



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E060 OF 2020

POLYCARP AKOKO OCHIENG.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Petitioner, Polycarp Akoko Ochieng filed a Petition dated 30th September 2020 under Articles 19, 20, 21, 22, 23, 27, 28, 41, 47, 50 and 258 (2) (c) of the Constitution of Kenya against the National Police Service Commission seeking the following prayers:-

- a. A declaration that the petitioner's Vetting undertaken on 23rd August 2016 and the Subsequent decision of 6th December 2016 violated his fundamental rights and freedoms as guaranteed under Articles 10, 27, 41, 47, and 50 of the Constitution;
- b. A declaration that the petitioner's Vetting review undertaken on 13th July 2017 and the Subsequent decision of 23rd August 2017 violated his fundamental rights and freedoms as guaranteed under Articles 10, 27, 41, 47, and 50 of the Constitution;
- c. An order of certiorari quashing the respondent's letter dated 22nd May 2018 which removed him from the National Police Service;
- d. An order reinstating the Petitioner to his employment, with back pay from the date of his removal and without loss of benefits;
- e. An order of compensation for the pain, suffering and loss of reputation to the petitioner.
- f. Costs of this petition.
- g. Any other relief or orders that this honourable court shall deem just and fit to grant.

2. The Petitioner avers that he joined the Kenya Police Service on 1st December 1986 and underwent recruit initial training course at GSU Training School-Embakasi after which he was posted to various GSU Field Companies for operational duties. That he was eventually assimilated to the Traffic Police Department as a Driving Test Examiner and through hard work, diligence and dedication, he rose through rank and file to the position of Chief Inspector of Police attached to the Traffic Department. He avers that he was subjected to a vetting exercise pursuant to the promulgation of the National Police Service (Vetting) Regulations, 2013 and which vetting was undertaken by the Respondent through the Commissioners and other invitees. The Petitioner averred that he received communication from the Respondent on the outcome of the vetting to the effect that he had failed and that according to the tenor of the decision, his declared wealth and transacted amounts exhibited disparity and cast doubt into his integrity. The Petitioner was aggrieved by the decision and he lodged a request for review pursuant to which he was invited for a vetting review interview at the Respondent's Offices in Westlands. The Petitioner averred that he was however later informed his vetting review interview was unsuccessful because he did not tender any new evidence, facts or documents to inform a contrary decision. The Petitioner asserted that despite the Respondent upholding the decision to remove him, he made several follow ups to overturn the said decision but the same was never responded to. The Petition further avers that the decision of the vetting panel was made by one Commissioner Ronald Musengi while the writing of the decision from the vetting was done and signed by another Commissioner, Murshid Mohamed who had not participated in the vetting process. Further, that despite the other panelists participating in the exercise, they neither appended their signatures nor participated in the decision making. The Petitioner averred that thus it follows the proceedings of the vetting panel and the subsequent decision contravened the principles of natural justice, the prescribed law and service regulations and thereby contravened Articles 10, 27, 28, 41, 47 and 50 of the Constitution. He further avers that he was not given an opportunity to be heard and make representations; nor was he notified of the right to legal representation despite the nature and magnitude of the administrative decision that was under consideration; and that he was not notified nor accorded the right to cross examine Kennedy

Rucho who gave adverse evidence against him, which was in violation of Articles 10(2)(b) & (c), 27 and 47 of the Constitution. Further, that the vetting panel primarily based the proceedings on his financial probity and ignored the other mandatory criteria of the past and recent record (antecedents) of an officer, integrity and human rights records, thus ignoring the vetting criteria contained in Regulation 7 and 14 of the National Police Service (Vetting) Regulations. The Petitioner averred that the Respondent also failed to supply him with information relied upon contrary to Section 4(3)(g) of the Fair Administrative Action Act. The Petitioner averred that they thus exhibited open bias, irrationality and most fundamentally violated his right to Fair administrative action contrary to the dictates of Article 47 of the Constitution of Kenya. The Petitioner also avers that the Vetting Review exercise and subsequent decision aggravated the violation of his fundamental rights and freedoms in that the review panel was improperly constituted; containing six instead of seven panelists. Further, that Mr. Johnstone Kavuludi signed the decision alongside other Commissioners despite having not participated in the vetting of the Petitioner. The Petitioner averred that he was similarly not given the opportunity to address his grounds for review in violation of his right under Article 47 and that the vetting review panel also failed and/or refused to consider and analyze the additional evidence he presented.

3. The Petitioner averred that the Respondent by failing to respond to his written follow ups was humiliating and degrading for an officer who had worked for over 30 years and this treatment violated his right to human dignity while offending the right to Fair Labour Practices as enshrined in Article 41 of the Constitution. The Petitioner averred that his removal from the Respondent's service has exposed him and his family to untold financial suffering, contempt, ridicule with the society viewing him as a corrupt, dishonest and a greedy person unfit to hold any office. He avers that the tainted record has made it impossible for him to secure any other employment. In his Supporting Affidavit, the Petitioner has annexed copies of the Hansard for both the vetting and vetting review proceedings and the decisions by both the Vetting Panel and Vetting Review Panel. He also annexes a copies of the letters stamped received by the Respondent to demonstrate the follow ups he made after the decision by the vetting review panel. The Petitioner avers that there is in fact no such disparity that existed as between what he had declared and what he actually had as demonstrated in the annexed copies of his bank statements.

4. The Petition was dispensed by way of written submissions. The Petitioner submitted that Section 14 of the National Police Service Act (hereafter, the Act) provides that the business and affairs of the Commission shall be conducted in accordance with the Second Schedule. The Petitioner submitted that pursuant to paragraph 3 of the Second Schedule of the Act, the quorum of meetings of the Commission is set at six members. That Regulation 10(1) of the National Police Service Regulations further provides that in order to ensure expeditious disposal of matter, the Commission may constitute such number of panels and comprising such persons as it shall determine. The Petitioner submitted that this outrightly means the vetting panel ought to be comprised of more than one Commissioner. That the Respondent thus lacked the requisite quorum to interview him or render a decision against him since it was only composed of one commissioner during the Vetting Interview. It is his submission that since the proceedings were undertaken thereof without a quorum, the decision is in itself illegal and unlawful.

5. The Petitioner further submits that Regulation 25(4) of the Regulations provides that decisions shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the Commission. That in his case on the contrary, a Commissioner who never participated in the vetting interview at all purportedly signed the decision. He cites the case of **Eusebius Karuti Laibuta v National Police Service Commission [2014] eKLR, Petition No. 79 of 2014** where Odunga J. questioned the basis of participating in a decision when not having participated in the hearing which in his view is unlawful and unfair. The Petitioner submitted that the position by Odunga J. was buttressed in the case of **Peter Kemboi Chemos v National Police Service Commission [2018] eKLR, Petition No. 9 of 2017** where the Court held that the officer signing a judgment on a vetting decision owns it as their decision and that one cannot however determine a matter they never heard. The Petitioner submitted that consequently, Commissioner Murshid Mohamed signing the decision when he knew he was never present during the vetting interview rendered the decision a nullity. The Petitioner submitted that Regulation 10(2) of the Regulations provides that the Commission may establish panels comprising such number of its members and co-opted persons as it may deem necessary for the purpose of determining applications for review and that in his case, the vetting review panel was improperly constituted of six instead of seven panelists and its decision was further prepared and signed by Commissioner John Kavuludi who was not present during the vetting review. The Petitioner submitted that as demonstrated through case law submitted herein above, both the vetting review and the decision thereat was illegal. He submitted that the Respondent is guided by the national values and principles of governance highlighted under Article 10(2)(b) of the Constitution and that human dignity is further a constitutional right guaranteed under Article 28 of the Constitution. The Petitioner cited the case of **A. N. N v Attorney General [2013] eKLR, Petition 240 of 2010** stated that the right to human dignity is breached when certain things or acts are done to a person and which have the effect of humiliating or subjecting him or her to ridicule. He further submits that the Respondent failed to accord him the right to equal treatment before the law under Article 27 as can be deduced from the Hansard of both the vetting interview and that vetting review. The Petitioner submitted that it is uncontroverted that he was never supplied with prior and adequate notice of the nature of the vetting interview contrary to Section 4(3)(a) of the Fair Administrative Action Act. The Petitioner cited the case of **Republic v National Land Commission & Another Ex Parte Farmers Choice Limited [2020] eKLR, Judicial Review 6 of 2019** where it was held that an applicant is deprived of the right to fair administrative action where there is lack of sufficient or proper notice. The Petitioner submitted that he was also not notified of his right to be accompanied by a legal representative while attending the vetting interview and review contrary to Section 4(3)(e) of the Fair Administrative Action Act. It is the Petitioner's submission that despite cross-examination being an important aspect of procedural fairness, he was not given a chance to challenge the assertions made by Ken Rucho.

6. The Petitioner submitted that the Respondent completely failed to consider his spouse's bank statement despite the same having been provided for on the day of vetting as had been demanded by the vetting panel and that the Respondent further ignored a fundamental fact that his wealth declaration had been done in December 2015 and consequently arrived at a wrong conclusion that there is a disparity in the source of wealth declared and source of income. He further submits that he was only given less than 7 minutes out of 26 minutes, to address his ground for review and was not given enough time to respond. The Petitioner submits that the Respondent by virtue of making an illegal, null and void decision has made him incur great costs in relation to this suit. That consequently it is only fair that the Respondent compensates him sufficiently for the costs incurred. The Petitioner thus prays that the Petition dated 30th September 2020 be allowed with costs.

7. The Petitioner seeks relief for the alleged infarctions that led to his removal from the Police Service. He asserts the decision to remove him was made by one panel and issued by another Commissioner contrary to expectations. He asserts that the Vetting Panel did not give him an opportunity to defend himself. The record speaks for itself. When he went before the panel he was given time to refute the allegations of financial impropriety concerning his Mpesa statements. He was consequently removed and on seeking review before the Panel Chaired by Commissioner Ronald Musengi he articulated the reasons he sought a review as being the new material he presented before the Review Panel on 13th July 2017. He was asked to explain the sources of income and he indicated that he received *per diem* each quarter. The sums he

declared in his declaration of wealth forms excluded the other income he now indicated was an oversight. He was heard by the panel comprising Commissioners Murshid Mohamed, Ronald Musengi, Mary Owuor and in the minutes it is indicated that Johnston Kavuludi was present. He signed the findings of the Panel on 22nd August 2017 and forwarded the decision of the Commission Board which was made on 7th November 2017 confirming the removal of the Petitioner as he had not presented any new material.

8. The above is ample evidence that the Commission and the Vetting Panel gave the Petitioner an opportunity first in the initial panel hearing and on review to explain himself. There was no suggestion that he was not heard as the meetings took place from 9.07am to 10.20am indicative that he was not heard for a mere 7 minutes. On the review panel he was heard from 10.56am to 11.20am a total of 26 minutes with the singular issue of new evidence/material being the focus of the review panel. It would seem nothing turned on the review and it thus confirmed the removal for service. In the Court's view there is nothing indicative of abridgment of the Petitioner's constitutional rights. This Petition being unproved is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2021

NZIOKI WA MAKAU

JUDGE