



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 29 OF 2011

BETWEEN

JOSPHAT SITONIK.....PETITIONER

AND

THE ATTORNEY GENERAL1ST RESPONDENT

THE COMMISSIONER OF POLICE2ND RESPONDENT

JUDGMENT

Background

1. The petitioner's case is about his dismissal from the Kenya Police Service and whether his rights were violated in the process.
2. This is the second judgment in this matter. The first judgment was set aside upon an application for review by the respondents.

Petitioner's Case

3. The facts giving rise to the petition date back to 4th October 2008 when the petitioner was dismissed from his employment as a Police Constable attached to General Service Unit (GSU), Recce Company. He joined the Police Force in 2002 and served in various stations. He was attached at Jolly Farm GSU Molo Camp, Molo District at the time of his dismissal.
4. The petitioner avers that he was accused of being found in motor vehicle registration GKA 906Q lorry which was carrying logs of wood from Longman Forest. He was arrested when he was called on 1st October 2008 from Jolly Farm to visit Molo Police Station to record a statement in relation to the incident. He was arrested and detained for two days when he arrived at Molo Police Station on 1st October 2008 at around 5pm. He also states that the orderly room proceedings could

not have been carried out on 1st October 2008 in the morning as the witnesses in the proceedings were released from Elburgon Police Station at 4.45 in the afternoon of the same day and it would take some time before they reached Molo Police Station where the proceedings were held. The petitioner testified that he was only informed of his dismissal through a signal that he had been dismissed from the Kenya Police Service with effect from 4th October 2008.

5. The petitioner was ultimately found guilty of, “*an act to the prejudice of good order and discipline*” contrary to **regulation 3(41) of Police Regulations**. The particulars of the offence and sentence can be discerned from the dismissal letter dated 4th October 2008 which read as follows;

DISMISSAL FROM THE KENYA POLICE FORCE

On the 1st October 2008 you were charged in orderly room proceedings with the following offence against discipline.

OFFENCE:
GUILTY OF AN ACT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE C/R 3(41) of Police Regulations.

PARTICULARS OF OFFENCE:
NO. 80647/2002022325 PC JOSEPHAT SITONIK (DEF.)
On the 30th day of September 2008 at Longman forest within Nakuru District of the Rift Valley Province being in the company of his G.S.U. colleagues were found having felled, loaded and were in the process of transporting 47 logs of cypress trees in a govt motor vehicle Reg. GK A 906Q Isuzu lorry illegally

You pleaded not guilty and this necessitated for full orderly room proceedings. You were accordingly convicted by the presiding officer, but due to the seriousness of the offence, the proceedings were remitted to this Headquarters so that a deterrent sentence could be awarded.

I therefore write to inform you that the Deputy Commandant-GSU has sentenced you to DISMISSAL from the Force with effect from 4th October, 2008.

Upon dismissal, you forfeit all retirement benefits and leave accrued if any. You will also return all items of Government Kit and equipment issued to you and pay for any deficiency noted.

You may be advised by the Personnel Division of Police headquarters of any benefits payable to you.

You have the right of appeal against the sentence only to the Commandant-GSU. Should you wish to exercise this right, you must do so in writing and within seven days on receipt of this letter through your Officer Commanding.

FOR: COMMANDANT-GSU

6. The petitioner appealed to the Commissioner of Police through his letter dated 22nd November 2008 and followed it up with a reminder in February 2009. He denied being anywhere near the place where the offence was committed and pleaded that the statements and sentence be reviewed. He was informed that his appeal was unsuccessful by the letter dated 19th November 2008 from the GSU commandant. In a letter dated 17th February 2009 signed on behalf of the Commissioner

- of Police, the petitioner was further informed that he had not appealed to the GSU Commandant as instructed in the dismissal letter and that he was time barred as he had not exercised his right of appeal.
7. The petitioner complains that the process leading to his dismissal was in contravention of his constitutional rights. He avers that the orderly room proceedings were conducted in breach of the principles of a fair hearing. He claims that he was neither invited to attend nor allowed to participate in the proceedings as he was detained in police cells from 1st to 3rd October 2008 which was contrary to the Constitution. He also avers that he was convicted by an officer who admitted not having jurisdiction to pass the sentence.
 8. The petitioner's counsel, Mr Bosek, submitted that orderly room proceedings were brought to his client's attention when the proceedings had taken place and a decision made. The petitioner further contends that he was detained in cells for two days while the orderly proceedings were being conducted. He further submitted that the incarceration of the petitioner rendered the orderly room proceedings unconstitutional and therefore null and void.
 9. The petitioner complains that the proceedings were set out to intimidate the petitioner and subject him to duress and as such the respondent violated his constitutional rights guaranteed by **sections 70, 72 and 77** of the repealed Constitution.
 10. In the Amended Petition dated 18th July 2012, supported by petitioner's own affidavit, the following reliefs were sought from this Court:
 - i. *A declaration that the Petitioner was not accorded the right to due process of the law.*
 - ii. *A declaration that the Petitioner's arrest and detention in police cells for 2 days without being taken to court was unconstitutional.*
 - iii. *A declaration that the orderly room proceedings alleged to have been conducted between 1st October and 3rd October 2008 at the time the Petitioner was in police cells is unconstitutional.*
 - iv. *The 2nd Respondent be compelled to reinstate the Petitioner's employment and pay him all his salaries in arrears.*
 - v. *The respondents do pay the general damages.*
 - vi. *The respondents do pay the petitioner aggravated damages for breaching his constitutional rights.*
 - vii. *Any other order this Honourable Court may deem fit to grant.*
 - viii. *Costs of this Petition.*

Respondents' Case

11. Chief Inspector George Odongo, the officer who presided over the orderly proceedings relating to the petitioner's misconduct and that of other four other police officers, testified on behalf of the respondents.
12. He stated that he heard two witnesses against the petitioner and that the petitioner was accorded the opportunity to cross-examine the prosecution witnesses and even testified in his own defence. Inspector Odongo concluded that he heard the petitioner's alibi defence and found it to be unsatisfactory. He conceded that the petitioner was not arrested at the scene but stated that there was enough evidence linking him to the incident.
13. Inspector Odongo refuted the petitioner's claims that he was absent during the conduct of his orderly proceedings. He stated that he was accorded all the rights and privileges available to police officers under the **Force Standing Orders** as well as the **Police Act(repealed)** including the right to fair hearing. He produced typed copies of the proceedings which were endorsed by the petitioner.
14. Mr Opondo, counsel for the respondents, submitted that the petitioner had invoked a wrong procedure in seeking to compel Commissioner of Police to reinstate his employment through the

petition and that the petitioner had not exhausted the remedies provided for in the *Police Act* and the *Force Standing Orders*.

15. The respondents deny that the petitioner was detained unlawfully. Counsel submitted that the fact that one was held in custody for more than 24 hours did not amount to a violation of one's rights. He cited the case of *James Kanyiita Nderitu v Attorney General & Another [2012] eKLR* in support of this proposition.

Determination

16. The central issue for determination that emerges from the pleadings, depositions and testimony is whether the orderly room proceedings were conducted in the petitioner's presence. The petitioner was emphatic that he was not present when the orderly room proceedings were being conducted and was therefore not given a chance to be heard and defend himself. This is an evidential inquiry and the petitioner bears the burden of proving his case on the balance of probabilities.

17. The petitioner's case is that he went to Molo Police Station at about 5.00 pm on 1st October 2008 and that the two witnesses who attended the proceedings were only released from Elburgon Police Station at 4.45 pm on that date, hence it would not have been possible to conduct the orderly room proceedings in the morning of 1st October 2008 as testified by Inspector Odongo.

18. Inspector Odongo produced a typed record of the orderly room proceedings which shows that inquiry was conducted. According to the record, two witnesses were called and the petitioner had a chance to cross-examine them. The record also indicates that the petitioner was given a chance to put forth his defence and thereafter given a chance to mitigate the sentence after conviction.

19. It is important to note that the petitioner endorsed the proceedings by affixing his signature after the testimony of every witness. He confirmed, when cross-examined, that the signature was his. He however stated he thought it was an order he was signing when the proceedings were given to him to sign on 2nd October 2013 and that he signed as he had been in custody and was under duress.

20. The petitioner did not tender any evidence to show that the typed proceedings were doctored. In fact he did not make this allegation. The petitioner appealed against the decision to the Commissioner of Police by the letter of appeal dated 22nd November 2008 and the follow up letter of received on 3rd February 2009. The petitioner did not mention the fact that the orderly proceedings were conducted in his absence or that the proceedings violated his rights in any manner or that he was detained in a police cell for two days. The content of both letters was focused on the analysis of the evidence against him. My reasoning is fortified by the fact that before dismissal, **Chapter 20** of the *Police Force Standing Orders* requires an inquiry to be carried out and if such an inquiry was not carried out why was the petitioner silent on the matter until he filed this suit four years later? At no time did he question why he was dismissed without an inquiry.

21. Since these appeals were made after the dismissal and presumably in an environment free from duress or intimidation, it is unlikely that the petitioner's allegations regarding the claim that the orderly room proceedings were not conducted in his presence are true. The petitioner's appeals against the dismissal leave no doubt that the petitioner was involved in the orderly room proceedings.

22. I have also taken into account the fact that even if the two witnesses left Elburgon at 4.45pm for Molo Police Station and the petitioner arrived there at 5 pm. There would be sufficient time to complete the orderly room proceedings within the time prescribed by **paragraph 16(ii)** of **Chapter 20** of the *Forces Standing Order* which requires that the must be conducted between 6.30 am and 6.30pm.

23. Taking the totality of the evidence before me into account, I find it more probable than not that orderly room proceedings were conducted in the petitioner's presence. I therefore find and hold that the allegation contained at paragraph 4 of the amended petition that, "*The Petitioner is aggrieved and states that the 2nd Respondent proceeded to condemn him unheard by conducting an orderly room proceedings which he was not allowed to participate and/or invited to attend*" is not supported by the evidence.
24. The petitioner's case is that the alleged orderly room proceedings were conducted while he was detained in police cells between 1st and 3rd October 2008. Having found that the evidence points to the petitioner having participated in the proceedings, I find and hold that the proceedings were not conducted while the petitioner was detained in the police cells. Inspector Odongo testified that the orderly room proceedings were conducted in an office and not police cells.
25. The petitioner's evidence and submissions have dwelt on the fact that there was no evidence upon which he would be found guilty. This petition is neither an appeal against his conviction nor a re-trial of the case, it is an application to determine the legality of the proceedings which he faced. In the circumstances I reject any plea to revisit the evidence and circumstances under which the petitioner was subjected to disciplinary proceedings.
26. Finally, I must state that a petitioner cannot plead two inconsistent causes of action. Either the petitioner was not subjected to orderly room proceedings or he was. If he was, then he may plead that the procedure was unconstitutional or defective and vice versa. In ordinary cases, such a pleading would be termed as embarrassing. However, as I have outlined, the petitioner's case fails because I have found that the orderly proceedings were duly conducted in his presence.

Disposition

27. The upshot of my findings is that the petition lacks merit and is hereby dismissed. There shall be no order as to costs

DATED and DELIVERED at NAIROBI this 24th day of January 2014.

D.S. MAJANJA

JUDGE

Mr Bosek instructed by Bosek and Company Advocates for the petitioner.

Mr Opondo, Litigation Counsel, instructed by the State Law Office for the respondents.