



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 827 OF 2015**

**KENNEDY OMOLLO.....CLAIMANT**

**-VERSUS-**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL, NATIONAL**

**POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> May, 2020)

**JUDGMENT**

The claimant filed the memorandum of claim on 18.05.2015 through Orego & Odhiambo Advocates. It is not disputed that the claimant was recruited into the Administration Police Service with effect from 06.10.2008 as an Administration Police Constable on one-year probation. The claimant successfully served the probationary period and was confirmed in the permanent and pensionable service and assigned No. P/No. 2008124492. As at termination he had served for 3 years and 7 months. As at termination he had been deployed at the Mathare AP Camp, Starehe District, Nairobi under the Security of Government Buildings Unit (SGB Unit).

The claimant's case as pleaded is that on 26.04.2012 the claimant was informed that his brother Philip Odhiambo Omollo was critically ill at their rural home in Nyatike District, Migori County and he sought permission from his in-charge at the place of work and he was granted the permission to attend to his brother. He was scheduled to travel on the evening of 27.04.2012. Thus in the morning of 27.04.2012 he applied and was issued with a Pistol Ceska Body No. F8428 loaded with twelve rounds of ammunition from the Armourer. The claimant's case is that he applied for the pistol for his personal security as a police officer because he was travelling to his rural home in a private car during the night. His application was duly entered in the Firearms Movement Register and the purpose recorded as personal security. He arrived at his rural home early morning of 28.04.2012 and the doctor advised that his brother was too sick to be transported to Nairobi and he was admitted at Camillus Mission Hospital for management prior to travelling to Nairobi.

The claimant's further case is that on the evening of 28.04.2012 the claimant sought accommodation at Goodwill Hotel. At about 9.00pm four Administration Police officers arrived at the Hotel and stated that they had information that an armed person at the Hotel had been threatening people with a pistol. The claimant offered to assist with the search but he was informed that he was the culprit. He surrendered the pistol in his possession and was arrested for custody at Nyatike Police Station. On 29.04.2012 an inquiry file was opened and the claimant recorded a statement and released on a cash bail of Kshs. 20,000.00. On 30.04.2012 the claimant was released unconditionally and the Kshs.20, 000.00 returned to him.

On 02.05.2012 at around 10.00am the claimant's Commanding Officer Superintendent Muchiri instructed the claimant to proceed to his Deploying Officer (SP Nyalwa) stationed at Uhuru Camp. The claimant complied and SP. Nyalwa accompanied the claimant to the Adjunct Officer In-Charge of all administrative issues at the SGB Unit. The claimant was directed to change from civilian clothes to uniform. The claimant appeared before the Commandant at his office and the Commandant demanded to know why the officers were using a firearm as though it was a walking stick. The other officers present (according to the claimant's case) were Superintendent Muchiri, Chief Inspector Koskey, Constable George Osero and Inspector Wawire. In the process the Commandant got annoyed and directed the officers to leave Mathare Camp within 2 hours. The claimant's further case was that on 12.06.2012 he was summoned to the SGB Unit Headquarters at Nairobi West and was issued with a dismissal letter dated 31.05.2012. The letter conveyed that the claimant had been charged and found guilty of the following two counts:

a) Count I: That on 27.04.2012 at around 1000hrs at Mathare AP Camp, the claimant, jointly conspired to use a firearm Ceska Pistol Body No. F. 8428 loaded with 12 rounds of ammunition without following firearms regulations.

b) Count II : That on the same material day the claimant conspired and engaged himself in unauthorised assignment.

The letter further stated that the claimant had been dismissed from the service with effect from 11.05.2012 with loss of terminal dues.

The claimant alleges that he was not subjected to the orderly room proceedings and he was charged and convicted of offences he never committed. Further as per the Firearms Movement Register he had obtained the firearm procedurally. He appealed on 18.06.2012 to the Provincial Administration and Internal Security and on 06.06.2014 he received a letter from the service dated 15.11.2013 conveying that his appeal was considered but disallowed owing to the serious offences committed.

The claimant alleges that the respondents breached section 89(3) (4) of the National Police Service Act and Article 47 of the Constitution as well as Article 50 by failing to accord him a fair hearing, delaying his appeal unreasonably, and failing to allow him to be accompanied by a fellow police officer of his choice for assistance and support respectively at the inquiry. The claimant's further case is that he was not accorded due procedure under section 16 of the Force Standing Orders prescribing the steps for due process during the disciplinary hearing on an officer to assist him at the inquiry; reading of details of the alleged offence; chance to enter a plea of not guilty; being informed the right to give evidence and to be cross-examined; and chance for mitigation prior to award of the punishment. The claimant's case was that he was convicted without evidence and upon unsubstantiated charges. The dismissal was therefore illegal, unreasonable and patently unfair. Further the claimant otherwise had a clean record of service.

The claimant has prayed for:

- a) A declaration that the conduct of the orderly room proceedings allegedly held on 02.05.2012 was illegal and *void ab initio*.
- b) A declaration that the claimant's subsequent dismissal from the Administration Police Service with effect from 11.05.2012 was unlawful, unconstitutional, unreasonable, unfair and the same should be set aside.
- c) An order directing the 2<sup>nd</sup> respondent to reinstate the claimant to the Administration Police Service forthwith.
- d) Full payment of the claimant's salary during the period that he was serving the illegal dismissal from the force and up to the period of May 2015 with interest at Court rates amounting to Kshs. 974, 340.00.
- e) Full payment with interest at Court rates from the period of June 2015 up to the date of reinstatement.
- f) Any such other appropriate relief that the Honourable Court may deem fit to grant.

The respondents filed the memorandum of reply dated 11.09.2015 through Beatrice Akuno, Litigation Counsel, for Attorney General. The respondents admit that the claimant was employed in the police service as pleaded for the claimant. The respondents' case is that the claimant was charged in orderly room proceedings and he pleaded guilty to the two counts so that the dismissal effective 31.05.2012 was justified as it was upon his own admissions. His appeal for reinstatement was disallowed due to the seriousness of the offences committed and the decision on appeal was conveyed to the claimant accordingly. Further the claimant was not truthful in stating that there were no orderly room proceedings. The respondents prayed that the claimant's suit be dismissed with costs to the respondents.

The claimant testified to support his case. The respondent's witness was Boniface Ngugi Njoki, Assistant Superintendent of Police at SGB Unit. The Court has carefully considered the pleadings, the evidence and the submissions filed for parties.

The Court finds that there is no reason to doubt the evidence as per the respondents' account. In particular, the Court returns that the relevant orderly room proceedings were conducted on 02.05.2012. While making that finding, the Court has carefully considered the dismissal letter dated 31.05.2012 and the claimant's appeal dated 18.06.2012. The first line in the dismissal letter refers to orderly room proceedings conducted against the claimant on 02.05.2012 whereby the claimant was charged and found guilty over the stated 2 counts. Of count one in his appeal letter the claimant stated, "**Contrary to the particulars given on the information laid before the orderly room proceedings, I did not use the firearm at all.**" The claimant further states, "**The officer who conducted my orderly room proceedings should not have assumed or concluded my guilt without auditing the armoury records.**" The Court has re-examined the claimant's appeal and while by inference admitting that orderly room proceedings took place, he purports to urge his case that he was not guilty. However nowhere does he deny in his letter of appeal that the proceedings took place and that he pleaded guilty to the two counts. The Court upholds the respondents' evidence and in particular the record of the orderly room proceedings showing that the claimant pleaded guilty to the two counts. The Court has noted the evidence by RW and has no reason to doubt that the firearm in the claimant's possession on the material dates was in violation of Chapter 14 section 2(1) (a) and 2(2) of the Service Standing Orders which provides that every police arms and ammunitions to be used for lawful execution of duty and for a police officer not to use police arms and ammunitions for private purposes. The claimant testified that he knew that if not on duty he had to take the firearm back to the armoury and that on the material dates, he was on a leave pass – and the Court returns that he ought to have returned the firearm to the armoury. The Court further finds that there is no reason to doubt RW's evidence that the material firearm had been assigned to one Ex-Inspector Wabwire then stationed at Mathare AP Post and who was on pass leave on the material date. Further that the said Wabwire had telephoned EX-APC George Osero instructing him to handover the firearm to the claimant contrary to the standing order that a firearm is only issued to an officer it is assigned to. Thus the Court finds that the respondents had a valid concern when RW testified that it was questionable that Wabwire issued or loaned the firearm to the claimant for unauthorised assignment. RW confirmed that the said Wabwire and Osero had equally been dismissed from the service.

The respondents have established that Chapter 14 Section 2 of the Service Standing Orders provides that every police arm and ammunition shall only be used in the lawful execution of duty; official training; or range practices. It also provides that a police officer shall not use

police arms and ammunition for private purposes. The Court finds that the claimant was not justified to urge that he used the firearm in issue while travelling to his village home and for personal security – which was clearly not official purpose. The record of the orderly room proceedings shows that the Armourer one SGT Peter Wathika blantly refused to issue the firearm to the claimant until APC Osero intervened. The Court finds all that record credible especially that the claimant pleaded guilty to the two counts.

The Court returns that the claimant was accorded due process at the orderly room proceedings and he pleaded guilty to the two counts. He is barred from belatedly turning back to his plea of guilt. His allegations of unfairness in contravention of constitutional and statutory provisions is found to be unfounded.

In conclusion the claimant's suit is hereby dismissed with costs.

**Signed, dated and delivered in court at Nairobi this Friday, 29<sup>th</sup> May, 2020.**

**BYRAM ONGAYA**

**JUDGE**