



Kibet v National Police Service Commission & 3 others (Employment and Labour Relations Petition E012 of 2021) [2023] KEELRC 50 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 50 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2021
ON MAKAU, J
JANUARY 20, 2023

BETWEEN

P.C DICKSON KIBET PETITIONER

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

THE DEPUTY INSTOPECTOR GENERAL 3RD RESPONDENT

NATIONAL POLICE SERVICE 4TH RESPONDENT

JUDGMENT

1. The petitioner was enlisted as a police officer on March 26 1994 and later became a police driver earning a monthly pay of kshs 42,750.00. On January 12, 2014 he caused a road traffic accident while driving a government police vehicle registration number GK X966 and was interdicted on January 13, 2014.
2. He was later charged in Embu Traffic case No 16 of 2015 and he was found guilty and convicted on September 8 2017 for the offence of careless driving, taking motor vehicle without consent, and failing to renew a driving licence. He was then sentenced to pay a total of kshs 30,000/- fine or serve jail term of upto 3 months and he paid the fine.
3. On January 25, 2018, the petitioner was served with a suspension letter effective from September 8, 2017 when judgment in the traffic case was rendered. Subsequently, on July 15, 2019, he was served with a letter by the Deputy Inspector General dismissing him effective September 8, 2017.
4. The petitioner contends that the basis of his interdiction, suspension and dismissal were traffic offences which did not warrant any disciplinary action and as such the said interdiction, suspension and dismissal were null and void ab initio. Further no disciplinary hearing, investigations or inquiry was



conducted before the said disciplinary actions were taken against him but his dismissal was based on the judgment in the Traffic case No 16 of 2015 which in his view amounted to double jeopardy.

5. He further avers that his removal from service violated his right to natural justice, fair administrative action, fair labour practices, Legitimate expectation and protection from double jeopardy. Therefore the petitioner seeks the following reliefs;
 - i. A declaration that he interdiction from January 13, 2014 to September 8, 2017 was in breach of the petitioner's rights under article 41(1), 47(1) and (2) of the Constitution of Kenya 2010 and the same is null and void for all purposes.
 - ii. A declaration that the suspension letter dated January 25, 2018 was in breach of the petitioner's rights under article 41(1), 47(1) and (2) and 50(2) (0) of the Constitution of Kenya 2010 and the same is null and void for all purposes.
 - iii. A declaration that the dismissal letter dated July 15, 2019 was in breach of the petitioner's rights under article 41(1), 47(1) and (2) and 50(2) (0) of the Constitution of Kenya 2010 and the same is null and void for all purposes.
 - iv. An order of judicial review in the nature of mandamus compelling the respondents jointly and severally to reinstate the petitioner without any loss of benefits.
 - v. Upon grant of prayer number (iv), an order of judicial review in the nature of prohibition directed against the respondents jointly and severally prohibiting them from dismissing the petitioner from the Kenya police service.
 - vi. An order of compensation as tabulated herein below;
 - a. Kshs 513,000 being one(1) year's as damages for unfair and unlawful termination.
 - b. Kshs 940,500 being 50% unpaid salary for the 44 months in interdiction.
 - c. Kshs 940,500 being unpaid salary during the 22 months in suspension.
 - vii. Costs of the petition.
 - viii. Interest of vi and vii at court rates
 - ix. Any other or better order that this court may deem fit and just to grant.
6. The 2nd and 3rd respondent opposed the petition by the Replying Affidavit sworn on April 6, 2022 by chief inspector Dennis Nyangule. In brief the affiant admits that the petitioner was enlisted into the police service as a police constable on March 26, 1994 and hence he was bound by the terms of his employment, all laws, regulations and service standing orders promulgated from time to time affecting his service in the police.
7. It was further 2nd and 3rd respondents' case that the petitioner voluntarily enlisted into the Kenya Police Driving School for a professional driving course in 2012 and upon graduation in June 2012 he was designated as a police driver. Thereafter he was transferred to Embu County as police driver subject to the provisions of chapter 36 of the service standing orders on 'Fleet Management' providing for management and control of police vehicles and particularly, part X of the chapter on 'accidents involving police vehicles.'
8. It was further averred that the petitioner caused accident while driving government vehicle on January 12, 2014 and he was charged with the offence of driving whilst under the influence of alcohol among other offences. He was then interdicted pending the outcome of the case (Embu Traffic case No 16



of 2015). The case ended on September 8, 2017 with conviction and sentencing of the petitioner for the offence of careless driving, taking a motor vehicle without consent, and failing to renew a driving licence.

9. Based on the outcome of the said traffic case, the petitioner was served with the letter dated January 25, 2018 suspending him from duty effective September 8, 2017. It was further averred that pursuant to paragraph 54 (2) of chapter 36 of the Service Standing Orders, the deputy inspector general, upon consideration of a detailed report submitted by the chief transport officer, particularizing the nature, circumstances and costs of the accident, and the outcome of the Traffic case No 16 of 2015, recommended the petitioner's dismissal to the National Police Service Commission through the inspector general.

Submissions

10. The respondents did not file submissions but relied on the Replying affidavit filed. The petitioner filed submission framing three issues for determination by the court namely;
 - a. Whether the impugned interdiction, suspension and dismissal violated the Constitution.
 - b. Whether the petitioner was unfairly and/or unlawfully terminated.
 - c. Whether the petitioner is entitled to the prayers sought
11. On the first issue, it was submitted that the petitioner was neither informed officially of the said interdiction nor was he involved in any investigations (if any) leading to the interdiction. It was further submitted that the impugned suspension and the subsequent dismissal were done before subjecting the petitioner to any disciplinary mechanism as required by THE Constitution.
12. It was further submitted that the suspension and dismissal were not based on independent investigations and decisions by the respondent but only on the basis of judgment in Embu Traffic case No 16 of 2015. Consequently, it was contended that the petitioner's rights to fair labour practices, fair administrative action and fair hearing under Article 41, 47 (1) and 50 (2) of the Constitution respectively were violated.
13. It was argued that the petitioner was condemned without being afforded a chance to defend himself and that there was a delay of 5 years from the date he was served with interdiction letter to the date his dismissal was communicated. Besides it was submitted that dismissing the petitioner based on the judgment in Traffic case No 16 of 2015 amounted to double jeopardy. For emphasis, the case of Gedo Abdulabi Mubamed v Commissioner of Police & Another (2015) eKLR which dealt with a similar dispute was cited.
14. As regards the second issue, it was submitted that the dismissal of the petitioner was unfair because a fair procedure was not followed. It was argued that the dismissal of the petitioner was not based on valid reasons because he was dismissed for traffic offences. It was contended that under paragraphs 39(4) of Chapter 30 of the Service Standing Orders provides that minor offences like traffic offense under the Traffic Act or the County Government's legislation shall not necessitate disciplinary action. In the petitioner's view none of the offences set out under 8th schedule to the National Police Service Act 2011, which necessitate disciplinary action have been cited for his dismissal.
15. Further, it was submitted that even if a valid reason for dismissal existed, the respondents did not follow the procedure set out under regulation 17 of the National police Service Commission (Discipline) Regulations, 2015. The said regulation requires that when a police officer is suspected of having committed an offence, he must be notified of the offence complained off and be given 3 days within



which to show cause why disciplinary action should not be taken against him. Thereafter a disciplinary committee must be constituted without undue delay and the officer notified of disciplinary meeting with an option of calling any witness or other form of evidence in defence. The decision of the committee must then be rendered within 28 days and communicated to the Commission which then communicates the recommendations to the Inspector General of Police.

16. It was submitted that the respondent did not attempt to accord the petitioner any shred, speck or iota of a hearing as contemplated in the aforementioned regulations and as such the impugned decision amounted to unfair and unlawful termination of the petitioner's service.
17. As regards the reliefs sought, it was submitted that the petitioner has made a good case to warrant granting of the orders sought in his petition. Consequently the court was urged to grant the declaratory orders and other reliefs sought plus costs.

Analysis and determination

18. There is no dispute that the petitioner was employed by the respondent from 1994 until July 15, 2019 when his services were terminated effective September 8, 2017 for offences related to a road traffic accident he caused on January 12, 2014. The issues for determination are;
 - a. Whether the termination was substantively and procedurally unfair and unlawful.
 - b. Whether the interdiction, suspension and the termination violated the petitioner's rights under Article 41 (1), 47 (1) and (2) and Article 50 (2) (0) of the Constitution.
 - c. Whether the reliefs sought are merited.

Substantive and procedural unfairness

19. Substantive fairness refers to validity of the reason for a disciplinary action while procedural fairness refers to the opportunity afforded to the employee to defend himself before the disciplinary action is decided.

Substantive fairness

20. In this case the reason for the interdiction, of the petitioner as per the police signal dated January 13, 2014 is that he had been involved in a road accident while driving police government motor vehicle No GK X966. The interdiction was pending the outcome of the inquiry into the accident.
21. The reason cited for his suspension as set out in the suspension letter dated January 25, 2018 is that the petitioner had been convicted of the offences related to the said traffic accident. The offences included careless driving contrary to section 49(1) of the Traffic Act, taking motor vehicle without consent contrary to section 65 of the Act, and failing to renew a driving licence contrary to section 30(3) of the Traffic Act. The suspension was in line with Chapter 36 paragraph 54 (2) of the Service Standing Orders and section 14 (9) of Legal Notice No 90 of the National Police Service Commission Act, 2011.
22. The reason for the petitioner's dismissal as per the minutes of the National Police Commission is that he had been convicted of the said three traffic offences.
23. I have carefully considered all the material presented and the service standing orders, and it is clear that paragraph 54 of the service standing orders mandates the formation commander to ensure that a police officer is interdicted for among others, the offence of driving whilst under the influence of alcohol or other substance, and driving a police vehicle without the consent of the officer in charge pending the outcome of the court case. In this case the petitioner was interdicted pending trial of the traffic case



No.16 of 2015 where among other charges, he was accused of driving whilst under the influence of alcohol, and taking a police vehicle without consent of the officer in charge. Consequently, I find and hold that the interdiction was for a valid reason.

24. As regards the suspension, paragraph 54 (2) of Chapter 36 of the Service standing orders provides that;
- “On being convicted, the driver shall be suspended from duty pending a decision from the Deputy Inspector General and the Director of Criminal Investigations through the chief Transport, respective service...”
25. The petitioner was convicted and sentenced to pay a fine for among others, driving a police vehicle without the consent of the officer-in-charge. I find that the said conviction was a valid reason for suspension of the petitioner under the aforementioned provision of the service standing orders.
26. As regards the dismissal the petitioner had been convicted of the said three offences and paid fine which brought to an end litigation on the matter. Paragraph 39(4) of Chapter 30 on “Discipline” of the Service Standing Orders which excuse disciplinary action on minor traffic offences does not apply to offences committed by police drivers while driving a police or government vehicles. Part X of Chapter 36 on Fleet Management of service standing orders paragraph 54 makes specific provision which binds police drivers while driving police vehicle or government motor vehicle. The evidence before the court affirms a finding that the reason for the dismissal was valid.
27. In view of the finding above that there was valid reason for the petitioner’s interdiction, suspension and dismissal, I must hold that the said disciplinary actions taken against the petitioner were substantively fair. I say so because they are actions founded on facts and the aforementioned provisions of the service standing orders.

Procedural fairness

28. Regulation 17 of the *National Police Service Commission (Discipline) Regulations*, 2010 provides the procedure for dealing with an officer who has committed an offence against discipline. It provides that in all cases, the officer must be notified of the offences he is accused of and be given at least three days to show cause why disciplinary action should not be taken against him or her. The notice may be waived in exceptional cases and the procedure under the standing orders be invoked but the presiding officer must make a written statement indicating the reasons for the waiver.
29. The said regulation further provides that an officer who is subjected to hearing has the option of calling witnesses or other evidence at his or her own costs. The hearing is to be before the disciplinary committee and must be conducted expeditiously and without undue delay or technicalities and any delay beyond 21 days must be reported to the commission stating the reason for the delay.
30. The recommendations of the national disciplinary committee must be forwarded to the commission for confirmation and approval and within 7 days of receipt of recommendation communicate to the inspector-general the disciplinary action to take against the officer. The inspector general must then take disciplinary action within three days of receipt of the communication from the commission.
31. In case of recommendations from the subordinate disciplinary committee, the same is forwarded to the inspector general or authorized officer as prescribed by the service standing orders, for confirmation and approval. Thereafter the Inspector-General or authorized officer then communicates or implement the disciplinary action to be taken against the officer taking into consideration Regulation 10.



32. The gist of the aforementioned regulation 17 is that an officer who is said to have committed an offence against discipline is entitled to be told the offence levelled against him and be accorded a hearing before a disciplinary committee. Any other procedure waiving that right is the exception to the rule and must be justified by valid reasons given by the presiding officer in writing.
33. I have keenly perused the evidence adduced by the parties but I have not seen any that shows that the petitioner was served with any show cause letter inviting him to defend himself in writing. I have also not seen any correspondence inviting him to hearing before a disciplinary committee as required by regulation 17 aforesaid.
34. There is also no evidence that the presiding officer in respect of this case, wrote any statement indicating the reasons for the waiver of a disciplinary hearing for the petitioner since none was produced as an exhibit. Going by the suspension letter dated January 25, 2018, the petitioner was only required to handover and proceed to his permanent address to wait for the decision. Later a decision was made to dismiss him.
35. The court finds that the petitioner was not accorded a fair hearing by the employer with respect to the offence against discipline, before he was dismissed. The internal disciplinary process is always separate and parallel to the criminal process. They can be conducted simultaneously or one after the other but they are not the same nor is the standard of prove the same.
36. Courts in Kenya have severally pronounced themselves on the duality of proceedings against employees and I am therefore just repeating what is already settled. The fact that an employee has been convicted or acquitted by a court of law in criminal proceedings does not bar internal disciplinary process. An employee can be acquitted by a court of law but still be dismissed from employment for the same complaints.
37. It is also a well settled principle of law and courts have jealously guarded it, that an employee shall not be condemned unheard. Article 47 of the *Constitution* and section 9 of the *Fair Administrative Actions Act* codifies the said principle of natural justice. It is immaterial that the offence committed is obvious. The right to fair administrative action must be accorded to a subject before condemnation by an administrator.
38. In this case the petitioner was condemned unheard and therefore the procedure followed to dismiss him was unfair. Besides the procedure from the date of interdiction to dismissal took over 5 years. Even if we were to blame the delay to the trial court in the traffic case, the delay after the conviction being two years is too much and in breach of regulation 17 of the National Police Service, which provides for prompt hearing and determination of internal proceeding against officers.

Violation of fundamental rights and freedoms

39. In view of the foregoing finding that the petitioner was dismissed from service without being accorded any hearing by the employer, the court holds that his right to fair administrative action under article 47 of the *Constitution* was violated by the respondents.
40. For the same reason the court holds that his right to fair labour practice was violated by his employer in that it dismissed him from service without a chance to defend himself and by the 5 years delay before finalizing his disciplinary case contrary to the National Police Service Commission (Discipline) Regulations. The failure to follow the procedure set out under the aforesaid regulation 17 also meant that he was treated differently from other officers and therefore he was discriminated against contrary to article 27 of the *Constitution*.



Reliefs

41. The reason for interdiction and suspension were valid and the procedure followed was fair and therefore I decline to declare that the said actions breached petitioner's rights or that they were null and void.
42. However for the reasons, stated above, I make declaration that the dismissal of the petitioner from the National Police Service was in breach of his rights to fair labour practices and right to fair administrative action under article 41 (1) and 47(1) and (2) of the Constitution of Kenya, 2010.
43. The dismissal took place and therefore cannot be declared null and void in law. However the court makes declaration that the dismissal was unfair, unlawful and contrary to article 236 of the Constitution which provides that a public officer shall not be;

“(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”
44. The petitioner was dismissed from service in July 2019, more than three years ago. The jurisdiction of the court to reinstate an employee to his job is restricted to only a period of 3 years from the date of the dismissal by dint section 12(3) (vii) of the Employment and Labour Relations Court Act. Consequently, the judicial review order of mandamus to compel the respondents to reinstate the petitioner is untenable. Likewise an order of prohibition cannot issue since the order of reinstatement is beyond the reach of the court's jurisdiction.
45. The petitioner has sought compensation for unfair and unlawful termination of his services equal to one year's salary as damages. The said relief is provided under section 49 of the Employment Act which does not apply to National Police Service. Therefore the court has no jurisdiction to award the said compensatory damages under section 49 of the Employment Act in this suit.
46. However, the court has a duty to do justice and in this case I will award the petitioner general damages for violation of his aforementioned rights assessed at kshs 3,000,000.00. In awarding the said damages, I have considered that the petitioner was kept in anxiety and without income for many years. He was bound by the law and police standing orders and Regulations all through and he could not seek for alternative employment. His dismissal was also back dated to September 8, 2017 in order to deny him salary from the date he was suspended.
47. The determination of his case did not require 5 years to close. No reason was given to justify the delay of 5 years yet the Regulations provides in mandatory terms that the disciplinary process for offences against discipline shall be determined expeditiously and within expressly set time lines.
48. The claim for 50% salary withheld during interdiction and full salary withheld during suspension is not payable because the petitioner was dismissed at the end of the disciplinary process.
49. As regards costs of the suit, the same should always follow the event unless the court has just reason to order otherwise. In this case, the court is satisfied that the petitioner was justified to file the petition herein and since he has succeeded, he is awarded costs.
50. In the end, I enter judgment for the petitioner against the respondents collectively and severally for sum of kshs 3,000,000.00 plus costs and interest at court rate from the date hereof. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF JANUARY, 2023.



ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

