



**Republic of Kenya v National Police Service Commission & 2 others; Nyabande (Exparte) (Judicial Review Application 37 of 2020) [2024] KEELRC 328 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 328 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW APPLICATION 37 OF 2020**

**MA ONYANGO, J**

**FEBRUARY 14, 2024**

**IN THE MATTER OF: AN APPLICATION BY PETER O. NYABANDE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS AGAINST THE NATIONAL POLICE SERVICE COMMISSION FOR ORDERS OF CERTIORARI AND MANDAMUS PURSUANT TO THE PROVISIONS OF ORDER 53 OF THE CIVIL PROCEDURE RULES.**

**AND**

**IN THE MATTER OF ARTICLES 21,22,23,47 AND 165(6) & (7) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 4,7,8 AND 11 OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF SECTIONS 88 & 89 OF THE NATIONAL POLICE SERVICE ACT**

**AND**

**IN THE MATTER OF REGULATION 17 OF THE NATIONAL POLICE SERVICE COMMISSION (DISCIPLINE) REGULATIONS, 2015**

**AND**

**IN THE MATTER OF CHAPTER 30 OF THE NATIONAL POLICE SERVICE STANDING ORDERS,2017**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**



AND

### JUDGMENT

1. The Judicial Review application before me is dated 21<sup>st</sup> December 2020 and has been brought under Order 53 Rule 3(1) of the Civil Procedure Rules, sections 8 and 9 of the Law Reform Act, Cap 26, section 11 of the Fair Administrative Actions Act, 2015, and all other enabling provisions of the Law.
2. The Exparte Applicant seeks the following orders:
  - a. That this Honorable Court be pleased to and hereby declares that the Respondents breached the Exparte Applicant's legitimate expectation to a lenient penalty by: issuing a Dismissal letter, which in effect departed from County Appeals Board Revised Recommendations; and for failing to give reasons for departing from the said Revised Recommendations.
  - b. That this Honorable Court be pleased to and hereby declares that by failing to give reasons why the 1<sup>st</sup> Respondent issued a Dismissal letter dated 25<sup>th</sup> June 2019, which in effect disregarded the Revised Recommendations of the County Appeals Board, the Respondent acted unfairly and contrary to Article 47 of the Constitution and section 4 of the Fair Administrative Action Act, 2015.
  - c. That this Honorable Court be pleased to and hereby declares that by failing to give reasons why the 1<sup>st</sup> Respondent, vide a letter dated 25<sup>th</sup> October, 2020, failed to consider the Exparte Applicant's Review Application (coached as a second appeal to the Commission), the Respondents acted unfairly, arbitrarily and contrary to Article 47 of the Constitution and section 4 of the Fair Administrative Action, 2015.
  - d. That this Honorable Court be pleased to and hereby declares that the 1<sup>st</sup> Respondent's conduct was Wednesbury unreasonable for failing to take into account factors that it ought to take into account such as the gravity of the offence as well as the Exparte Applicant's previous disciplinary conduct as provided for under Regulation 13(6) of National Police Service Commission (Discipline) Regulations, 2015 (NPSC Discipline Regulations) in issuing the Dismissal letter.
  - e. That this Honorable Court be pleased to and hereby, by way of a judicial review order of certiorari do quash the decision of the 1<sup>st</sup> Respondent handed down vide a letter dated 25<sup>th</sup> June 2019 dismissing the Exparte Applicant from the police service for contravening Article 47 of the Constitution.
  - f. That this Honorable Court be pleased to and hereby, by way of a judicial review order of certiorari, do quash the decision of the 1<sup>st</sup> Respondent, handed down vide a letter dated 25<sup>th</sup> August 2020, for failing to consider the Exparte Applicant's Review Application (coached as a second appeal) for breaching Article 47 of the Constitution and section 4 of the Fair Administrative Action Act, 2015.



- g. That this Honorable Court be pleased to and hereby directs the Respondent by way of Mandamus, to immediately reinstate the Exparte Applicant herein back into the police service with all the benefits and privileges that comes with his office.
  - h. That this Honorable Court be pleased and do hereby direct the Respondents by way of mandamus to pay to the Exparte Applicant the salaries due to him being the Exparte Applicant's half salary withheld by the 2<sup>nd</sup> Respondent on the 1<sup>st</sup> Respondent's directions, from the month of December 2016 until the month of June, 2019 till the date of this judgment
  - i. That this Honorable Court be pleased and do hereby direct the Respondents to give such reasonable compensation as directed by the Court to compensate the Exparte Applicant for breach of his rights enshrined under Article 47 and 50 of *the Constitution* and pursuant to section 11 of the *Fair Administrative Action Act*, 2015.
  - j. That costs of the Application be provided for.
3. The application is supported by Statutory Statement and the Verifying Affidavit of the Exparte Applicant, Peter Odhiambo Nyabande sworn on 23<sup>rd</sup> December 2020.
  4. In response to the application the 1<sup>st</sup> Respondent filed a Replying affidavit sworn on 17<sup>th</sup> May 2021 and a joint Replying Affidavit for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents sworn on 21<sup>st</sup> May 2021.
  5. Pursuant to directions issued by this Court on 29<sup>th</sup> September 2021, the application was disposed of by way of written submissions.

### **Brief Background**

6. The Exparte Applicant was employed by the National Police Service, the 1<sup>st</sup> Respondent herein, as an Administration Police Constable by letter of appointment dated 2<sup>nd</sup> June, 2009. He worked in various stations across the country and in the year 2015, he was deployed to Bungoma South Sub-County as a general duty officer.
7. The 1<sup>st</sup> Respondent is a Commission established under Article 246 of *the Constitution* and mandated with employing, dismissing and regulating the conduct of all police officers.
8. The 2<sup>nd</sup> Respondent, the Inspector General of Police, is an office created under Article 245 of *the Constitution* responsible for commanding police officers, upholding the discipline of service members and implementing the directives and decisions of the 1<sup>st</sup> Respondent.
9. The 3<sup>rd</sup> Respondent, the Attorney General, is the Government's Principal legal advisor established under Article 156 of *the Constitution*.

### **The Applicant's case**

10. It is the Exparte Applicant's case that on the 26<sup>th</sup> November 2016, while reporting to work at the Administration Command Post, he met with his supervisor, Sergeant Kuloba with whom he had an unfortunate altercation leading to a regrettable incident which incident culminated into disciplinary proceedings against the Exparte Applicant.
11. The Exparte Applicant states that on 28<sup>th</sup> November 2016, he was served with a Notice of Formal Disciplinary Proceedings which notified him to appear the following day, 29<sup>th</sup> November 2016 at 2pm at the Deputy Administrative Police-Sub County Commander's office. According to the Exparte



- Applicant, the notice gave him less than 24 hours to appear for disciplinary hearing contrary to Regulation 17 of the National Police Service Commission (Discipline) Regulations 2015.
12. It is the Exparte Applicant's case that he attended the disciplinary hearing before the Presiding Officer and upon hearing both parties, the Presiding Officer rendered his decision with reasons and entered a verdict recommending that the Exparte Applicant be dismissed from service by the 1<sup>st</sup> Respondent.
  13. Following the recommendations of the Orderly Room Proceedings, vide a letter dated 20<sup>th</sup> December 2016, the 2<sup>nd</sup> Respondent through the Office of Deputy Inspector General-Administration Police, suspended the Exparte Applicant from service denying him all remuneration benefits save for house and medical allowance. The suspension was to take effect on 16<sup>th</sup> December 2016 pending the final decision of the 1<sup>st</sup> Respondent. The letter of suspension directed the Exparte Applicant to be reporting every week and not to leave his duty station without express permission from his supervisor.
  14. By letter dated 5<sup>th</sup> March 2018, the 1<sup>st</sup> Respondent through the Regional Administration Police Commander, Western Region informed the AP Commanders Western Region that the Commission at its meeting held on 9<sup>th</sup> November 2017 fully deliberated on several disciplinary cases including those in respect of officers under their command and conclusively decided that the cases recommended for dismissal and reduction of rank "which the commission felt did not warrant such penalties were reverted back to the service for justification by various respective commands that made the recommendations."
  15. The AP Commanders were directed to coordinate and fast-track the process to enable the Commission finalize the disciplinary process initiated by the sub-counties.
  16. The Exparte Applicant contends that in accordance with the directions of the 1<sup>st</sup> Respondent, the County Disciplinary Appeals Board re-heard the Exparte Applicant on 19<sup>th</sup> March 2018, and vide a letter dated 23<sup>rd</sup> March 2018, the Bungoma County AP Commander forwarded to Deputy Inspector General AP, the proceedings and recommendations of the Appeals Board.
  17. According to the Exparte Applicant, in the said recommendations, the County Appeals Board was of the view that the punishment meted out to the Exparte Applicant was harsh and not proportional to the offence committed and accordingly recommended that the proposed punishment of dismissal be scaled down to a warning letter and his suspension be lifted.
  18. The Exparte Applicant states that he faithfully complied with the conditions imposed upon him pursuant to the suspension letter and both the Bungoma Sub-County Commander and the County Commander requested the Respondents to lift the suspension decision in light of his reformed character.
  19. The Exparte Applicant states that vide a letter dated 25<sup>th</sup> June 2019 from the Deputy Inspector General Administration Police, the Exparte Applicant was informed of the 1<sup>st</sup> Respondent's decision to dismiss him from service.
  20. The Exparte Applicant was aggrieved by the decision of the 1<sup>st</sup> Respondent to dismiss him and pursuant to Regulation 20 of the NPSC (Discipline) Regulations, on 19<sup>th</sup> July 2019, he applied for review of that decision vide an appeal letter addressed to the County Appeal Board, as was the policy.
  21. The Exparte Applicant states that after a delay of over one year, the 1<sup>st</sup> Respondent through a letter dated 25<sup>th</sup> August 2020 informed the Exparte Applicant that his appeal had not been considered meaning that his dismissal had been confirmed by the 1<sup>st</sup> Respondent.



22. According to the Exparte Applicant, the 1<sup>st</sup> Respondent's conduct of disregarding the County Appeals Board Revised Recommendations and rejecting the Review Application, is not only unreasonable but also fundamentally offends Article 10 and 47 of the Constitution as well as section 4 of the Fair Administrative Act, 2015.
23. The Exparte Applicant is therefore praying for Judicial Review orders to compel the Respondents to comply with the provisions of the law.

### **The Respondents case**

24. As stated earlier in this judgment, there are two Replying Affidavits filed, one by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> by Office of the Attorney General on behalf of all the Respondents. The 1<sup>st</sup> Respondent's Replying Affidavit is sworn on 17<sup>th</sup> May 2021 by its Chief Executive officer, Mr. Joseph Vincent Onyango. In that affidavit, the deponent states that the National Police Service Commission (Discipline) Regulations 2015 provide in Regulation 4(3) that in exceptional circumstances where the offence against discipline is clearly manifest as to render investigations unnecessary, the officer in-charge may immediately issue a notification to the appropriate Disciplinary Committee to conduct the Disciplinary Proceedings.
25. It is the 1<sup>st</sup> Respondent's case that the Exparte Applicant was charged in Orderly Room Proceedings where he pleaded guilty on Counts 1, II, III and VI, but when the proceedings went to full trial, aspects of all the offences he was charged with were proved. The 1<sup>st</sup> Respondent avers that the Exparte Applicant was convicted accordingly and sentenced to dismissal from the Administrative Police Service.
26. The 1<sup>st</sup> Respondent avers that prior to arriving at the decision to recommend the dismissal of the Exparte Applicant from service, the Presiding Officer took into consideration the circumstances in which the offence was committed and the gravity thereof, the seniority and length of service, the previous record and conduct and the statement made with regard to mitigating factors as provided for under section 13(6) of the National Police Service Commission (Discipline) Regulations 2015.
27. The 1<sup>st</sup> Respondent further aver that the Exparte Applicant being aggrieved by the Dismissal verdict, appealed against the said dismissal on the 19<sup>th</sup> July 2019 and upon the receipt of the Appeal against dismissal by the Exparte Applicant, the Bungoma County Disciplinary Appeals Board convened a meeting to deliberate on the case on the 9<sup>th</sup> August 2019.
28. The 1<sup>st</sup> Respondent states that the Exparte Applicant was invited to make submissions where he admitted that he was guilty but pleaded with the Board to reinstate him to the service. It is averred that the Board observed that the Exparte Applicant was given a fair hearing in accordance with the Constitution and other relevant laws.
29. It is contended that despite the Board making its findings against the Exparte Applicant, the 1<sup>st</sup> Respondent deliberated on the appeal by the Exparte Applicant amongst 35 other officers and made a determination that the appeal be disallowed and the sentence of dismissal upheld as it lacked merit due to the fact that the offences committed were too grievous.
30. The 2<sup>nd</sup> replying affidavit on behalf of all the Respondents jointly was sworn on 21<sup>st</sup> May 2021 by Stephen Gitari, the Administrative Police Service Legal Officer. The deponent stated that the Exparte Applicant on the 26<sup>th</sup> November 2016, while working in Bungoma South Sub-county went on a drinking spree and reported back to the station to collect a firearm for night guard duty; that the Armorer on duty declined to issue him with the firearm on account of his drunkenness; that the



Exparte Applicant on his way out met Sergeant Patrick Kuloba who inquired why he did not collect a firearm. The Exparte Applicant responded by hurling insults and even threatening the said Sergeant Kuloba. That Sergeant Kuloba went to book the matter in the Occurrence book (OB). The Exparte Applicant subsequently tore the page where he had been booked and threw the OB in a pit latrine within the police quarters.

31. It is the Respondents case that the Exparte Applicant deliberately threw the OB into the pit latrine while fully cognizant of the fact that it is a vital police record which contains information on police operations and further, that national examination were ongoing at the time and materials for the surrounding examination centers within Bungoma South DCC Center 3660201 were housed in an examination container No. KNEC 8543 within the Police premises whose detailed inventory was recorded in the same OB.
32. The Respondents aver that the disciplinary proceedings were conducted in strict conformity with *the Constitution*, the *National Police Service Act*, National Police Service Commission Standing Orders and other relevant laws.
33. The Respondents further contend that before arriving at the verdict to recommend dismissal of the Exparte Applicant from service, the Presiding Officer took into consideration the conditions set out under section 13(6) of the National Police Service Commission (Discipline) Regulations 2015.
34. The court was urged to treat the purported minutes of Bungoma County Disciplinary Appeals Board dated 19<sup>th</sup> March 2018 that allegedly recommended the reinstatement of the Exparte Applicant as forgeries meant to mislead the court as they cannot be verified nor their source authenticated.
35. The Respondents aver that the Claimant tendered an appeal against dismissal on 19th July 2019 where the Bungoma County Disciplinary Appeals Board invited him to make his submissions. It is maintained that the Board made a finding that the Exparte Applicant was given a fair hearing in accordance with *the Constitution*, *National Police Service Act*, *National Police Service Act*, National Police Service Commission (Discipline) Regulations 2015, the National Police Standing Orders and other relevant laws.
36. According to the Respondents the Board being cognizant of the gravity of the offences the Exparte Applicant committed, upheld the decision to dismiss the Exparte Applicant from the Administration police service. The Respondents averred that the decision of the Board notwithstanding, the 1<sup>st</sup> Respondent deliberated on the appeal against dismissal and disallowed the appeal.
37. The Respondents maintain that the Exparte Applicant was accorded both fair administrative action and hearing as outlined in *the Constitution*, *National Police Service Act*, Fair Administration Action and other relevant legislation.
38. In the end, the Respondents urged the court to dismiss the application with costs stating that it is an abuse of court process.

### **Exparte Applicant's Rejoinder**

39. The Exparte Applicant by way of rejoinder, filed a supplementary affidavit sworn on 31<sup>st</sup> August 2021 in which he avers that the facts deposed in the 1<sup>st</sup> Respondent's Replying affidavit are irrelevant to the proceedings herein as judicial review proceedings are concerned with the procedural propriety and legality of the acts of the 1<sup>st</sup> Respondent and not the substantive merits in relation thereto.
40. The Exparte Applicant further avers that Regulation 4(3) of the National Police Service (Discipline) Regulations 2015 referred by the 1<sup>st</sup> Respondent is concerned with exceptional circumstances that do



not warrant investigation and provides that the officer in charge immediately issues notification to the appropriate disciplinary committee to conduct disciplinary proceedings. According to the Exparte Applicant, it is not in any way concerned with the notification given to an accused police officer to appear before a disciplinary committee or the time given to prepare a hearing under such consideration.

41. The Exparte Applicant contends that he has demonstrated both in his Application dated 21<sup>st</sup> December 2020 and in his affidavit in support thereto that there was fundamental procedural impropriety on the part of the 1<sup>st</sup> Respondent.
42. In response to the Replying Affidavit sworn on 21<sup>st</sup> May 2021 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the Exparte Applicant states that the disciplinary proceedings fell short of the Constitutional threshold with respect to the right to fair administrative action and fair hearing due to lack of proper notice and proper particulars including the list of witnesses and witness statements.
43. The Exparte Applicant has reiterated that there was no compliance with Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015 on the need to provide an accused police officer with at least a 24-hour notice. Further, that the Commanding Officer never gave the Exparte Applicant written reasons justifying the exceptional circumstances warranting the waiver of the requirement to give an accused officer 24 hours' notice or at least a Notice to show cause with 3 clear days within which to respond to the 1<sup>st</sup> Respondent's allegations as envisaged under Regulation 17(3) of the NPSC (Discipline) Regulations 2015 contrary to Article 47 and Article 50 of *the Constitution*.
44. The Exparte Applicant in response to the Respondents assertion that the minutes of the County Disciplinary Appeals Board he filed as exhibits are forgeries, maintains that the allegation is false, malicious and made in bad faith. The Exparte Applicant averred that it is the Respondents who should shoulder the burden of proof to demonstrate that the said minutes are a forgery.
45. It is the Exparte Applicant's case that the said minutes and the letter dated 5<sup>th</sup> March 2018 created a legitimate expectation that the Commission would give him a fair decision instead of the harsh and unfair dismissal penalty visited upon him.
46. The Exparte Applicant therefore submitted that his application before court is merited and properly founded and that the prayers sought therein ought to be granted.

### **The submissions**

47. The Exparte Applicant in his submissions dated 4<sup>th</sup> November 2021 identified the issues for determination to be:
  - i. Whether the disciplinary proceedings adhered to the procedural requirement under the relevant statutory and regulatory provisions;
  - ii. Whether the 1<sup>st</sup> Respondent's disciplinary were marred with Wednesbury unreasonableness;
  - iii. Whether the 1<sup>st</sup> Respondent's decision injured the Exparte Applicant's legitimate expectation;
  - iv. Whether this court should grant the prayers sought herein.
48. On the first issue, the Exparte Applicant submitted that under Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015, disciplinary proceedings should be conducted appropriately and must comply with the following: the accused police officer must be give 7 days' Notice to show cause; the accused police officer must be given at least 24 hours' notice where the disciplinary hearing has been scheduled; and, where there is waiver of the requirement of the 24 hour



notice, then the Presiding Officer must outline the reasons warranting the exceptional circumstances for exempting the application of the 24 hour notice.

49. It is the Exparte Applicant's submission that he received a Notice to appear before the disciplinary proceedings at 17:57 hours on 28<sup>th</sup> November 2016 and he was to appear the following day on 29<sup>th</sup> November 2016 at 2 pm for the Orderly Room Proceedings. It is on this basis that the Exparte Applicant submits that the notice dated 28<sup>th</sup> November 2016 fell short of the 24-hour requirement as provided for under the NPSC (Discipline) Regulation and further, that the Presiding Officer did not record the reasons for the waiver of the 24-hour notice requirement.
50. The Exparte Applicant has urged the court to allow the application and quash the disciplinary proceedings together with the consequent decisions including the dismissal decision.
51. On the second issue, the Exparte Applicant submitted that the 1<sup>st</sup> Respondent failed to consider relevant factors in arriving at its decision and as a consequence thereof, granted a rather harsh penalty. That both the Standing Orders and the NPSC Discipline Regulations provided for more lenient penalty for the same offence. Reliance was placed in the case of Republic vs Public Procurement Administrative Review Board & 2 others Ex-parte Pelt Security Services Limited [2018] eKLR to buttress the Exparte Applicant's position that the 1<sup>st</sup> Respondent decision fell short of the Wednesbury Reasonableness test.
52. The Exparte Applicant urged the court to find the Respondent's decision to be irrational and unreasonable.
53. As to the issue whether the Exparte Applicant's legitimate expectation was breached, it is the Exparte Applicant's case that by a letter dated 5<sup>th</sup> March 2017, the Western Regional Commander annexed a list of officers in respect of whom the Commission sought justification as to the basis upon which the rather harsh penalties were meted. The Exparte Applicant avers that the said letter directed the County Disciplinary Boards addressed therein to either revise their punishments or in the alternative provide justification for the penalties meted.
54. It is the Exparte Applicant's case that in accordance with the directions of the 1<sup>st</sup> Respondent, the Exparte Applicant was re-heard on 19<sup>th</sup> March 2018 by the County Disciplinary Appeals Board and vide its letter dated 23<sup>rd</sup> March 2018 forwarded to the Deputy Inspector General, AP, a recommendation was made to the effect that the punishment meted on the Exparte Applicant was harsh and not proportionate to the offence committed and accordingly, it was recommended that the proposed punishment of dismissal be scaled down to a warning letter and the officer's suspension be lifted.
55. It is the Exparte Applicant's case that the 1<sup>st</sup> Respondent having by its letter dated 5<sup>th</sup> March 2017 pronounced itself that the penalty meted was unreasonable and the Bungoma County Administration Police Commander, having by its letter dated 23<sup>rd</sup> March 2018 recommended to the 1<sup>st</sup> Respondent to issue a more lenient penalty in respect hereto, it was not open for the 1<sup>st</sup> Respondent to re-affirm its initial decision of dismissing the Exparte Applicant. The Exparte Applicant avers that by doing so, the 1<sup>st</sup> Respondent evidently breached the Exparte Applicant's right to legitimate expectation.
56. Lastly on the issue whether the reliefs sought should be granted, the Exparte Applicant maintained that he has not only demonstrated that the decision of the 1<sup>st</sup> Respondent herein was irrational but also that the same was marred with procedural impropriety and as such, the court should grant the prayers sought in the application.



57. The 1<sup>st</sup> Respondent on its part framed the issues for determination to be the following in its submissions dated 6<sup>th</sup> December 2021:
- i. Whether the Exparte Applicant's actions warranted summary dismissal;
  - ii. Whether the Exparte Applicant was taken through properly convened orderly room proceedings;
  - iii. Whether the Exparte Applicant's constitutional rights were violated as alleged or at all;
  - iv. Whether the Exparte Applicant is entitled to the orders sought.
58. On the issue whether the Exparte Applicant's actions warranted summary dismissal, the 1<sup>st</sup> Respondent submitted that the action of throwing the OB into a pit latrine amounted to gross misconduct by the Exparte Applicant since he was aware that the OB is a vital police record which contains critical information on police operations.
59. According to the 1<sup>st</sup> Respondent, the actions of the Exparte Applicant were contrary to section 88(2) as read with 1(b), (c), (e), (f), (g) and (s) of the *National Police Service Act* and amounted to gross misconduct and the gravity thereof attracted the harshest penalty available.
60. On the second issue, the 1<sup>st</sup> Respondent submitted that prior to the Exparte Applicant being charged in orderly room proceedings, he was notified of the same and given ample time to avail and defend himself. It is further submitted that despite the offences against discipline committed by the Exparte Applicant being clearly manifest, the officer in charge tasked IP Evans Ogolla to undertake independent investigations in order to conform to protocol and due process in accordance with Article 47 and 50 of *the Constitution* on fair administrative action and hearing. The 1<sup>st</sup> Respondent cited the judgment rendered by this court in the case of Thomas Odero Dullo vs National Police Service Commission NRB ELRC Petition No. 37 of 2018 in support of its case.
61. Thirdly, on the issue whether the Exparte Applicant's constitutional rights were violated as alleged, the 1<sup>st</sup> Respondent submitted that the evidence rules provide that there must be material evidence to support what one is claiming. According to the 1<sup>st</sup> Respondent, there is no material evidence to demonstrate that the Exparte Applicant's rights were violated in any way by the Respondents. It is the 1<sup>st</sup> Respondent's case that the Exparte Applicant accepted his wrong doing and pleaded on the basis of "Reformed Character" for purposes of mitigation. In buttressing the position that the 1<sup>st</sup> Respondent did not in any way violate the Exparte Applicant's Constitutional rights as alleged by the Exparte Applicant, the following cases of Thomas Komo Allias Bilal Mohamed vs Republic (2013) eKLR, Susan Waithera Kariuki & 4 others vs Town Clerk Nairobi City Council & 3 others (2013) eKLR, Republic vs National Police Service Commission Ex-parte Daniel Chacha Chacha (2016) eKLR, and AM vs Premier Academy (2017)eKLR were cited.
62. On the last issue, it is the 1<sup>st</sup> Respondent's case that the prayer for reinstatement cannot issue by dint of section 12 of the Employment and *Labour Relations Act*. It is also submitted that the Exparte Applicant has clearly failed to prove any acts of procedural unfairness on the part of the 1<sup>st</sup> Respondent and that as such, the court should find and hold that the 1<sup>st</sup> Respondent conducted the disciplinary exercise in a fair manner and did not in any way infringe on the fundamental rights of the Exparte Applicant.
63. The court was urged to dismiss the application with costs to it.



## Determination

64. I have carefully considered the application, the rival affidavits, the submissions as well as the cited authorities. The issues that fall for my determination are;
- i. Whether the disciplinary proceedings the Exparte Applicant was taken through adhered to the procedural requirement under the National Police Service Commission (Discipline) Regulations, 2015;
  - ii. Whether the Exparte Applicant was entitled to have legitimate expectation of a lesser verdict by the 1<sup>st</sup> Respondent;
  - iii. What reliefs should then issue?
65. As submitted by the Exparte Applicant, Judicial Review is concerned with the process and not the merits of the case as was held by the Court of Appeal in the case of *Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd (2002) eKLR*, where the court observed as follows: - Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”
66. The Exparte Applicant has faulted the disciplinary procedure taken against him by the 1<sup>st</sup> Respondent. According to the Exparte Applicant, the disciplinary proceedings did not comply with Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015
67. The Respondents on the other hand have maintained that the disciplinary proceedings were conducted in strict conformity with *the Constitution*, the *National Police Service Act*, National Police Service Commission Standing Orders and other relevant laws.
68. Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015 provides as follows:
- “ 17.
- (1) Disciplinary proceeding shall be conducted in accordance with these Regulations and the Service Standing Orders and any guidelines issues by the Commission from time to time.
  - (2) Where an offence against discipline is committed by an officer, the officer's supervisor may take immediate corrective action, where necessary, pending the commencement of disciplinary process.
  - (3) In all disciplinary proceedings, the accused officer shall be notified of the offence he is charged of and shall be given at least three calendar days within which to show cause why disciplinary action should not be taken against him or her.



- (4) Where a disciplinary hearing is scheduled, an officer accused of a disciplinary offence shall be given at least twenty-four hours' notice before the date of the hearing.
- (5) In exceptional circumstances, the notice under paragraph (4) may be waived and the hearing held in accordance with the Service Standing Orders.
- (6) Where paragraph (5) is invoked, the presiding officer shall be required to make a written statement stating the reasons for the waiver.
- (7) The officer who is the subject of the hearing may, where applicable, call witnesses or other evidence on his or her behalf, at the officer's cost.
- (8) The disciplinary hearing before the Disciplinary Committee shall be conducted expeditiously and without undue delay or technicalities and any delay in the disposal of the proceedings beyond twenty-eight days shall be reported to the Commission stating the reasons for the delay.
- (9) The recommendations of the National Disciplinary Committee shall be forwarded to the Commission for confirmation and approval and the Commission shall within seven days upon receipt of the recommendations communicate to the Inspector-General the disciplinary action to be taken against the officer.
- (10) The Inspector-General shall take the disciplinary action within three days of receipt of the communication from the Commission.
- (11) The recommendations of the Subordinate Disciplinary Committee shall be forwarded to the Inspector-General or authorized officer as prescribed in the Service Standing Orders, for confirmation and approval.
- (12) The Inspector-General or authorised officer shall thereafter communicate or implement, where application the disciplinary action to be taken on the officer, taking into consideration regulation 10 of these Regulations.”

69. From the above provision of law, it is clear that before a disciplinary hearing is conducted, the accused officer shall be notified of the offence he is charged with and shall be given at least three calendar days within which to show cause why disciplinary action should not be taken against him or her. Where a disciplinary hearing is scheduled, an officer accused of a disciplinary offence shall be given at least twenty-four hours' notice before the date of the hearing. In exceptional circumstances, the 24-hour notice may be waived and the hearing held in accordance with the Service Standing Orders. Where this is done, the presiding officer shall be required to make a written statement stating the reasons for the waiver.

70. In the instant case, the Exparte Applicant has averred that he received the Notice to appear before the disciplinary proceedings at 5:57pm on 28<sup>th</sup> November 2016. He was required to appear before the



Orderly Room Disciplinary Proceedings at 2pm the next day, the 29<sup>th</sup> November 2016. This fact is not denied by the Respondents. Indeed, the two replying affidavits filed by the Respondents are silent on this issue which is prominent in the application before the court and was one of the grounds of appeal in the Exparte Applicant's appeal against his dismissal. Annexure JVO 3 of Joseph Vincent Onyango clearly reflects that the Exparte Applicant received the Notice of Formal Discipline Proceedings at 1757HRS ON 28th November, 2016. The same is also evident in Annexure PON-04 of the replying affidavit of Stephen Gitari on behalf of all the Respondents.

71. The notice fell short of the 24 hours requirement as provided for under the National Police Service Commission (Discipline) Regulations, 2015 which provides that the officer shall be given at least twenty-four hours' notice before the date of the hearing. The date of the hearing having been 29<sup>th</sup> November 20216, the notice should have been given before close of day on 27<sup>th</sup> November, 2016 so that it meets the requirement of 24 hours before the date of the hearing.
72. The Respondents in a rebuttal cited section 4(2) of the National Police Service Commission (Discipline) Regulations 2015 and submitted that the Exparte Applicant committed offences which were clearly manifest but non-the-less independent investigations were conducted in order to conform to protocol and due process.
73. Regulation 4(2) and (3) provides;
  - (2) Where an incident under subsection (1) occurs, such complaint shall be investigated by the most senior officer available or by an authorized officer in the manner prescribed in the Service Standing Orders.
  - (3) In exceptional circumstances, where the offence against discipline is clearly manifest as to render investigations unnecessary, the officer in-charge may immediately issue a notification to the appropriate disciplinary committee to conduct the disciplinary proceedings.
74. Regulation 17 of the National Police Service Commission (Discipline) Regulations is coached in mandatory terms. A perusal of the Record of the Orderly Room Proceedings conducted on 29<sup>th</sup> November 2016 do not reflect that the Presiding Officer, IP Kenneth Lihasi made a written statement stating the reasons for the waiver of the 24 hours' notice. Further, the Respondents decided to carry out investigations as is evident from the Investigation Report of Evans Oyugi Ogolla (IP) dated 28<sup>th</sup> November, 2016, the very date that the Exparte Applicant was served with the Notice of Formal Discipline Proceedings. The issue of waiver of the 24 hours notification under Regulation (2) and (3) are therefore not applicable to the Exparte Applicant's case.
75. From the foregoing, it is my finding that the disciplinary proceeding against the Exparte Applicant conducted on 29<sup>th</sup> November, 2016 did not comply with the procedure set under Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015.
76. With regard to the second issue for determination, the Exparte Applicant has submitted that the 1<sup>st</sup> Respondent's decision to dismiss him from service breached his legitimate expectation on the basis that the 1<sup>st</sup> Respondent went against the letter dated 5<sup>th</sup> March 2018 by the Regional Administration Police Commander addressed to all County Administration Police Commanders, directing them to either revise their punishments or in the alternative provide justification for the penalties meted.
77. The letter which as reproduced hereunder reads:

Administration Police Service  
5<sup>th</sup> March 2018.



All County Ap Commanders

Western Region

RE: Implementation of the National Police Service Commission Board Decisions

The National Police Service Commission letters no NPSC/1/28/1/VOL.II/19 and NSPCC/1/28/1/VOL.II/23 dated 15<sup>th</sup> and 16<sup>th</sup> November 2017, respectively on the above subject matter refers.

Following the NPSC Board meeting held on 9<sup>th</sup> November 2017, the Commission fully deliberated on several disciplinary cases including those in respect to the under mentioned officers who are under your command and conclusively decided as follows:

1. All desertion cases were reverted back to service to establish the affected officer's whereabouts.
2. Recommended dismissal and reduction of rank cases which the commission felt did not warrant such penalties were reverted back to the service for justification by various respective commands that made the recommendations.

The purpose of this letter is therefore to convey the NPSC decision for your appropriate intervention in terms of coordinating and fast-tracking process with a view of providing a timely feedback on the same by 7<sup>th</sup> March 2018 to enable this office to facilitate the final part of the disciplinary process initiated against the officers by various sub-county commanders from your command. (List attached)

Please treat this urgent.

Signed

Oloo A Steve (CP-APS)

For: Regional Administration Police Commander

Western Region



S.No	P/No	Rank	Name	Whats Required by NPSC	County	Sub County
1.	2009036024	APC	Peter o. Nyabande	Justification	Bungoma	Bungoma south
2.	1993054357	CPL	Jacob Wafula	Justification		Busia
3.	2009041914	APC	Yussuf Ali Ibrahim	Establish whereabouts		Namable
4.	2002050920	APC	George Odionyi Emai	Establish whereabouts	Kakamega	Kakamega East
5.	2007114672	APC	Geoffrey Anyona Magembe	Establish whereabouts		Kakamega North
6.	2008134772	APC	Rex Esipisu Anyangu	Establish whereabouts		Kakamega North
7.	1990085032	SGT	Kennedy Kipkirich Masudi	justification	Vihiga	Sabatia

78. Pursuant to the said letter, the Exparte Applicant's case was re-heard on 19<sup>th</sup> March 2018 by the County Disciplinary Appeals Board and vide its letter dated 23<sup>rd</sup> March 2018 forwarded to the Deputy Inspector General, Administration Police, it recommended that the proposed punishment of dismissal be scaled down to a warning letter and the officer's suspension be lifted.

79. I have below perused the letter dated 23<sup>rd</sup> March 2018, written by the County AP Commander, Bungoma and addressed to the Deputy Inspector General, Administration Police Services. The said letter had recommendations annexed to it which read to wit; -

#### Observation/Recommendations

After careful assessment and review by the County Disciplinary Appeals Board, we make the following observation and recommendation:

That the discipline and conduct of the officer before the incident was above board That the officer committed all the offences due to the influence of alcohol That the punishment meted against the officer was harsh and not proportionate to the offence committed That the officer has shown that he is remorseful, he regretted his action and is yearning to be pardoned That all officers including the sub County AP Commander are in favour that the officer should be given a benefit of doubt and be pardoned forthwith. Although this transformation could be occasioned by the suspension placed upon the officer. That even though the testimonies by his colleagues shows that the officer should strongly



pardoned, it is our view that he should be warned for the offences that he committed in order to act as a deterrent measure to others who may contemplate committing such offences. That the proposed punishment of dismissal be scaled down to a warning and the officer's suspension be lifted. That the officer to pay a fine of five thousand Kenya Shillings to cater for the cost of the Occurrence Book

Signed

Mr. Paul Ochieng (Chair) (Secretary)

80. From the above recommendations and marrying them to the letter dated 5<sup>th</sup> March 2018, the 1<sup>st</sup> Respondent created a valid expectation of reinstatement of the Exparte Applicant to service. The recommendations of dismissal of the Exparte Applicant had clearly been rejected by the 1<sup>st</sup> Respondent as communicated in the letter of 5<sup>th</sup> March 2016 and were thus no longer available for consideration by the 1<sup>st</sup> Respondent. The only recommendation before the 1<sup>st</sup> Respondent for consideration was therefore that contained in the letter dated 23<sup>rd</sup> March 2018.
81. The Court of Appeal in Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR held:
- “A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker's representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1<sup>st</sup> respondent's decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot ipso facto sustain an action founded on the doctrine of legitimate expectation.
82. The Respondents have averred that this letter was a forgery. The letters dated 13<sup>th</sup> July 2018 and 22<sup>nd</sup> February 2019 Exparte Applicant's documents PN9 and PN 10) also refer to the decision of the County Disciplinary Appeals Board decision recommending the lifting of the suspension and reinstatement. All these letters cannot be wished away by a mere dismissal of the same in the replying affidavit of the Respondents. As submitted by the Exparte Applicant, the Respondent is the one upon whom the burden of proof fell, being the one who wishes to have the allegation that the letter is a forgery believed by the court as per section 107 of the Evidence Act.
83. In the instant case there was legitimate expectation based on written representations by the 1<sup>st</sup> Respondent rejecting the recommendation of dismissal of the Exparte Applicant on grounds that the offence did not warrant such a harsh penalty. Having directed the County Commanders to reconsider their verdicts and the Exparte Applicant having been heard afresh and a recommendation made that his dismissal be scaled down to a warning and his suspension be lifted, the 1<sup>st</sup> Respondent is estopped from reverting to the abandoned earlier decision recommending dismissal of the Exparte Applicant.

#### **What reliefs should therefore issue?**

84. Having found that the 1<sup>st</sup> Respondent did not adhere to Regulation 17 of the National Police Service Commission (Discipline) Regulations, 2015 and having found further that the 1<sup>st</sup> Respondent in the letter dated 5<sup>th</sup> March 2018 and the subsequent rehearing and recommendations, it created a legitimate expectation that the Exparte Applicant's suspension would be lifted with the result that he would be reinstated to service with a warning, it is my finding that the Exparte Applicant is entitled to the prayers he is seeking.
85. Consequently, Judgment is hereby entered in favour of the Exparte Applicant in the following terms:



- i. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent breached the Exparte Applicant's legitimate expectation to a lenient penalty by: issuing a Dismissal letter, which in effect departed from County Appeals Board Revised Recommendations; and for failing to give reasons for departing from the said Revised Recommendations;
- ii. A declaration be and is hereby made that by failing to give reasons why the 1<sup>st</sup> Respondent issued a Dismissal letter dated 25<sup>th</sup> June 2019, which in effect disregarded the Revised Recommendations of the County Appeals Board, the Respondent acted unfairly and contrary to Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*, 2015
- iii. A declaration be and is hereby made that by failing to give reasons why the 1<sup>st</sup> Respondent, vide a letter dated 25<sup>th</sup> October, 2020, failed to consider the Exparte Applicant's Review Application (coached as a second appeal to the Commission), the Respondents acted unfairly, arbitrary and contrary to Article 47 of *the Constitution* and section 4 of the Fair Administrative Action, 2015
- iv. A declaration be and is hereby made that the 1<sup>st</sup> Respondent's conduct was Wednesbury Unreasonable for failing to take into account factors that it ought to take into account such as the gravity of the offence as well as the Exparte Applicant's previous disciplinary conduct as provided for under Regulation 13(6) of National Police Service Commission (Discipline) Regulations, 2015 (NPSC Discipline Regulations) in issuing the Dismissal letter.
- v. An order of certiorari be and is hereby issued quashing the decision of the 1<sup>st</sup> Respondent handed down vide a letter dated 25<sup>th</sup> June 2019 dismissing the Exparte Applicant from the Police Service;
- vi. An order of Mandamus be and is hereby issued to the 1<sup>st</sup> Respondent to immediately reinstate the Exparte Applicant herein back into the police service.
- vii. An order of Mandamus do and is hereby issued directing the 1<sup>st</sup> Respondents to pay to the Exparte Applicant the salaries due to him being the Exparte Applicant's half salary withheld by the 2<sup>nd</sup> Respondent from the month of December 2016 25<sup>th</sup> June, 2019.
- viii. The period between the date of dismissal and the date of reinstatement shall however be deemed to be leave without pay.
- ix. The 1<sup>st</sup> Respondent shall bear the costs of this suit.

86. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14<sup>th</sup> DAY OF FEBRUARY 2024**

**MAUREEN ONYANGO**

**JUDGE**

