



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

PETITION NO. 79 OF 2014

EUSEBIUS KARUTI LAIBUTA.....PETITIONER

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION...RESPONDENT

JUDGEMENT

Introduction

1. By a Petition dated 20th February, 2014, the Petitioner herein, **Eusebius Karuti Laibuta**, seeks the following orders:
 1. **A declaration that the Petitioners Fundamental Rights and Freedoms have been violated.**
 2. **An order of Certiorari do issue to quash the proceedings and the decision of the 1st Respondent declaring that the Petitioner had failed Vetting and further discontinuing the Petitioner from the Administration Police Service.**
 3. **Compensation to the Petitioner for the violation of his fundamental rights and freedoms.**
 4. **Costs of this Petition**
 5. **Any other relief that this honourable court may deem just to grant.**

Petitioner's Case

2. The Petition was based on the fact that the Petitioner is a Deputy Commandant of the Administrative Police at Emali.
3. According to the Petitioner, upon the enactment of the ***National Police Service Act***, (hereinafter referred to as the Act) the 1st Respondent (hereinafter referred to as the Commission) as tasked with the mandate of vetting of all officers of The National Police Service with the objective of assessing their suitability and competence and also tasked with the mandate of discontinuing the service of any officer who fails the vetting and in carrying out the process, the Commission was expected to gather and disclose relevant information regarding the subject officers from various sources including members of the public and the entire process was to be guided by the principles of National Justice and the applicable law.
4. According to the Petitioner, the Commission prior to the vetting date required the Petitioner to submit a duly filled Vetting Questionnaire and a Declaration of Income, Assets and Liabilities which the Petitioner did and the Commission invited the Petitioner to attend a vetting interview on 11th January 2014 for the purposes of the Vetting which the Petitioner did and the interview was carried out live on a number of TV stations broadcasting within Kenya.

5. Pursuant to the interview, the Commission delivered a decision signed by the Chairman **Johnstone Kavuludi** and 6 Commissioner namely **Ronald Musengi, Murshid Mohammed, Mary Owur, David Kimaiyo, Grace Kaindi** and **Samuel Arachi** in which the Commission purportedly found that the Petitioner had failed the Vetting and discontinued his employment with the Administration Police Service.
6. It is this decision which triggered the present Petition since according to the Petitioner he was aggrieved by the procedure and the manner the purported process was carried out as well as the content of the decision rendered therein as the same was Unconstitutional, *Ultra Vires*, illegal and contrary to the rules of natural Justice. It was further contended that as the decision which was forwarded to the Petitioner vide a letter by the Chief Executive of the Commission dated 29th January 2013 but delivered to the Petitioner on 3rd February 2014, was undated, the same was a nullity with an error apparent on the face of the record.
7. In the Petitioner's view, the Commission erred in various ways by its approach and by reaching its decision which justify a review under the provisions of Regulation 33 of the **National Police Service (Vetting) Regulations** (the Regulations) that render their decision unlawful. According to him, the Commission as presently composed and as composed at the time of his interview lacked the requisite quorum to interview him or to render the decision against him since under paragraph 3 of the Second Schedule of the **National Police Service Commission Act**, the quorum of the meetings of the Commission is required to have at least 5 members excluding the ex Officio members of the Commission namely the Inspector General and his 2 deputies. However, during his interview, only 4 Commissioners were present instead of 5 and these were **Johnstone Kavuludi, Mr. Murshid Mohamed, Mr. Musengi & Ms. Owuor**. Though the Hansard shows that **Mr. Samuel Arachi** was present, it was contended that that position was patently false considering that **Mr. Kavuludi** the Chairman of the Commission during the introduction stated that **Mr Arachi** was not present. It was therefore his view that since only 4 Commissioners were present in his vetting meeting, that number fell short of the statutory requirement and the proceedings undertaken thereof were without a quorum, without jurisdiction, were illegal and unlawful and so was the decision that was subsequently passed against him.
8. It was further contended that the /commission as composed presently is incapable of functioning properly of holding meetings of a substantive nature since it is composed of 9 Commissioners, 3 of who are ex officio members and out of the remaining 6, one by the name of **Esther Chui Colombini** passed away on 25th November 2013 and another called **Shadrack Muui** has been ailing and unable to attend meetings for more than a year now. However, the remaining 4 Commissioners without the participation of **Shadrack Muui** cannot validly hold any meeting and was incapable of proceeding to conduct his vetting process and to deliver the decision. Since the interview proceeded in their absence, the **Inspector General David Kimaiyo** and his two deputies, **Grace Kaindi** and **Samuel Arachi**, could not lawfully take part in delivering the decision discontinuing his service with the Administration Police Service.
9. To the Petitioner, under the provisions of Regulation (25)(4) of the Regulations, only the Commissioners present can lawfully take part in the delivery of a decision.
10. The Petitioner further contended that the act of signing the decision of the Commission by the **Inspector General David Kimaiyo** and his two deputies, **Grace Kaindi** and **Samuel Arachi** when they knew all too well that they were not present during the hearing was unfair, unlawful and thereby rendered the decision a nullity.
11. The Petitioner further averred that during the interview, he was asked to provide further Statement of Bank Accounts he held in Equity Bank and HFCK which he delivered to the Commission subsequent to the interview and having done so, he Legitimately expected that the Commission would recall him to clarify issues arising from those documents prior to reaching a verdict based on the documents. He was however not recalled yet it is in the public domain that some of the persons he was interviewed with including **Mwangi Kingori, Gideon Kimilu** and **Peter Pamba** we recalled and cleared. It was therefore his view that the Commission exhibited discriminatory tendencies contrary to Article 27 of the Constitution and double standards when it recalled other officers for interview pending determination but left him out. The Commission also exhibited open hostility, bad attitude and animosity towards him as can be shown by the Hansard proceedings and Video recording of the Interview particularly when the chair interpreted his assistance of a Commandant as including assisting to "eat".

12. The Petitioner's position was that the rendered was clearly wrong from a factual and legal perspective for the following reasons:

- i. On the issue of qualitative or quantitative progression of officers, it was wrongly alleged that he was evasive, indecisive and unable to answer the question due to incompetence, ignorance or otherwise yet he ultimately gave the required answer but was not comfortable to contradict Government Policy on National Television.
- ii. On his Sources of income, he was not evasive as held and he answered the queries in the manner that was consistent with the circumstances but nonetheless, there was nothing corrupt, illegal or criminal in his conducting "small business here and there".
- iii. On income derived from the sale of tea, it was not an offence for him not to recall with actual precision the amount of money he made from tea bonus and whether the amount he stated was right or wrong was not the key factor to be considered as what was crucial was whether the payments were received from a genuine source namely KTDA.
- iv. The Commission without any expertise, authority or competence in agricultural matters erred in finding that the amounts he declared for tea are too low for a 3 acre farm.
- v. He did not contradict himself on store ownership and the record bears this out.
- vi. On the finding of his non-declaration of accounts, the decision made was out of proportion and his erroneous thinking that it was not necessary to include those accounts which lacked money "of significance" did not warrant a total condemnation more so when he realised the error and honestly disclosed the accounts orally to the Commission and later submitted the subject accounts to the Commission.
- vii. The Commission was wrong in interpreting his closing remarks as a veiled threat to it more so when it is the Commission that requested for his feelings on the process and having studied Psychology at the University Level, he believed he was not out of order to express the fact that officers vetted out may end up dying out of factors like depression and other maladies and to punish him for making a honest statement only showed how inconsiderate the Commission was to its own officers.

13. To the Petitioner, the decision rendered was unreasonable and irrational in the circumstances. Further, there was no complaint which was brought to his attention made by members of the public or any other quarter imputing that he was incompetent, lacking in diligence, ignorant, indecisive, uninformed, evasive, deceptive, wilfully withholding information, dishonest, lacking in candour, questionable, lacking credibility, lacking financial probity, and incoherent without which the Commission had no legal, factual or other basis to make findings against him. Therefore, by purporting to dismiss him when there were no complaint against him, the Petitioner contended that the Commission became the Complainant, the prosecutor, the judge and the executioner all in one person and in the circumstances he could not possibly derive any justice from the Commission.

14. It was further contended that the Commission failed to take into account relevant factors including the Petitioner's academic qualifications, academic documents, sterling performance, appraisals by various institutions including 2 Heads of State, outcomes of previous interviews, lengthy period of service within the Administration Police surpassing 30 years without any formal complaint, disciplinary proceedings, reprimands or any adverse proceedings against him having been employed as a Constable with the Administration Police in the year 1981 and rising through the ranks due to his hard work on merit up to his present status. By not referring to his achievements in the service, it was contended that the Commission lacked proportionality in the Decision rendered.

41. By leaking the information to the media before informing the Petitioner of the decision, the Petitioner contended that the Commission exhibited bad faith. Further, the composition of the

Commission inherently lacked fairness, there was conflict of interest and some of the Commissioners were of necessity biased as a number of the Commissioners including the 2 Deputy Inspector Generals were in direct competition with the Petitioner for the position of Inspector General of Police either upon the retirement of **Mr. David Kimaiyo** or the position falling vacant and it was in their interest to eliminate perceived competitors such as him. Taking into account the fact that he had vied for the position of the Deputy Inspector General of Administration Police whereby he competed with the current holder of the office, for him to sit in a tribunal judging his suitability is irregular and hence the decision lacked fairness by all standards. In his view, the decision to discontinue his service in the Administration Police based on his response to the question of the *Nyumba Kumi Initiative* is irrational as the commission took his statement out of context and it did not consider the next statement that he made in further elaboration of the explanation of the meaning of Community Policing.

Respondents' Case

15. In response to the application, the Respondents filed a replying affidavit sworn by **Johnstone Kavuludi**, the Commission's Chairman on 3rd April, 2014.
16. According to him, under section 7 of the Act, the Commission is tasked, with the mandate of vetting all officers of National Police Service with the objective of assessing their suitability and competence and also tasked with the mandate of discontinuing the service of any officer who fails the vetting. It was contended that constitution under Article 246 (3) provides the functions of the commission and includes any other functions prescribed by legislation hence the mandate of vetting all members of the service is a constitutional mandate of the commission. In carrying out the process, the Commission is expected to gather and disclose relevant information regarding the subject officers from various sources including members of the public and the entire process is to be guided by the principles of natural justice and the applicable law including the commission's vetting regulations.
17. Prior to the vetting date required the Petitioner to submit a duly completed vetting questionnaire and a declaration of income, assets and liabilities which the Petitioner did and the Commission invited the Petitioner to attend a vetting interview on 11th January 2014 for the purposes of the vetting and the Petitioner duly made himself available on that date and the interview was carried out in public and aired live on a number of television stations broadcasting and widely reported thereafter. Further, the Petitioner together with the members of his rank of Assistant Commissioner of police were invited for the purpose of sensitization on the vetting process in November 2013, and the Petitioner did attend.
18. While conceding that following the interview, the Commission delivered a decision signed by himself and 6 Commissioners namely **Ronald Musengi, Murshid Mohamed, Mary Owuor, David Kimayo, Grace Kaindi** and **Samuel Arachi**, it was the deponent's case that the aforesaid decision pursuant to Regulation 25(4) of the Regulations was written and signed by all Commissioners who decided the matter and that the Commission found the Petitioner was neither suitable nor competent to continue serving in the National Police Service in light of the vetting criteria. The deponent therefore denied that the procedure and the manner the vetting process is carried out is unconstitutional, unfair, illegal and does not adhere to the rules of natural justice which is suitably captured in the vetting regulations. Similarly, he denied that the commission erred in its approach and reiterated the process of Review is a further elaboration of the fair process which the commission has put in place and indeed the grounds for seeking a review by the vettees indicating the Application are captured under Regulation 33 of the vetting regulations which process the Petitioner did not take advantage of. To him, the Petitioner's refusal to subject himself to the Review process is due to there not being grounds for seeking such review hence his contentions and petition is not made in good faith and is an abuse of the court process.
19. In his view that the vetting interview is not a meeting of the Commission as alleged and that Regulation 10(1) of the Regulations states *inter alia* that the commission may constitute such number of panels and comprising such persons as the commission shall determine to ensure expeditious disposal of matters. Since the vetting interview is conducted by a panel pursuant to Regulation 10, the panel was properly constituted, and the decision made regarding the Petitioner was properly made.

20. However, in further elaboration as to meeting of the commission, the commission is properly constituted with regard to Article 250 (1) of the constitution and at any rate the different components of the commissions' membership as provided under Article 246 are always present. It was further averred that Article 250 (1) of the constitution of Kenya provides that a constitutional commission shall consist of at least three but not more than nine members.
21. While admitting that **Mr. Arachi** was not present at the Petitioner's interview, it was contended that despite the typographical error on the list of members present at the interview, it confirms the integrity of the Hansard itself and that what was captured is a true record of the interview.
22. On the quorum, it was contended that the issue of quorum applies to ordinary meetings of the commission and does not apply to the vetting process and it was asserted that the vetting panels were properly and legally constituted and that the Commission has requisite quorum. On the issue of conflict of interest in the vetting process it was contended that this is adequately addressed by regulation 6 of the regulations.
23. Whereas all vettees were required to furnish bank statements and others as admitted by the Petitioner in paragraph 24 of his affidavit, the Petitioner failed to submit his accounts and actively concealed his accounts statements despite being aware of the consequences of failing to submit required information to the commission, in that he duly completed his vetting questionnaire and accepted the statutory declaration therein. Under the vetting criteria captured in the vetting regulations, the deponent deposed financial probity is a material issue and the vetting panel required the Petitioner to produce his bank statements as the Petitioner acknowledges in his affidavit and averred that this was to establish the existence of the hitherto concealed bank account and did not warrant a recall to establish that fact.
24. According to the Respondents, the Commission is empowered to request for information from the public as well as any other source and may conduct any investigations to establish the veracity of the information received as per Regulations 15(1) and 9(2)(d).
25. It was the Respondents' case that the allegations made in paragraph 32 of the Petitioner's application is far from true since the mandate of the Commission is enshrined in Article 246 (3) (b) and does not take into account specific factors in isolation but considers all matters in totality as per Regulation 14 (2) in determining the competence of an officer. To him, the commission analyzed the Petitioner's professional conduct, work record and experience in arriving at its decision and only communicated the result of the vetting to the petitioner in the manner prescribed under regulations of the vetting process.
26. The Court was therefore urged that in keeping with the varied expectations of Kenyans this petition be dismissed with costs to the respondents.

Petitioner's Submissions

27. It was submitted on behalf of the Petitioner that since the issue of dating of the decision was not controverted based on **William Kinyanjui Onyango vs. IEBC & 2 Others Election Petition No. 2 of 2013** that omission vitiated the decision.
28. It was submitted that under paragraph 3 of the Second Schedule to the National Police Service Commission Act, the quorum of the meetings of the commission is required to have at least 5 member of the Commission excluding the ex officio members. As only 4 Commissioners were present during the interview, there was no quorum.
29. It was submitted for a person who did not conduct a hearing cannot have capacity to render a decision in the matters heard as to do so would amount to a miscarriage of justice. It was submitted that under Regulation 25(4) of the Regulations only the commissioners present can lawfully take part in the delivery of a decision. . Whereas only 4 Commissioners were present during the interview, the decision removing the petitioner from service was written by 7 Commissioners. In support of this submission the Petition relied on this Court's decision in **Republic vs. Complaints Commission Media Council of Kenya & Others ex parte Baraza Ltd [2013] eKLR.**
30. According to the petitioner, he was treated differently from his fellow officers who were recalled to clarify certain issues. Further the vetting panel exhibited hostility to the Petitioner.
31. Notwithstanding lack of complaint from a member of the public it was submitted that there was no evidence on the basis of which the decision could be arrived at. Further the Commission

arrived at a decision based on lack of factual evidence. At the interview, issues were raised which the petitioner was not prepared for. The Commission was further accused of having taken the role of the complainant, the prosecutor, the judge and the executioner all rolled into one.

32. It was reiterated that the composition of the commission lent itself to a conflict of interest.

Respondent's Submissions

33. On behalf of the Respondents it was submitted that the vetting process was not based on a complaint but on the competence of the officers concerned.
34. It was submitted that the issue of financial probity goes to integrity and there were certain things which the petitioner did not disclose.
35. Whereas the petitioner opted for the right of review, he did not appear for the same hence he is estopped from alleging that he was not heard.
36. While conceding that the decision was not dated, it was contended that that did not vitiate the decision. In the Respondents' view the right to be heard is not a full adversarial hearing.
37. The Court was urged not to go into the merits of the decision and dismiss the petition.

Determinations

38. Having considered the application, the response thereto, the submissions of the respective parties and the authorities cited this is the view of the Court on the matter.
39. The first issue for determination is the issue of the failure by the Commission to date its decision. That the decision was not dated is not contested. In fact it was expressly admitted in the submissions. The only issue that remains for determination is the effect of the said omission. The Petitioner relied on certain decisions of this Court and the Court of Appeal. However it must be remembered that the said decisions were based on the provisions of the ***Civil Procedure Rules*** which expressly require that judgements and rulings be dated. There was no corresponding provision cited in the Regulations. Even in ***Civil Procedure Rules***, where there is an express provision that decisions be dated in **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593** the Court of Appeal expressed itself as follows:

“While Order 20 specifically refers to judgements, it may be taken as offering a guide to the manner in which interlocutory orders should be given and, of course orders should be dated. Although the order presumably given on 2 September 1983 was not dated, the irregularity did not vitiate the ruling, having in mind the nature of the complaints raised. Nothing is said as to any fundamental effect of a lack of a date. It has not inconvenienced any party in taking any procedural step; it has not inconvenienced the parties in appearing at the time of delivering the order; it is not darkly suggested that the order was not in fact given. It is simply an irregularity, which embarrassed no one, and cannot be dressed up to the extent of vitiating the order.”

40. This is not to downplay the role of dates in judgements and decisions. It must always be remembered that the dating of decisions plays a very important role in any proceedings since the dating thereof more often than not triggers consequential proceedings such as an appeal and the right to lodge an appeal may well depend on the date of the delivery of the decision. However in proceedings before Tribunals it would be elevating procedural rules to a fetish if an otherwise valid decision would be vitiated simply because the same was not dated.
41. In my view, in exercising its jurisdiction under section 7(2) of the *National Police Service Act* with respect to the vetting of members of the police service, the Commission was exercising a special jurisdiction and as is the norm with such Tribunals, it was governed by less strict rules of evidence and procedure than the ordinary courts of law. Accordingly I am not prepared in the circumstances of this case and taking into account the provisions of Article 159(2)(d) of the Constitution to hold that the decision in question ought to be vitiated on that score alone.
42. The next issue is whether the composition of the vetting panel was proper. In **Immanuel Masinde Okutanyi & Others vs. The National Police Service Commission Petition No. 6 of 2014**

Consolidated with Misc. Appl.Nos 11 and 12 of 2014, this Court held that:

“...under section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.”

43. Accordingly, I do not find that the panel had to be constituted in the manner the commission would be constituted when conducting its business.
44. The petitioner also raised issues with respect to the fact that his record was not taken into account and that the same ought to have been taken into account in order to determine his suitability to serve. It must be noted that the matter before the Court is a Constitutional petition rather than an appeal. Whereas such issues which go to the merit may properly form the basis of an appeal, the same may not necessarily be grounds on which a Constitutional petition may be grounded. Those grounds, I agree with the Respondents could have properly formed a basis for review rather than a petition.
45. The next issue is whether the people who participated in the decision making participated at the hearing or the vetting process. It was admitted that **Samuel Arachi** was not present on the day of the vetting. Therefore from the harsard report the only commissioners who were present on 11th January, 2014 when the petitioner was being vetted apart from the Chairperson, **Mr Johnson Kavuludi**, were **Mr Murshid Mohamed**, **Mr Ronald Musengi** and **Ms Mary Owuor**. Absent with apology were **David Kimaiyo** and **Grace Kaindi**. However the decision was signed by **Johnston Kavuludi**, **Ronald Musengi**, **Murshid Mohammed**, **Mary Owuor**, **David Kimaiyo**, **Grace Kaindi** and **Samuel Arachi**. Therefore three of the signatories who signed the decision were not present at the time of the interview.
46. In Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003 the Court pronounced itself as follows:

“As the Constitution of the Provincial Land Disputes Appeals Committee is expressly provided for by statute, it may well be that the improper constitution thereof may deny the Committee the legal capacity to Act. Section 9(2) of the Land Disputes Tribunal Act stipulates that “for the purpose of hearing appeals from Tribunals in the province for which the Committee is constituted, the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioners. In this case, the Provincial Appeals Committee was made up of a chairman and four members. The decision of the committee was signed by the five persons who constituted the committee and they did so presumably because they were party to the said decision. In other words, the said decision was made by them.....Section 8(5) of the Land Disputes Act states that appeals are to be determined by “the Appeals Committee, which shall consist of three members appointed under section 9”.....Therefore in so far as the decision by the Appeals Committee herein was made by five persons, it follows that there were two persons who had no authority to be involved in that decision-making exercise and their involvement must be deemed to have invalidated the decision, as the extra persons could only be construed as strangers.”

47. In Republic vs. Complaints Commission, Media Council for Kenya & 2 others [2013] eKLR, this Court held as follows:

“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 Mwarua 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.”

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.
49. It was contended that presently the Commission does not have the proper quorum to undertake a vetting. It is not for this Court to decide that issue. If the Commission has no quorum the issue ought to be taken by the people who appear before the Commission or a proper case ought to be filed prohibiting an improperly constituted Commission from commencing the process.
50. It was also contended that the composition of the vetting or interviewing panel did not lend itself to a fair vetting process due to their competing interests with the petitioner's. Again that is an issue that ought to be properly taken up in a challenge to the provisions dealing with the composition of the vetting panel. I will therefore not delve into that issue.
51. On the issue that the Commission's decision to recall the other officers who were interviewed without similarly recalling the petitioner amounted to discrimination, in my view is not necessarily correct. The decision to recall ought clearly to be based on whether or not there is a need for clarification and the Commission cannot be enjoined to recall persons simply because other interviewees have been recalled in order to give the Commission company.
52. Having considered the issues raised herein, it is my view that the decision made by the Commission herein was clearly unprocedural, unlawful and unfair. It went contrary to the provisions of Article 47 of the Constitution and ought not to be allowed to stand. Fairness in any administrative or adjudication process requires that those who make a decision be the same people who sit at the hearing where a hearing has been conducted as opposed to where a decision is based merely on documentary evidence.
53. It was contended that the petitioner ought to have pursued the review process provided under the Act. However, as this Court held in **Immanuel Masinde Okutoyi & Others vs. The National Police Service Commission** (supra) review is an option if the Petitioners' grievances are restricted to merits of the decisions. Here the decision was clearly arrived at in violation of the provisions of Article 47 of the Constitution hence the existence of a provision for review cannot be held to bar the petitioner from invoking the jurisdiction of this Court under Article 165(6) of the Constitution.
54. Having arrived at the foregoing decision, it is unnecessary for me to make a determination as to whether the Commission in its conduct evinced a bias attitude or made a determination on matters which were not sufficiently brought to the petitioner's attention. However as held by this Court in **Immanuel Masinde Okutoyi & Others vs. The National Police Service Commission** (supra) whereas the mere fact that there are no complaints lodged against an officer with the Commission does not necessarily mean that a police officer ought not to be discontinued from service, it is imperative that the allegations made against a police officer be availed to him or her in good time to enable him or her adequately respond thereto. To confront an officer with allegations when their source cannot be vouchsafed is in my view an unfair.
55. With respect to the language employed, **Apaloo, JA** (as he then was) in **Haji Mohammed Sheikh T/A Hasa Hauliers vs. Highway Carriers Ltd. [1988] KLR 806; Vol. 1 KAR 1184; [1986-1989] EA 524** expressed himself as follows:

“If the Judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can

properly be faulted. But if there is evidence on record to justify the Judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation... One's experience teaches one that charges of bias or ill-will against a Judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the Judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate Court in substituting its discretion for that of the trial court regardless of the facts, or provide such Court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it."

56. It is therefore my view that this petition is merited and must succeed on the issue of fairness based on the participation in decision-making process by "strangers" who never participated in the interview process.

Order

57. Consequently the order which commends itself to me and which I hereby grant is that the proceedings and the decision of the Commission declaring that the Petitioner had failed vetting and further discontinuing the Petitioner from the Administration Police Service is hereby quashed.

58. I further direct that the Commission starts the process of vetting the Petitioner *de novo*. As I held in **Okutoyi's Case**, for as long as these allegations, which the National Police Commission deemed serious enough to warrant his discontinuation, remain un-cleared, there can be no confidence in the Petitioner as a member of the police force. In the interest of the administration of justice and in the interest of the Petitioner, the complaints against the Petitioner should be fairly investigated and determined and findings made one way or the other.

59. I however decline to award the petitioner compensation as sought as there is no sufficient material on the basis of which such compensation ought to be based.

60. The Petitioner will have the costs of this Petition to be borne by the 1st Respondent.

Dated at Nairobi this 30th day of September 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Thuita and Mr Kurauka for the Petitioner

Mr Kuria for the Respondent