



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI

PETITION NUMBER 2 OF 2017

IN THE MATTER OF: ARTICLES 25 (C), 41 (1),
47 & 50 (1) OF THE CONSTITUTION OF KENYA

BETWEEN

SHADRACK KAHINDI SHIDA.....PETITIONER

VERSUS

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

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

ATTORNEY GENERAL.....3RD RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Nyongesa & Company Advocates for the Petitioner

Litigation Counsel, Paul Ojwang' for the 1st Respondent

Senior State Counsel, Ruth C. Lutta for 2nd & 3rd Respondent

JUDGMENT

1. Through his Petition, filed in Court on 13th October 2017, the Petitioner states he is a Police Constable, attached to the Administration Police, serving in Lamu West Sub-County.
2. At the time of filing the Petition, he had served for 12 years.
3. He previously served in Limuru Sub-County.
4. He states, while at Limuru, he took some days off to attend to his sick Child, between 30th January 2016 and 2nd February 2016. The Petitioner fell sick also, after his child was discharged. He was only able to resume duty on 12th February 2016.
5. He was redeployed to Githunguri Sub-County upon resumption, through a letter dated 17th February 2016.
6. While at Githunguri, the Petitioner learnt that his salary had been stopped.

7. He enquired from Police Head Office at Jogoo House, Nairobi, and was advised by the Human Resource Office, that stoppage was effected on the strength of a letter from Limuru Sub-County Commander, Michael Mathangani, dated 10th February 2016. It was alleged by Mathangani that the Petitioner had deserted service for 15 days.

8. The letter stopping Petitioner's salary was never sent to the Petitioner, directly.

9. Later, upon receiving explanation from the Petitioner, Githunguri Sub-County Commander Nicholas T. Marete, wrote various intercessory letters, seeking restoration of the Claimant to the payroll. All the letters hit a brick wall.

10. Against this backdrop, the Petitioner prays the Court to grant Judgment in his favour, as follows:-

a. The letter dated 10th February 2016 stopping Petitioner's salary is declared null and void.

b. The Petitioner's salary be restored from the date of stoppage to – date.

c. Declaration that stoppage of the salary is unconstitutional.

11. The Petition is supported by the Affidavit of the Petitioner, sworn on 13th October 2017.

12. Provisional measures issued on 13th October 2017, directing suspension of the letter dated 10th February 2016, and directing the Respondents to continue paying Petitioner's salary and allowances in full.

13. The Respondents filed Ground of Opposition dated 1st December 2017, stating that the Petitioner has not exhausted internal dispute resolution mechanism, and the Petition is premature. They also filed an Affidavit, sworn by Benard Mburu, Superintendent of Police, In Charge of Administration Police Service, Lamu County.

14. He confirms that the Petitioner's salary was stopped after the Petitioner deserted, on the strength of Limuru Sub-County Commander's letter.

15. The Head Office investigated stoppage of salary, and discovered that the Petitioner was habitual absentee. He had arrogance against authority. It was recommended disciplinary proceedings, be instituted against the Petitioner. The Petitioner disappeared while assigned to Lamu West Sub-County, on 30th June 2016, never to be seen again.

16. Parties agreed in Court on 28th October 2019, to have the Petition determined on the strength of the record. The Petitioner filed Closing Submissions as did the Respondents.

The Court Finds:-

17. Limuru Sub-County Commander's letter, alleging the Petitioner deserted, is dated 10th February 2016. It was the foundation upon which the Petitioner's salary was stopped.

18. The Petitioner's Child was sick, and he sought some days off, to attend to his Child. He has attached medical evidence to this effect. He has also shown that he too fell sick after his Child was discharged, compelling him to be away for a few more days. He notified his Sub-County Commander.

19. There is evidence that he was transferred formally from Limuru Sub-County to Githunguri Sub-County. This is after the alleged desertion. He continued to work. He was further transferred from Githunguri Sub-County, to Lamu West Sub-County. There are various letters, mostly written by Sub-County Commander Githunguri, Nicholas Marete, showing that the Petitioner was in active service, **after** the alleged desertion.

20. Commander Marete wrote to the Head Office, explaining in detail Petitioner's circumstances. He confirmed that the Petitioner was sick at the time he was alleged to have deserted. Commander Marete confirmed that the Petitioner is a dedicated Officer. Michael Mathangani Commander, Limuru Sub-County, wrote on 24th February 2016, deploying the Petitioner to Githunguri. He thanked the Petitioner for invaluable (not invariable) service to Limuru. Mathangani's letter is significant, because he also wrote the letter dated 10th February 2016.

21. The Court cannot therefore understand why the Respondents would continue to deny the Petitioner his salary. No disciplinary action has been instituted for any offence, alleged to have been committed by the Petitioner. He was assigned duty, and continued to faithfully discharge duty, long after the alleged desertion and illegal stoppage of salary.

22. The Respondents have acted in gross violation of the Petitioner's fundamental rights under the Articles of the Constitution identified by the Petitioner in his Petition. Principally, the Respondents acted in complete disregard of the Petitioner's right to fair labour practices under Article 41(1) of the Constitution, and Section 17 of the Employment Act which compels the Employer to pay the entire amount of salary earned by the Employee.

23. It is very disturbing, that the salary of a Security Officer who presently serves a high risk security County, could be stopped at the whims of a Sub-County Commander, based on apocryphal accusation of desertion. Are the mandarins at the Head Office not supposed to

investigate, and hear the Officer out, before stopping the Officer's salary?

24. It is worrisome, when generalized and untested allegations, such as those contained at paragraph 14 of Superintendent Mburu's Affidavit, to the effect that the Petitioner was a habitual absentee with an attitude and arrogance against authority, become the reasons justifying such a drastic measure, as the stoppage of a Security Officer's salary.

IN SUM, IT IS ORDERED:-

a. The Petition is allowed.

b. The letter dated 10th February 2016 stopping Petitioner's salary is hereby quashed in its entirety.

c. The Petitioner's salary, allowances and all benefits stopped as a result of the said letter shall be restored in full to the Petitioner from the date of stoppage.

d. It is declared that the stoppage of Petitioner's salary is unconstitutional.

e. No order on the costs.

Dated and delivered at Mombasa this 26th day of March 2020.

James Rika

Judge