



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 81 OF 2016

(Before Hon. Justice Mathews N. Nduma)

PETER NDEGWA GITHINJI.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. In the Amended Petition filed on 27th April, 2017 the Petitioner prays for:-

- (i) A declaration that the Petitioner's fundamental rights and freedoms have been violated.
- (ii) 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 vetting Review Decision.
- (iii) Compensation to the petitioner for the violation of his fundamental rights and freedoms.
- (iv) Costs of the Petition.

2. The Petitioner questions the grounds upon he was found unfit to continue serving as a superintendent of police to wit:-

- (a) He submitted a KCSE Certificate attained in the year 2010 to the vetting panel.
- (b) The vetting panel enquired from the Petitioner on the authenticity of the KCSE Certificate, which was suspect.
- (c) The panel submitted the KCSE Certificate to the Kenya National examination Council for authentication.
- (d) The Kenya National Examination Council found that the said certificate was not authentic.
- (e) The petitioner was neither registered nor sat for the 2010 KCSE Examination at the claimed Examination Centre – Ideal Tutorial Shauri Moyo.
- (f) The KNEC disowned the code reflected in the Petitioner's Certificate.
- (g) KNEC, ascertained that the said Ideal Tutorial Shauri Moyo does not exist in its data base for the year 2010 KCSE examination.

3. Being dissatisfied with the decision to remove him from service, the Petitioner sought a review of the decision pursuant to Regulation No. 33(2) (e) of the National Police (Service) vetting Regulations. The application for review was dismissed for lack of merit.

4. The Petitioner challenges the decision of the Review panel for failure to give reasons for its decision in violation of section 4 of the Fair Administrative Action Act, 2015 and for failure to consider the grounds raised in the application for review.

5. The Petitioner maintains that the Respondent proceeded on a gross misapprehension of law and facts and in particular Regulation 18(2) & 20.

6. That the Respondent failed to consider the Petitioner's record, conduct and performance in his current and previously held positions

contrary to Regulation 7.

7. The panel therefore failed to balance the adverse effect on the Petitioner's rights, liberty or interests with the purpose of the vetting process.

8. That not all commissioners who signed the decision took part in the vetting interview, in that only the Chairman Johnston Kavulundi & commissioner Mary Awuor were present, all others who signed were absent hence denying him a fair hearing and fair administrative procedure in violation of Article 47(1) and 50(1) of the constitution of Kenya 2010.

9. The Petitioner prays that the Petition be allowed.

Response

10. The Petition is opposed vide a Replying Affidavit to the amended petition sworn by Johnston Kavulundi the Chairman of the National Police Service Commission, the Respondent on 28th June 2017 and filed on 29th June, 2017.

11. The deponent denies the allegations in the petition in their totality and states that the vetting and the review process were procedural, factual, fair and in accordant with the principles of natural justice. That the decision to remove the petitioner was mainly based on the lawful and authentic finding by the review panel, that the KCSE Certificate, submitted by the Petitioner to the police service in 2014, and produced by himself before the panel, was obtained fraudulently, was not authentic and was a forgery and therefore, the continued stay of the petitioner as a very Senior Law enforcement Officer could not be sustained on the finding that he was a dishonest and unreliable officer. That the review panel upheld the finding of the vetting panel and did not err in any manner alleged or at all. The Respondent prays that the Petition be dismissed with costs.

Determination

12. The issues for determination are:-

(I) Whether the Respondent violated Article 47 & 50 of the constitution and the named Regulations in removing the Petitioner from the police service.

(II) Whether the Petitioner is entitled to the reliefs sought.

Issue I

13. The court has carefully considered the record of the vetting panel and that of the review panel in view of the competing submissions by the parties on this matter and has come to the following conclusions of law and fact:-

a. Only two (2) commissioners out of six (6) who made and signed the decision of the vetting panel participated in the vetting of the Petitioner and the majority of commissioners who made and signed the final decision to remove the petitioner from police service did not at all participate in the vetting process.

b. The Review panel did not give reasons for its decision to dismiss the application for review of the decision by the vetting panel.

c. The decision to remove the Petitioner from police service was largely based on documentary evidence produced in the vetting interview but the decision whether or not the petitioner was dishonest and therefore unfit to hold office could only be made by commissioners who heard his explanation on the matter.

14. In **Rex v Huntington Confirming Authority ex parte George and Stamford Hotels Ltd [1929] 1 KB 698**, It was held by **Lord Hanworth, MR** at page 714 as follows:

“One more point I must deal with, and that is the question of the justice who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.”

15. Romer, J on his part held at page 717 of the said judgment as follows:

“Further, I would merely like to point this out: that at the meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of the confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.”

16. In the present case, Commissioner Kavulundi and Commissioner Mary Owuor sat in the vetting interviews on 4th March, 2015 and all other four (4) commissioners who made and signed the decision to remove the Petitioner did not participate at all in the vetting process.

17. In **County Assembly of Kisumu & 2 others, v Kisumu County Assembly Board & 6 others [2015] eKLR** the court speaking on the requirements of fair administrative action and fair hearing under article 47(1) and 50(1) of the constitution of Kenya 2010 had this to say;

“Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with.”

18. In the present case, majority of the commissioners who made the formal decision to remove the Petitioner from the police service did not participate at all in the hearing. This resulted in a total negation of the vetting process regardless of the evidence that was presented before the two commissioners who vetted the Petitioner. The fact remains that the majority of decision takers had no clue about the case.

19. Accordingly, the Petitioner was neither given a fair administrative action nor was he given a fair hearing. The vetting process was totally flawed and in violation of Articles 47(1) and 50(1) of the constitution of Kenya 2010.

20. In the final analysis the court makes the following orders:-

- a. The Respondent violated the rights of the Petitioner provided under Articles 47(1) and 50(1) of the constitution of Kenya 2010.
- b. An order of certiorari is issued to quash the entire proceedings and the decision of the Respondent declaring that the Petitioner had failed vetting and had been removed from the Administration Police Service including the vetting review decision.
- c. The Respondent to pay costs of the Petition.

Judgment Dated, Signed and delivered this 18th day of April, 2018

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Thuita for Petitioner

Mr. Ojwang for Respondent

Anne Njung'e – Court Clerk