FROM *David Onyango Oloo Vs Attorney General* TO *Charles Kanyingi Karina Vs The Transport Licensing Board*: A STEP IN THE REVERSE?

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Introduction

The doctrine of natural justice is presently hackneyed in the realms of administrative law and justice, arguably, the world over.
The Rules of natural justice are minimum standards of fair decision-making imposed by the law to decision-making authorities.
According to P.L.O. Lumumba in his treatise, *An Outline of Judicial Review in Kenya*, the operating sphere of the principle is stated in the following terms.

> The principles of natural justice are basically concerned with common law rules of fair procedure. The principles were developed by the courts and are applied to administrative agencies (public authorities engaged in judicial and/or quasi judicial functions). **In broad terms, the principles of natural justice espouse the rule against bias and the duty to hear the other side.**

The first limb of the doctrine, namely, the rule against bias is outside the scope of coverage of this paper.
The second limb of the tenets of natural justice, that is, the right to hear the other side, is captured in the latin maxim *audi alterem patem* translating into 'no man shall be condemned unheard.' The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice. It has been stated, albeit somewhat romantically, to be reflected in God's treatment of Adam and Eve before the expulsion from the biblical garden of Eden and, indeed, to be an aspect of natural law in the sense of 'the laws of God and man'. It embodies a principle, which would universally be perceived as inherent in the concept of fair treatment.

Effect of breach of Rules of natural Justice

Lord Diplock said in the case of **Attorney General Vs Ryan (1980) 2 All ER 608** that

> It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority.

P.L.O. Lumumba (Supra) has opined that rules of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power.
The positions above have been further fortified by the holding in **O'Reilly Vs MacMann [1983]2`AC 273** where Lord Diplock reaffirmed that:

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> a breach of the rules of natural justice renders a decision a nullity. As Lord Bridge said, it has traditionally been thought that a tribunal, which denies natural justice ***to one of the parties before it, deprives itself of jurisdiction.*** Whether this view is correct or not, a breach of the rules of natural justice is certainly a sufficiently grave matter to entitle the party who complains of it to a remedy *ex debito justiciae*

The Kenyan Judicial Attitudes towards the Doctrine of Natural Justice

Although the Kenyan judiciary of yesteryears has been attacked from many fronts, the way it came out to ring-fence the place of the right to be heard in defence is commendable. This shall be demonstrated by a look at the decision of the Court of Appeal in the case of David Onyango Oloo Vs The Attorney General discussed below.

Taking cue from the jurisprudence oozing from the David Onyango Oloo case, the High Court of Kenya stated thus in the case of **Charles Orinda Dulo Vs Kenya Railways Corporation, Nairobi High Court Misc. Application No. 208 of 2000:**

> At this juncture I am reminded of the case of Dickson Ngigi Ngugi Vs Commissioner of Lands, Civil Appeal No. 297/97 (UR) wherein it is emphatically judged that "the right to a hearing before any decision is taken is a basic right and it cannot be taken away by the hopelessness of ones case.

The recent decision of the High Court of Kenya sitting at Nairobi in the case of Charles Kanyingi Karina Vs The Transport Licencing Board, Nairobi High Court Misc Application Number 1214 of 2004, delivered on 22nd October 2004, seems to have robbed, in broad daylight, all the gains made in terms of judicial bravery of liberally applying the right to be heard in ones defence.

It is thus our contention that this sudden departure by the High Court from the principles set in the David Onyango Oloo case was not in conformity with precedent.

This being a fairly harsh verdict against the reasoning and application of the principle by the learned judge, we propose to set out, in sufficient detail, the material facts and findings of the courts in these two cases.

David Onyango Oloo Vs The Attorney General [1987] K.L.R. 711

In this case, the appellant had been convicted by a Magistrate's Court for the offence of Sedition under Section 57(1) and (2) of the Penal Code and sentenced to imprisonment for five years.

Under the Prison's Act (Cap 90), at Section 46(2) thereof, the appellant was entitled to remission.

The Commissioner of Prisons later wrote to the Officer-In-Charge of the prison that in exercise of the powers conferred upon him by Section 46(3A)(a) of the Prison's Act, he was directing that the appellant be deprived of all remission granted to him under Section 46(1) of the Act.

It was found as a matter of fact that the appellant had not committed any Prison offence, that he had not been informed what wrong he had done or given an opportunity to state why he should not be deprived of his remission. The ***High Court nonetheless found in favour of the Respondent hence*** prompting an appeal to the Court of Appeal.

Finding for the appellant, the Court of Appeal, Nyarangi J.A. (as he then was) stated:

> The Commissioner's decision was an administrative act. Nevertheless, rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier that if he had to serve the full sentence of imprisonment. Lord Denning MR (as he then was) put it thus in *Reg Vs Gaming Board, Ex P Benalim,*(1970) 2 QB 417 at P 430, letter B,
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> > It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter ..... At one time it was said that the principles only apply to judicial proceedings and not administrative proceedings. That heresy was scorched in *Ridge Vs Baldwin 1984 AC 40.*
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> I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions, which will affect others to act fairly. In this instant case, reasonable people would expect the Commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the **Prisons Act.** Reasonable people would expect the Commissioner to act on reports, containing information concerning the appellant. The reports will obviously have been prepared by the Officer – in – charge of the Kamiti Main Prison. ..... in order to act fairly, the Commissioner is expected to hear the inmate on whatever reports he has on him. As was said in *Fairmount Vs Environment Sec [1976] 1 WLR 1255* at page 1263,
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> > For it is to be implied unless the contrary appears, that parliament does not authorize .... the exercise of powers in breach of the principle of natural justice ....
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> There is a presumption in the interpretation of statutes that the rules of natural justice will apply and therefore that in applying the material subsection the Commissioner is required to act fairly and so to apply the principles of natural justice.

The above speech of learned Nyarangi J.A has been quoted extensively to expose the apparent enthusiasm on the part of the Judge of Appeal to guard the subject from administrative injustice.

The Kenya Court of appeal was at it again in the case of **Mirugi Vs Attorney general, Nairobi Civil Appeal No. 70 of 1991** where it spoke the following language:

> As pointed out earlier in this judgment, the Act is silent as to what remedy is available to a person affected in the exercise of discretion by the Attorney

> General under Section 11(1). It is, however, quite clear that it is not within the powers of the Act to depart from the principles of natural justice when discretion is being exercised under this subsection. .....
> *The mere fact that the exercise of discretion by the decision making authority* affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice. Thus, that discretion must be exercised judicially, that is to say, fairly. The fact that the exercise of discretion is administrative does no make it any the less judicial for this purpose. .....
> ..... It is not the absoluteness of the discretion nor the authority exercising it that matter but whether in its exercise, some person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney-General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The appellant's complaint in the High Court was that this was so and for that reason he sought leave of that court to have it investigated.

The speech appears to be predicated on the philosophy that is most aptly captured in the English decision in the case of **Board of Education V Rice [1911] A.C 179** wherein it was stated that

> the duty to act fairly ..... lies upon everyone who decides anything, because while domestic tribunals, to comply with the rules of natural justice, give a person an opportunity of knowing the case against him and of dealing with it, and must come to a fair conclusion, it need not go further and copy the procedures of criminal courts. Where individuals are adversely affected by a decision, the presumption is very strong as Lord Reid noted in **Ridge V Baldwin**, the right to a fair hearing is 'a rule of universal application.

Charles Kanyingi Karina Vs The Transport Licencing Board – Rogue Jurisprudence?

The factual back ground of this matter was straight forward. On 19th August 2004 the applicant's vehicle KAQ 642 N was being driven on Thika Road. A representative of the Transport Licencing Board found or alleged that the speed governor fitted in the applicant's vehicle was faulty or otherwise interfered with. By a notice published in the issue of 3rd September 2004 of the *Daily Nation*, a local daily newspaper, the TLB suspended the use and operation of, among others, the applicant's vehicle for a period of three months from that date. It was submitted that the TLB representative and/or police had used a speed gun to detect the speed and that was how they ascertained that the vehicle had exceeded the prescribed highest speed; 80 KM/h.

The applicant claimed that three days after his car was alleged to have exceeded the limit, he personally drove it and ascertained that it could not exceed the speed limit of 80 KM/h.

It was also contended by the applicant that he was not given an opportunity to explain what had happened and that the speed governor could have been mechanically faulty instead of having been tampered with. That the police recording machine could have been faulty. That three weeks after the incident, on 15th September 2004, he secured a certificate from motor vehicle inspectors

that the speed governor was functioning correctly and that there was and had not been any interference.

The above facts were not contested since the Respondent was not represented at the hearing nor were any replying papers filed.
The court summarized, and rightfully so in my view, that of all the contentions made before it, the most relevant was that in the circumstances of the case, he was entitled to be heard before the suspension of his licence and that without being heard, the respondents had contravened the rules of natural justice.

On this material issue, the court found thus:

> The question is, is it reasonable for the drivers/owners to expect to be heard after detection. The answer in the opinion of the court is a clear "NO". There cannot be a legitimate expectation of a hearing. It is also clear to the court that the relevant law on suspension does not stipulate the right of hearing. If this right was to be legitimately expected it would defeat the purpose of the law, which is to ensure road safety, road discipline and the giving of a human face to the use of the Kenyan roads especially by this class of road users commonly known as "*matatu*" operators. There was therefore need for strict liability and imposition of sanctions on the spot. Hearings would be likely sources of corruption and lengthy court hearings thereby removing the sting from the new sanctions and denying the new law its efficacy and effectiveness. .....
> The decision by the TLB cannot be brought within the above definition. On the contrary it is a sensible was of instilling sense to this category of public service vehicle users who know no public discipline and who have over the years been the source of senseless accidents in Kenya's roads and who had prior to the introduction of the measures complained of developed a culture of road madness, impunity and invisibility to law enforcement agencies.
> Finally, this court is of the view that even if there was a violation warranting the grant of the order of certiorari, and such reasons are not in existence for the reasons given above, it would still decline to give or grant the order of certiorari firstly because the relief is still discretionary and secondly because of the wider public interest based on the principal of proportionality. .....
> What TLB is doing is in the public interest and on the principle of proportionality outlined above I would also dismiss this application as well. The fact that the applicant would cease to earn some income from the use of the vehicle is in the opinion of this court a lesser value than the value intended to be achieved by TLB in enforcing the rules.

It is our contention that the learned judge erred on a number of grounds;
First he, in our opinion, misapprehended the law relating to the right to a hearing by stating that the TLB regulations do not stipulate the right of a hearing. As noted earlier, there is a presumption of a right to a hearing enshrined in every legislation where the rights of the subject are to be affected. As a matter of principle, principles of natural justice are judicially allied to, and sometimes co-extensive with procedural requirements imposed by statutes although not themselves codified by statute. Lord Denning MR put it most aptly in the case of **Brean V AEU [1971] 2QB 175** that

> It is now well settled that a statutory body which is entrusted by statute with a discretion must act fairly. It does not matter whether its functions are described as judicial or quasi judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must, in a proper case, give a party a chance to be heard.

This position was upheld in the case of **Kanda V Government of Malaya [1962] A.C 322** wherein the court emphatically stated that,

> If the right to be heard is a real right, which is worth anything, it must carry with it a right of an accused man to know the case, which is made against him. He must know what evidence has been given and what statements have been made affecting him; and he must be given a fair opportunity to correct or contradict them.

Second, the learned Judge advanced the reasoning that guaranteeing the right to a hearing would defeat the purpose of the law, which is to ensure road safety, road discipline and the giving of a human face to the use of Kenyan roads. Granted, all these are the purposes of the legislation in issue. However, the concern of the application before court was an alleged procedural impropriety. In as much as the Transport Licencing Board is garbed with the duty of ensuring sanity on the Kenyan roads, this role has to be performed within prescribed rules. Natural justice is an essentially procedural concept, that is, it is an aspect of adjectival law, not substantive law. The test is not, 'has unjust result been reached?' but, 'was there an opportunity afforded for injustice to be done?'

Third, the court took into account some considerations which are deemed to be irrelevant in the corpus of judicial review in reaching its verdict. The previous "lunacy" of *matatu* operators, it is our view, cannot be impleaded in denying a particular operator the right to a hearing. This, we contend, in itself was an extraneous consideration – itself a proper ground for judicial review if it was entertained by an inferior tribunal.
In the case of **Republic Vs Kenya Medical Training College ex *Parte* James Kipkong'a Kandagor** Justice Lenaola, noting that the applicant might have been unruly indeed, however, stated thus

> It may very well be that the Applicant is a **"know-it-all", "arrogant", "indisciplined"** and a trouble shooter. Certainly, that he seems to rub people the wrong way cannot be bad luck or sheer coincidence. That he seems to attract terms such as **rude, uncooperative** and **disobedient** and the others that I have quoted above cannot be because he happens to be attractive to those terms! It says something about him. I shall say no more. However, as regards the matters before me, they far outwight his personality and the way he does things. He has made out a case for grant of certain orders that I shall now make here below:

The judge here demonstrated a clear understanding of the real issue before him and he ignored the extraneous considerations and went ahead to address the real issue. He did not allow himself to be blinded by side issues of the applicant's antecedent conduct.

Finally, the decision undervalued the worth of a licence as had been appreciated by Megarry J's judgment in **Mc Innes Vs Onslow Fane [1978] 1 WLR 1520** that the grant or forfeiture of a licence may involve an interference with either rights or interests or expectations, depending upon the circumstances. There is little doubt that the revocation will almost always involve the full protection of natural justice.

Conclusion

This article set out to interrogate the wisdom contained in the case of Charles Kanyingi Karina Vs The Transport Licencing Board. From the grounds and reasoning set out above, it is evident that the journey that the Charles kanyingi case took is a sad tale. This situation ought to be corrected at the soonest opportune moment as many Kenyan will stand to be condemned unheard and a justification will have been created. Be that is it may, a mischevious advocate brandishing this decision before a court of law ought to be warned that it was made *per in curium* the decision of the Court of Appeal in the case of David Onyango Oloo Vs The Attorney General.