Mokaya v National Police Service & 2 others (Petition E018 of 2021) [2023] KEELRC 2255 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2255 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E018 OF 2021

J RIKA, J

SEPTEMBER 29, 2023

IN THE MATTER OF: ARTICLES 1, 2,3[1], 10, 19, 20, 21,22,23,25,27[1] [2] AND [3], 28,35,41[1] AND [2]. 48, 49,50 [1][2] AND 159[2],162, AND 246 [1][2] AND [3] OF THE CONSTITUTION OF KENYA;

AND

IN THE MATTER OF: THE EMPLOYMENT ACT SECTIONS 41 [1][2][3] 45[2] [3] AND 49 [1]

BETWEEN

JACKLINE PAMELA MOKEIRA MOKAYA .... PETITIONER

AND

NATIONAL POLICE SERVICE .... 1ST RESPONDENT

THE INSPECTOR-GENERAL OF POLICE .... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL .... 3RD RESPONDENT

JUDGMENT

1. The Petition was filed on 12th February 2021.
2. The brief facts, as brought out in the Petition and its Supporting Affidavit sworn by the Petitioner, are that the Petitioner was employed as a Policewoman, on 9th September 1992; she was charged under orderly room proceedings, on 10th January 2011, with the offence of engagement in an act prejudicial to good order and discipline; and was dismissed from Police Service on the same date.
3. At the Principal Magistrate's Court, Kikuyu, the charge under the Penal Code, was that she aided a prisoner to escape on 16th April 2010, while serving as a Court Orderly at the Tigoni Principal Magistrate's Court. She was tried, and acquitted on 24th July 2014

4. She appealed internally against the decision to dismiss her. She asked the 1st Respondent to reinstate her after she was acquitted. It was not until 26th October 2021, that the Chief Executive Officer of the 1st Respondent wrote to the Petitioner, informing her that her appeal was disallowed, and sentence of dismissal upheld.

5. The Petitioner submits that the Respondents violated her right to fair labour practices, under Articles 41 of *the Constitution* and other rights enumerated in the title to the Petition. She states that orderly room proceedings did not meet the constitutional threshold of fair hearing under Article 50. She was served waiver notice in less than 24 hours to the orderly room hearing.

6. She petitions the Court, for the following orders: -

    a. Declaration that the Respondents, in serving waiver notice of orderly room proceedings to the Petitioner based on anonymous letter of escape of the prisoner from lawful custody, which the Petitioner was not aware of, violated her constitutional rights and protection under Articles 35,47, 41 and 48.

    b. Declaration that she is entitled to reinstatement in the National Police Service, having been acquitted in the criminal case, and acquittal to be treated as repeal of the orderly room proceedings and convictions.

    c. In the alternative to [b] the Respondents to pay the Petitioner salary arrears accruing from 10th January 2011 to the date of the conclusion of this Petition, to be assessed on submission, and other benefits entitled to the Petitioner.

    d. Costs and interest.

7. The Respondents rely on the Replying Affidavit of Silas Oloo Mc Opiyo, Acting Chief Executive Officer of the 1st Respondent, sworn on 12th April 2023.

8. Mc Opiyo confirms that the Petitioner was enlisted as a Police Constable, on 9th September 1992; she was charged under orderly room proceedings as pleaded; she aided a criminal who had been convicted and sentenced to 40 years' imprisonment, to escape; she was dismissed, and lodged an appeal against dismissal; and the appeal was considered, and dismissed on 9th May 2011, as shown in Respondents' exhibit 5.

9. It is the Respondents' position that under Force Standing Order, Chapter 20, Section 36, the Petitioner was to lodge her appeal with the Commissioner of Police, within 7 days of receiving dismissal notice. The appeal was heard in accordance with the existing legislation, and the 1st Respondent could not reopen and hear the appeal. The Petitioner has not explained delay in lodging the Petition, years later, in 2021. The Respondents pray for dismissal of the Petition with costs.

10. The Respondents raised a preliminary objection based on limitation of time under Section 90 of the *Employment Act*, and Section 3[2] of the Public Authorities Limitations Act. The Court made a Ruling on 30th November 2022 declining preliminary objection, on the ground that the 1st Respondent communicated its decision declining the Petitioner's appeal, only on 26th October 2021.

11. Parties agreed to have the Petition considered and determined, based on the record.

12. The issues are whether the orderly room proceedings violated the Petitioner's constitutional rights; whether she merits reinstatement or back-salary from the date of dismissal to the conclusion of the Petition; costs; and interest.

The Court Finds: -

13. Details of the Petitioner's service as a Policewoman, the relevant dates on appointment and termination of service, are uncontested.

14. It is common ground that the Petitioner was dismissed after orderly room hearing, which was necessitated by the escape of a prisoner who was under the escort of the Claimant and other officers, from the Principal Magistrate's Court at Tigoni to prison.

15. The escaped prisoner had been convicted for a lengthy, total of 40 years, for offences related to drug trafficking. He was being escorted to prison to start serving his sentence.

16. The Petitioner was charged under orderly room proceedings, for engagement in an act prejudicial to the good order and discipline, contrary to Regulation 3 [41] of the Force Standing Orders. She was simultaneously charged in Court, with the criminal offence of aiding a prisoner to escape.

Violation of constitutional rights.

17. Particulars of the disciplinary charge were not the same, as the charge sheet presented before the Criminal Court.

18. Particulars under the orderly room proceedings were that, on 16th day of April 2010, at Tigoni Police Station in Lari District, within Kiambu County, the Petitioner failed to process remand warrant with respect to the prisoner as required.

19. The charge sheet in Court particularized the offence this way - on 16th day of April 2010, at Tigoni Police Station, within Kiambu County, the Petitioner aided Denis Akoko Aketch in escaping from lawful custody at Tigoni Police cells.

20. The Criminal Court and the orderly room proceedings were not enquiring into the same charges against the Petitioner. The findings and Judgment of the Court did not bind the orderly room proceedings. The Judgment of the Court cannot have the effect of quashing decision of the orderly room proceedings. The Principal Magistrate's Court was not sitting on judicial review.

21. The Petitioner's assertion that her rights to fair labour practices, fair administrative action and fair hearing under Articles 41, 47 and 50 respectively, were violated, is not supported by evidence. There was no obligation for the Respondents to reinstate her, on the lone ground of her acquittal by the Criminal Court.

22. The waiver notice dated 10th January 2010 issued upon the Petitioner lawfully, pursuant to the provisions of Chapter 20 paragraph 16 [ii] of the Force Standing Orders. It was issued by an authorized officer. It was not contrary to Article 50[1][2][c] of *the Constitution*, as it is grounded on legally binding Force Standing Orders. Article 50 does not require that a notice of at least 24 hours is issued before an accused person is charged in quasi-judicial proceedings; it only requires that an accused person shall have adequate time and facilities to prepare a defence. The escape incident took place way back in April 2010. The Claimant had already been charged at the Criminal Court, and was familiar with the facts, by the time the disciplinary proceedings commenced on 10th January 2011. There was no ambush, as would to result in violation of Article 50 of *the Constitution*.

23. The Petitioner did not make any request for adequate time and facility, when she was presented as a Defaulter at the orderly room proceedings. The proceedings show 4 witnesses, mostly her colleagues, testified against the Petitioner. She cross-examined all of them, in a manner of an accused person who was deeply conversant with the facts.

24. The presiding officer considered the evidence of the 4 witnesses and ruled, in a colourful language, that the Defaulter, ''cannot evacuate herself from blame.'' She was placed on her defence, and gave her evidence unaided. There was no suggestion from her, that she required time, or other facility to conduct her defence.

25. Displaying a high level of skill in conduct of quasi-judicial proceedings, the presiding officer summarized the evidence impeccably, allowed the Claimant time to mitigate, and deferred to a higher authority to sentence the Petitioner, having concluded that he was not authorized to sentence.

26. The Petitioner was sentenced to dismissal from Service by the Provincial Police Officer Central Province, on the same date, 10th January 2011. The process was expeditious, almost to the discomfiture of the Petitioner.

27. The High Court in Republic v. Minister for Internal Security and Provincial Administration & 4 others ex parte James Mwita [2013] e-KLR, explained that '' disciplinary matters within disciplined forces such as the Police and the Armed Forces, should be dealt with expeditiously to contain and halt cases of indiscipline, which would negatively impact the essential services of the Forces.''

28. It was therefore in order that the Police Force, took out an expeditious disciplinary process against the Petitioner, the Petitioner having been implicated in escape of a hardcore convict, even though that expeditious action, commenced 9 months after the escape.

29. Were the Respondents bound by the acquittal of the Petitioner? The Court has partly answered this question in the negative, on the ground that details of the offences, and the offences at the 2 adjudicatory platforms, were not the same.

30. The standard of proof in the orderly room proceedings was on the balance of probability, while acquittal by the Criminal Court was based on proof beyond reasonable doubt. In R [Independent Complaints Commission] v. Assistant Commissioner Hayman [2008] EWHC 2191 [Admin], it was held that in disciplinary proceedings, the Tribunal, ''must look with the greatest of care at the accusations which potentially give rise to serious consequences. But in determining whether or not they occurred, it applies a single unvarying standard, the balance of probability.'' This was the standard applied in the orderly room proceedings, while the Hon. Principal Magistrate adopted the higher standard of proof, beyond reasonable doubt.

31. The balance of probability is the standard recommended by Section 43 of the *Employment Act*, an Act which the Petitioner argues, applied to her. In terminating an Employee's contract of employment, an Employer is only required to have genuine belief in the reason justifying termination. The Employer is not required to establish the reason, beyond reasonable doubt. A prisoner escaped while in the custody of the Petitioner, and the Employer had genuine belief that the Petitioner was involved in that escape. The Criminal Court looked at proof of the Petitioner's involvement, beyond reasonable doubt.

32. Even assuming the two trials were over the same offences, the Criminal Court made a ruling on 21st March 2014, finding that a prima facie case had been established, and the Petitioner was placed on her defence. A finding of a prima facie case in a criminal trial, the declaration by the Court that the accused person has a case to answer, would easily amount to proof on balance of probability in disciplinary proceedings.

33. The Court acknowledges that there is ofttimes legal conflict, in interpreting the effect of judicial proceedings, on disciplinary proceedings, based on shared factual backgrounds. Offences under Police Regulations, may be replicated as criminal offences, under the Penal Code. How these employment

offences and criminal offences are dealt with, does not always advance constitutional guarantees and protections of Employees.

34. Regulation 3 [16] of the Police Regulations under Section 65 of the repealed Police Act, Cap 84, makes it an offence for any inspector, or subordinate officer who negligently allows any prisoner who is committed in his charge, or whom it is his duty to guard, to escape. The provision states that the officer shall be guilty of an offence against discipline.

35. The Petitioner was contemporaneously charged in the criminal trial, for aiding a prisoner to escape, contrary to section 124 [a] of the Penal Code.

36. Although she was not charged directly with the offence of aiding a prisoner to escape, the offence exists under the Police Regulations and the Penal Code, creating the potential for an accused officer facing charges and sentences on basically the same offence, albeit in different trials.

37. Courts have held that the potential for charging accused persons in different platforms, based on the same factual backgrounds, does not advance the rights of accused persons to fair hearing.

38. The Nigerian Supreme Court, in Sofekun v. Akinyemi [1980] 5. S.C. 1, held that ''once a person is charged with a criminal offence, he must be tried in a Court of law, and no other Tribunal, Investigation Panel or Committee, will do.'' The holding was restated in F.S.S.C v. Laoye [1989] 2 NWLR pt. 154 to the effect that, ''conduct amounting to crime, must first be a matter for the Criminal Court, before disciplinary issues could be raised.''

39. The legislative framework in Public Service does not promote the right to a fair hearing, for officers facing criminal proceedings and disciplinary proceedings based on the same factual background. Section 62 of the *Anti-Corruption and Economic Crimes Act*, allows for suspension of public officers charged with corruption or economic crimes, pending hearing and determination of the criminal case. But section 62[4] states that the provision does not derogate from any power or requirement under any law, which the public officer may be suspended without pay or dismissed. Dismissal can take place, even as the criminal case is pending. Once a public officer has been acquitted, and has already been dismissed, there is no provision for setting aside dismissal decision, and resuming duty, under the relevant Act. The problem is aggravated where for instance the Court of first instance will agree with the disciplinary platform on the culpability of a public officer, convict and sentence, and the officer is successful on appeal before a higher jurisdiction, and is acquitted. Even after the facts and the law over which a public officer was initially found culpable, have been taken through the distillery of the appellate system, and he is adjudged to have been innocent after all, the Employer has no obligation under the law, to revisit its dismissal decision.

40. Section 180 [6] of the *Kenya Defence Forces Act*, states that if an officer is convicted by a Court Martial to a prison term, he is simultaneously sentenced to dismissal from service. If the officer is successful on appeal at the High Court, or other Superior Courts, conviction quashed and sentence set aside, the law does not clarify whether dismissal sentence is also set aside. The Court has recently, in E&LRC Cause Number E092 of 2021, Major Laban Agak Nyambok v. Kenya Defence Forces & Another, declared that indeed setting aside of the criminal sentence, includes setting aside of dismissal, and that requiring the officer to return to Court seeking orders of reinstatement, is not in consonance with the rights of fair administrative act and fair hearing under Article 47 and 50 of *the Constitution*. Declaration of innocence of an officer by a Court of law, ideally, must bind all tribunals seized of other forms of trials based on the same facts. A legal framework that advances this position would save the parties from falling back on the legal justification which is based on the difference in standards of proof, the different nature of the trials, and the dichotomization of criminal trials and disciplinary proceedings. There is

a lot of weight in giving way to criminal proceedings, and letting the Judgment of the Court, guide disciplinary proceedings.

41. The application of decisions from the Nigerian Courts cited above, would reduce the conflict between criminal processes and disciplinary processes founded on the same factual backgrounds.

42. Remedies. The Court is persuaded that the Petitioner does not merit the remedies pleaded. It is correct that she was taken before the orderly room proceeding in accordance with the existing legal framework, and heard fairly. While there were, and there remains in place, flaws in the legal framework through which she was dismissed from Police Force, such flaws would not justify the finding that the Petitioner's constitutional rights were violated by the Respondents.

43. The declaration of innocence by the Criminal Court must be viewed against the finding that a prima facie case had been established against her by the same Court, and that there are different standards of proof, under the two sets of proceedings. The Criminal Court was not sitting on judicial review of the orderly room proceedings, and its Judgment cannot be viewed as a decision which effectively quashed the process and outcome, of the orderly room proceedings.

44. The record shows that the Petitioner lodged an appeal on 26th January 2011, through the Provincial Police Officer Central Province, the OCPD Lari, and the OCS Tigoni. The response to the appeal is dated 9th May 2011. It answers all the grounds raised by the Petitioner. The problem with the appeal is that the outcome was not received by the Petitioner through the same chain of command it was presented. It was not until 26th October 2021, that the 1st Respondent communicated in clear language, that the appeal had been dismissed. This default appears to the Court to have been occasioned by police bureaucracy, but the appeal itself was comprehensively dealt with on all grounds, way back on 9th May 2011, and the decision reached through the orderly room proceedings, upheld.

45. There is no justification in granting an order of reinstatement of the Petitioner to the Police Service, 13 years after she was implicated in the escape of a prisoner, a hardcore drug peddler, who had been convicted and sentenced to a total of 40 years in prison. Her dismissal was to the good and protection of the general public. There is no justification is granting her salaries from the public purse, in arrears on 12 years, during which she was not involved in any form of utumishi kwa wote.

It is ordered: -

a. The Petition is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 29TH DAY OF SEPTEMBER 2023.

JAMES RIKA

JUDGE