



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 37 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010 ARTICLES 10, 19(2),  
20(1), (2), (3) AND (4), 21(1), 23(3), 35(1), 40, 41, 47(1) AND (2), 50(1), 258(1) AND 259(1)**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011**

**AND**

**IN THE MATTER OF SECTION 13 OF THE NATIONAL POLICE SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 2015**

**AND**

**IN THE MATTER OF THE VETTING OF OFFICERS IN THE RANK OF CORPORAL OF POLICE**

**BETWEEN**

**THOMAS ODERO DULLO.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

The Petitioner is a career Police Officer who was serving in the Kenya Police Service in the rank of Corporal. His last post was at Maseno Police Station in Kisumu County. The Respondent is an Independent government Commission established under the Constitution of Kenya and mandated under Article 246(3)(b) to inter alia observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service.

Under Section 7(1) of the National Police Service Act all persons who were immediately before the commencement of the Act, officers or employees of the Kenya Police Force and the Administration Police Force established under the Police Act Cap 84 and the Administration Police Act Cap 85, including officers working with the Criminal Investigations Department, upon commencement of the Act, became members of the National Police Service in accordance with the Constitution and the Act.

That based on the foregoing, the Commission formulated vetting regulations to enable it carry out the vetting exercise of all police officers who were in the Force prior to the enactment of the new Constitution and the Act.

The Commission is mandated under Section 7(2) of the National Police Service Act together with Regulation 4(a) of the National Police

Service (Vetting) Regulations 2013 (hereinafter referred to as the Vetting Regulations) to carry out the vetting exercise on all police officers.

Section 7(3) of the National Police Service Act read together with Regulation 32 of the Vetting Regulations gave the Commission the power to discontinue the service of any police officer who failed the vetting on grounds of being unsuitable or incompetent.

Pursuant to the Vetting Regulations, the Petitioner attended a vetting interview by the Respondent and was found unsuitable to serve in the Service in the decision delivered on 17<sup>th</sup> November 2017. Dissatisfied with the decision the Petitioner applied for review pursuant to the provisions of Regulation 33 of the National Police Service (Vetting) Regulations, 2013 but the application for review was dismissed. Aggrieved by the decision of the Respondent he filed the petition herein.

The Petitioner's focal grievances as contained in the Petition and supporting Affidavit are that he went through a statutory process of vetting and responded to all complaints levelled against him but the Respondent still went ahead to find him unsuitable to serve on allegations that had not been presented before him to answer prior to the vetting.

That the Respondent proceeded to rely on information provided by one Corporal Rosina Mkakisha Mganga despite the Petitioner not having an opportunity to cross examine the said corporal. Further that the Petitioner was not given a fair hearing as there was a failure to issue notice of the adverse information against him prior to the vetting; that the respondent acted in a biased manner, that the Respondent did not adhere to the threshold of standard of proof required. He claims that the Respondent did not consider important facts in the decision and his removal was not in public interest.

The Petitioner avers that the decision was illegal having been signed by people who never took part in the process and the decision was thus absurd and unreasonable. That the Petitioner appeared before two of the Respondent's Commissioners- Johnston Kavuludi and Mary Owuor for the initial vetting then the panel changed when the Petitioner was recalled to include Commissioners Murshid Mohammed, Johnstone Kavuludi and Mary Owuor thus showing lack of consistency and to add insult to injury other Commissioners who were not part of the Respondent's vetting panel proceeded nonetheless to rubberstamp a decision removing the Petitioner from the National Police Service without hearing him or participating in the review process. That this was contrary to the principles of Natural Justice, contrary to the Rules under the National Police Service Act and the Vetting Regulations and contrary to the Rights guaranteed under Article 41, 47 and 50(1) of the Constitution.

In his Petition dated 30<sup>th</sup> April 2018, the Petitioner prays for:

1. A declaration that the Petitioner's fundamental rights and freedoms have been violated;
2. An Order of Certiorari do issue to quash the entire proceedings and the decision of the Respondent declaring that the Petitioner had failed vetting and had been discontinued from the Kenya Police Service including the decision rejecting the Petitioner's application for review;
3. An order for reinstatement of the Petitioner to his post as a corporal of the Kenya Police Service as well as reinstatement of all his privileges including his salary;
4. An order substituting the Respondent's decision with a declaration that there exists no material to find that the Petitioner had failed vetting;
5. Compensation to the Petitioner for the violation of his fundamental rights and freedoms;
6. Costs of this petition;
7. Any other relief that this Court may deem just to grant.

The Respondent filed a Replying Affidavit sworn by Johnston Kavuludi, the Chairman of the Respondent (as at the time of filing the Petition) wherein the Respondent denies that the removal of the Petitioner from the Force was arbitrary. Mr. Kavuludi deposes that the decision to remove the Petitioner from the force was arrived at after it was established that there was great disparity between the officer's declared sources of income and the financial transactions noted in his Mpesa transactions and unexplained business engagements.

That the Commission while analysing the Petitioner's Mpesa records noted frequent and huge Mpesa transactions between the Petitioner and a colleague officer by the name Rosina whom he worked with at the Webuye Weighbridge as traffic officers. That when questioned about the transactions they both alleged business engagements but mentioned differing kinds of business with a view of justifying the alleged business dealings.

He also averred that the Respondent noted a drastic change in income of over Kshs.6 million between the period when the Petitioner was serving on general duties in Kangundo and when he was transferred to Webuye Weighbridge to serve as a traffic officer and the explanation tendered was not convincing.

That the Respondent in recognition of the Petitioner's rights to fair administrative action admitted a review application dated 28<sup>th</sup> December, 2016 for hearing on merit. That during the review hearing the Petitioner brought a contract trying to prove his tyre business relationship with Sameer Africa from which he alleged most of his income came from but the documents presented were not between him and Sameer but rather between him and Highway Emporium.

That the Petitioner could also not explain convincingly the coincidence of his colleague one Rozina with whom he worked at the same weighbridge receiving huge sums of money from one Hussein who had interests in the transport business. That they received Kshs.225,000 and Kshs.393,900 respectively. Further that the Commission also noted that the officer was inconsistent in his explanations about the business he was doing that earned him the huge income apart from his known salary and the explanations so advanced were unconvincing.

The Respondent avers that it received the application for review by the Petitioner and was not convinced by the explanations given by the Petitioner as it found the same not in consonance with the provisions of Regulation 33(2) which provides for review. That it accordingly dismissed the review application while upholding the initial vetting decision.

The Respondent contends that it is a misapprehension of the law guiding vetting for the officer to allege that the commission violated his rights by asking questions relating to his financial probity based on the documents he supplied to the commission. That the information on financial probity can only be deduced from information, financial records and transactions as captured in the documents presented by the relevant officer or any other source even in the absence of a complaint.

On the allegation of the decision being signed by Commissioner Musengi yet he was not part of the participants in the review process is untrue as the review Hansard clearly marks him as present. That both the vetting and review decisions were lawfully signed by commissioners who determined the same and the decision was formally released by the Commission's Board.

The Respondent is of the view that the orders sought by the Petitioner are baseless and unmerited given that he was justly and procedurally removed after failing both the vetting and review hearings as clearly demonstrated herein and thus the Petition ought to be dismissed.

### **Petitioner's Submissions**

It is submitted on behalf of the Petitioner that his rights under Article 47(1) and 50 of the Constitution as read together with the Fair Administrative Actions Act were violated and rules of natural justice were not followed as the Petitioner was not supplied with the complaints and particulars of adverse suspicion against him. They cite the case of **John Ndung'u Ikonya Vs National Police Service Commission Petition 89 of 2016** where it was held:

*“Vetting Regulation 18 is stated in mandatory terms. Regulation 18(2) binds the Respondent to avail documents alongside any complaint or summary of the complaints. The Case of the Respondent that the Petitioner seemed to know what case and complaints he faced is not in response to vetting regulation 18. To the contrary, the duty is vested upon the Respondent to ensure that before inviting the Petitioner for the vetting and hearing, he had a summary and complaints against him together with documents, details or material on complaints made against the petitioner were without detail or no sufficient material had been submitted and the respondent was of the view that the complaint required the Petitioner to respond, the burden was on the respondent to bring witnesses and testimony enough to supply such details and materials. To move the vetting without compliance with the set vetting regulations was to pitch him up for failure and the eventual finding of his unsuitability.”*

That during the vetting interview the Respondent was primarily concerned with the interaction between the Petitioner and the one officer known as Rosina Maganga. That this fact was not made known to the Petitioner as required by the rules of natural justice. Neither had he been informed that his bank accounts or Mpesa transactions were considered to be suspicious, or were under challenge but was surprised when he was required to respond to such serious accusations on the floor of the vetting interview.

It is further submitted that the Petitioner was not allowed to take part in the vetting hearings. A tribunal in deciding a matter must afford the subject person a real, reasonable and effective opportunity to defend himself including adequate time to prepare his defence. No person should be condemned unheard is a fundamental principle of justice. Individuals affected should have the opportunity to present their case fairly. The Petitioner submits that the Respondent proceeded by way of asking the Petitioner questions/grilling. That the question-answer session did not allow the Petitioner to state his case as desired.

The Petitioner submits that the vetting panel was improperly composed and decision signed by strangers. That during the exercise the panel that dealt with him kept mutating, that inconsistency is sufficient reason for courts to set aside decisions by the Respondent as was the case in **Peter Ndegwa Githinji Vs National Police Service Commission (2018) eKLR**.

That the Respondent failed to give reasons for its findings contrary to Article 47(2) of the Constitution. That it failed to give reasons as to what extent the Petitioner's deposits had outweighed his incomes and the Petitioner's lack of financial probity. Further that the Respondent did not give reasons as to why it considered the Petitioner to have given inconsistent information about his businesses. A report of the examination and financial analysis of his bank and Mpesa statements. Neither did the Respondent give any criteria used in conducting the said financial analysis, if any was used, and reasons for adoption of such criteria.

That the standard of proof in vetting as provided under Regulation 4(f) of the Vetting Regulations was not met. That for there to be proof of a fact on a balance of probabilities there must be some basic evidence pointing to the existence of a fact which in this case was wanting. Further that the Respondent abdicated its duty to investigate as required under Regulations 9(2)(d) and Regulation 28 of the Vetting Regulations.

It is submitted that the decision of the Vetting Board was factually wrong, irrational and absurd and as a result the Petitioner's counsel urged the Court to allow the Petition as prayed.

### **Respondent's submissions**

It is submitted that the law is clear that whoever alleges procedural unfairness must demonstrate clearly to the Court the instances or elements of unfairness and breaches of the law and a general quoting of the law without proof should not suffice as was held in the case of **Anarita**

That in removing the Petitioner the Respondent was guided by Regulation 14(2) of the National Police Service (Vetting) Regulations 2013 which requires the Commission to look at the past record including conduct, discipline and diligence of the officer's financial probity. That vetting is a combination of various parameters and lack of a complaint against an officer does not exempt an officer from the vetting exercise or guarantee him success in the vetting exercise.

That the Respondent relied on documents supplied by the Petitioner and therefore the requirement to supply the Petitioner with documents relied on does not apply in this case. The Respondent thus maintains that the Petitioner did not establish any act of procedural unfairness and it is only just and fair that the Petition be dismissed.

It is also submitted that the decision to remove the Petitioner from the force was lawfully arrived at. That the Respondent has demonstrated that the decision to remove Petitioner from the service was reached after a lawful and procedurally just vetting process and the subsequent review was duly considered by the Commissioners who decided the matter on behalf of the Commission as contemplated under Regulation 25 of the Vetting Regulations 2013.

That in an effort to not only discharge its mandate justly, the Respondent embraced the verbatim way of recording proceedings in a Hansard to guarantee fairness and clarity of information during deliberations and also for record and future reference if need be. ***Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009***, as follows:

*“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”*

That the Petition as framed lacks merit and is an attempt by the Petitioners to try and mislead the Court after failing the suitability test through imagined non-existing legal technicalities despite having been accorded the required administrative treatment during the vetting and subsequent review as enshrined and contemplated by law. The Respondent prays that the entire Petition to be dismissed.

#### **Analysis and Determination**

The issues for determination are:

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

The Fair Administrative Actions Act Section 4(1), (2), (3) and (4) provides 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.**

Article 47 of the Constitution also states:-

- 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**

The considerations required for an administrative action to be fair are that there must be notice of the nature and reasons for the administrative action and an opportunity to be heard is accorded to the affected to make their representations.

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 based on the 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.

The Petitioner appeared before the Vetting Panel on 26<sup>th</sup> August 2016 and the vetting then proceeded and the Petitioner was asked some questions concerning the drastic change in income of over Kshs.6 million between the period when he was serving on general duties in Kangundo and when he was transferred to Webuye Weighbridge to serve as a traffic officer.

A decision was rendered which was not in his favour leading to a review application. The Respondent heard his review application at which he produced contracts purporting to be evidence of the nature of business he was engaged in. He alleged to have been in business with a company by the name Sameer but the contract that he submitted was between him and a company called Highway Emporium in Kisumu.

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 in his Mpesa account. The Commission found that the Petitioner failed to offer a plausible explanation regarding transactions he claimed to have engaged in, which revealed a lack of consistency with his known earnings and this casting doubt on his integrity.

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. There is nothing in the proceedings that would lead the Court to find that the Petitioner was not aware beforehand of the process he was to undergo.

Regulation 2 of The National Police Service (Vetting) Regulations, 2013 states that “**vetting**” means a process by which the Commission assesses the suitability and competence of an officer in accordance with section 7(2) of the Act.

Section 7(2) of the National Police Service Commission Act is to the effect that:

- (2) Notwithstanding subsection (1), all officers shall undergo vetting by the Commission to assess their suitability and competence.**

The Petitioner relied on several decisions among them *Immanuel Masinde Okutoyi & others v National Police Service Commission & another [2014] eKLR*. In which Odunga J held that to confront an officer with allegations when their source cannot be disclosed is unfair. The Petitioner further relied on the case of *Onyango Oloo vs. Attorney General [1986-1989] EA 456*: in which *Platt, JA* held that:-

*“Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair.”*

Similarly, in *Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587* the Court held:

*“I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative*

tribunals sitting in a quasi-judicial capacity. P 386 – the court said;

1. *“If a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed;*
2. *if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal*  
*fairly to determine the question at issue;*
3. *In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best.....;*
4. *The person accused must know the nature of the accusation made;*
5. *A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward;*
6. *The tribunal should see to it that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it.”*

In this case the Petitioner was not accused. He was being vetted on documents that himself had submitted to the Vetting Board to prove his financial probity. The questions put to him were for him to explain the contents of the documents. His explanations did not clear the contradictions between his legal income and the deposits in his Mpesa account. It is the Petitioner who introduced Rozina by explaining that he had done some business with her. It is not true as submitted by the Petitioner that he was asked questions about Rozina without prior notice.

On the removal of the Petitioner from the force, the Respondent submitted that the Petitioner was removed from the force in accordance with Rule 14(2) and 15 of the Vetting Regulations. That the Petitioner was found to fall short and thus declared unsuitable to continue serving the force. From the Hansard record it is clear that a hearing was conducted and a determination made. **Michael Fordham in Judicial Review Handbook; 4<sup>th</sup> Edition**, at page 1007 discussed procedural fairness as follows:

*“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”.*

In the circumstances of the instant case it is clear that the decision to remove the Petitioner from the force was lawful. In the case of **Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009**, it was held as follows:

*“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”*

In as much that decision making bodies are masters of their own procedures, those procedures must be in accordance with the law and the principles of natural justice. The procedure for the Respondent was contained in Regulations that the Petitioner was well aware of the same.

The Petitioner contends that his vetting interview and review panels kept mutating and the decisions seems to be endorsed by six commissioners whereas there is no evidence of the six commissioners ever sitting together for a hearing. To remove the Petitioner from office by virtue of a decision endorsed by commissioners who did not sit in the vetting is highly irregular as was held in the case of **Peter Ndegwa Githinji vs National Police Service Commission (2018) eKLR**. that a decision made by commissioners who did not participate at all in the vetting process was totally flawed and in contravention of Articles 47(1) and 50(1) of the constitution of Kenya 2010.

In the replying affidavit the Respondent explained that the allegation that Commissioner Musengi signed the decision yet he was not part of the participants is misleading since the review hansard clearly indicates that the Commissioner was part of the vetting panel though he never asked questions just like other participants. Failure to ask a question during review should not be construed to mean that he had no right of signing the ultimate review decision.

I find that that the petitioner has not proved that there was violation of his constitutional rights. I further find that the process was procedural and that fair and the decision of the Respondent was well explained and justified in the proceedings of the vetting as set out in the Hansard. I therefore find that the petition has no merit and is dismissed.

Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**