



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2261 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 27<sup>th</sup> April, 2018)**

**YUSTO OPIYO ONYANGO.....CLAIMANT**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDEDNT**

**DEPUTY INSPECTOR GENERAL**

**ADMINISTRATION POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant filed suit through the firm of Achillah T.O & Company Advocates claiming terminal dues for unfair, wrongful and unlawful dismissal, reinstatement and pay in lieu of notice.
2. He avers that he was appointed by the Public Service of Kenya as an Administration Police Constable on 15<sup>th</sup> September 1997 earning a monthly salary of two thousand five hundred and thirty-two. He contends that on 7<sup>th</sup> November 2003 he was promoted to position of an Administration Police Corporal with a monthly salary of three thousand five hundred and seventy-five.
3. The Claimant was again promoted to the position of Administration Police Senior Sergeant Major Job Group PG5 effective 12<sup>th</sup> November 2007 with salary of 12,636/= and finally the Claimant was promoted to the grade of Administration Police Chief Inspector Job Group PG6 with effect from 2<sup>nd</sup> November 2011 with a salary of 36,979/= and entered the scale of 40,729/= per month with incremental date of 1<sup>st</sup> November.
4. The Claimant avers that on 24<sup>th</sup> March 2014, he applied for annual leave and the application was granted with thirty six (36) days annual leave effective 14<sup>th</sup> April 2014 to 2<sup>nd</sup> June 2014 and 36 days being balance of annual leave for 2013 and 18 days for 2012 were carried forward to be utilized before 31<sup>st</sup> December 2014 in accordance with N.3 (4) of the Code of Regulations (Revised 2006).
5. The Claimant further avers that while on leave, police officers without any warning whatsoever raided his rural home on 22<sup>nd</sup> April 2014, conducted an illegal and unwarranted search, harassed his ailing mother, arrested him and brought him to Nairobi Central Police Station on unfounded allegations of theft by servant.
6. He contends that when he made inquiries from the Administration Police Human Resource Department, he was verbally informed that he had been summarily dismissed from service prompting his advocates on record to write a demand letter to the National Police Service Commission on 22<sup>nd</sup> August 2014.
7. On 29<sup>th</sup> August 2014, the Claimant received a phone call from the office of the 2<sup>nd</sup> Respondent informing him to collect a letter from the reception which turned out to be dismissal letter. From the letter, he learnt that there was an orderly room proceedings allegedly conducted on 22<sup>nd</sup> April 2014 after which the Deputy Inspector General of Administration Police Service approved his summary dismissal from service.

8. The Respondent filed a Replying Memorandum wherein they admit the employment relationship and the terms of termination. They however deny that the termination was unlawful as on 27<sup>th</sup> February 2014 the Claimant willfully disobeyed lawful order not to process an imprest for one hundred and eighty-five (185) officers amounting to Kshs. 1,955,000 on operation at Samburu North Sub-County (Baragoi) contrary to Section 88(2) 1(g) of the Eighth Schedule of the National Police Service Act 2011. The Claimant stayed with this money till it was established that the same had not been paid and thereafter switched off his phone. The money did not reach the intended police officers at Samburu but the Claimant on the same note surrendered signed payment schedule purported to have been signed by the recipients of the said money to the APS Imprest section of which it has been confirmed to be a forgery.

9. The Respondents further aver that the Claimant absented himself from duty without official permission for twenty five days and refused to send the cash returns which was his duty contrary to Section 88 (2) 1 (cc) of the Eighth Schedule of the National Police Service Act (2011).

10. The Respondent states that the above charges were very serious warranting severe action. Pursuant to Section 1 (f) of the National Police Service Act 2011, the Claimant was summarily dismissed from the Administration Police Service with effect from 23<sup>rd</sup> April 2014 vide the Respondent's letter dated 20<sup>th</sup> August 2014, owing to the gravity of the offences committed.

### **Submissions**

11. It is submitted on behalf of the Claimant that from the evidence on record, there is nothing to show that the procedure and the law was followed. In fact there is doubt whether the orderly room proceedings actually took place on the typed proceedings or they were just prepared as an afterthought for the Court proceedings to justify the dismissal. None of the witnesses confirmed that the typed proceedings produced in Court are those of the actual proceedings that took place, the evidence of the 2 witnesses did not support the findings of the presiding officer. The reasons for the recommendation of dismissal are not supported by any evidence as no evidence was adduced to show that the Claimant absconded duty for 25 days as he was on leave duly approved by Commandant P. M. Muriithi.

12. It is further submitted that the disciplinary action and removal of the Claimant from the service was not undertaken by the 1<sup>st</sup> Respondent but by the 2<sup>nd</sup> Respondent acting unilaterally and without lawful authority. The 2<sup>nd</sup> Respondent exercised powers that he does not have or rather in excess of his powers by summarily dismissing the Claimant. They overstepped their constitutional mandate which amounts to abuse of office.

13. The 1<sup>st</sup> Respondent submitted that the National Police Service Commission is mandated under Article 246(3) of the Constitution of Kenya 2010 to recruit and appoint persons to hold or act in offices in the service, observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service. This mandate is also replicated and exemplified in the National Police Service Commission Act 2011 as clearly stipulated under Section 10 of the Act. The Commission has always discharged its mandate and related functions with utmost fidelity to the Constitution of Kenya 2010 and all other relevant laws and statutory regulations of the Republic of Kenya.

14. In their Submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted that the Applicant was lawfully dismissed as the orderly Room proceedings adhered to the laid down laws governing the Police Service and any officer found guilty of a disciplinary offence is liable to various punishments as outlined in Section 89 (1) of the National Police Service Act. Therefore, it was their submission that the Claimant's summary dismissal was lawful.

15. I have examined all evidence on record plus submissions thereto. Issues for determination are as follows:-

1. *Whether there were valid reasons to warrant dismissal of the Claimant.*
2. *Whether due process was followed before the dismissal of the Claimant.*
3. *What remedies are available in the circumstances?*

16. On the 1<sup>st</sup> issue, the Claimant was dismissed from the service vide a letter dated 20<sup>th</sup> August 2014 and which states as follows:-

#### **"Dismissal from the Administration Police Service**

*Reference is made to orderly room proceedings conducted against you in your presence at Nairobi County Administration Police Headquarters on 22<sup>nd</sup> April 2014 in which you were charged pursuant to Section 88(2) of the Eighth Schedule of the National Police Service Act, 2011 in that:-*

*Count 1: On 27<sup>th</sup> February 2014 you willfully disobeyed lawful order not to process an imprest for one hundred and eighty five (185) officers amounting to one million nine hundred and fifty five thousand shillings only (1,955,000) on operation at Samburu North Sub-county (Baragoi) contrary to Section 88 (2) 1(g) of the Eighth Schedule of the National Police Service Act 2011.*

*You collected the amount (Kshs.1,955,000) from the Harambee House cash office on 27<sup>th</sup> February, 2014 against imprest warrant Number 1509321 and upon receipt of the money, you disappeared to unknown destination.*

*Count II: Without reasonable cause, you failed to attend to duty which you were required to attend contrary to Section 88(2) 1(p) of the Eighth Schedule of the National Police Service Act 2011.*

**Count III: On 26<sup>th</sup> February, 2014 you signed false statement in official record by surrendering a payment schedule purported to have been signed by the recipients to the APS imprest section, contrary to Section 88(2) 1(v) of the Eighth Schedule of the National Police Service Act 2011.**

**Count IV: You resisted lawful arrest contrary to Section 88(2) 1(m) of the Eighth Schedule of the National Police Service Act 2011.**

**Count V: That from 26<sup>th</sup> March, 2014 you absented yourself from duty without official permission for twenty five (25) days contrary to Section 88(2) 1(h) of the Eighth Schedule of the National Police Service Act 2011.**

**Count VI: that you refused to send the cash return which was your duty contrary to Section 88(2) 1(cc) of the Eighth Schedule of the National Police Service Act 2011.**

**The above charges are very serious offences warranting a severe disciplinary action.**

**In accordance with the powers conferred by NPS Act 2011, pursuant to Section 89 (1) (f), it is not the intention of the Administration Police Service to retain you in service. The Deputy Inspector General has approved that you be and are hereby **SUMMARILY DISMISSED** from the Administration Police Service with effect from 23<sup>rd</sup> April 2014.**

**On dismissal, you lose all benefits entitlement, which you would have enjoyed had you left the service through the normal way.**

**However, you will be entitled to:**

**a. Refund of WCPS contributions as stipulated in the civil service code of regulations.**

**b. NSSF Government share contribution upon your registration.**

**This office also notifies you of your right to appeal to the National Police Service Commission through the In-charge of your last work station.**

**Upon receipt of this letter, you should sign declaration form for officers leaving the Government Service after having surrendered all government property that may be in your possession and be issued with a copy of Government Clearance Certificate on leaving the service.**

**Signed**

**P. Ndiema**

**For: Deputy Inspector General**

**Administration Police Service .....**

**17.** The reasons given for the dismissal are therefore stated in the said letter. On the 1<sup>st</sup> Count 1, the Claimant is said to have disobeyed a lawful order not to process an imprest. The order issued to the Claimant is however not exhibited to Court and it is therefore not clear whether any such order was even given or not. There is no written communication of any such order at all.

**18.** On the 2<sup>nd</sup> Count, the Claimant is said to have failed to attend duty which he was expected to do. This count is not explicit as the dates on which the Claimant failed to attend duty are not indicated. At the time of his arrest and dismissal, the Claimant avers that he was on annual leave which had been approved by his boss. This is evidenced from the Claimant's Appendix III, which shows that he was on leave from 14/4/2014 to 2/6/2014 and was to resume duty on 3/6/2014.

**19.** On the 3<sup>rd</sup> Count, the Claimant has denied ever signing a false statement on official documents. The Respondent's position is that he signed these documents, which he forged.

**20.** The Claimant's position is that imprest warrant No. 1509321 was in the process of being surrendered and it was not his duty to sign them. He has denied resisting arrest as per Count 4 and avers that he cooperated with police who arrested him and he was never charged with this offence to date which was investigated and investigations have never been completed. On refusal to surrender cash, he also denied the same.

**21.** The Claimant admitted signing the imprest documents at page 3 and took cash 1,955,000/= to Rukwaro. The money was going to assist officers in Samburu who were in operation. The Claimant however stated in cross-examination that he had no evidence that he gave the cash to Rukwaro. He however stated that he was like a Personal Assistant to the commanded Rukwaro and Pamba and so would be used to sign for the imprest and hand over cash to them. He avers that he did not know if the money reached the intended recipients.

**22.** From the evidence tendered by the Respondents witnesses, the Claimant received imprest for 1,955,000/= but the money was never paid to the intended recipients.

23. From the foregoing, it is apparent the Claimant received the 1,955,000/= which he acknowledges but states that he handed it to his boss one Rukwaro though there is no evidence of this handover to Rakwaro.

24. On this issue then I find that there were reasons that would have warranted dismissal of the Claimant as provided for under Section 43 of the Employment Act 2007.

25. On the 2<sup>nd</sup> issue, the issue of due process comes in play. The Claimant avers that he was never taken through any disciplinary process. He avers that he only learnt of his dismissal through a colleague after his salary had been stopped.

26. RW4 who is an employee of the National Police Service Commission (NPSC) gave evidence to the effect that the Claimant was dismissed by the National Police Service and not by the National Police Service Commission. He stated that the National Police Service Commission exercises disciplinary control of the service. That after as officer goes through the disciplinary process by the Police Service the matter should be referred to National Police Service Commission.

27. He stated that Appendix 8 – the Claimant’s dismissal letter is signed by Deputy Inspector General (DIGP). That the said letter does not cite any authority from the National Police Service Commission.

28. He avers that the National Police Service Commission only received information on this matter after the Claimant had been dismissed. The National Police Service Commission deliberated on the matter and found that the service did the dismissal without authority. The National Police Service Commission also found that the matter was under investigation and the National Police Service Commission wondered why the officer was dismissed without the investigation being completed.

29. In view of the evidence of RW1 and from the submissions filed, I refer to the case of **“Lilian S”** – jurisdiction is everything – when a constitutional organ proceeds to act without jurisdiction then the act or omission is null and void.

30. It is therefore my finding that the Claimant was dismissed by National Police Service without reference to the National Police Service Commission and therefore the procedure and process envisaged was not followed.

31. Section 45 (2) of Employment Act 2007 on other hand states as follows:-

*(2) A termination of employment by an employer is unfair if the employer fails to prove:-*

*(a) that the reason for the termination is valid;*

*(b) that the reason for the termination is a fair reason:-*

*(i) related to the employee’s conduct, capacity or compatibility; or*

*(ii) based on the operational requirements of the employer; and*

*(c) that the employment was terminated in accordance with fair procedure.*

32. In view of this provision, the dismissal of the Claimant was unfair and unjustified and I declare it so.

33. The Claimant sought various orders from this Court including an order for reinstatement. By virtue of the provisions of Section 12 of Employment & Labour Relations Act, reinstatement can only be allowed within 3 years since dismissal. Since the Claimant was dismissed in August 2014, the 3 year window lapsed in August 2017 and therefore the prayer for reinstatement cannot be allowed.

34. However, given that the dismissal was unfair and unjustified, I will convert the same to a normal termination in which case the Claimant will be entitled to payments of his termination as follows:

*1. 1 months salary in lieu of notice.*

*2. Salary unpaid from date of suspension to date of dismissal being 310,080/=.*

*3. Full payments of his pension under the Pension Act from the date of employment to the date of this judgement.*

*4. The Claimant is deemed to have served without a break in service upto the date of this judgment and is therefore entitled to payments of all his salary from date of dismissal to the date of this judgment.*

*5. Costs of this claim.*

Dated and delivered in open Court this 27<sup>th</sup> day of April, 2018.

HON. LADY JUSTICE HELLEN WASILWA

**JUDGE**

**In the presence of:**

OduKenya holding brief Oyugi for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents – Present

Odunga holding brief Ojwang for 1<sup>st</sup> Respondent

Nyambega holding brief Achillah for Claimant