



**REPUBLIC OF KENYA**

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

**PETITION NO. 130 OF 2018**

**IN THE MATTER OF: ARTICLES 1, 10, 22, 23, 25(c), 27, 28, 35, 41(1), 47(1), 50(1), 162(2), 165(3) and 236 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**BETWEEN**

**LAWRENCE NJUE NYAGA .....PETITIONER**

**VERSUS**

**NATIONAL POLICE SERVICE**

**COMMISSION.....1<sup>st</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Lawrence Njue Nyaga (Petitioner) was enlisted into the Administration Police Service in 2006 as a Constable.
2. On 26 April 2016, the Commandant, Security of Government Building Unit wrote to the Petitioner advising him that he had been redeployed to North Horr Sub-County in Marsabit County with immediate effect.
3. The Petitioner did not report to the new station.
4. On 2 August 2016, the Petitioner was charged in *absentia* at North Horr, Sub-County headquarters and after the orderly room proceedings, he was convicted.
5. On 30 December 2016 the Deputy Inspector General, Administration Police Service wrote to the Petitioner informing him that it had been decided that he be suspended from exercising police powers in terms of section 89(1)(b) and 76A of the National Police Service Act and section G.32(1),(3) and (6) of the Public Service Code of Regulations pending final decision by the National Police Service Commission (1<sup>st</sup> Respondent).
6. The suspension letter advised the Petitioner that during the suspension he would be entitled to house allowance and medical allowance but not to any salary.
7. It appears that the Petitioner had a frosty working relationship with his seniors prior to the redeployment (see letters 4 October 2016, 5 September 2017, 27 October 2017, 17 January 2018 and 20 August 2018).
8. Most of the letters were not responded to until eventually, the Commandant, Security of Government Buildings Unit wrote to the Petitioner on 9 November 2017 advising him that the redeployment was valid as it had emanated from the relevant office.
9. On 4 July 2018, the Petitioner's advocate on record wrote to the 1<sup>st</sup> Respondent lamenting about the Petitioner's ill treatment and seeking a status report.
10. There was no response forthcoming and on 1 August 2018, the advocate wrote a reminder.

11. The 1<sup>st</sup> Respondent replied to the advocate on 6 August 2018 indicating that the Petitioner's issue was under consideration and that the outcome would be communicated in due course.
12. The advocate sought for a clear update through a letter dated 27 August 2018 and when none was made, moved the Court on 5 December 2018 through a motion under certificate of urgency. The Court directed that the Respondents be served.
13. When the application came for *inter partes* hearing/directions on 6 December 2018, Ms Opiyo appeared for the 1<sup>st</sup> Respondent while the Inspector General of Police (2<sup>nd</sup> Respondent) was not represented despite evidence of service.
14. The 1<sup>st</sup> Respondent sought for time and the Court allowed both Respondents up to 13 December 2018 to file and serves their responses.
15. On 13 December 2018 when the application came up to confirm whether the Respondents had filed their responses, the Court confirmed that no responses were on file.
16. The Respondents were also not represented, and the Court therefore directed that the Petition be heard on 19 December 2018.
17. On 19 December 2018, the Court, with regret admitted the 1<sup>st</sup> Respondent's replying affidavit filed on 17 December 2018 and further directed that the parties file and exchange written submissions.
18. The Petitioner filed his submissions on 15 January 2019 while the 1<sup>st</sup> Respondent filed its submissions on 30 January 2019.
19. The 2<sup>nd</sup> Respondent did not file any pleadings/submissions. However, on 5 February 2019, after close of hearing, they filed a motion under certificate of urgency seeking leave to be allowed to file a Response out of time.
20. The Duty Court directed that the application be served upon the other parties for directions on 6 February 2019.
21. Despite the order, the Petitioner was only served in Court after the application had been called out for hearing. The Court gave the Petitioner time to go through the application and it was heard thereafter.
22. The Court, in an *ex tempore* ruling declined the application and reserved the giving of reasons in this judgment, which the Court now gives.
23. The 2<sup>nd</sup> Respondent was served with the Petition and accompanying application on 5 December 2018. They did not bother to enter appearance or cause the filing of a Notice of Appointment to signify an intention to defend the Petition/application.
24. On 6 December 2018, the Court set the Petition for mention on 13 December 2018. On the said date, the Court scheduled hearing of the Petition on 19 December 2018.
25. The 2<sup>nd</sup> Respondent was served with a hearing notice on 14 December 2018.
26. Yet again, no Notice of Appointment of Advocate or Appearance was filed. There was no representation on 19 December 2018.
27. The Attorney General, on behalf of the 2<sup>nd</sup> Respondent admit that they received instructions on 11 December 2018.
28. However, no Appearance or Notice of Appointment was filed to signify an intention to participate in the proceedings, until the instant application was filed, 3 days to delivery of judgment.
29. There was no cogent explanation why it took the 2<sup>nd</sup> Respondent from 11 December 2018 to 5 February 2019 to move Court. In the circumstances, the Court finds there was inordinate delay.
30. The Court has also looked at the proposed Response and attached documents. All the documents were already placed before the Court by either the Petitioner or 1<sup>st</sup> Respondent. The proposed Response and documents speak of undisputed facts which are common and are not in dispute.
31. The Court will now turn its attention to the Petition.
32. The Court has considered all the material on record and has also looked at the National Police Service Act and other laws referred to in the 1<sup>st</sup> Respondent's replying affidavit.
33. It is not in dispute that the Petitioner has been on suspension for over 2 years awaiting determination of his case.
34. The evidence from the 1<sup>st</sup> Respondent is that the delay to conclude the Petitioner's disciplinary case has been due to inefficiencies on the side of the 2<sup>nd</sup> Respondent.

35. There is evidence on record that the 2<sup>nd</sup> Respondent failed on more than one occasion to comprehensively respond to inquiries from the 1<sup>st</sup> Respondent to enable it (1<sup>st</sup> Respondent conclude the case).

36. It is also not disputed that the Petitioner, though promised house allowance and medical allowance has not been enjoying those allowances.

37. It appears to the Court that the Petitioner had legitimate differences with his seniors at the Security of Government Buildings Unit, but it is unfortunate that none of those seniors saw it useful to file appropriate affidavits to rebut the depositions by the Petitioner. The differences could as well have precipitated the redeployment to North Horr.

38. The bottom line however remains, in the view of this Court, that in terms of Article 47 of the Constitution and which provision has been given content and context in the *Fair Administrative Action Act* and more so section 4 thereof, the Respondents have failed to expeditiously and proportionately take a decision on the Petitioner's case.

39. Further the Service Standing Orders have comprehensively provided for discipline of police officers and even set timelines for conclusion of such processes and made disciplinary action subject to Article 47 of the Constitution.

40. The Respondents did not present any material at all including in the proposed response to suggest that they had complied with the provisions of the Service Standing Orders.

41. In terms of case law, this Court will endorse and find applicable the passage in *R v Amon ole Tiren & Ar* (2018) eKLR that

In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditious will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.

42. The Respondents are established institutions and it cannot be that it takes 2 years to conclude a disciplinary case considering that the Petitioner was not being paid allowances as indicated in the suspension letter to enable him house himself and provide for his necessities of life and medical needs.

43. The delay run contrary to the constitutional requirement of proportionality and expeditious and efficient determination of the disciplinary case against the Petitioner. The delay amounted to unfair labour practice as well.

44. Before concluding, the Court notes with regret and indicts the conduct of the 2<sup>nd</sup> Respondent of failing or declining to participate in the proceedings despite service and in this era of transparency, accountability and national values, considering the his conduct was the immediate cause of the proceedings.

### **Conclusion and Orders**

45. From the foregoing, the Court finds and holds that the Petitioner has made the standard required of him and issues orders in terms of prayers (a), (b) and (c).

46. The Court further lifts the suspension and orders the Respondents to reinstate the Petitioner to duty forthwith.

47. Considering the expected continued relationship between the parties, the Court makes no order as to costs.

**Delivered, dated and signed in Nairobi on this 8<sup>th</sup> day of February 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner      Mr. Wathome instructed by Mukunga, Wathome & Co. Advocates

For 1<sup>st</sup> Respondent Mr. Odunga instructed by National Police Service Commission 2<sup>nd</sup> Respondent did not participate

Court Assistant      Lindsey