



REPUBLIC OF KENYA

High Court at Meru

Petition 5 of 2011

IN THE MATTER OF SECTIONS 22(1) & 23(1) OF THE CONSTITUTION OF KENYA 2010

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
PURSUANT TO**

SECTIONS 27(1), 47(1) & 50 AND (2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOSEPH MWENDA MBUKO.....PETITIONER.

VERSUS

PROVINCIAL POLICE OFFICER, CENTRAL POLICE.....1ST RESPONDENT

THE POLICE COMMISSIONER.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

The petitioner, JOSEPH MWENDA MBUKO, was until 27th January, 2003, a Police Constable attached to Ruiru Police Station having been employed on 26th March, 1994 and having served for 9 years before his dismissal.

The petitioner through his petition dated 20th June, 2011 brought pursuant to Article 22(1), 23(1), 27(1), 47(1) and 50(1) and (2) of the Constitution of Kenya, 2010 seeks the following orders:-

- a) A declaration that his dismissal from the Kenya Police Force on 27/01/2003 was/is unlawful, unreasonable and unfair.***
- b) A declaration that his dismissal from the Kenya Police Force on 27/01/2003 was predicated upon skewed and biased findings uncorroborated by the evidence on record.***
- c) A declaration that the conduct of the Orderly Room proceedings was flawed in procedure as neither the complainant nor the listed witnesses testified.***
- d) A declaration that the petitioner was on 27/01/2003 dismissed from the Kenya Police Force on the strength of evidence that otherwise exonerated the petitioner from any wrong doing or default.***

e) A declaration that the charges preferred against the petitioner were not supported by the evidence adduced during Orderly Room Proceedings.

f) The Honourable Court to quash the decision made on 27/01/2003 dismissing the Petitioner from the Kenya Police Force.

g) An order directing the 2nd respondent to reinstate the Petitioner to the Kenya Police Force forthwith.

h) An order for compensation for wrongful and unlawful dismissal from the Kenya Police Force.

i) Any such other appropriate relief that the honourable court may deem fit to grant.

The petitioner's case is that on 27/1/2003 he was dismissed from Kenya Police Force on allegation of indiscipline. It is his contention that prior to his dismissal, he was subjected to a hearing commonly referred to in the forces as orderly room proceedings to establish the probability of the allegations against him and that after the testimony of three witnesses it was recommended that disciplinary action be taken against him leading to his dismissal and that being aggrieved with the said decision, he preferred an appeal and that to date he has never been informed of the outcome of the appeal despite making frantic efforts to establish whether the appeal was considered or not.

The petitioner further contends the entire process leading to his dismissal was illegal and wrongful as the Presiding Officer in the orderly room proceedings declined to summon both the complainant and the witnesses and that inter alia the Presiding Officer proceeded to recommend disciplinary action to be taken against the petitioner whereas the evidence on record did not disclose any default on petitioner's part.

The petitioner therefore contends his dismissal from the forces was improper and as a result of which his otherwise inviolable constitutional rights have been utterly infringed and tramped upon. He contends the entire process leading upto his dismissal as completely flawed and unprocedural thus rendering his dismissal unlawful, illegal, wrongful and unconstitutional. He cited amongst many reasons as Presiding Officer in orderly room proceedings declining to summon both the complainant and the listed witnesses who allegedly witnessed the alleged indiscipline, recommending disciplinary action to be taken against the petitioner whereas the testimony on record did not disclose any default on his part. That notwithstanding three witnesses were positive that the petitioner did not commit the alleged offence and that PWII stated the charges preferred against the petitioner had been "cooked". The petitioner further contended the entire orderly room proceedings were conducted with a pre-determined decision in mind thereby depriving him of his constitutionally guaranteed right to a fair hearing and lastly the 2nd respondent had deliberately declined to make a finding on his appeal thus denying him access to justice since filing of his appeal on 21st March, 2005, now 8 years down the line. The petitioner averred that due to the aforesaid dismissal he has suffered immense loss and suffering as his family to raise and maintain besides other numerous needs.

The respondents in this petition did not file any replying affidavit, but only a Notice of Preliminary Objection based on the following grounds:

1. That this petition offends the provisions Gazette Notice NO.1756 of practice and directions relating to filing of suits, applications, references in proper courts.

2. That this petition is devoid of merits as it does not disclose which fundamental rights of the petitioner have been violated.

3. That the petition herein is bad in law and an abuse of court process.

In this petition the respondents were given several opportunities to file their replying affidavit but failed to do so. That even after the court made an order for petition to be determined by way of written submissions and the respondents were served, they did not bother to file any written submissions,

consequently this court set date for judgment when time given for filing written submission expired.

Before I deal with matters raised in the petition I propose to deal with the respondents' preliminary objection though the same was not canvassed before me by the respondents. First and foremost the provisions of Gazette Notice No.1756 of Practice and Direction alluded to by the respondents to filing of suits, applications, references in proper court was not attached or produced to this Honourable Court. That the general submissions that the petition is devoid of merits as it does not disclose the fundamental rights the petitioner allege to have been breached is so wide and unsubstantiated. Under Article 23(1) of the Constitution of Kenya,2010 the duty of this court in considering application under the said Article is to determine whether or not there is violation or infringement or threat to, a right or fundamental freedom in the bill of rights and not whether the position offends certain provisions that might have been gazetted. The matter which this court is asked to adjudicate upon is brought under Article 23(1) of the Constitution of Kenya,2010 and as such the preliminary objection is without any basis and is therefore rejected.

Further to the above under Article 22 of the Constitution of Kenya,2010 every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened.

Article 47(1) of the Constitution of Kenya,2010 deals with fair hearing and provides:-

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

Also Article 50(1) and (2) of the Constitution of Kenya,2010 deals with fair hearing and provides as follows:-

“50. (1) 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.”

In the instant petition the issue is whether the petitioner was given a fair hearing. A fair hearing implies that the accused person is presumed innocent until the contrary is proved, is informed of the charge with sufficient details to answer it, to have adequate time and facilities to prepare a defence, to choose to be represented by, an advocate and to be informed by his rights promptly, to be informed in advance of evidence the prosecution intends to rely on and to have reasonable access to that evidence, to adduce and challenge evidence and the evidence against him not to be selectively adduced or deny producing any evidence simply because it is not supportive of the charge. The opportunity must be a fair, reasonable, and full of effective opportunity subject to expeditious disposal of the matter, bringing finality to the dispute and preventing an abuse of the court process.

Section 5(1) of the Police Act empowers the Commissioner of Police to issue administrative orders, to be called FORCE STANDING ORDERS, not inconsistent with the Constitution or provisions of the Act for the general control, direction and information of the force. Disciplinary proceedings in the Police Force are governed by Chapter 20 of the Force Standing Orders(Revised Edition 2001(1962) (hereinafter “the Standing Orders”).

The Standing Orders make provision for discipline generally under Section 16(x) and sets out the procedure for conduct of disciplinary proceedings as follows:-

“In all inquiries, the proceedings shall be conducted in the following manner:-

(a) The Presiding Office shall ascertain from the accused whether he/she has been notified in writing of the alleged offence against discipline as required in subparagraph(vii) above,

(b) When the provision to subparagraph (vii) above has been invoked, the Presiding Office shall so inform the accused and the reason shall be recorded in the proceedings.

- (c) The President office shall inquire from the accused whether he/she wishes to be assisted in his/her defence by a police officer who should not be above the rank of the presiding officer and must be serving within the same province.*
- (d) When an accused person wishes to be so assisted in his/her defence, the Presiding office shall consider the application and may make recommendations to the Officer in Charge of the division or formation in which the accused is charged or stationed.*
- (e) The details of the alleged offence against discipline shall be read to the accused in a language which he understands and he/she shall be required to plead thereto, and the pleas of the accused shall be recorded in his/her own words and he/she shall be required to sign such record.*
- (f) When the accused admits his/her guilt, a plea of guilty shall be recorded in his/her own words (in unambiguous terms) and he/she shall be convicted thereof.*
- (g) When the accused denies his/her guilt, a pleas of not guilty shall be entered by the Presiding Officer who shall proceed to record the substance of the evidence of the witnesses,*
- (h) Each witness shall be examined separately in the presence of the accused,*
- (i) Each witness may be cross-examined by the accused or by the police officer appointed to assist him/her in his/her defence, as the case may be, and may thereafter be re-examined by the police officer appointed under subparagraph (v) of paragraph 16 above.*
- (j) The evidence of each witness may be given on oath or affirmation if this appears to be necessary, on the directions of either the Commissioner of Police or the Provincial Police Officer or at the discretion of the Presiding officer.*
- (k) At the close the evidence in support of the alleged offence against the discipline the Presiding Officer shall, if he/she considers that no offence has been disclosed, acquit the accused and he/she shall record in writing his/her reasons for so doing.*
- (l) If at the close of the evidence in support of the alleged, offence against discipline, the Presiding Officer is of the opinion that sufficient evidence has been adduced against the accused to put him/her on his/her defence, he/she shall once again inform the accused of the substance of the allegations against him/her, and inform him/her that he/she has the right to give evidence on his/her own behalf and to calls such witnesses in his/her defence as he/she may wish;*
- (m) The Presiding Officer shall inform the accused that if he/she gives evidence on his/her own behalf he /she will be liable to cross-examination;*
- (n) The presiding officer shall record the evidence of the accused, if any, and shall then record the evidence of the witnesses for the defence in the same manner as that prescribed in subparagraph (g) above,*
- (o)When all the evidence has been recorded the president Officer shall review it, prepare a summary, showing the reasons for his/her findings, record a verdict and shall convict or acquit the accused as the case may be,*
- (p) Before awarding punishment against the accused the Presiding Officer shall inform him/her that he/she may make a statement in mitigation or sentence and he/she shall record such statement which will be signed by the accused,*
- (q) Having considered the accuser's statement in mitigation of sentence and his/her record of service, the Presiding officer shall award punishment against the accused.*

(r) If, having regard to the gravity of the offence against the discipline and to the accuser's record of service, the presiding officer is of the opinion that the punishment he/she is empowered to award is insufficient, he/she may remit the proceedings to the officer of a more senior rank, who may proceed to award punishment against the accused;

(s) When in any inquiry the Presiding officer is of the opinion that the offence has been proved against the accused, but is of the opinion that, having regard to the accused's record of service, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is inexpedient to award any proceedings to conviction make an order dismissing the charge;

(t) The accused shall be informed of the finding and sentence and of his/her right to appeal under paragraph 24 of this Chapter;

(u) If the accused does not wish to appeal, the Presiding Officer shall so record in the proceedings and the accused shall sign such record.

xi. When any inquiry or part of an inquiry is conducted in a language not understood by the accused, the presiding officer shall appoint a police officer or other person to act as interpreter. Such appointment shall be recorded in the proceedings.

xii. The Presiding Officer may, at any time in an inquiry, order the production or any document which he/she considers will assist him in arriving at a fair and just verdict.

xiii. The Presiding officer may, at any time in an inquiry, in order to obtain proof of any relevant fact or to clarify any point in the evidence of any witness ask such witness any questions he/she considers necessary."

From the rules set out above it is clearly demonstrated that Police Officers facing disciplinary proceedings are by law entitled like any other citizen to due process. These principles in my view, accord to the principles of Article 47(1) and 50(1) and (2) of the Constitution of Kenya, 2010 and adhere to the rules of natural justice and in conduct of disciplinary proceedings, the police Force is obliged to follow them to the letter.

According to the petitioner's assertions which remain uncontroverted and unchallenged the respondents did not call the material witnesses and the recommendation for disciplinary action was taken without any evidence in support. That the decision had been pre-determined and not based on evidence. Further the then Central Province Police Officer, Peter M. Leiyan, D.S.M in his recommendation dated 21st March, 2005 in considering the petitioner's appeal for onward transmission to the then Police Commissioner for determination noted numerous inadequacies in the conduct of the orderly proceedings that led to the petitioner's dismissal. He even recommended the petitioner be re-instated. It can be noted once again the contents of the recommendation of the then Central Provincial Police Officer has not been challenged by the respondents despite having had an opportunity to do so. It is not in dispute that the petitioner has over the years made frantic efforts to establish whether the appeal was considered or not as per several annexures to the petition. The respondents once again did not bother to furnish petitioner with any response or reply.

In the circumstances I find the proceedings leading to the dismissal of the petitioner were conducted in breach of the provisions of the STANDING ORDERS on discipline and as a result the petitioner's rights to fair hearing guaranteed by Article 47(1) and 50(1) and (2) of the Constitution of Kenya, 2010 were violated.

The petitioner's counsel has submitted that the petitioner is entitled to damages for wrongful violation of his Constitutional rights and wrongful dismissal to the tune of Kshs.2,000,000/= for period of time since he was dismissed until determination of this petition.

I have difficulties in understanding the petitioner's basis of seeking general damages to the tune of Kshs.2,000,000/=. I believe it is not the law that one be paid for services not rendered. I note further in the petitioner's affidavit there is no evidence to show what the petitioner's earnings were per month. I hold that the parties should always understand even in Constitutional matters, claim for monetary compensation should be supported by evidence with specific figures to guide the court in determining the sum due or awardable to the petitioner, though general damages are preserve of the court as they are discretionary.

I therefore ask should I award the petitioner compensation for violation of his rights? The remedy to which the petitioner is entitled to is clearly set out under Article 23(3) (e) of the Constitution of Kenya,2010 whether pleaded or not, the fact of breach of fundamental rights will in appropriate cases attract the remedy and the remedy is at the discretionary of the court. In the instant case the petitioner would be adequately compensated for the pain and suffering he has undergone all those years by way of monetary compensation.

On the issue of petitioner's reinstatement I do not think this is a proper case for reinstatement or order the proceedings be commenced afresh. The petitioner was dismissed from Police Force on 27th January, 2003,over 10 years ago. Police Force is a disciplined Force and I am of the view that reinstating the petitioner to force after such a long period of absence would not be in the best interest either the petitioner or the public. Similarly if I were to order fresh trial at this time it may be impossible to have a fair adjudication conducted as it may be impossible to get witnesses and witnesses may not remember what clearly happened 10 years down the line or none of the witnesses would be traceable or willing to give evidence.

I therefore enter judgment for the petitioner against the respondents jointly and severally as follows:-

a. I declare that the petitioner's rights under Article 47(1) and 50(1) and (2) of the Constitution of Kenya,2010 were violated by conduct of proceedings of the Orderly Room Proceedings of 23rd December, 2002 which was flawed in procedure and the basis of petitioners dismissal from Kenya Police Force and the charge against the petitioner was not supported by evidence and subsequently those proceedings and the dismissal of the petition by a letter dated 29th January,2003 from Kenya Police Forces are null and void.

b. That as a result of breaches aforesaid the petitioner has been unfairly treated and subjected to serious economic hardship and deprived his right to livelihood and I order compensation in global sum of Kshs.1,000,000/- for violation of his rights by the respondents jointly and severally.

c. I award interest of (b) above at court rates from the date of judgment.

d. I award petitioner costs of this petition against the respondents jointly and severally.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF MARCH,2013.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Murango Mwenda h/b Mr. M. Kariuki for the petitioner
2. N/A for the respondents.

J. A. MAKAU
JUDGE