REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.409 OF 2015

BETWEEN

WILFRED MBITHI JASON…….…….....……..PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION……...1ST RESPONDENT

ATTORNEY GENERAL…….....…2ND RESPONDENT

JUDGEMENT

Introduction

1. By his Petition dated 28th September 2015, the Petitioner alleged that his rights and fundamental freedoms guaranteed under the Constitution had been violated. The Petitioner also alleged that Respondents had contravened various provisions of the Constitution. Consequently, the Petitioner sought the following reliefs:

a) A Declaration that the Petitioner's fundamental rights and freedoms have been violated

b) Order of Certiorari to issue and quash the entire proceedings and decision of the 1st Respondent declaring that the Petitioner had failed vetting and had been discontinued from the Kenya Police Service.

c) An Order substituting the 1st Respondent's decision with a declaration that there exists no materials to find that the Petitioner has failed vetting.

d) Compensation to the Petitioner for the violation of his fundamental rights and freedoms.

e) The costs of this Petition.

f) Any other relief as the honourable court may deem just to grant

Petitioner's case

2. The Petition was supported by the Petitioner's Affidavit sworn and filed on 28 September 2015 as well as on the Petitioner's Further Affidavit filed on 19 January 2016.

3. The Petitioner states that he was first vetted by the statutorily mandated 1st Respondent on 5 March 2014 and a decision by seven commissioners, including the chairperson rendered on 22 May 2014. The 1st Respondent returned the verdict that the Petitioner was unsuitable to serve. The 1st Respondent found that the Petitioner was guilty of inappropriate relationship with a minor, had failed to initiate investigations into allegations of defilement of the minor and had also failed to assist the minor to settle medical bills incurred by the minor and arising out of a motor vehicle accident in which both the Petitioner and the minor were victims.

4. The Petitioner subsequently sought a review of the decision pursuant to Regulation 33 of the National Police Service (Vetting) Regulations 2013. The review was successful leading to directions that the Petitioner be vetted a fresh.

5. The Petitioner complains that the fresh vetting did not see the Respondents avail the complaints to the Petitioner. The previous complaint summary sheet supplied a day prior to the initial vetting also lacked the details or particulars. Besides, the Petitioner contends that he was not supplied with the medical report to show that the minor had been drugged and raped.

6. Additionally, the Petitioner complains that, the 1st Respondent proceeded to summon the minor her parents and siblings to appear before the 1st Respondent's panel without notifying the Petitioner. The minor and her family attended before the 1st Respondent's interview panel on 28 July 2015 and were examined by the 1st Respondent's panel in the absence of the Petitioner. Apparently, the 1st Respondent had asked the Petitioner to avail the minor's contacts.

7. The Petitioner also complains that the 1st Respondent also summoned and interviewed the Petitioner's wife in the absence of the Petitioner. In addition, the Petitioner complains that the findings or reports of an investigation conducted by the 1st Respondent were also not availed to the Petitioner.

8. The Petitioner accused the 1st Respondent of denying the Petitioner not only the notice of the proceedings but also the right to be heard, the right to question the complainants or the Petitioner's accusers, the right to give further testimony or to call witnesses and adduce evidence challenging the complaints lodged against the Petitioner. The Petitioner also accused the 1st Respondent of bad faith, bias and partiality.

9. Finally, the Petitioner held the view that there was an improper constitution of the 1st Respondent's vetting board with members leaving early and not fully participating in the proceedings yet being involved in the final decision making stage of the proceedings. In this regard, the Petitioner's case was that the decision to vet him out of the Police Service was unlawful as there was no consistent board or panel constituted to vet the Petitioner.

10. The Petitioner also attacked the merit of the decision to vet him out of the Kenya Police Service stating that the decision was not factually correct, was unreasonable and irrational. According to the Petitioner, the 1st Respondent found without proper evaluation of evidence and upon reliance on untested evidence or upon untruthful witnesses that the Petitioner had violated the minor.

11. In consequence the Petitioner contended that his rights as guaranteed under Articles 47 and 50(1) of the Constitution had been violated.

12. The Petitioner contended that the 1st Respondent's findings were made in contravention of the ***National Police Service (Vetting) Regulations, 2013*** (" the Vetting Regulations") which mandated the Respondent and donated to it wide powers to carry out investigations and act in accordance with both the Constitution as well as statute law. The Petitioner faulted the 1st Respondent's decision to have the review application heard without extending a hearing to the Petitioner.

13. To the Petitioner there was a well calculated scheme by the 1st Respondent to unconstitutionally and

illegally remove the Petitioner with embarrassment and dishonor from decorated service, to the nation, spanning over 38 years.

14. The Petitioner's submissions were largely focused on Articles 47 and 50 of the Constitution. In the Petitioner's submissions, the 1st Respondent was duty bound to conduct both the vetting and the review exercise while adhering to the law as well as the Vetting Regulations. Specific reference was made by Mr Thuita Guandaru who appeared for the Petitioner to Regulation 4 and also Regulation 18 of the Vetting Regulations.

15. Regulation 4(c) of the *Vetting Regulations* provides:-

> ***In conducting the vetting process, the Commission shall be guided by the following principles –***
>
> ***(a) Vetting shall be done in accordance with the values and principles set out in Article 10, 27, 47, 50 and 232 of the Constitution;"***

16. Counsel stated that the 1st Respondent was under an obligation both under the Constitution and the vetting regulations to supply the Petitioner with the complaint as well as particulars of the complaint besides any documents which accompanied the complaint. This way counsel submitted a party would be aware of the nature of the case he was to face and prepare as appropriate. Service of the charges and particulars upon the Petitioner would have shown that the 1st Respondent was acting in good faith.

17. Counsel pointed out that the provisions of Regulation 18 were mandatory and non compliance meant that the 1st Respondent's decision to disqualify the Petitioner from the service could not be allowed to stand. In this regard, counsel relied on the cases of **Byrne *vs.* Cinematrograph Renters Society Ltd [1985] 2 All E R 579** and **Maina *vs.* Nairobi Liquor Licensing Court [1973] EA 319**

18. Mr. Thuita also reiterated the fact that the Petitioner was never given an opportunity to be heard contrary to the age old natural justice principle of *audi alteram partem*. The right to be heard, counsel submitted, was entrenched in the right to afford a person an opportunity to defend oneself.

19. The Petitioner's counsel contended that besides not being given notice and particulars of the charges, the Petitioner was not given an opportunity to be heard and thus defend himself as he was only asked questions instead of him presenting his side of the story. The Petitioner was also not allowed to call witnesses. The Petitioner was also not allowed to question the witnesses who testified on behalf of the complainant as the witnesses were questioned in the absence of the Petitioner. In short, the Petitioner complained of being denied the right to cross-examine the witnesses who in any event only testified after the Petitioner had testified. This impropriety according to counsel destroyed the Petitioner's legitimate expectation to adduce evidence, call witnesses and cross-examine the complainant's witnesses.

20. The Petitioner additionally argued that the investigation by the 1st Respondent was unfair sloppy and biased as it was never geared towards getting the truth but to seek fault on the Petitioner. The Petitioner submitted that the investigation undertaken by the 1st Respondent lacked the requisite credibility as the Petitioner was never contacted to give his side of the story. Additionally, it was stated that the 1st Respondent's unfair and preferential treatment in relation to the complainant during the hearing showed that the 1st Respondent was apparently biased.

21. It was finally the Petitioner's submission that the findings by the 1st Respondent in arriving at the decision to vet out the Petitioner were factually wrong, irrational and absurd. According to the Petitioner, the decision defied all logic.

22. Mr Thuita concluded his submissions by stating that the vetting panel as constituted by the 1st Respondent was improperly constituted as the panel that interviewed the Petitioner was not the same one that interviewed the subsequent witnesses by the complainant.

Respondent's case

23. Only the 1st Respondent participated during the oral hearing of thePetition. Counsel Mr Ojwang represented the 1st Respondent.

24. A detailed Replying Affidavit was sworn in opposition to the Petition by Johnstone Kavulundi, the chairperson of the 1st Respondent and filed on 17 December 2015. From both the Replying Affidavit and the submissions by counsel, the 1st Respondent's case may be summarized as follows.

25. The 1st Respondent contended that the National Police Service 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. Under the new constitutional dispensation, the 1st Respondent was also statutorily mandated to undertake a vetting exercise of all the officers serving in the police service. In consequence, the 1st Respondent applied the Vetting Regulations to enable it carry out the vetting exercise of all police officers who were in the service prior to the enactment of the new Constitution and the Act.

26. The statutory mandate to carry out the vetting obtains under section 7(2) of the ***National Police Service Act*** as well as under Regulation 4(a) of the Vetting Regulations. The 1st Respondent may discontinue any officer who fails vetting on grounds of unsuitability or incompetence from serving in the police service. This is clear from a reading of section 7(3) of the *National Police Service Act* as read together with Regulation 32 of the *Vetting Regulations*.

27. Accordingly and pursuant to the guiding objectives, the *National Police Service Act* and the *Vetting Regulations*, the 1st Respondent started the vetting of police officers in December, 2013 starting with the most senior police officers. After the vetting process of the rank of S/ACP and ACP was complete, 12 police officers, amongst them the Petitioner herein was found to be unsuitable and or incompetent to continue to serve. Like all officers who were found unsuitable to serve, the Petitioner sought a review of the decision and his application for review was admitted.

28. The 1st Respondent insisted that details of the review were communicated to the Petitioner and ultimately the 1st Respondent decided that the Petitioner be re-vetted.

29. The Petitioner was subsequently invited to be re-vetted as according to the 1st Respondent there was need to clarify certain grey areas regarding the allegations of defilement of a minor girl. The 1st Respondent also stated that the complaint against the Petitioner had been received not just from local NGOs such as CRADLE but also from the minor girl herself. Further the 1st Respondent stated that the re-vetting was prompted by the need to cross check and corroborate the information on the complaint and consequently there was no need to recall the Petitioner to take the stand or cross-examine witnesses since the Petitioner had clarified his position previously. According to the 1st Respondent, the decision to re-vet the Petitioner was different from a court order decreeing fresh vetting.

30. The 1st Respondent added that it was not in these respects bound by the rules of evidence.

31. The 1st Respondent additionally contended that it had independently and extensively investigated the matter and visited various police stations and hospitals where details of the defilement was recorded and recalling the complainant and her family was only intended to help verify information which had been given by the complainant and was contained in the investigation report as well as in the Petitioner's response to the complaint and his testimony.

32. The 1st Respondent, for completeness, denied not giving the Petitioner the Hansard. The 1st Respondent also denied leaking the results of the vetting to the press. According to the 1st Respondent the decision to vet the Petitioner out of the police service was sound and was supported by evidence.

33. It was contended that regulation 33(2) of the *Vetting Regulations* provides the guide the 1st Respondent in the admission of a review application. These included 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 1st Respondent considers just and proper. In the case of the Petitioner, the 1st Respondent had found merit in the application for review, admitted the application, allowed the application and decreed that the Petitioner be vetted afresh.

34. The 1st Respondent also contended that it is not in all cases that a party must be accorded an opportunity to be heard, call witnesses or cross-examine the witnesses.

35. The 1st Respondent further contended that the threshold of reasonable precision in drafting constitutional pleadings had not been met and drew the court's attention to the cases of **Meme *vs.* Republic [2004]eKLR** and **Anarita Karimi Njeru *vs.* Republic [1976-80] KLR 1272.**

36. On the issue of the composition of the vetting panels, the 1st Respondent denied that the panels were illegally or improperly constituted. The 1st Respondent contended that there were two panels; one for the original vetting and another for the re-vetting exercise. The decision though was made solely by the commissioners. The 1st Respondent relied on Section 13 of the National Police Service Act and Regulation 10 of the Vetting Regulations which, in the 1st Respondent's view, authorized the constitution of boards and committees.

37. The 1st Respondent also relied on the case of **Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR** in which the 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.''***

38. Based on the above decision it was submitted that it was wrong for the Petitioner 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 1st Respondent also 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.***

39. While asserting that it had not violated any of the Petitioner's rights and that the proceedings in relation to the Petitioner had been conducted in a fair manner, it was submitted that the Petitioner had not shown that the decision to vet him out of the police service had been arrived at contrary to the Constitution or to any law.

Discussion and Determinations

40. I have reflected on the pleadings filed as well as the submissions made by counsel and I hold the view that the Petitioner's main complaint is that his rights to fair administrative action and fair hearing were violated.

41. The Petitioner attacked not just the findings of the Vetting panel as to his unsuitability to continue serving in the police service but also the alleged improprieties in the process of vetting itself.

42. According to the Petitioner, he was not accorded fair administrative action prior to the decision by the 1st Respondent. He was not availed with details of the charges or complaint against him. He was not given a chance to be heard. He was not allowed to cross-examine witnesses. He was vetted by a biased panel. These were the Petitioner's lamentations. To the Petitioner, the improprieties happened when he was being re-vetted.

43. The right to a just and fair administrative action is now entrenched in the Constitution. Article 47 of the Constitution lays it out in the following terms:

> ***(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.***

44. It would be fair to state that procedural propriety on the part of decision makers is now a substantive and mandatory constitutional requirement. It is substantive in the sense of having been embedded in the Constitution. It must not be a case of mere psychological satisfaction being extended to persons to be affected by any decision. It is substantive as well in the sense that even where there is no requirement that one be afforded the benefit of natural justice ,the decision maker is still expected to act expeditiously, fairly, lawfully, efficiently and reasonably in all circumstances.

45. The case of **Judicial Service Commission *vs.* Mbalu Mutava & Another [2015] eKLR** which was relied upon by the Petitioner, through his supplementary List of Authorities filed on 28 April 2016, clearly illuminates this position in re Article 47 of the Constitution. Of the said Article, the Court of Appeal(per Githinji JA) stated as follows :

> ***"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."***

46. The principal purpose of Article 47 in my view is to ensure that administrative actions where they affect or touch on an individual's interests rights and liberties are only undertaken by public tribunals or individual decision makers in compliance with constitutional principles and standards of fairness. These include but are not limited to the principles of natural justice as known under common law.

47. Both under the Constitution as well as statute and common law, it is understood that an individual whose rights interests or privileges are to be affected by any decision directly should have his case determined by a fair and impartial decision maker but only after being afforded an opportunity to present his case fully. That right to hearing entails also the opportunity to confront or challenge any evidence or contention by the party fronting a contrary view.

48. It must however be pointed out that whilst the right to a fair and just administrative action is now

engrained in the Constitution, that constitutional concept is notoriously flexible and each case must always be looked at on the basis of its own unique facts. Thus where there exists any legitimate expectation that a certain procedure will be followed or that a certain decision is likely to be arrived at, then procedural fairness will require a more stringent adherence to the tenets of fair and just administrative action processes. Likewise where the decision maker himself opts for a particular procedure the scrutiny is likely to be heavier on him unlike where the procedure is grounded on explicit statutory provisions: see **Russel *vs.* Duke of Norfork [1949] 1 All ER 107, 118 for an expositional approach**.

49. There may also exist institutional constraints which may hamper specific aspects of procedural fairness, and this is a factor which must not be ignored. Likewise, greater procedural protection may be required where there is no appeals process.

50. The flexibility of the right to fair administrative action and general procedural fairness is further made clearer when one reads the Fair Administrative Action Act 2015 as well as Article 25 of the Constitution. In short, the right to fair administrative action is not absolute

51. The end result must however be that , privately, the process has led to a fair decision and that ,in the public domain, the confidence of the public has stayed intact in such process in so far as such process are allowed to proceed and be undertaken. That way a degree of fairness is deemed to have been achieved: See **Onyango Oloo *vs.* Attorney General [1986-89] EA 456** where the court held that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly.

52. As was however stated in **Russel *vs.* Duke of Norfork (supra) what matters is that a person has his day with the decision maker in the form of also having the opportunity to state his case, notwithstanding the standard adopted.**

53. In the instant case, it is not in controversy that the Petitioner was vetted and that he met with a negative outcome. The 1st Respondent found that the Petitioner was not suitable to serve. The Petitioner then sought a review of the decision and the 1st Respondent thought in its own wisdom that the review application was merited. Without hearing the Petitioner, the application for review was allowed but with a rider that the Petitioner be vetted again. The 1st Respondent has advanced various reasons for allowing the review but I must point out that the rather mandatory Regulation 33(2) of the ***Vetting Regulations*** sets out the grounds upon which a review is to be based. The grounds are limited and the 1st Respondent is enjoined not to entertain, nay allow, an application for review save on the specified grounds. Regulation 33(2) reads as follows:

> ***"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.***

54. The grounds which will ordinarily see to it that an application for review is successfully admitted are relatively clear. The Petitioner's application for review was successful and it must only be that it fell within the stated grounds. The 1st Respondent held the view that there was need to interrogate and clarify further the allegations made against the Petitioner. The 1st Respondent figured out that there was need to

re-evaluate the Petitioner's competence and suitability to serve in the police service. The 1st Respondent decided that the Petitioner needed to be vetted again. The 1st Respondent must have acted under Regulation 33(2)(c) in allowing the application for review.

55. In its letter dated 7 January 2015 to the Petitioner informing the Petitioner of its decision on the application for review, the 1st Respondent stated, inter alia, as follows:

> ***" …Upon consideration and deliberation of the review application, the commission made the following observations:***
>
> > ***i. It is noted that the allegation against you, <u>of drugging and defiling of the then 13 year old girl, is grave and needs further interrogation and clarification</u>***
> >
> > ***ii. The <u>allegation raises serious doubt about your suitability and competence to continue serving in the national Police Service</u>.***
>
> ***Your application for review has been considered and in light of the gravity of observations listed above, the Commission's decision is to subject you to a re-vetting process to accord you an opportunity to respond to specific issues and to enable the Commission to interrogate issues further with a view to determining your competence and suitability to remain in the service***
>
> ***Please note that the <u>Commission shall communicate the date of your re-vetting in due course.</u>"***

56. The 1st Respondent also informed the Petitioner that he would be invited for the re-vetting. Indeed, the Petitioner was later invited for re-vetting which was scheduled to take place on 22 June 2015.

57. It is not in dispute that when the Petitioner had been vetted out the first time in 2014, he had been questioned over an array of matters which touched on both his integrity as well as competence. One of the charges or complaints against the Petitioner was that he had drugged and defiled a 13 year girl some eight years earlier. When the Petitioner was re-vetted in 2015 the focus was once again on the defiled minor as well as the Petitioner's conduct post the alleged defilement and an accident in which the Petitioner alongside the minor had been involved. The Hansard Report which recorded verbatim the 1st Respondent's proceedings and which has been tendered in evidence by both parties reveals this.

58. The Petitioner's first grievance was that he was not availed with the details of the charges. The evidence before me however reveals otherwise. The Petitioner was first supplied with a summary of all charges against him prior to the first round of his vetting. Specifically, the Petitioner was detailed on the defilement allegations. When the Petitioner was to be re-vetted it was once again the same charges levied against him. He was to be grilled over the same issue.

59. It is important to note that procedural fairness demands that a decision maker informs any person to be affected by a decision, of the complaint as well as particulars of any complaint that may lead to an adverse decision being made. The reasoning is that there is need for the affected party to know the charges he is faced with and to prepare his case or defence well. The affected person is then said to have a fair and reasonable opportunity to put his case. It serves little or no purpose to give a person a reasonable notice to attend a hearing without knowing the charges he is faced with. Conversely, it serves little or no purpose to notify the affected person of the charges but give him inadequate notice. The two, notice and notification of the charges, go hand in hand. Adequate notice requires the timely communication of all considerations, including adverse allegations, to the affected party.

60. The Petitioner herein was always aware of the charges he faced. At the re-vetting it was the same script as the letter dated 7 January 2015 notifying the Petitioner of the re-vetting focused only on the defilement issue.

61. The re-vetting was borne out of a successful application for review by the Petitioner. Neither the

Petitioner nor the 1st Respondent could have expected that new or fresh charges could be laid and indeed none was laid. If that had been the position then procedural as well as substantive fairness would have expected the 1st Respondent to serve the Petitioner with details of the fresh charges or allegations.

62. The 1st Respondent had for good reason decided to offer the Petitioner the benefit of the doubt and look again at its decision declaring the Petitioner unfit to serve with the assistance of additional information from witnesses and investigation reports. The 1st Respondent decided to undertake the process de novo. I am satisfied that even if the same charges were supplied it would have made no difference, just the same way there was no difference and neither was the Petitioner prejudiced when the same particulars were not formally supplied to the Petitioner.

63. The Petitioner also complained that he was never given the opportunity to challenge the evidence that was tendered against him. In this regard, the Petitioner contended that though the 1st Respondent heard witnesses and relied on documentation, the Petitioner never had the opportunity to cross-examine the witnesses or put a challenge to the documents.

64. I am conscious of the fact that the challenge before me is as regards the decision made after the fresh vetting. The Petitioner questioned the rationale of calling witnesses and not allowing him to be present as the witnesses testified during the fresh vetting.

65. It cannot be doubted that for the purposes of the re-vetting the 1st Respondent summoned and heard from or interviewed witnesses. The witnesses were interrogated by the 1st Respondent panel specifically constituted for the re-vetting. The testimonies of the witnesses were relied upon by the 1st Respondent in reaching its decision on the re-vetting session.

66. As already indicated and founded, it is a tenet of procedural fairness that a party likely to be affected by any decision be not only given timely notice for purposes of the hearing but also be availed all the necessary information. If there were documents the 1st Respondent had intended to rely upon and which were adverse to the Petitioner, the 1st Respondent was obligated to avail copies to the Petitioner. If there were witnesses and witness statements the 1st Respondent was set to rely upon in the process of re-vetting, there was need on the part of the 1st Respondent , in the circumstances of this case to avail to the Petitioner an opportunity to comment ,if not to challenge, such witnesses and witness' testimonies.

67. I have looked at Regulation 18 of the Vetting Regulations. The said regulation demands of the 1st Respondent to avail documents alongside any complaint. The Petitioner relied on this provision of the vetting Regulations in a bid to demonstrate that the 1st Respondent was statute bound to supply the Petitioner with the witness statements. The 1st Respondent on the other hand holds the view that the Petitioner was not entitled to any of the documents as the interviews and documentation merely constituted part of the 1st Respondent's investigations.

68. I hold the following view on this issue.

69. Undoubtedly, parties set to be affected by adverse administrative decisions ought to be timeously supplied with all relevant information. This enables a party to prepare for his case or defence. It is an aspect of procedural fairness. It is thus not mandatory but only dependent on the peculiar facts of each case.

70. The circumstances of this case were indeed peculiar.

71. The Petitioner had been found unsuitable to serve in the national police service by reason of an allegedly lewd relationship with a minor. The 1st Respondent thought that there was defilement and actually so held. Then the 1st Respondent thought and doubted its own decision. It decided that there was need to be more certain than before. It decided that it needed to call additional testimony or evidence to

prove the defilement and manner of treatment of the minor by the Petitioner. The 1st Respondent had reached a decision and upon a prompting by way of review by the Petitioner , the 1st Respondent thought and held that there was need to clarify and this necessitated the calling of witnesses. And it did. It however adopted a rather peculiar procedure, on the hearing following the review decision. Having assured the Petitioner of a hearing, the 1st Respondent decided to hear the Petitioner separately and the witnesses separately and on different dates. This was peculiar.

72. This procedure of converting an investigatory interview into a hearing of the accusations against the Petitioner in the absence of the Petitioner and applying such evidence towards a decision, in my view, was rather irrational and procedurally unfair. I view it so especially in view of the fact that the 1st Respondent had itself doubted its earlier findings that the Petitioner was unsuitable to serve in the police service.

73. The 1st Respondent had returned the verdict that there was need to clarify and reconfirm certain aspects of its earlier decisions before condemning the Petitioner to early retirement through a declaration of unsuitability. The aspects were not being reconfirmed by the Petitioner but by third parties who included , surprisingly, the Petitioner's wife. I am satisfied that the Respondent should have given the Petitioner the opportunity to also question any aspect of the clarifications that the 1st Respondent had obtained from the witnesses.

74. The failure to do so amounted to procedural unfairness which no doubt prejudiced the Petitioner as he never had any opportunity to rebut or challenge the fresh evidence.

75. The Petitioner finally faulted the 1st Respondent in the manner it had constituted its panels to hear and re-hear the Petitioner's vetting and re-vetting.

76. I agree that where the decision maker is a panel then procedural fairness and propriety demands that its composition is consistent.

77. In **Eusebius Karuti Laibuta vs. National Police Service Commission [2014] eKLR**, this Court in holding that a skewed panel's decision was unprocedural, unlawful and unfair ,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."***

78. Ideally, a member of a tribunal who has not heard all the parties or all the evidence should not participate or appear to participate in the tribunal's decision. He cannot claim to own such a decision. It cannot be his decision at all where he has not participated in the proceedings. Such a person cannot be expected to arrive at a rational reasonable and fair decision. The same should obtain in the instant case.

Conclusion

79. Having considered the foregoing, I am therefore not convinced that the process of the Petitioner's vetting met the constitutional muster. The requisite standards of fairness and proper procedure were not met. The decision by the 1st Respondent should therefore not be allowed to stand.

80. I am however not in a position to determine the merits of the decision, suffice to point out that the 1st Respondent seems to have been determined to gather the necessary evidence in support of the complaint. I find nothing wrong with that but an inference may be drawn that the 1st Respondent was determined to obtain a particular verdict having doubted its own decision. However, it would be inappropriate in the

circumstances to substitute the decision to vet out the Petitioner with one of this court without a full version of the Petitioner's side of the story. With the benefit of the Petitioner's version and story, it would be easier to determine whether or not the decision to still declare the Petitioner unsuitable to serve was reasonable and rational. I unfortunately have no material to ride on.

81. The 1st Respondent would appear to have been determined to confirm its own earlier conviction of the Petitioner through additional evidence. The 1st Respondent must live with that decision and expect the Petitioner to challenge the reasonableness, rationality and merits of any of its future decisions regarding the Petitioner if the 1st Respondents settles for another vetting session with the Petitioner. For now it is obvious that the Petitioner was prejudiced.

82. The Petition ought to succeed and it has.

Reliefs

83. Accordingly, and in the circumstances of this case, I grant the following reliefs:

a) A declaration that the Petitioner's rights under Article 47 of the Constitution were violated.

b) An order of Certiorari removing into this Court the proceedings of the 1st Respondent and the decision of the 1st Respondent declaring the Petitioner unsuitable to serve in the police service for purposes of being quashed, which proceedings and decision are hereby quashed.

c) An order that the 1st Respondent is at liberty to vet the Petitioner de novo and 1st Respondent shall decide within the next 60 days whether to vet the Petitioner de novo and do so within the same 60 days, in accordance with the Constitution and all relevant statute law.

d) An order that the costs of this Petition are awarded to the Petitioner to be borne by the 1st Respondent.

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

J.L.ONGUTO

JUDGE