



IN THE COURT OF APPEAL

AT KISUMU

[CORAM: MUSINGA, GATEMBU & SICHALE, J.J.A.]

CIVIL APPEAL NO. 83/84 OF 2018

VERONICA LEIRO SIMINTOI.....1ST APPELLANT

DOROTHY ADHIAMBO OKACH.....2ND APPELLANT

AND

NATIONAL POLICE SERVICE COMMISSION...RESPONDENT

An appeal from the judgment of the Employment & Labour Relations Court at Kisumu (M.N Nduma,J.) dated 7th March, 2019) in ELRC Petition No. 13 of 2018)

JUDGMENT OF THE COURT

The appellants, **Veronica Leiro Simintoi** and **Dorothy Adhiambo Okach**, filed petitions numbers 13 of 2018 and 18 of 2018 respectively in the **Employment and Labour Relations Court** (ELRC) at Kisumu. These two petitions and others were consolidated as they arose from the same cause of action and were heard and determined by **Nduma Nderi, J.** The genesis of the appellants' grievances in the ELRC are summed up in the judgment of **Nderi, J.**, as follows:

“The facts common in the petitions are that the petitioners were subjected to vetting for traffic officers held at Tom Mboya Labour College, Kisumu. The petitioners were found unfit to serve as police officers for various reasons provided in the hansard records of the proceedings and the report by the vetting board.

The petitioners filed review applications against the decision to remove them from police service.

The petitioners were called for vetting review and were subjected to further questioning by the review panel.

The review panel upheld the decision by the vetting panel to remove the petitioners from police service”.

The prayers of the appellants (the then petitioners) in the ELRC are again well encapsulated in the said judgment. They sought:-

“a. A declaration that the petitioners' human rights and fundamental freedoms have been violated.

b. An order quashing the entire proceedings and the decisions of the respondent declaring the petitioners failed vetting and removal from the Kenya Police Service.

c. An order for reinstatement of the petitioners to their respective positions held in the police service without loss of remuneration and privileges.

d. An order for damages for unlawful and unfair removal from service.

e. Compensation to the petitioners for the violation of their human rights and fundamental freedoms set in the petition.

f. Costs.”

On **7th March, 2019**, the learned judge dismissed the consolidated petitions. It is the said dismissal that provoked the two appeals before us.

On **11th May, 2020** when the two appeals came up via skype video link for hearing, **Mr. Wasuna**, learned counsel for the appellants applied to consolidate C.A. No. 83 of 2019 with C.A No. 84 of 2019 on the basis that the two appeals arose from the same judgment and that the grounds of appeal and the submissions thereon were identical. As there was no objection by **M/s Opiyo**, learned counsel for the respondent, we directed that the two appeals be consolidated, and that C.A. No. 83 of 2019 be the lead file.

In urging the appeal, **Mr. Wasuna** highlighted the written submissions dated **4th May, 2020**. He pointed out that although in the Memorandum of Appeal, he had listed 11 grounds of appeal, he opted to condense these grounds into 3 thematic areas. Firstly, **Mr. Wasuna** addressed us on the issue of whether there was a fair hearing in tandem with Article 47 of the Constitution which provides for fair administrative action. Counsel contended that the vetting exercise did not meet the threshold in Regulation 4(c) and (e) of the National Police Service (Vetting) Regulations 2013 which obligated the respondent to be guided by the values and principles of fairness as entrenched in the Constitution, including the right to a fair hearing. It was counsel's further submission that the appellants' 'trial' was an ambush that ran afoul the values and principles set out in Articles 10, 27, 47, 50 and 232 (1) (e) of the Constitution as the appellants were not informed of the specific or general charges against them, more so given the serious ramifications of the outcome. He was of the view that in spite of the fact that the vetting was not an adversarial process, nevertheless the appellants needed to have had prior knowledge of the charges against them. Reliance was placed on this Court's decision of *County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others [2015] eKLR* where it was stated:

"Impeachment or removal from office is a drastic step with serious ramifications on the career of an individual. It can easily consign an individual to professional oblivion...the fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it."

As for **Dorothy**, it was specifically submitted that she was unable to avail information/documentation during the vetting as her time was divided between mourning her sister and the responsibility of defending her job.

Secondly, counsel contended that the appellants were removed from service based on unproven accusations of impropriety.

Thirdly, it was the appellants' contention that the vetting panel was not properly constituted and hence the decision arrived at was unlawful. Reliance

on Regulation 25(1)(2)(4) and (7) of the National Police Service (vetting) Regulations which provides:

" 25. (1) At the conclusion of the vetting the Commission shall make a decision whether the officer vetted was found suitable and competent for continued service or was found to be unsuitable or incompetent;

2. Decisions of the commission shall be made by consensus or a majority vote;

4. Decisions shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the Commission

5. Where a Commissioner is unable to sign the decision, the reason shall be recorded, and the decision signed by the other Commissioners".

It was submitted that **Peter Musanga Pamba** who sat with **Johnston Kavuludi** during one of the vettings did not sign the decision/recommendations and that **Mary Owuor** who did not sit as a panelist signed the report. Reliance was placed on this Court's decision, *John Kingi Pamba vs. National Police Service Commission [2019] eKLR* wherein this Court underscored the irregularity of a report being signed by "**strangers**", who did not take part in the vetting process.

In opposing the appeal, **Miss Opiyo**, learned counsel for the respondent, highlighted the respondent's submissions dated **6th May, 2020**. It was the respondent's position that the appellants were removed from office due to lack of financial propriety; that the appellants had submitted their mpesa, wealth declaration forms and financial statements before the vetting; that the appellants were the sources of information upon which they were questioned on during the vetting and that all the questions were based on the information supplied by the appellants.

On the allegation that the decision was not signed by members who were in the interviewing panel, it was submitted that the respondent was mandated to establish panels with co-opted members as well constitute committees for purposes of vetting/review.

We have considered the record, the rival oral and written submissions, the authorities cited and the law. As this is a first appeal, we are mandated to re-consider the evidence, evaluate it and draw our own conclusions, whilst bearing in mind that we did not have the benefit of hearing or seeing the witnesses. See (*Selle vs. Associated Motor Boat Co. of Kenya & others [1968] EA 123*).

It is common ground that **Veronica** and **Dorothy** were both employees of the National Police Service. **Veronica** was enlisted on **16th March, 2002** whilst **Dorothy** was enlisted on **3rd May, 2003**. At the time of their vetting, each had put in a total of about 16 and 15 years of

service respectively. On **10th June, 2016** (prior to their vetting), each one of them was asked to submit their wealth declarations forms, mpesa statements as well as their bank statements for the years 2012 – 2013. Thereafter, the appellants underwent a vetting process, the outcome of which the duo were removed from service vide recommendations made on **16th December, 2016**. The appellants were aggrieved by the outcome of their vetting and they filed appeals/reviews which were heard by the respondent on **11th July, 2017** (in respect of **Veronica**) and on **17th July, 2017** (in respect of **Dorothy**). On **22nd August, 2017**, the respondent rendered its findings on the two (2) reviews and dismissed the appellants' appeals/reviews. This provoked the filing of the suits in the ELRC, the subjects of this appeal.

For a start, the respondent herein is a Constitutional Commission established under Article 246 of the Constitution. It is mandated to "... **exercise disciplinary control over and remove persons holding or acting in office within the service; ...**"

Article 244 of the Constitution spells out the objects and functions of the Commission. These are:

“

- a. strive for the highest standards of professionalism and discipline among its members;**
- b. prevent corruption and promote and practice transparency and accountability;**
- c. comply with constitutional standards of human rights and fundamental freedoms;**
- d. train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and**
- e. foster and promote relationships with the broader society”.**

On the other hand, Section 7 of the National Police Service Act provides as follows:

7. “1.(1) All persons who were immediately before the

commencement of this Act, officers or the employees of

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 Investigations Department, Criminal

shall upon Act become members of commencement of this the

Service in accordance with the Constitution and this Act.

- 2. Notwithstanding subsection (1), all officers shall undergo vetting by the Commission to assess their suitability and competence.**
- 3. The Commission shall discontinue the service of any police officer who fails in the vetting referred to under subsection (2)”**

It is on the basis of S. 7(2) of the National Police Service Act as shown above that the two appellants were subjected to the vetting process.

In respect of **Veronica**, the vetting proceedings were held at Tom Mboya Labour College on **11th June, 2016** after she had submitted her wealth declarations forms, bank and mpesa statements as well as the questionnaire she had been given to fill prior to the vetting. In respect of this meeting of **11th June, 2016** at Tom Mboya Labour College, the panelists were:

“ 1. Chairman Johston Kavulundi - Chairman

2. **Comm. Mary Owuor** - **Co-Chairperson**

3. **Mr. Peter Masanga Pamba** - **Assistant Inspector General**

4. **Dr. Antonina Okuta** - **KNCHR**

5. **Ms. Winnie Kitonga** - **Deputy Director of Communication**

During the vetting, **Veronica** was questioned as regards her financials in which **Veronica** stated that she had extra income from sale of water-melon which she was growing on 10 acres of land at Pekerra Irrigation Scheme and that she used to get between 150,000 to 200,000 per season. In respect of other monies on her mpesa, she explained that these were from her husband, a police constable who was also in the business of selling "**Ngombe na Mbuzi**". She added that she was also doing maize farming which was earning her Kshs. 300,000 per season and hence for two seasons, she would get Kshs. 600,000.00. Her sources of income notwithstanding, **Veronica's** account at Cooperative Bank showed massive deposits and at one time she banked 50,000.00 in six instalments. Further, her mpesa transactions revealed frequent transactions with other officers which she explained was on account of welfare and business deals but she had no proof to support this. The vetting panel found that **Veronica's** income did not correspond with the total sum of Kshs 6.8 million transacted via mpesa for the two years under consideration. The Commission found that **Veronica** did not give a plausible explanation on her mpesa transactions vis-a-vis her sources of income which were found to be incommensurate with her declared and/or expected income

On **6th December, 2016**, the board recommended that **Veronica** be removed from service for lack of financial probity. The report was signed by:

"(1) Johnston Kavuludi (Chairperson), (2) Mary Owuor (Commissioner)"

who are the two Commissioners who sat through her vetting. Thereafter, the report was presented to the Commission's Board and it was ratified by all the following Commissioners:

"Johnston Kavuludi (chairperson)

Joseph Boinnet (Commissioner)

Ronald Musengi (Commissioner)

Murshid Mohammed (Commissioner)

Mary Owuor (Commissioner)

Samuel Arachi (Commissioner)

Joel Kitili (Commissioner)"

On **27th December, 2016**, **Veronica** appealed against the decision of the board.

In a review meeting held on **11th July, 2017** at Skypark Westlands, her matter was re-considered. The following members of the respondent were present:

"1. Chairman Johnston Kavuludi - Chairman

2. Commissioner Murshid Mohamed- Commissioner/Co-Chairing

3. Commissioner Ronald Musengi -Commissioner/Co-Chairing

4. Commissioner Mary Owuor - Commissioner/Co-Chairing

5. Mr. Joseph Vincent Onyango - Commission CEO

6. Ms. Christine Rotich - Director Human Capital

7. Mr. Longinus Mulondo - Head of Vetting Secretariat

In their findings dated 22nd August, 2017, they concluded:

“9. The Officer, VERONICA LEIRO SIMENTOI, was initially vetted on 11th June, 2016. After being extensively queried, the Commission found the officer unfit to continue serving in the Service for the reason that she was found lacking integrity and financial probity for willfully misleading the commission about her engagement in alleged watermelon business contrary to regulation 18 and failing to plausibly explain the sources of her income especially the questionable mpesa deposits.

10. The officer was therefore removed on 6th December, 2016. On 4th January, 2017, she applied for a review of the decision made by the Commission, which found her unsuitable.

11. The officer’s application was admitted and he (sic) appeared for the vetting review hearing on Tuesday, 11th July, 2017 where he (sic) was interviewed by the members of the panel to establish any new issues the officer had for the Commission to consider in his (sic) review.

12. In her submission to the vetting review panel the officer stated that she had a water-melon business hence the deposits in her Mpesa and her banking regime; and that she was also into buying and selling of goats.

13. Upon further interview to establish the veracity of his (sic) narrative, she stated that her husband used to buy and sell goats from Kapenguria to Nairobi and they could make about Kshs 100,000 per month.

14. The Commission takes cognizance of the fact that the officer transacted 6.8 million in her mpesa and cash deposit of 1.2 million in her bank account which she is unable to wholly discharge its sources; her sources of income are still inconsummerate with the deposits in the mpesa/bank accounts.

15. The Commission also notes that the officer did not tender any new evidence, facts or documents that may inform a contrary decision and is therefore of the view that the earlier decision against the officer still stands.

DECISION

16. Taking these factors into account, the Commission finds that the officer VERONICA LEIRO SIMENTOI has failed the vetting review, and therefore upholds the decision to remove the officer from Service.”

The decision of the outcome of the review was signed by:

1. Johnston Kavuludi
2. Ronald Musengi
3. Murshid Mohammed and
4. Mary Owuor

It was then presented to the Board on 7th December, 2017 and the Board ratified the recommendation of the review panel. The members of the Board that ratified this report were:

1. Johnston Kavuludi
2. Ronald Musengi
3. Murshid Mohamed
4. Mary Owuor
5. Samuel Arachi and
6. Joel Kitili

Dorothy’s vetting interview was held on 30th August, 2016 at Hotel Kunste, Nakuru. The members of the vetting panel were:

- “ (1) Chairman Johnston Kavulundi - Chairman
(2) Commissioner Mary Owuor - Co-Chairing

- (
3 **Mr. Peter Wamoto** - **Director/D/CSS**
)
- (
4 **Mr. Bernard Kipkoech Ngetich** - **Law Society of Kenya**
)
- (
5 **Mr. Bernard Kibet Kurgat** - **KNCHR**
)
- (
6 **Ms Francisca Jelagat Kamuren** - **County Public Service Board**
)
- 7) **Mr. Francis Kiraithe** - **Assistant Inspector General**
- (
8 **Mr. Stephen Mbogo** - **Head of Vetting Secretariat NSPC**
)

During the vetting interview, **Dorothy** told the panel that she had rental income and income from farm produce, this being maize and milk income. She however did not know the breed of cow(s) that she milked. She also bought and sold maize. As for her mpesa transactions, she was questioned of a specific transaction where at one time, one **George Wekesa**, a fellow police officer sent her Kshs. 101,000.00 ten (10) times. According to her, this was money she had lent out to **George Wekesa** and the mpesa payments were refunds. The mpesa transactions also revealed that at one time, she sent Kshs 91,060.00 twelve (12) times to her colleague, **Monyenye Dennis** and a sum of Kshs 327,500.00 nineteen times (19) to another colleague by the name **Caroline Mwanji**. There were also 90 deposits into her account totaling to Kshs 1,834,850.00 by an agent known as Outech Investments. The deposits in her mpesa for the 2 years totaled to Kshs. 5,440, 854.00. The outcome of the vetting interview is that **Dorothy** was found unsuitable to serve as she was unable to explain the sources of the large and frequent transactions in her mpesa statements. She could also not explain remittances to and from her colleagues in the force.

Dorothy was dissatisfied with the outcome of her vetting and she applied for a review. The members of the panel that considered her review application on the **17th July, 2017** at Skypark, Westlands were:

- “ 1. **Chairman Jonston Kavuludi** - **Chairman**
2. **Commissioner Murshid Mohamed** - **Commissioner/Co-Chairing**
3. **Commissioner Ronald Musengi** - **Commissioner/Co-Chairing**
4. **Commissioner Mary Owuor** - **Commissioner/Co-Chairing**
5. **Mr. Longinus Mulondo** - **Head of Vetting Secretariat**
6. **Mr. Gabriel Obonyo** - **NSPC Chief Investigator”**

During the review process, **Dorothy** attempted to present a revised wealth declaration which had higher income than the previous one. According to her, at the time she filed her wealth declarations form, she was not having a clear mind as she had a sick sister who subsequently passed on and that she had failed to indicate that she owned rental house in Bondo which gives her Kshs. 60,000 per month. Her quest to re-file other wealth declaration forms was declined, which in any case did not justify her financial transactions. It was found that her mpesa transactions, cash deposits and transfers to other persons were well beyond her income.

Her review was dismissed vide a decision of **22nd August, 2017** signed by:

“**Johnston Kavuludi (Chairperson),**
Ronald Musengi (Commissioner),
Murshid Mohammed (Commissioner)

and Mary Owuor (Commissioner)”

The recommendation for her removal was presented before the Board on **7th November, 2017** and was signed by the following:

“Johnstone Kavuludi (Chairperson)

Joseph Boinnet (Commissioner)

and Ronald Musengi (Commissioner)

Mursid Mohammed (Commissioner)

Mary Owuor (Commissioner)

Samuel Arachi (commissioner) and

Joel Kitili (Commissioner)”.

The findings after the review were that:

“FINDINGS:

9. The officer, Dorothy Adhiambo Okach, initially appeared for vetting on Tuesday, 30th August, 2016. The officer failed the vetting exercise after the Commission found that the officer’s financial probity was wanting as she had failed to explain the sources of the large amounts frequently deposited into her bank and Mpesa accounts.

10. The officer applied for a review of the decision by the Commission, and her application was admitted for hearing to allow the officer to give further information on the issue.

11. She appeared for the vetting review hearing on Monday, 17th July, 2017 where she was interviewed by the members of the panel.

12. During the review hearing, the officer stated that at the time of (filling in) declaration, she was ill and also had a sick sister. She then stated that she had been called to re-fill the Wealth Declaration, but on her way to the station to do the same, her sister had passed on and she was therefore stressed during the entire vetting process.

13. She told the Vetting Review Panel that she had brought a Wealth Declaration during the Vetting Review hearing and wanted the same to be considered.

14. The officer told the Vetting Review Panel that she had failed to declare her maize business because the same had collapsed.

15. The Commission noted that the officer had declared higher income than what she had declared in her initial Wealth Declaration form; the officer did not offer plausible explanations on the incomes and why she had failed to declare the same before.

16. The Commission finds that the officer did not also provide documentation to support the explanations she gave.

17. The Commission therefore finds that the officer lacks financial probity.

DECISION:

18. Taking all these factors into account, the Commission finds that the officer DOROTHY ADHIAMBO OKACH has failed the vetting, and therefore upholds the decision to remove the officer from service”.

In our view, the questions relating to financial probity of the two appellants were based on the documents supplied by them. Clearly, the two appellants did not give plausible explanations of their sources of income. They struggled to explain additional sources of income which could not match their financial transactions. The huge, frequent deposits, transfer of moneys to other colleagues in the traffic department did smack of financial impropriety. A deposit of Kshs 101,000.00 ten times (in respect of **Dorothy**) and banking of Kshs 50,000.00 six times (in the case of **Veronica**) for instance, and which the 2 could not explain, as stated above, smacked of impropriety. Besides, they were both found to have handled huge sums of money not commensurate with their known sources of income in the period under review.

As regards the complaint that the appellants were not made aware of the charges before the vetting, we find that nothing turns on this. Each of the appellants had been given a questionnaire to fill in before the vetting. They had also been asked to supply their mpesa and Bank statements as well as their wealth declaration forms. The questions put to the two of them were based on what they themselves had presented to the vetting board. Being their own documents, they were best placed to explain them. Indeed, at the end of the initial vetting exercise,

Veronica thanked the Commission for the way the process had been carried out. She stated:

“I am so appreciative for your questions because they are relevant, no harassment that I have seen here Sir that is all Sir”

In our considered view, **Veronica** cannot now be heard to be saying that the process was an ambush and that she was not made aware of the charges to be levelled against her. We are in agreement with the trial judge’s finding that **Veronica** was questioned on documents that she herself had rendered to the Commission.

During the review of **Dorothy’s** matter, she attempted to file wealth declaration forms anew. The contents of the wealth declaration forms are based on one’s knowledge. It cannot be argued that when one is under extreme pressure, he/she forgets her sources of income, as **Dorothy** attempted to say.

In our view, the appellants were vetted based on information that they supplied to the respondent and as shown above, they failed the financial probity tests. Being dissatisfied with the outcome, they sought a review and in recognition of their rights to fair administrative action and fair hearing, they were given an opportunity for review.

Regulation 14 of the Vetting Regulations provides as follows:

“ (1) In vetting an officer, the Commission shall consider, assess and determine the suitability of the officer.

2. The Commission shall, in determining the suitability and competence of an officer, consider:

- a. whether the officer meets the Constitutional or other criterial required by law for recruitment and appointment of an officer;**
- b. the past record of an officer including conduct, discipline and diligence;**
- c. the integrity and financial probity of the officer and ...”**

The ELRC in dismissing the petitions stated:

“Clearly, all the petitioners were found guilty of receiving unexplained large amounts of money on a regular basis. They were also found guilty of involvement in unexplained financial transactions and money exchanges between themselves, fellow traffic officers and civilian in the transport industry yet all the officers worked in the traffic department and their key responsibility was to ensure law and order prevailed in the traffic industry so as to reduce the road carnage recently witnessed on the Kenyan roads. Only one officer was removed for failure to make truthful disclosure of information held by him.

Lack of integrity was correctly pinpointed by the commission as the key cause of non-compliance with traffic laws by road users resulting to the many accidents and loss of precious lives.

This is a matter that the commission could not take lightly and this court equally does not take this matters lightly. The responsibility placed upon the petitioners are sacred and the officers themselves must be beyond reproach in the course of their duties.

Sadly, all the petitioners failed the integrity test and were lawfully and fairly removed from service by the commission upon vetting by the vetting board.

The review applications filed by the petitioners lacked merit and were lawfully and fairly dismissed by the review board that heard them”

We respectfully agree with the judge.

As to the contention that the reports were signed by persons who did not take part in the vetting and subsequent review, we have outlined the membership of the panels both during the initial vetting and the subsequent reviews. It is clear that no “*stranger*” took part in the vetting and/or the subsequent reviews. As submitted by the respondent’s counsel, there was nothing wrong in respondent setting up committees and or panels. Regulation 10 of the vetting regulations states that:

“

1. The Commission may, in order to ensure expeditious disposal of matters, constitute such number of panels and comprising such persons as the Commission shall determine.

2. The Commission may establish panels comprising such numbers of its members and co-opted persons as it may deem necessary for the purpose of determining applications for review under regulation

33” [and that] ... section 13 of the National Police Service Commission Act which states that:

1. The Commission may establish committees for the better carrying out of its functions.
2. The Commission may co-opt into the membership of committees established under subsection (1) other persons whose knowledge and skill are found necessary for the functions of the Commission.
3. Any person co-opted into the Commission under subsection (2) may attend the meetings of the Commission and participate in its deliberation, but shall have no power to vote.”

In the two petitions before the ELRC, in paragraphs 16 (in respect of Veronica) and paragraph 22 (in respect of Dorothy), they averred that:

“the composition of the respondent was challenged as different members other than those who heard the petition during the vetting hearing are the ones who signed the decision”.

As stated above, we have painstakingly gone through the entire record and proceedings of the vetting and review panels and reproduced the membership of the various panels as well as the membership of the Board who ratified the findings of the initial vetting and/or reviews and we find no basis for this assertion.

On our part, we do not see any “*stranger*” who signed any of the recommendations, be it the outcomes of the initial vetting and/or the subsequent review and the contention that the decision and/or sittings were by “*strangers*” has no basis.

The upshot of the above is that we find no merit in the two appeals. They are dismissed with costs.

Dated and Delivered at Nairobi this 18th Day of December, 2020.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR