



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 26 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS
UNDER ARTICLE 19, 20, 21, 22, 23, 31, 47, 48, 49, 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF PETITIONER AND JURISDICTION IN CASE OF DISPUTES BETWEEN
EMPLOYER AND EMPLOYEE IN THE MATTER UNFAIR TERMINATIONS SECTIONS 47
AND 87 OF THE EMPLOYMENT ACT NO. 11 OF 2007 LAWS OF KENYA**

AND

IN THE MATTER OF VETTING OF BONIFACE MBOGO MWAURA SSP F/P NO. 215740/1983027835

AND

IN THE MATTER OF AN APPLICATION BY

BONIFACE MBOGO MWAURA

PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION

RESPONDENT

JUDGMENT

The Petitioner herein was enlisted into the Police Service in 1983. He was employed as a Police Constable in the Ministry of the Office of the President where he worked for 32 years, rising through the ranks to the position of Senior Superintendent of Police.

He avers that on 9th October 2015, he was served with a letter and decision dated even date discontinuing his service. He avers that the reasons for his removal were not supported by any evidence. He avers that he applied for a review against the decision but the Respondent did not give him an opportunity to be heard before making its decision, dated 25th January 2016.

He contends that the Respondent failed to prove the allegations raised in the removal letter without evidence and disregarded Rule 4 (c) of the National Police Service (Vetting) Regulation, 2013 (the Vetting Regulations). He further contends that the Respondent failed to comply with Regulation 9(2)(d) and 28 of the Vetting Regulations by taking into account matters and information not submitted before it by any party and without giving the Petitioner sufficient notice.

The Petitioner therefore seeks the following reliefs:

- a) An order to quash the decision made by the National Police Service Commission in a letter dated 9th October 2015 which removed the Petitioner from service.

b) An order to quash the decision made by the National Police Service Commission in the letter dated 15th January 2016 which confirmed the removal of the Petitioner from service.

c) A declaration that the decision in the letter dated 9th October 2015 was found on unsubstantiated evidence and was made unlawfully.

d) An order directing the Respondent to pay damages to the Petitioner for unlawful and unfair removal.

e) An order directing the Respondent to compensate the Petitioner for violation of his inalienable human rights.

f) An order directing the Respondent to pay the Petitioner 12 months' gross salary for unlawful removal from office as provided for under Section 49 of the Employment Act at the current salary scale of his rank.

g) An order directing the Respondent to compute and pay the Petitioner all his outstanding salaries, benefits and allowances since 9th October 2015 until his retirement age of 60 years on the same terms as before and payment of all his retirement **benefits as provided for under the law.**

h) An order for issue of an unconditional Certificate of Service reinstating into service.

i) A declaration that the Petitioner's constitutional rights to a credible and a fair hearing has been violated and consequently issue an order quashing the decision made by National Police Service Commission in the letter dated 9th October 2015.

j) An order for costs of the Petition.

k) Such other orders as this Court may deem fit to grant.

Respondent's case

The Respondent filed a Replying Affidavit sworn by Joseph V. Onyango its Chief Executive Officer on 30th December 2019. He avers that subject to section 7(1) National Police Service Act, the Commission formulated vetting regulations to enable it carry out the vetting exercise of all officers who were in force prior to the enactment of the Constitution, 2010.

He avers that the Petitioner appeared for vetting on 10th August 2015 where he was asked among other subjects his financial probity. He avers that from the submitted documents and the vetting exercise, it emerged that the Petitioner was seconded to Kenya Revenue Authority (KRA) in June 2006 where he was in charge of Revenue Protection Services.

He contends that starting 15th January 2009 to 4th June 2009, the Petitioner attended a Higher Training Course at the Kenya Police College and after his training he did not return to KRA. That he was attached to Kenya Airports Police Unit from June 2009 as the DCIO Mombasa Airport effectively ending his secondment to KRA. He contends that the Petitioner submitted a handing over checklist from KRA dated 17th March 2010 showing that he had exited KRA but he continued drawing salary and allowances from KRA for 4 years despite the fact that he was no longer seconded to KRA.

He avers that the Petitioner was asked why he was undeservedly drawing a salary from KRA but he did not give a plausible explanation. He avers that the Petitioner did not take any action or tender any evidence on the steps he took after he realised that he was still drawing a salary he was not entitled to.

He avers that when the Petitioner was questioned on how he was surviving without a salary after KRA initiated recovery of the unprocedural monies paid to him, he gave contradicting accounts that he is a single parent and his children depended on him and later stated that his eldest child is an engineer and he depends on the son.

He contends that in removing the Petitioner from service, the Commission was guided by Regulation 14(2)(c) of the Vetting Regulations which requires the Commission to look at the financial probity of the officer amongst other factors. He avers that the Petitioner's review was considered vis a vis the Commission's earlier decision and found to have fallen short of the requirements under Regulation 33.

The Petition proceeded by way of written submission.

Petitioner's Submissions

The Petitioner submitted that under Regulation 18 (2) of the National Police Service Vetting) Regulations 2013, the Respondent is required to serve the Petitioner with any complaints or any adverse information it had which it intended to rely on so as to give the Petitioner time to prepare and submit his written response to such adverse information.

He submitted that when he appeared before the Commission, he had not been informed of any complaint or adverse allegations made against him. He submitted that the Respondent failed to abide by Regulations 9(2)(d) and 28 as it took into account information submitted before it by KRA without giving him sufficient notice of the allegation prior to his vetting.

He averred that Article 47 of the Constitution was not adhered to therefore adversely exposing him to pains and penalties. He argued that his application for review was not adhered as provided under the Constitution and Fair Administrative Action Act. He further argued that the Respondent did not meet the test enunciated by W.R. Wade & C.F. Forsyth in Administrative Law, 10th Edition (2009) on the role of tribunals and quasi judicial bodies.

He submitted that Regulation 7(4) of the Vetting Regulations provides that decisions shall be recorded in writing and signed by all commissioners who decided the matter. He argued that a perusal of the proceedings indicates that there were 4 panellists however the decision of 9th October 2015 was signed by a different panel that did not participate in the vetting process.

He cited the cases of **George Kingi Bamba v National Police Service Commission [2019] eKLR** where the Court of Appeal reinstated the Appellant and ordered payment of his outstanding salaries. He further relied on the case of **Eusebius Karutu Laibuta v National Police Service Commission [2014] eKLR** where the Court nullified the decision of a differently constituted panel.

He submitted that he is entitled to a sum of Kshs.8,000,000 as compensation for violation of his inalienable human rights. He submitted that he is entitled to 12 months' gross salary for unlawful removal which amounts to Kshs.1,440,000. He further urged the Court to award him all outstanding salaries, benefits and allowances from 9th October 2015 until the date of his retirement.

Respondent's Submissions

The Respondent submitted that it was guided by Regulation 18 as read together with Regulation 19, of the Vetting Regulations. It submitted that section 9 of the Public Officer Ethics Act requires a public officer to live within his means and incur financial obligations that he can satisfy without financial hardship or embarrassment.

It submitted that there was no need to send the Petitioner a complaint or evidence as the Petitioner had admitted that matters were well within his knowledge. Further, he was the source of the information. It relied on the **George Kingi Bamba v National Police Service [2017] eKLR** where the Employment and Labour Relations Court held that the Respondent was justified in arriving at its findings on the basis of matters being admitted by the Petitioner.

With respect to the alleged violation of Regulation 9(2), (3) and 28 of the Vetting Regulations, it submitted that the Petitioner was timely and procedurally asked to submit information for vetting vide the letter dated 28th April 2015 before the vetting exercise which he submitted on 26th June 2015 and appeared for vetting on 10th August 2015.

It submitted that the provisions of Regulation 25(4) of the Vetting Regulations 2013 do not restrict decision making to the commissioners who participated in the hearing since the proceedings are recoded verbatim and later used to arrive at a decision whether the officer is suitable to continue serving or not. It further relied on the provisions of Regulation 10(1) of the Vetting Regulations.

It submitted that legal provisions informed the decision of the Commission to adopt the verbatim Hansard Record mode of recording proceedings to facilitate just deliberations and decision making. It relied on the case of **Immanuel Masinde Okutoyi & Others v National Police Service Commission & another [2014] eKLR** where the Court cited section 13 of the National Police Service Act and held that there is nothing wrong in the Commission setting up committees or panels as long as they comply with the law. They further cited the decision in **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009**.

It argued that the Petitioner in his review failed to prove any error apparent on the face of the record or new development that may not have been brought to the attention of the Respondent during his initial vetting.

He relied on the cases of **Anarita Karimi Njeru v the Republic (1979) KLR** and **Meme v Republic & Another [2004] eKLR**, and submitted that the Petitioner has not proved how his rights have been infringed upon. He averred that the Respondent has failed to demonstrate any act of procedural unfairness or illegality committed by the Respondent in the discharge of its statutory mandate to vet officers. It urged the Court to hold that the Respondent conducted the vetting exercise in a fair manner hence the Petitioner be dismissed with costs to the Respondent.

Analysis and Determination

The issues for determination are:

- a) Whether the Respondent violated the Petitioner's right to fair administrative action and fair hearing.
- b) Whether the decision to remove the Petitioner from service was justified.
- c) Whether the Petitioner is entitled to the reliefs sought.

Whether the Respondent violated the Petitioner's right to fair administrative action and fair hearing.

The Petitioner avers that he was not given sufficient notice of the allegations against him contrary to Regulation 9(2)(d) and 28 of the Vetting Regulations. He further avers that he was not given an opportunity to rebut the allegations and an opportunity to be heard after he applied for review of the decision dated 9th October 2015.

Article 47 of the Constitution provides:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) 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.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.

In his Further Statement, the Petitioner avers that apart from filling a questionnaire, he was never given any written allegations against him and that he only gave oral evidence as he had been notified to attend the vetting. As submitted by the Respondent, there were no complaints filed against the Petitioner. What the Respondent considered ere documents filed by the Petitioner himself. This is evident from the extract of the Hansard quoted by the Respondent in its submissions which I reproduce below –

“..... Com. Murshid Mohammed: That is why I am saying we do have your entire work trajectory but we are recording your details on the Hansard for the purposes that the officer who is with us is Officer Mwaura Mbogo. I think it has served that purpose. Now officer we also note that you have not furnished us with all the required documents to enable us conduct a much better vetting for you. We send you a letter on the 28th of April 2015 from the Commission where we wanted a number of documents – the KRA compliant certificate, your wealth declaration form and the bank statements for the period 2012-2014. Have you complied with this request?”

Mr. Boniface Mwaura Mbogo: Yes Sir, I did.

Com. Murshid Mohammed: Did you provide us with the bank statements?”

Mr. Boniface Mwaura Mbogo: Sir, I did. Maybe I should clarify on this issue. The bank statements that were required were for two years. However my bank account has not been active within the given time for reasons with your permission I can explain Sir ”

It is from that conversation that it emerged through the Petitioner’s own explanation why he had not submitted his bank accounts, that his account at Equity Bank had been dormant as he had not received a salary for 4 years. It is also from the said conversation that it emerged from the Petitioner himself, that the reason why he was not on payroll of the Respondent was because he had not been cleared by KRA. The Respondent would not have been privy to this information beforehand to enable it inform the Petitioner of any allegations in respect thereof and require him to respond before the vetting. This is information that came to the fore in the court during the vetting hearing.

I find no proof of the allegations by the Petitioner that the Respondent violated Regulation 18(2) and failed to abide by Regulation 9(2)(d) and 28 of the Vetting Regulations. I further find no proof of violation of the Petitioner’s right to fair hearing under Article 47 of the Constitution or Section 4 of the Fair Administrative Action Act. I further do not find any evidence that the Respondent took into account matters and information not submitted before it relating to Kenya Revenue Authority as the information before the Respondent in respect thereof was disclosed by the Petitioner when asked why he had not produced his bank account and clearance by KRA.

Regulation 9(3) of the Vetting Regulations provides that the Commission or its panel can inquire into any issue it deems fit. On the other hand, Regulation 18 provides:

- (1) An officer shall fully and truthfully supply all information required regarding the officer’s suitability and competence.*
- (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 in the process shall be served upon the officer.*
- (3) Where a summary of the complaint is served upon an officer, the officer shall lodge a response to the complaint within the period specified by the Commission in the notice.*
- (4) The response shall contain a summary of the material facts and any relevant documents and information on which the officer wishes to rely on in response to the complaint.”*

The Petitioner further raised the issue of the hearing of his application for review of the vetting decision. He avers that he was not given a hearing. The Petitioner has however not submitted the review decision or proceedings to enable the court make a determination on the same. The consequence is that the same has not been proved and must fail.

The Petitioner has raised the issue of the composition of the panel. This was not raised in the petition or amended petition, and was only raised in his written submissions. Considering a similar issue, the Court of Appeal in **George Kingi Bamba v National Police Service Commission [2019] eKLR** held:

“In the final ground the appellant has complained that the learned Judge ignored his complaint regarding the composition of the vetting panel; and that membership of the panel kept mutating.

We have looked at the record of both the vetting and review proceedings. Although there were six members during the vetting, of those, only two signed the report. The other three who signed the report did not take part in the vetting exercise. On the other hand two members who did not participate in the review proceedings signed the final report yet seven members took part in the review hearing. Was it fatal that some members of the panel who did not participate in the vetting and hearing of the review application signed the final report?

The regulations direct the respondent at the conclusion of the vetting exercise to make a decision as to suitability and competence of the officer vetted. That decision is to be made by consensus or by a majority vote.

“(4) Decisions shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the Commission.

(5) Where a Commissioner is unable to sign the decision, the reason for inability shall be recorded, and the decision signed by the other Commissioners”.

See **Rule 25.**

Although the Judge was addressed by both sides on this ground, she made no mention of it in the judgment.

Under paragraph 3 of the Second Schedule of the National Police Service Commission Act, the quorum of the meetings of the Commission (we believe including vetting) is required to have at least 5 members excluding the ex officio members of the Commission, namely the Inspector General and his 2 deputies. Under Regulation (25)(4) of the Regulations, only the Commissioners present can lawfully take part in the delivery of a decision.

Although we are satisfied that there was a quorum on both occasions, vetting and review, it was however irregular and unlawful to have “strangers” sign the report.

*It was expected that the panel as constituted to vet the appellant from its inception to conclusion would be the same. Only those members who took part in the vetting could legitimately own the report. If they did not sign it and there is no explanation the inevitable inference to be drawn is that they did not concur with it. The procedural impropriety and the irregularity went to the jurisdiction of the panel and definitely vitiated its decision. See **Eusebius Karuti Laibuta v National Police Service Commission, H.C. Petition No. 79 of 2014.***

The learned Judge, though alive to the gravity of the allegations and their potential to end the career of a fairly senior and long serving officer, failed however to appreciate that in removing the appellant the limits set by the Constitution and statute were not met. The appellant did not receive an administrative action that was procedurally fair.

With respect the learned Judge erred in her conclusion that the appellant repackaged relief food; and that the appellant and his wife purchased food from refugees; and that they engaged in unlawful trade without any independent proof.

She failed to balance the appellant’s achievements against the unproven accusations of impropriety.

Accordingly, we allow this appeal by setting aside the judgment and decree of the court below dated 30th March, 2017 with the result that the prayers 1, 2, 3 and 4 in the appellant’s petition dated 2nd June, 2016 are allowed. For the avoidance of doubt the appellant is reinstated, if he has not retired, to the position he served at the time of his vetting out with his salary and other benefits.”

It is trite that a party is bound by its pleadings. All the same, I have taken into account the decision of the Court of Appeal cited above in respect to composition of the vetting panel and the signing of the vetting report.

I would distinguish the circumstances herein from those in the cited case. In **Bamba case**, the main reason for the decision was that the appellant was not heard on the substantive issues that formed the basis for his removal from service. The composition of the vetting panel alone was thus not the reason for which the appeal was allowed.

I have considered the main reason for the removal of the appellant herein, which is financial embarrassment under the Public Officer Ethics Act. I have considered whether if a different panel was constituted it would arrive at a different decision. I have further considered whether the signing of the report by panellists who did not sit in the hearing would be fatal to the decision taking into account the reasons for the decision after reviewing the proceedings of the vetting hearing in the Hansard. I have further considered the objectives of vetting and the rights of the Petitioner to a fair hearing.

It is my conviction that the error in the irregularity in the signing of the report above did not vitiate the very valid reason for which the petitioner was removed from service.

For the foregoing reasons I find no merit in the petition and dismiss it.

Each party to bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF SEPTEMBER 2020

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 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