



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL APPEAL NO. 1 OF 2020

BETWEEN

ESTHER CHIUNJIZA.....APPELLANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE POLICE SERVICE COMMISSION.....2ND RESPONDENT

CORUM: R.M CHINANGWA

Chilomba	Counsel for the Appellant
Chuma	Counsel for the Respondents
Chitao	Court Clerk

JUDGEMENT

Introduction

1. This is an appeal against the decision of the Police Service Commission to discharge the appellant on ground that she is unlikely to become efficient.
2. The appellant has raised the following issues for the court to determine on appeal as reprinted below:
 - 2.1. Whether or not it is illegal for a Police Officer or Recruit to take or to have taken nude pictures of herself for her private use under any law in Malawi.

- 2.2. Whether or not the claimant did circulate or cause to be published her nude pictures within the meaning of section 52 of the Police Act as read together with clause 23 of the Code of Disciplinary conduct of police.
 - 2.3. Whether or not the Police conducted the disciplinary proceedings in accordance with the provisions of section 43 of Constitution of Malawi, Part VI of the Police Act and Rules of Natural Justice.
 - 2.4. Whether or not the National Disciplinary Committee (NDC) of the Police had powers to reverse their own decision on the directive of the Deputy Inspector General
 - 2.5. Whether or not the Police are guilty of favoritism and or discrimination against the claimant by shielding other officers from disciplinary action and prosecution.
3. The respondents did not contest the appeal. They requested the court to proceed in making a determination based on the documents on file.

Factual Background

4. In 2016, the appellant was a police recruit at Limbe Police Training School . Whilst at the training school, the appellant had her nude pictures taken.
5. In November 2016, the appellant was later deployed as Constable at Chileka Police.
6. On 28th February 2017, the appellant was informed by a friend that her nude pictures were on social media.
7. The appellant was charged with conduct to the prejudice of good order and discipline and was discharged on ground that she is unlikely to become efficient.

Issue for Determination

8. This court has to determine whether the appellants discharge from the respondent's institution was an administratively fair on account of reasons given and hearing process.

Analysis of Law and Evidence

9. Under section 65 of the Police Act gives any police officer aggrieved by the decision of the Police Service Commission to dismiss him the right to appeal to the High Court within 30 days after receiving notification of the decision.

10. The decision to dismiss the appellant was made in the year 2017. The appellant appealed in the year 2020, clearly contrary to section 65 of the Police Act. In an appeal out of time, the court granted the same *ex parte* on considering that the real delay was on account of the appellant negotiating her reinstatement through Malawi Human Rights Commission but the same proved futile.
11. Under section 22 of the Courts Act “*In a civil appeal the High Court shall have power (a) to dismiss the appeal; (b) to reverse a judgment upon a preliminary point and, on such reversal, to remit the case to the subordinate court against whose judgment the appeal is made for directions to proceed to determine the case on its merits; (c) to resettle issues and finally determine a case, notwithstanding that the judgment of the subordinate court against which the appeal is made has proceeded wholly on some ground other than that on which the High Court proceeds; (d) to call additional evidence or to direct the subordinate court against whose judgment the appeal is made, or any other subordinate court, to take additional evidence; (e) to make any amendment or any consequential or incidental order that may be just and proper; (f) to confirm, reverse or vary the judgment against which the appeal is made; (g) to order that a judgment shall be set aside and a new trial be had; (h) to make such orders as to costs in the High Court and in the subordinate court as may be just*”.
12. Being a matter relating to administrative action this court will be guided by section 43 of the Constitution. It states that “*Every person shall have the right to— (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and (b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected*”.
13. From the foregoing section this court has to determine whether the appellant was discharged with justifiable reasons and whether the appellant was accorded a procedurally fair administrative action.
14. To begin with the reasons for the appellants discharge, the appellant was discharged from the Malawi Police Service on ground that she was unlikely to become efficient having been charged with conduct to the prejudice of good order and discipline under section 52 (1) as read with section 23 of the Code of Disciplinary Conduct for Police Officers. This was as a result of her nude photos found circulating on social media. It is recorded in evidence that the

appellant admitted that the nude pictures circulating on social media were her photos. It is also not in dispute that the appellants nude picture was taken voluntarily with her consent. It was disputed by the appellant that she did not take the photos nor did she circulate them but a friend did so.

15. The question that arises is whether the appellants action does amount to conduct to the prejudice of good order and discipline? The term 'conduct to the prejudice of good order and discipline' has not been defined in the Police Act. In **United States v Airman First Class Jon-Austin Ray** United States Air Force ACM S31431, 13th February 2009, United States Air Force Court of Criminal Appeals *'for an act to be prejudicial to good order and discipline it must have a 'direct and palpable' effect upon good order and discipline. Manual for Courts-Manual, United States, Part IV, 60.c(2)(a) (2005 ed). While the drafters do not define the terms direct, palpable and effect, the standard English definitions of these terms are proximate, obvious and result or outcome. Black's Law Dictionary 459, 1110, 514 (6th Ed. 1990). Colonel William Winthrop tells us that to be cognizable as an act prejudicial to good order and discipline, the act 'must have been committed under such circumstances as to directly offend against the government and discipline of the military state'. William Winthrop, Military Law and Precedents, 723-724 (2nd ed. 1920 reprint) source: [ray-s31431.u.pdf \(af.mil\)](#)*

16. The charge that was laid before the appellant reads as follows:

Charge:

Conduct to the prejudice of good order and discipline contrary to section 52(23) of the Police Act

Particulars of the Charge:

In that you No. 4026 Constable Chiunjiza of Chileka Police Station on 1st March 2017 committed the disciplinary offence of conduct to the prejudice of good order and discipline of being seen naked on nude pictures posted in various social media groups such as MPS attested members only and whatsapp groups contrary to section 52(23) of the Police Act.

17. The question is did the appellants nude pictures have a direct effect on good order and discipline in the Police. The appellant admitted that the nude picture were hers as seen on social media. The appellant denied having circulated her nude pictures. It is this courts view that men and women in uniform have a call to a higher standard of conduct in the public domain. It is this courts view that though the appellant did not distribute her nude pictures, she availed

herself voluntarily to have her nude picture taken. By involving a fellow officer to take a picture of her naked the matter was no longer the appellants private matter and thus the right to privacy cannot be argued as she voluntarily brought herself into the public domain. Now posing naked in public for one employed in the police service is conduct prejudicing good order and discipline in the police service. Men and women in uniform are called to higher moral standard in the public domain and posing naked in public is unacceptable.

18. Regarding the procedural fairness, it has been emphasized by the court that any party subject to an administrative action should be subjected to procedural fairness. In this case it is noted that on 3rd March 2017 the appellant was called before the Station Disciplinary Panel which recommended that the appellant be discharged from Malawi Police Service for being unlikely to become efficient. Then the Regional Disciplinary Committee confirmed the recommendation. Later on, 6th March 2017, the National Disciplinary Committee *'quashed the finding of guilt and resultant sentence of Discharge on the basis of unlikely to become efficient on the basis that the defaulter could not be subjected to the Police Act for acts done before she became a member of the Malawi Police Force'*. On 8th March 2017, the Deputy Inspector General Administration, directed that the National Disciplinary Committee reconvene with utmost urgency to rectify the error of law in that the appellant could be charged under the Police Service Act by being a person employed in the Police Service under section 51 (1) of the Police Act. It does seem that the NDC reconvened and recommended a discharge as recorded in Police Service Commission Minute No. 7/2017. The Police Service Commission confirmed the decision of the NDC to discharge the appellant on ground that she was unlikely to become efficient.
19. The hearing process clearly has been flawed at four stages. These are inadequate notice; internal interference with disciplinary hearing process; disciplinary panel hearing the same matter twice which resulted in two different decisions being made and a higher disciplinary panel making a decision on a decision of a lower disciplinary panel which was *functus officio*. These will be explained below.
20. First, the appellant was given 24 hours' notice at the time she had appeared before the Station Disciplinary Hearing. The notice of hearing of less than 7 days was inadequate as it was contrary to regulation 49 of the Malawi Police Service Regulations.

21. Second, the Deputy Inspector General singularly interfered with the decision of the National Disciplinary Committee when his office singularly has no authority to do so. Owing to this interference, the NDC changed its earlier decision. If there was an error in the decision, the same was amenable for confirmation to the Police Service Commission. The matter should have simply been forwarded to the Police Service Commission.
22. Third, the NDC sat on the same matter twice. It is this courts view that once the NDC sat at the first instance, it became functus officio. The next step was for the NDC to forward the matter to the Police Service Commission. It is against the rules of natural justice for a disciplinary panel to hear the same matter twice.
23. Fourth, the decision made by the Police Service Commission became erroneous on account that the decision it was deliberating on was wrong in the first place, as the NDC became functus officio at it second sitting. If anything, the Police Service Commission could have been procedurally correct by deliberating and deciding on the first decision that the NDC made and not on the second decision which was made after the Deputy Inspector General had interfered.
24. It is paramount that rules of natural justice must be adhered to in full. In this matter the reason for the appellants discharge was valid but the hearing process was flawed. The law cannot be adhered to in part.

Finding

25. The appeal succeeds on ground of procedural unfairness.

Dated this 15th day of June 2021 at LILONGWE



**R.M CHINANGWA
JUDGE**