



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION no. 83 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010, ARTICLES 10, 19(2),**

**20(1), (2), (3) AND (4), 21(1), 23(3), 35(1), 41, 47(1) AND (2), 50(1), 258(1) AND 259(1)**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS 2013**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTON ACT, 2015**

**AND**

**IN THE MATTER OF THE VETTING OF GAZZETTED OFFICERS**

**IN THE RANK OF SUPERINTENDENT OF POLICE**

***BETWEEN***

**REGINA MUTINDI MBITHI.....PETITIONER**

***VERSUS***

**NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

1. The Petitioner, Regina Mutindi Mbithi, filed this petition on 24<sup>th</sup> May 2016. She thereafter filed an Amended Petition dated 21<sup>st</sup> June 2017 seeking for the following Orders:-

- a) A Declaration that the Petitioner’s Fundamental Rights and Freedoms have been violated.
- b) An Order of Certiorari do issue to quash the entire proceedings and the decision of the Respondent declaring that the Petitioner

had failed Vetting and had been discontinued from the National Police Service including the Decision.

- c) An Order for reinstatement of the Petitioner to her post as a Superintendent of the Kenya Police Service as well as reinstatement of all her privileges in that position.
- d) An order substituting the Respondent's decision with a declaration that there exists no material to find that the Petitioner had failed vetting.
- e) Compensation to the Petitioner for the violation of his fundamental rights and freedoms.
- f) Costs of this Petition
- g) Any other relief that this Court may deem just to grant.

## **Background**

2. The Petitioner avers that prior to her removal from service, she worked for the Respondent as a Superintendent of Police. Her last position was officer in charge of Highway Patrol Unit based at Traffic Headquarters Nairobi. That prior to the impugned vetting interview, the Petitioner was requested to fill out a vetting questionnaire and avail certain vital documents including Bank Statements for the two (2) years preceding the vetting exercise; copy of pin certificate and ID Card for the spouse; Tax Compliance Certificate; Curriculum Vitae; and copies of educational and professional certificates.

3. That without being informed that there were any complaints or adverse allegations or documentary evidence in support of any Complaints or allegations against her as required under Regulation 18(2) of the National Police Service (vetting) Regulations, the Petitioner was invited to appear for a vetting interview before the Respondent's vetting panel.

4. That on 9<sup>th</sup> October 2015, the Respondent, in a decision signed by all the Commissioners, found that the Petitioner had failed vetting and proceeded to remove the Petitioner from the Service. It found the Petitioner guilty of Professional misconduct over an incident that involved her Husband Wilfred Mbithi Jason (also a Police Officer) and a Minor known as FMM.

5. The reasons advanced by the Respondent were that the Petitioner: -

- a) Had failed to report an accident involving her husband and a minor.
- b) Had failed to ensure that the minor was compensated for the injuries suffered in the accident.
- c) Had abandoned the minor in a Hospital and did not inform the girl's next of kin.
- d) Had tried to cover up the incident.
- e) Had only ensured that her husband received medical assistance while failing to take responsibility for the girl.
- f) Had feigned ignorance or forgetfulness of the Police Officer and ambulance driver who drove her to the Hospitals.

6. The Petitioner being aggrieved by the decision sought a review pursuant to Regulation 33(2)(a) of the National Police (Service) Vetting Regulations. She appeared for hearing of the said review on 4<sup>th</sup> February 2016, but her advocate was unlawfully barred from addressing the Commission and she had to do the presentation herself. That subsequently, the Respondent delivered its Vetting Review Decision and it found that the Petitioner had failed to discharge herself from the earlier findings.

7. The Petitioner avers that she is dissatisfied with both the handling of her application for Review and initial vetting owing to procedural impropriety. The Petitioner urges the Court to fault the Respondent's review decision on the following grounds: -

- a) The Respondent by declining to have the Petitioner's advocate make submissions on her behalf denied her the right to representation and thereby denied her a fair hearing.
- b) Two of the Commissioners who signed the Review decision namely Joseph Boinnet and Samuel Arachi were not present at the Review hearing and there is nothing to show that they took part in deliberations that led to the decision. Consequently, their participation in signing the Review Decision adulterates the decision thus rendering it a nullity.
- c) In the Petitioner's application for Review, the Advocates had listed a total of 18 main grounds excluding sub-grounds as well as a 63 paragraph Supporting Affidavit plus annexures but the Commission in its Review decision did not bother to make even a single reference on the matters the Petitioner had raised.
- d) The Respondent failed to address issues that the Petitioner had raised including issues of impartiality; not being supplied with a complaint; being a witness rather than the subject; being immune from liability for her testimony; assurance given that she was only a witness and had no reason to worry over what she was to state; not having been supplied with documentary evidence; being condemned for the alleged sins of her husband; the minor and her family being on an extortion mission; making findings that were

completely unreasonable and irrational; and not considering the Petitioner's past record.

8. The Petitioner avers that prior to and during her entire process of vetting, the Respondent did not inform her of any complaint in respect of her conduct relating to the incident when her husband was involved in a motor vehicle accident while in the company of a minor at Salama Area along Mombasa- Nairobi Highway.

9. The Petitioner further avers that in the absence of a complaint, a complaint summary or any other documentation showing that the Petitioner's conduct during the subject incident was in issue, she did not anticipate that her career as a police officer was at stake over the issue. She did not therefore prepare a response to the issue, she did not compile necessary documents to answer the issue and she did not call or have an opportunity of calling witnesses who would have shed light on the matter. That the Respondent did not allow her to participate in the examination of the lady known as FMM, her parents and brother whose testimonies formed the basis upon which she has been removed from the National Police Service.

10. The Petitioner also avers that it was unfair to condemn her for the alleged sins of another person. That if at all her husband had committed the alleged sins, he ought to be solely answerable for the same. Further that the decision was irrational and unreasonable. That in relation to her husband's motor vehicle accident, she did not take any action as a police officer but acted as a wife of an accident victim. That there is territorial jurisdiction and having travelled from Athi River Police Station where she was stationed as the Officer in Charge (OC) crime, she could not go to Salama Police Station as suggested by the Respondent and arbitrarily commence traffic duties. That there were police officers from Salama Police Station who were already investigating the accident and the Respondent was irrational and unreasonable in imagining that the Petitioner could have taken over the investigation.

11. Further that the presumption made in the vetting decision that the Petitioner dumped the minor in a lesser Hospital while her husband was treated in a better hospital is absurd, irrational, unreasonable and unrealistic since Kenyatta National Hospital is not any ordinary rank and file medical centre but the largest and most equipped Referral Hospital in the East African region with all necessary equipment and highly qualified doctors and consultants.

12. The Petitioner also avers that the decision contains factual errors in that it was incorrect to conclude that the Petitioner and her husband never followed up on the state of the girl while indeed they met the girl's parents who became so hostile that further interactions were untenable. That it is also not true that the accident was not reported since the Petitioner's husband duly reported it at the Salama Traffic Police Base and was duly issued with a police abstract.

13. The Petitioner posits it that at her vetting interview on 10<sup>th</sup> June 2015 not even a single question was raised by the panelists on the subject accident and defilement allegation to warrant the Petitioner to be removed from office over the said issues. That from the manner the Vetting Process was undertaken, the Respondent fettered the Petitioner's right to call evidence and witnesses who would have shed light on the matters in controversy thereby denying her the right to a fair hearing.

14. That the entire vetting process was marred with illegality and bias. That Commissioners who did not participate in the vetting signed for her removal thereby rendering the entire process a nullity.

15. Respondent's case via the Replying Affidavit of **Johnston Kavuludi**, the Respondent vehemently opposed the instant petition. The Respondent avers that the Petitioner herein was first removed from the service on 9<sup>th</sup> October 2015 on the ground that she lacked the requisite professionalism expected of a senior officer of her caliber. That it was also established from the vetting that the Petitioner attempted to unlawfully use her position and influence as a senior traffic officer to cover up an accident and deliberately and heartlessly failed to timely notify the parents of the minor who was in a coma of the accident timely despite being aware of their residence. Further that the Commission also noted with consternation that the Petitioner feigned ignorance or forgetfulness of the identity of the Police Officer and ambulance driver who drove them to Nairobi Hospital and Kenyatta National Hospital in a deliberate effort to curtail information and mislead the commission.

16. That prior to the removal of the Petitioner from the service the Commission accorded her an absolutely fair and procedural hearing pursuant to the constitutional provisions, the National Police Service Commission Act and the Police Service (Vetting) Regulations 2013.

17. That indeed the Petitioner was and procedurally supplied with the vetting forms before the vetting exercise and later appeared for vetting on the 10<sup>th</sup> June 2015. Further that the vetting exercise was conducted in the most procedural, fair and lawful manner with utmost fidelity to the Constitution 2010 and all the other relevant Laws and Regulations and at no point did the Petitioner raise any complaint as to the manner and nature of the vetting process.

18. The Respondent further avers that indeed there were no formal complaints against her but issues were raised during her husband's vetting. That her husband is also a police officer and the Petitioner had been summoned as a witness during the vetting of her husband. That upon being adversely mentioned the Commission had to seek clarification from her.

19. That it is a clear misapprehension of the law for the Petitioner to purport that she could only be vetted if complaints had been raised about her directly and that the Commission had no mandate to question her on any related or emerging issues touching on her integrity and professionalism at the vetting or review stage.

20. The Respondent further avers that the Petitioner was given an opportunity to clarify on issues raised touching on her competency concerning the accident that involved her husband and minor and was offered the chance to be vetted afresh. That she however unequivocally objected to the same thus limiting the reasonable options available to the Commission as clearly captured in pages 11 and 12 of the Hansard records for the review.

21. That after hearing the aforementioned review application the Commission found that the same lacked merit and upheld its earlier decision since the Petitioner did not prove any error apparent on the face of the record or any new facts as per the requirements of Regulation.

22. That from the foregoing it is evident that the Petitioner was accorded utmost procedural fairness as enshrined in the Constitution.

23. That the instant petition is an abuse of the Court process and should be dismissed with costs.

24. Parties agreed to dispose off the petition by way of written submissions.

#### **Petitioner's Submissions**

25. The Petitioner through her advocate on record asserts that the Respondent failed to carry out the vetting process in line with the law and contrary to her rights under Articles 41, 47 and Article 50(1) of the Constitution of Kenya as well as the Fair Administrative Action Act. That the Petitioner was not accorded a fair hearing, there were factual errors on the Respondent's decision, the Respondent failed to consider the relevant facts, the Respondent acted in a biased manner, the Respondent failed to adhere to the threshold on the standard of proof required, the removal of the Petitioner from service was not in the public interest, the decision lacked proportionality; the decision lacked reasons for its findings; the decision was illegal having been signed by persons who never took part in the process; and the decision was absurd and unreasonable in the circumstances.

26. Counsel cited the case of **Wilfred Mbithi Jason v National Police Service Commission [2016]**; where the Court in discussing the import of Article 47 of the Constitution in Paragraph 44 held that:

*"It would be fair to state that procedural propriety on the part of decision makers is now a substantive and mandatory constitutional requirement. It is substantive in the sense of having been embedded in the Constitution. It must not be a case of mere psychological satisfaction being extended to persons to be affected by any decision. It is substantive as well in the sense that even where there is no requirement that one be afforded the benefit of natural justice, the decision maker is still expected to act expeditiously, fairly, lawfully, efficiently and reasonably in all circumstances.*

27. Counsel further submits that the Respondent did not supply the Petitioner with the complaints, if any, or notice and particulars of adverse suspicion against her or even the accompanying documents. That it is sound law that where a statute or regulation stipulates a procedure, the execution of the task will be null and void if the prescribed procedure is not followed. That it is also sound law that a person accused of any impropriety should know the nature of the accusation made, he should be given an opportunity to state his case and the subject tribunal should act in good faith.

28. Counsel further relies on the 1<sup>st</sup> Respondent's Vetting Regulations, Regulation 18 which provides as follows:

***"Supply of information and response to complaints.***

***1. ....***

***2. Where a complaint or any adverse information is received by the Commission against an officer, a summary of the complaint including any relevant documentation pertaining to that complaint as received by the Commission, and on which the Commission intends to rely on in the process shall be served upon the officer"***

29. Counsel reiterates that in the initial vetting of the Petitioner nothing regarding her husband and his accident with the minor was raised. That the first time the issue of the Petitioner's husband's accident was presented to the Petitioner was when her husband was being vetted. That she was summoned to be a witness against her husband contrary to Section 127(3)(c) of the Evidence Act. Counsel submits that failure to supply the Petitioner with reports that would adversely affect her job fell short of the constitutional threshold required in vetting exercises.

30. Counsel further relies on the case of **Constitutional Petition No. 89 of 2016 John Ndungu Ikonya v National Police Service Commission**, where Mbaru J. held:-

*58. As set out above with the contestations at the vetting and hearing of the Petitioner that he did not receive sufficient details, materials and information relating to the complaints against him before his vetting, then the question as to the respondent's compliance with its regulation became paramount. This is a matter the Petitioner went into his application for review; the respondent has chosen to ignore this aspect from the vetting, review and in these proceedings.*

*59. This must be applied to the benefit of the Petitioner. The provisions of Article 47 read together with Article 41 of the Constitution requires that all persons faced with adverse action against them and in the context of their employment be treated fairly in a manner that is lawful, reasonable and procedurally fair.*

*60. Once the Petitioner challenged the aspect of not being issued with the complaints against him in advance, the Respondent was bound by the rules at play to address this issue instantly. To proceed with the Vetting and hearing the Petitioner without addressing the material and context of Article 47 of the Constitution, the NSPC Act, and the Vetting Regulations, the proceedings thereon, the outcome of it and the review application were procedurally flawed. The Respondent cannot thus be said to have acted in a lawful, reasonable and procedurally fair manner. To do so would be to negate the very principles that the Respondent had set out to address and particularly the vetting objectives set out under the Constitutive Act for the Respondent under NPSC Act and Section 4 of the Fair Administrative Act.*

*61. The burden of proof was at all material time upon the Respondent to proof that indeed the Petitioner was served with all necessary materials and complaints against him..."*

31. Counsel also relies on the case of **Peter Kemboi Chemos v National Police Service Commission [2018] eKLR**, where the Wasilwa J. held :-

*“ 74. However, in respect of “adverse information”, the Respondent stated that they had adverse information against the Petitioner Concerning his Mpesa and bank statements where they considered the amount of money passing through his Mpesa and bank statements beyond his earnings.*

*75. This proposition could have been true. I have looked at the evidence supplied before this Court by both parties. I note that the Petitioner filed his Vetting questionnaire and also his Declaration of Income, Assets and Liabilities form under the Public Officer Ethics Act, 2003 on 17/3/2015. On 3.12.2015, the Respondent wrote to the Petitioner asking for additional information.*

*76. There is however, no indication that the request for further information was prompted by any adverse finding or information they had found. The Respondent also never pointed out to the Petitioner the adverse information they had found against him to enable him defend himself.*

*77. Article 50(2) of the Constitution provides as follows:-*

(a) .....

(b) to be informed of the charge, with sufficient detail to answer it;

(c)

*78. The Respondent failed in this respect by failing to give the Petitioner sufficient details of the adverse information they had against him to enable him answer it. In this respect, his rights Article 50(2) of the Constitution were breached.*

*79. ....*

*80. In the case before me, I cannot say that the Vetting Panel upon finding that the Petitioner’s Mpesa and bank account exceeded his income notified the Petitioner of this fact stating which transactions were questionable and seeking an explanation from him.*

*81. In this case, I find that the Petitioner also lacked adequate prior notice of the complaint before him. No notice of this finding was given to him but he was confronted on the vetting floor and asked to explain. Indeed it is humanly impossible to give finer details of all transactions in an Mpesa account spanning 2 years without due notice especially so in an open economy where Mpesa has become the easiest mode of buying and selling goods.”*

32. It was the learned counsel’s submission that the Petitioner was not accorded her right to a fair hearing. Counsel interestingly puts it that this right is so entrenched, so ancient and noble and even has roots in the Garden of Eden where even God did not sentence Adam, Eve and even the snake without hearing their separate defences.

33. Counsel further reiterates that the Petitioner was unfairly condemned for the sins of another person. That the Respondent’s decision was biased, irrational, unreasonable and marred with illegalities. He prays that the Petition be allowed as prayed.

### **Respondent’s Submissions**

34. Counsel submits that the Petitioner was given a fair hearing and in the spirit of fairness she was given the option to focus on those issues which she felt had not been brought to her attention properly and for her to be able to respond to the same. That she was also given the option for the Commission to annul her previous vetting and to re-vet her afresh but she declined.

35. Counsel, in response to the allegation of illegality in that the Petitioner was summoned to testify against her husband contrary to the Evidence Act, submits that Section 11 of the National Police Service Act allows the Respondent to issue summons, and that the said section exempts the Respondent from the strict rules of evidence.

36. On the issue of being supplied with relevant documentation on any adverse report, counsel submits that Commission is only obligated to supply an officer with a summary of complaints if the same is received against an officer and that if none is received there would be none to be supplied. Further that that the Petitioner was accorded utmost procedural fairness as enshrined in the Constitution 2010 and as contemplated by the rules of Natural Justice and any suggestion to the contrary is an abuse of the Court process.

37. Counsel further submits that it is wrong for the Petitioner to state that the vetting panel as constituted was illegal as the decision making process is left to the Commissioners. Counsel relies on the case of **Republic v National Police Service Commission Exparte James Ngumi Mutungi Misc App No.44 of 2016** where the Odunga J. held:

*“Vetting is a combination of the record of an officer termed a function, business or an affair of the Commission it is clearly one of the duties of the Commission and under section 14(1) of Cap 185 C ought to be conducted in accordance with Second Schedule. However, under Section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and*

*whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.”*

38. It was also the learned counsel’s submission that the allegations that the Respondent was biased and that it condemned the Petitioner for the alleged sins of another person were false and misleading. That the Petitioner though married to Wilson Jason Mbithi is individually liable for her own actions. That it was established from the vetting that the Petitioner attempted to improperly and unlawfully use her position as a senior officer to cover up the accident involving her husband and a thirteen year old girl. That the Petitioner admitted her own husband, who had light injuries first at Nairobi Hospital and unconscionably, several hours later, admitted the unconscious minor at Kenyatta National Hospital after midnight. That the Petitioner knowingly failed to discharge her duty as a senior police officer but instead carried out her duty in favour of her husband. Subsequently, counsel prays that the petition be dismissed with costs.

#### **Determination**

39. Having read the pleadings and the well-researched submissions by Counsel, the Court finds that the issues for determination are;

- (i) Whether the Respondent violated the Petitioner’s rights and fundamental freedoms, and her right to fair administrative action; and
- (ii) Whether the Petitioner is entitled to the orders sought.

#### **(i) Whether the Respondent violated the Petitioner’s rights and fundamental freedoms, and her right to fair administrative action;**

40. In exercising their vetting mandate, the Respondent is guided by the Constitution, the Fair Administrative Action Act and The National Police Service [Vetting] Regulations, 2013. 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 provides that:-

- 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].*

41. The right to fair administrative action is further provided for in Section 4 of the Fair Administrative Action Act provides;

#### **4. Administrative action to be taken expeditiously, efficiently, lawfully etc.**

**(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) 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—**

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—**

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse**

evidence against him; and

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

**(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.**

**(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.**

42. 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.

43. The Petitioner herein avers that she was not accorded fair administrative action in that she was not supplied with a summary of any complaint or suspicion nor was she given any adverse notice of allegations against her. That she was not given a chance to call her witnesses or even cross examine witnesses. The Respondent admits this. In response to this allegation, the Respondent has stated that it had no obligation to do so as there were no complaints filed against the Petitioner and that the adverse information emanated from the Petitioner when she was summoned as a witness during the vetting of her husband. Further that during her review she was given the option of a fresh vetting but she declined.

44. It is therefore not in dispute that the Petitioner was never supplied with any adverse report prior to her vetting. The Court has also perused the transcription of Hansard recording for 10<sup>th</sup> June 2015 and can confirm that it did not find anywhere where the allegations about the accident were presented to the Petitioner to respond to yet that was the only ground for her removal from police service.

45. Besides Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, Regulation 18(2) specifically provides as follows –

**(2) Where a complaint or any adverse information has been received by the Commission against an officer, a summary of the complaint including any relevant documentation pertaining to that complaint as received by the Commission, and on which the Commission intends to rely in the process shall be served upon the officer.**

46. In the instant case the Respondent argues that it had no obligation to supply the Petitioner with notice of the adverse report as there was no complainant. This in my view is the more reason why the Petitioner should have been informed of the intention to use the information from her husband's vetting against her and allowed to call evidence in her defence. The Court of Appeal in **George Kingi Bamba v National Police Service** emphasized 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.

47. The Petitioner in the instant case received no adverse report or notice from the Respondent. She participated in the vetting exercise without knowing that there was any adverse information against her. The reliance by the Respondent on her earlier testimony in another vetting exercise did not take away the obligation of the Respondent under Regulation 18(2). This was clearly stated in **Peter Kemboi Chemos v National Police Service Commission [2018] eKLR** where the Court faulted the Respondent for confronting the Petitioner on the floor of the vetting without supplying him with the adverse report they relied on.

48. The Court therefore agrees with the Petitioner that she was entitled to a notice containing a summary of any adverse information to be used against her before attending vetting, and that such information was not communicated to her.

49. Further, the Court faults the Respondent's reliance on testimony outside the Petitioner's vetting proceedings which did not form part of the record relating to the Petitioner. They were extraneous to the Petitioner's vetting.

50. The argument that the Petitioner declined the option of re-vetting cannot be used against her and does not correct or condone the serious lapses in her vetting. The Petitioner was invited to the vetting review to argue her case. The Commission having found that the Petitioner was not supplied with all the necessary information, the only option was to order for re-vetting and not to request the Petitioner to choose whether or not to undergo another vetting process.

51. The fact that at the review hearing the Respondent contemplated vetting the Petitioner again is an admission that the validity of the vetting was doubtful.

52. The Petitioner also challenges the competence of the panel that made the final verdict against her as some of the members did not participate in the vetting process. The Court must therefore determine whether having Commissioners who did not sit at the vetting sign the decision invalidated the decision of the vetting panel. In **Eusebius Laibuta v The National Police Service Commission**, Odunga J. stated:-

*“In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound*

*decision when they never participated in the hearing" Whereas it may well be that had all the persons participated in the interview they may have arrived at this same decision, this Court cannot say that it is certain that they would have arrived at the said decision."*

53. In the instant case, it is not in dispute that a majority of commissioners who signed the decision never participated in the vetting process. This inevitably invalidated the entire process.

54. The other issues raised by the Petitioner touch on merit and rationality of the decision made by the Respondent. As clearly stated by the Petitioner, she was never given a chance to present her defence to the issue that led to her removal from Police Service, or to call her witnesses and cross examine witnesses. Further, as submitted by the Petitioner, her husband successfully petitioned the Court and the vetting decision against him was quashed. Since it is the evidence in the vetting of the Husband that was used against her, the decision of the Vetting Board cannot stand.

**(ii) Whether the Petitioner is entitled to the orders sought**

55. The upshot of the above findings is that the Petition succeeds and accordingly, the Court grants the following reliefs:

**(a) A Declaration be and is hereby issued that the Petitioner's Fundamental Rights and Freedoms were violated by the Respondent;**

**(b) An Order of Certiorari do and is hereby issued quashing the entire proceedings and the decision of the Respondent declaring that the Petitioner had failed Vetting and had been discontinued from the National Police Service including the Decision both at the vetting and review thereof;**

**(c) An Order be and is hereby issued directing the immediate reinstatement of the Petitioner to her post as a Superintendent of the Kenya Police Service with effect from 5<sup>th</sup> May 2016 with all privileges and salary attached to her office;**

**(d) Costs are awarded to the Petitioner.**

56. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**