



**REPUBLIC OF KENYA IN THE INDUSTRIAL COURT AT NAIROBI**

**JUDICIAL REVIEW NO. 9 OF 2014**

**(FORMERLY NAIROBI H.C. J.R NO. 350 OF 2013)**

**RULING**

**JAMES MWANIKI THATHI S/ACP; OGW**

**VERSUS**

**INSPECTOR – GENERAL & 4 OTHERS**

**DELIVERED BY**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW NO. 9 OF 2014**

**JAMES MWANIKI THATHI S/ACP; OGW..... EX PARTE APPLICANT**

**VERSUS**

**INSPECTOR – GENERAL.....1<sup>ST</sup> RESPONDENT**

**DEPUTY INSPECTOR – GENERAL .....2<sup>ND</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION .....3<sup>RD</sup> RESPONDENT**

**COMMANDANT GENERAL SERVICE UNIT .....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

The Applicant JAMES MWANIKI THATHI filed the application herein by way of Notice of Motion dated 7<sup>th</sup> October 2013 and filed in court on the same day. The application is brought under Order 53 Rules 1(1), (2) and (4) of the Civil Procedure Rules. The Applicant seeks the following orders:

1. That this Honourable Court be pleased to grant an order of certiorari directed against the Respondents to remove the proceedings (if any) and the decision of the National Police Service Commission made on 11<sup>th</sup> September 2013 removing the Applicant from Kenya Police Service for the purpose of it being quashed.
2. That this Honourable Court be pleased to grant an order of mandamus directed against the 1<sup>st</sup> Respondent (Inspector – General) to reinstate the applicant to the Kenya Police Service.
3. That the costs of this application be provided for.

The grounds upon which the application is brought are as follows:

1. That on 1<sup>st</sup> day of May 1988 the Applicant was employed in the Kenya Police Service as Police Constable Service No. 219237 until he rose to the current rank of Senior Assistant Commissioner of Police (a/ACP) thus as such he is a Gazetted Officer.
2. That the Applicant has been awarded a Presidential Award of the Order of Grand Warrior (OGW) and has often been commended for his exemplary performance and he has never received any formal complaint from his superior, the Commandant General Service Unit touching on his work performance.
3. That on 25<sup>th</sup> September 2013 the Applicant received a letter from the Deputy Inspector General (2<sup>nd</sup> Respondent) communicating information that the National Police Service Commission (3<sup>rd</sup> Respondent) vide a letter referenced NPSC/1/3/10/vol.1/32 dated 11<sup>th</sup> September 2013 made a decision to REMOVE the Applicant from the Kenya Police Service with effect from 3<sup>rd</sup> September, 2013.
4. That the decision in question was un-procedurally and unfairly arrived at being in contravention of the clear rules of natural justice as he was not called upon for a hearing of any complaint against him or even issued with a notice to show cause or of the intention to remove him from the Kenya Police Service and in clear breach of the following provisions of the law:
  - i. **Sections 46(1) and 87 of the National Police Service Act 211 in that the decision was made within involvement of the Internal Affairs Unit to investigate a complaint (if any):**
  - ii. **Articles 47, 50, 244, 246 & 249 of the Constitution.**
5. That the decision in question is also unreasonable Ultra vires as it seeks to terminate the Applicant's employment retrospectively and condemns the Applicant unheard and completely against nemo iudex in causa sua.
6. That process of arriving at the decision in question amounts to an infringement of the Applicant's Constitutional Rights enshrined under Articles 47, and 50 of the Constitution of Kenya, 2010.
7. That it is therefore in the interests of justice that this honourable Court be pleased to grant the orders sought in this application.

The application is supported by the affidavit of the Applicant and the statement of facts. In the statement the Applicant repeats the grounds on the face of the Notice of Motion which are also substantially the same grounds deponed in the Applicant's supporting affidavit.

The Respondents are the Inspector General, the Deputy Service Commission, the Commandant General Service Unit and the Attorney General.

The Respondents opposed the application and filed a Relying Affidavit of Johnstone Kavuludi, the Chairperson of the national Police commission.

In the affidavit Mr. Kavuludi depones that the applicant worked in the Police Service Unit until September, 2013 when he was retired in public interest. That the retirement was informed by various events. The affidavit sets out the background of the case.

The facts of the case are as follows:

The Applicant was employed as a Police Constable on 1<sup>st</sup> May 1998. He rose through the rank and at the time of his removal from the service he held the rank of Senior Assistant Commissioner of Police. He was deployed as Staffing General Officer. On 15<sup>th</sup> July 2011, the 4<sup>th</sup> Respondent who is the Commandant, General Service Unit wrote a letter to the then Commissioner of Police complaining about the Applicant citing several instances in which he alleged that the Applicant failed to carry out responsibilities assigned to him by the commandants. Among them was failing to make arrangements for burial of deceased colleagues, switching off his mobile phone so that he could not be reached, insubordination, drunkenness, absenteeism, failure to attend official meetings, discussing his superiors with junior officers and general poor work performance among others. The Commandant recommended that the Commissioner intervenes to arrest the Applicant's indiscipline and his redeployment. Upon receiving the letter from the Commandant, the Commissioner of Police issued a show cause letter to the Applicant dated 18<sup>th</sup> July, 2011, accusing him of the following:

- Your general work performance has deteriorated and you are most of the time pushed in order to meet deadlines.
- Do not accept constructive criticism as a way of correction from your superiors, terming such criticism as quarrels.
- Have no respect for the chain of Command in that you sent an officer junior to you to go and make some petition to the Commandant on your behalf.
- Exhibited complete disrespect to the commandant in that you walked out on him from his office when called to substantiate some allegations you had alleged earlier.
- Have lately taken to heavy drinking, and at times during office hours. This is affecting your performance.
- Have total disregard for authority and decorum in that you discussed the conduct of the Commandant and his Deputy in the officers' mess with other officers; and
- Are exhibiting a don't care attitude towards work, and in the general discharge of your duties.

The Applicant was given 2 weeks to respond. He responded by his letter dated 25<sup>th</sup> July 2011 denying the allegations against him. In the letter he stated the following:

1. I have worked to the best of my ability to serve the Unit and the Force at large, I have never been reprimanded or warned for poor work performance in the days I have served as the GSO. Except for the usual normal mistake any one makes in an office I have never done anything to warrant a serious allegation on my work performance.
2. I have always accepted constructive criticism from my seniors.
3. The allegation that I sent a junior officer to my Commandant to make a petition is false. The officer came with a request for an off duty and since I knew how the work situation was, I told him I could not forward the request for him. I instead went to the Commandant with wild allegations which I presume is because he views himself close to him.
4. I walked out on the Commandant because he seemingly was very agitated and I did not want any comment from me to be construed as an act of insubordination. I was neither being given a chance to explain myself.
5. I don't deny that I drink but I do this when I am not on duty. This has never affected my performance and none of my seniors has ever advised against this.
6. On the day it is alleged that I discussed the conduct of the Commandant or his Deputy at the Offices Mess, we had just concluded a meeting to organize funeral of a fellow officer and I was waiting for my supper as I normally take meals at the mess. So a fellow officer came requesting for permission as I have explained and I gave him an answer that it could not be possible with the then strength of Staff Officers. I never thought this was an issue.
7. I have never procrastinated any work nor failed to meet deadlines. Officers I have interacted with

can attest to this. I have given my vest to my official and private work. I am surprised this misunderstanding could take the turn it has taken.

On 25<sup>th</sup> August 2011 he received a warning letter from the Commissioner requiring him to refrain from engaging in further misconduct. He responded to the warning letter on 2<sup>nd</sup> September 2011 confirming that he had read and understood the contents of the warning letter.

On 18<sup>th</sup> October 2012 the applicant received a letter from the Commissioner following his annual staff appraisal for 2011/2012. The letter read as followings:

**OFFICE OF THE COMMISSIONER OF POLICE**

POLICE HEADQUARTERS

P.O. Box 30083

NAIROBI.

**Ref No.P/CONF/219237/83      18<sup>th</sup> October, 2012**

NO. 219237 MR. JAMES MWANIKI THATHI – S/ACP

Thro’

The commandant

General Service Unit

P.O. Box 49506-00100

**NAIROBI.**

**ANNUAL STAFF APPRAISAL REPORT – 2011/2012**

This is to advise you that your Appraisal Report for 2011/2012 has been submitted by the Commandant GSU.

Upon perusal of your appraisal report it is noted that you have strong points and weak areas you need to address. Your strong points are not overlooked. It has been noted that you were issued with a warning letter Ref.PF/CONF/219237/75 dated 25/08/2011 addressing some indiscipline issues. It has further been noted by your superior officer, that your “work output has drastically gone down due to your don’t care attitude and lack of commitment to work”.

I wish to bring these points to your attention and advice you to re-examine yourself and become the team leader you are meant to be.

**(MATHEW K. ITEERE) MGH, CBS, OGW**

**COMMISSIONER OF POLICE**

On 26<sup>th</sup> 2013 the Commandant wrote to the Deputy Inspector of Police requesting for redeployment of the Applicant. The letter is reproduced below for emphasis:

**OFFICE OF THE COMMISSIONER OF POLICE**

THE GENERAL SERVICE UNIT

HEADQUARTERS

P.O. Box 49506-00100

NAIROBI.

**Ref No.PF/CONF/219237/96 26<sup>th</sup> March, 2013**

NO. 219237 MR. JAMES MWANIKI THATHI – S/ACP

Deputy Inspector General

Kenya Police Service

P.O. Box 30083

**NAIROBI.**

**RE: REQUEST FOR RE-DEPLOYMENT NO. 219237 MR. JAMES MWANIKI THATHI, S/ACP**

The above named officer was deployed as the General Staff Officer (GSO) GSU Headquarters since May 2008 to date.

The holder of the said office is technically the 3<sup>rd</sup> in command according to GSU command hierarchy whose key mandate includes co-coordinating and supervising the functions of other staff officers at Unit Headquarters for smooth and efficient running of their offices.

These responsibilities have now proved to be heavy going to Mr. Mwaniki that calls for a push all the time (close supervision) hence not auguring very well to a senior officer of his status who is supposed to discharge his duties with limited guidance and watch.

He apparently demonstrated low degree of commitment and ability in shouldering his current responsibilities and his continued stay in similar office is creating Unit administrative hitches.

It is with this in mind that, I strongly request for the officer to be re-deployed outside the Unit in an office with less responsibility or non-command position.

I had earlier made a similar request vide my letter GSU.SEC.POL 1/2/7/VOL.111/127 dated 25<sup>th</sup> October 2012 (copy enclosed).

Submitted for your kind and favourable consideration please Madam.

**WILLIAM A. SAYIA, CBS, OGW**

**COMMANDANT – GENERAL SERVICE UNIT**

Upon receiving the letter, the Inspector General, National Police Service, David Kimaiyo, 1<sup>st</sup> Respondent wrote to the chairman, National Police Service commission requesting for redeployment of the Applicant on grounds stated in the letter from the Commandant. Upon receipt of the letter, the Commission decided to retire the Applicant in public interest.

It is against the retirement in public interest that the Applicant has filed this application.

In his replying affidavit sworn on 6<sup>th</sup> February and further affidavit sworn on 11<sup>th</sup> February 2014, the Mr. Kavuludi, the Chairman of the National Police Service Commission depones that “*the removal of the Applicant from office was done as per laid down procedure and the Applicant was given an opportunity to appeal against the decision*”.

The disciplinary procedure for Police Officers is provided for under Part X of the National Police Service Act 2012. Section 87 provides for the establishment of the Internal Affairs Unit whose responsibility is to:

- a. receive and investigate complaints against the police;
- b. promote uniform standards of discipline and good order in the Service; and
- c. keep a record of the facts of any complaint or investigation made to it.

Subsections 3, 4 and 5 of the Act provide for the procedure of the Internal Affairs Units as follows: In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution. The Unit shall investigate misconduct and hear complaints:

- (a) from members of the Service or members of the public;
- (b) at the direction of a senior officer;
- (c) on its own initiative; or
- (d) on the direction of the Inspector-General; or
- (e) at the request of the Independent Police Oversight Authority.

Notwithstanding subsection (4)(e) the Authority may at any time intervene and take over the investigations when they have reason to believe the investigations are inordinately delayed or manifestly unreasonable.

The disciplinary measures are provided for under section 89 as follows:

- (1) A police officer who commits an offence against discipline is liable to be punished by:
  - (a) reprimand;
  - (b) suspension;
  - (c) an order of restitution;
  - (d) stoppage of salary increments for a specified period of time, but not exceeding one year;
  - (e) reduction in rank;
  - (f) dismissal from the Service; or
  - (g) any combination of the punishments provided under this section.

(2) The police officer authorized to impose a penalty for a disciplinary offence, shall enter a record of such punishment, the date of the punishment and the offence for which it was inflicted on the record sheet of the police officer punished, a copy of which shall be forwarded to the Commission for review and confirmation.

(3) All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall comply with Article 47 of the Constitution.

(4) A police officer facing disciplinary action may be accompanied by another police officer of his choice for assistance and support.

(5) A police officer aggrieved by the decision may appeal first at the County level, then to the Inspector-General and then to the Commission in accordance with regulations.

(6) The sanctions under subsection (1)(c), (d), (e), (f) and (g) only take effect after approval and confirmation by the Commission.

Article 47 of the Constitution provides for fair administrative action. The Article provides as follows:

1) Every person has the right to administrative action that is 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) Parliament shall enact legislation to give effect to the rights

Consumer rights in clause (1) and that legislation shall:

(a) provide for the review of administrative action by a court or,

if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

The Applicant submitted as follows:

- i. Whether the process of removal of the applicant's was legal fair, constitutional and in conformity with Rules of Natural Justice.
- ii. Whether the Applicant is entitled to the remedies sought
- iii. Whether the Honourable Court ought to order for costs against the Respondents.

The Applicant relied on the case of Joseph Mwenda Mbuko V. Provincial Police Officer Central Province & 2 others (2013) eKLR and Evans Musa Cheptumo V. Jomo Kenyatta University of Agriculture & Technology (2008) eKLR. The Applicant also relied on the following case:

1. Gladys Boss Shollei V. Judicial Service Commission & Another (2014) eKLR.

The Respondent also relied on the following authorities:

1. Republic V Commissioner of Lands & Another (2013) eKLR
2. Miscellaneous Civil Application 58 of 2010
3. Council of Civil Unions V. Minister for the Civil Service (1985) AC 2

4. Republic V National Environment Management Authority (2011) eKLR
5. R V. Birmingham City Council, Ex Parte Ferrero Ltd (1993) 1 All E.R 530
6. Republic V National Environment Management Authority Ex Parte Coral Drive Luxury Homes Ltd (2012) eKLR
7. R v. Nema ex parte Sound Equipment Ltd (2011) eKLR

I have considered the arguments in the submissions by the parties, the authorities and the law. From the facts as I have recounted above it is clear that the applicant was never given a hearing at all before disciplinary action was taken against him. The Respondents did not comply with the procedure in the National Police Service Act for discipline of Police Officers. Secondly, he was punished twice for the same offence, having been issued a warning letter on 25<sup>th</sup> August 2011, the same grounds that were used to eventually remove him from service. This constituted a violation of his right not to be punished twice for the same offence.

In addition to the foregoing the penalty meted against the applicant was illegal. In the first place, the recommendation by the 4<sup>th</sup> Respondent was for transfer and not removal of the Applicant from service.

Secondly, the National Police Service Act does not provide for retirement in public interest.

From the foregoing I find that the Respondents not only infringed upon the Applicant's rights under Article 47 of the Constitution, but also violated the provisions of the National Police Service Act by failing to comply with the disciplinary procedure therein and meting out punishment that is not provided for under the Act.

I find that this case falls under the purview of Judicial Review. Consequently, this court must call for the decision of the National Police Service Commission made on 11<sup>th</sup> September 2013 removing the applicant from Kenya Police Service and quash it by an order of certiorari.

I further grant an order of Mandamus directing the National Police Service to reinstate the applicant to the Kenya Police Service. The Respondents will also pay the applicant's costs.

Delivered and Dated in open court this 17<sup>th</sup> day of October, 2014.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

Kasiani holding brief for Petitioner

No appearance for Respondents