



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 105 OF 2018**

**IN THE MATTER OF ARTICLES 2, 19, 20, 22(1) and (2), 23, 25, 159 and 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 25, 27, 28, 29, 36, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT NO.11A OF 2011 AND THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS 2013, AND THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE AND PROCEDURE RULES 2013**

**BETWEEN**

**JOHN WAINAINA LABAN.....PETITIONER**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**PETITION**

1. The Petitioner through a Petition dated 21<sup>st</sup> March 2018 supported by Supporting Affidavit sworn by John Wainaina Laban of even date seek the following reliefs:-

- a) A declaration that the 1<sup>st</sup> Respondent has violated the Petitioner's fundamental freedoms and rights under Chapter 4 of the constitution of Kenya 2010.*
- b) A declaration that the 1<sup>st</sup> Respondent's vetting and decision arising therefrom was in violation of the Petitioner's fundamental rights under article 27, 36, 40, 47 and 50 of the Constitution of Kenya 2010.*
- c) An Order of Judicial Review to quash the 1<sup>st</sup> Respondent's decision of 6<sup>th</sup> December, 2016.*
- d) An Order of injunction restraining the 2<sup>nd</sup> Respondent from implementing the 1<sup>st</sup> Respondent's decision of 6<sup>th</sup> December 2016 and 22<sup>d</sup> August, 2017.*
- e) Any other or further relief as the court may deem just and expedient.*
- f) Costs of the Petition.*

## **PETITIONER'S CASE**

2. The Petitioner was employed by the 2<sup>nd</sup> Respondent in 1987 as a police officer and promoted to his current rank. That a decision was made to vet all police officers in service including the Petitioner. The Petitioner was subsequently invited, for vetting on 23<sup>rd</sup> August 2016, which process was adjourned to allow the Petitioner supply further details as per Petitioner's contention under page 45 of the second sitting.

3. The Petitioner contend that during the vetting exercise, the 1<sup>st</sup> Respondent concentrated on the petitioner's property as well as the Mpesa transactions. It is Petitioner's case that prior to the said vetting, the 1<sup>st</sup> Respondent had not indicated what evidence or allegations it was going to concentrate on, hence the Petitioner was caught by surprises as he could not answer all the questions as the same required prior preposition. The Petitioner requested to be allowed to refer to documents available to him, which request was denied.

4. It is Petitioner's contention the questions posed by the 1<sup>st</sup> Respondent referred to events that took place 2 – 3 years prior to vetting. Therefore some required details and reference to any document that the Petitioner had. The Petitioner therefore required time to prepare, resulting to the 1<sup>st</sup> Respondent adjourning the proceedings to a date to be communicated as per page 45 of the Hansard.

5. The Petitioner herein aver that he was never recalled again by the 1<sup>st</sup> Respondent so as to finalise the vetting. However the 1<sup>st</sup> Respondent never recalled the Petitioner but instead communicated its decision to the Petitioner on 6<sup>th</sup> December 2016 in which the 1<sup>st</sup> Respondent found the Petitioner unfit to continue in the service notwithstanding the 1<sup>st</sup> Respondent had not completed the vetting process against the Petitioner herein and without affording the Petitioner an opportunity to furnish additional information regarding the Petitioner's properties.

6. The Petitioner being dissatisfied with the 1<sup>st</sup> Respondent's decision, of 6<sup>th</sup> December 2016, applied for Review of the decision, but on review the 1<sup>st</sup> Respondent came to similar finding and communicated its decision on 22<sup>nd</sup> August 2017 to the Petitioner.

7. The Petitioner contend that the 1<sup>st</sup> Respondent decision grossly violated the Petitioner's rights under Articles 25, 27, 28, 36, 40, 47 and 50 of the Constitution which violation is likely to continue unabated unless this Court intervenes.

## **THE 1<sup>ST</sup> RESPONDENT'S RESPONSE**

8. The 1<sup>st</sup> Respondent is opposed to the Petition and relies on Replying affidavit by Johnson Kavuludi sworn on 22<sup>nd</sup> May 2018.

9. The 1<sup>st</sup> Respondent contend that the vetting process is a legal requirement under **Section 7 of the National Police Service Act** and the essence of vetting is to bring lasting reforms in the police service as per the aspiration of the Kenyan citizenry when they passed the 2010 Constitution. Upon promulgation, the Constitution required all persons holding public office to adhere to and comply with Chapter Six of the Constitution which deals with Leadership and Integrity. Specifically **Article 73(2), 75, 76** provide for guiding principles of leadership and integrity.

10. It is averred by the 1<sup>st</sup> Respondent that it was upon this mandatory requirement that, the constitution established the 1<sup>st</sup> Respondent herein and directed Parliament to enact a legislation that will allow it to carry out the vetting process. This was to ensure that all officers serving in the National Police Service comply with the requirements of **Chapter Six of the Constitution. Section 7(2) of the National Police Service Act** provides as follows: "**Notwithstanding subsection (1), all officers shall undergo vetting by the Commission to assess their suitability and competence.**" Further, **Regulation 32 of the Vetting Regulations 2013** provides that an officer who is found unsuitable or incompetent shall be removed from service.

11. The 1<sup>st</sup> Respondent states that it is evident from the foregoing that the vetting process is a legal obligation bestowed upon the 1<sup>st</sup> Respondent which duty the 1<sup>st</sup> Respondent has endeavoured to discharge in utmost fidelity to the constitution and other guiding legislations and principles.

## **THE 2<sup>ND</sup> RESPONDENT'S RESPONSE**

12. The 2<sup>nd</sup> Respondent did not appear nor participated in these proceedings.

## **ANALYSIS AND DETERMINATION**

13. I have considered the Petition, Affidavit in support and annexures and the Replying Affidavit as well as the parties rival submissions and from the aforesaid the following issues arise for consideration:-

a) *Whether the Petitioner's right to fair administrative action and fair hearing were violated by the 1<sup>st</sup> Respondent?*

b) *Whether the decision to remove the Petitioner was lawfully arrived at?*

c) *Whether the Petitioner is entitled to the orders sought?*

## **A. WHETHER THE PETITIONER'S RIGHT TO FAIR ADMINISTRATIVE ACTION AND FAIR HEARING WERE VIOLATED BY THE 1<sup>ST</sup> RESPONDENT?**

14. The Petitioner submit that he heavily relied on the witness statement dated 16<sup>th</sup> October 2018. It is petitioner's contention that the 1<sup>st</sup> Respondent opted to call no witness to rebut the evidence adduced by the Petitioner. The Petitioner aver that the way the vetting process was carried out was unfair. It is urged by the Petitioner that the vetting was not done in a transparent manner as dictated by **Section 4(g) of the said regulations**. It is urged that the commission failed to disclose the documents it was relying on to discredit the evidence adduced by the Petitioner regarding the ownership, income and value of assets of the Petitioner. Further it is contended the Commission bluntly condemned the Petitioner on the ground that he under disclosed and undervalued his assets without providing evidence how such a conclusion was arrived at.

15. It is further contended by the Petitioner that the commission did not disclose how the Petitioner's engaging in the small time maize buying and selling business was detrimental to his efficiency in his duties as a Chief Inspector. Further it is averred that it failed to observe that the Petitioner has had exemplary records throughout his service of over thirty five years in the Police Force. He rose meritoriously through the ranks to the post of Chief Inspector and no evidence was adduced by the Commission to cast a dark cloud on his performance records. The Petitioner states that his freedom to associate with people even in the business arena is enshrined in **Article 36 of the Constitution**.

16. The Petitioner further aver that the Commission failed to consider the Petitioner's evidence regarding the mpesa transactions. It failed to notice that most of those transactions were carried out in the ordinary course of the Petitioner's duties as a Chief Inspector. No criminal connotations were proven against the Petitioner yet the Commission just condemned him on the ground that too much money passed through the Petitioner's Mpesa transactions.

17. The Petitioner in addition to the aforesaid contend that the vetting atmosphere was harsh, unprofessional and only geared to humiliate the Petitioner. He contends further that the Commission did not produce the sources of information it used to condemn the Petitioner as required by **Section 15 of the Vetting Regulations**.

18. The Petitioner further assert that the vetting process was inconclusive and so was its decision to retire the Petitioner was premature, illegal and a violation of his constitutional rights. The process was adjourned on 23<sup>rd</sup> August 2016 to enable the Petitioner furnish the Commission with more documents. He avers that he was never recalled even after furnishing it with the documents requested for. The commission is urged to have violated the Petitioner's constitutional right to own properties. He urges that the fact that he had inherited some properties from his parents and purchased others from his savings was unlawfully used by the Commission against him. He contends that the latter did not disclose any illegality on the Petitioner's part in the process of owning any of the assets. The said right is enshrined in **Article 27 and 40 of the Constitution of Kenya 2010**.

19. It is petitioner's contention that the Commission seemed embittered by the fact that the Petitioner had some assets due to his name. It seemed to have had a preconceived idea that the Petitioner acquired his property illegally and thus gave him no fair hearing. It had already presumed him guilty and the vetting process was just an exercise carried out hurriedly and inconclusively to stamp its presumption of guilt against the Petitioner.

20. The Petitioner in view of the above contend that the Respondents violated his constitutional rights by terminating his services without any justifiable cause.

21. The 1<sup>st</sup> Respondent urge that it accorded the Petitioner utmost procedural fairness as contemplated in the constitution and other laws guiding vetting process in its replying affidavit.

22. The 1<sup>st</sup> Respondent contend that the Petitioner was removed from the service on 6<sup>th</sup> December 2016 due to lack of financial probity and integrity. This decision was arrived at after it was established that the officer was unable to explain his transactions. The commission also observed that the officer wilfully misled the commission on his business engagements. Indeed, the Commission while analysing the officer's M-pesa records noted several transactions with other officers as captured in the vetting Hansard pages 18, 19, 20, 21, 22, 23 and 24. The officer in an effort to justify the frequent transactions claimed that the same were as result of a maize business they did with a broker and also contributions to other officers but could not produce any business partnership or agency documentations or records of welfare contributions.

23. It is 1<sup>st</sup> Respondent's contention further that the Petitioner had huge direct deposits with Mpesa agents which he also attributed to the alleged maize business with a maize broker. Surprisingly, despite attributing the bulk of his transaction to the maize business done by the alleged broker, the officer admitted that he did not know the location of the storage facility where the maize was kept and also he did not have the contact of the alleged maize broker, that he had trusted with huge sums of money as captured in pages 35 and 36 of the hansard.

24. It is 1<sup>st</sup> Respondent's averment that based on these observations, the commission found the officer explanations concerning his financial transactions, especially Mpesa untenable and declared him unsuitable to continue serving. This conclusion was informed by the apparent lack of coherence in the Petitioner's explanations and provision of **Regulations 4(f) and 14 of Vetting Regulations 2013**.

25. The commission proceedings reveal from the Hansard on 23<sup>rd</sup> August 2016 on the hearing of the Petitioner's vetting on page 45 the Commission granted the Petitioner 21 days to provide all information which he had not produced. The said period was expiring on 14<sup>th</sup> September 2016. The decision was however served on 6<sup>th</sup> December 2016 before the Petitioner had been recalled to furnish the Commission with the pending documents.

26. The Petitioner upon being served with the vetting decision, applied for review pursuant to **Regulation 33 of the Vetting Regulations 2013**. The commission in recognition of his rights to fair administrative action and fair hearing admitted the said review application for hearing on merit which application was heard on the 13<sup>th</sup> July 2017. However, the Commission during the review hearing noted that the officer did not bring any new information that was relevant to the issues under consideration nor did he point out any error apparent on the face of the records as contemplated under **Regulation 33 of the Vetting Regulations 2013**. The review application was subsequently

dismissed for being meritless and a decision on the same conveyed to the Petitioner.

27. The Petitioner has not stated that he furnished the Respondents with additional evidence within 21 days period which was expiring on 14<sup>th</sup> September 2016 and was not considered before the decision he received on 6<sup>th</sup> December 2016. He has not shown that the decision was premature, illegal and a violation to his constitutional rights. He applied for review of the decision which application was allowed, heard and determination made.

28. The 1<sup>st</sup> Respondent contend the vetting exercise was conducted in the most procedural, fairness and lawful manner with utmost fidelity to the constitution and all other relevant laws and Regulations. The petitioner as per proceedings before the 1<sup>st</sup> Respondent, never raised any complaint as to the manner and nature of the vetting process. A clear perusal of the Hansard gives credence to 1<sup>st</sup> Respondent's contention that the vetting exercise was conducted efficiently, lawfully, reasonably and procedurally fairly. The Petitioner was given adequate opportunity to address all issued put to him during the vetting in strict compliance with the rules of natural justice.

29. The Petitioner even after a decision had been received and communicated to him, applied for Review pursuant to the provisions of **Regulation 33 of the National Police Service (Vetting) Regulations 2013** and the Commission in recognition of the Petitioner's right to fair hearing and fair administrative action as envisaged in **Article 50 and 47 of the Constitution** respectively admitted the said review application for hearing and considered it on merit after giving the Petitioner an opportunity to argue his application.

30. The Respondents in the review application noted that in view of inability of the Petitioner to demonstrate any errors apparent on the face of the record or to provide any fresh information to rebut the finding of unsuitability, the commission after lawful deliberations found that the same lacked merit and upheld its earlier decision.

31. **Article 50(2) of the Constitution** provides that every person has the right to fair trial and further **Article 47 of the Constitution** provides every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Upon consideration of the Petitioner's evidence, proceedings before the Commission and record in the Hansard, and parties rival submission, it turns out that the Petitioner was accorded a fair trial, which was expeditious, efficient, lawful and procedurally fair and as contemplated by the general rules of National justice.

32. The Law is very explicit that whoever alleges procedural unfairness must demonstrate clearly to the Court the instances or elements of unfairness and breaches of the law and a general quoting of the constitutional provisions and the statutory law without proof should not suffice. This proposition is supported by key principles outlined in the case of **Anarita Karimi Njeru vs. The Republic (1976 – 1980) KLR 1272** where it was held as follows:

***“i. Constitutional violations must be pleaded with a reasonable degree of precision.***

***ii. The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and how one is entitled to the same.***

***iii. The violations must be particularised in precise manner.***

***iv. The manner in which the alleged violations were committed and to what extent.***

33. Looking at the 1<sup>st</sup> Respondent's decision after vetting, analysis of the evidentiary documents provided by the Petitioner and after keenly considering the Review Application it was clearly established that the Petitioner failed to accurately and truthfully disclose and explain his various sources of income to the vetting panel thus making his financial probity questionable.

34. Further upon consideration of the Petition herein, as framed. I find that it fails to pass the test set in **Anarita Karimi Njeru case (Supra)**. It is further noted that the commission is empowered by the vetting Regulations to consider the professional conduct, work history and ethical conduct of an officer when arriving at a vetting decision on his/her suitability to continue serving as an officer. This was observed in the case of **Republic v National Police Service Commission Exparte James Ngumi Mutungi Misc. App No. 44 of 2016** where the Honourable Justice Odunga stated, **“Vetting is a combination of the record of an officer from the inception day in the Service, disciplinary record, professional conduct, financial probity, integrity of an officer and the human rights record.”**

35. Upon consideration of the Petitioner's evidence, and pleadings, it is evident that the Petitioner has failed to prove any act of perceived unfairness on the part of the 1<sup>st</sup> Respondent. I therefore find that the Petitioner's right to administrative action and fair hearing were not violated by the National Police Service Commission. Further Petitioner has failed to prove how his rights have been infringed by the 1<sup>st</sup> Respondent.

#### **B. WHETHER THE DECISION TO REMOVE THE PETITIONER WAS LAWFULLY ARRIVED AT?**

36. The 1<sup>st</sup> Respondent in its decision to remove the Petitioner herein was guided by **Regulations 14(2) (b) and (d) of the Police Service Vetting Regulations 2013**, which requires the Commission to look at the past record including conduct, discipline and diligence of the officer and also the human rights record of the officer. The Commission after the vetting, analysis of the documents provided by the Petitioner and considering the Review Application established that the Petitioner failed to truthfully and accurately explain his various sources of income to the vetting panel thus making his financial probity and ethics questionable.

37. Upon considering the 1<sup>st</sup> Respondent's decision, I find that it has been demonstrated that the 1<sup>st</sup> Respondent decision to remove the Petitioner from service, after a lawful and procedurally fair vetting process and subsequent reviews were duly considered and signed by the

Commissioners who decided the matter on behalf of the Commission as contemplated in **Regulation 25 of the Vetting Regulations 2013**. The said decisions were signed by the Commissioners who participated in the hearings and later procedurally released by the Commission's Board as evidenced by the decisions.

38. Similarly in the case of **Kenya Revenue Authority v. Menginya Salim Murgani Civil Appeal No. 108 of 2009** the Court of Appeal held that:-

***“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”***

39. I find from the Hansard of 23<sup>rd</sup> August 2016 as regards the proceedings subject of this Petition, the National Police Service Commission, in an effort to not only discharge its mandate justly but also to ensure justice is done and also seen to be done, the Commission proposed and embraced the verbatim way of recording proceedings in an Hansard to guarantee fairness and clarity of information during deliberations and also for record and future reference if need be in tandem with the above cited authority. Due to this innovation, this Honourable Court has been presented with the benefit of perusing the verbatim Hansard records of the vetting and review exercises to confirm the procedural soundness of the vetting exercise. I note the Petitioner has on the other hand made several allegations that the vetting atmosphere was not conducive without cogent proof. The verbatim Hansard record exhibits the nature of the vetting and vetting review exercise and at no point was the petitioner intimidated or denied a chance to precisely explain questions raised to him about his work record and financial probity. The Petitioner did not also raise any objection to the manner in which the vetting was conducted to the Commission at the hearings.

40. From the Hansard it is apparent that the Petition as framed lacks merit and is an attempt by the Petitioner to try and mislead this Honourable Court after failing the suitability test despite having been accorded the required fair administrative treatment during the vetting and subsequent review as enshrined and contemplated by the law.

**C. WHETHER THE PETITIONER IS ENTITLED TO THE ORDERS SOUGHT?**

41. Upon perusal of the Petitioner's statement, evidence adduced before the trial Court; and submissions in support, I find that the Petitioner has not demonstrated to the satisfaction of the Court any act of procedural unfairness or illegality committed by the 1<sup>st</sup> Respondent in its discharge of its statutory mandate to vetting officers. The Petitioner has failed to demonstrate that the vetting exercise was conducted in unfair manner and that it infringed on his fundamental rights so as to have orders sought granted.

**42. The Petitioner's Petition is without merit and is accordingly dismissed. I direct each party to bear its own costs.**

**Dated, Signed and Delivered at Nairobi on this 11<sup>th</sup> day of February, 2021.**

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**J. A. MAKAU**

**JUDGE**