REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 6 OF 2014 CONSOLIDATED WITH JUDICIAL REVIEW MISCELLANEOUS APPLICATION NOS. 11 AND 12 OF 2014

IMMANUEL MASINDE OKUTOYI & OTHERS…….....PETITIONERS

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION & ANOTHER.....RESPONDENTS

JUDGEMENT

Introduction

1. This judgement is the subject of Petition No. 6 of 2014 filed by **Immanuel Masinde Okutoyi**, Judicial Review Application No. 11 of 2014 filed by **Jonathan Kipkurui Koskei** and Judicial Review Application No. 12 of 2014 filed by **Peter Elaini Eregae.** The Petitioner and the Applicants, who shall be referred to as the Applicants instituted these proceedings against **The National Police Service Commission** and **Attorney General** as 1st and 2nd Respondents respectively. The said matters were consolidated as the issues involved in all the matters were similar and cut across the said causes.
2. In December, 2007 this Country went to the General Elections in order to elect its President, Members of Parliament and the Representatives in the Local Government as it was then known. Following those Elections, this country went through one of its worst crisis in its independent history. As a result, the leadership was prodded into hastening Constitutional and Legislative reforms which had hitherto been treated with lethargy and contempt by the previous regime. Some of the decisions which the people of Kenya made were the need to reform inter alia the Judicial, Electoral and Police Sectors.
3. One of the methods of the said reforms was the vetting of the members of the Police force. As a result of the said system of vetting the Applicants herein, who are senior police officers, found themselves threatened with discontinuation from being members of the police force. It is those decisions which provoked these proceedings.
4. In these proceedings, the Applicants are seeking the following orders:
    a. **A declaration that the Respondents' conduct and action amount to denial, violation, infringement and or threat to the fundamental rights and freedoms of the Applicants.**
    b. **A declaration that the vetting of police officers commenced in December 2013 is unconstitutional, illegal, null and void.**
    c. **An order of certiorari to bring into this court and to quash the determination of the Respondent to retire the Applicant from the National Police Service.**
    d. **An order of prohibition to issue as against the Respondent to prohibit the effecting of**

the determination made against the ex-parte applicant.

e. **An order of prohibition to issue as against the Respondent to prohibit the Respondents from making any retirement, promotions, dismissal, order of removal on the vetted officers on the basis of the vetting conducted in the month of December 2013.**
f. **An order to issue to the Respondent to compel the reinstatement of the ex-parte applicant to his duties as a Police Officer.**
g. **Costs.**
h. **Any other or further orders, writs and directions the Honourable Court considers appropriate and just to grant.**

The Case for the Petitioners/Applicants

5. The Applicants' case is that in December, 2013 the 1st Respondent's Vetting Board commenced the vetting of Police officers. However, it is their case that the said process was conducted in gross violation of the Rules of natural justice as they were not given an opportunity to cross-examine any complainants hence the process was prone to abuse and manipulation.
6. According to them instead of concentrating on the performance of the police officers, the Board instead concentrated in the income of the Police Officers hence violating the privacy of the police officers and exposed to danger.
7. It was further contended that the said Board as constituted is illegal, irregular and abnormal and did not meet the legal requirements envisaged in the Constitution and the relevant statute since it was being conducted without a quorum. As a result the Board was unlikely to reach a just and lawful conclusion in their findings as the ex officio members were playing a great role in the process while parties interested is settling scores were similarly playing a great role in the process.
8. As a result of the foregoing it was contended that the fundamental rights and freedoms of the Police Officers have been grossly violated which violation is likely to continue unabated unless the Court intervened as the officers had been subjected to inhuman and degrading treatment. According to the Applicants the vetting process is actuated by malice, ill will, witch hunt, mala fides, discrimination, vengeance, character assassination, public humiliation and ridicule and shadow boxing and is likely to achieve disastrous results to the officers, their families and the public.
9. To them the process is being conducted on the basis that they are guilty unless proved innocent contrary to the law. To them security is a major concern in the country hence the need to handle the process same with decorum and fairness. As the process is in violation of both the constitutional and the law they contended that the same are null and void.
10. According to their averments, the respondent commenced the vetting of all police officers including on Monday, 25th November 2013 at which time there were no Rules and Regulations to regulate the vetting process. Upon launch of the vetting process the respondent invited the public to submit their complaints in early December and prepared a vetting program and scheduled for the process vetting despite lack of the said Rules and Regulations. According to them this action was illegal. Consequently, when they appeared before the respondent for vetting in KICC Building in public they were not briefed of the existence of any rules and regulations for vetting and only came to learn later that the respondent published the Rules on 16th December 2013 just before their vetting without bringing the same to their attention.
11. According to them, the aforesaid Rules were availed to the National Police Service on 9th January 2014 long after they had been vetted and a decision rendered in their case so that even the ex officio members who were appearing in the vetting board did not legally have copies of the Rules and Regulations for Vetting.
12. Although after rendering its decision the Respondents promised to supply them with the proceedings and ruling, they contended that this was never done. Instead the determination was communicated to them by way of letters.
13. According to them, the people who were present during the vetting were **Johnstone Kavuludi**, **Mohammed Murshid**, **Ronald Musengi**, **Mary Owuor**, **David Kimaiyo** – ex officio, **Samuel Arachi** – ex officio and **Grace Kahindi** – ex officio. However section 14 and the Second Schedule Rule 3 of the ***National Police Service Act*** requires five members who shall include two

members appointed under Article 246(2) (a) (i) and (iii) of the Constitution and the five members excluding the ex-officio members appointed under Article 246(b) and (c) of the Constitution. They therefore contended that during the said process the commission lacked without quorum.

14. They asserted that there was no complainant during the vetting and the respondents conducted the case contrary to the rules of natural justice since they were the complainants, witnesses and judges in the aforesaid case. Although the mandate of the commission during the vetting is to determine suitability and competence of the Police Officer as provided under Section 7(2), the respondents considered other grounds not provided for in law and arrived determinations either not supported by evidence or without them being offered an opportunity to explain the allegations which formed the basis of their dismissal.
15. They further contended the respondents applied selective justice and discrimination in the way they conducted their interviews in that there were police officers who were interviewed in private or in the respondents' offices and others in public yet all the officers were asked the same questions. The respondents are the ones who determined who to interview in public or private. It was therefore their position that the vetting process was not being conduced in a transparent and fair manner and the respondents are out to manipulate the process and achieve their own selfish interest contrary to the public good.
16. Apart from the foregoing, the respondent incorporate persons of questionable integrity in the vetting panel with no locus to conduct vetting and these people were named as **Joseph Kaguthi** who was adversely mentioned in the T.J.R.C. Report and had not been cleared, **Simiyu Werunga** is implicated in the Judicial Service Commission procurement scan while **Ronald Musengi** had a pending fraud complaint vide C.I.D. Inquiry File No. 20/2013. Further, the respondents incorporated persons who were not vetted and or gazetted to serve in the panel in the National Police Service Commission and by extension the Vetting Panel. Since the vetting of police officers has been delegated to the National Police Service Commission it cannot delegate the aforesaid duties to third parties since the position in law is that a delegate cannot delegate. To them, the Task Force on Community Policing (*Nyumba Kumi*) has no mandate to vet the police officers and their incorporation in the vetting panel is illegal and wrongful.
17. It was averred that during the interview of **Peter Pamba** the Vetting Panel used vernacular language, yet some of the officers were not asked questions on financial probity, a clear case of favouritism and discrimination.
18. The said decisions, according to them were predetermined in that some of the officers being vetted were being asked whether they were comfortable to be posted in a particular unit. It was therefore contended that the determinations of the Respondents are therefore an illegality as they lack any basis in the relevant law. It is clear that the Respondent acted contrary to the law and rules of Natural justice and their determinations are wrongful, malicious, vexatious, scandalous and otherwise a mockery of justice and exhibit manifest errors of law. Further there are serious violations of the fundamental rights of the applicant in view of the applicant's legitimate expectations and rights as enshrined in the Bill of Rights.
19. By engaging in integrity issues instead of suitability and competence of the applicant, which issues are a preserve of an independent authority set up by the statute, the Respondents are accused of having exceeded their jurisdiction and since the Vetting Board is vested with quasi judicial powers, it is bound to observe the rules of natural justice while conducting the vetting process and is also bound to exercise its powers judiciously and not capriciously which it has failed to do. To them, the Vetting Panel has purported to remove them when there are currently no rules and regulations to retire, remove and or dismiss a police officer in service and any purported removal is illegal, null and void. Their position is that the commission is the only body that has powers to vet the police officers as per Section 7(2) of the ***National Police Service Commission Act***.
20. They further charged the commission chair of using derogatory language against them indicating that he had a predetermined mind. They alleged that the respondent did not investigate complaints against me but they forwarded the same to private investigators who have no investigative skills and mandate. The end result is that any purported investigations that were done were flawed and without tangible conclusion. The said investigators were not gazetted or legally recruited by the commission and they undertook illegal task which they cannot be held accountable and in the circumstances their report if any should have been supplied to the applicants but due to it illegality

the respondent did not supply the report to the applicants for response and comments and the same ought to be disregarded.

21. In the submissions, the Applicants while reiterating the contents of the supporting affidavits averred that the factual averments were not controverted hence the same ought to be taken as correct. It was submitted that it was not fair for the Respondents to promulgate the rules on 16th December 2013 and interview the Applicants the next day and not bring the existence of the Rules to the attention of the Applicants. Without a vetting Board it was contended the mandate of vetting the officers fell on the Commission and since the Government has delegated the powers of vetting to the Commission, the Commission has no authority to delegate the same to third parties. However in this case the Commission purported to establish a vetting panel through the ***National Service Vetting Regulations, 2013*** which panel is illegal as the Commission has no powers to delegate the mandate the said vetting. Further there was no quorum by the Commission to make the Regulations, compose the vetting panel and there was no public participation or transparency in its composition. Further the powers under which the Regulations were made (section 124 of the *National Police Service Act*) do not permit the Commission to deal with employment of officers as opposed to civilians. The said Regulations, it was submitted flouted the provisions of the *Statutory Instruments Act*, 2013 as there was no public participation in their preparation. Apart from that the Rules were gazetted by the Chairman of the Commission rather than the Minister as required by the law
22. It was submitted that under section 7(2) the powers of the Respondent is limited to determining suitability and competence of the officers and therefore in this case the Respondent introduced extraneous issues not within their mandate.
23. Without complaints being made by members of the public, it was submitted that it was unfair for the Respondent to find that the Applicants were unsuitable and incompetent. The Commission as was constituted, it was submitted lacked the quorum as stipulated in section 14 of the ***National Police Service Commission Act***.
24. With respect to availability of the avenue of review, the Applicants contended that the same does not bar the Applicants from applying for judicial review. In any event, they contended, there were stringent and unreasonable conditions for the said review.
25. Without any complaints made with respect to financial status of the Applicants, it was submitted the Respondent's finding thereon was unreasonable and amounted to unfair administrative action. Fair administrative action, it was submitted entailed seeking explanation from the officers of departments concerned with the Applicant.
26. While relying on several provisions of the Constitution the Applicants contended that the Respondents' decision was tainted with procedural unfairness, was in breach of the Applicants' legitimate expectation and violated the Applicants' fundamental rights and freedoms.
27. In support of their submissions the Applicants relied on **Republic vs. IEBC ex parte Issack Osman Sheikh HCMisc. No. 160 of 2013**, **Republic vs. Commissioner of Lands ex parte Carolizanne Gathoni Kuria HCJR No. 44 of 2011**, **Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001**, **Hon. Francis Chachu Ganya and Others vs. Hon. AG HCMA No. 374 of 2012**, **Republic vs. Minister of State for Immigration of Persons ex parte Peter Sessy HCMA No. 361 of 2012**.

Respondents' Case

28. In response to the Applicants' case the Respondents filed the following grounds and also swore affidavits in reply:

1. **That the ongoing vetting of the police officers is a legal requirement under the provisions of Section 7 of the National Police Service Act No. 11 of 2011 Laws of Kenya which is an act that was passed by members of parliament and as such it reflects the aspirations of the Kenyan people and the 1st respondent has no choice other than to comply with its provisions.**
2. **That Article 246(3)(c) of the Constitution gives mandate to the National Police Service Commission to perform any other function as prescribed by national legislation.**
3. **That Section 10 (3) (a) of the National Police Service Commission Act, gives the power exclusively to the National Police Service Commission to make the legislation.**

4. **That Section28 of the National Police Service Commission Act provides the National Police Service Commission powers to make Regulations and in this regard make the National Police Service Commission (vetting Regulations, 2013) and gazette under Legal Notice No. 218 on the 16th December, 2013.**
5. **That there are very clear vetting guidelines and standards that include officers satisfaction of entry and training requirements, professional conduct and discipline, integrity and financial probity and respect for human rights that will ensure that the National Police Service which is an institution in the public service undergoes a critical appraisal of the performance of its officers and thus ensure only the competent are cleared to continue serving.**
6. **That the vetting process is only meant to screen serving police officers to assess their suitability, integrity and competence to continue serving in the police service and the burden of proof lies with the interviewing panel to determine whether an individual is fit or unfit for public service.**
7. **That the standards of due process, principles of natural justice and the respect for every individuals constitutional rights are being applied in the ongoing vetting of police officers and the officers are taken through the review process and they have a right to fair hearing, to reply and to further review if unsatisfied with the decision of the vetting panel.**
8. **That the vetting process is being done in an open and transparent manner and on the basis of clear objectives and verifiable criteria and measures have been put in place to ensure that the public and those being vetted have access to relevant information on the vetting process in accordance with Article 35 of the Constitution.**
9. **That the vetting process has noble intentions to wit ensuring that individuals serving in the police service will uphold and deliver on the principles of national security as enshrined in Article 238 of the Constitution and particularly by ensuring utmost respect o the Rule of law, democracy, human rights and fundamental freedoms, which will in the end rebuild public trust and confidence in the police as a service to the citizenry.**
10. **That the police officers' duty relate to ensuring that the Republic of Kenya is protected against internal and external threats and that is sovereignty, its people, their rights, freedoms, property, peace, stability, property and other national interests are safeguarded and as such the men and women who serve as police officers must be people with integrity which standards can only be achieved through vetting.**
11. **That the Government of Kenya has invested a colossal amount of money to the vetting process and as such stopping the same will automatically make the government incur heavy financial losses notwithstanding the fact that the instant application has no merit.**
12. **That the petition is otherwise incompetent, misconceived, misplaced and is an abuse of the process of this Honourable Court as the petitioner's rights and fundamental freedoms have not been breached and the same ought to be dismissed.**

29. The Respondents' case on the other hand was that the vetting process commenced in March 2013 with the formulation of the principles that guide vetting guidelines, the procedures, vetting regulation and other attendant processes. The vetting of the first cohort of officers however began on 17th December 2013 and the results therefor was released on 3td January, 2014 and some officers applied for review hence the process is not complete.
30. It was contended that the process as conducted by the National Police Service Commission, through a panel consisting of commissioners, other experts and technocrats were conducted in compliance with the Constitution, enabling legislation, vetting regulations and in tandem with the rules of natural justice. It was their case that the Commission notified every officer of the issues raised against them and gave them the opportunity to respond thereto in writing and thereafter interviewed the said officers thereon as well as on the financial details provided by them in public to ensure transparency and accountability. The law is very clear and so are the rules and regulations guiding the vetting process which provided that sessions will be in public but the commission could decide to hold in camera proceedings in order to protect the right of privacy of any person in the vetting process in the interest f justice or national security and it was in this spirit that some of the sessions were conducted in camera and not due to discrimination as alleged by the applicants herein. In any case the applicants have not demonstrated any prejudice caused to them

by not being vetted in private and they never requested the panel to be vetted in private.

31. However those who wished to opt out were allowed to retire with full benefits. Further an avenue for review was availed to those aggrieved by the decision.
32. According to them the process is an administrative rather than an adversarial judicial process and that the same assesses and determines the suitability and competence of the officer taking into account the constitutional and legal criteria under Regulation 14 of the Regulations, past record including conduct, discipline and diligence, integrity and financial probity as well as human rights record. In their view, an inquiry into financial probity cannot and does not amount to an infringement of the officers' rights and neither does it exposes them and their families to danger.
33. They therefore were of the view that the process met the full requirements of the law and the Constitution and that the interviews conducted by the vetting panel cannot be confused with meetings of the Commission which have a provision to a quorum. In any case the applicants were asked whether they had issues with the panel before proceeding and had none hence they cannot be heard to challenge its composition.
34. It was contended that the ex-officio members of the Commission are members of the Commission as provided under Article 246(2)(b) and (c) of the Constitution and any conflict of interest is addressed by Regulation 6 of the Regulations and the allegation of conflict of interest is speculative. The allegations of violation of the Applicants' fundamental rights and freedoms were therefore denied.
35. On the issue of the existence of the Rules and Regulations, the Respondents' position was that it was not true that the respondent conducted vetting without the rules and regulations as alleged by the applicant. The rules and regulations were gazetted and published on the 16th December 2013 and the applicants were vetted after that. The Respondent's position is that the Rules and Regulations having been gazetted on 16th December, 2013 and the vetting process having commenced on 17th December, 2013 when the Applicant in JR No. 11 of 2014 was vetted while the Applicant in JR No. 12 of 2014 was vetted on 18th December, 2013, it was incumbent upon the Applicants to secure the same. Apart from that section 128 of the ***National Police Service Act*** provides that the Rules, Regulations, standing orders or any other form of subsidiary legislation or guidelines made under the Act are to be published in the Kenya Gazette and notified to the public.
36. According to the Respondents the new facts raised in the further affidavit ought not to be entertained by the Court.
37. Since judicial review remedies are discretionary and not guaranteed the Court was urged to decline to grant the remedies sought taking into account the importance of the vetting process.
38. Their case was that the commission requested the public to raise any complaint against the applicants to the commission before vetting and the fact that none was submitted did not bar the commission from conducting the vetting process against the Applicants and did it imply that the commission was the complainant witnesses and judge in that case.
39. It was therefore their position that there are very clear vetting guidelines and standards that include officers satisfaction of entry and training requirements, professional conduct and discipline, integrity and financial probity and respect for human right that will ensure that the National Police Service which is an institution in the public service undergoes a critical appraisal of the performance of its officers and thus ensure only those found suitable and competent are cleared to continue serving. After the vetting process the applicants were informed of the outcome vide a copy of the decision of the commission and a verbatim record of the interviews by the vetting panel. The Respondents' case is that integrity is part and parcel of the disciplinary process before and after the promulgation of the new constitution hence the applicants cannot claim that they should not be vetted on integrity.
40. According to the Respondents, the Applicants' case is frivolous, vexatious, an abuse of the court process and calculated to obstruct the implement the Constitution and stall police reforms.
41. The Respondents submitted that the vetting process is sanctioned by Parliament pursuant to the wishes of the people of Kenya hence the Applicants should not claim that the same is unconstitutional. It was submitted that Article 246(3)(c) of the Constitution gives the National Police Service Commission the power to perform functions given to it by the ***National Police Service Commission Act*** No. 11 of 2011. By section 10 of the said Act the Commission is empowered to make legislation regulating the vetting of police officers and at section 28 thereof the said Commission is empowered to make Regulations which it did make vide the Vetting

Regulations, 2013 and gazetted the same in the Legal Notice Number 218 of 2013 published on 16th December, 2013. According to the Respondents unlike section 14(1) which provide for the quorum of the Commission in conducting its business and affairs, which in accordance with the second schedule is five members including two members appointed under Article 246(2)(a)(i)(ii), there is no provision for quorum for its functions under section 14(2) thereof. Thereof under section 241 the Commission is empowered to make Regulations for the better carrying out of the purposes of the Act one of which is assessing the suitability and competence of all officers as provided under section 7(2)(3) and discontinue those who fail the vetting. For this purpose the Commission made the ***National Police Service (Vetting) Regulations, 2013*** wherein the process and procedure of vetting has been provided including the quorum of the panels which panels are constituted pursuant to Regulation 10(1). It was therefore submitted that the quorum of the panel is within the discretion of the Commission which is not the same as the quorum of the Commission.

42. While appreciating that the only valid complaint an officer can raise is under Regulation 4 with respect to impartiality, natural justice and/or discrimination and on this aspect, the panel invited the applicants to state their objections hence the panels were duly constituted with the requisite quorum.
43. It was submitted that the said Regulations having been formulated by the Chairman pursuant to the provisions of the Act, the same are legal and provide clear guidelines and standards that include officers' satisfaction of entry and training requirements, professional conduct and discipline, integrity and financial probity and respect for human rights in order to ensure that the Service is an institution of public service.
44. The Respondents therefore denied that the said vetting only focuses on the financial aspect of the officers since there are clear guidelines set out in the statute which guidelines were published on 16th December 2013 in accordance with section 124 of the Act. The said Regulations, it was contended incorporated the principles of building confidence and trust in the service, impartiality, natural justice and international best practices.
45. The Respondents therefore urged the Court to dismiss these matters as the government of the Republic of Kenya has invested colossal amounts of money in the process and as such stopping the same will automatically make the government incur heavy financial losses notwithstanding the fact that the instant petition has no merit. It was further submitted that the orders sought herein are against the public interest and the same ought not to issue.
46. In support of their submissions the Respondents relied on **Trusted Society of Human Rights Alliance vs. Attorney General & 2 Others Petition No. 229 of 2012**, **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and ***Halsbury's Laws of England***, 4th Edn. Vol. II page 805 para 1508.

Determinations

47. I have considered the foregoing and this is the view I form of the matter.
48. First I would like to associate myself with the sentiments expressed by the Respondents that the Applicants attempted to introduce new matters in the further affidavit sworn in support of their case. I must say that the conduct of introducing new grounds in a supplementary affidavit not grounded on either the petition or the statement in support of judicial review is a highly irregular practice that ought not to be tolerated. It is a practice which ought not to be countenanced as it amounts to ambushing the other party and amending pleadings by way of supplementary affidavits. Affidavits constitute evidence which ought to support the case as pleaded in the petition and outlined in the statements but ought not to be used as an avenue to mutate the case as the proceedings advance.
49. In my view the following are the issues for determination in this judgement.

1. **Whether the Respondents action of vetting the Applicants without bringing the Rules to their attention rendered the process unfair.**
2. **Whether the Respondents had the power to formulate and gazette vetting rules and regulations under Section 124 of the National Police Service Act.**
3. **Whether the vetting panel as constituted was legal.**

4. **Whether the panel conducted its proceedings in a fair manner.**
5. **Whether the vetting process was constitutional.**
6. **Whether the orders sought ought to issue.**

50. It is agreed by all sides that the Vetting Regulations were gazetted on 16th December, 2013 while the process of vetting commenced the following day on 17th December, 2013. The Applicants contend that the existence of these Rules and Regulations were never brought to their attention at the time of the vetting. This contention has not been seriously contested by the Respondents. The Respondents' position is that since the said Rules and Regulations had been gazetted on 16th December, 2013, it was upon the applicants to ensure that they secured copies of the said Rules and Regulations hence their ignorance thereof cannot assist them.
51. The importance of these Rules and Regulations for the process of vetting cannot be overestimated. In fact according to the Respondents, it is these same Rules and Regulations which dealt with the vetting procedure including such issues as the quorum of the vetting panels.
52. Section 128 of the ***National Police Service Act***, Cap 84, Laws of Kenya provides:

All regulations, rules, standing orders or any other form of subsidiary legislation or guidelines made under this Act shall be published in the Gazette and notified to the public.

53. The purpose of gazettement was dealt with in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational, in view of the growing stream of delegated legislation.
54. It is therefore clear that gazette notice unless expressly indicated as a pre-condition to the coming into force of a legislation is not necessarily the instrument by which an action becomes effective. In this case however, two steps were mandatorily required and these were gazettement and public notification. The requirement for notification over and above gazettement, in my view is a very positive step in a Country where a majority of the populace have no idea of what a gazette notice looks like leave alone how to access it. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
55. The Applicants contend that by the time of their vetting even the Respondents did not have copies of the gazetted Rules and Regulations. In support of this contention they have exhibited a copy of the receipt and proforma dated 9th January, 2014 for the purchase of Legal Notice No. 72 of 2013 by the National Police Service. There was no attempt by the Respondents to deny this damning allegation.
56. 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.

57. Procedural fairness is therefore a Constitutional requirement in administrative action. This requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now trite that even in cases where there is no 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 **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** the High Court

expressed itself as follows:

"Whereas the rules of natural justice are not engraved on tablets of stones, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all circumstances. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…….. Although the courts have for a long time supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. Additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. The courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise them without first hearing the people who were going to suffer as a result of the decision in question. This principle was applied to administrative as well as judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance. The courts can at least control the primary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his advantage. As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated...."

58. In this case the period between the gazettement of the Rules and Regulations was less than 24 hours in respect of one of the Applicants. The Respondents themselves have not disputed the allegations that at the time of the vetting of that applicant they did not have with them a copy of the gazetted Regulations. Yet these Regulations were very important in so far as the vetting process was concerned. Further there is no evidence that by the time of the vetting of the Applicants the public had been notified of the said Rules and Regulations as mandatorily required under section 128 of the aforesaid Cap 84. Taking into account the totality of the foregoing I am not satisfied that the process of vetting which took place within a period of less than 24 hours after the gazettement of the Rules and Regulations was fair to the Applicants.
59. The next issue for consideration is whether the Respondents had the power to formulate and gazette vetting rules and regulations under Section 124 of the *National Police Service Act*. It is clear from the Regulations that the same were purportedly made pursuant to the aforesaid provision. The said section provides as follows:

1. ***The Commission may make regulations for the better carrying out of the purposes of this Act, and in particular for—***

a. ***regulating the hours of duty for police officers and the keeping and signing of records of attendance;***
b. ***regulating and co-ordinating duties to be performed by police officers;***
c. ***regulating the granting of leave to police officers;***
d. ***prescribing arrangements and procedures for providing, assisting in or co-ordinating staff development programmes; and***
e. ***the employment of civilian staff within the Service.***

60. It is obvious that the aforesaid provision suffers from bad draftsmanship. Section 124 does not have more than one subsection hence there was no need to have subsection (1) of the section. However the Applicants' contention that the said section only deals with rules and Regulations relating to civilians cannot be correct. It is only subsection (e) that deals with civilians and as correctly submitted by the Respondents, section 7(2) of Cap 84 provides for vetting. Therefore unless otherwise provided in the Act, the Regulations formulated under section 124 of the Act may properly provide for procedures for vetting. There was also an allegation that the Rules and Regulations ought to have been formulated by the Minister rather than the Chairman of the Commission. No authority was cited for this submission and I am aware of none. By parity of reasoning the Rules formulated under section 81 the ***Civil Procedure Act*** are formulated by the Rules Committee and the gazette is normally signed by the Chairman of that Committee.
61. The next issue is whether the vetting panel as constituted was legal. It was contended that the vetting panel ought to have been constituted as per section 14 of the ***National Police Service Commission Act***, Cap 185C, Laws of Kenya. The said section provides:

> (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.
>
> (2)Except as provided in the Second Schedule, the Commission may regulate its own procedure.

62. It was argued on behalf of the Respondents that the process of vetting is not one of the business and affairs of the Commission and that it is a function of the Commission. In my view that is a distinction without a difference. 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.
63. That leads me to the issue whether the panel conducted its proceedings in a fair manner. It was contended by the Applicants that the Respondents concentrated on irrelevant issues such as financial probity of the Applicants rather than on suitability and competence of the Police Officer as provided under Section 7(2) of Cap 84. In my view I do not see the reason why the issues of integrity ought not to be considered in determining suitability and competence of the police officers to continue serving. As long as the requirement of fairness is adhered to in the process, integrity is one of the factors to be considered in selection under Article 73(2) of the Constitution taking into account that the guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability and accountability to the public for decisions and actions.
64. It was further contended that since there was no complainant during the vetting, the respondents conducted the case contrary to the rules of natural justice since they were the complainants,

witnesses and judges in the aforesaid case. The procedure in such matters has been the subject of several judicial pronouncements. As is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007:

"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".

65. 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."

66. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

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

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

68. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

69. 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."

70. Under section 7(2) of the ***National Police Service Commission Act***, the Commission is obliged to discontinue the service of any police officer who fails in the vetting referred to under subsection. Therefore for the Commission to discontinue an officer it must be satisfied that the officer in question has failed the vetting.
71. In **Hon. Mr. Justice Joseph Mbalu Mutava vs. Attorney General & Another Nairobi High Court Petition No. 337 of 2013** it was held:

"It has been argued that the role of the Commission was to conduct a preliminary hearing so as to determine if there was a *prima facie* case made, and that in any event the Petitioner would have a hearing at the Tribunal that has been set up to investigate him. Our response to this argument is two fold. Firstly, the Commission was under an obligation to verify the complaints made against the Petitioner and that the constitutional threshold for the removal of the Petitioner of a judge had been met. The Constitution requires the Commission under Article 168(4) to be satisfied that a complaint or petition discloses a ground for removal of a judge. This constitutional standard of in our view can only be achieved by a systematic and careful evaluation of the evidence before the Commission, to enable it reach a decision whether the evidence before it merited the formation of Tribunal to consider the Petitioner's removal."

72. In the above case the Judicial Service Commission was not the body empowered to make a decision to remove a Judge. Its role was limited to making a recommendation for the formation of a Tribunal to remove a Judge. Here, the Commission is empowered to discontinue a police officer. In those circumstances the Commission has even a more onerous task than where its role is simply that of making a recommendation.
73. Whereas I am not prepared to hold that where no complaints are lodge with the Commission, a police officer can never be discontinued, it is however 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 vouchsafed is in my view an unfair. As was held by **Platt, JA** in **Onyango Oloo vs. 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 in 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."

74. Similarly, 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."

75. As observed by **W.R. Wade & C.F. Forsyth** in their text, ***'Administrative Law'*** 10th edition (2009) Oxford University Press, at page 433 in this regard:

"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."

76. Several cases are cited by the two authors in support of this proposition, including **Osgoode vs Nelson (1872) LR 5 HL 636** where the House of Lords held that there exists a duty before exercising the power of dismissal to give 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.
77. The cited text by the two authors extensively reproduces part of the decision in **R vs. Deputy Industrial Injuries Commissioner ex. P. Moore (1965) 1 Q.B 456 at 490.** The court in that case observed 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 at the hearing, in particular allowing both parties to comment on or contradict any information that he had obtained.
78. In addition the court relied on the House of Lords decision in **Board of Education vs Rice (1911) A.C 179** where **Lord Loreburn LC** said:

"that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything'."

79. The Applicants have alleged that they were never afforded an opportunity of responding to the allegations made against them yet had they been afforded such opportunity they would have adequately answered the said allegation. The Respondents have admitted that though they invited the members of the public to lodge complaints none was forthcoming. It has not been contended that these complaints were availed to the Applicants before they appeared for vetting. I am therefore not satisfied that the process of vetting of the applicants met the standards of fairness.
80. The next issue for determination is whether the vetting process was constitutional. In my view the vetting process itself is not inherently unconstitutional. As stated at the beginning of this Judgement, the people of this Republic had issues with the performance of the police force hence there was a need to restore the public confidence in the said force. In so doing, however, the Constitutional safeguards have to be adhered to.
81. With respect to issues revolving around the competence of the Applicants and whether there was or there was no evidence to warrant the findings of their competence, those are issues which the Applicants ought to have challenged by way of a review. Similarly with respect to issues of nepotism and discrimination in the conduct of the vetting process, no sufficient evidence was laid before me to warrant me to make findings thereon.
82. Having reached a conclusion that the vetting of the applicants did not meet the threshold of fairness it now remains the issue of what orders ought to be issued. According to the Respondents the orders sought by the applicants ought not to issue since the Applicants ought to have applied for review. Review, in my view would have been an option if the Applicants' grievances were restricted to merits of the decisions. In the instant case there were allegations to failure to afford the Applicants adequate opportunity to respond. Without their responses, a review would not, in my view, have been an effective remedy.

83. In the present case, allegations were levelled against the Applicants whether rightly or wrongly which raised the issue of their suitability and competence to remain in the police force. For as long as these allegations, which the National Police Commission deemed serious enough to warrant their discontinuation remain un-cleared, there can be no confidence in the Applicants as members of the police force. In the interest of the administration of justice and in the interest of the Applicants, the complaints against the Applicants should be fairly investigated and determined and findings made one way or the other.
84. Accordingly the orders which commend themselves to me and which I hereby grant are as follows:
    a. **A declaration that the Respondents' conduct of the vetting process in respect of the Applicants did not meet the Constitutional and administrative threshold of fairness.**
    b. **An order of certiorari bringing into this court for the purposes of being quashed the proceedings leading to and determinations of the Respondents to retire the Applicants from the National Police Service which proceedings and determinations are hereby quashed.**
    c. **An order of prohibition against the Respondents to prohibiting them from effecting of the determination made against the Applicants.**
    d. **Pursuant to the provisions of Article 23(3) of the Constitution I direct the 1st Respondent to expeditiously commence de novo the process of vetting of the Applicants while ensuring compliance with all applicable provisions of the constitution and fairness as discussed herein.**
    e. **In the circumstances I make no order as to costs.**

Dated at Nairobi this 20th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kwengu for the Applicants

Mr Ojwang, Ms Sirai and Miss Muthiga for the Respondents

Cc Kevin