



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

(Formerly HCC JR 8/2019)

JUDICIAL REVIEW NO 1 OF 2019

DICKSON KIPLAGAT KASEBE.....APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

J U D G E M E N T

1. By a Notice of Motion dated 18th July, 2019 the applicant sought orders among others that: -

(a) THAT this honourable court be pleased to issue an order of mandamus to remove to quash the decision of the Respondent issued through one Sergeant Maingi who orally transferring the Applicant from Nairobi Water and Sewerage Company Limited in Industrial Area to the Meteorological Department along Ngong road without following the law and other laid down procedures.

(b) THAT this honourable court be pleased to issue an order of mandamus compelling the 1st respondent to pay the applicant's salary arrears effective from the month of April, 2019.

(c) THAT the honourable Court be pleased to issue an order of prohibition restraining the Respondent either by themselves or by someone authorized by them from orally Transferring taking disciplinary action or otherwise terminating the Applicant's contract without strict compliance with the applicable law and the Constitution of Kenya.

2. The application was supported by the affidavit of Dickson Kiplagat Kasebe who deponed on the main that: -

(a) THAT I am a police Officer by profession.

(b) THAT I served the respondents with diligence and commitment until 25th March 2019, when I was verbally transferred by one sergeant Maingi from the Nairobi City Water and Sewerage Company headquarters to Kenya meteorological department headquarters.

(c) THAT on 26th March ,2019, I proceeded to my new work station at the Kenya meteorological department headquarters but the boss in charge there by the name PETER MUENDO declined to allow me in on the grounds that I did not have a transfer letter.

(d) THAT I tried to go back to my old station but Sergeant Maingi insisted that he had transferred me to another station and I as therefore not allowed to work there anymore and so I was forced to stay at home.

(e) THAT I later visited an advocate who sent a letter to the national police service Commission complaining about my transfer procedure

(f) THAT the national police service Commission then responded to me on 10th May ,2019 insisting that I was the one on the wrong as I had been given a transfer letter reference No CIP/SMG/006/VOL.1/274 without even bothering to find out whether I ever received a transfer letter or not. They further stated in their letter that disciplinary proceedings had been commenced against me yet I had no knowledge of the

(g) THAT after receipt of the letter from the police service Commission, I went back to an advocate who wrote a letter to the police service Commission requesting for proceedings of the said disciplinary proceedings but the commission has never responded

(h) The respondent filed a replying affidavit through one Ismael Ahmed who deponed among others that: -

- (a) THAT I am the Staff Operations Critical Infrastructure Protection Unit (CIPU) of the Administration Police Service, conversant with the matter giving rise to the Cause No.08 of 2019, on behalf of the 2nd, 3rd and 4th Respondent.
- (b) THAT the Claimant is an employee of the Administration Police Service and had been serving under the Critical Infrastructure Protection Unit before his disappearance.
- (c) THAT due to the nature of duty the officers in the Critical Infrastructure Protection Unit undertakes, it is a normal routine to redeploy officers at regular time intervals to enhance their service delivery and at the same time cure eventualities arising out of officers overstaying in one area.
- (d) THAT on 17th April, 2018, the Officer Commanding Administration Police Service (CIPU) attached to Kenya Pipeline Company Limited while communicating the request of the Officer in-charge of APS Officers attached to Kenya Pipeline Company in Eldoret vide letter Ref. No CIPU/KPC/10/VOL1/26 wrote to the Unit Commander who is based at Athi River requesting the Commander to replace Claimant with another due to the facts that they were unable to perform their assigned duties aptly among other numerous complaints over misconduct
- (e) THAT on 30th April, 2018, the CIPU Commander vide a letter ref. No CIPU/SMG/006/VOL1/162 recalled the Claimant with another officer to the CIPU Headquarters for observation and deployed other two officers to replace them promptly.
- (f) THAT on 9th May, 2018, the claimant was deployed to Nairobi City Water and Sewerage Company which falls under the critical facilities the Unit is tasked to offer protective security to.
- (g) THAT on 22nd March ,2019 the Commandant Critical infrastructure protection Unit received a letter from the Officer Commanding APS Officers at Nairobi City Water and Sewerage Company relaying a communication from Nairobi City Water and Sewerage Company Chief Security Officer on the need to withdraw the Claimant among others due to wanting behaviors which were not in tandem with the company's Core function. However, at the time of inception of the letter, the Unit had already arranged on the reshuffling of CIPU officers.
- (h) THAT on 28th March,2019 the Commandant Critical Infrastructure Unit, issued a redeployment order served upon Claimant and other affected CIPU officers who were serving in various critical facilities.
- (i) THAT on 30th March,2019 the Claimant among other officers were transported vide a government vehicle GKB 504T ISUZU CANTER to the new station at Metrological Department Headquarters Nairobi.
- (j) THAT the Claimant upon reaching the new duty station, he subsequently and without any justifiable cause disappeared from the station from 1st April, 2019 as demonstrated by the sampled weekly duty rosters.
- (k) THAT on 10th April, 2019 the Commandant CIPU as a matter of procedure dispatched a trace signal to Eldoret West, Turbo and Soy-counties where the Officer is believed to be coming from and/or residing in a bid, if found to inform the officer to report back to duty station. Further a reminder trace signal was sent on 15th April, 2019 to the same stations with a view on following up a response from the station commanders if they were able to establish the whereabouts of the Claimant.
- (l) THAT on 15th April, 2019 a response signal was sent from Turbo sub-county AP Commander informing the CIPU Commandant that the Claimant was traced found and duly informed to report back to his duty station.
- (m) THAT on 16th April,2019 the Commandant through a letter addressed to the Deputy Inspector General of Administration police requested that the Claimant's salary be stopped as an initial step towards taking appropriate disciplinary measures against him for the unlawful absenteeism from work.
- (n) THAT the on 7th May 2019 the Director, Internal Affairs Unit of the National police Service wrote a letter to the CIPU Commandant requesting the unit to avail all the relevant status of the Claimant having received a formal complaint from the claimant on the what he termed as un-procedural verbal transfer.
- (o) THAT on 8th May, 2019, the Commandant CIPU replied to the Director IAU citing the prevailing facts surrounding the disappearance of the Claimant from his duty station.
- (p) THAT on 10th May,2019 the Director AIU responded to the Claimant assertions of unprocedural verbal transfer a letter and copied the same to CIPU commandant for information. The Claimant assertions lacked grounds and therefore he was advised to report to his new duty station and concentrate on his assigned duties, which he never heeded.
- (q) THAT on 8TH May,2019 the CIPU Commandant sent a presumption of Desertion signal to the Turbo AP Sib-County Commander taking cognizant of the fact that the Claimant being a residence of the area and having declined to report back to work should therefore be presumed a deserter and provisions of Section 94 of the National police Service Act which

provides that , A police officer who absents himself from duty without leave or just cause for a period exceeding ten days shall, unless the contrary is proved, be considered to have deserted from the service and that upon reasonable suspicion that any police officer had deserted the service any police officer may arrest that officer without a warrant, and shall there upon take him before a magistrate having jurisdiction in the area in which such person deserted or was arrested.

(r) THAT pursuant to the provisions of the National Police Service Act on the police officers who are presumed to have deserted the service, the officer was charged on 19th November, 2019 before chief Magistrate Court at Mavoko Law Courts for Desertion from service contrary to Section 94(1) of the National Police Service. Arrest warrant was equally issued by the same court on that very day.

(s) THAT the Claimant was subsequently vide Kenya Police Gazette No.7 through the Director Criminal Investigations published as a wanted person.

3. In submissions in support of the application counsel for the applicant Ms Luselia submitted that the alleged deployment letter was never served on the applicant and that the purported redeployment order alleged to have been issued upon the applicant could not suffice as procedural and lawful notification of transfer which in any case should be addressed to the individual. This according to counsel was a requirement under regulation 7(1) and (2) of the National Police Service Commission (Transfer and Deployment) regulations 2015. Verbal transfer was therefore unlawful counsel further submitted that the oral transfer was done in an arbitrary and unfair manner amounting to an abuse and improper exercise of authority.

4. Ms Luselia further contended that according to the regulations a transfer should not be used as a disciplinary sanction or reward measure and where it was found that a transfer has been so used, the Commission shall revoke the transfer and direct appropriate disciplinary action to be taken against any officer responsible. Further, the purported redeployment letter dated 28th March, 2019 was done by the Commanding Officer Infrastructure Protection Unit which was unprocedural.

5. Counsel further submitted that every person had the right to administrative action that was efficient, lawful, reasonable and procedurally fair. The applicant requested for the alleged disciplinary proceedings alleged to have taken place against him but the same were not supplied.

6. Counsel for the Respondent on its part submitted that the Court had no jurisdiction to decide the issue raised in the Notice of Motion. According to Counsel, the facts as pleaded go beyond the scope judicial review and tests the meritocracy of the respondent's alleged decision issued by Sergeant Mairigi . According counsel, contrary to the Claimant's allegations of transfer he was actually redeployed from CIPU to non- strategic following complaints of misconduct and unbecoming behaviour while he was serving at CIPU. The applicant upon redeployment deserted duty without any justifiable basis leading to his arrest and arraignment. This was a normal employer – employee dispute where an employee was merely claiming he was transferred unfairly while the employer maintained the Claimant deserted duty. The matter surrounds the validity or otherwise of the impugned decision to transfer the applicant. The issue in the dispute could be resolved through an ordinary claim where viva voce evidence could be called.

7. Counsel further submitted that assuming the dispute could be resolved by judicial review, the applicant did not annex any decision capable of being quashed pursuant to the provisions of Order 53 rule 7 of the Civil procedure Rules. The Claimant only claims a verbal decisions was made by the respondent and delivered to him by sergeant Maingi . The applicant did not avail any evidence to demonstrate that indeed the alleged verbal decision existed or that a verbal decision was made by the respondents.

8. Counsel further submitted that it was not in dispute that the respondent as an employer had the discretion to decide when and where to deploy employees. It could not therefore be true that in exercising that discretion respondent would be acting ultra vires. It followed that the respondent having exercised its discretion to redeploy the applicant and physically handed over the applicant to his new station, could not be blamed for failing to consult the applicant before redeployment.

9. The applicant in his motion seeks judicial review orders to quash an alleged verbal decision to transfer him from Nairobi Water and Sewerage Company Limited in Industrial area to the Meteorological Department along Ngong Road. The applicant further sought orders restraining the respondent from taking any disciplinary action against him.

10. The respondent on its part denied transferring the applicant. According to the respondent the applicant was redeployed from CIPU to Nairobi Water Sewerage Company Limited in Industrial Area and later on to Nairobi Meteorological Department on Ngong Road. The reason for the applicant's redeployment according to the respondent was misconduct.

11. The respondent further stated that upon redeployment, the applicant also deserted duties forcing the respondent to cause his arrest and arraignment in court as per the provisions of National Police Service Act. The respondent exhibited in the replying affidavit to the application, documents in support of these allegations. The applicant denied receipt of any of the documents exhibited by the respondent.

12. The applicant through his Counsel wrote a letter dated 18th April, 2019 appealing against the alleged verbal transfer. By a letter dated 10th May, 2019 the respondent refuted the Claimant's allegations of verbal transfer. According to the respondent, the applicant was officially redeployed through a letter dated 28th March,2019 but upon receiving his deployment letter he decided to absent himself from his new station without official leave. The letter further advised the applicant to go back to his new station and concentrate on his duties. This letter was attached with the applicant's application. No responses to it was however exhibited.

13. Judicial review orders are public law remedies hence apply in very limited circumstances to situations which may on critical evaluation be private law matters. In employment relationship Judicial review remedies could apply only in those situations where the employment of a public officer is underpinned by the Constitution or statute defining the terms and conditions of such officer's service. The officer is seeking judicial review remedies in such a case ought to demonstrate that the decision to interfere with his or her terms of service contravenes the Constitution or statute by which the employment relationship to underpinned.

14. Ordinary contracts of employment are adequately catered for by the Employment Act enabling statutes and or human resource manuals. It is therefore inappropriate to invoke judicial review orders under such circumstances. The case before me falls under the latter category.

15. Further, deployment of officers under the police service is a matter of discretion of the force Inspector General and or National Police Service Commission. It is not for the officer being deployed to pick and choose where he or she should be deployed. The applicant in the matter before me has not ably demonstrated that his deployment contravened the alleged provisions of the National Police Service Act. Further contrary to his allegation that he was verbally transferred there were documents on record that showed the applicant was actually formally deployed. The respondent in its letter dated 10th May, 2019 attached to the applicant's documents refuted the allegations by the Claimant that he was verbally transferred. The respondent further advised the applicant to report to his new station and concentrate on his duties. The Claimant did not exhibit any response to this letter showing that he indeed reported to his new duty station and was denied access. Two months later on 16th July,2019 the applicant instead filed the present application.

16. From the foregoing the Court finds the application in bad faith and unmerited. The same is hereby dismissed with costs.

17. It is so ordered.

Dated at Eldoret this 30th day of October 2020

Abuodha Jorum Nelson

Judge

Delivered this 30th day of October 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge