



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

PETITION NO. 10 OF 2019

IN THE MATTER OF

AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL

RIGHTS UNDER ARTICLES 19,20,21,22,23,31, 47, 48, 49,50 OF

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER BETWEEN DISPUTE OF EMPLOYER AND EMPLOYEE

AND

IN THE MATTER OF UNFAIR REMOVAL FROM SERVICE

UNDER SECTION 47 AND 87 OF THE EMPLOYMENT Act

AND

IN THE MATTER OF REGULATIONS 10, 18, 19, 25 AND 33(2) OF THE

NATIONAL POLICE SERVICE (VETTING) REGULATIONS

AND

IN THE MATTER OF REINSTATEMENT INTO THE POLICE SERVICE

P/NO:2002012095/81758 POLICE CONSTABLE JAMES KIPTOO KORIR

AND

IN THE MATTER OF AN APPLICATION BY:

JAMES KIPTOO KORIR.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein was enlisted into the National Police service Commission on the 16th March 2002 in the Traffic department and

issued with Police service number 70688. That he rose through the rank to the position of Police constable all this time working in the office of the President.

2. On 18th August, 2016, the petitioner together with other police officers in the department of Traffic were subjected to a routine Vetting process that was held at Kunste Hotel Nakuru.

3. That prior to the said vetting the Respondent had sent its DCIO to carry out investigation following the wealth declaration forms that the Petitioner and his colleagues had filed. That on the date of the vetting the commission raised concerns on his MPESA transactions which he explained.

4. The Petitioner then proceeded with his work only to be informed on the 8th December, 2016 that he was removed from service and was required to hand over all items in his possession which he complied however that the Respondent did not furnish him with the findings informing their decision to enable him challenge the same.

5. The petitioner avers that as much as the Respondent is mandated under section 7 of the National Police Service Commission Act to vet officers and affirm their suitability section 7(2) of the same Act mandates them to apply best practices while carrying out the vetting process and accord justice to the officer as provided for under Rule 4(c).

6. It was stated that the Respondent acted against its own regulation by failing to communicate the Petitioner's removal first to him before making the same public as provided for under Regulation 25(6). The Petitioner averred that he was not accorded any chance to review the Commission's decision as provided for under Regulation 33 for the reason that the Respondent did not furnish him with the findings of the commission to enable him seek for review.

7. The Petitioner contends that the fact that he was not accorded an opportunity to review the Commission decision went against the express provisions of Article 47 and 50 of the Constitution and he insists that his rights were infringed upon.

8. The Petitioner opined that he was unfairly terminated from services without being subjected to due process and prayed for judgment against the Respondent for; -

a) A declaration that the petitioner's Fundamental rights and freedoms have been violated

b) An order directing the Respondents to release the vetting results of the petitioner forthwith.

c) An Order confirming that the petitioner is still employed as a police officer by the Respondent

d) An order quashing the signal circulated by the Respondent on the 8th December, 2016 removing the Petitioner from service and requiring the petitioner to return his items/uniform of work.

e) An order for reinstatement of the Petitioner to his post as a police constable of Kenya Police service as well as reinstatement of all his privileges including his salary

f) A declaration that there exists no material to fins the petitioner had failed vetting

g) Compensation to the petitioner for violation of his fundamental rights and freedoms

h) Damages for unlawful removal of the petitioner from service

i) Costs of the Petition

j) Any other relief that this Court may deem just to grant.

9. The Respondent in opposition of the Petition filed a replying affidavit deposed upon by Joseph Vincent Onyango, the Respondent Chief Executive Officer, who averred that the Respondent is empowered under section 7 of the National Police Service Act and Regulation 4 of the National Police Service(Vetting) Regulations 2013 to vet its officers to ascertain their suitability.

10. The Respondent's Affiant averred that the removal of the Petitioner was arrived at after the Respondent noted a disparity between his declared wealth and his wealth in his bank Accounts and M-pesa. The disparity according to the Respondent could not be explained satisfactorily considering that the Petitioner had a net salary of Kshs. 9,000. It is on that basis that the Respondent concluded that the Petitioner lacked financial probity and integrity and removed him from service.

11. The Respondent's Affiant averred that the decision to Remove the Petitioner together with other officer was communicated to the Petitioner through the service channel. Subsequently he was removed from service and payroll however he was fraudulently reinstated back to the payroll which anomaly was discovered by the respondent in 2019 during the biometric verification to remove "ghost" workers and the Petitioner was now expunged from the payroll informing his filing of this Petition.

12. The Respondent's Affiant contends that the Petitioner has not demonstrated how the Respondent has violated his right under the Constitution during the vetting exercise.

13. The Respondent's affiant contended that they followed the procedural requirement provided for under the Act and the regulation in subjecting the Petitioner to the vetting exercise and did not at any point act against the law.

14. In response to the replying Affidavit, the Petitioner filed a further supplementary Affidavit on the 8th March, 2021 maintaining that he was not served with the vetting decision and that he kept on following with the Respondent on the reasons why he was ordered to surrender his uniform and service items when he was still earning salary. He then agreed that when his salary stopped he affirmed that the respondent had terminated his services and filed this case.

15. This Petition was canvassed by way of written submissions.

Petitioner's Submissions.

16. It was submitted for the petitioner on three issue; whether the Petitioner was served with the vetting decision, whether the petitioner's rights to fair administrative action and fair hearing was violated by the Respondent and whether the Petitioner was removed from service by a competent panel on valid grounds following a fair procedure.

17. On the first issue it was submitted that the petitioner was never served with the decision of the Commission on the vetting process carried out to enable him seek for a review. It was argued that the Respondent merely alleged having forwarded the decision through the service channel vide a letter which was not attached to the Replying affidavit affirming that the Respondent did not serve the said decision upon him as provided for under regulation 25(6) of the National Police service vetting regulations.

18. It was further submitted that under Regulation 18(2) of the National Police service vetting regulations the Respondent is mandated to serve the petitioner with any complaint or any adverse information which they intend to rely on and the Petitioner was required to respond in written form to the complaint. Also the fact that the Respondent breached its rules by failing to serve the Petitioner with the commissions' decision to allow him file for review infringed on his right to fair administrative action as provided for under Article 47 of the Constitution of Kenya and cited the Court of Appeal case of **County Assembly of Kisumu V Kisumu County Assembly Service Board and Others case No. 17 and 18 of 2015 (Ur)**.

19. It was also submitted that the person that signed the final document that recommended the petitioner's removal from services never participated in the vetting exercise which according to the petitioner negated the basic requirements of the rules of natural justice.

Respondent's Submissions.

20. The Respondent submitted on two issues; whether the Petitioner's rights to fair administrative action, fair hearing and fair labour practices were violated by the commission and whether the Petitioner is entitled to the Orders sought.

21. On the first issue it was submitted that the Petitioner challenged the fact that he was not served with the complaint against him when the vetting committee were basically relying on the documents which were supplied by the Petitioner in the vetting process therefore the allegation that there was a complaint raised outside the documents the petitioner filed is without any basis. In this the Respondent cited the case of **Veronica Leiro Simintoi and another V National Police service commission[2020] eKLR** where the Court held that;-

“...As regards the complaint that the appellants were not made aware of the charges before the vetting, we find that nothing turns on this. Each of the appellants had been given a questionnaire to fill in before the vetting. They had also been asked to supply their Mpesa and Bank statements as well as their wealth declaration forms. The questions put to the two of them were based on what they themselves had presented to the vetting board. Being their own documents, they were best placed to explain them.”

22. The Respondent then submitted that the Petitioner was relieved of his duties since the commission established that there was a huge disparity between his declared wealth as per the forms filled by the Petitioner and his wealth according to the Bank statement and M-pesa transactions.

23. The Respondent maintained that the Petitioner was served with the decision of the commission in line with regulation 25 of the National Police service vetting regulations which decision informed the Petitioner action of surrendering his kits and service items and subsequently removed from service payroll. It was argued that, if the Petitioner was not aware of the Respondent's decision then he would not have taken any action as he did.

24. It was then submitted that Regulation 33 of the National Police service vetting regulations provides for review of the commission decision within 7 days which review the Petitioner opted to forgo.

25. The Respondent argued that it did not in any way infringe on the Petitioner rights as enshrined under the Constitution of Kenya as the entire vetting exercise was carried out in accordance with the law. Additionally, that the Petitioner has not demonstrated how his rights were violated by the Respondent therefore the Petition is unfounded and ought to be dismissed with costs.

26. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

1. Whether the petitioner was subjected to fair administrative process.

2. Whether the petitioner's rights under the constitution were infringed.

3. Whether the petitioner is entitled to the remedies sought.

FAIR ADMINISTRATIVE PROCESS

27. The petitioner has submitted that he was not subjected to a fair administrative process. The petitioner submitted that after he was vetted, he was not served with the vetting results to enable him seek a review.

28. From the evidence submitted in court, the petitioner went through the vetting process but there is no evidence that he was served with the vetting decision. The decision removing him from service was dated 6th December, 2016 but the petitioner indicates that he continued receiving his salary up to January 2019. The petitioner annexed copies of the payslip as evidence.

29. The respondents aver that their decision was forwarded to Inspector General who forwarded the decision to the petitioner through a signal dated 8th December, 2016. The respondents aver that the petitioner was served with the said decision and surrendered his kit and was removed from the service.

30. The respondents exhibited their decision dated 6th December, 2016. There is no evidence exhibited by the respondent that they send the vetting results to the Inspector General of police. There is a signal exhibited dated 8/12/2016 from the County Commander Laikipia from the County Police Commander Laikipia. This signal is however not copied to the petitioner and there is no evidence that the petitioner was informed of the vetting results.

31. Other than there lacking evidence that the petitioner was sent the vetting results, the petitioner informed court that he remained on the payroll until January 2019 when his salary was abruptly stopped.

32. The petitioner exhibited his payslip up to the one of February 2019 which shows that he was still on the payroll and had never been removed.

33. If indeed the respondent had vetted out the petitioner, the duty to inform him of the results was important. The need to inform the petitioner of the results is provided for under Regulation 25(6) of the National Police Service vetting Regulation Section 5(d) of the Fair Administration Action Act provides as follows;

“5(d) Where the administrator proceeds to take the administrative action proposed in the notice-

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within the which such appeal shall be lodged.”

34. Section 6 (1) of Fair Administration Action Act also provides as follows;

“6. (1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.”

35. The above provision of law indicate that there is need to give reason for any administration action to enable the employee room for appeal/review.

36. In the case of the petitioner, there was indeed no indication that the petitioner was given results of the vetting board. As such, the respondent failed to adhere to the law in order to give the petitioner an opportunity to seek an appeal on review in the circumstance. It is my finding that the respondent failed to give the petitioner a Fair Administrative Action and they denied him an opportunity to appeal their decision or seek a review.

2. CONSTITUTIONAL RIGHTS

37. I have alluded to the fact that the petitioner was not given an opportunity to undergo a fair disciplinary process. His right to seek an appeal was denied because he was not given the vetting results. This was in contravention of Article 41 and 47 of the Constitution on Fair Labour Practices and a fair hearing. The petitioner submitted that his rights were infringed under Article 41 and 47 of the constitution. I agree with the petitioner that his rights under the constitution were flawed and I find that so.

REMEDIES

38. Having found as above, and having established that the petitioner remained on the payroll until February 2019 I find that he was only terminated when his salary was stopped in March 2019 and I find he is entitled to be reinstated to the service from March 2019 without loss of remuneration and promotion to date.

39. The respondents will also pay the petitioner an equivalent of kshs.2million as damages for unfair and unjustified dismissal.

40. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Moenga holding brief for Mongeri for Petitioner – present

Rwenji holding brief for Muthiga for National Police Service Commission – present

Court Assistant - Fred