



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 14 OF 2017**

**JOHN MACHARIA KIMUNDU.....APPELLANT**

**VERSUS**

**NAKURU COUNTY POLICE COMMANDER....RESPONDENT**

**JUDGMENT**

1. After duly obtaining leave of the Court, the Ex Parte Applicant has brought the present Notice of Motion Application seeking the following prayers:

- 1) *That the Application be and is hereby certified as urgent and he heard on urgent basis.*
- 2) *That an order of Certiorari be issued to move into the High Court and to call the proceedings, findings and decisions in Bondeni Inquiry File no. 1 of 2017 – Nakuru for purposes of quashing the decision.*
- 3) *That an order of certiorari be issued to move into the High Court and to quash the decision made by Joshua Omukata OCPD Nakuru in Bondeni Inquiry File No. 1 of 2017 – Nakuru*
- 4) *That an order of Certiorari be issued to move into the High Court and to quash the Legal Notice No. 90 (1)/2015 dated 24<sup>th</sup> 2017 where in the Applicant is required to Show cause why he should not be charged in Orderly Room Proceedings.*
- 5) *That this honourable court be pleased to issue an order directing Mr. Isaack Kegode OCPD Njoro Division to supply the Applicant with the certified proceedings, findings and decision in Bondeni Inquiry File No. 1 of 2017 – Nakuru*
- 6) *That costs of this matter be borne by the Respondents.*

2. The Application was opposed by the Honourable Attorney General on behalf of the Respondents. The Honourable Attorney General filed a Replying Affidavit sworn by Hassan Barua, the Nakuru County Police Commander. The Replying Affidavit was sworn on 17/10/2017 and filed on the same date.

3. Under the directions of the Court, the parties filed Written Submission and appeared before me for oral highlighting. Neither party found it necessary to orally highlight, however, as each relied wholly on their Written Submissions.

4. The basic facts of the case are as follows. The Ex Parte Applicant is a Police Officer of the rank of Inspector of Police. He says that on 31/12/2017, he and two junior colleagues were engaged in an exercise aimed at preventing a prisoner from escaping from custody. During the operation, he says he sustained serious injuries on the lower abdomen, left thigh and appendix lounge (sic). He says that the Police opened investigations vide Bondeni Inquiry File No. 1 of 2017. The culmination of the investigations was a recommendation by Mr. Joshua Omukata SSP, who was the Nakuru OCPD to subject the Ex Parte Applicant to Orderly Room Proceedings. This recommendation was followed by the superiors in the National Police Service and Legal Notice to Show Cause was served on the Ex Parte Applicant informing him of the intention to charge him in the Orderly Room Proceedings with the offence of discharging a weapon without reasonable cause contrary to section 8892, sub-regulation 1(o) of the National Police Service Act, 2011.

5. The Ex Parte Applicant maintains that the investigations were not properly done. He impugns the fact that the investigations were done by SSP Omukata who, he says, is also a witness in the case. He argues that he has not been supplied with the proceedings, findings and decision of the inquiry and that the intended Orderly Room Proceedings are vexatious and only meant to embarrass him. He therefore wants the recommendation to charge him in the Orderly Room Proceedings as well as the Legal Notice No. 90(1)/2015 dated 24/05/2017 to be quashed.

6. The Respondent's affidavit, on the other hand, contains the following additional facts:

- a. That, indeed, on 29/09/2016 a suspect in Police detention escaped under unclear circumstances.
- b. That it was suspected one Karanja had aided the suspect to escape and that the Ex Parte Applicant summoned two junior officers to assist him in apprehending the said Karanja.
- c. That when the three officers confronted Karanja, he drove off and that the Ex Parte Applicant, then, drew his pistol and fired one round of ammunition which hit the rear of the motor vehicle. It ricocheted back and hit the Ex Parte Applicant causing him injuries.
- d. That the Ex Parte Applicant did not follow the laid down procedures in reporting the incident and opening an inquiry file on the escape of the prisoner from lawful custody or to take any action against the said Karanja.
- e. That this misconduct led to the opening of an inquiry led by SSP Omukata. At the end of the inquiry, SSP Omukata recommended that the Ex Parte Applicant faces two charges in Orderly Room Proceedings:
  - i. Discharge of a weapon without any reasonable cause contrary to section 88(2) of the Eighth Schedule to the National Police Act; and
  - ii. Neglect to send any report contrary to section 88(2) and (11) of the Eighth Schedule to the National Police Act.
- f. That the inquiry file and recommendation were sent to the Regional Coordinator who forwarded it to the Deputy Inspector General of Police. The DIG accepted the recommendation that the Ex Parte Applicant faces the charges.

7. The parties filed Written Submissions pursuant to the Court's directions. Neither party orally submitted.

8. As far as I can understand the Written Submissions, the Ex Parte Applicant seems to be challenging the Orderly Room Proceedings as inherently violative of the rules of natural justice. He obliquely submits that "if there is an investigation which do (sic) reveal an offence within the review (sic) of the Penal Code then the best this (sic) to do is to have the application presented in a competent court of law not committees who have conducted an inquiry and attempt to hijack the process with a biased mind." The Ex Parte Applicant argues that Orderly Room Proceedings are draconian and intended at only reaching one decision: to dismiss the Ex Parte Applicant from the force.

9. The gist of the Respondent's response is that the investigations were properly conducted and that if the Ex Parte Applicant has any complaints thereon, he can raise them during the Orderly Room Proceedings. The Respondent argues that SSP Omukata is not actually a witness at the Orderly Room Proceedings and that, therefore, the Ex Parte Applicant's apprehension in this regard is misguided.

10. On the legality of the proceedings, the Respondent argues that Orderly Room Proceedings are properly founded on law and that there is no reason for the Court to interfere with their conduct. Finally, the Respondent argues that it is not open, in any event, to quash a "recommendation" issued after an inquiry in the manner suggested by the Ex Parte Applicant.

11. Under section 88 (1) of the National Police Service Act, 2011 every police officer is subject to the law and regulations from time to time in force relating to the Service. Under Section 88(2), the offences against discipline include the offences prescribed under the Eighth Schedule. These offences against discipline are tried in administrative proceedings which is internal to the Police Force. According to the National Police Act (Discipline) Regulations, 2015 at Rule 4, "every disciplinary process shall observe due process as provided under Article 47 and Article 246(3) (b) of the Constitution."

12. The administrative proceedings which are undertaken under section 88 of the National Police Service Act and the National Police Act (Discipline) Regulations are not criminal in nature. Indeed, section 88 envisages that in an appropriate case an officer might face criminal charges if the offence discloses a criminal act.

13. With this in mind, are the apprehensions of the Ex Parte Applicant that he will not receive fair treatment in the administrative proceedings justified? I do not think they are. I say so for at least three reasons.

14. First, as I have already said, the administrative proceedings are, in fact, envisaged in the law. They are not a translucent contraption of administrative tyranny. Indeed, both the legislation and the subsidiary legislation provides that the proceedings must meet the standards of administrative fairness guaranteed in the Constitution.

15. Second, the apprehension that rules of natural justice will not be adhered to in the proceedings are, at best, speculative and premature. The Ex Parte Applicant has not provided any demonstration that he will not be given an opportunity to present his side of the case. As to the apprehension that the person who did the inquiry will also be a witness in the proceedings, the Respondent has been clear that SSP Omukata will not be a witness in the case. Consequently, the basis for this complaint is no longer viable.

16. Third, the Respondent has now supplied the Ex Parte Applicant with all the documentation related to the intended proceedings against him. Indeed, the Respondent has indicated that the Ex Parte Applicant had never requested for copies of the same.

17. In the face of this factual scenario and context, there is little justification for the Court orders sought. Indeed, as the Respondent argued, relying on *R v The Commissioner of Administrative Justice & Another Ex Parte John Ndirangu Kariuki [2013] eKLR*, a prayer of certiorari to quash a recommendation to a superior which formed the basis of a decision would be improper in the circumstances.

18. The bottom line is that the circumstances and context of this case do not justify the intervention of the Court using Judicial Review principles. Judicial Review is not a tool that is used to needlessly pry open administrative processes and interfere with their operations. In ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR*** Justice Odunga delineated circumstances in which it is proper for the Court to exercise its Judicial Review jurisdiction in the following words:

*It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:*

- 1) *Where there is an abuse of discretion;*
- 2) *Where the decision-maker exercises discretion for an improper purpose;*
- 3) *Where the decision-maker is in breach of the duty to act fairly;*
- 4) *Where the decision-maker has failed to exercise statutory discretion reasonably;*
- 5) *where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*
- 6) *where the decision-maker fetters the discretion given;*
- 7) *where the decision-maker fails to exercise discretion;*
- 8) *where the decision-maker is irrational and unreasonable.*

19. Can the actions and decisions of the Respondent be impugned on any of these grounds? I have come to the conclusion that they cannot. There is absolutely no evidence that the decision to pursue administrative proceedings against the Ex Parte Applicant was irrational or unreasonable. There was no demonstration that the Police Authorities failed to exercise discretion or that they acted in a manner that suggests that they were pursuing improper objectives. Neither was there demonstration that they failed to exercise statutory discretion reasonably.

**20. In the circumstances, the Notice of Motion dated 05/07/2017 is dismissed in its entirety with costs to the Respondent.**

21. Orders accordingly.

**Dated and delivered at Nakuru this 30<sup>th</sup> day of May, 2019**

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**JOEL NGUGI**

**JUDGE**