



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 18 OF 2016

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 AND 246(1),(2) & (3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011

AND

**IN THE MATTER OF POLICE 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 DISMISSAL FROM THE NATIONAL POLICE SERVICE (FORMERLY
POLICE FORCE)**

BETWEEN

CORPORAL ANDREW ARISA

PETITIONER

v

NATIONAL POLICE SERVICE

COMMISSION

1ST RESPONDENT

INSPECTOR GENERAL OF POLICE

2ND RESPONDENT

DEPUTY INSPECTOR GENERAL, KENYA POLICE

JUDGMENT

1. Corporal Andrew Arisa (Petitioner) was enlisted into the Kenya Police Service on 1 September 1977 and rose to the rank of Corporal with effect from 10 September 2008.
2. On 4 October 2008, the Commandant, General Service Unit wrote to the Petitioner informing him of his dismissal from the Kenya Police Force for the offence of *acting to the prejudice of good order and discipline contrary to section 3(1) of the Police Regulations*.
3. The dismissal prompted the Petitioner to move Court (an earlier Petition was struck out) on 15 April 2016 seeking
 - (a) A declaration that the purported disciplinary proceedings conducted by the Respondents between the 29th September, 2008 and 4th October, 2008 and the resultant decision made on 4th October, 2008 dismissing the Petitioner from service was unconstitutional and in violation of the Petitioner's rights under Articles 41, 47, 50, 159 of the Constitution of Kenya, Sections 45 as read with Sections 35(1)(c) of the Employment Act, 2007.
 - b) A permanent injunction to restrain the Respondents and or their agents, servants or employees from approving the Petitioner's dismissal dated 4th October 2008.
 - c) Reinstatement of the Petitioner to the position he held prior to the said dismissal without any loss of rank/insignia and payment of salary and allowances and any other benefits entitled to him from 4th October 2008 amounting to Kshs 5,347,200/=.
 - d) Costs and interest be provided for.
 - e) Any other relief which this Honourable Court deems fit and just to grant.
4. The Petitioner alleged in the Petition that the dismissal was illegal and unconstitutional because no orderly room proceedings were conducted, he was denied an opportunity to be heard and that the provisions of sections 88 and 89 of the National Police Service Act and Force Standing Orders were not complied with.
5. The Petitioner also challenged the charge sheet as being defective, and that he was not supplied with copies of the *Orderly Room* proceedings for purposes of appeal.
6. The Petitioner further challenged the 8 years it took to determine the appeal he had preferred as inordinate.
7. He equally lamented that the failure to issue him with copies of the *Orderly Room* proceedings was in violation of the right of access to information as provided in Article 35 of the Constitution.
8. According to the Petitioner, the process leading to the dismissal and the dismissal were in violation of the rights enshrined in Articles 41, 47 and 50 of the Constitution and section 17 of the Employment Act.
9. The Petition was accompanied with a motion seeking interim reliefs and which application was determined on 2 November 2016.
10. The Respondents in opposition to the Petition filed a replying affidavit sworn by Mary Wakuu on 17 July 2017 (was filed outside the timelines set by Court but was nonetheless admitted on 21 September

2017). The Court also gave directions as to the hearing of the Petition after the Petitioner proposed that it be determined on the basis of the record and written submissions.

11. The Petitioner filed his submissions on 20 September 2017 while the Respondents filed their submissions on 17 October 2017.

12. The submissions were highlighted on 6 November 2017 and the Court has given them due consideration.

13. The parties did not frame the Issues for determination nor did they set out the same clearly in the submissions, but the Court has identified the *Issues* as, *whether the Petition raised constitutional questions, whether the Petitioner was granted an opportunity to be heard before dismissal, whether the Respondents complied with the provisions of the applicable statutes before dismissing the Petitioner and appropriate remedies.*

Constitutional questions

14. The Court has keenly perused the Petition and evidence on record from both sides and is of the view that the questions presented could have been determined through an ordinary Cause.

15. However, it appears that the Petition route was chosen in order to avoid the obstacle/(questions) of law of limitation as the cause(s) of action presented accrued with the dismissal of the Petitioner on 4 October 2008.

16. Further, the cause(s) of action presented by the Petitioner arose in 2008, before the Constitution 2010, and the Petition primarily ought to be dealt with in terms of the legal framework in place then.

17. In the view of the Court, the legal injuries or wrongful acts the Petitioner is complaining of arose with the dismissal in 2008, and not at the point of determination or notification of his appeal in 2010/2011.

18. The Court will decide go ahead to consider the Petitioner's contentions.

Opportunity to be heard

19. Although the Petitioner contended that his right to a fair hearing and fair labour practices were violated there is on record a *Waiver Notice* setting out the offence he was charged with and he signed the same on 1 October 2008.

20. Thereafter, the *Orderly Room* proceedings took place on the same day, and according to a record of the same as demonstrated in the *Defaulter Sheet*, the Petitioner entered a plea of guilty.

21. The Petitioner signed the *Defaulter Sheet*.

22. On 4 October 2008, the Petitioner's Commandant wrote to him informing him that it had been decided to dismiss him from the Police Force.

23. On the basis of the evidence before Court, the Petitioner cannot be heard to complain that he was not afforded an opportunity to be heard before dismissal or that the process followed by the Respondents violated the right to natural justice.

Delay in determining appeal

24. The Petitioner first appealed against the dismissal on a date which was not disclosed and on 10 November 2008, his then Commandant wrote to him through the Officer Commanding 'T' Company that the appeal had been dismissed.

25. The Petitioner then appeared to have appealed against the dismissal through a letter dated 4 December 2008.

26. The 2nd Respondent acknowledged the appeal in a letter dated 16 December 2011 sent through the Petitioner's former Commandant, which letter also informed the Petitioner that the appeal was found to lack merit and thus disallowed (Petitioner filed incomplete proceedings of the internal appeal which unfortunately are not dated).

27. On 15 January 2013, the Petitioner appealed to the 1st Respondent and in a response dated 17 January 2013, he was informed that the appeal was being given attention and he would be advised in due course.

28. It is therefore not true as contended by the Petitioner that it took 8 years to determine the appeal. It took about 3 years.

29. The Petitioner not having demonstrated the prejudice or injustice occasioned by the 3 years it took to notify him of the outcome of the appeal, the Court is of the view that this irregularity, if it may be called so, should not be decisive of the primary *Issues* identified for consideration or worth warranting a remedy, in the circumstances obtaining.

Failure to furnish proceedings

30. The Petitioner also contended that he was incapacitated in the appeal process because he was not supplied with copies of the *Orderly Room* proceedings, but he did not provide any evidence that he made a formal application for the proceedings.

31. The invocation of Article 35 of the Constitution, in the view of the Court was therefore premature.

Compliance with legal framework then in place

32. The Petitioner alleged that the Respondents did not comply with the statutory provisions in place at the time of the dismissal and reference was made to the National Police Service Act and the Forces Standing Order.

33. The National Police Service Act, 2011 was not in operation in 2008 and therefore it cannot avail the Petitioner herein as to the substance of the wrongs he is complaining of.

34. The Act may be of relevance only as regards the determination of the appeal he preferred if the same was still lawfully pending by 2011.

Appropriate remedies

35. It should be obvious by now that the Petition herein lacks merit and none of the reliefs sought by the Petitioner are legally tenable.

Conclusion and Orders

36. In light of the above, the Court finds no merit in the Petition and orders that it be dismissed with no order as to costs.

37. The file to be transmitted back to Nakuru after this judgment.

Delivered, dated and signed in Nairobi on this 19th day of January 2018.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Mageto instructed by M’Njau & Mageto Advocates

For Respondents Mr. Kirui, Senior Litigation Counsel, Office of the Attorney General

Court Assistants Nixon