



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 96 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 28, 41(1), 47(1 & 2), 48, 50, 162(a) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25, 28, 41(1), 47(1 & 2) AND 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF SECTIONS 4(6) OF THE NATIONAL POLICE SERVICE COMMISSION ACT NO. 30 OF 2011 (SUBSIDIARY LEGISLATIONS)

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTION 41 AND 45 OF EMPLOYMENT ACT

BETWEEN

MAXWELL ONDUSO.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DEPUTY INSPECTOR GENERAL.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The Petitioner, Maxwell Onduso filed a Petition dated 23rd June 2020 seeking for the following Orders:-

a. A declaration that the acts of the Respondents in suspending and dismissing the Petitioner from the Administration Police Service is a breach of the latter's Constitutional Rights under articles 25(c), 28, 41(1), 47(1) and (2), 50(1) of The Constitution of Kenya, (2010) and that the same are null and void for all intent and purposes.

b. A declaration that the Respondents acted unlawfully in suspending and subsequently dismissing the Petitioner as the Respondents contravened section 4 of the Fair Administrative Action Act and sections 41 and 45 of the Employment Act.

c. An order of Judicial Review of Certiorari to quash the Suspension of the Petitioner made in an Orderly Room Proceeding conducted on 1st November 2017 at RBPU Headquarters Kanyonyo for denying the Petitioner his right to a fair trial under Article 25, 47(1) and (2) and section 4 of the Fair Administrative Actions Act.

d. An order of Judicial Review of Certiorari to quash the dismissal of the Petitioner by the Respondents from the Administration Police Service made on the 25th June, 2019 for breaching the Petitioner's right to fair trial under articles 25, 47(1) and (2) of the Constitution and section 4 of the Fair Administrative Action Act.

e. An order of Judicial Review of Mandamus to compel the Respondents to reinstate the Petitioner to the Administration Police Service as his dismissal was unlawful, irregular and unjustifiable.

f. An order do issue directing the Respondents to compensate the petitioner for the violation of his rights under article 25, 41, 47 and 50 of the Constitution.

g. Costs of this Petition and interest thereon.

h. Any other relief or order that this court may deem fit to grant.

Background

2. The Petitioner avers that on 6th January 2016 he was offered employment by the 1st Respondent as an Administration Police Constable in Nambale Sub-County for 15 months under the terms and conditions expressly stated in his appointment letter which he accepted and duly signed. That on 20th March 2017, he received a Redeployment of in-service Administrative Police Personnel letter being *Circular No. NAM/ST/1/3/VOL.1(337)*, deploying him from Nambale Sub-County to RBPU-SG. That he later received a letter dated 4th May 2017 Ref: *NAM/ST/1/3/VOL.1 (09)* from the Nambale Sub-County Commander through the Deputy Officer Nambale Sub-County revoking the said deployment and instead deploying him to Lamu West Sub-County and which letter had the Rubber Stamp of the releasing officer at Nambale and Receiving officer at Lamu West Sub- County.

3. That when his salary was unexpectedly withheld in October 2017, the acting County Administration Police Commander wrote a letter dated 20th December 2017 to the 3rd Respondent requesting for reinstatement of the Petitioner's stopped salary.

4. That the Lamu West Sub-County Administration Police Commander issued him with a letter dated 6th February 2018 being an approval of his paid Annual Leave between 7th February 2018 and 27th March 2018.

5. The Petitioner avers that the 1st Respondent issued him with a suspension letter dated 26th March 2018 on allegations of: absenteeism from duty for 64 days without official leave; failure to attend team up parades between 27th September 2017 and 1st November 2017; refusal to resume duty and thus negligent in the performance of his duty; and breaking out of RBPU Camp-Kanyonyo. He avers that he appealed against the suspension vide an Appeal dated 2nd May 2018 and further wrote a letter to the 3rd Respondent on 27th May 2018 reminding him of the said Appeal. That he was eventually dismissed for the alleged absenteeism from duty via a letter dated 9th July 2019 and which dismissal he appealed against vide a letter dated 27th July 2019. That following the dismissal, an Officer Clearance Form was done in his respect on 29th June 2019 and he eventually signed a declaration letter dated 27th July 2019. That his advocates addressed a demand letter to the National Police Service Commission and copied to the Attorney General, Independent Police Oversight Authority and Commission on Administrative Justice (Ombudsman).

6. He further avers that prior to his dismissal he was never issued with a warning and a Notice to Show Cause and was also not invited to or subjected to any disciplinary hearing. Further, he was not afforded an opportunity to respond to the allegations leveled against him. That the 1st Respondent blatantly violated **Articles 10, 27, 28, 41, 47, 48 and 50 of the Constitution of Kenya** and **Section 4 of the Fair Administrative Actions Act 2015** since it relieved him of his duties without any sufficient reasons and without affording him a fair hearing. That the 1st Respondent violated his rights to a fair hearing and fair labour practices under Article 41(1) of the Constitution and that the fictitious reasons for the said dismissal as given by the 1st Respondent was contrary to Article 47 on fair administrative action. The Petitioner avers in his Supporting Affidavit that unless the Respondents' actions are quashed, the same fly in the face of the Constitution, Statute and best practice.

7. The Respondents filed a Replying Affidavit sworn on 21st October 2020 by the Director Human Capital Management attached at Administration Police Service Headquarters, Davies Leruma Lomwatu. He avers that the petition as filed is fatally defective, does not have a basis in law and/or fact and is an abuse of the due process of this court. That the Respondent consequently applies for the suit to be struck out and/or dismissed with costs. He also avers that the National Police Service Commission should be the respondent herein being the constitutional mandated authority to keep under review all matters relating to human resources policies of members of the service as under

Article 246 3(b) of the Constitution of Kenya.

8. He further avers that the Petitioner was enlisted in the Administration Police Service on 12th February 2016 and attended a recruit course at Administration Police Training College before he started working. He avers that the Petitioner upon redeployment to Rural Border Patrol Unit (RBPU-SG) in Kanyonyoo Kitui County but failed to report to the new station. That on 19th September 2017 the Administration Police Rural Border Unit released a trace signal when the Petitioner was traced and advised to report to RBPU-SG with immediate effect before stern administrative action was conducted. That on 1st November 2017 at RBPU Headquarters Kanyonyo, the Petitioner was charged in orderly room proceedings in absentia pursuant to **Section 88(2) as read with Eight Schedule of the National Police Service Act 2011** and which charges included:

a) Count I: the Petitioner absented himself without leave contrary to section 88(2) as read together with part 1(h) of the Eight Schedule of National Police Service Act 2011; that from 27th September 2017 to 1st November 2017, the Petitioner absented himself from duty without official permission for Sixty Four days contrary to section 1(h) of the Eighth Schedule of the National Police Service Act 2011.

b) Count II: Failing to attend Team-up parades contrary to Section 88(2) as read without part 1(p) of the Eighth Schedule of the National Police Act 2011; that without reasonable cause the Petitioner failed to attend morning and evening team -up parades for a period of Sixty Seven (67) days from 27th September 2017 to date contrary to section 88(2) as read with part 1(P) of the Eighth Schedule of the National Police service Act 2011.

9. That the presiding officer of the orderly room proceedings proposed that the Petitioner be dismissed from the service in accordance with **Section 89(1) subsection (f) of the National Police Service Act 2011** and that the orderly Room proceedings were forwarded to the National Police Service Commission for approval and confirmation. That the Petitioner was then lawfully suspended as under the National Police Service Act pending hearing and determination of his disciplinary case and that on 9th July 2019, the Commission approved his dismissal with effect from 25th June 2019. That the Petitioner was informed of his right to appeal the decision and on 7th August 2019 he appealed against his suspension to the Unit Disciplinary Appeals Board which forwarded its recommendations to the Service Disciplinary Appeals Board. That the Petitioner is therefore prematurely before court since the matter is currently awaiting determination before the said Service Disciplinary Appeals Board. That granting the orders sought by the Petitioner will be undermining and usurping the mandate and authority of the Respondent.

10. The Petitioner swore a Further Affidavit on 4th November 2020 averring that the Respondents filed their response out of time without being granted leave of the Court despite being indulged by this court on several occasions and that the said action infers that the Respondents were attempting to delay the matter. That the pleadings had closed by the time the Respondents' response was being filed and his advocate had further filed his written submissions in Court and that this Honourable Court should thus not consider the Response which stands to be struck out.

11. The Petitioner further avers that he was on official pass leave when he received the transfer letter redeploying him from Nambale to Rural Border Patrol Unit and that he received a call from an officer in RBPU asking for his whereabouts and requiring him to report to RBPU with the form that showed he was on leave. He denies receiving any invitation to respond to the alleged charges that were tabled against him from RBPU Headquarters Kanyonyo and avers that both the appeals against his suspension and dismissal respectively have never been heard and/or determined to date contrary to the laid down procedures. That the Respondents are clearly taking their precious time so that his appeal is overtaken by the set timelines seeing that it has been over 1 year and several reminder letters later. That the Respondents' assertions that he has prematurely come before Court is therefore unconscionable.

12. The Petition was dispensed by way of written submissions.

Petitioner's Submissions

13. The Petitioner submits that he was wrongfully, unlawfully and unfairly suspended and dismissed by the 1st, 2nd and 3rd Respondents despite giving a clear and detailed account in response to the allegations made against him in the letter of suspension. That the Respondents further failing to respond to his appeals against the suspension and dismissal respectively. That this infers they were unable to justify the same contrary to **sections 43 and 45 of the Employment Act**. That these actions disregard fair labour practices and fair administrative action under **Articles 41 and 47 of the Constitution**. That the Respondents' actions adversely affected him as his access to social and economic rights were dependent on his income. Further, that the Respondent neglected to apply the due process and procedures for disciplinary proceedings outlined in the **National Police Service Commission (Discipline) Regulations 2015** and the **National Police Service Act No. 11A of 2011**.

14. That **Section 89 (PART X) of The National Police Service Act No. 11A of 2011** states:

(1) A police Officer who commits an offence against discipline is liable to be punished by-

(a) reprimand suspension

(b) order of restitution

(c) stoppage of salary increments for a specified period not exceeding one year

(d) reduction in rank

(e) dismissal from service

(2) The Police Officer authorized 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 which will 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 that such officer is not a senior 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.

15. Further, that **Regulation 3 of the Regulations** states that the National Police Service Commission shall exercise disciplinary control over the Service and instances of such disciplinary control. That **Regulation 10 of the Regulations** provides that the disciplinary matter of Police officers of the same rank as the 1st Petitioner shall be heard by a Subordinate Disciplinary Committee constituted by the Commission and that the officer may be accompanied by another officer of their choice, provided that such officer is not of a senior rank to the presiding officer. That **Regulation 17** provides a clear guideline for hearing during disciplinary proceedings and that the procedure for conduct of disciplinary hearings is expressly outlined in **Regulation 11** as follows:

(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 days' notice before the date of the 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.

(8) The disciplinary hearings before the Disciplinary Committees shall be conducted expeditiously and without undue delay or technicalities and any delay in the disposal of the proceedings beyond twenty-eight days shall be reported to the Commission together with the reasons for such delay.

16. That the right to appeal and the appropriate procedure thereon is provided for in **Regulation 22** that:

(4) The Commission or the designated appellate body as per the Service Standing Orders or the Commission, as the case may be, may deal with an appeal by way of written submissions by the parties or through oral hearing or both.

(5) Where an appeal is to the Commission and the matter is to be handled through a hearing-

(a) the Commission shall constitute a panel to hear the case;

(b) the panel shall consider the matter within twenty-one days and shall make recommendations to the Commission for the Commission's considerations and final decision; and

(c) the decision and reasons for the decision shall be given to the officer by the commission, through the Inspector-General within fourteen days of the receipt of the recommendation of the panel.

17. The Petitioner submits that the Respondent contravened **Regulation 11(3) of the Regulations** as it failed to accord him three (3) calendar days to show cause why disciplinary action should not be taken and that neither did the Respondent issue him with at least seven (7) days' notice before the date of the disciplinary hearing as provided under **Regulation 11(4)**. That the orderly room proceedings were conducted in his absence and without evidence that notification of the date, venue and time of the disciplinary hearing was issued to him as stipulated under **Regulation 12(1)**. He further submits that the Respondents failed to respond to his appeals as directed under **Regulation 22 of the Regulations**.

18. The Petitioner relies on the case of **Joseph Mwenda Mbuko v Provincial Police Officer & 2 Others (2013) eKLR**, where the Court stated that it is clear Police Officers facing disciplinary proceedings are by law entitled like any other citizen to due process and that the principles accord to those of Article 47(1) and 50(1) and (2) of the Constitution of Kenya, 2010 and adhere to the rules of natural justice. Further, that the police Force is obliged to follow them to the letter in conduct of disciplinary proceedings. The said Court went on to hold that:

“In the circumstances I find the proceedings leading to the dismissal of the petitioner were conducted in breach of the provisions of the STANDING ORDERS on discipline and as a result the petitioner’s rights to fair hearing guaranteed by Article 47(1) and 50(1) and (2) of the Constitution of Kenya, 2010 were violated. I therefore enter judgment for the petitioner against the respondents jointly and severally....”

19. The Petitioner further relies on the case of **Edwin Kosgei Kibor & another v Inspector General of Police & 3 others [2018] eKLR**, where the Court held that the process the 2nd petitioner was subjected to having been with no prior notification of charges, was in violation of the Force Standing Orders and the trial was therefore a nullity. He submits that the importance of notice and hearing prior to termination on grounds of misconduct are reiterated in **Section 41 of the Employment Act 2007** and that the Respondents further grossly violated **Sections 4 and 6 of the Fair Administrative Action Act 2015**. That failure to issue him with notice to appear, informing him to attend the Orderly Room Proceedings and involving him in the Orderly Room Proceedings is in violation of his right to fair hearing, trial and administrative action as espoused under **Articles 47 and 50 of the Constitution of Kenya**.

20. He submits that he is rightfully entitled to compensation under **Article 23 (3) of the Constitution of Kenya 2010** as he has demonstrated that the Respondents violated his rights under the Constitution, Statute and Service Regulations. To this end he relies on the case of **Edwin Kosgei Kibor & another v Inspector General of Police & 3 others [2018] eKLR** where the Court awarded the petitioners general damages in the sum of Kshs.1 Million upon finding that the Respondents violated the petitioners’ rights. Further, that in **Joseph Sitonik v Attorney General & Another [2012] eKLR**, the Court awarded the petitioner Kshs.250,000/- as general damages for violation of his rights and fundamental freedoms.

Respondents’ Submissions

21. The Respondents submit that the Petitioner was dismissed fairly and procedurally pursuant to the **National Police Service Commission Discipline Regulations 2015** and **section 88 and the eighth schedule of the National Police Service Act, 2011**. That the right to fair hearing depends on the character of the decision making body as was held in **Lloyd v McMahon [1987] AC 625, 720**. That the Orderly Room Proceedings were fair as they complied with **Paragraph 16 (x) of the FSO** which requires that accused to be notified of the intended proceedings 24 hours before the commencement of inquiry. In support of this submission they rely on the case of **Stephen Munga v Minister for interior & National Coordination and Republic v Minister for interior and National Coordination & 3 Others Ex-parte PC Stephen Munga [2015] eKLR**.

22. The Respondents further submit that the Petitioner is prematurely before this court as his appeal is still pending before the Service Appeals Board. They cite the case of **Geoffrey Mworira v Water Resources Management Authority [2015] eKLR** where the Court held that the court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. They also rely on the cases of **Corporal Thomas Othoo v National Police Service Commission & 3 others [2016] eKLR** and **Francis Mbugua v Commissioner of Police & 2 Others**.

23. It is the Respondents’ submission that the Employment Act, 2007 which the Petitioner has relied upon does not apply to the Petitioner who is a police officer and that the applicable law is the National Police Act, 2011. Further, that the orders sought by the Petitioner cannot be issued against an institution that has no constitutional mandate and that the Judicial review orders sought can only be issued against the Police Service Commission who is not a party to this suit. That consequently, the Respondents herein have no powers and authority to effect the orders sought by the Petitioner.

Determination

24. I have considered the pleadings and submissions of the parties. The issues for determination are the following –

- (i) The law applicable to this suit.*
- (ii) Whether this suit is premature.*
- (iii) Whether the suspension and subsequent dismissal of the Petitioner was for valid reason and if fair procedure was followed.*
- (iv) Whether the Petitioner is entitled to the orders sought.*

Applicable Law

25. Section 3(2) of the Employment Act provides as follows –

(2) This Act shall not apply to—

- (a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);**
- (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force;**
- (c) the National Youth Service; and**
- (d) an employer and the employer’s dependants where the dependants are the only employees in a family**

undertaking.

26. The Petitioner having been employed as an Administration Police Officer, the Employment Act does not apply to him. In this respect I agree with the Petitioner's submission, the applicable procedure is the Orderly Room Proceedings under the National Police Act.

Whether this suit is premature

27. The Respondent has pleaded that this suit is premature as the Petitioner has not exhausted the procedure under the National Police Service Act as his appeal is pending determination.

28. The doctrine of exhaustion of remedies refers to a judicial or statutory requirement that a dispute or controversy will not be heard under the judicial process until the non-judicial or administrative remedies have been pursued. There are now even exceptions to this doctrine which include whether the issue involved is a pure question of law; when due process is clearly violated; when the administrative action is patently illegal amounting to lack or excess of jurisdiction; when there is urgent need for judicial intervention and where there is unreasonable delay or official inaction, to name but a few.

29. In the instant case, the Petitioner was advised of his right of appeal. In fact he appealed against both his suspension and his dismissal. The appeal against suspension is dated 2nd May 2018 while the appeal against dismissal is dated 27th July 2019. A reminder was sent on the appeal against suspension on 27th May 2019, before the Petitioner received the letter of dismissal.

30. Under Regulation 22 of the National Police Service Commission (Discipline) Regulations, 2015, provides for appeal to be heard within 21 days. Regulations 22 and 23 provide as follows in respect of appeals –

22. Procedure for appeal

(1) An appeal to the Commission or to the designated appellate authority within the Service, as the case may be, shall be in writing and shall be made within thirty days of the decision appealed against.

(2) An officer who appeals to the Service designated appeal authorities shall submit a copy of the appeal to the Inspector-General and to the concerned Deputy Inspector-General of the Officer's Service and to the Commission for information purposes.

(3) The Commission or the designated appellate body may, in accordance with the Service Standing Orders, accept an appeal out of time where there is a compelling reason to do so or in the interest of justice, and the officer shall in writing state the reasons justifying the appeal out of time.

(4) The Commission or the designated appellate body as per the Service Standing Orders or the Commission, as the case may be, may deal with an appeal by way of written submissions by the parties or through oral hearing or both.

(5) Where an appeal is to the Commission and the matter is to be handled through a hearing —

(a) the Commission shall establish a panel to hear the case;

(b) the composition shall depend on the rank of the person involved and shall be comprised of-

(ii) a Commissioner to chair the panel;

(iii) an officer from the same Service as the officer appealing, designated by the Inspector-General in consultation with the respective Deputy Inspector-General or Director of the Directorate of Criminal Investigations, as the case may be;

(iv) a human resource officer from the Service of the concerned officer; and

(v) any other officer who possesses the knowledge and skills deemed necessary by the panel;

(c) the panel shall consider the matter within twenty one days and shall make recommendations to the Commission for the Commission's consideration and final decision; and

(d) the decision and reasons for the decision shall be given to the officer by the Commission, through the Inspector-General within fourteen days' of the receipt of the recommendation of the panel.

23. Report of the panel.

(1) The appeals panel shall deliver its report to the Commission within seven days of the conclusion of the hearing and may, in respect of a decision appealed against recommend to –

(a) uphold the decision;

(a) set aside the decision;

(b) vary the decision as it considers to be just;

(c) make such directions as it may considers appropriate, with respect to the decision;

(d) make any decision for refund, reinstatement of remuneration or release of withheld payment due to an officer as it considers to be just;

(e) direct that disciplinary action be taken against any authorizing officer or other person within the Service who has failed to discharge a duty that was under obligation to discharge in relation to the disciplinary case; or

(f) make any other appropriate decision in view of the circumstances of the case.

(2) An appellant who is dissatisfied with the decision of the commission may petition the commission for review, if there is new information that warrants such review by the Commission.

(3) The Commission may issue guidelines for the better carrying out of disciplinary processes and proceedings.

31. From the foregoing, it is clear that the period provided in the Regulations for dealing with appeals had long lapsed by the time the Petitioner filed the instant petition. He was therefore entitled to come to Court as the Respondents had failed to deal with his appeal within the prescribed period.

32. I thus find that the doctrine of exhaustion is not applicable in the circumstances of his suit.

Whether the suspension and subsequent dismissal of the Petitioner complied with due process

33. The facts of his case are that the Petitioner was on 20th March 2017 redeployed from Nambale Sub County where he had been serving for 15 months, to RBPU-SG. That on 4th May 2020, he was issued with another deployment letter to Lamu West Sub-County.

34. The letter dated 20th March 2017 contained names of officer who had been re-deployed while the letter dated 4th May 2017 was specifically addressed to the Petitioner by the Sub-County AP Commander Nambale, through the Duty Officer, Nambale Sub-County.

35. The Petitioner reported to Lamu on 10th May 2017 and was accordingly deployed by the Sub County Administration Police Commander as evidenced by the letter at page 18 of the Petitioner's bundle.

36. He was serving in Lamu on 26th March 2018, the date of the letter of his suspension. The letter of suspension is reproduced below –

“Ref. No.NPS/APS/HRM/3/15/VOL.11/364 26th March 2018

P/NO: 2015062865

AFC Maxwell Onduso

Thro'

The Commandant,

Rural Border Patrol Unit.

P. O Box 550-90119.

MATUU

RE: SUSPENSION

You were charged and convicted for dismissal from the AP service in an Orderly Room Proceeding conducted against you in absentia on 1st November, 2017, at RBPU Headquarters – Kanyonyo for committing offences against discipline pursuant to section 88 (1)(2), as read with the Eighth schedule of the National Police Service Act, 2011.

Count I: That you absented yourself from duty without official leave for a period of sixty four (64) days wef 27th September, to 1st November 2017, being the date you were charged in absentia, contrary to Section 88(2) 1(h) of the -Eighth schedule of the National Police Service Act, 2011.

Count II: That between 27th September and 1st November 2017, you failed to attend team-up parades, contrary to section 88(2) 1(p) of the Eighth schedule' of the National Police Service Act, 2011.

Count III: That you were found to be negligent in the performance of your duties by refusing to resume duty when you were required to, contrary to section 88(2) 1(t) of the Eighth schedule of the National Police Service Act, 2011.

Count IV: On 27th September, 2017, you willfully without

lawful excuse broke out of RBPU Camp – Kanyonyoo, contrary to section 88(2) 1 (ee) of the Eighth schedule of the National Police Service Act, 2011.

Absenting yourself from duty without official leave, failing to attend team-up parades, being negligent in the performance of your duties and willfully without lawful excuse breaking out of any police line or camp are serious offences and gross misconduct against discipline and outright contravention of the NPSC (discipline) regulations more particularly if committed by a member of a disciplined service like you.

Accordingly and in exercise of powers conferred by section 89 (1) and (6) of the NPS Act, 2011, as read together with Chapter 30; Section 7 (1) and (2) of the National Police Service Standing Orders (Legal notice No. 100) of 9th June 2017 in the Kenya Gazette No. 89, it has been recommended that you be and are hereby suspended from exercising the powers and functions of your office, pending the final decision and confirmation by the National Police Service Commission.

While on suspension, your powers, privileges and benefits as a police officer shall be suspended but you continue to be subjected to the same discipline, penalties and to the same authority as if you had not been suspended.

Further, be informed that while on suspension, you are NOT entitled to any salary pay. However, you are eligible to some allowances and therefore you will be paid house and medical allowances only. You will be reporting to your supervisor at an agreed interval of time.

Please be informed accordingly.

SIGNED

H. M. LUSWELL, HSC

For: DEPUTY INSPECTOR GENERAL”

37. During the period the Petitioner is alleged to have been absent he was serving at Lamu, as evidenced by the letter dated 20th December 2017, from the Acting County Administration Police Commander Lamu. The letter is reproduced below –

“Ref; No. AP/LAMCOUN/FNCE.5/VOL.I/40

The Deputy Inspector General,

Administration Police Service, Jogoo House 'A'

P.O Box 53258-00200

NAIROBI.

RE: REINSTATEMENT OF SALARY

P/NO: 2015062865 AFC MAXWELL QBIERO.

The above mentioned Administration Police Officer is currently deployed in Lamu West Sub County, Lamu County. He was redeployed to Lamu West Sub County from Nambale Sub County vide letter Ref. No. NAM/ST/1/3/VOL.I (09) dated 4th May, 2017. He was received at Lamu West Sub County Headquarters on 10th May, 2017 and deployed accordingly (Copy attached).

He has been receiving salary up to the month of October 2017 when it was stopped. Kindly reinstate his salary because he has been performing his duties well since he was received.

Thank you.

SIGNED

J. KIGEN

Ag. COUNTY AP COMMANDER

LAMU”

38. Between 7th February and 27th March 2018, the Petitioner as on approved annual leave as is evident from the letter of approval of annual leave dated 6th February 2018 reproduced below –

“Ref. No: 2015062865/21

MR. MAXWELL O. OBIERO.

(/P/NO. 2015062865

RANK: APC

Date: 6th February, 2018

REF: APPROVAL FOR ANNUAL LEAVE

With reference to your application for annual leave dated 3RD August, 2017, I wish to inform you that it has been approved. Your 30 days annual leave and six(6) traveling days starts on 7/2/2018 and expires on 27/03/2018. You will carry forward nil days being the balance of your annual leave due to this plus Nil days brought forward from last year. This should be utilized in accordance with section N.3 (4) of the code of regulations. (Revised 2006).

Please note the public Holidays, Saturdays and Sundays are excluded from this leave.

Yours faithfully

SIGNED

DAVID NDUNGU

SUB - COUNTY AP COMMANDER

LAMU WEST”

39. It is therefore absolutely clear that the Petitioner was never released to report to RBPU-SG at Kanyonyo as he was instead released to report to Lamu West Sub-County and duly reported there.

40. There was thus no valid reason for the suspension and subsequent dismissal of the Petitioner, which was based on confusion by the 1st and 2nd Respondents over the station that he was transferred to.

41. The procedure for commencing and hearing disciplinary proceedings set out under the Discipline Regulations were obviously not complied with. The Regulations provide for investigation before an officer is charged. Had the Respondent carried out investigations, even by merely making an inquiry from the Petitioner’s last station at Nambale, it would have been discovered that he had reported and was deployed at Lamu West Sub-County.

42. Regulation 5 and 9 specifically provide as follows –

5. Cooperation with the other agencies.

(1) The officer- in-charge shall be required to cooperate with Internal Affairs Unit, the Independent Policing Oversight Authority and other investigative agencies during the course of any disciplinary process.

(2) Authorized officers conducting investigations into complaints against police shall be required to conduct the investigations expeditiously and to issue monthly reports on the findings of investigations to the Internal Affairs Unit for their record and other purposes in line with their mandates.

(3) The Internal Affairs Unit shall be required to submit quarterly reports to the Commission through the Inspector-General of all complaints and outcomes of investigations conducted by the Unit and reported from various field reports.

9. Conduct of disciplinary proceedings

(1) Disciplinary proceedings shall be conducted in accordance with these Regulations the Service Standing Orders and any guidelines issued by the Commission from time to time.

(2) Where an offence against discipline is committed by an officer, the officer's supervisor may take a corrective action,

where applicable, pending the commencement of disciplinary process.

(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 days' notice before the date of the 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.

(8) The disciplinary hearings before the Disciplinary Committees shall be conducted expeditiously and without undue delay or technicalities and any delay in the disposal of the proceedings beyond twenty-eight days shall be reported to the Commission together with the reasons for such delay.

(9) The recommendations of the Disciplinary Committee shall be forwarded to the Commission for confirmation and approval and the Commission shall subsequently communicate the disciplinary action to be taken on the officer through the Inspector-General.

(10) The recommendations of the Subordinate Disciplinary Committee shall be forwarded to the Inspector-General or authorized officer as prescribed in the Service Standing Orders, for confirmation and approval and the Inspector-General or authorized officer shall subsequently communicate or implement, where applicable, the disciplinary action to be taken on the officer, taking into consideration the provisions of regulation.

43. Disciplinary hearings where an officer is absent is provided for under Regulation 12 as follows –

12. Disciplinary hearings where the accused is absent.

(1) Where an officer fails to attend a disciplinary hearing despite evidence of notification of the date, venue and time of the hearing the disciplinary hearing may proceed in the absence of the accused officer and the presiding officer shall record the reasons for the accused officer's absence.

(2) The appropriate disciplinary committee may upon conclusion of the hearing issue a determination of the disciplinary action to be taken in writing, and the disciplinary action taken shall be recorded immediately in accordance with these Regulations.

44. In the Petitioner's case, none of these regulations were complied with.

45. From the foregoing it is clear that the Petitioner is not guilty of the offences he was charged with. It is further clear that he was at work and that the disciplinary process was totally unwarranted. That the same arose due to failure of the Officer investigating the case to carry out proper investigations which would have revealed that the Petitioner was actually posted to Lamu West Sub-County and was indeed at work at the time of both his suspension and dismissal. The contents of the replying affidavit of DAVIES LERUMA LOMWATU is evidently not truthful especially paragraph 6 thereof which reads –

“That on 19th September 2017 the Administration Police

Rural Border Unit released a trace signal for the Petitioner for not reporting to the station Ref No. NPS/APS/10/8/1 dated 8^o March 2017 when he was traced and advised to report of RBPU-SG with immediate effect before stern administrative action is conducted.”

46. For the foregoing reasons, I find the suspension and subsequent dismissal of the Petitioner to have arisen out of the recklessness of the 1st and 2nd Respondent's Officer who failed to carry out proper investigations which would have absolved the Petitioner of any wrongdoing. The same was a travesty of the Petitioner's right to due process and the Respondent's own disciplinary procedure. The same was not only unconstitutional but also in contravention of the statutory process provided for in the relevant Act and Regulations.

Remedies

47. Having made the findings above and from the totality of evidence on record, I make the following orders: –

(i). A declaration be and is hereby issued that the acts of the Respondents in suspending and dismissing the Petitioner from the Administration Police Service is a breach of the Petitioner's Constitutional Rights under articles 41(1) and 47(1) and (2) of the Constitution of Kenya, (2010) and that the same are null and void for all intent and purposes.

(ii). An order of Judicial Review of Certiorari be and is hereby issued quashing the Suspension of the Petitioner made in an Orderly Room Proceeding conducted on 1st November 2017 at RBPU Headquarters Kanyonyo.

(iii). An order of Judicial Review of Certiorari be and is hereby issued quashing the dismissal of the Petitioner by the Respondents from the Administration Police Sendee made on the 25th June, 2019.

(iv). An order of Judicial Review of Mandamus be and is hereby issued directing the Respondents to reinstate the Petitioner to the Administration Police Service without loss of benefits, rank or position.

48. The 1st Respondent shall bear the Petitioner's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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 had 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.

MAUREEN ONYANGO

JUDGE