



**Ngugi v National Transport and Safety Authority (Appeal E009 of 2022)
[2023] KETLABT 665 (KLR) (Civ) (19 July 2023) (Judgment)**

Neutral citation: [2023] KETLABT 665 (KLR)

**REPUBLIC OF KENYA
IN THE TRANSPORT LICENSING APPEALS BOARD TRIBUNAL
CIVIL**

APPEAL E009 OF 2022

**A KAMOTHO, JOSEPH MCDONALD, MARYAN HAJIR,
WAITHIRA MUIRURI & JAMES NGOMELI, MEMBERS**

JULY 19, 2023

BETWEEN

PHARIS NJOROGE NGUGI APPELLANT

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY RESPONDENT

JUDGMENT

A. Introduction

- [1] The Memorandum of Appeal herein is dated{{^}} 9th May, 2022 and was set for a hearing on 18th May, 2022. The Appellant, Pharis Njoroge Ngugi, seeks to set aside/ appeal or/and review the decision of the National Transport and Safety Authority (NTSA) at Nairobi County.

B. Background

- [2] The Appellant is a male adult of Identification Number 14405805 resident of Nakuru County.
- [3] The Respondent, National Transport and Safety Authority (NTSA), is a statutory body 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 Secret ary on matters relating to road transport and safety, implement policies relating to 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*.
- [4] The NTSA has denied and/or refused to issue the Appellant with a Public Service Vehicle Badge (PSV Badge).



C. Litigation

i. Tribunal proceedings

- [5] The Appellant filed an Appeal before this Tribunal seeking that the Board orders the Respondent, National Transport and Safety Authority (herein referred to as the NTSA), to release his PSV Badge unconditionally to enable him continue with his employment.
- [6] The Appellant claimed that he had a matter before the Kibera Law court for driving a vehicle without proper documents which is against the traffic laws. He was also sued for allegedly trying to bribe a traffic police officer in the Nairobi High court. These crimes were however vacated after he paid a fine of twenty thousand Kenya Shillings (Ksh. 20,000) which was the penalty ordered by court for his crimes.
- [7] The Appellant has not ever applied for a Public Service Vehicle Badge (PSV Badge) by himself because the Appellant's Police Clearance Certificate (PCC) has remarks. His employer NAROK LINE has however tried to make an application for the PSV Badge with no success.
- [8] The Appellant has been receiving his PSV Badge until 2018 this is majorly based on the fact that the Appellant has not been given his police clearance certificate (PCC) since 2018/2019 when he was charged with criminal charges.
- [9] The Respondent, NTSA, asked that the Appellant shows proof that he was criminally discharged. They also argued that the Appellant should reach out to the Directorate of Criminal Investigations (DCI) to be able to clear him and give him a valid Police Clearance Certificate (PCC).
- [10] The Respondent, did not have any other objection to the Appellant's application apart from the issue of the good conduct being a requirement before the issuance of a PSV Badge.
- [11] The Tribunal asked the secretariat to help write a letter to the Kibera Law Court Archives to be able to retrieve the court Proceedings and one to the DCI with evidence under law of General Data Protection Regulation, Article 17, which gives the 'right to be forgotten.'

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- (1) "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies....."

- [12] Through an email ref no. MOT/TLAB/003 VOLII/ (25) DATED 12TH JULY, 2022 the BOARD reached out to the DCI to clarify and give directions on the issue.

The Reply from the DCI dated 18th July 2022 ref no. CID/CRO/SEC/6/7/A.VOL.XI/002 stated that;

...all the enabling provisions of the Law have not provided for avenues and/or mechanisms for the disposal of these records thus, the same continues to be stored in our databases. However, as a result of numerous concerns, the Principal Criminal Registrar is engaging the Attorney General for policy direction."

D. Issues For Determination

- [15] Following the arguments made and evidence adduced by the parties before the tribunal during the trial, the following issues have been extrapolated for determination:



1. Whether the Respondent has a right to refuse to grant a PSV Badge to the Appellant on grounds that he had a criminal record?
2. Whether notwithstanding the remarks on the Appellant's Police Clearance Certificate (PCC) the Appellants' application for a PSV Badge should be approved?

E. Analysis And Determination

1. Whether The Respondent Has A Right To Refuse To Grant A Psv Badge To The Appellant On Grounds That He Had A Criminal Record?

[16] Section 6(m) The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 provides;

6 A person applying to for a licence shall submit to the Authority certified copies of—

- (m) the driving licence, identity card, and certificate of good conduct of each person who shall drive the public service vehicles in respect to which the application for the licences is being made;

[17] The Respondents' action of denying the Appellant's application based on his failure to meet the requirements put in place have merit. This is because administrative action can be taken even after criminal actions have.

[18] A licensee's protection against double jeopardy does not apply to an administrative agency's prosecution in an administrative disciplinary proceeding. The law is very clear that

the constitutional prohibitions against double jeopardy and double punishment do not prevent the legislature from enacting, and the executive from enforcing, civil as well as criminal sanctions for the same conduct."

Matter of Barnes v. Tofany, 27 NY2d 74 (1970) (defendant's driver's license was suspended for 60 days in a civil administrative proceeding and was again suspended for 60 days in a subsequent criminal action). Hence the Respondent can rightfully enforce its administrative action

[19] In this case though the Appellant does not have a pending criminal matter in court rather the case was closed and the Appellant should not be burdened with administrative punishment unless the respondent can come up with a policy or regulation showing that he should.

[20] Section 35 (1) and (3) of the Data Protection Act,2019 provides that;

35.

- (1) Every data subject has a right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning or significantly affects the data subject.
- (3) Where a data controller or data processor takes a decision, which produces legal effects or significantly affects the data subject based solely on automated processing—
 - (a) the data controller or data processor must, as soon as reasonably practicable, notify the data subject in writing that a decision has been taken based solely on automated processing; and



- (b) the data subject may, after a reasonable period of receipt of the notification, request the data controller or data processor to —
- (i) reconsider the decision; or
- (ii) take a new decision that is not based solely on automated processing.”

[21] Based on this argument, denying the Appellant a PSV Badge based on automated information is a violation of his rights under the [Data Protection Act, 2019](#). The Respondent did not accord the Appellant an efficient and fair administrative action contrary to Article 47 of [the Constitution](#) of Kenya, 2010 that states;

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

2. Whether Notwithstanding The Remarks On The Appellant’s Police Clearance Certificate (pcc) The Appellants’ Application For A Psv Badge Should Be Approved?

[22] The requirement of the Police Clearance Certificate (PCC) for one to acquire a PSV Badge is put in place by the Respondent in collaboration with the Directorate of Criminal Information (DCI). The information in the Police Clearance Certificate issued in this matter was not up to date. This is based on the evidence adduced before the tribunal.

[23] Section 25 (f) of the [Data Protection Act, 2019](#) provides;

25 Principles of data protection

Every data controller or data processor shall ensure that personal data is-

- (f) accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;”

[24] The use of the information in the Police Clearance Certificate (PCC) that is generated from the DCI system that is not up to date, to determine the Appellant’s application is a violation of his rights. Section 26 of the [Data Protection Act, 2019](#) provides;

26 Rights of a data subject

A data subject has a right—

- d) to correction of false or misleading data; and
- (e) to deletion of false or misleading data about them.”

[25] Being that the Respondent based their decision to issue the PSV Badge on the PCC provided, it will be a great injustice if Appellant continued to suffer economical loss based on incorrect information.

[26] This Tribunal decision is on a case to case basis and in this matter the Appellant has proved that he does not have an outstanding criminal matter and the remarks on his PCC are incorrect. Based on those facts the Appellant should be issued with a PSV Badge notwithstanding the remarks on his Police Clearance Certificate.



F. Orders

Having considered the facts and the law applicable to this case, the Transport Licensing Appeals Board hereby makes the following Order:

- a. That the Respondent Authority to issue the Appellant with a PSV badge within fourteen (14) days.
- b. That this order is enforceable for a period of one year from the date it is delivered.
- c. That the order be served upon NTSA and the Traffic Commandant

DELIVERED AT NAIVASHA BY THE TRANSPORT LICENSING APPEALS BOARD ON THIS 19TH DAY OF JULY 2023.

DR. ADRIAN KAMOTHO

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CHAIRPERSON

JOSEPH MCDONALD

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MEMBER

MARYAN HAJIR

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MEMBER

WAITHIRA MUIRURI

.....

MEMBER

JAMES NGOMELI

.....

MEMBER

