



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION 85 OF 2016

BENARD BARIU KOBIA.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGEMENT

1. The Petitioner herein sought from the court orders among others that:

- a. *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 Administration Police Service including the Decision summarily rejecting the Petitioner's application for Review.*
- c. *An Order for reinstatement of the Petitioner to his post as an Assistant 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.*

2. The factual background to the petition were contained in the petitioner's affidavit sworn on 27th May, 2016 in which he deponed on the main that:

- a. *That I joined the Administration Police Force currently (Administration Police Service) on 4th November 2002 as a recruit constable and I have risen through the ranks to my current position as Assistant Superintendent Police- a position in which I was appointed in the year 2015 or thereabouts.*
- b. *That upon enactment of the National Police Service Act, the respondent was tasked with the mandate of vetting all officers of the National Police Service with the objective of assessing their suitability and competence also tasked with the mandate of discontinuing the services of any officer who fails the vetting*
- c. *That pursuant to the vetting mandate of the respondent, I was asked to fill up vetting forms which I did and forwarded the same to the respondent herein before the vetting exercise.*
- d. *That I was also required to submit my academic certificates and other vital documents to the respondent which I duly submitted as required.*
- e. *That prior to the vetting exercise, the respondent served me with complaint summary sheet which briefly outlined complaints that had allegedly been made against me to the effect that:*
 - i. *The petitioner engaged in sexual harassment of female officers in Kwale Lamu West.*
 - ii. *The petitioner conspired with drug peddlers in transportation of drugs and receiving protection fees on a weekly basis*

leading to his removal of from Lamu Island to avert more complaints

iii. The petitioner does not bother about his daily work routine, value his rank and is always drunk and disorderly

iv. The petitioner cannot work without supervision because he is incapable and incompetent in decision making and thereby making the relationship with his supervisors to be under threat always

v. That the above allegations make him incapable of handling management issues on Human Resource, Bill of rights and integrity issues.

f. That I was not furnished with documentary evidence in support of the said complaints and the complaint summary sheet lacked proper particulars and was more or less too generalized.

g. That I nonetheless furnished a detailed written response to the aforesaid complaints and forwarded the same to the Chairman of the respondent in which I explained and even attached documentary evidence to show that the aforesaid allegations against me were baseless, unfounded and in some instances malicious.

h. That I attended the vetting exercise on 19th August 2015 during which I was interviewed by the members of the vetting panel.

i. That with regard to the matters raised in the complaint summary sheet I was questioned on sexual harassment of female officers in Kwale & Lamu, trafficking of drugs while in Lamu and alleged inability to work without supervision all of which I believe I answered satisfactorily.

j. That in the vetting interview, I was however not questioned on the complaints relating to being drunk and disorderly or handling management issues

k. That the respondent thereafter delivered its findings in a decision dated 9th October 2015 which I only received on or around 16th October 2015.

l. That in the aforesaid decision, the respondent purportedly found that I had failed the vetting service and discontinued my employment with the National Police Service.

m. That the purported basis of the decision by the respondent that was:-

i. I had usually collected protection fees from criminals

ii. I operated a kiosk ostensibly for Miraa business but which was a cover for transacting a business in hard drugs and a coordinating centre from the protection of criminals.

iii. As a member of the DSIC (District Security Intelligence Committee), I had been accused of leaking sensitive information on Police Operations to people including civilians which endangered public safety.

iv. I portrayed dishonest behavior in the management of the Police Canteen and I was accused of misappropriation of the same

v. I had abused my office and authority by soliciting money from my junior officers for my own private use and benefit.

vi. I was lacking discipline, decorum and dignity and my behavior amounted to gross misconduct.

n. That being aggrieved by the aforesaid findings a decision by the respondent, I applied for a review pursuant to the provisions of Regulation 33(2) (a) of the National Police Service (Vetting) Regulations 2013.

o. That as expected, the respondent invited me for a review hearing which was to take place on 9th February 2016.

p. That on the said date, 9th February 2016 I appeared for the review hearing and submitted in person and answered the queries raised by the panelists present.

q. That subsequently, the respondent delivered its Vetting Review Decision and it found that I had failed to discharge myself from earlier findings and the initial Vetting Decision was upheld.

r. That in the said Review Decision, the respondent made findings to the effect that:-

i. I had lied to the respondent in the review by stating that I was not involved in the Miraa business thus portraying me as an officer lacking integrity.

ii. I did not give any new information as expected upon admission of my application for review but aggravated the situation

by lying about my involvement in the business.

s. That I am dissatisfied with both the handling of my application for review and initial vetting.

3. The respondent through on John Kavuludi, its chairman filed a replying affidavit in which he deponed among others that:

o That the National Police Service Commission(hereinafter referred to as the Commission) is mandated under article 246(3)(b) of the Constitution to inter alia observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service

o That section 7(1) of the National Police Service Act states that all persons who were immediately before the commencement of the Act, officers or employees of the Kenya Police Force and Administration Police Force established under the Police Act (Cap 84) and the Administration Police Act (Cap 85) respectively, including officers working with the criminal investigation department, shall upon commencement of this Act become members of the service in accordance with the Constitution and this Act.

o That based on the foregoing, the commission formulated vetting regulations to enable it carry out the vetting exercise of all police officers who were in the force prior the enactment of the new Constitution and the Act.

o That pursuant to the mandate stipulate in the aforementioned constitution, the National Police Service Act and the Vetting regulations, the Commission started the vetting of police officers of the ranks of SDCP 1&3, DCO,S/ACP, SSP,SP and ASP and by the end of November 2015, the commission had vetted 1778 police officers of the aforementioned ranks

o That I know of my own knowledge that after the vetting process of the rank of SDCP 1&2, DCP, S/ACP, ACP SSP, SP and ASP was complete 87 police officers amongst them the petitioner herein were found to be unsuitable and incompetent to continue service.

o That in removing the petitioner herein the commission was guided by regulation 14(2) (b) of the vetting regulations which require the commission to look at the past record of the officer including conduct discipline and diligence amongst other factors set out.

o That prior to the vetting of the petitioner herein the commission received a complaint against the office with regard to the officer's conduct and integrity.

o That in accordance to regulation 18(2) of the vetting regulations on 28th April 2015 the Commission sent a summary of the complaint to the petitioner herein

o That I am aware that the petitioner herein responded to the said complaints on 24th May 2015

o That the petitioner herein was first removed from the service on 9th October 2015 on the ground that the petitioner collected protection fees from criminals and used a Miraa kiosk as a front for hard drugs among many other grounds.

o That I know of my own knowledge that after the petitioner herein was first removed from the service as a result of vetting , he applied for review as required under regulation 33 of the vetting regulations

o That I further know of my own knowledge that the said review application was admitted for hearing by the commission after it was found to have merit.

o That after admitting the review application, the commission looked at the merits and demerits of the said application and recommended that the petitioner's review application be heard.

o That thereafter the commission communicated its decision to hear the petitioner's review application vide a letter dated 22nd January 2015.

o That the commission vide the same letter dated 22nd January 2015 subsequently invited the petitioner herein for the hearing of his review application which was to be carried out on 5th February 2016.

o That the petitioner's review application was heard on 5th February 2016.

o That the review panel after hearing the petitioner's review application, it upheld its earlier decision to remove the petitioner from service

o That further, in the petitioner's application for review dated 22st October 2015 the petitioner states that the Miraa business was and is still being operated by his cousin one Robert meme.

o That the petitioner contradicted himself when he stated that the Miraa business is operated solely by his cousin and not the both of them as he had earlier stated

o That in reply to paragraph 25 to 27 of the petitioner's supporting affidavit, the commission avers that during the petitioner's

review hearing the petitioner himself stated that he was happy with the way the commission handled his issues.

*o That I am further advised by the advocate on record which advise I verily believe to be true that the decision of the commission is for the commissioners and not for the vetting panel s was held in the case of **Petition No.6 of 2014 Consolidated with Judicial Review Miscellaneous application Nos. 11 and 112 of 2014 Immanuel Masinde Okutoyi & Others VS 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 even the so called panels as long as the comply with the law”*

o That it is therefore wrong for the petitioner to state that since the Inspector General Mr. Joseph Boinnet and the Deputy Inspector General Mr. Samuel Arachi were not present during the vetting , they could not make and sign the decision

o That in reply to paragraph 28 to 40 the petitioner’s supporting affidavit , it is the commission’s contention that on 28t April 2015 in accordance to regulation 18(2) of the vetting regulations, the commission sent a summary of the complaint to the petitioner and he responded to the same on 24th May 2015

o That it is therefore wrong for the petitioner to state that the commission failed to issue adequate notice of the allegations and that he was bombarded with the allegations yet the commission gave him over a month to respond which itself was adequate notice

o That in response to paragraphs 41 to 54 of the petitioner’s supporting affidavit it is the commission’s disputation 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

o That in any case if the commission were to allow witnesses to be called and be cross examined, the vetting exercise would take very long time for it to come to an end given the number of officers to be vetted by the commission ranges from 80,000 to 90,000 officers

o That I am advised by the advocate on record which advise I verily believe to be true that in forming the vetting panel , the commission is guided by both section 13 of the National Police Service Act and Regulation 10 of the vetting regulations. The commission is further guided by the regulation 25 of the vetting regulations.

o That it is therefore wrong for the petitioner to say that the question and answer approach adopted in his vetting interview before a panel was made up of his bosses in the service was inappropriate and did not allow him to clearly and freely explain the issues at hand.

4. In his submissions in support of the petition Mr. Thuita for the petitioner submitted that in carrying out the vetting exercise against the petitioner the respondent failed to carry out the process in line with the law and contrary to petitioner’s right to fair administrative action under article 41, 47 and 50(1) of the constitution. According to counsel the petitioner went through the statutory process and was able to successfully respond to all complaints leveled against him however, the respondent still found the petitioner unsustainable on allegations that had not been presented before him prior to or during the vetting. The petitioner saw the allegations and grounds for this removal for the first time in the vetting decision.

5. According to counsel, the respondent did not supply the petitioner with complaints and sufficient particulars of the complaints against him or even the accompanying documents. Mr. Thuita submitted that the petitioner was supplied with what was referred to as a complaint summary sheet as answered to each and every allegation raised. Counsel further submitted that going by the Hansard report the respondent appeared to have not only received specific complaints against the petitioner but also none of these were availed to the petitioner during the vetting. According to counsel there was no complaint presented to the petitioner that the Miraa kiosk he had been running was a centre for criminal activities including selling of hard drugs. Similarly, there was no complaint supplied to him that he collected protection fees from criminals.

6. Mr. Thuita submitted further that the regulations required that the complaint received by the commission be supplied to the accused officer and not the summary. Further, the summary contained no proper particulars that would have enabled the petitioner to know the case adequately. For example, counsel submitted that the accusation that the petitioner while in Kwale and Lamu West sexually harassed female officers did not disclose how and when the harassment occurred hence the petitioner was supposed to engage in a wild goose chase and speculation.

7. Concerning the conduct of the process counsel submitted that the respondent proceeded by way of asking questions. The respondent asked questions that it wanted and the question and answer session did not allow the petitioner to call witnesses of his own. As a result, the petitioner was not only denied the right to cross-examine witnesses. Mr. Thuita further submitted that under rule 4(f) of the Vetting Regulations, the standard of proof applicable is on a balance of probabilities. However, the respondent appeared to have deliberately moved away from this requirement as far as possible. According to counsel the substantial findings by the respondent were not supported by the required evidence. There was no evidence to show that there was collection of protection fees from criminals. There was no adverse data, reports, arrests, prosecutions or findings on the said kiosk by anybody.

8. Counsel further submitted that in the vetting decision the respondent made sweeping findings that were not backed by any reasons at all. For instance at paragraph 11 of the decision, read “the commission noted that the officer collected protection fees from criminals” yet there was no explanation at all on how or the reasons why the respondent had arrived at his serous finding.

9. On the other hand, counsel contended that the respondent failed to consider relevant facts. That is to say, the petitioner was of the view that some of the allegations were made by one of his seniors by the name Rashid Abdullahi with ulterior motive yet the argument by the petitioner was never considered by the respondent. According to the counsel, the respondent exhibited apparent bias in the vetting exercise by according preferential treatment to the alleged complaints at the expense of the petitioner. Mr. Thuita further submitted that the vetting panel was improperly composed and that the decision was signed by strangers. According to counsel, only one commissioner took part in the vetting exercise throughout yet the vetting decision was signed by all commissioners including those who did not take part.

10. Ms. Opiyo for the respondent submitted that the vetting panel was properly constituted and relied on the case of **Immanuel Masinde Okutoyi & Others Vs. National Police Service Commission & Another (2014) eKLR** where Justice Odunga stated that the commission was entitled to establish committees for 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. Counsel further submitted that paragraph 3 of the National Police Service Commission Act, the quorum for the meeting is six which consists of four members appointed under article 246(2)(a)(i) and(ii) of the constitution and any two members appointed under article 246(2)(b) and (c) of the constitution.

11. According to counsel the allegations by the petitioner to the effect that the decision was not arrived at and signed procedurally are misleading and of the legal basis since regulation 25(4) of the Police Service (vetting) Regulations 2013 clearly provide that the decision shall be recorded in writing, signed by all commissioners and sealed with the common seal of the commission. According to counsel the regulations does not restrict decision making to the commissioner who participated in the hearing since the proceedings are recorded in the Hansard verbatim and print outs are later used in determining whether an officer is suitable to continue serving or not.

12. Concerning procedural fairness counsel submitted that the replying affidavit dated 13th July 2016 showed the petitioner was accorded utmost procedural fairness as contemplated in the constitution and other laws guiding the vetting process. Counsel further submitted that it was apparent from the vetting and the Hansard records that the petitioner contradicted himself when he stated that the Miraa business was operated solely by his cousin and not both of them as he had earlier stated during the initial vetting of 17th August, 2015 Ms. Opiyo further submitted that the petitioner was timely and procedurally supplied with complaints that were leveled against him on 28th April 2015 and the vetting forms before the vetting exercise. The petitioner responded to the complaints on 24th May 2015 almost one month later. The petitioner later appeared for vetting on 17th August 2015. Further the petitioner was asked by the panel if there was an error apparent on the face of the record and he replied that there were no errors.

13. According to counsel, the law was very explicit that whoever alleges procedural unfairness and violation of rights 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. Ms. Opiyo further submitted that in removing the petitioner the respondent was guided by regulation 14(2)(b) and (d) of the National Police Service(vetting) Regulations, 2013 which required the commission to look at the past records including conduct, discipline, and diligence of the officer and also human rights record of the officer. The respondent after the vetting analysis of the documents provided by the petitioner and considering the review application established that the petitioner had failed the vetting and subsequently removed him from the service.

14. The court has carefully reviewed the petition, response thereto and submissions by counsel for both parties. The court has more particularly reviewed and considered the Hansard report attached to the petition and the complaint summary sheet. The major and most serious complaints against the petitioner were that he sexually harassed female officers while working in Kwale and Lamu West and that he conspired with drug peddlers in transportation of drugs by receiving protection fees weekly. This elicited complaints which led to the petitioner's removal from Lamu island in order to avoid more complaints against the petitioner.

15. The petitioner in his response to these accusations denied any sexual harassment and further pointed out that he had never served in Kwale a fact which the respondent admitted was erroneous. Regarding the allegation of conspiracy with drug peddlers in transportation of drugs and receiving protection fees, the petitioner denied the allegation and stated that he had been personally involved in the seizure of large hauls of bhang and other drugs and successfully took suspects to court for prosecution. The petitioner attached in evidence photographs showing him with some of seized drugs and suspects. He further stated that he was transferred from Lamu Island to Witu Division as Ward AP Commander following Al-shabaab attacks in Mpeketoni, Hindi and Witu areas as opposed to the allegations of drug peddling. These were similar responses the petitioner gave during the oral hearing on 17th August 2015.

16. At page 284 of the vetting decision the commission stated that it was noted that the officer usually collected protection fees from criminals. The decision further stated that the commission noted that the officer operated a kiosk ostensibly for Miraa business but the same was in fact a cover for transacting business in hard drugs and was also used as a coordinating centre for protection of criminals. Further, the decision states that the officer portrayed dishonest behavior in the management of the police canteen and was accused of misappropriation of the same. The decision also stated that the commission found that the officer abused his office and authority by soliciting money from his junior officers for his own private use and benefit.

17. The petitioner in the court's view reasonably responded to the allegations against him concerning sexual harassment and drug trafficking yet the commission in their verdict did not appear to take into account the petitioner's responses. No analysis at all was made of the petitioner's response to the two allegations and the commission's findings seem to have been predetermined or informed by some other evidence that was not brought to the petitioner's attention. The commission further found the petitioner to have portrayed dishonest behavior in the management of the police canteen and that the petitioner abused his office and authority by soliciting money from his juniors for his own private use and benefit.

18. The court has carefully perused the complaint summary sheet annexed to the petition as well as the transcription of Hansard recording but did not find anywhere where the two allegations were presented to the petitioner to respond yet they were used as grounds for his removal from police service. In this context, the court agrees with the petitioner that he was not supplied with sufficient particulars of the complaints against him or even the accompanying documents.

19. It is a cardinal rule of natural justice that a person accused of anything should know the nature of the accusation made and further that

such a person accused should be given an opportunity to state his case. Concerning the question whether the vetting panel was properly constituted, the issue has been addressed very well by Justice Odunga in the case of **Immanuel Masinde Okutoyi & Others Vs. National Police Service (2014) eKLR** and I am fully persuaded by the learned Judge's position on the issue and have nothing useful to add.

20. In conclusion, the court hereby orders that the vetting decision dated 9th October 2015 as well as the review decision dated 5th May 2016 are hereby declared null and void for non-compliance with the constitution, Fair Administrative Action Act, National Police Service Vetting Regulations and the rules of natural justice generally.

21. The court therefore orders that the Petitioner herein be vetted afresh in accordance with the constitution, Fair Administrative Action Act; Vetting Regulations and the rules of natural justice generally.

22. For avoidance of doubt, the petitioner is hereby reinstated to service with effect from 9th October 2015 with all privileges and salary attached to his office but shall remain on paid leave pending fresh vetting.

23. The petitioner shall further have costs of the petition.

24. It is so ordered.

Dated at Nairobi this 2nd day of March 2018

ABUODHA J. N

JUDGE

Delivered this 2nd day of March, 2018

ABUODHA J. N

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent