REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 171 of 2006

JUDICIAL REVIEW

· Necessary information touching on impugned decision could be sought upfront at the threshold stage. Challenged decision must be identifiable.

· New thinking after PARENO in the case of violation of substantive legitimate expectation, serious abuse of power and violation of the rule of law, greater intervention by the court is necessary. Court not to sit back in the face of this.

· Cutting edges of fairness not to restricted or packaged. Suggestion that law must develop with the evolving realities and not tied to the past cut and dry principles.

· Courts not to interfere with the disciplinary and academic powers of Institutions of Learning. Powers remain vested in the Institutions and Universities.

IN THE MATTER OF AN APPLICATION BY DAVID KIMANI NJOROGE FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION DISCIPLINARY CASE NO. 1549/11/04/9 AND THE DECISION OF TEACHERS SERVICE APPEALS TRIBUNAL (TSAT) DATED 24/10/2005

BETWEEN

DAVID NJOROGE KIMANI ..... APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

The application for judicial review dated 20th April 2006 and filed on 24th April 2006 seeks an order of certiorari for the purpose of questioning the entire proceedings and findings of the Teachers Service Commission and the Teachers Service Appeals Tribunal case 1549/11/04/9. In particular what is challenged is the decision dated 24th October 2005. The applicant who was a teacher further seeks an order forreinstatement as a teacher. It is alleged that he had carnal knowledge of his own pupil.

The grounds relied on include:

(i) that the impugned decision was arrived at capriciously and without due regard to the basic tenets of the rules of natural justice

(ii) he is alleged to have committed an offence in one place whereas he had evidence that he was in a different town at the material time

(iii) The TSC and the Teachers Service Appeal Tribunal ignored all the evidence before them and acted without evidence

(iv) The Teachers Service Commission and TSAT misdirected themselves on the relevant law namely S 7 3 (b) of the TSC Act 212 and Regulation 70 2 (a) of Teachers Code of Regulations.

(v) The respondent declined to produce or avail the proceedings.

The applicant relies on various affidavits as filed and I have considered their contents in this judgment. The applicant has also relied on skeleton arguments filed on 5th February 2007.

On the other hand the respondents have wholly relied on skeleton arguments filed on 13th June 2006. In the written submissions the following points emerge:-

(i) That the applicant did admit that he was awarded the right of hearing by both targeted bodies see para 8 of the applicant's affidavit. The issue of breach of rules of natural justice does not therefore arise

(ii) Although he has pleaded bias against the respondent he has not given any particulars or demonstrated the existence of bias in the decision making process

(iii) Grounds (b) and (e) go to the merit of the decision of the targeted bodies and it is not the function of a judicial review court to review the merits of the impugned decision

(iv) The applicant has not shown or proved any of the known judicial review grounds at all and therefore the application should be dismissed

At the outset I must point out that while the applicant has the Court's sympathy to the extent that the proceedings in both targeted bodies were not availed to him to enable him to assess the legality of the decision reached, he has not demonstrated to the court that he was prevented from raising the issue of the production of the proceedings at the threshold stage. In a jurisdiction which has yet to enact the Freedom of Information Act (I am told a bill is in the pipeline) there is nothing to stop an applicant making a threshold application for the necessary proceedings to be availed. The applicant did not make any such attempt and chose to go for full hearing before making any such attempt.

The applicant at this stage has nothing to show that the targeted bodies did not take his alleged alibi into account when they arrived at the respective decisions to dismiss him for the alleged carnal knowledge with his own pupil. He has also not shown that they arrived at the decision to terminate his services without taking into account relevant considerations. In paragraphs (8) of his affidavit the applicant admits that both the TSC and TSAT did give him oral hearing.

Surely he had the opportunity to present his evidence on alibi and also call witnesses. There is no evidence that he was prevented from calling his witnesses or that if the time allowed was not sufficient or that he did apply for an adjournment of the proceedings and that this was declined. While I am aware that I have ruled in the recent case of ***R v Commissioner General of Kenya Revenue Authority & Others ex-parte Keroche Industries H C Misc Civil Application No. 743 of 2006*** that making a decision, without evidence in certain cases is a ground of intervention in judicial review there is nothing before me in this case to show that the two bodies failed to take into account material evidence.

On the alleged breach of the rules of natural justice the applicant admits having been accorded a hearing by the two challenged bodies see para 8 of his affidavit. Perhaps the court should emphasize that as regards the right to a fair hearing (the audi alteram rule) the first important and minimum requirement is that the person must have had an opportunity of presenting his case. The applicant herein had that opportunity. The second requirement is that he must have had adequate notice of any charges or allegations brought against him or any matters which the decision makers have to take into account.

To sum up the basic requirements I wish to fully adopt the finding of the Privy Council, in ***KANDA v GOVERNMENT OF MALAYA*** (PC 1962) where the court summarised the above requirements as follows:-

"**If the right to be heard is a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."**

There is nothing to suggest that the applicant did not have an opportunity to access the requirements set out, having been given an oral hearing.

Bias

Turning to the issue of the alleged bias there is nothing before the court which suggests bias whether threatened or actual. I need not reinvent the wheel. This court has extensively defined bias in the following cases:

1. R v GOLDERNBERG & ATTORNEY GENERAL ex-parte SAITOTI Misc Civil Application No. 102 of 2006

2. R v ATTORNEY GENERAL ex parte HOMEPACK LTD Petition No. 681 of 2006

3. R v COMMISSINER GENERAL OF KENYA REVENUE AUTHORITY & OTHERS ex parte KEROCHE INDUSTRIES LTD Misc Civil Application No. 743 of 2006

I would wish to reiterate the meaning of bias as defined in the above cases. Using the yardstick or the benchmarks outlined in the cases there is nothing to indicate bias in the circumstances of this case.

In terms of ascertaining whether there is bias in any given set of facts the common law world has not so far been able to better the test of Lord Hewart CJ's dictum in the case ***REX v SUSSEX JUSTICES ex parte McCARTHY*** (1924) IKB 256, 259:

"**it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."**

In the circumstances I find no bias after balancing the facts on the scales, using the above dictum. The test is that of a reasonable onlooker and perception of bias.

On the alleged misdirection by the targeted bodies of the relevant law I find no substance in the allegations.

Finally I uphold the argument by counsel for the respondent which is in line with my findings in the ***R v JUDICIAL SERVICE COMMISSION ex parte PARENO Misc Civil Application No. 1025 of 2003*** where I restated that judicial review is not concerned with the merits of a decision but with the decision making process. That was a statement of a fairly youthful judge without gray hairs, now three and a half years on, the gray appears to compete for mastery with the onset of a bald head and it is not known which will gain mastery over my once youthful head! Upon further reflection, and the advantage of hindsight, and I dare say with a little weight of the gray, I am now able to add that the function of the court in my view is to ensure that lawful authority or power is not abused by unfair treatment, but it is not for the court to attempt itself to do the work entrusted to that authority by the law. Since the goal of judicial review is to ensure that fair treatment is accorded to persons who challenge the authorities or decision makers, I would like to take the earliest opportunity to state that while the broad principle stated in PARENO above remains true the scope of the judicial review intervention must be developed or evolved with the different concepts of fairness and the ever changing needs of an ever changing society.

To give another illustration it would not be right in my respectful view for the court, as has happened in some recent cases for the court to force schools to readmit students, in the face of serious allegations of drug peddling in schools. That way the courts are likely to undermine discipline in schools and other institutions of learning and also defeat, or erode public confidence and public interest in the administration of justice. I wish to take the earliest opportunity to respectfully depart from those decisions. The court must at all times protect its ability to function as a court by using its process to achieve fairness and that such fairness is clearly manifest. This can be achieved without usurping the power conferred on schools and universities. Quashing the decisions and allowing the institutions or schools to remake decisions in accordance with the law is the way out. This is only one end of the pendulum.

The other end of the pendulum is the need not to cage our ability, role or power to give effect to the majesty of law in the ever changing situations before the courts and to always manifest the eternal nature of fairness and justice in every situation. The second illustration is that of a local Chief and a chicken farmer. If the Chief confiscates the farmer's chicken, we have an obligation to quash and to stop the act of taking away the farmer's chicken by the Chief. The reason that there is no potential of any further decision or action by the Chief to repeat the confiscation being lawful. The peasant farmers substantive legitimate expectation to keep his chicken must not be thwarted and the illegality of the confiscation calls for a greater and final intervention by the court. Thus, in the case of KEROCHE INDUSTRIES cited above after finding violation of a substantive legitimate expectation of the applicant, serious abuse of power, extensive overlap of proved grounds of intervention, and a violation of the rule of law, my finding on the basis of the requirements of fairness in the case, was to stop the act complained of because in my view this was the only way of according fairness to the applicant and also put an end to apparent impunity by the decision making authority. In other words the cutting edges of fairness cannot be restricted or packaged. Abused power is no power at all. On a humorous note, a Chief who confiscates a peasant farmers chicken, without colour of lawful authority must have his decision quashed and also stopped from repeating the act by the release to the peasant farmer of his chicken if still alive! Acts or decisions which constitute abuse of power or/and violation of the rule of law must be quashed and stopped.

On the facts I find no case for reinstatement of the employee applicant and even if it was necessary to invoke the court's discretion in granting judicial review remedy which is always there, I would not have invoked it in a contract of employment situation and more so in a matter affecting a teacher/pupil relationship. Surely the courts must address the possible effect of reinstatement of an employee on the teachers and the pupils and the erosion of discipline in schools. Barring any strong statutory underpinnings, pointing to a legitimate aim by the legislature to protect an office I would not intervene in an employment relationship or student/teacher relationship where the interests of discipline are likely to be compromised. Moreover the existence of alternative remedy such as of damages for breach of contract militate against any judicial review intervention and I would fully follow the case of ex parte ***R v BBC ex parte LAVELLE [1983] I WLR 23***.

Finally, institutions vested with special powers in maintaining certain professional and academic standards and discipline such as Schools, Colleges, Universities must be allowed to discharge their

functions except in very exceptional circumstances of serious breach of the principle of fairness where in most cases the ends of justice would be served better by a quashing order without reinstatement leaving the targeted body to do the needful after the quashing.

All in all, this application is dismissed but I make no order as to costs.

DATED and delivered at Nairobi this 19th day of October 2007.

J.G. NYAMU

JUDGE