



Kaino v Inspector General, National Police Service & 3 others (Petition E009 of 2022) [2023] KEELRC 961 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 961 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E009 OF 2022
NJ ABUODHA, J
APRIL 28, 2023

BETWEEN

NICHOLAS KIPROTICH KAINO PETITIONER

AND

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 1ST RESPONDENT

DEPUTY INSPECTOR GENERAL, KENYA POLICE SERVICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. The Petitioner filed a petition on March 30, 2022 seeking orders that:
 - a) A declaration do issue that the petitioner's rights under articles 10, 41, 47 and 236 of the Constitution of Kenya, 2010 and section 46 of the National Police Service Act, No 11A of 2011 were breached by the respondent and the decision of the 3rd respondent communicated vide the letter dated December 30, 2021 dismissing the petitioner from service is null and void.
 - b) An order of *certiorari* do issue to remove into this Honourable Court and quash the decision of the respondents to dismiss the petitioner from service through the letter dated December 30, 2021.
 - c) An order of mandamus to issue to the respondents compelling them to reinstate the petitioner to the position of Police Constable in the Kenya Police Service, General Service Unit.
 - d) The petitioner be awarded damages by way of;



- i) One month's salary in lieu of notice at Kshs 50,600.
- ii) 12 month's salary compensation for unfair termination at the monthly rate of Kshs 50,600 totaling to Kshs 607,200.
- iii) Salary from the month of July 2021 at the monthly rate of Kshs,50,600 to the date of the determination of this petition coupled with general damages for the breach of the rights to fair labour practices, fair administrative action and article 236 of the Constitution of Kenya, 2010.
- e) Costs and interests be awarded to the petitioner to be sourced by the respondents.

2. The petition was based on the following main factual background:

- (i) That the petitioner was recruited by the 3rd Respondent as a Police Constable under the Kenya Police Service on April 29, 2016 and upon completion of his training, he was posted to the Recce Company under the General Service Unit (G S U) and assigned the Force Identification Number 109316. By virtue of his recruitment as an officer under the National Police Service, the petitioner became a public officer by dint of article 260 of the Constitution of Kenya, 2010 and section 2 of the Public Officer Ethics Act, no 4 of 2003.
- (ii) That the petitioner was, in the year 2019, posted to the General Service Unit (G S U) sub-unit Cobra 28 and his working station upon being posted was the Jomo Kenyatta International Airport where he served diligently without incident until 1st July 2019 when a complaint was booked against him vide OB No 10/01/07/2019 for the alleged offence of 'disobeying a lawful command' together with PC 109923 Nichodemus Ongera.
- (iii) That the petitioner disputed the allegation against him vide OB NO, 13/02/07/2019 and shortly after his objection, he was served with a Notice to Show Cause why he should not be charged with another offence captioned as 'without proper authority, disclose any information concerning other police matter' which offence had not been booked in the occurrence book.
- (iv) That the petitioner did lodge a complaint to the Internal Affairs Unit regarding the Notice to Show Cause vide a letter dated July 16, 2019 and upon complying with the directions issued by the said unit, he was served with another notice to show cause dated July 18, 2019 before being sent on off-duty for a period of five (5) days, which off-duty he did complain about vide a letter dated July 19, 2019 before proceeding for the said off-duty.
- (v) That upon resumption of duties, the petitioner learnt that he had been charged in absentia for the offence which had not been booked and found guilty of the offence. The petitioner was fined Kshs 3,500/= which had already been deducted from his salary.
- (vi) That on diverse dates between April 12, 2020 and July 3, 2021, the petitioner was charged for various offences, which offences he was not informed of, neither was he accorded the opportunity to defend himself or respond to the allegations levied against him save for one of the offence which he was charged in his presence.
- (vii) That the charges culminated to his dismissal from employment vide a letter dated December 30, 2021 by the 3rd respondent through the 2nd Respondent following a suspension dated July 7, 2021 by the 2nd Respondent, which suspension he did lodge an appeal against and which appeal was never considered or heard by the 3rd



Respondent.

3. The petition was further supported by the affidavit of the Petitioner in which he deponed *inter alia* that:
- (i) I was recruited by the 3rd respondent as a Police Constable under the Kenya Police Service on April 29, 2016 and upon completion of my training, I was posted to the Recce Company under the General Service Unit (G S U) and assigned the Force Identification Number 109316. I am informed by my Advocates on record that by virtue of my recruitment as an officer under the National Police Service, I became a public officer by dint of article 260 of the Constitution of Kenya, 2010 and section 2 of the Public Officer Ethics Act, no. 4 of 2003.
 - (ii) I was, in the year 2019, posted to the General Service Unit (G S U) sub-unit Cobra 28 and my working station upon being posted was the Jomo Kenyatta International Airport where I served diligently without incident until July 1, 2019 when a complaint was booked against me vide OB NO. 10/01/07/2019 for the alleged offence of 'disobeying a lawful command' together with PC 109923 Nichodemus Ongera.
 - (iii) On diverse dates between April 12, 2020 and July 3, 2021, I was charged for various offences, which offences I was not informed of, neither was I accorded the opportunity to defend myself or respond to the allegations levied against me save for one of the offences which I was charged in my presence.
 - (iv) The charges culminated to my dismissal from employment vide a letter dated December 30, 2021 by the 3rd respondent through the 2nd respondent following a suspension dated July 7, 2021 by the 2nd respondent, which suspension I did lodge an appeal against and which appeal was never considered or heard by the 3rd respondent.
 - (v) My appeal against the dismissal from service was premised on the following grounds:
 - a) I had not gone for vigorous standardization course in preparation for a change over exercise which would take me to Damajale G S U Camp and I had not been informed of the said change over exercise as I had been given an off-duty for the period between March 16, 2021 to 21st March 2021 being the date for the said change over exercise.
 - b) I did not receive a change over allowance as alleged by the disciplinary committee and no evidence was produced in the form of payment sheets that were duly signed by myself in support of the alleged receipt of change over allowance.
 - c) The allegations levied against me that I willfully disobeyed lawful command to report to Damajale G S U Camp were unfounded and malicious since that I was not part of the formation that was to participate in the change over exercise. Since being posted to the G S U Recce Company, I had been a member of Group IV and no transfer documents had been executed from the G S U Headquarters indicating a change in that position.
 - d) I did make a request for off duty on May 17, 2021 to attend to my wife who had developed complications after undergoing delivery by caesarian section and had been referred to Kapsowar Mission Hospital for further medical assistance, which off duty was denied despite a signal being sent from Kapsowar Police Station indicating the situation of my wife, which signal I received a late notification of. Being aware of the state of my wife and the fact that my children had been left alone since my wife was hospitalized, I did proceed to attend to my wife and children.



- e) During the tenure of my service, I wrote various complaint letters to the Internal Affairs Unit which complaints went unaddressed and this served to frustrate me at my place of work.
 - f) I am aggrieved by the manner in which the proceedings against me were conducted without according me an opportunity to defend myself. The final warning letter given to me was served upon me together with a suspension letter dated July 7, 2021 which goes to compound the unfair manner in which the proceedings against me were handled.
4. The 3rd Respondent filed a replying affidavit on November 9, 2022 through one Silas Oloo Mc'Opiyo who stated *inter alia*:
- (i) That I am the Acting Chief Executive Officer of the National Police Service Commission, the 3rd Respondent herein and I am therefore seized of the facts herein and duly competent to swear this affidavit.
 - (ii) That the National Police Commission is mandated under Article 246(3)(b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service.
 - (iii) That the Petitioner was employed in the National Police Service as a Police Constable and attached to the General Service Unit- Recce Company (herein after referred to as GSU) identifiable under personal number 2017076781 and Force number 109316.
 - (iv) That the Petitioner has in his employment history been subject to varied separate disciplinary proceedings known in the Police Service as Orderly Room proceedings for offences against the discipline under section 88 of the National Police Service Act, 2011.
 - (v) That the Petitioner was a highly trained officer who had amongst other specialized training had undergone a standardization course and that is the reason he was accordingly deployed at the Unit's Recce Company.
 - (vi) That deployment on immediate notice and urgent response is inherent to the nature of the work at the General Service Unit Recce company which deployment draws from the entirety of the staff numbers of the Unit and which deployment does not constitute a transfer as misrepresented by the Petitioner in paragraph 13 (c) of his Petition.
 - (vii) That prior to deployment for change over duties, the Petitioner was granted 7 days off to prepare himself for the changeover exercise, which official off is granted to all officers on days preceding the change-over exercise for personal preparation.
 - (viii) That on May 24, 2021, the Petitioner was assigned duties for deployment to Damajale GSU Recce Camp.
 - (ix) That the Petitioner was granted 7 days off duty commencing May 17, 2022 preceding the date of deployment in which he was to report back by May 24, 2021 for the aforementioned deployment.
 - (x) That the Petitioner wilfully disobeyed the lawful command by failing to report for the said deployment on May 24, 2021 and subsequently failed to appear on May 25, 2021 for briefing parade also known as "tamaam" parade and in which a final warning letter was issued to the Petitioner.



- (xi) That the Petitioner was declared to be Away without Official Leave (AWOL) on May 27, 2022 and remained so missing for a cumulative period of 7 days.
- (xii) That the Petitioner resurfaced on June 3, 2021 in which a Notice to Show Cause was issued requiring the Petitioner to explain his absence without official leave.
- (xiii) That the Petitioner having full knowledge that a final warning letter for his indiscipline had been previously issued and having been declared as Away without Official Leave was served a Notice to show Cause why he should not be charged in Orderly Room Proceedings.
- (xiv) That the Petitioner was served with a Notice of Waiver for disciplinary proceedings on June 7, 2021 to serve as an immediate example and for proceedings of offence of having “absented himself without leave contrary to Section 88 (2) (1) (h) of the Eighth Schedule to the *National Police Service Act*, 2011.
- (xv) That the Petitioner was found guilty and the presiding officer noted that in awarding sentence his powers were inadequate having taken into account past disciplinary history and that there was the final warning letter as issued on May 24, 2021.
- (xvi) That the Petitioner’s file containing his disciplinary was actioned to the Commandant- General Service Unit who recommended the sentence of dismissal to the Deputy Inspector General of the Kenya Police Service.
- (xvii) That following the recommendation for dismissal, a the office of General Service Unit Commandant invoked Section 14 (9) of the *National Police Service Commission (Discipline) Regulations, 2015* also quoted as Legal Notice No 90 of 2015, which required the Petitioner to proceed on suspension requiring the officer to proceed to his permanent residence and to report to the local police station or post as prescribed in the Service Standing Orders.
- (xviii) That the Petitioner was charged for the disciplinary offence under section 88 (2) (1) (w) of the 8th Schedule of the *National Police Service Act*, 2011.
- (xix) That having so complained to the Internal Affairs Unit, he declined to undergo the General Service Unit’s disciplinary process as he indicated that the same is under investigation.
- (xx) That the Petitioner in his petition at paragraph 11 alludes to a second inference of indiscipline on April 12, 2020 in which disciplinary proceedings were preferred against him under section 88 (2) (1) (u) of the Eighth Schedule to *National Police Service Act*, 2011.
- (xxi) That in this second offence, the Petitioner was tasked by his superior specifically why he “without reasonable cause he appeared on duty untidy with beards”.
- (xxii) That the Petitioner’s response is stated in the Notice to Show Cause served on him, received and signed April 14, 2020.
- (xxiii) That the Petitioner was served with waiver Notice for immediate disciplinary proceedings in which he declined to participate and the response he gave was that the Petitioner indicated “...Afande, do as you wish because I am not going to sign any document.”
- (xxiv) That the Petitioner’s attitude prompted full disciplinary proceedings that were conducted and again concluded in his absence on April 20 and 23, 2020 and for which he was sentenced Ksh 3000/- for the said offence.



- (xxv) That later that year on November 4, 2020, the Petitioner was deployed to Damajale GSU Camp in which he was aware he was required to escort GKB 931 T Isuzu Lorry back to his command at the said Damajale Camp.
- (xxvi) That he was to re-joins group IV contrary to what he avers in paragraph 13 (c) of his Petition and which deployment is a non-issue as the Staffing officers and the head of Commands have authority to appropriately redeploy.
- (xxvii) That having failed to rejoin his group IV on the said deployment to GSU Damajale Camp on November 4, 2020, he was placed under the Command of group II through a signal reference GSU/46/3/R/100 dated November 19, 2020.
- (xxviii) That the Petitioner failed to report as deployed and in being tasked to Show Cause why Disciplinary action should not be taken for such failure he indicated that he had booked the incident in the occurrence book that “...I was seriously sick and I had gone to seek medication. I officially communicated that I was indisposed vide OB No. 49/03/11/2020. No one has ever asked me about my state of health since then instead I am being paraded to be charged”.
- (xxix) That the Petitioner did not report to any of the briefing officers that he was unwell nor did he proffer any credible evidence that he sought medical treatment for the alleged illness.
- (xxx) That the Petitioner was subsequently charged for the offence of “Wilfully disobeying a Lawful Command” in that the Petitioner on November 4, 2020 at GSU Recce Ruiru Camp failed to Board the said vehicle on escort to Damajale Camp a disciplinary offence Contrary to Section 88 (2) (1) (g) of the Eighth Schedule to the National Police Service Act, 2011.
- (xxxi) That the Petitioner was aware of these disciplinary proceedings and like previous instances refused to appear to defend himself nor in this case present any medical records in support of his alleged illness.
- (xxxii) That the Petitioner remains unfit for the National Police Service for indiscipline and whose conduct was gross misconduct at various periods in his employment as shown in the Orderly Room Proceedings including his obvious reluctance to take up deployment which is specific to the Recce Company is obvious from his disciplinary record.
- (xxxiii) That trial in absentia is provided for under the National Police Service Commission Regulation 12 and clearly spelt out in Chapter 30 of the National Police Service, 2017 - Service Standing Order at paragraph 33 and the annexed Orderly Room proceedings where this happened was where the Petitioner refused to participate in spite of having notice of the proceedings.
- (xxxiv) That the Commission has demonstrated it followed the letter and the spirit of the Constitution and the Law as severally demonstrated in this Replying affidavit and supported by the annexures herein and urge the Court to dismiss the Petition which claims the Petitioner’s Constitutional rights were violated.
- (xxxv) That the claim for compensation should be dismissed as the 3rd Respondents have demonstrated to court they acted within the Law, fairly in accordance to the circumstances and upheld the laid out procedures.
5. In support of the petition, Ms Mugambi for the Petitioner submitted in the main that the Petitioner’s rights envisaged under Article 10, 41, 47, 236, 244 and 246(3) of the Constitution had been breached by the 3rd Respondent since the Respondent being an administrator within the meaning of Section 2 of



- Fair Administrative Actions Act, 2015* had an obligation to comply with the mandatory requirements of Section 4 of the Act as well as Article 47 of the *Constitution*.
6. Counsel submitted that the administrative scope of the 3rd Respondent extends to the conduct of disciplinary proceedings relating to members of the service as informed by Article 246(3) of the *Constitution*.
 7. Counsel further urged the Court to note that the Petitioner was tried for several alleged offences as evidenced by the orderly room proceedings without being informed of the charges levied against him. The failure to notify him of the said charges denied him the opportunity to prepare a defence or respond to the allegations. Trial in absentia further denied the Petitioner opportunity to be heard and was therefore condemned unheard. In this respect Counsel relied on the case of *James Mwaniki Thatbi S/ACP; OGW v Inspector – General & 4 others* [2014] eKLR and *Evans Musa Cheptuma v Jomo Kenyatta University of Agriculture & Technology & another* (2008) eKLR.
 8. Mr Mugambi further submitted that the 3rd Respondent failed to consider the appeal raised by the Petitioner challenging his suspension from service. This was breach of Article 246 of the *Constitution* and Section 10(4)(g) of the *National Police Service Commission Act*.
 9. On whether the Petitioner is entitled to the reliefs sought, the Petitioner relied on Rule 28 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure* which empowers the Court after hearing the parties to make such orders as it may deem fit. Due process was not followed with regard to the Petitioner hence he was entitled to the remedies sought.
 10. The Petitioner according to Counsel was entitled to a certiorari to remove into the Court and quash the decision of the Respondents to dismiss the Petitioner and an order of mandamus to compel the Respondents to reinstate the Petitioner to his former position as police constable in National Police Service.
 11. The Petitioner has further contended to be entitled to twelve months' salary as compensation for unfair termination and further (though not initially pleaded) Counsel submitted that the Petitioner was entitled to damages for breach of his constitutional rights.
 12. Ms. Apiyo for the 3rd Respondent on her part submitted that the Petitioner having accepted the terms of employment in the National Police Service, agreed to serve anywhere in the Country and transfers were in accordance with terms and conditions of employment in the service as spelt out in Section 88(1) of the *National Police Service Act* and Chapter 72 paragraph 6(1) of the Standing Orders.
 13. According to Counsel, the inherent nature of police work in command based structure and high standards of discipline and work ethics which is exemplified by the service standing orders and the capacity to respond to assignments in a formal manner in public and national security interests.
 14. According to Counsel, the Petitioner failed to report to GSU Recce Camp Damajale Camp in November 2020 for a change over and relief of another team that was at the camp. He further failed to report for similar assignments scheduled for March 2021 and May 2021.
 15. According to Counsel, the Claimant committed offences against discipline and were all related to operations and were punishable through authorized officers in command of the General Service Unit. Further the Claimant breached these terms by absconding duty and refusing deployment which is the core function of his employment and training.
 16. The Court takes judicial notice that Police Service is a disciplined force and instructions and operations are usually regimental in nature.



17. Instructions to officers are usually issued in form of orders and commands which ought to be obeyed without questions by those they are directed to.
18. Article 24(5) of the Constitution provides in paraphrase that a provision in legislation may limit the application of the rights or fundamental freedoms listed thereunder to persons serving in Kenya Defence Forces and National Police Service. These include labour relations under Article 41 of the Constitution.
19. Further Section 3(3) of the Employment Act provides in paraphrase that the Act shall not apply to Kenya Police, the Kenya Prisons Service or Administration Police Force. This implies whereas the Court is seized of jurisdiction to hear employment disputes involving the disciplined forces, the provisions of the Employment Act do not strictly apply. Issues such as substantive and procedural fairness provided for in the Employment Act do not apply with regard to disciplined forces. These category of employees have their own homegrown disciplinary rules and processes in the name of Force Standing Orders and the Court in entertaining any dispute regarding them will be guided by these standing orders and will be only concerned whether in handling the issue the National Police Service followed the Force Standing Orders.
20. The Petitioner herein does not dispute that he was subjected to disciplinary process in accordance with the Force Standing Orders. His complaint seems to be that they were done in absentia. That is to say he was not called to be present to defend himself. The Petitioner with his petition, attached several letters from the 3rd Respondent informing him of Orderly Room Proceedings conducted in his absence and the verdict reached. For instance on October 7, 2019, the Petitioner was tried in absentia and fined. He was again on December 30, 2020 tried in absentia and fined. On April 23, 2021 he was charged in Orderly Room proceedings with absenting himself without leave and he pleaded guilty and was fined. On May 24, 2021, the Petitioner was once again charged in absentia, found guilty and fined. The Petitioner despite the fact that he was informed of his right of appeal did not appeal against these convictions.
21. On June 7, 2021, the Petitioner was suspended from duty for failing to participate in a changeover exercise when he failed to show up to board a vehicle to GSU Damajale Camp in Garissa County in spite of the fact that he was briefed by one Mr Ernest Cheruyiot, the Company SOOP. The letter further reminded the Petitioner of his previous disciplinary record referred to above and in respect of which as the Court observes he never appealed against. The Petitioner only appealed against his dismissal from service communicated by a letter dated December 29, 2021.
22. The Court has considered the foregoing and the nature of the Petitioner's employment which as observed above, is regimental in nature and is persuaded that the Petitioner was a difficult worker who did not appreciate the nature and the discipline required in execution of his duties. The 3rd Respondent was therefore justified in dismissing him from service.
23. In conclusion the petition is found without merit and is hereby dismissed with costs.
24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA J N

JUDGE

In the presence of:-



.....for the Claimant

..... for the Respondent

