REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO 345 OF 2013

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL……1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

EX-PARTE

NICKSON SHEDRACK AMITAI

CYRUS GAKUO NDUNGU

JUDGEMENT

Nickson Shedrack Amitai (the 1st ex-parte applicant) and Cyrus Gakuo Ndungu (the 2nd ex-parte applicant) were, until their dismissal, police officers attached to GSU Reece Company of the Kenya Police Service. They were, at the same time, pursuing part-time studies at Egerton University, Nairobi Campus.

According to the papers filed in Court by the applicants, on 1st July, 2013 they were informed that they had been deployed to Mandera. They tried to explain to their superiors that they were pursuing studies but they were instead charged with committing certain offences against discipline.

At the conclusion of the orderly room proceedings, the 1st applicant was through a letter dated 11th July, 2013 sentenced to a fine of Kshs.1,200/= for the offence of failing to attend a parade contrary to Section 88(2) and subsection 1(p) of the Eighth Schedule of the National Police Service Act, 2011 (the Act). The same letter also informed him that he had been dismissed from the Kenya Police Service for the offence of wilfully disobeying a lawful command contrary to Section 88(2) and subsection 1(g) of the Act.

By a letter dated 11th July, 2013 the 2nd applicant was fined kshs.1,300/= for failing to attend a parade without a reasonable cause contrary to Section 88(2) and sub-section 1(p) of the Eight Schedule of the Act. He was also sentenced to dismissal from Service for wilfully disobeying a lawful command contrary to Section 88(2) and subsection 1(g) of the Eight Schedule of the Act.

The applicants fault the decision of the Inspector General of Police (the 2nd respondent) for being unlawful as their dismissal was not ratified by the National Police Service Commission (the Commission)

as required by Section 89(6) of the Act. Secondly, the applicants accuse the 2nd respondent of convicting them for offences for which they had not been charged.

Through the notice of motion application dated 8th October, 2013 the applicants therefore seek orders:

> **(a) THAT this honourable court be pleased to grant an order of certiorari to remove into this Honourable Court and quash the decision of the 2nd Respondent dismissing the applicants from the Kenya Police Service on 11th July, 2013.**
>
> **(b) THAT this honourable court be pleased to grant an order of mandamus directed to the 2nd Respondent to immediately and unconditionally readmit the applicants back to the Kenya Police Service.**

The respondents opposed the application through the replying affidavit sworn on 4th February, 2014 by Josphat Kirimi an Assistant Commissioner of Police and the Deputy Commanding Officer, Recce Company. Through the said affidavit, the deponent informs the Court that on 1st July, 2013 one Mr. Jotham Wanyama briefed police officers who included the applicants that they would be leaving for deployment to Malkamari GSU Operational Camp the following day.

During the briefing, those present were asked to raise any concerns with the commanding officer but the applicants did not raise any issue. The next day the applicants failed to turn up for the trip and they were booked in the Occurrence Book for failure to report for duty. Mr. Kirimi avers that when the applicants reported on duty on 3rd July, 2013 they could not offer any satisfactory explanation as to why they had not turned up for duty. They were later charged with wilfully disobeying a lawful command and they pleaded guilty. They were convicted and sentenced to dismissal from service.

The respondents' case is that the applicants were informed of their right of appeal to the Deputy Inspector General of the Kenya Police Service. Further, the respondents contend that under Section 89(5) of the Act the applicants have a right of appeal first at the county level, then to the Inspector-General and finally to the Commission.

The respondents assert that the applicants' disciplinary proceedings were conducted in accordance with the law and in compliance with the rules of natural justice and if they were aggrieved by the decision to dismiss them then they ought to have filed appeals instead of resorting to the judicial review mechanism. It is the respondents' case that judicial review is a remedy of last resort which is only available to an applicant who has exhausted all the other available remedies.

The respondents' case was bolstered by a further affidavit sworn on 11th March, 2014 by Titi Ayiera a legal officer in the office of the Inspector General of Police. To that affidavit are attached orderly room proceedings for the applicants.

In my view, the only question to be answered in this judgment is whether the applicants were taken through a lawful, reasonable and procedurally fair administrative process.

Before proceeding to answer the question, it is important to address an issue raised by the respondents. The respondents submitted that the applicants ought to have resorted to appeal instead of commencing these proceedings. The applicants are indeed correct that judicial review is a remedy of last resort and where other adequate remedies are available, a court should decline to grant orders. However, if a party demonstrates that judicial review provides a quick, just and fair solution to an applicant's problem, then the court should not hesitate in granting judicial review orders.

The starting point would then be to establish whether the matter falls in the judicial review province. In the case of **COUNCIL FOR CIVIL SERVICE UNIONS v MINISTER FOR CIVIL SERVICE [1985] A.C. 374, at 401D** Lord Diplock demarcated the boundaries of judicial review when he stated that:

"Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

Judicial review is therefore available where a public authority has acted unlawfully, unreasonably or in defiance of the rules of natural justice. The applicants before this Court have submitted that the impugned decision is unlawful and goes against the principles of natural justice. The circumstances under which the decision was arrived at must therefore be examined in order to establish whether or not the remedies of judicial review are available to the applicants.

The applicants claim that they were sentenced for offences for which they had not been charged. I have looked at the waiver notices attached to the affidavits by the applicants and note that the waiver notices show that each applicant was being charged in respect of two counts. The 1st count is that of absenting oneself without leave contrary to Section 88(2) and sub-section (h) of the Eight Schedule of the Act. The 2nd count is that of failing to attend a parade without reasonable cause contrary to Section 88(2) as read with 1(p) of the Eight Schedule of the Act.

However the dismissal letters dated 11th July, 2013 shows that the 1st count was that of failing to attend a parade without reasonable cause contrary to Section 88(2) sub-section 1(p) of the Eight Schedule of the Act. The 2nd count was that of wilfully disobeying a lawful command contrary to Section 88(2) sub-section 1(g) of the Eight Schedule of the Act.

It is therefore clear that the 2nd count for which the applicants were convicted and which led to their dismissal was not contained in the waiver notice dated 4th July, 2013.

The respondents through the further affidavit of Titi Ayiera exhibited orderly room proceedings and waiver notices. The waiver notice for the 1st applicant is dated 3rd July, 2013 and it only contains one count, namely willful disobedience of a lawful command contrary to Section 88(2) and sub-section 1(g) of the Eight Schedule of the Act. The orderly room proceedings show that the 1st applicant was indeed charged with the single count of wilfully disobeying a lawful command. Even the Précis of Evidence confirm that the 1st applicant was indeed charged with one count of wilfully disobeying a lawful command.

The documents provided by the respondents do not explain how the 1st applicant was also found guilty of another count namely failing to attend a parade without reasonable cause. The documents provided by the respondents do not disclose this charge. There is no explanation why the waiver notice provided to the 1st applicant contains different charges.

As for the 2nd applicant, the waiver notice availed by the respondents show that he was only charged with one count of wilfully disobeying a lawful command contrary to Section 88(2) and sub-section 1(g) of the Eight Schedule of the Act. The respondents have however availed two sets of the orderly court proceedings. In one set of proceedings the 2nd applicant is said to have wilfully disobeyed a lawful command. In the other set of proceedings, he is alleged to have failed to attend a parade without reasonable cause. One set of proceedings has the 2nd applicant's signature but the other set of proceedings does not have his signature. No explanation was given by the respondents as to whether the 2nd applicant had two separate trials. The respondents did not bother to explain why the 2nd applicant's

waiver notice contained different charges from those found in one set of the orderly proceedings.

Looking at the documentation in respect of the disciplinary proceedings, it is clear that the applicants had no notice of the count that eventually led to their dismissal. They ought to have been given notice through the waiver notice so that they could adequately prepare for their trial. The right to a fair hearing includes the right to adequate notice before a hearing. It is therefore clear that the disciplinary proceedings were conducted in breach of the rules of natural justice. The 2nd respondent acted in breach of Article 47 of the Constitution.

The applicants also submitted that their dismissal did not comply with the provisions of Section 89 of the Act. It is important to set out the said Section at this stage. It states:

"(1) A police officer who commits an offence against discipline is liable to be punished by—

(a) reprimand;

(b) suspension;

(c) an order of restitution;

(d) stoppage of salary increments for a specified period of time, but not exceeding one year;

(e) reduction in rank;

(f) dismissal from the Service; or

(g) any combination of the punishments provided under this section.

(2) The police officer authorized to impose a penalty for a disciplinary offence, shall enter a record of such punishment, the date of the punishment and the offence

for which it was inflicted on the record sheet of the police officer punished, a copy of which shall be forwarded to the Commission for review and confirmation.

(3) All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall

comply with Article 47 of the Constitution.

(4) A police officer facing disciplinary action may be accompanied by another police officer of his choice for assistance and support.

(5) A police officer aggrieved by the decision may appeal first at the County level, then to the Inspector-General and then to the Commission in accordance with regulations.

(6) The sanctions under subsection (1)(c), (d), (e), (f) and (g) only take effect after approval and confirmation by the Commission."

Sub-section 6 clearly provides that dismissal from the police service can only take effect after approval and confirmation by the Commission.

Ms Cheruiyot for the respondents argued that sub-section 6 can only apply once the appeals mechanism is exhausted. This argument does not capture the clear provision of the law. Does it mean that if a dismissed officer does not appeal then the Commission needs not approve and confirm such a decision? In my view Section 89(6) is meant to protect police officers from arbitrary dismissal by their seniors. This case demonstrates that some senior police officers do not respect the rule of law. The dismissal of

the applicants could only take effect after approval and confirmation by the Commission. There is no evidence that the Commission approved and confirmed the applicants' dismissal. This is one case which squarely falls into the judicial review arena. There was unlawfully exercise of power which must be firmly tamed.

The decision by the 2nd Respondent is not only tainted with illegality but is also bad in that it was arrived at in breach of the rules of natural justice. The right to a fair hearing includes the right of an accused person knowing in advance the charges facing him. A person cannot, like in this case, be convicted of charges they were not aware of. The applicants were never given an opportunity to defend themselves in respect of the charge that led to their dismissal from the Kenya Police Service.

The application therefore succeeds and an order of certiorari is issued calling into this Court and quashing the 2nd respondents' letters dated 11th July, 2003 dismissing the applicants from the Kenya Police Service. Having found that the applicants' dismissal was unlawful, it follows that they remain members of the Kenya Police Service and an order of mandamus is therefore issued directed at the 2nd Respondent to immediately and unconditionally readmit the applicants back to the Kenya Police Service.

Considering the relationship between the parties, I will make no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT