REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 267 of 2006

CHRISTOPHER GATUIRI………………………………..APPLICANT

Versus

COMMISSIONER OF POLICE………...………..RESPONDENT

JUDGMENT

In the Notice of Motion dated 5th June 2007 the ex parte Applicant, Christopher Gatuiri seeks the following orders against the Commissioner of Police;

(a) That the Applicant be granted an order of certiorari to remove into this court and quash the decision of the Respondent dismissing the Applicant from service of the Kenya Police Force as a police officer as contained in the letter dated 27th February 2006;

(b) That costs of this Application be provided for.

The Motion is premised on grounds found in the statutory statement and the verifying affidavit of the Applicant, both dated 22nd May 2006 and the applicant's skeletal submissions filed in court on 22nd November 2006. The Applicant was represented by Ms Aulo Advocates.

The Respondent on being served with the Notice of Motion filed grounds of opposition dated 9th March 2007. No other papers were filed and Mr. Sitima who had been appearing for the Respondent did not attend the hearing of the motion though the hearing date had been given his the presence.

The Applicant who had been employed as a police officer for over 10 years is challenging the letter of dismissal from the force dated 27th February 2006 authored by Patrick Atsali on behalf of the Commissioner of Police.

The Applicant was charged with the offence of being guilty of an act and conduct to the prejudice of good order and discipline contrary to Regulation 3 (41) of the Police Regulations; It was alleged that on 26th October 2005 at Kiambu Law Courts, he had failed to present documentary exhibit ie. Ballistic expert report in Crc 210/401/2004 and failed to rearrest Cyrus Ngaruiya Kariuki , Gideon Mbuthia Mwangi and George Kabaki Njoroge whose case had been withdrawn under S.87 (a) of the Civil Procedure Code (charge sheet is exhibited as CG2. It is the Applicant's contention that after the Court orderly by the Resident Magistrate' proceedings the decision of the presiding officer had no bearing on the charge he faced (CG 3) and that this decision is therefore illegal and irrational. That the presiding officer did not follow procedure under the Police Standing Orders, Nos 15, 16 & 17 and is therefore guilty of procedural impropriety because he was not notified of the charges in writing at least 24 hours before the Room proceedings, or that he was liable to cross examination, and that the presiding officer did not read to him his findings and the conviction and even the sentence and right of appeal. Lastly, that he received the

letter of dismissal on 9th May 2006, whereas he had been on duty all that while. The Applicant also contends that the decision was capricious, unfair and oppressive, that the decision is based on fabricated evidence, there was no full and frank disclosure of material facts, that the recommendations of Superintendent Francis K. Sang who recommended that charges be dismissed was disregarded. That the Respondent's decision was therefore made in excess of the Respondents jurisdiction as the Applicant did not appeal and the Respondent did not have authority to pass the sentence it purported to pass. This is because the Respondent's jurisdiction is appellate in regard to discipline of subordinate officers.

The grounds filed in opposition of the motion are as follows.

1. That the Application is misconceived incompetent, and an abuse of the court process;

2. That, the application is devoid of merits to warrant the issuance of orders under Order 53 of the Civil Procedure Rules;

3. That, the Notice of Motion is not properly before the court;

4. That, the Application is not tenable in law as it offends inter alia, the spirit and tenor of Sections 8 and 9 of the Law Reform Act, Cap 26 of Laws of Kenya and Order 53 Civil Procedure Rules;

5. That the Applicant has invoked the wrong procedure of the law;

6. That the Applicant has not come to court with clean hands.

Having failed to attend, court the Respondent was not able to expound on the grounds as filed.

I have considered the submission of the Applicant, the statutory statement, the affidavit in support and the authorities relied upon. This being a Judicial Review Application the court's jurisdiction is limited to reviewing the process by which the Respondent made its decision. This is not an appellate court and so this court has no mandate to consider the merits of the Respondent's decision otherwise it would be usurping the mandate of the Respondent.

Under S. 65 of the Police Act, Cap 84 Laws of Kenya, the Minister is mandated to make regulations prescribing for inter alia, disciplinary offences. The Applicant was charged under Regulation 3(41) of the Police Regulations made pursuant to S. 65 of the Police Act and this is read with police standing orders and Code of Conduct made pursuant to S.64 of the Police Act.

S. 64 reads:-

"**Every police officer shall be subject to Force Standing orders and to the provisions of the Code of Regulations for the time being in force, so far as the same are not inconsistent with the provisions of this Act or any regulation or standing orders made thereunder". The relevant provisions relating to discipline are found in chapter 20 of the Force orders and provide procedure to be adopted in the conduct of disciplinary proceedings.**

In paragraph 15 of the Force Orders, once the presiding officer is satisfied that an offence is proved, he may impose one of the punishments he is empowered to award under appendix 20."

Before an enquiry into an allegation is commenced the accused person has to be notified of the offence in writing. The notice has to be in accordance with Appendix 2 c but the notice may be disposed with where it is in the public interest that the inquiry should proceed forth with. In the instant case, the Applicant contends that the Respondent breached this Regulation as he was never notified of the offence he was going to face. The offence against the Applicant was allegedly committed on 26th October 2005. The orderly proceedings were conducted against the Applicant on 31st October 2005 which was over 4 days since the alleged offence was committed. There is no evidence that before 31st October 2007, the

Applicant had been notified of the offence that he would be facing. The enquiry did not commence soon after26th October 2005 to allow for an exemption to the notice. The Respondent was in breach of para 16 of the Forces Orders.

Para 16(x) then sets out how all proceedings in inquiries will be conducted. The first step is for the presiding officer to ascertion whether the Applicant was notified of the offence in writing. The record of the proceedings CG 3 do not disclose that the presiding officer ever inquired into whether the notice was issued. The charge was supposed to be read to the accused in a language he understood. The proceedings do not disclose in what language the charge was read. The presiding officer compelled and recorded evidence of witnesses but failed to inform the Applicant that if he testified in his defence he would be cross examined as provided by the Force Orders in accordance with paragraph 16 (x)(r). The presiding officer evaluated the evidence and gave his verdict and referred the matter to the Police Commissioner for sentencing for reasons that the offence was very serious. The Applicant objects to the punishment being awarded by the Police Commissioner because the Applicant had a right of appeal to the same Police Commissioner and the fact that the matter was referred to the Police Commissioner for sentence denied him the right of appeal. Para 16(v)(r) allows the presiding officer to refer the proceedings to an officer of a more senior rank who may proceed to award punishment depending on the gravity of the offence. Para 24 provides that an appeal against discipline lies to the persons specified in the fourth column of Appendix 20 A. If the appeal lay to the Commissioner of Police then the sentencing should have been done by an officer of a lower rank than the Police Commissioner. By the presiding officer sending the matter to the commissioner for sentence, the Applicant's right of appeal was taken away, which is gross procedural lapse. Infact in the letter of dismissal it is so stated, that the Applicant had no right of appeal which is a breach of paragraph 24 of the orders. From a consideration of all the above provisions, the Police Act has specifically set out procedure to be adopted in discipline matters of its officers and the same has to be followed I find the Respondent to be guilty of gross procedural impropriety.

The Applicant also contends that the Respondent did not give reasons for his decision. Even where it is not expressly provided it is expected that a body exercising quasi judicial functions will give reasons for its decision as evidence of fairness of the decision. In **R V SECRETARY EX PA DOODY (H L) (1994) IAC 531** the House of Lords underscored the importance of giving reasons. It said at page 563 "**My Lords, I consider that the 2nd and 3rd issues are both as part of the same question, and that the focus of both is too narrow. The central question is whether the prisoner is entitled to know what materials the Secretary of State will find upon when making his decision and (after the event) how their decision was arrived at. The opinion of the Judges and the reasons for the opinion are important, not because they have any direct effect but because they form part of the corpus of material on which the Home Secretary bases his decision…."** In the instant case the presiding officer summarized the evidence of the witness and that of the Applicant and made his findings. He did not give reasons for the said decision and in my view I would find the same to be irrational and unreasonable since there is no basis for it. Such a decision would be amenable to Judicial Review.

The next issue that the Applicant raised is that the Respondents failed to consider relevant facts before arriving at their decision. It is urged that the Respondent failed to consider the proceedings from the Senior Principal Magistrate's Court, Kiambu in Criminal Case 582/05 in which the prosecution assured the court that the accused persons would not be rearrested and that those proceedings tallied with the Applicant's defence before the presiding officer. Further the Applicant also alleges that the Respondent should have considered that the Applicant was not an officer in charge of investigations nor was he in charge of procuring the exhibits before the court since that was the basis of the disciplinary proceedings that led to his dismissal. Earlier in this judgment, I have agreed with the Applicant that no reasons were given by the presiding officer for his decision. The presiding officer should have considered the pleadings before the court in Kiambu which would have helped him arrive at his decision since they were the genesis of the allegations against the Applicant. Michael Fordham in his Book, **Judicial Review Handbook 4th Edition** observes that public bodies and officials charged with decision making are obliged to ensure that relevant materials including views expressed by consultants are fairly and adequately presented to those who are the decision makers. It is their duty to ensure that material is adequately considered and issues addressed. In the **DOODY CASE (Supra) Page 561**, Lord Mustil observed "**in each case the requirements of fairness and rationality will be the same. So also are the**

familiar requirements that the decision maker should take into account all relevant considerations, amongst which are the opinions of the Judges; that he should not take into account irrelevant considerations and that his decision should be rational…"

In the instant case, there is no evidence that the Presiding Officer considered all the relevant facts as he merely summarized the evidence and never evaluated it before making his decision. The presiding officer is therefore irrational material and unreasonable since the evidence that should have been evaluated, and reasons given for the decision were not considered or given.

Can the orders of Judicial Review issue. This court is aware that the Respondent terminated the Applicant's employment with Police. The courts will normally not interfere with Master and Servant relationship by way of Judicial Review, Judicial Review being public law remedy. In **Republic Vs. EAST BERKSHIRE ex parte Walson (1985) QB 152**, a nurse who was dismissed for misconduct moved the court for Judicial Review orders and the court declined to grant them holding that the applicant was not seeking to enforce a public law right but a private contractual right under the contract of employment and that the application was therefore an abuse of the court process. The court said "**an applicant for Judicial Review had to show that a public law right which he enjoyed had been infringed but a distinction had to be made between infringement of statutory provisions giving rise to public law rights and those that arose solely from breach of contracts of employment."** In **Republic V. RRC ex parte Lavelle (1983) 1 NLR 23 and CONSOLATA KIHARA & 241 OTHERS VS. DIRECTOR OF KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE (2003) KLR, 233.** The courts have held that Judicial Review orders could not apply the contracts of employment. However, in the case of **ERIC MAKOKHA V. LAWRENCE SAGINI & others CA 20/1994,** the Court of Appeal observed that where one's employment is statutorily underpinned meaning that a special procedure is provided by statute for the removal of an officer from employment, the same should be adopted. The Court of Appeal said "**The word statutory underpinning is not a term of art**. **It has no recognized legal meaning… we should give it its primary meaning. To underpin, is to strengthen. As a concept, it may also mean that employee's removal was forbidden by statute unless the removal met certain formal laid down requirements. It means some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by statute were observed. It is possible this is the meaning of what has become the charmed words "statutory underpinning"**. In this case there is a specific procedure provided for in the Police Act and Regulations (Standing Orders). This court is aware that it can not force a marriage between the Applicant and the employer but, in such a case where procedure is set out in a statute and it is flagrantly ignored or neglected by the authority, or Public Officer this court would not hesitate to interfere so that the matter can be looked at again and a proper decision be made if possible. It matters not whether the same decision will be arrived at. This court is concerned with not the merit of the decision of the authority or Public Officer but the decision making process itself, to ensure that the 13 subject is treated fairly. In this case for example the Respondent would have to consider the evidence, evaluate it and give reasons. Even if the same decision were arrived at, the Applicant should not be denied due process and his right of appeal as provided under the Force Orders.

In conclusion, this court is satisfied that the Respondent did not comply with the procedure provided under the Forces Orders in terminating the Applicant's employment with the police. An order of certiorari lies where the decision has been made in excess or without jurisdiction or where rules of natural justice have been flouted or where there is an error on the face of the Record. (See **KENYA NATIONAL EXAMINATIONS COUNCIL V. REPUBLIC)**. In this case the Respondent acted in excess of his jurisdiction and breached rules of natural justice and an order of certiorari is hereby issued to call for and quash the decision contained in the letter dated 27th February 2006. Costs to the Applicant.

Dated and delivered this 13th March day of March 2007

R.P.V. WENDOH

JUDGE

Read in the presence of

Ms. Aulo for Applicant

Daniel: Court Clerk