REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Judicial Review 22 of 2009

1. SAMMY BENTLEY ALUSO………..………)
) APPLICANTS
2. CHARLES KARANI NJERU………………..)

VERSUS

1. THE COMMISSIONER OF POLICE………)
2. THE DIRECTOR OF CID...…………………) RESPONDENTS
3. THE HON. ATTORNEY GENERAL………..)

R U L I N G

Both ex-parte Applicants moved this court for leave to seek redress against the Respondents by way of Judicial Review. The leave sought was granted on 22nd September 2009. They thereafter filed the notice of motion dated 7th October 2009 in which they are seeking the following orders:-

1. ***That an order of certiorari be issued to remove the orderly room proceedings, the charge, Defaulter Sheet and/or the inquiry pending before the Embu District Criminal Investigation Department office for the purpose of their being quashed.***
2. ***That an order of prohibition be issued restraining the Respondents, their servants and/or agents from prosecuting the said orderly room proceedings, the charge/Defaulter sheet and or inquiry.***
3. ***That an order of mandamus be issued compelling the Respondents, their agents and or servants to reinstate the ex-parte applicants to full and unconditional service.***
4. ***That the costs of this Application be provided for.***

The motion is supported by the verifying and supporting affidavit and the statement of facts along with several annexures. The Application is premised on 9 grounds on it face.

Basically the facts giving rise of these Judicial Review proceedings is that both ex-parte Applicants were serving as police officers at Embu Police Station in the year 2005. Following an incident which I feel I should not delve into, they were arrested and charged before the Chief Magistrate Court in Nairobi with 3 counts.

They were found not guilty as charged and acquitted after a trial that lasted almost 3 years. From the nature of count 1, they must have remained in custody for that period of time.

After their acquittal, their employer commenced "orderly room proceedings" against them ostensibly for breaching the provisions of Regulation 3(41) of the police regulations to the effect that they had failed to make an entry in the Occurrence Books to the effect that they had recovered some suspected stolen motor vehicle parts which they had recovered and dumped into the police station yard.

Apparently, they were charged with handling those motor vehicle parts in the chief magistrate's court. - A Charge on which they were also acquitted.

Their contention therefore is that the institution of the said "Orderly room Proceedings" on the basis of the same facts was unlawful and against the Rules of Natural Justice.

They contend that the said proceedings are ultra vires the mandate conferred by section 12(iv) of the Kenya Forces Standing Orders (Cap 20 thereof).

Section 12(iv) of Cap 20 of the Kenya police Standing Orders provides:-

> ***"When a police officer has been tried and acquitted of a criminal charge, the evidence at that trial may reveal that, in spite of such acquittal, he/she is guilty of a disciplinary offence, in which case he/she may be charged for such offence providing that such other disciplinary charge arises out of his/her conduct only in the matter and does not raise substantially the same issues on which he/she was acquitted".***

The ex-parte Applicants argued that subjecting them to orderly roomproceedings was tantamount to exposing them to double jeopardy.

Cousel for the ex-parte Applicants also cited contravention of Section 62 of the Police Act which provides:-

> ***"Nothing in the Act shall exempt any police officer from being proceeded against under the provisions of any other law in force in respect of any act or omission constituting an offence under any of the provisions of this Act. Provided that no police officer shall be punished twice for the same offence."***

He also submitted that the right procedure ***"as mandated by Section 18(1) of Police Act Cap 84"*** was not followed. Unfortunately Section 18(1) of Cap 84 has nothing whatsoever to do with the conduct of "***orderly Room Proceedings".*** I can only say therefore that counsel has not laid any basis to claim that the laid down procedures were not followed.

Having outlined the ex-parte Applicant's case as here above, the next thing for me to do is to consider whether Judicial Review would apply in these circumstances. It is important to point out that judicial Review is not about the merits or correctness of a decision but rather with the process used to arrive at the said decision. It is noted indeed that in this matter no decision had been arrived at yet following the institution of the orderly Room Proceedings. It is the conduct of the orderly room proceedings that was being challenged.

Accord to **THE SUPREME COURT PRACTICE 1997 VOL. V3/1-14/6,**

> ***"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 for, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that treatment by the authority to which one has been subjected and that it is no part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law is to decide the matter in question".***

An order for certiorari will issue if the decision by the tribunal or other quasi-judicial organ is made without or in excess of jurisdiction, or where the rules of natural justice are breached, or the decision is unreasonable or that irrelevant and extraneous matters have been considered in reaching the impugned decision.

In this counsel for the ex-parte Applicants was not able to convince this court that the Rules of natural justice were flouted. He relied on the wrong provisions of the law. I may also add that he did not cite even one single authority or decided case in support of his clients' case. That has nonetheless not dissuaded me from considering the relevant law and authorities in order to arrive at a just decision.

To my mind, this matter is pegged on 2 issues:-

Firstly that the Respondents or their Agents acted ultra vires in commencing orderly room proceedings in respect of a matter that had already been determined by the court, and thus subjecting the Applicants to double jeopardy; and secondly, by explicitly ignoring or breaching the law as articulated under **Section 62 of the police Act and Section 12 (iv) of Cap 20 of the Police Force Standing Orders.**

As far as the first issue is concerned, it is clear that the applicants were indeed charged with handling the said motor vehicle parts. Part of the reasons for being so charged was because they took the said parts and dumped them in the parking area at the police station and failed to make the relevant entry to that effect in the Occurrence Book. They ought to have done so. Having been tried and acquitted of the count, they cannot again be charged with failing to make the said entry in the occurrence book. That is tantamount to exposing them to the principle of double jeopardy which is clearly against the law. It matters not that they were not convicted on the charge. They went through 3 excruciating years in custody while awaiting trial and that amounted to punishment for the said act.

There was no place to institute orderly room proceedings based on issues that had already been dealt with and determined by a competent court of law. The Respondent clearly lacked jurisdiction to initiate the Orderly Room Proceedings in that respect. They therefore acted ultra vires and their decision was therefore a nullity.

It is unfortunate and very disgraceful that the Respondents though served with the order for leave and stay of the proceedings decided to ignore the same and continued with the said proceedings inspite of the court orders. The Respondents are supposed to respect, protect and enforce the law and where they have acted in total defiance of the same, one wonders where innocent citizens are expected to turn for enforcement of their rights.

That said, as stated above, my finding is that the Respondents in instituting the Orderly Room Proceedings against the ex-parte Applicants acted in violation of the law and without jurisdiction. Their Act was therefore null and void. An order of certiorari therefore lies. The said proceedings are therefore removed into this court and the same are hereby quashed.

Prayer 1 of the notice of motion dated 7/10/09 is therefore granted.

On prayer 2 however, given the circumstances outlined above, would it be efficacious to grant an order of prohibition?

The **Court of Appeal digest 1997 paragraph 9** defines prohibition as follows

> ***"An order from the High Court directed at an inferior tribunal or body from continuing to hear and or adjudicate proceedings in the tribunal or before the body in excess of its jurisdiction or in contravention of the laws of the land …..it lies, not only for excess of jurisdiction or total absence of it, but also for a departure from the Rules of natural justice, but it does not lie to correct the course practice or procedure of an inferior tribunal or body or a wrong decision on the merits of the proceedings."***

An order of prohibition cannot by its very essence be invoked to quash decision that has already been made. It can only be granted to prevent a contemplated decision. In this case, there is nothing to prohibit or stop as the Orderly Room Proceedings have already been finalized.

Prayer 2 cannot therefore lie and the same is disallowed.

No prayer 3 (mandamus), the Applicants are asking for an order to reinstate them to full and unconditional service. As regretted earlier on, counsel for the ex-parte applicants did not cite any decided authorities on this subject. The trend in our courts is to decline

granting orders of mandamus where an employee has already been dismissed or contract terminated. In this case the terms of employment of the applicants was not brought to the fore – nor were the conditions on which they can be dismissed or the procedure to be used in the dismissal process. I was given very little material – both factual and legal on which to consider this prayer.

In the case of **REPUBLIC VS JUDICIAL SERVICE COMMISSION (Ex-parte PARENO) MISC. APPL. 1025/03** in which the exparte applicant was a Resident Magistrate who was dismissed from the service, the AG conceded that the Judicial Service Regulations pertaining to discipline and dismissal procedure were not followed, yet the court could not order for reinstatement of the officer.

In the case of **CONSOLATA KIHARA AND 241 OTHERS VS DIRECTOR KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE 2003 KLR 232**, the court held that

> ***"In ordinary situations of employer and employee, or master servant, if a master wrongfully dismisses an employee, the employment is effectively terminated and the servant cannot obtain an order of certiorari to quash the decision".***

In the Ex-parte Pareno case (supra) the court held inter alia that

> ***"It is a strong thing for the office of a magistrate to lose the perception of dignity and respect and thus where an officer has already left office for some time, it would not be desirable to force the hiring authority to have him back because it would be contrary to the policy of the law and not in the public interest and the principles of master and servant clearly apply".***

This holding can be extrapolated in this case given the fact that the office of a police officer is a dignified and respected one and it may not be in the public interest to order reinstatement of the 2 ex-parte Applicants who had been out of office for the 3 years while undergoing trial and thereafter upon dismissal. Whereas I hold that their dismissal was unlawful since it was pegged on unlawful orderly room proceedings, I find that the order for reinstatement as prayed cannot issue in the present circumstances. The recourse lies in the civil realm where they would be liable to be awarded damages for wrongful dismissal.

Unfortunately, this court sitting in *sui generis* jurisdiction of Judicial Review has no power to make an award for damages.

In brief, the notice of motion succeeds in part. I allow prayer 1 of the same but disallow prayer 2 and 3. I also award costs of the notice of motion to the exparte applicants against the Respondents.

W. KARANJA
JUDGE

Dated, signed and delivered at Embu this27th day of September 2010.

In presence of :- Both ex-parte Applicants.