REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 328 OF 2009

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE ARMED FORCES ACT CAP 199 LAWS OF KENYA

AND

IN THE MATTER OF THE ARMED FORCES STANDING ORDERS

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF OF GENERAL STAFF.....1ST RESPONDENT
THE HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE

JOHNSON NJOGU

RULING

Johnson Njogu, the ex parte applicant, hereinafter referred to as **" the applicant",** filed an application by way of Notice of Motion dated 26th June, 2009. He sought the following orders:

"1. An order of certiorari to remove into this honourable court and quash the decision of the 1st respondent conveyed by one E.K. Keitany on his behalf dated 18th December, 2008 purporting to retire the applicant from the Armed Forces with effect from the 8th December, 2008.

2. An order of certiorari to remove into this honourable court and quash the decision of the 1st respondent purporting to find the applicant guilty of a criminal offence allegedly committed at the Gilgil Regional Hospital.

3. An order of mandamus to remove in this honourable court and reinstate the 1st applicant to the Armed Forces and in the same position he was together with all the benefits, privileges and entitlements including the removal of the entry from his Qualification Card.

4. Costs of and incidental to the application be provided for.

5. Such further and other reliefs that the honourable court may deem just and expedient to grant."

The application was supported by a statutory statement and a verifying affidavit sworn by the applicant.

The grounds upon which the aforesaid reliefs are sought are as follows:

"(a) The decision was contrary to law in that it was made in breach of the rules of natural justice.

(b) The decision was illegal, arbitrary and unreasonable.

(d) That the wrong procedure to come to the decision and that is contrary to the law.(sic)

(e) The decision put into account irrelevant considerations and failed to take into account relevant considerations.

(f) The respondents are subject to the supervisory jurisdiction of this honourable court.

(g) Such other and further reasons to be adduced during the hearing hereof."

The contents of the applicant's lengthy verifying affidavit may be summarized as hereunder.

The applicant was a serviceman at the Kenya Armed Forces and of the rank of a Sergeant. He was working as an Enrolled Community Health Nurse at the Gilgil Regional Hospital. He was enlisted in the Kenya Armed Forces on 16th February, 1979. He became an Enrolled Community Nurse in the year 1990 and served as such upto 8th December, 2008 when he was dismissed vide a letter dated 18th December, 2008 signed by **Major E.K. Keitany for the Chief of General Staff.**

The applicant's duties as an Enrolled Community Health Nurse included examining ante-natal mothers with a view to establishing whether they were experiencing any problems during pregnancy, prescribing and treating such mothers and patients generally. On 14th November, 2008 the applicant examined a pregnant lady by the name **"G.W.I".** It was alleged that in the course of examining the said patient the applicant assaulted her sexually. According to the charge sheets that were annexed to the applicant's affidavit it was alleged that:

(i) The applicant sexually assaulted the patient by inserting his penis into her vagina while making her believe that he was using an applicator to insert vaginal tablets, an act he knew or was expected to know to be an offence.

(ii) The applicant, without consent of the said patient, tricked her that he would insert vaginal tablets into her vagina using a dummy penis but inserted his penis into her vagina, an act he knew or was expected to know to be an offence.

(iii) The applicant acted against professional ethics by conducting vaginal examination to the said patient in the absence of any other nurse or a third party, an act he knew or was expected to know to be an offence.

The applicant was arrested on the same day (14th November, 2008) by the Military Police and was tried under the provisions of the **Armed Forces Act** before the Commanding Officer, Gilgil Regional Hospital. The applicant was found guilty and dismissed summarily.

The applicant alleged that the offence which he should have been charged with should have been rape which is not triable by the Commanding Officer but a Court Marshal. In paragraphs 20 to 27 of his verifying affidavit, the applicant made, *inter alia,* the following allegations:

(a) The decision of the Commanding Officer was reached in contravention of the rules of natural justice in that he was not given adequate time to prepare his defence neither was he provided with any of the prosecution witnesses' statements despite having requested for them.

(b) That his accuser and her associates did not give their evidence orally in his presence neither were their written statements availed to him.

(c) That the Commanding Officer failed to call a nursing officer to testify as it is only a nursing officer who could have conclusively given evidence on the procedures used in conducting examination of an ante-natal mother.

(d) That the Commanding Officer never conducted investigations to establish the truth of the matter nor was there sufficient evidence at the trial.

(e) That the Commanding Officer was biased against the applicant as he made comments that were adverse to his fair trial.

(f) That the Commanding Officer appeared to be under pressure from his superiors to find the applicant guilty and as a result failed to take the applicant's defence into consideration.

(g) The Commanding Officer considered irrelevant considerations in reaching his decision in that he considered that the patient was helpless and truthful and could not have given a false report and that she was unable to appear and testify because she was pregnant.

The applicant complained that he was dismissed from the Armed Forces without any benefits despite having worked for the Army for a period of 29 years and 297 days. He had never been incriminated in any sexual offence there before.

A replying affidavit was filed by **Lt. Col. Richard Onyari Nyakundi,** the Commanding Officer, Gilgil Regional Hospital. He stated that the applicant was a senior non-commissioned officer serving under his command at the said hospital. The applicant appeared before him on the three charges as aforesaid. The deponent produced a copy of the proceedings which he conducted. The proceedings disclose, *inter alia*, that:

(a) The applicant admitted that he had received a copy of the charge sheet and abstract of evidence not less than 24 hours prior to the hearing date.

(b) The applicant admitted that he had sufficient time to prepare his defence.

(c) The applicant agreed in writing that witnesses against him need not give their evidence in person.

(d) The applicant did not wish to give evidence on oath but chose to hand in a statement in his defence without being sworn.

(e) The applicant said that he would accept the award of the Commanding Officer as he did not want to be tried by a Court Marshal.

The Commanding Officer said that he was not biased against the applicant during the trial and neither did he make any negative statements against the applicant as alleged. He also denied that he was under any pressure from anybody to convict the applicant. He added that he considered the applicant's defence and arrived at a conclusion based on the evidence before him.

At the conclusion of the trial the applicant was found guilty on all the charges and awarded a dismissal from service subject to the Commander's approval. The Commanding Officer added that the charge relating to having carnal knowledge of the patient was quashed by the Army Commander on review under **Section 83** of the **Armed Forces Act Cap 199.**

No further affidavit was sworn by the applicant to dispute the averments made by the said Commanding Officer in the replying affidavit. Parties filed their submissions which I have carefully considered.

It is trite law that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made but the decision making process itself. See **REPUBLIC vs JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 203.** In Judicial Review proceedings, the court does not act as an appellate court and neither can it interfere in any way with the exercise of any power or discretion which has been conferred on a tribunal or an inferior quasi-judicial body unless it is demonstrated that the tribunal or quasi-judicial body in the exercise of its jurisdiction acted unreasonably or did not comply with the rules of natural justice.

One of the allegations made by the applicant is that the Commanding Officer acted *ultra vires* in arriving at the conviction. He alleged that the **Armed Forces (Summary Jurisdiction) Regulations** under which he was tried stipulate the offences that can be tried summarily and also sets out the limitations of powers of Commanding Officers of different ranks. The offence of rape is not included in the list of offences which are triable summarily. He further stated that he was tried by a Lieutenant-Colonel whose corresponding rank under the said regulations is that of a Captain. However, a close reading of **Section 82(4)** of the **Armed Forces Act** and the said regulations reveal that a Commanding Officer can deal with the charges as the ones which the applicant faced in a summary manner and if the accused is a non-commissioned officer, the Commanding Officer may order a dismissal from the Armed Forces but subject to confirmation by the Commandant. Further, although the applicant was alleged to have committed an offence akin to rape, he was charged under **Section 68** of the **Armed Forces Act** which provides that:

"Any person subject to this Act who is guilty of any act, conduct or neglect to the prejudice of good order and service discipline shall be guilty of an offence and liable, on conviction by court martial, to imprisonment for a term not exceeding two years or any less punishment provided by this Act."

He was therefore rightly charged and prosecuted.

Secondly, although the applicant complained that there was breach of the rules of natural justice in that he was condemned unheard, was not provided with witnesses' statement, his accuser did not appear to give oral evidence and was therefore not cross-examined, the proceedings reveal otherwise. The contents of the pleadings as summarized hereinabove were not discounted by the applicant.

There is therefore no evidence that the rules of natural justice were not complied with during the trial before the Commanding Officer. The applicant's accuser had recorded a statement which was availed to the applicant. The statement was also annexed to the affidavit of the said Commanding Officer and formed part of the record. There are also statements recorded by three witnesses, **Agneta Auma Osanya, LT Chessa and Edward Owiti**. The proceedings show that the applicant agreed in writing that the witnesses against him need not give their evidence in person.

The Commanding Officer denied that he had taken into account irrelevant considerations and failed to take into account relevant considerations in arriving at the decision to dismiss the applicant from his employment. He further denied that he was biased against the applicant and that he acted in bad faith.

Section 83 (1) and **(2)** of the **Armed Forces Act** state as follows:

"(1) Where a charge has been dealt with summarily and has not been dismissed, the reviewing authority may at any time review the finding or award.

(2) Where on a review under this section it appears to the reviewing authority expedient, by reason of any mistake of law in the proceedings on the summary dealing with the charge or of anything occurring in those proceedings which in the opinion of the authority involved substantial injustice to the accused, to do so, the authority may quash the finding; and if the finding is quashed the authority shall also quash the award."

Subsection (3) thereof gives the reviewing authority power to vary an award as it may deem proper. There is evidence that the award made by the Commanding Officer was considered by the reviewing authority and in its discretion quashed the charge of having had unlawful carnal knowledge of the patient.

In view of the foregoing, I find no merit in the applicant's application and dismiss the same with costs to the respondents.

Lastly, the delay in delivery of this ruling is regretted. The same was caused by the fact that after counsel highlighted their submissions the court file was inadvertently misplaced and was retraced recently after the applicant's advocates wrote to the court to enquire about the ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2011.

D. MUSINGA

JUDGE

In the presence of:
Nazi – Court Clerk
Mr. Morris Kimuli for the Ex Parte Applicant
Mr. Sala for Mr. Bosire for the 1st Respondent