



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, AZANGALALA & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 19 OF 2014

BETWEEN

REPUBLIC.....APPELLANT/APPLICANT

AND

THE CHIEF OF GENERAL STAFF.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(An Appeal from an order/Ruling of the High Court of Kenya

at Nairobi (Musinga, J) Dated 25th May, 2011

in

H.C.Misc. Civil Application No. 328 of 2009)

JUDGMENT OF THE COURT

The appellant **Johnson Njogu**, by a Chamber Summons dated the 8th day of June, 2009 sought leave of court to apply for orders of certiorari to remove into the High Court and quash the decision of the 1st respondent conveyed by one **E.K. Keitany** dated 18th December, 2008 purporting to retire the appellant from the Armed Forces with effect from the 8th December, 2008; an order of certiorari to remove into the High Court and quash the decision of the 1st respondent purporting to find the appellant guilty of a criminal offence allegedly committed at the Gilgil Regional Hospital; and an order of mandamus to remove into the High Court and reinstate the appellant to the Armed Forces in the same position together with all the benefits, privileges and entitlements including the removal of the entry from his qualification Card.

The substantive Notice of Motion dated the 26th day of June, 2009 was grounded on the grounds set out in the statutory statement and the verifying affidavit in which the appellant contended that the Commanding Officer’s decision was illegal, arbitrary, unreasonable and contrary to law, as relevant considerations were ignored while irrelevant considerations were taken into account. Further, that the appellant was not given adequate time to prepare for his defence; he was not provided with witness

statements before trial; his accuser and her witnesses were not availed to him for cross-examination; no nursing officer was called to testify as to the procedures used in conducting examination of an ante-natal mother; investigations into the offence were shoddy; the Commanding Officer was openly biased against him, made remarks that were adverse to his fair trial, yielded to pressure from his superiors to find the appellant guilty and also failed to consider his defence.

The motion was resisted by a replying affidavit deposed by **Lt.Col.Richard Onyari Nyakundi** on the 11th day of August, 2009 averring inter alia that the appellant admitted that he had received a copy of the charge sheet and abstract of the evidence not less than 24 hours prior to the hearing date and that he had been accorded sufficient time to prepare for his defence. He agreed in writing that he did not wish witnesses against him to give their evidence in person. Neither did he wish to give evidence on oath. Instead, he chose to hand in a statement in his defence without being sworn. He also said that he would accept the award of the Commanding Officer as he did not want to be tried by a Court Martial. The deponent denied being openly biased against the appellant during the trial. Neither did he make any negative remarks against the appellant. Nor was he under pressure from any source to convict the appellant. Further, that his decision was based on sound evidence tendered before him, inclusive of the appellant's defence.

No further affidavit was filed by the appellant to controvert the depositions in the replying affidavit.

The merit disposal of the above competing interests is what resulted in the impugned Ruling of D. Musinga, J (as he was then) dated the 25th day of May, 2011 dismissing the appellant's application for judicial review.

The appellant raised seven (7) grounds of appeal, subsequently compressed into two, namely:-

1. That the learned judge erred in law by holding that the Commanding Officer and the Reviewing Authority had jurisdiction to decide on the matter.
2. That rules of natural justice were breached in the course of the trial before the commanding and Reviewing officers.

In support of ground 1, learned counsel **Mr. Malelu** instructed by the firm of **BM Musau and Company Advocates** submitted that since the offences the appellant faced were akin to rape, these fell into the category of civil offences as defined in **section 2** of the Armed Forces Act (the AFA) and ought to have been prosecuted either before a civil court through a criminal process; or alternatively under the **section 69(1)** of the AFA before a Court Martial.

Turning to ground 2, **Mr. Malelu** reiterated the content of the statement and verifying affidavit that the summary proceedings trial upheld by the impugned ruling did not comply with the principles of natural justice, as not all relevant information regarding the commission of the alleged offences was tendered before the Commanding Officer; the appellant was not afforded an opportunity to confront and cross-examine the accuser and her witnesses; he was not given adequate notice to prepare for the hearing as the day he was given the notice was the same day he was to appear before the commanding officer for the hearing; **Rule 8** of the Armed Forces Regulations on admission of oral evidence was ignored. The condoms and gloves tendered in evidence were not examined to provide a nexus to their use by the appellant during the commission of the alleged offence; the resultant decision of the summary proceedings, was unreasonable and tainted with illegality as the appellant was demoted and then summarily dismissed, instead of being given a lesser punishment.

To buttress his submissions on lack of jurisdiction, the appellant referred to the case of, **In Re:The Matter of the Interim Electoral Commission [2011] eKLR** in which the court reiterated the principle in the case of **Owners of Motor Vessel "Lillians 'S'" versus Caltex Oil (Kenya Limited [1989] KLR 1** that jurisdiction flows from the law; and the case of **Peninah Nandako Kiliswa versus Independent Electoral and Boundaries Commission (IEBC) & 2 others [2015] eKLR** in which the court approved the case of **Pastoli versus Kabale Local Government Council and others [2008] 2 EA 300** for the

exposition as to what in law, amounts to an illegality, irrationality and procedural impropriety. An illegality arises where the decision making authority commits an error of law in the process of decision making. An irrationality arises where there is demonstration of gross unreasonableness in the decision taken, which no reasonable authority addressing itself to the facts and the law before it, could have made such a decision; while, procedural impropriety arises where there is a failure to act fairly on the part of the decision making authority.

To buttress the submission on breach of the rules of natural justice, the appellant referred to the case of **Law Society of Kenya versus Centre for Human Rights and Democracy and 13 others [2013] eKLR** in which the court cited with approval the case of **Animistic Limited versus the Foreign Compensation Commission and Another [1969] 1 ALL ER 208**, for the holding *inter alia* that:-

“Court would not hesitate to invoke their jurisdiction and intervene where the decision of a tribunal is shown to have been made in contravention of the principle on natural justice and good faith; has acted ultra vires its power; failed to do something in the course of the inquiry which is of such a nature that its decision was anullity; made its decision in bad faith; made a decision which it had no power to make; misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it; refused to take into account something which it was required to take into account; or based its decision on some matter which under the provisions setting it up, it had no right to take into account.”

The case of **Hipolito Cassiano Desouza versus Chairman and Members of Tanga Town Council [1961] EALR 377** for the holding *inter alia* that if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice. Such a decision must be declared to be no decision.

Learned counsel **Miss Ogama** for the 1st and 2nd respondents submitted that under **section 82, 83 and 84** of the AFA, both the commanding officer had the requisite mandate to adjudicate over the offences that the appellant faced and order his dismissal from the Force, while the reviewing officer had the, mandate to review the award and affirm his dismissal from the Force.

Further that there was no breach of the principles of natural justice as the appellant was accorded fair hearing within the ambit of the threshold set out in **Article 50** of the Kenya Constitution 2010; the pleadings filed were never objected to or discounted by the appellant; the Commanding Officer based his conclusions on the evidence tendered before him inclusive of the appellant’s defence and he also answered in the affirmative when the Commanding Officer inquired from him whether he had been accorded a proper opportunity to defend himself. Lastly that allegations of bias were not supported by the content of the record which demonstrates clearly that the Commanding Officer was lucid and exhibited exceptional emotion and intelligence when conducting the summary proceedings.

There was no reply to the respondents’ submission.

This being a first appeal, our duty is as was put more appropriately in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**, thus:

“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 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 is 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270.”

This court further stated in Jabane vs. Olenja [1986] KLR 664, thus

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870.”

In the course of the analysis, the learned Judge made observations that the appellant had not rebutted the averments made by the commanding officer in his replying affidavit and the annexures thereto. He then drew inspiration from the case of **Republic versus Judicial Service Commission Exparte Pareno [2004] 1KLR 203** and correctly set out the principles that guide the exercise of the discretion in deciding to grant or withhold the relief of Judicial review, namely; that judicial review is concerned with reviewing not the merits of the decision but the decision making process itself; that in judicial review proceedings, the court is not to act as an appellate court and neither can it interfere in any way with the exercise of any power or discretion which has been conferred on a tribunal or an inferior quasi-judicial body unless it is demonstrated that the tribunal or quasi judicial body acted unreasonably or did not comply with the rules of natural justice.

Applying the above principles to the rival pleadings and submission before him, the learned judge made findings *inter alia* that **section 82(4)** of the AFA together with the attendant Regulations made thereunder was clear proof that the charges the appellant faced were triable summarily by the commanding officer and if found culpable; the commanding officer could order a dismissal among other available penalties; that although the offences the appellant faced were akin to rape, they were properly laid under section 68 of the AFA.

Further, that contrary to the appellant’s complaints that there was a breach of the rules of natural justice, his failure to file a further affidavit to rebutt the respondents’ averments in the replying affidavit together with the annexures thereto left the respondents assertions therein already reflected above unshaken, all of which went to demonstrate existence of a fair process; that he believed the averments of the Commanding Officer as truthful when he denied being biased or acting under external pressure to find the appellant guilty or taking into consideration irrelevant considerations and leaving out relevant ones, and that his decision was based on the evidence tendered before him inclusive of the appellants’ defence; and lastly that the reviewing authority exercised its discretion properly under section 83 (1) (2) and (3) when he reviewed the commanding officers’ award and discounted the offence of having unlawful carnal knowledge of the patient, but left intact the offence of professional misconduct which was sufficient to found a conviction and form a sound basis for the confirmation of the appellant’s summary dismissal from the Armed Forces.

We have considered the above findings in the light of the totality of the record, and the rival submissions set out above. It is our view, that the issues that fall for our determination are the same grounds of appeal as compressed above by the appellant.

On want of jurisdiction, or otherwise, we agree with the appellants’, submissions that in law, jurisdiction is everything. Without it the adjudicating authority has no mandate to proceed further with the matter. It has to down its tools. Nyarangi,JA (as he then was) put it more succinctly in the case of the **Owners of the Motor Vessel “Lillian “S” versus Caltex Oil (Kenya) Limited [1989] KLR 1** as follows:-

“ Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

.....”.

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limits is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

The offences the appellant faced as were captioned in the impugned ruling were as follows:

- i. The appellant sexually assaulted the patient by inserting his penis into her vagina while making her believe that he was using an applicator to insert vaginal tablets, an act he knew or was expected to know to be an offence.***
- ii. The appellant, without consent of the said patient, tricked her that he would insert vaginal tablets into her vagina using a dummy penis but inserted his penis into her vagina an act he knew or was expected to know that it was an offence.***
- iii. The appellant acted against professional ethics by conducting vaginal examination to the said patient in the absence of any other nurse or a third party an act he knew or was expected to know to be an offence.***

The major reason as to why the appellant challenged his subjection to summary proceedings before the commanding officer, was because in his view, the offences he faced were akin to rape and therefore fell within the category of civil offences in terms of the definition given in **section 2** of the Armed Forces Act; and therefore triable either in a civil court through a criminal process or alternatively under **Section 69 (1)** of the AFA by a Court Martial, but with prior consent from the Attorney General. **Section 2** of the Act defines a civil offence as follows:-

“Civil Offence” means an offence under part XVI or an offence under some written law other than this Act, or an act or omission which if committed in Kenya would constitute an offence”

While **section 69 (1)** of the other hand provided thus:

“69. (1) Any person subject to this Act who commits a civil offence, whether in Kenya or elsewhere, shall be guilty of an offence and, on conviction by court martial-.....

.....

Section 68 provided thus:-

“Any person subject to this Act who is guilty of any act, conduct or neglect to the prejudice of good order and service discipline shall be guilty of an offence and liable, on conviction by court martial, to imprisonment for a term not exceeding two years or any less punishment provided by this Act.”

Rape is an offence recognized under section 3 of the Sexual Offences, No. 3 of 2006. Although it is not specifically provided for in part XVI of the Armed Forces Act, as a civil offence, it definitely falls into the category of offences prescribed under “any other written law” (The Sexual Offences Act) as defined in **Section 2** of the Armed Forces Act. In view of the content of sections 2,68 and 69(1) the 1st respondent

had an election to proceed against the appellant either under **Section 68** summary procedures or under section 69 (1) Court Martial procedures. According to the 1st respondent, they elected to adopt the **Section 68** of the Act, summary proceedings with the consent of the appellant as he declined to be tried by a court martial.

Reliance was also placed on the attendant Armed Forces (Summary Jurisdiction Regulations These were promulgated and revised vide **L.N. Numbers 254/1969; 145/1985; and 553/88** respectively. Regulation 3(1) defines a commanding officer of an accused person as the officer who has powers of command over the accused and one who is in immediate command of the unit to which the accused belongs or is attached and who is directly responsible in disciplinary matters to an officer empowered to convene a Court Martial to try an officer or serviceman belonging or attached to that unit. There has been no contention that the commanding officer who conducted the summary proceedings against the appellant was not his commanding officer. This is the officer who deposed the replying affidavit asserting that the appellant voluntarily submitted himself to the summary proceedings before him as he declined to face a Court Martial. These are averments which the learned judge observed and rightly so that they had not been controverted by the appellant. It is therefore our finding as did the learned judge that the appellant voluntarily submitted himself to the summary proceedings he was subjected to, and, second, that the Commanding Officer who conducted those proceedings was the appellant's own Commanding Officer.

Regulation 5 of the above regulations specifically makes provision for offences provided for in the various sections of the AFA that fell outside the mandate or the jurisdiction of a commanding officer. **Section 68** under which the offences the appellant faced were laid is not one of the provisions exempted from the jurisdiction of a Commanding Officer. We therefore affirm the learned Judge's finding that the commanding officer was properly seized of the matter.

The offences that the appellant faced having been laid under **section 68** and not **section 69(1)** as civil offences, it follows that the punishments for civil offences that a Commanding Officer could award under the schedule to the Regulations made thereunder were not available to the Commanding Officer who presided over the appellants' summary proceedings. The said Commanding Officer had no option but to fall back on to the range of punishments provided for in **section 82(4)** of the Act.

Under **section 82(4) (a)**, dismissal from the Armed forces is one of the punishments that could be awarded. The learned Judge was therefore right when he held that the punishment awarded was a lawful punishment notwithstanding, that there were other minor or alternative punishments that the commanding officer could have awarded, but which he chose not to award. As put by the learned judge, the mandate of Judicial review is not to interrogate the merits of the resultant decision, but the process leading to the making of that decision, which process the learned judge held and rightly so that it was regular, which finding we affirm as the same was within the law as demonstrated above.

Turning to the mandate of the Reviewing Authority, **section 83(1)** of the AFA provided that where a charge has been dealt with summarily and has not been dismissed, the reviewing Authority may at any time review the findings, or the award. **Section 83(4)** defines who a Reviewing Authority is. It provides:-

“In this section “the reviewing authority” means

- a. Any officer superior to the officer who dealt summarily with the charge; or***
- b. The commander; or***
- c. The Chief of General staff, if the commander was involved in the summon proceedings' or***
- d. The defence council”***

The powers of the Reviewing officer are set out in **section 83(2) and (3)**.

These include the power to quash the resultant award; to declare an award invalid, too severe or too

lenient, and to vary the award, with the only attendant caveat being that where such variation is likely to be to the officers' disadvantage, then such an officer should be accorded an opportunity of being heard before the intended adverse variation is effected.

Section 83(3) (d) provides *inter alia* thus:-

“The authority may vary the award by substituting such punishment or punishments as the authority thinks proper, being a punishment or punishments which could have been included in the original award”

This provision donates to the reviewing authority the right to exercise its discretion as it deems fit. The power to interrogate the merits of such exercise of discretion was outside the realm of the Judicial review process. All that the learned Judge was obligated to do when the exercise of the right to review of the reviewing authority's discretion was called into question, was to determine whether the exercising authority was properly seized of the matter. The learned Judge found that he was properly seized of that mandate under **section 84** of the Act. The appellant's complaint against the exercise of the review authority's mandate was limited to his assertions that offences akin to rape which are in effect civil offences, found their way before a Commanding Officer under **section 68** of the Armed Forces Act, instead of a Court Martial under **section 69(1)** of the same Act, or alternatively, before a civil criminal court and should therefore have been rejected by the reviewing authority.

The reviewing authority severed and rejected count (i) and (ii) which related to sexual assault against a patient. In our view, the power of severance of offences is inbuilt in **section 84**. By discounting counts (i) and (ii), all that the reviewing officer did was to sever offences not falling under **section 68** and discount them. As to the propriety of the reasons underlying the election to so sever, this was beyond Judicial review, as Judicial Review mandate as already pointed out above was simply to interrogate whether the said severance was within the reviewing authority's power or not. We also find that since the appellant had not been awarded a favourable punishment capable of being varied or revised to his disadvantage, there was no obligation on the part of the reviewing authority to accord him audience before deciding either way.

The discounting of counts (i) and (ii) left intact count (iii). Though we have no doubt this offence too flowed from the alleged sexual assault on a patient, its framing leaned towards professional misconduct on the part of the appellant as a member of the disciplined Forces in the cause of duty as per the ingredients of the said section. It was therefore properly founded in **section 68**. There is no requirement in **sections 82, 83 and 84** that one offence cannot sustain summary proceedings before a Commanding Officer. It is therefore our view, that count (iii) was sufficient to sustain both the summary and the review proceedings.

As the above assessment disposes of all the want of jurisdiction issues raised by the appellant. We now turn to ground 2. As already observed above, the assertions made on appeal by the appellant on this ground and which we have already highlighted above are the same as those he laid before the learned Judge. As rightly observed by the learned Judge, these were countered by the replying affidavit, and annexures thereto, which replying affidavit was never rebutted by the appellant. One of the annexures to the replying affidavit which appears to be a questionnaire, demonstrates that the appellant responded in the affirmative that he was availed charges not less than 24 hours to the hearing, and also raised no objections to the said charges; that he admitted that he had been accorded adequate time to prepare for his defence; that he had agreed in writing that it was not necessary for his accusers to attend the hearing for cross-examination and that he had been availed their witness statements.

Further that he elected to hand in a written statement of defence as opposed to giving sworn testimony and be subjected to cross-examination. He also elected not to give any further evidence besides what he had handed in as his written defence. He also willingly submitted himself to trial by way of summary proceedings as it was noted therein that he declined to be subjected to a trial by a Court Martial. There is also no mention that he requested for a nursing officer to testify on his behalf, on the applicable procedures when examining an ante-natal mother and the request declined.

The failure to controvert all the above, negates allegations of breach of rules of natural justice, bias, yielding to external pressure, failure to consider all the relevant considerations and alleged unreasonableness of the resultant award.

The upshot of all the above is that, we find no merit in the appeal. It is dismissed. Since the appeal arises from a dispute between an employer and employee, we order each party to bear its own costs both on appeal and the court below.

The judgment has been delivered under **rule 32 (2)** of this Court's Rules on account of the Retirement of Hon. Mr. Justice Festus Azangalala, JA from the service.

Dated and Delivered at Nairobi this 28th day of April, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR