



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OUKO (P), ASIKE- MAKHANDIA & MURGOR, JJA)

CIVIL APPEAL NO. 108 OF 2020

BETWEEN

JOYCE ARUS OWITI.....APPELLANT

AND

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

(An appeal from the Judgment and Decree of the Employment & Labour Relations court of Kenya

at Kisumu by (M.N. Nduma, J.) dated 7th March, 2019 in Kisumu ELRC Petition No. 21 of 2018)

JUDGMENT OF THE COURT

The appellant, Joyce Arus Owiti, (Joyce) was a police officer having been employed by the National Police Service Commission (*the Commission*) on 16th March, 2002 as Police Constable No. 81616 in the Office of the President, where she worked for over 16 years.

On 19th August, 2016 she was subjected to a vetting hearing for the traffic police officers that was held before a Vetting Panel at Golf Hotel, Kakamega. Prior to the hearing she had submitted her wealth declaration forms together with her M-pesa statement, tax clearance certificate, bank statements for the years 2012 – 2013 and copies of her professional certificates to the Commission. The Vetting Panel comprised of;

1. Johnson Kavuludi (Chairperson)
2. Mary Owuor Commissioner

During the vetting, Joyce explained that the source of her wealth was from poultry, dairy, sugarcane and groundnut farming, and two car wash businesses. With regard to the frequent and substantial M-pesa transactions on her two mobile phone lines, which were in excess of Kshs. 9 million, she stated that the amounts were in respect of the contributions from several merry go rounds in which she participated with other traffic officers and friends.

On 6th December, 2016, the Commission rendered its decision that removed her from service for the reason that she lacked integrity and financial probity as her bank statements disclosed substantial deposits of cash whose source could not be ascertained; that in particular Joyce,

- **“Could not give coherent and detailed explanations on the source of the bank deposits;**
- **Failure to give plausible explanations regarding the deposits reveal lack of conformity with her declared sources of income;**
- **Could not explain the nature of the business dealings that earned her close to Kshs. 9 million;**
- **Unable to provide tangible details that would account for the deposits into her accounts that ascertain her various business engagements”.**

The recommendation to remove her from Service was confirmed at a Commission Board meeting held on 6th December 2016 that was signed by all the Commissioners.

On 22nd December, 2016, Joyce sought to have the decision reviewed. And on 14th July, 2017, she attended the vetting review and was interviewed

by a panel comprising;

1. Johnson Kavuludi (Chairperson)
2. Ronald Musengi Commissioner
3. Murshid Mohammed Commissioner
4. Mary Owuor Commissioner

On 7th November 2017, the Commission upheld its decision to remove her from service having found that;

“... she was involved in timber, hotel and car wash businesses which she used to operate with her brother.

13. The Commission also noted that the officer did not tender any new evidence, facts or documents to support her narrative on the existence of the businesses, which may inform a contrary decision and is therefore of the view that the earlier decision against the officer still stands.”

Once again, the recommendation for removal was signed by all the Commissioners at a meeting of the Commission Board held on 7th November 2017.

Dissatisfied with that decision, Joyce together with other petitioners, filed a petition dated 10th March, 2018 in the Employment and Labour Relations Court challenging her removal where she sought for; a) A declaration that her fundamental rights and freedoms were violated; b) An order quashing the entire proceeding and the Commission’s decision declaring that she had failed the vetting and had been discontinued from the Kenya Police Service, including the decision made on 22nd August, 2017 upholding the earlier decision; c) An order for reinstatement to her post as a police corporal of Kenya Police Service as well as reinstatement of all her privileges including her salary; d) An order substituting the Commission’s decision with a declaration that there exists no material to find that she had failed vetting; e) Compensation for the violation of her fundamental rights and freedoms; f) Damages for unlawful removal from service and costs.

In a judgment delivered on 17th March, 2019, the trial judge dismissed the petition having found that Joyce was subjected to a fair hearing before the Vetting Board, where the rules of National Justice were properly applied; that she was provided with ample opportunity to prepare for the vetting and to make written and oral representation. On its part the Board adhered to its Constitutional, statutory and regulatory provisions by providing Joyce with adequate notice, information and the opportunity to explain and justify the material submitted before arriving at its decision. The trial court also found that Joyce was guilty of receiving unexplained large amounts of money on a regular basis and involvement in unexplained financial transactions and money exchanges with fellow traffic officers and civilians in the transport industry.

Joyce was once again aggrieved by the trial court’s decision and appealed to this Court on the grounds that the learned judge wrongly dismissed her petition yet she had proved to the required standard that the Commission had not meet the threshold set out in **regulation 4 (e) and (g)** of the **National Police Service (Vetting) Regulations 2013 (the Vetting regulations)**; in holding that she were afforded a fair hearing yet the vetting process had violated her Constitutional rights of natural justice; in upholding the vetting process when the proceedings were a nullity and void for being conducted contrary to **regulations 25 (1), (2), (4) and (7)** of the same regulations; and in failing to find that the entire vetting exercise was a trial by ambush.

Learned counsel **Ms. Imbaya** for Joyce and learned counsel **Ms. S. Muthiga** for the Commission appeared before us on a virtual platform owing to the Covid -19 pandemic. Both counsel informed us that they had filed written submissions which they would rely on entirely.

In her submissions, Joyce faulted the learned judge for failing to find that her Constitutional right to a fair hearing was violated since she was not notified of the case she was required to face or accorded an opportunity to respond to the questions raised during the hearing; that further, she was not provided with the reasons for termination of her employment. In addition, it was asserted, that she was not subjected to a fair administrative process in accordance with the laid down Constitutional, statutory and regulatory requirements because she was vetted by two panelists, but the decision to remove her was arrived at by seven commissioners, five of whom did not participate in the hearings.

Next, it was submitted that the Commission shifted the burden of proof to Joyce to explain the source of the deposits and transactions

reflected in her various M-pesa statements, and at the same time, it failed to produce any evidence that demonstrated her financial impropriety; that therefore the balance of probability requirement specified in **regulation 4** of the vetting regulations was not met.

In response, the Commission opposed the appeal and submitted that the appellant having submitted her wealth declaration forms, financial and other statements was fully aware of the vetting process that she was required to undergo. And that having supplied the material to the Commission, she was better placed to explain their contents. The case of **George Kirigi Bamba vs National Police Service Commission, Nairobi ELRC Petition NO. 87 of 2016** was cited in support of this contention. That furthermore, she willingly answered all questions asked in respect of her M-pesa Statements, which information was within her knowledge.

On the issue of whether the Vetting Panel was lawfully and legally constituted, it was asserted that **regulations 10** allowed for establishment of panels comprising members of the Commission and co-opted persons as the Commission deemed necessary to conduct such processes.

We have considered the parties' pleadings and submissions of counsel. It will be borne in mind that our duty on a first appeal is as set out in **Makube vs Nyamiro [1983] KLR 403** that;

“...a Court of Appeal will not normally interfere with a finding of fact by a trial court, unless it is based on no evidence, or on a misapprehension of evidence, or the judge is shown demonstrably to have acted on wrong principles.”

Upon considering the grounds of appeal, we discern that 3 issues fall for consideration.

- i) *Whether the appellant was subjected to a fair hearing;*
- ii) *Whether the Vetting Panel and the ensuing decisions were constitutional and lawful; and*
- iii) *Whether the case against the appellant was proved to the required standard.*

We begin by ascertaining whether Joyce was subjected to a fair hearing. **Regulation 4** of the Vetting regulations sets out the principles that guide the Commission in the conduct of vetting processes. **Sub regulations (d), (e)** and

(f) stipulate that;

“(d) The Commission shall be guided by the principles and standings of impartiality, natural justice and international best practice.

(e) The proof applicable shall be that of a balance of probabilities.

(f) Vetting shall be done in a transparent manner allowing the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision”

On the issue that the appellant was not subjected to a fair hearing, contrary to the requirements of **Articles 50 (1)** and **47 (1)** of the **Constitution** as read with **section 4** of the **Fair Administrative Actions Act 2015**, the trial court had this to say;

“51. The onus of proof is on the petitioners to demonstrate on a balance of probabilities that the respondent violated their human rights to a fair hearing and/or did not subject the petitioners to a fair administrative action in violation of Article 50 (1) and 47(1) of the Constitution as read with section 4 of the fair Administrative Act 2015.

53. The Court is satisfied that the commission provided adequate notice and information on the matters the petitioners were to be examined on during the vetting hearing, by the vetting board.

54. The court is satisfied that the petitioners had sufficient notice and opportunity to give explanation and justification in respect of the material they had been asked to provide in adherence to the commission.

55. The court is satisfied from the records before it that each of the petitioners provided answers to all the questions asked during the vetting. The court is satisfied that none of the petitioners requested for more time and/or adjournment of the scheduled sessions to prepare themselves further and/or to provide document that they required to give reasonable explanation to the matters asked regarding their financial probity and integrity.

56. The court is satisfied that the vetting board did not flout any Constitutional, statutory or regulatory provision guaranteeing rights or freedoms to the petitioners in the manner they proceeded in vetting the petitioners.

57. It is also the court's finding that the vetting board adhered to the Rules of National Justice in the manner they proceeded and in arriving at the decision in respect of each of the petitioners.”

It was not controverted that prior to the hearing, Joyce submitted her wealth declaration form together with her Mpesa statement, tax clearance certificate, bank statements for the years 2012 – 2013 and copies of professional certificates. It was also not controverted that she attended the hearing and was questioned on the documents and materials that she had submitted to the Commission for vetting purposes. This being information that she had herself supplied, meant that she was best placed to explain their contents. For its part, the Vetting Board

accorded her every opportunity to elaborate upon and clarify the information contained in the materials that she had presented. As observed by the trial judge, she did not object to the questioning, or request for additional time to prepare for the hearings.

After the vetting decision was rendered, she applied for and attended a review hearing before the Vetting Review panel. Once again, she was provided with the latitude to explain the source of her wealth. As such, the question of her having been ambushed during the process cannot therefore arise. Like the trial judge, we too are satisfied that she was accorded a fair hearing with the result that she cannot now be heard to complain that her rights to a fair hearing were violated.

On the next issue which was the allegation that the Commission's Decisions were signed by persons who were not part of the vetting or review process, we find that nothing turns on this as, under **Article 246 (3) (b)** of the **Constitution**, recommendations for removal of an officer are ultimately the mandate of the Commission and require to be signed by all seven members of the Commission's Board. In addition, **regulation 25** of the Vetting regulations is clear. It specifies that at the conclusion of the vetting process, the Commission shall make a decision on suitability of the officer for continued service, which decision shall be in writing signed by all commissioners and sealed with the commission seal. This allegation is therefore without basis.

The final issue was whether the learned judge was wrong in finding that the case against Joyce was proved on a balance of probabilities. In upholding, the Commission's finding, the learned judge concluded that Joyce, "...was removed on 6th December, 2016 for lack of financial probity. She received unexplained huge deposits in her bank account which were incommensurate with her declared and expected income. She was evasive on the nature of business that earned her lose to Kshs. 9 million".

The trial judge also found that she was guilty of receiving unexplained large amounts of money on a regular basis and involvement in unexplained financial transactions and money exchanges with fellow traffic officers and civilians in the transport industry.

As to whether on a balance of probabilities the learned judge was right in so finding requires an interrogation of the materials that were before the Commission to establish whether or not the weight of the evidence (or the burden of proof) was against Joyce.

In the case of **Miller vs Minister of Pensions (1947) 2 ALL ER 372**, Lord Denning J. explained the nature of the burden of proof thus;

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not".

According to the Hansard report, Joyce informed the Commission that she derived her income from farming, car washing, loans and merry go round contributions. But of significant interest to the Vetting panel were the frequent and substantial cash amounts that were transacted through her Mpesa lines from 2012 to 2015 which amounted to in excess of Kshs. 9 million. This prompted Dr. Antonina Okuta to ask, "Now when we look at your Mpesa transactions 2012 – 2015, this is a period of three years, you have transacted 9,387,000/= where is the source of this money?"

Joyce stated thus;

"The source of that money apart from the ones I declared for the farming, I said I also have a car wash. Car wash is where they wash vehicles at Kisumu which I did not declare by then since I opened it for my brother who had no job. So the car wash sometimes depends with the day. If you wash like 20 vehicles or 15 and then each car pays 150/= or 200/= you get like 3,000/= per day."

She also attributed some of the cash transactions to loans and merry go round contributions. Her long winding explanations notwithstanding, she was hard pressed to explain the source of the numerous cash deposits. This was particularly because, it could not be overlooked that there was nothing that connected the car wash businesses or merry go round contributions to the M-pesa cash with the transactions. It was also not possible to reconcile the large amounts of unexplained cash with the sources of income specified in her Wealth Declaration Form. Clearly, it was these acute discrepancies that were inconsistent with her explanations and her position as a police officer earning a monthly salary of Kshs 9,000 that led the Commission to find that she was lacking in integrity and financial probity.

The Chairman, Johnstone Kavuludi's conclusion in this regard was insightful;

"We are simply saying Madam when you see all these deposits, the transactions and then you look at Lady Joyce Arus Owiti income, put it together even with the loans. Take the loans, take the car wash, take the njugu, pick the milk, pick the chicken and the chicken's eggs, pick the sugarcane put it all together and you leave nothing, it does not come to 9 million shillings but significantly you have transacted beyond 9 million shillings".

When she went before the Vetting review panel, the central question for clarification was the source of her wealth. In particular, Commissioner Murshid Mohammed questioned her thus;

"...I want to address your conversation to a very small aspect that is the reason for your removal and what do you have to say that is different from what you said so that you justify that you were removed wrongly. So the first one is, you were removed because we could see substantial amount of cash which is not a problem, the problem is failing to explain where the cash is coming from, by either failing to give us proper sources, we still find that there is a disparity which you could not overcome and it is only that item that lends credence to our belief that, that money was earned improperly, in other words through corrupt means."

So as to connect the cash transactions with different businesses, Joyce produced a business permit alleged to be for one of the car wash businesses that was in the name of her brother, “*Andrew Ogutu Owiti*”. She also produced a recently signed agreement of January 2015 to show that she was in partnership in a timber business. After interrogating the documents, the Vetting Panel took the view that neither documents supported the existence of the business relationships as alleged, but more importantly neither document could explain the frequent and persistent cash transactions reflected on her M-Pesa statements.

Based on our reanalysis of the record, we are satisfied that the materials presented to the Commission established on a balance of probabilities that Joyce lacked integrity and financial probity, and the learned judge was right in upholding the Commission’s decision by finding that her claims were without merit. Joyce’s explanations as to the source of her cash, were implausible and unconvincing, with the result that the conclusions reached that she lacked integrity and financial propriety were well founded.

In sum, we find that the appeal is without merit, and is dismissed with costs.

The Judgment has been delivered in accordance with **Rule 32(2) of this Court’s Rules, W. Ouko JA** (as he then was) having been appointed a Judge of the Supreme Court.

Dated and delivered at Nairobi this 9th day of July, 2021

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR