



REPUBLIC OF KENYA

# **IN THE HIGH COURT OF KENYA AT NAIROBI**

JUDICIAL REVIEW DIVISION

MISCELLENOUS CIVIL APPLICATION NO. 224 OF 2016

IN THE MATTER OF AN APPLICATION BY EVANS MOMANYI GETEMBE FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE REMOVAL OF THE APPLICANT FROM THE NATIONAL  
POLICE SERVICE

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION ACT

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS 2013

AND

IN THE MATTER OF THE INDEPENDENT POLICE OVERSIGHT AUTHORITY ACT, 2011

AND

IN THE MATTER OF LAW REFORM ACT, CAP 26, LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

# THE NATIONAL POLICE SERVICE COMMISSION..RESPONDENT

EVANS MOMANYI GETEMBE.....EXPARTE APPLICANT

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 25<sup>th</sup> May, 2016, the *ex parte* applicant herein, **Evans Momanyi Getembe**, seeks the following orders:

1. **AN ORDER OF CERTIORARI to bring into this court and to quash the determination of the Respondent to remove the Applicant from the National Police Service.**

2. **AN ORDER OF PROHIBITION to issue as against the Respondent to prohibit the effecting of the determination made against the ex-parte applicant.**

3. **THAT AN ORDER to issue to the Respondent to compel the reinstatement of the ex-parte applicant to his duties as a Police Officer.**

4. **THAT costs of this application to provide for.**

### Applicant's Case

2. According to the applicant, the Respondent Commenced the Vetting of all Police officers including himself on Monday, 25<sup>th</sup> November 2013 and he was vetted on 21<sup>st</sup> March 2015 during which the members present were **Johnstone Kavuludi, Geylord Avedi, Fred Mwei, Mary Owuor, Esther Jowi, Eli Owinyi, Susan Kapule** and **Canon Retired Akhuluia** among whom the gazetted commissioners were **Johnston Kavuludi** and **Mary Owuor**.

3. It was averred that the Respondent rendered its decision in the case on 9<sup>th</sup> October 2015 and on 14<sup>th</sup> October 2015 they communicated their determination by way of a letter addressed to the applicant by which they found the applicant unsuitable to continue serving in the National Police Service. According to the applicant the decision was signed by **Ronald Musengi, Mohamed Murshid, Mary Owuor, Joseph Boinnet, Samuel Arachi** and **Johnston Kavuludi**. It was the applicant's case that of the above named Commissioners, only Commissioner **Johnston Kavuludi** and **Mary Owuor** were present during the hearing of his vetting while the rest of the Commissioners who appended their signature to the said decision namely, **Mohamed Murshid, Ronald Musengi, Joseph Boinnet** and **Samuel Arachi** were not present thereat.

4. It was therefore contended that only two commissioners considered the evidence and made a decision on the applicant's vetting while the other four commissioners arrived at a decision without even participating in the hearing. Being dissatisfied with the decision of the Commission the applicant made a formal request for review of the decision pursuant to regulation 33 of the vetting regulations and appeared for the vetting review hearing on 3<sup>rd</sup> February 2016 before the Respondent and during the vetting review the members present were **Johnstone Kavuludi, Mohamed Murshid, Ronald Musengi, Mary Owuor, Mr. Kitur** and **Mr. Mugo**. The applicant averred that the Respondent on 12<sup>th</sup> May 2016 communicated their determination of his case to discontinue him serving as a Police officer pursuant to the Pursuant to the *National Police Service Commission Act, 2011* in a decision signed by **Johnstone Kavuludi, Mohamed Murshid, Ronald Musengi, Mary Owuor, Joseph Boinnet** and **Samuel Arachi** yet **Joseph Boinnet** and **Samuel Arachi** were not present during the hearing of the vetting review.

5. To the applicant, the effect of the abovementioned two commissioners signing the decision is that they arrived on a decision when they did not participate in the hearing.

6. It was the applicant's case that the act of signing of the decision of the commission by the absent commissioners while they knew too well that they were not present during the hearing of the vetting and Review of the vetting was unfair, unlawful and therefore rendered the decision a nullity. Further the Respondent incorporated persons who were not vetted and or gazetted to serve in the panel in the National Police Service Commission and by extension the vetting panel. The vetting of Police officers has been delegated to the National Police Service Commission who cannot delegate the aforesaid duties to third parties since the position in law is that a delegate cannot delegate.

7. To the Applicant, whereas the mandate of the commission during the vetting is to determine suitability and competence of the Police Officer as provided under section 7(2) of the **National Police Service Act**, the Respondent considered other grounds not provided for in law and arrived at their determination based largely on the allegation that on an analysis of the Mpesa documents that the applicant submitted, the documents had been allegedly altered without providing the applicant with an opportunity to test the veracity of that information hence breaching the principle of natural justice and the right to a fair hearing under Article 50 of the Constitution. It was further averred that the Commission also stated that the Mpesa statements the applicant submitted showed that he had undeclared sources of income which are channeled through his Mpesa account even after finding that the same were altered.

8. It was contended by the applicant that the commission failed to consider his explanation on the various uses of his Mpesa accounts among them being that he receive rent money from tenants using the said Mpesa account; that he regularly sent money to his wife towards the running of the retail shop she operates in Molo and also cater for the various family needs; that there are also police activities which involved Mpesa transactions such as first aid competitions, athletes, thanksgiving ceremonies and also fundraising in case of the death, illness or any other emergency of a police and close family members and that he also used to be invited to fundraising events for schools, churches and needy students in his home county and therefore used to send money through Mpesa. In his view, there are no regulations in the National Police Service Regulations that bar him in any way from using his Mpesa account as a medium for the above stated transactions.

9. To the applicant, whereas he was cleared of all the other allegations from the anonymous complainant, the commission failed to clear him on the Mpesa issue in which there was no disclosed complainant and none was presented to the Commission during the vetting for him to have an opportunity to scrutinize and challenge the said allegations.

10. It was therefore the applicant's case that the determination of the Respondent is an illegality as it lacks any legal basis and that the Respondent acted contrary to the law and rules of Natural justice and their determinations are wrongful, malicious, vexatious, scandalous and otherwise a mockery of justice and hence the determinations exhibit manifest errors of law which ought not to be left to defeat Justice.

11. In his submissions, the applicant relied on section 7(2) of the **Fair Administrative Actions Act, 2015**, Rule 25 of the **National Police Service (Vetting) Regulations, 2013**, **Eusebius Karuti Laibuta vs. National Police Service Commission Petition No. 79 of 2014 [2014] eKLR**, **Republic vs. Complaints Commission, Media Council for Kenya & 2 Others Misc. Civil Application No. 182 of 2012 [2013] eKLR**, and submitted that during the Applicant's vetting and review of the vetting, various commissioners who did not sit through either process rendered a decision on the matter notwithstanding and that this can be interpreted to mean that the absent commissioners on either process reached a determination without the opportunity of testing the veracity of the evidence tendered.

12. To the applicant the actions of the aforementioned absent commissioners constitute grave procedural impropriety and therefore a miscarriage of justice as the absent Commissioners did not have any legal capacity to render any decision on either process. To him the law foresaw such an occurrence and accordingly remedied the situation through rule 25(5) of the **National Police Service (Vetting) Regulations, 2013** which was blatantly disregarded by the Respondent.

13. With respect to the breach of the rules of natural justice it was submitted on behalf of the applicant that he was not given an opportunity to test the veracity of that information which was invariably used by

the Respondent. In support of this submission he relied on Article 50 of the Constitution section 4(1) of the ***Fair Administrative Actions Act, 2015*** rule 4(c) and (e) of the ***National Police Service (Vetting) Regulations, 2013*** which provides that in conducting the vetting process, the Commission shall be guided by inter alia the principle that vetting shall be done in accordance with the values and principles set out in Articles 10, 27, 47, 50 and 232 of the Constitution and that the Commission shall be guided by the principles and standards of impartiality, natural justice and international best practice.

14. The Applicant also relied on **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** at page 7 where the Court referred to the decision of the Uganda Supreme Court in **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, regarding the rules of natural justice as follows:

**“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”**

15. It was submitted on behalf of the applicant that the law is clear on the principles of natural justice which is an express requirement for the vetting process to be valid yet the respondent adopted a position on an item of evidence that was adverse to the applicant and in doing so did not accord the applicant an opportunity to verify the same. In the alternative the applicant submitted that the Respondent failed to consider the applicant’s explanation on the various uses of his Mpesa accounts hence contravened section 7(2)(f) of ***The Fair Administrative Actions Act, 2015*** which inter alia states that a court or tribunal under subsection (1) may review an administrative action or decision, if the administrator failed to take into account relevant considerations and relied on **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** on the broad grounds on which the Court exercises its judicial review jurisdiction. Accordingly, it was submitted that the respondent acted irrationally and reached a determination in defiance of logic and acceptable moral standards in admitting evidence that was initially declared to be a forgery and even using such evidence.

16. To the applicant, the actions exhibited by the respondent manifest bias, unreasonableness and irrationality the kind of which this Honourable court should curb to ensure the ends of justice are maintained.

### **Respondents’ Case**

17. In opposition to the Application the Respondents contended that the National Police Service Commission (hereinafter referred to as the Commission) is mandated under Article 246(3) (b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service. According to the Respondents, section 7 (1) of the ***National Police Service Act*** states that all persons who were immediately before the commencement of the Act, officers or employees of the Kenya Police Force and the Administration Police Force established under the ***Police Act*** (Cap 84) and the ***Administration Police Act*** (Cap 85) respectively, including officers working with the criminal investigations department, shall upon commencement of the Act become members of the Service in accordance with the Constitution and the said Act. Based on the foregoing, the Commission formulated vetting regulations to enable it carry out the vetting exercise of all police officers who were in the Force prior to the enactment of the new Constitution and the Act. It was further averred that the Commission is mandated under section 7(2) of the ***National Police Service Act*** together with Regulation 4(a) of the ***National Police Service (Vetting) Regulations 2013*** (hereinafter referred to as the Vetting Regulations) to carry out the vetting exercise on all police officers. Further, section 7 (3) of the ***National Police Service Act*** read together with Regulation 32 of the ***Vetting Regulations*** gives the

Commission the power to discontinue the service of any police officer who fails the vetting on grounds of being unsuitable or incompetent.

18. According to the respondents, the Commission in vetting police officers, the Commission is guided by the Constitution, the **National Police Service Commission Act**, the **National Police Service Act** and the **Police Service (Vetting Regulations), 2013** (hereinafter referred to as “the Vetting Regulations”). In removing the officer from the Service, the Respondents averred that the Commission is bound by Regulation 3, 4 and 14 of the Vetting Regulations which Regulations not only set out the objectives and purpose of the vetting process but also the principles and standards that guides the Commission in carrying out the vetting to arrive at a just decision to remove the officer or not.

19. It was contended that the Ex parte Applicant herein was first removed from the service on 9<sup>th</sup> October 2015 on the ground that he willfully supplied the Commission with doctored Mpesa records and failed to truthfully and fully supply the Commission with documents and information relating to his sources of income and assets as contemplated under Regulation 18 of the Vetting Regulations and the decision communicated to him via a letter dated 9<sup>th</sup> October 2015. Prior to the removal of the *ex parte* Applicant from the service the Commission accorded him an absolutely fair and procedural hearing pursuant to the constitutional provisions and the National Police Service Commission Act and the Vetting Regulations and that indeed the *ex parte* Applicant was timely and procedurally notified of the Complaints against him through a Complaints summary sheet dated 25<sup>th</sup> February 2015. It was disclosed that the *ex parte* Applicant wrote in reply to the Complaints via a letter dated 4<sup>th</sup> March 2015 and at no point did he raise a complaint with regard to the manner and nature of the Complaints furnished upon him. He was subsequently invited for a vetting session which he made appearance on the 21<sup>st</sup> March 2015 and that the vetting exercise was conducted in the most procedural, fair and lawful manner with utmost fidelity to the Constitution 2010 and all the other relevant laws and regulations and at no point did the *ex parte* Applicant raise any complaint as to the manner and nature of the vetting process. To the Respondent, the Hansard records exemplifies this affirmation that the *ex parte* Applicant was given adequate opportunity to address all the Complaints leveled against him in strict compliance with the rules of Natural Justice and even had an opportunity to give recommendations on how effective the traffic department could be run.

20. It was averred that after the *ex parte* Applicant herein was first removed from the service as a result of vetting on 9<sup>th</sup> October 2015, he applied for Review pursuant to the provisions of Regulation 33 of the **Police Service (Vetting) Regulations 2013** via an Application for Review dated 21<sup>st</sup> October 2016 which application was admitted for hearing and considered on its merit by the Commission in order to give the *ex parte* Applicant an opportunity to explain the discrepancies noted between the Mpesa statements he had personally submitted to the Commission and those sent directly to the Commission by Safaricom Ltd via email. After the analysis of the Mpesa statements it was evident that the ones supplied by the *ex parte* Applicant had been deliberately and unlawfully doctored with the sole objective of misleading the Commission and/or the Vetting Panel an act that was not only unprofessional and unethical contrary to the legal expectations but also criminal in nature.

21. The Respondent contended that after hearing the aforementioned Review Application on the 3<sup>rd</sup> February 2016, the Commission found that the same lacked merit and upheld its earlier decision since the *ex parte* Applicant did not prove any error apparent on the face of the records or any new facts as per the requirements of Regulation 33 guiding on the process of the Review but only delved on the manner in which the financial analysis of the statements was conducted without pointing out any procedural unfairness or illegality emanating from the same.

22. To the Respondent, the *ex parte* Applicant in the Review further suggested that the alteration of his Mpesa records could have been as a result of infiltration of the Commission without providing any evidence on the outrageous accusations of infiltration sole aimed at casting aspersions on the integrity of the Commission. It was averred that the *ex parte* Applicant confirmed and affirmed that traffic officers under his command were principally armed because of the fear of the officials of EACC who could conduct an impromptu sting operations on corrupt officers, a clear demonstration that officers under his command were prepared to go to extreme lengths to curtail the mandate of other constitutional institutions

and perpetuate corruption. Furthermore, the *ex parte* Applicant confirmed during the Review that indeed he received huge sums of money from junior offices within his control and area of jurisdiction in a suspicious periodic pattern which monies he claimed were for welfare yet he was at pains accounting or proving records of the collections and subsequent disbursement as clearly captured at pages 21 to 38 of the Hansard record for the review. Despite confirming remittances from the officers he was well conversant with as evidenced in the Hansard Records, the data or records of these remittances were surprisingly missing in the Mpesa statements he furnished the Commission unlike the one provided by Safaricom, a suspicious anomaly he could not adequately explain only blaming the Mpesa shop in Kakamega and an alleged infiltration of the Commission.

23. According to the Respondent, the *ex parte* Applicant also confirmed that he had misled the Commission on his sources of income and indeed he had supplied the Commission with incomplete records and information contrary to the legal expectations as captured in pages 31 and 32 of the review Hansard marked JK6 where in an effort to explain periodic remittances from one **Nelson Omwenga** he affirmed that part of it was from maize trade the officer was doing on his behalf. To the Respondent, it was apparent to the Commission that the *ex parte* Applicant was indisputably a person of questionable integrity despite being in a senior leadership position in a sensitive police department that the public had consistently complained ranked the highest in corruption.

24. It was contended that thereafter the Commission after lawful deliberations as provided for under regulation 25 of the Police Service (Vetting) Regulations 2013 communicated its decision upholding the decision to remove the *ex parte* Applicant from service to the *ex parte* Applicant vide its letter dated 5<sup>th</sup> May 2016. It was emphasised that for all intent and purposes and from the foregoing it is evident that the *ex parte* Applicant was accorded utmost procedural fairness as enshrined in the Kenyan Constitution 2010 and as contemplated by the general rules of Natural Justice and any suggestion to the contrary is only designed to mislead this Court and is an abuse of the court process.

25. To the Respondent, the law is very explicit that however alleges procedural unfairness must demonstrate clearly to the Court the instances or elements of unfairness and breaches of the law and a general quoting of the constitutional provisions and the statutory law without proof should not suffice and that in removing the *Ex parte* Applicant herein the Commission was guided by regulation 14(2)(b) and (d) of the Police Service (Vetting) Regulations 2013 which requires the Commission to look at the past record including conduct, discipline and diligence of the officer and also the human rights record of the officer.

26. The Respondent asserted that after the vetting, analysis of the documents provided by the *ex parte* Applicant and considering the Review Application it established that the *ex parte* Applicant failed to accurately explain his various sources of income to the vetting panel thus making his financial probity wanting.

27. To the Respondent, regulation 25(4) of the ***Police Service (Vetting) Regulations 2013*** clearly provides that the decision shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of Commission. In its view, the unequivocal provisions of the aforementioned regulation do not restrict decision making to the Commissioners who participated in the hearing since the proceedings are recorded in the Hansard record verbatim which print-outs are later used in determining whether an officer is suitable to continue serving or not.

28. It was therefore contended that the decision to remove the *ex parte* Applicant from the service after a lawful and procedurally just vetting process and subsequent review was duly considered and signed by the commissioners who decided the matter on behalf of the Commission while relying on the Hansard records and documents provided by the *ex parte* Applicant which decisions were later communicated to the *ex parte* Applicant timely.

29. To the Commission, the assertions by the *ex parte* Applicant that the Commission unlawfully incorporated persons not gazetted to serve in the Commission to take part in his vetting as contained in paragraph 17 of the Affidavit are purely based on ignorance or misapprehension of the law since the

Commission pursuant to regulation 10(1) of the ***Police Service (Vetting) Regulations 2013*** is mandated to constitute such number of panels and comprising such persons as the Commission shall determine in order to ensure expeditious disposal of matters. In addition, Regulation 10(2) of the ***Police Service (Vetting) Regulations 2013*** provides that the Commission may establish panels comprising such co-opted persons as it may deem necessary for purposes of determining applications for review under section 33.

30. It was therefore the Respondent's position that the Application as framed lacks merit and is an attempt by the *ex parte* Applicant to try and mislead this Court with the unlawful aim of forcing himself back to the service after failing the suitability test through imagined non-existing legal technicalities despite having been accorded the required fair administrative treatment during the vetting and subsequent review as enshrined and contemplated by the law.

31. In its submissions the Respondent relied on **Anarita Karimi Njru vs. The Republic [1976-1980] KLR. 1272**, **Meme vs. Republic & Anor [2004] eKLR**, **Republic vs. Kenya Revenue Authority & Another exp Bear Africa(K) Limited, Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR** and **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009** and submitted that the applicant's claim was lacking in particularities, was a challenge on the merits of the decision as opposed to the merits, was procedural and fair and hence the orders sought are not merited.

### **Determinations**

32. I have considered the application, the affidavits both in support of and in opposition thereto, the submissions filed by the respective parties as well as the authorities relied upon in support thereof.

33. Although the applicant has taken issue with the merits of the decision made by the vetting panel as well as the decision of the Commission on review, it is my view that the decision that is properly the subject of these proceedings is the decision of the Commission disallowing the review. This must necessarily be so since the Commission on review is empowered to review the merits of the decision of the vetting panel as long as a challenge is taken to the same. In this case the merits of the decision of the vetting panel was the subject of the review and the same was considered and determined. Ordinarily, where the Commission hearing a review properly makes a determination on the merits, this Court would not under the guise of its judicial review jurisdiction purport to review the said findings as opposed to the process through which the said decision was arrived at.

34. In this case, it was contended that some of the Commissioners who signed the impugned decision did not hear the review. This position is not disputed. Instead the Respondent has contended that regulation 25(4) of the ***Police Service (Vetting) Regulations 2013*** clearly provides that the decision shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the Commission. To the Respondent, this provision does not restrict decision making to the Commissioners who participated in the hearing since the proceedings are recorded in the Hansard record verbatim which print-outs are later used in determining whether an officer is suitable to continue serving or not.

35. With due respect to the Respondent, it seems that it does not appreciate its role on review as opposed to an appeal. That a Board exercising revisionary as opposed to appellate jurisdiction has wide powers was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara & Co. Limited and Others [2012] eKLR**. This was the position adopted in **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, in which the Court expressed itself as follows:

**“Before dealing with the issues raised it is important for the Court to deal with the scope of the request for a review undertaken by the Respondent under the Act. In our view a review is not an appeal. Section 93(1) of the Act provides:**

***Subject to the provisions of this Part, any candidate who claims to have suffered or to***

*risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.*

“Administrative review” is defined by *Black’s Law Dictionary*, 9<sup>th</sup> Edition at page 1434 *inter alia* as “review of an administrative proceeding within the agency itself” while *Ballentines Law Dictionary* at page 13 defines “administrative proceeding” as “a proceeding before an administrative agency, as distinguished from a proceeding before a court. Compare judicial proceeding”. What then is expected of the Respondent in exercising its jurisdiction on a request for review? A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

*“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”*

The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker...“Review” is defined in *Black’s Law Dictionary*, 9<sup>th</sup> Edition at page 1434 *inter alia* as “Consideration, inspection, or reexamination of a subject or thing.” *Ballentines Law Dictionary* on the other hand defines the same word at page 482 *inter alia* as “A reevaluation or reexamination of anything.” Clearly a review is much wider in scope than an appeal.”

36. That the Respondent in reviewing the decision of the vetting panel is exercising the powers of “administrative review” is clear from the fact that the same persons who sit in the first panel do also sit in the review panel. If it was not so acting, they would be barred from sitting on the review since as was held by **Wendoh, J** in Christopher Gatuiri vs. Commissioner of Police, Misc Appl. 267 of 2006 (2007) **eKLR** at page 4:

**“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 Applicants’ right of appeal was taken away, which is gross procedural lapse...From 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.”**

37. In other words if the review was to be equated to an appeal, it would have been absurd to permit the same person(s) who presided over the initial vetting to hear and determine the review.

38. A review, in my view is, however, a re-hearing and requires a re-evaluation or reconsideration of the evidence by the reviewing panel. In such process the evidence and the earlier decision is subjected to fresh scrutiny both in terms of merits and legality but subject to the terms of the legal instrument guiding the review process. Such a procedure in so far as it entails a re-hearing even at a narrower level than the initial hearing ought not to be treated as merely a matter of record perusal so that to justify the view that those make the determination may be different from those who actually heard the review.

39. The applicant also contended that from the vetting decision, it was clear that four (4) Commissioners

of the Respondent were present in the vetting interview panel that conducted the vetting hearing of the Applicant. However, the vetting decision communicating the Applicant's removal from the National Police Service was signed by six (6) Commissioners of the Respondent, two of whom did not participate in the decision making process. In **Republic vs. Complaints Commission, Media Council for Kenya & Another Exp Baraza Limited t/a Kenya Television Network (KTN) Misc. Civil Application No. 182 of 2012**, this Court expressed itself as follows:

**“Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners Peter Mwarua and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Al-Mehdawi vs. Secretary of State for The Home Department [1990] AC 876; Pastoli vs. Kabale District Local Government Council and Others Kampala HCCC No. 152 of 2006 [2008] 2 EA 300. The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find.”**

40. Similarly in **Eusebius Karuti Laibuta vs. National Police Service Commission [2014] eKLR**, this Court found as follows:

**“In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision.”**

41. In **Ferdinand Indagasi Musee & Another vs. Republic [2013] eKLR**, an appeal arising from the decision of a two judge bench, the Court of Appeal expressed itself as follows:

**“We note that whereas the judgement was crafted by both Judges, it is only Odero, J who signed it after delivering it. In the absence of the signature of the other Judge, it cannot be said that the judgement was regular or proper or valid.”**

42. It is therefore my view that administrative proceedings especially where the same are disciplinary in nature ought to be taken very seriously by those presiding thereat. The members of the Tribunal ought not to treat the same as a “walk-in walk-out” function by attending the same when convenient and absenting them at will only later on to resume the sitting as if they had not absented themselves from the previous sitting or sessions. In my view where a member of the Tribunal misses a crucial sitting or session it is not permissible for the same member to participate in the said proceedings and make a determination thereof at a later stage. This was the position adopted in **Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd [1929] 1 KB 698**, where it was held by Lord Hanworth, MR at page 714 as follows:

**“One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that**

**new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.”**

43. **Romer, J** on his part held at page 717 of the said judgement as follows:

**“Further, I would merely like to point this out: that at the meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of the confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.”**

44. The facts of the instant case were similar to those in **Samuel Max Mehr vs. The Law Society of Upper Canada [1955] CanLII 7** where the Supreme Court of Canada (**Cartwright, J**) while adopting the holding in **Rex vs. Huntington Confirming Authority ex parte George and Stamford Hotels Ltd** (supra) allowed the appeal and quashed the Respondent’s decision.

45. The same decision was cited with approval in **Re Ramm and the Public Accountants Council for the Province of Ontario [1957] CanLII 130**, where the Canadian Court of Appeal while allowing the appeal expressed itself as follows:

**“With respect to the difference in the constitution of members of the Public Accountants Council on the first and second hearings, it may well be that the two members of the Public Accountants Council who were not present at the earlier hearing, abstained from argument on the issues which fell for determination. It appears, however, that they did vote inasmuch as the decision to revoke the licence of the appellant Ramm was unanimous. It is well established that it is not merely of some importance but of fundamental importance, that “justice should not only be done but should manifestly and undoubtedly be seen to be done.” In a word, it is irrelevant to inquire whether two members of the Council who were not present at the earlier hearing took part in the proceeding in the Council’s deliberation on the subsequent hearing. What is objectionable is their presence during the consultation when they were in a position which made it impossible for them to discuss in a judicial way, the evidence that had been given on oath days before and in their absence and on which a finding must be based.”**

46. In **Moyer vs. Workplace Health, Safety and Compensation Commission [2008] NBCA 41 (CanLII)**, **Richardson, JA** whose decision received concurrence of the other Judges held, while allowing the appeal, by that:

**“In my view the record reveals a breach of the fairness. I agree with the Commission that lengthy arguments can at times result in panel members no longer being able to resume a hearing. However, when this occurs, steps can easily be taken to ensure procedural fairness. When a hearing has truly begun, as was the case here, and when, after an adjournment, it has become necessary to substitute decision-makers, the least that can be expected to avoid procedural unfairness is that the parties be advised on the change before the resumption of the hearing and be given an opportunity to recommence the hearing. This is not to say that, in all cases, proceedings will need to recommence. It may be that the parties will reach some agreement on how to acquaint the decision-maker(s) with evidence previously adduced or arguments previously made. However, what is important is that the parties at least be advised of the change in a timely fashion and be given the opportunity to recommence the hearing, if that is how they wish to proceed.”**

47. This Court has had occasion to deal with similar circumstances in **Republic vs. National Police**

**Service Commission Exparte Daniel Chacha Chacha [2016] eKLR and Republic vs. Stephen Kiptanui Arap Soi JR. Misc Application No.51 of 2016.**

48. It was contended that the Respondent delegated its vetting functions to persons who are not legally empowered to conduct the vetting. In **Hardware & Ironmongery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271**, the Court expressed itself as follows:

**“What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer’s evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director’s powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred.”**

49. Therefore if the Respondent unlawfully delegated its statutory powers, its decision would be no decision at all and would not be permitted to stand.

50. However, with respect to panels this Court in **Immanuel Masinde Okutoyi & Others vs. National Police Service Commission & Another [2014] eKLR** expressed itself *inter alia* as follows:

**“It was argued on behalf of the Respondents that the process of vetting is not one of the business and affairs of the Commission and that it is a function of the Commission. In my view that is a distinction without a difference. Section 7(2) of Cap 84 obliges all officers to undergo vetting by the Commission to assess their suitability and competence. Whether this is termed a function, business or an affair of the Commission it is clearly one of the duties of the Commission and under section 14(1) of Cap 185C ought to be conducted in accordance with Second Schedule. However, under section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.”**

51. It is therefore my view that the incorporation of other persons other than the Commissioners by the Respondent during the process of vetting does did not amount to delegation of its powers as long as the minimum number of Commissioners were present during the vetting. In other words the mere fact that the Respondent incorporates other persons who in its view possess knowledge and skills necessary for the functions of the Commission does not necessarily render the constitution of the vetting panel unlawful as long as those incorporated though may participate in the deliberations do not vote thereat.

52. Having considered the foregoing, I am therefore not satisfied that the manner in which both the original vetting and the request for review were determined met the standards of fairness. Both processes in my view were marred and tainted with both procedural and substantive irregularities. Though what is under challenge is the decision on review as was held in **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA No. 689 of 2001 [2006] 1 EA 318**:

**“Despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not**

be fit to abdicate its supervisory role and it has powers to strike out nullities.”

**Order**

53. According I grant the following reliefs:

1. An order of Certiorari removing into this Court for the purposes of being quashed the determination of the Respondent to remove the Applicant from the National Police Service which decision is hereby quashed.
2. An order prohibiting Respondent from effecting the said determination made against the ex-parte applicant.
3. An order of mandamus compelling the Respondent to reinstate the applicant to his duties as a Police Officer unless and until otherwise lawfully removed.
4. Pursuant to section 11(1)(h) of the *Fair Administrative Action Act*, an order of mandamus compelling the Respondent to commence the vetting of the applicant de novo in accordance with the Constitution and the relevant laws in particular, the *National Police Service Act*, the *National Police Service (Vetting) Regulations 2013* and the *Fair Administrative Action Act, 2015*.
5. In light of the decision made herein with respect to de novo hearing there will be no order as to costs.

54. Orders accordingly

Dated at Nairobi this 8<sup>th</sup> day of November, 2016

G V ODUNGA

JUDGE

*Delivered in the presence of:*

*Mr Odunga for the Respondent*

*Mr Senteu for the Applicant*

*CA Mwangi*