



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 147 OF 2011**

**REPUBLIC .....APPLICANT**  
**VERSUS**  
**THE COMMISSIONER OF POLICE .....RESPONDENT**  
**EX-PARTE**  
**JAMES OTIENO OPONDO**  
**JUDGMENT**

The ex-parte applicant (James Otieno Opondo) has through the notice of motion dated 11<sup>th</sup> November, 2011 asked this court to issue an order of certiorari quashing the decision of the respondent (the Commissioner of Police) contained in the letter dated 18<sup>th</sup> February, 2011 dismissing the ex-parte applicant's appeal and thereby dismissing him from the police force.

The ex-parte applicant is a former police constable and on 30<sup>th</sup> July, 2010 he was attached to Garissa Police Station. During the course of the day, a prisoner by the name Adan Abdile Dieso escaped from the Police Station. The following day Orderly Room Proceedings were commenced against the applicant who was found guilty of negligently allowing a prisoner to escape. Vide letter dated 26<sup>th</sup> August, 2010 the Provincial Police Officer, North Eastern Province dismissed the applicant from the police service. The applicant subsequently appealed to the respondent who upheld his dismissal.

The applicant has therefore moved to this court challenging the decision of the respondent on the ground that the respondent did not act fairly in dealing with his appeal. He also contends that the respondent acted in excess of his powers.

The respondent opposed the application through a replying affidavit sworn on 20<sup>th</sup> September, 2012 by Julius Kitili, an Assistant Commissioner of Police. I find it necessary to reproduce some paragraphs of the said affidavit since they specifically respond to the applicant's claim that no reason was given by the respondent for his decision. Julius Kitili averred as follows:-

**“8. THAT the Applicant duly appealed and the Commissioner of Police constituted a four member Appeal Board to look into the appeal. The Board disallowed the same for lack of merit which decision was adopted by the Commissioner. The Board noted that the prisoner had a deformity hence the Applicant ought to have easily noticed his escape if he was a diligent officer. The Board also noted that the Applicant was expected to be extra cautious and alert due to Al-Shabaab threats as the prisoner was being suspected for terrorism. Annexed and marked “J.K.3” is the true copy of the Commissioner’s decision.**

**9.THAT I am advised by the State Counsel on record, J. A. Chimau which advice I verily believe to be true that from the foregoing the Commissioner of Police acted within his powers as conferred by the Police Act and the Force Standing Orders. The procedures as laid down in the Force Standing Orders were adhered to hence the case should be dismissed with costs.**

**10.THAT I am further advised by the State Counsel on record J. A. Chimau, which advice I verily believe to be true that, since the Deputy Provincial Police Officer gave elaborate reasons for dismissing the Applicant, the communication from the Commissioner of Police to the Applicant to the effect that the Applicant’s appeal lacked merit is sufficient in the context of the reasoning provided by the Deputy Police Officer–North Eastern.**

**11.THAT I am further advised by the State Counsel on record, J. A. Chimau, which advice I verily believe to be true that, the Commissioner did not make any order or decision to be quashed and this application is an abuse of the court process and should be dismissed with costs to the Respondents.”**

From the respondent’s affidavit, it is clear that the respondent did not give any reason for dismissing the appeal. The letter dated 18<sup>th</sup> February, 2011 addressed to the applicant by the respondent simply stated that:-

**“The Commissioner of Police acknowledges receipt of your letter of appeal against dismissal from the service.**

**He has carefully perused your appeal and since it lacked merit, he has disallowed your appeal and upheld the sentence of dismissal.**

**I wish to inform you further that since the Commissioner of Police is the final appellate authority**

**you have no further right of appeal.”**

The other defence gleaned from the replying affidavit is that the respondent did not make a decision which can be quashed.

I will start by addressing the issue as to whether the respondent made a decision. The respondent heard the applicant's appeal and dismissed it. The decision to dismiss the applicant's appeal was conveyed to him by the respondent through the already cited letter. To me, there is a decision made by the respondent concerning an issue placed before him by the applicant. The respondent's argument that there is no decision made, that is amenable to judicial review, is therefore rejected.

Judicial review is about the decision-making process and not the merits of the decision. The applicant has questioned the fact that his appeal was dismissed and he was not given any reasons. The respondent attempted to give reasons through the replying affidavit. The respondent also claims that the reasons contained in the letter of the Provincial Police Officer dated 26<sup>th</sup> August, 2010 dismissing the applicant will serve the purpose. This is very unfortunate. The said letter clearly contains the reasons why the applicant was being dismissed from police service. The applicant through his letter dated 30<sup>th</sup> August, 2010 appealed against the dismissal. The respondent was supposed to consider the appeal and give reasons for his decision. It is not enough for the respondent to now claim that a Board was constituted. In fact the proceedings of the Board have not been annexed to the replying affidavit. Reasons must accompany decisions, and that is a pertinent principle of good governance. The applicant had been in the police service for over 21 years prior to his dismissal. The respondent was the final appellate authority and he ought to have given reasons why the applicant's appeal was dismissed. In this country we are trying to construct a fair and just society. We ought to treat each other in a humane manner. The respondent abused his powers and acted unfairly in failing to give the applicant reasons for rejecting his appeal. The applicant had a right to know why the respondent had disallowed his appeal. In the circumstances, I allow the application and quash the decision of the respondent as contained in the letter dated 18<sup>th</sup> February, 2011. Even after allowing the application, the applicant remains dismissed from the police force. One of the remedies available in judicial review is an order of this court remitting a matter in question to the decision maker to reconsider the matter in accordance with the law. As such, I remit the applicant's appeal as contained in his letter dated 30<sup>th</sup> August, 2010, to the respondent now the Inspector General of Police to consider the said appeal afresh and make a decision within 60 days from the date of this judgement. The Inspector General of Police is at liberty to place the appeal before the body which is currently tasked with hearing appeals from police officers of the applicant's rank. This is one case in which the applicant was justified in coming to court. He is awarded costs against the respondent.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of April , 2013**

**W. K. KORIR,**

**JUDGE**