 notifying the petitioner the refusal of his second appeal. The letter was addressed to the petitioner herein where reasons are given for the decline of his second appeal. The same read as follows; “*After due consideration of your petition, it has been noted that there are no new grounds/ mitigation to warrant constituting service Appeals Board to hear and determine your second appeal on the matter in line with section 14.10 of the NSIS Disciplinary Rules and Regulations of 2007*”

The petitioner denied ever receiving such a letter even after his advocate wrote to the respondent requesting to be furnished with some documents.

Whether there was violation of Article 28

23. The petitioner averred nobody wanted to associate with hm. There is no illustration or evidence that indeed he has been isolated by people. A mere utterance without proof was fatal on his part. On who alleges has to prove. Article 28 provides that, “*Every person has inherent dignity and the right to have that dignity respected and protected.*”

The petitioner has failed to demonstrate the violation.

Whether there is violation of Article 29 (d) & (f)

24. The petitioner contends he was being kept in the dark by the respondent, an allegation denied. This has led to psychological torture. The respondent in their replying affidavit and as demonstrated above annexed the two letters of dismissal and the letter dated 1.7.2016 informing him that his reasons for an appeal were not sufficient to warrant formation of the Service Appeals Board. As it stood at then, it implied the petitioner had been dismissed from work.

Whether there is violation of Article 35(1)

25. Article 35(1) provides as below.

(1) Every citizen has the right of access to—

. (a) information held by the State; and

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

The petitioner had the right to know the outcome of the second appeal and which he says the respondent had failed. However as seen from above the respondent informed the petitioner that a second appeal could not be constituted.

Whether there was violation of Article 50

26. Article 50 provides as follows;

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

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

(a) to be presumed innocent until the contrary is proved;

The petitioner contends that his hearing by the respondent was not fair. It was already predetermined and he was not given time to prepare for his defence. The petitioner was governed by the National Security Intelligence Service Disciplinary Rules and Regulations (DRR 2007) which the respondent avers to have used during the hearing and in decision-making. The petitioner was served with a show cause letter dated 2.7.2015 which was pursuant to his detention in Amsterdam in the month of April 2015 while in transit to Germany on official duties which had been occasioned by an anomaly which was detected in his passport. A day notice was too short for the petitioner to prepare his defence. That was the genesis of the petitioner’s misfortunes. On 3.7.2015 the petitioner responded back affirming that the trip to France did not materialize, but the finance officer MR. Bore authorized the payments and an officer Mr. Abuga Moseti had affixed the fake stamps. That the two were to blame for this anomaly.

27. The summary report by the Operational and Technical Services Divisional Disciplinary Committee meeting held on 1.7.2015 had found both Mr. Abuga and the petitioner to be guilty of the offences charged and that is when the petitioner was issued the notice to show cause. Then this court finds that there was no discrimination against the petitioner since the party he cited as an accomplice was also summoned though not in the same meeting. In min.4/2015 held on 25.8.2015 it shows the director of OTS appointed a Board of Inquiry to investigate the circumstances that led to the petitioner's arrest, detention and deportation. All these show that there was due procedure that was followed and the petitioner cannot allege to have been denied a fair trial.

28. Clause 2.1 xi and xiv of the DRR provides as follows,

“An officer who commits any of the following breaches of discipline shall be subject to an inquiry as laid down in Article 3 of these rules and regulations.. Fraudulently obtains or misuses NSIS property, funds or is in improper possession of any NSIS property and when one signs or makes any false statement in any document or official record.”

The petitioner was found to be guilty of the following:

I. *Fraudulently obtaining funds contrary to section 2.1(xi) of the Disciplinary rules and Regulations (DRR) 2007*

II. *Signing, forging and making false statements in an official document contrary to section 2.1(xiv), Disciplinary Rules & Regulations (DRR) 2007*

III. *Breach of service code of conduct contrary to section 2.1(xv) of disciplinary Rules & Regulations (DRR) 2007*

IV. *Engaging in gross misconduct where he embezzled service funds contrary to section 2.1(xx), Disciplinary Rules and Regulations (DRR) 2007.*

29. He had appealed against this decision but the same appeal failed. He appealed the second time but was informed there was no new evidence that would warrant formation of an appeals board. However he denied ever receiving such information. In **Dry Associates Limited vs. Capital Markets Authority** [2012] eKLR 180 where the Judge stated “fairness” in the exercise of its functions that:

“fairness does not necessarily require a plurality of hearings and representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be easily sacrificed.”

As illustrated above the petitioner could not have been given a fair trial if his appeal had not been considered.

Whether Judicial Review orders could be granted

30. In view of this the petitioner decided to seek for judicial review yet the same was not pleaded in the petition itself. Even if he had pleaded, can review orders be granted in a petition. The petitioner brought in issues in relation to judicial review. He averred that he was not issued a copy of the Disciplinary Rules and regulations (DRR) 2007, section 79(2) of the NIS Act 2012 provides as below, “Regulations made under this section shall not be published in the gazette but shall be notified to the members of the service to whom they apply in such manner as the director-General shall determine.” The petitioner contends that this meant that the decision was already predetermined. If he could have read the copy he could have prepared his appeal well. As stated above one does not have to go through many hearing to establish fair trial, the respondent had already demonstrated due procedure was followed.

31. Judicial review was defined as follows in, **Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd.** In that case, the Court of Appeal held that: “Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

32. The High court in **Rv. IEBC ex parte NASA Kenya & 6 Ors** [2017]eKLR upheld the decision Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**,[20] as hereunder:-

“We have considered the rival submissions on the issue of an alternative remedy. The respondents’ submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the 2010 Constitution. The law has now changed and the provisions of Article 22 (3) and 22 (4) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and Section 7 (1) (a) and (2) of the Fair Administrative Action Act suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by Petition under the Rules made pursuant to Article 22 (3) of the Constitution. (See Legal Notice No. 117/2103 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013).

52. Of significance is Section 5 (2) of the Fair Administrative Action Act which stipulates that:

(2) Nothing in this section shall limit the power of any person to –

a. (a)....

b. *apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or institute such legal proceedings for such remedies as may be available under any written law.*”

53. Article 47 of the Constitution as read with the provisions of Section 5 (2) of the Fair Administrative Action Act establishes a non-exclusive approach to challenge of administrative action. The section permits bifurcation or a split approach for remedies. One approach is by way of statutory judicial review under the Act; the other is through proceedings for any other remedies as may be available under the Constitution or any written law. Subject to Section 9 (2), and (4) of the Fair Administrative Action Act, the two approaches are not mutually exclusive. The bifurcated and non-exclusive nature of proceedings for remedies must be read in the context of Article 47 of the Constitution and Section 12 of the Fair Administrative Action Act. The common law principles of administrative review have now been subsumed under Article 47 Constitution and Section 7 of the Fair Administrative Action Act. In this regard, there are no two systems of law regulating administrative action - the common law and the Constitution - but only one system grounded in the Constitution. The courts' power to statutorily review administrative action no longer flows directly from the common law, but inter alia from the constitutionally mandated Fair Administrative Action Act and Article 47 of the Constitution.

54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in Section 2 (a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in Articles 47 and 10 (2) (c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in **Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR** it is clear that they -Articles 47 and 50(1)- have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases."

33. This court is guided by the above decision. The position would have been the same if the petitioner would have pleaded for the reliefs, failure to then this court hand is tied. As stated in *Adetoun Oladeji (NIG) Ltd*(supra) referred by counsel for the Attorney General parties are bound by their pleadings and thus judicial review can not be granted in this petition.

34. The petitioner has failed to demonstrate violation of his right. The petition has no merit.

DELIVERED DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MARCH 2019

H. A. OMONDI

JUDGE