



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 66 OF 2017

(Formerly HCCC Petition 302 of 2016)

Before Hon. Lady Justice Maureen Onyango

IN THE MATTER OF ARTICLES 1(1), 1(3)(c), 2, 3, 6, 10, 159(2)(e), 249 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF BREACH OF FUNDAMENTAL FREEDOMS AND RIGHTS ENshrined AND PROTECTED IN ARTICLES 19, 20, 21,22, 23, 27, 28,47, 50, OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, CAP 84 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION ACT, CAP 185C OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO 4 OF 2015

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS 2013

AND

THE MATTER OF SECTIONS 4, 10, 11, 22, 23& 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

SHDRACK MUTWETUMO MAITHYA.....PETITIONER

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION...RESPONDENT

JUDGMENT

The Petitioner was in the serve of the Respondent as a Senior Superintendent of the Respondent until 5th May 2016 when, pursuant to the vetting exercise conducted on 23rd March 2015 and the vetting review conducted on 2nd February 2016, he was found unsuitable to be in the force and removed from service for failing the vetting. The Petitioner was aggrieved by the decision hence this Petition where he seeks the following prayers:

- a. That this Court makes a declaration that the Respondent's conduct and actions during the vetting of 23rd March 2015 and 2nd February 2016 and through the decisions of 9th October 2015 and 5th May 2016 amounted to a denial, violation, infringement and/or threat to the fundamental rights and freedoms of the Petitioner, especially under articles 27, 47 and 50 of the Constitution.
- b. That the Court makes a declaration that the vetting processes on the 23rd March 2015 and 2nd February 2016 and the decisions arising therefore dated 9th October 2015 and 5th May 2016 respectively are illegal, invalid, unlawful and null and void.
- c. That the Court grants a judicial review order of certiorari bringing to this Court and quashing the decision of the Respondent of 9th October 2015 and 5th May 2016 to remove the Petitioner from the National Police Service.
- d. That upon granting the order in 3 above, the Court do make an order directing the Respondent to re-vet the Petitioner afresh according to and in compliance with the law.
- e. That the Court do order the compensation of the Petitioner including salary and emoluments that have been stopped due to the infringement of the Petitioner's rights and fundamental freedoms.
- f. That the costs of the Petition be provided for.
- g. That this Court be pleased to make any further orders as it may deem just and fit to grant.

The Respondent has opposed the Petition vide the Replying Affidavit of Johnston Kavuludi, the then Chairman of the respondent Commission.

It is the Petitioner's case that one of the grounds for his removal was that he had undervalued his assets to conceal his net worth. That in so doing the petitioner prevented the Respondent from making an evaluation on the Petitioner's financial status thus frustrating the vetting process, and thereby demonstrating his lack of integrity. The assets in question included his land and house in Kangundo, breakdown business, a land rover that was sold in 2015, his bar and restaurant business and a Toyota Corolla belonging to his wife. It is his contention that this decision breached his constitutional rights and fundamental freedoms and that the decision was irrational, unreasonable and failed to take into account the relevant considerations because no complaint regarding conflict of interest had ever been raised.

It is the Petitioner's position that if the issue of valuation of his assets was contentious, the Respondent had the power to request for valuation reports of his properties, which was never done.

It is also the Petitioner's contention that the decision against him was unfair because some commissioners who did not participate in the vetting process took part in the decision making. He further contends that the Respondent acted ultra vires when it held that the Petitioner had attempted to defraud even though the matter regarding the same was pending in court and had partly been held in his favour. It is his position that he was discriminated against based on his marital status by holding him solely liable for business and activities that were solely owned by his wife.

The Respondent on the other hand contends that the Commission was guided by the provisions of Regulation 14(2)(c) of the vetting regulations which require the Commission to look at an officer's past records regarding their discipline, conduct, diligence and financial probity. The Respondent avers that prior to the vetting, it had received a complaint against the Petitioner's integrity and conduct and the Petitioner responded through his advocates Robert Muthama and Associates.

The Respondent also avers that the Petitioner was requested for additional information vide the letter of 14th September 2015. It is the respondent's case that it heard the Petitioner's review application and upheld its earlier decision to remove the Petitioner from service as the review did not raise any new matters or error apparent on the face of the record. It is further the position of the respondent that the Petitioner altered documents so as to mislead the Commission and which altered documents are annexed to his Petition. The Respondent maintains that the Wealth Declaration Form annexed by the Petitioner to the petition is substantially different from the one that was presented before it. The Respondent contends that the Petitioner was accorded procedural fairness as required by the Constitution and the relevant laws.

The petition was disposed of by way of written submissions. Parties filed their written submissions and thereafter highlighted the same in open court.

Determination

The Petitioner has set out the issues for determination as follows –

Fairness

- a. Whether the respondent denied the petitioner the right to cross examine the complainant?
- b. Whether the respondent was fair to the petitioner in allowing commissioners who were not part of vetting process to make the decision on his suitability to continue serving?

Unreasonableness

- c. Whether the respondent acted unreasonably in holding that the petitioner had undervalued his house when no valuation of the house had been carried out?
- d. Whether the respondent acted unreasonably in holding that the petitioner failed to declare the location of his house in Nairobi when he so declared?
- e. Whether the respondent acted unreasonably in holding that the petitioner intentionally failed to declare the acreage of his property when the forms given to the petitioner never requested for the information?

Bias and partiality

- f. Whether the Respondent's Commissioners were biased in stating that the petitioner sold the bar and restaurant?
- g. Whether the Respondent was biased in stating that the petitioner had taken up the matter to drag the matter and cause the complaint pain?
- h. If the foregoing is in the affirmative, should the court grant the prayers in the petition?

The Respondent also set out its own issues for determination as follows –

- A. Whether the petitioner's right to fair administrative action and fair hearing were violated by the Commission?
- B. Whether the decision to remove the petitioner was lawfully arrived at and signed?
- C. Whether the petitioner is entitled to the orders sought?

The Court will adopt the three broad issues as set out by the petitioner being: fairness, unreasonableness, bias and impartiality.

In determining whether a Petitioner has met the threshold set in seeking the reliefs sought, this Court is guided by the Constitution in addition to principles set out in the case of *Anarita Karimi Njeru v Republic (1976-1980) 1 KLR 1272 eKLR* where it was held:

“...We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

The Petitioner submitted that his right to a fair hearing and fair administrative action was infringed upon because the decision to dismiss him from service was made by Commissioners who never sat in the vetting proceedings, which decision amounted to an illegality. That for the initial vetting proceedings Commissioners Johnston Kavuludi, Samuel Arachi, Murshid Mohammed and Joseph Boinnet signed the decision yet they were not present during the proceedings. At the vetting review, Commissioners Joseph Boinnet and Samuel Arachi were not present yet they signed the decision. In their submissions, the Respondent contends that this is misleading as Regulation 25(4) of the Police Service (Vetting) Regulations provides that the decision shall be recorded in writing, signed by all Commissioners who made the decision and sealed with the common seal of the commission. The Respondent did not deny that some of the commissioners who signed the decisions were not present at the hearing. The Respondent however submits that this is merely procedural and ought not to vitiate the whole vetting process.

Rule 25 (4) of the National Police Service (Vetting) Regulations 2013 reads as follows:

Decisions shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the Commission.

In *Francis Omondi Okonya v National Police Service Commission [2016] eKLR* the court cited with approval the case of *Eusebius Karuti Laibuta vs National Police Service Commission case [2014] eKLR*. The Court also cited with approval the decision in *Republic vs Complaints Commission, Media Council for Kenya and 2 Others [2013] eKLR*, where it was held thus:

“Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners Peter Mwaura and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision...”

The Court in *Francis Omondi Okonya -V- National Police Service Commission [2016] eKLR* decided thus-

“...In this case, three people seem to have participated in the impugned decision yet they were never part of the panel which

interviewed the Petitioner. In my view that was clearly unlawful and unfair. On what basis were they expected to arrive at a sound decision when they never participated in the hearing? Whereas it may well be that had all these persons participated in the interview they may have arrived at the same decision, this Court cannot say that it is certain that they would have arrived at the said decision.”

As a result, the Court held that:

“It is not in doubt that Commissioners Boinnet and Arachi did not sit during the Petitioner’s vetting but signed the final decision. Arachi in fact sat on a day the vetting failed to take off. The Respondent’s answer is that they did so as part of the Commission and not as members of the Vetting Panel. Is that a good defence to the Petitioner’s contention? I think not. Why would a person who knows nothing about a process as serious as the vetting of the Petitioner, purport to make a decision based on no more than the decision of a Panel? Is the Commission qua Commission meant to endorse everything the Panel has determined? Why not in fact indicate that the two absent Commissioners did not participate in the vetting and would therefore not make any decision?”

I am unable to accept the Respondent’s answers to the above issue and its conduct amounted to an illegality”

I agree with the decisions quoted above. If it was necessary for all the members of the Commission to sign the decision, the proceedings should at least have reflected that the decision of the persons who sat at the vetting of the petitioner was presented to, and adopted by the Commission. This is not evident from the record. As it were, the record reflects that the decision was signed by persons who did not sit at the vetting. I thus agree with the petitioner’s submission that as in the cases referred to above this is sufficient ground to vitiate the decision of the vetting Tribunal for procedural defect.

The other ground raised by the Petitioner is that he was dismissed for grossly undervaluing his house at Kangundo Road taking into consideration its size and its value and further that he did not indicate the acreage and location of the house. He submits that no Valuation Report was produced to justify this decision. Regulation 28 of the National Police Service (Vetting) Regulations gives the Commission the power to utilize the services of any officer, investigating agency of the Government or any expert it considers necessary for purposes of conducting an investigation on any matter alleged or otherwise brought to its attention. If the Commission was indeed of the view that the value attached to the property by the Petitioner was an undervaluation, it ought to have demonstrated this by carrying out an independent valuation of its own. Regulation 23 permits the suspension of the vetting process so that the petitioner can be given time to bring documents supporting his approximation of the value of the property or for the Respondent to utilize the services of a valuer and resume the proceedings after obtaining the valuation report. This was not done and if it was, the same was not shared with the Petitioner. As such, this was not a valid ground to dismiss the Petitioner.

It is further the petitioner’s submission that the location of the house was declared, and that the contention of the respondent that he did not disclose the location of the house is not correct.

I agree with the Petitioner that all that was required in the declaration was location of asset and approximate value which he gave and that there was no justification for the decision by the respondent that he did not declare the acreage and location, and undervalued the property thereby concealing his net worth.

The other ground against the petitioner was fraudulent grabbing of land belonging to Josphat Mutua and that he failed to disclose his bar and restaurant business which according to the petitioner was a matter pending in Court. I have noted that in the vetting form attached to the replying affidavit of Mr. Kavuludi there is an entry of “Bar/Restaurant NBI (Under dispute)” with a ‘NIL’ entry under valuation. The Petitioner explained at the vetting hearing that the business was closed due to the disagreements with his partners. There was thus no basis for the holding that the Petitioner had failed to disclose the business.

I however find that the Petitioner did not comply with the Commission’s request vide the letter dated 14th September 2015 to furnish it with additional information regarding the Registration number of the breakdown that had stopped working, details of the vehicle bought at the auction and the vehicles at Thika and Nyamira Police Stations. The Petitioner had previously been directed by the panel to furnish the person who would lead him out of the vetting room with the requisite documents and he had indicated that he would. In addition to this, I note that the Wealth Declaration Form annexed by the parties differ. The one by the Petitioner has the item “4 plots in Nairobi – No. T. Deeds... 2 m. shillings” while this is lacking in the one filed by the Respondent thus affirming the concerns during the vetting that some of the properties the petitioner referred to were missing in the Commission’s copy. This raised doubts of dishonesty of the Petitioner. No logical explanation was given regarding this discrepancy.

The petitioner also raised issues of discrimination by the Respondent by virtue of his marital status on account of breakdown business belonging to his wife who was also a police officer. I find this argument lacking in merit as the petitioner was required to submit declaration forms for his spouse and any dependent children under the age of 18. The fact that no such information was submitted to the Commission raised serious questions and the Commission cannot be faulted for arriving at the conclusion it did.

Turning to the other specific issues for consideration as set out in the submissions by the Petitioner, I find that there was no denial of the right to cross examine the complainant as there was no complainant who testified before the trial. There was further no request by the Petitioner for the complainant or any witness to be called for cross examination.

On the issue of bias and partiality, the petitioner alleged that comments made by Commissioner Mary Owuor to the effect that he was swaggering before the Board; by the Commissioners that he coerced the Plaintiff in Nairobi Misc. Application No. 102 of 2013 to withdraw the matter and by Commissioner Murshid that he forcefully alienated the property belonging to the Complainant in the suit premises were proof of bias and impartiality. I find no proof of bias or impartiality as alleged by the Petitioner. I do not find the comments of the Commissioners as cited by the Petitioner to amount to proof of bias or lack of objectivity as alleged.

I further do not find the decision of the Commission to the effect that the purchase of a Toyota Corolla at a police auction by the Petitioner's wife or the finding that the petitioner allowed his wife to carry on breakdown business to be unreasonable.

Conclusion

From the foregoing I have found that the signature of the decision of the Commission by Commissioners who were not present during the hearing as well as the finding that the Petitioner undervalued his property to have been without justification. I however find these grounds, weighed against the other grounds raised by the petitioner would not justify the orders of mandamus. Further taking into account the time lapse since the Petitioner left service on 5th May 2016 and also taking into account that according to the record the Claimant is attaining retirement age on 20th May 2020 according to his date of birth (20th May 1960) as per Declaration of Income, Assets and Liabilities form,, it will not be just to order the reinstatement of the Petitioner. I will therefore substitute the prayer for mandamus with an order that the Petitioner be retired with effect from the date of his vetting out being 5th May 2016 but his retirement benefits be based on actual retirement date of 20th May 2020. In addition, I award the petitioner Kshs.1.5 million as compensation.

The respondent will pay the petitioner's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE