



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC PETITION NO. 11 OF 2018

(as consolidated with No. 12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29 and 36 of 2018.

(Before Hon. Justice Mathews N. Nduma)

1. CELINA NADITE.....1ST PETITIONER
2. JOSEPHINE NYAKARA KEGICHA.....2ND PETITIONER
3. VERONICA LEIRO SIMINTOI.....3RD PETITIONER
4. BEATRICE WAMBURA MURIUKI.....4TH PETITIONER
5. FRANCIS AGESA YOYA.....5TH PETITIONER
6. SIMON NAIBEL.....6TH PETITIONER
7. PHILOMENA MWONGELI NICHOLAS.....7TH PETITIONER
8. DOROTHY ADHIAMBO OKACH.....8TH PETITIONER
9. PETER MUNGAI KAMAU.....9TH PETITIONER
10. GEOFFREY MANYALI KIKECH.....10TH PETITIONER
11. JOYCE ARUS OWITI.....11TH PETITIONER
12. KENNEDY RUCHO OBUSURU.....12TH PETITIONER
13. JAPHETH SAFARI BAYA.....13TH PETITIONER
14. SAMSON KIPKULEI AYEBEI.....14TH PETITIONER
15. NELSON DAVID NJOROGI.....15TH PETITIONER
16. ROSINA MKAKISHA MAGANGA.....16TH PETITIONER
17. SORA DUBA HUKA.....17TH PETITIONER
18. ROSELYNE LUVEGA MWANJE.....18TH PETITIONER
19. ROTICH SYLVESTER KIPRONO.....19TH PETITIONER
20. CHARLES KIRUI KIBORE.....20TH PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. These matters were consolidated since they arise from the same cause of action.
2. The facts common in the petitions are that the petitioners were subjected to vetting for traffic officers held at Tom Mboya Labour College, Kisumu. The petitioners were found unfit to serve as police officers for various reasons provided in the hansard records of the proceedings and the report by the vetting board.
3. The petitioners filed review applications against the decision to remove them from police service.
4. The petitioners were called for vetting review and were subjected to further questioning by the review panel.
5. The review panel upheld the decision by the vetting panel to remove the petitioners from police service.
6. Written submissions were filed by Mr. Mongeri Advocate on 16th July 2018 on behalf of all the petitioners and arguments were made collectively by counsel except petition no. 21 in which the petitioner was represented by Mr. Ogutu Advocate and separate submissions had been filed and argued by the advocate. The petitioners pray for the following reliefs:
 - (a) A declaration that the petitioners' human rights and fundamental freedoms have been violated.
 - (b) An order quashing the entire proceedings and the decisions of the respondent declaring the petitioners failed vetting and removal from the Kenya Police service.
 - (c) An order for reinstatement of the petitioners to their respective positions held in the police service without loss of remuneration and privileges.
 - (d) An order for damages for unlawful and unfair removal from service.
 - (e) Compensation to the petitioners for the violation of their human rights and fundamental freedoms set out in the petition.
 - (f) Costs.

Foundation of the petitions

7. The petitioners state that the National Police Service Commission is empowered under *Section 7 of the National Police Service Commission Act (NPSC Act)* to vet all officers on their suitability and competence and discontinue those found wanting from service.
8. That Rule 4(c) of the National Police Service Commission Vetting Regulations provide:

“In conducting the vetting process, the commissions shall be guided by the following principles:-

Vetting shall be done in accordance with the values and principles set out in Article 10, 27, 47, 50 and 232 of the constitution”
9. That the Respondent failed to abide by *regulation 9(2) (d) and 28* for taking into account matters and information not submitted before it by any party and without giving the petitioners sufficient notice over the said matters.
10. That *Articles 47 (1) and 50 of the Constitution* with regard to fair administrative action and protection of rights to fair hearing were violated by the respondent both in the original vetting and in the review panel.
11. That *Section 4 of the Fair Administrative Act*, was violated by the respondent for failure to give the petitioners sufficient reasons for the action taken against them.
12. That the petitioners were not allowed to call witnesses contrary to regulation 30 and complaints introduced during the hearing had not been served on the petitioners.
13. The issues put forth by the petitioners for determination are therefore:-
 - (i) Whether the procedure followed by the respondent in vetting and removing the petitioners from service violated the rules of National Justice and fair administrative action.
 - (ii) Whether the petitioners are entitled to the reliefs sought.

Replying affidavits

14. The respondent filed comprehensive replying affidavits dated 12th January 2018 signed by Johnston Kavuludi, Chairman National Police Service Commission.
15. The respondents framed the issues for determination in a similar manner as the petitioners, to wit, whether the petitioners' right to a fair hearing and fair administrative action were violated in the vetting process and removal and whether the petitioners are entitled to the reliefs sought.
16. The respondent in the replying affidavit set out in detail the constitutional, statutory and regulatory basis of the vetting process. The respondent states that all the provisions and principles contained therein were followed in the vetting of the petitioners.
17. That the petitioners were removed from service for lack of financial probity and integrity in that the officers had received numerous huge deposits in their bank and mpesa accounts which were incommensurate with their declared and expected income and were unable to give a clear explanation or justification for such deposits.
18. That the vetting panel gave a fair hearing to the petitioners and a detailed decision on the officers removal from service after failing the vetting exercise.
19. That the petitioners had prior to vetting completed and submitted the vetting questionnaire and had therefore opportunity to address all matters relevant to the vetting before it took place.
20. That the explanation given for the large amounts of money were unbelievable and the officers were firstly, in default of providing full and truthful information to the panel as per *regulation 18 of the National Police Service (vetting) Regulations 2013*.
21. That upon removal, the officers applied for review of the decision under *regulation 33 of the vetting regulations 2013*. The review applications were heard. That all the petitioners did not bring any new information that was relevant to the issues and no apparent error on the face of the records as contemplated under regulation 33 were discerned. The review applications were therefore dismissed and decision communicated to the petitioners.
22. That the respondent did not violate any human right or fundamental freedom of the petitioners. The commission adhered to the constitution, statutes and regulations.
23. That the petitions lack merit and they be dismissed accordingly.

Determination

24. The issues for determination as set out herein before are as follows:-

- (i) Whether the petitioners' right to a fair hearing and fair administrative action was violated by the respondent.
- (ii) Whether the petitioners are entitled to the reliefs sought.

Issue (i)

25. In answering the first issue, it is important to note that each of the petitioners was confronted at the hearing with issues of financial impropriety with regard to salaries and mpesa transactions. It is this specific information which is challenged in that it was not raised before the petitioners faced the vetting panel and therefore they were ill prepared to handle it and as a result the hearing was not fair and violated Article 50 which guarantees the right to fair hearing and the right to fair administrative action under *Article 47 of the Constitution as read with Section 4 of the Fair Administrative action 2015*.

26. Brief facts of each petition is as follows:-

Celina Nadite

The vetting board raised concerns on mpesa transactions between herself and Osman Hussein, Juviline Karani and Abdi Omar. She explained why the three persons had sent money to her. That the Mpesa transactions in issue for the four years, 2012-2013 totaled Kshs 44,000. Details of the mpesa and bank transactions had been requested prior to the vetting. She was removed for lack of financial probity on 6th December 2016.

Josephine Nyakara Kegicha

27. Before the vetting hearing, the petitioner submitted to the National Police Service Commission the wealth declaration together with her Mpesa statement, tax clearance certificate and copies of education and professional certificates and bank statements for the year 2012-2013. Petitioner was removed for lack of financial probity, commission noting that there was a disparity after it was established that the officer had received numerous huge deposits in her bank and M-pesa accounts which were incommensurate with her declared and expected income and could not give a clear explanation or justification for such deposits. She was removed from office on 6th December 2016.

Veronica Leiro Simintoi

28. Officer was removed on 6th December 2016. Officer could not explain transactions noted in her mpesa account which were incommensurate with her declared and expected income. She failed to give justification for such disparity.

Beatrice Wambura Muriuki

29. Officer was removed from office on 6th December 2016 due to lack of financial probity. The officer had received numerous huge deposits in her bank and mpesa accounts which were incommensurate with her declared income.

Francis Agesa Yoye

30. Officer was removed on 6th December 2016. He could not explain huge deposits in his bank and mpesa account statements and was unable to justify the frequent mpesa remittance to senior officers as noted in his transactions.

Simon Naibei

31. The officer was removed on 6th December 2016 due to lack of financial probity. There was great disparity between the officer's declared earnings and the financial transactions noted in his statements. This was upon analysis of the officer's mpesa records, bank statements and declared earnings.

Philomena Mwangela Nicholas

32. Officer was removed on 6th December 2016 due to lack of financial probity. There was a huge disparity between the petitioner's noted transactions and declared source of income. The traffic officer received money from colleagues and persons with business interest in the transport industry and could not provide reasonable explanation.

Dorothy Adhiambo Okech

33. Officer was removed from service on 6th December 2016 due to lack of financial probity. The petitioner received numerous huge deposits in her bank and mpesa account, which was incommensurate with her declared and expected income. She could not give a clear explanation or justification for the deposits. Deposits were from other officers and civilians. She said her only other source of income was maize farming.

Peter Muigai Kamau

34. The officer was removed from office on 6th December 2016 due to lack of financial probity. There was big disparity between the officer's declared earnings and the financial transactions noted in his mpesa records. The officer in his explanation mentioned sources not previously mentioned in the declared earnings.

Joyce Arus Owiti

35. The officer was removed on 6th December 2016 for lack of financial probity. She received unexplained huge deposits in her bank account which were incommensurate with her declared and expected income. She was evasive on the nature of business that earned her close to Kshs 9 million.

Kennedy Rucho Obusuru

36. The petitioner was removed from service on the 6th December 2016 due to lack of financial probity. There was great disparity between the officer's declared earnings and the financial transactions noted in his statements.

Japheth Safari Baya

37. The officer was removed from office on 6th December 2016 due to lack of financial probity. He could not justify the large financial transactions in his mpesa account. He was sending and receiving money to and from other officers and civilians. He could not explain the transactions. The explanation he gave that he was making loan repayments or business transactions was not convincing at all.

Samson Kipkulei Ayabei

38. The officer was removed from service on 6th December 2016 due to lack of financial probity. The officer was through his mpesa account receiving and sending money to his seniors working within the traffic department frequently and was unable to justify these transactions.

Nelson David Njoroge

39. The officer was removed from service on 6th December 2016 for lack of financial probity and integrity in that he had lied to the

commission that he had no active mpesa line but this was proved otherwise, this was in clear breach of regulation 18 that requires truthful disclosure.

Rosina Mkakisha Maganga

40. The officer was removed on 6th December 2010 due to lack of financial probity. The officer had received huge deposits in her bank and mpesa accounts which were incommensurate with her declared and expected income. She could not give a clear explanation on frequent transactions between her and other senior officers.

Sora Duba Huka

41. The officer was removed on 6th December 2016 due to lack of financial probity. The officer had received numerous huge deposits in his bank and mpesa accounts which were incommensurate with his declared and expected income. The officer could not give clear explanation or justification for the deposits.

Roselyne Luvega Mwanje

42. The officer was removed on 6th December 2016 due to lack of financial probity and integrity. It was established that the financial transactions in her bank statement were incommensurate with her declared and expected income. The officer's explanation was found to be untenable.

Rotich Sylvester Kiprono

43. The officer was removed from service on 6th December 2016 due to lack of financial probity. The officer had received several mpesa deposits from persons with interests in the transport business yet he was a traffic officer and the petitioner could not give a rational explanation for the deposits.

Charles Kirui Kibore

44. The petitioner was removed from service on 6th December 2016 due to lack of financial probity. The officer had received huge deposits in his bank and mpesa accounts which were incommensurate with his declared and expected income. The officer failed to give a clear explanation or justification for such deposits.

Geoffrey Manyali Kikech

45. The officer was removed from service on 6th December 2016 due to lack of financial probity in that it was established that there was great disparity between the officer's declared earnings and financial transactions noted in his mpesa and bank statements. The officer did not give any reasonable explanation for this disparity.

46. All the petitioners were removed from office due to lack of financial probity and/or integrity upon examination of their bank and mpesa account statements in which various deposits and payments were noted and the officers asked to explain the source and purpose of the deposits and payments. Only one officer was removed for lack of integrity for failure to disclose ownership of an mpesa line or account.

47. From the submissions by the petitioners, it is apparent that before the vetting hearing was convened, the petitioners had been requested by the commission to fill in wealth declaration forms and produce their bank and mpesa statements; Tax clearance certificates; and copies of education and professional certificates. Statements for the period 2012 to 2013 were requested and provided.

48. The petitioners were questioned by the Vetting Board during the hearing on the various transactions in their statements and offered explanation that was found to be wanting.

49. It is the court's considered view and finding that the petitioners were not ambushed by the Vetting Board on the matters they were asked to give explanation. The petitioners got humble opportunity to prepare for the vetting and to make written and oral representation to the vetting board on the matters regarding their financial probity and integrity.

50. The court is mainly concerned with the question whether the petitioners were given a fair hearing and whether they were subjected to fair administrative action. The court is also concerned as to whether the commission and the vetting Board adhered to the constitutional, statutory and regulatory provisions that guide the vetting process.

51. The onus of proof is on the petitioners to demonstrate on a balance of probabilities that the respondent violated their human rights to a fair hearing and/or did not subject the petitioners to a fair administrative action in violation of *Article 50(1) and 47(1) of the constitution as read with Section 4 of the fair Administration Act 2015*.

52. The court has considered the evidence provided in the supporting affidavits of the petitioners and the content in the replying affidavits by Mr. Johnstone Kavuludi for the respondent.

53. The court is satisfied that the commission provided adequate notice and information on the matters the petitioners were to be examined on during the vetting hearing by the vetting board.

54. The court is satisfied that the petitioners had sufficient notice and opportunity to give explanation and justification in respect of the material they had been asked to provide in adherence to the commission.
55. The court is satisfied from the records before it that each of the petitioners provided answers to all the questions asked during the vetting. The court is satisfied that none of the petitioners requested for more time and/or adjournment of the scheduled sessions to prepare themselves further and/or to provide document that they required to give reasonable explanation to the matters asked regarding their financial probity and integrity.
56. The court is satisfied that the Vetting Board did not flout any constitutional, statutory or regulatory provision guaranteeing rights or freedoms to the petitioners in the manner they proceeded in vetting the petitioners.
57. It is also the court's finding that the Vetting Board adhered to the Rules of Natural Justice in the manner they proceeded and in arriving at the decision in respect of each of the petitioners.
58. Clearly, all the petitioners were found guilty of receiving unexplained large amounts of money on a regular basis. They were also found guilty of involvement in unexplained financial transactions and money exchanges between themselves, fellow traffic officers and civilians in the transport industry yet all the officers worked in the traffic department and their key responsibility was to ensure law and order prevailed in the traffic industry so as to reduce the road carnage recently witnessed on the Kenyan roads. Only one officer was removed for failure to make truthful disclosure of information held by him.
59. Lack of integrity was correctly pinpointed by the commission as the key cause of non-compliance with traffic laws by road users resulting to the many accidents and loss of precious lives.
60. This is a matter that the commission could not take lightly and this court equally does not take these matters lightly. The responsibility placed upon the petitioners are sacred and the officers themselves must be beyond reproach in the cause of their duties.
61. Sadly, all the petitioners failed the integrity test and were lawfully and fairly removed from service by the commission upon vetting by the vetting board.
62. The review applications filed by the petitioners lacked merit and were lawfully and fairly dismissed by the review Boards that heard them.
63. The court relies on the authorities submitted by the respondent in the matter, to wit, *Leonard Mambo Kuria vs Ann Wanjiru Mambo [2017] eKLR; Stephen Gathua Kimani vs Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR; Republic vs National Police Service Commission Exparte James Ngumi Mutungi. Misc. App No. 44 of 2016 and ELRC NO. 87 of 2016; George Kingi Bamba vs National Police Service Commission* in arriving at its considered decision that the consolidated petitions lack merit and are dismissed with costs to the respondent.
64. In awarding the costs in the matter, the taxing master to take into account that the many petitions were consolidated and heard as one case. There ought not to be any duplicity in the various items taxed.
65. In the final analysis the consolidated petitions are dismissed with costs.

Judgment Dated, Signed and delivered this 7th day of March, 2019

Mathews N. Nduma

Judge

Appearances

M/S Mongeri & Company Advocates for the petitioners

Paul Ojwang – Litigation Counsel National Police Service Commission.

Chrispo – Court Clerk