



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Judicial Review 35 of 2011**

**YAHYA IBRAHIM JAI .....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>st</sup> RESPONDENT**

**THE PROVINCIAL POLICE OFFICE NYANZA.....2<sup>nd</sup> RESPONDENT**

**THE COMMISSIONER OF POLICE .....3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

The applicants Notice of Motion dated 12<sup>th</sup> October 2012 prays for the following orders:-

1. **That this honourable court be pleased to grant the applicant Yahya Ibrahim Jai an order of certiorari to remove into the high court and quash the dismissal decision of the Provincial Police Office Nyanza dated 12<sup>th</sup> July 2011.**
2. **That this Honourable court be pleased to grant the applicant YAHYA IBRAHIM JAI an order of Certiorari to remove to the High Court to quash the exparte orderly Room proceedings, decisions, findings and / or recommendations of the Presiding Officer No. 233449 IP Benjamin Boen conducted on 22<sup>nd</sup> June 2011.**
3. **That this honourable court be pleased to grant the applicant YAHYA IBRAHIN JAI an order of prohibition to prohibit the OCS, OCPD, PPO Nyanza and / or the commissioner of police from enforcing the findings and/or recommendations of the exparte orderly Room proceedings presided over by No. 233229 IP Benjamin Boen on 22<sup>nd</sup> June 2011 relating to the applicant herein.**
4. **That this honourable court be pleased to grant the applicant YAHYA IBRAHIN JAI an order of Mandamus compelling the Commissioner of police through the provincial police officer Nyanza or any other officer to reinstate the applicant herein back in service with full salary and all the allowances he was entitled to prior to his dismissal.**
5. **That the costs of this application be provided for.**

The applicants verifying affidavit shows that he was employed in the police force on 30<sup>th</sup> June 2007 as a police constable.

On 21<sup>st</sup> June 2011 he was assigned the duties of guarding KCB Bank Tuskeys Branch and was

issued with a G3 Rifle serial number 6530630 loaded with 20 rounds of ammunition.

The applicant further depones that he completed his assignment at 7:00 p.m. in the evening and he was unable to return the firearm to the armoury as it closes by 6:45 p.m. He thus went with it to his house.

According to him at around 4:00 a.m on 21<sup>st</sup> June 2011 the OCS one C. I. **Domnic Murau** together with other police officer went to his house and collected the said rifle as well as the 20 rounds of ammunition. He was placed in the police cells and released on 22<sup>nd</sup> June 2011 at 3:15 hours.

Subsequently, three charges were preferred against him namely:-

1. **Idle and negligence in performance of duty contrary to Regulations 20 sub regulation 24 of the Police Regulation Act Cap 84 F. S. O.**
2. **Without lawful excuse breaking out of the Police lines contrary to Regulation 13 of the Police Regulation Act Cap 84 F. S. O.**
3. **Discharging a weapon without orders or without reasonable or lawful cause.**

According to the applicant the proceedings were conducted by one **I.P Benjamin Boen** without his knowledge. He was found guilty and dismissed from duty.

The applicant contents that the said dismissal lacked sufficient evidence and was in total breach of the rules of natural justice and that the same ought to be quashed.

The respondent vide the replying affidavit of one **Lary Kiyeng** the Deputy Provincial Police Officer Nyanza sworn on 14<sup>th</sup> March 2012 opposed the application. According to the respondent, there was sufficient evidence to demonstrate that the in discipline charges against the applicant were appropriately done and properly investigated and that the proceedings went according to the laid down procedures.

The respondent further argued that the applicant was adequately served or notified of the charges against him and in any event though he failed to attend the proceedings deliberately he was well represented. The orderly Room proceedings according to the respondent did not fail the test of natural justice requirements.

Having perused the application as well as the replying affidavit and the partes submissions herein, the province of the writs of Judicial Review is not necessarily to inquire about the illegality or otherwise of the verdict reached by a tribunal but the procedure which gave rise to the said decision.

Did the orderly Room proceedings breached the Rules of natural justice? Did the provincial. Police Officer exceeds his jurisdiction? Was there any bias exhibited by the respondent against the applicant?.

It is not in dispute that the applicant was an employee of Kenya Police and that on 21<sup>st</sup> June 2011 he had been issued with a rifle and was guarding KCB Bank at Tuskeys Branch.

The applicant episode occurred when some police officers on patrol found some people in a near fight and when they intervened they found that one of them (the applicant) was a police officer. Later a gunshot was heard and a civilian person came to the station complaining about the applicant. A search was conducted and it was established that the applicants rifle had not been returned. The same was traced to the applicants house.

The whole process as earlier observed led to the applicant being locked up at the police cells but was later released pending the formal disciplinary process.

What is the requirement or the procedure where one is found to have breached the Forces Standing Order?.

Under Standing Order No. 16 (vii) the same states:-

**“An accused person shall at least 24 hours before the commencement of such inquiry, be notified in writing of the alleged offence against discipline into which it is proposed that an inquiry shall be held. Such notice shall be in accordance with Appendix 20 C of this Chapter.**

**Provided that notice need not be given in any inquiry where an immediate example is required or where the provincial or any gazetted officer, considers it expedient or in the public interest that an inquiry should proceed forthwith “.**

The applicant herein was detained at the police cells on 22<sup>nd</sup> June 2011. According to the respondent he was served with a waiver notice. The same is attached as annexure Y1J5 and dated 23<sup>rd</sup> June 2011.

The O. B. attached to the applicants verifying affidavits state in part:-

**“Remarks column: Noted. I. P. Boen take action. Sgt Musili serve the officer with notification to appear before I. P. Boen on 22<sup>nd</sup> June 2011 at 10:00 a.m. Signed by OCS**

**C. I. Dominic Murau”.**

I believe this is the same notice dated 23<sup>rd</sup> June 2011. This notice seemed to have been served upon the applicant while at the police cells.

There are two issues however in regard to this notice. The first issue is that the same is dated 23<sup>rd</sup> June 2011 yet the proceedings were done on 22<sup>nd</sup> June 2011. If the proceedings were for 22<sup>nd</sup> June 2011 why date the notice the following day.

Secondly I do not find anywhere where the applicant signed or for that matter anything to show that he refused to sign. The form in appendix 20 C of the Forces Standing Orders clearly stipulate that the officer whose proceedings are being brought against must acknowledge.

Equally the time of the inquiry ought to be clearly stated among others.

The waiver notice in my mind is too simplistic and even if it was a waiver the same ought to have been clearly grafted as this was a notice which formed the primary basis for the proceedings.

There is no evidence that what was served upon the applicant by Sgt Musili was this notice or not.

In the proceedings the same states at the introduction part:-

**“He was instructed to appear before the presiding officer I.P Benjamin Boen on the 22<sup>nd</sup> day of June 2011 and under the escort of the orderly N. C. O. Sgt Joseph Musili but deliberately refused to attend”.**

Again Sgt Musili ought to have clarified this position. He ought to have testified so as to establish this fact.

The sum total of my finding is that I do not see any evidence of service or notice upon the applicant. The Cardinal Rule in judicial review is that all the partes must be accorded adequate notice. The Standing Forces Orders requires a waiver of the 24 hour rule as earlier own quoted, but even then the victim ought to be notified or at least exhibit any evidence of notification.

It is very difficult to disagree with the applicant that he was served with the notice on 23<sup>rd</sup> June 2011 a day after the proceedings had been concluded. In any case this has not been denied by the respondent.

The other issue to be considered and which was raised by the applicant is the procedure required to be followed in case like this where the person is tried in absentia.

Regulation 16 (iv) (a) states:-

**“If an inspector or a subordinate officer, having been properly instructed, refuses to attend an inquiry into an offence against discipline for which he/she is charged or having attended as required willfully obstructs the holding of such inquiry in such a manner as to prevent the inquiry being carried out or completed, the inquiry may be held in the absence of the accused, as though he /she were in fact present.**

**(b) when it becomes necessary to carry out or complete an inquiry in the absence of the accused, as provided for in subparagraph (a) the presiding officer shall appoint another officer or above the rank of inspector and not below that of the accused to represent the interest of the accused at the inquiry. The evidence relevant to the disciplinary offence with which the accused is charged will be recorded, and the presiding officer may give consideration to the inclusion of evidence at the request of the officer representing the interest of the accused.**

**The accused's representative will be required to counter sign the proceedings at their close and the presiding officer will record in full, his / her reasons for conducting the inquiry in the absence of the accused so as to establish clearly that no other course of action was open to him or her”.**

It is apparently clear that in the instant proceedings the appellant was represented by one P. C. Edward Muturia who proceeded deli gently and as required on behalf of the applicant. The said P. C. Muturia apparently was of the same rank as the applicant thus clearly violates the above quoted rules. The rules contemplated a rank of an inspector or above.

On this score alone the entire proceedings were defective. The drafters of the rules must have contemplated the issue of experience and seniority. Both P. C. Muturia and the applicant were of equal rank and could not therefore fit within the rank.

The applicant has alleged bias on the part of the respondent. According to him it was not only him who failed to return the firearm on the material day but there was equally somebody else.

I do not find this to be a convincing argument. There must have been a reason why the respondent zeroed in on the applicant. In any case there was sufficient evidence even by his colleagues that he was found in a brawl with some civilian and that he boarded a police vehicle and was brought to the police line that night.

My finding therefore is that the respondent was right in carrying out the said inquiry save that it failed to follow down the laid down procedures and rules and in particular that applicant was not adequately notified and represented.

The findings on the charges laid against the applicant as earlier indicated is not for this court to inquire. The law provides the avenue for such redress.

Having arrived at the above finding I shall proceed to allow the applicants application in terms of prayer 1, 2, and 3 of the application namely the orders of certiorari and prohibition as prayed therein. The applicant shall equally have the costs of this application.

**Dated, signed and delivered at Kisumu this 25<sup>th</sup> day of March 2013.**

**H.K. CHEMITEI**

**JUDGE**

In the presence of:

.....for appellants

.....for the respondent

*HKC/aao*