



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 160 OF 2012

REPUBLICAPPLICANT

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

PROVINCIAL POLICE OFFICER3RD RESPONDENT

Ex-parte

NO. 85214 P.C. ROBERT MAGIGE

JUDGEMENT

The ex-parte Applicant, Robert Magige (hereinafter simply referred to as the Applicant) was a police constable up to 18th October, 2011 when he received a letter dated the same date from the Provincial Police Officer, Central Province dismissing him from the police service.

Some background is necessary at this point. On 1st October, 2011 the Applicant was among police officers manning a road block at Juja area along Nairobi-Thika road when he was allegedly found by the Deputy Provincial Police Officer, Central Province receiving a bribe from a motor cyclist. The Applicant allegedly committed four offences in the process.

On 3rd October, 2011 he was subjected to Orderly Room proceedings and allegedly charged with four counts. He was subsequently convicted of all the counts. The Applicant was sentenced to dismissal from service with effect from 18th October, 2011 in respect of one of the counts. The Applicant has filed these proceedings and prays for an order of certiorari to quash the decision to dismiss him and an order of mandamus to compel the respondents to reinstate him to the police service.

The Attorney General is the 1st Respondent and the Commissioner of Police is the 2nd Respondent. The Provincial Police officer, Central Province is the 3rd Respondent.

The Applicant's case is brought out by the substantive notice of motion which appears to be dated 10th May, 2012 or 19th May, 2012 but was received at the court registry on 15th May, 2012. The grounds in support of the application are:

“1. That the Respondents and particularly the 3rd Respondent has purportedly dismissed the applicant from the Kenya Police Service without following due process, in that;

- a. **The Applicant was not given the requisite 24 hour notice or at all prior to the Orderly Room proceedings instituted against him as required under the FORCE STANDING ORDERS, Cap 20 Laws of Kenya**
 - b. **The Applicant was not notified, in writing of the alleged offences against discipline as required under the Forces Standing Orders.**
 - c. **The Presiding Officer did not inform the Applicant of his right to call a fellow police officer to defend him in the proceedings if he so wished.**
 - d. **The entire proceedings in the Orderly Room leading to the decision to dismiss the applicant were seriously flawed.**
 - e. **The counts in the charge sheet at the Orderly Room proceedings and the Charges spelt out in the 3rd Respondent’s dismissal letter clearly do not tally.**
1. **The Respondents failed, in the entire process leading to the purported decision to dismiss the applicant, contravenes the law as contained in the Constitution, the Employment Act and the Forces Standing Orders.**
 2. **The Applicant was condemned unheard contrary to principles of natural justice as the offenses for which allegedly led to his dismissal did not form part of the charges he was tried for at the Orderly Room Proceedings.**
 3. **The applicant is being punished for carrying out the duties entrusted to him by law as a police officer.**
 4. **The decision to dismiss the Applicant is malicious, unlawful and void ab initio having been arrived at without following the laid down procedure in the Force Standing Orders and relying on a charge that the applicant was not tried for.**
 5. **Unless the orders sought herein are granted, the Applicant will suffer prejudice in standing dismissed from the Kenya Police Service hence losing out on his long built career and succumbing to “back door” dismissal.”**

The respondents opposed the application through the replying affidavit sworn on 1st October, 2012 by George Omwoyo, an Assistant Commissioner of Police. Through the said affidavit the respondents assert that the proper procedure for dismissing a police officer as found in the Police Act, Cap 84, Laws of Kenya and the Force Standing Orders was strictly adhered to. On the allegation that the Applicant was subjected to Orderly Room proceedings without written notice the respondents contend that since the offences with which the Applicant was charged were committed in the presence of Mr. Amalla a Senior Assistant Commissioner of Police and the Deputy Provincial Police Officer who was a gazetted officer, Paragraph 16(vii) of the Force Standing Orders was invoked and it was therefore not necessary to give notice to the Applicant. The respondents also submit that the Applicant was indeed given a chance to get somebody to assist him and proceedings were adjourned so that he could do so. The respondents assert that the Applicant was indeed charged with four counts as can be seen from the defaulter sheets annexed to the replying affidavit. The respondents finally assert that the application is defective since it was filed outside the six months provided for seeking an order of certiorari. It is the respondents’ case that the Applicant was dismissed from service on 18th October, 2011 and he filed this application on 10th May, 2012.

There are issues that can be addressed without considering the detailed arguments of the parties. The respondents alleged that this application is incompetent since it was not filed within six (6) months from the date of the decision being challenged. This argument is fallacious. A perusal of the file shows that the application was filed on 18th April, 2012 and on 19th April, 2012 leave was granted to the Applicant to commence judicial review proceedings. The decision being challenged was made on 18th October, 2011. The application was therefore brought on the last day of the sixth month from the date of the decision. The application was thus filed within six months from the date of the impugned decision.

There is the issue as to whether the Applicant was taken through a fair process. The Applicant claims he

was not given adequate notice. The Applicant averred that he was bundled into a police vehicle on 3rd October, 2011 and on arriving at Juja Police Station he was casually informed by one Inspector Betty Cheruiyot that he was to face Orderly Room proceedings. He averred that he was not given adequate notice to prepare for the proceedings. In response to this the respondents cited the proviso to paragraph 16(vii) of the Force Standing Orders to wit:

“Notice need not be given in any inquiry where an immediate example is required, or where the Provincial or any Gazette Officer considers it expedient or in the Public Interest that an inquiry should proceed further with.”

The Applicant did not respond to this argument and I am of the opinion that the Orderly Room proceedings were conducted in accordance with the above cited proviso.

The Applicant also claimed that he was abused and humiliated by Mr. Amalla at the roadblock. I believe that goes to the merits of the decision and this is a no go zone for judicial review. The Applicant also alleged that the presiding officer of the Orderly Room proceedings did not inform him of his right to call a fellow police officer to defend him in the proceedings if he so wished. This is not true since a copy of the proceedings provided to the court by the Applicant clearly shows that the proceedings were adjourned to 2.00 p.m. so that somebody could be availed to assist him.

Generally, the proceedings, though hastened, were regular and fair. There is, however, an important issue raised by the Applicant. The Applicant claims that he was charged with two counts but the dismissal letter contained four counts.

Looking at the copy of the Orderly Room proceedings submitted to the court by the Applicant, I find that the Applicant was indeed charged with two counts. The 1st count is framed as **“being guilty of an act of prejudice to the good order and discipline contrary to Regulation 3 Sub Regulation 41 of the Police Regulations.”** The 2nd count is framed as follows: **“Wilfully disobeys any lawful command contrary to Regulation 3 Sub Regulation 8 of the Police Regulations.”**

The proceedings availed to the court through the replying affidavit of George Omwoyo has four counts. On top of the two counts in the proceedings produced by the Applicant, there is a third charge known as **“being disrespectful in demeanour to a police officer senior in rank contrary to Regulation 3 Sub-Regulation 7 of the Police Regulations”** and a fourth charge framed as **“leaving his place of duty before being regularly relieved contrary to Regulation 3 Sub-Regulation of Police Regulations.”**

According to the letter of dismissal dated 18th October, 2011 the Applicant was sentenced as follows:

“Count 1 - Fined Kshs.2,500/=

Count 2 - Fined Kshs. 2,500/=

Count 3 – Reprimanded

Count 4 – Dismissal from Service w.e.f. 18th October, 2011.”

In the verifying affidavit sworn on 16th April, 2012 the Applicant stated that as he was waiting for the outcome of the Orderly Room proceedings he was informed that two more counts had been added. He asked for a retrial from the presiding officer who declined his request and told him that she was just informing him of the additional charges as a formality.

On this particular allegation George Omwoyo averred at paragraph 8 of the replying affidavit:

“THAT the Ex-parte Applicant was charged with four (4) offences. Annexed hereto and marked “CP2”, “CP3”, “CP4”, and “CP5” are copies of the defaulter sheets. The Ex-

parte Applicant was duly convicted after a proper hearing and was accordingly convicted.”

How does one reconcile the two sets of proceedings which contradict each other? The Applicant should thank L. Kenyani the litigation counsel in the office of the Attorney General for unraveling the mystery. In the submissions dated 7th November, 2012 and filed in court on 8th November, 2012 she submitted at page 2 that:-

“From the orderly room proceedings, it is clear that the ex-parte applicant was charged with 4 offences and indeed, he has endorsed the proceedings by signing them. Under the Force Standing Orders Paragraph 24(vii), any officer empowered to consider an appeal may call for and review any proceedings and in so doing order a retrial. In this case, when the proceedings were forwarded it emerged that the ex-parte applicant was actually guilty of 2 additional counts which he was then charged with and tried for.” (Underlining is mine for emphasis).

The evidence before this court clearly shows that the Applicant was only tried once. The submissions by the state counsel appear to suggest that he was tried twice. This is not true and the only conclusion is that the Applicant is correct when he says that he was indeed convicted for charges he was never charged with. This is indeed contrary to the rules of natural justice. No man should be convicted for an offence he has not been charged with. The Applicant was convicted in respect of two additional counts without being given an opportunity to offer a defence in respect of those counts. In normal circumstances, appropriate orders ought to issue accordingly.

This application is, however, bedeviled by defects which cannot be cured by the application of Article 159(2)(d) of the Constitution. In the first instance, the Applicant’s application does not comply with the strict rules for commencing judicial review proceedings. An application for leave is supposed to be accompanied by a verifying affidavit containing the facts in support of the application. It is also supposed to be accompanied by a statement, commonly known as a statutory statement. The contents of a statutory statement, as per Rule 2 of Order 53, are:-

“An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”

In my view a statutory statement is like a plaint in an ordinary suit. It gives a snapshot of an applicant’s case. The Applicant herein filed, together with the application for leave, a document he refers to as a ‘statement of facts.’ I presume this is his statutory statement. It has 19 paragraphs. Without being concerned about the form, it is noted that the said document does not have the names of the parties. One can say it has the name of the Applicant since the document opens as follows: **“I, No. 85214 PC Robert Magige**” The document does not state the names of the respondents. The court can ignore this. The court can also deduce from the document the grounds upon which the relief is sought. However, the document does not disclose the relief sought. In short, this is not a statutory statement as defined by Order 53 Rule 2 of the Civil Procedure Rules. The application is therefore fatally defective.

Even assuming that the said defect can be overlooked, the application would still fail since the substantive notice of motion was filed more than 21 days from the date of the grant of leave. This is contrary to Order 53 Rule 3 (1) of the Civil Procedure Rules which clearly provides that:

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”

The Applicant was granted leave on 19th April, 2012 and directed to file his substantive application within 21 days. The substantive application as can be seen from the court stamp was filed on 15th May, 2012. Excluding the date the leave was granted and the date the substantive application was filed, it can be seen that the substantive notice of motion was filed 25 days from the date of the grant of leave. The leave granted had therefore lapsed by the time application was filed. The leave was spent and the Applicant no longer had the court's authority to file the substantive application. Maybe time could have been enlarged had he sought the court's permission. He did not do so. As a matter of fact the entire exercise of hearing this application was an act in futility since there was no proper application before the court for consideration.

Rules are made to guide parties and to help the court in disposing of matters before it. If rules are not obeyed, it would result in chaos in the justice system. A party cannot be allowed to claim that failure to comply with the rules amounts to procedural technicalities which can be ignored by the court. Sometimes, the court can excuse non-compliance with technical rules but where a rule goes to the substance of the matter, the court has no option but to enforce the rule. The court may be sympathetic to the cause of a party but it cannot enlarge time on its own motion. It ought to be moved appropriately.

For the foregoing reasons, I find that the orders sought by the Applicant cannot be granted. His application is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 5th day of December, 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT