IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 28 OF 2021

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI

AND MANDAMUS

IN THE MATTER OF DISMISSAL FROM EMPLOYMENT OF

ELEMELECK HERZON LOVA

BETWEEN

ELEMELECK HERZON LOVA.....APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE & OTHERS.....1ST RESPONDENT

THE PERMANENT SECRETARY MINISTRY OF

HOME AFFAIRS.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Date of Last Order: 13/6/202

Date of Ruling: 24/6/2022

BEFORE: S.C. MOSHI, J.

This ruling is pursuant to an application which is made under rule 8 (1) (a) (b) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review, Procedure and Fees) Rules, 2014). The applicant seeks the following orders: -

An order for certiorari quashing: -

(i) The decision dated 02nd day of June, 2009 for being tainted with serious illegalities both of procedure and decision; for being very unreasonable that no reasonable authority could have reached to that decision; for lack of reason by both not taking into account matters which ought to have been taken into account and taking into account matters which ought not to have been taken into account; and for being bias/ or double standard and without taking into account the principle of equality of all human beings before the law.

(ii) The decision dated 02nd day of June, 2019 which terminated the employment of the Applicant from the Tanzania Police Force was erroneously reached in breach of the principles of natural justice and fair trial.

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Force was erroneously reached in breach of the principles of natural justice and fair trial.

(iii) The decision dated 05th day of July, 2021 is so unreasonable that no reasonable authority could ever come to it.

(iv) The decision dated 2nd day of June, 2019 and 05th day of July, 2021 as while the former is the decision reached by the Regional Police Commander terminating the Applicant from his employment and the latter is the decision reached by the 1st Respondent upholding the former decision which are so unreasonable that no reasonable authority could ever come to it.

1. An order for mandamus compelling the 2nd Respondent to reinstate the Applicant's employment in Tanzania Police Force without loss of remuneration and all entitlements for the whole period that he was out of the employment as the decision for his dismissal of employment from Tanzania Police Force was so unreasonable, in total violation of principals of natural justice and fair trial, and for being bias and/ or double standard and without taking into account the principles of equality of all human beings before the law.

2. Costs of this application.
3. Any other relief (s) which the Honourable court shall deem fit and just to grant in favour of the applicant

Brief back ground of the matter; the applicant was employed by Police Force, Tanzania from 2005 to 11th of June, 2019 when his employment was terminated by the RPC and confirmed by the IGP (First respondent) on 5th of July, 2021. The facts reveal that, the applicant together with other five police officers were charged with disciplinary offence; it was alleged that they demanded and received a bribe of Tshs. 250,000/= and 56 pieces of timber from unnamed person. An identification parade was held, however, an unnamed complainant denied to have known the applicant and the other police officers who were charged together with him. Thereafter, a disciplinary inquiry was conducted by one S.P. Haji Mohamed whereby the applicant and other five police officers were found guilty. S.P. Haji Mohamed imposed three punishments; first to conduct general cleanness for three days around police premises, a warning letter and "kucheza taburu kwa dakika arobaini na tano" (quick police drill for 45 minutes). The punishments were subject to be confirmation by Kigoma Regional Police commander. The record of proceedings was forwarded to him, he made a decision whereby

he varied applicant's punishment; he dismissed the applicant from the police force employment without affording him a right of being heard while other five police officers who were charged with the applicant were retained in the police force and the RPC confirmed their punishments as recommended by Sp. Haji.

Hearing of the application was by oral submissions, the applicant was represented by Mr. Jordan Mashaka, advocate whereas the respondents were represented by Ms. Pauline Mdendemi, State Attorney. Submitting in support of the application, Mr. Jordan Mashaka, among other things, said that, the 1st respondent who is the Inspector General of Police denied his appeal and confirmed the applicant termination as per annexure LLA–3. The applicant decided to seek a Judicial Review before this court because the first respondent's decision was final, therefore the application for certiorari is necessary as it was decided in the case of **Ally Linus & others vs THA and another** (1998) TLR 9 & 10 where it was held that certiorari lies where there's absence or lack of jurisdiction, second errors of law on fact of record and breach of Natural justice, and where the termination was procured by

fraud, collusion or perjury. He also cited the case of **Sanai Murumbe and Another vs. Muhere Chacha** (1990) TLR 54 where it was held that: -

> " *an order for certiorari is one issued by the High court to quash the proceedings & decision of a subordinate court or tribunal or public authority among others where there is no right of appeal. The High Court is entitled to investigate the proceedings of the lower court or Tribunal or the public authority."*

He pointed out that, the following grounds are apparent on the record

a) Taking into account matters which ought not to have been taken into account.
b) Not taking into account matter which ought to have been taken into account
c) Lack of access jurisdiction
d) Conclusion arrived at is so unreasonable. That no reasonable authority could have come into it.
e) Rules of Natural Justice have been violated, illegality of procedure or decision.

He submitted that; the application is based on the grounds which have been shown at page six of the statement as follows: -

1) The Regional Police Commander without any reasonable cause and without following proper procedure did enhance the punishment of the applicant without affording him with a right to be heard.
2) The Regional Police Commander without affording the applicant with a right to be heard and fair trial enhanced the punishment proposed by the disciplinary inquiry to terminate the applicant's employment with Tanzania police force.
3) The Regional Police Commander enhanced punishment different from those proposed by the disciplinary officer without following proper procedure, hence the decision thereof becomes void ab initio and illegal.
4) That the applicant was charged with other five Police officers with the same offence but the Regional Police Commander terminated the applicant employment and retained the others.
5) The decision dated 2nd of June, 2019 by the Regional Police Commander and which is date 5th July 2021 by the 1st respondent lack reasons for not taking into account matters which ought to have not been into account and taking into account matters which ought not have been taken into account.

He urged the court to determine whether the disciplinary inquiry was conducted in accordance with the law. He said that the procedure of conducting disciplinary inquiry starts with charges which are stipulated under section 50 of **Police Force and Auxiliary Services Act, Cap. 332.** The officer in charge if a designated officer, or any other designated officer will make inquiry of the truth of that charge may acquit the accused or impose punishment as per Section 51 of Cap, 322. In so doing the officer is allowed to collect evidence and make findings thereto. He said that, items 22 up to 30 of the **police General orders No. 106** outline the procedure for conducting a disciplinary inquiry. Some of the key issues were over looked, for instance, item 24 provides for procedure to be followed where the officer tried objects to the officer trying his case, the Regional Police Commander is mandated to choose another officer to try the case. This was not complied with when the applicant and the other five accused objected to SP Haji Mohamed to try their case on the grounds that he was supposed to come outside Kasulu district and has been chosen by the OCD instead of the RPC; as per Page 5 & 6 of the inquiry proceedings annexure OSG 1 to the Respondents affidavit.

officer, the RPC as per S. 52 (2) of Police Force and Auxiliary Service Act, which provided as follows:

"The superintendent in charge of Police to whom any case is referred under subsection (1)

(a) may return the case to the officer by whom it was referred for hearing and determination for taking further evidence or

(b) may himself make inquiry into the case either with or without taking of further evidence by himself or by the police officer by whom the case was referred and impose punishment."

There is no evidence on record from the respondent's affidavit which shows that the RPC did comply with those provisions. The then RPC for Kigoma, Martin L.Otieno, ASP enhanced the punishment by terminating the applicant exclusively and retaining other police officers who were charged together with the applicant. The RPC did not call the applicant or summon him to show cause why such punishment should not be valid. He cited Section 53 (1) of Police Force and Auxiliary Act, Cap. 322 which provides that,

"No punishment shall be increased unless the accused has first had an opportunity of showing cause. Why the punishment should be valid."

He said that, item 27 provides that every who officer who is empowered to hear the case may summon and examine witnesses and require production of documents. No witness from the complainant or prosecution was summoned by the inquiry officer, again there was no any evidence which was tendered to prove the said charge. He said that, Item 30 allows the officer conducting the inquiry when hearing the case to record all evidence appearing to be relevant starting with the prosecution witness, to permit the defaulter to examine each prosecution witness, read out each witness statement to ensure that it's correct and the defaulter understands it, tender the names of all witnesses and their statement numbers, and details of any exhibit admitted. He contended that, these important procedures were disregarded by the inquiry officer SP Haji, Mohamed.

According to annexure OSG – 1 titled *Mashtaka ya Kijeshi kwa mujibu of wa PGO 106;* after concluding the proceedings he recommended punishments, at the last page OSG – 1 *"waandikiwe barua ya onyo, kucheza Taburu kwa dakika 45 kwa siku tatu, kufanya fatiki ya saa mbili kwa siku tatu."* These punishments were to become effective after being confirmed by Kigoma Commanding officer per Regulation C.8 of Police Force Service Regulations, 1995. The said proceedings were forwarded to commanding

inquiry was not conducted according to principles of maintaining impartiality. In support of his argument, he cited the case of **E. 933 CPL Philimatus Fredrick vs IGP & Attorney General,** Misc Cause No. 03 of 2019, High court at Page 16, Kahyoza Judge and in the Case of **Hamisi Ramadhani Lugumba vs Republic,** App.565/2020, CAT, at page 19 Fikirini, JA.

He argued that, the disciplinary inquiry conducted by Haji Mohamed, did not pass the impartiality test. He convicted all the accused without summoning witnesses from the prosecution or receiving any evidence. There are no minutes whatsoever which show who were the complainant's witnesses, at Page 6 of the said inquiry proceedings all the accused persons are recorded to have denied the charge. Surprisingly, at page 7 of same proceedings, the inquiry officer records that,

"Baada ya kueleweshwa watuhumiwa wote sita wamekiri shtaka na wamesikilizwa."

He said that, the quoted statement does not show how such explanation was given and what kind of explanation was given to accused person. The statement states generally that the accused confessed to their charges but it does not show how each accused confessed. The exact wording of their confession is lacking. He said that, during

mitigation, which is part of the same proceedings which is "Maombolezo", all the accused persons are recorded to have asked the inquiry officer to acquit them of the charges because there was no evidence that proved their charge and the complainant did not identify them at identification parade.

He said that, again the same behavior of not being impartial and neutral is exhibited by RPC of Kigoma, in OSG – 2 the proceedings conducted by him, at page 2 is quoted that after the OCD for Kasulu ASP. Sumari received complaints relating to the alleged offence, he contacted inspector Jacob John to make a follow up on the said matter at page 2, first paragraph the RPC is quoted:-

"Kwa upande wake mkaguzi wa pollce insp. Jacobo ambaye alikuwa Kaimu OCS anathibitisha kuwa baada ya kupata maelekezo toka kwa ASP Sumari ambaye alikuwa Kaimu OCD alifanikiwa kuwapata askari watatu ambao mbele yake walikiri kuchukua mbao hizo 56 lakini wallkanusha kuchukuwa rushwa ya T.Shs. 250,000/=. Askari hao walikiri mbele yake walikuwa i/c wa doria siku hiyo, F. 7970 PC Elimeleki F. 9522 PC Mtotno na G 5637 PC Musa. Haingii akilini kama kweli inspector Jacobo anaweza kuwasingizia hawa askari

Regulation C. 8(4) of Police Force Service Regulations of 1995 Provides:

> *"The commanding officer shall have no power to vary a finding of not guilty and punishment unless the accused has been given an opportunity of being heard by the commanding officer."*

He contended that, this is a clear violation of a principle of "*Audi alteram partem*". Therefore, the RPC'S decision becomes void ab initio. By doing this, also the RPC becomes a judge of his own cause violating another principle of Natural Justice, i.e. *Nemo Judex in causa sua".* He was the investigator, prosecutor and adjudicator at the same time. In this regard he cited item 31 of police General (Orders) Discipline Defaulter Procedure rank and file. He said that the inquiry conducted by SP Mohamed and later by RPC does not show how these officers proved the charge against the applicant and his fellow police officers as no witnesses were called. He said that, the applicant and other officers were charged with receiving bribes of Tshs. 250,000/= and 56 pieces of timber from a complainant whose description is not known. The items which were said to have been taken by the applicant and his fellow officers were never tendered before disciplinary proceedings. In absence of such evidence from the respondents it cannot be known how the police officers obtained evidence to find guilty the applicant and other officers. The

kama kweli hawakukiri mbele yake."

It is clear that the RPC based his decision on evidence which he received from inspector Jacobo to terminate the applicant from police force because inspector Jacobo was never summoned by the RPC when the proceedings were forwarded to him. The RPC is allowed by s. 51 (2) of Cap. 322 to take further evidence by himself or by inquiry officer. If the RPC summonsed inspector Jacob in order to ascertain the confession which were alleged to have been made before him, this would have enabled the current applicant, as per the law, examine and cross examine the said inspector Jacob, it is not clear how the RPC got evidence from inspector Jacob, as insp. Jacob was never summoned either by the RPC himself or SP Haji Mohamed.

He argued that, the RPC was biased, he was not impartial; he dismissed the applicant based on non-existing evidence. He referred to the case of **Simeon Manyaki vs IFM,** (1984) TLR 304 where the court emphasized that administrative bodies are required to comply with the principles of Natural Justice, it was held that:

"an Administrative body exercising functions that impeach directly on legally recognized interests owns as its duty to act judiciously in accordance with Rules of Natural Justice "

He submitted that, on the point of unreasonableness of the decision, the term reasonable was defined in the case of **Council of Civil Service Union vs Minister for Civil Service** (1985) AC 74. Lord Diplock stated that,

> *"irrationality means what can by now be succinctly referred to as wellness by unreasonableness. It applies to a decision which is so outrageous in its defiance logic or accepted moral standards that no sensible person who had applied mind to a question to be decided could have arrived at it."*

In this instance where witnesses were not summoned by either SP Haji Mohamed or the RPC, the decision to terminate the applicant in the circumstances becomes unreasonable and against the principles of Natural Justices. On issue of bias and double standard, he said that, principles of equality before the law, as provided for under Art 13 (6) (a) of the constitution of United Republic of Tanzania which affords each person equality before the law whenever their rights are being determined by any court or agency. That, a fair hearing should be availed to any person at all times. He said that, in the proceedings of the then RPC for Kigoma Martin Otieno ASP terminated the applicant only and retained the other police officers, one wonders if all six accused persons were charged with the same

facts how only one of them was terminated, and the other five remained in employment. He said that, the same rules and standards which were used to retain the other five accused persons are the same rules used to terminate the applicant. This amounts to double standard and vitiate a fair hearing.

On the issue of mandamus, he pointed out that in this regard, the issue is whether the said writ or order necessary? The necessary conditions for court to order mandamus was laid down in the case of **John Mwombeki Byombalila vs RC and RPC Bukoba** (1986) TLR 73.

Submitting on the first conditions, he said that, during the disciplinary inquiry the applicant and his fellow asked the inquiring officer to dismiss the charge against them, as there was no evidence or witnesses summoned from the respondent to establish the charge yet the said officer disregarded that plea and went on to convict the accused persons under bizarre circumstances. After being dissatisfied by his dismissal by the RPC the applicant appealed to 1st respondent and went on to confirm the decision of the Applicant by the RPC.

On 2nd condition, he said that, the officers working under the 1st respondent had a legal duty to conduct disciplinary proceedings in accordance to police force and Auxiliary Service Act Cap. 322, Page 60 No. 106 and Police

Force Regional 1995. This duty was owed to the applicant, the officers disregarded such duty and dismissed him from employment.

On 3rd condition, he elaborated that, the duty of RPC, to enhance punishment of the applicant by not following the procedure shown in Section 53 (1) of police force & Auxiliary Act, Cap. 322, item 31 of the PGO; these procedures are mandatory it is not in the discretion of the inquiry officer to ignore what the law demands to be done. The deliberate non adherence to these rules let the applicant suffer injustice.

4th condition; on locus standi, he referred to the case of **Lujuna Shubi Balanzo vs. Registered Trustees of CCM** 1986 TLR 203, Samatta, JA, and said that, the applicant has locus standi since it was him who was unjustly dismissed from employment without concrete reasons. The applicant is entitled to bring this suit so as to seek protection of his rights

On 5th condition, he argued that, the applicant has no other remedy as according to Section 56 (1) of police force and Auxiliary Service Act, Cap 322. The decision of 1st respondent on appeal is final.

He in the end, requested the court to grant an order of certiorari and an order of mandamus as prayed.

In reply, **Ms. Pauline** agreed that the principles for grant of prerogative orders have been laid down in the cases of Ally Linus (Supra) and Saanane Mirumbe (Supra). She pointed out that, the applicant has raised new allegations which have not featured in the applicant's affidavit or statement. He raised new allegations that no witnesses were called during the inquiry hearing, she said that, he had said that, an ID parade was conducted but unknown person failed to identify the suspect and no evidence was tendered at the inquiry hearing to prove charges against the applicant, and that, TShs 250,000/= and 56 timbers which were allegedly have been taken by the applicant and his fellow police officers were never tendered during the inquiry hearing. She said that, raising these allegations at this stage of hearing or rather challenging the disciplinary hearing which was conducted by SP Haji Mohamed is an afterthought and the court should not entertain such allegation. That, the said grounds have been stated in paragraph six 6 A (i), B(i), C (i), D(iv) and E(V). She said that, looking at these grounds, it is clear that the applicant is challenging the decision of the RPC and IGP, he is not challenging the procedures of the inquiry Hg before SP haji. In support of this argument, she cited the case of **Backlays Bank**

(T) Ltd. vs Jacob Muro, Civil Appeal Number 357 of 2019. Court of Appeal decision, at page 11.

She proposed that, the submission made by the counsel for applicant regarding new facts not featuring in the affidavit and statement should be ignored by the court.

In her reply to respondent's counsel submission, she consolidated ground number 6 (A) (i), 6 (B) (ii) and 6 (C) (iii) in which it is alleged that, the RPC enhanced the applicant's punishment without reasonable cause, and without following proper procedure, without affording the applicant a right to be heard, and that the RPC enhanced the punishment without a fair trial. She said that, the applicant was charged per Regulation 6 (5) of the police force services Regulations 1995 (Regulations) and not per police force and Auxiliary service Act, cap. 322. The law applicable in relation to his termination proceedings is the 1995 Regulations and not cap. 322 as referred by counsel for applicant in his submissions. She cited Regulation C. 1; this Regulation provides that: -

> *"Subject to the provisions of this part of their Regulations, any offence against disciplinary or any other misconduct by the police officer shall be dealt with in accordance with this, another regulations or orders"*

She submitted that, Regulation C. 7 of the Regulations provides for procedures of inquiry of disciplinary offences for non-commissioned officers and constables, and in this application, the applicant was at the level of constable. Regulation C.7 (1) (2) (a) 2 (b) gives powers to senior officers or Tribunal to hear charges against the defaulters. In the present application, the charges against the applicant and his fellows, were heard by a senior officer SP Haji Mohamed, Regulation C.7 (6); it reads;

> *"Where the defaulter pleads on is found guilty but the appropriate Tribunal considers that the punishment which it can award is sufficient to meet the gravity of the case, it shall not make an award but sent a report to the commanding officer together with a copy of proceedings, its findings and the reasons thereof."*

She said that, Regulation C.7 (7) (A) (I) provides that on receipt of a report and other documents referred to in paragraph (6) (i) of these Regulations, a commanding officer may:

> *"confirm all or any of the findings or substitute for any finding of the appropriate tribunal any other finding at which the tribunal could have arrived upon the evidence may either himself make an award in*

relation thereto, in which case shall communicate the same to an appropriate tribunal."

She said that, Regulation C. 8(5); provides that where a Report or reference has been made to the commanding officer under paragraph 6 or sub. Para 7 of Regulation C. 7 the commanding officer may award one or more of the punishments specified in sub. Paragraph two of Regulation C.8 or in lieu thereof, may dismiss or terminate the appointment of the non-commissioner officer or Constable.

She argued that, Regulation C 8 para 5 doesn't require the commanding officer, the RPC to hear the defaulter before varying or conforming any punishment, there's no requirement to re-hear the applicant or witnesses before the commanding officer. She said that, all the procedures, as pointed out above were followed during the inquiry hearing of the applicant to ascertain whether the applicant was guilty or not of the alleged charges laid against him and his fellow police officers.

She said that, at Paragraph 5 of the applicant's affidavit, the applicant has admitted that he was summoned before the disciplinary inquiry and he was heard accordingly (in Respondent's counter affidavit entitled "mwenendo wa mashtaka.....").

She said that, after the conclusion of Applicant's inquiry hearing the proposed punishment and proceeding were sent to RPC who varied the punishment according to Regulation 6.8 (5) of the Regulations. He varied the proposed punishment for the applicant after going through the proceedings of an inquiry hearing before SP Haji Mohamed as seen in Annexure OSG 2 to the respondent's counter affidavit.

It was also her argument that, the applicant was given an opportunity to be heard as the law requires, hence there was no violation of principles of Natural Justice, therefore he had a fair trial.

With regard to ground (d) and (e), she said that the counsel for applicant submitted that the RPC had only terminated the applicant and retained other five police officers; hence Art. 13 (6) (a) of the constitution, which provide for equality before the law has been violated, and that the RPC & IGPS decisions didn't take into account matters which ought to have been taken into account and took into account mattesr which ought not to have been taken into account. It was her response submission that applicant's rights as provided for under Art. 13 (6) (a) of constitution haven't been violated, there is no biasness in RPC'S decision. All the defaulters were treated equally by the RPC. The fact that all the defaulters were charged

with the same offence does not mean that they should all receive the same punishment. That does not amount to biasness. She argued that, the RPC'S decision to dismiss the applicant was reached after looking at the involvement of the applicant in the commission of the alleged offences. In that regard, she referred to annexure OSG. 2, page 36 paragraph 2 to the Respondents counter affidavit.

She submitted that, the prayer for an order of mandamus sought by the applicant as stated in his statement at paragraph 5. B, doesn't meet the requirement as laid down so to warrant this court exercise its power and grant the sought order. That, the principles for granting an order for mandamus laid down in the case of **John Mwambeki (supra).** paragragh 5 B reads thus;

> *"an order for mandamus compelling the 2nd respondent to reinstate the applicant without loss of remuneration and all entitlement for the whole period that he was out of the employment as the decision for dismissal of employment from Tanzania Police Force was so unreasonable, in total violation of principles of Natural Justice and fair trial and for being bas and/or double standard and without taking into account of equity to all human beings before the law."*

She contended that, the judicial review is type of proceedings in which the court review the lawfulness of decision or actions made by a public body or authority exercising quasi – Judicial decision. The court will not substitute what it thinks is the correct decision, the duty of the court is to confine itself to the question of legality. This is to the extent that courts have to consider as to whether a decision-making authority exceeds its powers, violates Rules of Natural Justice, reached decision which a reasonable man would have reached or whether it abused its powers.

She said that, this Court will have to substitute the punishment awarded by the 1st respondent which the court can't do. She said that, reversing the decision of 1st respondent, will defeat the whole purpose of judicial review. She prayed the court not to grant the prayers as asked by the applicant, and that the petition be dismissd it with costs.

In rejoinder, counsel for applicant submitted that, he did not raise new allegations which are not in applicant's affidavit. He pointed out that what he did is an analysis of law relating to disciplinary inquiry and he did not submit from the bar. For instance, when he submitted on item 22 – 30 of the PGO, these are procedures outlined by law. He argued that, in the course

of submission counsels, are not allowed to raise new facts which are not pleaded but they are at liberty to make analysis on point of law.

He said that, they are issues of laws applicable to the disciplinary inquiry conducted against the applicant. The police disciplinary procedures are not only confined to Regulations as stated by counsel for respondent who submitted that only the Regulation of 1995 are applicable. He said that, there are several laws such as the police force and Auxiliary Service Act, CAP 322 which provides for powers and procedure for inquiry officers, commanding officers and IGP conducting disciplinary inquiry at different levels. He said that, other laws include the PGO which also provide for the same procedure as the Regulations. These Laws apply in all disciplinary proceedings concerning the police.

He submitted that, the offences are provided for under section 50 (1) of the Act, Cap. 322, the same offences also appear in PGO in the part entitled Discipline and Rank and File; and also, they appear under Regulation C.5 of the Regulations. So, it is not true that only the Regulations were used in trying the applicant. He said that, Annexure OSG 1 annexed to respondents' Counter affidavit are proceedings conducted by SP Haji

Mohamed at Kasulu district. The title of the proceedings is quoted in Kiswahili, *"Mashtaka ya Kijeshi kwa mujibu wa PGO 106"*

He argued that, therefore, this is proof that not only the Regulations were used but also the PGO were used. He said that, another annexure, OSG – 2 proceedings by the RPC for Kigoma, the title reads in Swahili, "*Police Force Regulation 1995 R.E. 2002, Ikisomwa pamoja na PGO 106",* the 1st paragraph of these proceedings they are quoted in Kiswahili, Kanuni C.7 (7) (A) ya PFCR – RE 2002, *"ikisomwa Pamoja na PGO 106 (31) mamlaka ya kutoa adhabu au kuthibitisha an kubadilisha, adhabu kulingana na kosa la washtakiwa."*

Turning to the issues of impartiality by the RPC after proceedings were forwarded to him, and whether he followed the procedures, applicant's Counsel referred to Regulation C.8 (5) which provides that, the commanding officer has power to dismiss or terminate the appointment of a non-commissioned officer or constable. However, the same regulation under Regulation C. 8 (3) provides that,

> *"No award by an appropriate tribunal shall be carried into effect unless and until it's confirmed by commanding officer, the commanding officer may vary or remit the punishment provided but no punishment*

shall be increased nor any punishment shall be added unless the non-commissioned officer or constable has been given an opportunity of being heard by the commanding officer"

He said that, same principles are outlined under Regulation C.8 (4) of the Regulations (1995) it is clear from the records of proceeding conducted by RPC annexure OSG -2 did not comply with this mandatory requirement of the law. He contended that, the RPC did not summons the applicant and hear him before enhancing the punishment which was recommended by the inquiry officer.

He said that, the respondent's counsel said that under paragraph 5 of affidavit the applicant stated that he was fully heard, so the procedures were followed. However, that's personal interpretation of the counsel. In essence the applicant says that they were summoned before the disciplinary inquiry and in the sense that he and other five police officers were allowed to tell their own version of their story, also paragraph 12 of the same affidavit the applicant depose that the whole process leading to termination of his employment was tainted with serious irregularities and illegalities both of procedure and decision and in violation of principles of Natural Justice and a

fair trial. So, the applicant dispute the whole process resulting to its termination.

He submitted that, to start with the proceeding inquiry by SP Haji Mohamed which was Later forwarded to the RPC, the counsel for Respondent has also submitted that the applicant was dismissed because he was a leader of patrol which were contacted by the applicant and his fellow police officer. In this regard, one would expect to find evidence to that effect, showing that, he was the leader of patrol on that particular day. Looking at both proceedings conducted by the RPC, and the SP Haji Mohamed; OSG – 1 and OSG – 2 there's no any proof or annexure which show that the applicant was indeed a leader of the patrol. The complainant failed to produce occurrence book these in both proceedings to show that indeed the applicant was the leader of patrol. He said that, the counsel for the respondent also submitted that he was terminated because of his involvement in the commission of the alleged offences; but even the annexures which are annexed to respondent's counter affidavit do not have any proof that the applicant was involved in the alleged offences. The inquiry officer and RPC are mandated by the law to call witnesses receive evidence and statement of witnesses but they did

not comply with the laws therefore applicant's prayers of mandamus and certiorari have merits, he therefore prayed that they be granted by this court.

I have considered the submissions for both sides my deliberations will trace their basis on the pleadings and the corresponding affidavit and counter affidavit. It is evident that the laws applicable for disciplinary inquiry for police officers are governed by Police Force and Auxiliary Service Act, CAP 322, Police Force Regulations of 1995, GN. 193, Police General Order and other laws. A scrutiny of page 5, 6 and page 7 of a copy of the inquiry proceedings which were conducted by SP. Haji Mohamed annexure OSG 1 to the respondent's counter affidavit, titled Mashtaka ya Kijeshi kwa mujibu wa PGO 106, at page 7, indicates that the the case was heard on 18/3/2019 whereby the defaulters raised a preliminary objection that they did not trust the officer who was conducting the inquiry. The inquiry officer recorded their preliminary objection and adjourned the case to 19/3/2019 at 10:00 hours. Surprisingly the inquiring officer on, on the same date on 18/3/2019 convicted the defaulters on the ground that they confessed to the charges, however, the said confessions were not recorded. This is clear indication that the appellant and others who were charged together with him were denied a right of being heard. After concluding the proceedings he recommended

punishments, at the last page of OSG 1 it is written that; " *barua ya onyo, kucheza Taburu kwa dakika 45 kwa siku tatu na kufanya fatiki ya saa mbili kwa siku tatu."* These punishments were to become effective after being confirmed by the Regional Commanding officer per Regulation C.8 of Police Force Service Regulations 1995. The said proceedings were forwarded to commanding officer, the RPC as per Section 52 (2) of Police Force and Auxiliary Service Act, which provided that the superintendent in charge of Police to whom any case is referred under subsection (1)

(a) may return the case to the officer by whom it was referred for hearing and determination for taking further evidence or (b)may himself make inquiry into the case either with or without taking of further evidence by himself or by the police officer by whom the case was referred and impose punishment."

There is no evidence on record from the respondent's affidavit which shows that the RPC did comply with those provisions. The then RPC for Kigoma, Martin L. Otieno, ASP enhanced the punishment by terminating the applicant exclusively and retaining the other police officers who were charged together with the applicant. The RPC, did not call the applicant or summon him to show cause why the punishment should not be valid , see

annexure SGO 2. Section 53 (1) of Police Force and Auxiliary Act, Cap. 322 provides that, *"No punishment shall be increased unless the accused has first had an opportunity of showing cause Why the punishment should be valid."*

Again, Regulation C. 8(4) of Police Force Service Regulations of 1995 provides that:

"The commanding officer shall have no power to vary a finding of not guilty and punishment unless the accused has been given an opportunity of being heard by the commanding officer."

All these laws go hand in hand.

Similarly, the IGP confirmed the applicant's termination. The RPC committed the same errors, it is obvious that he was not impartial and neutral as exhibited by RPC of Kigoma, in OSG 2 at page 2 stated that after the OCD for Kasulu ASP. Sumari received complaints on the alleged offence he contacted inspector Jacob John to make a follow up on the said matter at page 3 paragraph 1 the RPC is quoted saying that: -

"Kwa upande wake mkaguzi wa police insp. Jacobo ambaye alikuwa Kaimu OCS anathibitisha kuwa baada ya kupata maelekezo toka kwa ASP Sumari ambaye alikuwa Kaimu OCD alifanikiwa kuwapata askari watatu ambao

mbele yake walikiri kuchukua mbao hizo 56 lakini walikanusha kuchukuwa rushwa ya T.Shs. 250,000/=. Askari hao walikiri mbele yake walikuwa i/c wa doria siku hiyo, F. 7970 PC Elimeleki F. 9522 PC Mtono na G 5637 PC Musa. Haingii akilini kama kweli inspector Jacobo anaweza kuwasingizia hawa askari kama kweli hawakukiri mbele yake."

However, the said Jackobo was neither called before the RPC nor at appeal stage before the IGP. Likewise, the applicant was never called to both platforms before his sentence was enhanced to a more serious punishment, i.e., termination of his employment was confirmed as the above quoted law mandates. It is evident that, the decisions were reached upon against the principles of natural justice for failing to conduct a fair hearing. 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. I thus agree with applicant's counsel that, the applicant was denied a right of having a fair hearing when the disciplinary inquiry was conducted and the RPC confirmed the finding of the inquiry officer and enhanced the punishment by imposing termination contrary to law. Also, the first respondent erred by confirming

the RPC's decision which was tainted with procedural irregularities which were in breach of principles of natural justice as it denied the applicant a fair hearing.

Therefore, failure to abide with procedural law, occasioned failure of justice as both authorities violated rules of natural justice, which affected the fairness of the trial, they failed to give reasons for decision; hence, the findings leading to discharge of the applicant from police force is unreasonable and suggests lack of good faith, and bias.

Now, the issue is whether the applicant has made out a case for an order for certiorari. The root of this application is mainly on the ground of violation of rules of natural justice, bad faith, bias and failure to provide. As indicated herein above, the proceedings which were the basis of the impugned decision were conducted in clear violation of relevant regulations and laws. Therefore, I find that an application for certiorari is meritorious for reasons stated herein above.

The next issue is whether the conditions pertaining to issue of mandamus have been met. Mandamus is a judicial remedy by

way of a judicial review which is supposed to command a public body to perform a public duty imposed on it by the constitution or by law. However, a judicial review aims at determining the legality of the decision made by lower court or public authority and not to substitute the decision made by those bodies. The applicant prays the court to compel the 2nd respondent to reinstate the applicant's employment in Tanzania Force without loss of remuneration and all entitlements for the whole period that he was out of the employment from Tanzania Police Force. It is my view that, this prayer is misplaced because giving such an order would be tantamount to entertaining an appeal, the power of the court to interfere is not that of an appellate authority, see Sanai **Murumbe and Another Vs Muhere** (1986) TLR 54. That said, I find that the prayer for mandamus is not tenable.

I therefore, basing on what is said herein, I grant an order for certiorari as prayed, let it be issued.

Orders accordingly.

I make no orders as to costs.

S.C. Moshi

Judge

24th June, 2022