



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHT DIVISION

PETITION NO 251 OF 2016

ONESMUS KIPKORIRI TOWETT.....APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. **Onesmus Kipkorir Towett**, the petitioner, is a police officer who, prior to this petition, was serving in *the National Police Service*, the respondent, a Commission established under Article 243(1) of the Constitution. The respondent subjected the petition to vetting by virtue of the provisions of the *National Police Service Act* as read with the *Police Service (vetting Regulations) 2013*, and in a decision dated 9th October 2015, the petitioner was adjudged unfit to serve in the police service and was discontinued.

2. The petitioner applied for review of that decision which was granted and in a decision dated 5th May 2016, the petitioner's application for review was found wanting and dismissed. The decision of 9th October 2015 was upheld prompting the present petition.

3. The petitioner averred that the process as well as the decision that found him unfit to serve in the National Police Service is unlawful and a violation of the Constitution and the law. The petitioner contended that he was not served with a summary of the complaint laid against him and the documents relating to that complaint; that the respondent relied on a statement by a junior female officer ("**RC**") recorded 7 months after the petitioner's initial vetting and which was not given to the petitioner to enable him respond to it; and that "**RC**" merely stated in her statement that the petitioner attended her late mother's funeral but denied that she was in a relationship with the petitioner.

4. The petitioner further contended that although he supplied all the information as required by section 25 of the Police Service Act as read with regulation 18(1) of the Police Service (vetting Regulations) 2013, his defence was not considered at all. He stated that he was not involved in any relationship with "**RC**", and that the allegations made against him were not only false but were also not proved; that the complaint was premised on rumours devoid of evidence. The petitioner went on to contend that the action taken against him is contrary to the principles of vetting and the vetting standards outlined in regulations 4(a) and 14(2) of the regulations, hence the action is unconstitutional, illegal and unlawful.

5. Based on the above facts, the petitioner sought he following reliefs:

(a) *A declaration that the petitioner's fundamental rights and freedoms have been violated.*

(b) *An Order of certiorari do issue to quash the proceedings and the decision of the 1st respondent (sic) declaring that the petitioner had failed vetting and further discontinuing the petitioner from the Kenya Police Service.*

(c) *A declaration that the petitioner is fit to serve as a police officer*

(d) *Compensation to the petitioner for violation of his fundamental rights and freedoms.*

(e) *costs of the petition.*

Response

6. The respondent filed a replying affidavit by **Johnston Kavuludi**, the Chairperson of the respondent, sworn on 12th October 2016 and filed in Court on 26th October 2016. **Mr. Kavulundi** deposed that section 7(1) of the National Police Service Act requires all persons serving with the respondent at the commencement of the Act to undergo vetting to determine their suitability to serve in the service; that vetting

regulations of 2013 were formulated to guide the vetting process and that section 7(2) of the Act and regulation 4(a) mandated the respondent to carrying out vetting of police all officers.

7. **Mr. Kavulundi further** deposed that section 7(3) of the Act and regulation 32 give the commission power to discontinue from the service officers found unsuitable and that the respondent undertook the vetting exercise guided by the Constitution, the Act and the regulations. **Mr. Kavulundi** admitted that the petitioner was first removed from the service on 9th October 2015 on grounds of the petitioner's willful engagement in unprofessional relationship with a married junior officer's wife which was an immoral conduct, and that the petitioner failed to supply the commission with relevant information as required by sections 18 and 25 of the regulations. He deposed that the petitioner was found to be dishonest and knowingly gave misleading information; that the petitioner displayed a wanting demeanor during vetting and therefore, his removal on 9th October 2015 was done after according him fair and procedural hearing and that he was timely and promptly notified of the complaints against him.

8. It was also deposed that after the decision for removal, the petitioner applied for a review and after the hearing, it was clear to the respondent that no new facts or evidence had been adduced but that the petitioner was merely challenging the respondent's earlier decision, thus the review was dismissed. **Mr. Kavulundi** further stated that by the time the petitioner attended the funeral of **RC's** mother, he had already been transferred and could therefore not officially represent his former station and in fact addressed mourners as such despite his denials.

9. It was **Mr. Kavulundi's** deposition that the review was dismissed for lack of merit and that under regulation 25, the respondent communicated its decision of 5th May 2016 removing the petitioner from the service. He contended that the petitioner was given a fair hearing and process and that the law was followed.

Petitioner's Submissions

10. **Mr. Kamanda**, learned counsel for the petitioner, submitted highlighting their written submissions dated 19th June 2017; that the petitioner was not accorded a fair hearing during the vetting. He contended that Article 50(1) of the Constitution was violated thus the fair administrative action was disregarded. According to learned counsel, the respondent found that the petitioner lacked integrity to serve in the Police Service and lacked disciplined during vetting, yet throughout the vetting, it was not pointed that the petitioner did not show discipline or used foul language.

11. Learned counsel referred to paragraphs 105 and 106 of the decision and submitted that the allegation that the petition had an affair with a junior officer's wife was not proved. It was contended that the person alleging the affair was not called as a witness to support the allegations and that the letter of complaint was not served on the petitioner in advance and that the petitioner was informed of the complaint during the vetting and even then, he was not given the letter. This, **Mr. Kamanda** submitted, denied the petitioner the opportunity to prepare and even cross examine the complainant.

12. According to **Mr. Kamanda**, vetting was held on 6th February 2015 and concluded on the same day, but a statement was later recorded by "**RC**" the person he said to have had a relationship with but was not given to the petitioner even though "**RC**" denied being in a relationship with the petitioner but only said the petitioner attended her mother's funeral. **Mr. Kamanda** maintained that the petitioner was only asked to greet monomers.

Respondent's submissions

13. **Mr. Opiyo**, learned counsel for the respondent, relied on their replying affidavit, and written submissions dated 23rd January 2017. Learned counsel confirmed to court that their replying affidavit did not contain the complaint or statement by "**RC**". In their written submissions, the respondent submitted that the petitioner was found unsuitable to serve; that the vetting exercise was conducted fairly, procedurally and in accordance with the law; and that the petitioner was given adequate opportunity to address all issues and the respondent complied with the rules of national Justice as envisaged in Articles 47(1) and 50(1) of the constitution.

14. It was further submitted that the respondent complied with regulation 33(2) on review in that the petitioner did not establish an error apparent on the face of the record or new facts as required by regulation 33(2). According to the respondent, there was no proof of discrimination as the petitioner alleged and that the petitioner who alleged procedural unfairness failed to show that indeed that was the case. Reliance was placed on the case of **Meme v Republic & another** [2004]eKLR for the submission that where a person seeks redress from the court in a matter involving reference to the constitutions, he should set out with a reasonable degree of precision that of which he complains and the provisions said to be infringed.

15. The respondent submitted that in making its decision to remove the petitioner, it was guided by regulation 14(2) (b) and (d) of the regulations which require the respondent to look at past records including conduct, discipline and diligence of the officer. According to the respondent, the petitioner had admitted during the review that he had been issued with warning letters in the course of his work. The respondent submitted that the petitioner was not truthful when he denied that he saw the complaint during the funeral. The respondent relied on the case of **Republic v National Police Service Commission Ex parte James Ngumi Mutungi** Misc Appl. No 44 of 2016 for the submission that vetting is a combination of the record of an officer from the inception day of service, disciplinary record, professional conduct, financial probity, integrity of an officer and the human rights record.

16. Regarding calling and examining witnesses, the respondent relied on the case of **Judicial Service Commission v Mbalu Mutava & Another** [2015]eKLR for the submission that the requirement of natural justice depends on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject matters being dealt with among other decisions. The respondent therefore contended that it complied with the law and procedure and urged that the petition be dismissed with costs.

Determination

17. I have considered this petition; the response thereto; submissions by counsel for the parties and authorities relied on. The petitioner, a police officer, was vetted, found unfit to serve in the service and was discontinued on 9th October 2015. He applied for review which was granted and after considering the matter on review, the respondent made a decision dated 5th May 2016 dismissing the review and upheld the petitioner's dismissal. The petitioner lodged this petition challenging the decision to remove him from the Police Service.

18. The petitioner contended in his petition, that he was not accorded a fair hearing and fair administrative action. He argued that the respondent did not give him the full complaint and material relied on prior to vetting or at all and that he only heard about them during the vetting. He also contended that the complainant was not availed for cross examination and that there was no evidence to prove the claim that he had a relationship with a junior officer's wife. The petitioner further contended that the statement from "**RC**" was recorded after he had been vetted yet the respondent relied on it to make a determination against him. The respondent denied these allegations and maintained that it accorded the petitioner a fair hearing and complied with the law and procedure during the petitioner's vetting.

19. The petitioner was dismissed on 9th October 2015 after the respondent found him unfit to continue serving in the Police Service for the single reason that he was involved in a relationship with a junior female officer, who is a wife to another serving junior officer. The respondent observed in its decision;

"[104] During the vetting interview the officer was put to task to explain the nature of his relationship with a colleague who happens to be the wife of a junior officer and whom he allegedly is having an unprofessional relationship with that in turn affects her relationship with the husband..

[105]The officer vehemently denied these accusations and insisted that his relationship with the lady in question was purely professional. The Commission further sought to know if the officer had attended the burial of the mother of the lady in question which it was alleged that he was introduced as the husband of the lady. In response to this queries (sic) the officer stated... I went there as a mourner and the person representing the office where she works. I am surprised I heard some comment from the chairman that I was introduced during the burial as a husband..."

20. The respondent did not believe the petitioner's explanation and on the basis of this accusation, found the petitioner unfit to continue serving in the police service and discontinued him. The petitioner filed for review which was heard but also dismissed on 5th May 2016 with the respondent stating there was no new evidence to warrant interfering with its earlier decision. The respondent upheld its earlier view that the petitioner was not suitable to serve due to the fact of having a relationship with a junior officer's wife which tainted his moral fitness.

21. The petitioner contended that he never had a relationship with "**RC**" and that the complainant's statement was not given to him prior to his vetting or at all. He also complained that **RC's** statement was recorded after he had been vetted and was equally not given to him, but maintained that the allegations against him had no basis and were a surprise to him.

22. I have perused the response to the petition as well as submissions on behalf of the respondent. I have also seen the decision of 9th October 2015 dismissing the petitioner from the service and that of 5th May 2016 disallowing the review sought by the petitioner. It is true that according to the respondent's decision of 9th October 2015, the only reason why the petitioner was found unfit to serve in the police service was because of his alleged relationship with **RC**, a wife to a junior officer.

23. The petitioner says that he was not given the complaint; that the complainant was not availed for questioning and that the statement by **RC** was recorded after he had been vetted and though relied on, the same was not given to him. Although the respondent denied the petitioner's complaint that he was not given the letter alleging the relationship between him and **RC**, the respondent has not stated when, if at all, the petitioner was given the letter alleging the relationship between the petitioner and **RC**. In fact during the vetting, **Commissioner Mary Owuor** asked the petitioner at page 24 of the **Hansard** on vetting how much information he had been given on the issue, he had responded that he had only been given two typed paragraphs.

24. **Commissioner Owuor** herself seemed unsure how much information the petitioner had been given when she stated that she did not know how much the petitioner had been given, and when the petitioner answered that he had been given two typed paragraphs, she said she would read a to him the complaint. The petitioner even stated that he had not heard of the complainant and that he was hearing of him for the first time from that letter.

25. The petitioner was no doubt facing a serious complaint that he had an affair with a junior officer's wife which he needed to be fully aware of and respond to effectively. He says he saw the letter of complaint on the day of the vetting but which the respondent denies without stating when the petitioner was given the letter of complaint. The petitioner having stated on oath that he was not served with the letter of complaint, it was up to the respondent to answer with sufficient clarity and give particulars when it served the petitioner with the letter of complaint to enable the court determine whether the respondent acted in a procedurally fair manner as required by the Constitution and the law. This did not however happen.

26. Secondly, the petitioner stated that the statement from **RC** was only recorded seven (7) months after he had been vetted and that the letter denied any relationship between her and the petitioner. This statement is not on record and **Mr. Opiyo**, learned counsel for the respondent, admitted during the hearing, that they had not denied that fact and that both the letter of complaint and the statement were not attached to their replying affidavit.

27. It was important for the respondent to deny the petitioner's contention that the statement was not taken several months after his vetting and attach the letter of complaint and **RC's** statement to their replying affidavit to enable the Court determine the nature of the complaint and whether or not the statement was indeed recorded after the petitioner had been vetted. and whether the statement admitted or denied the allegations that made the petitioner lose his job.

28. These being questions of fact, there is no way the Court could agree with the respondent that the allegations against the petitioner were proved without looking at the evidence tabled before the vetting panel. On the other hand, the Court is not in a position to decide whether or not the statement was recorded after the petitioner had been vetted as he alleges. The statement, if any and it is not denied, was in the hands of the respondent and failure to produce it should, in my view, should be taken to mean it would have been against the respondent and that is why it did not wish to disclose it to Court.

29.

38. Regulation 16 of the vetting regulations provides that (1) the respondent may receive information from members of the public including that delivered anonymously, and (2) the Commission shall determine the usefulness of the information towards assessing the suitability and competence of an officer. However, once such information is accepted for purposes of vetting, it should be availed to the person being vetted as required by regulation 4(g) of the same regulations. This is because the law and vetting guidelines bestow upon those to be vetted certain procedural rights that the respondent must comply with during the vetting process.

39. From the record, the respondent cannot be said to have accorded the petitioner a fair administrative action and fair hearing as required by Articles 47(1) and 50(1) of the Constitution and Police (Vetting Regulations) 2013. The respondent was in a hurry to conduct the vetting but obviously violated the petitioner's right to a lawful and procedurally fair vetting process.

40. The court appreciates the statement of *Moseneke DCJ* in the South African case of *Masetlha v President of the Republic of South Africa* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) that;

“Ordinarily courts would look favourably on a claim of a litigant to gain access to documents or other information reasonably required to assert or protect a threatened right or to advance a cause of action. This is so because courts take seriously the valid interest of a litigant to be placed in a position to present its case fully during the course of litigation. Whilst weighing meticulously where the interests of justice lie, courts strive to afford a party a reasonable opportunity to achieve its purpose in advancing its case. After all, an adequate opportunity to prepare and present one's case is a time-honoured part of a litigating party's right to a fair trial”

41. Bearing in mind the above proposition, submissions by parties and the law, I am satisfied that the petitioner has a genuine complaint that his vetting was vitiated by violation of the Constitution and the law and must therefore be set aside. Consequently the petition dated 13th June 2016 is allowed and I make the following orders;

(a) A declaration is hereby issued that the respondent violated the petitioner's fundamental right to fair administrative action and fair hearing guaranteed by Articles 47(1) and 50(1) of the Constitution during the vetting process.

(b) An Order of certiorari is hereby issued quashing the respondent's decision of 9th October 2015 declaring the petitioner unfit to serve in the National police Service and his discontinuation from the Kenya Police Service.

(c) An order is hereby issued directing the respondent to conduct fresh vetting of the petitioner within sixty (60) days from the date of this judgment in accordance with the Constitution and the law.

(d) Costs of the petition to the petitioner.

Dated, Signed and Delivered at Nairobi this 30th Day of July 2018

E C MWITA

JUDGE