REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 282 OF 2016

IN THE MATER OF AN APPLICATION OF JOE LEKUTA FOR LEAVE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS TO REINSTATE THE APPLICANT TO THE SERVICE.

AND

IN THE MATTER OF CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

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

BETWEEN

JOEL LEKUTA ……...……....APPLICANT

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION…..RESPONDENT

JUDGMENT

1. On 26th June 2016 Honourable Odunga J granted the exparte applicant herein Joel Lekuta leave to commence Judicial Review proceedings to challenge the decision of the National Police Service Commission which vetted the applicant herein out of the National Police Service on account of unsuitability and incompetence to continue serving. The applicant was granted 14 days within which to file and serve the substantive motion.

2. The substantive motion was dutifully filed on 11th July 2016 within the said 14 days as per the leave granted. The motion is dated 5th July 2016.The exparte applicant seeks for the following prayers/orders.

> 1. That pending the hearing and determination of this application inter partes and thereafter pending the hearing and determination of these proceedings, there be a stay of the decision of the matter in as far as it relates to the respondent's letter dated 5th May 20216;

2. That pending the hearing and determination of this application, interpartes and thereafter, this Honourable court be pleased to grant an order of prohibition against the respondent from stopping the salary of the applicant until this matter is fully determined by this Honourable court;

3. That this Honourable court be pleased to grant an order of certiorari to bring into this court and to quash the decision of the respondent to remove the applicant from The National Police Service hereinafter referred to as 'the service'.

4. That this Honourable court be pleased to grant an order of prohibition against the respondent from effecting the decision made against the applicant on 5th May 2016.

5. That this Honourable court be pleased to grant an order of mandamus to compel the respondent to reinstate the applicant to his duties as Superintendent of Police.

6. That cost of this application be borne by the respondent.

3. The notice of motion is supported by 7 grounds on the face thereof; a statutory statement and a supporting affidavit sworn by Joel Lekuta the exparte applicant herein.

4. The judicial Review proceedings herein challenge the decision of the National Police Service dated 5th May 2016 which upheld the earlier decision of the vetting panel. In other words, the exparte applicant applied for review of the decision to remove him from the service and it is the review decision that he is challenging vide these Judicial Review proceedings.

5. The exparte applicant's case is that on 31st March 2016, he was vetted by the respondent pursuant to Section 7(1) and 7(2) of the National Police Service Act, 2011, to assess his suitability and competence and to discontinue the service of any officer who fails the vetting thereto.

6. The exparte applicant further complains that he was only given two days to prepare a response to the allegations against him, which time frame was not adequate.

7. The exparte applicant further claims that during the vetting exercise, the applicant was only interviewed for twenty (20) minutes and the Board concluded that the applicant failed the vetting.

8. Further, the applicant laments that he was not accorded a fair hearing as espoused in Article 50(1) of the Constitution of Kenya, 2010 as no complainant and or witnesses were called in for cross examination by the applicant.

9. That despite challenging the decision of the Vetting Board dated 9th October 2015 and filing the application for review and after the review hearing on 5th February, 2016, the Review Board upheld the decision to remove him from the service.

10. The applicant laments that the decision to remove him from the service was never communicated to him until 5th May 2016 three months later vide letter dated 5th May 2016 requiring him to acknowledge receipts of the results from the vetting process. That when the applicant received the said letter and copy of the decision as annexed on 20th May 2016 he approached this court for redress.

11. The applicant avers that the respondent disregarded the law and grossly violated the Rules of natural justice as the applicant was not given an opportunity to examine the complainants hence the process was prone to abuse and malice, ill will, witch hunt, malafides, vengeance and ridicule achieving disastrous results to the applicant, his family and the public; and that the ends of justice demand that the application be allowed *ex debito justiciae.*

12. The supporting affidavit reiterates the above grounds which form the basis of the alleged

violations by the respondent as per his statutory statement and verifying affidavit filed together with the chamber summons for leave to institute these Judicial Review proceedings. He also annexed the impugned decisions and his application for review and proceedings of the vetting process both at the initial stage and at the review level.

13. The respondent opposed the notice of motion and filed a relying affidavit sworn by Mr Johnston Kavulundi who is the Chairman of National Police Service Commission. Most of the depositions of the deponent from paragraphs 3-11 of the affidavit are depositions on points of law by reproducing statutory provisions of the National Police Service Act and Regulations which in essence are not depositions of fact. Affidavits are governed by the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya. A deponent is expected to depose to matters of fact which are either within his own knowledge or on information which he verily believe to be true.

14. n the instant case, I find the depositions reproducing statutory provisions not being acceptable.

15. However, the facts upon which the opposition are premised which can be gathered from the verbose affidavit of Mr Kavulundi are those annexing the proceedings and decision of the Vetting Board to the effect that the applicant was procedurally removed from the police service after the vetting process on 9th October 2015 on various grounds key among them being failure to supply the Commission with full and truthful information contrary to Regulation 18 as read with Regulation 19 of the National Police Service(vetting) Regulations 2013, associating with criminal groups, suspicious deposits which he could not give plausible account for and being rude, arrogant, combative, hot tempered, impatient and argumentative.

16. According, to Mr Kavulundi, prior to the removal of the applicant from the police service, the applicant was accorded an absolutely fair and procedural hearing pursuant to the constitutional provisions and the National Police Service Commission Act and the Police Service (vetting) Regulations, 2013.

17. Further, that the applicant was timely and procedurally notified of the complaints summary sheet dated 25th February 2015; of which the applicant responded on 5th March 2015 and that he never raised a complaint regarding the manner and nature of the complaint furnished upon him.

18. That when the applicant appeared to be vetted on 31st March 2015 he never raised any complaint as to the manner and nature of the vetting process, as shown by the hansard records which show that he was accorded ample opportunity to address all the complaints leveled against him.

19. That during the review application hearing conducted on 5th February 2016, the applicant did not prove any error on the face of the records or any new facts a per the requirements of Regulation 33 of the Police Service (vetting) Regulations which guides the process but that instead, the applicant contradicted himself while admitting that he used to receive periodic remittances from junior officers, a fact which he had initially denied during the initial vetting process. That the vetting process was smooth save that it was apparent that the applicant was a person of questionable integrity.

20. That no elements of unfairness and or breaches of the law was specifically cited and that after analyzing the documents provided by the applicant, the respondent found during the review application that the applicant had failed to accurately explain the various sources of income hence his financial probity was wanting. That the hansard report shows that the applicant was given sufficient time during the vetting; that he asked questions and hence the decision to remove him from the police service was procedurally done. That therefore this application is an abuse of the court process as it seeks to prevent the commission from getting rid of officers of questionable integrity, suitability and competence from the service in an effort to bring sanity and restore public confidence in the police service. The respondent therefore prayed that the Judicial Review proceedings be dismissed with costs.

21. In the exparte applicant's further affidavit sworn on 19th September 2016 and filed in court on 20th September 2016, the exparte applicant deposes in response to the replying affidavit sworn by

Mr Johnson Kavuludi that when he appeared before the vetting panel, he was interviewed for about 20 minutes touching on allegations in the summary sheet and that only Mary Owour interviewed him hence there was no quorum to constitute the vetting panel in its composition, yet the decision that discontinued him from the service was signed by several other commissioners who, infact, did not attend the vetting.

22. Further, that Mr Kavuludi himself was not present and therefore he only signed the results. He denied ever associating with criminal gangs. He denied allegations that he solicited for money from junior and that neither was he disrespectful as he was an officer of honour. The applicant maintained that prior to the vetting, he had requested for details of the particulars of the complaints leveled against him but that he had been denied the same, which was in breach of Articles 35, 47,50 and 249 of the Constitution as well as Regulation 18 of the National Police Service (vetting) Regulations, 2013. The applicant maintained that his alleged accusers were not availed for cross examination. According to the applicant, the respondents had a predetermined mind to remove him from the service.

23. The applicant further claimed that even during the review application, he was not accorded ample time to adequately give his side of the story contrary to the rules of natural justice and that the review panel instead resorted to intimidating him, through constant interruptions which infringed on the applicant's rights to a fair hearing as they subjected him to questioning on matters that he could not adequately respond to since there were fresh allegations at the review hearing to the effect that he solicited monies from James Saguti, Daniel Munywaru and Jared Sia Naibei among others hence there was no justification for discharging the applicant from the service.

24. The applicant also deposed that section 7(2)of the National Police Service (vetting) Regulations 2015 limits the respondents' powers to determining the suitability and competence of the officers but that instead, the respondents herein introduced extraneous issues of integrity yet this was not within their mandate.

25. The applicant maintained that he was a trustworthy officer who had served diligently and that therefore the decision to remove him from the service was unconstitutional.

26. The parties' advocates filed written submissions to canvass the application. The exparte applicant filed his submissions on 20th September 2016, together with a list of authorities dated 19th September 2016. The respondent on the other hand filed its written submissions dated 10th October 2016. The applicant's submissions reiterated the grounds and depositions in his supporting affidavit and further affidavit filed on 20th September 2016, and raised two issues for determination namely;

> *1. Whether or not the respondent conducted the proceedings at the vetting on 31st March 2015 and the review hearing on 5th February 2016 in a fair manner?*
>
> *2. Whether the orders sought by the applicant ought to issue.*

27. On whether the vetting and review process were conducted in a fair manner, Article 47 of the Constitution was cited and a submission made to the effect that the vetting and review process was not fair because the applicant was never given adequate time to respond to the allegations leveled against him; that no complainant testified for cross examination as requested by the applicant hence the findings of the Review Panel were unreasonable and amounted to unfair administrative action; breach of legitimate expectation; and in total violation of the applicant's rights to procedural fairness. Reliance was placed on **Halsbury's Laws of England 5th Edition 2010 VOL 61 paragraph 639** as cited in **National Police Service Commission exparte Francis Omondi Okonya [2014] e KLR page 13.**

28. It was further submitted on behalf of the exparte applicant that failure to call the complainants for cross examination to ascertain the truth in their allegations violated the applicant's right to due process and natural justice. That insufficient time was accorded to him to comprehensively respond to the allegations and that fresh complaints during the review hearing ought to have been brought to his attention prior to the hearing for there to be fairness in the as espoused in Article 50(1) of the

Constitution.

29. The applicant also relied on **Judicial Service Commission vs Mbalu Mutava & Another [2015] e KLR** wherein Article 47(1) of the Constitution on fair administration action was interpreted, with the applicant submitting that the respondent must meet the minimum irreducible elements of fairness. The applicant prayed for the orders sought in the notice of motion.

30. In their rejoinder submissions filed on 10th October 2016 the respondents submitted framing three issues for determination namely:

a. Whether the applicant's right to fair administrative action and fair hearing were violated by the commission.

b. Whether the vetting panel was lawfully constituted and the decision to remove the applicant lawfully arrived at and signed.

c. Whether the applicant is entitled to the orders sought.

31. On whether the applicant's right to fair administrative action and fair hearing was violated by the National Police Service Commission, it was submitted by the respondent that by letter dated 9th October 2015 the applicant was informed of the decision why the review application was dismissed.

32. The respondent maintained that it accorded the applicant an opportunity to be heard prior to his removal after vetting him procedurally, lawfully and fairly and in accordance with the Constitution, the relevant law and regulations. That the respondent removed the applicant after vetting him on his suitability and competence and in accordance with Regulation 12(2) (b) and (d) of the Police Service (Vetting) Regulations which require the Commission to look at the past record including the conduct, discipline and diligence of the officer and also the human rights record of the officer.

33. Further, that the Hansard records demonstrate how fair the vetting process was in strict compliance with the rules of natural justice. That during the review hearing, the applicant was given a fair hearing and fair administrative action as envisaged in Articles 50 and 47 of the Constitution and that the applicant was accorded an opportunity to explain and clarify on issues he was found wanting with regard to his professionalism, diligence, and suitability to serve in the service. That the review application was dismissed because the applicant failed to exonerate himself from the allegations that had been leveled against him hence the claim that the rules of natural justice were breached was misleading to the court and an abuse of the court process. That the elements of unfairness and breaches of the law were not specified by the applicant who merely quoted the constitutional provisions and the statutory law without proof which does not suffice.

34. Reliance was placed on **Musili Mwendwa V Attorney General & 3 Others [2016] e KLR** citing **Anarita Karimi v Republic [1976-80] KLR 1272** and as reiterated in **Mumo Matemu Vs Trusted Society of Human rights Alliance & 5 Others [2013] e KLR** and **Meme vs Republic [2004] e KLR** that the alleged violations must be particularized in a reasonably precise manner and that the specific provisions of the Constitution which availed the violated rights had to be stated as was the Manner of violation and extent thereof.

35. On the second issue of whether the decision to remove the applicant was lawfully arrived at and signed, it was submitted that the applicant's contention that the decision was not arrived at and signed procedurally are misleading and of no legal basis since Regulations 25(4) of the Police Service (vetting) Regulations 2013 provides that the decision shall be in writing signed by all the commissioners who decided the matter and sealed with the common seal of the commission. That the above provision does not restrict the decision making to the Commissioners who participated in the hearing since the proceedings are recorded in the Hansard verbatim which print outs are later used in determining whether an officer is suitable to continue serving or not. Further, that few Commissioners are incorporated in the

various vetting panels whose other members do not enjoy voting rights when it comes to decision making which right is a preserve of the respondent through the Commissioners thus the need for the adoption of the verbatim Hansard record.

36. Further, it was submitted on behalf of the respondent Commission that although the hearing was not conducted by all Commissioners who signed the decision, Regulation 10(1) of the National Police Service (vetting) Regulations 2013 mandates the Commission to constitute a number of panels and comprising such persons as the Commission shall determine in order to ensure expeditious disposal of matters. That Regulation 10(2) of the Police Service (vetting) Regulations 2013 further provides that the Commission may establish panels comprising such co-opted persons as it may deem necessary for purposes of determining application for review under Section 33 of the Act. That the co-opted members are barred from participating in decision making which is in the exclusive preserve of the Commissioners hence the adoption of the Hansard recording by Commissioners.

37. Reliance was placed on **Immanuel Masinde Okutoyi & Others V National Police Service Commission & Another [2014] e KLR** where Honourable Odunga J interpreted the above provisions on the formation and composition of panels and committees for the better carrying out of the Commission's functions and that in doing so it 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 deliberations they have no power to vote. Accordingly, that the learned judge found that there is inherently no wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.

38. On the third issue of whether the applicant is entitled to the orders sought, it was submitted that the applicant had failed to demonstrate any act of procedural unfairness or illegality allegedly committed by the respondent in the discharge of its statutory mandate to vet officers. The respondent urged the court to find that the exercise of vetting the applicant was fair and that it did not infringe on any fundamental rights of the applicant hence the orders sought by the applicant are not merited and therefore the application should be dismissed with costs to the respondent.

39. The parties advocates had initially agreed to highlight their respective submissions but at the oral hearing on 17th October 2016 they agreed to adopt their written submissions as above with Mr Ngira for the applicant submitting that due process goes beyond issuing notice to appear and that the complainants had to be availed for cross examination by the applicant which was not the case here.

Determination

40. This court has considered the applicant's notice of motion seeking for Judicial Review orders of certiorari, mandamus, and prohibition. I have also considered the opposition thereto by the respondent and the submissions filed by the respective parties' advocates and the authorities relied on.

41. The issue for determination is whether the applicant is entitled to the judicial review remedies sought.

42. The main complaint by the applicant against the respondent is that the respondent did not follow due process as to avail the complainants for cross examination following allegations against the applicant and that instead, the respondent hurriedly reached the conclusion that the applicant had failed the vetting without according him a fair hearing.

43. Procedural fairness is now not only a common law requirement in decision making processes by quasi judicial or administrative entitles but it also a constitutional imperative such that even where a statute or internal rules of an entity whether public or private do not provide for the right to head before a tribunal or body or authority makes a decision, the principle of procedural fairness is implied.

44. Judicial Review comes in handy to check on the excesses of a tribunal or authority in decision making process. It also comes in to check on whether there was procedural fairness in the decision making process by the inferior body, or where there was illegality, or irrationality of the decision or

decisions making process. Judicial Review looks at the procedure used in decision making and not the merits of the decision. This court when exercising Judicial Review jurisdiction does not exercise civil or criminal jurisdiction therefore it is not permitted to act as an appellate court.

45. The entrenchment of the judicial review remedies as a constitutional principle naturally expands the scope of the judicial review remedies beyond the public private power dichotomy. They apply to all persons as defined under the Constitution (Article 260) and more particularly, Article 20(1) under the bill of rights which espouse that *" The Bill of Rights applies to all law and binds all stare organs and all persons.* Article 47 of the Constitution of Kenya stipulates that:

> 1. "47(1) every person has the right to administrative action that is expedition, 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.
>
> 3. Parliament shall enact legislation to give effect to the rights in clause(1) and that legislation shall:-
>
> a). Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> b). Promote efficient administration.

46. In **W.R. Wade & CF Forsyth "Administrative Law 10th edition [2009] Oxford University Press page 433** it is stated:

> ***"Where an oral hearing is given, it has been laid down that a tribunal must:***
>
> ***a. Consider all relevant evidence which a party wishes to submit;***
>
> ***b. Inform every party of all the evidence to be taken into account, whether derived from another party or independently;***
>
> ***c. Allow witnesses to be questioned;***
>
> ***d. Allow comment on the evidence and argument on the whole case.***
>
> ***And in exercising the power of dismissal, there exists a duty before exercising that power, to accord an officer an opportunity of knowing the charges and of the evidence in support of them and of producing such evidence as he desired to produce (see Osgoode V Nelson [1872] LR 5 HL 636.***

47. In **Republic vs Deputy Industrial Injuries Commissioner Exparte P. Moore [1965] 1QB 456 at 490** the court stated that the rules of natural justice required the Commissioner to listen fairly where a hearing has been requested or there is a hearing whether requested or not, to the contentions of all persons who are entitled to be represented and the hearing, in particular allowing both parties to comment on or contradict any information that he had obtained.

48. In adherence to Article 47(3) of the Constitution, Parliament in 2015 enacted the Fair administrative Action Act No. 4 of 2015. Section 4 of the said Act reiterates the constitutional entitlement of every person to administrative action that is expeditions, efficient, lawful, reasonable and procedurally fair simultaneously*; that every person has the right to be given written persons for any administrative action taken against him; In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision-prior and adequate notice of the nature and reasons for the proposes administrative*

action, an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision when applicable; a statement of reasons, notice of the right to legal representations and the right to cross examine; as well as information, material and evidence to be relied upon in making the decision or taking the administrative action.

49. It is worth noting that some of the elements in Section 4 above are mandatory whereas some are only required where applicable. The Section goes on to provide in subsection 4, obliging the administrator to comply with the Act.

50. This court notes that the impugned decisions of the Review Panel of the Commission was made on 5th May 2016 after hearing of the review process upholding the decision of the initial vetting process that found the exparte applicant unsuitable to continue serving as a police officer. However, the Fair Administrative Action Act, 2015 was enacted and Gazetted on 3rd June 2015. It was assented to by the President on 27th May 2015 and its date of commencement is 17th June 2015. That being the case, and as statutes do not operate retrospectively, although the Act implements Article 47 of the constitution, it would not be appropriate to substantially base the vetting process of the applicant on the verbatim statutory provisions espoused in the Fair Administrative Action Act, 2015.

51. I would, in the circumstances, focus on the substantive constitutional provisions on fair, efficient, effective and expeditious administrative action and as interpreted by courts in various decisions prior to 17th June 2015.

52. In this court's view, failure to adhere to the provisions of Article 47 of the Constitution to administrative action is to violate the bill of rights and to limit the person's rights under the Constitution.

53. The Constitution obliges all persons to promote, protect and fulfill the rights and fundamental freedoms entrenched in the bill of rights Article 50(1) of the Constitution obliges that

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

54. What the above provision espouses is the right to a fair hearing which is a cardinal principle of the rule of law. In **Russel V Duke of Norfork [1949] 1 ALL ER 118** the court stated.

> "***There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirement 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 is that being dealt with and so forth. Accordingly I do not 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."***

55. In **Halsbury's Laws of England 5th Edition 2010 paragraph 639** the writers state that

> ***"the rule that no person is to be condemned unless that person has been given prior notice of 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 court."***

56. Section 7(2) of the National Police Service Commission Act mandates the Commission to discontinue the service of any Police Officer who fails in the vetting referred to under the Subsection. For the Commission to discontinue the services of the officer, however, it must be satisfied that the officer has failed the vetting.

57. However, as was held by Odunga J in **Immanuel Masinde Okutoyo & Others vs The National Police Service Commission Petition No. 6 of 2014** consolidated with **Miscellaneous Application Nos 11 and 12 of 2014**, ***" the mere fact that there are no complaints lodged against an officer with the commission does not necessarily mean that the police officer ought to be discontinued from service, it is imperative that the allegations made against a police officer be availed to him or her in good time to enable him or her adequately respond thereto. To confront an officer with allegations when their source cannot be vouch safed is in my view unfair". As was held by Platt, JA in Onyango Oloo V Attorney General [1986-1989] EA 456.***

> ***"Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the courts of Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair."***

58. In the instant case, the exparte applicant complains that he was served with complaints lodged against him vide letter dated 25th February 2015 Ref NPSC/1/3/9/VOL VII/(165) and asking the applicant to send a response by 6th March 2015, which was about 9 days. That the complaint summary sheet comprised three allegations by one Daniel Otieno Oponyo over his piece of land; soliciting money from police officers and smoking in the office. The applicant received the notice on 4th March 2015 and prepared a response on 5th March 2015 to the respondent, a day before the last date for submitting the response. The vetting took place on 31st March 2015 and a decision to remove him was communicated to him on 9th October 2015.

59. In his response letter dated 5th March 2015 the applicant in his last paragraph stated as follows:

> ***"I have not been able to sufficiently respond to the summary of complaint for reason that the complaints have been generalized. I would have done better if proper particulars were supplied in good time and I am willing to do so as and when called upon and I deny all allegations raised in the complaint"***

60. What the applicant was saying in the above letter is that the summary of complaint was generalized and that it lacked better or proper particulars which, if supplied in good time, he would have responded thereto sufficiently.

61. I have examined annexture JL2 a complaint summary sheet for the applicant. The complaint states:

> **1.**"***It is alleged that you are intimidating and black mailing one Daniel Otieno Oponyo over his pieces of land so that he surrenders the said pieces of land to a group of Asians who were duped into purchasing the said parcels of lands by well known brokers.***
>
> ***2. Its further alleged that you abuse your power, are corrupt, incompetent and demand money from officers as follows: OCS Kondele 5000 weekly, OCS Kisumu 3000 weekly, OC crime Kondele 3500, OC Kisumu 2000, D/OCS Kondele 2000 weekly, OC Perty Kisumu 1000, OC-Perty Kondele 2000 weekly, All in charge post/base,5000 weekly, Chania Group 3000 daily, America Group, 4000 – totaling to around 120,000 per month.***
>
> ***3. Its further alleged that you smoke in the office before police and civilians , call officers using bad nicknames, seduce and kiss police officers, who are female"***

62. According to the applicant, he was interrogated by Commissioner Mary Owuor only for 20 minutes and that he was not given an opportunity to be heard. Further, that although the decision was signed by 6 Commissioners, those Commissioners never vetted him hence the decision is a nullity.

63. On whether the applicant was given sufficient time to respond to the allegations leveled against

him, this court finds that indeed the letter and summary sheet of complaints was send to him on 4th March 2015 and he was expected to respond to those allegations by 6th March 2015. The applicant met the deadline of 6th March 2015 by responding on 5th March 2015 but he protested that the time allocated to him to respond was too short and that the complaints were generalized and that they did not contain better particulars.

64. In my humble view, as the vetting process was a statutory requirement, and as the applicant was to be vetted on 31st March 2015, there was absolutely no reason why the respondent gave the applicant less than 3 days to respond to the allegations against him.

65. I say so because having written the letter on 25th February, there is no reason why that letter was not delivered to him by a runner and instead it was delivered to the applicant on 4th March 2015 yet the deadline was 6th March 2015.

66. Indeed, albeit the applicant was going to be vetted anyway, and it mattered not that there was any specific complaint against him. I am in agreement with Hon. Odunga J in **Immanuel Masinde Okutoyi** (supra) case ***that it is imperative that the allegations made against a police officer be availed to him in good time to enable him or her adequately respond thereto.*** The applicant in this case, was in my humble view not given adequate time to respond to the allegations against him.

67. I therefore find that serving the applicant with allegations on 4th March 2015 and expecting him to respond thereto by 6th March 2015 which was a day away was unfair.

68. On the other limb of generalized allegations that had no better particulars, the court notes that other than Mr Daniel Otieno Oponyo who was alleged to have been blackmailed by the applicant, the other allegations were truly generalized. And although the sources were said to be other officers holding junior positions to the applicant in the Kisumu area, their names were never provided. It was also not indicated as to what specific period/dates the applicant is alleged to have received or demanded monies from his juniors and the criminal gangs namely the China Group and the America Group. The complaints were too generalized yet at the vetting, the applicant was never given an opportunity to face or confront his accusers with questions to determine their credibility. ***In my humble view, the applicant was confronted with allegations whose source could not be vouchsafed which is unfair.*** In this regard the writings by **W.R. Wade & CF Forsyth in Administrative Law 10th Edition [2009] Oxford University Press page 433** (supra) are instructive that:

> ***"Where an oral hearing is given, it has been laid down that a tribunal must:***
>
> ***a. Consider all relevant evidence which a party wishes to submit;***
>
> ***b. Inform every party of all the evidence to be taken into account, whether derived from another party or independently;***
>
> ***c. Allow witnesses to be questioned;***
>
> ***d. Allow comment on the evidence and argument on the whole case."***

69. Albeit, in this case, the Hansard report shows that the applicant was vetted for a considerably long time which cannot be a 20 minute interview by Mrs Mary Owour as stated by the applicant, the court notes that the applicant's accusers were never availed for the applicant to question them on the allegations against the applicant.

70. What I see from the Hansard report is that the panelists became the investigators, accusers, the judges, and jury in their own cause. They did most of the talking and talking without according the applicant sufficient opportunity to respond to the matters they raised.

71. A vetting process need not necessarily be characterized by any specific accusations since it is meant to test the competence and or suitability of the police officer to continue serving. However, the moment specific accusations are leveled against the officer, those specific accusations must be served upon him in good time to enable him respond thereto and during the vetting process, the Commission is under a duty to avail the accusers to be questioned by the applicant. That is the only way that the applicant can be said to have been accorded a fair opportunity to be fully heard on the accusations. Failure to do so is a denial of the right to be heard fairly.

72. I am fortified by the decision in **Gathaiga V Kenyatta University Nairobi HC Miscellaneous Application 1029 of 2007 [2008] KLR 587** where the court held:

> ***" I would at this stage adopt the observations made in the Hypolito Cassani De Souza v 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. Page 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; the person accused must know the nature of the accusation made;***
>
> ***4. 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;***
>
> ***5. The tribunal should see to it that matter which has come into existence for the purpose of the quasi- his is made available to both sides and once the quasi-his has started 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."***

73. And in **Halsbury's Laws of England 4th Edition Reissue VOL 1(1) 178** it is stated

> ***"Notification of the proceedings or the proposed decision must also be given early enough to afford the persons concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course would be to postpone or adjourn the matter."***

74. Vetting of a police officer and which may result in his or her removal from the service is a serious process that would affect the career and livelihood of persons therefore it was important that in this case, the respondent provides sufficient particulars of the allegations leveled against the applicant including names of his accusers in sufficient time to enable the applicant respond to those allegations and or question his accusers. That did not happen which in my view was unfair, and not in accordance with the principles and rules of natural justice.

75. In addition, during the plaintiff's vetting which led to the decision to remove him from the service it was never stated that the Commission had established that the applicant would visit the bases weekly to collect the money from bases and subbases and or that he associated with members of criminal gangs in Kisumu known as China and America. These allegations arose during the review hearing which was new evidence that was never given to the applicant to respond thereto prior to the review

hearing.

76. Further, during the review application, the Commission, from the Hansard report appears to have been revetting him a fresh as opposed to listening to the officer's submissions on why he was not satisfied with the decision to remove him from the service. Indeed, it is members of the review panel, and especially the chairman of National Police Service Commission Mr Johnston Kavuludi that did the questioning of the applicant throughout the process while introducing new matters and new evidence as if the applicant was being vetted afresh.

77. In my humble view, a review application by the exparte applicant was never heard. Instead, it was the Commission questioning the applicant on new matters which were never part of the initial vetting process. That being the case, I find that the applicant was denied a fair hearing. Nonetheless, I do not agree with the applicant that there was no quorum and or that the panel was wrongly constituted, as Regulation 10 permits the Commission to co-opt other members to the vetting panel who may not have a casting vote, to assist the Commission in its work and hence, the other members who sat with Mrs Mary Owour during the vetting process but who could not sign the determination. Accordingly, I find that challenge unmerited.

78. In the end, I find that the applicant's prayer for certiorari is merited. I grant prayer No. 2 of the notice of motion, bringing into this court and quashing the respondent's decision made on 5th May 2015 to remove the applicant from the National Police Service;

79. Prayer No. 3 seeking for prohibition prohibiting the National Police Service from affecting the decision made on 5th May 2015 is however superfluous as the impugned decision has effectively been brought into this court and quashed;

80. I further grant prayer No. 4 compelling the respondent to reinstate the exparte applicant to his duties as superintendent of police;

81. I further grant prayer No. 5 prohibiting the respondent from stopping the salary of the applicant.

82. In addition, I order that as the vetting process is a statutory requirement for all serving police officers, the respondent shall carry out their statutory mandate of revetting the applicant herein Joel Lekuta, following the laid down procedure and constitutional and other statutory processes and requirements to the letter.

83. Each party shall bear their own costs of these Judicial Review proceedings.

Dated, signed, and delivered in open court at Nairobi this 13th day of December, 2016.

R. E. ABURILI

JUDGE.