REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 24 OF 2014

REPUBLIC …….…..……..……..……APPLICANT

VERSUS

THE NATIONAL POLICE SERVICE

COMMISSION OF POLICE……..……...……..……RESPONDENT

FRANCIS OMONDI OKONYA .....*EX-PARTE*

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th January, 2014, the ex parte applicant herein, **Francis Omondi Okonya**, seeks the following orders:

a. **THAT an order of Certiorari do issue to remove to this Honourable Court and quash the decision of the Respondent to discharge the Ex-parte Applicant from the National Police Service ("The Service").**
b. **THAT an order of prohibition do issue to restrain and/or prohibit the Respondent and/or their agents and/or officers from continuing with the vetting of all the disciplined members of the Service which was commenced on or about 23rd November 2013 and is currently ongoing.**
c. **THAT the costs of this application be borne by the Respondent.**

Applicant's Case

2. The application was based on the following grounds:

1. **The Respondent contrary to the principles of Natural justice and in direct contravention of Articles 50 and 249 of the Constitution failed and/or refused to avail the information requested for by the Applicant in respect of the Complaint.**
2. **During the Applicant's appearance before the Respondent on 17th December 2013 the Respondent grossly in abuse of the principles of natural justice and in direct contravention of Articles 45, 50 and 249 of the Constitution and substantively ultra vires Section 124 of the Service Act.**

i. Subjected the Applicant to questioning based on allegations and claims which he had not previously been informed about and which deviated grossly from the one complaint

he had been informed about on 9th December 2013- See paragraph 2.2. above.

ii. Failed to accord the Applicant a fair hearing by refusing and/or failing to avail him adequate time within which to respond to the fresh and alien allegations levelled against him.

iii. Ambushed the Applicant with malicious and defamatory claims which it knew or ought to have known could not be adequately defended based on the fact that the Applicant was hearing of the said claims for the first time on the said 17th December 2013 during the hearing.

iv. Subjected the Applicant to questioning based on laws and regulations which had been made by the Respondent and yet the Respondent had no power and/or mandate to make such laws.

v. Subjected the Applicant to questioning based on laws and regulations which were being applied retrospectively upon the Applicant.

vi. Subjected the Applicant to questioning based on laws and regulations which were arbitrarily made by the Respondent without the requisite consultation with the relevant stakeholders*, to wit,* the Police officers.

vii Failed to adjourn the hearing of 17/12/2013 even when it knew or ought to have known that some of the allegations and/or complaints levelled against the Applicant could not be adequately defended based on the fact that the Applicant was hearing of the said allegations and/or complaints for the first time on the said 17/12/2013 during the hearing.

3. **Despite the Respondent having come to the decision to discharge the Applicant from the Service on 31/12/2013 it did, on 2/01/2014, *vide* a letter of even date purport to request the Applicant to provide it with information/evidence supporting his defence to the fresh and alien allegations levelled against him on 17/12/2013. The aforesaid evidence was being sought only a day before the Respondent informed the public that the Applicant had been discharged from the Service. The aforesaid action by the Respondent *was made in bad faith, in contravention of the Applicant's right to fair administrative action as enshrined under Article 47 of the Constitution and in further contravention of the principles of natural justice and in direct contravention of Articles 50 and 249 of the Constitution*.**
4. **Given what is stated under paragraph 4.3 above the Applicant could not by any stretch of the imagination and even after the exercise of due diligence on his part have been expected to produce before the Respondent the evidence touching on the fresh and alien allegations levelled against him on 17/12/2013 either before the hearing of 17/12/2013 or before 3/01/2014 when the public was informed of the decision to discharge the Applicant from the Service.**
5. **The Respondent, following the impugned decision discharging the Applicant from the Service, has *in violation of the principles of natural justice and the Applicants right to fair administrative justice as recognised under Article 47 of the Constitution and contrary to Articles 35, 50 and 249 of the Constitution and Regulations 25 (7), 33 and 34 of the National Police Service (Vetting) Regulations 2013 ("the Regulations"):***

i. Failed, refused and/or neglected to avail to the Applicant copies of the reasoned decision, order and/or judgment pursuant to which he was discharged from the Service and copies of the proceedings of the vetting exercise - despite express request from the Applicant on 9/01/2014 and 14/01/2014.

ii Failed, refused and/or neglected to afford the Applicant audience/a hearing in respect of an application for review lodged by the Applicant on 10/01/2014.

iii Failed, refused and/or neglected to stay its decision to discharge him from the Service despite the Applicant having lodged his application for review. This violates the mandatory provision of Regulation 33 of the Regulations.

6. **The hearing of the substantive judicial review application will be rendered academic and/or nugatory unless this Honourable Court stays the purported discharge of the Applicant by the Respondent from the Service and unless it stays the vetting exercise currently being undertaken by the Respondent. Further unless this Honourable Court stays the purported discharge of the Applicant by the Respondent from the Service and the vetting exercise being conducted by the Respondent in respect of the disciplined members of the Service the Applicant and the Country in general is set to suffer irreparable damage as expounded on under paragraph 14 of the application hereto.**
7. **It is only fair and just that the orders as prayed be granted.**

3. The application was supported by affidavits sworn by the applicant on 20th January, 2014 and 26th May, 2014.
4. According to the applicant, he was a police officer holding the rank of Senior Deputy Commissioner of Police 1, from the National Police Service ("**the Service**") up and until 3rd January, 2014 when the Respondent purported to dismiss him from the Service. According to him, his job description before the Respondent purported to discharge him was that of performing the critical role of Principal Assistant to the Commissioner of Police (now Inspector General) charged with, *inter alia*, handling police operational and administrative matters as well as being the Chairman of the training committee of all police officers within the Country.
5. On 23rd November, 2013 the Respondent ostensibly acting pursuant to Sections 7 (2) and 7 (3) of the ***National Police Service Act*** ("**the Service Act**") commenced the vetting exercise of the first batch of police officers within the National Police Service ("**the Service**") which consisted of senior police officers of which the applicant was one. The said vetting commenced by the publishing of the names of the senior officers in the Daily Nation and Standard newspapers and inviting members of the public including institutions to provide any relevant information that they may have in respect of the said officers.
6. Following the invitation of complaints and/or information from the public as above said the Respondent *vide* a letter dated 9th December, 2013, received by the applicant on 10th December, 2013, informed the applicant that a complaint ("**the Complaint**") had been lodged by a member of the public touching on the applicant's suitability to continue serving in the Service.
7. On 10th December, 2013 the applicant responded to the Complaint *vide* a letter of even date ("**the Response**"). In the Response I further requested for details and particulars of the Complaint. However, despite the said request the Respondent failed and/or refused to avail the information requested and the applicant contended that pursuant to the principles of natural justice, Articles 35, 47, 50 and 249 of the Constitution he was duly entitled to the details and particulars of the Complaint.
8. On 13th December, 2013, barely three (3) days after the applicant was informed of the Complaint, the Respondent *vide* a letter of even date served him with a schedule of the hearing dates as to when he would appear before it ("**the Schedule**") and as per the Schedule the applicant was to appear before the Respondent on 17th December, 2013.
9. During the applicant's appearance before the Respondent on 17th December, 2013, the applicant averred that the Respondent gravely infringed upon his rights to a fair hearing in that the Respondent subjected him to questioning based on allegations and claims which he had not previously been informed about and which deviated grossly from the one complaint he had been informed about on 9th December, 2013; the Respondent failed to accord him a fair hearing by refusing and/or failing to avail him adequate time within which to respond to the fresh and alien allegations levelled against him; the Respondent ambushed him with malicious and defamatory claims which it knew or ought to have known could not be adequately defended based on the fact that he was hearing of the said claims for the first time on the said 17th December, 2013 during the hearing; the Respondent subjected him to questioning based on laws and regulations which it had made and yet the Respondent had no power and/or mandate to make such laws; the Respondent

subjected him to questioning based on laws and regulations which were being applied retrospectively upon him; and the Respondent failed to adjourn the hearing of 17th December, 2013 even when it knew or ought to have known that some of the allegations and/or complaints levelled against him could not be adequately defended based on the fact that he was hearing of the said allegations and/or complaints for the first time on the said 17th December, 2013 during the hearing.

10. According to the applicant, by the Respondent levelling against him allegations/complaints in respect of which he did not have prior notice and subjecting him to questioning based on laws and regulations made by the Respondent when it did not have power to make said laws and again applying the said laws and regulations retrospectively the Respondent acted grossly in abuse of the principles of natural justice and in direct contravention of Articles 47, 50 and 249 of the Constitution and substantively *ultra vires* Section 124 of the Service Act.
11. Further in expounding on the fact that during the hearing of 17th December, 2013 and the subsequent rendering of a decision by the Respondent the said Respondent relied on laws and regulations which it had purportedly made and yet it had no powers to make said laws and that it relied on laws and regulations which were being applied on me retrospectively and that the said laws were made without consultation the applicant averred that conducting the hearing on 17th December, 2013 the Respondent placed reliance on the ***National Police Service (Vetting) Regulations 2013*** ("**the Regulations**") which Regulations from their preamble were purportedly made by the Respondent pursuant to Section 124 of the ***Service Act*** yet that section does not grant the Respondent the power to make laws to govern the manner in which police officers are vetted and confirmed or dismissed from the Service; and that the Regulations which the Respondent used to vet and discharge the applicant from the service were made by the Respondent on 16t December, 2013 and therefore were made a day before the applicant appeared before the Respondent in the purported hearing of 17th December, 2013 and twenty three (23) days after the vetting exercise commenced hence it is manifestly clear that the Regulations were made without the requisite consultation with the relevant stakeholders, *to wit*, the Police officers.
12. It was deposed that the fresh and alien allegations which were levelled against the applicant during the purported hearing of 17th December, 2013, touched on the applicant's financial probity based on the monies in his personal account as well as his supposed arrogance and disrespectful attitude towards his seniors. Specifically touching on the issue of the allegation of the applicant's supposed lack of financial probity the Respondent raised issues with the fact that the applicant's personal account on 10th December, 2012 showed three (3) "irregular" credits of Kshs. 500,000; his personal account at some instances reflected debits of supposed huge amounts; and that he held in his personal account amounts of monies which did not supposedly correspond with the salary of a police officer in the Service.
13. After the appearance before the Respondent on 17th December, 2013 he was notified by the Respondent *vide* a letter dated 31st December, 2013 that the Respondent was going to deliver its verdict as to the applicant's suitability to continue serving in the Service on 3rd January, 2014. However, despite the Respondent on 31st December, 2013 having come to a decision as to the applicant's suitability to continue serving under the Service it did on 2nd January, 2014 *vide* a letter of even date purport to request the applicant to provide it with information/evidence supporting the applicant's defence of the fresh and alien allegations levelled against him on 17th December, 2013. According to the applicant, the above said evidence was being sought by the Respondent only a day before it informed the public that the applicant had been discharged from the Service.
14. It was the applicant's case that the foregoing was a manifestation of bad faith, contravention of his right to fair administrative action as enshrined under Article 47 of the Constitution and in further contravention of the principles of natural justice and in direct contravention of Articles 50 and 249 of the Constitution. As a result, the applicant contended that he could not by any stretch of the imagination and even after the exercise of due diligence on his part have been expected to produce before the Respondent the evidence touching on the fresh and alien allegations levelled against me on 17th December, 2013 either before the hearing or before 3rd January, 2014 when the public was informed of the decision to discharge him from the Service.

15. According to the applicant, he has since 3rd January, 2014 when the public was informed of the decision to discharge him from the Service and since 9th January, 2014 when he was formally informed of the same embarked upon collating the evidence and/or documentation that would enable him address the fresh and alien allegations levelled against him on 17th December, 2013.
16. The applicant asserted that the issue of his finances were capable of being explained and he exhibited documents in support thereof. With respect to the allegation of being disrespectful, he averred that he had never once be cited as having such a character and my record throughout not only his professional career but my school going days demonstrate the contrary. It was therefore his case that had the Respondent given him adequate notice of all the allegations and complaints against him before the purported hearing of 17th December, 2013 he would have been able to address them fully and adequately. To him, in respect of all the documentation and information the Respondent had prior to the purported hearing of 17th December, 2013 requested him to provide he did so provide and/or make full disclosure.
17. Upon his being formally informed on 9th January, 2014 of the decision by the Respondent discharging him from the Service the applicant immediately requested from the Respondent for copies of the decision and the proceedings of his vetting *vide* a letter of the same date and on 10th January, 2014 through his advocates he did lodge an application for review with the Respondent. Despite all these, the Respondent in violation of the principles of natural justice and the applicant's right to fair administrative justice as recognised under Article 47 of the Constitution and contrary to Articles 35, 50 and 249 of the Constitution and Regulations 25 (7), 33 and 34 of the Regulations, failed, refused and/or neglected to avail to him the copies of the reasoned decision, order and/or judgment pursuant to which he was discharged from the Service and copies of the proceedings of the vetting exercise; failed, refused and/or neglected to afford him audience/a hearing in respect of the application for review lodged on 10th January, 2014 and failed, refused and/or neglected to stay its decision to discharge him from the Service despite the applicant having lodged an application for review contrary to Regulation 33 of the Regulations.
18. It was therefore the applicant's case that in light of the foregoing, this Court will vindicate his rights and safeguard the national security of the Country through the quashing of the impugned decision of the Respondent which purported to discharge him from the Service and through the restraining of the Respondent either by themselves or their agents from continuing the vetting exercise/proceedings of the disciplined members of the Service which was commenced on or about 23rd November, 2013 and is currently ongoing. According to him, his averment touching on the need to prohibit the Respondent from continuing with the ongoing vetting exercise is made on the firm belief that his un-procedural vetting and discharge from the Service by the Respondent is a manifestation of the form and manner in which the Respondent is conducting the ongoing vetting of the other disciplined members of the Service and to forestall the very real threat posed to the national security and integrity of this Country arising from the said flawed vetting this Honourable Court ought to restrain the Respondent from undertaking the said vetting exercise.

Respondent's Case

19. In response to the application, the Respondent filed a replying affidavit sworn by **Johnstone Kavuludi**, the Respondent's Chairman on 11th April, 2014.
20. According to him, under the Act, the Respondent is tasked, with the mandate of vetting all officers of National Police Service with the objective of assessing their suitability and competence and also tasked with the mandate of discontinuing the service of any officer who fails the vetting.
21. According to him, the Respondent followed all procedures in respect to the vetting of the Ex-parte Applicant and decision thereunder and he denied the assertions alluding to lack of quorum and stated that the Commission has requisite quorum and further aver that the vetting panel had the requisite jurisdiction and requisite quorum as provided under the law. According to him, the vetting interview is not a meeting of the Commission and that the Regulations state *inter alia* that the Commission may constitute such number of panels and comprising such persons as the Commission shall determine to ensure expeditious disposal of matters. He further deposed that the Vetting interview is conducted by a panel pursuant to the regulations and that the panel was properly constituted, and the decision made regarding the Applicant was properly made. In further

elaboration as to meetings of the Commission, he averred that the Commission is properly constituted with regard the Constitution and at any rate the different components of the Commissions membership as provided are always present and that the Constitution of Kenya provides that a Constitutional Commission shall consist of at least three but not more than nine members.

22. To him, in carrying out the vetting process, the Respondent is expected to gather and disclose relevant information regarding the subject officers from various sources including members of the public and the entire process is to be guided by the principles of natural justice and the applicable law including the Commission's vetting regulations. Further, prior to the vetting date the Respondent required the Ex-parte Applicant to submit a duly completed vetting questionnaire and a declaration of income, assets and liabilities which the Applicant did and the Respondent invited the Ex-parte Applicant to attend a vetting interview on 17th December 2013 for the purposes of the vetting and the Applicant duly made himself available on that date and the interview was carried out in public and aired live on a number of television stations broadcasting and widely reported thereafter.

23. While admitting that following the interview, the Respondent delivered a decision signed by him and 6 Commissioners namely **Ronald Musengi**, **Murshid Mohamed**, **Mary Owuor**, **David Kimaiyo**, **Grace Kaindi** and **Samuel Arachi**, the deponent however contended that the aforesaid decision pursuant to the National Police Service (Vetting) Regulations was written and signed by all Commissioners. He therefore reiterated that the Procedure and the manner the Vetting process is carried out is constitutional, fair, legal and adheres to the rules of natural justice which is suitably captured in the vetting regulations and 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 ensures that only the suitable and competent officers remain in the service.

24. He deposed that the Commission requested the public to raise any complaint against the Applicant to the Commission before vetting and indeed complaints were raised about the Ex-parte Applicant. However, the Respondent observed the principles of natural justice as the Ex-parte Applicant was informed of the vetting interview date, in advance, and if, as he alleges, he was not adequately prepared, he had an opportunity to indicate the same to the Respondent. To him, the Ex-parte Applicant is to blame for his failure to do so. Further, the proceedings were recorded on hansard and there is no record in the hansard indicating that the Ex-parte Applicant expressed any discomfort or sought for an adjournment and was denied.

25. It was further denied that the Respondent conducted vetting without the rules and regulations as alleged by the Applicant. The Rules and regulations were gazette and published on the 16th December, 2013 the Applicant was vetted on the 17th December 2013 hence the same did not apply retrospectively as alleged. He contended that the officers of the National Police Service were part of the process of developing the regulations and therefore the Ex-parte Applicant knew what was in the rules and regulations and now cannot claim he was not aware of the rules when it is only gazettement that took place on the 16th December, 2013. In addition to the foregoing, the Respondent conducted sensitization forums to inform officers about the details and criteria for the vetting process and the Applicant was among the officers who attended and participated in the sensitization forums in November 2013. According to him, Section 124 of the Act gives the Commission power to make regulations for the better carrying out of the purposes of the Act and that includes functions such as vetting of all members of the Service by the Commission as provided under Section 7 of the same Act. Similarly, the Constitution provides the functions of the Commission and includes any other function prescribed by legislation hence the mandate of vetting all members of the Service is a Constitutional mandate of the Commission.

26. While admitting that the Respondent found the Applicant was neither suitable nor competent to continue serving in the National Police Service in light of the Vetting criteria, he averred that the Applicant was asked during his vetting interview on the 17th December 2013 to furnish the Respondent with any information that would be useful to it in order to clarify any matter raised in his financial probity but the Applicant has not provided any documents to this effect to the Respondent to date. He however denied that there were fresh and alien allegations levelled against

the Ex-parte Applicant that had not been communicated to him for his response and that with regard to questions of financial probity, the questions put across to the Ex-parte Applicant were from the analysis of the bank statements that he provided and follow up questions to the answer provided.

27. It was asserted that after the Ex-parte Applicant's vetting process the Ex-parte Applicant was informed of the outcome vide a copy of the decision of the Commission and a verbatim record of the interview by the vetting panel.
28. The deponent contended that the vetting regulations provided an opportunity for a process of review of the Respondent's decisions. The Ex-parte Applicant indeed filed an application to the review panel of the Respondent which he subsequently withdrew but nevertheless attended the review hearing allocated to him. Since the Applicant was presented himself before the review panel on 6th March 2014, the allegations that the Respondent failed, refused and/or neglected to afford him audience in respect of the application for review is not true.
29. To the deponent, the objective of the vetting process is to restore public confidence in the police service through conducting a transparent process and retaining officers who are competent and suitable to remain in the service hence in keeping with the varied expectations of Kenyans he urged the court to dismiss this petition with costs to the Respondents since this application is an abuse of court process as that Judicial Review deals with the process and not the merit of the case and further Judicial Review remedies are discretionary nature.

Determinations

30. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited this is the view I form of the matter.
31. 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.

32. Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In **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...."

33. It was contended by the applicant that the Respondent had no power to formulate and gazette vetting rules and regulations under Section 124 of the *National Police Service Act*. 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.***

34. However as this Court held in **Immanuel Masinde Okutoyi & Others vs. The National Police Service Commission Petition No. 6 of 2014 Consolidated with Misc. Appl.Nos 11 and 12 of 2014**, the Regulations formulated under section 124 of the Act may properly provide for procedures for vetting.
35. It was contended that the applicant was never afforded a fair hearing in that he was ambushed with complaints at the hearing without being afforded a prior opportunity to appraise himself of the same. The procedure in such matters is aptly dealt with by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007 as follows:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

36. 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."

37. 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 in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

38. 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."

39. 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."

40. 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."

41. 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 the subsection. Therefore for the Commission to discontinue an officer it must be satisfied that the officer in question has failed the vetting.

42. 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 as 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 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."

43. 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.
44. As this Court held in **Immanuel Masinde Okutoyi & Others vs. The National Police Service Commission** (supra) whereas the mere fact that there are no complaints lodged against an officer with the Commission does not necessarily mean that a police officer ought not 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 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."

45. 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."

46. 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."

47. 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.
48. 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.
49. 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'."

50. The Applicant has alleged that at the hearing certain allegations with respect to his financial probity and disrespectful conduct were raised yet he was not given prior notification that the same were going to be raised in order to enable him adequately prepare to deal with the same. Whereas the twin issues were properly issues which the Respondent could validly and competently take into account in considering the applicant's suitability, it is my view that the applicant ought to have been put on notice in advance that the same were going to form the subject of his vetting. The Respondent has not seriously controverted these allegations made by the applicant save to say that the issues arose from the statements submitted by the applicant. In fact part of the Respondent's response and submissions seems to have been directed at another matter other than the present application since it addressed issues not even raised by the applicant herein. It is one thing to raise issues based on the financial statements submitted and another to require the person submitting the statement to explain the same since the latter may necessitate the production of further documents. Similarly allegations of disrespect ought to be availed to the applicant with particulars thereof in order to enable him adequately deal therewith. That is what fairness entails. It has however contended that the applicant did not apply for the deferral of the hearing. That may be so. However, the right to fair hearing is a cardinal principle of the rule of law. To this effect Article 50(1) of the Constitution provides as follows:

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.

51. To underpin the importance with which our Constitution attach to this right Article 25(c) of the Constitution expressly identifies the right to a fair trial as one of the fundamental rights which cannot be limited. Therefore the mere fact that a person does not insist on being afforded a fair hearing does not preclude the tribunal from adhering to the constitutional requirements for a fair trial. In other words the right to a fair trial cannot be abridged or curtailed merely because a person has not demanded to be treated fairly. As is stated in ***Halsbury's Laws of England***, 4th Edition Reissue Volume 1(1) at page 178:

"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 will be to postpone or adjourn the matter."

52. I therefore associate myself with the decision in **Priddle vs. Fisher & Sons [1968] 3 All ER 506** in which it was held:

"What is said here is that the tribunal, who clearly had a discretion in the matter as to whether or not to adjourn, should as a proper exercise of a judicial discretion have adjourned in the circumstances. For my part I think that is correct. The Tribunal seem to have proceeded on the basis that because an adjournment had not been asked for, this was merely a polite intimation over the telephone that he would not be appearing and an invitation to the tribunal to continue in his absence...The matter can be put in many ways but the way in which it appeals to me is that a tribunal is acting wrongly in law if, knowing that an appellant has all along intended to turn up and give evidence and support his claim, and being satisfied, as they must have been, that he was unable for one reason or another to attend, they refuse to adjourn merely because he had not asked expressly for an adjournment."

53. That it might have been prudent to adjourn the hearing is reinforced by the fact that vide a letter dated 2nd January, 2014, the Respondent appreciated that the applicant had during the interview mentioned his source of income constantly and asked for the same. What is however curious is that by a letter dated 31st December, 2013, the Respondent had already invited the applicant to appear before it on 3rd January, 2014 so that the results of the vetting could be communicated to him. One cannot but conclude that the contents of the letter dated 2nd January, 2014 was an afterthought since it was clear that by 31st December, 2013, the Respondent had already made its decision. To therefore contend that vide a letter dated 2nd January, 2014 the applicant was afforded an opportunity to avail further evidence is with due respect unreasonable. As it is clear that by 31st December, 2013 when its decision was ready, the Respondent by its own communication recognised that there were certain materials which would have been useful in assisting it arrive at a fair decision, hence the letter dated 2nd January, 2014, one cannot but conclude that not only was the decision unfair but as also irrational.
54. The applicant also seems to have raised the issue of the fact that the Regulations were not brought to his attention. However unlike in **Immanuel Masinde Okutoyi & Others vs. The National Police Service Commission** (supra) this issue was only raised in the submissions rather than in the affidavit and seemed to have been more of an afterthought. What was contended was that there was no public participation in promulgating the same. However, no sufficient material was placed before the Court to enable the Court reach that conclusion.
55. Having considered the foregoing, I am therefore not satisfied that the process of vetting of the applicant met the standards of fairness.
56. Accordingly the order which commends itself to me and which I hereby grant is an order of Certiorari removing to this Court the decision of the Respondent to discharge the Ex-parte Applicant from the National Police Service for the purposes of being quashed which decision is hereby quashed.
57. With respect to the order of prohibition sought I am afraid that I am unable to grant the same in the manner sought. In judicial review applications unlike in constitutional petitions orders akin to declaratory orders cannot be granted. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…....…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined..."

58. The applicant cannot by his application "hold brief" for others as it were in these kinds of applications. It follows that the Court cannot grant orders at large the way the applicant seeks in his prayer (b) of the Motion.
59. Having quashed the Respondent's decision, it is now upon the Respondent to decide on its next move.
60. With respect to costs, it is clear that these proceedings were commenced on 21st January, 2014 during the pendency of at least one request for review. Although the requests for review were eventually withdrawn, as at the time of the institution of these proceedings, there was one request which was alive. The applicant ought not to have pursued two legal remedies simultaneously. Accordingly each party will bear own costs.

Dated at Nairobi this 17th day of September 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muchiri for the Applicant

Mr Ojwang for Mr Opili for the Respondent

Cc Patricia