



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.E001 OF 2020

(Before D.K.N.Marete)

CPL ALEX MURIITHI NKANDA.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

THE INSPECTOR-GENERAL OF THE NATIONAL

POLICE SERVICE2ND RESPONDENT

THE DEPUTY INSPECTOR GENERAL, KENYA

POLICE SERVICE.....3RD RESPONDENT

JUDGMENT

This matter was originated by way of a petition dated 16th September, 2020.

The 2nd and 3rd Respondents in a Respondents Replying Affidavit sworn on 9th October, 2020 avers that the petition is ill conceived, premature, not merited and an abuse of the process of court and should be dismissed with costs to themselves.

The Petitioner's case is that he is a citizen within the meaning of Article 12(1) and 20(2) of the Constitution of Kenya, 2010 and therefore entitled to each and all fundamental rights expressed and implied under such constitution.

Again, Article 22(1) entitles the Petitioner and any other persons to move this court where a right and fundamental freedom in the Bill of Rights is denied, violated, infringed and threatened.

It is the petitioner further case that under Article 41(1) of the Constitution of Kenya, 2010 he becomes entitled to a fundamental and inalienable right to fair labour practices and also lawful and procedural fair administrative action per Article 47(1) of the said constitution.

The Petitioner's other case is that on 18th October, 2018, he was 'deployed' from Thika Police Base, Kiambu County to Magumu Traffic sub-base, Nyandarua County with effect from 4th August, 2018. Within six months thereof, he was redeployed to Kaharati police station, Murang'a County, though this was delayed by the onset of the Novel Covid-19 pandemic.

The Petitioner's further case is that on 18th October, 2019, he was deployed to Naivasha Traffic Base, Nakuru County but this was rescinded.

His other interactions on the so called deployments were as follows;

- 19th June, 2020-Kaharati Police Station but delayed by Novel Corona Pandemic.
- 24th June, 2020 –Likoni Police Station, Mombasa County in less than a month from Kaharati.
- 17th August, 2020 diverted to Kizingitini Police station, Lamu County.

His other case is that he, in the meantime, continued to be allocated duties by his superior at Magumu, Nyandarua County and was on duty as indicated by the duty roster of the week ending 23rd August, 2020 and 30th August, 2020.

The Petitioner further avers that on 5th September, 2020, having been on duty, he was arrested by Thika West sub-county police Commander and locked up for alleged desertion and release on no changes an indication that the deployments were malicious. This is as follows;

16. Your Petitioner contends that the said “deployments” are in violation of his rights to fair labour practice contrary to Article 41(1) of the Constitution and are also discriminatory and unlawful because of the following;

i) Under Regulation 2, Legal Notice Number 89 of 2015, the National Police Service Commission (Transfer and Deployment) Regulations, 2015 “deployment” means the temporary movement of an officer from one station to another station to undertake specific assignment, for a period not exceeding three months and in which the pay point remains at the original station in which the officer was initially posted prior to the deployment”

ii) Under Regulation 2, Legal Notice Number 89 of 2015, the National Police Service Commission (Transfer and Deployment) Regulation, “Transfer” means the relocation of an officer from the current duty station to a new duty station and matters relating to the officer including the pay point of the office is moved to the new duty station.”

iii) The frequent and consistent “deployments” are being used in a manner to be construed that they are being used as a disciplinary sanction contrary to Regulation 8 (3) of the aforesaid regulations.

iv) Through camouflaged as “deployment” the aforesaid three speedy “deployments” are actually transfers as my pay point and commanders changed from Nyeri, Othaya and Narumoru police stations and my County Commander from Nyeri to Murang’a police station and Murang’a county.

v) The frequent and speedy “deployments” are against the aforesaid regulations as they have not been sanctioned by the commission.

vi) The speedy and frequent “deployments” have been used in a manner to be construed as being used as a disciplinary measure contrary to regulation 3 (2) of the aforesaid regulations.

vii) The speedy and frequent “deployments” are discriminatory against me contrary to Article 27 (1) of the Constitution as they are without explanation or hearing yet the other 10,000 police officers in the Lenya police service are not being transferred in the same manner.

viii) The speedy and frequent “deployments” violate my rights to fair labour practices as it is unfair to keep on transferring an employee frequently and speedily even before I settle in one station while there are over 10,000 officers who have remained in one (1) stations for over five (5) years and more yet no explanation or reasons are offered for the frequent and speedy transfers.

ix) The frequent and speedy “deployments” are violation of my rights to a fair Administrative action as enshrined in Article 47 (1) of the Constitution and the Fair Administrative Action Act, 2015 as they are being used as a disciplinary sanction due to their uncalled for frequency yet I have not been given reasons for the same or given an opportunity to be heard and it affects me adversely as I am a family man with minor children who are in school and who are in my custody.

He appealed against these deployments to the Inspector General vide his letter dated 9th September, 2020 but this has not elicited on response to date. He further states thus;

18. Your Petitioner contends that the Respondents are bound by the National Police Service values and principles set out under Article 10 of the Constitution which includes observance of human rights, rule of law, integrity, social justice, non –discrimination and accountability. Article 27 (1) of the constitution binds the Respondents not to discriminate against your Petitioner.

He prays thus;

i) A declaration that the acts of the Respondents in frequently and speedily ‘deploying’ him from one station to another and currently transferring him from Magumu Traffic sub Base , Nyandarua County within a frame of three (30 weeks to Kizingitini police station within Lamu County is in breach of the Petitioner’s Constitutional rights under Article 27 (10,(2) and (3), 27 (1), 41 and 47 of the Constitution and the National Police Service Commission (Transfer and Deployment), Regulations 2015 and the same is null and void for all interests and purposes and the same be quashed.

ii) That pending the hearing and final determination of this petition, conservatory orders of stay do issue staying the transfer of the Petitioner from Magumu Traffic Sub-Base,Nyandarua County to Kizingitini Police Station, Lamu County or any other Sub-Base, County or police station and the Petitioner do continue with the normal discharge of his duties at Magumu Traffic Sub-Base.

iii) An order directing the Respondents not to interfere in any way with the Petitioner’s discharge of his duties at Magumu Traffic Sub-Base, charge him or discriminate him in any way.

iv) Any other or better Order this court may deem mete and just grant.

The 1st Respondent case is an admission and acceptance of her role under Article 246 (3) (a) and (b) of the Constitution of Kenya, 2010 and section 10 of the National Police Service Act. These functions have been executed with fidelity to the law.

The 1st Respondents other case is that in order to achieve its constitutional mandate and functions, she has developed several regulations, including the National Police Service Commission (Transfer and Deployment) Regulations, 2015.

The Respondent's other case is as follows;

- That at all material times to this petition, the petitioner was stationed at Magumu Traffic Base under Haraka police station, Nyandarua County where he served for three years.
- On 9th September, 2019, while at Magumu, he was transferred to Naivasha Traffic Base, Nakuru County.
- The transfer above was rescinded vide a letter dated 4th October, 2019 on his request.
- He has never been deployed to Kaharati police post in Murang'a by the Regional Commander.
- Regional Commanders have no authority of deployment.
- By a letter dated 22nd July, 2020, the petitioner amongst 22 other officers were deployed to various police stations within the country with his being from Magumu to Likoni police station, Mombasa County.
- The transfer to Likoni was rescinded on 12th August, 2020 and instead diverted to Kizingitini police station, Lamu County on grounds of shortage of officers and in the interest of national security.
- The petitioner defied his release order and has not reported to his area of deployment. His whereabouts were also not known as is evidenced by the desertion signal made by the Regional commander, Coast Region.
- He was not allocated duties from 23rd to 30th August, 2020 as he alleges.
- The petitioner upon being released to proceed to Likoni did not and was arrested on 7th September, 2020 for deserting service.
- That the arrest of the petitioner was legitimate and in accordance with section 94 of the National Police Service Act.
- That there is no nexus between his arrest and the alleged punitive and malicious deployment.
- He was charged and convicted in disciplinary proceedings for desertion.
- This is an attempt by the petitioner to disparage his seniors with a view to blocking his deployment.
- Article 41 of the Constitution does not apply to members of the National Police Service by virtue of Article 24 (5) so limiting.
- The petitioner has not filed an appeal against his deployment as alleged at paragraph 17 of the petition.
- There is no violation of the rights of the petitioner.
- Interim orders of court should be set aside and vacated for non disclosure of material facts.

They in conclusion pray that in view of the foregoing the petition be dismissed with costs.

The matter came to court variously until the 16th December, 2020 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there is a violation of rights of the petitioner by the Respondents?
2. Whether the petitioner is entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether there is a violation of rights of the petitioner by the Respondents. The petitioner in his written submission reiterates his case and submits that the numerous "deployments" are a violation of his rights to fair labour practices contrary to Article 41(1) of the constitution and discriminatory contrary to Article 27 of the same constitution. They are indeed unlawful.

The petitioner buttress his case by a reference to Regulation 2, Legal Notice Number 89 of 2015, the National Police Service Commissions

(Transfer and Deployment) Regulations, 2015,) which provides as follows;

Deployment” means the temporary movement on an officer from one station to another station to another station (sic) to undertake a specific assignment, for a period not exceeding three months and in which the pay point remains at the original station in which the officer was initially posted prior to the deployment”

This is in contrast to Regulation 2 of the said Legal Notice which provides thus;

“Transfer means the relocation of an officer from the current duty station to a new duty station and matters relating to the officer including the pay point of the officer is moved to the new duty station”

The petitioner’s further submission is that he was deployed as follows;

- i) Letter dated 11th September 2019 – from Magumu sub-base –Nyandarua County to Naivasha Traffic Base – Nakuru County w.e.f 23.9.2019.
- ii) Letter dated 19th June 2020 from Magumu sub-base Nyandarua County to Kaharati Police post-Murang’a County w.e.f 26.2.20
- iii) Letter dated 24th July 2020 from Magumu sub-base Nyandarua County to Likoni police station Mombasa County w.e.f immediately.
- iv) Letter dated 27th August 2020 deployment rescinded and diverted from Likoni police station Mombasa County to Kisingitini Police Station –Lamu County.
- v) The purported “deployments” are actually transfers. They violate Regulation 3 (1), (2) and 8 (1), 12 and (3) and 9 of Legal Notice Number 89 of 2015.

He submits that under Regulation 3 (1) and Article 246 (3) of the Constitution only the commission has the mandate to transfer. Transfers require that an officer has served for a continuous period of one year and a maximum of three. In his case, the purported deployments were not as such but punitive transfers as he was not required to undertake specific assignments for a period not exceeding three (3) months.

Further, he submits that he had not served for a period of three years at Magumu police station by 11th December, 2019 when he was “deployed” to Naivasha Traffic Base and likewise on 19th June, 2020, 24th July, 2020 and 24th August, 2020.

The petitioner in conclusion faults his arrest and arraignment before the ordering room proceedings as these were irregular as he had not deserted duty as alleged. Again, the arresting officer was not his sub-county commander as is required of the police regulations.

The 1st Respondent in her written submission dated 2nd February, 2021 denies a violation of the petitioner’s rights. She submits that the petitioner has not in any specific manner laid out the breaches of the constitution alleged to have been committed against him. On this, she chose to rely on the authority of **Godfrey Paul Okutoyi** (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habiolaka –Executive Director (secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another (2018)eKLR, where the court observed thus;

“49. It is now an established principle of law that anyone who wished the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdiction basis for it. This was stated in the case of Anarita Karimi Njeru v Republic (No.1) – (1979) KLR 154 where the court stated;

50. This principle was emphasized by the Court of Appeal in Mumo Matemo v Trusted Society of Human Rights Alliance (2014)eKLR, where it stated thus;

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

51. looking at the petition and the supporting affidavit as well as the manner of pleading therein. I am unable to find any semblance of a constitutional petition pleading breach of known constitutional provisions, violation of and or infringement of rights and fundamental freedoms. What I find is a general pleading on breach of a statutory provision capable of redress in a normal suit and not through a constitutional petition”

The 2nd and 3rd respondents also submit a case against any violation of the constitutional rights of the petitioner. At the onset, it is their submission that section 41 and 47 of the constitution are not applicable to person in the National police Service Commission by dint of Article 24 (5) (d) of the constitution and section 47 of the National police service Act.

Their further submission is that the petitioner as a police officer is available for service at any police service in Kenya and is subject to all

law relating to this service. He therefore deny that the deployment and transfers of the petitioner were unlawful and unprocedural.

The 2nd and 3rd respondents further submit that the petitioner was transferred from Magumu Traffic Base on 4th July, 2017. Here he had served for over three (3) years as is evidenced by a casualty return signal of the same date.

Further, the petitioner's deployment to Naivasha traffic base was rescinded on 9th September, 2019 through a signal dated 4th October, 2019 on his request. He did not proceed to Naivasha but continued working at Magumu Traffic Base from 2017. The petitioner was never deployed to Kaharati police base and the alleged signal of transfer is fictitious and a forgery. The allegation of speedy deployment therefore a lie.

Again, the respondents submit that the petitioner has not exhausted available internal disputes resolutions mechanisms before resulting to court. Article 246 enables the 2nd Respondent to manage the Human resource functions whereas sub-Article 3 (b) is responsible for observing due process in the police service.

It is their case that this petition is premature, vexatious and an abuse of the process of court. On this, they seek to rely on the authority of **Narok County Council vs Transmara County Council (2000)1.EA 161** where under similar circumstances, inopportune reference was made to court.

A look at the respective cases of the parties brings out a case in favour of the petition. His case overwhelms that of the petitioner. The Petitioner has illustrated a case of unmitigated harassment on his part at the work place through frequent and unjustified deployments by his seniors.

The Petitioner has also brought out a case of arrest and subjection to room orderly proceedings for desertion of work which he denies. He deems and submits that the conduct of the respondent in dealing with his employment as police officer is unlawful and unconstitutional and a violation of his rights under the said constitution.

The 2nd and 3rd respondent deny breach and violation of the petitioner's right and fundamental freedoms and fault his case as being vexatious and an abuse of the process of court. They pegged their defence on the authority of **Anarita Karimi Njeru v Republic** and buttress this by submitting that the claimant's case is based on half truths and outright falsehoods. It is vexatious, premature and an abuse of the process of court. It is intended to Bismarck the offices of his seniors who have conducted themselves appropriately in the circumstances.

The framing of the petitioner's case has also been faulted by the respondents. Some of the pleadings and evidence adduced has been doubted and faulted for being a fabrication and forgery. This is not answered by the petitioner. His case comes out as a thriller scene not supported by any evidence. All his allegations of violation of rights have been answered by the respondents to satisfaction.

It is their case that the Petitioner has not complied with Section 107 of the Evidence Act provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

This is a case of your word against mine. In this circumstances, matter is decided on a balance of probabilities. Here, the petitioner's case overwhelms that of the respondents in a balance of probabilities. He has overwhelmingly brought out a case of a violation of rights through frequent and not considerate deployments and transfers. I therefore find a case of a violation of the rights of the petitioner in the circumstances. This answers the 1st issue.

The 2nd issue for determination is whether the petitioner is entitled to the relief sought. He is. Having won on a case of violation of rights, he becomes entitled to the reliefs sought.

I am therefore inclined to allow the petition and orders reliefs as follows;

i) A declaration be and is hereby issued that the acts of the Respondents in frequently and speedily deploying the petitioner from one station to another and currently transferring him from Magumu Traffic Sub Base, Nyandarua County with a time frame of three weeks to Kizingitini station, Lamu County is in breach of the petitioner's constitutional rights under Articles 27 and 47 of the Constitution and the National Police Service Commission (Transfer and Deployment) Regulation, 2015.

ii) That this transfer is null and void for all interests and purposes and the same is quashed.

iii) That the respondents be and are hereby prohibited from interfering in any way with the discharge of the petitioner's duties at Magumu Traffic Sub-Base.

iv) That these orders of court are not an immunity to the petitioner to override the rules and regulations appurtenant to its employment obligations.

v) That these orders are not in any way a limitation to the respondents in dealing and effecting normal work relations on the petitioner.

vi) That the costs of this petition shall be borne by the Respondents.

Dated and delivered at Nyeri this 26th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Wahome Gikonyo instructed by Wahome Gikonyo and Company Advocates for the Petitioner.
2. Mr. Lumumba holding brief for Sarah Muthiga for the 1st Respondent.
3. Mr.Njoroge instructed by State Law Office for the 2nd and 3rd Respondents.