



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 9 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

OFFICER IN CHARGE OF STATION, KAREN.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE APPLICANT:

JARED ISOE

JUDGMENT

1. Jared Isoe, the *ex parte* Applicant herein, is seeking judicial review orders of certiorari and mandamus, in a Notice of Motion application dated 27th January 2020. The specific orders sought are as follows

1. THAT this Court be pleased to issue an order of Certiorari directed at the Police Officer in Charge of Station-Karen and quash forthwith the 1st Respondent's decision to seizing and illegally detaining the Occasions Business Equipment of the Appellant in their custody.

2. THAT this Court be pleased to issue an order of Mandamus, and compel the Respondent to unconditionally return all the impounded Business Equipment to the Applicant's store, and in any event within twenty-four (24) hours of this Court's Judgment.

3. THAT Costs be in the cause.

2. The grounds for the said application are stated therein, and in the statutory statement dated 17th January 2020 and supporting affidavit sworn by the *ex parte* Applicant on even date and on 27th January 2020, and a further affidavit he swore on 23rd July 2020. The *ex parte* Applicant averred that on 20th December 2019, police officers from the Karen Police station, acting under the instructions of the station's Officer in Charge, the 1st Respondent herein, loaded various business equipment into *ex parte* Applicant motor vehicle registration number KAR 687H. Further, while the said motor vehicle is parked at the Karen Police Station, the whereabouts of the impounded business equipment are unknown, including equipment which had been lent to the *ex parte* Applicant. The *ex parte* Applicant annexed a copy of an inventory of the equipment compounded by the Respondent.

3. The Respondent did not respond to the application, nor participate in its hearing proceedings.

The Determination

4. The *ex parte* Applicant's Advocates on record, Onwong'a Nyakeriga & Co Advocates, filed submissions dated 23rd July 2020, wherein it was urged that the *ex parte* Applicant is the owner of the subject business and lawfully operated the same. Therefore, that he possesses sufficient interest and/or *locus standi* to institute the instant judicial review proceedings. Further, that the administrative action or decision complained against is attributable to the police who are a public body or authority and that the said decision affected the legal rights and/or interests of the Applicant.

5. I have considered the *ex parte* Applicant's pleadings and arguments, and note that the fact that his property was confiscated by the police

has not been disputed by the Respondent. Two issues therefore arise for determination. The first is whether the decision and actions by the Respondent were fair and procedural, and secondly whether the said decision and actions were reasonable.

On Whether the Respondent acted fairly and procedurally

6. The *ex parte* Applicant submitted in this respect that neither he nor his employees were summoned for questioning on suspicion of committing any offence, and his inquiries at the Karen Police Station for the reasons as to why his private property was impounded and when the same will be released have been in vain. The *ex parte* Applicant accordingly contended that the seizure and confiscation of the said property is an infringement of his constitutional rights

7. According to the *ex parte* Applicant, while the National Police Service has a constitutional and statutory mandate to investigate crime, and under the provisions of the National Police Act as well as the Criminal Procedure Code, a Police Officer is mandated to enter premises even without a warrant to search. They have however not disclosed whether an offence had been committed, the nature of their investigation, or the reasons for the confiscation. Therefore, that the Respondent's action exceeded and was *ultra vires* the powers donated under the National Police Service Act, was unreasonable and against the rules of natural justice. The holding by the Court of Appeal in **David Oloo Onyango vs Attorney General (1987)** that there is a presumption in the interpretation of statutes that rules of natural justice will apply was relied upon in this respect.

8. Article 47 of the Constitution, and the provisions of the Fair Administrative Act in this regard now import and imply a duty to act fairly by a decision maker in any administrative action. The Fair Administrative Action Act defines an administrative action to include - (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

9. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

10. The Fair Administrative Action Act therefore applies to the Respondent in the exercise of its statutory authority and powers and as a quasi-judicial body, in respect of the decisions that it makes that may affect the rights of parties before it. Procedural fairness in administrative action is embedded in the natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done as illustrated in sections. The core of the duty to act fairly therefore is the need to ensure that a person affected by a decision has an effective opportunity to make representations, before it is made and by an impartial decision maker. The Court of Appeal in this respect held as follows in **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR**:

“The term “procedurally fair” used in Article 47(1) by a proper construction, imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to fair administrative action.

11. I note in this regard that the Respondent has not provided any evidence of the procedure it adopted or reasons for its decision and action to rebut the *ex parte* Applicant's averments. To this extent, not only was the *ex parte* Applicant not accorded an opportunity to be heard, the

Respondent decision and actions were also procedurally unfair.

On Whether the decision by the Respondent was Reasonable

12. The *ex parte* Applicant submissions on this issue were that the decision to confiscate the *ex parte* Applicant's property without any reason was illegal and arrived at arbitrarily and capriciously. The *ex parte* Applicant further submitted that the unlawful seizure, impounding and detention of the business equipment has caused economic loss to the Applicant as the equipment letting business was his only source of income and livelihood. Reliance was placed on the decision in **Republic vs Kenya National Examination Council, ex parte Geoffrey Gathenji & 9 others; CA No.266 of 1996**, for the position that this Court can intervene where a decision is arrived at in excess of jurisdiction, arbitrarily, capriciously, mala fides or in breach of natural justice.

13. The Fair Administrative Action Act under section 7 provides for reasonableness as a ground for review of an administrative action. Courts and tribunals have the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. Lord Diplock in the case of **Council of Civil Service Union vs Minister for The Civil Service [1984] 3 ALL ER 935** defined unreasonableness as follows:

“So outrageous in defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

14. In **Energy Regulatory Commission v SGS Kenya Limited & 2 others [2018] eKLR**, the Court of Appeal while addressing its mind as to what constitutes unreasonableness referred to the English Court of Appeal decision of **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation [1948] 1 KB 223**, where Lord Greene M.R in his lead judgment, agreed upon by Somervile LJ and Singleton J, and stated as follows:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”? Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J in Short v. Poole Corporation [1926] Ch 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

15. In the present case, as indicated earlier, the Respondent did not provide any reasons for its decision and actions, which are therefore outrightly unreasonable and illogical.

On Whether the Relief sought are merited.

16. The *ex parte* Applicant has sought the remedies of certiorari and mandamus. An order certiorari nullifies an unlawful decision or enactment, while an order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties.

17. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the part of a public body or official. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded.

18. In the present case, the decision and actions of the Respondent to confiscate the *ex parte* Applicant's property without providing the reasons has been found to be procedurally unfair and unreasonable. To this extent, the remedy of certiorari and mandamus are merited, to ensure that if there is good reason, the proper procedure and due process according to the law is employed by the Respondent.

The Disposition

19. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion application dated 27th January 2020 is found to be merited to the extent of the following orders:

I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision and actions of the Police Officer in Charge of Station-Karen, to seize and detain the Occasions Business Equipment owned by the *ex parte* Applicant.

II. An order of mandamus be and is hereby issued compelling the Police Officer in Charge of Station-Karen, to return the *ex parte* Applicant's impounded Occasions Business Equipment to the *ex parte* Applicant.

III. The Respondents shall bear its own costs of the *ex parte* Applicant's Notice of Motion dated 27th January 2020.

20. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2021

J. NGAAH

JUDGE