

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 16 OF 2020

FAUSTINE JOSEPH MWAKALINGA.....APPLICANT

VERSUS

**SECRETARY TO THE SERVICE COMMISSION
FOR POLICE FORCE IMMIGRATION AND PRISONS.....1st RESPONDENT**

INSPECTOR GENERAL OF POLICE.....2nd RESPONDENT

THE ATTORNEY GENERAL.....3rd RESPONDENT

RULING

30/11/2020 & 28/12/2020

Masoud, J.

The applicant moved this court for orders of certiorari, mandamus and prohibition to, respectively, quash the decision of the first respondent made on 01/07/2019 which terminated him from his employment, compel the first and second respondent to pay all entitlements to the applicant as the employee of the second respondent as from the date of termination and reinstate the applicant into his employment, and to prohibit the first respondent from interfering with the employment contract of the applicant.

The application was filed after the applicant had obtained leave on 31/08/2020, which leave was not opposed or objected by the respondent in any way. It was made by chamber summons supported by the applicant's affidavit and statement. The application was premised on the grounds that, firstly, the failure of natural justice before the service Commission for police, Immigration, and Prisons and at the relevant ministry prior to his termination; the failure of the said Commission and the court martial to provide reasons for its decision of affirming the verdict and for the verdict reached; bad faith; and bias.

The application was objected and opposed both on preliminary issues and on merit. Relevant counter affidavit and statement in reply were filed along with a notice of preliminary objection to the effect that the application was time barred.

Going by the application, it is clear that the applicant was an employee of the Tanzania Police Force before his termination on 01/7/2019. Sometime in October 2018, he received a letter from the Police Force Headquarters calling upon him to show cause why he asked for a bribe from a certain businessman. The applicant responded by denying the allegations. He was consequently arraigned in the Court Martial (herein

after the trial tribunal) where he was eventually found guilty of the accusations laid against him. He was as a result ordered to be demoted or his salary reduced.

Being dissatisfied by the decision, the second respondent referred the matter to the first respondent for his inquiry. The applicant was as a result terminated from employment on 01/07/2019 allegedly without being heard. A letter in respect of the termination was shown and it in part reads thus:

Ninakuarifu kuwa kikao Na. 04/2018/2019 cha Tume ya Utumishi ya Polisi, Uhamiaji na Magereza kilichofanyika tarehe 01 Julai, 2019 kilipitia Mwenendo wa Mashtaka ya Kijeshi dhidi yako na kuthibitisha pasipo shaka kuwa ulitenda makosa yote matatu kinyume na Kanuni C.5(xxv), kinyume na Kanuni C.5 (xlv) na kinyume na Kanuni C.5(xviii) za Kanuni za Utumishi za Jeshi la Polisi za mwaka 1995 kama zilivyrekebishwa mwaka 2013.

Hivyo, kwa mamlaka iliyopewa kwa mujibu wa kifungu cha Sheria Na. 8 ya Tume ya Utumishi ya Polisi, Uhamiaji na Magereza ya Mwaka 1990,

*kama ilivyorekebisha na Sheria Na.8 ya Uhamiaji
yam waka 2015, Tume kupitia kikao hicho iliridhia
uachishwe kazi kuanzia tarehe 01 Julai, 2019 na
unastahili kulipwa stahili zako zote.*

*Endapo utaona hujatendewa haki, kwa mujibu wa
Kifungu cha 9(2) cha Sheria Na. 9 ya Tume ya
Utumishi ya Polisi, Uhamiaji, na Magereza ya
Mwaka 1990 kama ilivyorekebisha na Sheria Na.
8 ya Uhamiaji ya mwaka 2015 kikisomwa Pamoja
na kanuni C.18(1) ya Kanuni za Utumishi za Jeshi
la Polisi za mwaka 1995 kama zilivyorekebisha
mwaka 2013, unayo haki ya kukata rufaa kwa
maandishi kwenye Tume ya Utumishi ya Polisi,
Uhamiaji, na Magereza ndani ya kipindi cha siku
saba (7) kuanzia tarehe utakayopokea barua hii.*

*Meja Jenerali Jacob G. Kingu, ndc
Katibu wa Tume*

Subsequently, the applicant filed an appeal to the first respondent and to the Permanent Secretary of the Ministry of Home Affairs for being aggrieved by the decision of the first respondent. He was however told by the first respondent that the Commission has no mandate to

determine the appeal as it was the same Commission which reached the decision of terminating him and thus confirming its decision.

The letter in respect of the applicant's appeal which is dated 24/07/2019 and addressec to the "Katibu Mkuu", of the relevant Ministry for Home Affairs through the Inspector General of Police reads thus in part:

YAH: RUFAA YA KUACHISHWA KAZI

Somo tajwa hapo juu la husika. Rejea pia barua yako yenye kumb. Na. USPC 17259/9 ya tarehe 06/07/2019 ambayo nilipata tarehe 22/07/2019.

Mimi sijaridhika na maamuzi ya kikao Na. 04/2018/2019 cha Tume ya Utumishi ya Polisi, Uhamiaji na magereza kilichofanyika tarehe 01/07/2019 na hivyo kupelekea kuandika rufaa hii baada ya kuona kwamba sikutendewa haki katika mwenendo mzima wa mashtaka haya kama ifuatavyo:

1.Wakati wa kuendeshwa kwa mashtaka haya utaratibu mzima ulikiukwa kwa kunikatalia kupewa haki yangu ya kutetewa na mwakilishi.

2.Wakati wa kusikiliza mashtaka haya shahidi mkubwa katika kesi ambaye ni mlalamikaji hakuweza kufika katika baraza na kutoa Ushahidi wake.

Hali hiyo ilininyima haki yangu ya kumhoji maswali ili kuthibitisha ukanushaji wa mashtaka haya niliyopewa. Kinachonishangaza ni kwamba kutokana na hali hiyo Ushahidi wa kunikuta na hatia yalitokana na nini?

3.Mashahidi wote waliokuja kutoa Ushahidi walitoa Ushahidi wa kusikia kwani hawakuwepo kwenyetukio na hivyo kukiuka kipengele cha sheria ya Ushahidi K/F No. 61 na 62.

4.Adhabu niliyopewa ni kubwa sana kulinganisha na uzito wa makosa niliyoshtakiwa nayo. Aidha kwa rufaa hii naomba niondolewe adhabu hii.

Naomba Kuwasilisha.

Faustine J. Mwakalinga

The first respondent's reply to the above letter was afforded by a second letter dated 14/04/2020 with ref No. USP17259/10 which departed from the first letter of the first respondent dated 6/7/2019 advising the applicant to lodge his appeal to the Commission if he was aggrieved by the decision. As such, the second letter dated 14/04/2020 informed the applicant that the Commission was not mandated to hear and determine his appeal. The letter in its details read thus:

YAH: RUFAA DHIDI YA KUACHISHWA KAZI

Tafadhali rejea rufaa yako yenye kichwa cha Habari hapo juu Pamoja na barua yenye Kumb. Na. USPC 17259/9 ya tarehe 06 Julai, 2019 iliyokuachisha kazi.

*2. Ninakujulisha kuwa katika Kikao Na. 02/2019/2020 kilichokaa tarehe 09 April, 2020 Tume ya Utumishi wa Jeshi la Polisi Uhamiaji na Magereza haikuweza kupitia rufaa kuhusu kutoridhika na adhabu uliyopewa ya **kuachishwa kazi**. Tume haina Mamlaka ya kusikiliza rufaa hii kwa kuwa ndiyo iliyotoa adhabu ya awali.*

3. Unashauriwa kuwasilisha rufaa yako kwa mamlaka nyingine za kisheria.

Christopher D. Kadio

KATIBU WA TUME

There was no substantive opposition by the respondents on the factual context set out herein above. This is evident in the counter affidavit and supplementary counter affidavit and statement in reply of the respondents. The exception was on the following. They stated that the applicant was afforded the right to be heard as is evidenced in the copy of the court martial proceedings which was annexed to the respondents' supplementary counter affidavit. They also stated that the applicant only

appealed to the first respondent and not to the Permanent Secretary of the relevant ministry. It was further stated that the applicant was supposed to appeal to the Permanent Secretary instead of appealing to the Commission. The purported response of the appeal was made by the first respondent and not the Permanent Secretary as is required by the law.

In addition to the above, it was averred in the supplementary counter affidavit that the Chairman of the tribunal which conducted the proceedings against the applicant forwarded the proceedings to the second respondent. In turn, the second respondent reported the case to the Permanent Secretary and proposed dismissal of the applicant. In relation to this, reference was made on the following important letters.

The first was a letter dated 1/11/2018 with Ref No. DSMZ/AD.10/Vol.IV/95. The said letter was addressed to the Inspector General of Police in relation to the proceedings which were conducted against the applicant and which invited the Inspector General to confirm the proposed punishment. This letter reads and I quote in part:

YAH: MASHTAKA YA KIJESHI KUMHUSU MKAGUZI

WA POLISI FAUSTINE JOSEPH MWAKALINGA

*Tafadhali husika na somo tajwa hapo juu, na pia
reja barua yako yenye kumbukumbu na.
PHQ/PF/17259/A/09 ya tarehe 25/09/2017.*

*Pa:moja na barua hii nakutumia hati ya mashtaka
Pa:moja na mwenendo wa mashtaka nan akala
tatu kumhusu Mkaguzi mtajwa hapo juu ili
kutnibitisha adhabu kwa mshtakiwa baada ya
ańsa msikilizaji kukamilisha kusikiliza mashtaka
hayo.*

Naomba kuwakilisha

Sgd

D. D. Magiligimba – ACP

Kny: Kamanda wa Polisi

Kanda Maalum ya Polisi

Dar es salaam

The second letter which was referred to by the respondents was dated 14/11/2018 with ref No. PHQ/PF/17259/12. It was addressed to “Katibu Mkuu, Wizara ya Mambo ya Ndani ya Nchi” from the Inspector General of Police. It was in relation to the recommendation of the Inspector

General for dismissal of the applicant from employment following his conviction on the three offences the applicant was charged with.

The hearing of this matter was by filing written submissions in respect of both the preliminary objection raised by the respondents and the merit of the substantive application. The submissions were duly filed. The applicant was unrepresented although he received services of the Legal and Human Right Centre on legal aid basis in drafting his submissions. The respondents were on their part represented by Mr Daniel Nyakiha, learned State Attorney. My consideration of the submissions for my deliberations will not consider the entire submissions, but those which trace their basis on the pleadings and the corresponding affidavit and counter affidavit, starting with the preliminary objection raised.

On whether or not the application is time barred, reference was made by the respondents on the date of the letter (i.e 06/07/2019) that notified the applicant of the decision to terminate him following his conviction and sentence. It was then argued that since the instant application and the application for leave were respectively filed on 9/09/2020 and August 2020, it meant that the applicant was out of time. As to the applicant, he seemed to have generally disputed that the application was time barred.

On my part, I was aware of a letter dated 14/04/2020 which notified the applicant of the decision of the Commission on the applicant's appeal. The letter indicated that it was received by the applicant on 18/05/2020. The letter was to the effect that the Commission could not entertain the appeal as the Commission was the one which imposed the first sentence. It is clear to us that the said sentence was imposed upon confirmation of the verdict. It was by a letter dated 6/07/2019, which also informed the applicant that if he was aggrieved by the decision, he could appeal to the Commission. As a result, the applicant filed the appeal contained in his letter dated 24/07/2020.

On the above records, I think in deciding whether or not the applicant was out of time, regard must be had to the last communication from the respondents, which is 14/04/2020 received on 18/5/2020, and which should also be considered in the light of the letter informing the respondent about his right to appeal before the Commission if aggrieved. I am for such record, prepared to hold as I hereby do so that the time should be reckoned from the date the applicant received the letter notifying him that the Commission was not competent to determine the

appeal. The letter was dated on 14/4/20220 but it was received by the applicant on 18/05/2020.

The appeal was indeed aiming at challenging the decision terminating his employment. He was on reasons revolving on the failure of observance of rules of natural justice, and unreasonableness, dissatisfied by the conviction and sentence imposed based. As the application was filed on 09/09/2020, I find that the application is within time. The objection is for such reason dismissed.

It was in relation to the failure of the observance of rules natural justice, alleged that the appellant was denied his right to appeal to the Commission contrary to the advice that the very Commission gave to the applicant pursuant to the Commission's letter reproduced herein above. The court was told that this happened when the Commission assumed the mandate of the Permanent Secretary contrary to the law, and could as a result not preside over the appeal on its own decision of affirming the finding of the court martial and the decision to terminate the applicant. In support of the above argument, I was referred to section 9(2) of the Police Force and Prisons Service Commission Act, and regulation C.6(8) of the Police Force Service Regulations, 1995.

As to the respondents, they were at one with the applicant in relation to the position of the law requiring the second respondent to forward his report and recommendations to the Permanent Secretary, as to dismissal of the applicant in which case the said secretary may dismiss the applicant.

In the present case, however, the respondents are of the view that in so far as the applicant's rank was concerned, the permanent secretary was mandated as he rightly did to forward the matter to the Commission for its determination as to termination of the applicant's employment. Insistence was made that given the rank of the applicant, the Permanent Secretary was not mandated to terminate him. In this respect, section 7 of the Police Force and Prisons Service Commission Act, 1990 was relied on. In addition to the above, it was argued that the applicant's submissions did not adopt the affidavit and hence there was nothing to support the submissions. The court was thus invited to not to consider the affidavit.

In so far as the rival submissions were concerned on the point on the failure of observance of rules of natural justice and in particular violation of the applicant's right of appeal, I was quick to land my eyes on Part IV

of the Police Force Service Regulations, 1995 entitled "Discipline". This part provides an elaborate procedure on handling disciplinary proceedings involving a police officer.

It was apparent from the above mentioned Regulations that the accused officer is required to be given reasonable access to documents necessary for preparation of his defence. Consistent with this right, the tribunal is also required to give opportunity to the accused officer to put questions on his own behalf to witnesses. And of particular relevance to this matter, it is the requirement under such Regulations that no documentary evidence should be used against the accused officer unless the said accused officer had previously been supplied with a copy of the document or access thereof. This requirement is stipulated under C.6(6) of the Police Service Regulations.

My further reading of sections 7 and 8 of the Police Force and Prison Service Commission Act, and the entire of the provisions of regulation 6 of the above cited Regulations made it clear to me that upon the findings of the trial tribunal, the second respondent had two options.

The first option was for him to confirm the finding of the trial tribunal and the sentence recommended. The second option was to forward a report to the Permanent Secretary with a recommendation that the applicant be dismissed if he was of the view that the circumstances of the case merit dismissal of the applicant. The Permanent Secretary would in the circumstances dismiss the applicant or remit the case to the second respondent for him to award any punishment he deemed appropriate.

In so far as police officers of the rank between Assistant Inspector and Assistant Commissioner are concerned, there is no requirement on the part of the Permanent Secretary to forward a report of the matter to the Commission for it to determine dismissal. Rather, I am settled as I am mindful of sections 7 and 8 of the Commission is an appellate body for a police officer of the above stated ranks.

I would thus agree with the applicant that he was denied his right of appeal when the Commission assumed the powers vested in the Permanent Secretary of acting on the report from the second respondent and deciding to confirm the finding of the trial tribunal and impose

termination as was recommended by the Inspector General of Police (second respondent).

Consequently, the applicant's appeal which was pursued in the light of the advice of the Commission before it later on refused to entertain the appeal, could not be attended on its merit. I am alive that the applicant's appeal was grounded on the complaint concerning the manner into which the trial proceedings were conducted, and how the proceedings occasioned failure of justice by virtue of the violation of rules of natural justice, which affected the fairness of the trial, failure to give reasons supporting the findings leading to the termination of the applicant, and unreasonableness suggesting lack of good faith, and bias. The grounds of complaints which formed the basis of the appeal were as follow for ease of reference:

1.Wakati wa kuendeshwa kwa mashtaka haya utaratibu mzima ulikiukwa kwa kunikatalia kupewa haki yangu ya kutetewa na mwakilishi.

2.Wakati wa kusikiliza mashtaka haya shahidi mkubwa katika kesi ambaye ni mlalamikaji hakuweza kufika katika baraza na kutoa Ushahidi wake.

Hali hiyo ilininyima haki yangu ya kumhoji maswali ili kuthibitisha ukanushaji wa mashtaka

haya niliyopewa. Kinachonishangaza ni kwamba kutokana na hali hiyo Ushahidi wa kunikuta na hatia yalitokana na nini?

3. Mashahidi wote waliokuja kutoa Ushahidi walitoa Ushahidi wa kusikia kwani hawakuwepo kwenyetukio na hivyo kukiuka kipengele cha sheria ya Ushahidi K/F No. 61 na 62.

4. Adhabu niliyopewa ni kubwa sana kulinganisha na uzito wa makosa niliyoshtakiwa nayo. Aidha kwa rufaa hii naomba niondolewe adhabu hii.

These grounds (which were annexed to the applicant's affidavit supporting the application) are in my view reflective of the grounds averred by the applicant in his statement of facts. I think if the appeal were heard on its merits, the Commission would have been convinced and find the appeal meritorious.

My scrutiny of the proceedings made it apparent that the complainant was indeed not one of the witnesses who were called to testify against the applicant. There was no reason disclosed whatsoever as to why he was not called to testify as a key witness. The failure is in my view grounds the complaint raised by the applicant and supports the

submission that there was lack of good faith and bias on the part of the trial tribunal.

My finding herein above is supported by the fact that the statement of the complainant was tendered and admitted as Exhibit and used in the trial proceedings against the applicant without no justification as to why the complainant could not appear and testify and cross-examined by the applicant. In so doing, the procedures as highlighted herein above were not followed. Firstly, the applicant was not given a copy of the statement of the complainant or reasonable access to the same for his preparation of his defence. In this respect, it is the position of the law that unless an accused officer had previously been supplied with a copy of a document or access thereof, the same cannot be used in a trial against him. This requirement is stipulated under C.6(6) of the Police Service Regulations.

The proceedings of the trial tribunal which were also used by the respondents to impress this court the trial was fair had yet another anomaly which is within the purview of the applicant's complaints. This is none other than the fact that at page 29 of the typed proceedings which constitute the decision of the trial tribunal, the trial tribunal used the applicant's statement to reason for and support its finding of guilty

against the applicant although the applicant's statement was not tendered and admitted in evidence and there is no record that the document was supplied to the applicant in good time as is required by the law. The relevant part of the decision of the trial tribunal showing how the applicant's statement was used against him although it was not part of the proceedings reads thus and I quote:

*Mahakama hii tumepitia kwa makini sana Ushahidi uliotolewa na mashahidi wa upande wa mashtaka na kujiridhisha kuwa mshtakiwa alifanya makosa yote matatu anayoshtakiwa nayo. Pamoja na Ushahidi huo **mshatikiwa pia aliandika maelezo yake binafsi ambayo pia hayapishani na malalamiko yaliyotolewa dhidi yake kwani yanaonyesha wazi kufanya makosa hayo.***

In the light of the above finding and the fact that all the witnesses who testified were admittedly hearsay witnesses, the complaint that there was lack of good faith and bias is seemingly meritorious as it also points to unreasonableness of the findings of the trial tribunal.

With the foregoing in mind, the question is whether the argument by the learned State Attorney that the trial tribunal proceedings were fair as the applicant was afforded a fair hearing holds any water. In respect of this argument this court's attention was referred to the trial tribunal's proceedings which was annexed in the respondents' supplementary counter affidavit as OSG-1. As I am recalling my earlier findings, I am prepared as hereby do so, answer the issue in the negative.

I am settled that the above anomalies in themselves suffice to dispose of the matter in favour of the respondent. I am thus unprepared to venture into any other issue raised by the rival submissions only that the failure of the applicant to adopt the affidavit as forming part of his submissions in chief is not in my view not fatal as the very affidavit is part of the record in support of the applicant's case.

Having so found as herein above, I must consider the issue whether the applicant has made out a case for the order of certiorari to issue for the impugned decision to be removed into this court for the purpose of being quashed. The crux of this application was mainly on the ground of violation of rules of natural justice, bad faith, bias and failure to provide reasons.

I am in the circumstances prepared to answer the above issue in the affirmative on the grounds of violation of rules of natural justice, bad faith and bias. As there was also a clear violation of relevant regulations, I would also be prepared to find that there was a clear violation of procedure set out under the relevant Regulations (supra). The application is therefore meritorious for reasons stated. There is accordingly a sound basis for granting the other prayer for an order of mandamus. I would however decline to grant the order of prohibition against the respondents as prayed as doing so would amount to restraining the respondents from doing what they are in law entitled to do against the applicant in good faith.

In the upshot, the applicant has made out his case. I would, accordingly, grant the prayer for an order of certiorari to quash the impugned decision affecting the applicant, including the subsequent confirmation by the first respondent of the trial tribunal proceedings and the decision terminating the applicant employment. Consequently, an order of mandamus is issued. As the matter was conducted on the legal aid basis in relation to the applicant, and considering that the matter relates to matters of employment, I will not make any order as to costs.

I order accordingly.

Dated at Dar es Salaam this 28th day of December, 2020




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B. S. Masoud
Judge