



**Muregi v National Police Service Commission & 2 others (Employment and Labour Relations
Petition E054 of 2024) [2024] KEELRC 2261 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2261 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E054 OF 2024
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

HENRY MICINO MUREGI PETITIONER

AND

THE NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed a Petition dated 28th March 2024.

Petitioner's Case

2. The Petitioner avers that he has been a police officer for seven years attached to the 3rd Respondent and over this period he served the National Police Service diligently in various parts of the country and on various special and general missions.
3. The Petitioner avers that he was arrested and arraigned before the Nakuru Chief Magistrate on 22/6/2020 with the offence of torture contrary to section 4(a)(i) as read together with section 5(1) of the *Prevention of Torture Act*. Once he was charged, the 3rd Respondent interdicted him with half pay vide a letter dated 20/7/2020.
4. The Petitioner avers that the criminal case against him was withdrawn on 1/10/2020 and the 3rd Respondent lifted his interdiction and deployed him to Kuresoi on 18/1/2022 after the charges were withdrawn.



5. The Petitioner avers that on 15/2/2024, he received a letter from the 3rd Respondent dated 9/1/2024 removing him from service effective 19/12/2023 for the reason that he was charged with an offence of torture contrary to section 4(a)(i) as read together with section 5(1) of the *Prevention of Torture Act*.
6. The Petitioner avers that before lifting the interdiction, the 1st and 3rd Respondents called for the criminal proceedings for the case against him to confirm the acquittal which they satisfied themselves and proceeded to lift the warrants.
7. The Petitioner avers that the termination letter noted that he had been served with a show cause letter which he replied and was considered and forwarded to the 1st Respondent.
8. It is the Petitioner's case that the Respondents' failure, neglect and/or refusal to accord him a fair hearing and fair administrative action prejudiced his right to fair administrative action, fair hearing and access to justice contrary to *the constitution*.

Petitioner's Submissions

9. The Petitioner submitted that when the interdiction was lifted, he was deployed to Kuresoi and his full salary reinstated until December 2023, although his arrears have never been processed. This is a case of double jeopardy as further to the criminal proceedings, he was subjected to an internal disciplinary process and was reinstated but he was subsequently removed from service for the same reason he was tried. He was therefore subjected to two disciplinary proceedings within the service.
10. It is the Petitioner's submission that the internal disciplinary process was concluded and he was reinstated therefore the complaint ought to have been buried forever. However, he was dismissed from service after 1 year which decision was not an appeal thus making the process irregular.
11. The Petitioner submitted that his right to fair administrative act, fair hearing, fair labour practices and legitimate expectation were grossly violated.
12. The Petitioner submitted that the 3rd Respondent's decision to remove him from the National Police Service was contrary to his right to fair labour practices as the Respondents reviewed his case and response to the notice to show cause and proceeded to lift his interdiction but still revisited the matter one year later and proceeded to remove him from service.
13. It is the Petitioner's submission that he was not accorded an opportunity to be heard before any disciplinary tribunal, he was not presented with a charge and neither did he appear with his representative to defend himself in violation of the fair labour process. Further, he was not subjected to the National Police Service Commission (Discipline) Regulation, 2015.
14. Upon receiving the notice of removal from service, he applied for an appeal as espoused under Regulations 22 and 23 of the National Police Service Commission (Discipline) Regulation, 2015. However, the Respondents never responded to the same or called him to an appellate disciplinary committee. It is the Petitioner's submission that the Respondents disregarded their own regulations and dismissed him illegally in gross violation of his rights under Article 41, 47 and 50 of *the constitution*.
15. The Petitioner submitted that it is not in dispute that he was on half pay from 26/6/2020 to 18/1/2022. He would have been discharging his duties for the 19 months he was on interdiction therefore he is entitled to all the withheld salaries amounting to Kshs 513,000.
16. The Petitioner submitted that it is not disputed he was entitled to plain cloth allowance of Kshs 30,000 annually which was never paid during the period of interdiction.



17. The respondent did not file a replying affidavit or submissions even though they were given enough opportunity to do so.

Analysis and Determination

18. The first issue for determination is whether the Respondent infringed the Petitioner's right to fair administrative action.

19. The right to fair administrative action is provided for under Article 47 of *the Constitution* of Kenya as follows: -

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
- a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. Promote efficient administration.”

20. It was further discussed in *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board* [2016] eKLR, where the court held:

“Section 4(3) of the *Fair Administrative Action Act*, 2015 provides that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision, where applicable; a statement of reasons pursuant to section 6.

As to what constitutes fair administrative action, the court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, stated thus:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards



will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.”

21. The Petitioner averred that he was arrested and tried at Nakuru Chief Magistrate for the offence of torture contrary to section 4(a)(i) as read together with section 5(1) of the *Prevention of Torture Act*. Once he was charged, the 3rd Respondent interdicted him with half pay vide a letter dated 20/7/2020.
22. He was acquitted when the same was withdrawn and his interdiction was lifted vide a letter dated 18/1/2022. He was then asked to report to SCCIO Kuresoi pending further instructions on his deployment from headquarters.
23. However, vide a letter dated 9/1/2024, the 1st Respondent dismissed him from service based on the criminal case which he was duly acquitted and subsequently lifting of his interdiction.
24. In view of the foregoing, the Respondent clearly violated the Petitioner’s right to fair administrative action as he was not subjected to any disciplinary process or informed that the matter was being reexamined with the intent to dismissing him from service.
25. The second issue for determination is whether the Respondent violated the Petitioner’s right to fair labour practices.
26. Article 41 of *the Constitution* provides for this right and reads:
 - “(1) Every person has the right to fair labour practices.
 - (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike.”
27. The right to fair labour practices was elaborated in *James Ang’awa Atanda & 10 others v Judicial Service Commission* [2017] eKLR as follows: -

“The cornerstone or fulcrum upon which the employment relationship turns in this country has been set out in Article 41 of *the Constitution* and it is not lawful labour practices or legal labour practices. It is fair labour practices.

Fair labour practice has not been defined expressly either in *the Constitution* or statute.



In such a case, in my view, it is the responsibility of Parliament to give the right content in the first instance and failing that, it is for this Court as a specialist Court to set out its contours, scope, limits and nature of the right on a case by case basis.

Although the primary statutes governing the employment and labour relations in this country predate *the Constitution* of Kenya, 2010, there are prescriptions scattered over the statutes which in one way or the other prescribe or direct as to what may comprise the content of fair labour practice(s) would be.

These prescriptive statutory rights and duties would include sections 9, 10, 11, 12, 13, 26 – 34, 35, 41, 43 and 45 of the *Employment Act*, 2007. These provisions serve as a beacon to the Court when called upon to determine what constitutes fair labour practice, and whether there has been an unfair labour practice.

In short, the jurisprudence on what practice would amount to an unfair labour practice goes further and or beyond what is legal or lawful.”

28. Against this background, the Petitioner has proved that the Respondent violated his right to fair labour practices as he was denied an opportunity to defend himself before his dismissal. He was dismissed for an offence he had already been acquitted and yet was not informed he was being charged again for the same offence.
29. Further, the Respondent dismissed the Petitioner’s employment based on a matter that was clearly handled previously and he was exonerated from the charges leading to the lifting of his interdiction by the 1st Respondent and subsequent redeployment to Kuresoi.
30. The third issue for determination is whether the Petitioner is entitled to the unpaid half salary and allowances withheld from 26/6/2020 to 18/1/2022 totaling to Kshs 513,000.
31. In *Grace Gacheru Muriithi –Versus- Kenya Literature Bureau* (2012) eKLR, the court stated:

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of *the Constitution*; it is unconstitutional.”
32. In view of the foregoing, the Petitioner is entitled to unpaid half pay for 19 months and plain cloth allowance for 2 years which was withheld during the interdiction period. This is based on the fact that the criminal case was withdrawn and the 1st Respondent subsequently lifted the interdiction.



33. Having established that the Respondent violated the Petitioner's constitutional rights of fair administrative action and fair labour practices, the Petitioner is entitled to his prayers as per his petition and in particular he is entitled to the following orders:-

1. This honorable court be pleased to stay the removal of the petitioner/applicant from National Police Service
2. This honorable court be pleased to issue conservatory orders staying the petitioner/applicant's removal from the National Police Service.

34. The petitioner have been reinstated to his employment with all the unpaid salary and this includes the kshs 513,000/- being unpaid half salary from 26/6/2020 to 18/1/2022 and plain cloth allowance for 2 years at Kshs 60,000/- and back pay salary from date of removal to date. The court finds petitioner is well compensated. Aggravated damages will not be awarded.

35. Each party will meet their respective costs of this petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

