



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E078 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLE 47(1), 2(1), 3, 10, 21, 27, 41, 22, 23, 159, 160, 161 AND 162(2) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

SAMUEL MURATHI GATUUA.....PETITIONER

VERSUS

COMMISSIONER GENERAL OF PRISONS.....1ST RESPONDENT

CABINET SECRETARY, INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The Petitioner was until his discharge from service, an employee of the Public Service Commission deployed under the Kenya Prisons Service in the Ministry of Interior and Co-ordination of the National Government.
2. At the time material to this suit, he was engaged as a Prison Constable and deployed at Uruku GK Prison.
3. The 1st Respondent is the Commissioner General of Prisons duly appointed under the State Department for Correctional Services, Kenya Prisons Service in the Ministry of Interior & Co-ordination of National Government.
4. The 2nd Respondent is the Cabinet Secretary, duly appointed by the President of the Republic of Kenya under the Constitution of Kenya, being in charge Interior & Co-ordination of National Government.
5. The 3rd Respondent is the Public Service Commission duly established under Article 233 and the Public Service Commission Act. No. 13 of 2012 which give it various functions and powers within the meaning of Article 234 of the Constitution of Kenya, 2010 and the Public Service Commission Act. No. 13 of 2012.
6. The 4th Respondent is the Chief Legal Advisor duly established under Article 156 of the Constitution of Kenya with mandate to represent the National Government in legal matters and to advise the Government to uphold the rule of law and the provisions of the Constitution of Kenya 2010.
7. It is the Petitioner's averment that his dismissal from employment was in violation of Articles 1, 2(1), 3, 10(1), 21(1), 27, 41 and 47 of the Constitution. He prays for the following reliefs –

a) A Declaration that the Respondents decision to terminate employment of the Petitioner and the decision dated 26th July 2019 disallowing the Petitioner's appeal for reinstatement infringed his rights and was unconstitutional, unlawful, unjust and unfair.

- b) A Mandatory Injunction compelling the 1st Respondent to forthwith reinstate the Petitioner to employment with full benefits.*
- c) An Order directing the Respondents to pay the Petitioner his remaining half of his Salary while on interdiction thereof.*
- d) An Order directing the Respondents to pay the Petitioner his Salary arrears from the date of interdiction thereof.*
- e) General damages*
- f) Any other or further relief that this Honourable Court may deem fit to grant.*
- g) Interest on above and costs of this Petition hereof.*

8. In response to the petition the Respondent filed two replying affidavits. The first replying affidavit is sworn by Simon K. Rotich, the Secretary/Chief Executive Officer of the 3rd Respondent, the Public Service Commission on 23rd November 2020. The second replying affidavit is sworn by Kennedy A. Aluda, a Senior Assistant Commissioner General of Prisons and Director of Administration and Personnel of the 1st Respondent.

9. In his affidavit, Mr. Rotich avers that the Petitioner was dismissed from service on account of poor record of service having committed six other misconducts before.

10. He avers that the Petitioner had previously on various dates between 1993 and 2016 been charged with absence from duty without good cause three times and being under the influence of alcohol four times. That the last offence was using personal violence against another prison officer. Particulars of the offence committed and dates are contained in the Prisons Human Resource Management Committee meeting of 11th and 13th October, 2017.

11. Mr. Rotich continues that the Prisons Service is a disciplined service that calls for high stands of discipline, that the Petitioner has not denied that he used violence on another prison officer, his only defence being that he was provoked. That the Petitioner admitted the incident in which he slapped a fellow prisons officer using a panga due to provocation.

12. The Affiant avers that in using actual violence on a fellow colleague, the Petitioner exhibited conduct which is risky to both his colleagues and prisoners and had to be dismissed from service.

13. That the dismissal was not as a result of the incident which occurred on 22nd September 2016 alone, but a culmination of the various previous offences which happened before.

14. In the replying affidavit of Mr. Aluda, he deposes that the Petitioner who worked at Uruku Prisons was enlisted in the Service on 4th January 1993 on Permanent and Pensionable terms.

15. That on 22nd September, 2016, at around 1150 hours the Petitioner threatened to cut one Sergeant Wambua Mbolu with a panga and ended up slapping him with a panga on the shoulder.

16. That the Eastern Region Prisons Commander as a matter of procedure forwarded his decision to dismiss the Petitioner to the Commissioner General's office for further deliberation by the Prisons Human Resource Management Advisory Committee (PHRMAC) vide his letter ref:RCP/EAS/STF/31/VOL.VI/239 dated 28th October 2016.

17. That the case was presented before the Prisons Human Resource Management Advisory Committee (PHRMAC) on 4th and 5th July 2017 wherein the Committee recommended that the Petitioner be dismissed from Service on account of poor record of service and gravity of the offence committed. The same was approved by the Commissioner General of Prisons on 24th July 2017.

18. That the Petitioner had accumulated six previous disciplinary offences.

19. That the verdict was communicated to the Petitioner's officer in charge through the office signal ref:pf/24536/1993000950/44 dated 24th July 2017 and the Commissioner Generals letter ref:pf/1993000950/46 dated the 1st August 2017 addressed to him through his home address provided in his personal file.

20. THAT upon learning of the dismissal order, the Petitioner appealed for reinstatement through his letter dated 3rd August 2017 to the Public Service Commission of Kenya through the Commissioner General of Prisons. His case was then presented to Prisons Human Resource Management Advisory Committee (PHRMAC) meeting sitting on 27th December 2017.

21. The Committee in its recommendations upheld the dismissal order and forwarded the findings to the Public Service Commission of Kenya.

22. THAT the Public Service Commission in its reply disallowed the appeal vide letter ref:PS/D/GA/306(5) dated 14th February 2018. The Petitioner was however given a right of application for review which he exercised.

23. That the decision by Public Service Commission was communicated to the Petitioner vide a letter ref: pf: 199300950/54 dated 21st March 2018.

24. That the Petitioner applied for a review through his letter dated 3rd September 2018 and the same was presented to Prison Human Resource Management Advisory Committee (PHRMAC) meeting of 23rd to 30th January 2019.

25. That the Public Service Commission of Kenya in its reply disallowed the application for review stating that the Petitioner did not cite any new grounds and marked the case as closed through its letter ref:PSC/D/GA/306/(12) dated 17th July 2019.

26. The Affiant avers that the petitioner has not proved his case to the required standard of proof.

27. He further avers that the ultimate decision in dismissing the Petitioner from the Service was procedural, fair and in total observance of all the underlying Laws guiding the Department.

Petitioner's Case

28. It is the Petitioner's case that on 22nd September 2016 while on night shift duty two Prison Officers, one Sergeant Wambua and the other PC Konchella arrived at the gate of the prison while engaged in a serious altercation. That he was worried and did not open the gate for them until he was called by one Sergeant Gakubi who authorised him to open the gate and allow Sergeant Wambua and PC Konchalla into the prison premises.

29. It is further the Petitioner's case that after signing out of night duty he went to his house to take breakfast and rest. That at about 11 am while he was cutting firewood with a panga to make lunch, Sergeant Wambua appeared at his doorstep and started abusing him accusing him of inciting PC Konchalla over the incident that happened at the prison gate that morning. That he denied the allegations. That at that moment one CO1 Kitata with one SPO Ojir who were on normal duty saw him and Sergeant Wambua. Sergeant Wambua ran to them and told them that the Petitioner had threatened him with a panga.

30. It is the Petitioner's case that he was not given an opportunity to explain to CO1 Kitata and SP Ojir what had happened between him and Sergeant Wambua.

31. That the incident was registered as a complaint by Sergeant Wambua who called three witnesses during the orderly room proceedings. That he was not allowed to call any witnesses. That SSP Vincent Manyara who was the In Charge of Uruku GK Prisons and the adjudication officer proceeded to interdict the Petitioner and directed that he reports to the station every day at 8 am and 4 pm which he did for about a year until his discharge from service on 1st August 2017.

32. The Petitioner appealed against his interdiction by letter dated 3rd October 2016 which was never responded to.

33. He appealed against his dismissal by letter dated 3rd August 2017 seeking reinstalment. In the appeal he stated that the complainant went to his house and abused/provoked him. That there was malice on the part of the complainant. The Appeals Committee upheld the decision to dismiss him.

34. The Petitioner thereafter appealed to the Public Service Commission. The Commission disallowed the appeal by letter dated 14th February 2018. The Petitioner's application for review was also dismissed by letter dated 26th July 2019. It is after this that the Petitioner filed the instant petition.

Submissions

35. The petition was disposed of by way of written submissions.

36. In the Petitioner's submissions, he submits that the 1st and 3rd Respondents failed to comply with the Constitution, the Employment Act and the Kenya Prisons Service Act. He submitted that no record of the disciplinary proceedings has been filed. That the Respondents infringed the Petitioner's rights under Articles 4, 2(1), 3, 10(1), 21(10), 27, 41 and 47.

37. The Petitioner relies on the following authorities: -

a) **Petition No. 39 of 2014 (Nairobi) Edwin Kosgei Kibor & Another v The Inspector General of Police & 3 Others** – where the Court held that;

Under Article 246 (3)(b) it is the role of the National Police Service Commission to –

“Observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.”

b) **Cause No. 2261 of 2014 Yusto Opiyo Onyango v National Police Service Commission & 2 Others**

where it was held that;

“However, given that the dismissal was unfair and unjustified, I will convert the same to a normal termination in which case the Claimant will be entitled to payments of his termination ...”

c) **Grace Gacheri Muriithi v Kenya Literature Bureau (2012) eKLR** where the Court held that;

“The Court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated... ”

In the circumstances, of this case, the court therefore finds that the claimant is entitled to be returned to work by the respondent...

The Claimant was entitled to salary arrears ... and 12 months’ compensation ... plus interest.”

d) **Tailors and Textiles Workers Union v EMKE Garments Kenya Limited Cause 36 of 2007** where it was held that the Claimants was liable for payment of 12 months’ salary as compensation of illegal and wrongful termination of employment in accordance of Section 15(1)(ii) of the act.

e) **Kenya Guards & Allied Workers Union v Factory Guards Co. Ltd Cause no. 53 of 2006 (NAIROBI)** where the grievant sought orders of the court for wrongful termination of employment and was given compensation of twelve (12) months' salary in compensation o loss of employment.

38. For the Respondents it is submitted that they complied with Section 4(3) of the Fair Administrative Actions Act. That they complied with fair procedure as the Petitioner was given notice, allowed to call witnesses and allowed to appeal against his dismissal.

39. The Respondent relied on the decision in **Jared Aimba v Fina Bank Limited [2016] eKLR** where the Court of Appeal delved into Section 41 of the Employment Act and discussed in depth the issue of notification and hearing before termination on grounds of misconduct and stated that: -

“Termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard before termination.”

40. The Respondents also relied on the case of **Msagha v Chief Justice and 7 Other Nairobi HCMCA No. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** where the Court highlighted the ingredients of fairness or natural justice that must guide all administrative decisions to be:

a) *That a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker;*

b) *That no one ought to be judge in his or her own case; and*

c) *That an administrative decision must be based upon logical proof or evidence material.*

41. The Respondent submits that the Petitioner has not proved the violation of his constitutional rights as per the case of **Anarita Karimi Njeru v Republic Miscellaneous Criminal Application No. 4 of 1979 [1979] eKLR** where the Court held that the alleged incidences of bias, discrimination and violation of constitutional rights have to be proved with clarity and precision.

42. It is further the Respondents’ submissions that they complied with the statutory requirements under Sections 41, 43 and 45(2) of the Employment Act relying on the case of **Timon Otieno Mboga v Kenya Forest Services [2015] eKLR** where the Court held that

“The Employment Act, the Industrial Court Act, or other labour laws for that matter do not provide for suspension. However, the Employment Act at Section 12 provides that every employer who employs more than 50 employees must have a statement on disciplinary rules ... Issues such as interdiction and suspension, therefore, ought to be provided for in the statement of disciplinary rules.”

43. The Respondent further relies on the case of **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR** where the Court held that: -

“Whether an employee will be paid during the period of interdiction or suspension will depend on the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if, at the end of the disciplinary process, the employee is found culpable ...”

Determination

44. Having considered the pleadings and submissions, the issues for determination are whether the Petitioner’s dismissal and discharge from the Prison’s Service was unfair and unconstitutional and whether the Petitioner is entitled to the orders sought.

45. The Petitioner has insisted that he did not assault Sergeant Wambua. He has further insisted that he was never given an opportunity to call his witnesses.

46. The Respondent on the other hand avers that the Petitioner slapped Sergeant Wambua with the flat side of a panga.

47. No copy of minutes of the orderly room proceedings were availed to the Court by the Respondents. Further none of the parties who participated in the orderly room proceedings swore an affidavit to verify the facts as presented to the Court in the Respondents' replying affidavits. The two affidavits of Mr. Simon K. Rotich and Mr. Kennedy A. Aluda were based on hearsay as none of them participated in the proceedings at which the decision to dismiss the Petitioner was made. This left the Petitioner's averments in his pleadings uncontested.

48. I have further carefully gone through the pleadings and documents on record and have been unable to come across any evidence of admission by the Petitioner of the use of violence against Sergeant Wambua as alleged by the Respondents.

49. The Respondents have further not rebutted the Petitioner's averment that he was not allowed to call any witnesses, as a result of which the proceedings violated Articles 41 and 47 of the Constitution, Sections 41, 43 and 45 of the Employment Act and Section 4(3) of the Fair Administrative Actions Act.

50. Besides the foregoing, the letter of dismissal gives the reason for dismissal to be on account of poor records of service. The reasons given in the Officers Defaulters' Report and in the brief by Kennedy A. Aluda at document 1 of the Respondents' List and Bundle of Documents is that the Petitioner used personal violence against another prisons officer C/S124(i)(t) of the Prisons Rules 1977 revised in that on 22nd September 2016 at around 1150 hours he threatened to cut Sergeant Wambua Mbolu with a Panga and ended up slapping him on the shoulder with it.

51. Section 124 of the Prisons Rules provides for offences by prison officers as follows –

124. Offences by prison officers.

(1) Any prison officer who commits any of the following offences shall be deemed to have committed an offence against discipline—

- (a) absence from duty without good cause;**
- (b) sleeping on duty;**
- (c) neglect or disobedience of orders;**
- (d) being under the influence of alcohol or drugs, whether on duty, or off duty;**
- (e) insubordination;**
- (f) wilful destruction of or careless loss of or injury to Government property;**
- (g) neglect of duty;**
- (h) malingering;**
- (i) using personal violence to any prisoner save as provided in Section 12 of the Act;**
- (j) instigating or permitting any prisoner to commit any crime or offence against prison discipline;**
- (k) allowing an unauthorized person to communicate with a prisoner;**
- (l) borrowing money from or lending money to another prison officer;**
- (m) bringing tobacco or spirituous or fermented liquor or any other prohibited article into a prison;**
- (n) being improperly dressed when in uniform;**
- (o) reporting late for duty;**
- (p) losing supervision over prisoners in his charge;**
- (q) selling or making away with any part of his uniform, equipment or accoutrements;**
- (r) destroying, damaging or losing, either on purpose or by neglect Government or a prisoner's property;**

(s) trafficking with prisoners;

(t) using personal violence towards another prison officer;

(u) associating with discharged prisoners without the written authority of the officer in charge;

(v) receiving any fee or gratuity from, or having any business dealing with, a prisoner or a discharged prisoner, with a friend of a prisoner or with a visitor to a prison;

(w) making an unauthorized communication concerning the prison to any other person;

(x) any other conduct to the prejudice of good order or discipline or the security of a prison.

52. The reason for dismissal in the Petitioner's letter of dismissal is alien to the Prisons Rules. It is different from the charges which the Petitioner was required to answer to according to the Officer's Defaulters' Report.

53. If the Defaulters' Report is what was presented to the Petitioner, then he was dismissed for an offence that he was therefore not charged with and which he was never given an opportunity to respond to.

54. For the foregoing reasons, I find that the dismissal of the Petitioner was in violation of the Constitution and both the Employment Act and the Fair Administrative Action Act. The same was therefore both unlawful and unconstitutional. I declare accordingly.

Remedies

(1) The Petitioner's prayer for reinstatement is in my view not practical as the Petitioner has been out of employment since 1st August 2017. A lot has changed since then and it may not be in the public interest to send him back to work after such a long lapse of time. I will instead set aside the dismissal and replace it with an order of normal discharge from the Prison's Service with full benefits.

(2) I further order that the Petitioner be paid all the salary and/or allowances withheld during interdiction, up to the date on which his appeal for review was dismissed by the Public Service Commission.

(3) In view of the orders made in (1) and (2) above, it is my view that the Petitioner will be adequately compensated. I thus decline to award him general damages.

(4) The Attorney General shall pay the Petitioner's costs.

(5) Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE