IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 149 OF 2017

BETWEEN

GEORGE KINGI BAMBA.....APPELLANT

AND

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

(An appeal from the judgment and decree of the Employment and

Labour Relations Court at Nairobi (M. Mbaru, J)

dated 30th March 2017

in

Petition No. 87 of 2016

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JUDGMENT OF THE COURT

By way of background, **section 7(2)** of the National Police Service Act decreed that all officers who were in service before 30th August, 2011, being the commencement date undergo vetting by the National Police Service Commission (the Commission) to assess their suitability and competence. This came in the backdrop of police reforms that were triggered by the tragic events of the post-election violence (PEV) of 2007–08 and the findings made by the Commission of Inquiry into Post- Election Violence (CIPEV) that indicted the police for having committed serious human rights violations. Police reforms therefore became an Agenda No. 4 item of the National Dialogue and Reconciliation Agreement and eventually promulgated in the Constitution of Kenya, 2010.

The objects and functions of the National Police in terms of **Article 244** include, the maintenance of the highest standards of professionalism; prevent corruption, promote and practice transparency and accountability; train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and to foster and promote relationships with the broader society.

In the discharge of its function the Commission, on the other hand is enjoined by **Article 246(3)** to observe;

> **"(b) the due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and**
>
> **(c) perform any other functions prescribed by national legislation".**

We shall revert to these provisions shortly suffice, however to note that in 2011 three important pieces of legislation were enacted, pursuant to the above **Article 246(3)(c)** to anchor the police reform process in law. The legislations were the National Police Service Act, the National Police Service Commission Act and the Independent Policing Oversight Authority Act. We have said already that under the National Police Service Act the Commission is vested with the power to vet serving police officers as a measure to reform the police service, to hold police officers accountable for abuses, and to support professionalism among its rank and file. The National Police Service (Vetting) Regulations, 2013 were promulgated to provide for the vetting procedure.

In fulfillment of **Article 246(3)** and **section 7(2)** of the National Police Act, the Commission conducted a vetting process and found the appellant, a Senior Superintendent of Police, serving as the OCPD Kirinyaga East Sub-County in Kirinyaga County, unsuitable to serve. He was removed from the service under **Regulation 32(1)** of the National Police Service (Vetting) Regulations, 2013.

After his request for a review of the above decision by the Commission was rejected, the appellant petitioned the High Court for;

> **"1. A declaration that the petitioner's fundamental rights and freedoms have been violated.**
>
> **2. An order of *Certiorari* do issue to quash the entire proceedings and the decision of the Respondent declaring that the Petitioner failed vetting and had been discontinued from the Kenya Police Service including the decision rejecting the petitioner's application for review.**
>
> **3. An order for reinstatement of the Petitioner to his post as a senior Superintendent of Kenya Police Service as well as reinstatement of all his privileges including his salary.**
>
> **4. An order substituting the respondent's decision with a declaration that there exists no material to find that the Petitioner had failed vetting.**
>
> **5. Compensation to the Petitioner for the violation of his fundamental rights and freedoms."**

The appellant contended that his vetting was not conducted in compliance with the law and regulations and further that the process was in violation of his constitutional rights and fundamental freedoms; that prior to the vetting interview the appellant was required to fill a vetting questionnaire and avail to the Commission in advance all the documents required for his vetting; that under **regulation 18(2)** the respondent was, on the other hand required to serve the appellant with any complaints or any adverse information it had which it intended to rely on so as to give the appellant time to submit written response to such adverse information; that at the time he was invited to appear before the Commission for vetting he had not been informed of any complaint or adverse allegations against him and was not served with any allegations that required him to give a response; that after the vetting on 19th February, 2015 and the review, the respondent by a decision on 9th October, 2015 found him unsuitable to continue serving merely for allegedly trading in maize meant for refugees, a matter raised during the vetting and for which he had not been warned; that the respondent failed to address the fact that the appellant had not himself engaged in the maize trade but his wife who sourced the commodity in the open market; that it was irregular for two commissioners, Joseph Boinnet and Samuel Arachi to have signed the decision when they were not part of the review panel; that the review hearing failed the natural justice test; that there was bias against him as the respondent became the accuser, investigator and judge of its own cause against the appellant; and that the respondent failed to abide by **regulation 9(2)(d)** and **28** and instead took into account matters and information not submitted before it by any party without giving the appellant sufficient notice over the same.

To all this the respondent's reply was that the appellant was taken through the due process and found to be unsuitable and incompetent to serve due to professional misconduct for engaging in selling of relief food; that when asked about the sources of frequent deposits and withdrawals of funds noted in his bank account he could not give a coherent and detailed explanation; that he was evasive, incoherent and contradictory when questioned about sale of relief food for profit; that the appellant failed to state how his rights were violated by the vetting panel; and that the 6 letters the appellant presented at the review stage to show that the sale of relief food was permitted were an afterthought.

After observing that the respondent's decision was informed by two adverse findings, that the appellant was unprofessional and unethical in repackaging relief food before selling and that as a law enforcer he was expected to curb vices of selling relief food rather than himself engage in such business, the Judge was of the view that the appellant had failed to explain sufficiently the source of Kshs. 800,000 deposited in his bank account; that in the process of vetting the appellant volunteered information about the sale of relief food and his involvement; and that the respondent could not have been expected to have been the one to supply him with the information and evidence to support the allegation. The Judge was satisfied that the appellant by his own admission confirmed that he was involved in the sale of relief food marked **"not for sale"** and was found to have engaged in such business contrary to the requirements of his office, bringing into question the appellant's integrity**.**

The following four paragraphs of the judgment summarize her conclusion of the issues raised in the petition.

> **"35. To the contrary, the Petitioner as the officer of the service responsible for law enforcement had a responsibility to ensure adherence to the law on the ground. It cannot be that the Respondent failed in its duties while he was the officer in charge bearing responsibility. On his own admissions and averments, I find the Respondent was under no duty to call witnesses, refuges, UN agencies or the local authorities in the Lagdera area to give further evidence.**
>
> **36. There may be unethical practices condoned by the UN agencies, WFP, local authorities such as the County Government, traders and social network of which the petitioner's wife was a beneficiary, but the Petitioner as the officer of the Service in the midst of all these persons and agencies, was the law enforcer. The position held by the Petitioner cannot be equated to that of the other entities and persons; the Petitioner was a disciplined officer in the service until he was lawfully removed from the service.**
>
> **39. The Petitioner at his vetting though with specific allegations against him offered to admit facts and gave more information on the same. He engaged in the sale of relief food that had been sourced from refugees, repackaged and sold through his wife/spouse. That he did so as everybody else, even to this date is doing such business.**
>
> **40. Engaging in an unlawful business on the basis that others are doing it or all else are involved including UN agencies and local authorities does not make it legal or lawful. Such justification only confirms impunity. The Petitioner as a law abiding**

and enforcing officer ought to have appreciated these basic principles and complied. Integrity is not only going by what the larger society demand. The perception on the individual is key. How an officer of the rank of the Petitioner conducted himself on the face of all the malpractices, sale of relief food, his wife engaging in such sale, he became a direct beneficially of unethical practices and conduct contrary to his call of duty..... I find the decision of the Respondent in removing the Petitioner from the Service was based on good cause and the same was justified. Such decision is hereby confirmed."

With that, the petition was dismissed with orders that each party would bear own costs.

The appellant was obviously aggrieved by that determination and now comes to this Court by way of first appeal. Although the appeal has been brought on 15 grounds, in our assessment the appeal only turns on three grounds; whether the appellant was accorded a fair hearing before the termination of his services; whether the grounds of misconduct warranting his removal were sufficiently proved; and whether the vetting panel was properly constituted. We shall consider all three grounds together.

We start our consideration of those grounds by reiterating our role as expressed in numerous decisions of the Court, the leading and one often cited being **Selle & another V. Associated Motor Boat Co. Ltd.& others** (1968) EA 123 where it was stated that;

"..... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally".

Because of its relevance and importance in the determination of this appeal we set out below the provisions of **section 7** of the National Police Service Act which explains the limits and objects of vetting as follows;

"7. (1) All persons who were immediately before the commencement of this 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 this Act become members of 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).

(4) The Commission shall, in consultation with the Cabinet Secretary, develop criteria and Regulations to guide the exercise of vetting of officers under subsection (1)".

By **section 6** of the National Police Service (Amendment) Act, 2014 the above **section 7** was amended by inserting a new subsection to read;

"(a) The Commission shall, in consultation with the Cabinet Secretary, develop criteria and Regulations to guide the exercise of vetting of officers under subsection (1)"

The National Police Service (Vetting) Regulations, 2013 envisaged in the above section were published in Legal Notice No. 218 of 2013, where the objective and purpose of vetting is expressed to be the building of confidence and trust in the National Police Service and to ensure that the Service complies with Chapter Six of the Constitution and the principles of public service as set out in **Article 232** of the Constitution and in the Public Officer Ethics Act.

It is common factor that when the appellant appeared before the Commission for vetting there was no specific complaint against him. It is also true that the vetting was based on documents submitted by the appellant where he offered to explain the source of some Kshs. 800,000 reflected in his bank statement. He explained that while serving as the OCPD in Lagdera in the year 2012 his wife traded in relief food, specifically maize which he admitted were supplied by the donors (World Food Programme) to the refugees in the camp, and which would be repacked and sold in open market in Lagdera; that although the original package was clearly marked **"not for sale"**, the commodity would be repackaged before being released for sale in the market; and that, since maize is not staple food for those in the camps, they were allowed, as a policy to sell it and purchase rice, oil, pasta wheat flour, vegetables and other food stuff.

The matter of sale of refugee relief food, as shown in the preceding paragraph came from the plenary session hence the appellant's complaint in the first ground of appeal that the principles of natural justice were not followed, in that he was not accorded sufficient advance notice that he would be expected to answer questions relating to refugees' relief food.

Articles 20 and **21** of the Constitution bind all State organs and all persons to respect, promote, observe, protect, and fulfill the rights and fundamental freedoms in the Bill of Rights. Any person whose right or fundamental freedom has been denied, violated or infringed, or is threatened has the right under **Article 22** to institute proceedings in court to review the action complained of.

In addition, the Constitution expressly recognizes the right to an administrative action that is fair, and stipulates that;

"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration".

In **Judicial Service Commission V Mbalu Mutava & Another,** Civil Appeal No. 52 of 2014**,** this Court expressed itself on the importance of **Article 47** of the Constitution as follows**:**

"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

The legislation envisaged in the foregoing Article, the Fair Administrative Action Act, was enacted in 2015 and under **section 4(3)** it is a mandatory requirement that;

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action". (Our emphasis).

In **Selvarajan V. Race Relations Board** [1976] 1 ALL ER 12 at 19 Lord Denning said that:

"…in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. 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. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only." (Our Emphasis)

In addition, the administrator is enjoined to accord the person against whom administrative action is being taken an opportunity to attend proceedings, in person or in the company of an expert of his choice; with no limitation to be **"represented by a legal representative in judicial or quasi-judicial proceedings".** See **section 4(5).**

The matter of sale of relief food having arisen at the vetting, and the appellant having not fully prepared with the answers and documents, it was unfair to condemn him without giving him a chance to demonstrate that indeed it was his wife and not himself personally who was trading. The vetting panel ought to have adjourned the proceedings to investigate whether it was a common practice allowed by the donors, as a matter of policy for the refugees to sell maize in order to buy other food stuff they needed. The panel ought further to have enquired whether the sale of repacked maize was acceptable, widespread and open; whether the practice offended the donors or any of their

regulations . The panel was clothed with enough power to ascertain all these as demonstrated in **Regulation 9** that gives the panel all the powers necessary for the execution of its functions, including the power to;

> **"(a) gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;**
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> **(b) interview any individual, group or members of organizations or institutions;**
>
> **(c) hold inquiries for the purposes of performing its functions under the Act or these Regulations; and**
>
> **(d) conduct investigations to establish the veracity of information received.**
>
> **(3) In the performance of its functions, the Commission and the panel—**
>
> **(a) may inquire on any issue in such manner as it deems fit**
>
> **......"** (Emphasis Ours)

This Court explained in the case of **Kenya Revenue Authority V. Menginya Salim Murgani,** Civil Appeal No. 108 of 2009 that:

> **"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."** (Emphasis Ours)

By **regulation 28** the respondent could utilize services of public officers, investigation agency of the Government or any expert for purposes of conducting an investigation on any matter alleged or otherwise brought to its attention.

What we are stressing is that the proceedings of the panel, by their very nature are inquisitorial as opposed to adversarial. That is why **Regulation 4(f)** makes it clear that the vetting panel would not be bound by strict rules of evidence; that the standard proof applicable was on a balance of probabilities; and that the vetting would be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that was to be used by the Commission to reach its decision; and that in case of a complaint or adverse information against an officer, the Commission would supply the former with a notice containing a summary of the complaint including any relevant documentation pertaining to that complaint and on which the Commission intended to rely in the process. It is from that summary of the complaint that an officer would be expected to respond within the period specified by the Commission in the notice, supplying all the relevant material facts and any relevant documents and information on which the officer wishes to rely in response to the complaint.

Though there was no specific complaint against the appellant as such, a similar procedure would have been adopted, if the panel was of the opinion that he had transgressed the limits of integrity.

Apart from being forthright in his testimony, disclosing the nature and details of trade in relief food, the appellant repeatedly explained that only on two occasions did his wife buy maize which was already repacked; that she bought maize not from the refugees but from traders carrying on the business lawfully in the local market; and that he was personally not involved in the trade.

After the first determination by the vetting panel removing the appellant from the office, he applied to the panel for the review of its decision. Armed with documents that he thought would exculpate him from the adverse conclusion on his character by the vetting panel, he presented six letters to show: that while he served in Lagdera refugees were permitted to sell maize supplied to them in food aid in order to buy certain basic commodities to supplement their diet; that the maize would be sold freely in open market; that the donors, police, Kenya Revenue Authority, Public Health officers, Kenya Bureau of Standards and the county government condoned and approved the trade; that to transport the commodity out of the county the police would issue a letter giving such authority to the trader, providing details such as the tonnage, registration number of the vehicle in which it was to be moved, the exact location where the maize was purchased and the destination. The letters proved, from the dates that even as the panel was conducting its proceedings the trade was on-going. At its disposal the respondent had many means as provided in the Regulations to ascertain the veracity of this information. The letters were on the official letter heads of the concerned organizations, signed and names of the authors disclosed.

In its determination of the application for review, the panel dismissed the evidence presented by the appellant insisting that it was not useful. In paragraph 13 of the determination the panel stated that;

> **"13. The Commission however notes that regardless of the fact that the refugees engage in selling the relief food given to them, a practice which is not prohibited by law, the officer's involvement is unethical in so far as he would be expected to maintain control over the abuse of the same."** (Our emphasis).

The panel blamed the appellant for failing to prove that he or his wife had similar letters; and that it was unacceptable for him, as a law enforcer to engage in an activity that would be viewed as criminal. The panel completely refused to accept without investigations and making an independent decision, that the trade was permitted and that it was the appellant's wife and not the appellant who was carried on the business.

Because of the likely outcome of the vetting process, once it appeared to the respondent that the appellant's fate depended on the explanation

regarding the sale of relief food, at that stage, the panel ought to have invoked the safeguards provided by the Constitution, the Fair Administrative Actions Act, the National Police Act and the National Police Service (Vetting) Regulations, by extending adequate time to him to present his case; and to obtain legal representation.

The learned Judge for her part made a conclusion that had no support in the evidence presented to the vetting panel, namely that;

> **"40. <u>Engaging in an unlawful business</u> on the basis that others are doing it or all else are involved including UN agencies and local authorities does not make it legal or lawful. Such justification only confirms impunity. The Petitioner as a law abiding and enforcing officer ought to have appreciated these basic principles and complied".** (Emphasis supplied).

It was unconscionable to use the answers innocently and honestly supplied to them by the appellant against him. That is why, as a matter of principle under **Regulation 29**;

> **"a statement made by a person in the course of giving evidence before the Commission in the vetting process shall not subject that person to, or be used against that person in, any civil or criminal proceeding, except in a prosecution for giving false evidence by such statement".**

When he set out to go before the respondent, the question the appellant least expected to dominate the entire vetting process was that of sale of relief food. His demeanor from the answers he gave left no doubt that he was not prepared with the necessary supporting documents to strengthen his case and secondly that he sincerely believed the trade was legitimate and sanctioned by the donors and government agencies. The panel failed the following test enunciated by **W.R. Wade & C.F. Forsyth** leading authors in their text ***'Administrative Law'*** 10th edition (2009) Oxford University Press, at page 433 where the enunciated the role of tribunals and other quasi-judicial bodies;

> **"Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case."**

We stress once again that it is a cardinal requirement of the rules of natural justice to be fair in all judicial, quasi- judicial and administrative proceedings which involve civil consequences to the parties. See: The Canadian Supreme Court case of **<u>Baker V. Canada (Minister of Citizenship & Immigration)</u>** 2 S.C.R. 817 6 where it was held that:

> **"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."**

Section 4(3)(e) and **(5)** of the Fair Administrative Action Act, 2015 enjoins administrators to adopt procedures that are expeditious, efficient, reasonable, lawful and above all, procedurally fair; that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision;

> **"4(3)(e) notice of the right to legal representation, where applicable;**
>
> **.....**
>
> **(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings".**

In paragraph 19 of the petition the appellant complained that his advocate, Guandaru Thuita was barred for accompanying him to the review proceedings, in breach of the above provisions. This averment, also repeated in the appellant's submissions has not been controverted.

The law and regulations governing the vetting process gave the vetting panel the discretion to balance and weigh several things in assessing the suitability and competence of an officer to serve in the police service. For example in **Regulation 7**;

> **"The Commission shall, while determining the competence and suitability of an officer, consider the officer's record, conduct and performance in the present position and in any other previous position".**

Even assuming that the appellant was personally involved in the business, it was accepted generally that it was not illegal; and that there were no previous allegations of misconduct against the appellant. If anything, it is apparent from the record, specifically the appraisal reports from 1992 to 2015, that the appellant had never had an adverse report. The panel ought to have considered this fact as well as the appellant's long service of over 35 years during which he had risen through the ranks in the police service to be a Senior Superintendent of Police and the OCPD of Kirinyaga County at the time of his vetting. The vetting panel adopted a procedure that did not meet the threshold of fairness; it violated the principles of proportionality in the terms defined by **De Smith, Woolf and Jowel,** in their text ***Judicial Review of Administrative Action, Fifth Edition (pp.594- 596)*** as:

> **"...a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which**

it pursues."

This was a classic case of using a sledge hammer to kill a mosquito.

In the final ground the appellant has complained that the learned Judge ignored his complaint regarding the composition of the vetting panel; and that membership of the panel kept mutating.

We have looked at the record of both the vetting and review proceedings. Although there were six members during the vetting, of those, only two signed the report. The other three who signed the report did not take part in the vetting exercise. On the other hand two members who did not participate in the review proceedings signed the final report yet seven members took part in the review hearing. Was it fatal that some members of the panel who did not participate in the vetting and hearing of the review application signed the final report?

The regulations direct the respondent at the conclusion of the vetting exercise to make a decision as to suitability and competence of the officer vetted. That decision is to be made by consensus or by a majority vote.

> **"(4) Decisions shall be recorded in writing, signed by <u>all Commissioners who decided the matter</u> and sealed with the common seal of the Commission.**
>
> **(5) Where a Commissioner is unable to sign the decision, the reason for inability shall be recorded, and the decision signed by the other Commissioners".**
>
> See **Rule 25.**

Although the Judge was addressed by both sides on this ground, she made no mention of it in the judgment.

Under paragraph 3 of the Second Schedule of the National Police Service Commission Act, the quorum of the meetings of the Commission (we believe including vetting) is required to have at least 5 members excluding the *ex officio* members of the Commission, namely the Inspector General and his 2 deputies. Under **Regulation (25)(4)** of the Regulations, only the Commissioners present can lawfully take part in the delivery of a decision.

Although we are satisfied that there was a quorum on both occasions, vetting and review, it was however irregular and unlawful to have "strangers" sign the report.

It was expected that the panel as constituted to vet the appellant from its inception to conclusion would be the same. Only those members who took part in the vetting could legitimately own the report. If they did not sign it and there is no explanation the inevitable inference to be drawn is that they did not concur with it. The procedural impropriety and the irregularity went to the jurisdiction of the panel and definitely vitiated it decision. See **<u>Eusebius Karuti Laibuta V.</u> <u>National Police Service Commission</u>,** H.C. Petition No. 79 of 2014.

The learned Judge, though alive to the gravity of the allegations and their potential to end the career of a fairly senior and long serving officer, failed however to appreciate that in removing the appellant the limits set by the Constitution and statute were not met. The appellant did not receive an administrative action that was procedurally fair.

With respect the learned Judge erred in her conclusion that the appellant repackaged relief food; and that the appellant and his wife purchased food from refugees; and that they engaged in unlawful trade without any independent proof.

She failed to balance the appellant's achievements against the unproven accusations of impropriety.

Accordingly, we allow this appeal by setting aside the judgment and decree of the court below dated 30th March, 2017 with the result that the prayers 1,2,3 and 4 in the appellant's petition dated 2nd June, 2016 are allowed. For the avoidance of doubt the appellant is reinstated, if he has not retired, to the position he served at the time of his vetting out with his salary and other benefits.

Each party to bear its own costs.

Dated and delivered at Nairobi this 6th day of August , 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR