THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.82 OF 2019

JUMA NKUNYINGI SSEMBAJJA---------- APPLICANT

VERSUS

1. **SECRETARY PUBLIC SERVICE COMMISSION**
2. **ATTORNEY GENERAL---------- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Sections 36 of the Judicature Act as amended, Rules 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following judicial review reliefs;

1.) A declaration that the 1st respondent's decision of refusing to reinstate the applicant to the public service of Uganda and payment of all accrued benefits from November 2012 to date is illegal, unconstitutional, unjustified and is against the principles of natural justice and was done without giving the applicant an opportunity to be heard and riddled with procedural impropriety.

2.) An order of Certiorari quashing the decision of the 1st respondent contained in their letter of 3rd December 2018 and served on the

applicant on 15th January 2019 declining to reinstate the applicant to the public service of Uganda and pay all his accrued benefits.

3.) An Order of Mandamus directing the respondents to reinstate the applicant to the Public service of the Republic of Uganda in his former position as deputy Chief Administrative Officer and pay all his accrued benefits from November 2012 to date.

4.) An order of Prohibition be issued against the respondent restraining him, from taking any further disciplinary action against the applicant relating to the facts in Criminal Case No. 185 of 2011 the final determination of Criminal Appeal No. 271 of 2016 pending before court.

5.) An Order of Injunction to stop the respondents their agents or anyone acting under their direction from implementing and/or enforcing the respondents' direction or order terminating the applicant's employment.

6.) That an award of general damages and exemplary damages be made to the applicant for the loss/injury occasioned by the respondent's decision refusing to reinstate him to the Public Service of the Republic of Uganda and pay all his accrued benefits.

7.) Costs of this application

The grounds in support of this application were stated in the Notice of Motion and repeated in the affidavits in support of the applicant-Juma Nkunyingi Ssembajja and briefly state that;

1) That on 6th May 2009, the applicant who was then a Principal personnel Officer of Kiboga District Local Government was offered and accepted appointment as Deputy Chief Administrative Officer on transfer of service from Kiboga Distrct Local Government to the Central Government by the Public Service Commission.

2) The applicant was transferred to different districts as Deputy Chief Administrative Officer and sometimes assigned duties of Chief Administrative officer of Manafwa District. The applicant was transferred to Kyejonjo District as Deputy Chief Administrative Officer.

3) That while at Kyenjojo district, the applicant was on 18th October 2011 charged and subsequently convicted on the 16th October 2012 for offences allegedly committed during his time of service at Manafwa District vide High Court (Mbale) Criminal Case No. 185 of 2011.

4) The applicant being dissatisfied with the decision of the trial court, appealed against the judgment and conviction by the High Court to the Court of Appeal vide Criminal Appeal No. 214 of 2012 and was further granted bail pending the disposal of his appeal.

5) That upon release on bail, the applicant found his position as the Deputy Chief Administrative Officer of Adjumani District had since been given to another individual without being heard and or notifying him of the reasons for this. His name was as well deleted off the payroll and has not received his emoluments since November 2012 todate.

6) The applicant's appeal which was pending in the Court of Appeal was successful with the appellate court ordering for a retrial vide judgment dated the 28th day of September 2015.

7) That at the retrial, the applicant was convicted and he has since appealed against the decision to the court of Appeal and was granted bail pending Appeal.

8) The applicant followed up with the Ministry of Local Government and Public Service Commission in March 2017, and established that by a letter dated 18th December 2012, he was dismissed from the public service of Uganda with immediate effect.

9) The applicant complained about the validity of the letter of dismissal which did not contain any reasons and was never served on him, to the office of the Chief Administrative Officer Manafwa District Local Government who in turn sought the opinion of Solicitor General.

10) That by letter dated 11th April 2017, the Solicitor General advised that it was wrong to take a decision against the applicant and others based on criminal conviction prior to the appellate court taking a final decision, but the 1st respondent has refused to heed to this advice.

11) That on the 15th January 2019, the applicant was given a letter by Commissioner Engomu dated 3rd December 2018 communicating the decision of the 1st respondent declining to reinstate the applicant and pay all the accrued benefits.

12) The decision of the 1st respondent in its letter dated 3rd December 2018 was against the rules of natural justice and contrary to the Uganda Public Service Standing Orders and is riddled with procedural impropriety and disclosed no reason for denial of the applicant's request in as far as:-

(i) The applicant was not given an opportunity to appear and substantiate his claim before taking the decision as required.
(ii) The reason for the denial of the request was not disclosed in the letter communicating the decision.
(iii) The decision was against the said advice of the Solicitor General communicated to the respondents.
(iv) The decision is discriminatory in nature in as far as there other officials still serving despite being convicts and their convictions pending appeal.
(v) The decision was taken without basis.
(vi) The decision was taken without involvement and/ knowledge of the Ministry of Local Government.
(vii) Failure to timely communicate the decision.

13. That justice demands that this application be allowed and the applicant be reinstated to his former position as Deputy Chief Administrative Officer and pay all his accrued benefits since November 2012 currently standing in the range of 153,920,000/=

The respondents opposed this application and they filed an affidavit in reply through Dr John Geoffrey Mbabazi the Secretary of Public Service Commission.

(1) That on 8th November, 2012, the Permanent Secretary, Ministry of Local Government made a recommendation to the Public Service

Commission recommending that Mr. Juma Nkunyingi Ssembajja be dismissed from Public Service following his conviction by the Anti-Corruption Act of a criminal offence.

(2) That Justice P.K Mugamba sentenced Nkunyingi to three years imprisonment on the charge of abuse of office, and two years imprisonment on the charge of causing financial loss. The judge further ordered that both convicts were barred from serving in the public service for 10 years from the date of Judgment.

(3) That by the time of removal of Mr Nkunyingi from the Public Service Commission in 2012, he was a convict. The fact that he was appealing against his conviction did not invalidate the conviction. In any case there was no Court Order to stay execution.

(4) That the Public Service Commission would have been in contempt of court had it not removed Nkunyingi from the Public Service. The decision to remove him from Public Service was not in contravention of the Public Service Standing Orders.

(5) That the Public Service Commission (PSC) did not have to hear the officer prior to removal at the time, he had ceased to be a Public Officer by virtue of the Court Order which was in effect from the date of Judgment.

(6) That the Public Service Commission had proceeded under Regulation 47 of the PSC Regulations, 2009 which did not make it mandatory that the entire disciplinary procedure needed to be followed when removing a convicted officer as the Commission had the right to

determine whether to subject the matter disciplinary punishment without proceedings in regulations 38, 39 and 40.

At the hearing of this application the parties were directed to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Two issues were proposed for court's resolution;

1. ***Whether the application raises any grounds for judicial review?***
2. ***Whether the applicant is entitled to the remedies sought?***

The applicant was represented by *Mr Isaac Kugonza* whereas the respondents were represented by different lawyers at the different hearings who included *Mr. George Kalemella, Mr. Tusubira Sam and Mr Mugisa Moses*.

ISSUE ONE

Whether the application raises any grounds for judicial review?

The applicant's counsel submitted that the 1st respondent's decision was made in violation of the rules of natural justice and it was irrational since no reasons where availed to the applicant and it violated 1995 Constitution of Uganda under **Article 42** provides for the Right to just and fair treatment in administrative decisions.

The above Article requires that a Public body which seeks to exercise administrative powers to take an administrative decision ought to comply with the applicable rules of natural justice. It is also expected to act within the law, its powers and jurisdiction and should not arrive at a decision which is so unreasonable that no court, tribunal or public authority properly directing itself on the relevant law and acting reasonably could have reached it, as per ***Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B 223***.

The respondents contended that the dismissal of the applicant was done in accordance with the law since the applicant had been convicted and sentenced. The act of dismissing the applicant was in compliance with the Court judgment an act of enforcement of a court Order.

The circumstances of the applicant's dismissal did not require having a disciplinary hearing under regulation 47 of the PSC Regulation 2009. Because according to them, the applicant had ceased to be a Public Officer by virtue of the Court Order.

Determination

The applicant's case is that at the time of dismissal he was not given a hearing. The respondent upon receipt of the judgment of High Court moved themselves to have the applicant formally dismissed in accordance with the court orders.

The applicant successfully challenged the conviction and the Court of Appeal overturned the High Court decision and ordered a retrial before another Judge.

This in effect returned the status quo as at the time of arrest and this therefore meant that the applicant had to be reinstated as Deputy Chief Administrative Officer.

The applicant contended that there are several persons who are convicted and have appealed the decisions of court and they have remained on the payroll until the appeal is determined. The 1st respondent never responded to this assertion by the applicant. This means it is true that the practice in public service is to wait for the determination of the appeal against conviction.

This is equally supported by the opinion of the Solicitor General which stated as follows; "*However, it is our opinion that an appeal is a process by which a judgment of a subordinate court is challenged before its superior court. An appeal can either acquit the accused or uphold the conviction of the lower court……*

Until a decision of an appellate court is made, the accused remains innocent……

The District Service Commission taking a decision against appellants, based on the criminal conviction, prior to the appellate court taking a decision, would be pre-empting the outcome of the appeal.

It is important to note that it is only prudent for the District Service Commission to wait for the final disposition of the appeal."

This opinion is binding on the 1st respondent since it is from the Attorney General's chambers as the legal adviser to government. See ***Gordon Sentiba & 2 Others vs Inspectorate of Government SCCA 6 of 2008 & Bank Arabe Espanol SCCA No. 1 of 2001***

The reasoning behind this opinion is simple to understand and appreciate; it would cause unnecessary confusion in the public service administration when the decisions of the lower court which convicted the public servant are overturned on appeal as it was this case.

This same reasoning is the justification why the 1st respondent has always not overzealously like in this case not removed every convict upon pronouncement by the trial court. This case was not any different and the reasons advanced by the Secretary to Public Service Commission that it was enforcing the court Order or that it would be in contempt of court order is baseless and devoid of merit.

Once the public office has established a practice in its operations, then such a practice becomes law and must be applied without any discrimination to all manner of public servants under the same or similar circumstances. The same cannot be applied in a discriminatory and/or whimsical manner

Regulation 11 of the Uganda Public Service standing Orders 2010 which was saved from the Uganda Public Service Standing Orders Vol. 1 provides as follows:

Standing Orders make provision for what is authorised. Where there is no provision, there is no authority. Anything done for which there is no provision is, therefore, void.... If Standing Orders fail to make provision for a particular circumstance, the matter should be referred to the Responsible Permanent Secretary who shall decide what shall be done and, if necessary, whether Standing Orders shall be suitably amended.

In this case, the Public Service Standing orders Vol.1 were silent on the fate of a convicted person who has appealed against the conviction. So the responsible officers had to apply their mind to those facts and delay the dismissal and removal until the determination of the appeal.

The manner in which the applicant's dismissal was carried out invites this court to question the motive behind it, if there others who have not been removed from office and yet they are convicted by the first court.

In addition the applicant contends that he was never given a hearing and the respondent gave no reasons for the decision taken against him. The right to be heard is a constitution right and it is clearly embedded in the Public Service Standing Orders. The respondent's arguments that the right to be heard was not envisaged at this stage are not tenable. At every stage an affected person ought to know about the decision that is going to be taken against him.

This is best achieved through a hearing where a notice is issued and the affected person presents there case. It wrong to assume that once the court has handed down a conviction against a public servant, then automatically, the secretary Public Service Commission acts like a robot with punched-in-information to auto dismiss any such convicted public servant.

It is that due process that will inform them of whether the convict has appealed or not. Without such a hearing how would the Public Service know about the convict's appeal?

Natural justice gives a sense of participation to the concerned persons in administrative decision-making which can by itself be justified as a democratic value. Such participation may help in making decisions acceptable to the concerned persons. This helps in reducing chances of reaching a decision in ignorance of facts and other relevant circumstances are reduced as the hearing given to a person will bring out all relevant facts.

Thus, giving hearing to a person before taking a decision affecting him or her, leads to good decisions by the administration. It is much more important to reach a good and just administrative decisions at the outset rather that bad decisions to be upset later on which injures the reputation of government and harms the interests of the affected person.

Therefore the 1st respondent could not dispense with a hearing simply because the applicant was convicted by Court. The decision of the Court could indeed be the main reason but they ought to know whether the person has preferred to appeal or not before a final decision of dismissal and removal from the government pay roll is taken. In the same vein, when the appeal is allowed, they ought to be in position to act swiftly to restore the dismissed person.

In Order to impose procedural safeguards, the courts imply natural justice in many situations even when the legislation is silent on the point. The courts take the position that omission to impose the hearing requirement is the statute under which the impugned action is being taken by the administration does not exclude a hearing; it may be implied from the nature of the power.

The argument of the respondent that the Public Service Commission did not have to hear the officer prior to the removal because at that time, he had ceased to be a public officer by virtue of the Court Order is hollow and untenable. Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of the parties.

The applicant is also challenging decision of the respondent because he was never given any reasons for the decision taken to dismiss him and remove his name from the payroll.

Recording of reasons is a principle of natural justice and every decision taken must be supported by reasons. It ensures transparency and fairness in decision making. It is a fundamental principle of fair play that parties should know at the end of the day why a particular decision has been taken. It is intolerable in a democratic society that the law should allow a decision maker to whom an appeal or reference is made to make his/her decision without reasons why he/she has reached that decision. See page 1331-134. ***Public Law in East Africa by Ssekaana Musa 2009***

In the case of ***Breen v Amalgamated Engineering Union [1971] 2 QB 175*** *Lord Denning* emphasized that " *the giving of reasons for a decision is one of the fundamentals of good administration. It constitutes a safeguard against arbitrariness on the part of the decision-maker*."

Articulating the bases of a decision can improve the quality of decision making in a number of significant ways. The duty to give reasons introduces clarity, ensures objectivity and impartiality on the part of the decision-maker and minimises unfairness and arbitrariness.

The decision-maker or adjudicator will have to give such reasons for his decision for his or decisions as may be regarded fair and legitimate by a reasonable man and thus will minimise chances of unconscious infiltration of personal bias or unfairness in his or her conclusions. Unreasoned decisions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will give an appearance of justice.

An individual like the applicant who is entitled to have a decision reviewed by court or a higher tribunal or body, may be unable to exercise this right effectively unless he or she knows the basis upon which the original decision rested. In absence of reasons, the statutory right of appeal or judicial review may become nugatory.

The court's supervisory function can be discharged effectively only when the decision-making authority reveals its own mind and thought processes. Not giving reasons may be convenient for the authorities or decision-makers but it certainly does not promote good administration.

The recording of reasons ensures that the authority applies its mind to the case and that the reasons which impelled the authority to take the decision in question are germane to the content and scope of the power vested in the decision maker or authority.

In the present case, the 1st respondent wrote a letter to the applicant which is reproduced hereunder;

PUBLIC SERVICE COMMISSION'S DECISION REGARDING THE APPEAL TO REINSTATE MR. JUMA NKUNYINGI SSEMBAJJA TO THE POST OF DEPUTY CHIEF ADMINISTRATIVE OFFICER, SCALE U1SE.

I refer to your letter Ref. No. KBB/0215/2011 dated 17th September 2018 in which you requested the Public Service Commission to reverse the earlier decision to dismiss Mr. Juma Nkunyingi Ssembajja and have him reinstated with accrued benefits from November 2012.

This matter was considered by the Public Service Commission during its Meeting held on Friday 23rd November 2018. The request was however ***not accepted.***

The purpose of this letter is therefore, is to convey to you the decision of the Public Service Commission on the matter.

Dr. John Geoffrey Mbabazi
Secretary
Public Service Commission

The above decision does not have any reasons for the decision and will definitely leave a reasonable person wondering whether justice was done or it was made as a mere formality. Giving of reasons ensures that the hearing was not a meaningless charade.

Therefore for the above reasons herein the decision of the 1st respondent is found to have been procedurally improper and made in breach of rules of natural justice and fairness as envisaged under Article 42 of the Constitution.

ISSUE TWO

What remedies are available to the parties?

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

The decision of the Public Service Commission refusing to reinstate the applicant to the Public Service Commission of Uganda and payment of all accrued benefits from November 2012 and the decision contained in the letter dated 3rd December 2018 is quashed for procedural impropriety.

General damages

Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See ***Bendicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011***

The applicant did not guide court on the nature of the loss or injury suffered apart from stating that "*the applicant as a result of the respondent's unjustified, illegal and high handed actions been inconvenienced, psychologically tortured, embarrassed amongst his pears and professionals, family denied a source of livelihood for which he seeks exemplary and general damages.*"

In the submissions of the applicant, he sought general damages of 300,000,000/= and punitive damages. The above are not supported by any evidence and there is no basis whatsoever. Secondly, judicial review is not about seeking damages but rather correcting public wrongs. Damages are awarded in rarest of the rare cases and in exceptional circumstances.

This court awards the applicant his entitlements as per his contract of employment which stood as at the time of filing the pleadings at a sum of 153,920,000/= as damages for inconvenience suffered since the illegal dismissal in 2012 November until the determination of his appeal.

The award of entitlements shall accrue an interest of 20% from the time the amount was due until payment in full.

The application is allowed with to costs against the respondents.

I so order

Dated, signed and delivered be email at Kampala this 30th day of April 2020

SSEKAANA MUSA
JUDGE