



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 9 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> May, 2018)**

**PETER KEMBOI CHEMOS.....PETITIONER**

**VERSUS**

**THE NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner Peter Kemboi Chemos filed this Petition on 17/2/2017 through the firm of Guandaru Thuita & Company Advocates alleging violation of his rights guaranteed under Article 41, 47(1) and (2) and Article 50(1) of the Constitution of Kenya 2010 (the Constitution).
2. He avers that the Petition is founded on the Constitution whose supremacy is recognized under Article 2(1), which binds all persons and state organs at both levels of government.
3. He states that the Petition is anchored on the provisions of Articles 35(1), 41, 47(1) and (2) 50(1) and Articles 162(2), 165(6) and (7) of the Constitution.
4. He has stated that the law relating to vetting is set out in Section 7 of the National Police Service Act (NPS Act) which provides that the Respondent shall vet all officers to assess their suitability and competence and discontinue from the service any officer who fails the vetting.
5. The National Police Service (Vetting) Regulations 2013 are the relevant regulations governing the form and procedures to be used when vetting the officers.
6. The Petitioner has averred that his vetting was not conducted in compliance with the laws and regulations relating to the vetting of officers of National Police Service and that the entire process infringed on his constitutional rights and freedoms.
7. The Petitioner has set out the facts leading to this Petition and he has averred that prior to the vetting interview, he was required to fill out a vetting questionnaire and avail, which he did, submit vital documents including a bank statement for 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.
8. On their part, the Respondent was required under Regulation 15 of National Police Service (vetting) Regulation to source for any complaints from individuals and other entities listed therein. That the Respondent was also required under Regulation 18(2) of the Vetting Regulations to source any adverse information it had and which it intended to rely on.
9. On the Petitioner's part, he was to be accorded time to give written answers to the adverse information if any.
10. The Petitioner further avers that he was not informed whether the Respondent received any information from the institutions and individuals listed under Regulation 15 of the Vetting Regulations and neither was he informed that there was any complaint or adverse allegations against him from whatever source nor was he served with any adverse allegations against him.
11. The Petitioner contends that he appeared before the vetting interview before the Respondent's Vetting Panel on or about 24.8.2015 and the panel had only one Commissioner namely Mr. Murshid Mohammed.

12. Subsequently he was recalled once again on 1.12.2015 before a differently constituted panel made up of Commissioners John Kavulundi, Mary Owuor, Ronald Musengi and Murshid Mohammed.

13. It is his contention that subsequent to the vetting interview, the Respondent in a decision signed by all the Commissioners on 14.1.2016 but transmitted to him on 21.1.2016 found that the Petitioner had failed the vetting process and proceeded to remove him from the service.

14. The Petitioner has averred that the Respondent in its decision made a number of adverse findings against him as follows:-

- a) *The financial analysis of his Mpesa Statements showed his deposits far outweighed his sources of income.*
- b) *He could not clearly demonstrate the interest he had in a business that he had been financing.*
- c) *He could not produce documents on the business partnership or even give a plausible explanation on his involvement as well as that of his wife.*
- d) *It was unbelievable that the Petitioner and his wife would invest in a business without any shareholding interest and get profits therefrom.*
- e) *There was no agreement profit sharing between his wife and him on one hand and his business associate on the other hand.*
- f) *His explanation on the deposits made by junior officers was hypothetical.*
- g) *He could not give a credible explanation on the deposits and he could not avail any documentation to prove his explanation.*
- h) *He was dishonest and gave misleading information on his business dealings and partnership thus showing that he was lacking in integrity, he was guilty of gross misconduct and he was lacking in financial probity.*

15. The Petitioner avers that he was not satisfied with the aforesaid finding and sought a review pursuant to Regulation 33(2)(a) of the National Police (Service) Vetting Regulation on the following grounds:-

- a) *There was no basis for the adverse findings on financial probity as there was no prohibition on Police Officers using Mpesa or having a limit on Mpesa use.*
- b) *There was no evidence pointing to the conclusion that the Petitioner was lacking in financial probity.*
- c) *The Respondent relied on irrelevant materials in reaching a conclusion of lack of financial integrity particularly so when no complaint existed.*
- d) *The Petitioner was lawfully a business associate in Jetmeja & Tribute Limited and the dealings with the said entities were above board.*
- e) *The Respondent failed to consider the Petitioner's explanation.*
- f) *The Respondent failed to consider the Petitioner's record from the time he joined the service.*
- g) *There was new evidence which could not have been produced at the vetting hearing.*
- h) *The Respondent misapprehended the nature and operations of the ballast and sand business due to the limited nature of the interview.*
- i) *There was no complaint whatsoever to warrant the Petitioner removal from the service.*
- j) *The Mpesa transactions to colleagues and civilians were for legitimate business.*
- k) *The Petitioner had testimony from witnesses who were and are still ready to shed light on his financial transactions and had the commission taken their testimonies, it would have reached a different verdict.*
- l) *It was in the interest of justice and the national Police Service to review the Petitioner's Vetting Decision.*

16. The Petitioner avers that he was invited for a Review hearing, which took place on 27<sup>th</sup> July 2016. He avers that he appeared for the Review hearing, addressed the Respondent on his submissions and answered various questions.

17. That subsequently the Vetting Review Decision was made which upheld the initial vetting decision. In the said Review Decision, the Respondent made further findings to the effect that:-

- a) *His application had been admitted to allow him to expound on the business he had attributed deposits to.*

*b) The affidavit of Jeremiah Kibet Lupwaku contradicted his averment that he was a partner in the Jetmeja business.*

*c) The documents he submitted particularly the Memoranda with Tribute Company were not relevant to the issues at hand and did not explain transactions for the period 2012/2013.*

*d) His explanations were not convincing and were an attempt to mislead the commission thus depicting him as a person of law integrity.*

18. The Petitioner has averred that he was not satisfied with the Review hearing on the grounds that:-

*a) 3 of the Commissioners who have signed the Review decision namely Joseph Boinnet, Samuel Arachi & Joel Kitili were not present when the Review was being undertaken and there is nothing to show that they took part in deliberations that led to the decision. Their participation in signing adulterates the decision thus rendering it a nullity.*

*b) In his application for Review and in his submissions, the Petitioner raised weighty grounds which the Commission in its Review decision did not bother to make even a single reference to.*

*c) The Respondent failed to address issues that the Petitioner had raised including issues of not being supplied with a complaint; and the documentary and oral evidence from him and his witness.*

*d) The since a quasi-partner or business partner did not require any registration, the Review Decision was factually incorrect when it stated at paragraph 13 thereof that the affidavit of Jeremiah Kibet Lupwaku contradicted the Petitioner's assertion that he was a quasi-partner.*

*e) The findings once again that the Petitioner was lacking in financial probity were not elaborated or reasons given for the said finding contrary to the provisions of the Fair Administrative Action Act.*

*f) The Respondent fettered its discretion when in its decision it stated that it was limiting the review to expounding on the business that the Petitioner had attributed the deposit to, yet in the offending Vetting Decision, there was much more that the Petitioner was required to respond to.*

*g) The Petitioner further avers that contrary to the obligations imposed on the Respondent by Regulation 9(2)(d) and Regulation 28 of the Vetting Regulations to conduct investigations on information received, the Respondent did not conduct any investigations to establish the veracity of the information supplied by the Petitioner in his review application with a view to validate or contradict the information.*

*h) The Respondent abdicated its statutory duty to conduct investigations into the Petitioner's finances and other affairs before making untenable and ridiculous findings.*

19. The Petitioner has also stated 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 national justice contrary to the Rules under the National Police Service and the Vetting Regulations and contrary to the rights guaranteed under Article 41, 47 and 50(1) of the Constitution.

20. The Petitioner has averred that contrary to Section 18 of National Police Service Vetting Regulations he was not given prior notice or served with any complaint or adverse information received by the Commission against him nor given any opportunity to report the complaint or adduce any relevant documents and information in response to the complaint.

21. He also avers that he was not given any notice or alert that the deposits in his accounts and Mpesa line were considered suspicious or were under challenge.

22. He avers that at paragraph 15 of the initial vetting decision, the Respondent asserts that they carried out a Financial Analysis on his Mpesa statements and made conclusion that his Mpesa account far outweighed the service of his income yet in making such adverse conclusions, the Respondent did not supply him with a report of the aforesaid Financial Analysis, nor bother to let him know to what extent his deposits had far outweighed his income nor allow him to know the criteria used in conducting the said Financial Analysis or allow him to question the said criteria.

23. He avers that the Respondent should have written to him inquiring on specific transactions which he would have organized to answer as best as he could with supporting documents.

24. It is his contention that without such a notice the Respondent set him to fail as he was ambushed on the floor of the vetting interview and bombarded with questions on various bank deposits and withdrawals made a number of years back spanning 2 years. He contends that failure to issue him with the notice was absolutely unfair and contrary to the requirements of adequate notice and on fair hearing.

25. On failure to accord him fair hearing, the Petitioner contends that the Respondent bombarded him with contents that had not been brought to his attention prior to the vetting interview.

26. He avers that the Respondent failed to give him a chance to face his accusers if any and challenge their evidence in cross-examination or by other means. He contends that the Respondent did not summon relevant witnesses despite power under Regulation 30. He further

contends that his submissions and evidence before the Commission was completely ignored.

27. It is also the Petitioner's contention that the Vetting decision contained errors apparent on the face of the record when it stated that he failed to furnish documents in support of his explanation when at the same time he did not know beforehand the suspicions the Respondent had against him and that in any event he supplied documents which were ignored by the Respondent.

28. On issue of taking part in sand and ballast business, the Petitioner avers that the Respondent misunderstand it. He explained that Jetmeja Enterprises was run by his relative Jeremiah Kibet and his parents who owned an Isuzu lorry. He avers that this vehicle was used in transportation of either sand and ballast from Mavoko or Kajiado quarries for delivery to various destinations in Nairobi, Machakos and Kajiado County.

29. He contends that the business was quite profitable but that it required an operator to provide credit payment terms to the customers for periods ranging from a day to months. That due to the immense capital and finances required, the Petitioner and Mr. Kibet agreed that if the Petitioner could support the business by financing it with capital from time to time, he could recoup his investment quickly together with a handsome profit.

30. He contends that all the operations were carried out by Jetmeja employees (Driver and turn boy) but payment of supplies would often be made to the account of Jetmeja Enterprises which would in turn pay to the Petitioner his investment and profits.

31. He contends that Jeremiah Kibet had written to the Respondent giving an insight into the nature of the arrangement but he was never called as a witness.

32. The Petitioner has also averred that the Respondent was biased during the entire process and instead of becoming an impartial arbitrator, the Respondent became investigator, prosecutor, judge, jury, executioner and persecutor all rolled into one.

33. The Petitioner contends that the Respondent failed to conduct the vetting process while adhering to the standard of proof required under Regulation 4(f) of the Vetting Regulations.

34. He avers that in their finding the Respondent 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.

35. It is his contentions that the Respondent shifted the burden of proof to him and purported to assume him guilty until he could prove himself innocent.

36. The Petitioner has averred that the Respondent failed to consider his version and testimony on issues at hand nor even his previous performance. It is his contention that in his 17 years of service, there had been no formal complaint, orderly room proceedings or any other adverse proceedings against him. He had risen through the ranks to the position of Assistant Superintendent of Police through sheer hard work, discipline and dedication.

37. He contends that the Respondent failed to consider his chequered and unblemished career as required and balance it with any allegations made thereby showing that the decision lacked proportionally.

38. He avers that Respondent failed to furnish reasons for its findings. He also contends that the Panel that vetted him was improperly constituted and the decision signed by people who did not vet him.

39. I view of these contentions the Petitioner prays as follows:-

**1. A Declaration that the Petitioner's Fundamental Rights and Freedoms have bene violated.**

**2. 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 rejecting the Petitioner's application for Review.**

**3. An order for reinstatement of the Petitioner to his post an Assistant Superintendent of the Administration Police Service as well as reinstatement of all his privileges including his salary.**

**4. An order substituting the Respondent's decision with a declaration that there exist no materials to find that the Petitioner had failed vetting.**

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

**6. Costs of this Petition.**

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

40. The Respondent filed their Replying Affidavit in Opposition to this Petition on 11.7.2017. The Affidavit was sworn by one Johnson Kavulundi the Respondent's Chairman who deponed that the Respondents mandate is provide for 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 office within the service.

41. He also depones 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 the Administration Police Force established under the Police Act (Cap 84) and the Administration Police Act (Cap 85) respectively including officers working with the Criminal Investigations Department, shall upon commencement in the Act become members of the service in accordance with the Constitution and the National Police Service Act.
42. 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 to the enactment of the new Constitution and the National Police Service Act.
43. He also avers that the Commission was mandated under section 7 of National Police Service Act together with Regulation 4(a) of the National Police Service (Vetting) Regulation 2013 to carry out the vetting exercise of all police officers.
44. He contends that Section 7(3) of the National Police Service Act read with Regulation 32 of the Vetting Regulations gives the Commission the power to discontinue the service of any police officer who failed the vetting on grounds of being unsuitable or incompetent.
45. The deponent has further deponed that the Commission is guided by the Constitution, the National Police Service Commission Act, National Police Service Act and Vetting Regulations in removing an officer, the Commission is guided by Regulation 3, 4 and 14 of the Vetting Regulation which sets out the principle and standards of the Vetting exercise in order to arrive at a just decision.
46. On account of the Petitioner, he depones that the Petitioner was removed from the service on 14.1.2016 due to lack of financial probity, integrity and gross misconduct. That this decision was arrived at after it was established that despite the officer receiving numerous huge deposits in his bank and Mpesa accounts, which were incommensurate with his expected income, he could not give a clear explanation or justification for such deposits.
47. It is his contention that the Respondent analyzed the Petitioner's Mpesa records and noted several deposits from junior officers and civilians a situation the Petitioner could not justify but only claimed that the same could have been loans from such officers and individuals.
48. He avers that the Petitioner could also not avail any documentation to prove his explanations regarding the deposits thereby raising serious integrity issues on his part. He contends that the decision on the Petitioner's removal from the service after failing the vetting exercise dated 14.1.2016 was supplied to him, which is Annex Marked PKC 6.
49. It is the Respondents position that before the removal of the Petitioner, he was supplied with all the documentation including vetting questionnaire and asked to supply a wealth declaration form duly filled. He acknowledged receipt of the questionnaire as per paragraph 7 of his supporting affidavit – Annex PKC -3 - PKC 5.
50. That the Petitioner supplied his Mpesa and bank statements and which formed the basis of his 2<sup>nd</sup> Vetting on 1.12.2015. The Respondent aver that they looked at the Petitioner's confidential and personal file guided by Regulation 14 of the Vetting Regulation.
51. The Respondent aver that the Petitioner was vetted on 24.8.2015 and 1.12.2015 and that the 2<sup>nd</sup> vetting was necessitated by the fact that the Petitioner Mpesa records after being analyzed revealed substantial amounts from his juniors and civilians. That further the Respondent avers that the Mpesa deposits far outweighed the source of income he had previously declared. This prompted the Respondent to invite him for a 2<sup>nd</sup> vetting.
52. That even despite this, the Petitioner was unable to explain himself and that for the period under investigation the amount deposited in his Mpesa was approximately over 18 million and this was contrary to his wealth declaration form for the period of 17<sup>th</sup> March 2013 to 17<sup>th</sup> March 2015 Appendix JK 2.
53. He avers that the Petitioner's efforts to link the deposits with a business deal with a company called Jetmeja was unbelievable since despite affirming that both himself and his wife were not partners or shareholders, he could not produce any agreement justifying his involvement with the business or evidencing a specific amount which he had invested in the alleged company. Pages 37 to 42 of JK1(b).
54. That the Petitioner was therefore found to be lacking in financial probity and integrity. The Petitioner also filed for review and the review was also considered.
55. The Respondent content that they considered the Petitioner's rights to fair administrative action and fair hearing and admitted the review application for hearing on merit. That the Petitioner was asked to submit any other documents he deemed necessary in accordance with Regulation 33. The Petitioner failed to bring any new information that was relevant to the issues under review. He failed to clarify on huge amounts on his Mpesa.
56. The Respondent position is that they gave a detailed decision clearly giving reasons for the dismissal of the review application and communicated the same to the Petitioner. They also content that they followed all procedural steps.
57. They contend that the orders sought by the Petitioner are therefore baseless and unmerited and they ask this Court to dismiss this Petition with costs.
58. I have considered the averments of both parties and the submissions in which the parties relate their averments. The issues for determination are as follows:-

1. *Whether the Vetting process was carried out by a legally constituted panel.*
2. *Whether the vetting was carried out in accordance with the law and proper procedure.*
3. *Whether the Petitioner is entitled to the orders sought.*

59. The key principle that guards the filing of constitutional principles have been fairly established within our jurisdiction. The case of **Anarita Karimi Njeru vs The Republic (1976-9180) KLR 1272** states that when filing such a Petition, constitutional provision must be pleaded with a reasonable degree of precision, the law upon which the Petitioner alleges violation must be precisely enumerated, the violation must be particularized and the manner in which the violations were committed and to what extent must be stated.

60. This principle was further applied in **Meme vs Republic and Another (2004) eKLR** which held as follows:-

*“Where a person is seeking a redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed .....”.*

61. I have examined the Petition filed herein. Indeed the Petitioner has set out in the Petition as per the evidence analyzed above what violations were allegedly committed against him. I find that the Petitioner has also set out which constitutional provisions were ostensibly violated against him.

62. In the circumstances, I find the Petitioner set out the Petition as per the principles established in the case law cited (supra).

63. The Petitioner has contended that his rights under Article 47(1) and 50 (1) of the Constitution as read with the Fair Administrative Action Act were violated.

64. Article 47(1) of the Constitution provides as follows:-

*“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.*

65. On the other hand Section 4 of the Fair Administrative Action Act states as follows:-

1) *“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*

2) *Every person has the right to be given written reasons for any administrative action that is taken against him.*

3) *Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-*

a) *Prior and adequate notice of the nature and reasons for the proposed administrative action;*

b) *An opportunity to be heard and to make representations in that regard;*

c) *Notice of a right to a review or internal appeal against an administrative decision, where applicable;*

d) *A statement of reasons pursuant to Section 6;*

e) *Notice of the right to legal representation, where applicable;*

f) *Notice of the right to cross-examine or where applicable; or*

g) *Information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

4) *The administrator shall accord the person against whom administrative action is taken an opportunity to:-*

a) *attend proceedings, in person or in the company of an expert of his choice;*

b) *be heard;*

c) *cross-examine persons who give adverse evidence against him; and*

d) *request for an adjournment of the proceedings, where necessary to ensure a fair hearing.*

5) *Nothing in this section shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.*

6) *Where the administrator is empowered by any written law to follow a procedure which confirms to the principles set out in Article 47 of the constitution, the administrator may act in accordance with that different procedure”.*

66. The Vetting power of the Vetting Board were set out under Rule 4 of the Vetting Regulations which provide as follows:-

“.....

- c) *Vetting shall be done in accordance with the values and principles set out in Article 10, 27, 47, 50 and 232 of the Constitution.*
- d) *The Commission shall be guided by the principles and standings of impartiality, natural justice and international best practice.*
- e) *The proof applicable shall be that of a balance of probabilities.*
- f) *Vetting shall be done in a transparent manner allowing the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision”.*

67. I will first consider the composition of the Vetting Panel. This is particularly important because if the Panel was improperly constituted then everything done by it was all null and void in view of the provisions of Section 7(2) (a) (i) of the Fair Administrative Action Act which states as follows:-

*“(2) A court or tribunal under subsection (1) may review an administrative action or decision, if:-*

*a) the person who made the decision*

*i) was not authorized to do so by the empowering provision;*

68. The Petitioner submits that the Panel that vetted him kept mutating. It is his contention that the only Commissioner who participated in the vetting was one Murshid Mohammed and the other 3 Commissioners joined in at the further hearing having not taken part in the first hearing.

69. That later all Commissioners including those who never took part in the process signed the decision.

70. On the composition and quorum of the Vetting Panel, Regulation 10 of the Vetting Regulations states as follows:-

*“Vetting Panels*

- 1) The Commission may in order to ensure expeditious disposal of matters, constitute such number of panels and comprising such persons as the Commission shall determine.*
- 2) the Commission may establish Panels comprising such numbers of its members and co-opted persons as it may deem necessary for the purpose of determining application for review under Regulation 33”.*

71. The Regulations are not clear on quorum of the Vetting Panel or Committees. In this case so long as the Panel had been constituted as the Commission determined, then it was a properly constituted panel. The contention by the Petitioner that the panel was improperly constituted is therefore not true.

72. On the second issue, the Petitioner has contended that he was not supplied with complaints and sufficient particulars of the complaint against him or even the accompanying documents as envisaged under Regulations 18 of the Vetting Regulations which provides as follows:-

*“Supply of information and response to complaints*

1) .....

- 2) Where a complaint or any adverse information is received by the Commission against an officer, a summary of the complaint including any relevant documentation pertaining to that complaint as received by the Commission, and on which the Commission intends to reply on in the process shall be served upon the officer. (emphasis is ours).*
- 3) Where a summary of the complaint is served upon an officer, the officer shall lodge a response to the Complainant within the period specified by the Commission in the notice.*
- 4) The response shall contain a summary of the material facts and any relevant documents and information on which the officer wishes to reply on in response to the complaint.*

73. I note that the Petitioner himself submitted that there was no complaint received against him. There was therefore no need for the

Respondent to supply any information or a complaint that was no existent.

74. However, in respect of “adverse information”, the Respondent stated that they had adverse information against the Petitioner concerning his Mpesa and bank statements where they considered the amount of money passing through his Mpesa and bank statements beyond his earnings.

75. This proposition could have been true. I have looked at the evidence supplied before this Court by both parties. I note that the Petitioner filed his Vetting questionnaire and also his Declaration of Income, Assets and Liabilities form under the Public Officer Ethics Act, 2003 on 17/3/2015. On 3.12.2015, the Respondent wrote to the Petitioner asking for additional information.

76. There is however, no indication that the request for further information was prompted by any adverse finding or information they had found. The Respondent also never pointed out to the Petitioner the adverse information they had found against him to enable him defend himself.

77. Article 50(2) of the Constitution provides as follows:-

(a) .....

(b) *to be informed of the charge, with sufficient detail to answer it;*

(c) .....

78. The Respondent failed in this respect by failing to give the Petitioner sufficient details of the adverse information they had against him to enable him answer it. In this respect, his rights Article 50(2) of the Constitution were breached.

79. The Court of Appeal in Kisumu Court of Appeal Case No. 17 and 18 of 2015 County Assembly of Kisumu vs Kisumu County Assembly Service Board and Others had this to say on due process:-

*“...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.*

*73. 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 well 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 it. The person charged is entitled to what, in legal parlance is referred to as the right to “notice and hearing”. That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in Kanda v. Government of Malaya*

*“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them”.*

80. In the case before me, I cannot say that the Vetting Panel upon finding that the Petitioner’s Mpesa and bank account exceeded his income notified the Petitioner of this fact stating which transactions were questionable and seeking an explanation from him.

81. In this case, I find that the Petitioner also lacked adequate prior notice of the complaint before him. No notice of this finding was given to him but he was confronted on the vetting floor and asked to explain. Indeed it is humanly impossible to give finer details of all transactions in an Mpesa account spanning 2 years without due notice especially so in an open economy where Mpesa has become the easiest mode of buying and selling goods.

82. The Petitioner submitted that despite the fact that the Vetting Panel was constituted, the Panel that signed his Vetting decision never heard him.

83. I have looked at the hansard proceedings of the Vetting process. On 24.8.2015 the Panel sitting consisted of the following Panelist:-

1. *Commissioner Murshid Mohamed*

2. *Jones Kavoi – Assistant IPG*

3. *Bishop Bernard Njoroge K – representing LSK*

4. *Mrs. Benadette Nzioki – PSC*

84. There were also members of the secretariat present. This Panel was chaired by Commissioner Murshid Mohammed.

85. On 1.12.2015, the Petitioner went through a further vetting process. This time round the Panel was chaired by Johnson Kavulundi. 3 other Commissioners Murshid Mohammed, Ronald Musengi and Mary Owuor were present. Other Panelists included Jones Kavoi, Mirriam Ngina, Benjamin Oyile, Peter Wamoto, Winnel Kitonga and Godfrey Kasili. The proceedings started at 7.11 pm and ended at 8.08 pm.

86. What I note from the above scenario is that the membership of the Vetting Panel changed during the second Vetting session and only 2 Panelists who were in the initial proceedings attended the second panel now made up of 8 new faces.

87. On 14.1.2015, the Panel now released its findings against the Petitioner. The decision of the Vetting process is now signed by 6 Commissioner Johnson Kavulundi, Joseph Boinnet, Ronald Musengi, Murshid Mohammed, Mary Awuor and Samuel Arachi. What is interesting is that 2 of the Panelists Joseph Boinnet and Samuel Arachi who at no time sat in any Panel that vetted the Petitioner signed the vetting decision owning it as their collective decision when they had not heard the Petitioner at any time.

88. In **Petition No. 79 of 2014 Eusebius Laibuta vs National Police Station Commissioner**, Hon Justice Odunga was faced with a similar situation and he observed that it was unlawful and unfair for persons to sign a decision regarding an exercise they never participated in.

89. The Respondent argued that the decision they made was proper as the non-participating Commissions had an opportunity to read the harsard proceedings. This in my view can never be far from the truth. Signing a judgment on a vetting decision makes the officer signing it own it as his or her decision. One cannot however determine a matter they never heard. Thus I agree with the decision of my brother J. Odunga in the Eusebius case when he states as follows:-

***“...fairness in any administrative or adjudication process requires that those who make a decision be the same people who sat at the hearing where the hearing was concluded as opposed to where a decision is based merely on documentary evidence. I find that the procedure followed by the Commission failed the fairness test and therefore in violation of the audi alteram partem rule. Accordingly, the changes made on the Panel that made the decision undermined procedural fairness of the vetting process and the exercise was unlawful, null and void”.***

90. As to violation of the Petitioner, I have already found that indeed there were certain violations against the Petitioner including failure to give him prior notice of any adverse information against him and also by having a decision rendered against him by a Panel that never heard him. It is my finding that his right to a fair hearing were violated by the Respondent.

91. The Petitioner applied for review of the Vetting decision and the Respondent proceeded to uphold their unfair initial decision. This was also done by another 7 Commissioners including one Joel Kitili who was also not part of the initial bench.

92. In my view, the Respondents proceeded to perpetrate the illegality in the first vetting. They had a chance to review and correct their initial mistakes but they did not. It is therefore my finding that the Respondent erred and subjected the Petitioner to an unfair and unjust vetting process.

93. In terms of remedies to be granted, I render the following orders:-

***1. A Declaration that the Petitioner’s rights under Article 47(1) and 41(1) and 50(1) of the Constitution were violated by the Respondent who rendered a decision finding him unsuitable to serve in the National Police Service without following due process and without according him a fair hearing.***

***2. An Order of Certiorari is issue to remove from this Court for purposes of being quashed the proceedings leading to and determination and decision of the Respondent dated 14.1.2016 and 6.12.2016 rendering the Petitioner unsuitable to serve in the Administration Police Service.***

***3. 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 and with no loss of rank effective immediately.***

***4. An order that there exist no reason to find that the Petitioner had failed the vetting.***

***5. Costs of the Petition are awarded to the Petitioner.***

**Dated and delivered in open Court this 30<sup>th</sup> day of May, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odunga for Respondent – Present

Mcharo for Petitioner – Present