



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Omondi v Attorney General & 2 others (Civil Appeal 20 of 2020)  
[2021] KECA 1086 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 1086 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 20 OF 2020  
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**JAMES OTIENO OMONDI ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

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

**NATIONAL POLICE SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Makau, J.) delivered on 3rd January 2017 in ELRC Cause No. 257 of 2015)*

**JUDGMENT**

1. The appellant, James Otieno Omondi, has challenged the judgment of the Employment and Labour Relations Court at Mombasa (ELRC) (Onesmus Makau, J.) delivered on 3<sup>rd</sup> January 2017 dismissing his claim for wrongful or unfair termination of employment against the respondents, the Attorney General, Inspector General of Police, and National Police Service Commission, the 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively.
2. Based on his memorandum of claim, his testimony, and submissions before the ELRC, the appellant's case was that he was employed as a police constable on terms and conditions set out in a letter of appointment on 12<sup>th</sup> May 2011. His remuneration comprised a basic salary of Kshs.18,330; house allowance of Kshs.3,000; police field allowance of Kshs.2,000 and police allowance of Kshs.9,000.
3. On 2<sup>nd</sup> April 2014 he was served with a "letter of removal from the Kenya Police Service" on grounds that he was "unlikely to become an efficient police officer as stipulated in chapter 26 subsection 3(i)



(b) of the Force Standing Orders” based on the history of his conduct in the service, namely, absenting himself

“without leave every now and then.” He had prior to that letter been reinstated to service on 17<sup>th</sup> February 2014 after he was acquitted by the Chief Magistrate’s Court at Naivasha of the offence of desertion contrary to Section 94(1) of the [National Police Service Act](#), with which he had been charged.

4. The appellant averred that the letter of removal contravened the tenets of natural justice; that his employment was terminated without being given an opportunity of being heard; and that the termination amounted to unfair labour practice. He referred to Section 44(4)(f) of the [Employment Act](#), Article 50 of the Constitution; [International Labour Organization Convention No. 158 and Termination of Employment Convention 1982](#) Articles 3 and 4.
5. For relief, the appellant prayed for: a declaration that the termination was unfair, unprocedural, unlawful, and illegal; general damages; an order for the payment of terminal dues; two months’ salary in lieu of notice in the amount of KShs. 101,320; 12 months’ salary compensation of KShs. 607,920; and reinstatement to the police service.
6. In response to the claim, the respondents averred that the appellant was removed from service, in accordance with Force Standing Orders, on grounds that he was unlikely to become an efficient police officer; that he was declared a deserter with effect from 26<sup>th</sup> February 2013, was arrested and charged with desertion under Section 94(1)(3) of the National Police Service Act on 24<sup>th</sup> April 2013 but was acquitted whereupon he was reinstated back to service; that he was removed from service with effect from 3<sup>rd</sup> April 2014 for good reason after being given an opportunity to show cause why he should not be removed; that the provisions of the [Employment Act](#) on which the appellant relied do not apply to the police service; that the appellant’s removal from service was lawful and justified owing to his poor disciplinary record and tendency of absenting himself without leave.
7. During the trial before the ELRC, the appellant in his testimony reiterated that he was wrongfully removed from police service having been acquitted of the charge of desertion and after having been reinstated to service. Chief Inspector of police, Patrick Osuru Ombach, testified for the respondents and set out the appellant’s disciplinary history culminating with his removal.
8. After reviewing the evidence and considering the submissions made before him, the learned Judge in his judgment found that there was a justifiable reason why the appellant was removed from service and that a fair procedure was followed in doing so. The Judge stated:

“After considering the evidence, submissions, and the said chapter 20 paragraph 33 of the Force standing orders, I am satisfied that the procedure followed in removing the claimant from the police service was proper, fair and lawful. As correctly submitted by the defence, Section 41 of the [Employment Act](#) and indeed the whole of that Act does not apply to member of Kenya police service by dint of section 3(2)(b) of the said Act. Similarly convention 158 of the ILO which deals with fair termination of employment contracts by employers is not part of our laws by dint of Article 2(6) of the Constitution of Kenya because it was never ratified by Kenya.”

9. The appellant has challenged that judgment on 12 grounds as set out in his memorandum of appeal dated 17<sup>th</sup> February 2020, which coalesce into the question whether the learned judge erred in concluding that the appellant’s removal from service was not illegal, unfair or unprocedural. The appellant, who appeared virtually before us in person having filed a notice to act for himself relied on



written submissions filed by his erstwhile advocates, David N. Muriuki Advocates, which he orally highlighted.

10. It was urged that that there was insufficient evidence tendered before the trial court to support the claim that he disappeared from his station on 5<sup>th</sup> May 2012; that contrary to the Force Standing Orders no orderly room proceedings were conducted prior to his removal from service on 2<sup>nd</sup> April, 2014; that the appellant's removal from service was unfair and unprocedural because his case was never referred to the Internal Affairs Unit for consideration in accordance with under Section 87 of the National Police Service Act; that the Commandant of Anti-Stock Theft Unit should have forwarded the complaint in relation to the appellant to Internal Affairs; that the Commandant should have submitted a report to the Inspector General (formerly Commissioner of Police) or the Regional Commander, who were the only ones with the mandate to remove the appellant from service; that on the strength of the ELRC case of *Kennedy Odhiambo Owino vs. National Police Service Commission & 3 Others* [2018] eKLR the power to remove an officer from the National Police Service is the preserve of the National Police Service Commission and the Commandant, Anti-Stock theft unit had no such powers; that the Judge therefore failed to consider whether the procedure laid down in the removal of the appellant was followed to the letter.
11. It was also submitted that the Judge erred in upholding the appellant's removal from service based on an offence for which he had been acquitted. In that regard the case of *Joshua Muindi Maingi vs. National Police Service Commission & 2 Others* [2015] eKLR was cited for the argument that upon acquittal by the magistrate's court of the charge of desertion, the employer could not initiate disciplinary proceedings on the same grounds as those on which the criminal case was based.
12. The appellant argued that he was not accorded an opportunity to be heard and his rights under Articles 47 and 50 of the Constitution were violated and his removal erroneously upheld by the court. He maintained that due process was not followed in his removal and prayed that his appeal be allowed.
13. Opposing the appeal, learned counsel for the respondents Ms. Njau also relied on written submissions which she highlighted. According to counsel the learned judge made the correct findings, and the appeal is not merited. Counsel submitted that sufficient evidence, in the form of the judgment of the criminal court and orderly room proceedings pertaining to disciplinary proceedings, was produced before the trial court to demonstrate that the appellant was removed from service due to his poor disciplinary record and tendency to absent himself without leave; that his removal was in accordance with the procedure set out in chapter 20 of the Force Standing Orders; that he was notified in writing of the date of his removal and invited to show cause; that he was informed of his right of appeal which he lodged with the Deputy Inspector General, Kenya Police Service and that his appeal was heard and disallowed by the National Police Service Commission.
14. It was urged that the procedure on removal of an officer from service under paragraphs 30 and 33 of Chapter 20 of the Force Standing Orders is distinct from disciplinary proceedings under paragraphs 16 to 24 of that chapter; that removal of an officer from service does not require the conduct of orderly room proceedings as is the case with disciplinary proceedings; that the Judge was therefore correct in finding that the termination of the appellant was fair as it accorded with the procedure set out for removal of officers under the Force Standing Orders; that in addition there was a confidential report that was submitted to the Deputy Inspector General by the Commandant Anti Stock Theft Unit on 14<sup>th</sup> January, 2014 which detailed the appellant's work and his conduct.
15. It was submitted that contrary claims by the appellant that he was removed from service on account of an offence for which he was acquitted, he was removed because previous disciplinary conduct and for being an unreliable and inefficient officer; that during his short stint with the police force of less



than 3 years, he had absented himself without leave on several occasions, an indicator of negligence and indiscipline. It was submitted that the authorities cited in support of the appellant's case are distinguishable. Counsel urged the Court to follow the decision in *Teachers Service Commission vs. JWN* [2014] eKLR for the proposition that a successful outcome of a criminal process against an employee does not have primacy over an internal disciplinary process against such an employee arising from the same set of circumstances and that the two processes are distinct.

16. With regard to the contention that he was removed from service notwithstanding that he had been cleared of criminal charges and reinstated into service, counsel submitted that the appellant had not been dismissed from service after he was charged with the criminal offence; rather, he had been interdicted after his arraignment in court whereupon he was placed on half pay and all privileges and benefits withdrawn; that after his acquittal he was reinstated in accordance with the applicable procedure after the conclusion of any criminal charge; that the reinstatement into service after termination of the criminal charge did not bar initiation of removal proceedings against the appellant based on his disciplinary record and conduct.
17. As regards the contention that Internal Affairs Unit was not involved, counsel submitted that the mandate of that Unit under Section 87 of the National Police Service Act is to handle complaints against the police and that it has no mandate in the removal of officers from service. Moreover, counsel submitted, chapter 5 of the Service Standing Order which has provisions for the Internal Affairs Unit came into effect in June 2017, well after the appellant had been removed from service in 2014 and could not therefore apply to his case.
18. In relation to complaint that the appellant's right to fair hearing under Article 50 of the Constitution and his right fair administrative action under Article 47 of the Constitution were breached, counsel submitted that the appellant did not plead with precision the manner in which those provisions were allegedly breached or violated. The case of *Anarita Karimi Njeru vs. Republic (No.1)* [1979] KLR 154 and the case of *Mumo Matemo vs. Trusted Society of Human Rights Alliance* [2014] eKLR were cited. In any case, the appellant was duly accorded an opportunity to be heard; he was served with notice to show cause why he should not be removed and the reasons for the intended removal whereupon he responded by acknowledging the error of his ways and blaming it on inexperience. It was submitted that due process was adhered to. Reference was made to the case of *Kipkurui Langat vs. Police Commissioner/Inspector General, National Police Service & another* [2012] eKLR where the procedure for removal of an officer was upheld by the court.
19. Counsel submitted further that the appeal is an abuse of the process of court because following the dismissal of his case by the ELRC, the appellant filed a fresh action, by way of judicial review application before the High Court at Kisumu which was dismissed. Counsel concluded by stating that the prayers sought in the petition in the lower court are not available and urged the Court to dismiss the appeal.
20. We have considered the appeal, re-appraised and re-evaluated the evidence with a view to drawing inferences of fact in accordance with our mandate under Rule 29(1)(a) of the *Court of Appeal Rules*. The circumstances in which this Court may interfere with the decision of a trial Judge on findings of facts are limited. It would only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the Judge's impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown



demonstrably to have acted on wrong principle(s). In the often-cited case of *Selle vs. Association of Motorboat Co. of Kenya & Others* [1968] EA 123 the Court stated that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”

21. With those principles in mind, there are two issues for determination in this appeal. The first is whether the learned Judge erred in concluding that there was a justifiable reason for removing the appellant from the police service. The second issue is whether the Judge was right in concluding that the procedure followed in removing the appellant from service was proper, fair, and lawful. We start with the first issue.
22. There is no dispute that the appellant was appointed as a police constable with effect from 12<sup>th</sup> May 2011 in terms of a letter of appointment of that date. Amongst other things, the letter of appointment provided that the appellant would be subject to all regulations for officers of the public service which were then in force, or which may be promulgated from time to time. Such regulations include the Force Standing Orders.
23. The reason given by the respondents for the removal of the appellant from police service was that he was “unlikely to become an efficient police officer” as stipulated in the Force Standing Orders. Paragraph 30 of Chapter 20 of Force Standing Orders (Revised edition 2001) provides that:

“Any Inspector may be removed from the Force by the Commissioner of Police and any subordinate officer may be removed from the Force by the Commissioner of Police or Provincial Police Officer for any of the reasons set out here under:

(a)...

(b) if the Commissioner of Police or Provincial Police Officer as the case may be, considers that he/ she is unlikely to become or has ceased to be an efficient police officer;

(c)...

(d)...

(e)...

(f)...

The Commissioner of Police or Provincial Police Officer may delegate to any officer of or above the rank of Assistant Commissioner of Police the powers to remove any member of subordinate officer. [Emphasis added]

24. In a letter dated 23<sup>rd</sup> February 2014 the appellant was invited to “show cause” why removal proceedings should not be initiated against him having regard to his history of absenteeism from work. The appellant responded by his letter of 6<sup>th</sup> March 2014 attributing his previous conduct to being “young



in the service”. The Commandant, Anti Stock Theft Unit to which the appellant had been deployed was not satisfied with the appellant’s explanation and in a letter to the appellant dated 2<sup>nd</sup> April 2014 titled “Letter of Removal from the Kenya Police Service”, the Commandant, Anti Stock Theft Unit after narrating previous incidents of absenteeism and disciplinary proceedings notified the appellant that he had “30 days’ notice to be removed” from the Police Service as he was unlikely to become an efficient police officer. In part of that letter, the appellant was informed that:

“The Kenya Police Service has no room for officers of your calibre who have a habit of absenting themselves without leave instead of performing their duties. Having keenly perused your personal record and reply to the show cause letter, there are no sufficient grounds as to why you should be retained in the Kenya Police Service. I wish to inform you that you have 30 days’ notice to be removed from the Kenya Police Service with effect from 3<sup>rd</sup> April 2014. By 2<sup>nd</sup> May 2014 you should have returned all the items of government kit and equipment on issued to you. Any deficiencies noted will be met by you. You have the right of appeal to the Deputy Inspector General, Kenya Police Service within seven days of receipt of this letter through the right police channels.”

25. Before the trial court, Chief Inspector Patrick Osuru Ombach who testified for the respondents narrated that during the appellant’s short stint with the police service, he absented himself from duty without leave on at least four occasions. According to the witness, the appellant was enlisted on 12<sup>th</sup> May 2011 and trained at General Service Unit (GSU) School in Nairobi; that the appellant started showing “signs of indiscipline” during his internship at Naivasha Police Station by disappearing from the station; that he disappeared on 5<sup>th</sup> May 2012 and re-appeared on 9<sup>th</sup> May 2012; that after passing out, he was posted to Anti Stock Theft Unit Gilgil from where he was sent with other officers to Tana Delta on operation duties in November 2012 and while there he disappeared without leave on 9<sup>th</sup> November 2012 for 20 days and re-appeared on 29<sup>th</sup> November 2012.
26. Chief Inspector Ombach testified further that in January 2013 the appellant was granted leave up to 3<sup>rd</sup> January 2013 but failed to report back until 14<sup>th</sup> January 2013; that when the Tana Delta operation ended towards end of January 2013, the appellant alongside other officers were taken to Embakasi from where they were supposed to be picked but the appellant disappeared and did not present himself; that subsequently the appellant was given three days sick off after which he never reported back to work and after 21 days he was declared a deserter with effect from 25<sup>th</sup> February 2013. It was in connection to this latter incident that the appellant was charged with the offence of desertion and subsequently acquitted by the Magistrate’s court. In support of the respondents’ case pertaining to the appellant’s history of absenteeism, orderly room proceedings, notification of disciplinary inquiry and copies of signals were produced before the trial court.
27. As enumerated in the notice to show cause letter to the appellant as well as in the letter of removal, there was ample evidence produced before the trial court demonstrating that the appellant had absented himself from work without leave, namely: on 30<sup>th</sup> November 2012, the appellant was charged in orderly room proceedings for the offence of absenting himself without leave for 20 days and was fined Kshs.3,000.00 and forfeited salary equivalent to those days in the amount of Kshs.11,840.00; On 15<sup>th</sup> January 2013, he was again charged with a similar offence in orderly room proceedings for absenting himself without leave for 9 days and was fined Kshs.2,000.00 and forfeited his salary equivalent to those days; on 5<sup>th</sup> February 2013 the appellant again absented himself for 21 days, was later arrested and charged before the Magistrates court for the offence of desertion but acquitted as already indicated.
28. Based on the foregoing, and on a balance of probabilities, we are satisfied there was sufficient evidence presented before the learned trial Judge demonstrating a pattern of absenteeism on the part of the



appellant and justifying the conclusion reached by the Judge that “there was a justifiable reason for removing the [appellant] from the police service.” The claim by the appellant that the reason for his removal from service was on account solely of the incident of desertion over which he was charged and subsequently acquitted is not borne out by the record. The evidence shows that that incident was only one in a series of incidents leading to the conclusion by the respondents that the appellant “was unlikely to become an efficient police officer”.

29. It bears repeating that the claim by the appellant that he was wrongfully removed from service on account of a charge over which he was acquitted is not borne out by the evidence. It is also noteworthy that in respect of that specific incident, in applying to be reinstated to service after his acquittal by the magistrate’s court, he readily accepted, despite the acquittal, that he had deserted service. In his letter to the Commandant Anti Stock Theft Unit dated 23<sup>rd</sup> December 2013 applying for reinstatement to the service, he stated in part:

“From the 5<sup>th</sup> February 2013, I absented myself from duty without official leave for a period of 72 days whereby I was declared a deserter on 20<sup>th</sup> April 2013. I was arrested by C.I.D personnel at Kendu-Bay and taken to Kendu-Bay police station, where I was charged with the offence of desertion contrary to Section 94(1) of the Penal Code. The case was acquitted under Section 215 of the CPC due to lack of enough evidence from the prosecution. Sir, I wish to be reinstated to duty because I am interested in police work and need to exercise my profession and career.” [Emphasis]

30. Moreover, and as a general principle, we do not think there is merit in the assertion that an employer is prevented from terminating the employment of an employee on basis that the grounds for termination are not upheld by a criminal court. As this Court held in *Attorney General and another vs. Andrew Maina Giibinji and another* [2016] eKLR employers are not bound by the outcome in criminal cases in undertaking disciplinary proceedings. And in *Teachers Service Commission vs Joseph Wambugu Nderitu* [2016] eKLR, this Court stated:

“It is our view that this Court has made itself clear on the issue as to whether a successful outcome of a criminal process against an employee has primacy over an internal disciplinary process against such an employee arising from the same set of circumstances. The two processes are distinct from each other.”

31. It is therefore our finding that there is no merit in the complaint by the appellant that the learned Judge erred in concluding that there was a justifiable reason for his removal from the police service.
32. Next is the question whether the Judge was right in concluding that the procedure followed in removing the appellant from service was proper, fair, and lawful. The procedure for removal of an officer from police service due to inefficiency is set out in Paragraph 33 of Chapter 20 of Force Standing Orders. Paragraph 33(c) provides that when the officer having charge of the Division or Formation in which the officer is serving considers that such member is unlikely to become or has ceased to be efficient, he shall submit to the Commissioner of Police (read Inspector General) or the Provincial Police Officer as the case may be a full report, including confidential reports, on the work, conduct and efficiency of such officer, full details of any warning that may have been administered, and details of any representation that the officer may have made in reply to such warnings. Upon receipt of such report, the Inspector General or Provincial/Formation Commander, as the case may be, is required to inform the officer that his removal is contemplated, giving reasons therefore and calling upon the officer to submit in writing, before a day to be specified, such representations as he may wish to make why he should not be removed from the service.



33. Upon making such representations as the officer may wish to make to the officer having charge of the Division or Formation in which he is serving, such officer shall forward such representations to the Inspector General or Provincial Police officer together with any comments he may consider necessary. If the Inspector General or Provincial Police Officer, having perused such representations, and having regard to the usefulness of the officer and all other circumstances of the case is satisfied that the officer is unlikely to become or has ceased to be an efficient police officer, he shall remove him from the service. The officer concerned is then to be notified in writing of the effective date of his removal from the force. Under Paragraph 36 of the Force Standing Orders, an appeal lies to the Inspector General within 7 days after receipt of the notification of removal.
34. As it emerged from the testimony of the appellant and that of the Chief Inspector Ombach, there is no doubt that prior to being notified of the date of his removal, the appellant was served with notice to show cause why removal proceedings should not be initiated. He was given reasons for the intended removal and given an opportunity to demonstrate why he should not be removed. He responded by his letter dated 6<sup>th</sup> March 2014 but failed to satisfy his employer. He was also informed of his right to appeal which he exercised. The testimony of Chief Inspector Ombach regarding the process followed in the removal of the appellant from service was not challenged at all during his cross examination.
35. Upholding a similar process where an officer was removed from office in public interest under Force Standing Orders, Mumbi Ngugi, J. (as she then was), in the case of *Kipkurui Langat vs Police Commissioner/Inspector General, National Police Service and another* [2012] eKLR had this to say:
- “31. Given the above provisions, I find nothing that indicates a violation of the provisions of Article 47 of the Constitution. The petitioner was given an opportunity to present his case against his removal in the interests of the Force, and was afforded an opportunity to appeal against the decision to remove him as was required under the procedure set out in Paragraph 35 and 36 of the Force Standing Orders. There is clearly nothing in the process leading to his removal that was violated, and I find and hold that the 1<sup>st</sup> respondent acted in accordance with the provisions of the Force Standing Orders and in compliance with the Constitution in removing the petitioner.”
36. Equally, given provisions in Paragraph 33 of the Force Standing Orders and the process followed in the removal of the appellant, we are unable to fault the learned Judge for the conclusion he reached. The learned Judge had a basis therefore for concluding as he did that due process was followed in the appellant’s removal from service.
37. The appellant has before us made the complaint that the Commandant did not have the mandate to remove from service. This issue does not appear to have been taken up before the lower court. In view of the provision in paragraph 30 of the Force Standing Orders that “the Commissioner of Police or Provincial Police Officer may delegate to any officer of or above the rank of Assistant Commissioner of Police the powers to remove any member of subordinate officer”, it would have been a question of fact whether the Commandant had delegated powers. As to the complaint that Internal Affairs was not involved in the process of his removal, its role under Section 87 of the National Police Service Act, it seems to us is to deal with external complaints against police officers.
38. In the result, we uphold the judgment of the ELRC. The appeal fails and is dismissed with costs to the respondents.

**Orders accordingly.**

**DATED AND DELIVERED AT MOMBASA THIS 3<sup>RD</sup> DAY OF DECEMBER 2021.**



**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

