



**Akoko v National Police Service Commission (Civil Appeal
686 of 2021) [2024] KECA 485 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 485 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 686 OF 2021
MA WARSAME, K M'NOTI & KI LAIBUTA, JJA
MAY 9, 2024**

BETWEEN

POLYCARP AKOKO APPELLANT

AND

THE NATIONAL POLICE SERVICE COMMISSION RESPONDENT

*(An appeal from the ruling of the Employment & Labour Relations Court of Kenya at Nairobi
(Justice Nzioki Wa Makau) dated 22nd September, 2021 in ELRC Petition No. E060 of 2020)*

JUDGMENT

1. The integrity of police officers is of vital importance, as it creates public confidence in our institutions. Vetting procedures such as those provided in the National Service (Vetting) Regulations 2013 (the Regulations) aim to remove from police service, persons with integrity deficits, establish civic trust and dismantle structures within which individuals abuse donated powers for private use. It is therefore important to appreciate the clear rules and guidelines with regard to review and appeal of the decisions made by vetting panels, in order to safeguard the interests of the police officers who undergo the rigorous scrutiny of the vetting process. It is also meant to ensure that no police officer misuses the process and procedure with the intent of getting away with unwanted conduct. The process is both a shield and a sword that can be used to safeguard the officer and the interests of the public. Such are the stark facts of the appeal before us.
2. On 23rd August 2016, the appellant, Polycarp Akoko Ochieng, appeared before the National Police Service Commission (the Respondent) for a vetting interview for traffic police officers pursuant to the Regulations. The appellant was given an opportunity to defend himself and present rebuttals. After considering the case and the defence, the respondent on 6th December, 2012 found that the appellant lacked financial integrity; that the allegations and evidence presented against the appellant were proved and watertight; that, in particular, his M- pesa transactions differed from his declared



sources of income; and that there was lack of conformity of funds received from his fellow officers and from civilians.

3. The respondent came to the conclusion that the appellant had engaged in corrupt practices and had therefore failed the vetting test and was dismissed from service.
4. The appellant was aggrieved and applied for a review pursuant to regulation 33, which provides that a review request shall be based on the discovery of a new and important matters which was not within the knowledge of, or could not be produced by the officer at the time the determination sought to be reviewed was made, provided it was not due to lack of diligence; mistakes apparent on the face of the record; or any just reason. The appellant submitted that the new information was that he had forgotten to declare per diem received while on duty, which were sometimes sent via M- pesa by his fellow officers and that the same be taken into consideration.
5. The review was admitted and heard by a panel constituted by the respondent on 13th July 2017 and, in a written decision delivered on 22nd August 2017, it was found that the appellant's review had no merit on the grounds that no new evidence or information had been presented and proved. Consequently, the decision to dismiss the appellant from the National Police Service was upheld.
6. Aggrieved, the appellant filed a petition before the Employment and Labour Relations Court alleging that *the constitution* of the interviewing panel and the review panel were contrary to the Regulations, rendering the decisions illegal; that the decision of 6th December 2016 was signed by one commissioner Murshid Mohamed who never participated in the vetting interview, rendering it a nullity, while the review decision was signed by Mr. Johnston Kavuludi who was not present during the vetting review; that his right to a fair hearing, right to dignity and fair administrative action were violated; and that the respondent acted unreasonably.
7. Upon considering the Petition on merit, the learned Judge (Nzioki Wa Makau, J.) in a Ruling dated 16th March, 2021 found that the minutes of the review indicated that Johnston Kavuludi was present; that the appellant was given ample opportunity to explain himself; and that there was nothing indicative of abridgment of the appellant's constitutional rights. The petition was dismissed as it did not disclose grounds to upset the decision of the respondent.
8. Undeterred, the appellant sought to review the Court's decision in an application dated 20th April 2021. The application was anchored on the grounds that first, there were fundamental errors on the face of the record which included that:
 - a. Commissioner Murshid did not participate in the vetting interview, as the Hansard indicated that he had stepped out of the room yet he signed the resulting decision, rendering it void; and
 - b. that Commissioner Johnston Kavuludi did not participate or chair the Vetting review of 13th July 2017 yet he signed the decision therefore vitiating it.
9. Second, he stated that there were sufficient reasons warranting the review including that the vetting proceedings offended *the Constitution*, the *Fair Administrative Action Act* and the Regulations; that both panels refused to give the appellant a right to be heard and make representations; that the vetting panel relied on hearsay evidence and ignored the materials presented before them; that the vetting review panel exhibited open bias and hostility towards the appellant; and that the vetting review panel failed to consider additional evidence presented by the appellant, including his additional income by way of per diems and the bank statement from his spouse.



10. Faced with the foregoing, the learned Judge in a ruling dated 22nd September, 2021 again dismissed the application with costs. Citing Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, the learned Judge expressed himself as follows:

33.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgement or ruling requires clarification; or
 - d. for any other sufficient reason.

...If the Petitioner was aggrieved by the decision on the grounds he elaborately sets out in his motion, the only option open to him was for an appeal to the Court of Appeal and not a review before this Court. The grounds for review are above and not the fallacious list produced by the Petitioner in his motion which as is evident from a clear reading of the Rules unmerited...”

11. It is that decision that is the subject of this appeal which is predicated on 14 grounds which can be aptly summarised as follows:

- a. The learned Judge erred by declining to hold that the appellant had demonstrated that there were errors on the face of the record which were sufficient to warrant the orders sought
- b. The learned Judge erred by holding that an issue which affords a party a good ground of Appeal does not afford the same party a good ground for review
- c. The learned Judge erred by failing to hold that the appellant had provided sufficient reasons to warrant a review thereof

12. When the matter came up for hearing, Learned Counsel, Mr. Munyua Advocate, appeared for the appellant and opted to dispose of the appeal through written submissions. There was no appearance or response from the respondent.

13. Reiterating his position at the ELRC, the appellant maintained that he had met the threshold for review of the judgement and that the judgement had blatant errors on the face of the record. Citing this court's decision in *George Kingi Bamba v National Police Service Commission* [2019] eKLR, it was submitted that only commissioners present could sign and deliver a decision whereas the decision of 6th December 2016 was signed by one commissioner Murshid Mohamed who, according to the Hansard, stepped out of the interview and never participated in the vetting interview; that the review was signed by commissioner Johnston Kavuludi who was not present during the vetting review; that it was therefore illegal for strangers to sign the two reports and the procedural impropriety went to the jurisdiction of both panels; and that the judgement was made on the fallacious assumption that the Hansard reflected the correct proceedings in accordance with the Vetting Regulations, which put into question the integrity of the process.



14. Secondly, it was submitted that other sufficient reasons existed to warrant the review. The appellant contended that he was not granted fair administrative action given that he did not receive proper notice of the information the vetting panel intended to use, that he was not accorded an opportunity to challenge the hearsay evidence against him by cross examination and that the frequent and aggressive interventions by panelists compromised his right to fair hearing and indicated a clear bias.
15. We have considered the record, submissions by the appellant and the law. The parameters within which a court exercises its discretion in an application for review are succinctly spelt out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. In this case, the appellants' application for review was anchored on the ground that there was an error apparent on the face of the record and there were other sufficient reasons to sustain his case.
16. What constitutes an error apparent on the face of the record depends on the circumstances of each case. This Court in *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 described an error on the face of the record as follows:

“In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”
17. Applying the foregoing principles, it is clear that an error which is evident from the record of the case does not require detailed examination or scrutiny of the evidence, submissions, facts or the law. If an error is not self-evident and requires a detailed explanation or reasoning, then it cannot be treated as an error apparent on the face of the record.
18. The appellant's position is that the Hansard clearly showed the commissioners who participated in the vetting and review processes; that persons who never participated signed the final decisions that resulted in his removal from service; and that this rendered the decision invalid and irregular.
19. In addressing the appellant's issues the learned Judge stated that:

“...the record speaks for itself. When he went before the panel he was given time to refute the allegations of financial impropriety concerning his Mpesa statements. He was consequently removed and on seeking review before the Panel Chaired by Commissioner Ronald Musengi he articulated the reasons as being the new material he presented before the Review Panel on 13th July 2017. He was asked to explain the sources of income and he indicated that he received per diem each quarter. The sums he declared in his declaration of wealth forms excluded other income he now indicated was an oversight. He was heard by the panel comprising Commissioners Murshid Mohamed, Ronald Musengi, Mary Owuor and in the minutes it is indicated that Johnston Kavuludi was present. He signed the findings of the panel on 22nd August 2017...”



20. The appellant is alleging that the decision and conclusions of the trial court is erroneous and, therefore, there is a need to reanalyse the facts and evidence in order to arrive at a different conclusion. In our view, what the appellant is raising requires examination and argument. It requires this court to reconsider and re-examine the validity of *the constitution* of the panel in the recorded minutes, in view of the record of the Hansard and arguments on the probability of whether a commissioner who was present and stepped out may or may not have come back to hear the proceedings. These examinations are not self-evident and cannot be the subject of a review. They are fit for appeal.
21. As for the grounds adduced under the heading “sufficient reasons” warranting review by the appellant, including that the vetting proceedings offended *the Constitution*, the *Fair Administrative Action Act* and the Vetting Regulations; that the vetting panel relied on hearsay evidence; and that the review panel exhibited open bias towards the appellant and failed to consider additional evidence presented, the Learned Judge addressed himself as follows:
- “The above is ample evidence that the Commission and the Vetting Panel gave the Petitioner an opportunity first in the initial panel hearing and on review to explain himself. There was no suggestion that he was not heard as the meetings took place from 9.07 am to 10.20 am indicative that he was not heard for a mere 7 minutes. On the review panel he was heard from 10.56 am to 11.20 am a total of 26 minutes with the singular issue of new evidence/material being the focus of the review panel. It would seem nothing turned on the review and it thus confirmed the removal for (sic) service. In the Court’s view there is nothing indicative of abridgement of the Petitioner’s Constitutional rights”
22. It is important to note that rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 confers an unfettered discretion in the Court to make such orders as it thinks fit on review and what amounts to ‘any other sufficient reason’. In this regard, we are certain that the learned Judge exercised his discretion appropriately. Moreover, the grounds adduced require a thorough review of the evidence provided and are also fit for appeal.
23. In the end, we find that the learned Judge properly addressed himself on the requisite conditions for allowing an application for review and also appreciated that the questions raised by the appellant could only be determined in an appeal and not in the application for review. Accordingly, there is no reason to justify interference with the learned Judge’s discretion. We find that the appeal lacks merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024

M.WARSAME

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JUDGE OF APPEAL

K.M’INOTI

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JUDGE OF APPEAL

DR K.I LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true Copy of the original



Signed

DEPUTY REGISTRAR

