

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS CAUSE NO. 208 OF 2017**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

KIWANUKA KUNSA STEPHEN..... APPLICANT

AND

ATTORNEY GENERAL RESPONDENT

BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

RULING

A. Introduction

1. On June 20, 2017, by notice of motion, the Applicant moved this court under Articles 28, 42 & 172 of the Constitution, Section 36 of the Judicature Act Cap 13, rules 3 (1) (a), 6 (1), (2) and 7 of the Judicature (Judicial Review) Rules 2009, and the Ugandan Public Service Standing Orders for orders of Certiorari, Prohibition, Mandamus, and other consequential orders. The application is supported by the affidavits in support and rejoinder of the Applicant, Kiwanuka Kunsu Stephen while the Respondent filed an affidavit in reply deposed by the Permanent Secretary, Ministry of Public Service, Mrs. Catherine Bitarakwate Musingwiire opposing the Application.

B. Background facts

2. The Applicant joined public service as a Personnel Officer on July 3, 1981 and rose through the ranks to the position of Director Research and Development by 2010. He served in that position until his contested dismissal in March 2017.

3. On December 6, 2017, this court required parties to appear before a mediator which effort failed for non-appearance of parties according to the mediator's report dated July 12, 2018. On December 5, 2018, Ruling on the motion was reserved on notice and parties were directed by the deputy registrar, on my instructions, to file written submissions which they did and I have carefully considered.

C. The evidence

4. The evidence adduced by both parties is not disputed. The Applicant was appointed on Probation as Personnel Officer on July 3, 1981 and thereafter confirmed in the public service and promoted through the ranks to the post of Director for Research and Development by 2010.
5. On September 19, 2012 by letter referenced CP 55763 the Applicant was interdicted from office by Mrs. Adah Muwanga for the Permanent Secretary on allegations of creation of pension and gratuity ghosts which had led to the fraudulent payment of approximately sixty-three billion (63,000,000,000) Ugandan Shillings between the months of February and October 2011.
6. On January 23, 2013, he was charged before the Anti-Corruption Division of the High Court with causing financial loss and neglect of duty, and subsequently, the charges were dismissed on April 13, 2015 for want of prosecution.
7. On April 22, 2015, the Applicant wrote to the Ag. Permanent Secretary (PS) Ministry of Public Service (MOPS) to lift the interdiction based on the dismissal of the charges against him.
8. Subsequently the Applicant was indicted for related offences of causing financial loss, abuse of office, false accounting, conspiracy to defraud, and diversion of public resources. He was convicted by the Anti-Corruption Division of the High Court on November 11, 2016 and sentenced to five years' imprisonment and an order to compensate

government of Uganda a sum of 50b. The Applicant filed a Notice of Appeal against the decision on November 14, 2016.

10. On February 27, 2017, the Applicant who was serving sentence in prison sent the Permanent Secretary a letter of intention to retire since he was to make 60 years on October 2, 2017. In the said letter, the Applicant requested for his retirement benefits. On March 24, 2017, the Permanent Secretary Ministry of Public Service wrote to the Applicant dismissing him from the public service.

D. The dispute

11 While the Applicant maintains that his dismissal from the service was done without according him the right to a fair hearing contrary to established practice in the public service, the Respondent contends that the Responsible officer acted within her powers and her decision was arrived at after due consideration of the sound principles of law and properly believed that the trial court had complied with the principles of natural justice. Furthermore, that the decision to dismiss the Applicant was premised on his trial and subsequent conviction by a court of competent jurisdiction that found him guilty of offences and was procedurally proper and justified in the circumstances.

12 Counsel for the Applicant framed two issues that were addressed by both counsel, namely,

a) Whether the Applicant's dismissal was lawful

b) Whether the Applicant is entitled to the remedies sought

E. The law

13 The principles that guide the court when reviewing decisions and decision making processes of administrative bodies are now well settled as set out in the case of **John Jet Tumwebaze vs. Makerere University Council & 2 Others Misc. Cause No. 353 of 2005**. The Applicant has to show that the decision or act

complained of is tainted with illegality, irrationality and procedural impropriety. The court in that case defined these guiding principles as follows:

Illegality: when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality.

Procedural impropriety: failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

Irrationality: when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

F. Whether the Applicant's dismissal was lawful

14. Like in all civil cases, the legal burden of proof is on the Applicant to demonstrate that the decision complained of is tainted with illegality and procedural impropriety or unfairness and it is irrational while the standard of proof of evidence is on either party that asserts a fact.

15. Counsel for the Applicant submitted that the decision by the Respondent to terminate the employment of the Applicant without according him a fair hearing was illegal and in violation of the

legally established procedures. Counsel for the Applicant cited **Public Service Commission Act 2008; Public Service Regulations 2009** and **Public Service Standing Orders 2010(F-s) paragraph 8(b)** in support.

16. Section 18 of the Public Service Commission Act 2008 imposes a duty on the Commission to observe principles of natural justice in disciplinary proceedings. This requirement is captured in the standing orders and regulations, some of which provisions are reproduced below.

17. Section F-r of the Standing Orders¹ is central to this case. I reproduce the relevant rules below:

- a) Para 2: The power to discipline and remove public officers from office is provided in the Constitution. In this regard Article 172 (1) (a) of the Constitution confers on the Public Service Commission disciplinary control over officers above rank of head of department under which category the Applicant falls.
- b) Para 3: proper disciplinary procedure shall be followed in all cases involving discipline and removal of public officers.
- c) Para 4: The Rules of natural justice must apply in all disciplinary cases of whatever description.
- d) Para 5: No public officer shall be subjected to any punishment without first being informed in writing what he or she has done and given an opportunity to defend himself or herself.
- e) Para 6: Those handling disciplinary cases must be impartial and both sides in the case must be heard.
- f) Para 8: A responsible officer must ensure that the submissions are instituted against a public officer are complete and factual, that events which led to disciplinary action are isolated as to place and time, and that supporting written documents are properly annotated and cross-referenced so as to facilitate speedy handling by the appointing authority.

¹ Ministry of Public Service Standing Orders, page 49 to 50

- g) Para 12: The conviction of an officer on a criminal charge and his imprisonment does not automatically remove him from office.
18. From the evidence adduced by both parties it is clear the only evidence disciplinary proceedings having been conducted is the letter from the Permanent Secretary dated March 24, 2017 signed by the PS. The content of that letter is reproduced below:

'Dismissal *from public service of Uganda*'

'I have been directed by the Appointing Authority under Public Service Commission Advice No. 6 of 2017 dated March 8, 2017 to inform you that you have been dismissed from Public Service with immediate effect.

In accordance with the Public Service Standing Orders (2010) Section (F-t) 7, your rights and privileges as a public officer are henceforth forfeited.'

19. The Respondent does not dispute that the Applicant was not invited to the disciplinary proceedings nor that he did was not given an opportunity to defend himself before the Public Service Commission as required by the standing orders that are founded in the rules of natural justice. A cardinal rule of natural justice is: hear the other party, a rule reflected in para. 5 of Section (F-s) to the effect that a public officer shall not be subjected to punishment without first being informed in writing of what the officer has done, and without being given an opportunity to defend himself.
20. Another aspect of the fair hearing procedures in the standing orders is that a conviction of an officer on a criminal charge and his imprisonment doesn't automatically remove him from office. This is unique to the public service so that an officer is not automatically dismissed and that he is still entitled to a fair,

impartial and separate disciplinary hearing, regardless of a conviction by a court of law.

21. Counsel for the Respondent submitted that the Applicant had already undergone a fair trial through a criminal hearing and therefore a disciplinary hearing was unnecessary. It seems counsel was relying on regulation 47 of the Public Service Regulations 2009 that empowers the Commission to consider dismissal of an officer on the basis of a criminal conviction without recourse to disciplinary process as prescribed by regulations 38, 39 and 40 of the 2009 Regulations.

22. Section 18 of the Public Service Act 11 of 2008 imports the rules of natural justice into any disciplinary process under the Act, whether for cases that call for severe punishment or not including removal from office. The two rules in Section 18 are:

- a) The right of an officer under discipline to be informed of the case against him;
- b) The right of the officer to put up a defense and present his or her case in writing within a specified time and to appear before a properly constituted meeting of the Commission.

23. Therefore, Regulation 47 in so far as it contradicts a substantive provision of the Act must be construed to give effect to the Act and not to deny any officer the right to a fair hearing as enacted in Section 18 of the Act.

24. Needless to say, regulation 47 goes against the distinctive position of the public service standing orders that order for a separate disciplinary process regardless the outcome of a criminal case against an officer as well as section 18 of the Public Service Act 2008.

25. Counsel for the Respondent also relied on **Mpungu & sons Transporters Ltd v Attorney General and Kamme Coffee factory (Coach) Ltd SCA No. 17 of 2001** where Katureebe CJ reiterated the imperative of observance of the cardinal rule of '*audi Alteram Partem*' (hear the other party) but the precedent supports the Applicant's case and not the Respondent's case.
26. Because the disciplinary process is a separate procedure, regulation 39 of the Public Service regulations gives discretion to the responsible officer to determine what proportion of emoluments an officer will get after conviction of a criminal offence.
27. In the final analysis, based on the undisputed evidence of failure to subject the Applicant to a disciplinary process by the Respondent, his impugned dismissal by the Permanent Secretary by letter dated March 24, 2017 is without basis and ultra vires Section 18 of the Public Service Act 2008 and Section (F-r) of the Standing Orders and the rule of natural justice '*hear the other party*'.

G. Remedies

28. Having found that the dismissal was ultra vires the law and contrary to the natural law rule of 'hear the other party', the Applicant is entitled to appropriate remedies including general damages to vindicate the wrong done to him by the Appointing Authority when it did not comply with the substantive and procedural law on disciplinary process. In the premises, the Applicant is awarded 10,000,000/ as general damages in addition to consequential orders.

H. Summary of findings

29. The Applicant's impugned dismissal by the Permanent Secretary by letter dated March 24, 2017 is without basis and ultra vires Section 18 of the Public Service Act 2008 and Section (F-r) of the

Standing Orders and the rule of 'hear the other party ' and the Applicant entitled to appropriate remedies as a result.

I. Orders

- a) An order of Certiorari shall issue quashing the decision to dismiss the Applicant from the public service without due process.
- b) On order of Mandamus shall issue directing the Appointing Authority to conduct fresh disciplinary proceedings in accordance with the law within six months from the date of this order.
- c) Should there be non-compliance with the order of Mandamus, the Applicant will be deemed to have retired from the public service on October 2, 2017 and entitled to all the rights and benefits that go with mandatory retirement from the public service regardless of the criminal conviction.
- d) The Respondent shall pay the Applicant general damages of 10,000,000/-with interest of 8% from the date of this Ruling until full payment.
- e) The Respondent shall pay the Applicant costs of the application.

DATED AT KAMPALA THIS 7TH OF FEBRUARY 2020

HON. LADY JUSTICE HENRIETTA WOLAYO

Legal representation

M/s Isabirye & Co. Advocates for the Applicant

M/s Attorney General Chambers for the Respondent.