



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT NAIROBI

CAUSE NO 386 OF 2013

SUSAN WAMBUI NDURUCLAIMANT

VERSUS

INSPECTOR GENERAL OF POLICE1ST RESPONDENT

POLICE SERVICE COMMISSION.....2ND RESPONDENT

ALL SUED THROUGH THE ATTORNEY GENERAL

JUDGEMENT

1. The Claimant averred that she was employed by Kenya Police Force on 15th September, 1984 and worked in various places rising to the rank of Police Corporal by 2006 when she left the service.
2. On 21st March, 2006 while deployed on IGAD meeting Security duties at the New Stanley Hotel, she parked her personal car at the Security Parking in front of the hotel.
3. At about 11.30 am she was informed by Security guards that her vehicle had been towed away by Traffic Police Officers. She followed up the vehicle at 1.00 pm at Traffic Headquarters after seeking and obtaining permission from the in charge one Inspector Terer, she found her vehicle not booked as being known to belong to a Police Officer and she was informed by the Officer manning the security of the parking yard PC Momanyi to only pay towing charges, to him which she paid and PC Momanyi allowed her to take her motor vehicle.
4. The Claimant further pleaded that while driving away she overheard another officer asking PC Momanyi why he had released the vehicle. She slowed down and PC Momanyi asked her to return but before she could reverse the car the other officer PC Ngoza came to the car and with violence assaulted her and tried to pull her out of the vehicle which incident attracted other officers including CPL Mogaka who entered the car and advised her to drive to the opposite side of the road where he could listen to the case without acrimony. After listening to her explanation and after PC Momanyi had walked over and returned the towing money, CPL Mogaka allowed the Claimant to proceed back to her assignment.
5. The Claimant averred that after duty she went to report the incident at Kilimani Police Station and then back to at Traffic headquarters to see the then Traffic Officer 1, the late Maserati where all parties involved in the morning incident were called and they all went to the Principal Police Officer, Nairobi then Mr. Kingori Mwangi.
6. To the Claimant surprise and shock everyone turned against her and without being given a chance to defend herself she was arrested and ordered to be taken into cells at Kilimani Police Station and later escorted to Buru Buru to surrender her firearm.
7. On 22nd March, 2006 she was collected from Kilimani Police station and taken to Nairobi Area Traffic Headquarters and from 12.-00 pm to 1.00 pm taken through hearing orderly room proceedings which led to her purported conviction on charges of being guilty of an act to the prejudice of Good Order and Discipline and leaving her place of duty without being regularly relieved.
8. The Claimant further averred that she was subsequently taken and arraigned in Kibera Court on a criminal charge of stealing a motor vehicle and willfully obstructing a police officer. She was however, acquitted of the charges.
9. According to the Claimant, her acquittal from a criminal case which was premised on the events leading to her dismissal clearly illustrated that the Orderly Room proceedings were false and was part of an orchestra to get her out of the police Force.
10. The respondent on the other hand averred that the Claimant without permission or following proper procedure for release of motor vehicles, removed her car which had been towed to Nairobi Area Traffic Headquarters for causing obstruction and threatened to shoot PC Ngoza and PC Momanyi with a Ceska Pistol when they attempted to stop her from taking the vehicle.

11. The respondent further stated that the Claimant was arrested and confined as a result of a fair complaint made to the 1st respondent, investigation carried out and confinement done in execution of a statutory duty conferred upon the 1st respondent by law.

12. According to the respondent, the Claimant was arraigned on a valid and proper orderly room proceedings and in accordance with the law and Force-standing Orders during the day. Further that the removal of the Claimant from the force was in order as she indulged in activities or behaviours which was found prejudicial to good order and discipline contrary to regulation 3(1) and regulation 3(41) of the Police Regulations Force Standing Orders.

13. In her oral evidence, the Claimant stated among others that in the 22 years of service she faced disciplinary cases. In December, 2001 she had family issues and exceeded her leave by one day and was charged for it and fined Kshs. 800/=.

14. On 21st March, 2006 she was assigned duties at the New Stanley Hotel. She was guarding Heads of States for IGADD meeting. At that time, she was attached to Buru Buru and used to use her personal car because she was armed and could not use public means. She parked her car at the Security Guard area, later a security Guard came and told her some Traffic Officers wanted to tow her car, when she rushed out she found the vehicle already towed. She therefore asked her nephew to follow up the matter and he later informed her that the vehicle had been towed to Nairobi Area Traffic Headquarters. She therefore asked Inspector Terer, her in charge for permission to deal with the matter. She got permission at 1.00 pm.

15. When she got the parking yard at Nairobi Area, PC Momanyi who was in charge told her that although her vehicle was there, it had not been booked and that she could pay the towing charges and go with the car. She paid and took the car. As she was driving past the gate she heard a voice from behind. She looked but could not see anyone so she turned to joint the main road. She however saw PC Momanyi flagging her down. She stopped and was told by Mr. Momanyi that there was an officer who was being unreasonable so she should return the vehicle. It was PC Gonza who came and grabbed her by the neck and attempted to pull her out of the vehicle. He shouted at her and abused her.

16. It was her evidence that Momanyi refunded the towing charges and asked for her number in case he needed to contact her. She then drove off. She reported the issue to the Inspector Terer who told her to report the issue to Mr. Matulu who in turn told her to report to Kilimani Police Station and get a P3 and to hospital.

17. She was thereafter asked to see Traffic Officer in charge of Nairobi Mr. Moserati. They were then asked (all officers involved in the incident) to see the PPO Mr. Kingori Mwangi. Everyone gave their version of events except her. According to her when she started explaining she was ordered by Mr. Kingori to shut up. She was asked where her firearm was and she said she had taken it back to Buru Buru. Chief Inspector Nacny escorted her to Buru Buru and thereafter in the company of PC Mogaka, and Gonza she was taken to Kilimani Police station where she was booked with the offence of stealing a motor vehicle and obstructing an officer on duty and detained in the cells.

18. The next day she was taken to Nairobi area for Orderly Room proceedings which was conducted by Chief Inspector Mwangi. It was her testimony that by the time she was taken for orderly room proceedings she had not eaten and that she had not changed clothes from the overnight stay in cells.

19. Mogaka and Gonza were some of the witnesses however, PC Momanyi was never called as a witness. It was her evidence that the proceedings ended at 1.00 pm from 1 p.m in the afternoon. Half of the proceedings took place at night. She was thereafter taken back to Kilimani Police Station and the next day taken to Kibera Law Courts where she was charged with theft of motor vehicle and obstructing a police officer on duty. She was however later acquitted of the charges. The verdict of the orderly room proceeding was however that she be dismissed from service.

20. She denied threatening to shoot PC Gonza during the incident and in the criminal charge she never faced any charge concerning firearm. She appealed over the dismissal but both appeals were unsuccessful. Upon termination she was not paid anything.

21. In cross -examination she stated that they were required to be at the Stanley for 12 hours a day. However, they used to have tea and lunch breaks.

22. It was further her evidence that she found her vehicle at the yard and that she was told by PC Momanyi that the vehicle had not been booked as she could pay the towing charges and take the vehicle. She denied calling any officer a fool and denied she was disrespectful.

23. The respondent 1st witness PC Nahason Gonza stated that on 21st of March, 2006 at around 1pm he was on duty with another officer Enock Momanyi. He was manning the security of Nairobi Area Traffic. A vehicle KAP 136U Toyota Corolla had been towed into the yard from Sarova hotel in town. The vehicle was causing obstruction and the owner was not readily available. The vehicle was booked and was not given a release order. He stated that when the vehicle was driven out without a release order he stopped the driver to have the vehicle removed properly.

24. According to him the driver removed a pistol and tried to shoot at him twice. The Claimant stopped but eventually drove off. He made a complaint to his Senior Nancy Ngunjiri who came out and saw the vehicle some two hundred meter's away from the yard. They saw his colleague CPL Mogaka come out of the vehicle and walk towards them. Nancy demanded to know why he came back without the suspect. It was his evidence that at the orderly room proceedings, the charges were stated and waiver notice used to charge the defaulter immediately. He attended the orderly room proceedings and gave evidence and that the defaulter (Claimant) was given a chance to defend herself.

25. In cross-examination he stated that he was on duty on 21st March, 2006 and that he would direct vehicles where to park and also permits them to be driven out. There was an officer in charge of the parking yard. It was PC Momanyi. He was not called as a witness during the orderly room proceedings and at the Criminal trial at Kibera. It was his evidence that it was PC Momanyi who informed him the vehicle in

issue had been towed to the station. He further stated that he was the principal complainant and that the complaint was attempt to unlawfully remove a vehicle from the police yard and there was also a threat to his life. It was his evidence that he did not know why firearm charges were not part of the criminal case. He denied assaulting the Claimant and that he had never been questioned or charged over assault.

26. According to him the OB report was an afterthought because it was made three months after the incident.

27. Mr. Gonza further stated that the Claimant was arrested and put in custody on the same day of the incident and that the orderly room proceedings took place the following day at 11.30 am.

28. The Claimant was removed from cells to the orderly room proceedings and that she had not been notified of the charge as per the Force Standing Orders. She was also not represented by a fellow officer. He gave his testimony before the orderly Room proceedings at around 2pm but did not know when the proceedings ended. It was further his evidence that the Claimant was never availed change of clothes overnight in cells and at the orderly room proceedings.

29. In re-examination he stated that the Court found that it was not clear how the Claimants' clothes got torn. Respondents second witness CPL Robert Mogaka stated that on the material date while manning traffic PC Momanyi shouted at him to stop vehicle that was coming from Nairobi Area Traffic at high speed. Sensing he could not stop the vehicle he created a jam by allowing vehicles from Ng'ong Road to town to move. The driver of the vehicle was a policewoman in uniform. He talked to her and she looked unhappy saying her vehicle was towed from town without her permission.

30. PC Momanyi and Gonza came and asked the Claimant why she was removing the vehicle without a release order. When Gonza tried to remove the ignition key the claimant drew a gun.

31. In cross-examination he stated that no one was shot during the confrontation and that he testified at the orderly room proceedings around 10.30 am the following day.

32. This matter is unique in the sense that it involved a disciplinary process over a uniformed officer. Further, it is not in all cases where an employee or its authorized agents has power to confine an employee and subject such employee to a disciplinary process akin to a criminal trial.

33. The fact that the respondent in this particular case enjoyed such immense powers required restraint and highest observance of rules of natural justice and respect of the Claimant's civil liberties.

34. It was common ground that the Claimant was arrested in the evening of 21st March,2006 and subjected to Orderly Room Proceedings the following day without being given a chance to prepare herself for trial, call witnesses let alone change clothes and freshen up after overnight stay in police cells.

35. The offences the Claimant was charged with did not pose any flight risk. There outcome as was the case was dismissal from service. The Court therefore wondered the urgency with the charges and why the Claimant could not be given reasonable time, opportunity and mental frame to answer to the charges she was facing.

36. Whereas the two officers namely PC Gonza (the main complainant) and PC Momanyi (who alleged he saw the Claimant threatening to shoot PC Gonza) gave evidence, PC Momanyi who allegedly authorized the release of the vehicle to the Claimant was never called as the prosecution witness nor was the Claimant accorded a chance to call him to give evidence.

37. The right to be heard is a fundamental principle of natural justice that if violated cannot be sanitized by the fact that the person who was about to face hearing was after all guilty of the charges. The right to be heard includes the right to be given reasonable opportunity to defend oneself and call witnesses. This did not happen in this particular case.

38. The Claimant was detained overnight in police cells and straight from detention taken through orderly room proceedings which also ended very late in the night. This cannot possibly amount to a fair hearing process.

39. The Claimant was dismissed from the force on 3rd April, 2006 she was entitled to appeal as per the Force Standing Orders. She therefore appealed to the Commissioner of Police on 6th July, 2006. By a letter dated 25th March, 2010 the Commissioner of Police informed her that her appeal lacked merit and was therefore disallowed.

40. The Court as observed above concerning the process the Claimant was taken through prior to dismissal, is of the view that a maximum award of 12 months' salary as compensation would be appropriate.

41. In conclusion the Court awards the Claimant as follows: -

Kshs

(i) Three months salary in lieu of notice 61,155

(20,385X3)

(ii) Twelve months' salary as compensation

For unfair termination

244,620

305,775

(iii) Pension and retirement benefits as At 3rd April,2006 if not paid

(iv) Costs of the suit.

42. This award shall attract interest at Court rates from date of judgement until payment in full but shall be subject to taxes.

43. It sis so ordered.

Dated at Nairobi this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

Delivered this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge