



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 33 OF 2018

JANE ATIENO OTIENO.....CLAIMANT

- VERSUS -

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DEPUTY INSPECTOR GENERAL OF KENYA POLICE SERVICE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The circumstances of the present petition are that the petitioner was enlisted in the then Kenya Police Force in 1990 and was dismissed in 2011. The petitioner was charged on the 12.01.2011 with the offence of negligently allowing a prisoner who was committed to her charge to escape. The petitioner was later taken through orderly room proceedings which resulted in her dismissal with effect from 14.01.2011 after she was found culpable. The petitioner appealed against the dismissal to the Public Service Commission but the same was disallowed and she was informed her right to review as communicated by the Public Service Commission per the letter dated 06.04.2011.

The petitioner was subsequently charged at Kikuyu Principal Magistrate's Court in criminal case number 27 of 2011 with the offence of aiding a prisoner to escape contrary to section 124(a) of the Penal Code. The petitioner was later acquitted of the criminal charges though she had long been dismissed in the internal disciplinary proceedings which had been initiated and concluded prior to the commencement, hearing and determination of the criminal case.

The petitioner had exhausted the prescribed internal disciplinary procedure but then sought to reopen her administrative disciplinary case by appealing to the newly established 1st respondent. The 1st respondent considered the appeal and upheld the earlier decision by the Public Service Commission dismissing the petitioner from service by noting that her case had been conclusively dealt with and the Commission did not have the mandate to reopen it. The 1st respondent's decision was communicated to the claimant.

Being dissatisfied with the turn of events, the petitioner filed the petition on 19.04.2018 through M'njau & Mageto Advocates. The petition was in the matter of Chapter 4 of the Bill of Rights, Articles 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 25, 27(1), (2) and (3), 28, 35, 41(1), 47(1), 48, 49, 50(1), (2) (a) and (o), 159(2) (d), 258, 162 and 246(1), (2) and (3) of the Constitution of Kenya 2010; the Employment Act 2007; the National Police Service Act, 2011; the Force Standing Orders under the Police Act, Cap.84 Laws of Kenya; the disciplinary or orderly room proceedings; and in the matter of dismissal from the National Police Service (formerly the Police Force).

The petitioner prayed for judgment against the respondent for:

- a) A declaration that the disciplinary proceedings conducted by the respondents on 12.01.2011 and the resultant decision made on 17.01.2011 dismissing the petitioner from the National Police Service and subsequent subjecting the petitioner to criminal proceedings on the same grounds in Kikuyu PMC criminal case No.27 of 2011 was unconstitutional and in violation of the Petitioner's rights under Articles 41, 47, 50, 159, Of the Constitution.
- b) A permanent injunction to restrain the respondents and or their agents, servants, or employees from confirming dismissal and or termination and or ill treatment of the petitioner in any manner on account of having brought this petition to the Honourable Court.
- c) Reinstatement of the petitioner to the position she held prior to the said dismissal without any loss of rank or insignia, salary and

allowances and any other benefits entitled to her.

d) Damages as compensation for the constitutional violations under Article 23 of the Constitution of Kenya 2010.

e) Costs and interests.

The 1st respondent entered appearance on 08.05.2018 through Paul Ojwang, Litigation Counsel. The 1st respondent filed on 31.10.2018 the replying affidavit of Joseph Vincent Onyango, the Chief Executive Officer.

The 2nd, 3rd, and 4th respondents appointed Wangeci Gichangi, State Counsel, for the Hon. Attorney General to act in the matter. The 2nd, 3rd, and 4th respondents filed on 30.10.2018 the replying affidavit of Samuel Gathirwa (SP), the Staffing Officer Personnel 9 (SOP 9) in the Kenya Police Service.

The Court has considered the pleadings, the affidavits and the final submissions made for the parties and makes findings as follows:

1) The petitioner was dismissed by the letter dated 17.01.2011 effective 14.01.2011 after a full orderly proceeding held on 12.01.2011 for the offence of negligently allowing a prisoner committed to her charge to escape. It was found at the hearing that the petitioner allowed a convicted prisoner by the name Dennis Akoko to escape, and who was to be locked up in Tigoni Police Station for safe custody as from 16.04.2010 to 19.04.2016 when he was to be transferred to Industrial Prisons to serve a 20 years jail sentence – the prisoner was taken to her office by the in-charge court orderlies and before he was formerly booked and he disappeared without trace. The record shows that the petitioner confirmed at that hearing that she had no witnesses and she handed in her written statement concerning the matter in question. She signed as much. The recorded summary of the evidence was that at the material time, 7 convicted and sentenced persons were brought to the station and the petitioner being the Deputy OCS “**knew about**” the case of the one convicted person who disappeared. The said convict, Dennis Akoko had not been booked in the daily occurrence book but was taken to the petitioner’s office and the said Akoko remained in the petitioner’s office – the last time Akoko was seen. On 18.04.2011 the petitioner informed the other police officers that the missing convict had been taken to Industrial Prisons by a friend to the OCS. That was the record of the orderly room proceedings. As at the time of conviction, the Court returns that the respondents have established that they had genuine reasons to dismiss the petitioner from the Police Service. Article 47 was not violated in any manner because the letter of dismissal set out clear reason for the termination.

2) The Court has considered the petitioner’s case that the dismissal decision was in exercise of powers usurping the trial court in the criminal case so that Article 50 of the Constitution on the rights of an accused person including trial by a court with competent jurisdiction was thereby usurped. The Court returns that that was not the case in the instant petition. First, the allegations against the petitioner at the orderly room proceedings were founded upon misconduct under the contract of service as provided for in the applicable and binding regulations being an offence contrary to regulation 3 sub-regulation 16 of the police regulations. The decision to dismiss came earlier than the judgment in the criminal case on 24.07.2014. The trial court acquitted the petitioner under section 215 of the Criminal Procedure Code because the prosecution had failed to prove the case beyond doubt. The trial Court found that the failure by the prosecution to call 2 crucial witnesses upon whose evidence the petitioner would have squarely been exculpated or convicted resulted in the acquittal. Taking the findings in the criminal case into account, the Court returns that in any event, nothing in the criminal trial court’s judgment therefore impeached the findings of the orderly room proceedings. Accordingly Articles 47 and 50 of the Constitution had not been violated as urged for the petitioner.

3) The Court has considered paragraph 7 of the replying affidavit of Samuel Gathirwa (SP). It states that the force standing orders provide that a notice of proceedings may be dispensed with where there is need to set an immediate example or where the provincial or gazetted officer considers it expedient or in the public interest that an inquiry needs to proceed immediately. Paragraph 8 thereof then states that such was the case to protect the public from the convict who had disappeared and further at paragraph 9 that the waiver notice being exhibit SG 1 was served upon the petitioner. The Court observes that the petitioner did not file her further affidavit to rebut the respondent’s explanations. The Court also observes that the waiver notice being exhibit SG 1 does not narrate the same charges as in issue in this petition – so that such waiver as relied upon did not serve the purpose to unseat the requisite notice. However, the Court has considered all material on record as at the time of the orderly room proceedings or appeal to the Commissions and returns that the petitioner did not protest and seek more time to answer the allegations or urge the case that she had not been given an ample time to answer the allegations. The evidence is that she prepared her defence and presented a written statement at the orderly room proceedings. The Court considers that the lamentation about the waiver and the requisite notice in the instant case did not therefore operate to occasion manifest injustice and any irregularities would be excusable in the circumstances of the case.

4) It is true that by way of a background the dismissal letter referred to earlier disciplinary proceedings against the petitioner but it was clear that the reason for dismissal was the disappearance of the convicted and sentenced person in issue and not such earlier disciplinary allegations that had been set aside by the Commissioner of Police. The petitioner’s concerns in that regard are found unjustified as the Court returns that no injustice resulted from mentioning such previous disciplinary case in the dismissal letter.

5) The petitioner did not establish the contractual or statutory provision that imposition of interdiction or suspension was a mandatory precondition prior to dismissal or initiating dismissal proceedings and the concerns in that regard will fail.

6) The petitioner alleged that the respondents failed to furnish her with the copies of the disciplinary proceedings for the purposes of filing the appeal and provisions of Articles 35, 59(4), 79, 248, and 252 of the Constitution were thereby violated. The Court returns that the argument must fail because the petitioner has not shown that he ever requested for provision of the information in issue and the same was denied as alleged. Further the present petition was not about provision of such information, no prayer was made in that regard and the argument was either belated (the appeals in issue having been determined without petitioner’s grievance as now made ever having been earlier made) or unnecessary.

7) The Court has considered the circumstances of the case including the acquittal in the criminal case and returns that each party will bear own costs of the case.

In conclusion judgment is hereby entered for the respondents against the petitioner for dismissal of the petition herein with orders that each party shall bear own costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Friday 15th March, 2019**.

BYRAM ONGAYA

JUDGE