



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v National Police Service Commission & another (Petition  
189 of 2022) [2023] KEELRC 3264 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3264 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 189 OF 2022  
B ONGAYA, J  
DECEMBER 7, 2023**

**BETWEEN**

**NAOMI WAMBUI MAINA ..... PETITIONER**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition dated 16.09.2022 through M/S M. M. Uvyu & Company Advocates. The petitioner prayed for:
  - a. A declaration that the petitioner's fundamental freedoms and rights under Chapter 4 of *the Constitution* of Kenya, 2010 have been infringed and or violated by the 1<sup>st</sup> respondent.
  - b. A declaration that the 1<sup>st</sup> respondent's vetting and decision arising thereof was in violation of the petitioner's fundamental rights under Articles 27, 40, 47 and 50 of *the constitution*, 2010.
  - c. An order of judicial review to quash the 1<sup>st</sup> respondent's decision of 06.12.2016.
  - d. An order of injunction restraining the 2<sup>nd</sup> respondent from implementing the 1<sup>st</sup> respondent's decision of 06.12.2016.
  - e. An order directing the 2<sup>nd</sup> respondent to reinstate the petitioner in employment in the same capacity she was before the unlawful dismissal.
  - f. Payment of dues being the salary and allowances from the date of dismissal until the date of reinstatement.
  - g. Any other or further relief as the court may deem just and expedient.



2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and further affidavit sworn on 22.06.2023. The petitioner's case is as follows:
- a. She was employed by the 2<sup>nd</sup> respondent on 31.06.2007 as a Police Constable.
  - b. On 03.06.2016 the 1<sup>st</sup> respondent conducted vetting exercise at the school of government, Mombasa. On 06.12.2016, the 1<sup>st</sup> respondent delivered its findings, in which the petitioner was removed from the service on allegations that she had failed the vetting.
  - c. The petitioner was served with the decision on 28.12.2016 and she formally requested for the Hansard record through her letter of 29.12.2016 received by the 1<sup>st</sup> respondent on 30.12.2016.
  - d. The Hansard record was later provided to the claimant. She then wrote in an application for review of the 1<sup>st</sup> respondent's decision.
  - e. The petitioner was invited for a vetting review exercise which was conducted on 11.07.2017. The petitioner states that she never received the outcome thereof despite several correspondences requesting for the outcome.
  - f. Prior to the vetting, the petitioner had supplied the 1<sup>st</sup> respondent with her Mpesa transaction statements for the period between 01.01.2012 to 31.12.2013.
  - g. Prior to the vetting she had supplied the 1<sup>st</sup> respondent with her bank statement at the cooperative bank for the period between January, 2012 to December, 2013 as requested by the 1<sup>st</sup> respondent.
  - h. Prior to the vetting the petitioner had supplied the 1<sup>st</sup> respondent with Kenya Police Sacco statements for the period between 12.03.2010 to 31.05.2014 as requested by the 1<sup>st</sup> respondent.
  - i. The 1<sup>st</sup> respondent's findings as per the verdict of 06.12.2016 allegedly stated that she admitted to receiving money from persons with business interest in the transport sector which the petitioner states is not factual because she explained the circumstances under which she received the monies from the various individuals including her family members, as captured in the Hansard.
  - j. The 1<sup>st</sup> respondent arrived at a conclusion that she lacked financial probity and hence dismissed her services, which findings were not based on any evidence or material before it and therefore her constitutional rights were violated by the 1<sup>st</sup> respondent because when she was called for a second interview for the review of the verdict the 1<sup>st</sup> respondent has never given its verdict thereof to date.
  - k. Other colleagues of the petitioner who had been dismissed after the vetting process were reinstated upon hearing their review applications. The petitioner contends that this is discrimination against her contrary to Article 27 of *the Constitution* which stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law.
  - l. Despite several requests for the outcome of her vetting exercise she has never been informed of the same which is contrary to Article 47(1) of *the constitution* which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



- m. The petitioner states that she had a legitimate expectation that she would receive the verdict of the review exercise within a reasonable time but to date she has never received that verdict which is contrary to provisions of Article 47 of the constitution on fair and administrative action.
  - n. That the 1<sup>st</sup> respondent's verdict that she lacks financial probity contravenes her right to own property contrary to Article 40(1) of the constitution which stipulates that every person has the right either individually or in association with others to acquire and own property of any description. That she had given evidence that she buys and sells rice to her various customers but that fact was ignored by the 1<sup>st</sup> respondent.
  - o. That the 1<sup>st</sup> respondent did not grant her a fair hearing in that she had a legitimate expectation that she would get a verdict of the review exercise as expected under article 50 of the constitution which stipulates that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair hearing before a court or impartial tribunal or body.
  - p. That the 1<sup>st</sup> respondent in arriving in its decision to dismiss her from the service did not consider her previous record, conduct and performance while on duty because had it done so, it would have found that she had never faced any disciplinary proceedings in the course of her duties and therefore the verdict arrived at by the 1<sup>st</sup> respondent was contrary to the provisions of section 7 of the National Police Service (vetting) Regulations, 2013.
3. The 1<sup>st</sup> respondent filed the replying affidavit of Peter Kiptanui Leley, the Chief Executive Officer of the 1<sup>st</sup> respondent, sworn on 17.05.2023 and further affidavit sworn on 27.09.2023 through the National Police Service Commission. It was stated and urged as follows:
- a. The petitioner was removed from the service on 06.12.2016 after being found to be unsuitable to continue serving. This decision was arrived at after the Commission found the petitioner's financial probity lacking because she failed to account for the difference between the amounts declared as income and the income received.
  - b. The petitioner duly completed and submitted the vetting questionnaire and subsequently appeared for vetting on 03.06.2016 where she was asked among other questions, her financial probity and business ventures.
  - c. The Commission noted a disparity between the earnings declared by the officer and the amounts transacted by the officer, the officer received money from other officers rather than from her declared sources. Further, the officer admitted to receiving money from transfers to and from her Mpesa to her fellow officers.
  - d. The Commission found the petitioner explanations inconsistent and based on the evidence and on a balance of probabilities the commission concluded that the petitioners lacked financial probity and integrity and removed him from the service having failed the vetting.
  - e. That a detailed decision on the petitioner's removal from the service after failing the vetting exercise dated 06.12.2016 was supplied to her through the proper service channels communication.
  - f. The petitioner asked for a copy of the Hansard and the commission in apparent recognition of the petitioner's right to fair and administrative action a letter dated 09.01.2017 acknowledged receipt of the petitioner letter dated 29.12.2016 requesting for the vetting interview hansard and issued the same.



- g. The petitioner applied for review pursuant to Regulation 33 of the Vetting Regulations, 2013. The petitioner in her application for review dated 29.12.2016 stated that, inter alia, the Commission made an error in finding that there was a disparity between her declared earnings and monies transacted by her and when questioned she gave hypothetical explanations.
  - h. The petitioner was scheduled for review hearing on 11.07.2017 which she duly attended.
  - i. That Regulation 33 (2) of the Vetting Regulations provides the parameters to guide the Commission in admittance of a review application.
  - j. During the vetting review hearing the Commission took note that petitioner did not tender any new evidence, facts or documentations that may inform a contrary decision and as provided for under Regulation 33 and the vetting panel upheld the decision to remove the petitioner from the service.
  - k. The Commission through a board meeting held on 07.11.2017 approved vetting review decisions in which 38 listed officers were removed from the service and the petitioner was among the persons listed and the same was forwarded to the office of the inspector general for purposes of transmission to the respective officers.
  - l. The petitioner alleges that she did not have access to the vetting review decision rendered by the Commission. However, the Commission forwarded the vetting decision to the Inspector General of Police for onward transmission to the police officers.
  - m. The petitioner vetting review decision was further communicated to her through the Regional Police Commander, Coast region vide a letter dated 23.02.2018 enclosing individual letters of the police officers who were removed from the service and the petitioner was among those listed for removal.
  - n. The petitioner has failed to prove how her fundamental freedoms and rights have been infringed upon yet vetting was done in a transparent manner and she was accorded a fair hearing during the vetting and also during her application of review as prescribed in section 4(g) of the national police service regulations.
4. The 2<sup>nd</sup> respondent filed the replying affidavit of Dennis Nyangule, Chief inspector of Police based at Police headquarters, sworn on 30.10.2023 and through the office of the Attorney General. It was argued and stated thus:
- a. The suit offends the mandatory provisions of section 3(2) of the Public Authority Limitation Act Cap. 39 which provides for time within which proceedings founded on contract against the government should be filed.
  - b. That section 90 of the *employment act* provides that notwithstanding the provisions of section 4(1) of the Limitations of Actions Act Cap. 22 no civil action/proceedings arising out of this act or contract of service shall lie or be instituted unless it is commenced within 3 years after the cause of action arose.
  - c. That the cause of action arose on the date of removal, which was 06.12.2016. Accordingly, the limitation period started to run as from the date of removal meaning that the limitation period expired on 16.12.2019, time within which suit ought to have been filed.
  - d. That the suit is statutory barred and therefore it cannot stand before any court of law.



- e. The 1<sup>st</sup> respondent's decisions on the initial vetting and review were implemented by the 2<sup>nd</sup> respondent by issuing her an early retirement letter and later deleting her records from the service pay roll after communication of the decisions to the petitioner through her last police command as a matter of procedure.
  - f. The petitioner is aware of the 1<sup>st</sup> respondent's decisions on her employment as communicated through the 2<sup>nd</sup> respondent and to date, no request for any information from the petitioner/ her legal representative is pending before the 2<sup>nd</sup> respondents for action.
  - g. The National Police Service regards any form of financial probity as a matter of grave concern due to the serious ramifications it has to policing and the police service as a disciplined institution required to maintain high integrity in its operations.
  - h. The vetting process followed all provisions of *the Constitution* and other relevant laws.
  - i. The petitioner has intentionally neglected to appreciate the leniency of the 1<sup>st</sup> respondent's decision to retire her on public interest in lieu of not prosecuting detectable offences and making a follow –up of her wealth from questionable sources.
  - j. That the petition dated 16.09.2022 has been overtaken by events and that the prayers sought therein rendered moot after the 1<sup>st</sup> respondent's decision were implemented many years ago and that the suit is now statutorily barred.
  - k. The petitioner has failed to demonstrate with reasonable degree the provisions of *the Constitution* or any other law violated, if any, how it was violated and the particulars of such violations. The petitioner has cited articles of *the constitution* without any demonstration of the alleged violations.
5. Final submissions were filed for the parties. The 1<sup>st</sup> respondent filed through learned Litigation Counsel Doris Ombui and the 2<sup>nd</sup> respondent through the learned Deputy Chief Litigation Counsel Daniel O. Oure. The Court has considered all the material on record. The Court returns as follows.
  6. To answer the 1<sup>st</sup> issue, the facts in the suit appear not in dispute and are as pleaded for the parties. The only fact in dispute is whether the petitioner received the decision on the review application. While the respondents allege it was delivered, there is no evidence that it was so delivered. The failure to communicate the decision amounts to a continuing injury in that regard.
  7. To answer the 2<sup>nd</sup> issue, the Court returns that the petitioner has established that her rights were violated as alleged. The decision on review has not been delivered to the petitioner within a reasonable time. The petitioner has shown that her rights to a fair hearing were violated. There was no complaint made against her. The 1<sup>st</sup> respondent caused her to avail bank statements and m-pesa statements upon whose basis, speculatively so and without verification, the 1<sup>st</sup> respondent purported to find her culpable and removed her from service on what was called vetting out. That was in clear violation of Article 50 of *the Constitution* barring self-incrimination and which right to fair trial or hearing could not be limited per Article 25(c) of *the Constitution*. In in Gladys Boss shollei –Versus- Judicial Service Commission & Another Petition No. 34 of 2014 [2022]KESC5(KLR) (17 February 2022) (Judgment) the Supreme Court (Koome CJ &P, Mwilu DCJ, &V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ),held 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.”

8. Further in Peter Kilonzo Katheka -Versus- National Police Service Commission and Another the Court Petition ELRC NO.17 OF 2023 (Formerly HC Petition No.E136 of 2018)(Judgment delivered on 25.05.2023) found and held as follows:

- “ 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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*.”

9. The Court returns that the findings fully apply to the instant petition. The rights were violated accordingly.
10. The 3<sup>rd</sup> issue is on remedies. The Court returns as follows:



- a. The Court returns that the petitioner has established award of the declaration that the petitioner's fundamental freedoms and rights under Chapter 4 of *the Constitution* of Kenya, 2010 have been infringed and or violated by the 1<sup>st</sup> respondent as found in this judgment.
- b. The Court returns that the petitioner has established award of the declaration that the 1<sup>st</sup> respondent's vetting and decision arising thereof was in violation of the petitioner's fundamental rights under Articles 27, 40, 47 and 50 of *the Constitution*, 2010.
- c. The petitioner prays for an order of judicial review to quash the 1<sup>st</sup> respondent's decision of 06.12.2016. The petition is dated 16.09.2022. The 6 months attached to the grant of the judicial review order of certiorari appear to have long lapsed by the time the petition was filed. The Court returns that the prayer was time barred in that circumstance.
- d. An order of injunction restraining the 2<sup>nd</sup> respondent from implementing the 1<sup>st</sup> respondent's decision of 06.12.2016. It appears that the prayer is linked to the prayer for an order directing the 2<sup>nd</sup> respondent to reinstate the petitioner in employment in the same capacity she was before the unlawful dismissal. The Court has considered the impact of the injunction would be to essentially grant a reinstatement. But an order to reinstate is time barred as three years have lapsed since the removal by vetting out and as per section 12 of the *Employment and Labour Relations Court Act* as to when the order of reinstatement may issue. The orders will be declined.
- e. The claimant prayed for payment of dues being the salary and allowances from the date of dismissal until the date of reinstatement. The Court has declined an order of reinstatement and back payment is as well declined.
- f. The petitioner prayed for any other or further relief as the court may deem just and expedient. The Court of Appeal has held that once violation of rights has been established, the Court may move to inquire into the issue of appropriate relief especially award of damages. The Court has found that the petitioner's rights and freedoms were violated. The Court has considered the circumstances of the case as per established facts and returns that an award of Kshs.4,000,000.00 will serve as due reparation in the case. The award is consistent with the award in the similar and recent case of Peter Kilonzo Katheka -Versus- National Police Service Commission and Another the Court Petition ELRC No. 17 OF 2023 (Formerly HC Petition No. E136 of 2018) (Judgment delivered on 25.05.2023). The respondents will pay costs of the suit.

In conclusion, judgment is hereby entered for the petitioner against the respondents, jointly and severally for:

- a. The declaration that the petitioner's fundamental freedoms and rights under Chapter 4 of *the Constitution* of Kenya, 2010 have been infringed and or violated by the 1<sup>st</sup> respondent as found in this judgment.
- b. The declaration that the 1<sup>st</sup> respondent's vetting and decision arising thereof was in violation of the petitioner's fundamental rights under Articles 27, 40, 47 and 50 of *the Constitution*, 2010.
- c. Payment of Kshs.4,000,000.00 being compensation for violation of rights and by 01.06.2024 failing, interest to be payable thereon at Court rates from the date of this judgment till full payment.
- d. The payment of costs of the suit.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
THURSDAY 7<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

