



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.52 OF 2016

**IN THE MATTER OF AN APPLICATION BY WILLIAM KARIUKI NGUGI FOR LEAVE TO
APPLY**

FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE (VETTING)

REGULATIONS LEGAL NOTICE NO. 218 OF 2013 LAWS OF KENYA

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT NO.11A OF 2011 LAWS OF
KENYA**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 LAWS OF
KENYA**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

EX PARTE: WILLIAM KARIUKI NGUGI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th February, 2016, the *ex parte* applicant herein, **William Kariuki Ngugi**, seeks the following orders:

- a. **THAT this Honourable Court do issue orders for judicial review for an order of Certiorari to remove into the High Court and quash the decisions of the 2nd Respondent made on the 9th day of October, 2015 and 25th January, 2016 terminating the applicant's employment with the National Police Service.**
- b. **THAT this Honourable Court do issue orders for judicial review for an order of mandamus to move this Honourable Court to reinstate the Applicant herein to the employment of the National Police Service pursuant to e quashing of the 2nd Respondent's decisions made on the 9th day of October, 2015 and 25th January, 2016.**
- c. **THAT this Honourable Court be pleased to issue any other orders it deems fit.**
- d. **THAT the costs of this application be provided for.**

Applicant's Case

2. According to the applicant, he joined the Kenya Police Service on 1st September, 1978 and served to the rank of Superintendent of Police with the Criminal Investigation Department.
3. On 14th February, 2015, the applicant appeared before the 2nd respondent's vetting panel wherein he was questioned inter alia on a complaint regarding the death of one **Billy Ayieko Auma**, a victim of mob justice on 27th July, 2011. Thereafter vide a decision dated 9th October, 2015, the applicant came to learn that the 2nd Respondent had made a finding that the applicant had abused his office and was culpable of gross professional misconduct and proceeded to discontinue the applicant from service with the National Police Service (hereinafter referred to as "the Service").
4. Thereafter the applicant vide a letter dated 19th October, 2015 applied for a review of the said decision pursuant to section 33 of the National Police Service (Vetting) Regulations Legal Notice No. 218 of 2013 (hereinafter referred to as "the Regulations"). However vide a letter dated 25th January, 2016, the 2nd Respondent notified the applicant that the 2nd respondent had considered the said application for review and found the application unmerited and upheld their earlier decision dated 9th October, 2015 (vetting decision).
5. According to the applicant one of the complaints which was lodged before the vetting panel was by one **Charles Lwande Omondi** alleging that the applicant was involved in a cover up into the killing of the said **Billy Ayieko**. According to the applicant the same complaint had prior to his vetting been lodged before several authorities which found that the applicant was not guilty of any wrongdoing and that these findings were placed before both the vetting panel and the review panel.
6. However the applicant did not hear from the applicant after he lodged the said application for review.
7. I was contended by the applicant that the impugned decisions made by the 2nd respondent were extremely prejudicial, unfair and an utter miscarriage of justice as they failed to give reasons why they disagreed with the said earlier findings which exonerated the applicant.
8. The applicant therefore prayed that the orders south herein be granted.

Respondents' Case

9. In opposition to the Application the Respondents 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 Respondents, 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 Act become members of the Service in accordance with the Constitution and the said Act. 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. It was further averred that 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 on all police officers. Further, 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.

10. According to the respondents, the Commission in vetting police officers, the Commission is guided by the Constitution, the **National Police Service Commission Act**, the **National Police Service Act** and the **Vetting Regulations**. In removing the officer from the Service, the Respondents averred that the Commission is bound by Regulation 3, 4 and 14 of the Vetting Regulations which 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.

11. It was contended that 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, among them the applicant herein were found to be unsuitable and incompetent to continue to serve. According to the respondents in removing the applicant herein the Commission was guided by regulation 14(2) (b) of the vetting regulations which require the Commission to look at the past record of the officer including conduct, discipline and diligence amongst other factors set out and prior to the vetting of the applicant herein the Commission received a complaint against the officer in regard to the officer's conduct which was in accordance to regulation 18(2) of the vetting regulations, sent to the applicant who responded thereto and on 14th February 2015 the applicant appeared before the vetting panel in Meru as per the invitation letter and was questioned among others on the murder of **Billy Ayieko** which occurred in 2011 when the applicant was the DCIO Siaya and after considering the applicant's response pursuant o regulation 4(f) of the Vetting Regulations, the Commission on a balance of probability came to the conclusion that applicant's conduct in handling the murder case of one **Billy Ayieko** was unprofessional which formed the basis of his removal.

12. According to the Respondents, the Commission is an independent institution and in carrying out its mandate it is not bound by the direction of any institution including the Internal Affairs Unit or any other institution. Further regulation 18 of the **National Police Service (Vetting) Regulations 2013** as read together with regulation 19 provide that an officer is in default if he or she fails to fully or truthfully supply all information required regarding his or her suitability or competence.

13. The Respondents conceded that the applicant applied for review as required under regulation 33 of the vetting regulations on 19th October 2015 and the same was received by the Commission on 19th October 2015. Pursuant to regulation 33(2) of the **Vetting Regulations** the Commission after going through the review application of the applicant herein vis-à-vis the Commission's earlier decision and the record in its possession declined to admit the said application after the Commission was satisfied that it was not merited.

14. To the Respondent, 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.

15. It was further contended that the applicant's application is incurably defective as the applicant has

failed to file the substantive motion within 21 days as required under Order 53 of the *Civil Procedure Rules* and the *Law Reforms Act* Cap 26.

Determinations

16. 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.

17. It was contended by the Respondents that the Motion herein was not filed in accordance with the directions issued by this Court. On 17th February, 2016, this Court granted leave to the applicant herein to commence judicial review proceedings. The said proceedings were to be commenced within 7 days of the said order which means that the substantive motion ought to have been filed and served by latest 27th February, 2016. From the record the said Motion was filed on 24th February, 2016 and there is an affidavit of service to the effect that the same Motion was served on 26th February, 2016. It is therefore clear that going by the record, the directions of the Court regarding the filing and service of the Motion were complied with.

18. Although the applicant has taken issue with the merits of the decision made by the vetting panel as well as the decision of the Commission on review, it is my view as I will show hereinabove that the decision that is properly the subject of these proceedings is the decision of the Commission disallowing the review. This must necessarily be so since the Commission on review is empowered to review the merits of the decision of the vetting panel as long as a challenge is taken to the same. Where however an officer does not challenge the merits of the vetting panel before the Commission hearing the review, it is my view that the officer cannot by instituting judicial review proceedings turn the same into a merit review. Similarly, where the Commission hearing review, properly makes a determination on the merits, this Court cannot under the guise of its judicial review jurisdiction purport to review the said findings as opposed to the process through which the said decision was arrived at.

19. In this case it is contended that after the applicant filed his review which challenged the findings of the vetting panel on merits, the applicant was confronted by a decision without being afforded an opportunity of being heard. This contention is not controverted by the Respondents who are of the view that the Commission was entitled to determine the review without hearing the applicant.

20. 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.

21. 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.”

22. 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 paragraphs 135 -136 where 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...”

23. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. 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.”

24. 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 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.

25. 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.

26. The right to be afforded an opportunity of being heard must have be distinguished from the necessity to have an oral hearing especially in 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”.

27. 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].

28. In **Russel vs. Duke of Norfolk [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].

29. 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.”

30. What comes out from the above cases 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. The hearing can take the form of oral hearing or the applicant can present his case in writing. Either way is permitted. However to completely lock out a party who has invoked the revisionary jurisdiction of the Commission is unacceptable.

31. 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.

32. 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.

33. 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.”

34. 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 do not permit 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.

35. 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.”

36. 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.

37. 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.

38. 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...”

39. 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.”

40. 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.

41. Having considered the foregoing, I am satisfied that the manner in which the request for review was determined did not meet the standards of fairness.

Order

42. According I grant the following reliefs:

a. An order of an order of Certiorari removing into this Court the 2nd Respondent's decision made on 25th January, 2016 terminating the applicant's employment with the National Police Service for the purposes of being quashed and the same is hereby quashed.

b. An order of mandamus compelling the 2nd Respondent to proceed to hear the Applicant's vetting review application in accordance with the Constitution and pursuant to the guidelines given in this decision.

c. The costs of this application are awarded to the Applicant to be borne by the 2nd Respondent.

43. Orders accordingly

Dated at Nairobi this 21st day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mandala for Mr Mworio for the applicant

Cc Mwangi