



**REPUBLIC OF KENYA**

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

**PETITION NO. 43 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10,19, 20, 21, 22, 27(2),(3), 28, 41(1), 47(1),(2), 50 AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 28, 41, 47 AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT (ACT NO. 11A OF 2011)**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**PC BENJAMIN NJAKWAL.....PETITIONER**

**VERSUS**

**NATIONAL POLICE SERVICE**

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

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

**HON. ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

1. Benjamin Njakwai (Petitioner) was enlisted into the Kenya Police Force on 2 September 1995 and was deployed to L Coy, G Coy and lastly to traffic department, Kilimani Police Station.
2. Around 28 December 2013, the Petitioner travelled to his home town of Baragoi in Samburu County after receiving information that 6 of his relatives had been killed in the so called *Baragoi massacre*.
3. When the Petitioner resumed duty on 26 January 2014, he found that a signal had been issued to the effect that he had deserted.

4. Upon reporting to the immediate supervisor, the Supervisor directed the Petitioner to the Staff Officer Administration, Nairobi County Traffic Headquarter who after listening to his explanation allowed him to resume duty (it appears the Petitioner was not paid salary for February 2014).

5. On 17 September 2014, the Petitioner secured 4 days compassionate leave to attend the burial of his child who had died upon birth. The Petitioner resumed duty on 21 September 2014.

6. Around 28 December 2014, the Petitioner fractured a leg as a result of a fall at his residence, and after attending a hospital was put on rest until recovery.

7. According to the Petitioner, he alerted his in charge (Divisional Traffic Officer) of the accident/injury through a colleague and the County Traffic Headquarters was advised accordingly.

8. When the Petitioner resumed duty on 20 July 2015, he was informed that he had been declared a deserter in February 2014 and therefore his salary could not be reinstated before the issue of desertion was addressed.

9. On 4 November 2015, the Petitioner saw a newspaper article reporting that a warrant of arrest had been issued against him. On 15 May 2016, the Petitioner was arrested and charged with desertion before the Magistrate's Court but the charge was withdrawn under section 87(a) of the Criminal Procedure Code.

10. According to the Petitioner, the Respondents failed to reinstate him to work despite the withdrawal of the charge before the Magistrate's Court and he therefore instituted the instant proceedings seeking orders of reinstatement, unpaid salaries from March 2014 and terminal benefits upon honourable discharge, declaration that failure to reinstate him contravened the right enshrined in Articles 27(1)(2) and (3); 28, 41 and 50 of the Constitution; prohibiting continuation of any criminal investigations and prosecution in respect of the alleged desertion and an order reviewing the discharge under section 87(a) of the Criminal Procedure Code with an order of acquittal.

11. The Petition was filed together with a motion seeking an order of reinstatement at the interlocutory stage.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition to the motion on 28 June 2017.

13. On 5 June 2017, the Court directed that the Petition be heard instead of the motion, and the Respondents were directed to file answers to the Petition within 14 days (directive was not complied with).

14. On 28 June 2017, the Court directed the 1<sup>st</sup> Respondent to file responses to the Petition within 7 days and directions as to the filing of submissions were also issued.

15. When the Petition came up for mention on 31 January 2018, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents informed the Court that they would rely on the grounds of opposition to the application which accompanied the Petition as responses to the Petition.

16. The Petitioner filed additional documents, Issues for determination and submissions on 17 May 2018.

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed joint submissions on 15 November 2018.

18. The 1<sup>st</sup> Respondent did not file any response/submissions to the Petition.

## **Evaluation**

19. The Court has given due consideration to the Petition, the grounds in opposition and the submissions on record.

20. In the view of the Petitioner, the failure to reinstate him on account of the withdrawal of the criminal court charges violated his rights, was illegal, unconstitutional and not founded on any legal parameters.

21. It is now settled that criminal proceedings and disciplinary proceedings have different objectives and purposes.

22. Even the evidential thresholds to be met are different.

23. In a criminal charge, the prosecution is expected to prove a charge beyond reasonable doubt while in disciplinary proceedings, the employer is not expected to comply with the strictures of proof expected in criminal court proceedings. The employer is not expected to hold a mini-court in the name of disciplinary proceedings.

24. In the view of the Court therefore, criminal proceedings/conviction cannot serve as a substitute for disciplinary proceedings/(vitiating such proceedings) more so where there are elaborate statutory procedures on how misconduct/(removal from service) in the work place should be dealt with.

25. It is not in dispute that the 1<sup>st</sup> Respondent as an employer had disciplinary control over the Petitioner (2<sup>nd</sup> Respondent ingeniously submitted that it had no disciplinary control over police officers and that the mandate belonged to the 1<sup>st</sup> Respondent, a submission the Court

finds not sound in law).

26. The disciplinary control was subject to express provisions of the Constitution and more so Article 236, the provisions of the National Police Service Commission Act and the Discipline Regulations made thereunder, the Service Standing Orders among others.

27. The Respondents did not file any replying affidavits to rebut the depositions by the Petitioner and that leaves the Court in quandary.

28. A quandary because there are factual gaps in the narration as presented by the Petitioner such as whether he had permission to be away from work between 28 December 2013 to 26 January 2014; whether the Staff Officer, Administration Nairobi County Traffic Headquarters had the legal mandate to deal with the question of absence as opposed to the 1<sup>st</sup> Respondent and whether the acceptance of the explanation was accepted in writing.

29. Despite the gaps in the Petitioner's case, it is obvious to the Court that the officers within the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who handled the Petitioner's case should have filed appropriate affidavits to set out the facts from their perspective.

30. It is highly regrettable that such public officers continue with a *laissez fair* attitude towards the running of public affairs in this age of transparency and accountability.

31. The Respondents may want to institute inquiries to establish why this case was not defended and whether the appropriate office holders who handled the case were faithful to the obligations of their respective offices.

32. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also submitted that the Petition was incompetent as it did not raise any constitutional questions and the Courts attention was drawn to *Josphat Ndirangu v Henkel Chemicals EA Ltd (2013) eKLR*.

33. In the view of the Court, this point should not be decisive in this case considering that the Employment Act, 2007 does not apply to the Police Service. In any case, the Respondents did not demonstrate any prejudice or injustice occasioned to their respective cases by the manner the Court was moved.

34. The Petitioner's depositions remain unchallenged and uncontroverted, and because there is even no dismissal or discharge letter, the Court will order that

(a) The Respondents do reinstate the Petitioner to his employment without loss of benefits including salaries from March 2014.

35. No order as to costs.

**Delivered, dated and signed in Nairobi on this 1<sup>st</sup> day of February 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner MCM & Associates

1<sup>st</sup> Respondent did not enter appearance but an advocate appeared once

2<sup>nd</sup> and 3<sup>rd</sup> Respondents Ms. Odhiambo, State Counsel, Office of the Attorney General

Court Assistant Lindsey