IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 102 OF 2015

BETWEEN

BENJAMIN KIPKURUI CHEPWONY.......................1ST APPELLANT

JOSEPH KIPLAGAT SANG....................................2ND APPELLANT

LEDAMA KOILA ……………....................……......3RD APPELLANT

SHADRACK KIPLAGAT KIRUI…………................4TH APPELLANT

VERSUS

THE PUBLIC SERVICE COMMISSION.......……1ST RESPONDENT

THE PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY…............................2ND RESPONDENT

THE HON. ATTORNEY GENERAL ....….....3RD RESPONDENT

(Appeal from the Ruling and order of (Musinga J.), dated and delivered at Nairobi on the 31st day of January 2011 in the Original Nairobi HCC Misc Application No. 847 of 2007 (JR) in HCC MISC. Appl. No. 847 of 2007)

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JUDGMENT OF THE COURT

This is an appeal from the ruling and order of the High Court Musinga J., (as he then was) in Nairobi HCC Misc. Application No. 847 of 2007 dated 31st January, 2011. The backdrop to this appeal is as follows. The four appellants were civil servants working as Chief/Assistant Chiefs deployed in various locations within the then Trans Mara District under the Provincial Administration, they were Public Service Commission employees. The appellants faced accusations of neglecting duty and other misconduct that were stated in the letters to show cause that were addressed to them by the District Officer on behalf of the Permanent Secretary Provincial Administration. The appellants responded to those allegations but their services were eventually terminated; the 1st and 4th appellants were retired in public interest while the 2nd and 3rd appellants were terminated summarily with no benefits.

They filed suit by way of Judicial Review, seeking orders in the nature of *certiorari* to bring to the High Court for purposes of quashing, letters addressed to them on various dates that purported to dismiss/retire them from public service. The 1st appellant, Benjamin Kipkurui Chepwony, was Chief of Emurua Dikirr location of Kiridon Division, the 2nd appellant, Joseph Kiplagat Sang was Assistant Chief of Kapsosian sub-location of Emarti location, the 3rd appellant, Ledama Koila was the Assistant Chief of Ntulele Sub location Kapsosian Sub location and the 4th appellant, Shadrack Kiplangat Kirui was the Assistant Chief of Mogondo Sub-location of Murkon Location all within the former Trans Mara District.

The representative suit was filed on behalf of all the four appellants. It was supported by a verifying affidavit by the 1st appellant sworn on behalf of all his co-applicants. Briefly stated, all the appellants received letters addressed to them on various dates which were written on behalf of the District Commissioner Trans Mara demanding that they show cause for neglecting duty and aiding and abetting clashes and cattle rustling in their respective areas. The 1st appellant claimed that he received a letter dated 5th November, 2004 in which he was accused of negligence and laxity while on duty; failing to report tribal clashes with intent to fanning it and failing to recover stolen animals; he replied to those allegations vide his letter dated 17th January 2005; denying the allegations of clashes or incidences of stolen animals in his location. According to him, the clashes occurred within Emerti Location which was under a different Chief and to the best of his recollection, no disciplinary action was taken against the said chief.

The 1st appellant further explained the letter of 5th November 2004 was delivered to him after undue delay; upon responding to it, he did not hear anything regarding the complaints for two years until he received a letter dated 21st January 2005 authored by a Mr S.O Ouko on behalf of the Provincial Commissioner, Rift Valley Province interdicting him from service; eventually, by a letter dated 28th June, 2007 the 1st appellant was retired from civil service in public interest. He contended that no reasons were given for the dismissal/retirement thus terming it unfair and unreasonable.

The 2nd appellant, Joseph Kiplagat Sang was the Assistant Chief of Kapsosian sub-location of Emarti location. He received a letter dated 3rd September 2004, accusing him of gross misconduct and failing to prevent the clashes from taking place in his area and in failing to report incidences of clashes where the youth within his area attacked innocent residents and stole animals. He was accused of failing to recover the animals even after the footprints were traced to his area of jurisdiction. Though 2nd appellant responded to the said letter and denied that any clashes took place in his area of work, he was nonetheless served with another letter dated 21st January, 2005 interdicting him from exercising the functions and powers of the office with effect from 28th December 2004.

In the said letter, it was indicated that during the period of interdiction, he would receive one half of his salary, he was directed not to leave his duty station except with the leave of the District Officer. On the 28th June, 2007, the 2nd appellant's services were terminated through a letter signed by one D.O. Ogutu on behalf of the Permanent Secretary, Provincial Administration and Internal Security dismissing him from public service with effect from 24th April 2007 on account of gross misconduct. He was given the liberty to appeal to the Public Service Commission as per Public Service Commission Regulations within 42 days of the said letter.

The 3rd appellant, Ledama Koila was the Assistant Chief of Ntulele Sub location Kapsosian Sub location, received a letter dated 13th March, 2006 accusing him of gross misconduct which were tabulated in the said letter and particular incidences where he was accused of failing in his duties were cited. He was interdicted in the said letter which also gave him 21 days to show cause why he should not be dismissed for what was termed gross misconduct. The letter was authored by D.O Ogutu on behalf of the Permanent Secretary Provincial Administration and Internal Security. The 3rd respondent wrote his defence vide a letter dated 10th April, 2006 denying all the allegations, in particular, he denied there were acts of clashes in his sub location or acts of cattle rustling. The 3rd appellant was dismissed from service by a letter dated

2nd July, 2007. No reasons were cited for his dismissal. The said letter merely stated that he was confirmed in appointment but dismissed with effect from 10th August, 2006.

As for the 4th appellant, Shadrack Kiplagat Kirui, he was the Assistant Chief of Mogondo Sub Location, Murkan Location in Kirindon Division. He too received a letter dated 2nd July, 2007 retiring him from public service in the public interest. The retirement took effect from 1st September, 2007. He claimed that the said retirement was unwarranted and unjustified because he had neither been given any prior warning, nor was the said letter signed by D.O. Ogutu.

Premised on the aforesaid grounds, the appellants filed an application dated 1st August, 2007 seeking reliefs of Judicial Review nature to wit:-

> **"1. An order of certiorari to bring into this honourable court and quash the decision of the 1st respondent conveyed by one D.O. Ogutu on behalf of the 2nd respondent dated 28/6/2007 purporting to dismiss the 1st applicant from the Public Service with effect from 24th April, 2007 on account of gross misconduct.**
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> **2. An order of certiorari to bring into this honourable court and quash the decision of the 1st respondent conveyed by one D.O. Ogutu on behalf of the 2nd respondent dated 28/6/2007 purporting to dismiss the 2nd applicant from the Public Service with effect from 10th August, 2006 on account of gross misconduct.**
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> **3. An order of certiorari to bring into this honourable court and quash the decision of the 1st respondent conveyed by one D.O. Ogutu on behalf of the 2nd respondent dated 2/7/2007 purporting to retire the 3rd applicant in the public interest with effect from 1st September, 2007.**
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> **4. An order of certiorari to bring into this honourable court and quash the decision of the 1st respondent conveyed by one D.O. Ogutu on behalf of the 2nd respondent dated 2/7/2007 purporting to retire the 4th applicant in the public interest with effect from 1st September, 2007.**
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> **5. That the honourable court be pleased to give further orders and other reliefs as may be deemed just and expedient to grant.**
>
> **6. That cost of and incidental to the application be provided for."**

The same was expressed to be on grounds that;

> **"a. The decisions were made in breach of the rules of natural justice.**
>
> **b. The decisions were illegal, arbitrary and unreasonable.**
>
> **c. Mr. D.O. Ogutu is not a designated officer within the meaning of the Public Service Commission Regulations and hence his actions are ultra vires.**
>
> **d. The power purportedly exercised by D.O. Ogutu on delegation from the Permanent Secretary was not delegable.**
>
> **e. The respondents are subject to the supervisory jurisdiction of this honourable court.**
>
> **f. The decisions to dismiss and/or retire the applicants in the public interest were based on irrelevant considerations.**

g. The 1st respondent (The Public Service Commission) acted ultra vires its powers under the Public Service Commission Regulations in making the decisions purporting to dismiss and/or retire the applicants in the public interest."

The matter was opposed; Bernadette Mwihaki Nzioki swore a replying affidavit on 5th October, 2009 on behalf of the 1st respondent. The 1st respondent admitted that indeed all the appellants were dismissed/retired from public service. The 2nd and 3rd appellants for gross misconduct while the 1st and 4th in public interest due to misconduct. The 1st respondent posited that the terminations were done after following the duly set out regulations and the procedure to show cause was done within the provisions of **section 106(12)** of the retired Constitution.

According to the 1st respondent, the rules of natural justice, requiring a party to be accorded a fair hearing to state their cases were observed in dealing with the appellants.

The matter fell for hearing before Musinga J., (as he then was) who, in a considered ruling delivered on 31st January, 2011, found no merit in the application and dismissed it with costs, thus precipitating this appeal. In the instant appeal, the appellants contend that the learned judge erred in;

a. Finding that the appellants were given an opportunity to be heard;

b. Restricting the rule of natural justice which demands that justice should not only be done but seen to be done;

c. Failing to appreciate changes in jurisprudence when he relied on the decision in **East African Community v. Railway African Union (Kenya & Others) 1973 E.A 529**, thereby denying the appellants their legitimate expectation;

d. Misapplying the provisions of regulation 39 of the Public Service Regulations 2005;

e. Finding the appellants were provided with the substance of the complaints against them as per Regulation 40 of the Public Service Regulations 2005;

f. Lastly, the learned Judge was faulted for misapprehending the evidence and the law thus occasioning a miscarriage of justice.

During the plenary hearing of this appeal, Mr. Oguttu, learned counsel for all the appellants submitted that his clients were never given the substance of the complaints of misconduct levelled against them; the details of allegations were not discernible with certainty and so was the nature of the complaints. Further, the learned Judge was faulted for failing to address the purport of Regulation 39 and 40 of the Public Service Regulations. Moreover, counsel stated that following the promulgation of the new Constitution in 2010, it was incumbent upon the learned Judge to take into consideration the aspect of the broad principles that entrench a right to a fair hearing and the fundamental right to work and in particular to disregard the old position laid out in the case of **East African Community v. Railway African Union (Kenya & Others) 1973 E.A 529** which tended to give an employer a right to terminate an employee without giving reasons.

According to counsel for the appellant, the learned Judge ought to have considered that the 4th appellant was never served with a notice to show cause, thus he was not given an opportunity to be heard; further, no reasons were given in his letter of termination pursuant to the provisions of the regulations. Lastly, counsel pointed out that regulation 40 requires a report of the findings by the Public Service Commission to have been served on the appellants by a designated officer and the person who signed the termination letters, was himself exercising delegated power, which could not be delegated further.

On the part of the respondent, Mr Bitta, learned counsel, opposed the appeal submitting that the appellants were accorded a fair hearing; that the letters communicating the allegations are contained in the

replying affidavit. Counsel supported the decision by the learned Judge, as in his view, the learned Judge arrived at the correct finding that there was no automatic right for an oral hearing under the law; supporting the authority in **East African Community V. Railways African Union** (supra) relied upon by the Judge as good law. Responding on the provisions of Regulation 40, counsel made reference to Regulation 92 of the Public Service Regulations and concluded by stating that the signing of the letters of dismissal was never delegated. Counsel urged us to consider that judicial review orders are discretionary by nature and the parameters within which this court's interference can be invoked were not at all demonstrated thereby sealing the fate of the appeal which only lies in its being dismissed.

As demonstrated from the summary above, we have taken time to appreciate the background information and ruling, this being a first appeal; we appreciate our responsibility is to analyse and re-evaluate the evidence on record afresh and reach our own conclusions bearing in mind that although no *viva voce* evidence was adduced in the matter, for the trial Judge to observe demeanour of witness. It is the trial court that had the advantage of even calling the deponents of the affidavits (if need be) to clarify an issue(s). (See **Selle v Associated Motor Boat Co. [1968] EA 123**). In **Kiruga v Kiruga & Another [1988] KLR 348**, where this Court observed that:-

> "**An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution**."

That said, the main issue for determination will be whether the appellants' right to be heard was violated, and if so, the remedy thereof. It is not in dispute that by virtue of the several letters stated earlier, the 1st, 2nd and 3rd appellants were each given a detailed letter informing them of the reasons why disciplinary action was taken and a notice to show cause was issued to which each one responded. In fact, they each wrote detailed responses to the letters, denying the allegations levelled against them and none of the appellants denied having received letters that gave a detailed account of the alleged acts of misconduct. However, that was not the case for the 4th appellant.

This is an appeal against an order made in judicial review proceedings and perhaps there is need for us to restate that the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application was made, but the decision making process itself. It is trite in judicial review, the High Court is not concerned with the merits of the decision by a public body but rather undertakes a consideration of the process involved when the decision under review was made. This much was stated in **Ransa Company Ltd vs. Manca Francesco & 2 others [2015] eKLR** -

> **"As we all appreciate, a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties."**

The said jurisdiction was further expounded by Lord Green M.R. in the often cited case of **Associated Provincial Picture House vs. Wednesbury Corporation [1914] 1 KB 222** as follows**:**

> **"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."**

Specifically, on *certiorari*, it was stated by this Court in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** Civil

Appeal No. 266 of 1996 that the purpose of c***ertiorari*** is to:

> **'…quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.'**

Were the appellants accorded fair hearing in the instant case? As stated earlier, the 1st, 2nd and 3rd appellants were well aware of the complaints facing them, which they adamantly refuted. The letters specifically spelt out the allegations of neglect of duty by failing to inform the relevant authorities. These incidences were indicated as youth from their locations attacked innocent people and failing to recover stolen cattle after the footmarks were traced up to their locations. All the appellants were served with notice to show cause and the complaints against each one of them were outlined therein so was the disciplinary action that was being contemplated. Each of the appellant responded to the allegations. We also need to mention that each of the appellants was given 42 days within which to prefer an appeal against their employer's decision as per the Public Service commission Regulations. However, none preferred an appeal, as a result, the appellant forfeited their right of appeal. As regards this ground of appeal, we agree with the findings by the learned trial Judge that the appellants were given a hearing and the 1st respondent considered their responses which were dismissed and the punishment that was contemplated in the show cause letter was implemented.

The 4th appellant was not served with the notice to show cause. Although there was deposition that he was not served, and the respondent had an opportunity to provide evidence of such service which was not done; we find merit in his appeal. The other reason why we part company with the learned trial Judge was, whereas all the appellants faced similar allegations, two of the appellants were terminated for gross misconduct thereby losing their benefits while the other two were retired in public interest thereby entitling them to their retirement benefits. We do not know why there was different treatment. Indeed, the letter addressed to the 3rd respondent confirmed to him his appointment and his admission to the Permanent and Pensionable establishment but he was summarily dismissed. We are aware a determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly and in this case, the reason for according them differential treatment was not provided; as they were all subjected to the same allegations, giving them different sanctions lends credence to the allegation of abuse or excess of power on the part of the 1st respondent. There could have been a reason, such as they did not qualify for pension, but whatever it was, it ought to have been stated in the said letters. Moreover, even if they did not quality for pension, there is pay for notice, leave and such other benefits that would accrue if they were retired in public interest.

The appellants challenged the dismissal/retirement letters which were authored on behalf of the Permanent Secretary Provincial Administration and Internal Security. In responding to this issue, the learned Judge correctly restated the definition of an authorized officer according to the Public Service Commission Regulations. In this case, D.O. Ogutu, who communicated the decision of the Commission was the duly authorized officer for the Permanent Secretary Provincial Administration. The Judge further reproduced the provisions of Regulation 39 (1) which gave disciplinary authority to authorized officers in regard to disciplinary proceedings against Chiefs, Assistant Chiefs and members of subordinate service. We need not reproduce what the Judge stated save to state that in our view, it is the correct restatement of the law.

In conclusion, this appeal partially succeeds, we quash the decision of the 1st respondent in respect to the dismissal letters in regard to the 2nd and 3rd appellants dated 2nd July, 2007 as the reasons for offering differential treatment to the 2nd and 3rd appellants were not provided. As the termination was justified, the 2nd and 3rd appellants should have been terminated in public interest with benefits. We also quash the dismissal letter in regard to the 4th respondent, Shadrack Kiplaga Kirui, who was not served with notice to show cause. The rest of the prayers fail. We award costs to the 2nd, 3rd and 4th respondents while the other parties will bear their own costs.

Dated and delivered at Nairobi this 30th Day of June 2017.

ALNASHIR VISRAM

…...............................

JUDGE OF APPEAL

W. KARANJA

…...............................

JUDGE OF APPEAL

M. K. KOOME

…..............................

JUDGE OF APPEAL

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

DEPUTY REGISTRAR