



**Chepkonga v National Police Service Commission (Petition
E010 of 2021) [2023] KEELRC 980 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 980 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E010 OF 2021**

NJ ABUODHA, J

APRIL 28, 2023

**IN THE MATTER OF: ARTICLES 2,3(1),10,19,20,21,22(1),28,41(1),47(1)
(2),48,50 AND 246(3)(B) OF THE CONSTITUTION OF KENYA, 2010 IN
THE MATTER OF: FAIR ADMINISTRATION ACTION ACT, 2015**

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT, 2021

IN THE MATTER OF: THE NATIONAL POLICE SERVICE COMMISSION ACT, 2013

BETWEEN

EDWARD DESAI CHEPKONGA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION RESPONDENT

JUDGMENT

The Petition

1. Edward Desai Chepkonga (hereinafter the petitioner) through a petition dated 11th June 2021 avers that he was enlisted in the Police Service as an administration police constable on 26th June 1993 and was in active service until 17th May 2018 when he was summarily dismissed from service.
2. The petitioner averred that on 9th October 2013, Orderly Room Proceedings were conducted against the Petitioner at Marakwet East Sub- County Headquarters in his absence contrary to the provisions of the law , for allegedly performing his duties negligently. The presiding officer of the Orderly Room Proceedings recommended the Petitioner be retained and a deduction of one month salary be effected. The Sub county commander subsequently concurred with one part of the recommendation to retain the petitioner but introduced his own punishment of demotion and transfer from Marakwet East Sub County. The deputy Inspector General was forwarded the unlawful Orderly Room Proceedings four years and four months after delivery of verdict in violation of Article 47 of the Constitution.



3. Further, that on 14th March 2017, a second Orderly Room Proceedings were instituted against the petitioner on charges of causing disturbance in police premises, drinking while on duty and discharging two rounds of ammunition without reasonable cause. The presiding officer proposed demotion of rank from Administrative Police Sergeant to Administrative Police Corporal, which verdict was upheld by the Sub county Administrative Police Commander and the Deputy Inspector General.
4. The petitioner averred he was subsequently demoted to the rank of Administrative Police Corporal vide a letter dated 27th June 2017, a verdict he accepted and continued to serve the nation in that capacity without prejudice.
5. The petitioner avers that he was surprised when vide a letter dated 7th December 2017, he was arbitrary dismissed from the Administrative Police Service and that from that letter, it was erroneously indicated that he was on suspension when in real sense he was not.
6. The petitioner contended that vide a letter dated 23rd May 2018, he appealed to the County Disciplinary Appeal Review Board against his dismissal from the service.
7. The Petitioner further averred that the Appeal Board in its decision recommended that the Respondent vary the decision of severe punishment of dismissal as per the National Police Service Standing Orders Chapter 31(1)(c) and uphold the decision of Reduction in rank as per the decision RefNo.NPS/APS/HRM/3/15/VOL.1/216 dated 27th June 2017.
8. It was the petitioner's contention that in total disregard of the findings and recommendation of the County Disciplinary Appeal Review Board, the Respondent vide a letter dated 7th January 2021 arbitrary dismissed the Petitioner from service on grounds of public interest.
9. The petitioner averred that his constitutional right under Articles 10(1) and (2), 47(1) (2), 48, 50 and 246 (3)(b) of the Constitution of Kenya, Sections 4,6 and 12 of the Fair Administrative Action Act and Section 46(1) of the National Police Service Act had been violated.
10. The petitioner sought for;
 - a. A declaratory order do issue that the Petitioner's fundamental rights and freedoms have been violated
 - b. A certiorari order do issue to quash the entire proceedings and decision of the Respondent held on 17th December 2020 under minute no 142/12/2020
 - c. An order of reinstatement of the Petitioner to the Administrative Police Service at the rank of corporal
 - d. Compensation of the Petitioner
 - e. Costs of the petition be provided for;
 - f. Interest on (d) and (e) above
 - g. Any other suitable order(sic)

Response To Petition

11. The petition was opposed by the respondents through a replying affidavit sworn by Vincent Onyango, the Chief Executive Officer of the respondent on 21st January 2022.



12. In that affidavit, the deponent averred that the petitioner was subject to two separate disciplinary proceedings for offences against the discipline under section 88 of the National Police Service Act; that there was one witness in the said orderly Room Proceedings Sergeant Wilson Cheptoo and the petitioner did not present any witness in his defence.
13. It was contended that on the 25th August 2013, the petitioner wilfully failed to disarm Administrative Police Constable Abebo Mamo after he intentionally discharged a bullet that killed a member of the public
14. That the petitioner was senior in rank and had the authority over the said Abebe Mamo and that the failure to disarm led to the subsequent death of the daid Administration Police Contsble Abebo Mamo after the irate members of the public lynched him and in which the petitioner was charged under the Orderly Room Proceedings on 1st October 2013 with the offence of being negligent in the performance of his duty.
15. That the following the Orderly Room Proceedings , the presiding officer recommended punishment as salary deduction for one month as well as retraining.
16. That the Sub-County Administrative Police Commander recommended on the 9th October, 2013 that the Petitioner be demoted and retrained as well as transferred from his home county station.
17. It was deponed that section 89(1) of the National Police Service Act, 2021 empowers the Commission to Administer punishments to officers found liable for offences against discipline including but not limited to reduction of rank, dismissal from the Service or combination of the punishments provided under that section.
18. That the letter dated 27th June 2017, and upheld by the commission on 15th November 2017 was a notification to the petitioner of the recommendation for demotion in rank by the Inspector General as sent to the Commission and the appropriate rank in which he was to hold.
19. That from the 2013 Orderly Room Proceedings, the only corrective actions executed on the Petitioner was that he was warned and redeployed to another station while in essence the decision to demote him was not relayed or rescinded by the commission.
20. That the petitioner was charged in a second disciplinary process on 14th March 2017 at the sub county Administration Police Commander's office in Marakwet West before the Inspector of Police with three offences namely; causing disturbances in the Administration Police contrary to the 8th Schedule under Section 88(2) of the National Police Service Act; being drunk while on duty contrary to the 8th Schedule under section 88(2)(1)(e) of the National Service Act and discharging two rounds of 7.62mm calibre using G3 A3 Rifle without orders or reasonable cause contrary to the 8th schedule under section 88(2) (1)(0) of the National Police Act.
21. It was contended that four witnesses gave evidence in those proceedings against the Petitioner and he cross examined them and presented his defence before the sentence and conviction against him.
22. That the petitioner pleaded guilty in all the three counts and was informed of the decision of demotion of rank to the rank of Administrative Police corporal pending the approval of the commission and that the petitioner had a previous conviction pronounced on 7th October, 2013 and that this fact was highlighted and taken into account in the sentencing in the second Orderly Room Proceedings held on 14th March 2017.
23. It was contended that section 8A(1) of the National Police Service (Amendment)Act 2014 clearly indicate that while the Inspector General is responsible for discipline within the service subject to



disciplinary control of the Commission, even where the implementation of the disciplinary procedures including for the rank of Police Constable, are under the command of the Inspector General, the commission retains disciplinary control which includes inter alia ensuring compliance with the prescribed disciplinary procedures and guidelines formulated by the inspector General, ensuring compliance with the due process in disciplining members of the service, receiving regular reports from the Inspector General on disciplinary matters handled by service, reviewing or ratifying of disciplinary actions taken by the inspector General and hearing and determining appeals from the members of the service; that at the time the Petitioner presented his appeals in 2018 and 2019, the inspector General had already commissioned service standing orders in which chapter 30 guides on how to navigate disciplinary procedures in tandem with the discipline standards set by the commission; that the National Police Service Commission (Discipline) Regulations 13(4) and 13(5) provides that where the proposed sanctions are for an order of restitution, stoppage of salary increments for a specified period but not exceeding one year, reduction in rank, dismissal from the service, or any combination of punishments provided shall only take effect on approval and confirmation by the commission.

24. That the Discipline Regulations expressly outline that it is the sole prerogative of the commission to uphold, review and or rescind any such recommendation of whether the petitioner was demoted in rank or upheld in his previous or make such other holding as fits the circumstances and that the commission received the report from the Inspector General of the petitioner's disciplinary proceedings and personal file and made the considered view that the proper sentence in the Orderly Room Proceedings of 14th March 2017 was for the petitioner's dismissal.
25. It was averred that the Disciplinary Regulation 16(4) indicates that in reviewing a disciplinary measure taken against an officer, the commission may review the process and the outcome of an investigation and the recommended punishment, in order to confirm that the disciplinary action meted on an officer was commensurate to the offence committed.
26. It was the respondent's case that the petitioner was duly informed of the decision over him through a letter dated 7th December 2017 through the office of the County Administrator Commander, Elgeyo Marakwet County.
27. The court was urged to dismiss the petition.

Written Submissions

28. On 6th June 2022 parties agreed to dispose the petition through written submissions. The Petitioner filed his submissions on 3rd October 2022 and the respondent filed its submissions on 8th December 2022.
29. The petitioner submitted the issues for court's determination are whether the petitioner was denied the right to fair administrative action; whether the petitioner was denied the right to a fair hearing; whether the petitioner was unfairly and unlawfully dismissed from service and lastly whether the petitioner is entitled to the remedies he is seeking.
30. As regards the 1st issue, the petitioner submitted that his right to Fair administrative action under Article 47 of the constitution and section 4 of the Fair Administrative Action Act was violated in that on 9th October 2013, Orderly room proceedings were conducted against him at Marakwet East Sub county headquarters for allegedly performing his duties negligently in his absence in violation of Article 50 of the Constitution of Kenya.
31. It was his contention that the presiding officer of the orderly room proceedings recommended in his verdict that the petitioner be retained and a deduction of 1 month salary. That the sub



county commander subsequently concurred with one part of the verdict to retain the petitioner but introduced his punishment of demotion and transfer from Marakwet East Sub county.

32. It was submitted that furthermore, the deputy Inspector General was forwarded the unlawful orderly room proceedings of 9th October 2013 four years 4 months for delivery of verdict in a blatant violation of Article 47 of the Constitution. Reliance was placed on the case of *Obuya Bagaka v Kenya School of Government* [2021]eKLR for the position that the respondent did not accord the petitioner the opportunity to face justice in a fair and efficient manner as provided by the Constitution and the other relevant statutes.
33. On the second issue, the petitioner submitted that the respondent had not demonstrated in any way that the petitioner's right to a fair hearing was not violated. He relied on the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Co. Ltd.*
34. The petitioner submitted that as regards the third issue, his dismissal from employment was unfair, unprocedural and unlawful. It was submitted that the 1st orderly room proceedings, that's proceedings for 9th October 2013, were forwarded 4 years 4 months for delivery of verdict in a blatant violation of Article 47 of the constitution.
35. It was submitted that on 14th March 2017, orderly room proceedings were instituted against the petitioner and it was the presiding officer's recommendation that the petitioner be demoted from the rank of administrative police sergeant to Administrative Police Corporal which verdict was upheld by the sub county administrative police commander and the deputy Inspector General.
36. The petitioner submitted that he was shocked when on 7th December 2017, he was arbitrary dismissed from the Administrative Police Service. According to him, the dismissal was unfair, unlawful and unprocedural.
37. According to the petitioner the disciplinary proceedings against petitioner were conducted in an opaque manner and the process was tainted with malice. To buttress this position, the petitioner cited the Supreme Court of Kenya case of *Kenfreight (E.A) Limited v Benson K. Nguti* [2009]eKLR
38. As regards the last issue, the petitioner urged the court to award him an appropriate relief including an order for compensation as according to the petitioner, the respondent violated the petitioner's constitutionally guaranteed rights.
39. The respondent identified the issues for determination to being, whether the petitioner's fundamental rights and freedoms were violated; whether the petitioner was denied a right to a fair hearing and whether the petitioner is entitled to the orders sought.
40. It was submitted the petitioner was subject to disciplinary control of the respondent during the tenure of his employment as envisaged under section 88(1) National Police Service Act and that the disciplinary control is a prerogative of the employer and the Courts will only intervene where it is demonstrated that the process is flawed or there was a breach of laws.
41. Counsel for the respondent submitted that orderly room proceedings of 9th October 2013 constituted the petitioner's disciplinary records and that trial in absentia are provided for in the service standing orders.
42. It was further submitted that petitioner was indolent in that he had the right of appeal to the National Police Service to clear his name if aggrieved by the sanction proposed and that the proposed sanction of demotion in rank as recommended in the 2013 orderly room proceedings was not effected as a result



- of an administrative lapse in forwarding the petitioner's disciplinary records for ratification by the Respondent.
43. On the proposition that equity could not aid one approaching it with unclean hands, the respondent's counsel submitted that it annexed appendix JVO 2 which was a confidential report on the petitioner from his former County Commander indicating various other disciplinary concerns surrounding the petitioner and supporting his removal from service as a fair penalty and that as such, the petitioner cannot be said to be with clean hands.
 44. As regard the 2nd issue, it was submitted that the Orderly Room proceedings of 14th March 2017 were carried out procedurally, lawfully and expeditiously and the petitioner pleaded unequivocally guilty to the charges in the orderly room proceedings. The cases of Republic v Minister for Internal Security and Provincial Administration & 4 others Exparte CPL James Mwita[2013]Eklr and Simon Gakuo v Kenyatta University and 2 others Misc Civil Applic No. 34 of 2009 were cited to buttress the averment that the petitioner could not cherry pick what he considered to be his appropriate punishment by alleging unfairness.
 45. It was also submitted that the petitioner merely alleged that his constitutional rights had been breached but did not precisely enumerate the alleged violations as held by the court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*[2013]eKLR.
 46. Lastly, as to whether the orders of certiorari and mandamus should be granted, the respondent submitted that the petitioner has neither demonstrated nor indicated excess or lack of authority by the respondent in the disciplinary proceedings and disciplinary action against him. Reliance was placed on *William and others v Spautz*[1993]2LRC 659 at 667 and *Kenya National Examination Council and the Republic*, Nairobi, Court of Appeal, Civil Appeal number 266 of 1996 .
 47. According to the respondent, the petitioner had been separated from employment of the respondent for more than 3 years as provided under section 12(3) (vii) of the Employment and Labour Relations Court, 2011(sic) and that it remained against public interest that if he was ordered to be reinstated as he was seeking. In support of this position, counsel cited the case of *Kenya Airways v Allied workers union Kenya & 3 others* [2014]eKLR

Determination

48. It is now settled that employment contract is a contract for personal service and some of the fundamental principles undergirding the relationship include that the parties to an employment agreement have mutual obligations of trust and confidence in their dealings with each other. There is also the duty of good faith which is reciprocal between the employer and employee. Good faith here implies good behavior consistent with the implied terms of the contract of employment.
49. On the part of the employee, commitment to serve, honesty and protection of the employer's interest and property under such employee's custody and care are the very essence of the employment relationship.
50. Some employment relationships given their special and or sensitive nature, are additionally and or exclusively governed by specific Acts of Parliament and regulations tailored for the industry or sector the relationship is domiciled.
51. The Petitioner was a Police Officer hence his contract was governed by the National Police Service Act and Force Standing Orders made thereunder. It is important to note that Police Service is a disciplined force and instructions and operations are usually regimental in nature. Instructions are usually in form



of orders and commands which require to be quickly obeyed by those they are directed to. Discipline and obedience are therefore some of the fundamental standard operating procedures for the service.

52. It was not disputed that the Petitioner had been subjected to two separate disciplinary proceedings. The first was on 25th August, 2013 when the Petitioner wilfully failed to disarm an Administrative Police Constable, one Abebo Mamo after he intentionally discharged a bullet killing a member of the public. The petitioner was senior in rank and had authority to disarm the said police constable. Following the Orderly Room Proceedings that ensued, the Petitioner was recommended for punishment by salary reduction and retraining. The Sub County Administrative Police Commander further recommended that the Petitioner be demoted in rank.
53. On 14th March, 2017 at the sub County Administration Police Commander's Office in Marakwet West the Petitioner was once again charged with the offences of causing disturbance, being drunk while on duty and discharging two rounds of 7.62 mm calibre using a G3 A3 rifle without orders or reasonable cause. The petitioner pleaded guilty to all the three counts and was reminded of his previous conviction. These were taken into account in sentencing the claimant, culminating to his dismissal from service.
54. In a claim for unfair termination of employment, the Court usually applies the test of a "reasonable employer". That is to say, would a reasonable employer confronted with similar facts or situation consider dismissal or termination as the most appropriate or proportional disciplinary measure in the circumstances. If the answer be in the affirmative, the Court will not interfere.
55. It was correctly submitted by Counsel for the respondent that the Petitioner was subject to the disciplinary control of the respondent as envisaged under section 88(1) of the National Police Service Act. The Court has carefully reviewed and considered the Petition herein and the grounds upon which it has been brought side by side with the response by the respondent and is persuaded that the conduct of the Petitioner was inconsistent with that of a disciplined officer. He posed a risk not only to the public he was meant to serve but also to other officers working with him and a risk to himself through reckless use of firearm entrusted to him for the discharge of his duties.
56. From the foregoing the Court is sufficiently persuaded that there existed valid and justifiable reasons for dismissing the petitioner from the National Police Service and the Court does not find any reason to interfere with the respondent's decision to do so. The Petition is therefore found without merit and is hereby dismissed with costs.
57. It is so ordered.

DATED AT NAIROBI THIS DAY OF 2023

DELIVERED VIRTUALLY THIS 28TH DAY OF APRIL 2023

ABUODHA J. N.

JUDGE

In the presence of:-

..... for the Claimant

..... for the Respondent

