



Mukoro v National Police Service Commission & 2 others (Petition 1 of 2020) [2022] KEELRC 3989 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3989 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION 1 OF 2020
JW KELI, J
SEPTEMBER 22, 2022**

**IN THE MATTER OF: ALLEGED CONTRAVENTIONS OF RIGHTS AND /
OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 10, 19(1), 25, 27, 41, 47,
48, 159, 162, 246, 258 AND 256 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF : ALLEGED CONTRAVENTION OF
RIGHTS AND/OR FUNDAMENTAL FREEDOMS UNDER
ARTICLE 10,19(1), 25,27,28, 29, 35, 40(3), 41(1), 43,47, 50(1), 2**

AND

**IN THE MATTER OF THE NATIONAL POLICE SERVICE
COMMISSIONS ACT CAP 185C OF THE LAWS OF KENYA**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

BETWEEN

JACOB WAFULA MUKORO PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DEPUTY INSPECTOR GENERAL ADMINISTRATION POLICE

SERVICE 3RD RESPONDENT



JUDGMENT

1. The petitioner, an administrative police constable, by the petition dated January 16, 2020 and received in court on the January 16, 2020 sought the following reliefs:-
 - a. That a declaration be and is hereby issued that the petitioner's fundamental rights and freedoms were violated.
 - b. That a declaration be and is hereby issued that the petitioner's dismissal from the administration police service by letter dated June 25, 2019 was unlawful, unconstitutional, invalid, null and void.
 - c. That an order of *certiorari* be and is hereby issued removing into this honourable court and quashing the decision and proceedings of the 1st respondent as communicated in the letter dated June 25, 2019 dismissing the petitioner from the administration police service from August 10, 2017.
 - d. An order be and is hereby given directing the 1st respondent to reinstate the petitioner to the administration police service to a position earlier held before the impugned decision together with full benefits.
 - e. An order is hereby given directing the respondent to pay to the petitioner salary and all other accrued benefits in arrears from date of purported dismissal to the date of reinstatement.
 - f. An order of payment of compensation be and is hereby issued against the respondent jointly and severally for violation of the petitioner's fundamental rights and freedoms.
 - g. Interest on (e) and (f) above
 - h. Costs of this petition together with interest thereon.
 - i. That this honourable court be pleased to grant such further orders as may be just and appropriate.
2. The petitioner filed supporting affidavit sworn by Jacob Wafula Mukoro (the petitioner) on the January 16, 2019 together with the petition and annexing several documents.
3. The petition is unopposed. The court confirmed service of the pleadings on the respondents. On the December 9, 2021, the respondent's sought and were given 21 days to file and serve their responses. That did not happen. The petitioner's counsel informed the court that the respondents opted to reinstate the petitioner to his employment *vide* a letter dated August 22, 2019 which was forwarded to him on January 14, 2022.
4. The petitioner submits that he was reinstated to employment and reported back to his station. Further in the reinstatement letter his rank was reduced to AP constable. (letter dated August 22, 2019). The judgment addresses outstanding issues. The petition was canvassed by way of written submissions.
5. The petitioner's written submissions drawn by M/S.J.O Makali & Company Advocates are dated May 9, 2022 and received in court on the May 11, 2022.
6. The 1st respondent's written submissions drawn by Brenda Opiyo, litigation counsel, are dated July 13, 2022 and received in court on the July 20, 2022. The other 2 respondents did not file their submissions.



Determination

7. The petitioner submits on compensation for violation of fundamental rights and freedoms , for reinstatement to rank prior to dismissal, payment of salary arrears and benefits from time of dismissal to date, compensation equivalent to 9 months salary and costs plus interest.
8. The 1st respondent's submissions challenge the validity of the petition on the basis of being premature and for lack of merit.
9. The court having considered the submissions and pleadings before it is of the considered opinion that the issues before it for determination are as follows:-
 - a. Whether the petition is valid and merited
 - b. Whether the petitioner is entitled to outstanding reliefs sought of :-
 - i. Compensation for violation of fundamental rights and freedoms.
 - ii. Reinstatement to rank prior to dismissal,
 - iii. Payment of salary arrears and benefits from time of dismissal to date,
 - iv. Compensation equivalent to 9 months salary and
 - v. Costs plus interest.
 - c. Whether the petition is valid and merited
10. The petition is brought under articles 22 and 23 of the *Constitution* and hinged under other various articles of the *Constitution*. The petitioner states the various violations committed against him by the respondents and the particulars are detailed under paragraphs 32 to 37 of the petition.
11. The petitioner alleges that he was dismissed from service , demoted in rank and subjected to disciplinary hearing without due process of the law. That during the pendency of the petition he was reinstated to service hence the prayer for reinstatement is overtaken by events. The only outstanding issue for determination is salary arrears and compensation for violation of rights.
12. The petition was not opposed the respondents having not filed their defence/ response to the petition.
13. The test for determination of the suitability of a constitutional petition is as set out in *Anarita Karimi v Republic (No 1)* (1979) 1 KLR 154 defined as follows:- ‘We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.’
14. The court is satisfied that the petition before it met out the threshold by stating with precision the violation complaints, the provisions of the *Constitution* infringed and the manner they were infringed as set out under the particulars.
15. The 1st respondent filed written submissions. The court is of the considered view that written submissions are not pleadings in response to a petition or any suit. The court then declines to consider the said submissions as response and finds that the petition is unopposed. The position of the court has been upheld by various courts. Justice Odunga in *Stephen Ndolo Wambua v Beatrice Mbula Mutilu & 2 others* [2019] eKLR cited with approval the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited the decision



of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings*.” The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...”

16. The court upholds with approval the foregoing jurisprudence in considering the written submissions of the 1st respondent filed in the instant case in absence of defence pleadings.
17. The 1st respondent submitted that the petitioner did not exhaust available mechanisms being appeal before the commission. The court has already held that the petition is unopposed. The petitioner did not have opportunity to respond to the issue of exhaustion of alternative dispute resolution mechanisms. At this stage it would be travesty of justice to deny audience to the petitioner based on the submission that he did not exhaust the alleged existing mechanisms. The right to fair hearing requires opportunity to respond. In any event this court has original jurisdiction under articles 162(2)(a) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act* on all employment disputes.
18. The court holds and determines that there is a valid petition before it.

Whether The Petition Is Merited

19. The facts of the petition are undisputed.
20. The petitioner was on the March 10, 2017 served with a notice for formal disciplinary proceedings stating as follows:-

‘pursuant to eighth schedule (section 88)(2) of the *National Police Service Act* , 2011, you are alleged to have committed offences against discipline as stated below:-

Count (i) wilfully disobeyed lawful orders in that you failed to report for operational duties

Count (ii) without reasonable cause refused to go to operation with other officers to Laikipia when required.”(JWM-4)
21. The petitioner responded to the said charges *vide* letter dated March 15, 2017.
22. Vide letter dated August 10, 2017, it is stated that orderly room proceedings were conducted on the March 17, 2017 against the petitioner in person and he was convicted of the charges. In the said letter it is stated he was demoted from the rank of the AP corporal to his previous rank of AP constable



pending the final decision of the National Police Service Commission. He was also strongly warned to cease from such unprofessional behaviour of working which is unacceptable in the service. It is further stated that such behaviour if repeated in the future would attract more severe punishment which may include summary dismissal from service among others(JWM-6).

23. The petitioner on receipt of the warning/ reduction of rank letter dated August 10, 2017 (supra) avers he continued in service. On the July 24, 2019 the petitioner was served with a letter dated June 25, 2019 dismissing him from service. The said letter referred to a meeting of the 1st respondent's board held on the June 11, 2019 where it was stated that the petitioner's disciplinary case was conclusively deliberated on and a decision made that the petitioner be dismissed from the administrative police service with effect from August 10, 2017 being the date of the petitioner's recommendation for reduction of rank. The letter stated he could appeal the decision within 14 days of service with the letter and at same time he was to be deleted from payroll.
24. The petitioner states upon receipt of the letter of dismissal he petitioned the 3rd respondent *vide* letter dated August 13, 2019 and had never received any response (JWM-7).
25. The petitioner was *vide* letter dated August 22, 2019 by the deputy inspector general administrative police service reinstated to service. The said letter revoked the dismissal decision in the letter dated June 25, 2019 and reinstated the petitioner back to service but on reduced rank of AP constable effective from date of the board meeting.
26. The petitioner submits that the reinstatement letter dated the August 22, 2019 was forwarded to him on the January 14, 2022. The petitioner reported to work on the January 17, 2022 as communicated by the Kakamega CIPU commander under letter of same date and filed in court with the petitioner's written submissions.
27. The petitioner submits that during the entire period from dismissal and even after reinstatement he was not paid his salary.
28. The petitioner produced his last payslip of June 2019 where his gross salary is reflected as Kshs 65,350/-. The petitioner submits his basic salary as per the June 2019 payslip is Kshs 43,350/- and seeks to be paid salary arrears for date of dismissal to date.
29. Further, the petitioner submits that if the reinstatement had been communicated by the respondents immediately, the instant dispute would have been avoided. That this was inhumane treatment and therefore a proper case to make order for compensation under article 23(3)(e) of the Constitution of Kenya (2010) and section 49(1)(c) of the Employment Act which provides for compensation not exceeding the equivalent of 12 months' salary of the employee at the time of dismissal.
30. The court proceeds to consider the orders sought by the petitioner as follows:-

a. A declaration be issued that the petitioner's fundamental rights and freedoms were violated.

31. The petitioner pleaded violation of his fundamental rights and freedoms under paragraph 25 of his supporting affidavit dated January 16, 2022 and in the petition. In the instant case the court finds that the petitioner was punished twice for same offence *vide* the letter of dismissal dated June 25, 2019 having been subjected to reduction of rank and a warning on record *vide* prior letter dated August 10, 2017. This is a violation of the rule against double jeopardy and a violation of the provisions of article 50(2)(o) of the Constitution of Kenya.
32. The letter of dismissal was withdrawn and the petitioner reinstated to service. The petitioner submits that the letter of reinstatement was dated August 22, 2019 and but communicated January 14, 2022



in the course of these proceedings. The court is satisfied there was breach of procedural fairness in the process leading to the letter of June 25, 2019 as the petitioner who was in employment was not aware of the said proceedings and was not accorded opportunity to be heard and the dismissal was backdated by 2 years yet he was in service.

33. The court finds that delay in communication of the reinstatement violated the petitioner's right to earn wages and to employment. The court declares that the petitioner's fundamental rights and freedoms were violated.

b. Whether the decision to dismiss the petitioner having since then been revoked and the petitioner having been reinstated to his employment, the reduction in rank was illegal and whether the petitioner ought to be reinstated to his rank prior to his dismissal

34. The court is mindful not to meddle in the internal disciplinary proceedings of the employer unless there is an apparent violation of the employee rights. The court is not satisfied that evidence has been laid before it to question the procedural fairness of the proceedings of March 17, 2017 leading to the reduction of rank. The right of the employer to met punishment on employee under disciplinary proceedings can only be interfered with by the court for unfairness.
35. The court is guided by the provisions of section 43, 45 and 41 of the *Employment Act* in making its decisions on the process of dismissal. No evidence was placed before court of the unfairness of the process of March 17, 2017 which led to the reduction of rank of the petitioner. The court finds that the reinstatement letter dated August 22, 2019 returned the petitioner to status as at June 25, 2019. The prayer on the reduction of rank is disallowed.

c. Whether the petitioner ought to be paid all his salary arrears and benefits from time of dismissal to date.

36. The petitioner was reinstated to service and reported to duty on the January 17, 2022. The court finds that the petitioner having been reinstated to employment from date of dismissal he is entitled to payment of salary arrears and all other employment benefits from the alleged date of dismissal which was backdated to August 10, 2017. The court in making this award is persuaded by the decision of Justice Ongaya in *Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers v Timber Treatment International Limited*, [2013]Eklr where the court held that for the period the employee is kept away unlawfully on interdiction or suspension, the employee is entitled to partial reinstatement and therefore a total of salaries due during that period. In the said decision the court noted that the employee has legitimate expectation to be reinstated and does not engage in other earning as they await the outcome of the court case or negotiation hence are entitled to payment of salary during the period of waiting. The court upholds with approval the foregoing decision by justice Ongaya. In the instant case the employer reinstated the petitioner on its own will while the petition was pending. The court already found that the dismissal was unlawful and unfair. Consequently, the petitioner having reported on duty on January 17, 2022, he is entitled to salary arrears as prayed from July 2019 to January 16, 2022. The employer to pay the petitioner basic salary of Kshs 43,000 in arrears for the period July 2019 to January 16, 2022.
37. The court finds that it is an act of illegality for the employer not to have paid the petitioner salary on reinstatement and the same is ordered to be paid. The petitioner to be paid his full salary in arrears from January 17, 2022 to date at rate of Kshs 65,350/- per month as per last payslip of June 2019 together with any increments in the period.



d. Whether the petitioner ought to be paid compensation equivalent to 9 months.

38. The court found there was violation of the fundamental rights and freedoms of the petitioner. The court finds that those violations could as well have been litigated under the provisions of the Employment Act as they concern procedural fairness falling under section 43, 45 and 41 of the Employment Act. The court having ordered compensation of payment of basic salary and benefits during entire period of termination is of the considered opinion that the petitioner who was also reinstated to employment has been adequately compensated. It is never the intention of the law to punish the employer but to restore the employee into the same position he was had the employer not violated the law.
39. The claim for compensation with equivalent of 9 months salary is disallowed.

e. Whether the petitioner ought to be paid costs of this petition plus interest.

40. It is trite law costs follow the event. The petitioner has succeeded in his case and is entitled to costs. The respondents to jointly and severally pay costs of the suit to the petitioner.
41. Interest is awarded at court rates to apply in the event that the full award amount is not paid within 30 days of the judgment.

Conclusion And Disposition

42. The court enters judgment in favour of the petitioner and awards as against the respondents jointly and severally as follows:-
- a. A declaration is hereby issued that the petitioner's fundamental rights and freedoms were violated by the respondents.
 - b. An order for payment of salary and all other accrued benefits in arrears to the petitioner from the date of reinstatement subject to statutory deductions. The salary arrears calculated at Kshs 43,000/- from month of July 2019 to January 16, 2022 when petitioner was under dismissal. Thus award of salary arrears for 30 months x 43000(1,290,000) plus 16/31 days x43000(22,194) = Kshs 1,312,194/- awarded.
 - c. An order for payment of salary arrears to the petitioner at full salary of Kshs 65,350/- from date of reinstatement being January 17, 2022 to September 2022(total 8 months (65350x8)plus 15 days January 2022 (15/31x 65350).Total award of due salary arrears post reinstatement Kshs 554,421/-.
- (Total award for salary arrears payable to the petitioner by the respondents is Kshs 1,866,615/- subject to statutory deductions and any paid salary amount in the period)
- d. An order that full benefits due as at June 2019 salary to the petitioner to be reinstated.
 - e. The respondents to pay the petitioner costs of the petition.
 - f. Interest is awarded at court rates on the award amount if the same is not paid in full within 30 days of the judgment.
 - g. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 22ND SEPTEMBER 2022.

J. W. KELI,



JUDGE.

In the Presence Of:-

Court Assistant : Brenda Wesonga

For Petitioner :- Masiga holding brief for Murunga

For Respondents: Mr Tarus holding brief for Brenda Opiyo for 1st Respondent.

