



**Mutuma v National Police Service Commission & 2 others (Petition E208 of 2023) [2024] KEELRC 2061 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2061 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E208 OF 2023**

**B ONGAYA, J**

**JULY 26, 2024**

**IN MATTER OF SECTIONS 24, 45, 46, 49, 56, 57(2), AND  
88(3) OF NATIONAL POLICE SERVICE ACT (11A OF 2011)**

**AND**

**IN THE MATTER OF THE CONSTITUTIONALITY OF PARAGRAPH 15 (5) OF CHAPTER  
30 OF THE NATIONAL POLICE SERVICE STANDING ORDERS & REGULATION 11 (5) OF  
THE NATIONAL POLICE SERVICE COMMISSION (DISCIPLINE) REGULATIONS (2015)**

**AND**

**IN THE MATTER OF REINSTATEMENT INTO THE NATIONAL POLICE SERVICE  
OF PF NO. 237227/2008145383 – EX=IP SOLOMON MUTIIRIA MUTUMA**

**BETWEEN**

**SOLOMON MUTIIRIA MUTUMA ..... PETITIONER**

**AND**

**THE NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition dated 31.10.2023 through Ngaruiya Gitau & Co. Advocates seeking the following orders:
  - a. A declaration be and is hereby made that the respondents are under the obligation to observe, respect, protect, promote and fulfil the rights and freedoms enshrined on the Bill of Rights, Chapter four of *the Constitution*.



- b. A declaration be and is hereby made that the Orderly Room Proceedings that led to the petitioner's eventual dismissal from the National Police Service violated the Petitioner's constitutional right to fair administrative action and fair trial or hearing and that the petitioner's dismissal from the National Police service was unconstitutional, unlawful, null and void for all intents and purposes.
- c. An order if Certiorari to remove into the Court for purpose of being quashed, the decision emanating from the Orderly Room Proceedings ostensibly conducted by the 2<sup>nd</sup> respondent against the petitioner at Isiolo GK Prison on 28<sup>th</sup> February, 2020.
- d. An order if Certiorari to remove into the Court for purpose of being quashed, the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents communicated on 24<sup>th</sup> June, 2020 ostensibly dismissing the petitioner from the Kenya Police Service for being wantonly excessive in the circumstances despite an acquittal from the related criminal charges by a court of competent jurisdiction.
- e. An order of Mandamus compelling the 1<sup>st</sup> respondent to forthwith reinstate the petitioner to the National Police Service to the position earlier held with full benefits.
- f. An order directing the 1<sup>st</sup> respondent to forthwith compensate the petitioner for lost employment benefits from the date of the interdiction to the date of reinstatement including unpaid salary dues for all the time the petitioner has been out of employment at the National Police Service with interest at court rates.

[At the time of the petitioner's dismissal on 24<sup>th</sup> June 2020, the petitioner's salary was Kshs. 92,550.00 per month excepting the 3 months when he was under interdiction where he was earning 50,250.00)

Therefore, his lost salary dues as at the date of this petition are;

Kshs. 42,300.00 x 3 months = Kshs. 126,900.00 (March to May 2020)

Kshs. 92,550 x 40 months = Kshs. 3,702,000.00 (June 2020 to October 2023)

Total = Kshs. 3,828,900.00

Applicable salary increments should be factored in while compensating the petitioner who has lost employment benefits.]

- g. An order for compensation and general damages for the unlawful dismissal from the National Police Service and violation of the Petitioner's fundamental rights by the respondents jointly and severally.
  - h. A declaratory order that provisions of paragraph 15(5) of the National Police Service Standing Orders (Cap 30) and Regulation 11(5) of the National Police Service Commission (Discipline) Regulations (2015) are contrary to the provisions of Articles 2, 21, 23, 25, 47 and 50 of the Constitution and therefore unconstitutional, null and void.
  - i. Costs of the petition.
  - j. Any such other relief that the Court may deem fit and just to grant to the petitioner.
2. The petition was based upon the supporting affidavit of the petitioner and annexures thereto filed together with the petition and sworn on 31.10.2023. The petitioner's case is as follows:
- a. That on 14.08.2008 he was enlisted into the Kenya Police Service as a Police Constable under the General Service Unit and put on probation for a period of one year after which his



employment was confirmed. He worked and was promoted to the rank of Inspector of Police on 29.03.2019 after a successful completion of special platoon commanders' course at NPC Embakasi "B" campus.

- b. That before his dismissal from the police service, he was based at Moyale Sub-County in Marsabit County as an officer in charge of a formed-up platoon of the General Service Unit "T" company which was headquartered at the Merille in Isiolo County.
- c. That on 22.02.2020 while in the line of duty at the nearby Moyale town he received a phone call by an informer namely Ali Dika who informed him that he had noticed a suspicious motor vehicle possibly carrying aliens at Qate heading towards Bashir-Dagochia Yamicha Road which connects Marsabit and Isiolo Counties.
- d. That he took it as a matter of urgency and gave chase and did not manage to sign the work ticket, which he intended to do so once he got back.
- e. That their vehicle developed a flat tyre before they could catch up with the motor vehicle and apprehend the suspects who were allegedly trafficking narcotics and smuggling aliens.
- f. That while on Dagochia-Yamicha Road within Merti, Isiolo County, the petitioner together with others were intercepted and arrested by officers from Merti Police Station who accused them of trafficking narcotic drugs and human smuggling.
- g. That on 24.02.2020 the petitioner together with PC Ali Dida and one Ali Hassan were arraigned at the Chief Magistrate's Court in Isiolo and charged in criminal case No. 6 of 2020 in which they denied the allegations and were remanded at Isiolo GK prison.
- h. That he was interdicted on the same date due to the criminal charges and put on half salary and his powers suspended.
- i. That he was also ordered to surrender his certificate of employment and other office tools and government items in his possession and relocated to his residence in Marimanti in Tharaka Nithi County. He was asked to report to Marimanti Police station for accountability pending the hearing of the criminal case.
- j. On 28.02.2020 while in remand at Isiolo GK prison he was charged with disciplinary charges for being negligent in the performance of duty, breaking out of police camp without lawful excuse and making away with a vehicle belonging to the government.
- k. That he had not been served with earlier notice of the disciplinary charges or hearing and neither was he called to defend himself, cross-examine or avail his witnesses.
- l. That he was coerced into signing a waiver notice and fined Kshs.7,500.00 for the two counts, which amount, was recovered from his salary.
- m. That he was subsequently suspended on 30.03.2020 and on 31.03.2020, he received a letter from the 2<sup>nd</sup> respondent informing him of the outcome of the orderly room proceedings.
- n. That on 24.06.2020 he received a letter of dismissal from the Kenya Police Service with effect from the date of his suspension being 30.03.2020. He appealed against the dismissal on 15.07.2020 and the same was acknowledged by the National Police Service Commission on 15.10.2020.



- o. That on 15.11.2021 he was acquitted on both criminal charges that he was facing in court for lack of evidence and the Honourable Magistrate noted that the eyewitnesses were contradictory.
  - p. That on 14.03.2022 he wrote to the 1<sup>st</sup> and 2<sup>nd</sup> respondents reminding them of his letter of 15.07.2020 and seeking to have them reconsider the dismissal which was acknowledged on 31.03.2022.
  - q. That on 21.02.2023 he received communication from the GSU commandant in Nairobi informing him that his appeal was disallowed and his dismissal upheld on 21.10.2022 on recommendation of the 1<sup>st</sup> respondent vide the Deputy Inspector General. That the said letter was not served upon him.
  - r. That he contests his dismissal and stated that it was biased and in bad faith as the orderly room proceedings were flawed for want of fair administrative action and that the actions to dismiss him were harsh and excessive since he was even acquitted of the criminal charges leading to the decision.
  - s. That he pleads that the Honourable Court sets aside and quashes the respondents' disciplinary proceedings and sentence for dismissal from the service.
3. The 1<sup>st</sup> respondent filed the replying affidavit of Peter Kiptanui Leley, its CEO, through their senior litigation counsel, Valerie J. Kasaiyan dated 03.06.2024.
4. The deponent went ahead and outlined the legal basis of the establishment and the roles of the 1<sup>st</sup> respondent. Its case is as follows;
- a. That between 22.02.2020 and 23.02.2020 while at the GSU operational camp in Moyale, the petitioner made away with a government vehicle registration no. GKB 521U Toyota land cruiser on an unauthorized journey without informing his commanding officer.
  - b. That the petitioner was charged with trafficking narcotic drugs contrary to section 4(a) of the Narcotic drugs and Psychotropic Substances Control [Act No. 4 of 1994](#); and a second charge of human smuggling contrary to section 53 (1) (P) as read with section 53 (2) of the Kenya Citizenship Immigration [Act No. 12 of 2011](#).
  - c. That the petitioner was acquitted under section 215 of the Criminal Procedure Code which means he was found with a case to answer and put on his defence hence he was not maliciously prosecuted.
  - d. That the waiver notice that is issued under regulation 11(5) of the NPSC discipline regulations and section 15(5) is usually issued under exceptional circumstances.
  - e. That the petitioner's circumstances herein were exceptional as an officer of the rank of Inspector of Police had made away with a vehicle committed to his charge belonging to the Government of Kenya contrary to section 88(2) and section 1 (q) of the eighth schedule of the Nation Police Service [Act No. 11 of 2014](#) and the said waiver was issued to set an immediate example.
  - f. That the petitioner has not shown that the waiver notice is unlawful as it is anchored in law and its purpose given.
  - g. That the waiver notice simply requires that the disciplinary proceedings begin immediately the offence is committed; it does not deny the accused officer the right to be heard.



- h. That the rights to fair hearing were observed including the right to remain silent and the right to representation.
  - i. That the petitioner's conduct was intended to impede the expeditious hearing of the case resulting to the orderly room proceedings being conducted in his absence in accordance with Article 50 (f) of *the Constitution*.
  - j. That the petitioner has not specifically stated and illustrated how the 1<sup>st</sup> respondent has breached and violated the petitioner's constitutional rights.
  - k. They pleaded that it is in the public interest and in the interest of justice that the petition be dismissed with costs.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners filed the replying affidavit of Nickson Ochieng Auka, SP, who is the Staffing Officer personnel at the General Service Unit through the Attorney General sworn on 12.04.2024. Their case is as follows:
- a. That the facts and the circumstances that led to the petitioner's dismissal from the service which facts are independent from what was used in the criminal case are between 22.02.2020 at unknown time and 23.03.2020 at 0700hrs made away with the company car.
  - b. That the petitioner was subsequently charged with the offence of "making away with vehicle committed to his charge belonging to the Government of Kenya" in violation of section 88(2) as read with sec 1 (q) of the 8<sup>th</sup> schedule of the *National Police Service Act*, 2011.
  - c. That previously before he had been charged with two disciplinary charges which he was charged with 'breaking out of police camp without lawful excuse and being negligent in performance of his duty.' He pleaded guilty and convicted to a fine of Kshs. 4500/= and Kshs. 3000/= respectively.
  - d. That the law as per the *National Police Service Act* and their discipline regulations provide for guidelines on dealing with indiscipline exhibited by the members of the service.
  - e. That the petitioner was served with a waiver so that the proceedings would commence immediately with a view of instilling discipline in the service and because the GSU platoon he was in charge of was on a very sensitive assignment in a disturbed area.
  - f. That the petitioner failed on his leadership role as evidenced in the defaulter sheet where in his own words admitted to having not signed the work ticket as is required.
  - g. That due procedure was followed leading to his dismissal and his appeal reasonably dealt with within two years of his dismissal.
  - h. That after being served with a notice to show cause he was given three days to reply but he chose not to reply.
  - i. That the dismissal of the petitioner and subsequent handling of the appeal arose out of a rigorous internal disciplinary process that was considered at the committee level, the commandant GSU, the Deputy Inspector General Kenya Police Service, the Inspector General and ultimately the National Police Service Commission.
  - j. That the illegal omissions and commissions of the petitioner which amounted to disciplinary offenses in the service and which actions put to grave danger the lives of the officers is highly frowned upon especially in an operational duty area.



- k. That the waiver notice adopted in the regulations had a meaning and purpose and the court should not be invited to litigate on operational issues of the service.
  - l. That the petitioner having invited this Honourable court to find the provisions of *National Police Service Act*, Service standing orders and legal notice no.90 NPSC (discipline regulations) as unconstitutional. The drafters of the law and regulations had in mind the unique nature of the service as disciplined organ with special security assignment.
  - m. They pleaded the petition be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
6. The petitioner filed a further affidavit dated 12.06.2024 and responded to both replying affidavits as follows:
- a. That on the issue on service of the waiver, he was never served with the notice and was only informed about it while in incarceration at Isiolo GK prison which he declined to receive since he was not in a stable state of mind having being ambushed with disciplinary offenses and criminal charges.
  - b. That having denied to sign the waiver and proceedings commenced in his absence, it raised doubts as to when he appended his signature on the other notice dated 28.02.2024 as annexed by the 1<sup>st</sup> respondent.
  - c. That during the orderly room proceedings that happened in his absence, the officer representing him had no evidence to offer in his behalf since he was not the one that had appointed him and they had not had any communication.
  - d. That in response to his appeal being subjected to rigorous internal process, no such minutes of committee meetings, findings or reports were ever attached or availed to him in his requests on the status of the appeal as proof.
7. Final submissions were filed by the parties. The Court has considered all the material on record. The Court returns as follows:
- a. The petitioner by his own affidavit and pleadings has confirmed that he embarked and used the government vehicle without signing the work ticket. The Court finds that by that admission, the reason for the imposed punishment has been established to be genuine and fair. By his own admission, the motor vehicle suffered a puncture thereby establishing that indeed property entrusted to his care was wilfully damaged. The Court finds that the disciplinary charges of being negligent in performance of duty, breaking out of a police camp, and, wilful damage to property committed to the petitioner were indeed in existence and fair reasons for the dismissal as attributable to the petitioner. The Court further finds that the petitioner therefore fully contributed to his removal from the service. While alleging breach of due process, it appears to the Court that the petitioner having confirmed he used the government vehicle irregularly, it cannot be found that the alleged constitutional provisions had been violated. The petition must collapse as unjustified and the respondents' submissions upheld in that regard.
  - b. The petitioner has failed to establish the alleged double jeopardy. The charges in the criminal case he was acquitted were completely different from the reasons for the dismissal.
  - c. The petitioner alleges was provided an opportunity to sign a waiver while in prison but he says he declined to sign the same due to his state of mind. However, how else would the proceedings go on while he was actually in custody? It appears to the Court that the respondents acted diligently in invoking the waiver procedure and which appears to serve genuine instances, like



the instant case, of conducting orderly room proceedings promptly and in absence of the charged officer.

- d. Section 15(5) of Chapter 30 of the Service Standing Orders provides that all officers subject to disciplinary proceedings shall be notified at the earliest date possible before but not less than 24 hours before hearing date. Section 15(5) thereof states that the waiver notice pronounced in Regulation 11(5) of the Disciplinary Regulations can only be issued by an officer of the rank of Assistant Superintendent. The 1<sup>st</sup> respondent has promulgated the Discipline Regulations 2015 whose Regulation 11(5) states that in exceptional circumstances, the seven calendar days' notice to an accused officer for a disciplinary hearing may be waived. The petitioner's case is that provisions on the waiver notice are unconstitutional as it contravenes Article 47 and 50 of *the Constitution* on fair administrative action and fair hearing. The petitioner urges that to that extent, the provisions on waiver notice should be declared inconsistent with *the constitution*, null and void. The 1<sup>st</sup> respondent has submitted that the National Police Service is a disciplined service and regimental in nature. Article 24(5) on limitation of rights states that despite the principles of limitation of rights and freedoms in Article 24 (1) and (2) a provision in legislation may limit certain freedoms for persons serving in the Kenya Defence Forces or National Police Service and such rights include the right to fair labour practices in Article 41 of *the Constitution*. Thus section 3(2) of the *Employment Act* which implements Article 41 states that the *Employment Act* shall not apply to the National Police Service and therefore the *National Police Service Act* applies. The 1<sup>st</sup> respondent submitted that the waiver notice issued during disciplinary proceedings is an important way of enforcing the highest standards of discipline within the service by facilitating imposition of prompt punishment in appropriate cases. The Court should therefore find that the waiver provisions are not unconstitutional.
- e. The Court holds that from the outset, under Article 25 of *the Constitution* the following rights cannot be limited:
- i. Freedom from torture and cruel, inhuman or degrading treatment or punishment.
  - ii. Freedom from slavery or servitude.
  - iii. The right to a fair trial.
  - iv. The right to an order of habeas corpus.
- f. Thus, while the 1<sup>st</sup> respondent's submission that the right to fair labour practices can be limited, none of the rights mentioned in Article 25 may be limited by legislation.
- g. The Court considers that of interest in the instant case is the right to fair hearing in Article 50. Article 50 (2) (c) provides for the right to adequate time and facilities to prepare a defence. The constitutional wording is "adequate time" . The cited Discipline Regulations and the Service Standing Orders provide for notice period and then a waiver where the general timelines may not apply. Whether the waiver guarantees adequate time will vary from case to case. In the Court's opinion the cited waiver and notice provisions aid and advance the realisation of Article 50 and do not derogate therefrom. The waiver and notice provisions have not been shown to be inherently inconsistent with any of the constitutional provisions as urged for the petitioner. The Court finds that the challenged provisions are not unconstitutional. Invariably, in a specified case, the application of the waiver and notice provisions may result in an unconstitutional effect and in which case, the adversely affected person may move the Court for an appropriate remedy. In the instant case the petitioner has not shown that the invoking of the waiver provisions was unfairly so with an unfair impact or outcome especially



that the Court has already found that the claimant by his own case has shown that the reason for the dismissal was genuine and fair – so that with or without the waiver, he was culpable and the punishment would remain motionless. Thus, the Court returns that the impugned waiver provisions are capable of being implemented constitutionally as they are not inherently inconsistent with constitutional provisions or rules. The Court finds accordingly.

- h. In view of the findings, the Court returns that the petitioner has not established any of the reliefs prayed. The Court has considered the time lapse in communicating the decision on administrative appeal and each party to bear own costs.

In conclusion, judgment is hereby entered for the respondents for dismissal of the petition with orders each party to bear own costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26<sup>TH</sup> JULY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

