



REPUBLIC OF KENYA

High Court at Kisumu

Miscellaneous Civil Application 27 of 2009

CHARLES NDEGE NYAKIENIAPPLICANT

VERSUS

THE HON ATTORNEY GENERAL for & on behalf of the

COMMISSIONER OF POLICERESPONDENT

JUDGMENT

The Notice of Motion dated 2nd September 2009 prays for the following reliefs.

- 1) That an Order of Certiorari directed to the respondent removing to the High Court for purposes of being quashed the decision of the Commissioner of Police made on 13th May 2009 dismissing the ex parte applicant from the Kenya Police Force.
- 2) That an Order of Mandamus directed to the Commissioner of Police compelling him to reinstate the ex parte applicant in the Kenya Police Force and release of all withheld salaries to the applicant.

The applicant was employed in the police force on 15th July 1985. On 14th December 2006 while working within the Highway Patrol Unit of Police Kisumu he lived at Kisumu Police Line. On the material day one Sarah Hawi Kiberenge made a complaint that on 13th December 2006 the applicant had defiled one Alice Akinyi a house help who was aged twelve years.

After the said complain the complainant minor was referred to hospital for medical examination. Meanwhile the matter was taken up by the O. C. S.

The results from the medical examination carried out by Dr. Aggrey Akula showed that there were minor bruises on the majora of the said victim.

The applicant was charged pursuant to Regulation 3 (41) of the Police Regulation with the offence of "Guilty of an act to the prejudice of good order and discipline".

After going through the process the board headed by one Chief Inspector Mark Seroney found the applicant guilty and recommended termination of his duties. This was done by the Provincial Police Officer on 27th December 2006.

The applicant subsequently was charged vide Kisumu criminal Case No. 1090 of 2006 with the

offence of defiling a minor under the age of fourteen years. After full hearing the applicant was acquitted under Section 210 of the Criminal Procedure Code.

The applicant then mounted a second appeal to the Disciplinary Appeal Board who on 21st April 2009 recommended that the applicant be reinstated and be retired on the interest of the police force.

The applicant however avers that the commissioner of police went contrary to the police recommendations of the Disciplinary Appeal Board and upheld the dismissal without providing any reason for his decision. According to him the commissioner of police did not give any reasons for his decision and this ran contrary to the principles of natural justice.

The respondent on the other hand through one Larry K. Kieng swore an affidavit dated 27th May 2010 where the deponent again reiterated the issues which I have outlined above in regard to the history of this case.

According to the respondent the decision of the disciplinary board is not binding on the commissioner of police and this is supported by the Force Standing orders.

Further the deponent stated that the commissioner of police is not required to consult anybody or bodies of persons when making such decision.

I have carefully perused the pleadings as well as the parties written submissions herein. There is no doubt that the applicant went through a prosecution process herein. The first one was the orderly room process which was an internal investigation carried out by the respondent in which the Forces Standing Orders apply.

The second was the Criminal suit No. 1090 of 2006 in which the applicant was acquitted.

In my considered opinion this cannot amount to double jeopardy. The two processes are provided by two different Acts of parliament. Each of the Acts that is the Police Act Chapter 84 Laws of Kenya and the Criminal Procedure Code Chapter 75 Laws of Kenya provides various sanctions should one be found guilty. Parliament in its wisdom appreciated this fact and therefore I do not subscribe to the applicants assertion that there was double jeopardy against the applicant. The two are indeed separate and distinct.

The writs available vide the Judicial Review Procedure does not necessarily entertain the merits and the demerits of the case. Its province is that of procedure and whether or not the rules of natural justice were followed by a tribunal in arriving at the said decision. Further it seeks always to inquire whether there was any bias or injustice caused against the applicant or for that matter any party appearing before any such tribunal.

In this case the applicant was acquitted in the criminal case no. 1090 of 2006. The contention however is that the commissioner of police failed to take into consideration the boards recommendation to reinstate and sack the applicant for the sake of police interest.

The letter dated 13th May 2009 from the Commissioner of Police States:-

“The Commissioner of Police is in receipt of your appeal against dismissal from the police force.

He has carefully perused your appeal and directs that you be informed that your appeal has been dismissed and the sentence of dismissal upheld as your appeal lacks merit”.

Was the commissioner of police required to give reasons for his refusal to accept the boards recommendation?

According to the respondent he was not. In fact Larry Kieng affidavit earlier own alluded states at

paragraph 20 that:-

“Under the Force Standing Orders the decision of the disciplinary board is not binding on the commissioner of police”.

Whereas this could be true or not the rules of natural justice must be applied by the said commissioner of police. He cannot hide under the force standing orders and issue any order whether valid or invalid affecting a party without giving any reasons.

I have no doubt in my mind that the applicant went through the process of discipline under Chief Inspector Seroney fairly. He had the chance to question the witnesses and call his own. The Disciplinary Board also carried its powers fairly and justly . However does the actions of the commissioner of police amount to biasness against the application?. Does lack of giving reasons a justification for this court to grant the orders sought?.

In the case of **Republic & Other =vs= Attorney General & Another (2006) & 2E.A. 265** the court said;

“A duty to give reasons would be implied in the following situations

- a) Where the decision involved an interest which was highly regarded in law.**
- b) Where the nature of the process required reasons to be given**
- c) From the circumstances of individual case”.**

The commissioner of police in my view cannot first reject the decision of the board or at least the applicant appeal without giving such reasons. How would the applicant know the reasons advanced by the commissioner?

Larry Kieng has further deponed that under the provisions of Section 108 (2) of the Constitution the Commissioner of Police is **“not required to consult anybody or bodies of person when making such decision”.**

This is absolute power! He is not above our laws and more so the constitution . The courts must intervene to curtail such absolute power.

The applicant, granted, has had other disciplinary issues but that does not permit his boss to whimsically make a unilateral decision to disregard the disciplinary board without giving any reasons.

The allegations against the application were indeed grave. Whether he was discharged by the court fairly or unfairly ought to have been a subject of an appeal. The respondent choose not to appeal.

I do not agree with the proposition by the respondent that the respondent has not suffered any mental stress and anguish. If for any reason the respondent would have given reasons for its decision I suppose the applicant would have considered other remedies available to him.

Consequently I find that the respondent demonstrated biasness against the applicant and further violated the principles of natural justice by failing to accord the applicant the reasons for the refusal to follow what the board had suggested namely to reinstate and sack him for the sake of police interest.

I shall allow the notice of motion dated 2nd November with costs to the applicant.

Orders accordingly.

Dated, signed and delivered at Kisumu this 14th day of November 2012

**H.K. CHEMITEI
JUDGE**

In the presence of:

N/ A for the applicant

Langa for the defendant

HCK/aao