



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

PETITION NO. 513 OF 2012

BETWEEN

EVANS NYAMBEGA AKUMAPETITIONER

AND

THE ATTORNEY GENERAL1ST RESPONDENT

NATIONAL POLICE SERVICE

COMMISSION.....2ND RESPONDENT

MR. JOHNSTONE M. KAVULUDI.....3RD RESPONDENT

AND

ALBERT MULINDI.....1ST INTERESTED PARTY

SAMUEL MUIGAI NG'ANG'A.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. Evans Nyambega Akuma, the Petitioner herein is a Kenyan committed to the implementation of the Constitution and particularly concerned about probity in appointment to public office and hence his Amended Petition dated 17th December 2012.
2. Although that Amended Petition is not a good example of elegance in the drafting of Court documents, I can summarise his case as follows;
 - i) *that the process leading to the establishment of the National Police Service Commission (the 2nd Respondent) was irregular and not in line with the provisions of the National Police Service Act.*
 - ii) *that the 3rd Respondent, Johnstone Kavuludi was and is unqualified to be the Chairman of the National Police Service Commission.*

iii) that the appointment of David Kimaiyo, Francis Ndegwa and Samuel Arachi as Inspector-General and Deputy Inspectors- General respectively was irregular and unlawful.

3. For the above reasons, he seeks the following orders;

“a) Nullification of any work or duties he has undertaken or executed because it will be unconstitutional null and void” (sic).

Presumably, this order is sought against the 3rd Respondent.

b) An order of Judicial Review of “his appointment”.

Presumably, again this order is sought as against the 3rd Respondent.

c) The National Police Service Commission “be declared unfit to serve”.

I understand this to mean that all members of the Commission should be declared unfit to serve as such.

d) That all pending advertisements made by him on “the strength of the National Service Commission” be quashed.

I presume that this order is targeting advertisements for the positions of Inspector General and his Deputies.

e) An order of Certiorari to quash the “nominations of Mr. Francis Ndegwa, Samuel Mwangera Arachi and David Kimaiyo aforesaid and that new persons be recruited in their place”.

f) Costs”.

Case for the Petitioner

4. In his Written Submissions, the Petitioner titled the same, “*Final Submissions for removal of Johnstone Matenyi Kavuludi as a Chairperson of the National Police Service Commission ...*” and all that he has stated herein points to the singular issue whether Kavuludi aforesaid is fit to hold the position of Chairperson of the Commission. Looking at the prayers sought in the Petition and the Submissions by the Petitioner, it seems to me that it is therefore Kavuludi's appointment that is being challenged and that all other issues complained of, flow from that fact and to that extent are inter-related.

5. In any event, the Petitioner's main argument is that the 3rd Respondent was not properly appointed the Chairperson of the Commission because firstly, he lacked the necessary qualifications under **Section 5** of the **National Police Service Commission Act** as he was not and is not qualified to be appointed a Judge of the High Court; That the said Kavulundi is said to be a holder of a Bachelor of Education degree obtained from Kenyatta University in 1977 and his work experience is limited to service as an officer in the Ministry of Education and later, the Ministry of Labour; that therefore he has no educational and other experience that would make him eligible as a judge of the High Court and therefore as Chairman of the National Police Service Commission.

6. Another complaint made against Mr. Kavuludi is that he lacks integrity and his past conduct is inconsistent with *inter alia*, **Article 73(1) (a), (ii),- (iv) and (b)** of the **Constitution, 2010** and certain allegations are made relating to inappropriate conduct in that regard but of relevance is that while at the Highridge Teachers College he was interdicted for alleged misappropriation of monies belonging to the Institution and later as Commissioner for Labour and Permanent Secretary, Ministry of Labour, he was allegedly involved in unethical professional conduct.

7. The Petitioner goes further to allege that even after he was appointed Chairman of the National Police Service Commission, the said Mr. Kavuludi, proceeded to advertise for, and was later involved in the recruitment of persons to the offices of Inspector- General and his Deputies contrary to the Constitution and the relevant Statute.

8. The specific Complainant in that regard is that the said persons were unqualified to hold the said positions and that their positions should be re-advertised to enable qualified and untainted persons apply for, and be appointed as such.

9. I consider other issues raised in the Petition and the Submissions of the Petitioner irrelevant, speculative and personal to the Petitioner and should best be left as they are. I say so with respect to the Petitioner who exhibited exemplary zeal and passion in the pursuit of his Petition.

Case for the Respondents

10. The Respondents were all represented by the 1st Respondent, the Attorney-General, and their response to the Petition is contained in Affidavits sworn by the 3rd Respondent in his personal and official position as Chairman, National Police Service Commission. Their case is straightforward; that the Petition is misguided, incompetent and without merit for the following reasons;

i) *That the process of appointment of the 3rd Respondent and all members of the National Police Service Commission was procedurally done and lawfully made in accordance with **Article 246 of Constitution and Sections 5, 6 and 12 of the National Police Service Act, No.3 of 2011.***

ii) *That regarding the 3rd Respondent's alleged lack of integrity and lack of suitability for appointment to the position of Chairman of the Commission, the Selection Panel invited views on the subject from any person with such information and that no such information was presented under **Article 10 and Chapter Six of the Constitution as well as Section 42 of the Leadership and Integrity Act, No.19 of 2012.***

iii) *That the Petition raises no constitutional issue for determination and no violation or breach of any fundamental right has been properly exhibited.*

iv) *That therefore the Petition is without merit and should be dismissed with costs.*

Opinion

11. I have considered the pleadings, submissions and the totality of the case before me and I should now give my opinion as follows;

Firstly, the composition of the National Police Service Commission is governed by **Article 246(1) and (2) of the Constitution** which provides as follows;

“(1) There is established the National Police Service Commission.

(2) The Commission consists of—

(a) the following persons, each appointed by the President—

(i) a person who is qualified to be appointed as a High Court Judge;

(ii) two retired senior police officers; and

(iii) three persons of integrity who have served the public

with distinction;

(b) the Inspector-General of the National Police Service; and

(c) both Deputy Inspectors-General of the National Police

Service.”

It is obvious therefore that the 3rd Respondent, who was a long-serving officer in the public service could only meet the criteria set out in 2(a) (iii) above and not 2(a) (i) as read with **Article 166(5)** of the **Constitution**, the latter which sets out the qualifications for appointment of persons to the office of judge of the High Court. I will revert to the issue of integrity, or lack thereof, shortly.

Secondly, regarding the appointment of the Chairperson of the Commission, the criteria is set out in **Section 5** of the **National Police Service Commission Act** which provides as follows;

“(1) A person shall be qualified for appointment as chairperson or a member if such person

a. is a citizen of Kenya;

b. holds a degree from a university recognized in Kenya;

c. meets the requirements of Chapter Six of the Constitution, and

(d) is not, and has not previously been a member of the National Police Service.

(2) For purposes of Article 246 (2) (a) (ii) of the Constitution, the President shall appoint two retired senior police officers, one each from the Kenya Police Service and the Administration Police Service, and who shall be of opposite gender.

(3) A person shall not be qualified for appointment under subsection (2) unless the person held the rank of senior superintendent of police or above.

(4) A person shall be qualified for appointment as a member under Article 246 (2) (a) (iii) of the Constitution if the person possesses the following additional qualifications—

(a) holds a degree from a university recognized in Kenya;

(b) has at least ten years’ experience in any of the following disciplines—

(i) finance and administration;

(ii) economics;

(iii) human resources development and management;

(iv) public administration;

(v) labour laws;

(vi) economics;

(vii) law;

(viii) human rights;

- (ix) ethics and governance;*
 - (x) mediation and consensus building; and*
 - (c) change management.*
 - (d) is not and has not previously been a member of the National Police Service; and*
 - (e) has had a distinguished career in their respective fields.*
- (5) A person shall not be qualified for appointment as a chairperson or member if the person—*
- (a) is or has been at any time within the previous five years a member of Parliament or a county assembly;*
 - (b) other than the Inspector-General or Deputy Inspectors-General, is a serving State officer;*
 - (c) is a member of a governing body of a political party;*
 - (d) is an undischarged bankrupt;*
 - (e) has been convicted of a felony; or*
 - (f) has been removed from office for contravening the provisions of the Constitution or any other law.*
- (6) Subsection (5) (a) shall cease to apply to a person after one general election for Parliament has been held since the person ceased to hold such office.”*

13. Again, it is obvious that the 3rd Respondent was indeed qualified to be appointed as chairperson for the simple reason that the Petitioner admitted that the 3rd Respondent had a long career in public administration and was both Commissioner of Labour and Permanent Secretary, Ministry of Labour and so was within the criteria set out above.

14. The above findings quickly dispose of the first set of complaints by the Petitioner and thirdly therefore, regarding whether Mr. Kavuludi lacks the requisite integrity to hold the office of Chairperson of the Commissioner, I will dispose off this issue by stating that the 3rd Respondent is already in office and therefore his removal must be guided by the Constitution and the Act.

I also agree with the Respondents that the Petitioner had an opportunity to question the 3rd Respondent's integrity before the Selection Panel constituted in accordance with **Section 6(1)** of the **Act**. Apparently he did not. Once the 3rd Respondent therefore took office, his removal for alleged lack of integrity can only be done, not by a direct Petition to this Court, but by following the procedure set out in **Section 42** of the **Leadership and Integrity Act No.19 of 2012** which provides as follows;

“(1) A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.

(2) A public entity may authorize any of its officers to inquire into a complaint on its behalf and determine whether a State officer has contravened the Code.

(3) An investigation may be made at the instance of a public entity.

(4) A State officer being investigated under this section shall be informed by the investigating

authority, of the complaint made against that State officer and shall be given a reasonable opportunity to make a representation relating to the issue, before the investigation is concluded.

(5) A person who has lodged a complaint against a State officer shall be entitled to be informed of any action taken or to be taken in respect of the complaint and shall be afforded a hearing.

(6) Where an investigation under this section is initiated while the State officer is in office, it may be continued even after the person under investigation has ceased to be a State officer.

(7) Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.

(8) The Commission shall prescribe disciplinary mechanisms and procedures to be followed in the event of contravention of the Code, and those mechanisms and procedures shall comply with Article 47 of the Constitution or any other applicable written law for the time being in force.

(9) The public entity or an authorized officer may take disciplinary action against a State officer serving in the public entity. ”

Further, **Article 251** of the **Constitution** provides that a member of any of the Commissions mentioned in **Article 248** of the **Constitution** can be removed from office on various specific grounds including “serious violation of [the] Constitution or any other Law including a contravention of **Chapter Six**” (the **Chapter on Leadership and Integrity**).

The procedure for removal is set out in **Article 258 (2), (3), (4), (5), (6) and (7)** which involves the setting up of a Tribunal which shall investigate any complaints against a member of a Commission and if it recommends removal, then the President shall act in accordance with that recommendation and remove the officer from office.

15. Clearly, the Petitioner has not followed the above procedures and this Court cannot purport to delve into the matter to the exclusion of the right bodies to do so. There is now a long list of authorities that where the Constitution or a Statute has donated powers to certain institutions to undertake certain lawful processes, Courts should be slow to assume those powers - See for example **Speaker of the National Assembly vs. Karume, Civil Application No.92 of 1992** and **Jimmy Mutinda vs. Independent Electoral and Boundaries Commission & 2 Others and Ex parte Sheilesh Kumarnata Verbai Patel & 20 Others (2013)eKLR**

I agree with the above decisions and will apply them squarely to this case and I need not say anything more.

Fourthly, the last issue to address is whether appointments of the Inspector-General and his deputies was unlawful. On this issue, once the other issues have been addressed above and a finding made that the Commission and its Chairperson were lawfully in office, their actions, save any unlawful ones, in that capacity cannot be faulted. I have in any event seen no evidence in the instant Petition of any such unlawful actions including the appointments made by the Commission. Further, the named individuals including David Kimaiyo were never party to these proceedings and it is trite that in the circumstances, no adverse orders can be made against any of them.

16. While encouraging the Petitioner to continue his crusade for adherence to the Constitution by all public and other officials, his crusade in the present Petition lacked direction and I have said why.

17. I will quickly dismiss the Petition but will order that each party should bear its own costs. I say so because I saw no personal gain that the Petitioner was going to obtain even if the Petition had succeeded.

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner present

Mr. Ojwang for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE