



REPUBLIC OF KENYA

IN THE TRANSPORT LICENSING APPEALS BOARD

AT NYERI

APPEAL CASE NO 015 OF 2019

GAKANANGO SACCO.....APPELLANT

VERSUS

NATIONAL TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT

(Being an appeal from the decision of the National Transport

and Safety Authority, made in October 2018, deregistering the Appellant Sacco)

JUDGMENT

Introduction

1. The Appellant is a Sacco that is registered under the Cooperative Societies Act (Cap 490).
2. The Respondent, National Transport and Safety Authority (NTSA), is established under section 3 of the National Transport and Safety Authority Act No. 33 of 2012 and has the responsibility to: advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety; implement policies relating road transport and safety; plan, manage and regulate the road transport system; ensure the provision of safe, reliable, and efficient road transport services and to administer the Traffic Act.

Background

3. The Appellant filed an appeal at the Transport Licensing Appeals Board (TLAB) via a Memorandum of Appeal dated 10th April, 2019, which was supported by the affidavit of one Charles Thumbi Muhunyo that was sworn on 10th April, 2019. The Appellant appealed against the decision of the Respondent to deregister it and relied on the following grounds:

- i. THAT the Respondent failed give the Appellant prior and adequate notice for the nature of its decision, contrary to the provisions of the Fair Administrative Action Act, 2015.*
- ii. THAT the Respondent failed to accord the Appellant an opportunity to be heard and make its representation before the Appellant's deregistration in October 2018. This was contrary to the Fair Administrative Action Act, 2015.*
- iii. THAT the Respondent had failed to forward the said decision deregistering the Appellant, together with the written reasons, which was contrary to the provisions of Article 47 of the Constitution of Kenya.*

iv. THAT after the decision appealed against herein, the Respondent had neglected and/or failed to completely act on a request by the Appellant to have the Appellant's reinstated to carry on with public transport business. Equally no reasons had been given by the Respondent which was contrary to the provisions of Article 47 of the Constitution of Kenya.

4. The Appellant prayed for:

i. The appeal herein be allowed.

ii. A declaration that the Respondent in deregistering the Appellant from undertaking the public transport business in October 2018 contravened Article 47 of the Constitution of Kenya and section 4 of the Fair Administrative Action Act, 2015.

iii. A declaration that the Respondent in failing to act on the request by the Appellant to have the Appellant reinstated to carry on the public transport business contravenes Article 47 of the constitution of Kenya.

iv. An order of certiorari quashing the Respondent's decision made in October 2018 deregistering the Appellant from undertaking the public transport business.

v. An order of mandamus compelling the Respondent to reinstate the Appellant in undertaking the public transport business and issue the road service license.

vi. Costs of the Appeal to be awarded to the Appellant.

Appellant's Case

The Appellant argued its case both orally during the trial on 4th June, 2019 and via written submissions dated 12th June, 2019, filed on 1st July, 2019.

5. During the trial, counsel for the Appellant, relied on the Memorandum of Appeal and supporting affidavit of Charles Thumbi Muhunyo, the Chairperson of the Appellant.

6. The Appellant submitted that, prior to its deregistration by the Respondent in October 2018, it had been operating various routes in Nyeri County since 2012. The Appellant was deregistered because the number of motor vehicles on its fleet had become less than the requisite thirty (30) serviceable vehicles.

7. The Appellant alleged that, without any notice, the Respondent withdrew its Road Service Licence (RSL) and it was made aware of the same by police officers apprehending the vehicles on the routes they plied.

8. The Appellant submitted that it had become compliant and had thirty two (32) vehicles. It had approached the Respondent twice for the reinstatement of its Road Service Licence (RSL), via the letters dated 11th March, 2019 and 1st April, 2019; the former was received on 13th March, 2019 by the Respondent while the latter was neither received nor acted upon. Both letters were adduced in evidence.

9. It was the Appellant's case that the basis of this appeal was the fact that the Respondent's decision to deregister the Appellant was in contravention of Article 47 of the Constitution of Kenya and section 4 of the Fair Administrative Action Act, 2015, as:

i. The Appellant was not given prior notice of the decision;

ii. The Appellant did not receive a written copy of the decision;

iii. The Appellant was not given an opportunity to be heard; and

iv. The Respondent had failed and/or neglected to act on the Appellants request for reinstatement of its Road Service Licence (RSL).

10. The Appellant denied receiving any communication from the Respondent. According to the Appellant, the Respondent had the burden of proof service of its communication. It was the Appellant averment that the Respondent had failed to discharge this burden of proof.

11. The Appellant quoted section 3(5) of the Interpretation of General Provisions Act, which recognises registered post as the mode of effective service through post. It further stated that no Certificate of Postage was produced by the Respondent.

Respondent's Case

The Respondent argued its case both orally during the trial on 4th June, 2019 and via written submissions dated 8th July, 2019, filed on 8th July, 2019.

12. During the trial, the Respondent called upon Regan Murithii, a Licensing Officer, working for the Respondent, whose responsibility was registration of Public Service Vehicles (PSV) and Public Service Vehicles (PSV) Sacco's. He outlined the procedure for deregistration of a non compliant Sacco as follows:

i. *A notice of non compliance is issued;* the Sacco is given fourteen (14) days to comply. It was the Respondent's submission that this notice was issued via a letter dated 11th July, 2018. The same was admitted in evidence.

ii. *The Sacco is summoned;* after the lapse of fourteen days from the issuance of the notice, summons are issued to the Sacco to appear before the Respondent to show cause why the Authority should not suspend it for non compliance. It was the Respondent's submission that the Sacco was summoned via a letter dated 30th July, 2018. The same was admitted in evidence.

iii. *Suspension;* if the Sacco is still not in compliance, it is suspended for thirty (30) days until it complies.

iv. *Deregistration;* a Sacco is deregistered after the lapse of the thirty (30) days suspension. It was the Respondent's submission that this was done via a letter dated 18th October, 2018. The same was admitted in evidence.

13. The Respondent submitted that all the letters admitted in evidence were served on the Appellant via post on the postal address indicated in the letters. Proof of service was not presented in court.

14. The Respondent further stated that a Sacco can see the level of its compliance on its portal and would therefore be aware of non compliance.

15. The Respondent stated that the reinstatement of a Sacco was done after it had complied with all the requirements, as per the checklist for reinstatement, provided on the Respondent's website.

The issue

The main bone of contention herein was whether the Respondent was in violation of the rules of natural justice. The rules of natural justice allegedly breached were; the right to receive a written copy of the decision and the right to be heard. Whether these rules were breached will be determined by the answers to the following:

i. Whether the Respondent served the notices and the written reasons for its decision to the Appellant.

ii. Depending on I above; whether the administrative action taken by the Respondent was procedurally fair.

Reasoning

Whether the Respondent served the notices and the written reasons for its decision to the Appellant

16. *The Respondent submitted that it served the Appellant with; the notice of non compliance, summons and the notice of deregistration through post.* This Board was guided by section 3(5) of the Interpretation of General Provisions Act, which recognises registered post as the mode of effective service through post. Proof of service via registered post is a Certificate(s) of Postage. The Respondent did not produced in evidence Certificate(s) of Postage for the letters they allegedly sent to the Appellant.

17. *The Board agrees with Appellant on this issue and associates itself with the Appellant's arguments.* The Respondent had the burden to proof service of its communication. The Respondent had failed to discharge this burden of proof.

Whether the administrative action taken by the Respondent was procedurally fair

18. *Procedural fairness is rooted in the principles of natural justice. This Board has already established that there was no proper service of notice of non compliance, summons and the notice of deregistration of the Appellant. This automatically means that the Appellant was not given an opportunity to be heard, as it did not even receive the summons to appear before the Respondent nor was it served with the notice of deregistration.*

19. Article 47(1) and (2) of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

20. This Tribunal was also guided by the provision section 4(1), (2) and (3) of the *Fair Administrative Action Act* 2015 which provides as follows:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

21. Pursuant to the provisions of Article 47 of the Constitution and section 4(1), (2) and (3) of the Fair Administrative Action Act 2015; the Appellant should have been given an opportunity to be heard before a decision was entered against it by the Respondent and should have been served with the notice of deregistration.

22. Failing to act on the Appellant's request to reinstate its Road Service Licence (RSL) without reason is a breach of Article 47 of the Constitution and section 4(1), (2) and (3) of the Fair Administrative Action Act 2015.

23. What therefore is the effect of a decision made by an administrative body without due regard to the rules of natural justice" Is the decision valid in law" According to the case of General Medical Council vs. Spackman [1943] 2 All ER 337 which was cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 the court ascertained that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

Similarly, In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

24. The reasons for which the Appellant was deregistered were facts not in issue as both parties agree that some of the vehicles in the Appellants fleet had become unroadworthy leaving the Appellant with less than the requisite thirty (30) serviceable vehicles. In OnyangoOloo vs. Attorney General [1986-1989] EA 456: it was held that a decision is void as long as it is in breach of the principles of natural justice; it matters not that the same decision would have been arrived at.

Determination

The Transport Licensing Appeals Board finds that the Respondent's decision to deregister the Appellant was in breach of natural justice and makes the following orders:

1. **THAT** the Respondent's decision to deregister the Appellant is **REVERSED** with immediate effect.
2. **THAT** the Respondent registers the Appellant and issues the Appellant's vehicles with Road Service Licences (RSLs).
3. **THAT** this Order is served upon the Respondent and the Traffic Commandant, with the view to ensure that **Gakanango Sacco** is allowed to operate until the Respondent registers it and issues its vehicles with Road Service Licences (RSLs).

Delivered, dated, and signed in Nyeri by the Transport Licensing Appeals Board on this 20th day of August 2019.

Dick Waweru Chairman

Prof. Kiarie Mwaura Member

Moses Parantai Member



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