



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

**PETITION NO.43 OF 2016**

**BETWEEN**

**FRANCIS OMONDI OKONYA ..... PETITIONER**

**AND**

**THE NATIONAL POLICE SERVICE COMMISSION..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition before me is dated 8<sup>th</sup> February, 2016 in which the Petitioner, Francis Omondi Okonyo, a police officer of the rank of a Senior Deputy Commissioner, challenges the decision by the Respondent, the National Police Service Commission, to dismiss him from service. In the Petition, he seeks that the following reliefs be granted to him:

- (1) That an order for declaration that the 1<sup>st</sup> Respondent's conduct and action amounts to denial, violation, infringement and or threat to the fundamental rights and freedoms of the Petitioner.***
- (2) That an order for certiorari bringing to this Honourable Court for purposes of quashing the decision of the 1<sup>st</sup> Respondent to remove the Petitioner from the National Police Service.***
- (3) That an order for certiorari bringing to this Honourable Court for purposes of quashing the proceedings of the 1<sup>st</sup> Respondent of 8<sup>th</sup> May, 2015 and 22<sup>nd</sup> June, 2015.***
- (4) That a declaration that the fundamental rights and freedoms guaranteed to the Petitioner under Articles 1, 2, 3, 10, 19, 20, 21, 23, 27, 28, 35, 40, 47 and 50 of the Constitution have been contravened and or threatened by the 1<sup>st</sup> Respondent.***
- (5) That this Honourable Court be pleased to invoke its power under Chapter Ten, and Articles 22 and 23 of the Constitution thereof to revoke and/or set aside the decision of the 1<sup>st</sup> Respondent of 7<sup>th</sup> August and 25<sup>th</sup> January, 2016.***
- (6) That an order for declaration that the vetting proceedings of 8<sup>th</sup> May, 2015 and 22<sup>nd</sup> June, 2015 and any decision arising from them is illegal, invalid, unlawful and null and void.***

(7) ...

(8) *That the costs of the Petition be provided for.*

(9) *That this Honourable Court be pleased to make any further orders as it may deem just and fit to grant.*

2. The Petition had earlier been filed against the National Police Service and the Independent Policing Oversight Authority as an Interested Party, but on 29<sup>th</sup> April, 2016, by consent of the Petitioner and the present Respondent, the two were removed from the proceeding.

### **The Petitioner's Case**

3. The Petitioner's case is contained in his Affidavit in support of the Petition sworn on 8<sup>th</sup> February, 2016, a Further Affidavit sworn by him on 21<sup>st</sup> April, 2016 and Written Submissions dated 21<sup>st</sup> April 2016.

4. It was the Petitioner's case that on 7<sup>th</sup> August, 2015, the Respondent dismissed him from the Police Service after a vetting exercise conducted on 8<sup>th</sup> May, 2015 and 22<sup>nd</sup> June, 2015, which vetting was aimed at assessing his suitability to continue serving as a police officer. Being dissatisfied with that decision, vide a letter dated 19<sup>th</sup> August, 2015, addressed to the Respondent, he expressed his intention to have the entire decision reviewed on the grounds that there was a mistake and error apparent on the face of the record and on account of infringement of his constitutional rights. Accordingly, that vide a letter dated 18<sup>th</sup> August, 2015 addressed to the Respondent, he requested for the Hansard proceedings of 8<sup>th</sup> May, 2015 and 22<sup>nd</sup> June, 2015 and the Respondent responded through its letter dated 1<sup>st</sup> October, 2015 acknowledging receipt of his letter and informing him that he shall be given feedback regarding the same.

5. The Petitioner further stated that it was not until 29<sup>th</sup> January, 2016 that he received a letter dated 25<sup>th</sup> January, 2016 from the Respondent in which he was informed that his application for review had been considered and the same was unmerited under **Regulation 33 of the National Police Service (Vetting) Regulations, 2013** (hereafter 'the Regulations'). In that regard, the Petitioner asserted that he was never given any reasons to back that decision.

6. The Petitioner's case was further that there existed a substantial basis for the grant of his request for review because on 15<sup>th</sup> December, 2014, the Respondent, ostensibly acting pursuant to **Article 246 of the Constitution** and **Sections 7 (2) and (3) of the National Police Service Act** and the orders issued by the Court in **J.R Misc App. No. 24 of 2014, Republic vs The National Police Service ex parte Francis Omondi Okonya**, commenced his re-vetting exercise and that the Respondent therein published a notice in the *Daily Nation* and *The Standard* newspapers inviting members of the public and public institutions to provide any relevant information that they may have in respect of his re-vetting. Following the said advertisements, the Respondent vide a letter dated 23<sup>rd</sup> January, 2015 informed him that a complaint had been lodged by a member of the public touching on his suitability and that he was required to avail certain clarifications on certain deposits made in his bank account and information on certain incomes and properties he had mentioned in his wealth declaration form.

7. The Petitioner stated that on 6<sup>th</sup> February, 2015 he responded to the aforesaid letter as had been required of him and he was subsequently informed that his re-vetting would be conducted on 8<sup>th</sup> May, 2015 and he duly attended the same but contended that two individuals, Mr. Samuel Arachi and Mr. Joseph Boinett, were not present in that vetting exercise and yet they later signed the decision that had been reached by the Vetting Panel. This, in his view, invalidated the said decision.

8. It was the Petitioner's other contention that during the vetting, he answered the questions put to him fully and conclusively without any prevarication and at the end of the vetting exercise, the Vetting Panel made a demand that he avails his bank account statements for the years 2011 and 2012 despite the fact

that in its initial request, the Respondent had asked for his bank statements for the years 2013 and 2014 only. According to the Petitioner, the said demand of the 2011 and 2012 statements was irregular, malicious, made in bad faith and unlawful and stated further that the same was in breach of **Regulation 12 (f)** of the **Regulations** and his rights to a fair hearing and legitimate expectation to be subjected to questioning based on materials expressly excluded. The above notwithstanding, the Petitioner asserted that he made a request that the vetting be adjourned for two hours to enable him get the said bank statements but his request to have the session adjourned for the two hours was declined and the Respondent instead directed that the matter be adjourned to future dates that were to be communicated to him.

9. The Petitioner's further contention was that despite indicating his desire to have the vetting expeditiously concluded, the Respondent decided to adjourn the same indefinitely and that through a letter dated 13<sup>th</sup> May, 2015, it requested him to avail his bank statements for 2011 and 2012 and further give explanations on certain investments amounting to Kshs.3,000,000/= that he had made. That he responded vide his letter dated 19<sup>th</sup> May, 2015 in which he expressed his desire to avail the said statements and make any explanation required of him and further requested to have the Hansard proceedings relating to his vetting and the names of the members of the Vetting Panel given to him. That he sought for the same mainly to enable him to respond adequately to the said letter and also to ensure that his rights were being protected and/or promoted during the vetting exercise and that the said request was justified and made pursuant to **Articles 35, 50, 246 and 249** of the **Constitution**, **Sections 10 and 12** of the **National Police Service Act**, and **Schedule 2, Paragraph 5** thereto as well as **Regulations 4 (g), 6 and 34** of the **Regulations**.

10. According to the Petitioner, in direct contravention of the law and in breach of the principles of natural justice, the Respondent, in a letter dated 12<sup>th</sup> June, 2015, refused to avail him with the information that he had requested and instead summoned him for further vetting on 22<sup>nd</sup> June, 2015 which he attended. In that regard, the Petitioner asserted that the aforesaid Mr. Arachi was among the Panel members on the said date, and that Mr. Joseph Boinett was absent but he still signed the decision that was eventually reached by the Respondent.

11. It was his further case that the said vetting, he was asked whether he had any objections to the constitution of the Panel wherein he stated that he was uncomfortable with the participation of one, Mary Auma Owuor, who he was scheduled to testify against in **Milimani High Court ELC Petition No. 232 of 2011, Police SACCO vs Ruaraka Housing Estate Limited and Mary Auma Owuor and Others** where she had been sued, and that he was also objecting to the presence of Samuel Arachi who had not participated in his earlier vetting process. These objections however, he stated, fell on deaf ears and as such, his rights to a fair and unbiased hearing were contravened and further the decision was contrary to **Regulation 6 (2) (b)** of the **Regulations**. Additionally, that upon his insistence that he be given a chance to present his case, the Chairman of the Respondent unilaterally and unjustifiably pronounced that he, the Petitioner, had refused to take part in the vetting exercise and he was thereby kicked out of the vetting room.

12. In his Further Affidavit, the Petitioner reiterated his earlier position and asserted further that during his vetting, the Respondent and in particular, the Chairman, created a hostile environment and even stopped the process before he could raise his concerns in regard to the composition of the Panel. That the Chairman openly harassed and embarrassed him when he asked him whether he was comfortable with the Panel, continually told him to be quiet and even switched off his microphone at times before he could respond to the questions put to him, suspended the process although he was ready to proceed and as a result therefore, the Respondent's actions were prejudicial and biased against him. Accordingly, that the Respondent exercised its discretion wantonly by failing to review its decision yet it had stated that the vetting was not concluded and as such when it made its final decision, it did not have full information and documents to enable it render a fair decision.

13. The Petitioner therefore argued that the Respondent's actions amounted to an infringement of his rights to a fair hearing and fair administrative action and in addition, he stated that the said actions amounted to him being condemned unheard and the decision rendered by the Respondent cannot stand in

the circumstances and the orders he is seeking herein ought therefore to be granted.

### **The Respondent's Case**

14. The Respondent opposed the Petition through its Affidavit in Reply sworn on its behalf by Johnston Kavuludi, its Chairman, on 7<sup>th</sup> March, 2016 and two sets of Written Submissions dated 21<sup>st</sup> April, 2016 and 28<sup>th</sup> April, 2016, respectively.

15. Mr. Kavuludi stated that the Respondent Commission is mandated under **Section 7 (2)** of the **National Police Service Act** together with **Regulation 4 (a)** of the **Regulations** to carry out the vetting of all police officers and that **Regulation 8** of the **Regulations** gives officers to be vetted an option to either appear in person or opt out of the vetting. He maintained that the **National Police Service Commission** is guided by the **Constitution**, the **National Police Service Commission Act**, the **National Police Service Act** and the **Regulations**, in the vetting process.

16. It was the Respondent's case that the Petitioner herein, being among the senior most police officers was among the first officers to be vetted and he was subsequently found to be unsuitable and incompetent and was removed from the service.

17. Mr. Kavuludi further deponed that the Petitioner was first removed from service on 3<sup>rd</sup> January, 2014 on the ground of lack of financial probity and he applied for a review of that decision as per **Regulation 33** of the **Regulations** and he also instituted a suit in the High Court being **Misc App. No. 24 of 2014** in which he challenged the decision of the Vetting Panel. He later withdrew the review application and pursued the said suit successfully and thereby warranting a fresh vetting exercise.

18. It was Mr. Kavuludi's other deposition that during the Petitioner's vetting on 8<sup>th</sup> May, 2015, he admitted to being comfortable with the composition of the Vetting Panel and that the vetting was cut short as a result of the failure on his part to explain the nature of businesses he was carrying on at the stock exchange and the name of the person he was dealing with and further that he was required to avail further documents to clarify certain issues on his financial affairs. Accordingly, Mr. Kavuludi conceded that indeed the Petitioner had requested that the vetting be adjourned for some hours in order to enable him furnish the Panel with the requested documents, but in the Panel's view, since the documents required were bulky, the hours sought by the Petitioner would not have been sufficient for it to acquaint itself with them and analyse the same and hence the decline in granting the adjournment for the hours sought.

19. The Respondent further took the position that **Regulation 13 (h)** of the **Regulations** mandates the Respondent to request for the submission of any other such documents it deems necessary for the furtherance of the vetting process and **Regulation 12** therein only provides for the sittings of the Vetting Panel and not the documents to be submitted to it as alleged. Furthermore, that the discretion to adjourn a matter for a particular period lies with the Vetting Panel and in the circumstances of the present case, the Respondent being a quasi-judicial body, enjoys the exclusive powers and discretion to adjourn any matters before it so as to enable it acquaint itself with the information or documents supplied to it.

20. The Respondent's additional contention was that it wrote to the Petitioner vide its letter dated 13<sup>th</sup> May, 2015 requesting for the aforesaid documents to be availed within a period of seven days but instead, the Petitioner made fresh demands through his letter in response dated 19<sup>th</sup> May, 2015. In that context, it was the Respondent's argument that the Petitioner's conduct showed that he was not only unwilling to participate in the vetting exercise but was but also ill-bent in giving directions to the Commission instead of the Commission doing the same. That when the Petitioner appeared before it on 22<sup>nd</sup> June, 2015, he expressed his dissatisfaction with the composition of the Panel and when probed to name the person he was uncomfortable with, he gave out what he termed a dossier on a member of the Commission which had nothing but a report of meetings of the Kenya Police SACCO. That at no time did he mention Commissioner Mary Owuor as one of the members he did not want in his Vetting Panel and that in any event, the said dossier did not in any way mention the said Commissioner adversely.

21. Furthermore, that the Petitioner did not at any time inform the Commission that he had a case against Commissioner Mary Owuor in the aforesaid **Milimani High Court ELC No. 232 of 2011, Police Sacco vs Ruaraka Housing Estate Limited and Mary Owuor and Others**. In addition, that the Petitioner has not adduced any evidence in support of the assertions that he was in fact to testify in the said case.

22. The Respondent argued further that the Vetting Panel made a decision under **Regulation 20** of the **Regulations** to remove the Petitioner from service because by the Petitioner's conduct, the vetting process became impossible and had to be stopped and therefore the Commission was justified in discontinuing the Petitioner from service as is stipulated under the said **Regulation**, he having refused to participate in the vetting.

In the Respondent's further view, the Petitioner on 19<sup>th</sup> August, 2015 applied for review of the said decision to remove him from service but upon examining the application and the Hansard record, the Commission concluded that there was nothing to be reviewed as the Petitioner's vetting had not been concluded as at that time.

23. 24. The Respondent therefore maintained that in removing the Petitioner from service, it was duly guided by **Regulation 14 (2) (b) and (d)** of the **Regulations**, and the Petitioner has not indicated how his constitutional rights have been infringed by it, but has merely quoted Articles of the **Constitution** without stating how any of the rights therein have been infringed and that in any event, the Respondent was justified in removing the Petitioner on the ground of having failed the vetting exercise.

25. Finally, the Respondent's position was that the decision of the Commission is to be made collectively by all Commissioners and not members of the Vetting Panel alone as was held in the case of **Immanuel Masinde Okutoyi and Others vs National Police Service Commission and Another, Petition No. 6 of 2014, Consolidated with J.R Misc App. Nos. 11 and 12 of 2014**.

For the above reasons the Respondent prays that the Petition should be dismissed with costs.

### The Parties' Submissions

#### For the Petitioner

26. The Petitioner submitted that the Respondent failed to rely on clear provisions of its Regulations in carrying out the vetting process and also acted in breach of **Regulation 4 (g)** which he contended has a close nexus with the right to access information where that information pertains to the enjoyment of fundamental rights, the right to fair administrative action, the right to a fair trial and the right to equality before the law. In that regard, his contention was that the denial of the information he had requested for resulted in a violation of **Articles 27 (2), 35 (1) (b), 47 and 50** of the **Constitution**.

27. The Petitioner's other position was that **Regulation 34** requires the Respondent to cause and keep an accurate record of its proceedings and the implications is that its proceedings are public records that should be available to the public in general and to the officers being vetted. As such, the failure by the Respondent to provide a Hansard record of the proceedings implied that the Respondent had failed to keep proper and accurate records of its proceedings thereby causing it to use other illegal reasons to justify its failure to provide him with the information sought to enable him prepare for the vetting.

28. The Petitioner's further submission was that **Regulation 13 (f)** was not complied with following the request to have him avail bank statements for the years 2011 and 2012 and in his view therefore, the request for the statements was illegal and outside its mandate. Further, that the assertions by the Respondent in justifying the said non-compliance with the request is untenable because of the maxim *expression unious, est exclusion alterius* as was stated in **National Industrial Credit Ltd vs Mindi Estates Ltd and 2 Others [2002] eKLR**.

29. In addition, that there is a rationale for the exclusion of documents such as bank statements outside the two-year period because bank transactions for a person who is employed and runs businesses are

many and one can forget some of the transactions. Additionally, that most people misplace documents supporting such transactions over time, memories fade, evidence may also be corrupted and may disappear and as such, it would be unfair to require a person to remember and furnish documents to support such transactions and to use the failure to remember or bring such supporting documentation as the basis for removing them from service.

30. The Petitioner also submitted that **Regulation 6 (1) and (2)** were violated as Commissioner Mary Owuor who sat in the Vetting Panel ought to have disclosed the imminent perception of her conflict of interest in the matter which could have clouded her conscience in rendering a fair finding on him. In addition, that **Regulation 25 (6)** was also contravened in that he learnt that he had been removed from service through the media and only received a formal decision on the same on 14<sup>th</sup> August, 2015 vide a cover letter dated 7<sup>th</sup> August, 2015 and it was his argument that the foregoing action was not only tainted with illegality but was also biased and flies in the face of the very integrity that the Respondent was constituted to restore in the police service.

31. The Petitioner also submitted that the decision by the Respondent was irregular and illegal as it was made solely by the Chairman of the Vetting Panel without being subjected to a vote or consensus as required by **Regulation 25 (2)** and further, the finding that he was hostile to the Panel was never recorded in writing and signed by all the Commissioners who reached the said decision. He relied on the decision in **Joseph Mbalu Mutava vs The Attorney General and Another [2014] eKLR** for that proposition.

32. The Petitioner's other position was that his right to fair administrative action that is expeditious, lawful, efficient, reasonable and procedurally fair was violated in that the Respondent allowed persons who never participated in his vetting to deliberate and make a finding to dismiss him. He relied on the decisions in **Eusebius Karuti Laibuta vs National Police Service Commission [2014] eKLR** and **Republic vs Complaints Commission, Media Council for Kenya and Others [2013] eKLR** in support of that contention.

33. Further, that the denial by the Respondent to give him the Hansard proceedings also violated his right to administrative action and in addition, that the Respondent was biased, non-objective and irrational. In that regard, he relied on the decisions in **King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Another vs Standard Chartered Financial Services Ltd and Others [1995] eKLR**.

34. For the foregoing reasons, the Petitioner finally submitted that this Court has wide discretionary powers to grant reliefs, including judicial review orders and declarations, under **Article 23** of the **Constitution** as was affirmed in **Nancy Makokha Baraza vs Judicial Service Commission and 9 Others [2012] eKLR** and therefore should allow his Petition and grant the orders sought therein.

### **For the Respondent**

35. On the Respondent's part, it maintained that the orders sought by the Petitioner cannot be issued and while relying on **Paul Ng'ang'a Nyaga and 2 Others vs Attorney General and 3 Others [2013] eKLR**, it was its argument that the present Petition is an abuse of the court process. That the Petitioner has proved himself to be a litigious litigant whose sole purpose is to abuse the Court process and this has been demonstrated by the numerous claims that he has instituted since his removal from the service. That the present Petition is not only frivolous but is also scandalous and meant to bring the good name of the Commission into disrepute. While relying further on **Young vs Hillary 1895 P 87/90**, it was the Respondent's submission that the Petitioner is motivated by self-interest and has not given the Court any legal basis for his Petition.

36. The Respondent also relied on **Black's Law Dictionary's** definition of the word 'bias', and the decisions in **Medicament and related Classes of Goods (2001) 1 WLR 700**, **Judicial Service Commission vs Gladys Shollei and Another, Civil Appeal No. 50 of 2014**, **R vs Gpugh [1993] AC 646**, **Porter Magill vs Weeks [2001] UKHL 67**, and **Attorney General vs Anyang' Nyongo and Others [2007] 1 E.A** and submitted that claims of bias and prejudice have no room in administrative

actions.

37. It was the Respondent's other submission that the Petitioner has not pleaded constitutional violations with precision, as required of him in accordance with the principles set out in the **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272**, and **Meme vs Republic and Another [2004] eKLR**. Additionally, that the Respondent has not in any way infringed on or denied the Petitioner any fundamental rights and freedoms and that no material whatsoever has been placed before the Court to demonstrate the alleged violations.

38. On whether the signatures by Commissioners Boinett and Arachi invalidated the final finding, the Petitioner's suitability to continue serving in the Police Force, the Respondent relied on the decision in **Immanuel Masinde Okutoyi and Others vs National Police Service Commission and Another [2014] eKLR** to argue that the vetting of police officers being one of the functions of the Commission, it is required under the law that any decision it makes must be by its Commissioners and not any co-opted members as required by **Sections 13 and 14** of the **National Police Service Act** and as such, the said signatures do not invalidate the findings. In addition, that as Commissioners, the two are required by law to participate in the decision making irrespective of whether they were present during the vetting or not and in any event, as per **Schedule 2 paragraph 3** of the **National Police Service Commission Act**, the quorum for the meeting of the Commission is six which may therefore include the two officers.

39. On the allegations that the Petitioner was never accorded an opportunity to be heard, the Respondent submitted that he was accorded a fair opportunity of being heard but because his hostile conduct, he failed to utilize the same and further made the vetting process impossible to be conducted. While relying on **Joseph Mbalu Mutava vs Attorney General and Another, Petition No. 337 of 2013**, the Respondent was of the view therefore that what constitutes procedural fairness in any hearing depends on the circumstances of each particular case and in the present case, the Petitioner was accorded the right but he abused it.

40. To the Petitioner's assertions that the inclusion of Commissioner Mary Awuor in the Vetting Panel amounted to conflict of interest, the Respondent's position was that if he felt uncomfortable with her being in the Panel, he ought to have said so when he first appeared before the Panel in 2013 and later on 8<sup>th</sup> May, 2015. Further, that he ought to have raised the question during the vetting as opposed to stating that he had submitted a dossier (which had nothing to do with the vetting Process) in order to enable the Commission to determine whether her presence should have been dispensed with.

41. The Respondent maintained that in removing the Petitioner, it observed the rules of natural justice and followed due process and as such, the allegations that it acted outside its scope are unfounded. Accordingly, that it requested the Petitioner to submit all his bank statements as required under **Regulation 13 (f)** of the **Regulations** and therefore, to say that it acted *ultra vires* its mandate is to mislead the Court. That in any event, **Regulation 13 (h)** gives it wider powers to seek for any information from officers to be vetted and as such, it was justified in seeking for the bank statements for the years 2011 and 2013.

42. The Respondent also submitted that the Petitioner has not shown by way of evidence that indeed it released the vetting results to the media before the same was communicated to him and further that before the vetting results are released to the public, the same is always given to any officers who have undergone the vetting and the same is also always the same is always communicated to the Inspector General who in turn communicates the same to the affected officers on the same date and that in the event that there was delay in the communication of the results to the Petitioner, the delay can only be attributed to either his negligence or that of the Inspector General and not the Respondent.

43. Finally, the Respondent also urged the Court to follow the decisions in **Tinyefunza vs Attorney General, Petition No. 1 of 2003** and **Mumo vs Trusted Society of Human Rights Alliance and 5 Others (supra)** and hold that the Petitioner has not raised any constitutional issue for this Court to determine. Accordingly, that he has failed to prove the allegations that his constitutional rights have been infringed and therefore, the Petition ought to be dismissed with costs.

## **Determination**

44. The key issue for determination is whether the Petitioner's constitutional rights were violated during his vetting and whether the said vetting was so fundamentally as flawed to warrant the grant of the orders the Petitioner has sought in the Petition herein.

45. In that regard, perhaps it must be borne in mind that in the present matter, this Court is not sitting as an appellate Court but rather is partly being called upon to exercise its jurisdiction under **Article 165 (6)** of the **Constitution** which gives it supervisory jurisdiction over Subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function and I say so certain that the Respondent, in vetting police officers, was acting in that capacity. In exercise of that mandate, **Article 165 (7)** provides that:

***For the purpose of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give direction it considers appropriate to ensure the fair administration of justice.***

46. In addressing that mandate, this Court is to examine the fairness of the process in terms of whether the procedures under the law were followed during the vetting process engage in a merit review of the decision of the Vetting Board as was the decision of the Court of Appeal in **Isaack Osman Sheikh vs IEBC & Others, Civil Appeal No. 180 of 2013** where the Court expressed itself as follows:

***“A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere.”***  
(Emphasis added)

47. That said, the question then that is to be answered is whether the Petitioner's vetting process was flawed as alleged by the Petitioner and in turn whether the Respondent's actions were a violation of his constitutional rights. In that regard, the Petitioner asserts that he was not accorded a fair hearing in that his request for adjournment for one or two hours was denied; he was dissatisfied with the presence of one, Commissioner Mary Owuor in the Vetting Panel; during the said vetting he was harassed by the Chairman and that his microphone was even switched off. Additionally, that the request by the Vetting Panel for his bank statements for the years 2011 and 2012 was unlawful; the signing of the Vetting Panel's decision by Commissioner Boinett and Arachi rendered the decision null; and the decision not to complete his vetting was unconstitutional.

48. In that context, is there any violation of the Petitioner's rights under **Articles 10 (2), 27, 28, 35, 47 and 50 (1)** of the **Constitution**? **Article 10 (2)** outlines the national values and principles of governance. It states that:

**The national values and principles of governance include-**

**(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**

**(c) Good governance, integrity, transparency and accountability; and**

**(d) Sustainable development.**

49. **Article 27** makes provisions for equality and freedom from discrimination. It states that:

***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***

***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

***(6) ...”***

50. **Article 28** guarantees every person the right to inherent dignity and the right to have that dignity respected and protected while **Article 35**, provides for the right to access information in the following terms:

***(1) Every citizen has the right of access to-***

***(a) Information held by the State; and***

***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects them.***

***(3) The State shall publish and publicise any important information affecting the nation.***

51. On the other hand, **Articles 47** and **50** make provision in regard to fair administrative action and the right to fair hearing, respectively. The former provides thus:

***(1) Every person has the right to administrative action that expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

***(3) ...***

52. **Article 50 (1)** then provides that;

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

53. Applying the foregoing to the present matter, firstly, this being a Constitutional Petition, It must be borne in mind that any person alleging any violation of rights is under an obligation to plead with a measure of precision in regard to the alleged article contravened and the manner in which the said article has been infringed- See **Anarita Karimi case (supra)**. As such, I shall address the issues in this Petition while bearing that principle in mind and also aware that precision is not expected to be scientific and mathematical but only to ensure that a Respondent knows what case to respond to.

54. In that regard, I have seen the proceedings of the Petitioner's vetting that was conducted on 8<sup>th</sup> May 2015 and 22<sup>nd</sup> June, 2015 and I note that Commissioner Mary Owuor was present in both sessions. I also note that during the vetting conducted on 8<sup>th</sup> May, 2015, the Petitioner did not object to the composition of the Vetting Panel. Further, in the same session, upon being asked by the Chairman whether he had any documents that he had not availed to the Panel which he wished the Panel to look at in the course of the vetting, the Petitioner answered the question in the negative. At page 53 of the proceedings of the vetting conducted on 8<sup>th</sup> May 2015, I furthermore note that the Chairman alluded to the Petitioner's vetting being conducted in another session owing to the need to get more information from the Petitioner. The Chair asserted that:

***“Let me say this: I can see from what indeed Commissioner Murshid was concerned about that we may need another session. We definitely will need another session. We will want you to prepare properly for that session. That session may call a lot more specific references because any reference that gives anonymity to sources will not be admissible to the Commission and as Commissioner Murshid puts it we need to be fair to you not unfair...”***

The Chairman at page 55 went on to state thus:

***“... I want to make this direction. The Commission will like to make progress in being able to give you adequate time to present to the Commission information that will lead to a fair assessment of yourself as part of the vetting process that will determine your suitability and competence for retention. We feel that will not be done if certain information is not provided by yourself especially taking into account the history of your employment especially after you joined Central Bank. It is because of this that we feel that Mr. Okonya, you will come back for further vetting on a date that our Secretariat will determine. This will give us an opportunity to make meaningful follow-ups on the issues that tie up with your current financial position or position as brought out in the documents that you presented.***

He went further to state;

***“We shall need further statements which may date back to 2011 or any other such time as to reflect the details that you are bringing out in your pay slips. We will also wish to inform you that it is in the practice of the Commission when carrying out vetting to inquire and to expect to be given full disclosure of sources. We feel as a Commission that we are not getting such full disclosure. The information you are giving us as already stated will be strictly in confidence tailored to be of use to you in this vetting process. Therefore Mr. Okonya, we shall suspend your vetting for now and do further vetting which will be focused purely on those aspects of financial probity that we will want to be brought out.”***

55. The Petitioner it is recorded, after the above statements, in that regard objected to the adjournment citing various reasons as can be seen at pages 56-57 of the record. Can it then be said that the denial of the adjournment was in violation of his rights? My answer to this question is in the negative. I say so because, the Commission is duly guided by its procedures and rules and it is upon it to determine what course to take in a particular case which is to its convenience. On this particular occasion, as I have stated above, the Commission sought to do a further follow up on the material it had received from the Petitioner. Additionally, as can be deduced from page 58 of the record the Chairman went into great length to explain why it was not possible to adjourn the matter for an hour or two as had been requested by the Petitioner. I am unable to find any contravention of the Petitioner's right to a fair hearing in that regard because the adjournment was not to bar the Petitioner from any hearing at all but to merely postpone the hearing and for further follow up action by the Commission and to enable the Petitioner to get additional information as was sought by the Commission.

56. Further to the above, in the proceedings of 22<sup>nd</sup> June 2015, I note that Commissioner Mary Awuor was present. The Petitioner, on being asked whether he was comfortable with the composition of vetting panel, asserted thus:

**“I will answer that through submitting a dossier which you can read. If you want to reveal the name, reveal it, the media is here, it is not Okonya revealing the name to the media, the Chairman you can go ahead.”**

57. In that regard, the Chairman responded by stating as follows:

**“... We invited you for re-vetting. We indicated to you what preparations you need to make. We gave you time to go and prepare to come and present yourself. We wrote several letters to you reminding you of the same including today’s date. You have arrived for your re-vetting and you are unwilling to take directions from the Chairman. This we have a lot of objections to. As a Commission, we shall not allow a serious vetting process to turn into a circus. When we have asked you questions, we expect answers from you. The arguments you have started even before the Commission begins to vet you are uncalled for. The Commission would like to give you a chance to be vetted both as required by the law and as directed by the court. I would like you to put yourself in your position as a vettee and not take over the role of the Chairman to direct the Panel. That is not acceptable including, keep off your hand off the microphone Mr. Okonya. Can you listen to me, leave your papers alone.”**

58. A further perusal of the Hansard proceedings for that day reveals that the Petitioner’s vetting was thereby suspended and the Chairman gave a verdict to the effect that:

**“... The Commission finds you hostile, unwilling to be vetted and we are directing that until that time you will be ready and willing to be vetted, until that time you will come and submit to the Commission for purposes of being vetted, the Commission directs and I so direct that you leave this vetting room and we shall inform you of any other communication relating to your vetting. We thank you and we are finished with you.”**

59. My reading of the above proceedings would lead me to conclude that I am not satisfied that the Petitioner has made out a case in support of his contentions in regard to violation of his right to be heard for reason of the presence of Commissioner Owuor. I say so because, based on the evidence before me and that which I have partly reproduced above, I note that the Petitioner was accorded an opportunity to address the Vetting Panel in regard to the members he alleged he did not wish to have in the panel. The Petitioner however, did not address the Panel on the question but instead opted to table what he called a dossier which he alleged contained information relating to an unnamed member of the Vetting Panel.

60. In my view, bearing in mind the nature of the vetting process, I am unable to fault the Commission on its decision. The Petitioner had the opportunity to address the Commission on that question but he opted not to do so. He cannot therefore properly allege that he was denied an opportunity to be heard. I do not see the difficulty, if any, that warranted the Petitioner not to submit and address the question that was posed to him in regard to his dissatisfaction with the composition of the Panel. If indeed he was dissatisfied with the said composition, he ought to have out rightly mentioned the name of a conflicted member and the reasons thereof to enable the Commission make a finding there and then on the question. I am therefore inclined to agree with the Respondent’s explanation on that issue.

61. On whether the Petitioner’s rights to a fair hearing and fair administrative action were otherwise infringed, I have seen the record of the proceedings before the Vetting Panel on the respective dates of his vetting. I note that on both dates, the Commission reminded the Petitioner of the importance of the vetting process and the importance attached to ensuring that he received a fair and transparent process. I note however that from the proceedings of 22<sup>nd</sup> June 2015,, the emerging issue was that the Petitioner appeared to have attempted to take charge of, and purport to control his own vetting process. I say so, with respect because at page 6 of the Hansard proceedings of the said day, the Chairman is recorded as stating:

**“Mr. Okonya? The session has started, we are proceeding and the direction we are taking is given by the Chairman. We will give you the responsibility of responding to us and I think we should begin on the right footing where you don’t give conditions to the Commission. I have**

**asked you a question and I expect an answer. And when I ask you to provide any other information, you will be able to do so. I want us to have a very clear understanding about that one. Do not attempt to direct the proceedings and processes of this Vetting Panel...”**

62. Reading the above transcripts I am unable to fault the Commission in the manner it handled the Petitioner and neither can I find any bias or any such harassment as alleged. In fact, it is apparent that the switching off of the Petitioner’s microphone was prompted by his own conduct and I do not see any illegality or unconstitutionality in the Chairman so doing. The Petitioner, was the author of his own misfortune to that extent only and subject to what I shall say herebelow.

63. On whether the Vetting is a nullity because the Panel that sat on 22<sup>nd</sup> June 2015 did not include two Commissioners, namely Boinett and Arachi, who were also absent in the Panel of 8<sup>th</sup> August, 2015; whether the signing of the Commission’s findings by the said two Commissioners renders the decision illegal; and whether the dismissal of the Petitioner’s application for review was in contravention of the right to fair administrative action under Article 47 of the Constitution, my answer to these questions is detailed herebelow.

64. In that regard, Regulation 10 of the Regulations provides for the establishment of Vetting Panels to actualise the Respondent’s mandate. It states that:

**(1)The Commission may, in order to ensure expeditious disposal of matters, constitute such number of panels and comprising such persons as the Commission shall determine.**

**(2)The Commission may establish panels comprising such number of its members and co-opted persons as it may deem necessary for the purpose of determining applications for review under regulation 33.**

65. The Regulation thus gives the Commission the discretion in terms of the constitution of panels in order to ensure expeditious disposal of vetting matters and it is also within its discretion to decide who sits in what vetting panel and at what time. In the **Eusebius Karuti Laibuta vs National Police Service Commission case (supra)** however, the Court cited with approval the decision in **Republic vs Complaints Commission, Media Council for Kenya and 2 Others [2013] eKLR**, where it was held thus:

**“Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners Peter Mwaura and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision... The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find.”**

The Court went on to conclude that:

**“[48] In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the**

**interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision.”**

66. It is not in doubt that Commissioners Boinett and Arachi did not sit during the Petitioner’s vetting but signed the final decision. Arachi in fact sat on a day the vetting failed to take off. The Respondent’s answer is that they did so as part of the Commission and not as members of the Vetting Panel. Is that a good defence to the Petitioner’s contention? I think not. Why would a person who knows nothing about a process as serious as the vetting of the Petitioner, purport to make a decision based on no more than the decision of a Panel? Is the Commission qua Commission meant to endorse everything the Panel has determined? Why not in fact indicate that the two absent Commissioners did not participate in the vetting and would therefore not make any decision?

I am unable to accept the Respondent’s answers to the above issue and its conduct thereby amounted to an illegality.

67. Regarding the Petitioner’s application for review, Regulation 33 of the Regulations states that:

**(1) An officer who has been found unsuitable or incompetent may, within seven days after being informed of the decision, request for a review of the decision by the Commission.**

**(2) The Commission shall not grant a request for review unless the request is based—**

**(a) on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the officer at the time the determination or finding sought to be reviewed was made, Provided that the lack of knowledge on the part of the officer was not due to lack of due diligence;**

**(b) on some mistake or error apparent on the face of the record; or**

**(c) on any reason the Commission considers just and proper.**

**(3) A request for review shall act as a stay of the decision of the Commission, but the officer in question shall proceed on leave for the duration of the review.**

**(4) The Commission may, upon review, confirm or reverse its earlier decision.**

68. A plain reading of the foregoing provision indicates that an application for review is a matter of discretion on the findings of merit made by the Commission regarding any vetting. In the instant case, the Respondent dismissed the Petitioner’s application citing the reason that there was nothing to be reviewed since the Petitioner had not been vetted. If he had not been vetted, why was he removed? On what basis was the review application then dismissed? In any event, does the reason advanced above fit within the expectations of Regulation 33 above? I think not. Dismissal of a review application including under Regulation 33(2)(c) must be based on sound reasoning and not anything else.

69. I further note however that the conduct of the Petitioner probably frustrated the Commissioners to the point of making a hasty decision to remove the Petitioner and dismiss his review application without much thought. That, in my humble view, cannot be the conduct of an independent body properly applying the expectations of Article 47 of the Constitution and I so find.

70. The Petitioner is further aggrieved by the fact that the Commission requested for his bank statements for the years 2011 and 2012. In that regard, Regulation 13 (f) of the Regulations is to the effect that:

**An officer shall within such period as the Commission determines submit documents as required by the Commission including bank statements for the last two years of all bank accounts, personal and business, that the officer, his spouse and dependents under the age of eighteen have maintained.**

71. The foregoing should not be read in isolation with the other provisions of the Regulations. On that basis, Regulation 9 outlines the powers of the Commission in the following terms:

**(1) The Commission and every panel established under regulation 10 shall have all the powers necessary for the execution of its functions under the Act and these Regulations.**

**(2) Without prejudice to the generality of paragraph (1), the Commission and the panel shall have the power to—**

**(a) gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;**

**(b) interview any individual, group or members of organizations or institutions;**

**(c) hold inquiries for the purposes of performing its functions under the Act or these Regulations; and**

**(d) conduct investigations to establish the veracity of information received.**

**(3) In the performance of its functions, the Commission and the panel—**

**(a) may inquire on any issue in such manner as it thinks fit; and**

**(b) may receive on oath, written or oral statements.** (Emphasis added)

72. Further to the above, pursuant to **Regulation 22**, I note that the Commission has inherent powers to be exercised for the fair and expeditious disposal of all cases before it and to ensure justice is done to all parties. The **Regulation** stipulates that:

**Nothing in these Regulations shall limit or otherwise affect the inherent powers of the Commission either to make such orders as may be necessary for the fair and expeditious disposal of a case or to do justice to the parties or to prevent an abuse of its process.** (Emphasis added)

73. It is therefore clear that the Commission has immense and inherent powers to make such orders so as to ensure a fair and expeditious disposal of a case. In the instant case, as I have shown elsewhere above, the Chairman of the Commission made it explicit that the request for the bank statements for the years 2011 and 2012 was for the Commission to reach a fair assessment pertaining to the suitability of the Petitioner to continue to serve as a police officer because in the Commission's view, the information that had been given by the Petitioner did not satisfactorily address its questions and it required further information to clarify certain issues, which information could only be obtained by a further examination of the Petitioner's 2011 and 2012 bank statements. That is why the Chairman stated:

***“We shall need further statements which may date back to 2011 or any other such time as to reflect the details that you are bringing out in your pay slips. We will also wish to inform you that it is in the practice of the Commission when carrying out vetting to inquire and to expect to be given full disclosure of sources. We feel as a Commission that we are not getting such full disclosure.”***

74. Noting foregoing and taking into account the above cited Regulations, I am satisfied that the Commission rightly exercised its inherent powers as provided under Regulation 22 and the request for bank statements for the years 2011 and 2012 was not in any way illegal as the same was aimed at ensuring that the Commission reaches a just finding on the questions before it.

75. Finally, the Petitioner alleged violation of his right to information under Article 35 of the Constitution. It was his argument in that regard that he sought for a copy of the proceedings of his

vetting that was conducted on 8<sup>th</sup> May 2015 but the same was denied and that fact amounted to an infringement of his right to access information. In that regard, I note that the Commission, through its letter dated 13<sup>th</sup> May 2015, requested the Petitioner for information for further interrogation of financial transactions noted in his bank account statements. In the said letter, the Commission specifically outlined the information required. To wit:

**“Following the analysis and during the vetting interview, it became apparent to the Commission that to facilitate conclusion of your vetting, the following is required to:-**

**1. Provide original bank account statements for all your bank accounts for the years 2011 and 2012.**

**2. Make full disclosure on the following issues:**

- **Which stock brokerage firm or investment firm were you or your friend using to trade in the stocks and shares?**
- **What is the name of your friend whose company trades in the stocks and shares?**
- **What was the name of the company trading in?**
- **What was the mode of payment of the Kshs.3,000,000/= you gave your friend to make the investment? In which year did you give your friend the Kshs.3,000,000/=?**
- **Into which of your bank accounts were you depositing the proceeds from the investments?**
- **For how long did you engage in the business?**
- **Did you and/or your friend open a Central Depository System (CDS) account? And if yes, do you and/or your friend have the CDS account statements for the same period?**

**In your earlier explanation during the vetting interview of 8<sup>th</sup> May, 2015, you indicated that in January 2013 you decided to recoup your investment and the person (your friend) paid you back in four equal instalments of Kshs 1, 000, 000/= each. In regard to this explanation, kindly provide the Commission with details on the following: -**

- **What was the mode of this payment from your friend? (was it in cash or cheque or bank transfer)**
- **In which specific months did you receive the payments from your friend? Please provide details of the transactions.**

**The Commission requires you to provide a response to this letter and to submit the documents as indicated and any other additional information that would facilitate your vetting within seven days of this letter.”**

76. In response however, the Petitioner set a pre-condition that he first be issued with a complete Hansard recordings of the proceedings of 8<sup>th</sup> May 2015, so as to enable him respond “adequately” and “in a relevant manner” to the issues raised therein. On that basis, Regulation 4 (g) of the Regulations provides that:

**“Vetting shall be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision.”**

77. In that regard what was so difficult about the Respondent giving the Petitioner the Hansard of its

*proceedings for him to adequately prepare himself for his vetting? I need not belabour that issue at all as the Commission clearly acted unprocedurally and therefore also unlawfully.*

### **Conclusion**

*78. Based on my findings above, it cannot be lost that procedural fairness is the yardstick to determine whether this Court should interfere with the decision of the Commission in regard to the Petitioner's vetting process. I note further that Regulation 20 of the Regulations anticipates a scenario whereby a police officer fails to participate in the vetting process. It states that:*

***Where an officer willfully refuses to attend the vetting process by—***

***(a) failing to appear before the Commission; or***

***(b) failing to obey an order of the Commission in respect to the vetting process, and as the result the vetting process becomes compromised or impaired, the Commission shall treat such officer as having failed the vetting process and shall remove the officer from the Service.***

79. Elsewhere above, I have shown that the Petitioner was partly the author of his misfortune but I have also shown that the Commission has not escaped blame for its rushed and hasty decision making. But turning back to Regulation 20 above, can it be properly said that the Petitioner failed to obey an order of the Commission and that therefore the Commission had no option but to remove him? I think not.

80. The Petitioner's conduct may have been annoying, frustrating and exasperating but the Commission should not have then reacted in a similar manner and hastily flouted its own Regulations. I am clear in my mind that by so doing, the defence offered by **Regulation 20** is not available to it.

81. Regarding the proper orders to make in this case therefore, Prayers 2 as read with Prayer 5 must be granted but limited to the violation of **Articles 35** and **47** only. Prayers 3 as read with Prayers 6 and 7 must also be granted limited to setting aside the Petitioner's removal and appropriate orders consequential shall be made shortly.

82. On the issue of costs, each Party is partly to blame for these proceedings and so each shall bear its own costs.

83. In conclusion, the Commission ought to restart the Vetting Process from the point at which it was adjourned on 22<sup>nd</sup> June 2015. The Petitioner should also comply with all directives of the Commission and let his vetting reach its lawful conclusion and the same should not continue to be the subject of litigation as is now apparent.

### **Disposition**

84. Based on my reasoning above, the proper orders to make are the following:

i) It is hereby declared that in the vetting process of the Petitioner, the Respondent violated his rights under **Article 35** and **47** of the **Constitution**.

ii) It is also declared that the rushed and hasty decision to remove the Petitioner from the Police Service was unlawful to the above extent only.

iii) The said decision is hereby quashed.

iv) The Petitioner's vetting shall restart from where it was adjourned on 22<sup>nd</sup> June 2015 and shall be expeditiously concluded.

v) Each Party shall bear its own costs.

85. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Ojwang for Respondent

Mr. Busiega holding brief for Mr. Kithi for Petitioner

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**