



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 516 of 2005

REPUBLIC

AND

THE PUBLIC SERVICE COMMISSION OF KENYA.....RESPONDENT

AND

EX PARTE

JAMES NENE GACHOKA.....APPLICANT

JUDGMENT

Introduction

1. The Notice of Motion dated 3rd May 2005 was filed pursuant to leave granted on 15th April 2005. The ex-parte applicant (“the applicant”) failed to take any step to prosecute the matter the Court on its own motion dismissed the motion for want of prosecution on 24th February 2012. The dismissal order was subsequently set aside when cause was shown on 10th May 2013.

The application

2. In the Notice of Motion dated 3rd May 2005 the applicant seeks an order that, “*An order of certiorari do issue quashing the decision of the Public Service Commission dismissing the applicant herein from the Public Service communicated to the said applicant vide a letter dated 15th October 2004 from the Office of the President.*”

3. The application is supported by a verifying affidavit sworn by the applicant on 3rd May 2005 and the applicant’s statement of facts and grounds dated 14th April 2005. The respondent did not file any replying affidavit.

The facts

4. The facts giving rise to the application are not contested. The applicant was at the material time a public servant having been employed by the Public Service Commission (“the PSC”) on 28th May 1980.

By a letter dated 4th December 1990, he was interdicted with effect from 27th November 1990 after he was charged with the offence of stealing by a person employed in the public service contrary to **section 280** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He was convicted. He thereafter he lodged an appeal to the High Court. The conviction was quashed on 31st July 2001.

5. After his conviction was quashed, he appealed to be reinstated by the PSC. On 18th December 2001, he was informed that he should show cause why he should not be dismissed for gross misconduct as he had tampered with cheques payable to a hardware shop. Another letter dated 25th February 2002 requested him to show cause why he should not be dismissed for negligently causing loss of Kshs.340,880/= being property of the Government of Kenya. He duly responded to the letter by his own letter dated 21st March 2002 in which he stated that he had been charged with the offence and had been acquitted on appeal.

6. By a letter dated 14th May 2003, the applicant was informed the PSC that he was dismissed from office on account of negligence of duty and that he had a right to appeal the decision. He exercised his right to appeal but PSC disallowed the appeal by a letter dated 13th January 2004. By a letter dated 15th October 2004, the applicant was informed that his second appeal against dismissal from the service was dismissed.

The issue

7. Before hearing, I framed the issue for determination as follows, ***“Whether the Public Service Commission may commence disciplinary proceedings against an employee for gross misconduct or negligence upon acquittal by the Court of an offence related to employment and based on the same facts.”***

The arguments

8. Mr Kamunda, learned counsel for the applicant submitted that the applicant faced double jeopardy by reason of the fact that after acquittal by the Court he was forced to face disciplinary proceedings upon the same facts contrary to **section 77(5)** of the former Constitution which prohibits the trial of a person acquitted or convicted of an offence based on the same facts. He further submitted that the PSC had no power to discipline the applicant or subject him to double jeopardy. Counsel cited the case of ***Stanley Mutota and Others v Labour Commissioners Nairobi Petition No. 313 of 2012 [2012]eKLR*** to support his argument.

9. Mr Bitta, learned counsel for the respondent, submitted that the PSC had exclusive jurisdiction to deal with disciplinary proceedings arising from employment in the public service. He suggested that disciplinary proceedings are not a trial and are therefore not covered by **section 77(5)** of the former Constitution. Counsel cited ***Grace Omolo v Attorney General and Others [2012] eKLR*** where the Court held that the PSC had exclusive jurisdiction to discipline public servants in a manner consistent with the principles and values of the Constitution. He also cited ***Kenya Revenue Authority v Menginya Salim Murgani Nairobi Civil Appeal No. 108 of 2010 [2010] eKLR*** to support the respondent’s case. Counsel submitted that the application should therefore be dismissed

Determination and disposition

10. Although the petitioner’s counsel cited **Article 50(2)(o)** of the Constitution which is of equivalent effect to **section 77(5)** of the former Constitution, the Constitution is not applicable to the facts of this case as it is not retrospective in its application.

11. The applicant’s case is grounded on **section 77(5)** of the former Constitution which states thus;

5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the

course of appeal or review proceedings relating to the conviction or acquittal.

12. The prohibition contemplated by the provision is that of a person undergoing trial for the same offence for which he was tried, convicted or acquitted. This is the reason why in **Stanley Mutota and Others v Labour Commissioners (above)**, the petitioners were unable to obtain the benefit of **Article 50(2)(o)** of the Constitution as they had not been subjected to earlier criminal proceedings which resulted to an acquittal or conviction. In that case the petitioners attempted to quash criminal proceedings after an earlier case had been withdrawn without any determination.

13. What the constitutional principles of *autrefois convict* and *autrefois acquit* whereby the accused pleads that he has been previously convicted or acquitted of the same offence for which he is now being prosecuted are replicated in **section 138** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which states that;

138. A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.

14. The phrase **‘tried for that offence or for any other criminal offence’** found in **section 77(5)** of the repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings. Disciplinary proceedings cannot be equated to a **‘trial for an offence’** so as to attract the defence of double jeopardy doctrine. As such, disciplinary action, professional or otherwise, being of a civil nature, is not a punishment given by a court. The Supreme Court of the United Kingdom in case of **R (on the application of Coke- Wallis) v Institute of Chartered Accountants of England & Wales [2011] UKSC 1** noted that principles of *autrefois acquit* did not apply to disciplinary matters, which were civil not criminal proceedings. Lord Collins noted that, “[60] ... The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.”

15. A somewhat reverse situation occurred in the case of **Daniel Ndung’u v Director of Public Prosecutions and Another Nairobi Petition No. 69 of 2012 [2013] eKLR**. The petitioner, an advocate applied to the court to stay proceedings before the Advocates Disciplinary Committee on the ground that he was facing the charges arising from the same facts. His contention was that prosecution in the criminal court was in breach of **Article 50(2)(o)**. He contended that the criminal proceedings were a nullity as they amounted to double prosecution to his prejudice and detriment. Justice Lenaola, dealing with the matter, dismissed the argument thus, “[18] It is not necessary to delve into what a “trial” and a “prosecution” mean (as the Petitioner would want me to) because it is generally agreed that proceedings before the Committee relate to “professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocated” – **Section 60 of the Advocates Act**. Criminal prosecutions on the other hand relate to the “determination of the guilt or innocence of a person charged with crime” [19] Proceedings before the Committee cannot therefore by any shade of doubt be termed “a criminal trial” and the mere choice of the word, “convict” at the end of its proceedings cannot criminalize the actions of the Respondent in those proceedings. In fact the standard of proof is much higher in criminal proceedings; beyond reasonable doubt which is not the same standard as in the Committee”

16. In this case, what the applicant faced were disciplinary proceedings. Neither **section 77(5)** of the former Constitution nor **Article 50(2)(o)** of the Constitution apply to proceedings of another nature other than criminal proceedings. As submitted by the respondent, the PSC is constitutionally and statutorily mandated to discipline employees and it is entitled to do so despite the acquittal of the employee of a criminal offence based on facts related to the offence.

17. Having so held, I find and hold that there is no violation of any law or the former Constitution by the Public Service Commission in conducting disciplinary proceedings against the applicant. There being no other error or breach of the rules of natural justice, an order of certiorari cannot issue.

18. Learned counsel for the applicant submitted that the petition was entitled to damages in the matter. This submission lacks merit as the court does not have jurisdiction to award damages in proceedings for orders of judicial review.

19. The ex-parte applicant's Notice of Motion dated 3rd May 2005 is dismissed with costs.

DATED and DELIVERED at NAIROBI this 31st day of May 2013.

D.S. MAJANJA

JUDGE

Mr Kamunda instructed by Kamunda Njue and Company Advocates for the ex-parte applicant.

Mr Bitta, Principal State Counsel, instructed by the State Law Office for the respondent.