



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M’INOTI, J.J.A)

CIVIL APPEAL NO. 1 OF 2016

BETWEEN

STEPHEN MUNGA.....APPELLANT

AND

MINISTER FOR INTERIOR & NATIONAL COORDINATION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

OFFICER COMMANDING RABAI DIVISION.....3RD RESPONDENT

OCS RABAI POLICE STATION.....4TH RESPONDENT

(Appeal from the ruling and order of the High Court at Mombasa, (Emukule, J.) dated 15th May 2015

in

Misc. App. No. 34 of 2014)

JUDGMENT OF THE COURT

The appellant, **Stephen Munga** is a police constable in the employment of the National Police Service. At the time of the events leading to this appeal, he was attached to Rabai Police Division in Kilifi County. It was alleged that on 18th December 2013, he failed, without lawful cause, to report to duty at the Inquiry Office, **Rabai Police Station**, where he was supposed to be with effect from 6.00 am.

It was further alleged that as at 10 a.m. he had not reported to duty and as a result a large number of citizens seeking assistance from the police were forced to congregate at the report office waiting to be served. To ameliorate the situation, **Superintendent of Police, John Matsili**, the **Officer Commanding Police Division**, Rabai Police Division, deployed Police Constable **John Muraguri** to attend to the waiting citizens at 10.00 a.m. Later the same day Supt. Matsili asked the appellant to explain his absence from duty but he did not give a satisfactory explanation.

On 19th December 2013, the appellant was served with **Notification of Disciplinary Inquiry**, which he

received and acknowledged the same day at 10.00 hrs. The Notification informed him that orderly room proceedings would be instituted against him to determine whether on 18th December 2013, at 6.00 hrs. at Rabai Police Station, he committed an offence against discipline contrary to **regulation 88(2)** of the **National Police Service Regulations**, by failing to attend duty at the Report and Inquiry Office. The Notification further informed him that the inquiry would commence at Mariakani Police Station on 23rd December 2013 at 8.00 hrs. before **Inspector Julius Baru**, the **Officer Commanding Station**, Rabai Police Station.

The appellant did not attend the inquiry on 23rd December 2013. The record does not indicate that any proceedings took place on 23rd December 2013 as notified. Instead, the transcript indicates that the proceedings commenced on 14th January 2014 at 10.00 a.m., when the appellant was noted as absent. The inquiry however appointed **Inspector of Police, Rama Saidi**, to represent him in his absence. The charge framed against the appellant was failing to report on duty contrary to regulation 2, sub-section (20) as read with section 88 (2) (p) of the National Police Service Act, 2011. Thereafter it appears that the inquiry adjourned to 16th January 2014 when Supt. Matsili and PC Nelson Mwenje testified. A further hearing took place on 7th February 2014 when the evidence of PC John Muraguri was taken.

On the same day the inquiry found the appellant guilty of a disciplinary offence as charged. Finding the offence serious and beyond his powers in terms of sentencing, the presiding officer remitted the matter to a higher authority for purposes of meting out an appropriate sentence. On 11th April 2014, the County Police Commander, Kilifi passed sentence on the appellant and fined him **Kshs 2,500/-** vide **Kilifi County Weekly Order No 5/2014**.

That sentence aggrieved the appellant and on 16th July 2014, after obtaining the necessary leave, he commenced judicial review proceedings in the High Court seeking an order of certiorari to quash the Kilifi County Weekly Order No. 5/2014. In his Notice of Motion, the appellant challenged the validity of the orderly room proceedings and the Kilifi County Weekly No. 5/2014 contending that they were unlawful, irregular and in violation of the National Police Service Act and the Force Standing Orders; that the proceedings were a usurpation of the functions of the judiciary; and that the rules of natural justice were violated because he was denied a chance to defend himself; and that the complainant against him was a witness in the orderly room proceedings.

In his verifying affidavit sworn on 16th July 2014 and further affidavit sworn on 28th July 2014, the appellant denied that he was supposed to be at the report and inquiry office at Rabai Police Station on 18th December 2013. He however admitted that he was served with the notification of disciplinary inquiry on 19th December 2013, which as we have already adverted informed him of the complaint against him and advised him of the hearing scheduled on 23rd December 2013 at Mariakani Police Station. As for the reasons for his failure to attend the inquiry as scheduled on 23rd December 2013, he explained that he was neither relieved of his duty nor provided with transport and security to enable him attend the inquiry.

The respondents opposed the application vide a replying affidavit sworn by Insp. Baru on 22nd July 2014, defending the validity of the orderly room proceedings. It was deposed that the appellant was duly notified of the charges against him and the date of the proceedings, but nevertheless failed to attend and that the proceedings were properly conducted in his absence.

Emukule, J. heard the application and by a ruling dated 15th May 2015, found no illegality, irrationality or procedural impropriety within the meaning of Lord Diplock's judgment in **Council for Civil Service Unions v. Minister for Civil Service [1985] AC 374** to justify an order of certiorari. Accordingly, he dismissed the application, thus precipitating this appeal.

The appellant's rather prolix and imprecise memorandum of appeal contains 19 grounds that are repetitive and overly verbose. As this Court has pointed out before, **Rule 86(1)** of the Court of Appeal Rules demand that the memorandum of appeal must be precise without argument or narrative. We must

reiterate what the Court stated in **William Koross v. Hezekiah Kiptoo Komen & 4 Others, CA. No. 223 of 2013 (Eldoret):**

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

(See also **Abdi Ali Dere v. Firoz Hussein Tundal & Others, CA No. 310 of 2005**, and **Andrew Peter Ngirich & Another v. Wanje Masha Wanje, CA No. 17 of 2015 (Malindi)**). The concise issue raised in the lengthy memorandum of appeal is really whether the appellant was denied the right to fair administrative action guaranteed by Article 47 of the Constitution in that he claims that he did not know the case he had to meet; he was denied the right to be present at the inquiry and to be heard; and that the proceedings against him were conducted before an officer who was not independent and impartial.

Arguing the case for the appellant, which was canvassed through written submissions and oral highlights, **Mr. Gathuku**, learned counsel, submitted that the appellant was denied an opportunity to be heard because there was no evidence that any proceedings took place on 23rd December 2013 as notified; that from the record the proceedings took place from 14th January 2014 when the appellant had no notice; that he was consequently denied an opportunity to be present and to be heard; that Insp. Saidi who was appointed to represent him was not an officer of his choice; that there was no evidence adduced to show that he was supposed to be on duty at Rabai Police Station on 18th December 2013 or that the station is a duly gazetted police station; that the proceedings against him were by an officer who was not independent or impartial and that his right of appeal was violated because he was informed of the verdict on the last day for filing the appeal.

Lastly the appellant relied on **Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others, CA No. 266 of 1996** on when an order of certiorari will issue and submitted that a decision reached in violation of the rules of natural justice must be quashed.

Ms. Lutta, learned counsel for the respondent was of a different view and submitted that the appeal was bereft of merit. In counsel’s view, the appellant did not adduce any grounds to justify an order for judicial review. Counsel further urged that the appellant did not prove any illegality on the part of the respondents, because failure to report to duty is an offence under the Section 88(2)(p) of the National Police Service Act and regulation 3(3) of the National Police Service Regulations. It was also submitted that no procedural impropriety was established because the appellant was notified in advance of the inquiry, the charges he had to face and the venue, but elected not to attend. Although he failed to attend the inquiry, it was urged, an officer was appointed to represent him, consistent with the Standing Orders which allow for hearings in absentia.

Lastly, relying on the judgment of the High Court in **Bogonko v. National Environment Management Authority KLR (E&) 1, 772**, counsel submitted that the decision of the inquiry could not be challenged as irrational and that the remedy of certiorari being discretionary, could be denied even where the grounds existed if it was not efficacious in the circumstances.

We have carefully considered the record of appeal, the memorandum of appeal, the judgment of the High Court, the submissions of counsel, both written and oral, and the law. We bear in mind that the **Fair Administration Action Act, 2015**, which is otherwise relevant to this appeal, was not operational by the time of the inquiry and the judgment of the High Court. Indeed that Act came into force on 17th June 2015, a month and two days *after* the judgment of the High Court. Nevertheless the appellant still had the right to fair administrative action guaranteed by Article 47 of the Constitution. That Article provides:

“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*, CA. No. 52 of 2014, Githinji, JA, speaking for a unanimous Court stated as follows regarding fair administrative action:

“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.”

It is common ground that the inquiry, which has aggrieved the appellant, was conducted under the *National Police Service Act, 2011*. One of the objectives of that Act is to give effect to, among others, *Articles 238* and *244* of the Constitution, which respectively make provision for the principles of national security in Kenya and the objects and functions of the National Police Service. What is clear is that national security is hinged on the tenets of the Constitution. Under *Article 239*, the National Police Service is one of the national security organs. *Article 238(2) (a)* and *(b)* provides as follows:

“(2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles-

(a) national security is subject to the authority of this Constitution and Parliament;

(b) national security shall be pursued in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms. (Emphasis added).

The objects and functions of the National Police Service are set out in Article 244 in the following terms:

“244. The National Police Service shall—

(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.” (Emphasis added).

As this Court stated in *Attorney General & Another v. Randu Nzai Ruwa & Others*, CA. No. 275 of 2012, even where national security is implicated, it has to be pursued while observing and respecting the

rule of law, democracy human rights and fundamental freedoms. It seems axiomatic to us therefore that when the Constitution and the National Police Service Act emphasize respect for human rights, fundamental freedoms and dignity, it is both for the citizens and for the individual police officers serving in the Service. This means that while dealing with police officers, the National Police Service or any person exercising power of the Service, must observe and respect the human rights, fundamental freedoms and dignity of those police officers. Plainly, that is the reason why **section 46(1)** of the National Police Act provides that:

“Subject to section 47, a police officer shall be entitled to all the rights set out in the Constitution.”

However, consistent with **Article 24** of the Constitution, which sets out the circumstances under which human rights and fundamental freedoms may be limited, section 47 of the National Police Service Act has expressly allowed limitation of some of the fundamental rights of police officers. Among the fundamental rights that are limited are the right to privacy, freedom of expression, freedom of the media, the right to access information, freedom of association, the right to assemble, demonstrate, picket and petition public authorities and the right to fair labour practices. We have carefully perused the Act and are satisfied that the right to fair administrative action under Article 47 is not among of the rights limited by the Act.

Part X of the National Police Service Act makes provision on offences against discipline by police officers. **Section 88 (1)** thereof makes every police officer subject to the law and regulations in force from time to time relating to the police service. **Section 88(2)** sets out offences against discipline that may be committed by a police officer by reference to the **Eighth Schedule** to the Act. Some of those offences include willfully disobeying any lawful command or order, absence from duty without leave, and leaving the assigned post or place of duty before being regularly relieved, save in pursuit of an offender who it is the officer’s duty to apprehend, and negligent performance of duty.

The Act also provides mechanisms for hearing disciplinary offences. In our view, there is absolutely no merit in the appellant’s submission that such disciplinary proceedings are a usurpation of the power of the judiciary. A police officer who is alleged to have committed a disciplinary offence under the Act or the Standing Orders made thereunder does not have to be charged before a court of law. The internal disciplinary mechanisms provided by the Act, so long as they pass the test of fair administrative action, are not inconsistent with the letter or spirit of the Constitution. Indeed, **Articles 50** and **159** of the Constitution contemplate the hearing and determination of dispute or proceedings by bodies other than the courts.

That a police officer who is subject to disciplinary proceedings is entitled to a fair hearing and the right to fair administrative action is reinforced by **section 89(3)** of the Act which provides thus;

“All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall comply with Article 47 of the Constitution.”

Turning now to the merits of this appeal, one of the issues raised by the appellant is that the orderly room proceedings were not conducted impartially.

While one of the rules of natural justice, that of **nemo iudex in causa sua**, the touchstone of fair administrative action, require that no person should be a judge in his own cause, nevertheless it has long been accepted that in some proceedings, particularly disciplinary proceedings, a senior officer may be called upon to determine whether his junior has acted unprofessionally or in breach of the applicable regulations. That is notwithstanding that the junior officer ordinarily reports to the senior officer, thus technically making the senior officer an interested party in the outcome. In our view therefore, in those kinds of proceedings, as in the appeal before us, the decisive issue is not merely whether the appellant’s boss presided over the proceedings, it is whether, on the evidence presented, a reasonable and fair-minded person would have concluded that the presiding officer was biased. (See **Attorney General of Kenya v Prof. Peter Anyang Nyong’o & 10 Others, EACJ APP No. 5 of 2001** and **Kalpana H. Rawal v Judicial**

Service Commission & Others, CA (APP) No 1 of 2016. From an evaluation of the entire record, we do not see any material upon which bias on the part of Insp. Baru may be reasonably suspected.

The other aspect of the appellant's complaint is that Superintendent Matsili, who initiated the complaint against him, testified as a witness before the inquiry. We must, with respect, confess that we do not understand the basis of this complaint. Precisely for the reason that it was Supt. Matsili who had raised the complaint against the appellant, he had to testify, be confronted, and cross-examined by the appellant. One of the attributes of a fair hearing, subject to some limitations, is the right of a defendant or accused person to confront his or her accuser and to challenge the evidence adduced against him. In our view, the appellant's complaint would have made sense if it were his allegation that Supt. Matsili had lodged the complaint against him and failed to testify.

The appellant was also given in advance the allegations against him with sufficient particularity as to enable him to adequately defend himself. The regulations that he was alleged to have violated, the date, place and manner of violation, were all provided. We are not persuaded that the appellant's right to a fair hearing was violated because he did not know the case he had to meet at the orderly room proceedings.

The crux of the matter is whether the appellant was denied an opportunity to be heard. As we have already indicated, the Notification of Inquiry, which was served upon the applicant, and which he acknowledged receipt of, indicated the inquiry was to commence on 23rd December 2013 at 8.00 am at Mariakani Police Station. The appellant did not attend the inquiry on the date scheduled. If we had any evidence before us that the orderly room proceedings commenced on 23rd December 2013 as notified, we would not hesitate to conclude that the appellant was duly notified of those proceedings and therefore he cannot claim that he was denied an opportunity to be heard.

The problem however is that the record does not show that any proceedings took place on the appointed date. Instead, the evidence on record indicates that the proceedings commenced on 16th January 2014 at 10.00 a.m. when the appellant was marked as absent and Insp. Saidi was appointed to represent him. The record reads as follows:

“Place: Mariakani

Date: 14/1/2014

Time: 10.00 a.m.

The orderly room proceedings commenced today 14th January 2014 at 10.00 am in absentia after the defaulter failed to appear before the presiding officer IP Julius Baru after having notified (sic) in writing of the alleged offence. I now call upon IP Rama Saidi to represent the interest of the defaulter in orderly room proceedings in absentia.”

While there is a meticulous record of the proceedings for each subsequent day, there is absolutely nothing to show what, or indeed if anything transpired on 23rd December 2013. We would have been satisfied to see a record showing that the orderly room proceedings commenced 23rd December 2013 as notified to the appellant and then adjourned to 14th January 2014. Having been notified and having failed to attend on the appointed date, the appellant could not have been heard to complain. However, in the absence of a record of such proceedings, we must conclude that no proceedings took place on 23rd December 2013. There is also no evidence that the appellant was notified of the subsequent proceedings that took place with effect from 14th January 2014. The appellant's right to fair administrative action demanded that he be informed of the date of the fresh orderly room proceedings, if for any reason, it was changed from 23rd December 2013 as earlier notified.

The other aspect of the proceedings, which has caused us tremendous concern, is the role played by Insp. Saidi. Section 89(4) of the Act allows a police officer facing disciplinary proceedings to be accompanied

by another officer. It provides:

“(4) A police officer facing disciplinary action may be accompanied by another police officer of his choice for assistance and support.”

While in principle the respondents cannot be faulted for appointing Insp. Saidi to represent the appellant in absentia, Insp. Saidi did not rise to the occasion but reduced his role to a mere formality. When he was given an opportunity to cross-examine Supt. Matsili, PC Nelson Mwenje and PC John Muraguri, the appellant’s representative simply responded that he had no questions to ask. When he was invited to make a statement in mitigation, he amazingly responded as follows:

“That I am the above named, an inspector of police attached to Mariakani Police Station as the in charge of anticrime office and I would like to state as follows – that I have nothing to say”

The provision in the Act for a police officer who is facing disciplinary proceedings to be assisted by another police officer is not a hollow formality. That officer, even when appointed in the absence of the subject of the proceedings, must strive to discharge the duty that the statute vests in him. He is not appointed merely to confirm the complaint. In this case, the manner in which Insp. Saidi discharged his duties as regards the appellant put the lie to the respondent’s assertion that the appellant, who was not notified of the date of the proceedings, was adequately represented by Insp. Saidi.

For the above reasons, we come to the conclusion that the appellant was not notified of the orderly room proceedings on the day they commenced; that Insp. Saidi did not represent him, adequately or at all; and that his right to fair administrative action both under the Constitution and the National Police Service Act was violated. We accordingly allow this appeal, set aside the order of the High Court dated 15th May 2016 and substitute therefor an order quashing ***Kilifi County Weekly Order No 5/2014*** which imposed a fine of Kshs 2,500/- upon the appellant. The appellant shall have costs of this appeal.

Dated and delivered at Mombasa this 14th day of October, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR