



INQUIRY BY THE OMBUDSMAN

IN THE MATTER

BETWEEN

ROBERT LESTER KAPANGAZIWIRI ZAKUMVA.....COMPLAINANT

AND

MALAWI POLICE SERVICE.....RESPONDENT

Inquiry No: 19/2020

FILE NUMBER: LL-16-OMB-061

DETERMINATION

CORAM:

Martha Chizuma - Ombudsman

Robert Zakumva - Complainant

Representing the Respondent:

Mike Sitolo - ACP Nation Headquarters

Sub Inspector Aurelius Phukaphuka - National Police Headquarters

DETERMINATION

1. The Complainant lodged a complaint against the Respondent the Malawi Police Service on 9th April, 2017 alleging that he was dismissed without proper reasons. Investigations failed to resolve the matter as such it was recommended for Public Inquiry which took place on 25th November, 2019.
2. During the inquiry the Complainant stated that he was employed on 27th September, 1965 and was dismissed on 24th September, 1974. The allegation was that he reported for duties whilst drunk. When the matter was discussed he was not satisfied as the witnesses who allegedly saw him drunk nor the medical report proving his drunkenness was ever produced. He recalls the doctor telling the Sergeant who had escorted him to the hospital that he was sober.
3. After his dismissal considering how times were in that time, it was difficult to take administrative action until he heard about the Office of the Ombudsman that is when he came and complained. He further stated that he would like assistance from the Ombudsman as his dismissal was unfair.
4. In cross examination by the Respondent, the Complainant stated that he was not asked to write a report on the incident of his drunkenness but he was taken to the hospital. He agreed that the incident occurred during the time of the convention. He further agreed that one needs to be on a line before going on duty. He also refuted ever being shown the medical report or his alcohol test. He also stated that he was aware that during this time they were using the old Constitution. He did agree that he was called for a hearing but refuted that he was given a chance for an appeal. Lastly he stated that he did ask for his discharge certificate.
5. The Respondent in their evidence stated that the Complainant was indeed employed on 27th September, 1965. On 3rd September, 1974 he was found guilty on a charge of being found drunk at work, upon being asked he denied it but based on the evidence he was found guilty.
6. It was Inspector Tamani who found him guilty and it was Detective Mailosi who took him to the Hospital where a medical report proved that the Complainant was drunk. Before the Dismissal he was given seven days within which to appeal which he did not do so. He took his discharge certificate on 9th September, 1967. The Complainant also lost police notebook/certificate of approval previously.
7. The Respondent stated that all procedural steps were taken according to the applicable laws at the time.
8. In cross examination by the Complainant the Respondent stated that upon dismissal all benefits are forfeited.

ANALYSIS OF THE LAW AND FACTS

9. The primary function of an Ombudsman is to investigate complaints of maladministration. Maladministration has many facets but for us in Malawi first port of call to establish maladministration is section 123 of the constitution and section 5 of the Ombudsman Act. Under these provisions for maladministration to be proved the complaint lodged has to allege either or several of the following instances; injustice; abuse of power; unfair treatment; manifest injustice or conduct qualifying as oppressive or unfair in an open and democratic society; the exercise or performance of powers duties and functions in an unreasonable, unjust or unfair way. As per section 5 (2) this further includes decision or recommendation made by or under the authority of any organ of Government or any act or omission of such organ that is unreasonable, unjust or unfair or based on any practice deemed as such and also that the powers, duties and functions which vest in any organ of Government are exercised in a manner which is unreasonable, unjust or unfair.
10. My task is to determine if the complaint before me fits into any of the instances mentioned above. The complaint herein is of unfair treatment to the Complainant in that the Respondent dismissed him from employment without a valid reason. During his examination in Chief he stated that it was on some allegations of being drunk and that no medical report was produced.
11. From the evidence produced by the Respondent the Complainant was called for a disciplinary hearing on 3rd September, 1974. The Charges against him were that of drunkenness. The Complainant according to the documentation of the disciplinary hearing admitted to having drunk Chibuku at a tavern on the material night as he was hungry but he stated that he was not drunk. According to the medical report the smell of alcohol was detected on his breath and his speech was slow and his movements were mildly impaired. The conclusion of the report was that the Complainant had consumed intoxicating liquor but he was sober at the time of the examination.
12. From the statement that he had provided during the disciplinary hearing The Complainant had consumed alcohol between 16:30 hours when he knocked off to 17:45 hours when he was contacted and informed that he was required for duty. He met D/Inspector Tamani just after 20:00 hours. The medical report does not contain the time the medical examination was conducted, however, according to the Complainant's statement he was taken to the hospital at around 21:00 hours. And

according to the statement of Inspector Tamani he sent the Complainant to the hospital at or about 21:30 hours on foot.

13. From the assessment of the evidence I am of the view that it is more probable than not that after consuming alcohol at or about 16:30 to 17:45 when D/Inspector Tamani first met the Complainant some two hours later at 20:00 hours the Complainant was intoxicated. Considering another hour passed before he was assessed by the medical personnel it is also probable that he did not show any grave physical signs of being drunk. In conclusion, the Respondent had a valid reason to call the Complainant for a disciplinary hearing as at the time he was first encountered he was intoxicated.
14. I am also not satisfied that the Complainant was denied the right to appeal. This is because during his examination in Chief he stated that after his dismissal considering how things were in those days, it was difficult to take administrative action. That is why he did not pursue the matter further after the dismissal and then came to the Office of the Ombudsman years later. However, during his cross examination that is when he refuted that he was given a chance for an appeal but agreed that he had asked for his discharge certificate. As much as I agree that during those years people were operating under fear, I believe that in this case the Complainant simply did not try to appeal. He accepted the verdict of the disciplinary hearing and requested for his discharge certificate.
15. The Respondent having adhered to rules of natural justice and also having a valid reason to call the Complainant for a disciplinary hearing, are not guilty of any maladministration. I therefore, find that this matter lacks merit and I dismiss it in its entirety.

RIGHT OF REVIEW

16. Any Party dissatisfied by this determination and with sufficient interest in the matter has a right to apply for review to the High Court in accordance with section 123 (2) of the Constitution within 90 days from the date of this determination.

Dated this 13th Day of March , 2020.



Martha Chizuma
OMBUDSMAN