SAMUEL KUFANDADA

Versus

SUPERINTENDANT PILATE MOYO

And

CHIEF SUPERINTANDANT MATANGE

And

SUPERITENDANT MOYO

And

SUPERINTENDANT ZULU

And

COMMISSIONER GENERAL POLICE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 17 AND 24 NOVEMBER 2011

Applicant in person
Dodo for respondent

Opposed Court Application

KAMOCHA J: The applicant brought this matter on review on the grounds that he was not given an opportunity to call three defence witnesses namely Sgt Masiyemvura, Cst Rwizhi and Sgt Zhou. He alleged that those witnesses would have explained to the board the reasons why he had failed to report for duty on the two occasions that he was not on duty.

He also alleged that the Commissioner General Police disregarded his medical record which explained the reason why he had failed to report for work.

It was his story that the president of the board Chief Superintendant Matange had an interest in the matter and should have therefore recused himself.

Further, he alleged that he had not been given the requisite notice of 72 hours to convene the board.

Finally, he alleged that Chief Superintendant Matange's bias was exhibited by his refusal to postpone the board's proceedings to some other future date when he (applicant) requested for a postponement because he was sick. He alleged that some police officers had to literally carry him to the 4th floor where the board deliberations were being held. The officers who carried him dumped him on the floor of the room where the hearing was taking place and the proceedings took place while he lay on the floor.

The brief circumstances giving rise to this case were that on two occasions he allegedly was absent from work without leave. The first count related to the failure to report for duty from 7 to 8 August 2010. Secondly, he allegedly failed to report for duty on 16 and 17 August 2010. What he allegedly did was in contravention of paragraph 13(1) of the Schedule to the Police Act [Chapter 11:10] and was accordingly charged with the two counts. He was found guilty of both counts and was sentenced to undergo 5 days detention in barracks at Fairbridge in respect of each count.

While he was still serving his ten days punishment he was summoned to attend a board of inquiry into his suitability or otherwise as a member of the force. The board found him to be unsuitable to remain in the police force and recommended that he be dismissed therefrom. His dismissal was then confirmed by the Commissioner General Police resulting in the applicant being discharged on 4 April 2011.

On 19 April the applicant launched this application seeking the recommendation and subsequent discharge set aside for the reasons set out in his grounds for review above.

At the hearing Mr *Dodo* was constrained to concede that there was a gross irregularity in the proceedings before the board in that the applicant was not afforded an opportunity to call his defence witnesses. Chief Superintendant Lancelot Matange did not deny in his opposing affidavit that the board he chaired refused to hear his witnesses. He, however, denied that applicant was not given the requisite 72 hours notice. Instead he said the applicant was given 96 hours. He averred that the board came to the conclusion that the applicant was malingering. His conduct of lying on the floor was a deliberate ploy to scare the board so as to delay proceedings unnecessarily. But what sticks out like a sore thumb is the fact that he was denied the opportunity to call his witnesses.

The Commissioner General Police, however, did advert to the issue of the calling of defence witnesses and held the view that their evidence was of no probative value. But the applicant said his witnesses would have furnished the board with the reasons why he had failed to report for duty on the respective days. Those were material and favourable witnesses to the applicant's case. The applicant should have been given a full opportunity to call his defence witnesses he wished. He has a right to do so as enshrined in section 18(3) (e) of the Constitution of Zimbabwe and is a fundamental principle of natural justice. In terms of section 18 (3)(e) of the Constitution an accused is entitled to obtain the attendance of witnesses on the same condition as those applying to witnesses called by the prosecution. This includes the right to subpoena reluctant witnesses. The failure to call the applicant's witnesses constituted an irregularity. It would amount to a gross injustice where the tribunal bars the calling of the witnesses just because it erroneously feels their evidence had no probative value. See the case of *Yusuf* 1997 (1) ZLR 102 (H).

The proceedings in this matter were highly irregular and the Commissioner General ought not to have upheld the result following such irregularity.

The draft order filed by the applicant lacks clarity. This court shall proceed in terms of rule 240(1) of the rules of court and issue the following order.

It is ordered that:

1. the proceedings and the recommendations of the board held on 5 March 2011 whose members were the 1^{st}, 2^{nd}, 3^{rd} and 4^{th} respondents be and are hereby set aside;
2. the confirmation by the Commissioner General Police of the said recommendation made by the said board be and is hereby set aside;
3. the matter be remitted to the police force to be heard by a board comprising new members; and
4. the respondents shall bear proved costs, if any, incurred by the applicant.

Civil Division of the Attorney-General's Office, respondents' legal practitioners