REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. MISC APPLICATION NO.51 OF 2016

IN THE MATTER OF: AN APPLICATION BY STEPHEN KIPTANUI ARAP SOI FOR ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 47(1) & (2), 48 & 50 (1)

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE COMMISSION ACT 2011

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS 2013

AND

IN THE MATTER OF: THE DECISION BY THE NATIONAL POLICE SERVICE COMMISSION TO SUMMARILY DISMISS THE APPLICANT'S REVIEW APPLICATION WITHOUT ACCORDING HIM THE RIGHT TO BE HEARD

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW STEPHEN KIPTANUI ARAP SOI

BETWEEN

REPUBLIC……..……APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION…..……RESPONDENT

EXPARTE STEPHEN KIPTANUI ARAP SOI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th February, 2016, the ex parte applicant herein, **Stephen Kiptanui Arap Soi**, seeks the following orders:

a. **An order of Certiorari to remove into the High Court and quash forthwith the decision of the Respondent contained in the letter dated 25th January, 2016 rejecting the Applicant's vetting review application dated 4th September, 2015.**
b. **THAT an order of prohibition to be issued against the Respondent prohibiting and restraining the Respondent from enforcing, implementing and in any other manner whatsoever from actualising its decision contained in the vetting decision dated 7th August, 2015 and the decision summarily rejecting the Applicant's vetting review dated 25th January, 2016.**
c. **An order of mandamus to compel the Respondent to proceed to hear the Applicant's vetting review application dated 4th September, 2015 and in any event within seven (7) days from the Court's judgement.**
d. **The costs of this application be provided for.**

Applicant's Case

2. The application was based on the grounds that the Applicant appeared before the Respondent's vetting panel for his vetting interview on 8th May, 2015 and prior to then, there were no written complaints submitted against him. However, on 1st September, 2015, through a decision dated 7th August, 2015, the Applicant was informed of the Respondent's decision to remove and or dismiss him from the National Police Service. According to the Applicant, in its decision, the Respondent found, without any evidence whatsoever that the Applicant flouted established rules and regulations by pulling a trigger on an innocent person which finding amounted to subjecting the Applicant to double jeopardy since a court of law had already acquitted him in respect of criminal charges instituted against him under the ***Penal Code***. Apart from that a further irregular and irrational finding made by the Respondent was that the Applicant was guilty of assaulting and wounding a police constable in the GSU which finding the applicant contended was arrived at contrary to the available evidence that an inquiry file was instituted against him and subsequently closed without any further action being taken against him. To the Applicant, this amounted to double jeopardy.

3. In addition, the Respondent made an irrational, absurd and unreasonable finding that the Applicant had erstwhile been removed from the service whereas the Applicant has never been removed from the service prior to 7th August, 2015. The Applicant's case was that the Respondent had no legal basis or mandate for questioning the Applicant's earlier retirement from the service as the same had been declared illegal by this Hon. Court on 26th April, 2012. Having been declared illegal and quashed, it was the Applicant's position that the action to illegally retire the Applicant was as though it was never taken.

4. The Applicant asserted that the Respondent's decision to dismiss him from service was unlawful and without legal basis in that it is purported to have been made by six (6) commissioners of the Respondent whereas only four (4) commissioners who signed the vetting decision conducted the Applicant's vetting interview. To the Applicant, regulation 34 of the ***National Police Service (Vetting) Regulations, 2013*** ("Vetting Regulations") requires the Respondent causes to be made and kept an accurate record of its proceedings. In this case there was no record availed to the Applicant to indicate that the findings of the

four (4) commissioners who conducted the Applicant's vetting interviews were ever deliberated by a full quorum of the Respondent.

5. Aggrieved by the decision, the Applicant by application for review dated 4th September, 2015 ("review application") brought under regulation 33(1) of the Vetting Regulations, challenged the Respondent's decision to remove him from the service and by operation of regulation 33(3) of the ***Vetting Regulations***, the Respondent's decision stood suspended pending the hearing and determination of the review application. It was however contended that four (4) months after the Applicant's review application was filed, by letter dated 25th January, 2016 and communicated to the Applicant on 2nd February, 2016, the Respondent summarily rejected the Applicant's review application, citing that it was unmerited, without affording the Applicant an opportunity to be heard and without giving any reasons for dismissing the review application.

6. To the Applicant, there is no hurdle or limitation under regulation 33 of the ***Vetting Regulations*** that the Applicant has to meet before applying for and being heard on his review application and that the option of seeking a review of the Respondent's decision is a legal remedy available to all officers dismissed from the National Police Service. To the Applicant, since the Respondent is legally mandated under regulation 4(c) of the ***Vetting Regulations*** to carry out the vetting process in accordance with, *inter alia*, Articles 47 and 50 of the Constitution of Kenya, 2010, the Respondent is constitutionally and legally obliged to afford a hearing to all officers applying for review before determining whether their applications for review meet the criteria set out under regulation 33(2) of the ***Vetting Regulations***. It was the Applicant's case that the Respondent's decision not to hear the review application and further not giving any reasons for the said refusal contravened the Applicant's right to be heard and his right to fair administrative action guaranteed under Articles 50(1) and 47(1) and (2) of the Constitution respectively. Further, the Respondent's decision not to hear the Applicant's review application offended the provisions of section 4(2) and (3) of the ***Fair Administrative Action Act, 2015***.

7. The Applicant also contended that the Respondent's decision not to hear the Applicant on his review application and to summarily dismiss his review application without giving any reasons is discriminatory of the Applicant in violation of Article 27 of the Constitution in that several of his colleagues of equal rank who have erstwhile been dismissed and thereafter successfully or unsuccessfully applied for a review of the Respondent's decision were accorded a hearing by the Respondent. In addition, it was his view that by dismissing the Applicant's review application without hearing the Applicant or giving any reason for the dismissal without hearing, the Respondent has contravened the Applicant's right to access justice in contravention of Article 48 of the Constitution.

8. To the Applicant, the totality of the Respondent's actions runs contrary to Article 41 (1) of the Constitution as they amount to unfair labour practices and unless this Court acts with alacrity and urgently intervenes and grants the conservatory orders sought, the Respondent's decision would be implemented and the Applicant removed from the employment of the National Police Service thus occasioning serious prejudice and hardship to the Applicant and his livelihood. On the other hand the suspension of the Respondent's decision would not occasion any prejudice to the Respondent.

9. It was submitted on behalf of the Applicant that the Respondent had no basis of reopening matters concluded through a court case or an internal inquiry file more than two (2) decades ago without adverse action being taken against the Applicant. This, it was submitted, was in clear breach of the doctrine of double jeopardy which was captured by the Employment and Labour Relations Court in the case of **Dismas Juma Wanasibwa vs. National Police Service Commission [2014] eKLR.**

10. During the vetting interview, it was submitted the Respondent made an allegation against the Applicant that he had erstwhile been removed from the service and sought to know why he had been removed. To the Applicant, the Respondent had no basis in law to make any adverse findings against the Applicant for comments solicited by the Respondent and which were not only placed before the trial court but also captured and acknowledged by this Hon. Court in its judgment. In the Applicant's view, the allegations and findings made against the Applicant by the Respondent in its vetting decision were absurd, unreasonable and untenable.

11. It was submitted that the Respondent's decision to summarily dismiss and reject the Applicant's review application without affording the Applicant a chance to be heard offended the right to natural justice and the *audi alteram partem* rule which dictates that no person should be condemned unheard. This right of a fair hearing, according to the applicant is a non-derogable constitutional guarantee enshrined under Article 50(1) of the Constitution. Since the Applicant's right to review stems from Regulation 33 of the Vetting Regulations which guarantees all officers dissatisfied with the result of their vetting interview to apply for a review of the decision from the Respondent, it was the Applicant's case that the Respondent was mandated and obliged to consider whether the review application met the criteria set out under regulation 33(2) of the ***Vetting Regulations***. However, in applying for review, the Applicant does not have to jump any hurdle or abide by any conditions before he can be heard on his review application. In support of his submissions the Applicant relied on regulation 33(2) of the ***Vetting Regulations.***

a. It was the Applicant's case that from the foregoing provision, the Respondent must only grant a request for review of its decision if the request for review is based on the three facets highlighted above. However, for the Respondent to determine whether the request for review falls within the corners of the grounds specified in the ***Vetting Regulations***, it was submitted that the Respondent must afford any officer submitting the request for a review a right to be heard to determine whether any of the grounds raised in the request for review meet the threshold elucidated in regulation 33(2) of the ***Vetting Regulations***. It was therefore submitted that the procedure adopted by the Respondent to summarily dismiss the Applicant's review application without affording him a right to be heard was not only foreign to the ***Vetting Regulations*** but inimical to the express provisions of regulation 4 of the ***Vetting Regulations*** which expressly mandates the Respondent to adhere to certain principles in conducting the entire vetting process, including the vetting review. The Applicant relied on regulation 4(c) of the ***Vetting Regulations*** in support of his case.

12. In the Applicant's submissions, the Respondent was duty bound to conduct both the vetting and the review exercise while adhering to the lofty edicts of the constitutional guarantees of the right to fair administrative action and the right to be heard provided under Article 47 and 50 of the Constitution respectively as there was no legal hurdle erected by the ***Vetting Regulations*** for an officer to meet before being granted the right to be heard on his review application. By operation of the Constitution and statute, the right to be heard is a minimum prerequisite before any adverse action can be taken against the Applicant.

13. It was the Applicant's case that the gravity of the Respondent's actions cannot be overstated. To him, to simply term the Applicant's review application as not merited and summarily dismiss it by a stroke of pen in violation of his right to be heard regardless of the impact it has on the Applicant's forty one (41) year career in the police service, his family and his entire livelihood, is action that is unreasonable, irrational and absurd. It was therefore the Applicant's submission that considering the various irrational and absurd findings in the Respondent's vetting decision and the Respondent's summary dismissal of the Applicant's review application, the Respondent's actions clearly reek of ill will, malice, bias and point to a diabolical scheme to unconstitutionally and illegally remove the Applicant with humiliation and dishonour from a forty one (41) year decorated career in service of his country.

14. It was reiterated that the Respondent's actions amounted to unfair labour practices by not taking into account the Applicant's long standing career as a senior police officer in complete contravention of Article 41 (1) of the Constitution. To the Applicant, as a requisite of fair administrative action guaranteed under Article 47 of the Constitution, the Respondent was constitutionally and statutorily obliged to hear the Applicant before making any adverse findings against the Applicant. In support of this submission the Applicant relied on ***Halsbury's Laws of England*** Judicial Review (Volume 61 (2010) 5th Edition) Para. 639 where it is stated as follows with respect to the right to notice and opportunity to be heard:-

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with**

the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule.… However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations."

15. In the Applicant's view, the ***Fair Administrative Action Act, 2015*** ("the Act") was enacted to illuminate and expand the values espoused under Article 47 of the Constitution and section 4(3) thereof provides the following broad parameters which bodies undertaking administrative action have to adhere.

16. It was submitted that it was clear that the Respondent breached the Applicant's right to be heard on his review application contrary to the tenets of fair administrative action guaranteed under the Act.

17. Based on Article 47 (2) of the Constitution, it was submitted that the said provision imposes an obligation on administrative bodies and decision makers to give reasons for their decision. However, in this case, no reasons were furnished by the Respondent for the summary dismissal of the review application without being considered on its merit. To the Applicant, a flippant and superficial term calling the review application *'not merited'* was used by the Respondent to summarily reject the Applicant's review application and uphold his dismissal from the employment of the National Police Service. In support of this submission the Applicant relied on section 4(2) of the Act which explicitly captures the provisions of Article 47 (2) of the Constitution.

18. On the duty to give reasons, the Applicant relied on ***Halsbury's Laws of England*** Judicial Review, (Volume 61 (2010) 5th Edition) which states as follows:-

"Although it is still correct to say that there is no general duty, arising from requirements of procedural fairness, to give reasons for an administrative decision; in a substantial number of cases a duty to provide reasons has been found to exist on the particular facts of the case. In these cases the conclusion was that having regard to the nature of the interest concerned and the impact of the decision on that interest, and all other relevant considerations, a reasoned decision was required. Reasons may also be required if a decision appears to be aberrant and requires explanation."

19. It was the Applicant's case that despite the weighty issues going to the heart of the Respondent's jurisdiction to make the findings contained in the vetting decision, the Respondent went ahead to ride roughshod over the Applicant's right to be given written reasons for the summary dismissal of his review application.

20. To the Applicant, the Respondent discriminated against him in violation of his right to fair and equal treatment guaranteed under Article 27 of the Constitution. He submitted that his colleagues of equal rank who were erstwhile dismissed from the service all applied for review which review applications were admitted for hearing and the affected officers given a right to be heard on their review applications. Out of these, three (3) were however rejected, only after their review applications were heard on their merits and subsequently dismissed. The three (3) officers who were at equal rank as the Applicant subsequently lodged a case before the Employment and Labour Relations Court being Petition No. 13 of 2015 against the merits of the Respondent's decision on their vetting review. By making an about-turn and summarily dismissing the Applicant's review application without affording him an opportunity to be heard, it was submitted that this was clearly discriminatory treatment in violation of the Applicant's constitutional rights guaranteed under Article 27 of the Constitution.

21. It was further submitted that from the vetting decision, it was clear that four (4) Commissioners of the Respondent were present in the vetting interview panel that conducted the vetting hearing of the Applicant. However, the vetting decision communicating the Applicant's removal from the National Police Service was signed by six (6) Commissioners of the Respondent, two of whom did not participate in the decision making progress. In support of this submission the Applicant relied on **Eusebius Karuti Laibuta vs. National Police Service Commission [2014] eKLR**.

22. The Applicant relied on regulation 34 of the ***Vetting Regulations*** which mandates the Respondent to cause to be made and kept an accurate record of its proceedings. In his view, what was transmitted to the Applicant by letter dated 25th January, 2016 was a communication from the Secretary and Chief Executive Officer of the Respondent communicating the Respondent's decision simply stating that the Respondent found that the Applicant's review application was *'not merited'*. It was submitted that there was no record availed to the Applicant demonstrating that the Respondent ever sat down to deliberate and consider the Applicant's review application and the outcome of the deliberations, if any. Accordingly, it was submitted that the respondent violated express provisions of the ***Vetting Regulations*** in arriving at its decision to summarily dismiss the Applicant without hearing him.

23. This Court was urged to take judicial notice that the courts are granted a power to review their own decisions under Order 45 of the ***Civil Procedure Rules, 2010*** and that the provisions of regulation 33(2) of the ***Vetting Regulations***, giving the stepping stones on which an officer may ground his review application are strikingly similar to the provisions of Order 45 of the CPR under which a litigant may anchor his application for review before the Courts. It was expounded that once a litigant files a review application before the Court, he is automatically afforded the opportunity to be heard on his application in order to satisfy the Court that his review application is merited within the corners of the criteria laid down in the CPR. By parity of reasoning it was submitted that considering the Respondent is mandated to conduct the vetting in accordance with the constitutional edicts under Article 47 and 50 of the Constitution, the Respondent is under a constitutional and statutory duty to afford the Applicant a right to be heard on his review application.

24. It was therefore the Applicant's case that he had demonstrated that his right to be heard and the right to fair administrative action, constitutionally guaranteed, were violated by the Respondent's frivolous decision to summarily dismiss and reject his review application. He therefore prayed that this Court should immediately order the Respondent to proceed to hear and determine his review application without delay, and in any event, within seven (7) days of the Court's decision, taking into account the fact that the Applicant had barely six (6) months to reach the statutory retirement age.

Respondent's Case

25. In opposition to the Application the Respondent contended that the National Police Service Commission (hereinafter referred to as the Commission) is mandated under Article 246(3) (b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service. According to the Respondent, section 7 (1) of the ***National Police Service Act*** states that all persons who were immediately before the commencement of the Act, officers or employees of the Kenya Police Force and the Administration Police Force established under the ***Police Act*** (Cap 84) and the ***Administration Police Act*** (Cap 85) respectively, including officers working with the criminal investigations department, shall upon commencement of the said Act become members of the Service in accordance with the Constitution and the Act. It was averred that based on the foregoing, the Commission formulated vetting regulations to enable it carry out the vetting exercise of all police officers who were in the Force prior to the enactment of the new Constitution and the Act.

26. To the Respondent, the Commission is mandated under section 7(2) of the ***National Police Service Act*** together with Regulation 4(a) of the ***National Police Service (Vetting) Regulations 2013*** (hereinafter referred to as the Vetting Regulations) to carry out the vetting exercise of all police officers. In its view, section 7(3) of the ***National Police Service Act*** read together with Regulation 32 of the ***Vetting Regulations*** gives the Commission the power to discontinue the service of any police officer who fails the vetting on grounds of being unsuitable or incompetent. It was however its view that in vetting police

officers, it is guided by the Constitution, the ***National Police Service Commission Act***, the ***National Police Service Act*** and the ***Vetting Regulations*** and removing the officer from the Service, the Commission is bound by Regulation 3, 4 and 14 of the ***Vetting Regulations***.

27. According to the Applicant, the aforementioned regulations not only set out the objectives and purpose of the vetting process but also the principles and standards that guides the Commission in carrying out the vetting to arrive at a just decision to remove the officer or not. To them, pursuant to the mandate stipulated in the aforementioned Constitution, the ***National Police Service Act*** and the ***Vetting Regulations***, the Commission started the vetting of police officers in December, 2013 starting with the most senior police officers of the ranks of SDCP 1& 2, DCP, S/ACP, ACP, SSP, SP and ASP and by the end of November 2015 the Commission had vetted 1778 police officers of the aforementioned ranks. After the vetting process of the rank of SDCP 1& 2, DCP, S/ACP, ACP, SSP, SP and ASP was complete, 87 police officers, amongst them the ex-parte applicant herein was found to be unsuitable and incompetent to continue to serve. The Respondent explained that the ex parte applicant herein was vetted belatedly on 8th May 2015 having been away on official duties outside the country.

28. It was the Respondent's case that in removing the ex-parte applicant herein the Commission was guided by regulation 14(2)(b)(d) of the ***Vetting Regulations*** which requires the Commission to look at the past record including conduct, discipline and diligence of the officer and also the human rights record of the officer. According to the Respondent, the Commission relied heavily on both the personal and confidential file of the officer to access his conduct and discipline from which file it was evident that indeed the ex-parte applicant herein was not only culpable of human rights abuse but was also found to be guilty of gross misconduct and wanting in discipline.

29. To the Respondent, vetting is not a disciplinary issue but is a combination of the analysis of the record of an officer from their inception day in the service, disciplinary record, professional conduct, financial probity, integrity of an officer and their human right record. It was contended that regulation 33(2) of the ***Vetting Regulations*** provides the parameters to guide the Commission in admittance of a review application which are on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the officer at the time the determination or finding sought to be reviewed was made, provided that the lack of knowledge on the part of the officer was not due to lack of due diligence; on some mistake or error apparent on the face of the record; or on any reason the Commission considers just and proper.

30. It was the Respondent's position that pursuant to the said regulation, the Commission after going through the review application of the ex-parte applicant herein vis-à-vis the Commission earlier decision and the record in its possession declined to admit the said application after the Commission was satisfied that it was not merited. Further the ex-parte applicant's herein was notified of the same vide a letter dated 25th January 2016 and it is therefore wrong for the ex-parte applicant to allege that he was not accorded equal opportunities as other officers of his rank hence the Commission violating his right under article 27 of the Constitution.

31. It was the Respondent's position that it is not in all cases that a party must be accorded an opportunity to be heard and hearing does not in all cases entail oral submission or oral hearing.

32. In support of their submissions the Respondent relied on section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya which provides that:

> ***whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

33. This Court was urged to be cognisant of the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved) and reliance was placed on **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where the court observed that:

"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

34. The Applicant also relied on **Thomas Komo Alias Bilal Mohamed vs. Republic [2013] eKLR** where the Court noted that the applicant had not demonstrated the manner, nature and/or proof of breach of his fundamental rights which he has alleged. He also urge the Court to be persuaded by the findings by the High Court in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** held as follows;

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

35. It was submitted that the applicant having failed to prove to this Court how his rights have been infringed by the respondent, this suit therefore should be dismissed.

36. To the Respondent, not in all cases that a party must be accorded an opportunity to be heard and hearing does not in all cases entail oral submission or oral hearing. In this respect the Respondent relied on **Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR, Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009** and **Russel vs Duke of Norfork (1949) all ER 118.**

37. The Respondents asserted that they had not in any way infringed on or denied the applicants fundamental rights and freedoms either as claimed or at all.To the contrary, it was averred that the Respondent conducted its proceedings in a fair manner in the circumstances and was not discriminatory towards the applicant.

38. On the composition of the Tribunal the Respondent relied on regulation 10 of the vetting regulations which state that:

(1) The Commission may, in order to ensure expeditious disposal of matters, constitute such number of panels and comprising such persons as the Commission shall determine.

(2) The Commission may establish panels comprising such number of its members and co-opted persons as it may deem necessary for the purpose of determining applications for review under regulation 33.'

39. The Respondent also relied on section 13 of the ***National Police Service Commission Act*** which states that:

(1) The Commission may establish committees for the better carrying out of its functions.

(2) The Commission may co-opt into the membership of committees established under subsection (1) other persons whose knowledge and skills are found necessary for the functions

of the Commission.

(3) Any person co-opted into the Commission under subsection (2) may attend the meetings of the Commission and participate in its deliberation, but shall have no power to vote.'

40. The Respondent relied on **Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR** which this Court expressed itself as follows:

> **''Section 7(2) of Cap 84 obliges all officers to undergo vetting by the Commission to assess their suitability and competence. Whether this is termed a function, business or an affair of the Commission it is clearly one of the duties of the Commission and under section 14(1) of Cap 185C ought to be conducted in accordance with Second Schedule. However, under section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.''**

41. Based on the above decision it was submitted that it was wrong for the applicant to allege that the vetting panel as constituted was illegal. Further, the co-opted members in the panel have no mandate in the decision making process as the decision making is left to the commissioners themselves. In support of his position that Respondent relied on the 2nd schedule, paragraph 3 of the ***National Police Service Commission Act*** for the proposition that the quorum for the meeting of the Commission is 6 members who include the following:

(a)The four members appointed under article 246(2)(a)(i) and (ii) of the constitution and

(b) Any two of the members appointed under article 246(2)(b) and (c) of the Constitution.

42. It was submitted that at present the Commission has only 6 members as the other 3 members have not been replaced or appointed. It was disclosed that the position of the vice chair, which fell vacant after her demise has not been filled, similarly the position of the deputy inspector general Kenya police, **Madam Grace Kaindi**, a substantive appointment has not been made and also the position of **Major Muia** who is incapacitated has equally not been filled. This, it was contended, leaves the Commission with only 6 members to make a decision and if any one of them is absent the subsequent decision made thereof shall be a nullity.

43. The Court was reminded that judicial review remedies being discretionary, the Court would not grant them in certain circumstances even if the same are merited and reliance was placed in the decision of **Korir J** in **Republic vs. Kenya Power & Lighting Company Ltd & another [2013] eKLR** where the learned Judge expressed himself as follows:

> **"I think the words of Lord Greene, M.R. at page 229 in the Wednesbury Corporation case will make good closing remarks in this case. He observed that:-**
>
> > **'It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it**

lay within the powers of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.'

It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."

44. In the Respondent's view, there is an onus placed on the applicant to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the authority. However, it was the Respondent's submission that it had demonstrated that there was a clear basis for the decision it arrived at while the applicant on the other and has fallen short on that score.

45. To the Respondent, it did not make an absurd conclusion that would warrant the intervention of this court. There is no evidence placed before the court by the applicants to show that the decision of the respondent is unreasonable as was stipulated in the Wednesbury sense. The Respondent therefore contended that the applicant having failed to prove the allegation that his right under the constitution was infringed, he is not entitled to the orders sought and therefore this application be dismissed in favor of the respondent.

Determinations

46. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited this is the view I form of the matter.

47. The Applicant has taken issue with the findings which were made by the vetting panel. According to him the said findings of his unsuitability were based on issues which ought not to have been taken into account. It must however be noted that what the applicant seeks in these proceedings is not the quashing of the initial decision made by the vetting panel but the subsequent decision made on review. Accordingly, this Court cannot determine the findings made by the panel in its original determination which was the subject of the review as the same is not properly before this Court.

48. According to the applicant, the review panel did not afford him a hearing before it dismissed his application for review.

49. Article 47 of the Constitution of Kenya provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

50. Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** Civil Appeal 52 of 2014 in which the Court of Appeal held that:

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the

Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

51. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

52. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

"**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

53. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.

54. Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

55. The right to be afforded an opportunity of being heard must have be distinguished from the necessity to have an oral hearing especially id disciplinary matters. The procedure in such matters is aptly dealt with by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007 as follows:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely

contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

56. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. *Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed*."** [Emphasis mine].

57. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

> **"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but *whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case*."** [Emphasis mine].

58. However as is stated in ***Halsbury Laws of England*, 5th Edition 2010 Vol. 61** at para. 639:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."**

59. What the above cases hold is that whatever form of proceedings adopted by the authority, it must meet the irreducible minimum elements of fairness. In this case, it is clear that after the Applicant filed his application for review, he was not invited to argue his case. Whereas he need not have appeared before the Tribunal in person, the law expected that the applicant would be heard on his case before a determination either way was made.

60. The question that arises however, is whether in the circumstances of the case, the applicant ought to have been availed an opportunity whether orally or in writing to present his case. Regulation 33(2) of the ***Vetting Regulations*** sets out the grounds upon which a review is to be based and provides that:

> ***"The Commission shall not a grant a request for review unless the request is based-***
>
> ***(a) on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the officer at the time the determination or finding sought to be reviewed was made,***
>
> ***Provided that the lack of knowledge on the part of the officer was not due to lack of due diligence;***
>
> ***(b) on some mistake or error apparent on the face of the record; or***
>
> ***(c) on any reason the Commission considers just and proper.***

61. In my view, what these provisions provide is that the grounds set out are to be considered by the Commission in its determination whether or not to grant the request for review. The said grounds

therefore cannot be a basis for determining whether or not the request for review is to be admitted to hearing. In other words the foregoing provisions do not admit for summary dismissal of the request for review.

62. In **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

> **"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. *if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides.* It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…….; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."**

63. Unless the legal instrument provide for summary dismissal of a request for review, where the right to review is provided by statute, the said right ought not to be denied by introducing procedures which are inimical to a fair hearing and adjudication of the statutorily provided avenue for redress. "Review" is defined in ***Black's Law Dictionary***, 9th Edition at page 1434 *inter alia* as *"Consideration, inspection, or reexamination of a subject or thing."* ***Ballentines Law Dictionary*** on the other hand defines the same word at page 482 *inter alia* as *"A reevaluation or reexamination of anything."* Clearly a review is much wider in scope than an appeal.

64. In this case, the Commission did not purport to find that the grounds upon which the request for review was made did not fall within the purview of regulation 33(2) of the ***Vetting Regulations***. To the contrary, the Commission found that the request was "not merited". In other words, the Commission purported to determine the request on merits. How the Commission had arrived at this determination before the applicant had presented his case, defeats reason. In **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation** [1948] 1 KB 223, **Lord Greene** stated (at page 229) that:

> "**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

65. In my view, an introduction of a procedure which does not permit the hearing of a party in his case whether orally or otherwise, may well amount to bad faith and constitute irrationality as one cannot be in a position to know what factors were considered by the authority in arriving at the decision. Such a decision may well be described as having being arbitrarily arrived at. This must necessarily be so because statutes are interpreted by reference to their purpose, and statutory powers must be exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose. In my view the purpose of the procedure for review is to afford a person aggrieved by the decision made on his or her vetting an opportunity to challenge the same. To thwart that intention by blocking a person's grievance from being agitated on the vague ground that the request for review is not merited amounts in my view to thwarting statutory or legislative intent and purpose. This position was adopted in **R (Haworth) vs. Northumbria Police Authority [2012] EWHC 1225 (Admin)** at [104] cited at page 534 of ***Judicial Review Handbook*** 6th Edn. by **Michael Fordham** where the Court was dealing with the refusal to consent to police pension reconsideration, however strong the merits.

66. Even if the Respondent's submission that after going through the review application of the ex-parte applicant herein vis-à-vis the Commission's earlier decision and the record in its possession, it declined to admit the said application after being satisfied that it was not merited was taken as the position, section 4(3)(b) of the ***Fair Administrative Action Act*** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard.

67. In my view the right of review can only be meaningfully enjoyed if the party requesting for review is heard before the decision is made**.** For an authority or tribunal entrusted with taking administrative decisions which affect the rights of a person to close itself in an office and by way of fiat dismiss a petition without procedurally and properly hearing the same and without indicating how the decision was arrived at whether by tossing a coin or otherwise thus leave the petitioner speculating as to the manner in which the determination was made, can be anything but fair. In my view the power given to administrative or executive authorities ought to be properly exercised and must not to be misused or abused. This is so because as elucidated by **Prof Sir William Wade** in his learned work, ***Administrative Law*****:**

> **"The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of [his property] just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…"**

68. It was further contended that the applicant was never given the reasons for the decision. Article 47(2) states:

> ***"Every person has the right to be given written reasons for any administrative action that is taken against him."***

69. Similarly section 4(3)(d) of the ***Fair Administrative Action Act*** provides where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision a statement of reasons. In this case, the decision in my view was that the request for review was not merited. That statement cannot also constitute the reasons for the decision. Accordingly, the decision made by the Respondent violated Article 47(2) of the Constitution and contravened section 4(3)(d) aforesaid.

70. The applicant also contended that from the vetting decision, it was clear that four (4) Commissioners of the Respondent were present in the vetting interview panel that conducted the vetting hearing of the Applicant. However, the vetting decision communicating the Applicant's removal from the National Police Service was signed by six (6) Commissioners of the Respondent, two of whom did not participate in the decision making process. In **Republic vs. Complaints Comission, Media Council for Kenya & Another Exp Baraza Limited t/a Kenya Television Network (KTN) Misc. Civil Application No. 182 of 2012,** this Court expressed itself as follows:

> **"Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners Peter Mwarua and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Al-Mehdawi vs. Secretary of State for The Home Department [1990] AC 876; Pastoli vs. Kabale District Local Government Council and Others Kampala HCCC No. 152 of 2006 [2008] 2 EA 300. The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find."**

71. Similarly in **Eusebius Karuti Laibuta vs. National Police Service Commission [2014] eKLR**, this Court found as follows:

> **"In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision."**

72. In **Ferdinand Indagasi Musee & Another v. Republic [2013] eKLR**, an appeal arising from the decision of a two judge bench, the Court of Appeal expressed itself as follows:

> **"We note that whereas the judgement was crafted by both Judges, it is only Odero, J who signed it after delivering it. In the absence of the signature of the other Judge, it cannot be said that the judgement was regular or proper or valid."**

73. It is therefore my view that administrative proceedings especially where the same are disciplinary in nature ought to be taken very seriously by those presiding thereat. The members of the Tribunal ought not to treat the same as a "walk-in walk-out" function by attending the same when convenient and absenting them at will only later on to resume the sitting as if they had not absented themselves from the previous sitting or sessions. In my view where a member of the Tribunal misses a crucial sitting or session it is not

permissible for the same member to participate in the said proceedings and make a determination thereof at a later stage. This was the position adopted in **Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd [1929] 1 KB 698**, where it was held by **Lord Hanworth, MR** at page 714 as follows:

> **"One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation."**

74. **Romer, J** on his part held at page 717 of the said judgement as follows:

> **"Further, I would merely like to point this out: that at the meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of the confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown."**

75. The facts of the instant case were similar to those in **Samuel Max Mehr vs. The Law Society of Upper Canada [1955] CanLII 7** where the Supreme Court of Canada **(Cartwright, J)** while adopting the holding in **Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd** (supra) allowed the appeal and quashed the Respondent's decision.

76. The same decision was cited with approval in **Re Ramm and the Public Accountants Council for the Province of Ontario [1957] CanLII 130,** where the Canadian Court of Appeal while allowing the appeal expressed itself as follows:

> **"With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that "justice should not only be done but should manifestly and undoubtedly be seen to be done." In a word, it is irrelevant to inquire whether two members of the Council who were not present at the earlier hearing took part in the proceeding in the Council's deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based."**

77. In **Moyer vs. Workplace Health, Safety and Compensation Commission [2008] NBCA 41 (CanLII)**, **Richardson, JA** whose decision received concurrence of the other judges held, while allowing the appeal, by that:

> **"In my view the record reveals a breach of the fairness. I agree with the Commission that lengthy arguments can at times result in panel members no longer being able to resume a hearing. However, when this occurs, steps can easily be taken to ensure procedural fairness. When a hearing has truly begun, as was the case here, and when, after an adjournment, it has become necessary to substitute decision-makers, the least that can be expected to avoid procedural unfairness is that the parties be advised on the change before the resumption of**

the hearing and be given an opportunity to recommence the hearing. This is not to say that, in all cases, proceedings will need to recommence. It may be that the parties will reach some agreement on how to acquaint the decision-maker(s) with evidence previously adduced or arguments previously made. However, what is important is that the parties at least be advised of the change in a timely fashion and be given the opportunity to recommence the hearing, if that is how they wish to proceed."

78. In this case however, what is being challenged is the decision of the Respondent on review. It is clear that there were no sittings of the Respondent and even if there were such sittings, there is no record of the same exhibited before me to enable me make a finding that some members who made the decision did not sit. Whereas the applicant has exhibited the original decision, that is not the decision being challenged in these proceedings.

79. With respect to the contention that the Applicant was treated in a discriminatory manner, no record was produced before this Court on the basis of which this Court can determine that the Applicant was treated differently from his colleagues. It was incumbent upon the Applicant to furnish sufficient material on the basis of which the Court could make a finding on the issue.

80. Having considered the foregoing, I am therefore not satisfied that the manner in which the request for review was determined met the standards of fairness.

Order

81. According I grant the following reliefs:

a. **An order of Certiorari removing into this Court the decision of the Respondent contained in the letter dated 25th January, 2016 rejecting the Applicant's vetting review application dated 4th September, 2015 and the consequential orders which decision and orders are hereby quashed.**
b. **An order of mandamus compelling the Respondent to proceed to hear the Applicant's vetting review application dated 4th September, 2015 in accordance with the Constitution and pursuant to the guidelines given in this decision and in any event within twenty-one (21) days of service of this judgement.**
c. **The costs of this application are awarded to the Applicant to be borne by the Respondent.**

82. Orders accordingly

Dated at Nairobi this 22nd day of June 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Esmail for the ex parte Applicant

Mr Odunga for Mr Ojwang for the Respondent

Cc Mutisya