



**Maithya v National Police Service Commission (Petition 66 of 2017)
[2023] KEELRC 3263 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3263 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 66 OF 2017
B ONGAYA, J
DECEMBER 7, 2023**

**BETWEEN
SHADRACK MUTWETUMO MAITHYA PETITIONER
AND
THE NATIONAL POLICE SERVICE COMMISSION RESPONDENT**

RULING

1. The petitioner filed an application by the notice of motion dated 25.04.2023 through Okubasu & Munene Advocates. The application was under section 12 (3) (viii) and 16 of the *Employment and Labour Relations Court Act*, 2011; Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and all enabling provisions of law. The application is seeking the following orders:
 - a. That the application be certified urgent
 - b. That the Honourable Court be pleased to reinstate the matter herein for purposes of prosecuting the instant application.
 - c. That the Honourable Court be pleased to amend, vary and or review its order number 3 in the decree extracted from the judgment delivered on the 05.07.2019 to read as follows;

“That the prayer for mandamus be is hereby substituted with an order that the petitioner be retired with effect from the date of his vetting out being 05.05.2016 judgment being 05.07.2019 but his retirement benefits be based on actual retirement date of 20.05.2020”



- d. That in the alternative to (2) above the honourable court pleased to amend, vary and/or review its order number 3 in the decree extracted from the judgment delivered on the 05.07. 2019 to read as follows:
- “ That the prayer for mandamus be and is hereby substituted with an order that the petitioner be retired from the service with effect from the date of his vetting out being 05.05.2016 but his and his retirement benefits be based on actual retirement date of 20.05.2020.”
- e. That costs be provided for.
2. The said application is made on the following grounds:
- a. The petitioner/applicant vide his petition dated and filed on the 14.07.2015 moved this honourable court challenging the respondent’s decision of vetting out the petitioner from the National Police Service.
- b. That by its judgment delivered on the 05.07.2019 the Honourable Court found in favour of the petitioner/applicant by holding that the vetting out of the petitioner/applicant was unlawful and unconstitutional.
- c. That one of the prayers sought by the petitioner/applicant, vide his petition, was an order for reinstatement which if granted would allow the petitioner/applicant serve to his age of retirement.
- d. That the Honourable Court did indeed find that the termination of the petitioner/applicant’s services was unlawful.
- e. That, However, in its wisdom, the Court found that an order for reinstatement was untenable at the time and instead substituted the sought prayer with an order:
- “ That the prayer for mandamus be and is hereby substituted with an order that the petitioner be retired with effect from the date of his vetting out being 05.05.2016 but his retirement benefits be based on actual retirement date of 20.05.2020.”
- f. That despite finding in favour of the petitioner/applicant, the aforesaid “substituted” order is ambiguous and thus prejudicial to the petitioner/applicant for reasons that:Years of completed service is used to calculate retirement benefits thus using the date of vetting out as the retirement date (05.05.2016) as opposed to the actual retirement date (20.05.2020) or date of delivery of judgment (05.07.2019) reduces the petitioner’s years of completed service hence reduced the retirement benefits.Latest salary drawn amount is used to calculate retirement benefits thus using salary drawn as at the date of vetting out (05.05.2016) does not factor in salary increment that the petitioner/applicant was entitled to if allowed to serve until his actual date of retirement (20.05.2020) or date of delivery of judgment (05.07.2019). Annual salary increment is per the human resource policies and procedure manual for the public service.
- g. That the “substituted” order is ambiguous and by implication prejudicial to the petitioner/applicant, since it slashes his retirement benefits which further perpetuates the respondent’s unfair labour practises despite Court making a finding in favour of the applicant.
- h. It is thus in the interest of justice that the court orders the amendment, variance and/or review of its order number 3 as sought herein.



3. The Respondent filed the replying affidavit of Peter Kiptanui Leley, the Chief Executive Officer of the respondent sworn on 20.06.2023 and Mr. Lumumba Advocate appeared for the respondent. It was urged thus:
- a. The judgement herein by the Honourable Lady Justice Maureen Onyango was well informed and unequivocal.
 - b. That on the basis of the orders sought by the applicant in the petition, the learned judge took into consideration the time lapse from the date the applicant herein was vetted out and the date the judgment was being delivered.
 - c. The date of delivery of judgment of the Honourable Court being the 05.07.2019, the Court also took into consideration the applicant's date of retirement being 20.05.2020 and deemed it untenable to grant orders of mandamus to reinstate the applicant back to service.
 - d. On the contrary the Honourable Judge with her wisdom substituted the said prayer of mandamus with an order that the petitioner be retired with effect from the date of his vetting out being 05.05.2016 but his retirement benefits be based on the actual retirement date of 20.05.2020.
 - e. Additionally, the applicant was awarded Kshs.1,500,000 as compensation for the time he spent out of the service.
 - f. The learned judge conclusively dealt with all the issues argued in the petition and subsequently addressed them in the judgment considering the prevailing circumstances of the matter.
 - g. The petitioner being dissatisfied with the decision of the trial court now claims for review via this application on the basis that he seeks for salary increments for the duration in which he was not in service.
 - h. In its Judgment, the Court was of the opinion that the petitioner be awarded compensation in addition to the substituted order that accounted for his time out of service.
 - i. The petitioner's prayer that the Judgment be amended or reviewed would be duplicitous and vexatious in that the Court had already dealt with the issue of the petitioner's time out of service by awarding compensation amounting to Kshs.1,500,000/=
 - j. The petitioner's application fails to stand as the rules for the Court to grant review of a decree/ order are clearly stipulated on order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Rules and none of these circumstances have been demonstrated by the applicant as against the court's Judgment.
 - k. The applicant has not specifically stated or illustrated how the Court has made an error on the face of the record and/or how the judgement was indeed ambiguous despite the same judgement being unequivocal on all the issues raised in the petition.
4. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
5. To answer the 1st issue, the review is urged on account that the judgment is ambiguous. However, by the applicant's own case it is confirmed that the order of reinstatement as was prayed for was not available in view that three years of limitation attached to the order per section 12 of the *Employment and Labour Relations Court Act* had already lapsed. To meet ends of justice, the Court refined the prayer as was ordered.



6. To answer the 2nd issue, it is clear that since the order of reinstatement was not available, the Court compensated the applicant for the unfair removal by the way of award of the Kshs.1,500,000. The Court finds that no manifest injustice has been established in that regard and review is not available on account of resultant manifest injustice.
7. To answer the 3rd issue, the applicant is seeking to enjoy the salary incremental over the period between the period of the vetting out and the judgment or actual due retirement date but which cannot be available unless a reinstatement order had been obtained. The Court finds that the claim for such incremental is vacuous on account that devoid reinstatement order, the claim stands on without due contractual or statutory or other foundation.
8. Finally, for the 4th issue, as urged for the respondent, the applicant has not established any known ground for granting of a review. All the applicant has done is to attempt to unreasonably seek the Court to change its analysis and reasoned judgment. That is obviously not the purpose for a review procedure and the legitimate approach was for the applicant's dissatisfaction to move to appeal. The application will fail as unjustified.
9. In conclusion, the petitioner's application dated 25.04.2023 is hereby dismissed with costs.

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

BYRAM ONGAYA

PRINCIPAL JUDGE

