



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 183 OF 2019**

**(Before Hon. Justice Hellen S. Wasilwa 16<sup>th</sup> September, 2020)**

**JULIUS NDEGWA .....PETITIONER**

**VERSUS**

**NATIONAL POLICE**

**SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**DEPUTY INSPECTOR GENERAL,**

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

**JUDGEMENT**

1. What is before this Honourable is the Petition dated 3/10/2019, in which the Petitioner seeks the following reliefs:-

- i) A Declaration that the Petitioner's Fundamental Rights and Freedoms have been violated.***
- ii) An Order of Ceterari do issue to quash the entire proceedings and decision of the Respondents dismissing the Petitioner from the Administration Police Service.***
- iii) An Order for Reinstatement of the Petitioner to the service as a Police Officer as well as reinstatement of all his privileges including his accrued salary, allowances and any entitlements.***
- iv) Compensation to the Petitioner for the violation of his fundamental rights and freedoms.***
- v) Costs of this Petition.***
- vi) Any other relief that this Honourable Court may deem just to grant.***

**Background**

2. The Petitioner avers that he was enlisted in the Administration Police Service on or about the year 2008. He further averred that he performed his duties diligently and with dedication with his last posting being the Administration Police Training College (APTC) and was deployed to APTC Kibiko Camp following his successful nomination to coach athletes in various training camps.

3. The Petitioner further avers that in June 2017 he was shocked to learn that his salary had been stopped indefinitely without any reasons being issued. On his investigations into the issue of his stopped salary, he learnt that the same was done following his alleged posting to Loiyangalani sub County, Marsabit County.

4. He maintained that this new posting and/or transfer was not communicated to him contrary to the provisions of Service Standing Orders Chapter 72 paragraph 7 that required service of notice and/or communication prior to his transfer.

5. The Petitioner averred that it was after his arrival at Marsabit County that he met the County Commander who furnished him with his suspension and dismissal letter and a declaration under the Official Secrets Act for officers leaving service. He further averred that he was also informed of his two transfer letter to Loiyangalani that had been issued in March 2017 and that it was alleged that he had refused to

report to his new posting.

6. The Petitioner contended that the Respondents actions were unfair and unlawful for the following reasons:

*a) He was purportedly redeployed to Loiyangalani Sub County from APTC (Kibiko Camp) without any official communication being issued to him or any request being made for clearance from his unit.*

*b) Failure by the Respondents to notify him of his alleged suspension from the force that took effect on 4<sup>th</sup> October, 2017. Further failure by the Respondents to abide by the Service Standing Orders that provide that an officer on suspension ought to receive half of his salary together with house allowance as none was paid to him.*

*c) The Orderly Room Proceedings allegedly held on 5<sup>th</sup> September, 2017 were held in his absence which is an infringement of his right to fair hearing as protected under Article 47 and 50 of the Constitution of Kenya, 2010 as read together with the provisions of the Fair Administrative Action Act.*

*d) The Petitioner maintained that no notice or hearing was given to him prior to his alleged dismissal and further that the alleged dismissal failed to follow set procedure.*

7. The Petitioner maintained that the entire process carried out by the Respondents leading to his alleged dismissal was conducted in a manner contrary to the provisions of the principles of Natural justice, contrary to his rights as guaranteed under Articles 41, 47 and 50 of the Constitution of Kenya, 2010.

8. He further maintained that the Respondents actions were further in breach of his legitimate expectation since as a service Police Officer he reasonably expected that any transfer would be effected in accordance with the relevant laws, the Service Standing Orders and that the same would have been properly communicated to him.

9. The Petitioner further contended that it was his expectation that in the event of any disciplinary proceedings being preferred against him, he would have been duly notified of the same and equally given an opportunity to defend himself.

10. The Petitioner averred that the decision to suspend and dismiss him from service on the grounds of his alleged absence from service from 20/3/2017 to 5/9/2017 was factually erroneous as the Petitioner was in lawful service at his then workstation at APTC Kibiko.

11. He further averred that the Respondents failed to consider the chequered and unblemished career of 10 years of service and balance it with the allegations made a clear indication that the decision to dismiss the Petitioner lacked proportionality. He further maintained that the Respondents failed to consider his record, conduct and performance in his current and previous postings.

12. The Petitioner further contended that the entire process of his Orderly Room Proceedings, his suspension and final dismissal was conducted in a manner contrary to the Principles of Natural Justice, contrary to the rules under the National Police Service (Transfer and Deployment) Regulations 2015, National Police Service (Discipline) Regulations, The National Police Service (Service Standing Orders) and his rights as guaranteed under Articles 47 & 50 of the Constitution of Kenya, 2010.

13. The Petitioner maintains that his transfer and/or deployment to Loiyangalani and his subsequent dismissal was not carried out in a manner that respected the Public Interest as his wellbeing as an individual, human rights, social justice and the rule of law were all violated.

14. In conclusion, the Petitioner urges this Honourable Court to allow his Petition in terms of the reliefs sought therein.

15. The Petition is supported by the Petitioner's Affidavit sworn on 3/10/2019 in which he reiterates the grounds on the face of the Petition.

16. In response to the Petition the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by **JOSEPH VINCENT ONYANGO**, it's Chief Executive Officer on 20/1/2020 in which he confirms that the Petitioner was enlisted in service as from the year 2008.

17. The Affiant maintained that the Petitioner was redeployed from the Administration Police Training College Kibiko camp vide the signal Ref No. JGO/AP/OUT/SIG/VOL.J/44/17 dated 15/5/2017 to Loiyangalani Sub County but failed to report to the new station.

18. He further averred that the Petitioner was dismissed from service with effect from 5/9/2017 following his conviction on two accounts being, absenting himself without leave contrary to Section 88 (1) (2) as read with the Eighth Schedule of the National Police Service Act and wilfully disobeying lawful order to report to his new station contrary to Section 88 (2).

19. He maintained that the above grounds were valid reasons for the Petitioner's dismissal and that due process was followed as the Petitioner was properly charged and convicted in the Orderly Room Proceedings and pursuant to the provisions of Section 88 (1) (2) as read with the Eighth Schedule of the National Police Service Act, 2011.

20. The 1<sup>st</sup> Respondent further averred that the Petitioner was duly informed of his right to Appeal against his dismissal and that he did vide his letter dated 13/11/2018 but was unable to determine the appeal due to lack quorum in the office.

21. He maintained that no violations were committed by the 1<sup>st</sup> Respondent as the Appeal as filed is yet to be concluded.

22. It is on this basis that the 1<sup>st</sup> Respondent urged this Honourable to find the Petition as filed devoid of merit and that the same be dismissed with costs to the Respondent.

23. Parties thereafter agreed to dispose of the Petition by way of written submissions.

### **Submission by the Parties**

24. The Petitioner submitted that his dismissal was unfair and unlawful as the Respondent failed to comply with the mandatory rules of Natural Justice as provided for under Article 47 of the Constitution of Kenya. To buttress this argument he cited and relied on the findings in the cases of **Wilfred Mbithi Jason Vs National Police Service Commission (2016) eKLR** and **Republic Vs National Land Commission and 2 Others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) (2018) eKLR** where the Courts held that it is a substantive and mandatory constitutional right of all parties that they be accorded a chance to be heard and that a decision maker is expected to make an expeditious, fair, lawful, efficient and reasonable decision in all circumstances.

25. The Petitioner further submitted that he was not accorded a fair hearing by the Respondents prior to his dismissal from service as provided under Article 50 of the Constitution of Kenya, 2010. For emphasis the Petitioner cited and relied on the case of **Msagha Vs Chief Justice Nairobi HCMCA No. 1062 of 2004** where it was held that no party is to be condemned unheard.

26. It is on this basis that he maintained that the decision to dismiss him was procedurally unfair for the Respondents' failure to comply with the mandatory provisions of procedural fairness. For emphasis, he cited and relied on the provisions of Chapter 5 Paragraph 7 of the Service Standing Orders on the Principles of Procedural Fairness and the case of **Wilfred Mbithi Jason Vs National Police Service Commission (Supra)** where the Court elaborates further on what constitutes procedural fairness.

27. The Petitioner maintained that the Orderly room proceedings purportedly undertaken by the Respondent herein were not procedural and that the same were done contrary to the provisions of Section 94 of the National Police Service Act and Chapter 30 of the National Police Standing Orders.

28. He therefore argued that the Orderly proceedings were therefore a sham and urged this Court to find that the same was done in breach of his rights to Natural Justice as protected under Article 50 of the Constitution of Kenya, 2010.

29. The Petitioner argued that his dismissal was therefore not carried out in accordance with the applicable laws. He contended that the dismissing Authority is the National Police Service Commission and not the Administration Police. He further contended that he is yet to receive any such dismissal letter or notification from the National Police Service Commission and therefore termed his alleged dismissal as irregular, illegal and unwarranted.

30. The Petitioner further submitted that the Respondents failed to consider the principle of proportionality prior to arriving at the decision to terminate his service. He argued that the Respondents failed to consider his performance in service for the period of 10 years he had worked without having any disciplinary issues.

31. In conclusion, the Petitioner submitted that his dismissal was unlawful, wrong and unfair and as a result is entitled to the reliefs sought in his Petition. He therefore urged this Honourable to allow his Petition in terms of the reliefs sought therein.

### **1<sup>st</sup> Respondent's Submissions**

32. The 1<sup>st</sup> Respondent on the other hand maintained that he suit as filed before this Court is not proper due to the doctrine of exhaustion as the Petitioner's Appeal is still pending before it. To buttress this argument the 1<sup>st</sup> Respondent cited and relied on the Court of Appeal decision in the case of **Geoffrey Muthinja & 2 Others Vs Samuel Munga Henry & 1756 Others (2015) eKLR** where the Court held that where dispute resolution mechanism exists outside the Courts, the same ought to be exhausted before the Jurisdiction of the Court is invoked.

33. The 1<sup>st</sup> Respondent argued that the Petitioner having lodged his Appeal failed to wait for the final determination of the Appeal and opted to file the instant Petition. The 1<sup>st</sup> Respondent on that basis maintained that this Honourable Court lacks the requisite Jurisdiction to hear and determine the Petition as filed. For emphasis the 1<sup>st</sup> Respondent further cited the cases of **Republic Vs Nairobi City County Government Ex-parte Ndiara Enterprises Limited (2017) eKLR**, **Railroad Commission Vs Duluth Street Railway 273 U.S 625, 628 (192)** and **Alice Mweru Ngai Vs Kenya Power & Lighting Company Limited (2015) eKLR** on the doctrine of exhaustion and the Court's Jurisdiction.

34. It further argued that this Honourable Court has to down its tools and allow it proceed with the Appeal already lodged by the Petitioner on 13/11/2018.

35. On the issue of service of the redeployment and/or transfer letter, the 1<sup>st</sup> Respondent maintained that the Petitioner was duly informed of his redeployment orders vide the signal dated 15/2/2017 but wilfully chose to defy the same and failed to report to his new posting.

36. The 1<sup>st</sup> Respondent further maintained that the Petitioner's redeployment was a subject of a mass transfer following from which the signal reference number JGO/AP/OUT/SIG/VOL.49/17 was generated and that other officers mentioned therein did report to their new deployments.

37. It is on this basis that the 1<sup>st</sup> Respondent maintained that there were indeed valid reasons of dismissing the Petitioner's service and that

due process was followed.

38. It is further submitted that the Petitioner has failed to approach this Court with clean hands and can therefore not seek protection of this court. For emphasis the 1<sup>st</sup> Respondent cited the case of **Francis Munyoki Kilonzo & Another Vs Vincent Mutua Mutiso (2013) eKLR.**

39. On the issue of the Petitioner's entitlement to the reliefs sought in his Petition, the 1<sup>st</sup> Respondent submitted that the Petition as filed offends Section 9 (2) of the Fair Administration Act and that further he failed to satisfy the exceptional circumstances requirement as provided under Section 9 (4) of the Fair Administrative Actions Act.

40. The 1<sup>st</sup> Respondent urged this Court to find that the suit as filed offends the doctrine of exhaustion and therefore proceed to dismiss the Petition in its entirety with costs to the 1<sup>st</sup> Respondent.

41. In conclusion, the 1<sup>st</sup> Respondent urged this Court to dismiss the Petition with costs to the 1<sup>st</sup> Respondent.

42. I have examined all the evidence and submissions of the Parties herein.

43. From the Petitioner's position, he was condemned unheard and his services dismissed for no valid reasons.

44. Vide a letter dated 4/10/2017 the Petitioner was suspended from duty for knowingly and willfully disobeying a lawful order which was to report to a new workstation. The letter was forwarded to the Petitioner on 25/12/2017 and so this indicates that was the time he learnt of the suspension.

45. It is contended by the Respondent that the Petitioner had been transferred through a signal dated 26/5/2017 but which the Petitioner denied receipt of.

46. In their defence the Respondents insist that the Petitioner had knowledge of the signal in question. The Respondents insist on this indicating that signals are very important means of communication and cannot be ignored. The Respondents however have not demonstrated how the Petitioner was served with the signal however important it is.

47. The prudent thing would have been for the Respondent to demonstrate that the said signal was communicated to the Petitioner through his supervisor in one form or another. The Respondents did not adduce any evidence of the remittance of this signal to the Petitioner.

48. It is indeed the Respondent who alleges knowledge to prove the same and without such proof, it is my finding that the Petitioner had no knowledge of his transfer or deployment.

49. It was therefore erroneous for him to be condemned on an issue he knew nothing of. This in effect breached his rights under Article 41 of the Constitution, which provides for fair labour practices.

50. The Petitioner also contends that he was never given a chance to be heard. The Respondents indicated that they subjected him to a disciplinary process.

51. The Respondents have not demonstrated the fair process alluded to. Minutes of the hearing have not been produced in this Court and there is no iota of proof that the Petitioner was given a chance to be heard. Without such proof again, it is evident that the Petitioner was not given a fair hearing before his dismissal.

52. The Petitioner also indicated that he filed an appeal against his dismissal and to date the appeal has not been conducted.

53. The Respondent agreed that an appeal was filed but has not been heard due to lack of quorum. The Respondents' position that lack of quorum led to the appeal not being considered is laughable and a clear dereliction of duty by the Respondent.

54. Section 45(2) of Employment Act 2007 states as follows:-

**(2) "A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure".**

55. The Respondents having dismissed the Petitioner without valid reason and without following due process, I find the dismissal of the Claimant was unfair and unjustified. The same breached Petitioner's rights for fair hearing under Article 47 of the Constitution and Article

41 on fair labour practices.

56. In terms of remedies for prayers sought, I order as follows:-

*j) "A Declaration that the Petitioner's Fundamental Rights and Freedoms have been violated.*

*ii) An Order of Certiorari to issue quashing the entire proceedings and decision of the Respondent dismissing the Petitioner from the Administration Police Service.*

*iii) An Order for reinstatement of the Petitioner to the service as a Police Officer without loss of salary, benefits and promotion from the time of dismissal to date.*

*iv) Compensation of 1 (one) million Kenya shillings for violation of the Petitioner's rights and freedoms.*

*v) The Petitioner to pay costs of this Petition.*

Dated and delivered in open Court this 16<sup>th</sup> day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

Thita for Petitioner – Present

Wangechi for 2<sup>nd</sup> Respondent – Present

Chebet Koech holding brief Muthiga for 1<sup>st</sup> Respondent – Present