



Munyi v National Police Service Commission & 2 others (Petition 10 of 2021) [2022] KEELRC 13089 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13089 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
PETITION 10 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

**IN THE MATTER OF ARTICLES 22 AND ARTICLE 259(1)
& (2) (C) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED THREAT OF VIOLATION OF
ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED THREAT TO AND CONTRAVENTION OF
ARTICLES 41, 47, 48, 50 & 246 OF THE CONSTITUTION OF KENYA, 2010**

**THE EMPLOYMENT ACT, 2007, NATIONAL POLICE SERVICE
ACT & THE NATIONAL POLICE SERVICE COMMISSION ACT.**

BETWEEN

JONATHAN NYAGA MUNYI PETITIONER

AND

THE NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

**THE DEPUTY INSPECTOR GENERAL-THE ADMINISTRATION POLICE
SERVICE 2ND RESPONDENT**

THE HON.ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. This matter was originated by way of a constitutional petition dated September 10, 2021.
2. The 1st Respondents in a Replying Affidavit sworn on April 26, 2022 denies the issues raised were exhaustively handled by the commission thereby rendering the Petition vexatious and material for dismissal with costs.
3. The 2nd and 3rd Respondents did not file a reply to the Petition.



4. The Petitioner's case is that he comes to court under the auspices of Article 23 (1), 33 and 258 of the Constitution of Kenya, 2010 that permits this court to expound people's rights that are violated on under threat of such violation. This is further amplified by Act 162(2), 41, as read with Article 159 that clothe this court with jurisdiction to hear and determine issues on violation of fundamental freedoms and rights.
5. The petitioners other case is that vide a letter dated May 23, 2009. He was appointed as an Administration Police Officer at the rank of constable and No.2009026964. He served and was deployed at various stations until 25th May, 2015 when he served at the Security of Government Buildings (SGB) within Nairobi. He earned Kshs.52,080.00. In all this, his record was impeccable, steadfast and blemish free.
6. The Petitioner's further case is that on or about August 30, 2015, he was diagnosed with upper gastrointestinal bleeding coupled with irritable bowel syndrome and prescribed 4 days off starting August 30, 2015 and ending September 3, 2015 during which time he was deployed by officers in the 2nd Respondents command to various assignments which including providing security/guarding Family Bank, Moi Avenue.
7. Further, the Petitioner avers that on September 3, 2015 he was notified of orderly room proceedings to be conducted against himself on September 4, 2015 in respect of the charges with regards to the events of September 2, 2015.
8. His further case is that on or about September 4, 2015, a day after notification of the charges, officers under the Command of the 2nd Respondent conducted orderly room proceedings against the petitioner wherein the Petitioner was charged with 3 counts for alleged gross misconduct. The charges were;
 - Count 1: on September 2, 2015, at around 1600 hours in Nairobi County along Moi Avenue while on official duties guarding Family Bank, you actively engaged yourself in drunkenness while in uniform and armed with a G3 Rifle Body No.J4299 loaded with Twenty Rounds (20) of 7.62mm caliber contrary to paragraph 1 (f) of the Eighth Schedule of the National Police Service Act 2011.
 - Count 2: On the same material date, you unlawfully threatened to shoot your colleagues PNO.201132XXXX- APC Josephat Kahuthia and PNO 2008114162 APC Daniel Emaka whom you were with at the bank when they tried to calm you down contrary to paragraph 1 (c) of the Eighth Schedule of the National Police Service Act 2011.
 - Count 3: On the same date, you caused disturbance in a public place (Bank) while in uniform and armed contrary to paragraph 1(d) of the Eighth Schedule of the National Police Service Act 2011.
9. He was thereafter summarily dismissed upon being subjected to orderly room proceeding conducted by the 1st Respondent on September 4, 2015.
10. The petitioner further avers that he appealed against the decision of dismissal under a letter dated January 4, 2016 seeking reinstatement and for a chance to have his appeal heard but this was not replied to.
11. Overtures at reinstatement and a resolution of issues in dispute was not taken seriously by the 2nd Respondents who insisted that he should avoid the legal process and pursue Alternative Dispute Resolution. This dalliance affected his pursuit for redress. The Respondents still inform him that they are looking at his matter.



12. The Petitioner's other case and averment is that;
26. Whereas the Constitution of Kenya provides for fundamental rights and freedoms to be enjoyed by all citizens of the Republic of Kenya the same christened as an integral part of our democracy and social economic and cultural policies and in particular
- a. Right of fair labour practices under Article 41 of the Constitution of Kenya 2010.
 - b. Right to fair administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair –Article 47 of the Constitution of Kenya.
 - c. Access to justice- Article 48 of the Constitution of Kenya.
 - d. Right to fair Hearing under Article 50 (1) and (2) of the Constitution of Kenya.
27. That whereas the Eighth Schedule of the National Police Service Act, provides for Disciplinary Offences, the Petitioner was charged on Count 2 with an offence under Section 88 1 (c) which provides the Disciplinary offence of using threatening language or insubordinate or disrespectful language word, act or demeanor to a police officer senior to him in Rank. The officers mentioned therein were not senior in rank to him and were not victims of the said offence in either way.
28. That whereas Section 88 and 89 (3) & (4) of the National Police Service Act provides that all disciplinary proceedings shall be in accordance with the service internal Disciplinary procedures and shall comply with Article 47 of the Constitution. The 1st and 2nd Respondents did not comply with either.
29. Whereas the Petitioner has a constitutional obligation to respect, uphold and defend the Constitution and a guaranteed right to institute court proceedings to claim that the Constitution and Bills of Rights have been contravened;
30. And whereas the State, defined to include the Respondents herein, have an obligation to promote and protect the rights and fundamental freedoms including rights to fair hearing, right fair administrative actions among others;
31. Whereas the 1st Respondent has failed refused and or neglected to perform its functions as set out in Article 246 (3) of the Constitution of Kenya, 2010 and section 10 & 11 of the National Police Service Commission Act which functions include but not limited to;
- a. Recruit and Appoint persons to hold officers in the service.
 - b. Exercise disciplinary control over and remove persons holding or acting in offices within the Service.
 - c. Hear and determine appeals from members of the service on disciplinary matters relating to transfers promotion and appointments.
 - d. Investigate, monitor and evaluate personnel practices of the service.
32. And whereas the bill of rights applied to all law and binds all state organs and all persons, government action that unreasonably and unjustifiably limit and violates the rights and fundamental freedoms; the summary dismissal was done outside the ambit of the Constitution of Kenya, 2010, The National Police Service Commission Act and the Employment Act, 2007 has adverse effects on constitutional provisions and guarantees the same does not pass the threshold for limitation of rights and fundamental freedoms and must therefore fail.



13. He prays thus;
- a. A declaration be issued that the Petitioner's enjoyment of their rights and fundamental freedoms secured in the Bills of Rights under Article 41,47, 48, 50 and 246 of the Constitution of Kenya, 2010 have been contravened and infringed by the 1st and 2nd Respondent.
 - b. A declaration that the orderly proceedings of September 4, 2015 and the Petitioner's summary dismissal by the 2nd Respondent was without regard to due process of law and natural justice hence null and void.
 - c. An order of *certiorari* to issue removing into the Honourable court land quashing the decision of the 2nd Respondent contained in the letter dated December 2, 2015 relating to the summary dismissal of the Petitioner the same be quashed.
 - d. An order of *Mandamus* directing the 1st and 2nd Respondents to reinstate the petitioner to the National Police Service on the same progressive terms of remuneration with effect from 2nd December 2015.
 - e. An order for remittance/payment for all unpaid salaries and benefits to the claimant from December 2, 2015 to date.
 - f. General Damages for unfair administrative action and wrongful/unfair termination/dismissal and loss of earnings.
 - g. Costs be borne by the Respondents.
14. The 1st Respondent in response avers that the commission is, under Article 246 (3) (b) of the Constitution obligated to make;
3. That the Commission is mandated under Article 246 (3) (b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.
 3. That the mandate of the National Police Service Commission is also replicated and exemplified in the National Police Service Act as clearly stipulated under section 10 of the Act.
16. It is the Respondent's further case that the Petitioner, while on duty at the Family Bank left his place of work to partake to personal emergencies and also misconducted himself by shouting and threatening to shoot his colleagues while on duty. He was subjected to orderly room proceedings and dismissed for this misconduct.
17. At the proceedings, the Petitioner admitted liability and misconduct, being drunk while on duty and sought forgiveness but this was found unacceptable.
18. Subsequently, he appealed and these were considered to no avail as to his reinstatement. This is expressed as follows;
31. That the law is very explicit that whoever alleges procedural unfairness or abuse of any fundamental Human Right must demonstrate clearly to the court the instances or elements of unfairness and breached of law but a general quoting of the statutory law without proof should not suffice.
 31. That the reinstatement of the petitioner remains against public interest considering that the petitioner threatened use of armed force on fellow officers whether junior in rank contrary to the expected discipline of the National Police Service.



31. That it is the 1st Respondent's contention that the suit is indeed vexatious as his matter was conclusively deliberated upon procedurally by the commission and it should be dismissed with costs.
19. The issues for determination therefore are;
1. Whether the Petitioner's fundamental rights and freedoms secured in the Bill of Rights under Articles 41, 47, 48, 50 and 246 of the Constitution of Kenya, 2010 have been violated, contravened and infringed by the Respondent.
 2. Whether the Respondent is entitled to the relief sought.
 3. Who bears the costs of this cause.
20. The 1st issue for determination is whether the Petitioner's fundamental rights and freedoms secured in the Bill of Rights under Articles 41, 47,48, 50 and 246 of the Constitution of Kenya, 2010 have been violated, contravened and infringed by the Respondent. The Petitioner in her written submissions dated May 8, 2022 brings out a case of violation of fundamental rights which is overtly denied by the Respondent. He comes out as follows;
- The Petitioner stated that he had no time to prepare for the orderly room proceedings and that he was not aware of the charges against him hence the proceedings were a trial by ambush in which he was ultimately the losing party. He further stated that the panel conducted the proceedings in the form a question-and-answer session in which they asked questions which they deemed fit for the expediency of the proceedings. He further stated that he was not accorded any witnesses or representation before the proceedings hence the proceedings were a mere sham meant for purposes of justifying the process.
21. He further seeks to rely on the authority of Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (EA) Limited (2022) eKLR, the court held thus;
- “Section 41(1) addresses the manner in which the fair procedure is to be achieved. It makes specific requirements in regards to the process to be complied with by an employer and this entail notifying the employee of the allegations leveled against him or her and granting him or her and opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.
- ...The fairness of a disciplinary process cannot be over emphasized. A disciplinary process which has the likelihood of depriving the employee of his livelihood must by all means be seen to be fair.
- In the case of Patrick Abuya vs Institute of Certified Public Accountants of Kenya (ICPAK) & another (2015) eKLR, the court had this to say on the fairness of a disciplinary process; “Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to an employee to prepare psychologically as such employee is always under the threat of losing a livelihood.”
22. This is with a view to illustrating that the orderly proceedings by the Respondent did not afford him substantive and procedural fairness in that these were by ambush and in toto not accommodative of his rights as an employee.



23. The 2nd and 3rd Respondents deny the petition and seek to rely on the authority of *Anarita Karimi Njeru vs The Republic* (1979) KLR 154 to buttress their case. Here the court held thus;
- “...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.”
24. They further seek to rely on the authority of the *Mumo Matemo v Trusted Society of Human Rights alliance* (2014) eKLR, the court observed thus,
- “...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court...Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”
25. It is their case that the petitioner has not linked his case to the constitutional violations and infringements as set out therefore this should fail. There lacks synchrony between this case and the alleged breaches in contradiction of the dicta in *Anarita Karimi Njeru* as cited.
26. I agree. The petitioner’s case is overtly flawed. He has not demonstrated his case both in law and breach of the *constitution*. He was walked through a flawless disciplinary process where he was found culpable of the offences raised. He was awarded an open and fair hearing in which he participated to the full. A breach of fundamental rights therefore not tenable and I find as such.
27. The 2nd issue for determination is whether the Respondent is entitled to the relief sought. He is not. Having lost on a case of breach of fundamental rights, he becomes disentitled to the relief sought.
28. I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Gikonyo instructed by Gikonyo & Ngugi Advocates for the Petitioner.
2. Mr. Kimathi instructed by the State Law Office for the 2nd and 3rd Respondent.
3. Miss Chebet holding brief for Mr.Opiyo instructed by the for the 1st Respondent.

