



**Nderi & another v National Police Service Commission & another (Employment and Labour Relations Cause E183 of 2022) [2024] KEELRC 2422 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2422 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E183 OF 2022**

**MN NDUMA, J  
OCTOBER 3, 2024**

**BETWEEN**

**PETER NDERI ..... 1<sup>ST</sup> CLAIMANT**

**SAMUEL NGUMBI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

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

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

**JUDGMENT**

1. The claimants filed suit on 17/11/2022 vide a statement of claim dated 21/3/2022 seeking the following reliefs: -

1. A declaration that the dismissal of the claimants from employment was unfair and unlawful;
2. Reinstatement of the claimants to the positions they held before the purported dismissal without loss of salaries and/or benefits.
3. Further to (2) above, payment to the claimants of all their salaries unpaid to them from the date of the purported dismissal to the date of judgment

In alternative

4. Award of compensation to the claimants as follows:

Peter Nderi: -

- i. Kshs. 916,560/= being twelve months compensation for unfair termination of employment.



- ii. Kshs. 229,140/= being payment in lieu of three months termination notice.
- iii. Full pension and  
Samuel Ngumbi: -
  - i. Kshs. 761,700/= being twelve months compensation for unfair termination of employment.
  - ii. Kshs. 190,425/= being payment in lieu of three months termination notice
  - iii. Full pension and/or

5. Costs and interest on the above
2. The statement of claim is supported by supporting affidavits of the 2<sup>nd</sup> claimant, Samuel Ngumbi, in which he extensively deposes to the facts of the case on behalf of himself and the 1<sup>st</sup> claimant Mr. Peter Nderi.
3. The facts of the case as set out in the supporting affidavit may be summarized as follows: -
 

That the claimants were suspended from service by an officer who did not have the legal authority to do the same. That they were taken through orderly room proceedings which were contrary to *the Constitution*, the *National Police Service Act* and Service Standing Orders. That whilst it was alleged that they were caught on camera involving themselves in corruption, no video and/or photograph was produced in the said proceedings showing the alleged incident. That they were neither informed in advance of the accusations against them nor given adequate time to prepare.
4. The claimants relied on documents attached to the supporting affidavit of the 2<sup>nd</sup> claimant which documents included: letters of appointment dated 5/10/1991 for the 1<sup>st</sup> claimant and 2/8/1994 for the 2<sup>nd</sup> claimant.
5. Letter of suspension dated 1/10/2021 of both claimants by one Mutune Mukuru whose rank is not stated, on behalf of SCPC Langata.
6. It is alleged in the letter of suspension that on 21/9/2021 at Bellevue along Mombasa Road, the claimants committed an offence against discipline in that:
 

Without proper authority demands or extracts from any person any carriage, portage or provisions, commit an act which amounts to corruption under any law in force in Kenya contrary to section 88(2) sub-section (1)(z)(aa) of the Eighth Schedule of *National Police Service Act* of 2014.”
7. The claimants were to appear before orderly room proceedings while on suspension with effect from 1/10/2021 in which period the two were not entitled to any salary except alimentary allowance upon application to the Deputy Inspector General, Kenya Police Service.
8. The claimants filed Judicial Review application No. E027 of 2021 dated 5/10/2021 upon which the court granted the two officers leave to file substantive motion seeking orders of certiorari to bring into this court for the purposes of its being quashed the letter of suspension dated 1/10/2021 addressed to the applicant and for the court to issue an order of prohibition barring the respondents from dismissing



the applicants from employment based on the disciplinary proceedings, conducted on 23<sup>rd</sup> and 24<sup>th</sup> September 2021.

9. On 12/10/2021, the court issued orders in which the court stayed the letter of suspension issued by the respondents to the claimants and further disciplinary action pending hearing and determination of the said judicial review proceedings. The said orders were served upon the respondents on 15<sup>th</sup> and 18<sup>th</sup> October 2021.
10. The respondents however proceeded with the orderly room proceedings and dismissed the claimants vide letters dated 3/11/2021 and communicated to them on 26/11/2021 dismissing the two from service.
11. The claimants state that the respondents acted in blatant contempt of the court order issued on 12/10/2021.
12. This claim was subsequently filed to challenge the validity and fairness of the said dismissals in open defiance and contempt of the court order of 12/10/2021.

### **Defence**

13. The 1<sup>st</sup> respondent filed a statement of response to the claim dated 24/9/2023 in which the 1<sup>st</sup> respondent denies each and every allegation of fact contained in the statement of claim and puts the claimants to strict proof thereof.
14. The respondents aver in the response that the claimants were lawfully charged in orderly room proceedings, on 23<sup>rd</sup> and 24<sup>th</sup> September 2021 with committing acts that amounted to corruption contrary to section 88(2) of the [National Police Service Commission Act](#) as read together with the Eighth Schedule of the [National Police Service Act](#).
15. That the two were suspended by letter dated 1/10/2021. That in terms of National Police Service Standing Order Chapter 30, Regulation 48(1) allows for the power of delegation by the Inspector General of his power to suspend which was done in the present case.
16. That the claimants came before this court before exhausting the appeal process prescribed under the National Police Service Standing Orders Chapter 30, Regulation 29(2) which prescribes for an elaborate appeal mechanism which lies with the 1<sup>st</sup> respondent.
17. The respondents therefore raise a preliminary objection to wit that the statement of claim dated 21<sup>st</sup> March 2022 offends the doctrine of exhaustion of internal mechanism as set out by the Court of Appeal in Geoffrey Muthiya and another versus Sanuel Muguna Henry and 1756 others [2015] eKLR and therefore the court does not have jurisdiction to hear and determine that suit.
18. The 1<sup>st</sup> respondent also opposes the issuance of the orders sought in the statement of claim.
19. The 1<sup>st</sup> respondent had earlier filed grounds of opposition to the claim dated 21/6/2023 in which the said preliminary objection to the suit was raised.
20. The grounds of opposition were accompanied by written submissions on the issue whether the claimants offend the doctrine of exhaustion of internal mechanism and whether the claimants' dismissal from employment was fair and lawful.
21. The 2<sup>nd</sup> respondent also filed written submissions dated 25/6/2024 in opposition to the claim dated 21/3/2022.



22. The claimant filed written submissions dated 23/4/2024 in response to the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
23. The parties agreed to proceed with the matter by way of the pleadings and written submissions aforesaid without adducing oral evidence.
24. The court shall determine the issues raised guided by the aforesaid background as set out by the parties.

### **Determination**

25. The issues for determination are: -
  - i. Whether the respondents proceeded with the disciplinary process despite knowledge of court orders temporarily stopping the process.
  - ii. Whether the suit offends the doctrine of exhaustion of internal remedies.
  - iii. Whether the suit has any merit.
  - iv. What reliefs if at all are the claimants entitled to.

### **Issue i**

26. ELRC JR. No. E027 of 2021 was filed by the applicant and on 12<sup>th</sup> October 2021, the court granted the applicant leave to file substantive motion and the leave granted was to act as stay of the letters of suspension, issued by the respondents to the claimants and the disciplinary action pending hearing and determination off the said Judicial Review proceedings.
27. The said orders were served on the respondents on 15<sup>th</sup> and 19<sup>th</sup> October 2021 which service is evidenced by the stamps and signatures appended on a copy of the extracted court orders by the office of the National Police Service, on 15/10/2021 and by Langata Police Station on 19/10/2021.
28. The respondents clearly received the court order on the stated dates but despite receipt and knowledge of the said court orders the respondents proceeded to issue the claimants with letters of dismissal dated 3<sup>rd</sup> November, 2021 which were served on the claimants on 26<sup>th</sup> November 2021. The claimants pray that the said dismissal was an act of defiance of the court order dated 12<sup>th</sup> October 2021 the court having enjoined any further action to be taken in pursuit of the orderly room proceedings conducted on 23<sup>rd</sup> and 24<sup>th</sup> September 2021 against the claimants.
29. The 1<sup>st</sup> respondent has in the response to the statement of claim dated 24<sup>th</sup> September 2023 completely ignored the issue of contempt of court against 1<sup>st</sup> and 2<sup>nd</sup> respondents raised clearly by the claimants under paragraphs 15, 16 and 17(v) of the statement of claim and in the written submissions by the claimants.
30. The 1<sup>st</sup> respondent did not address the issue of defiance of the court order served on the respondents as expressly stated by the claimants before the date of the purported dismissal from employment of the claimants.
31. Furthermore, the 2<sup>nd</sup> respondent in the written submissions dated 21<sup>st</sup> June 2024 also completely ignored the issue of defiance of the court orders clearly raised by the claimants in the statement of claim and in the submissions filed by the claimant and dated 23<sup>rd</sup> April 2024.
32. The Court of Appeal in the case of Dr Fred Matiang'i versus Miguna Miguna & 4 others (2018) eKLR stated as follows:



33. Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a court we do not take lightly allegations of contempt of court. NO court should.
34. When courts issue orders they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex-cathedra, are compulsive, peremptory and expressly binding. It is not for any party be they high or low, weak or mighty and quite regardless of his status or standing in society to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This court, as must all courts, will deal firmly and decisively with any party who designs to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law and the upholding of the rule of law are not mere platitudes but realities.”
35. In the present case, the respondents seek to have orders of this court be issued in their favour in respect of a dismissal of the claimants which clearly happened when the respondents had received and had clear knowledge of the orders of the court issued on 12<sup>th</sup> October 2021 directing the respondents in particular the 2<sup>nd</sup> respondent from “taking any other adverse action against the applicants based on the disciplinary proceedings conducted on 23<sup>rd</sup> and 24<sup>th</sup> September 2021” pending the hearing and determination of this application. Clearly, the respondents disregarded and continue to disregard the said orders of the court as a mere supposition that they had a choice to obey or not to obey. They chose not to come to court to have the said order reviewed, varied or set aside before they could proceed to dismiss the claimants from employment based on the disciplinary proceedings conducted on 23<sup>rd</sup> and 24<sup>th</sup> September 2021.
36. On this basis alone, the action of dismissing the claimants by letters dated 3<sup>rd</sup> November 2021 and communicated to the claimants on 26<sup>th</sup> November 2021, was contemptuous of the aforesaid court order and the action was illegal, unlawful null and void ab initio as a blatant violation of fundamental rights of the claimants and abrogation of the constitutional edict of equality before the law enshrined under Article 27 of *the Constitution* of Kenya 2010.

#### **Issue ii**

37. Regarding whether or not this suit violates the doctrine of exhaustion, the court firstly reiterates that the claimants who were applicants in ELRC JR No. E027 of 2021 were duly entitled to bring the ex-parte application seeking leave to file substantive motion for orders of certiorari to quash the entire orderly room proceedings conducted on 23<sup>rd</sup> and 24<sup>th</sup> September 2021 and orders of prohibition stopping the respondents from taking any further steps arising from the said orderly room proceedings pending the hearing and determination of the substantive application.
38. The opportunity to appeal the outcome of the disciplinary process had not kicked in by dint of the interim injunctive orders of the court. The respondents only alternative was move court for the review, varying or setting aside of the interlocutory orders.
39. The authorities relied upon by the respondents in the matter of Geoffrey Muthinja and another and Samuel Mugure Henry and 1756 others [2015] eKLR and William Odhiambo Ramogi and 3 others versus Attorney General and 4 others [2019] eKLR, are not applicable in the circumstances of this case. Any internal appeal process was pre-empted by the interim orders of the court. The claimants were not obliged to countenance the unlawful action by the respondents in engaging in already illegal process by dint of the lawful court orders.



40. The reference by the respondents to the provisions of section 43(1) which stipulates:

A police officer against whom a punishment has been awarded in respect of an offence against discipline, may appeal within fourteen days upon receipt of the decision of the Service Disciplinary Appeal Board by lodging a notice of appeal at the National Police Service Commission,” does not avail the respondents

41. The anticipated action in terms of this provision were untenable since the matter was sub judice and the respondents had concluded the disciplinary process in blatant contempt of court orders.

### Issue iii

42. The suit by the claimants has merit, their dismissal have been done in blatant contempt of court orders. More importantly on 1/10/2021, the claimants were suspended from service indefinitely following an appearance at Nairobi County Police Headquarters where they were charged in orderly room proceedings without notice of prior charges. At the hearing they were shown unclear video in which it was alleged the claimants were seen taking bribes. The claimants were taken through a rigorous orderly room trial for two days based on the undisclosed videos.

43. The claimants deposed that their right to a fair hearing was violated by the respondents since the manner in which they were ambushed denied them opportunity to defend themselves fairly. That the process was in any event enjoined by the court but the respondents proceeded to dismiss the two from employment in defiance of the court order and without giving the claimants opportunity to be heard fairly.

44. In *Rebecca Ana Maina and 2 others versus Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, Ndolo J. stated: -

I agree with counsel for the respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charge must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of employer which would assist them in preparing their defence.”

45. Clearly that did not happen in the circumstances of this case. The claimants were simply summoned and immediately charged and tried in two days proceedings without any prior notice to show cause to charges already notified to them and without any opportunity at all to prepare their defence. They had no opportunity to get a colleague of choice to accompany them as provided under section 14(3)(b) read with section 18(1) of the National Police Service Standing Orders in which officers facing disciplinary proceedings have a right to be accompanied to the said proceedings by a colleague of choice. This is also a mandatory requirement under section 41(1) of the *Employment Act*, 2007.

46. In terms of section 15(1) of the said standing orders, an officer facing disciplinary proceedings is entitled to know in advance the charges facing them and the orders given at least seven (7) working days to show cause and the provision of section 15(3) guarantees the officer(s) at least seven working days to prepare for the hearing. As stated earlier, the claimants were simply ambushed with a disciplinary hearing without prior notice of charges and opportunity to show cause. None were given even one day to prepare their defence.

47. The proceedings clearly negated the cardinal rules of natural justice and were a violation of Article 50(2)(c) of *the Constitution* of Kenya 2010.



48. The court concludes that the dismissal of the claimants was unlawful and unfair and constituted contemptuous action by the respondents against a lawful court order and therefore illegal, null and void. The respondents cannot expect to be rewarded by the court having shown contempt for court orders as was stated in *Rwanyarare and others versus Attorney General (2003) 2EA 664*.

### **Remedies**

49. The dismissal of the claimants by the respondent was contumacious, stubborn, willful and disobedient display by the respondents against lawful court orders that were still in place at the time of dismissal of the claimants.

50. Accordingly, the action having been unlawful ab initio necessitate the court to grant the prayers set out by the claimants taking into account the guidelines set out under section 49(4) of the *Employment Act* 2007.

51. In this respect the nature of allegations made against the claimants though not proven make the court to have reasonable believe, that the respondents have lost confidence in the claimants and so reinstatement of the claimants to position of police officers is no longer tenable.

52. However, due to the egregious abuse of the rights of the claimants this is a proper case , taking into account the salary earned by the claimants, their service to the Police Service which was unblemished up to the time of allegations made against them, the summary manner of dismissal without a proper hearing and any compensation and/or payment of terminal benefits, the fact that due to the allegation made against them that they are unlikely to get any gainful employment in security service which is the area of their training and that no evidence was lawfully adduced that the claimants contributed to the dismissal; further considering the case of *George Osero versus the Hon Attorney General, National Police Service, and National Police Service Commission 2019 eKLR*;

53. The court makes final orders against the respondents in favour of the claimants as follows: -

- i. Maximum compensation of twelve (12) months' salary in the sum of Kshs. 916,560 for Peter Nderi and Kshs. 761,700 for Samuel Ngumbi respectively.
- ii. Kshs. 76,380/= in lieu of one month notice for Peter Nderi.
- iii. Kshs. 63,475/= in lieu of one month notice for Samuel Ngumbi
- iv. Payment of full pension to the claimants from date of dismissal.
- v. Costs of the suit
- vi. Interest at court rates in respect of compensation and notice pay above till payment in full

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024**

**Mathews Nderi Nduma**

**JUDGE**

Appearance:

Mr. Juma for claimants

M/s. Chebet for 1<sup>st</sup> respondent

Mr. Oure for 2<sup>nd</sup> respondent

Mr. Kemboi – Court Assistant

