



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 96 OF 2018**

**BELVIN WANJIRU NAMU.....PETITIONER**

**VERSUS**

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

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

**JUDGMENT**

1. **Belvin Wanjiru Namu**, the petitioner, is a member of the Kenya Police Service. The 1<sup>st</sup> respondent is the **National Police Service Commission** while the 2<sup>nd</sup> respondent is the **National Police Service** responsible for the operations of the National Police.

2. The petitioner was vetted on 9<sup>th</sup> June 2016 by the 1<sup>st</sup> respondent and was found unfit to serve. The petitioner states that during the vetting, the 1<sup>st</sup> respondent concentrated on two areas of finance and business. The Petitioner avers that although she fully explained that she and her husband had Matatus that were initially run by **Nairobi shuttle** but she also told the 1<sup>st</sup> respondent that she had no role to play in the day to day operations of the business and that the running of their matatu was later taken over by a family company called **Astrabell Ltd.**

3. The petitioner further avers that during her vetting, the 1<sup>st</sup> respondent accused her of operating matatu considered a conflict of interest, although no firm foundation was given to support this accusation. She states that she supplied documents to prove that there was no such conflict of interest but the evidence was ignored by the 1<sup>st</sup> respondent.

4. The petitioner contends that prior to her vetting she was not informed that ownership of matatus would be an issue during her vetting. She stated that she never used her position as a police officer in a manner that was in conflict with her duties; that at the time of vetting, she had been transferred away from Nairobi where the family matatu operated and that as a citizen, she had a right to own property so long as it did not interfere with her duties and faulted the 1<sup>st</sup> respondent's decision of **6<sup>th</sup> December 2016** to remove her from the Service.

5. The petitioner contended that the decision violated her right to equal protection of the law guaranteed by Article 27, the right to freedom of association guaranteed by Article 36; the right to property under Article 40 and the right to fair administrative action contrary to Article 47(1) of the constitution. The petitioner sought the following reliefs:-

***a. A declaration that the petitioner fundamental freedoms and rights under chapter 4 of the constitution of Kenya 2010 has been infringed and or violated by the 1<sup>st</sup> respondent.***

***b. A declaration that the 1<sup>st</sup> respondents vetting and decision arising thereof was in violation of the petitioners fundamental rights under articles 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 decisions of 6<sup>th</sup> December 2016 and 22<sup>nd</sup> August 2017.***

***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>nd</sup> August 2017.***

***e. Any other or further relief as the court may deem just and expedient.***

***f. Cost of this petition.***

## Response

6. The respondents filed a replying affidavit by **Longinus Mulondo** sworn on 19<sup>th</sup> November 2019 in opposition to this petition. He deposed that the 1<sup>st</sup> respondent complied with the law in conducting the petitioner's vetting; that the petitioner was removed from the service on 6<sup>th</sup> December 2016 due to conflict of interest and lack of financial probity and that the decision was arrived at after it was established that the petitioner operated a fleet of Matatu which was in conflict with her duties as a police officer.

7. It is the respondents' contention that during the vetting, the 1<sup>st</sup> respondent noted various cash transactions in the petitioner's bank statements and therefore reasons for her removal from the service were detailed in the decision of 6<sup>th</sup> December 2016. Mr. Mulondo contends that the petitioner was unable to explain the source of large sums and frequent transactions which the commission found unbelievable hence the impugned decision.

8. According to the deponent, the petitioner sought a review of the decision through an application dated 26<sup>th</sup> December 2016 which was heard on 11<sup>th</sup> July 2017 but the petitioner did not adduce further or new information to warrant a different decision. The 1<sup>st</sup> respondent was, therefore, still not satisfied with the petitioner's explanation hence it upheld its earlier decision.

## Petitioner's submissions

9. Mr. Munyua, counsel for the petitioner, submitted, highlighting their written submissions dated 23<sup>rd</sup> May 2018, that the petitioner, who had been employed by 2<sup>nd</sup> respondent in 2003, had risen to the rank of Chief Inspector of Police. Counsel submitted that on 9<sup>th</sup> June 2016 the petitioner went through vetting exercise and that she admitted to being a shareholder in a family company operating Matatu business.

10. According to counsel, the 1<sup>st</sup> respondent terminated the petitioner's employment through its decision of 6<sup>th</sup> December 2016 on grounds of conflict of interest based on the fact that she was engaged in matatu business. Counsel contended that although the petitioner sought a review of that decision, the same was dismissed on 11<sup>th</sup> July 2017, leading to this petition.

11. Learned counsel contended that there was no evidence that there was conflict of interest given that the petitioner was based outside the area where the matatu were operating and, further, that matatu were owned by a limited liability company. Mr. Munyua submitted that the petitioner had presented evidence, including documents, to show that the matatu were subjected to lawful processes such as warrants and payment of fines and there was no evidence that she had used her position to the advantage of the family business.

12. In learned counsel's view, the 1<sup>st</sup> respondent violated regulations 9 and 29 of the Police Vetting Regulations which required the 1<sup>st</sup> respondent to gather relevant information that could be necessary during the vetting. In their further view, the 1<sup>st</sup> respondent did not rely on any material evidence to show that the petitioner used her position for the benefit of the business to arouse the issue of conflict of interest. He relied on the case of **Stephen Kimei Kiptoo & 2 others v National Police Service Commission** [2016] eKLR for this submissions.

13. Mr. Munyua contended, therefore, that the 1<sup>st</sup> respondent made a fundamental error by finding that it was wrong for a police officer to own a matatu; that the 1<sup>st</sup> respondent violated Article 50(1) by not exhibiting impartiality and that by stating that a police officer cannot own a matatu, the 1<sup>st</sup> respondent violated Article 40 of the Constitution.

## Respondent's submissions

14. Miss Opiyo, learned counsel for the respondents, submitted highlighting their written submissions, that it was not true that the matatus associated with the petitioner were under **Astrobell Company Ltd.** Referring to page 8 of the Hansard, (Annexure "JK11" of the affidavit), counsel submitted that the matatus were in the petitioner's name; that initially the petitioner was based in Nairobi before she was transferred to Kendu Bay, and that there was no violation of Police Vetting Rules. She relied on the case of **George Kingi Banba v National Police Service Commission** (Petition No 87 of 2010(ELRC), for the submissions that the petitioner was the source of the information.

15. Learned counsel contended that the law prohibits officers from owning properties that would lead to a conflict of interest and relied on Articles 73(1) (8) and 75(1) of the Constitution on declaration of interest that may conflict with one's public duty and how public officers should behave. She also relied on section 71 of the National Police Service Act arguing that it prohibits police officers from engaging in business that may lead to conflict of interest with their duties.

## Determination

16. I have carefully considered this petition, the response and submissions. I have also considered the authorities relied on. The issue raised in this petition is whether the 1<sup>st</sup> respondent acted fairly in determining that the petitioner was unsuitable to serve in the National Police Service. This petition challenges the 1<sup>st</sup> respondent's decision to terminate the petitioner's service on grounds that she failed the vetting. The reason for failure was that the petitioner was involved in matatu business which, according to the 1<sup>st</sup> respondent was in conflict with her duties as a police officer.

17. The petitioner has faulted this decision contending that she only held shares in a family company managed her husband; that she played no role in the daily management of the matatu business and that the business is wholly managed by her husband. The petitioner further argues that she was in Nairobi for a short stint and by then, the family had only one matatu and according to her, the matatu was purchased through a loan. She was later transferred to **Kendu Bay**. For those reasons, the petitioner contends that she did not act in conflict with her official duties.

18. The petitioner also argues that the 1<sup>st</sup> respondent did not tender evidence to show that she had used her position to assist the family business so as to amount to conflict of interest. She produced documents, including copies of warrants of arrest and receipts for fines paid for the motor matatu found flouting traffic rules to demonstrate that just like any other operators, the matatu operated by the family company were subjected to legal processes. The 1<sup>st</sup> respondent has, however, argued that the petitioner acted in conflict of interest and for that reason she was not fit to continue serving.

19. The 1<sup>st</sup> respondent is required by section 7(2) of the National Police Service Act to vet and assess suitability and competence of all police officers serving at the commencement of the Act. On that basis, the 1<sup>st</sup> respondent formulated the **National Police Service (Vetting) Regulations 2013** for purposes of fulfilling its mandate under section 7(2) of the Act. Regulation 3 thereof states the general objectives. Under regulation 14(1), the 1<sup>st</sup> respondent is required to consider, assess and determine the suitability and competence of the officer. In determining the suitability, regulation 14(2) requires the 1<sup>st</sup> respondent to consider among other things; whether the officer meets constitutional or other criteria required by law for recruitment and appointment of an officer; past record of the officer, including conduct, discipline and diligence; integrity and financial probity of the officer and the human rights record of the officer.

20. On the basis of the above, the petitioner underwent vetting but was found unsuitable to serve. She sought a review of that decision but her application for review was declined. The reason for finding the petitioner unsuitable to serve was because she was involved in matatu business which the 1<sup>st</sup> respondent contends was a conflict of interest with her duties. The petitioner has argued that there was no evidence that she acted in a way that conflicted with her duties as a police officer. To demonstrate otherwise, she produced copies of documents to show that the matatu were routinely subjected to legal processes and that wherever the vehicles were found to be in conflict with the law and traffic rules, they were appropriately dealt with in accordance with the law.

21. In its verdict, the 1<sup>st</sup> respondent stated at paragraph 14;

***“The Commission observes that there exists a direct conflict of interest where a police officer operates a matatu business. It is likely that the matatus will not be subjected to the consequences arising from breach of traffic rules and regulations.”***

22. From the above finding, the only reason why the petitioner was adjudged unsuitable to serve as a police officer was due to perceived conflict of interest. During the hearing of this petition the respondents’ counsel readily conceded that the petitioner was not found culpable on any other ground except that she was a director of a family company that owned and managed matatu business.

23. Conflict of interest must be real and incompatible with the officer’s work. **Black’s Law Dictionary, Tenth Edition**, defines conflict of interest as **“a real or seemingly incompatibility between one’s private interests and one’s public or fiduciary duties.”** Otherwise put, **conflict of interest** is a situation where an individual has interests or loyalties competing against each other. It involves dual relationships where person in a position in one relationship is in another competing relationship in another position such that the person has conflicting responsibilities.

24. Section 16 of the Leadership and Integrity Act on conflict of interest is to the effect that a public officer should use the best efforts to avoid being in a situation where personal interest conflicts with the officer’s official duties. In that case, conflict of interest would arise where a person finds oneself confronted by two different interests so that serving one interest would be against the other. For there to be conflict of interest in the petitioner’s case, her participation in the business while at the same time performing duties as a police officer should be shown to have been inconsistent, incompatible and prejudicial to her official duties.

25. Admittedly, the petitioner was a shareholder in the family business. She however informed the 1<sup>st</sup> respondent that she played no active role in that business. That is; she was not in active management of the matatu business which was solely under the control of managers appointed by her husband. The evidence on record, and it is not disputed by the 1<sup>st</sup> respondent, is that the matatu were purchased through loans in 2013. The petitioner was then serving in Nairobi but was later transferred to **Kendu Bay** where she was serving at the time of her vetting in 2016. These facts are not disputed by the respondents

26. Furthermore, the 1<sup>st</sup> respondent did not point out a single incident that would show that the petitioner used her position to the advantage of the family business. The 1<sup>st</sup> respondent does not even question the petitioner’s integrity in the performance of her duties as a police officer. It is noteworthy that during the vetting, the petitioner did not hide the fact that she was a shareholder in the family business. She was candid and even explained how the family purchased the matatu through loans which the 1<sup>st</sup> respondent did not doubt either.

27. In its decision, the 1<sup>st</sup> respondent appeared to assume that since the petitioner was a director of the company that automatically amounted to conflict of interest gong by its conclusion at paragraph 14 of the verdict reproduced elsewhere in this judgment. On the contrary, the petitioner adduced documentary evidence to debunk the 1<sup>st</sup> respondent’s view that the matatu would not be subjected to applicable traffic rules and regulations. The 1<sup>st</sup> respondent said nothing about this evidence.

28. The 1<sup>st</sup> respondent has a legal obligation under section 7(2) of the Act to vet police officers in office at the commencement of the Act to assess their suitability and competence to serve in the service. That is what the petitioner was subjected to on 9<sup>th</sup> June 2016. While doing so, the 1<sup>st</sup> respondent is, however, required to act fairly and reasonably. A conflict of interest that should constitute unsuitability to serve should, in my view, consist a situation of Self-dealing in which someone in a position of responsibility has outside conflicting interest and acts in his/her own interest rather than the interest of the public. In other words, there should be evidence that the person actually acted in favour of the self -interest as opposed to public interest.

29. Applied to the petitioner’s case, there was need to show through empirical evidence that indeed the matatu belonging to the petitioner’s family company were not subjected to law and regulations because of the petitioner’s position and intervention to amount to conflict of interest. This was not the case and the petitioner showed that indeed that was not the case since the matatu were actually arrested and fined

when at fault.

30. Article 40 of the Constitution allows every person to own property of any description. Article 260 of the Constitution renders definition of property to include the matatu. The right to own property is, therefore, a fundamental right in our Bill of Rights. It is guaranteed and protected by the constitutional. Being a right, it can only be limited by a law that is reasonable and justifiable in an open and democratic society and only if there are no less restrictive means of limitation.

31. That is not to say that the petitioner's right to operate matatus could not be limited, where it is in conflict with the public position she holds. The conflict must however be clear and manifest. As a police officer, this right could be limited so that she was not involved in the day to day running of the business.

32. The respondents relied in section 71 of the National Police Service Act which provides that “ ***No member of the service other than a reserve police officer shall engage in any trade, business or employment outside the scope of his duties as an officer of the service if the trade business or employment is in conflict of interest with the performance of the police officer's duties***”

33. Although the petitioner was involved in traffic duties, there was no evidence at all that her position allowed the company's vehicles receive preferential treatment or that they did not comply with the law. Being a traffic officer is not a permanent engagement. One may act as a traffic officer one day and perform different duties another day. The question of conflict must be clear and not presumptive. The fact that the petitioner is a police officer could not disentitle her family from engaging in business. She could have been given an option to resign from the directorship or leave the Service in the absence of direct acts of conflict. It was too harsh in my view, to terminate her service on grounds of perception.

34. I am in agreement with the finding of the Court in *Stephen Kemei Kiptum & 2 others v National Police Service Commission* [2016]eKLR, that there was no evidence that at any one time the vehicles owned or managed by the company in which the petitioner is a director were given preferential treatment by traffic officers.

35. Taking the above into account and considering the facts and circumstances of this petition, I am satisfied that the petition has merit and should be allowed. The petitioner should however reconsider her position as a director of the company given her current duties. Consequently, this petition is allowed as follows;

***a. A declaration is hereby issued that the 1<sup>st</sup> respondent's vetting and the decision arising therefrom was harsh and in violation of the petitioner's rights and fundamental rights guaranteed under Articles 27, 36, 40, 47 and 50 of the constitution.***

***b. An order of judicial review is hereby issued quashing the 1<sup>st</sup> respondent's decisions of 6<sup>th</sup> December 2016 and any other subsequent decision thereafter.***

***c. An order of prohibition is hereby issued prohibiting the 2<sup>nd</sup> respondent from implementing the 1<sup>st</sup> respondent's decision of 6<sup>th</sup> December 2016 and or any other decision thereafter.***

***d. Each party do bear own costs***

**Dated, Signed and Delivered at Nairobi this 14<sup>th</sup> of March 2019**

**E.C MWITA**

**JUDGE**