



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 14 OF 2015

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, 41(1), 47(1), 48, 49, 50(1),(2)(A) AND (O), 159(2)(D), 258, 162 & 246(1), (2) & (3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011

AND

IN THE MATTER OF THE FORCE STANDING ORDERS UNDER THE POLICE ACT CAP 84 LAWS OF KENYA

AND

IN THE MATTER OF DISCIPLINARY/ORDERLY ROOM PROCEEDINGS

AND

IN THE MATTER OF THE REMOVAL FROM THE POLICE SERVICE

(FORMERLY POLICE FORCE)

BETWEEN

POLICE CONSTABLE HENRY NYAKOE OBUBA.....PETITIONER

VERSUS

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

INSP. GENERAL NATIONAL POLICE SERVICE.....2ND RESPONDENT

DEPUTY INSP. GENERAL NATIONAL POLICE SERVICE...3RD RESPONDENT

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

RULING

1. The Petitioner seeks a review of the Judgment of the court and asserts that there is an error apparent on the face of the Judgment. The Petitioner asserts that the decision of the court had an error in order (c) of the decision as it was meant to be 'in addition' to instead of 'in alternative to'.

2. The Respondent is opposed and asserts that the decision of the court was clear as it gave the parties distinct options in the determination by the learned Judge.

3. The issue before the court is a review and key to the determination of the motion is whether the application has met the threshold for grant of review of judgment. Under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, review of judgment can be sought within a reasonable time:

33.(1)(a) if there is discovery of a new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of that person at the time when the decree was passed or order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) if the judgment or ruling requires' clarification; or

(d) for any other sufficient reason.

4. It is not contested that the review was sought way after a proposed appeal was filed in the Court of Appeal. Without belabouring the point, once a party seeks an appeal it precludes a review and vice versa. That said, the judgment of the court was delivered on Friday 13th May 2016 and the review was sought on 13th April 2018 that is not within a reasonable time as contemplated by Rule 33. The exact orders granted by Ongaya J. were as follows:-

a. The declaration that the respondents in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service (formerly the Kenya Police Force) based on the concluded Meru Chief Magistrate's Court Criminal Case No. 1764 of 2000 and 696 of 2000 was in breach of the petitioner's constitutional rights and protection under Articles 47(1), 236(b) and 41(1) of the Constitution, 2010.

b. The declaration that the petitioner is entitled to reinstatement in the service of the Kenya Police Service with effect from 31.08.2000 with orders that the period between 31.08.2000 and the date the petitioner reports to the 3rd respondent to resume work being not more than 10 days from the date of this judgment be treated as leave without pay so that there is no break in the petitioner's service.

c. In alternative to (b) above the respondents to pay the petitioner a sum of Kshs. 3,000,000.00 being compensation under Article 23(3)(e) of the Constitution for violation of the petitioner's constitutional rights and protections per order (a) above; and to pay by 01.10.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

d. The respondents to pay the petitioner's costs of the petition.

5. In this case, the ground upon which the review is sought is that there is a mistake or error apparent on the face of the record, and to boot, that the court ought to have stated *in addition to* in place of the words *in alternative to*. I am not persuaded that a party or even this court has the capacity to get into the mind of the Judge who made the determination. If Ongaya J. meant to state in addition to he would have done so eloquently. He instead granted prayer (c) in alternative to the prayers preceding it. I cannot review the decision as no error is apparent on the face of it. The motion by the Petitioner is therefore devoid of merit and is accordingly dismissed. As the issues the Petitioner is grappling with relate to his employment relations with the 1st Respondent I will not give any order on costs and each party therefore will meet their own costs.

It is so ordered.

Dated and delivered at Nyeri this 12th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar