IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD - 2022

Coram: - *M. Welbourne (Mrs), J.A. (Presiding)*

Bright Mensah, J.A.

N. Aryene, J.A.

Suit No. H1/207/2020

Date: 20th October, 2022

Benjamin Ntow
Sunyani Central Prison **===** **Plaintiff/Appellant**
Sunyani, BA/R

Vrs

1. **Ghana Prison Service**
   Prison Headquarters **===** **Defendants/Respondents**
   Accra

2. **Attorney General**

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JUDGMENT

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WELBOURNE, J.A

This Appeal emanates from the Judgment of the High Court, Accra dated 27th day of March, 2018.

In this appeal the Plaintiff/Appellant will be referred to as the Appellant, and the 1st and 2nd Defendants/Respondents will also be referred to as Respondents.

BACKGROUND

The Plaintiff is a serving prison officer with the 1st Defendant institution. The Plaintiff was the gatekeeper at the Sunyani Central Prisons. On the 23rd September, 2014 some prisoners were taken out for outdoor labour during which time one of the inmates serving 25 years IHL escaped. On the day in question, the Plaintiff was the gate keeper and was on duty with his Assistant.

The Plaintiff and some other Prison officers were subsequently arraigned before a disciplinary panel to answer charges against them regarding the incident of that day. The Disciplinary Panel recommended the acquittal and discharge at the end of its hearing; however the 1st Defendant thought otherwise and applied a sanction of reduction of rank of Sergeant to Corporal.

The Plaintiff argues that the basis for the punishment meted out by the 1st Defendant's Director-General was wrong, misconceived, factually incorrect and totally misplaced, as same was not borne out of the record of proceedings.

At the trial, the Plaintiff sought for the following reliefs;

i. An order setting aside the sanction imposed on the Plaintiff by the Director-General of Prisons as being without merit unlawful and unwarranted under NRCD 46 of the Prison Service Decree 1972 and therefore null and void.

ii. An order directed at the 1st Defendant to reinstate Plaintiff to his former position as Sergeant in the Prison Service.

iii. Further order that Plaintiff be paid all the difference in salary when he was reduced from sergeant to corporal with effect from 1st April, 2015 to date of reinstatement.

iv. An order directed to 1st Defendant to promote Plaintiff to the rank of Petty Chief Officer in line with his colleagues and to be paid all salaries and allowances relating.

v. Declaration that the discretionary powers exercised by the Director-General of Prisons in imposing harsher sanction on Plaintiff is ultra vires and not in consonance with Sections 17(2) and 18(5) of NRCD 46 of the Prison Service Act of 1972.

The case of the Defendant is that on the 23rd September 2014 Plaintiff was allocated as the main gatekeeper of the Sunyani Central Prison with L/Cpl Daniel Nyarko as his assistant. On the said date Defendant alleged that the Plaintiff and his assistant let out Sgt. Abraham Odonkor and his gang of four prisoners which included CP. Kofi Kontor 25 years IHL for external labour. Defendant said CP Kofi Kontor on external labour took advantage of his escorting officer's negligence and escaped from lawful custody.

The escape incident called for investigations to be conducted which revealed that the prisoner was serving a 25 year sentence and therefore qualified as a high risk prisoner who is unqualified to go for external labour therefore the Plaintiff as the main gatekeeper should have made further checks as to the prisoners' suitability for external labour especially CP Kofi Kontor, considering his long term incarceration. Consequently, Plaintiff, his assistant, the escorting officer and the Senior Chief Officer Administration found to be culpable were charged and made to stand trial before a Board of Enquiry set up by 1st Defendant.

It is the case of the 1st Defendant that at the trial it was found that Plaintiff and his assistant let out Sgt. Abraham Odonkor and his gang of prisoners including CP Kofi Kontor for external labour, that CP Kofi Kontor was unqualified for external labour and that Plaintiff had failed to perform his role as the main gate keeper and had reneged on his duties by allowing L/Cpl Daniel Nyarko, his assistant to let out Sgt. Abraham Odonkor and his gang of four prisoners which included CP Kofi Kontor.

The panel of enquiry established that the Plaintiff glossed over his duty of verification as the main gatekeeper and allowed his assistant to check the prisoners and let them out for external labour and for this reason the panel recommended that the accused officer should be discharged and acquitted.

The issues that the trial court considered were as follows:

1. Whether or not the reduction in rank of Plaintiff by the Director-General of Prison was proper.

2. Whether or not Director-General of Prisons was right in substituting her own finding in place of the committee of Enquiry.

3. Whether or not the Director-General exercised her discretionary powers fairly in imposing a harsher punishment on Plaintiff in spite of the recommendation of the Board of Enquiry.

4. Whether or not the Defendant is liable.

5. Whether or not Plaintiff is entitled to his clam

6. Any other issue(s) arising from the pleadings.

After the trial, the court held that the Plaintiff's claim fails in its entirety and same is dismissed. At trial, the Defendant denied Plaintiff's claim and averred that the Plaintiff being the main gatekeeper had a role to play in the escape of the prisoner from lawful custody. It was the case of the 1st Defendant that the Plaintiff as the main gatekeeper on 23rd September, 2014, was the final verification point in the Sunyani Central Prison before a prisoner could be allowed to leave the prison. This was the reason why he had a duty to satisfy himself that the prisoners being allowed to undertake external labour were qualified for same in accordance with the rules guiding the operations of the Ghana Prisons Service, which duty the Plaintiff failed to exercise with due care and diligence.

It is also the case of the 1st Defendant that the Disciplinary Panel established the culpability of the Plaintiff namely, that the prisoner in question was not suitable for external duties therefore the recommendation of the disciplinary panel to acquit and discharge the Plaintiff did not exonerate him. The 1st Defendant contended that, the Director-General as the highest disciplinary authority at the 1st Defendant institution may in terms of Section 18(5) of the Ghana Prisons Act NRCD 46 enhance a sanction recommended by a service enquiry where the Director-General deems it fit to do so,

and thus was not bound by the recommendations of the Disciplinary Panel and therefore the Plaintiff claim fails.

In support of her decision, the trial judge quoted from the cross examination of the Plaintiff by the Respondent's counsel (pages 166-167) of the record:

Q: What were your main duties at the Sunyani Central Prison on the 23rd Day of September, 2014?

A: I was a gate keeper.

Q: Can you tell this court what the duties of the gate keeper is?

A: He takes the responsibility of the in and out of daily occurrences to ensure the safe keeping of the place.

Q: As a seasoned Prison Officer you know that your institution is a regimented institution –is that the case?

A: Yes My Lord.

Q: The Service Enquiry made a finding that your conduct was contrary to section 16 (K) of NRCD 46 but yet acquitted and discharged you. Is that the case?

A: Yes My Lord.

Per the Plaintiff's own admission, the Service Enquiry found his conduct was contrary to section 16 (K) of NRCD 46 yet it acquitted and discharged him. The Director-General therefore did not substitute her own findings with the findings of the panel. What the Director – General did was to apply sanction contrary to the panel's recommendation to acquit and discharge the Plaintiff.

In the instant case, the panel did not form a view that a major punishment should be imposed on Plaintiff to require it to send its findings to the Director-General with the sole purpose of the Director-General to impose that major punishment in accordance with law. Section 18(5) of NRCD 46 is therefore not applicable in Plaintiff's case.

What the panel recommended was acquittal and discharge. What is crucial is whether or not the 1st Defendant is bound by the recommendation of the disciplinary panel and therefore obligated to adopt the recommendation. It is trite learning that no disciplinary authority is bound by the recommendations made to it following a disciplinary action. It was held in **REPUBLIC V STATE HOTELS CORPORATION; EX PARTE YEBOAH AND OTHERS [1980] GLR 875 – 882** that: *"Although the board of inquiry made certain recommendations to the Managing Director of the Corporation, the decision to dismiss was entirely for the Managing Director who was in no way bound to accept the recommendations of the board. Even if he accepted the recommendations, the decision to dismiss was his alone."*

The Director-General has disciplinary powers as respects all or any posts or ranks of Prison Officers and may delegate any or all of this powers through a disciplinary board or superior prison officer as appropriate. The inference is that, the ultimate disciplinary power rests with the Director-General and the latter is not bound by any recommendation made to it.

The court having found that the Director-General has powers under the NRCD 46 to impose the sanction that she did on the Plaintiff, the court held that the conduct of the 1st Defendant in reducing Plaintiff's rank cannot be said to be illegal or null and void. Hence Plaintiff has thus failed to prove that 1st Defendant breached sections 17(2) and 18(5) of NRCD 46.

THE GROUNDS OF APPEAL

The Appellant being dissatisfied with the decision of the trial court filed an appeal to the Court of Appeal and the grounds of appeal set out in the Notice of Appeal are as follows:

a. That the judgment is against the weight of evidence.

b. That the trial judge erred in law when she found that the Director-General of Prisons was not bound by the recommendation of the Adjudicating panel set up by itself.

CONSIDERATION

In an appeal such as this, the onus cast upon an Appellant who complains that the judgment is against the weight of evidence is to clearly and properly demonstrate to the Appellate court that there were certain lapses in the evidence on record which if applied in his favour could have changed the decision in his favour or that certain pieces of evidence have been wrongly applied against him. See: **DJIN V MUSAH BAAKO [2007-2008] SCGLR 686 at 687.** The onus is on such an Appellant to clearly and properly demonstrate to the Appellate Court the lapses in the judgment being appealed against.

Also in **BONNEY V BONNEY [1992 – 1993] GBR 779 SC**, it was held that an Appellate court ought not under any circumstances interfere with the findings of fact by the trial court except where it is clearly shown to be wrong, or that the judge did not take all the circumstances of the case into account or that the findings are not supported by the evidence.

In the **ASSEMLIES OF GOD CHURCH, GHANA V RANSFORD OBENG AND OTHERS** CA J4/7/2009/3/2/2010 Dotse JSC stated that unless an Appellate court, such as this court, and the Court of Appeal for that matter, are satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of fact by the trial court are perverse and therefore unreliable, the Appellate court must be slow in interfering with the said findings of fact.

Where the Plaintiff alleges that the judgment is against the weight of evidence, the Appellate Court is under an obligation to go through the entire record to satisfy itself that a party's case was more probable than not as was held by their Lordships in **TUAKWA V BOSOM [2001-2001] SCGLR 61.** The court held as follows:

> *"An appeal is by way of re-hearing particularly where the Defendant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence. In such a case, it is incumbent upon an appellate court, in a civil case to analyze the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".*

This court proceeds to consider pieces of evidence which may or may not inure to the benefit of the Appellant. During cross examination of the Defendant's representative by Plaintiff's counsel the following ensued at pages 137 to 142 of the ROA:

Q: Director did you see the recommendation of the board of directors on service enquiry?

A: Yes I saw it.

Q: Can you tell the court the basis on which the panel recommended that the Plaintiff be acquitted and discharged?

A: The trial panel erred by recommending the Plaintiff to be acquitted and discharged.

Q: Now Mr. Director, look at Exhibit "A" page 32, read out the recommendation made by the panel on the Plaintiff.

A: Witness read in open court Exhibit "A" page 32.

Q: Before the recommendation, what was the finding of facts made by the enquiry?

A: My Lord the panel upon carefully deliberation…read in open court AG3 page 34.

Q: I am putting it to you that the panel never erred?

A: My Lord the panel did err and it not have the final authority.

Q: I am putting it to you that Exhibit B dated 15TH May, 2015 and signed by the Director-General of Prison, Matilda Baffour Awuah did not disagree with the recommendations of the panel but simply went ahead to punish the Plaintiff for no wrong done. I am putting it to you?

A: My Lord that is not so, all the four officers involved were duly punished and in the situation where a leader oversees the activities of his assistant to do the wrong thing he is equally punished.

Q: I am putting it to you strongly that based on the recommendations of the panel the Director-General could not have substituted her own findings to justify the punishment that was meted to the Plaintiff.

A: My Lord the Director-General of Prisons has the final word he or she could vary the punishment upwards or downwards.

Q: And I am putting it to you that the punishment of the Plaintiff was unjustified and capricious?

A: The punishment is most appropriate My Lord.

Q: I am also putting it to you that it also amount to abuse of discretionary powers?

A: It is not so my Lord.

Counsel for the Appellant in further submissions stated at the end of the inquiry, the panel made the following findings:

> *"Upon careful deliberation on the issue, we came to realize that the involvement of the gatekeeper in the case is as the result of the unsuitability of the inmates in question. Not necessarily the escape. Based on the facts that the gate lodge lacks the list of qualified prisoners due for outside labour, the panel begs to differ from the position of the prosecutor that the accused officer (Plaintiff) be punished*
>
> *In addition the labour card was also duly signed by the necessary authority authenticating the suitability of the inmates. The panel therefore holds the view that, there was barely anything Sargent Benjamin Ntow could have done in that capacity to salvage the situation".*

According to the Appellant's Counsel, from the judgment the trial judge seems to have fallen into grave error when she also found that the Plaintiff admitted having committed an error in allowing the inmates out of the prison gate for outside labour when in fact the card was duly approved by a Senior Officer.

During cross examination of the Defendant's representative on the 9th of February, 2018 the following ensued at pages 136 to 142 of ROA:

Q: Director did you see the recommendation of the directors on service enquiry?

A: Yes I saw it.

Q: Can you tell the court the recommendations made in respect of the Plaintiff?

A: My Lord the trial panel recommended that the Plaintiff be acquitted and discharged.

Q: Now can you tell the court the basis on which the panel recommended that the Plaintiff be acquitted and discharged

A: The trial panel erred by recommending the Plaintiff to be acquitted and discharged.

Q: You have not answered the question, I said tell the court the basis of the recommendation by the panel for the Plaintiff to be acquitted and discharged.

A: The panel felt that the Plaintiff only stood aloof and observed his assistant gatekeeper to open the unqualified prisoner out.

Q: I am putting it to you that the panel never erred.

A: My Lord the panel did err and is not the final authority.

Counsel for the Appellant further submitted that under Section 3(2) of C.I. 93 Prisons Service (Staff Discipline) regulation 2016 the Adjudicating panel has power over major and minor offences committed by Prison Officers.

In this instant case, the Adjudicating Panel set up by the 1st Defendant to hear the case involving the Plaintiff and others was exercising power conferred on it by C.I. 93 Prisons Service (Staff Discipline) Regulation 2016 and it was under obligation to observe the rules of natural justice and therefore not merely to confront the Defendant but also it

was exercising a judicial or quasi- judicial function which required the guilt or otherwise of the Accused to be proved beyond reasonable doubt.

The provision under Prison Service (Staff Discipline) Regulation C.I 93 regulation 2016 envisage only one situation i.e. *"where the Adjudicating Panel established the guilt of the officer and is unable to impose the appropriate punishment, that is to say major penalty at the end of it proceedings then it should refer the matter to the Director-General who will then impose the appropriate penalty".*

In the instant case, the Adjudicating panel did not find the accused person guilty hence the Adjudicating panel did not impose or intended to impose any penalty be it minor or major on the accused.

It is therefore the submission of the Appellant's counsel that the punishment meted out to the Plaintiff by the Director-General of Prisons has no legal basis and therefore null and void.

Every administrative body and administrative officer is enjoined to act fairly and reasonably and comply with the rules of natural justice with the requirements imposed on them by law.

This has received constitutional blessing under Article 23 of the 1992 Constitution. Article 296 of the 1992 Constitution also provides as follows:

> *"Where in this Constitution or in any other law discretionary power is vested in any person or authority:*
>
> a. *That discretionary power shall be deemed to imply a duty to be fair and candid.*

b. *The exercise of the discretionary power shall not be arbitrary, capricious, or biased either by resentment , prejudices or personal dislike and shall be in accordance with due process of law, and*

c. *Where the person or authority is not a judge or other judicial officer, there shall be published by Constitutional Instrument or Statutory Instruments Regulations that are not inconsistent with the provision of the Constitution or that other law to govern the exercise of the discretionary power".*

It is therefore the submission of the Appellant that the trial judge did not address her mind to the relevant provisions of Sections 24 and 25 of Prison Service (Staff Discipline) Regulations 2016.

A proper introspection on the above regulations is to support the argument of the Appellant as follows:

> *"25(2) Prison Service (Staff Discipline) Regulations C.I 93 2016: Dismissals, removal and reduction in rank shall be treated as major penalties and other penalties shall be treated as minor penalties.*
>
> *25 (4) Prison Service (Staff Discipline) Regulations C.I 93 2016: where there is the need to impose a major penalty, the adjudicating panel or a senior prisons officer shall refer the findings and other relevant documents to the Director-General.*

From the provisions contained in the Prisons Service (Staff Discipline) Regulations 2016 C.I. 93, if at the end of the proceeding before the Adjudicating panel, the offending officer is not found guilty there would not be need to refer same to the Director-General to impose a sanction that requires a major penalty.

Suffice to say that in the instant case, the Adjudicating Panel set up by 1st Defendant to hear the case involving the Plaintiff and others was exercising power conferred on it by the C.I 93 Prisons Service (Staff Discipline) Regulation 2016 and it was under obligation to observe the rules of natural justice and therefore not merely was it to confront the Defendant but also it was exercising a judicial or quasi-judicial function which required the guilt or otherwise of the Accused to be proved beyond reasonable doubt.

Counsel for the Appellant further stated that indeed the adjudicating Panel that heard the evidence of witnesses and observed the demeanour of the Defendants, applied all the rules and regulations of the Prison Service (Staff Discipline) Regulation C.I 93 and made findings of facts before coming to a just conclusion that the Plaintiff be acquitted and discharged of the offences leveled against him was better in the position to have arrived at that conclusion.

The provision under Prison Service (Staff Discipline) Regulation C.I 93 envisage only one situation i.e. *"Where the Adjudicating Panel established the guilt of officer and is unable to impose the appropriate punishment, that is to say major penalty at end of it proceedings then and only then it should refer the matter to the Director-General who will then impose the appropriate penalty".*

Contrary to the above observations by Appellant's Counsel, this is what the Appellant said under cross- examination:

Q: Can you tell the court what the duties of a gatekeeper are?

A: He takes responsibility of the in and out of daily occurrences to ensure the safe keeping of the place.

Q: You were the gate- keeper on that day?

A: Yes my Lord.

Q: You did not even check the so – called card that was signed by your superior that was what you told the court this morning?

A: Yes my Lord, It was after they have gone before the card handed over to me. So when I saw the card, the card was duly signed by the senior administrator that is the authority for any prison officer to take prisoners for outdoor labour. So my Lord, if all these things have been done who is me to say I will not accept it.

The Defendants make the point that this is a court of law which is to eschew witch-hunting or selective justice. It is a human right enshrined in our 1992 Constitution that: "All are equal before the Law". Clearly from Appellant's own testimony all involved in this breach of prison security were duly punished with a reduction in rank. The Appellant would have had a fantastic case, if he had been singled out and punished.

These are his own words, in his testimony under cross- examination.

Q: What is the name of your assistant gatekeeper?

A: My Lord, Lance Corporal Daniel Nyarko.

Q: Is he still in the service?

A: Yes my Lord.

Q: Was he ever punished?

A: Yes my Lord.

Q: What was the punishment?

A: My Lord he was also reduced from Lance Corporal to second class (see pages 125 to 135 of the record).

As counsel for the Respondent submitted, *"the Appellant may have been a fine officer with a reasonable expectation of promotion, but like everyone else, we are susceptible to, is the rut of routine. We cannot in the face of ineptitude and dereliction of duty in a regimented institution like the Prisons Service make a claim that we were following orders or the authorization of a superior officer, this rather disingenuous excuse which has been denounced by the world during the Nuremberg Trials after the Second World War".*

The gravamen of the Appellant's case is the power of the Director-General to substitute findings that are different from the findings of the service enquiry.

What is crucial is whether or not the Director-General was bound by the recommendation of the Disciplinary Adjudicating Panel and therefore obligated to adopt the recommendation? The learned trial High Court Judge thought otherwise when she held as follows:

> *"It is trite learning that no disciplinary authority is bound by the recommendation made to it following a disciplinary action. It was held in* ***REPUBLIC V STATE HOTELS CORPORATION: EX PARTE YEBOAH AND OTHERS*** *(supra)* that, *" Although the board of inquiry made certain recommendations to the managing director of the corporation, the decision to dismiss was entirely for the managing director who was in no way bound to accept the recommendations of the board. Even if he accepted the recommendations, of the decision to dismiss was his alone…*
>
> *Also in Exhibit "B" on page 57 of the record of appeal. The Director General in issuing Exhibit "B" was clothed with article 207(2) of the 1992 Constitution which provides as follows: "The Director – General of the Prisons Service shall subject to the Provisions of this Article and to the control and direction of the Prisons Service Council, be responsible for the operational control and administration of the Prisons Service".*

According to the Respondents the Director-General was exercising her operational control and administration of the Ghana Prisons service; and that the discretionary powers exercised by the Director-General were fair since she exercised her residual powers in accordance with the procedure stipulated in the 1992 Constitution and NRCD 46. I completely agree with that assertion.

CONCLUSION

Having perused the entire record and examined the evidence both for the Appellant and the Respondents, I am of the view that the trial judge cannot be faulted in her decision. The Director-General was mandated in accordance with NRDC 46 of the Prisons Service Decree to take whatever steps necessary to maintain law and order within that very important institution.

It is also pertinent to note that the Appellant's on his own say so, neither inspected the inmates, nor saw the labour card before they exited. It was only after they had left and the subsequent escape by the inmate Kuntor that he sighted the labour card.

The Panel itself did not exonerate the Appellant, but nevertheless recommended his acquittal and discharge. A contradictory decision indeed.

The Director-General was right in my view to state at page 57 of the record of appeal (Exhibit "B") as follows:

> *"It is has to be reiterated that the Gate is the eye of the Prison and its controllers must be cautious, diligent and professional in the approach to their duties. By his conduct it is obvious that the officer cared little about the above mentioned virtues of a gatekeeper. In order to prevent him and others of like minds from repeating such egregious blunders in*

the future he is hereby reduced in rank from Sergeant to Corporal with effect from 1st April, 2015".

It must be noted that other persons found culpable were also demoted. It was not as if he was singled out for punishment.

The appeal therefore fails and is dismissed as unmeritorious.

(Sgd)

Margaret Welbourne (Mrs.)

(Justice of Appeal)

(Sgd)

I agree Philip Bright Mensah

(Justice of Appeal)

(Sgd)

I agree Novisi Aryene (Mrs.)

(Justice of Appeal)

Counsel:

- Adjei Lartey for Plaintiff/Appellant
- Cecil Adadevoh (CSA) for Defendants/Respondents