



Katheka v National Police Service Commission & another (Petition 17 of 2023) [2023] KEELRC 1241 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 17 OF 2023**

B ONGAYA, J

MAY 25, 2023

**(FORMERLY HIGH COURT PETITION NO. 136 OF 2018 IN
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION AT NAIROBI)**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES 2,10,
19(2), 20 (1) (2) (3) & (4), 21 (1), 22, 23, 27, 36, 40, 47 (1) & (2), 50 (1), 258 (1) AND
259(1) FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 22, 23,
27, 36, 40, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT,
THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS,
2013, THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT (SPORTS, ARTS
& SOCIAL DEVELOPMENT FUND) REGULATIONS, 2018 (L/N 194 OF 2018)**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

PETER KILONZO KATHEKA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT



Regulation 13 of the National Police Service (Vetting) Regulations in content, design and impact or effect amounts to a classical limitation of article 50 of the Constitution on the right to fair hearing and hence unconstitutional

The petition sought for among other orders; a declaration that the National Police Service Commission's (the Commission) vetting process and decision was in violation of his fundamental rights. The court noted that while the Commission appeared to have religiously implemented the statutory and regulatory provisions on the vetting, the provisions in content and impact offended article 50 of the Constitution as they were capable of being interpreted and implemented unconstitutionally. The court found that regulation 13 of the National Police Service (Vetting) Regulations in content, design and impact or effect amounted to an unconstitutional and classical limitation of article 50 of the Constitution to fair hearing.

Reported by Kakai Toili

Statutes – interpretation of statutory provisions – interpretation of the National Police Service (Vetting) Regulations – interpretation of the statutory and regulatory provisions on the vetting of police officers – interpretation of regulation 18 of the National Police Service (Vetting) Regulations on supply of information and response to complaints - whether the statutory and regulatory provisions on the vetting of police officers in content and impact offended article 50 of the Constitution on the right to fair hearing – whether regulation 18 of the National Police Service (Vetting) Regulations applied to situations where no complaint or adverse report was received – Constitution of Kenya, 2010, article 50; National Police Service (Vetting) Regulations, regulation 18.

Constitutional Law – constitutionality of statutes – constitutionality of regulation 13 of the National Police Service (Vetting) Regulations on the requirement of officers to submit documents - whether regulation 13 of the National Police Service (Vetting) Regulations in content, design and impact or effect amounted to an unconstitutional limitation of the right to fair hearing - Constitution of Kenya, 2010, article 50; National Police Service (Vetting) Regulations, regulation 13.

Judicial Review – judicial review orders - order of certiorari - whether a judicial review order of certiorari could be issued after the lapse of 6 months from the date of the decision – whether an order of reinstatement of Chief Inspector of Police to his post could be issued after lapse of 3 years - Civil Procedure Rules, Order 53.

Brief facts

The petitioner's case was that prior to his vetting, he was required to fill out a vetting questionnaire and avail, which he did, certain vital documents. The petitioner claimed that he was not informed if the 1st respondent, the National Police Service Commission (the Commission) had received complaints or adverse information against him and from the individuals and institutions listed in regulation 15 of the National Police Service (Vetting) Regulations or from any other source. He further claimed that he was not served any adverse information or complaint in that regard.

The petitioner stated that he appeared for vetting interview and that the Commission in a decision signed on December 6, 2016 but transmitted to the petitioner on December 22, 2017 found that the petitioner had failed the vetting and proceeded to remove him from service. The petitioner averred that the Commission in its decision made adverse findings against him which included that it had carried out a financial analysis on the m-pesa statements and noted that the petitioner had received substantial amounts of money from officers as well as from civilians; and that the transactions far outweighed the sources of income declared by the petitioner.

The petitioner was dissatisfied with the decision and applied for a review. The Commission in the vetting review decision upheld the initial vetting decision. The petitioner was dissatisfied with the handling of his initial and review vetting owing to procedural impropriety. The petitioner prayed for among other orders; a declaration that his fundamental freedoms and rights had been infringed by the Commission; and a declaration that the Commission's vetting process and decision was in violation of his fundamental rights.



Issues

- i. Whether the statutory and regulatory provisions on the vetting of police officers in content and impact offended article 50 of the Constitution on the right to fair hearing.
- ii. Whether regulation 18 of the National Police Service (Vetting) Regulations on supply of information and response to complaints applied to situations where no complaint or adverse report was received.
- iii. Whether regulation 13 of the National Police Service (Vetting) Regulations in content, design and impact or effect amounted to an unconstitutional limitation of the right to fair hearing.
- iv. Whether a judicial review order of *certiorari* could be issued after the lapse of 6 months from the date of the decision.
- v. Whether an order of reinstatement of Chief Inspector of Police to his post could be issued after lapse of 3 years.

Held

1. The petitioner could appear not to have provided relevant and material evidence to show that the National Police Service, the 2nd respondent violated any of his rights or freedoms as alleged. Thus, the petition could appear to fail as far as it related and alleged that the 2nd respondent violated the petitioner's rights and fundamental freedoms. While making that finding the court had considered the mutual position by the petitioner and 2nd respondent that the police vetting exercise was vested in the as the constitutional employer of police officers including the petitioner.
2. While the Commission appeared to have religiously implemented the statutory and regulatory provisions on the vetting, the provisions in content and impact offended article 50 of the Constitution as they were capable of being interpreted and implemented unconstitutionally.
3. The petitioner appeared to have not shown that the Commission violated his right to fair administrative action under article 47(1) of the Constitution. Regulation 18(2) of the National Police Service (Vetting) Regulations applied to a situation where, in the vetting process, the Commission would receive a complaint or adverse information – meaning that the provision would not apply to situations whereby no such complaint or adverse report was received; the instant case being such case where no complaint or adverse report was received. Nowhere was it alleged by the parties to the petition, including the petitioner, that an adverse information or complaint was made to the Commission against the petitioner. None at all.
4. Invoking regulation 18 of the National Police Service (Vetting) Regulations to require the Commission to serve upon the petitioner written complaint or adverse information and invite his response thereto was a misconceived attempt to invoke that regulation as there was no such complaint or adverse information. In any event, any deficiencies in the initial vetting hearing may appear to have been cured in the review hearing, in the appeal the petitioner never raised failure to apply regulation 18 most likely because he knew the situation prescribed in that regulation did not accrue in his vetting proceedings.
5. The instant case was distinguishable from *Peter Kemboi Chemos v National Police Service Commission* [2018] eKLR where the respondent had stated that it had adverse information against the petitioner and the court found that the respondent had violated article 50(2)(b) of the Constitution requiring the petitioner to be informed of the charge, with sufficient detail to answer it. In the instant case, articles 47 and 50 of the Constitution were not violated at all upon the alleged failure to comply with regulation 18 of the National Police Service (Vetting) Regulations because the situation envisaged in that regulation did not accrue and was not in issue in the instant case.
6. Irrationality or unreasonableness could appear not established against the Commission. The Commission was not concerned with the petitioner's entitlement to associate with his colleagues and indeed any other person. The concern was the purity or integrity of the content or agenda of the association as could be concluded from the m-pesa transactions. It could not be said that the Commission's line of opinion was aimed at undermining the petitioner's right to associate so that no irrationality or unreasonableness had been established in that regard.



7. A statutory and regulatory design of the vetting procedure as was invoked in the instant case or generally was considered. While the Commission was complying with the set statutory and regulatory regime, the same was manifestly unfair and unconstitutional.
8. Regulation 9 of the National Police Service (Vetting) Regulations, 2013 in the vetting procedure, conferred the Commission and its vetting panels wide powers, so that, looking at the instant case, amounted to serious constitutional breaches in their content and invariably in their effect or impact. Regulation 13 of the Regulations provided that an officer shall within such period as the Commission determined submit documents as required by the Commission. Pursuant regulation 13, the petitioner completed the vetting questionnaire for members of the National Police Service and the declaration of income, assets and liabilities substantially in the form prescribed under the Public Officer Ethics Act.
9. Regulation 13 of the National Police Service (Vetting) Regulations in content, design and impact or effect amounted to an unconstitutional and classical limitation of article 50 of the Constitution to fair hearing. The petitioner and other police officers were under obligation to provide information and documents which the Commission engaged or set out to rely upon, by way of analysis and logic, in arriving at the drastic decision to remove the petitioner from the service.
10. The petitioner had no chance of presumption of innocence – in terms of section 7 of the National Police Service Act under which all officers were to be vetted – shifting the constitutional presumption of innocence to one of guilt until otherwise one exculpated; for there would be no need to vet an officer upon own information free from adverse report, information or complaint being made against the officer.
11. No charge was preferred against the petitioner. He was denied the right to remain silent. Instead, he was compelled to provide such information that could be self-incriminating. Such self-incriminating information obtained in apparent violation of article 50 of the Constitution and the right to privacy in article 35 of the Constitution could not stand the constitutional test. In that sense then, article 47 of the Constitution on fair administrative action was violated in the design of the statutory and regulatory vetting provisions that in effect;
 1. subjected all officers to the vetting even where no complain or adverse information had been made;
 2. required the Commission to compel the officers to mandatorily provide information that especially targeted their self – incrimination like the petitioner’s Mpesa statements in the instant case; and
 3. while regulation 18 of the National Police Service (Vetting) Regulations pretended to prescribe a regime for situations whereby a complaint or adverse information may have been received and responded to, such was not a precondition for the vetting and like in the petitioner’s case, the regulations were designed to rely solely on unconstitutionally obtained self-incriminating material to fix the officers like the petitioner.
12. The Commission’s authority to vet the petitioner in the manner that it was done was not legitimate as the statutory and regulatory regime for the vetting as was implemented was not constitutionally good and right. It was unfair, unconstitutional as offending the safeguards in article 50 of the Constitution and the decision made could not stand, but was a nullity as offending reasonableness in article 47(1) of the Constitution and equality and freedom from discrimination in article 27 of the Constitution.
13. The Commission was not entitled to implement the statutory and regulatory provisions that in design, content and effect threatened and actually violated the rights of the officers such as the provisions were implemented in the petitioner’s case – offending the right to fair hearing and trial as provided in article 50 of the Constitution and which could not be limited.
14. The vetting process had far reaching career, livelihood and socio-economic impact on the affected officers and despite their being civil in nature, the statutory and regulatory design of the vetting procedures and then, the implementation of the same by the respondents, had to abide by and



- uphold article 50 safeguards. That was not done as the regulatory and statutory regime in place was unconstitutionally implemented and the petitioner's removal from the service was manifestly unfair and unconstitutional.
15. An order of judicial review of *certiorari* to quash the 1st respondent's decision of December 6, 2016 and August 22, 2017 with the effect that the petitioner continued in the respondents' service was declined. *Certiorari* would issue if the prayer was made within 6 months from the date of the decision to be quashed as per Order 53 of the Civil Procedure Rules. The petition was filed on April 11, 2018 long after the lapsing of the 6 months. The order would therefore be declined as time barred.
 16. The petitioner prayed for an order of reinstatement to his post as Chief Inspector of Police as well as reinstatement of all his privileges including his salary. The grant of the order was time barred per section 12(3)(vii) prescribing that an order of reinstatement may issue only within three years of dismissal. In the instant case the three years had since lapsed. The order would therefore be declined as time barred.

Petition partly allowed.

Orders

- i. *A declaration was issued that the petitioner's fundamental freedoms and rights had been infringed by the 1st respondent and in particular the violation of articles 27, 47(1) and 50 of the Constitution to the extent as found in the judgment.*
- ii. *A declaration was issued that the 1st respondent's vetting process and decision was in violation of the petitioner's fundamental rights under articles 27, 47(1) and 50 of the Constitution and to the extent as found in the judgment.*
- iii. *An order was issued substituting the respondent's decision with a declaration that there existed no lawful material to find that the petitioner had failed vetting.*
- iv. *The 1st and 2nd respondents to jointly or severally pay the claimant Kshs. 4,000, 000.00 in compensation for breach of constitutional rights and fundamental freedoms as found in the judgment and to pay by September 1, 2023 failing interest to accrue thereon at court rates from the date of the judgment until full payment.*
- v. *The 1st respondent and 2nd respondent to jointly or severally pay the petitioner's costs of the petition.*

Citations

Cases

Kenya

1. *Chemos, Peter Kemboi v National Police Service Commission* Petition 9 of 2017; [2018] KEELRC 1540 (KLR) - (Explained)
2. *Limbitu, Sebastian Kirunya v National Police Service Commission & another* Petition 41 of 2016; [2017] KEELRC 601 (KLR) - (Explained)
3. *Ndegwa, Julius v National Police Service Commission & another* Petition 183 of 2019; [2020] KEELRC 485 (KLR) - (Explained)
4. *Shollei v Judicial Service Commission & another* Application 10 (E016) of 2022; [2023] KESC 8 (KLR) - (Explained)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53- (Interpreted)
2. Constitution of Kenya articles 10, 27, 36, 40, 47, 50(1); 50(2)(b); 232; 246(3)(b); Chapter 6- (Interpreted)
3. Fair Administrative Action Act (cap 7L) In general - (Cited)
4. National Police Service (Vetting) Regulations, 2013 (cap 84 Sub Leg) regulations 4, 7(2)(3); 8; 9; 14(1); 14(2); 15; 18(2); 33(2)(a)- (Interpreted)
5. National Police Service Act (cap 84) section 7- (Interpreted)



6. National Police Service Commission Act (cap 85) In general - (Cited)
7. Public Officer Ethics Act (cap 185B) In general- (Cited)

Advocates

None mentioned

JUDGMENT

1. The petitioner is Peter Kilonzo Katheka. He initially filed on 11.04.2018 a petition dated 09.04.2018 in the High Court at Nairobi and through Peter Kilonzo Katheka. On 26.01.2023 Ong'udi J found that the High Court lacked jurisdiction to hear and determine the petition and ordered that the same be transferred to the Employment and Labour Relations Court for hearing and determination.
2. The petitioner's case is based upon the amended petition dated 30.03.2022 and filed through Wanjiku Mwaura & Guandaru Thuita Advocates. The petitioner prayed for:
 - a. A declaration that the petitioner's fundamental freedoms and rights have been infringed by the 1st respondent.
 - b. A declaration that the 1st respondent's vetting process and decision was in violation of the petitioner's fundamental rights under article 27, 36, 40, 47 and 50 of the *Constitution of Kenya*.
 - c. An order of judicial review to quash the 1st respondent's decision of 06.12.2016 and 22.08.2017.
 - d. An order of reinstatement of the petitioner to his post as Chief Inspector of Police as well as reinstatement of all his privileges including his salary.
 - e. An order substituting the respondent's decision with a declaration that there exist no material to find that the petitioner had failed vetting.
 - f. Compensation to the petitioner for the violation of his fundamental rights and freedoms.
 - g. Any other or further relief that the court may deem just and expedient.
 - h. Costs of the petition.
3. The petitioner's case is pleaded as follows:
 - a. Regulation 7 of the *National Police Service (Vetting) Regulations, 2013* provides that the National Police Service Commission while determining the competence and suitability of an officer, consider the officer's performance in the present and any other previous position. Regulation 18 thereof provides that where a complaint or any adverse information has been received by the Commission against an officer, a summary of the complaint including any relevant documentation shall be served on the officer.
 - b. Prior to the vetting the petitioner was required to fill out a vetting questionnaire and avail, which he did, certain vital documents including bank statements for previous two years, copy of PIN certificate and ID card for spouse, tax compliance certificate, curriculum vitae, and copies of educational and professional certificates.
 - c. Prior to the vetting the 1st respondent was required to source for complaints from individuals and other entities listed in regulation 15. Under regulation 18(2) the 1st respondent was required to serve the petitioner with any complaint or adverse information it had and which it



intended to rely on. The petitioner was to be accorded an opportunity to give a written answer to the adverse information.

- d. The petitioner was not informed if the 1st respondent had received complaint or adverse information against him and from the individuals and institutions listed in regulation 15 or if any adverse information or complaint had been received from any other source. He was not served any adverse information or complaint in that regard. Further no documentary or other evidence was provided in support of any complaint or against him.
 - e. The petitioner appeared for vetting interview before the respondent's vetting panel on 23.08.2016 composed of two Commissioners of the 1st respondent one Ronald Musengi as Chairperson and one Murshid Mohamed as panel member.
 - f. In a decision signed by all commissioners of the 1st respondent on 06.12.2016 but transmitted to the petitioner on 22.12.2017 found that the petitioner had failed the vetting and proceeded to remove the petitioner from service.
 - g. The respondent in its decision made adverse findings against the petitioner as follows. That the 1st respondent had carried out a financial analysis on the M-pesa Statements and noted that the petitioner had received substantial amounts of money from officers as well as from civilians; the transactions noted far outweighed the sources of income declared by the petitioner; the said transactions cast doubts as to the petitioner's integrity; and the transactions revealed a lack of conformity with known earnings which show that the petitioner must have been involved in corrupt practices.
4. The petitioner was dissatisfied with the decision and applied for a review per regulation 33(2) (a) of the Regulations. The review was upon the grounds that the petitioner had served since 1984 with no disciplinary issues; the commission erred in finding noble transactions to be corrupt; the petitioner had not been given prior notice of the allegations; he was ambushed with the allegations and was ill-prepared to mount a defence; and the impugned transactions were all above board.
 5. The respondent invited the petitioner for the review hearing on 13.07.2017 under stewardship of the 1st respondent's Chairperson Johnson Kavuludi and 3 other commissioners. The petitioner made his presentation, submissions and answered questions that were put to him.
 6. The respondent delivered the vetting review decision and returned that the petitioner had failed to discharge himself from the earlier findings and the initial vetting decision was upheld.
 7. It is the petitioner's case that he is dissatisfied with the handling of his initial and review vetting owing to procedural impropriety. The petitioner urges as follows:
 - a. Commissioner Joseph Boinnet was not present at the review hearing and signed the decision thereby adulterating it and rendering it a nullity.
 - b. At review hearing and in the written review application the petitioner raised weighty issues ut which were never referred to in the decision.
 - c. The respondent failed to address issues the petitioner had raised namely not being supplied with a complaint, documentary evidence, and oral evidence from the petitioner and his witnesses.
 - d. The finding that the petitioner was lacking in financial probity were not elaborated or reasons given for the said finding and contrary to the provisions of the [Fair Administrative Action Act](#).



- e. The respondent did not carry out investigations on information received to establish the veracity of the information supplied by the petitioner in his review application with a view to validate or contradict the information. The initial and review vetting processes proceeded in breach of the rules of natural justice.
8. The 1st respondent filed the replying affidavit of Johnston Kavuludi, the Chairman of the 1st respondent sworn on 14.09.2018 and drawn by the 1st respondent in person. It was stated and urged as follows:
- a. The commission, 1st respondent, 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 2nd respondent.
- b. Section 7 of the National Police Service Act states that all persons being officers or employees of the Kenya Police Force and Administration Police Force established per the Police Act and Administration Police Act respectively including officers working with the criminal investigations department, shall upon commencement of the National Police Service Act become members of the 2nd respondent in accordance with the Act and Constitution. Section 7(2) of the Act and regulation 4 (a) of the National Police Service (Vetting) Regulations 2013 mandate the 1st respondent to vet all police officers.
- c. Section 7(3) of the National Police Service Act read together with regulation 32 of the vetting of the vetting regulations mandate the 1st respondent to discontinue the services of any police officer who fails the vetting on grounds of being unsuitable or incompetent.
- d. The vetting exercise was guided by the Constitution, the National Police Service Act, the National Police Service Commission Act, and the vetting regulations.
- e. Regulation 3 set out the objectives of the vetting exercise as to build confidence in the service; and, ensure that the service complies with chapter six of the Constitution and the principles of public service as set out in article 232 of the Constitution and in the Public Officer Ethics Act. Regulation 14 (1) stated that in vetting an officer, the commission shall consider, assess and determine the suitability and competence of the officer. Regulation 14(2) stated that the commission shall, in determining the suitability and competence of an officer consider, whether the officer meets the constitutional or other criteria required by law for recruitment and appointment of an officer; the pat record of an officer; the integrity and financial probity of the officer; and the human rights record of the officer.
9. It was stated in the 1st respondent's replying affidavit that regulation 4 stated that in conducting the vetting process the commission shall be guided by the following principles:
- a. Subject to regulation 8, all officers shall undergo the vetting individually.
- b. The vetting process shall be implemented consistently and the same procedural principles shall be applied in all cases.
- c. Vetting shall be done in accordance with the values and principles set out in articles 10, 27, 47, 50, and 232 of the Constitution.
- d. Vetting shall take into account the need to protect national security as defined in article 238 of the Constitution.
- e. The commission shall be guided by the principles and standards of impartiality, natural justice and international best practice.



- f. The vetting process shall not be bound by strict rules of evidence and the proof applicable shall be that of a balance of probability.
 - g. Vetting shall be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that has been used by the commission to reach its decision.
10. The replying affidavit further stated as follows:
- a. The petitioner was removed from the service on 06.12.2016 due to lack of financial probity. The decision was arrived at after establishing that the petitioner had substantial frequent transactions with other officers and civilians which he could not plausibly explain. The transactions were also greatly incommensurate with his declared sources of income pointing to a possible engagement in corruption activities. The Commission analysed and noted frequent Mpesa transactions with his colleagues mostly with whom they worked together in the driving tests sections but only attributed the same to welfare contributions and personal businesses. However, it was noted that the various officers with whom they transacted gave differing versions of the kind of businesses they were engaged in together thereby raising suspicions on their honesty and professionalism. The petitioner also admitted to transactions with civilians which the commission observed but the petitioner failed to offer plausible account for. An example of unbelievable explanation was that the petitioner received money from a truck driver who frequently plied the road the petitioner was working so the petitioner would deliver the money to the truck driver's children studying at Kenyatta University yet the driver was personally based in Nairobi. It was not believable that the students would not be having m-pesa enabled phones to receive the money directly from their father. How would a truck driver ordinarily working in Nairobi send money to an officer stationed in Eldoret to deliver the money to the driver's children in Kenyatta University in Nairobi? The replying affidavit stated that the details were well captured at pages 29 to 32 of vetting Hansard record exhibited by the petitioner from page 26 to 47 of his petition bundle.
 - b. The detailed decision on the officer's removal from the service after failing the vetting exercise and dated 06.12.2016 was supplied to the officer and the petitioner has exhibited it at pages 48 to 49 of the petition bundle.
 - c. Prior to the removal from the service the commission looked at the petitioner's confidential and personal files and was guided by regulation 14 requiring the commission to look at the integrity and financial probity of an officer when determining his or her suitability and competence to continue in the service.
 - d. The petitioner completed the vetting questionnaire and duly appeared for vetting on 23.08.2016. The Hansard record of the proceedings show that the petitioner was unable to convincingly explain the transactions between himself, fellow officers and civilians as noted in the statements he had already supplied to the commission. The commission found him lacking in integrity and financial probity based on his own inability to explain the transactions. He was removed from the service having failed the vetting.
 - e. The petitioner applied for review per regulation 33 of the vetting regulations 2013 by his application dated 27.12.2016 exhibited by the petitioner at page 50 to 52 of his bundle. The review application was admitted and the petitioner invited for a review hearing on 13.07.2017 and he attended. The petitioner again failed to plausibly explain the transactions in issue. He provided no new evidence or point to an error apparent on the face of the record as



contemplated in regulations 33. The decision on the review application was communicated to the petitioner as exhibited in his bundle at page 67 to 69.

- f. The petitioner has failed to show that the commission vetting panel violated his rights and fundamental freedoms as alleged.
 - g. Prior to the vetting, it had been written to the petitioner that he retires in public interest but which the 1st respondent promptly retracted so the petitioner would be vetted.
 - h. The orders sought are baseless.
11. The Attorney General who acted for the 2nd respondent filed the replying affidavit of Albert Masese, the Staffing Officer Personnel at Kenya Police Service Headquarters and dated 03.12.2018 and filed final submissions through learned litigation counsel Ruth J. Rop. It was urged for the 2nd respondent that the petitioner attended vetting on 23.08.2016 and decision rendered on 06.12.2016. The decision was communicated to the petitioner by 2nd respondent's letter dated 19.06.2017. The petitioner applied for review on 27.12.2016 and his removal was therefore stayed by the 1st respondent's letter dated 18.07.2017. Thus the 2nd respondent reinstated the petitioner in the service. On 22.08.2017 the 1st respondent upheld the decision for removal of the petitioner. The decision was dated 27.08.2017. The petitioner has not shown how the 2nd respondent may have violated the petitioner's rights and fundamental freedoms. The petition should therefore be dismissed with costs.
12. The court has considered all the material on record. The court returns as follows.
13. To answer the 1st issue for determination, as urged for the 2nd respondent, the petitioner may appear not to have provided relevant and material evidence to show that the 2nd respondent violated any of his rights or freedoms as alleged. Thus the petition may appear to fail as far as it relates and alleges that the 2nd respondent violated the petitioner's rights and fundamental freedoms. While making that finding the court has considered the mutual position by the petitioner and 2nd respondent that the police vetting exercise was vested in the 1st respondent as the constitutional employer of police officers including the petitioner. However, as the court will revisit the issue towards conclusion that the material on record show that while the 1st respondent appear to have religiously implemented the statutory and regulatory provisions on the vetting, the court will return that the provisions in content and impact offended article 50 of the Constitution as they were capable of being interpreted and implemented unconstitutionally.
14. To answer the 2nd issue for determination, the court returns that the petitioner appears to have not shown that the 1st respondent violated his right to fair administrative action under article 47(1). The reason given for his removal was that while making that finding to show that within the submissions made for the petitioner, the 1st respondent had acted within the design and framework of the statutory and regulatory framework, later the in this judgment the court will revisit the statutory and regulatory framework towards a conclusion that it was unconstitutional. That rules of natural justice were breached may appear not established because the petitioner attended the initial vetting hearing on 23.08.2016 and then the review vetting hearing on 13.07.2017. In both instances the petitioner was heard and he did not raise an issue that he had not received the complaint or written adverse information or that he did not know the case that confronted him. In particular, his application for review was dated 27.12.2016 and he did not complain about want or lack of supply to him of such written complaint or written adverse information. The complaint may appear as belated afterthought that lacks justification as aimed at defeating the initial and review hearings the petitioner voluntarily submitted himself to and without lamentation that prior to the hearing he needed this or that material thing to prepare for the hearing. Nothing may appear to have been established to



show breach of the rules of natural justice of the right to be heard by an independent or impartial arbiter. The panel at initial review interview and then at the review hearing signed the decision which was then countersigned by all commissioners signifying adoption or ratification by the commission. The petitioner's claim that a commissioner who signed the review decision but was not part of the review hearing panel would therefore be found baseless. While making that finding, the court has considered regulation 18 (2) relied upon by the petitioner thus, "18(2) Where a complaint or any adverse information is received by the commission against an officer, a summary of the complaint including any relevant documentation pertaining to that complaint as received by the commission, and on which the commission intends to rely on in the process shall be served upon the officer." The court holds that the provision applies to a situation where, in the vetting process, the commission would receive a complaint or adverse information – meaning that the provision would not apply to situations whereby no such complaint or adverse report was received; the instant case being such case where no complaint or adverse report was received. The court observes that nowhere is it alleged by the parties to the petition, including the petitioner, that an adverse information or complaint was made to the commission against the petitioner. None at all. Essentially the petitioner completed the vetting form and upon the information therein the commission engaged the petitioner about his m-pesa transactions and in the process the commission formed an opinion and finding that the petitioner's financial probity and integrity were wanting – all based upon the petitioner's own provided information. It therefore appears to the court that invoking regulation 18 of the vetting regulations to require the 1st respondent to serve upon the petitioner written complaint or adverse information and invite his response thereto was a misconceived attempt to invoke the said Regulation as there was no such complaint or adverse information looking at the material on record. In any event, any deficiencies in the initial vetting hearing may appear to have been cured in the review hearing but as already found, in the appeal the petitioner never raised failure to apply regulation 18 most likely because he knew the situation prescribed in that regulation did not accrue in his vetting proceedings. The instant case is therefore distinguishable from *Peter Kemboi Chemos –Versus- National Police Service Commission* [2018]eKLR where the respondent had stated that it had adverse information against the petitioner and the court found that the respondent had violated article 50(2) (b) requiring the petitioner to be informed of the charge, with sufficient detail to answer it. For avoidance of doubt, the court has looked at how the conversation at the initial vetting interview on 23.08. 2016 introduced the issue of Mpesa transactions. It is at page 7 of 43 of the Hansard and Mr. Fredrick Mugambi introduces the subject thus, "Now am going to take you through your banking not really banking, mpesa transactions in the period 2012/2013." And the petitioner replied, "Yes Sir". Thus it was not an adverse information or complaint but, the petitioner's own statements that were relied upon. In this case, the court finds that articles 47 and 50 were not violated at all upon the alleged failure to comply with regulation 18 because the situation envisaged in that regulation did not accrue and was not in issue in the present case. Related to this, the court finds that it was misconceived when it was submitted that the petitioner was denied an opportunity to meet and cross-examine his accusers – no such accusers were alleged to exist or were in issue. All that happened was that the hearing panel probed the petitioner about the information or statements he had provided by himself to the commission and the commission arrived at the conclusions based on the petitioner's responses. That was whatever took place looking at the Hansard reports of both the initial vetting interview and the subsequent review application hearing.

15. To answer the 3rd issue, the court returns that irrationality or unreasonableness may appear not established against the 1st respondent. It is submitted that the 1st respondent was irrational or unreasonable in disregarding or undermining the petitioner's association with the colleagues as related to the mpesa transactions in issue as to undermine the freedom of association in article 36 of the *Constitution*. The court finds that the commission was not concerned with the petitioner's entitlement to associate with his colleagues and indeed any other person. The concern was the purity or integrity



- of the content or agenda of the association as could be concluded from the mpesa transactions. The court finds that in that consideration it cannot be said that the 1st respondent's line of opinion was aimed at undermining the petitioner's right to associate so that no irrationality or unreasonableness has been established in that regard. It is unfounded to submit for the petitioner that it was irrational to expect the petitioner to remember mpesa transactions undertaken 3 or 4 years earlier whereas upon the material on record the petitioner had not replied to the queries by stating that he could not recall or remember the particulars or circumstances of the transactions under inquiry.
16. To answer the 4th issue for determination, the court has carefully considered the statutory and regulatory design of the vetting procedure as was invoked in the instant case or generally and returns that while the respondent was complying with the set statutory and regulatory regime, the same was manifestly unfair and unconstitutional. The court has identified the following serious shortfalls that amounted to attrition of the constitutional safeguards that ought to have otherwise been inherent in the prescribed vetting procedure.
17. Regulation 9 of the *National Police Service (Vetting) Regulations, 2013* (earlier and later in this judgment referred to as such or simply as regulations or vetting regulations) in the vetting procedure, conferred the 1st respondent and its vetting panels wide powers, so that, looking at the instant case, amounted to serious constitutional breaches in their content and invariably in their effect or impact. Regulation 13 provides that an officer shall within such period as the commission determines submit documents as required by the commission including –
- a. a self –assessment form as prescribed by the commission;
 - b. the officer's national identity card;
 - c. the officer's certificate of appointment;
 - d. academic certificates;
 - e. a duly completed declaration of income, assets and liabilities;
 - f. bank statements for the last two years of all bank accounts personal and business, that the officer, his spouse and dependants under the age of eighteen have maintained;
 - g. a certificate of tax compliance;
 - h. any other or such documents that the commission may deem fit and necessary for the furtherance of the vetting.
18. Pursuant to provisions of that regulation 13, the petitioner completed the vetting questionnaire for members of the National Police Service and the Declaration of Income, Assets and Liabilities substantially in the form prescribed under the *Public Officer Ethics Act*. Prior to the vetting, the petitioner had been asked to furnish the Commission with his Mpesa statements for the years 2012 to 2013 for his mobile number 0722507149. The petitioner supplied the statements in June 2016 together with the other documents asked for (invariably under the said regulation 13). It is these statements that the 1st respondent, the commission, relied upon to remove the petitioner from the National Police Service.
19. Did regulation 13 in its content and effect as implemented in the petitioner's case meet the constitutional test? The court has reflected upon this issue of its own motion and returns it did not. Article 50 provides for the right to fair hearing. Sub-article 50(2) provides that every accused person has the right to a fair trial, which includes the right - (a) to be presumed innocent until the contrary is proved; (b) to be informed of the charge, with sufficient detail to answer it; (j) to remain silent, and



not to testify during the proceedings; (l) to refuse to give self-incriminating evidence. Sub-article 50(4) states that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice. Article 25 provides that despite any other provision in the Constitution the following rights and freedoms shall not be limited, thus, “(c) the right to a fair trial”

20. The court finds that the said regulation 13 in content, design and impact or effect amounted to an unconstitutional and classical limitation of article 50 to fair hearing and in particular with respect to the sub-articles of the said article 50 as cited in the foregoing paragraph of this judgment. The petitioner and other police officers were under obligation to provide information and documents which the 1st respondent engaged or set out to rely upon, by way of analysis and logic, in arriving at the drastic decision to remove the petitioner from the service. The petitioner had no chance of presumption of innocence – in terms of section 7 of the National Police Service Act under which all officers were to be vetted – shifting the constitutional presumption of innocence to one of guilt until otherwise one exculpated; for there would be no need to vet an officer upon own information free from adverse report, information or complaint being made against the officer. No charge was preferred against the petitioner. He was denied the right to remain silent. Instead he was compelled to provide such information that could be self-incriminating. Such self-incriminating information obtained in apparent violation of article 50 and the right to privacy in article 35 cannot stand the constitutional test. In that sense then, the court finds that article 47 on fair administrative action was thereby violated in the design of the statutory and regulatory vetting provisions that in effect, subjected all officers to the vetting even where no complain or adverse information had been made; required the commission to compel the officers to mandatorily provide information that especially targeted their self – incrimination like the petitioner’s Mpesa statements in the instant case; and while regulation 18 pretended to prescribed a regime for situations whereby a complaint or adverse information may have been received and responded to, such was not a precondition for the vetting and like in the petitioner’s case, the regulations were designed to rely solely on unconstitutionally obtained self-incriminating material to fix the officers like the petitioner. The court finds the vetting procedure to have visited some sense of hell upon the officers in circumstances of the petitioner’s case whereby each was to be vetted free from reported complaint or adverse information given to the commission; compelling of the officers to provide information to the Commission that targeted self-incrimination; and the commission, upon own motion, fishing around for information per vetting regulation 9 empowering the commission to gather information from any source including government agencies and to compel production of such information –with the obvious inspecting venture to find culpability; and regulation 15 on getting information from a wide range of government authorities or public bodies and any other persons and organisations - with the obvious goal of targeting and creating culpability of the officers. In the opinion of the court, that was an unfair regime carefully designed for fictitious silver-tree human beings. It was an unjust vetting regime as in unjust law is no law – *lex iniusta non est lex*. In that sense it appears to the court that the 1st respondent’s authority to vet the petitioner in the manner that it was done was not legitimate as the statutory and regulatory regime for the vetting as was implemented was not constitutionally good and right. It was unfair, unconstitutional as offending the cited safeguards in article 50 and the decision made cannot stand, but was a nullity as offending reasonableness in article 47(1) and equality and freedom from discrimination in article 27 of the Constitution.
21. While making that finding, the court has been guided by the Supreme Court holding in Gladys Boss shollei –Versus- Judicial Service Commission & Another Petition No 34 of 2014 [2022] KESC5 (KLR)



(17 February 2022)(Judgment)(Kooome CJ &P, Mwilu DCJ, &V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ), *inter alia*,

- “ 19. Article 50(1) of the Constitution referred to the right to a fair hearing for all persons, while article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of the Constitution listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.
20. Although the right to a fair trial was encompassed in the right to a fair hearing in the Constitution, a literal construction of article 50(1) and 50(2) of the Constitution could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Constitution on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect.”
22. Accordingly, the court returns that the 1st respondent was not entitled to implement the statutory and regulatory provisions that in design, content and effect threatened and actually violated the rights of the officers such as the provisions were implemented in the petitioner’s case – offending the right to fair hearing and trial as provided in article 50 and which cannot be limited. The court finds that the vetting process had far reaching career, livelihood and socio-economic impact on the affected officers and despite their being civil in nature, per the cited Supreme Court’s holding, the statutory and regulatory design of the vetting procedures and then, the implementation of the same by the respondents, had to abide by and uphold article 50 safeguards. The court has found that was not done as the regulatory and statutory regime in place as found by the court was unconstitutionally implemented and the petitioner’s removal from the service was manifestly unfair and unconstitutional.
23. To answer the 5th issue on the reliefs prayed for the court returns as follows:
- a) The petitioner is entitled to the declaration that the petitioner’s fundamental freedoms and rights have been infringed by the 1st respondent and in particular the violation of article 50 to the extent as found in this judgment.
 - b) The petitioner is entitled to a declaration that the 1st respondent’s vetting process and decision was in violation of the petitioner’s fundamental rights under articles 27 on equality and freedom from discrimination; article 47(1) on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and 50 of the Constitution of Kenya and to the extent as found in this Judgment. The court has found that the 1st respondent and its instituted regulations as found earlier in this judgment, failed to take into account the cited safeguards in article 50 of the Constitution. Such failure was trapped with unreasonableness as envisaged in article 47 (1) and whose impact or effect was the catastrophic injustice visited upon the petitioner throughout the vetting proceedings and the decisions made by the 1st respondent in that regard.
 - c) An order of judicial review of *certiorari* to quash the 1st respondent’s decision of 06.12.2016 and 22.08.2017 with the effect that the petitioner continues in the respondents’ service is



declined. The court considers that certiorari would issue if the prayer is made within 6 months from the date of the decision to be quashed as per order 53 of the *Civil Procedure Rules*. The decisions to be quashed were made on 06.12.2016 and 22.08.2017 but the petition was filed on 11.04.2018 long after the lapsing of the 6 months. The order will therefore be declined as time barred.

- d) The petitioner prays for an order of reinstatement to his post as Chief Inspector of Police as well as reinstatement of all his privileges including his salary. The court considers that the grant of the order is equally time barred per section 12(3)(vii) prescribing that an order of reinstatement may issue only within three years of dismissal. In the instant case the three years have since lapsed. The order will therefore be declined as time barred.
- e) The court returns that the claimant is entitled to an order substituting the respondent's decision with a declaration that there exist no material to find that the petitioner had failed vetting. That order is consistent with the court's finding that the mpesa statements the 1st respondent relied upon to terminate the petitioner were material obtained in contravention of the rule against self-incrimination and the other provisions of article 50 the court has found to have been violated.
- f) The petitioner prays for compensation to the petitioner for the violation of his fundamental rights and freedoms. The court has found that the petitioner has established violation of particularly articles 27, 47(1) and 50 of the *Constitution*. The court has considered that the petitioner had a clean record of service. He joined the respondents' service on 16.06.1984 and he had a clean record of service until the removal in the impugned vetting process. It is submitted for the petitioner that in *Julius Ndegwa v National Police Service Commission & another* [2020] eKLR the court awarded an order of reinstatement plus Kshs 1 million and in this case, an addition of Kshs 2 million to an order of reinstatement, (but reinstatement being already declined), be awarded. It is also submitted that in *Sebastian Kirunya Limbitu v National Police Service Commission & Another* [2017] eKLR the court awarded Kshs 3 Million for violation of the petitioner's right to fair administrative action per article 47. The court has considered the nature of violation of article 50 in the instant case and which right to a fair hearing and trial cannot be derogated from or limited. The court has also considered the already stated factors in favour of the petitioner. The court awards the petitioner a sum of Kshs 4 million for the violation of his right under articles 27, 47(1) and 50 of the *Constitution*.
- h) The petitioner is awarded costs of the petition as he has substantially succeeded.
- In conclusion judgment is hereby entered for the petitioner against the respondents for:

1. The declaration that the petitioner's fundamental freedoms and rights have been infringed by the 1st respondent and in particular the violation of articles 27, 47(1) and 50 to the extent as found in this judgment.
2. The declaration that the 1st respondent's vetting process and decision was in violation of the petitioner's fundamental rights under articles 27, 47(1), and 50 of the *Constitution of Kenya* and to the extent as found in this Judgment.
3. The order substituting the respondent's decision with a declaration that there exist no lawful material to find that the petitioner had failed vetting.
4. The 1st respondent and 2nd respondents to jointly or severally pay the claimant Kshs 4,000,000.00 in compensation for breach of constitutional rights and fundamental freedoms as



found in this judgment and to pay by 01.09.2023 failing interest to accrue thereon at court rates from the date of this judgment until full payment.

5. The 1st respondent and 2nd respondent to jointly or severally pay the petitioner's costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

