



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**JUDICIAL REVIEW NO. 4 OF 2020**

**DENNIS KIPKIRUI MARITIM.....APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY STATE DEPARTMENT FOR**

**CORRECTION SERVICES.....1ST RESPONDENT**

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

**THE COMMISSIONER GENERAL OF PRISONS..... 3RD RESPONDENT**

**THE COMMANDANT KENYA PRISONS**

**STAFF TRAINING COLLEGE.....4TH RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5TH RESPONDENT**

**JUDGMENT**

1. On 20.2. 2020, the Court granted leave to the Applicant to apply for orders of certiorari, prohibition and mandamus and directed that the application for the leave to operate as stay be heard inter-partes on 3.3. 2020. The court granted the order of stay on 9.3.2020 but the same was not complied with and contempt proceedings ensued leading to the 1<sup>st</sup> respondent being cited for contempt of court. The court deferred the sentence after the parties agreed to settle the matter amicably.

2. On 17.6.2021, the parties reported that they had reached settlement save for costs and the applicant prayed for the court to determine the main Motion dated 4.3.2020 on merits. The motion was disposed of by written submission.

**Applicant's case**

3. The applicant's case is that on 9.10.2019, the Kenya Prisons Services advertised for mass recruitment for Prisons Constables vide the daily Newspapers. He attended the selection like other citizens and presented his credentials and he was selected. Thereafter he was given a letter calling him to attend Kenya Prison Training College at Ruiru on 22.10.2019.

4. He continued with the training until 2.1.2020 when he was dismissed from the training college without being told the reason. Thereafter he went to enquire about the reason from the college, and the Adjutant informed him that the reason for his dismissal was because he had criminal records with the police.

5. The applicant went to the Director of Criminal Investigations to verify the alleged criminal records and he was given a Police Clearance Certificate confirming that he had no criminal records. He then went back to the Prisons Training College with the said information but he was told to tell the DCI to communicate with the College directly.

6. Later he learned that his problems related to a criminal case he had been charged with, but which was dismissed under section 202 of the Criminal procedure Code (see Proceedings marked DKM3). Despite the said Police Clearance Certificate and a letter (Signal dated 15.12.2019 marked DKM4) from the OCPD Chepalungu, the respondents refused to readmit him to the College.

7. The applicant contends that his dismissal was in violation of Article 47 and 232 of the constitution and the provisions of the Fair Administrative Actions Act. He further contends that his right to fair hearing under Article 50, and right protection from discrimination under Article 27 of the Constitution were violated by the said abrupt dismissal.

8. He submitted that his right to legitimate expectation to complete his training, graduate and be deployed to render security services within the Kenya Prisons Services was breached by the respondents through the dismissal. He contended that legitimate expectation is the root of the constitutional principle of the rule of law. He relied on the case of **Communications Commission Authority of Kenya & 5 others v Royal Media Services 5 others** for emphasis.

9. Finally he submitted that the respondents have persisted in refusing to readmit him even after the court ordered them to do so and urged the court to grant him the reliefs sought in the Motion.

#### **Respondents' case**

10. The respondents' case is contained in the Affidavits sworn by the Deputy Commissioner of Prisons Mr. John Mutevesi on 4.3.2020 and 13.3.2020 in which he admits that the applicant was enlisted to the Kenya Prisons Service in a free and fair recruitment exercise; that he was issued with a calling letter and he reported to the Kenya Prisons Staff Training College for initial training; that on 18.11.2019 the Commandant of the Training college wrote to the Directorate of Criminal Investigations requesting for the applicant's database; and that the DCI responded by the letter dated 23.11.2019 stating that the Applicant had an outstanding matter in criminal case number 803/72/15.

11. The affiant further contends that as pursuant to the law governing the Prisons Department, the applicant was discontinued; that as at the time the court ordered for his readmission on 9.3.2020, the applicant had missed a lot of training during his three months absence; that after consultation was made with the Commissioner General of Prisons, it was agreed that the applicant will be considered on priority basis during the next recruitment exercise; and that by letter dated 12.3.2020 the Commissioner General of prisons gave the respondents commitment to consider the applicant during the next recruitment.

12. The respondents submitted that the discontinuation of the applicant from the training and the failure to reinstate him after the court order was justified and a commitment to consider him for the next round of recruitment was given. They urged the court to dismiss the application because the action against the applicant was lawful. They relied on **Kingdom Kenya limited v the District Land registrar of Narok & 15 others [2018] eKLR** where the court held that the judicial review does not involve itself with merits but the process of the decision making.

#### **Analysis and determination**

13. There is no dispute that the applicant was recruited to join the Kenya Prisons Service and that in October 2019 he was admitted for initial training. It is also not in dispute that in January 2020, he was dismissed from the training college on allegation that he had criminal records. The main issues for determination are:

**a) Whether the dismissal was done without following due process of law.**

**b) Whether the applicant is entitled to the reliefs sought.**

#### **Due process**

14. Article 236 of the Constitution provides that a public officer shall not be:

“

**a)**

***b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”***

15. The due process of the law is codified in Article 47 of the Constitution which provides as follows:

***(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 reason for the action.***

***(3) Parliament shall enact legislation to give effect to the rights in clause (1)...”***

16. The foregoing provisions are amplified by Sections 4 (1) (2) and (3) of the Fair Administrative Actions Act provide as follows—

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

***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***

***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the***

*administrator shall give the person affected by the decision—*

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

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

*(c) ...*

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

*(e) ...*

*(f) ...; or*

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

17. It is further amplified by section 45 (2) of the Employment Act which provides that termination of employment contract of an employee shall be unfair unless the employer proves that it was grounded on a valid and fair reason related to the employees misconduct, capacity and compatibility or employer’s operational requirement; and that a fair procedure was followed.

18. In the instant case, the applicant contends that he was dismissed from the training without being told the reason; that he learned later from the Adjutant that the reason was alleged criminal records. The procedure followed was obviously not in accordance with the elaborate procedure set out by Article 47 of the Constitution and the Statute law.

19. The applicant was not served with a written reason for the dismissal, he was not given any evidence in support of the reason, and he was not given an opportunity to defend himself before the dismissal was decided.

20. Had the applicant been accorded the opportunity to defend himself, he would have availed documentary evidence to prove that he had no criminal record. When he learned the reason for his dismissal, he swiftly brought Police Clearance Certificate and even court proceedings to clear himself.

21. Courts in this country have embraced the doctrine of fairness as codified in Article 47 and the said statutes in a plethora of cases. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, the Court of Appeal held that:-

*“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”*

*Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.*

22. Having found that the respondents dismissed the applicant without following the procedure set out in the Constitution as well as Statutes, I find and hold that the applicant has proved in the required standard that his dismissal was not in accordance with due process of law.

#### **Reliefs sought**

23. In view of the foregoing I find that the applicant is entitled to, and hereby I grant him the order of Certiorari quashing the decision by the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents dismissing him from the training at the Kenya Prisons Training College, Ruiru.

24. The above order has the effect of reinstating the applicant to his position before the unfair and unlawful dismissal. However, the respondents have shown that it is not practicable to receive the applicant back immediately because his colleagues have since finished the training and graduated. They have given a written commitment to readmit him with the next recruits. Consequently, I direct that the applicant shall report back to the Kenya Prisons Training College together with next recruits subject to production of Police Clearance Certificate otherwise known as Certificate of Good Conduct.

25. I believe that the foregoing order plus an order granting the applicant costs of the suit assessed at Kshs 150, 000 will appease him for the breaches by respondents.

26. The order of Prohibition was sought on interlocutory basis and it now overtaken by events.

27. In his written submissions, the applicant urged the court to award him damages for the constitutional violations against him by the respondents. He cited a number of court decisions where the courts have expanded the scope judicial review remedies and awarded damages. The cited precedents include **John Atelu Omilia & another v Attorney General & 4 others [2017] eKLR** where the court awarded Kshs.2,000,000 to each petitioner as compensation for violation of their rights, **Anthony Murimi Waigwe v Attorney General & 4 others [2020] eKLR** where the court awarded Kshs 4,500,000 for constitutional violations, and **Edward Akong’o Oyugi & 2 others v Attorney**

**General [2019] eKLR** were the court awarded the petitioners Kshs. 20,000,000 for violation of constitutional rights.

28. However the said precedents are distinguishable from the instant case because they were brought by way of petitions under the provisions of the Constitution while the applicant herein has approached the court by a motion under Order 53 Rule 1 & 2 of the Civil Procedure Rules. Consequently, I decline to award any damages to the applicant because it is not an appropriate relief under order 53, and also because it was not sought in the pleadings filed.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**