



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CONSTITUTIONAL PETITION NO. 5 OF 2018

PETER MAOSA NYANGAU.....PETITIONER/APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL NATIONAL SERVICE.....2ND RESPONDENT

DEPUTY INSPECTOR GENERAL KENYA POLICE SERVICE..3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the petition on 22nd October 2018 seeking the following reliefs:

(a) A declaration that the stoppage, withholding and refusal to pay the Petitioner his salary and allowances for 13 months and failure to deploy the Petitioner is unconstitutional and in violation of the Petitioner's rights under *Articles 35, 41, 47, 50, 159 of the constitution of Kenya and Section 17 as read with Section 35(1) (c) of the Employment Act, 2007.*

(b) A mandatory injunction to compel the Respondents to deploy the Petitioner and pay him his salary and allowances including increments and leave allowance accumulated from May 2016 to date amounting to Kshs. 583,440/=.

(c) Any other relief which this Honourable Court deems fit and just to grant.

(d) Costs and interests be provided for.

2. The Petitioner is a police constable stationed at Malakisi Police Station Bungoma County as a general duty officer employed by the police service on 1st September 1996 currently earning a monthly salary of Kshs. 44,880.

3. The main complaint by the petitioner is that he was transferred to Mberere Police Post in Nandi County on 18th April 2016.

4. The Petitioner appealed to the National Police Service Commission to have the transfer rescinded on grounds that the transfer was calculated to have the petitioner lose his property situated at Malakisi being LR1408/32 which he had bought on 30th June 2014 from one Saiwaz Jetha Jiwa and was now subject of a dispute between the petitioner and a businessman by the name Nyongesa Wangila living at Malakisi township. The dispute also involved the County Government of Bungoma, which had laid claim to the said property and had proceeded to destroy petitioner's property on the said plot. That the destruction of property was not the subject of criminal charges in Sirisia SRM's Court Criminal case No. 1142 of 2016.

5. It is the petitioner's contention that the transfer was malicious and aimed at thwarting his efforts to secure his property whilst stationed at Malakisi Police Station.

6. The petitioner alleges that the respondents were partisan in that private dispute and had engaged in intimidation of the petitioner prior to the orchestrated transfer.

7. The petitioner states that he was removed from the duty roster without explanation and his salary was stopped with effect from September 2017. That the petitioner's efforts to seek explanation for these actions did not bear fruit.

8. That on 23rd May 2018, the petitioner discovered that the respondents had charged him with the offence of desertion from the Kenya National Police Service in SRM's Court Sirisia Criminal Case No. 550 of 2018, which charge was subsequently withdrawn by the

respondents under *Section 87A of the criminal procedure Code*.

9. That the petitioner has not been disciplined, suspended, interdicted or dismissed from service and thus the action taken against him of removing him from the payroll and duty roster without any written communication was unlawful, and a violation of the petitioner's statutory and constitutional rights under *Articles 41, 47, 50, 73 and 236 of the constitution of Kenya 2010* being unfair labour practice; unfair administrative action and violation of the right to be heard as enunciated in the Cardinal rule of national justice, that no person should be condemned unheard. That the action also violates principles of leadership and integrity enunciated under *Article 73 and offends Article 236* which stipulates that no public officer may be punished without following due process.

10. Furthermore, the petitioner relies on Section 17 of the Employment Act, 2007 which protects salary/wages of an employee while in lawful employment.

11. The petitioner prays for the reliefs sought.

Response

12. The 2nd, 3rd and 4th respondents rely on a replying affidavit of Chief Inspector, Sammy Kipngeno sworn on 22nd January 2019 in response to the Application and Petition as follows:

13. The deponent admits that the petitioner was stationed at Malakisi police station since 13th July 2009. That the deponent is the station commander at Malakisi police station. That the petitioner and other police officers were transferred from Malakisi Police Station in Bungoma County vide vigilance Nairobi signal Ret. Sec. Pol/1/2/29/VOL. XLV/29 dated 16th April 2010.

14. That as per Police Procedure, a marching order was prepared on 5th December 2016 but the petitioner refused to sign and collect the same neither did he report to his new station.

15. The petitioner was later charged with the offence of desertion from the National Police service in violation of Section 94(1) read with Section 3 of the National Police Service Act, 2011.

16. That the transfer of the petitioner and his colleagues was done procedurally and was not in any manner meant to frustrate the petitioner from pursuing his private land case.

17. That the complaints by the petitioner have no basis and are mere fabrications and an excuse to defy a lawful transfer order. That the transfer to Nandi County could not in any way prevent the petitioner from attending his private land case.

18. The 1st respondent filed a replying affidavit to the petition on 13th May 2019 sworn to by Joseph Vincent Onyango the Chief Executive Officer of the National Police Service Commission who deposes that the petitioner's letter of appointment provided *inter alia* that the petitioner was subject to all regulations of officers of public service of Kenya which were enforce then or put in place from time to time including those pertaining to transfer, deployment, promotion and disciplinary procedures.

19. That the petitioner was on 16th April 2016 lawfully transferred from Malakasi police station in Bungoma County to Mberere police post in Nandi County vide a signal dated 16th April 2016. That the petitioner wrote a complaint to the Internal Affairs Unit on 22nd April 2016 appealing his deployment due to the court cases involving his parcel of land and indicated his intention to resign if his request was not met.

20. That by a letter dated 9th May 2016, the petitioner applied for early retirement on grounds that he had three pending court cases at the Bungoma High Court in relation to his parcel of land in Malakisi being LR 1408/32 and it would be difficult for him to proceed with the cases from his new police station.

21. The letter of retirement was forwarded to the Deputy Inspector General vide a letter dated 20th June 2016.

22. That the petitioner was instructed to apply for rescission of his deployment and report to his new station by the County Commander by a letter dated 7th September 2016.

23. That on 17th August 2016, the petitioner was informed vide a signal that he needed to report to Mberere Police Station as deployed or his salary would be stopped.

24. On 5th September 2016, the petitioner was issued with marching orders to proceed to Mberere Police Post yet again.

25. That the petitioner failed to apply for rescission of his deployment but instead left his duty station and his whereabouts was unknown.

26. That on 27th September 2016, Deputy Inspector General wrote to the then Regional Police Commander indicating that the petitioner had to submit his letter of appointment, KRA, Pin certificate, identity card and current pay slip to enable them process the petitioner's request for early retirement.

27. That the petitioner did not submit those requested documents but instead on 12th January 2017 appealed his deployment stating that the deployment was meant to intimidate and frustrate him.

28. The commission wrote to the deputy Inspector General on 16th March 2017 asking why the commissions had not received the retirement request letter by the petitioner. The Deputy Inspector General wrote on 29th March 2017 to the Commission stating that the application for retirement by the petitioner was incomplete hence the delay.
29. That the Regional Police Coordinator wrote to the deputy Inspector General on 20th June, 2017 requesting that the petitioner's appeal be considered since he had acquired the land genuinely and he had a title deed.
30. The Deputy Inspector General sent a signal dated 2nd August 2017 to the Regional Coordinator and County Commander in Western and Nandi region indicating that the petitioner be informed that his salary had been stopped until he reports to his new station.
31. On 24th August 2017, the Regional Police Coordinator wrote to the deputy Inspector General indicating that the petitioner had been removed from the duty roster of Malakisi Police Station on the assumption that he had reported to the OCPD Nandi North.
32. On 19th October 2017, the Deputy Inspector General wrote a signal asking the Regional Commander Western and Rift Valley to investigate why the petitioner had not yet reported to Nandi County and if he was still at Malakisi Police Station he should be issued marching orders to proceed to Nandi County.
33. Investigation by the director Internal Affairs established that the petitioner had voluntarily declined to report to the new station. A signal was issued on 24th April 2018, directing the petitioner be traced since his whereabouts was unknown since 18th April 2016.
34. The petitioner upon learning that he would be charged for desertion wrote a letter dated 25th June 2018 to the commission requesting that his superiors be investigated for misconduct.
35. That the petitioner's appeal is yet to be concluded since the commissioners exited in October 2018 and new commissioners assumed office on 18th March 2019.
36. That the transfer originated from the office of the inspector general under *Section 116 of the National Police Service Act, 2011* and *Regulation 8 of the transfer and deployment Regulations 2015* and not from the petitioner's immediate superiors as alleged or at all.
37. That the respondents have not violated any of the rights of the petitioner under *Articles 41, 47, 50, 73 and 236 of the constitution*. That the petition is frivolous and lacks merit completely and same be dismissed with costs.

Determination

38. The issues for determination are:

- (a) Whether the transfer of the petitioner was lawful and procedural.
- (b) Whether the petitioner is entitled to the reliefs sought.

39. In answer to both issues above, the court has considered the extensive deposition by the petitioner *vis a vis* that by the respondents. The court has further considered supplementary affidavits by the petitioner filed on 27th May 2019 in which he joins issue with the averments made in both replying affidavits by the respondents. The court has further considered the submissions filed by the parties and has come to the following findings of law and fact.

40. The petitioner was lawfully and procedurally transferred to Mberere Police Station in Nandi County from Malakisi Police Station on 16th April 2016.

41. The petitioner declined to report to the new police station despite service of marching orders.

42. The conduct by the petitioner amounted to insubordination and violation of the terms of service contained in his letter of appointment, the Police Service Act, and Regulations made thereof.

43. The petitioner has failed to prove on a balance of probabilities that the transfer was actuated by malice, ill will or vendetta as he alleges or at all. Indeed the transfer did not emanate from his immediate supervisors but from the office of Deputy Inspector General of Police situated at the Police Headquarters at Nairobi. That the transfer involved several other officers from Malakisi Police Station who proceeded to report to their new duty stations.

44. That the private matters stated by the petitioner do not constitute a valid reason to decline a lawful order of transfer. The petitioner declined to follow counsel from the regional superiors to report to the new station and then proceed to appeal the transfer to the police service commission.

45. As at the time of filing suit, the petitioner had not reported to his new station and was no longer on duty at his previous station namely Malakisi police station. The court finds as a matter of fact that the petitioner had deserted service without lawful authority as at the time he filed this suit and his salary and allowances had been lawfully stopped.

46. However, the respondent have deposed that the petitioner has since resurfaced at Malakisi Police station and the desertion proceedings earlier commenced in terms of paragraphs 58(4) 8(6) and 59(4) of the service standing orders had been withdrawn under *section 87(a) of the criminal procedure code* in favour of internal administrative proceedings currently stayed by a court order pending determination of this petition.

47. It is the court's considered decision on the authority of the Court of Appeal decision in *Mumo Matemo vs Trusted Society of Human rights Alliance (2014) eKLR* where it cites *Amanta Karimi Njeru vs Republic (No. 1)-1979 KLR 154* as follows:

“If a person is seeking redress from the High court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner which they are alleged to be infringed”

48. In the present case, the facts pleaded by the petitioner do not disclose any violation of the *Article 41, 47, 50, 73 and 236 of the constitution*.

49. The respondent have rebutted the general allegations of malice and vendetta attributed to the immediate superiors of the petitioner. To the contrary, the court is satisfied that the conduct by the petitioner amounted to defiance of lawful, and procedural orders of transfer and that the petitioner failed to comply with the same as he pursued an appeal to the commission against the transfer which appeal is pending to date.

50. Accordingly, the petition lacks merit in its entirety and is dismissed with no order as to costs

Judgment Dated, Signed and delivered this 30th day of January, 2020

Mathews N. Nduma

Judge

BUNGOMA

Appearances

Mr. Mogelo for the Petitioner.

Mr. Tarus for 2nd, 3rd, 4th respondent

Mr. Ojwang for 1st respondent.

Chrispo – Court clerk.