



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION 12 OF 2016**

**(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> February, 2019)**

**LAWRENCE MWAURA NJOROGE.....PETITIONER/APPLICANT**

**VERSUS**

**THE NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner herein filed an Amended Petition on 27<sup>th</sup> June 2018 through the firm Oduor Henry John Advocates alleging that his dismissal from the Police Service did not adhere to the principles of natural justice. The Petitioner therefore seeking the following orders:-

- 1. An order quashing the entire proceedings and the decision of the Respondent declaring that the Petitioner is incompetent and unsuitable and had been discontinued from the National Police Service.***
- 2. An order declaring that the Respondent had violated the Petitioner's fundamental rights and Freedom.***
- 3. An order quashing the decision of the Respondent to dismiss the Petitioner's review application.***
- 4. An order reinstating the Petitioner to the service of the Respondent to his current posting and with all benefits.***
- 5. Any other relief that this honourable Court may deem just to grant.***
- 6. Costs of this Petition.***

2. The Amended Petition is supported by the affidavit of the Petitioner, Lawrence, Mwaura Njoroge, sworn on 8<sup>th</sup> June 2018. In response to the Petition the Respondent filed a Replying Affidavit sworn by Johnston Kavuludi, the Respondent's Chairman, on 22<sup>nd</sup> August 2018.

3. The Petition was heard by way of written submissions.

**Petitioner's Case**

4. The Petitioner avers that he was invited for review of his vetting by the Respondent on 19<sup>th</sup> October 2016 which he attended though under duress as he was unwell having been involved in an accident and that the Respondent had intimidated and harassed him despite being aware of his medical condition. The Petitioner avers that prior to the hearing of his review application the Respondent had insisted that he withdraws the Petition filed in court on 8<sup>th</sup> February 2016.

5. The Petitioner avers that the Respondent delivered its decision on the first vetting of the Petitioner on 9<sup>th</sup> October 2015 finding that the Petitioner was incompetent and unsuitable to continue serving the Respondent without any evidence. The Petitioner avers that the Respondent's decision delivered on 6<sup>th</sup> December 2016 contradicted the Respondent's decision delivered in 9<sup>th</sup> October 2015 removing him from its service.

6. The Petitioner avers that in its decision of 9<sup>th</sup> October 2015 the Respondent found the Petitioner had qualified educational background for the entry in the police service and that no complaint was made by the public to the Respondent regarding his integrity.

7. The Petitioner avers that the decision to find him as incompetent and unsuitable to serve the Respondent was unfair and biased and made against the principle of natural justice. In addition, that his constitutional rights of being given a fair hearing in a legal process have been violated by the Respondent.

8. The Petitioner avers that the Respondent did not give the reasons of dismissing the Petitioner and that this was made by ill motive as before the hearing the Respondent had shown signs of being biased by intimidating the Petitioner which continued even during the hearing. The Petitioner further avers that the Hansard during his vetting and review indicates the Respondent's bias at arriving at his decision.

9. The Petitioner avers that the letter dated 25<sup>th</sup> January 2015 dismissing his review application does not state which Commissioners dealt with the Petitioner's review application to dismiss it. The Petitioner further avers that the Respondent's position that the Petitioner lacked financial probity in respect of monies deposited into his account by his wife from the family business was unreasonable and wanting in proportionality.

10. The Petitioner avers that the Respondent has violated his rights under Articles 47 and 50 (1) of the Constitution as the Respondent did not table any evidence that aided in arriving at the decision. Further, that the Respondent has never supplied the Petitioner with the minutes of the meeting that led to the dismissal of the Petitioner from its services.

### **Respondent's Case**

11. The Respondent avers that the Petitioner was procedurally vetted and found to be unsuitable and subsequently removed from the service and that the Petitioner's review application was found meritless and dismissed.

12. The Respondent avers that the Commission took note of the decisions in **JR No. 1 of 2016 Margaret Nyaruai Theuri v National Police Service Commission and JR. No. 51 of 2016 Stephen Kiptanui Arap Soi** where the Court found that summary dismissal of a review application was unfair. Hence, it reached a consent with the Petitioner to have his review heard pursuant to the Judgement.

13. The Respondent avers that the review application was heard on 19<sup>th</sup> October 2016 and that the Petitioner was severally asked, if he had any objection due to his ill health to which he confirmed having no objections and that he was competent to proceed with the hearing.

14. The Respondent avers that the Petitioner was found unsuitable and incompetent to continue serving as the Commission was guided by Regulation 14 (2) of the Vetting Regulations, which requires the Commission to look into financial probity.

15. The Respondent avers that the Commission was guided by Regulation 4 (e) and (g) in conducting the interview not only by the principles and standards of impartiality, natural justice and international best practice but in a transparent manner.

16. The Respondent avers that the Petitioner did not provide new information to the Commission regarding his sources of income and did not submit any records on the alleged chicken business which resulted to the Respondent finding him unfit to serve due to lack of financial probity in accordance with Regulation 14 (c).

17. The Respondent avers that the claim that the Petitioner's rights were violated for not being supplied with minutes are a clear misapprehension as Regulation 23 of the vetting regulations only obligates the commission to supply an officer who has been found unsuitable with a duly signed decision indicating the reasons for removal which the Commission complied with.

### **Petitioner's Submissions**

18. The Petitioner submitted that he was never sensitised before the vetting and that amounts to the violations of his constitutional rights or notified that the deposits in his account were suspicious as required by Regulation 18 (12) of the Vetting Regulations to enable him respond.

19. The Petitioner submitted that due process was not followed in both the vetting and review processes. He submitted that the Respondent breached the law by failing to sensitise him, failing to provide any report of integrity of financial probity, allowing strangers to make a decision on his termination and failing to avail minutes of the decision that led to his declaration of being unfit to serve.

20. The Petitioner relied on the case of **Eusebius Laibuta v The National Police Service Commission Petition 79 of 2014:-**

***"In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision."***

21. The Petitioner submitted that the Respondent contravened section 4 of the Fair administrative Action Act and that he was not informed that the Respondent was suspicious of his bank deposits. The Petitioner relied on the Court of Appeal decision in **County Assembly of Kisumu and 182 others v Kisumu County Assembly Board and 6 Others [2015] eKLR.**

22. The Petitioner submitted that the Respondent carried out independent investigations and analysis of the declaration forms submitted by the Petitioner but it refused and or neglected to provide the Petitioner with investigative report and analysis of the Petitioner's source of income.

## **Respondent's submissions**

23. The Respondent submitted that the allegation of procedural unfairness must be demonstrated clearly to the Court the instances or elements of unfairness and that a quoting of constitutional provisions should not suffice. The Respondent submitted that the principles outlined in the case of **Anarita Karimi Njeru v the Republic (1976-1980) KLR 1272** and **Meme v Republic & Ano [2004] eKLR** were not adhered to.

24. The Respondent submitted that it is empowered by the Vetting regulations to consider the professional conduct, work history and ethical conduct of an officer when arriving at a vetting decision on his/her suitability to continue serving as an officer. The Respondent relied on the case of **Republic v National Police Service Commission Exparte James Ngumi Mutunga Misc. App No. 44 of 2016**.

25. The Respondent submitted that under Regulation 18 of the vetting Regulations it is only obligated to supply an officer with summary of complaints if the same are received and that if there were none there would be no complaint to be supplied. The Respondent further submitted that the lack of a complaint does not excuse an officer from the vetting exercise as mandated under Section 7 (2) of National Police Service Act 2011.

26. The Respondent submitted that, in removing the Petitioner from service it was guided by Regulation 14 (2) of the Police Service (Vetting) Regulations 2013 after it established that the Petitioner failed to truthfully and accurately explain his sources of income.

27. The Respondent submitted that it had demonstrated that the decision to remove the Petitioner from the service after a lawful and procedurally just vetting process and subsequent reviews was duly considered and signed by commissioners who decided the matter of the Commission as contemplated under Regulation 25 of the Vetting Regulations 2013.

28. The Respondent submitted that the decision was signed by the Commissioners who participated in the hearings and later procedurally released by the Commission's Board as evidenced by the decision. Therefore, the Petitioner's allegation that strangers signed his vetting and vetting review decisions is misleading.

29. The Respondent submitted that the entire board membership only signified the formal release of the result of the vetting upon being tabled in the board by commissioners who made the decision and who signed differently.

30. The Respondent further submitted that this is not a new phenomena since even judicial decisions are at times signed by both the Judge who determines the decision and the one who reads it. The Respondent relied on **Immanuel Masinde Okutoyi & Others v National Police Service Commission & Other [2014] eKLR**

*“As is stated by Michael Fordham in Judicial Review Handbook; 4<sup>th</sup> Edition at page 1007:*

*“procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case”.*

31. The Respondent submitted that it had proposed and embraced verbatim the recording of proceedings in a Hansard to guarantee fairness and clarity of the information during deliberations. It finally submitted that Petitioner has failed to demonstrate any act of procedural unfairness or illegality committed by the Respondent in the discharge to its unique statutory mandate to vet officers.

32. I have examined all submissions and averments from both parties. The issues for determination by this Court are as follows:-

1. *Whether the Respondents violated the Petitioner's right for fair administrative and fair hearing.*
2. *Whether the decision to remove the Petitioner were lawfully arrived at?*
3. *Whether the Petitioner is entitled to remedies sought.*

33. On the first issue, the Fair Administrative Action Act Section 4(1), (2), (3) and (4) states as follows:-

1. *“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
2. *Every person has the right to be given written reasons for any administrative action that is taken against him.*
3. *Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-*
  - a) *prior and adequate notice of the nature and reasons for the proposed administrative action;*
  - b) *an opportunity to be heard and to make representations in that regard;*
  - c) *notice of a right to a review or internal appeal against an administrative decision, where applicable;*

- d) a statement of reasons pursuant to Section 6;*
- e) notice of the right to legal representation, where applicable;*
- f) notice of the right to cross-examine or where applicable; or*
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

**4. The administrator shall accord the person against whom administrative action is taken an opportunity to:-**

- a) attend proceedings, in person or in the company of an expert of his choice;*
- b) be heard;*
- c) cross-examine persons who give adverse evidence against him; and*
- d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*

34. Article 47 of the Constitution also state as much that:-

- 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*

35. The parameters required for an administrative action to be considered fair are: there must be notice of the nature and reasons for the administrative action and an opportunity to be heard accorded to the affected to make their representations as above.

36. The Petitioner has contended that he was not accorded a fair administrative action as required by the law. From the Hansard records, the Petitioner appeared before the Vetting Panel of the Respondent's Commission on 17.3.2015. The Panel comprised of the following:-

***"Commissioner Murshid Mohamed and Rashid Musengi and Co-opted members, Patrick Owino Ochieng, Anna Konuche, Isabella Krop and Wilson Siambi".***

37. Before the vetting, the Petitioner had completed and submitted a vetting questionnaire as expected. The reasons for the vetting were clearly understood by the Petitioner following a requirement in the National Police Service Act to vet all officers of the National Police Service to assess their suitability and competence and to discontinue the service of any officer who fails the vetting.

38. Based on the law, the Petitioner appeared before the Vetting Panel on 17/3/2015 as indicated above. From the Hansard record, the Petitioner was asked if he had any objection to the membership of the Panel and he said no. The vetting then proceeded and the Petitioner explained his career movement in the police force.

39. The Petitioner was then asked some questions concerning his bank accounts and those of his wife. He indicated that he had 2 accounts with Equity Bank and 2 accounts with Barclays Bank and also 1 with National Bank and a dormant account with Co-operative Bank and 1 with Diamond Trust.

40. He was further asked about his other properties, which he explained and indicated he keeps about 4000 chicken on a hired plot and makes like 1.4 million every 6 weeks. He indicated that his wife was also running maize and second hand clothes business.

41. After this vetting, the Petitioner was found not suitable to serve in the police service on the ground that he could not explain regular deposits on his bank account and also failed to provide documents to explain the business he alleged he was running. The Commission found that the Petitioner failed to offer a plausible explanation regarding his bank accounts, which revealed a lack of conformity with his known earnings and this casting doubt on his integrity.

42. From the above explanation and from the Hansard proceedings, the Petitioner was well aware of the purpose of the vetting and was given a chance to explain himself. The decision of the Respondent is signed by Jonston Kavulundi, Ronald Musengi, Murshid Mohammed and Mary Owuor, Joseph Boinnet and Samuel Arachi.

43. It is apparent that not all the 6 Commissioners sat in this Vetting Panel and therefore it was improper for the said Commissioners –

Johnstone Kavulundi, Mary Owuor, Joseph Boinnet and Samuel Arachi to sign the decision as though they had sat in the Panel that heard the Petitioner's vetting hearing.

44. The Petitioner appealed the decision of the Vetting Panel. The review exercise was scheduled for 19.10.2011. The review was carried out by three Commissioners – Murshid Mohammed, Mary Owuor and Godfrey Kasili. The review was however dismissed. The review decision is signed by 7 Commissioners whereas only 3 sat in the review and even of the 3 only 1 sat in the initial Vetting Panel.

45. I have faulted the review decision which proceeded with a Panel of 3 but whose decision is signed by 2 Commissioners and ratified by a Panel of 7 some of who never heard the Petitioner in the first vetting exercise and who also never sat on the review exercise.

46. This is in tantamount to making a decision against the Petitioner without hearing him as provided for under Section 4 of the Fair Administrative Act and thus condemning him unheard. This is against rules of natural justice.

47. Given the finding above, it is my finding that the decision by the Respondent to declare the Petitioner unfit to serve in the police service was arrived at without due process and I therefore declare it null and void.

48. In the circumstances, I will order that the Petitioner be considered to have served in the police service successfully and to be retired accordingly in the normal course of service with effect from the date of this judgement. He is entitled to all withheld salaries if any upto the date of retirement and all his pension dues.

49. The Respondent will pay costs of this Petition.

**Dated and delivered in open Court this 11<sup>th</sup> day of February, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Opanyi holding brief Oduol for Petitioner – Present

Respondents – Absent