



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 129 OF 2016

(Before Hon. Justice Mathews N. Nduma)

AUGUSTUS MAUNDU MUTIAPETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

J U D G E M E N T

1. The Petitioner in his petition dated 14th October, 2016 and filed on the even date prays for –

a. Declaration that the Petitioner’s Fundamental Rights and Freedoms have been violated.

b. 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 National Police Service (NPS) including the decision rejecting the Petitioner’s application for Review.

c. An Order for reinstatement of Petitioner to his post as a Senior Superintendent of the Administration Police Service as well as reinstatement of all his privileges including his salary.

d. An order substituting the Respondent’s decision with a declaration that there exists no materials to find that the Petitioner had failed vetting.

e. Compensation to the Petitioner for the violation of his fundamental rights and freedoms.

f. Costs of this Petition.

g. Any other relief that this Honourable Court may deem just to grant.

2. The petitioner has pleaded that his rights guaranteed under Articles 41, 47(1) & (2) and Article 50(1) of the constitution of Kenya 2010 have been violated by the Respondent as set out herein below –

3. The Petitioner avers that his vetting was not conducted in compliance with the laws and regulations relating to the vetting of officers of the NPS and the entire process infringed on his constitutional rights and freedoms.

4. Prior to the vetting interview, the Petitioner was required to fill out a vetting questionnaire and avail, which he did, certain vital documents including the following: Bank Statements for the two (2) years preceding the vetting exercise; copy of pin certificate and ID Card for the spouse; Tax Compliance Certificate; Curriculum Vitae; and copies of educational and professional certificates.

5. Prior to the vetting interview, the Respondent was required under Regulation 18(2) of the National Police Service (vetting) Regulations to serve the Petitioner with any complaint or any adverse information it had and which it intended to rely on. On the Petitioner’s part, he was to be accorded time to give a written answer to the adverse information if any.

6. The Petitioner avers that he was neither informed that there was any complaint or adverse allegations against him nor was he served with any adverse allegations against him or documentary evidence in support of any Complaints or allegations that the Respondent would have had against him.

7. The Petitioner appeared for a vetting interview before the Respondent’s vetting panel on or around 17th & 19th March 2015.

8. Subsequent to the vetting interview, the Respondent in a decision signed by all the commissioners on 9th October 2015 found that the Petitioner had failed vetting and proceeded to remove the Petitioner from the service.

9. The Respondent in its decision made a number of adverse findings against the Petitioner as follows:-

- a) He had been receiving salary of two Administration Police Officers (APS) who had allegedly been supplied to a private establishment.
- b) He was not ensuring payment to Aps was channeled through the Appropriation in aid (AIA) Account.
- c) He had purportedly presented a letter from a Junior Officer to the Commission when the Letter had been done by him.
- d) He had deployed six (6) officers to the University of Eldoret yet only four (4) could be seen on the ground thus insinuating that he was misappropriating the salary for the other two (2).
- e) He displayed arrogance, lacked decorum and lacked etiquette by cutting panellists short.
- f) He was involved in serious misappropriation as he could not explain why the amounts were found in his account.
- g) He displayed serious insubordination and gross misconduct.

10. Being dissatisfied by the aforesaid findings the petitioner sought a review pursuant to Regulations 33(2) (a) of the National Police (Service) Vetting Regulations raising several grounds including the following:-

- a) There were numerous mistakes and errors apparent on the record such as failure to seal the decision, not stating whether the Petitioner was unsuitable or incompetent, the decision was based on rumours, there was bias, the respondent overstepped its mandate, it usurped the role of a handwriting expert, it ignored the Petitioner's defence and the conclusions were illogical.
- b) There were new and important pieces of evidence that could not be produced at the Vetting including authority from his Commander to collect and expend funds through his personal account, letters from recipient officer confirming that they received all their dues and documentation on the deployment of officers to the University of Eldoret and Hass Petroleum.

11. The Respondent invited the Petitioner for a Review hearing, which took place on 10th February 2016.

12. The Petitioner avers that he appeared for the Review hearing addressed the Respondent on his submissions and answered various questions asked.

13. Subsequently, the Respondent delivered its Vetting Review Decision and it found that the Petitioner had failed to discharge himself from the earlier findings and the initial Vetting Decision was upheld.

14. The Petitioner avers that he is dissatisfied with both the handling of his application for Review and initial vetting owing to procedural impropriety.

15. In addition to the unlawful dismissal of his application for review, the Petitioner further avers that the entire process of Vetting including the handling of his initial interview and the delivery of the Vetting Decision was conducted in a manner contrary to the principles of Natural Justice, contrary to the Rules under the National Police Service & the Vetting Regulations and contrary to the Rights guaranteed under Article 41, 47 & 50(1) of the Constitution.

16. Under the provisions of Rule 18 of the National Police Service (Vetting) Regulations, 2013, the Respondent was mandated to serve any complaint or adverse information received by the Commission upon the Officer who then has an opportunity to respond to the Complaint and/or adduce any relevant documents and information in response to the complaint.

17. Prior to the vetting interview, the Petitioner had not been given notice or alerted that the deposits in his accounts, his deployment of officers to the University of Eldoret or handling of funds in Rachuonyo North District were considered suspicious, or were under challenge.

18. The Petitioner avers that the least the Respondent would have done is to write to him inquiring on the two issues which the Petitioner would have organized to answer as best as he could with supporting documents.

19. In failing to issue such a notice, the Respondent essentially set up the petitioner to fail as the Petitioner was ambushed on the floor of the Vetting interview and bombarded with queries that on his feet couldn't adequately address.

20. The failure to issue the notice was absolutely unfair and contrary to the requirements of adequate notice and a fair hearing.

21. The Respondent despite having the necessary powers under Regulation 30 of the Vetting Regulations did not summon relevant witnesses.

22. The submissions and evidence of the Petitioner before the Commission was completely ignored.

23. From the manner the Vetting Process was undertaken, the Respondent fettered the Petitioner's rights to call evidence and witnesses who would have shed light on the matters in controversy.
24. The question and answer approach adopted in the Vetting Interview was inappropriate in allowing the Petitioner to clearly and freely explain the issues at hand.
25. The environment and the manner in which the proceedings were carried out were very hostile to the Petitioner and on several instances he was shouted down by the Chairman of the Respondent who mistook his submissions as insubordination, arrogance or engaging in a quarrel with his employers and the Chairman even threatened to switch off the Petitioner's microphone.
26. The Vetting decision contained errors apparent on the face of the record including the Petitioner's date of enlistment, date of transfer from Rachuonyo North District to Uasin Gishu County and status of Officers securing the University of Eldoret.
27. The conduct of the Respondent in the whole process was completely biased, and instead of playing the role of an impartial arbiter the Respondent became investigator, prosecutor, judge, jury, executioner and persecutor all rolled into one.
28. One of the Vetting Commissioners by the name of Mary Owuor had a pre-determined mind-set and was biased on the subject matter of the Rachuonyo Project based on the fact that she hailed from the region and purported not to have seen any AP Officers on the site.
29. The Respondent maliciously, unreasonably and without any evidence or factual foundation made findings that the Petitioner was possibly involved in misappropriation of funds.
30. Regulation 4 (f) of the Vetting Regulations requires the Respondent to conduct the vetting process while adhering to a standard of proof on a balance of probabilities.
31. There was no evidence of the Petitioner collecting other officers allowances or payment for his personal aggrandizement.
32. The Respondent in its findings did not make any reference to the Petitioner's income, bank statements, lifestyle audit and assets that would have suggested that he was deriving income illegally from any other source except from his employment.
33. The Respondent in violation of the rules of natural justice & various legal provisions shifted the burden of proof to the Petitioner and purported to assume him guilty until he could prove himself innocent.
34. The Respondent was accordingly in violation of the Vetting Regulations for not adhering to the required standard of proof.
35. The Petitioner gave a version and testimony on the issues at hand which the Respondent was under the Law required to consider and evaluate.
36. The Respondent ought to have considered the previous performance of the Petitioner since enlisting including his tenure in hardship areas.
37. The Petitioner avers that Public Interest is in favour of a process that is objective and is geared towards achieving the purpose of the Police Vetting process.
38. The Petitioner avers that his Vetting was not carried out in a manner that respected the Public Interest as his wellbeing as an individual, human rights, social justice and rule of law were all violated.
39. The Petitioner further avers that removing him from service on unsubstantiated grounds breeds no faith in the National Police Service and does not meet the criteria and purpose of the Vetting Process.
40. The Petitioner avers that in his 36 years in service, he has had no formal complaint, orderly room proceedings or any other adverse procedures against him.
41. The Petitioner has risen from a mere constable to his current position of Senior Superintendent of Police through sheer hard work, discipline and dedication.
42. The Respondent failed to consider the chequered and unblemished career of the Petitioner as required and balance it with the allegations made thereby showing that the decision lacked proportionality.
43. The Petitioner avers that as both an Administrative & quasi-judicial tribunal, the Respondent failed to balance the adverse effects on the Petitioner's rights, liberties or interests with the purpose of the vetting process.
44. The adverse findings made against the Petitioner without regard to due process have sounded a death knell on his 36 year old career and is unlikely to find any employment or engagement in consultancy in his area of expertise both in the public sector and private sector.
45. The Petitioner states that the Respondent did not consider the petitioner's record, conduct and performance in his current and previous posting contrary to Regulation 7 of the Vetting Regulations.

46. The Respondent as a quasi-judicial body is under duty to furnish reasons for its findings.

47. The Respondent failed to give reasons in the Vetting Decision as to why it considered the Petitioner; to have been arrogant, guilty of insubordination, lacking etiquette, engagement in serious misappropriation and gross misconduct.

48. The Respondent failed to give reasons as to why if found that the Petitioner willfully withheld information.

49. The Petitioner appeared before two (2) of the Respondent's Commissioner's for his vetting interview. The four (4) other Commissioners were not part of the Respondent's vetting panel but proceeded nonetheless to rubberstamp a decision removing the Petitioner from the National Police Service without hearing him or participating in the review process.

50. There is no record availed to the Petitioner that the four (4) Commissioners who signed the vetting decision but did not participate in the Petitioner's vetting interview deliberated on the allegations against the Petitioner and considered his answers.

51. The Respondent is in breach of Regulation 34 of the Vetting Regulations which mandates it to cause to be made and kept an accurate record of its proceedings. In the absence of any record that the Respondent's Commissioners all deliberated on his vetting interview, the Respondent's decision was a nullity in law.

52. The Petitioner avers that the vetting decision signed by persons who did not participate in his vetting interview was illegal, null and void and ought to be quashed by this Hon. Court.

Response

53. The Respondent answered the Petition vide a Replying Affidavit of Johnston Kavuludi, the Chairman of the Respondent sworn on 11th January, 2017.

54. The defence of the Respondent to the petition is set out in the Affidavit and summarized below.

55. The removal of the officer from the service, is in terms of Regulation 3, 4 and regulation 14 of the vetting Regulation which provides –

Regulation 3

“The objective and purpose of the vetting –

(a) Build confidence and trust in the Service; and

(b) Ensure that the Service complies with Chapter Six of the Constitution and the principles of public service as set out in Article 232 of the Constitution and in the Public Officer Ethics Act”

Regulation 4

“ In conducting the vetting process, the Commission shall be guided by the following principles –

(c) Subject to regulation 8, all officers of the Service shall undergo vetting, individually;

(d) The vetting process shall be implemented consistently and the same procedural principles shall be applied in all cases;

(e) Vetting shall be done in accordance with the values and principles set out in Articles 10, 27, 47, 50 and 232 of the constitution;

(f) Vetting shall take into account the need to protect national security as defined in Article 238 of the Constitution of Kenya;

(g) The Commission shall be guided by the principles and standards of impartiality, natural justice and international best practice;

(h) The vetting process shall not be bound by strict rules of evidence and the proof applicable shall be that of a balance of probabilities;

(i) Vetting shall be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision.”

Regulation 14

“(1) In vetting an officer, the Commission shall consider, assess and determine the suitability and competence of the officer.

(2) The commission shall, in determining the suitability and competence of an officer, consider –

- (a) whether the officer meets the constitutional or other criteria required by law for recruitment and appointment of an officer;*
- (b) the past record of an officer including conduct, discipline and diligence;*
- (c) the integrity and financial probity of the officer; and*
- (d) the human rights record of the officer”*

56. THAT pursuant to the mandate stipulated in the aforementioned Constitution, the National Police Service Act and the Vetting Regulations, the Commission started the vetting of police officers in December, 2013 starting with the most senior police officers of the ranks of SDCP 1 & 2, DCP, S/ACP, SSP, SP and ASP and by the end of November 2015 the Commission had vetted 1778 police officers of the aforementioned ranks.

57. THAT in removing the petitioner herein the Commission was guided by regulation 14(2) (c) of the vetting regulations which require the Commission to look at the past record of the officer including conduct, discipline and diligence and the financial probity of the officer amongst other factors set out.

58. THAT prior to the removal of the petitioner from the service the commission accorded him a fair and procedural hearing pursuant to the constitutional provisions and the National Police Service Commission Act and the Police Service (Vetting) Regulations 2013.

59. THAT further to the foregoing, the petitioner was timely and procedurally notified of the complaints against him through a complaints summary sheet in accordance with regulation 18(2) of the Vetting Regulations. This is evident in paragraph 13 of the petitioner’s supporting affidavit where he states that he received a letter of allegations. It is therefore wrong for the petitioner to turn around and state that he was not informed of any adverse allegations against him as stated in paragraph 11 contrary to the unequivocal contents of paragraph 13.

60. The Petitioner was first vetted on 17th March, 2015 and the hansard record of the proceedings is annexed to the replying affidavit.

61. The petitioner failed to supply and provide all the details and information that was required of him and he was requested to come back on 19th March, 2015. This is evidence that the Petitioner was accorded procedural fairness.

62. The petitioner herein appeared for further vetting on 19th March 2015 and at no point did he raise a complaint with regard to the manner and nature of the Complaints furnished upon him.

63. That after the vetting process of the rank of SSP, SP and ASP was complete, 69 police officers, amongst them the petitioner herein were found to be unsuitable and incompetent to continue to serve and were therefore removed from the service as per the requirement of section 7 of the National Police Service Act and regulation 25 of the National Police Service Commission vetting regulations.

64. The petitioner herein was first removed from the service on 9th October 2015 on the grounds that he failed to explain the huge deposits and withdrawals in his bank accounts and that he deployed APs to over sixteen private institutions and not all institutions paid AIA to the Government for the service of the deployed officers among other grounds as contained in the decision conveyed to the officer. The decision was communicated to the petitioner via a letter dated 9th October 2015.

65. That after the petitioner herein was first removed from the service as a result of vetting, on 21st October 2015 he applied for review as required under regulation 33 of the vetting regulations.

66. That the said review application was admitted for hearing by the commission in order to give the petitioner another opportunity to explain the discrepancies noted in his bank account statements.

67. That thereafter the commission communicated its decision to hear the petitioner’s review application vide its letter 22nd January 2015 which hearing was re-scheduled for 5th February 2016. However, the said hearing could not proceed as scheduled and was scheduled to 10th February, 2016.

68. That after hearing the aforementioned Review Application on 10th February 2016, the Commission found that the same lacked merit and upheld its earlier decision to remove the petitioner from the Service since the petitioner did not prove any error apparent on the face of the record or any new facts as per the requirements of Regulation 33 of the Vetting Regulations.

69. That the law is very explicit 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 constitutional provisions and the statutory law without proof should not suffice.

70. That in removing the petitioner herein the Commission was guided by regulation 14(2) (b) and (d) of the Police Service (Vetting) Regulations 2013 which requires the Commission to look at the past record including conduct, discipline and diligence of the officer and also the human rights record of the officer.

71. That the commission is not bound by strict rules of evidence as it is only required to base its decision on a balance of probability and therefore the argument that the petitioner has to cross examine witnesses and also summon witnesses is not plausible.

72. The question and answer approach employed by the vetting panel is in line with section 10 of the National Police Service Act and Regulation 10 and 25 of the vetting Regulations.

73. That the unequivocal provisions of the aforementioned regulation do not restrict decision making to the Commissioners who participated in the hearing since the proceedings are recorded in the Hansard record verbatim which print-outs are later used in determining whether an officer is suitable to continue serving or not.

74. The Commission is guided by both Section 13 of the National Police Service Commission Act and Regulation 10 of the Vetting Regulations. The Commission is further guided by Regulation 25 of the Vetting Regulations in making vetting decision.

75. That the decision of the Commission is for the Commissioners and not for the vetting panel as was held in the case of **Petition No. 6 of 2014 Consolidated With Judicial Review Miscellaneous Application Nos. 11 and 12 of 2014 Immanuel Masinde Okutoyi & others v National Police Service Commission & another [2014] eKLR** where the Court held that –

“However, under section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the panels as long as they comply with the law”

76. That it is therefore apparent that the petition as framed lacks merit and is an attempt by the petitioner to try and mislead this Honourable Court with the unlawful aim of forcing himself back to the service after failing the suitability test through imagined non-existing legal technicalities despite having been accorded the required fair administrative treatment during the vetting and subsequent review as enshrined and contemplated by the law.

77. That it is the Commission’s contention that the petition be dismissed with costs to the respondent.

Determination

78. The issues for determination are as follows:-

Issues 1

79. Whether the Petitioner was removed from service by a competent panel on valid grounds following a fair procedure.

80. The question that the court must answer is whether by having commissioners who did not sit at the vetting, this invalidated the decision of the vetting panel.

81. In **petition No. 79 of 2014, Eusebius Laibuta v The National Police Service Commission, Justice Odunga** stated:-

“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 the persons participated in the interview they may have arrived at this same decision, this court cannot say that it is certain that they would have arrived at the said decision.”

82. In the present case the respondent justified the decision to have commissioners who did not participate in the committee panel make the final decision on section 13(1) and (2) of the National Police Service Commission Act which provides for establishment of committees, co-option of members with special knowledge and skills to the committee, who however have no power to vote.

83. This in itself, is proper, but the person’s who participate in the final decision making must have all sat during the proceedings of the panel from the beginning to the end for them to make an informed, just and fair decision so as to satisfy the dictates of natural justice. Anything short of this would not sell.

84. The uncontroverted facts are that the petitioner appeared before two (2) commissioners amongst co-opted members for his vetting interview. There were four (4) commissioners who did not take part in the vetting who took part in making the decision to remove the petitioner from NPs. This is patently illegal and in itself invalidated the decision itself.

85. The commission has been guided by the court in its various judgments to ensure only persons who participate in the vetting process make and sign the final decision. The Commission deviates from this guideline at its own peril.

86. The court therefore finds that by this fact alone, the decision of the panel was invalid.

87. The court need not to go any further except to say that having persons who did not hear the petitions make the decision to remove him

negated the very essence of the principles of natural justice in that the non-participants who later made the decision provided the petitioner with no hearing at all contrary to the cardinal rule of *audi alteram partem* rule.

88. In **Kisumu Court of Appeal Case No. 17 & 18 of 2015, County Assembly of Kisumu v Kisumu County Assembly Service Board and others**, the court had this to say –

“72 due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our constitution, it is a constitutional imperative”

89. In the present matter all the good work done by the vetting panel was compromised by the illegality eventually committed by the commission against the petitioner, by allowing strangers to the proceedings to make the impugned decision. This clearly led the Respondent to consider extraneous matters in arriving at the impugned decision and disregarded the defence put by the petitioner and especially his good record for 36 years of service. The decision was not supported by valid reasons having been arrived at by strangers to the proceedings.

90. Accordingly, the petition succeeds and the court makes the following orders:-

- a. The court makes a declaration that the petitioner’s fundamental rights and freedoms have been violated.
- b. The court issues an order of certiorari to quash the entire proceedings and the decision of the Respondent declaring that the petitioner had failed vetting and had been discontinued from the National Police Service including the Decision regarding the petitioner’s application for review.
- c. The court makes an order for reinstatement of the petitioner to his post as a Senior Superintendent of the Administration Police Service as well as reinstatement of all his privileges including his salary.
- d. The Respondent to pay costs of the petition.

Dated and Signed in Kisumu this 8th day of February, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of March, 2018

Maureen Onyango

Judge

Appearances

Mr. Guandaru Thuita for Claimant/Respondent

Mr. Ojwang for Respondent

Anne Njung’e – Court Clerk