



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 12 OF 2015

PC STEPHEN MATHENGE KARIITHI.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE.....1ST RESPONDENT

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

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner sought relief against the Respondents on account of a letter that was issued to him requiring that he shows cause. He was initially charged with desertion contrary to Section 94(1) of the Police Service Act in criminal case No. 706 of 2014 at Mavoko Law Courts and the Learned Trial Magistrate Hon. E. K. Too acquitted the Petitioner on 28th November 2014. The desertion was alleged by the OCPD Athi River Division an officer under the 1st and 2nd Respondent. After the acquittal the Petitioner was reinstated to the service. What precipitated the Petition was the show cause letter dated 15th July 2015 which rehashed the desertion charges and was asked to show cause why he should not be removed from the force.

2. Mr. Gikonyo appeared for the Petitioner while Mr. Nderitu appeared for the 3 Respondents. Mr Gikonyo submitted that it was common ground that the Petitioner is an employee of the National Police Service as a Police Constable. He submitted that the Petitioner was duly acquitted of offence of desertion by the Court and was subsequently reinstated to the force on 11th August 2015. He submitted that the Respondents issued the letter of 15th July 2015 asking the Petitioner to show cause on the same offence of desertion for which he was acquitted in November 2014. He asserted that the Petitioner is entitled to fair administrative action per the Constitution Article 47 and Article 50 which provides the Petitioner cannot be tried twice for the same offence. Having been charged and acquitted of the offence of desertion the employer cannot charge him with the same offence as this was tantamount to double jeopardy. The moment court rendered itself on whether he deserted or not the employer cannot reopen it and assert that he deserted. He relied on the case of **Joshua Muindi Maingi v National Police Service & 2 others [2015] eKLR** and submitted that the Learned Judge declared Section 84(4) of the National Police Service Act was unconstitutional as it allowed retrial and that it is inconsistent with Article 50(2). He submitted that pursuant to the decision under Statute Miscellaneous Amendment Act, Act No. 12 of 2015 Section 88(4) was amended and deleted as the 3rd Respondent herein agreed with the judgment of the court. He submitted that the National Police Service cannot go back and retry the officer. He urged the court to declare the notice to show cause unconstitutional, null and void as it is violation of Petitioner's rights under Articles 27, 28, 41 and 50 of the Constitution as it amounts to unfair labour practice and is double jeopardy. He submitted that the authorities cited by the Respondents were distinguishable as they dealt with orderly room proceedings and unfairness in termination of employment and are not on all fours with the Petition.

3. Mr. Nderitu for the Respondents opposed the Petition. He submitted that the Respondents' argument is that disciplinary proceedings are distinct from proceedings of State in criminal proceedings. He submitted that the Petitioner entered into a contract of employment and the rules of engagement also encompass and entail rules of conduct. He submitted that the Petitioner owes a duty to the State to perform his duties diligently and owes a duty to the employer the National Police Service based on the contract of employment. He submitted that the Petitioner, if he is in breach of duty owed to State, the State has the right to institute the proceedings on behalf of the people of Kenya in a court of law. He asserted that when the Petitioner is in breach of the contract he entered into with National Police Service as employer, the employer has every right to pursue any disciplinary process in response to the breach occasioned by the Petitioner. He submitted that the Petitioner was charged in Criminal Case No. 706 of 2014 with the offence of desertion from the Police Service contrary to Section 94(1) of the National Police Service Act 2011. These were proceedings instituted by the State on behalf of the people of the Republic of Kenya to whom the Petitioner owes a duty and a member of the disciplined service to perform diligently which he had failed to. He submitted that there was no involvement or participation of the Respondents in the said criminal prosecution. He cited the Court of Appeal decision in **Clement Karuri v Kenya Ports Authority [2018] eKLR** where there is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings. He argued that in the internal disciplinary proceedings the threshold is on balance of probabilities while

in the criminal proceedings the standard that is required is proof beyond reasonable doubt. He relied on the case of **Geoffrey Kiragu Njogu v TSC & 2 Others [2015] eKLR** where it was held that the institution of criminal proceedings is not a bar to civil proceedings or disciplinary hearing on similar facts. He posed the rhetorical question that if at all the Petitioner has already been acquitted in proceedings the employer did not participate in and were not initiated by the employer but by the State, why is he reluctant to face the internal proceedings if there is no evidence to show he is guilty of desertion on contract entered into between him and the employer? He submitted that that the Petition lacks merit as the Petitioner is currently working for the Respondent and is still performing his duties and internal disciplinary proceedings do not constitute a violation of his constitutional rights as alleged or it all. He thus urged the Petition be dismissed with costs.

4. In a brief reply Mr. Gikonyo submitted that on the breach alleged the breach alleged is purported desertion of duties by Petitioner and for that a competent court of law has already decreed there has no such alleged desertion. He submitted that the decision of Ongaya J. cited above and the Statute Miscellaneous Amendment Act has already established the law as it is. He stated that the Respondents were the complainants in the Criminal Case.

5. In this Petition, focal is the letter alluded to above. The notice to show cause was directed to the Petitioner for his alleged desertion. He argues this is unconstitutional and unfair labour practice as he was adjudged innocent by a competent court of law. Managerial prerogatives are the domain of an employer and courts are loath to interfere. In the case of **Geoffrey Mworira v Water Resources Management Authority & 2 Others [2015] eKLR** the court stated thus:-

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.

6. I agree that courts will very sparingly interfere in the employer's prerogative in the performance of the employer's human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function unless it can be shown that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or statute or in flagrant breach of the contract of employment or where there is manifestly unfair application of the process against the employee. In the consideration I must enquire whether the internal dispute procedure is necessary in the circumstances and it is disingenuous therefore for the Respondents to argue that the managerial prerogative supersedes the decision of the criminal court. The standard there is beyond reasonable doubt and the criminal court found there was no evidence of desertion. Whereas an employee is bound by the rules of engagement to be subject to the dictates of the human resource policy and his contract of employment, in this case the employer let the criminal case run its gauntlet without a murmur and never issued the employee with a notice to show cause. There was no need for the employer to abide the outcome of the criminal trial before initiating the internal disciplinary process. It seems the employer subrogated its disciplinary process awaiting what it hoped would be a favourable outcome in the criminal trial and when that failed proceeded to charge him afresh over the same matter. In the decision of **Joshua Muindi Maingi v National Police Service Commission & 2 Others (supra)**, Ongaya J. held that Section 88(4) of the National Police Service Act was unconstitutional as it permitted the employer to charge officers with offences for which courts have found the employee not guilty. That would definitely fly in the face of Article 50 of the Constitution and is classic double jeopardy. If the processes proceed in tandem it is permitted but one cannot wait for the court to clear him only to face the second hurdle for the same offence. In my view, that was never the intention of Parliament in enacting legislation in 2011 to govern the Police Service. Neither is it the import of contract that one should have the specter of additional action after the contemplated action is deferred for 4 years or so as a criminal process is engaged in before being compelled to undergo the disciplinary process again. I find there is merit in the Petition and declare the letter by the Respondent unconstitutional; the Petitioner should not be subjected to any disciplinary process in regard to the alleged desertion. The Petitioner to have costs of this petition as it ought not have been resisted granted the outcome of the criminal trial which was in the knowledge and with participation of the 1st and 2nd Respondents.

It is so ordered.

Dated and delivered at Nyeri this 15th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar