



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

JR NO. 2 OF 2014

JOHN OGENDO ANYONA APPLICANT

VERSUS

CHIEF OF KENYA DEFENCE FORCES 1ST RESPONDENT

KENYA ARMY COMMANDER 2ND RESPONDENT

PERMANENT SECRETARY, MINISTRY OF

STATE FOR DEFENCE 3RD RESPONDENT

Mr. Obutu for Applicant

M/s Chimani for Respondent

JUDGMENT

1. The applicant sought leave to bring a judicial review application for an order of *certiorari* to remove to this Court to be quashed the decision of the Respondents made on 25th March 2009 and all subsequent redress orders made by the 3rd Respondent on 17th April 2012.
2. The Applicant further sought leave to apply for order of *Mandamus* to compel the Respondents to issue a certificate of discharge containing correct particulars.
3. The Application dated 16th October 2012 and filed on 17th October 2012 was certified urgent and leave was granted to the ex parte applicant to commence judicial review proceedings in terms of the said application.
4. The Applicant was directed to file and serve the substantive notice of motion application within 21 days and costs to abide the outcome of the substantive notice of motion.
5. The notice of motion dated 6th November 2012 was filed on 7th November 2012 and the same together with the statutory statement, verifying affidavit and mention notice were served on the 1st Respondent on 8th November 2012 and on the Attorney General on 9th November 2012. A return of service deposed to by one Dominic Mulenge, process server dated 12th November 2012 was filed on the same day.
6. On 29th May 2013, both parties appeared before Hon. Korir J. and the Respondent was

granted 30 days to put in a response to the judicial review application and the Applicant to file in written submissions within 21 days upon expiry of the 30 days. The Respondent had corresponding leave to file written submissions from date of service and matter was set for mention on 15th August 2013 with a view to fix a hearing date.

7. On the said date the Applicant had filed his submissions the Respondent having failed to file in a response nor its submissions. The Respondent did not attend Court either on the said date. Matter was fixed for highlighting of submissions on 30/10/2013.

8. On 30th October 2013, the representative of the Respondent appeared and sought leave to file in a reply and submissions. The Court granted leave to the Respondent to file in the reply and submissions within 7 days and matter to be mentioned on 29/11/2013. Both parties attended court and again the Respondent had failed to file a response and submissions as directed. Matter was set for highlighting of submissions on 22nd January 2014.

9. On 22nd January 2014, the matter came before Hon. Majanja J. and there was no appearance for the Applicant but Mrs Chitaka appeared for the Respondent.

10. The matter was transferred to the Industrial Court, *suo moto* for hearing and determination as it concerns terms of employment. The Applicant was to be notified accordingly by the Deputy Registrar.

11. A notice of mention dated 27th January 2014 and filed at the Industrial Court on the same date seeking to review the decision by Hon. Majanja to transfer the matter to the Industrial Court was not prosecuted by the Applicant. On 6th February 2014, both parties appeared before me and the highlighting of submissions was set for 17/3/2014. Mrs Mwangi represented the Respondent. On 17th March 2014, Mr. Obulu appeared for the Applicant whereas Mrs Chitaka appeared for Mrs. Chimani who was absent. The Respondents opted not to highlight their submissions whereas the Applicant proceeded to do so.

12. The history of this matter in Court illustrates the laxity in which the Respondent has approached the same in spite of enormous condonation by the Court.

13. For the avoidance of doubt, on the authority by the Court of Appeal in the matter of **Professor Daniel Mugendi V. Kenyatta University, Civil Appeal No. 6 of 2012**, the matter was rightly transferred to the Industrial Court which has the jurisdiction to handle it.

No Response

14. For the record, the Respondent did not file any response to the Notice of Motion and the grounds set out therein. Similarly, there is no substantive response by the Respondents to the statutory statement and the reliefs sought therein. The matters set out in the verifying affidavit have not been controverted in a replying affidavit.

15. In law the averments in the supporting affidavit in particular, having remained unchallenged to date, stand proven on a balance of probability and the Court proceeds to apply the law applicable in matters of this nature based on the proven facts.

Facts

16. The Applicant joined the Armed Forces in 1984 and worked in various departments for 26 years. He rose through the ranks from a trainee to a sergeant. At the time of dismissal he was a finger print expert under the military police cops of the Defence Forces.

17. In 2005, he applied for a loan from Harambee Co-operative Society and the same was

approved. He continued to pay the loan until later in 2007 when he applied for a top-up loan and the same was approved by one Sgt. Joe Birgen a representative of the Harambee Co-operative. During repayment, it was realized that the Applicant's payslip reflected little amount of net salary.

18. That the Army Commander ordered the Applicant be charged with the offence of:

- i. forging a payslip;
- ii. forging a signature;
- iii. forging a service rubber stamp;
- iv. receiving a low figure as net salary.

19. The Applicant states that the charges had no basis and were unjustified. That he was prosecuted and found guilty of all counts and sentenced as follows;

- i. 15 days fine for counts (i) and (ii);
- ii. a demotion to the rank of a corporal for count (iii); and
- iii. dismissal for count (iv).

20. The Applicant deposes that no evidence was adduced by the prosecution to incriminate him for any wrong doing nor was a representative of the Harambee Co-operative called to testify on the matter of forgery of a payslip and signature. That the Applicant's appeal to the Commander, Kenya Defence Forces (1st Respondent) using the normal chain of command was unsuccessful. The Applicant states that his discharge from service was unprocedural because he ought to have been brought before a Court Martial which did not happen. That the purported summary trial was unreasonable, unprocedural and ultravires the provisions of the Armed Forces Act Cap 199 of the Laws of Kenya and the Rules/Regulations thereunder. (repealed)

21. **Issues for determination**

- i. whether or not the Respondents acted unreasonably in the circumstances of the case;
- ii. whether or not the conduct by the Respondents was ultravires the statute.
- iii. what remedy if at all is available to the Applicant.

22. In the case at hand, the Court appreciates that the 1st and 2nd Respondents had statutory authority to discipline the Applicant for lawful cause in terms of the procedure laid out in the ***Armed Forces Act Cap 199*** of the Laws of Kenya and Regulation made thereunder (repealed).

23. Going by the authority in the High Court of Kenya at Nairobi **Misc. Civil Application No. 30 of 2007, Republic versus The Vice Chancellor Jomo Kenyatta University of Agriculture and Technology, Respondent ex parte: Dr. Cecilia Mwachii and Mr. Moses Muchina**, the Court in a Judicial Review Application may only intervene;

- i. where there is abuse of discretion;
- ii. where the decision maker exercises discretion for an improper purpose;
- iii. where the decision maker is in breach of duty to act fairly;
- iv. where the decision maker has failed to exercise statutory discretion reasonably;
- v. where the decision maker acts in a manner to frustrate the purpose of the Act donating power;
- vi. where the decision maker fails to exercise discretion;

vii. where the decision maker fetters the discretion given;

viii. where the decision is irrational and unreasonable.

The question always arises as to whether it is the decision to terminate which is under attack or the process which led to the termination.

24. From the submissions by the Applicant, both the decision and the process is under attack. With regard to the decision it is alleged that given the facts of the case, no reasonable person would have arrived at a decision to dismiss the Applicant precisely because he was dismissed for having a very low balance of Kshs.770/= per month in his payslip.

25. This led to a wrong assumption without any evidence at all that the loan top up which he had taken in 2007 could not have been properly obtained and therefore he must have forged his documents for the concerned officer to have approved the loan leaving him with a balance that was below the authorized minimum.

26. The Respondent as earlier said did not tender any evidence at all to justify the decision taken and the procedure followed. On the contrary, the Applicant in the letter to the Army Commander dated 25th March 2009 gave an explanation as to the loan balance in his payslip as follows:

“In the year 2007, is when I applied for Top-up where the forms were processed by our Harambee Co-operative representative by then Sgt. Joe Birgen, now (Lt) Birgen through AFPCTS (Kabete) administration as I was attached to that unit with Water Works Football Club of DOD CAU. By then the order of not committing payslip to a half of your pay had not been issued. I have never applied for another loan since this one of year 2007.”

27. This explanation by the Applicant in the absence of any evidence by the Respondents to the contrary completely explains why the payslip of the Applicant reflected a salary balance of Kshs.770/= which was less than the half salary permitted when the issue was raised in the year 2009.

28. With regard to the procedure followed, the Applicant has challenged the disciplinary tribunal convened by the 2nd Respondent, The Commander, Kenya Army without giving the Applicant the option of appearing before a Court Martial.

29. The Applicant states that the failure by the 2nd Respondent to exercise his decision to refer its case to a Court Martial denied the Applicant the full benefit of the law and gravely prejudiced his case leading to the demotion and dismissal.

30. Furthermore, the Applicant presented passionate mitigation stating that the sentence was too harsh. At the time he had served the Forces for a period of 26 years and had a clean record. He was a father of 7 children who depended on him and had aged parents who looked up to him. He had taken the loan in the first place to meet the need of the children and ought not to have been dismissed for that. He prayed that, in the alternative, the dismissal be reduced to retirement under service no longer required (SNLR) and he retains his rank of Sergeant.

Decision

31. In the **JKUAT case supra**, Nyamu J. stated citing **The Supreme Court Practice 1997 Vol. 53/1-14/6** as follows:

“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.

It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute by law the decision in the matter in question.”

He emphasized that;

“The Court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is grossly unreasonable. The function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law the Court would under the guise of preventing the abuse of power be guilty itself of usurping power.” Per Lord Brightman in Chief Constable of North Wales Police V. Evans [1982], WLR 1155 P 1173.

32. Mindful of the above dictum, and in consideration of the foregoing, uncontroverted evidence by the Applicant, the Court finds that the 1st and 2nd Respondent exercised jurisdiction conferred upon them unreasonably as to amount to abuse of lawful authority conferred on them by the statute. The result of this was unfair summary dismissal of an officer of good standing for 26 years with loss of all his terminal and retirement benefits. In addition the Applicant was demoted from a sergeant to a corporal and was fined equivalent of 15 days salary. All these for having a salary in his payslip which was less than half his monthly pay which was sanctioned when this was not prohibited.

33. In conclusion and in answer to the issue 1 and 2 as framed, the Respondent acted unreasonably as to amount to abuse of office. In so doing, the conduct of the Respondent was ultravires the enabling statute. As a consequence the Applicant’s dismissal was not justified and was unfair. The demotion and fine meted out equally followed unreasonable and unprocedural exercise of authority by the Respondents.

34. In the final analysis, the Court makes the following orders:

- i. An order of **CERTIORARI** is issued to quash the decision by the 1st and 2nd Respondent and conveyed by the 3rd Respondent to reduce the Applicant in rank, forfeiture of 15 days pay and dismissal from service.
- ii. An order of **Mandamus** is issued to compel the Respondents to reinstate the Applicant to the position previously held by him with full pay and retire him without loss of rank and benefits from the date of this judgment.
- iii. The Respondent to pay the costs of the Application.

Dated and Delivered at Nairobi this 30th Day of May 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE