REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 248 OF 2019

IN THE MATTER OF: THE CONSTITUTION OF KENYA;

THE NATIONAL POLICE SERVICE ACT, 2011;

THE NATIONAL POLICE SERVICE COMMISSION ACT, 2013;

THE FAIR ADMINISTRATIVE ACTION ACT, 2015; AND,

THE VETTING OF GAZETTED OFFICERS IN THE

RANK OF CHIEF INSPECTOR OF POLICE.

BETWEEN

GEORGE MBURUGU IKIARA.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Guandaru Thuita & Company Advocates for the Petitioner

Ms. Sarah Muthiga, Litigation Counsel for the Respondent

JUDGMENT

Petition

1. The Petitioner joined the Kenya Police Service on 4th October 1992.

2. He served in various ranks and stations. He was lastly Chief Inspector of Police, serving at Eldoret Driving Test Centre, as a Driving Test Examiner.

3. He was vetted on 23rd August 2016 under the National Police Service [Vetting] Regulations 2013, made pursuant to the National Police Service Act No. 11 A of 2011.

4. In its decision rendered on 6th December 2016, the Respondent found that the Petitioner had failed the vetting, ‘’ *and is hereby, in*

accordance with the law, removed from office.'' It was the finding of the Respondent that the Petitioner was unable to give plausible explanation of his financial transactions. He wilfully misled the Respondent on the kind of business he was engaged in, since the other Officers he mentioned as his business associates, informed the Respondent that they were in totally different business; and that therefore, the Petitioner was a person of questionable integrity and lacked financial probity.

5. He sought review on 3rd January 2017. The vetting review decision is dated 22nd August 2017. The decision of the initial vetting was upheld, the Commission having found that the Petitioner did not present any new evidence, facts and documents.

6. The Petitioner filed his Petition on 20th November 2019. He prays for: -

a. Declaration that his fundamental rights and freedoms have been violated.

b. An order of certiorari quashing the entire proceedings and decision of the Respondent.

c. An order of reinstatement.

d. An order declaring that there was no material to find that the Petitioner had failed vetting.

e. Compensation of the Petitioner.

f. Costs.

g. Any other suitable order.

7. He raises several constitutional, legal and factual grounds in seeking these orders. These grounds are comprised in the Petition and the Affidavit of the Petitioner sworn on 14th December 2019. He also filed Submissions, accompanied by a catena of Judicial Authorities on the subject of vetting in the Police Service.

8. The grounds may be summarized as follows: -

a. Failure to give notice to the Petitioner, of adverse suspicion under Regulation 18 of the Vetting Regulations, 2013. The Petitioner was not notified that any transaction from his m-pesa account was considered suspicious.

b. Failure to accord the Petitioner fair hearing. The Petitioner was not given a chance to face any of his accusers and cross-examine them. The Respondent had powers to summon any witness under Regulation 30 of the Vetting Regulations. Petitioner's own evidence was disregarded by the Respondent.

c. There were fundamental factual errors, in the vetting decision. Petitioner's service numbers were indicated as F/NO. 219522 P/NO. 198304614. The correct numbers are F/NO 232594 P/NO 1992035928. Service numbers are important as they identify individual officers.

d. The Respondent was biased, combining the role of investigator, judge and executioner.

e. The Respondent did not observe Regulation 4 [f] of the Vetting Regulations on standard of proof required- balance of probability. It was not established that the Petitioner enjoyed income from any source illegally.

f. The Respondent failed to consider relevant facts, and the Petitioner's record in the Service. It was not taken into account that the Petitioner had obtained a Sacco loan facility of Kshs. 900,000 and transacted the loan amount through m-pesa.

g. The process did not achieve the objective of vetting. It was not predicated on public interest, and totally violated Petitioner's individual rights.

h. The Respondent disregarded the principal of proportionality. The Petitioner had served for 24 years. There were no formal complaints against him in those years, or any orderly room proceedings.

i. The Petitioner was not provided with reasons for the adverse findings.

j. There was illegality. Chairman Kavuludi did not show up for the initial vetting. On the cover of the Hansard, it was indicated that he was present. Kavuludi though absent, signed the vetting decision. Other Commissioners who did not sit at the vetting rubber-stamped the decision.

9. The Petitioner argues in light of the grounds above, that his right to fair administrative action under Article 47 of the Constitution, and right to fair hearing under Article 50[1] of the Constitution, have been violated.

10. The Petitioner adopts various decisions of the Kenyan Courts, in his Closing Submissions, regarding the subject matter, digested hereunder: -

- ***CoA Kisumu Appeal No. 17 and 18 of 2015, County Assembly of Kisumu v. Kisumu County Assembly Service Board*** – the person charged is entitled to notice of hearing containing substantial information with sufficient details, to enable him ascertain the nature of the allegations against him**.**

- ***CoA in George Kingi Bamba v. National Police Service Commission [2019] e-KLR*****-** by Regulation 28, the Respondent could utilize services of public officers, investigative agencies and any expert for purposes of conducting investigation. The subject officer should have notice, containing summary of the complaint, including relevant documentation. The Court also emphasized the need to consider the employment record of the concerned Police Officers, and observation of the principal of proportionality, cautioning against the tendency to use a sledgehammer to kill a mosquito.

- ***Joel Lekuta v. National Police Service Commission [2017] –*** Vetting of a Police Officer is a serious process which may result in removal from Service. The Officer must have sufficient notice, with relevant information and time to answer allegations, and face his accusers.

- ***Republic v. Retirement Benefits Appeals Tribunal & 5 others ex-parte Kenya Airports Authority Staff Superannuation Scheme [2015] e-KLR-*** It is the responsibility of the Court or Tribunal to give reasons for its decision.

- ***Eusebius Karuti Laibuta v. National Police Service Commission [2014] e-KLR –*** it is unfair and unlawful for persons to sign a decision regarding an exercise they never participated in. This decision agrees with decision in ***George Kingi Bamba*** above, where it was held that only those members who took part in the vetting could legitimately own the report. Other decisions underscoring this principle include ***H.C Petition No. 43 of 2016, Francis Omondi Okonya v. National Police Service Commission*** and ***Michael MuchirI Nyaga v. National Police Service Commission [2017] e-KLR.***

- ***Sebastian Kirunya Limbitu v. National Police Service Commission & Another [2017] e-KLR –*** damages in sum of Kshs. 3 million was awarded to the Claimant, for violation of Article 47 right.

The Response

11. The Respondent opposes the Petition, relying on the Affidavit of its Chief Executive Officer, Joseph Vincent Onyango, sworn on 20th February 2020.

12. The CEO gives a legal background to the vetting process under Section 7 [1] of the National Police Service Act.

13. He concedes that the Petitioner was a Police Officer, and was vetted out upon finding that he was unsuitable to continue serving.

14. The Petitioner completed and submitted vetting questionnaires and subsequently offered himself for vetting on 23rd August 2016.

15. The Petitioner's m-pesa account was found to have frequent and huge transactions involving the Petitioner and his fellow Officers, Kennedy Rucho and John Laban, who were Petitioner's seniors at some point.

16. The Officers alleged they were engaged in business, but mentioned different types of business. The Petitioner wilfully misled the Respondent on the type of business he was involved in, because his colleagues categorically denied being involved in the line of business the Claimant was involved in.

17. There were amounts of Kshs. 1.6 million, Kshs. 1.1 million and Kshs. 671,000 passing through m-pesa tills. The Petitioner explained that he had obtained a loan of Kshs.997,000 from his Sacco, which was transacted through m-pesa tills.

18. The Petitioner was therefore found to have failed to explain these transactions and the business dealings with his colleagues. The dealings earned the Petitioner huge income.

19. It was concluded by the Respondent, based on a balance of probabilities, that the Petitioner lacked financial probity and integrity. He was removed from Police Service.

20. The Petitioner applied for review. It was found that he did not tender any new evidence, facts or documents to warrant disturbing the decision for his removal.

21. The CEO explains that the Petitioner alleged he was involved in maize business with Kennedy Rucho, Peter Katheka and Polycarp Ochieng. All these Officers underwent vetting and were removed from Police Service. They petitioned the Employment and Labour Relations Court at Kisumu, which dismissed their respective Petitions.

22. The detailed decisions at primary and review level, were communicated to the Petitioner, with clear reasons given, justifying the decisions.

23. The Petitioner has not shown how the Respondent violated his constitutional rights. He was accorded ample time before, during and after vetting. There was no need to give notice of the information against him, because he is the one who supplied the information, which included m-pesa statements. The information was already within his knowledge. During vetting, he did not plead for more time to prepare. The technical rules of evidence, with the attendant right to cross-examination, do not form part of rules of natural justice, or part of fair

administrative action.

24. Chairman Kavuludi was part of the vetting panel. He did not ask questions, but the Hansard indicates he was part of the vetting panel. Failure to ask questions did not mean he had no right in signing the vetting decision.

25. The Respondent adopts the following decisions in its Closing Submissions: -

- ***George Kingi Bamba v. National Police Service Commission, Nairobi E&LRC Petition Number 87 of 2016*** - where it was held that the Petitioner Police Officer, was the source of his own information [m-pesa statements], and the Respondent was not expected to supply the same information. [it is noted that this decision from the E&LRC was reversed by the Court of Appeal, in the decision cited in the Submissions of the Petitioner above].

- ***Judicial Service Commission v. Mbalu Mutava & Another [2015] e-KLR-*** the requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

- ***rePergamon Press Limited [1971] 1 Ch. 388-*** what disclosure will be necessary… must depend on the circumstances of each case. It does not involve offering opportunity to cross-examine any witness.

- ***Meme v. Republic & Another [2004] e-KLR*** and ***Anarita Karimi Njeru v Republic [1976-1980] KLR 1272 –*** constitutional violations must be pleaded with a degree of precision.

26. The issues as identified by the Parties in their Submissions can be reduced to the following: ***whether the Petitioner's rights to fair administrative action and fair hearing were violated by the Respondent; and whether the Petitioner is entitled to the remedies sought***.

The Court Finds: -

27. The Petitioner joined the Kenya Police as a Constable on 4th October 1992. He rose through the ranks. He was a Chief Inspector, serving at Eldoret Driving Test Centre, as Driving Test Examiner, when he was removed from Police Service, through the vetting mechanism, on 6th December 2016. He served for 24 years.

28. The Respondent found that the Petitioner failed to give a plausible explanation for his financial transactions; and two, that he wilfully misled the Respondent on the kind of business he was engaged in, since Officers he mentioned as his business associates, contradicted him on the nature of business they carried out.

29. He sought review. The Respondent made a vetting review decision on 22nd August 2017, upholding the initial decision, removing the Petitioner from Police Service.

30. He petitions the Court to reverse this decision to remove him. He submits in a capsule that: he was denied notice of any complaint of adverse information against him; he was not accorded a fair hearing; the vetting decision had factual errors; the Respondent was biased; the Respondent failed to consider relevant facts; the Respondent was biased ;there was no proof on the balance of probability to warrant removal from office; vetting did not respect public interest; the decision lacked proportionality, the Petitioner having enjoyed an unblemished career spanning 24 years; he was not availed reasons for the decision; and the decision was tainted by illegality, Chairman Kavuludi having signed the decision, yet he did not participate in the proceedings of the initial vetting.

31. Section 7 of the National Police Service Act, states that all persons who were immediately before the commencement of the Act, Officers or Employees of the Kenya Police Force and Administration Police Force, shall upon commencement of the Act, become members of the Service. The Respondent is mandated under Section 7[2] of the Act and Regulation 4[a] of the National Police Service [Vetting] Regulations 2013, to carry out the vetting exercise. The purpose of vetting is expressed to be the building of confidence and trust in the National Police Service, and to ensure that the Service complies with Chapter 6 of the Constitution [Leadership and Integrity] and the principles of public service as set out in Article 232 of the Constitution and in the Public Officers Ethics Act.

32. In vetting its Officers, the Respondent acts as an Administrator, and must discharge its role, in accordance with Article 47 of the Constitution. The Article stipulates: -

a. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

b. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

c. Parliament shall enact legislation to give effect to the rights in clause [1]. [The rights above]

33. Parliament enacted Fair Administrative Action Act No. 4 of 2015 as required, to give effect to Article 47 above. Courts have emphasized the centrality of Article 47 of the Constitution, in discharge of administrative roles, affirming that the Article is self- executing. Even without the enactment of the Fair Administrative Action Act in 2015, Article 47 was not moribund. This was emphasized by this Court in ***Mohammed Sheria & 2 others v. Simon Kipkorir Sang & 5 others [2018] e-KLR***.

34. The Fair Administrative Act defines administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The Act applies to all state and non-state agencies, including any person, exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution of any written law; or whose action, omission or decision affects the legal rights or interests of any person, to whom such act, omission or decision relates.

35. Section 4, of the Act reaffirms the right of fair administrative action, as stated under Article 47, stressing under Section 4[3] that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the Administrator shall give the person affected by the decision: prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; notice of a right to a review or internal appeal against an administrative decision where applicable; a statement of reasons pursuant to Section 6; notice of the right to legal representation where applicable; notice of the right to cross-examine where applicable; or, notice of information, materials and evidence to be relied upon in making the decision and taking administrative action.

36. Whereas Section 4[3] mainly relates to fair administrative action before the actual hearing, Section 4[4] relates to the actual hearing. The Administrator shall accord the person against whom administrative action is taken, an opportunity to: attend the proceedings in the company of an expert of his choice; be heard; cross-examine persons who give adverse evidence against him; and request for adjournment where necessary to ensure fair hearing.

37. Section 6 allows Administrators acting on authority of other written laws, to follow procedures prescribed in these other laws, so long as they are in conformity with Article 47. Article 47 is the minimum standard of fair administrative action.

38. The Court is allowed to interfere with the decision of an Administrator under Section 7[2] of the Fair Administrative Action Act, if: a person who made the decision was not authorized to do so by the empowering provision; the person acted in excess of jurisdiction or power conferred under any written law; acted pursuant to delegated power in contravention of any law prohibiting any such delegation; was biased or may reasonably be suspected of bias; or denied the person to whom administrative action or decision relates, a reasonable opportunity to state the person's case; a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; the action or decision was procedurally unfair; the action or decision was materially influenced by an error of law; the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; the Administrator failed to take into account relevant considerations; the Administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions; the administrative action or decision was made in bad faith; the administrative action or decision is not rationally connected to the purpose for which the action was taken, the purpose of the empowering provision, the information before the Administrator or the reasons given for it by the Administrator; there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law; the administrative decision or action is unreasonable; the administrative decision is not proportionate to the interests or rights affected; the administrative action or decision violates the legitimate expectations of the person to whom it relates; the administrative action or decision is unfair; or the administrative decision or action is made in abuse of power.

39. These standards of fair administrative action are in addition to, and not in derogation from, the general principles of common law and rules of natural justice, as stipulated in Section 12 of the Act.

40. The Court has deemed it necessary to highlight the Fair Administrative Action Act here, because it is the minimum standard through which the fairness of administrative action, must be gauged. Other written laws, the general principles of common law, and the rules of natural justice are in addition to, not in derogation from, this common standard of fair administrative action. Administrators have no room to opt out of the provisions of the Fair Administrative Action Act.

41. The Court of Appeal of Kenya in ***Judicial Service Commission of Kenya v. Mbalu Mutava & Another [2015] e-KLR*** distinguished the right of fair administrative action from the right to fair hearing. The Court held that the right to fair administrative action, is wide in scope, as it encompasses several duties: the duty to act expeditiously; the duty to act fairly; the duty to act lawfully; the duty to act reasonably; and in specified cases, duty to give written reason.

42. The National Police Service Act 2011, acknowledges under Section 46 [1], that a Police Officer shall be entitled to all the rights set under the Constitution subject only to limitations specified under Section 47 of the Act.

43. The National Police Service [Vetting] Regulations, 2013, state under Regulation 4[c] that vetting shall be done in accordance with the values and principles set out in Articles 10, 27, 47, 50 and 232 of the Constitution of Kenya. The Commission is bound under Regulation 4 [e] by the principles and standards of impartiality, natural justice and international best practice. Regulation 4 [g] requires that vetting shall be done in a transparent manner, allowing the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision.

44. Regulation 7 is on determination of suitability and competence of an Officer. The Commission is obligated to take into account the Officer's record, conduct and performance in the present position and in any other previous position.

45. The National Police Service Act and the National Police Service [Vetting] Regulations therefore are consistent with the Fair Administrative Action Act, with respect to the need for Administrators to observe standards of fairness, in vetting of Officers.

46. The Petitioner submitted documents to the Respondent as required under Regulation 13 of the Vetting Regulations, which included a self-assessment form as prescribed by the Respondent; national identity card; certificate of appointment; academic certificates; a duly completed declaration of income, assets and liabilities; bank statements for the previous 2 years of all bank accounts that the Officer, the Officer's spouse and dependants under the age of 18 have maintained; certificate of tax compliance; and any other documents the commission may deem fit and necessary for furtherance of the process.

47. *Was the Petitioner entitled to a notice, with a summary of complaint or any adverse information received?*

48. In the view of the Court, the answer is in the affirmative. The submission of the documents is a statutory requirement, before the Officer attends. vetting. The Respondent, in the respectful view of the Court, is required to study the documents so submitted, and if there are queries that would amount to adverse information against the Officer, communicate such information through a notice, to the concerned Officer. The submission by the Respondent that the Petitioner was not entitled to a notice, with a summary of adverse information, because the Petitioner submitted the documents over which his financial probity and integrity was being questioned, is a flawed submission. The documents on their own told nothing, at least not to the Petitioner. They were submitted in fulfilment of a statutory requirement. It was for the Respondent, to assess the documents, and if there was adverse information seen in the documents, against the Petitioner, notify him about the adverse information.

49. The Court of Appeal emphasized in ***George Kingi Bamba v. National Police Service*** that vetting should be done in a transparent manner, allowing the person undergoing vetting, to know and assess the information that was to be used against him. It was held that it is from notice of such information, that the officer would be expected to respond. The Petitioner received nothing from the Respondent after he submitted the required documents. He went to the vetting without knowing what adverse information the submitted documents had generated.

50. There was no complaint received from the sources identified in Regulation 15 of the Vetting Regulations. The fact however, that the documents sourced from the Petitioner disclosed adverse information to him, necessitated notice to the Petitioner from the Respondent, in much the same way a complaint received from the sources under Regulation 15 would.

51. This was position was by the Employment and Labour Relations Court in ***Peter Kemboi Chemos v. National Police Service Commission [2018] e-KLR***. *''The Respondent also, never pointed out the adverse information they had found against him, to enable him defend himself,''* the Court held. The Court faulted the Respondent, for confronting the Petitioner on the floor of the vetting, finding that it was humanly impossible for the Petitioner to explain details of m-pesa transactions which spanned 2 years, without due notice, especially in an open economy where m-pesa has become the easiest mode of buying and selling goods.

52. The Court agrees with the Petitioner, that he was entitled to a notice containing a summary of adverse information, before attending vetting, and that such information was not communicated to him.

53. Did the decision contain factual error? The Hansard clearly shows that the vetting decision of 6th December 2016, identified the Petitioner to be George Mburugu Ikiara, F-219522, P/No. 1983946140. In the vetting review decision, the service numbers were different. They were F-232594 P/No. 1992035928. The discrepancy is not explained, in either the decision of 6th December 2016 or the review decision of 22nd August 2017.

54. The Respondent ought to have given an explanation in its decisions, on the changing identification of the Officer under vetting. Service or personnel numbers are unique numbers, assigned to each Employee. The numbers help in identifying individual Employees. Whenever an action takes place that affects the Employee [promotion, disciplinary action, or change in personal details such as address, etc.] the relevant entry is made using the unique personnel number. Police Service places high premium on service numbers, so much so that even when Officers appear in Court to testify, they always identify themselves with these numbers before giving their names and ranks. The Police Service understands the importance of service numbers, in this age of widespread identity theft.

55. It is therefore shocking that the Respondent, got the Petitioner's service numbers wrong, and even when afforded an opportunity to explain the mix-up on review, said nothing of the discrepancy in the decision. The Petitioner felt, and in the view of the Court correctly, that this mix-up gave credence to the likelihood of mistaken identity. How would the Petitioner be guaranteed that the contents in the respective decisions of the Administrator, related to him?

56. Was the Respondent biased? Did the Respondent fail to treat the Petitioner fairly at the actual hearing and review?

57. Administrators have an obligation under the Fair Administrative Action Act, to act reasonably, without bias or suspicion of bias, and to act in good faith. The Administrator must create an atmosphere that enables fair and objective hearing, without a condescending attitude to the person subject of the administrative action.

58. The language employed by the Commissioners who vetted the Petitioner, was at times intemperate, and did not assist in creation of the right atmosphere to conduct a fair, reasonable and objective hearing.

59. At page 15 of the Hansard dated 23rd August 2016, when answering questions put to the Petitioner by Bernard Kibet Kurgat, Commissioner Mary Owuor who was chairing the exercise, told the Petitioner: -

> *'' It is yes Madam! You are not talking to him [Kurgat]. We are not on the streets!''*

60. At page 17, the Chairperson enquired from the Petitioner whether he reduced transactions relating to his maize business into writing, saying: -

> *'' I mean…you can't keep in your head, even if you are a computer.''*

61. When the Petitioner at page 24 of the Hansard stated that he had a friend called Mercy Langat, who purchased items from Nairobi and Malaba, and sold them within Taita, the Chairperson interjected: -

'' Isn't it the other way round? You know we also do business of this nature. We buy them in Taita Taveta and we come and sell in Nairobi.''

62. In closing the initial hearing, the Chairperson asked the Petitioner how many people had passed driving tests, during his role as a Driving Test Examiner, and how many died [in road accidents] immediately after passing the driving tests. This was a morbid sense of humour which did not sit well with the seriousness of the business at hand.

63. The Court does not think that the language of the panellists, especially its Chairpersons Owuor and Kavuludi, was temperate, creating the right atmosphere for fair administrative action.

64. On review, the Respondent did not change its tone from the initial hearing. At the very opening of the review, Chairperson Kavuludi sardonically told the Petitioner, *'' yes… that is good. You see the Director may be wondering what happened to your voice. You know we did not take it away. You went with it home, and you have come back with it. ''*

65. The Chairman went on to introduce a Lawyer in the panel, asking the Petitioner if the Petitioner had ever seen a Lawyer before. He went on to introduce Owuor, who had chaired the previous sitting, asking the Petitioner not to be scared by the seriousness in her face. *'' That is how she takes matters of policing with seriousness… she is the lady who gives us advise [sic], on whether or not you are a good man…''*

66. Chairman Kavuludi went on to tell the Petitioner offhandedly, that the discrepancy in the service numbers had been corrected. He did not say what occasioned the error in the first place. Who owned the service numbers attributed to the Petitioner? The Claimant was cautioned that he would only have 10 minutes to prosecute his review. Commissioner Owuor told the Petitioner from the beginning *'' don't go into other stories.''*

67. In the view of the Court, the Petitioner was justified to feel prejudged. The review was a formality. The language and demeanour of the Chairpersons, was not to be expected of a fair administrative process. The conduct, questioning and approach taken by an Administrator, may call into question the fairness of the process and suggest bias. Administrators are expected to conduct themselves throughout the proceedings in a judicial manner.

68. Comments, tone or body language which gives the appearance of a closed mind, may call into question the fairness of the process. Frequent and aggressive interventions, such as was exhibited by Commissioner Owuor, have been found to compromise fair hearing, [see ***London Borough of Southwark v. Kofi-Adu [2006] EWCA Civ. 2008***]. Notably, Commissioner Owuor on many occasions portrayed lack of judicial comportment. She alluded to the Petitioner's unsuitability and incompetence, when she asked how many of his driving students had died in road accidents, immediately they came out of his driving tests. This was improper, particularly because the Commissioner was mandated to assess the Petitioner's competence and suitability. Commissioner Kavuludi welcomed the Petitioner to the vetting review, with snide remarks, wondering if the Petitioner had forgotten his voice behind.

69. Did the Respondent establish the allegations against the Claimant on a balance of probability? Was the Claimant denied a fair hearing?

70. The Respondent found that the Claimant was contradicted by his fellow Officers, Kennedy Rucho, John Wainaina and Polycarp Ochieng' on his evidence that the Officers were involved in a joint maize business.

71. Unfortunately, the Hansard does not contain the evidence of Kennedy Rucho, John Wainaina and Polycarp Ochieng'. It is hard to tell when and where, these Officers gave evidence with regard to the Petitioner. It is hard to say whether they agreed with or contradicted the Petitioner on the nature of business carried out by the Officers.

72. In his application for review, the Petitioner suggested that the Respondent relied on information allegedly given by his Colleagues during their own vetting processes. If this be the case, why would the Respondent conclude that the Petitioner misled the Respondent on the nature of the business, and that the other Officers did not mislead the Respondent in their vetting processes?

73. This issue would have been resolved by calling of the other Officers as Witnesses, and by allowing the Petitioner to cross-examine them and test their evidence. The Respondent was wrong in putting reliance on statements made outside the Petitioner's vetting proceedings. Those statements did not form part of the Hansard relating to the Petitioner. They were extraneous to the Petitioner's vetting.

74. The Fair Administrative Action Act and the Vetting Regulations should have guided the Respondent to call the other Officers, before finding the Claimant to have misled the Respondent, on his evidence relating to the maize business.

75. The Respondent said nothing about the explanations given by the Petitioner in justifying m-pesa transactions. He was an Officer who had access to Sacco loan facility; he had invested in some residential blocks; and was involved in maize and sale of clothes with fellow Officers and friends. He had worked for 24 years. Why would transactions of less than Kshs. 2 million bother the Respondent?

76. Section 71 of the National Police Service Act allows Police Officers to engage in trade or business outside the scope of their duties, so long as the trade or business is not in conflict with the performance of their duties.

77. The Court is satisfied that the Respondent took the wrong approach in concluding that the Petitioner had misled the Respondent on the nature of the maize business; and in concluding that the Petitioner was an Officer lacking in financial probity and integrity. The allegations against the Petitioner, without calling the Officers who allegedly contradicted the Petitioner in his evidence, cannot be said to have been established on a balance of probability.

78. As confirmed by the Court of Appeal in ***George Kingi Bamba v. National Police Service Commission,*** the Commission has an

obligation under Regulation 7, to consider the Officer's record, conduct and performance in the present position and in any other position.

79. The Petitioner had served for 24 years. He did not have formal complaints against him. He had not faced orderly room proceedings or other adverse proceedings in his career. He had worked his way up from Police Constable to Chief Inspector of Police. He had acquired a degree in criminology and fraud management. An Officer holding a degree, let alone a degree in the highly specialized area of criminology and fraud, is an asset to the National Police Service. This was not considered by the Respondent.

80. The closest the panel came to enquiring about his record, was at the end of the initial vetting when Owuor asks the Petitioner: -

> *''when are you graduating? ''*
>
> Petitioner: *That is when I graduated [2015]*.
>
> Owuor: *When is the cake being cut, the graduation cake?*
>
> Petitioner: *Probably next year December*.
>
> Owuor: *I hope you will remember to call me*.

81. The other enquiry on Petitioner's record is captured at paragraph 62 of this Judgement, where Owuor asked the Claimant how many people had passed the driving tests conducted by the Petitioner, only to die in road accidents, immediately they left the left the Petitioner.

82. There was no genuine consideration of the Petitioner's record, as required under the Vetting Regulations. Instead, the Respondent opted to engage in frivolities, morbid humour, cutting of graduation cake, and sarcasm on the Petitioner's driving test competence.

83. The Hansard of 23rd August 2016, does not show that Chairman Kavuludi participated in vetting. Owuor welcomed the participants, stating that she was the temporary Chairperson and that Kavuludi would be arriving any time.

84. The vetting closed at 8.20 a.m. with Owuor still on the Chair. It cannot be true, as submitted by the Respondent, that Kavuludi participated in the vetting, but did not ask any questions. The temporary Chair would have been recorded announcing the arrival of Kavuludi, and probably paving way for Kavuludi to chair the remaining session. It is unlikely that Kavuludi would arrive, and quietly observe the proceedings from a corner. There is no record of such arrival. Kavuludi simply was not there.

85. And yet Kavuludi signed the decision of 6th December 2016. He did not participate in the deliberations, and was therefore not seized of the matters that transpired on 23rd August 2016. The integrity of the vetting panel itself comes into question. Why would the Hansard list Kavuludi as one of the participants, while clearly he was not? Vetting Regulation 34, demands that the Respondent shall cause to be made and kept, accurate record of its proceedings. The inclusion of the name of a Commissioner in the Hansard, while the day's proceedings show he was not in attendance, is not an accurate record, and puts into question the integrity of the process.

86. This defect was addressed by the Court of Appeal in ***George Kingi Bamba [supra].*** Relying on Regulation 25 [4] of the Vetting Regulations, the Court held that the decision of the Respondent shall be signed by Commissioners who decided the matter. Only members who took part in the vetting could legitimately own the decision. The procedural impropriety and irregularity, the Court held, went to the jurisdiction of the panel and definitely vitiated the decision. The Court of Appeal took issue with the E&LRC, from which the Appeal arose, for not having addressed the issue when it was raised upon trial. In the view of the Court of Appeal, this is a fundamental legal point, affecting the jurisdiction of the panel. This position has support in other judicial authorities including, ***Michael Muchiri Nyaga v. National Police Service Commission [2017] e-KLR***, where, Hon. Justice Jorum Nelson Abuodha, held that: *''reading of Hansard printout, in some backroom, after the oral hearing which that person never attended, does not constitute procedural fairness, and is procedural impropriety. ''*

87. The decision of 6th December 2016, was vitiated by Chairman Kavuludi's signature. This ground alone would be enough to grant the Petition.

88. The Petitioner was given reasons for the initial vetting decision and the review decision. The reasons may not have been valid reasons, but the Court is of the view that reasons were given. Both decisions conformed with Vetting Regulation 25 [6], on statement of reasons. The argument on proportionality is weak. Rule 7 of the Vetting Rules requiring that the panel takes into account the Officer's record, is not in the view of the Court, about proportionality of the decision. It is there to guide the panel to either retain, or remove the concerned Officer. The panel did not have options, if in its view, an Officer had failed vetting. It would not matter what mitigating factors existed. There was no middle ground. It was either one is in, or out. In the view of the Court, the principle of proportionality had no applicability, because legally, the panel was bound to remove the Officer on finding that he was unsuitable. The suggestion that the panel fired cannons to kill a mosquito has no foundation. The principle of proportionality would come into play, where there was a middle ground in decision-making, where for instance the panel would have the option of: reprimanding, warning, demoting, suspending, sending back to Kiganjo for refreshing, or retiring, the Officer early with benefits. Regulation 25 of the Vetting Regulations states that at the conclusion of the vetting, the Commission shall make a decision as to whether or not, the Officer vetted was found suitable and competent. The law is in black and white. The principle of proportionality is composed of three sub-principles: suitability, which means that the restrictive measure is appropriate to achieve the aim that has to be achieved; necessity, which means that the adopted measure should not exceed what is necessary to achieve the objective, and that a less restrictive measure does not exist; and finally, *stricto sensu* proportionality, which means that the disadvantages caused by the measure, do not outweigh the advantages that would justify the measure ***[see R. Alexy, Rights, Legal Reasoning and the Rationale Discourse, Ratio Juris 1992, p. 149 ff]***. Without the Administrator having the leeway to take any other decision, other than retention or removal or an Officer, it is hard to agree that the decision taken was disproportionate.

89. The Court does not think that in the circumstance of this case, it was in the discretion of the Respondent to call, or not call Witnesses. The facts required the calling of the Officers who allegedly contradicted the evidence of the Petitioner. The Fair Administrative Action Act and the Vetting Regulations, required such Witnesses are called to give their evidence in the presence of the Petitioner. The Petitioner's right to cross-examine ought to have been honoured. The submission by the Respondent that the Respondent had discretion in calling and cross-examination of Witnesses, is not correct. Without calling Rucho and the others, there was no way the panel would conclude as it did, that the Petitioner misled the panel. The panel in the end, relied on extraneous material, in reaching its verdict.

90. The Court does not think that the submission by the Respondent, that the Officers who worked with the Petitioner challenged their own vetting unsuccessfully, at the E&LRC sitting at Kisumu, has any bearing on this Petition. Vetting was not a collective exercise. The Respondent did not even supply the Court with the particular decisions of the E&LRC, if it deemed these decisions to have any persuasive value.

91. And lastly, the Court does not see in what way the Petition fails to meet the rule on specificity, under ***Anarita Karimi Njeru v. The Republic***. The Petition and Submission of the Petitioner are detailed, clearly stating with precision the violations and Articles of the Constitution which entitles the Petitioner to the remedies sought.

92. Taking guidance from the decision of the Court of Appeal in ***George Kingi Bamba v National Police Service Commission,*** this Court accedes to the Petition, to the extent that the Petitioner is reinstated to the position he held at the time of vetting, with his back salary and benefits, if he is not already due for retirement.

93. Having been reinstated without loss of salary and other benefits, it is imprudent to grant the Petitioner, compensation for violation of his constitutional rights. Reinstatement, back pay and benefits, have placed him to the position he would have been at, had he not been vetted out.

94. Declaratory order No. 1 is allowed.

95. Declaratory order No. 4 is not necessary in view of the quashing of the proceedings and decisions of the Respondent.

96. No order on the costs.

IN SUM, IT IS ORDERED: -

a. It is declared that the Petitioner's fundamental rights have been violated.

b. An order of certiorari is issued, quashing the entire proceedings and decisions of the Respondent, declaring that the Petitioner had failed vetting, and had been discontinued from the Kenya Police Service.

c. The Petitioner is reinstated to the position of Chief Inspector of Police, without loss of salary, service, privileges and other benefits.

d. No order on the costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

JAMES RIKA

JUDGE