



**Omondi v National Police Service Commission & 2 others (Employment and Labour Relations Cause 255 of 2017) [2022] KEELRC 13389 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13389 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 255 OF 2017**

**JK GAKERI, J**

**DECEMBER 6, 2022**

**BETWEEN**

**TOBIUS OLUTH OMONDI ..... CLAIMANT**

**AND**

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

**THE INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Claim dated February 9, 2017 and filed on even date, the Claimant sued the Respondent alleging unfair termination by the 2<sup>nd</sup> Respondent.
2. The Claimant avers that he was an employee of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent until February 6, 2017 when he received a letter dated January 31, 2017 from the 2<sup>nd</sup> Respondent dismissing him from employment on the ground that the National Police Service Board had recommended his dismissal having been suspended by letter dated July 14, 2016 but continued earning a salary despite the suspension.
3. The Claimant avers that he was not given reasons for dismissal from employment which violated the right to fair administrative action. That if he was accorded a hearing by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents before decision was taken, he would not have been dismissed from employment.
4. The Claimant further avers that the court should quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to dismiss him from employment and seeks damages for unlawful termination.
5. The Claimant prays for;
  - i. A declaration that the Claimant was wrongfully dismissed from employment.



- ii. An order of mandamus compelling 1<sup>st</sup> and 2<sup>nd</sup> Respondent to reinstate the Petitioner to his duties as a police officer forthwith.
- iii. A declaration that any act undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents initiating any disciplinary process and or removal proceedings of the Petitioner from Kenya Police Service is null and void and is in breach of the Petitioner's rights under Article 47 and 50(1)(2) of the Constitution.
- iv. An order for compensation.
- v. Costs of this petition be provided for.

### **1<sup>st</sup> Respondent's case**

6. The 1<sup>st</sup> Respondent filed its response on June 29, 2017 asserting that Article 246(3) of the Constitution of Kenya, 2010 mandated it to observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the services.
7. The 1<sup>st</sup> Respondent avers that section 7(1) of the National Police Service Act provides that persons who were officers or employees of the Kenya Police and Administration Police under the relevant statutory provisions became members of the service when the Act came into force.
8. The 1<sup>st</sup> Respondent further avers that the Claimant was enlisted in the service on May 3, 2003 and was thus bound by all regulations as may be promulgated from time to time.
9. That the Claimant was taken through Orderly Room Proceedings for impersonating an officer with the Anti-Narcotics Unit among other counts.
10. That the Claimant was arrested while in the company of another police officer and a former police officer when members of the public raised alarm after they arrested two civilians and bundled them in a civilian motor vehicle Reg No xxxx while posing as police officers from the Anti-Narcotic Unit.
11. That they were taken to the Kayole Police Station where it was ascertained that they were not on official duty within Kayole and their presence had not been disclosed to the Kayole Police and the vehicle had a fake registration number.
12. It is the 1<sup>st</sup> Respondent's case that no complaint about drug trafficking had been made at the Kayole Police Station.
13. That the Claimant was issued with a Waiver Notice, charges were read out to him and had the opportunity to cross-examine witnesses and was suspended.
14. That the recommendations of the panel were tabled before the 1<sup>st</sup> Respondent's board on December 9, 2016 for deliberation and the board resolved that the Claimant be dismissed from the service effective December 9, 2016 and the same was forwarded to the Inspector General of Police.
15. That the Claimant's rights were not violated.
16. That the Claimant should be surcharged for the salary he received while on suspension.
17. That the Claimant did not appeal the Commission's decision.



## **2<sup>nd</sup> & 3<sup>rd</sup> Respondents response**

18. The Respondents filed their response to the Memorandum of Claim on September 27, 2017 alleging that the Claimant's actions instigated his dismissal from employment.
19. They admit that the Claimant was enlisted as a police constable on May 3, 2003 and prior to his dismissal, he was stationed at the Embakasi Police Station and was the body guard of Hon Omondi of Embakasi North Constituency.
20. The Respondent further avers that on June 17, 2016, the Claimant, PC Bob Mosioma Bigogo and Michael Onyango Ndigire were arrested for soliciting money from members of the public while posing as police officers from the Anti-Narcotics Unit.
21. That the Claimant and his accomplices were in possession of a Motor Reg No xxxx which the Directorate of Criminal Investigations confirmed with the Registrar of Motor Vehicles that it had a fake number plate.
22. That the Claimant disclosed to the media about their arrest and insinuated that one, Vincent Moroga was part of the drug trafficking cartel.
23. It is further avered that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents waived notification of disciplinary inquiry in respect of the Claimant and he was suspended by letter Ref B/EST/1/14/Vol 34(25) dated July 14, 2016.
24. That the Respondents conducted Orderly Room Proceedings on 20<sup>th</sup> and June 21, 2016 and the Claimant was found guilty.
25. That by letter dated August 25, 2016, the 2<sup>nd</sup> Respondent forwarded the recommendation for dismissal of the Claimant to the National Police Service Commission and the recommendation was approved effective December 9, 2016 and the County Police Commander for Nairobi was by letter dated January 18, 2017 directed to implement the decision and the Claimant was notified of the dismissal through a letter dated January 31, 2017.
26. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deny that the Claimant's constitutional and fair administrative action rights were violated.
27. It is the Respondents case that the Claimant's dismissal from employment was reasonable and justified in the circumstances.
28. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents pray for dismissal of the suit with costs.

## **Claimant's evidence**

29. The Claimant had no written statement. He testified that he was arrested on June 17, 2016 and was taken through Orderly Room Proceedings after 2 days, presided over by Madam Kithure and had no witness at the hearing.
30. That he pleaded not guilty and did not sign any document at the meeting and was not granted the right of appeal.
31. On cross-examination, the Claimant stated that he was Police Officer No xxxx attached to the National Police Commission. That in June 2016, he was not attached to Kayole but Embakasi and was the guard to the Member of Parliament and had no special duty with the Anti-Narcotics Unit nor duty at the Kayole Division and was armed. That he did not report his presence to the OCS Kayole.



32. It was his testimony that having served for 13 years, he was aware of the rules of Operation, Standing Orders including Orderly Room Proceedings and that the latter were of a disciplinary nature for those who violated Standing Orders.
33. That he was unaware that he had been arrested for a disciplinary matter and no bhang was recovered from him.
34. That he saw the Waiver Notice signed by the OCPD Kayole Division.
35. The Claimant confirmed that the Orderly Room Proceedings were disciplinary, that witnesses testified and he cross-examined them.
36. It was his evidence that he was not accorded an opportunity to present his defence.
37. The witness testified that he had arrested a vehicle with bhang while in civilian clothes but had nothing to show that he was on duty in Kayole.
38. That he was notified the outcome on July 14, 2016 and filed an appeal with the OCS Embakasi on July 27, 2016.
39. That the National Police Service made the decision to dismiss him on December 9, 2016.
40. That he did appeal to the National Police Service.
41. The witness testified that during the Orderly Room Proceedings, he told the panel that he would rather file a suit in court and did not object to any ones presence during the proceedings.
42. The witness confirmed that apart from the waiver notice, the charges he was facing were read out to him before the proceedings commenced.
43. It was his evidence that they had arrested 2 civilians and put them in his colleague's vehicle, Mr Ntingro, but had not notified any one nor had the raid been authorised by anyone or the motor vehicle used.
44. That the vehicles documents were falsified.
45. The witness confirmed that he was the one who was quoted by the Newspaper not Vincent Maronga. The witness denied having stated that Mr Vincent Maronga was part of a cartel or having given audience to the newspaper reporter.
46. On re-examination, the Claimant testified that his friend picked him from his house and they went to Kayole to relax and did not have to inform the Kayole OCS since he could arrest persons anywhere in Kenya and required no authority to do so.
47. That he did not utter the words attributed to him by the newspaper dated June 20, 2016.
48. That he did not appeal because the Orderly Room Proceedings were unfair and opted to file the instant suit.

### **Respondent's evidence**

49. The 1<sup>st</sup> Respondent relied on the responses dated June 19, 2017 and the annexures thereto and did not call any witness.



## **2<sup>nd</sup> and 3<sup>rd</sup> Respondents evidence**

50. RWI, Mr Lucas Ongaya was cross-examined and testified that he was the OCS Kayole police station and was not the one who arrested the Claimant.
51. That the Claimant and his colleagues were extorting money from members of the public who called the police. That the arresting officers were PC Malonga and PC Oketch.
52. The witness explained that a Waiver Notice was issued whenever there was need for urgency or in the public interest so as to clear the inquiry within a short time.
53. The witness was emphatic that the reasons for the waiver must be indicated and in this case the reason was public interest.
54. The witness testified that as the OCS Kayole Police Station, he allocated duties to those under his command and had no officers on special duties on June 17, 2016 and had no information that the Anti-Narcotics Unit was in the Kayole Area.
55. That the Claimant had not booked the persons he had arrested who were searched at the station and had no bhang on them.
56. The witness further testified that he notified the Claimant that he would undergo Orderly Room Proceedings and the same took place on Monday June 20, 2016 and the witness appeared and gave evidence.
57. It was his testimony that a Police Officer need not be in police uniform to participate in Orderly Room Proceedings.
58. On re-examination, the witness testified that the National Police Service was the statutory body mandated to dismiss police officers.
59. It was his testimony that proper procedure was followed.

## **Claimant's submissions**

60. The Claimant's counsel identified two issues for determination;
  - i. Whether the disciplinary process or removal proceedings breached Article 47 and 50 (1) and (2) of the Constitution of Kenya, 2010.
  - ii. Whether the Claimant is entitled to the reliefs sought.
61. As regards the first issue, counsel submitted that the Claimant was taken through the Orderly Room Proceedings (ORP) in a rush and had no time to prepare for the hearing. That he did not even sign the Waiver Notice as required by the Standing Orders, nor was he given the evidence the Respondents relied upon. It is submitted that the process did not pass the fairness test as the Claimant was unaware of the charges before the proceedings held on June 20, 2016.
62. Reliance is made on the decision in Susan Wambui Nduru v Inspector General of Police & another [2019] eKLR and APC Daniel Namunyu Oblingo v National Police Service Commission [2021] eKLR to underscore the essence of the right to be heard.
63. It is submitted that the procedural defects impaired the Orderly Room Proceedings from the onset and the decision arising there from was void ab initio.



64. Reliance is made on the provisions of Regulation 9 of the National Police Service Commission (Disciplinary) Regulations, 2015 on the conduct of disciplinary proceedings.
65. It is urged that Mr Ali Nuno, who issued the Waiver Notice was not the Presiding Officer but a witness in the proceedings.
66. Reliance was also made on the provisions of section 89(3) of the National Police Service Act, 2011 on the requirement that the Standing Orders relating to disciplinary proceedings must comply with the provisions of Article 47 of the Constitution of Kenya, 2010.
67. Finally, the decision in Republic v National Police Service Commission & 3 others, Ex-parte Joel Atuti Nyakango 7 another [2017] eKLR is relied upon to urge that the proceedings in the instant case did not meet the threshold prescribed by the Constitution.
68. As to whether the Claimant is entitled to the reliefs sought, reliance is made on the decision in Joseph Mwenda Mbuko v Provincial Police Officer, Central Police & 2 others [2013] eKLR where the court awarded Kshs 1,000,000/= as general damages in a petition to urge the court to award the Claimant Kshs 1,500,000/=.

### **1<sup>st</sup> Respondent's submissions**

69. The 1<sup>st</sup> Respondent isolated two issues for determination.
  - i. Whether it violated the Claimant's constitutional rights.
  - ii. Entitlement to the reliefs sought.
70. As regards the 1<sup>st</sup> issue, it is urged that the National Police Service has authority to discipline its employees and does so in accordance with the provisions of the National Police Service Commission Act, 2011 and the Regulations, 2015.
71. That the Claimant committed three offences on June 17, 2016 and was taken through Orderly Room Proceedings expeditiously and the Claimant was accorded a fair hearing.
72. Reliance is made on the decision in Republic v Minister for Internal Security and Provincial Administration & 4 others Ex-Parte CPL James Mwita [2013] eKLR to urge that disciplinary proceedings involving disciplined forces should be dealt with expeditiously.
73. It is urged that the Claimant was accorded a fair hearing in the Orderly Room Proceedings and 8 witnesses testified and the Claimant cross-examined them.
74. The court is invited to rely on the sentiments in Augustine Mutembei Marangu v Inspector General of Police and 3 others [2017] eKLR where the court relied on Simon Gakuo v Kenyatta University and 2 others on procedural fairness.
75. It is submitted that the Claimant refused to proceed with the hearing citing the absence of a police uniform yet no provision was cited to justify the same.
76. The court is further urged to adopt the sentiments of the court in Kipkurui Langat V Police Commissioner/Inspector General of National Police Service & another (2012) eKLR as regards interference with decisions of the 1<sup>st</sup> Respondent.
77. That the Claimant had indicated that he would rather go to court and did so.



78. The 1<sup>st</sup> Respondent further avers that the Claimant's suspension was a corrective action permitted by the [National Police Service Act](#) pending conclusion of disciplinary proceedings.
79. As regards the reliefs sought, it is urged that he who comes to equity must do so with clean hands, and the same cannot be said of the Claimant who abandoned the internal disciplinary process and filed a court case having refused to appeal the decision.
80. That he excluded himself from the disciplinary process without good cause yet the disciplinary process is the prerogative of the employer.
81. Finally, it was submitted that since the Claimant had been out of employment for more than 3 years as provided by section 12(3)(vii) of the [Employment and Labour Relations Court Act](#), 2011, reinstatement was not an appropriate remedy.

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submissions**

82. As to whether termination of the Claimant's employment was unlawful, the Respondents submitted on the offences committed by the Claimant, procedure employment and payment of dues.
83. It was submitted that the fact that the Claimant arrested Gabriel Oduor and Fredrick Owino while posing as an officer from the Anti-Narcotics Unit was illegal under the law and he was operating outside his area of jurisdiction, and had not notified the OCS Kayole. That the Claimant attempted to extort cash from the two persons he had arrested, made allegations about another officer and disclosed investigation information to the public without prior authorization.
84. That the offences were corroborated by evidence provided by the witnesses who testified during the Orderly Room Proceedings and amounted to contravention of the [National Police Service Act](#).
85. As regards the procedure employed by the 1<sup>st</sup> Respondent, it is urged that the [National Police Service Act](#) and the Standing Orders envisioned a fair procedure in the conduct of disciplinary proceedings against police officers. Reliance is made on the provisions of section 89(2) of the Act and Regulation 90 of the Standing Orders.
86. Reliance is also made on the provisions of section 41 of the [Employment Act](#), 2007 to buttress the submission.
87. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the suspension letter, record of Orderly Room Proceedings, evidence, waiver notice and dismissal letter were a testimony of the procedural precepts adopted by the Respondents.
88. That the Claimant was only contesting the substantive fairness of the process.
89. The Respondents submit that the disciplinary process was undertaken with utmost fairness and with due regard to fair administrative action ordained by Article 47 of the [Constitution](#) of Kenya, 2010.
90. It was submitted that contrary to the Claimant's submissions, Regulation 9(5) and (6) did not require the signature of the person in respect of whom the Waiver Notice was taken out.
91. That due to severity the offences, the Claimant's right to a seven-day notice was waived.
92. Finally, the Respondents further submit that the allegation that the Claimant was unlawfully detained for 4 days was neither pleaded nor substantiated.
93. As regards the reliefs sought, the Respondents submit that at the time of dismissal, the Claimant had no pending dues other than a Certificate of Service.



94. The Respondents submit that the declaration sought cannot issue because the Claimant did not prove that the termination of employment was unlawful.
95. Reliance is made on the Court of Appeal decision in *Mbutia Macharia v Anna Mutua Ndwiga & another [2020]* as regards the burden of proof.
96. On reinstatement, the Respondents submit that the Claimant had not demonstrated any exceptional circumstances as explained in *Kenya Shipping Clearing Freight Logistics and Warehouse Workers Union v May Freight Ltd [2020] eKLR*.
97. That it was within the powers of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to undertake disciplinary process against the Claimant under the law, thus the prayer to have the process declared null and void was not deserving.
98. As regards compensation, it is urged that to do so would unjustly enrich the Claimant. Reliance is made on the decisions in *DK Njagi Marete v Teachers Service Commission [2013] eKLR* as well as *Hema Hospital v Wilson Makanga Marwa* to urge that employment remedies must be proportionate to the economic injuries suffered.

### **Determination**

99. The issues for determination are;
  - i. Whether termination of the Claimant's employment was unlawful.
  - ii. Whether the Claimant is entitled to the reliefs sought.
100. As to whether termination of the Claimant's employment was unlawful, the starting point are the uncontested facts of the case.
101. It is not in dispute that the Claimant joined the Kenya Police as a Police Constable, Service No xxxx on May 3, 2003 and was subject to the provisions of the Police Act, 1988.
102. It is also not in dispute that at the time of his arrest on June 17, 2016, he was serving as the body guard of the Member of Parliament for Embakasi East and was not on duty on the material day.
103. That on the said date, the Claimant and 2 other persons were in the Kayole Area in civilian clothes, armed and using Motor Vehicle Registration Number xxxx, a black Toyota Wish allegedly owned by one of the Claimant's friends but whose registration details, it was subsequently revealed belonged to a Tuk Tuk registered in Mombasa. That among the two friends, one was ex-police officer while the alleged owner of the motor vehicle was a police officer serving elsewhere and the trio had not reported their presence in Kayole to the OCS Kayole Police Station.
104. The actual mission of the trio remains unclear but the evidence on record leave no doubt that it was far from noble.
105. It is not in contest that the trio arrested one Gabriel Oduor and Fredrick Owino allegedly for dealing in bhang yet none had the substance.
106. The facts are further muddled up by the Claimant's allegation that they had arrested a motor vehicle carrying bhang but produced neither the alleged motor vehicle nor the bhang.
107. Worthy of note, the presence of the trio in Kayole and their mission only came to light after they were arrested by officers from Kayole Police Station at the instigation of the public who raised the alarm.



108. After arrest, the Claimant was detained until June 20, 2016 when he was taken through Orderly Room Proceedings after the 7 day notice was waived by Mr Ali Nuno Dubat on the same day. The reason for the waiver was stated as to set a good example/public interest.
109. Although RWI confirmed that he informed the Claimant that he would undergo Orderly Room Proceedings, it is unclear how he did so and whether he also notified the Claimant the charges he would confront.
110. The Orderly Room Proceeding Defaulters Sheet had three charges.
1. Commission of an act which amounts to corruption under Kenyan law contrary to section 88(2) of the 8<sup>th</sup> Schedule to the *National Police Service Act, 2011*.
  2. Disclosure or conveyance of information concerning any investigation or other police matter without authority contrary to the Act.
  3. Knowingly making false accusation or complaint or statement against any police officer or other person affecting the character of such person contrary to section 88(2) of the Act.
111. It is common ground that the Orderly Room Proceedings took place on Monday June 20, 2016 and were presided over by Madam Eunice Kithure. Many witnesses testified including PC Boniface Okello and Vincent Maronga, one of the arresting officers, Fredrick Owuor, one of the individuals the trio had arrested, Gabriel Oduor and Mr Ali Nuno Dubat.
112. Significantly, the Claimant confirmed on cross-examination that he participated in the Orderly Room Proceedings and cross-examined the witnesses. He was categorical that he did not object to the presence of anyone being in the proceedings.
113. From the evidence on record and the Claimant confirmed as much, when he was called upon to defend himself, he was emphatic that he did not wish to continue with the proceedings.
114. He complained that the proceedings were not being conducted properly because he was in civilian clothes and was supposed to be in uniform. He additionally refused to sign any document during the proceedings.
115. As regards the uniform, neither the Claimant nor his advocate cited the relevant Regulation and RWI, Mr Lucas Ongaya confirmed on cross-examination that it was not mandatory that a police officer had to be in uniform for Orderly Room Proceedings to be deemed regular.
116. Finally, although the Claimant was informed of the outcome of the Orderly Room Proceedings and the right of appeal, he neither appealed to the National Police Service nor appeal the dismissal. He confirmed on cross-examination that he had resolved not to appeal but move to court.
117. As regards the charges against the Claimant, the evidence adduced during the Orderly Room Proceedings and in court reveal that the mission of the Claimant and his two colleagues at Kayole on June 17, 2016 was conspicuously suspicious and the Claimant led no evidence to legitimize the mission. His testimony that they had gone to Kayole to relax was not believable.
118. Relatedly, the allegation that he had arrested a motor vehicle carrying bhang remained unsubstantiated. Neither the motor vehicle nor its registration number nor the driver/owner was provided by the Claimant and his colleagues to the police.



119. The fact that the Claimant, serving as a body guard of a Member of Parliament was in civilian clothes, armed, outside his jurisdiction, using a civilian motor vehicle in the company of another police officer and an ex-police officer purportedly arresting bhang dealers or carriers in Kayole, without the knowledge of the OCS or OCPD and their mission was only disrupted when a member of the public reported the same is puzzling.
120. Similarly, the two persons they had arrested allegedly for ferrying bhang had none on them and the objective of the arrest appear to have been to extort cash from them.
121. Strangely, the Claimant testified that he did not report to the OCS Kayole because he had gone to Kayole to enjoy and could arrest individuals anywhere in the Republic of Kenya.
122. In sum, the Claimant did not furnish sufficient evidence on why he and others had arrested the two civilians they had in motor vehicle xxxx on the afternoon of June 17, 2016.
123. The charge on disclosure of information concerning investigations or other police matter without authority is interesting.
124. The story published by the Star Newspaper on June 20, 2016 is a detailed account of what allegedly transpired before and on June 17, 2016 in the words of the Claimant and his companion, Mr Mosioma. The story quotes the two verbatim and provides the nitty-gritty of the transactions involved. When asked about the newspaper story, the Claimant admitted that he was the one being quoted by the journalist but denied having stated so.
125. The Claimant's defence was that he was in police cell.
126. Be that as it may, the Claimant led no evidence that he had no access to his mobile phone from the evening of Friday to Monday.
127. Evidently, the star Newspaper journalist must have obtained the information either on Friday, Saturday or Sunday.
128. But more significantly, the details published in the Newspaper were too intimate to have been obtained by happenstance. The information was availed by a person intimately involved in the activities on June 17, 2016 and the Claimant was a principal actor and is the one cited most by the journalist.
129. For the foregoing reasons, it is the finding of the court that the Claimant did not provide sufficient evidence to exculpate himself from the second charge.
130. Finally, although the newspaper story makes reference to a 'cartel' and 'failure to agree with one of the cops from Kayole' as well as that the 'officer was angry' the story makes no mention of the officers, name or designation or details of the alleged cartel.
131. The court is satisfied that Respondent failed to adduce sufficient evidence to demonstrate that the Claimant made false accusations or complaint against any police officer or other person affecting the character of such person. This charge was not supported by any evidence.
132. Section 88(2) of the *National Police Service Act*, 2011, on Disciplinary Offences provides that ;  
The offences against discipline include the offences prescribed under the Eight Schedule.
133. Section 89(1) of the Act prescribes the penalties for disciplinary offences.  
It provides;  
(1) A police officer who commits an offence against discipline is liable to be punished by –



- (a)
- (b)
- (c)
- (d)
- (e)
- (f)

Dismissal from the service.

- (2) A police officer authorised to impose a penalty for a disciplinary offence, shall enter a record of such punishment, the date of the punishment and the offence for which it was inflicted on the record sheet of the police officer punished, a copy of which shall be forwarded to the Commission for review and confirmation.
  - (3) All disciplinary proceedings under this part shall be in accordance with the Service Standing Orders as approved by the Commission and shall comply with Article 47 of the *Constitution*.
  - (4) A police officer facing disciplinary action may be accompanied by another police officer of his choice for assistance and support provided such an officer is not of a senior rank to the Presiding Officer.
  - (5) A member of the service aggrieved by a decision made under this section may appeal to the Commission in accordance with the procedure laid out by Regulations made by the Commission in consultation with the Inspector General.
  - (6) The sanctions under subsection (i) (e) and (f) only take effect after approval and confirmation by the Commission.
    - (6A) An officer recommended for dismissal under disciplinary proceedings shall be suspended from duty pending the final decision of the Commission.
134. The provisions of the *National Police Service Act*, 2011 on discipline are reinforced by the Service Standing Orders and the National Police Service Commission (Discipline) Regulations, 2015.
135. Regulation 9 of the Regulations provides that;
- (1) Disciplinary Proceedings shall be conducted in accordance with the Regulations and Service Standing Orders and any guidelines issued by the Commission from time to time.
  - (2)
  - (3) The accused officer shall be notified of the offence accused of having committed and shall be accorded an opportunity of at least three calendar days within which to show cause why disciplinary action should not be taken against him or her.
  - (4) Where a disciplinary hearing is scheduled, an officer accused of a disciplinary offence shall be given at least seven calendar day's notice before the date of hearing.
  - (5) The notice under paragraph (4) may, in exceptional circumstances be waived and the hearing held in accordance with the Service Standing Orders.
  - (6) Where paragraph (5) is invoked, the Presiding Officer shall record the reasons for such waiver in writing.



- (7) Where applicable or relevant, the officer who is the subject of the hearing may call witnesses or other evidence on his or her behalf, at the officer's own cost.
136. This case turns on whether the Respondents complied with the provisions of the *National Police Service Act* and the Regulations.
137. Although noticeable efforts were expended in an attempt to comply with the law, the process in this case did not pass muster for the following reasons.

- (i) Section 89(3) of the *National Police Service Act*, 2011 is clear on how all disciplinary proceedings shall be conducted and makes specific reference to Article 47 of the *Constitution* of Kenya, 2010 on fair administrative action. This would include prior adequate notice of the reasons for the proposed action, opportunity to be heard and make representations and appeal among others.

Similarly, Service Standing Order 15(2) require that an officer subjected to disciplinary proceedings be notified at the earliest date possible before but not less than 24 hours before the hearing date. The Notice must be in Form 30 c as set out in Appendix 30(c) of Chapter 30 of the Standing Orders.

In this case, the Claimant was arrested on June 17, 2016 and put in a cell. The Respondents adduced no evidence to show that it gave Claimant prior and adequate notice of the reasons and nature for the proposed disciplinary action or hearing notice. The Defaulter Sheet on record is dated June 20, 2016, the date of the hearing.

There is no other document on record sent to the Claimant prior to the Default Sheet.

- (ii) Second, Regulation 9(3) of the Regulations, 2015 provides for at least 3 day's notice to the officer accused of a disciplinary offence to show cause why disciplinary action should not be taken against him or her. The Service Standing Orders have a similar requirement.

As adverted to elsewhere in this judgement, the Claimant was arrested on June 17, 2016 and Orderly Room Proceedings or disciplinary hearing took place on June 20, 2016.

Evidently, Regulation 9(3) was disregarded.

- (iii) Although Regulation 9(5) provides that the 7 days notice of the hearing may be waived in exceptional circumstances, in this case, the Waiver Notice by Mr Ali Nuno Dubat, SSP dated June 20, 2016 states at the bottom

'To set immediate example/expedient in the public interest.'

Both the Regulations, 2015 and the Service Standing Orders provide that Waiver Notices are only applicable in exceptional circumstances and reasons for the waiver shall be recorded.

In the instance case other than the above quoted phrase below the charges and whose context is undefined, no other explanation was provided to demonstrate the exceptional circumstances involved.



- (iv) Both the Regulations and the Service Standing Orders provide for witnesses, if the accused police officer desires to rely on them and the presence of another police officer of the officer's choice during the proceedings.

From the evidence on record, it is unclear whether the Claimant was not accorded such rights.

138. For unexplained reasons, the Respondents appear to have been in a hurry to conduct the Orderly Room Proceedings and in the process refused to abide by the law and the Service Standing Orders which perhaps partly explains why the Claimant opted out of the proceedings under the excuse that he was not in uniform having cross-examined all the witnesses and assessed the evidence while not in uniform.
139. As regards the Claimant's refusal to participate in the proceedings by tendering his defence, the record is clear that he pleaded to the charges and participated in the proceedings but when it came to his opportunity to respond to the allegations or charges, he was emphatic that he did not wish to continue, should be taken to court, had no uniform and refused to sign the cross-examination.
140. In the court's view, the Claimant had no sustainable reason not to mount his defence having heard and cross-examined witnesses. The grounds relied upon for the withdrawal at that late stage are in the courts view an afterthought after having sensed the direction the proceedings were moving.
141. Coupled with the foregoing is the Claimant's refusal to appeal at any of two levels provided by the Regulations and Standing Orders.
142. The allegation that he filed an appeal to the OCPD Kayole through the OCS was unsubstantiated.
143. He was however emphatic that he did not appeal the dismissal by the 1<sup>st</sup> Respondent.
144. For the above stated reasons, the court is satisfied and finds that termination of the Claimant's employment by the 1<sup>st</sup> Respondent though justified was in violation of the procedural precepts prescribed by the *National Police Service Act*, 2011, National Police Service Commission (Discipline) Regulations, 2015 and the Service Standing Orders, his unjustifiable refusal to participate in the Orderly Room Proceedings to conclusion notwithstanding.
145. Noteworthy, the Claimant's counsel used the terms Claimant and Petitioner interchangeable perhaps inadvertently. The suit before the court is a cause not a petitioner.

## Reliefs

- (i) Having found that termination of the Claimant's employment by the Respondent was unfair for violation of procedural precepts, a declaration hereby issues that termination of the Claimant's employment by letter dated January 31, 2017 was wrongful.
- (ii) Orders of mandamus for reinstatement
146. The remedy of reinstatement is discretionary under section 49 of the *Employment Act* read with 12(3) (vii) of the *Employment and Labour Relations Court Act*, 2011 and which restricts its award within 3 years from the date of termination of employment. In this case, the duration has already lapsed for the remedy to issue.

The relief is disallowed.



- (iii) A declaration that any act undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in initiating any disciplinary process and/or removal proceedings of the Claimant from the Kenya Police Service as null and void cannot issue since the 1<sup>st</sup> Respondent has power to discipline members of the Police Service and the disciplinary processes are provided for by the law.

The prayer is declined.

- (iv) An order for compensation

147. Having found that termination of the Claimant's employment was conducted in breach of the law and the Service Standing Orders, the Claimant is awarded the equivalent of 2 month's salary as compensation.

148. In the upshot, judgement is entered for the Claimant against the 1<sup>st</sup> Respondent as follows;

- a. A declaration that termination of the Claimant's employment was wrongful.
- b. Equivalent of 2 month's salary.
- c. Costs of this suit.
- d. Interest at court rates from the date hereof till payment in full.

149. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF DECEMBER 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

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