



Nyaga v National Police Service Commission & 2 others (Employment and Labour Relations Petition E048 of 2022) [2024] KEELRC 1201 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1201 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E048 OF 2022**

MN NDUMA, J

MAY 9, 2024

BETWEEN

LENOX KINYUA NYAGA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner filed suit on 8th March 2022 seeking the following reliefs:
 - a. A declaration be and is hereby issued that the petitioner's rights enshrined in the Bill of Rights have been grossly violated and/or infringed by the respondents especially, Articles 41, 47, 48, 50 and 246(3) (b).
 - b. An order be and is hereby issued directed to the 1st and the 2nd respondents to compensate the petitioner for the violation of their rights.
 - c. An order of mandamus be and is hereby issued directing the 1st and 2nd respondents to unconditionally reinstate the petitioner to the National Police Service with effect from the date of dismissal and to pay him all his salary as though he was not dismissed.
 - d. The cost of this petition
2. The petitioner was employed by the 1st respondent as a Police Constable under General Service Unit on 1/9/1996. He served the police service in various capacities for a period of 25 years.



3. On 26th July 2021, the petitioner was suspended from service on allegations of having been seen in a video on 25th July 2021, taking bribes from members of the public at an unknown road. The petitioner received a waiver notice dated 26/7/2021 to effect suspension from duty.
4. On 26/7/2021, the petitioner was taken to a disciplinary panel where only police officers were present as the accusers. The incriminating video was not played at the hearing nor were the persons the subject in the video clip called to testify.
5. That the petitioner was not given time to prepare for his defence. The petitioner was also not given opportunity to be represented by a counsel or any other person of choice.
6. That the petitioner was forced to sign the waiver notice and to participate in those disciplinary proceedings. That the proceedings were a sham in which the petitioner was being quarreled. The petitioner was suspended on 30/7/2021 after the hearing on the basis that it was confirmed that he had engaged in corrupt dealings. The petitioner was recommended for dismissal. This was done pursuant to section 48(1) of the SSO.
7. By a letter dated 18/8/2021, the petitioner was dismissed from service for having committed an act of corruption contrary to section 88(2) read with schedule 1(a) and section 89(1) of the National Police Service Act No. 11A of 2011 as amended by Act No. 11 of 2014 section 3 Act No. 19 of 2014.
8. The dismissal was with effect from 26th July 2021, the date he was charged in orderly room proceedings.
9. The petitioner was given 14 days within which to appeal the decision.
10. The petitioner did not appeal because he did not receive a copy of the proceedings of the disciplinary hearing.
11. The petitioner alleges that the respondent violated his right to a fair hearing contrary to Article 50 of the Constitution. That he was subjected to unfair administrative action contrary to Article 47 of the Constitution and was denied access to justice in violation of Article 48 of the Constitution.
12. That the respondents further violated Article 246(3) of the Constitution which obliges the National Police Service Commission to observe due process in disciplining police officers.
13. The petitioner prays to be awarded the reliefs sought.

Replying affidavit

14. The 1st respondent filed a replying affidavit sworn to by Peter Leley the Chief Executive Officer of the National Police Service Commission who deposes that the Commission has mandate under Article 246(3) to exercise disciplinary control over and remove persons from police service.
15. That Police Service Act, section 10 reiterates this mandate read together with National Police Service Commission (NPSC) (Discipline) Regulations 2015.
16. That the petitioner by joining the Police Service had voluntarily bound himself to the law and regulations governing police service.
17. That the petitioner while attached to Buruburu Police Station and while performing traffic duties was charged with an offence against discipline for committing an act of corruption contrary to section 88(2) read with paragraph 1(e) of the 8th schedule of the National Police Service Act.



18. That the particulars of the offence were that along Kangundo Road, on diverse dates between 23rd June 2021 to 25th July 2021 at an unknown time near Kenol Kobil Petrol Station, jointly together with two others, the petitioner engaged in collecting bribes using civilians.
19. That a full hearing was conducted where the petitioner was given opportunity to defend himself and the petitioner was found guilty of the offence and was recommended for dismissal by the 2nd respondent to the 1st respondent.
20. That the basis of the above proceedings was a widely circulating video clip showing the petitioner and his accomplices engaging in the alleged corrupt activity to which upon being questioned failed to give adequate evidence in rebuttal of the alleged activity.
21. That the petitioner had been initially suspended on 26/7/2021 vide a letter dated 30/7/2021. That the 1st respondent approved the dismissal of the petitioner due to the gravity of the offences.
22. That the petition has no merit and it be dismissed with costs by 1st respondent.

Determination

23. The parties filed written submissions which the court has carefully considered together with all the depositions by the parties. The court has delineated the following issues of determination: -
 - i. Whether the petitioner has established that his rights under Article 41, 47, 48, 50 and 246(3) b of the Constitution were violated.
 - ii. Whether the petitioner is entitled to the reliefs sought.
24. The court notes that under section 3(1) of the Employment Act 2007 is provided:

“Application

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(2) This Act shall not apply to

(a)

(b) The Kenya Police, the Kenya Prisons Service or the Administration Police Force.”
25. The law applicable to the discipline of the police is the National Police Service Act and Regulations made thereunder and the necessary Constitutional provisions that protect persons from unfair labour practice; unfair administrative action; and denial of a fair hearing before any adverse action is taken against any police officer.
26. To this end, to the extent that the police service Act, and the regulations thereunder do not have elaborate provisions on the threshold for a fair hearing as provided under sections 41, 43, 44 and 45 of the Employment Act which provisions do not apply to police officers, the doctrine of constitutional avoidance does not apply to cases filed by police officers since the fairness or otherwise of their dismissal is measured against the aforesaid constitutional provisions being Articles 41, 47, 50 and 246 (3) b of the Constitution in particular, and any other Article of the Constitution that may be invoked depending on the circumstances of the case.



27. The principle sought to be applied by the respondents in the cited case of *Gabriel Mutava v 2 others v Managing Director Kenya Ports Authority and another* (2016) EKR where the Court of Appeal stated: -
- "Time and again it has been said that there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional court by bringing action that could very well and effectively be dealt with in that other forum," is not a fit in the present matter.
28. The provisions of Article 246(3) b of *the constitution* as read with section 10 of the *National Police Service Commission Act* empower the 1st respondent to dismiss the police officers who have been found guilty of an offence in the performance of their duties, the NPSC (Discipline) Regulations 2015, provide elaborate procedure to be followed by the 2nd respondent in the conduct of the disciplinary hearing as happened in this case.
29. The imperatives under Article 41, 47 and 50 of *the Constitution* and the known rules of natural justice inevitably are engrained to ensure justice, fairness, reasonableness and proportionality in the conduct of that disciplinary process from the beginning to the end.
30. In this regard, a petitioner who relies on the constitutional imperatives has the mandate to demonstrate on a preponderance of evidence the manner in which the cited provisions of *the constitution* have been violated.
31. In this regard Judge Mumbi Ngugi (as she then was) in *Susan Waitthera Kariuki and 4 others v Town Clerk Nairobi City Council and 3 others* [2013] eKLR stated:
- "As a basic minimum the petitioners are required to not only cite the provisions of *the Constitution* which have been violated and the manner in which they have been violated with regard to them...the petitioners should present before the court evidence on a factual basis on which the court can make a determination whether or not there has been a violation."
32. In the present matter, the petitioner was confronted with a widely circulated video clip where he was seen with others while doing traffic duties stopping vehicles whose drivers would subsequently give money to two civilians standing nearby.
33. The petitioner was charged with the offence of taking bribes in the course of duty as framed in the charges set out in the letter of suspension dated 30th July 2021.
34. The petitioner did not provide any written response to the charges made against him in the orderly room proceedings itself and the disciplinary hearing that ensued after the suspension.
35. The petitioner in this elaborate petition does not specifically deny that he was involved in acts of corruption as seen in the video clip produced at the disciplinary hearing only emphasizing that police officers who testified did not identify him as the officer involved in soliciting for bribes from motorists.
36. The court finds that in the circumstances of this case, the respondents had a valid reason to subject the petitioner to a disciplinary hearing in terms of the relevant provisions of the NPS, Act and the Regulations thereunder. The petitioner did not provide any evidence to rebut the charge.
37. The court finds that the petitioner was provided with opportunity to defend himself before the suspension and dismissal.



38. The kind of evidence that would have exonerated the petitioner from the offence was to demonstrate that he was not on duty at the stated road, place and time, the subject of the charge. The petitioner did not provide any exculpatory evidence in the petition itself and in the supporting affidavit attached thereto.
39. The respondents have demonstrated that the 1st respondent had due regard and consideration to section 13(b) of the NPSC (Discipline) Regulation 2015 before dismissing the petitioner in that it took into consideration
- (a) the circumstances in which the offence was committed and the gravity;
 - (b) The seniority and length of service of the officer;
 - (c) The previous record and conduct of the officer and
 - (d) The statement made by the officer for the purposes of mitigation.”
40. The petitioner did not demonstrate that these matters were disregarded by the respondents before dismissing him. The onus to impugn the process lies with the petitioner and he failed to discharge that onus.
41. The court agrees with the submissions by the respondents that the glaring nature of this offence demanded immediate action be taken against the petitioner in terms of section 4(2) of the NPS (Discipline) Regulation 2015. The offence committed by the petitioner presented exceptional circumstance in which the offence against discipline was clearly manifest and the respondent correctly called upon the petitioner to answer to the charges without any need for further investigations.
42. The waiver notice issued to the petitioner in terms of section 15(5) of the service standing orders was procedural in the circumstances prior to the preference of the substantive charges of having committed a corruption act contrary to section 88(2) as read with 1(ae) of the [National Police Service Act](#).
43. In [Thomas Odera Omollo v National Police Service Commission](#) Nairobi ELRC Petition No. 37 of 2018 Lady Justice Maureen Onyango stated:
- “There is ample authority that decision making bodies other than courts and bodies whose procedure are laid down by statute are masters of their own procedures, provided that they achieve the degree of fairness appropriate to the task, it is for them to decide how they will proceed.”
44. In the final analysis, the petition lacks merit in its entirety, and is dismissed with no orders as to costs.

DATED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Nyongesa for petitioner

Mr. Lumumba for 1st respondent

Mr. Odukenye for 2nd and 3rd respondent

Mr. Kemboi, Court Assistant

