



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 29 OF 2011

BETWEEN

JOSEPH SITONIK PETITIONER

AND

THE ATTORNEY GENERAL1ST RESPONDENT

THE COMMISSIONER OF POLICE2ND RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner was, at the time material to this case, employed by the Kenya Police General Service Unit (GSU). He was employed on 23rd March 2002 and as at 30th September 2008 was based in Molo Reece Company.

2. The petitioner avers that he was accused of being found in motor vehicle registration GKA 906Q lorry which was carrying logs of wood from Longman Forest. He was arrested when he was called on 1st October 2008 from the GSU Molo Camp (Jolly Farm) to visit Molo Police Station to record a statement in relation to the incident.

3. Upon visiting Molo Police Station on 1st October 2008 at around 5pm, the petitioner was arrested and detained for 2 days. He was only informed of his dismissal through a signal that he had been dismissed from the Kenya Police Force with effect from 4th October 2008. The letter dated 4th October 2008 stated as follows:

PF/8064/2002022325/57

4th October, 2008

Thro'

*The Officer Commanding
'T' Company
MOLO*

DISMISSAL FROM THE KENYA POLICE FORCE

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

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

PARTICULARS -NO. 80647/2002022325 OC JOSEPHAT SITONIK OF THE OFFENCE (DEF).

On the 30th day of September 2008 at 10.00 p.m. at Longman forest within Nakuru District of Rift Valley province you were guilty of an act to the prejudice of good order and discipline in that you were arrested by forest guards having felled, loaded and in the process of transporting 47 logs in a Government M/v registered number GK A906Q Isuzu Lorry illegally.

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

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

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

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

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

P.N. OKERI

FOR: COMMANDANT – GSU

4. The petitioner was shocked that orderly room proceedings were carried out on 1st October 2008 in his absence on day he reported to Molo Police Station to record a statement. He lodged an appeal against the dismissal. The appeal was supported by his superior who also made a report supporting the petitioner's appeal. That appeal was dismissed by the GSU Commandant by communication dated 19th November 2008. The petitioner did not appeal further to the Commissioner of Police although he was entitled to.

5. The petitioner's contention is that he was not subjected to any internal disciplinary procedures and or given an opportunity to defend himself. He avers that a full orderly room proceedings was conducted without his knowledge or participation. He was therefore condemned unheard and the proceedings were in total contravention of the law.

6. The petitioner also avers that his detention for 2 days without charge and prior to his dismissal was a contravention of his fundamental rights and freedoms.

7. The petitioner contends that the respondents' actions were contrary to **Articles 47, 48 and 50** of the Constitution. He seeks relief from this court for contravention of his rights.

Respondents' Case

8. No replying affidavit was filed on behalf of the 2nd respondent. The respondents filed grounds of opposition dated 8th June 2011 where they opposed the petition on the following grounds;

- (a) The application has invoked the wrong procedure of law by seeking to compel the 2nd respondent to reinstate the petitioner's employment via a constitutional petition.
- (b) That the **Police Force Standing Orders** provides for a trial in absentia under **section 16(iv)** of **Chapter 20**.
- (c) That the petition has not exhausted the remedies provided for in the **Police Act (Cap 84)** and the **Force Standing Orders**.
- (d) That the application lacks merit and should be dismissed with costs.

9. In order to support the objections counsel for the respondents adopted the written submissions dated 23rd July 2011. Counsel relied on the cases of **Steven Pareno v Judicial Service Commission Nairobi HCMisc. No. 1025 of 2003 (Unreported)** and **Republic v Judicial Service Commissions ex p Colletta Osyanjju Khaemba Kisumu HC Misc. App. No. 30 of 2005 (Unreported)**. In both cases the court upheld the private law public law dichotomy in respect of cases of dismissal from the public service. The court was of the view that the subject of employment did not have the underpinnings that brought the claims into the realm of public law in order to attract judicial review remedies. On the basis of these cases, the respondents' counsel urged me to dismiss this petition.

Failure to file Replying Affidavit

10. The petitioner has set out in his petition, supporting affidavit sworn on 16th February 2011 and further affidavit sworn on 10th November 2011 detailed facts relating to his ordeal resulting in his dismissal from the Police Force on 4th October 2008. These facts are neither contested nor contradicted. In the circumstances they must be taken as true and correct.

11. This matter came up several times on 21st February 2011, 15th March 2011, 8th June 2011, 4th July 2011, 9th November 2011 and 14th December 2011 where the respondents were given the opportunity to respond to the petitioner's allegations. Mr Kipkoge, counsel for the respondents, informed the court that in fact he had written to the Police Department several letters from May 2011 up to December 2011 but to no avail.

12. I will therefore assess the facts as stated by the petitioner and determine whether they disclose a violation of the Constitution.

Applicable Constitution

13. The petitioner has made his claim by invoking **Articles 47, 48 and 50** of the Constitution. The acts complained of took place in the year 2008 prior to the promulgation of the Constitution. As the Constitution is not retrospective, it is the former Constitution that is applicable to the circumstances (see the case of **Joseph Ihura Mwaura & 82 Others v The Attorney General and Others Nairobi Petition No 498 of 2009 (Unreported)** at *paragraph 26*). I shall therefore construe the petition as one brought under the former Constitution and any reference to the Constitution shall be the former Constitution.

Issues of Determination

14. The arrest of the petitioner and detention for 2 days prior to his dismissal on 4th October 2008 has not been contested by the respondents. The respondents have not proffered an explanation to demonstrate that the arrest and detention was necessary and reasonable (see the case of **James Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 (Unreported)**). I therefore find the petitioner's right guaranteed under **section 72(3)** of the Constitution infringed.

15. The only issue for determination is whether the petitioner was afforded a fair hearing in accordance with **section 77(9)** of the Constitution.

16. Before considering this issue I will deal with the legal points raised in the grounds of opposition

filed on the respondents' behalf.

Employment Claim versus Constitutional Petition

17. The argument that the petitioner ought to have pursued an ordinary employment claim rather than filing an enforcement action under **section 84** of the Constitution was consigned to the dustbins of history by the Court of Appeal in decision of ***Rashid Allogoh & Others v Haco Industries Ltd Nairobi Civil Appeal No. 498 of 2009 (Unreported)***.

18. In that case, the High Court had struck out the petition lodged by the claimants on the basis that it was essentially an employment claim. The Court of Appeal reinstated the matter and held that the duty of the court in considering an application under **section 84** of the Constitution is to determine whether or not there is a violation of fundamental rights or freedoms and not whether a matter is contractual or otherwise.

19. Thus following the ***Rashid Allogoh Case***, the question for consideration in this petition brought under **section 84** of the Constitution is not whether the matter is of a private or public nature but whether a violation or infringement of the petitioner's fundamental rights under the Constitution is disclosed. If it is not, the matter comes to an end.

20. The private law or public law dichotomy is peculiar to judicial review proceedings where the court exercises jurisdiction derived from **section 8** of the ***Law Reform Act (Chapter 26 of the Laws of Kenya)***. The matter I am asked to adjudicate upon is brought under **section 84** of the Constitution as such the authorities cited by the respondents are not relevant.

Exhaustion of remedies

21. The respondents contend that the petitioner has not exhausted the remedies provided for in the ***Police Act*** as there is a right of appeal to the Commissioner of Police. Once again, this argument lacks merit. **Section 84** of the Constitution provides that the relief provided there under is ***“without prejudice to any other action with respect to the same matter which is lawfully available”***. This means that a person need not exhaust any procedure provided under statute or seek any other relief before moving the court for the enforcement of fundamental rights and freedoms under the Bill of Rights.

22. The purpose of **section 84** is to provide unhindered access for the protection of fundamental rights and freedoms. I would do no better than quote the case of ***Church Road Development Company Ltd v Barclays Bank of Kenya Limited [2007] 1 EA*** where the court stated, *‘It is then immediately clear that the Plaintiff’s right to lodge the petition under section 84(1) of the Constitution is without prejudice to any other cause of action available to him. It is therefore not a sufficient answer, as far as this present application is concerned, that the plaintiff ought to have lodged an Appeal against the two orders complained of. It was entitled to bring the petition (and the application within the petition) notwithstanding its right of Appeal.’*

Right to a fair hearing

23. **Section 77(9)** of the Constitution provides as follows;

A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

24. The contents of **section 77(9)** are the constitutional embodiment of the rules of natural justice which our courts have from time to time elucidated at great length. The two aspects of the rule of natural justice are embodied in two Latin maxims and include the following; the *nemo iudex* rule that no man shall be a judge in his own cause and the *audi alteram partem* rule that is the right to a fair hearing (see ***Charles Kanyingi Karina v Transport Licensing Board Nairobi Misc. Apply No. 1214 of 2004***

(Unreported), *Mwongera Nkwaru v M'Linturi M'Libachi Meru* HCCA 127 of 1999 (Unreported), *Pashito Holdings Limited and Others v Paul Ndungú and Others* Nairobi Civil Appeal No. 138 of 1999 (Unreported)).

25. The present case concerns the second aspect of the rule, that is, whether the petitioner was given a fair hearing. A fair hearing implies that the accused must be given an opportunity to present his case or defence. This opportunity must be a fair, reasonable, full and effective opportunity subject to considerations of expeditious disposal of litigation, bringing finality to a dispute and preventing an abuse of the court process. (See ***General Plastics Limited v. Industrial Property Tribunal & Another* Nairobi Petition No. 348 of 2006 (Unreported).**)

26. It is now recognised that the right to a fair hear depends on the character of the decision making body. Lord Bridge in the case of ***Lloyd v McMahon* [1987] AC 625, 720H** stated that, '***What the requirements of fairness demand ... depends on the character of the decision making body, the kind of decision it has to make and the statutory framework in which it operates.***'

27. **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***').

Application of the Forces Standing Orders

28. **Chapter 20 of the *Standing Orders*** make provision for discipline generally. **Section 16(x)** sets out the procedure for conduct of disciplinary proceedings as follows:-

- x. ***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 call 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 presiding 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 he/she may 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.

29. As regards trial in absentia, **section 16(iv)(a), (b) and (c)** of *Chapter 20* of the *Standing Orders* provides as follows:-

(iv) (a) If an Inspector or a subordinate officer, having been properly instructed, refuses to attend an inquiry into an offence against discipline for which he/she is charged, or having attended as required, wilfully obstructs the holding of such inquiry may be held in the absence of the accused, as though he/she were in fact present.

(b) When it becomes necessary to carry out or complete an inquiry in the absence of the accused, as provided for in subparagraph (a), the presiding Officer shall appoint another officer of or above the rank of Inspector, and not below that of the accused, to represent the interests of the accused at the inquiry. The evidence relevant to the disciplinary offence with which the accused is charged will be recorded, and the Presiding Officer may give consideration to the inclusion of evidence at the request of the officer representing the representative will be required to countersign the proceedings at their close and the Presiding Officer will record in full, his/her reasons for conducting the inquiry in the absence of the accused so as to establish clearly that no other course of action was open to him/her.

(c) If an inquiry is conducted in accordance with subparagraph (b) above the Presiding Officer may

recommend any punishment provided for in Appendix 20 A of the chapter and will submit the proceedings to the Provincial/Formation Commander or the Commissioner of Police as the case may be, who may dismiss the accused or award any lesser punishment. On being advised of the sentence imposed, the accused will be informed of his/her right of appeal.

30. I have set out the rules in detail to show that police officers facing disciplinary proceedings are by law entitled to due process. These procedures, in my view, accord to the principles of **section 77(9)** and adhere to the rules of natural justice and in the conduct of disciplinary proceedings, the Police Force is obliged to follow them to the letter.

31. According to the uncontested evidence of the petitioner, he was not given an opportunity to defend himself in accordance with the provisions of the **Standing Orders**. He only knew of his dismissal after being detained in custody for 2 days.

32. The provisions of **section 16(iv)** of **Chapter 20** of the **Standing Orders** are very clear on the circumstances under which proceedings may be conducted in absentia. Nothing has been placed before me to show that the petitioner conducted himself in such a manner as to make it impossible for the proceedings to be carried out in his absence.

33. In the circumstances, I find that 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 right to a fair hearing guaranteed by **section 77(9)** of the Constitution was violated. In my view, nothing would have been easier than for the 2nd respondent to produce a record of the proceedings in order to rebut the uncontested evidence of the petitioner.

Relief

34. Under **section 84** of the Constitution this court is entitled to frame any relief necessary to vindicate or secure the protection of the petitioner's rights and fundamental freedoms. Apart from granting declarations that follow my findings, I will consider whether the petitioner is entitled to reinstatement and the extent of damages.

35. Since the proceedings were fatally flawed, it follows that the process that led to the dismissal is declared null and void. Such a declaration would ordinarily result in reinstatement of the petitioner to his position or an order that the disciplinary proceedings be conducted afresh to accord to provisions of the law.

36. I do not think this is a proper case for reinstatement of the petitioner or an order that the proceedings be carried out afresh. The petitioner was dismissed from the Police Force in 2008. Over four years have now elapsed since his dismissal from the disciplined forces. The Police Force is a disciplined force and I am of the view that reinstating the petitioner to the Force after such a long absence would not be in the interests of either the petitioner or the public. Similarly, given the lapse of time it may be impossible to have a fair adjudication conducted.

37. I think an award of damages is the more appropriate remedy for breach of the petitioner's fundamental rights. He was dismissed and as a result he has suffered loss. His freedom from arrest and unlawful detention must be vindicated. Though the violations are distinct, I would adopt the sentiments of the court in **Dominic Arony Amolo v Attorney General Nairobi Misc. App. 494 of 2003 (Unreported)** where the court was of the view that where the violations complained of constitute one continuous transaction one award should normally be made.

38. The petitioner referred me to the case of **Robert Kisiara Dikir and 3 Others v Officer Commanding Keiyan General Service Unit and Others Kisii Petition No. 119 of 2009 (Unreported)**, the 1st and 2nd petitioners were arrested and detained for 4 to 5 days respectively without access to their relatives. During this time they were also subjected to degrading and inhuman treatment by being beaten senselessly to extract confessions. Each petitioner was awarded the sum of Kshs. 200,000.00 for unlawful arrest and confinement and a further Kshs. 200,000.00 as exemplary damages.

39. Having considered the circumstances of this case I am inclined to award the sum of **Kshs. 250,000.00** as general damages as there was no allegation of torture, inhuman and degrading treatment.

40. I am alive to the fact that the petitioner would, but for his dismissal, have earned a living for the foreseeable future and would probably have earned a pension in old age. The process that led to his dismissal has been impugned and in ordinary circumstances he would have been reinstated to his position. For reasons I have alluded to at paragraph 35 and 36 above and in order to do full justice in light of my jurisdiction under **section 84(2)** of the Constitution, I direct the petitioner and the respondents to agree, within the next thirty days, on such sum as is necessary to put the petitioner in a position he would have been had he not been dismissed improperly. Should the parties fail to agree I shall hear the parties on the appropriate award to grant.

Conclusion

41. I therefore enter judgment for the Petitioner against the respondent as follows;

- (i) **I declare that the petitioner's rights under section 77(9) were violated by the conduct of proceedings of 1st October 2008 and consequently those proceedings and the dismissal of the petitioner by the letter dated 4th October 2008 are null and void.**
- (ii) **I declare that arrest and consequent detention of the petitioner from 1st October 2008 to 4th October 2008 was contrary to the provisions of section 72(3) of the Constitution.**
- (iii) **I award the petitioner the sum of Kshs. 250,000.00 as general damages for violation of his rights and fundamental freedoms.**
- (iv) **I award interest on (iii) above at court rates from the date of this judgment.**
- (v) **I award the petitioner costs of this suit.**
- (vi) **I direct the petitioner and the respondents to agree, within the next thirty days, on such sum as is necessary to put the petitioner to a position he would have been had he not been dismissed improperly. In default I shall hear the parties on the appropriate award to grant in the matter on a date to be fixed.**

DATED and DELIVERED at NAIROBI this 3rd day of February 2012.

D.S. MAJANJA
JUDGE

Mr Chelule instructed by the Bosek and Company Advocates for the Petitioner.
Mr Kipkoge, Litigation Counsel, instructed by the State Law Office for the Respondent.