



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Appeal 86 of 2009

IN THE MATTER OF : AN APPLICATION BY HON. UHURU

MUIGAI KENYATTA FOR JUDICIAL
REVIEW SEEKING ORDERS OF CERTIORARI

AND

IN THE MATTER OF : KENYA NATIONAL COMMISSION ON
HUMAN RIGHTS ACT, 2002

AND

IN THE MATTER OF : THE REPORT BY THE NATIONAL
COMMISSION ON HUMAN RIGHTS ON THE CAUSE OF POST ELECTION
VIOLENCE IN KENYA IN 2007 – 2008

REPUBLIC APPLICANT

AND

THE KENYA NATIONAL
COMMISSION ON HUMAN RIGHTS..... RESPONDENT

EX-PARTE HON. UHURU MUIGAI KENYATTA

JUDGMENT

INTRODUCTION

The respondent is **The National commission on Human Rights**, a Statutory National Human Rights Body charged with the mandate of promotion and protection of human rights. (Hereinafter referred to as “**The Commission**”) The Commission was established under Section 3 of The Kenya National Commission On Human Rights Act 2002, (Act No. 9 of 2002) (hereinafter referred to as “**The Act**”). The functions of the Commission under Section 16 (1) of the Act includes, to investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of human rights; to investigate and conciliate complaints on its own initiative where the nature of the alleged human rights Violation makes conciliation both possible and appropriate.

The *ex-parte* applicant **UHURU MUIGAI KENYATTA** is a deputy Prime Minister of the Republic of Kenya, current Minister for Finance and Member of Parliament for Gatundu, South Constituency.

Following the post election violence of 2007 in Kenya, the Commission undertook an investigation on the character and scope of human rights violation, which took place after the elections. Thereafter the Commission prepared a report entitled **“on the brink of the precipice. A human rights account of Kenya’s post – 2007 election violence”** (hereinafter referred to as the Report) which report comprises of various findings and recommendations. The report was handed to the President and The Prime Minister of the Republic of Kenya, various agencies including the police, the Attorney General and The International Criminal Court.

The *ex-parte* applicant is aggrieved by Paragraph 545 of the report. He claims that the report adversely affects him and has brought his character and reputation into disrepute. The matter before us is centered on the said report and particularly the said paragraph.

PLEADINGS:

The *ex-parte* applicant moved the court by way of Notice of Motion dated 18th September, 2009, under the Law Reform Act and Order LIII of the Civil Procedure Rules having obtained leave to institute judicial review proceedings on the 6th of February, 2010.

In the Notice of Motion, the *ex-parte applicant* sought for the following orders.

1. **That an order of certiorari to forthwith remove to the High Court, quash, and annul the decision of the respondent made in a report entitled “on the brink of the precipice. A human rights account of Kenya’s post – 2007 election violence” that the applicant participated or was involved in the said violence.**
2. **That an order of certiorari to quash and annul the decision made by the respondent in the said report that the *ex-parte applicant* participated in the planning and organized gangs in Central Province.**
3. **That the costs of this application be provided for.**

The application was supported by the grounds on the face of the application, the statement of facts and verifying affidavit of the *ex-parte applicant* both dated 18th February, 2009.

The respondent objected to the application by filing a replying affidavit sworn by **Mohammed Hallo**, the secretary of the respondent and dated 12th May 2009.

The *Ex-parte* applicant’s case:

The *ex-parte* applicant, brought the application on the grounds that, the respondent failed to observe the rules of *natural justice*, was unreasonable and unfair by failing to give the *ex-parte* applicant an opportunity to be heard, as it did other parties, and that by so failing, the respondent was discriminatory and unfair to the *ex parte* applicant. Further that the respondent lacked jurisdiction to make a decision on evidence that had no probative value thus making the report a nullity.

The facts of the matter as stated by the *ex-parte* applicant, are that the respondent undertook investigations in discharge of its statutory mandate and by its own admission, the object of its investigation was to document the post election violence to ensure that there would be a comprehensive record of the violation as a basis for enabling redress of such violations. In August 2008, the respondent announced that it had completed its investigations and had prepared a report, which it released, to several people, the media, the President, the Prime Minister and the Waki Commission of Inquiry. The report submitted to the Waki Commission had names of alleged perpetrators of the post – election violence.

The *ex-parte* applicant’s grievance is that the report contained his name as one of those identified as having been involved in the planning and organization of post-election violence. The *ex-parte* applicant’s Counsel submitted that:-

- a) The respondent failed to observe the rules of Natural justice as it denied the *ex-parte* applicant the right to defend himself against the allegations and making a finding without according him a hearing.
- b) That the respondent, made a finding out of jurisdiction by adversely making a decision on the *ex-parte applicant* without all relevant materials.
- c) That in the absence of (b) above the respondent acted oppressively, unfairly, and there is no material in the report to support the respondent’s request to the Presidents, International Criminal Court, Police force or National Assembly to implement the findings against the *ex-parte* applicant to be found in paragraph 545 of the

said report.

- d) The findings against the *ex-parte* applicant were not made for a proper purpose as the *ex-parte* applicant's human rights were not protected, the findings were malicious and have adversely affected the liberty, career, reputation and his fundamental rights.

It is the *ex-parte applicant's* contention further that he did not attend any meetings as alleged in paragraph 545. That, at all material times, the *ex-parte* applicant attended only public rallies organized to appeal for peace.

The **ex-parte** applicant also submitted that contrary to the assertions made by the respondent, that the report was a collection of allegations and information, the report contained findings described by the respondent as "**key findings**", contained in not less than 4 pages (7-10). That paragraph 545 made findings including those made against the *ex-parte* applicant as stated above.

Counsel for the *ex-parte* applicant also submitted that the defence raised by the respondent that the report is not subject to judicial review does not lie and in this regard relied on **H. C. Misc. Application No. 1269 of 2002** where the court adopted with approval the holding in **Mahon VS Air New Zealand Ltd & Others** (1984) 3 All R. In advancing the *ex parte* applicants case his counsel relied also on the following cases;

In the matter of the Report by Judicial of Inquiry into Tribal Clashes in Kenya H.C. MISC. NO. 1269 OF 2002, Ridge VS. Baldwin And Others (1963) 2 ALL .E .R, Republic VS Nat Bell Liquors (1922) 2 A.C 128

Counsel urged the court on the basis of the above facts and submissions to allow the prayers.

The respondent's case:

The respondent's case is set out in the replying affidavit of **MOHAMMED HALLO** dated 12th May 2009 and its written submission of 2nd October, 2009.

The respondent in the said affidavit in reply, admits that it undertook investigations across the country on the nature and scope of human rights violations during the post election period. It stated that the exercise was carried out wholly within its mandate pursuant to Section 16(1) of the Act. The affidavit sets out 3 basic objectives of the report. First, to assess whether Kenya had complied with its human rights obligations, failures and to make recommendations on measures of how the State failure could be avoided in the future, secondly, to investigate and analyze the criminal responsibility of alleged perpetrators and to make recommendations to relevant authorities, thirdly in order to make general recommendations that would enable the country undertake an effective truth, justice and reconciliation process.

It is the respondent's case that in its investigations, it did not arrive at any decisions but rather relied on information and findings based on the reports and information received, and in handing over the report to the Attorney General, the police and others, the respondent recommended further investigations.

In answer to the allegations that, it failed to observe the rules of Natural Justice by failing to accord the *ex-parte* applicant a hearing, the respondent contended that on the 15th of April, 2008 it wrote to all members of parliament including the *ex-parte* applicant, requesting them to come forward and present their views on the post – election violence . The *ex – parte* applicant and other members of parliament ignored the said invitation.

It is further contended by the respondent that the court ought not to interfere with its statutory mandate. The report was not because of any judicial or quash judicial proceedings and the *ex-parte* applicant will have an opportunity to legal, constitutional rights and protection should there be judicial or quasi judicial proceedings.

It was submitted further by the respondent's counsel that the prayers sought are not specific, are referenced on a non-existing document, the application is misconceived and misleading, as the *ex-parte* applicant has misinterpreted paragraph 545 as the same referred to allegations received during investigations, and there are no findings or decisions made, and as such there is no decision to quash or annul.

The respondent took issue with the delay of 6 months between publishing of the report and institution of this suit. The respondent's counsel relied **on Davis & Shirtcliff Vs A-G (1976-1980) KLR 1063 at 1065/20, Zola Vs Ralli (1969) E.A 691 CA, Dummer VS Brown (1953) ALL E.R. 1158**

Analysis findings and conclusions:

We have considered the pleadings, submissions and authorities cited by counsel for the two sides. The same have assisted us immensely in arriving at our decision. We are grateful. In writing this judgment we have considered the mandate of the respondent, the General principles governing the said mandate *vis a vis* the allegation of breach of rules of natural

justice. We have also considered whether the report contains findings Or mere recommendations, whether the report has affected or is likely to affect the *ex parte* applicant adversely and the role of the court in situations where there has been an allegation of breach Natural Justice.

There are undisputed facts as follows:-

1. There was post election violence in various parts of the country after the 2007 elections.
2. The respondent has a mandatory mandate to investigate human rights abuses and to make recommendations.
3. The respondent made investigations, and prepared a report that was handed over to the Coalition Principles, President Mwai Kibaki and Right Hon. Raila Odinga the Prime Minister, the Attorney General, the Police, the Waki Commission and the International Criminal Court.
4. That the report contained recommendations.
5. That paragraphs 545 made reference to the *ex – parte* applicant.

As the issue of the court’s jurisdiction was been raised, there is need for us to address the same first. There is no doubt that the Act, more specifically, Section 16, mandates the respondent to investigate human rights abuses and to make recommendations. It is equally true that the Section 17 of the Act provides guiding principles, so that in our view, if there is an allegation that the Commission has acted outside its mandate, then as a public body, it would be amenable to the supervisory role of the High Court. In the case of **Kenya National Examination Council And Republic *Ex parte* Geoffrey Gathenji Njoroge and others** Civil Appeal No. 266 Of 1996 the Court of Appeal stated inter alia,

“As a creature of statute, the Council can only do that which it’s Creator (the Act) and the rules made thereunder permit it to do. If it were purported to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by parliament, it would become amenable to the supervisory jurisdiction of the High Court, which, for simplicity is now called “judicial review”.....”

Following the above, we are of the view that the court has supervisory jurisdiction over the Commission and the matter is therefore, rightly before the court. The next question is whether Section 33 of the Act excludes the court from exercising its supervisory role? Section 33 provides as follows;

“ No suit or legal action shall lie against the Commission or any Commissioner or any person acting under the direction of the commission or appointed to serve on a subcommittee of the commission in respect of anything which is done in good faith or intended to be done in pursuance of this Act or of any regulation or order made hereunder or in respect of any report, paper or proceedings of the Commission.”

What the *ex-parte* applicant has done is to invoke the supervisory jurisdiction of the court, which is a jurisdiction **sui generis**. The above section is therefore not relevant.

Section 16 (1) of the Act provides the jurisdiction of the Commission to include;

- 16 (1) (a) to investigate; on its own initiative or upon a complaint made any persons or group of persons, the violation of any human rights.**
(h) to investigate and conciliate complains on its own initiative where the nature of the alleged human rights violation makes conciliation both possible and appropriate.

The respondent’s position is that the investigations were carried out under its mandate as provided for in Section 16 above.

Section 17 of the Act gives the Commission the guiding principles to be followed while discharging its mandate. It provides *inter alia* that the Commission shall observe the rules of natural justice and fairness. (emphasize ours)

It is the *ex parte* applicant’s contention that by failing to seek his views, the respondent did not invoke the rules of natural justice. The respondent on the other hand states that it had issued a general invitation seeking for views, which the *ex parte* applicant ignored and the principle of natural justice does not apply in this instance as their report was compiled under S. 20, 22 & 25 of the Act.

Section 17 of the Act; requires that the Commission do observe the rules of natural justice while undertaking its

mandate. It is our view that the commission is under a statutory obligation in all its undertakings. It matters not that the report was written pursuant to sections 20, 22 and 25. It is also our view that it was not enough for the respondent to consider the general invitation it sent out to the public and members of parliament as sufficient notice on the part of the *ex parte* applicant or any other person adversely mentioned or likely to be affected as a result of the information to be published. Rules of Natural Justice and Fairness required much more from the respondent. Natural Justice as a fundamental principle expects one to be accorded an opportunity to be heard and no bias. In **O'Reilly v Mackman (1983) 2 AC 237, 297F-G** Lord Diplock stated,

“the two fundamental rights accorded to him by the rules of natural justice or fairness vis , to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and in the absence of personal bias on the part of the person by whom the decision falls to be made.”

The respondent's case is that it invited all members of public and specifically letters were written to all members of parliament including the *ex-parte* applicant to give their views on the post election violence. The *ex-parte* applicant refutes that he received a letter from the respondent. In any event there is no evidence that the *ex-parte* applicant was informed of the allegations made against him, neither was he, as a result of the allegations given an opportunity to state his case.

We are concerned here with procedural fairness. The **“other side must be heard”** *audi alterem partem*. The person affected by a decision should be afforded some opportunity to present his case.

Paragraphs 545 of the respondent's report states:-

“Certain individuals within PNU allegedly raised funds and organized gangs to perpetuate the post-election violence in Central Province. A number of meetings were held in Nairobi by some leaders from Central Province where the plight of Kikuyu IDPs was discussed. The meetings started to take a sinister turn when retaliation against non-Kikuyu communities was discussed during which time these leaders met at Kenyatta International Conference Centre (KICC), Landmark Hotel and Marble Arch Hotel. Leaders who attended these meetings included Njenga Karume, the immediate former MP of Kiambaa. Other participants in the meetings were Stanley Githunguri, MP for Kiambaa, who allegedly organized fund raising; Kabando wa Kabando, MP for Mukurweni, who organized the delivery of weapons; Uhuru Kenyatta, Deputy Prime Minister and MP for Gatundu South, who organized finances to fund pro-Kikuyu organized gangs; and Mary Wambui, a PNU activist, who allegedly organized finances and arranged for arms to be delivered from Ethiopia via Moyale and Marsabit. Another politician mentioned adversely in relation to whipping ethnic tensions is Peter Mungai Mwachhi, Lari MP, who uttered inciting statements at Kirathimo camp when he asked Mungiki to arm itself to defend Kikuyu people in the Rift Valley.”

From the above, the respondent's report contains allegations implicating the *ex-parte applicant* and others. The respondent argues it did not make findings of fact; it prepared a report based on information received. In the local case **In the matter of the report by Judicial Commission of Inquiry into Tribunal clashes in Kenya** (H. C. MISC. APPL NO. 1269 of 2002) the court adopted with approval as we hereby do the holding in **Mahon VS Air New Zealand Ltd and Another** (1984) 3 All E. R at 201 and 202.

“A tribunal making a finding in the exercise of an investigative jurisdiction (such as royal commission) was required to base its decision on evidence that had some probative value, in the sense, that there had to be some material that tended logically to show the existence of facts consistent with the finding and that the reasoning supporting the finding, if disclosed, was not logically self contradiction”

And

“A tribunal exercising an investigative jurisdiction was also required to listen fairly to any relevant evidence conflicting with, and any rational argument against, a proposed finding that a person represented at the inquiry whose interests (including his career and reputation) might be affected wished to place before the inquiry. Accordingly a person represented at the inquiry who would be adversely affected by a decision to make a finding was entitled to be informed that there was a risk of the finding being made and to be given the opportunity to adduce additional material of probative value which might deter the tribunal from making that finding.”

We want to go further and hold that even where the investigations are not in the form of a hearing, and a party is likely or has been mentioned adversely he must be given the opportunity to adduce additional material of probative value which may deter the administrative body from making that finding.

Having stated as above, this court is certain that failure by the commission to act within Section 17 of the Act was clearly a flaw on its part. The commission ought and must apply rules of natural justice in all its endeavors and undertakings. Being the defender and a watchdog of human rights, the Commission is expected to be the best respecter of rules of natural justice. They ought to hold and defend the said principles with distinction. The respondent on the other hand in admitting its failure argued that even if there was failure on its part to hear the *ex-parte*

applicant, its report is not conclusive and the issue alleged is yet to go through a judicial process and as such the *ex-parte* applicant still has an opportunity to address his case, if it will be necessary to do so. It is our duty thus to consider in light of the provisions of Section 17 of the Act, whether at the end of the day and in the circumstances of this case, the *ex parte* applicant despite our finding above, is likely to get recourse elsewhere, where he will be able to give his side of the story.

The respondent's report is based on allegations. It is not final by their own admission. Further investigations must be carried out by any Agency that may wish to rely on the same. In the report the respondent has made several recommendations including that

- v **The Attorney General and the Police Forces should undertake investigations in terms of Section 26 of the Constitution on the list of alleged perpetrators and to determine their culpability for human rights violations.**
- v **The Chief Justice should establish special courts in theatres of violence where many crimes may have been committed to expedite post election violence related cases.**
- v **The prosecutor of the international Criminal Court should open investigations on Kenya to determine who bears the greatest responsibility of crimes against humanity detailed in the report etc**

In **Republic V Judicial Service Commission *ex parte* Pareno** (2004) 1 KLR 203 at 219 Nyamu j (as he then was) quoted with approval the Supreme Court practice 1997 Volume 53/1-14/14 which we hereby do,

“Even if a case falls into one of the categories where judicial review will lie the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary, What order or orders the court will make depends upon the circumstances of the case.”

In the **Pareno's** case (supra), the court found that the Judicial Service Commission had not fully complied with the rules of Natural Justice but declined to grant the order of *certiorari*.

Halsbury's Laws of England 4th edition Volume II page 805 Paragraph 1508 defines *certiorari* as follows:-

“Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.”

Quashing parts of the respondent's report in our view may not be the most efficacious remedy available. The report has already been distributed where it was intended. Secondly, the report is out in the public domain and now a matter of public interest. This court has the onerous task of maintaining the delicate balance between an individual right and those of the public. Sometimes private rights have to bow to public interest.

Putting all facts together, this court is of the view that in the circumstances of this case, public interest far outweighs the right of the *ex-parte* applicant and in considering all the above, balancing and putting all matters to scale this court in exercising its judicial discretion declines to give an order for *certiorari* and the application is therefore fails . We shall in the same breath not make any order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 11th DAY OF JUNE, 2010.

WENDOH

JUDGE

ALI-ARONI

JUDGE

In the presence of:

Mr. Wanandaa..... present for Applicant

Mr. Onyiso.....present for Attorney General

Mr Victor Kamaupresent for theRespondent