



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 39 OF 2014

(Formerly Nairobi HC Petition 208 of 2014)

Before Hon. Lady Justice Maureen Onyango

EDWIN KOSGEI KIBOR.....1ST PETITIONER

LINUS OYEMBA MUKOLWE.....2ND PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

THE DEPUTY INSPECTOR GENERAL

IN CHARGE OF ADMINISTRATION.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

The petitioners EDWIN KOSGEI KIBOR (1st petitioner) and LINNUS OYEMBA MUKOLWE (2nd petitioner) filed this petition on 2nd May 2014 against the Inspector General of the National Police service (1st respondent), the Deputy Inspector General of the National Police Service in Charge of Administration Police (2nd respondent), the National Police Service Commission, the 3rd respondent and the Attorney General, the 4th respondent. They seek the following remedies –

i) A declaration that the deployment and assignment of duties to the petitioners by the 1st and 2nd respondents for three (3) months between December 2013 and February 2014 without pay/salary is a violation of the fundamental right of the petitioners to human dignity, freedom from cruel, inhuman and degrading treatment and freedom from slavery and/or servitude in violation of Articles 28, 29 (1) and 30 (1) of the constitution.

ii) A declaration that the purported disciplinary Orderly Room Proceedings initiated against the petitioners by officers of the 2nd respondent on 3rd November 2013 without prior notice of charges on the petitioners, without affording the petitioners time to prepare their defence/s, to source and avail witnesses or consult counsel or any other person/s the petitioners were entitled to consult under the law were arbitrary, unfair, highhanded, oppressive and in violation of the petitioners' fundamental right to fair and just administrative action guaranteed by Article 47 (1) and (2) of the constitution.

iii) A declaration that the stoppage of the petitioners' salary for the 3 months of December 2013 to February 2014 by the respondents without any notice, without a hearing and without any reasons was arbitrary, highhanded, oppressive and in violation of the petitioners' fundamental right to fair and just administrative action guaranteed by Article 47 (1) and (2) of the constitution.

iv) A declaration that the decision to dismiss the petitioners from the National Police Service purportedly made by the 2nd respondent Deputy Inspector General of the National Police Service dated 29th November 2013 is unlawful, unconstitutional, ultra-vires Article 246 (3) (b) of the Constitution and in violation of the petitioners' fundamental rights to fair labour practice and fair and just administrative action guaranteed to Articles 41 (1) and (2) of the constitution and is a nullity.

v) A declaration that the petitioners were and are entitled to access all information including the charges, proceedings of the

purported Orderly Room Proceedings and decisions made there at leading to the petitioners' dismissal from the National police Service and the failure to furnish the petitioners with the said information is a violation of the petitioners' fundamental right of access to information guaranteed to Article 35 (1) (a) of the constitution.

vi) A declaration that the 3rd respondent has no powers and/or authority to relegate and/or delegate its powers of discipline and dismissal of the petitioners a officers of the National Police Service to the 1st and/or 2nd respondent or to endorse and/or ratify the decision to dismiss the petitioners from service purportedly made by the 2nd respondent dated 29th November 2013 to the detriment of the fundamental rights and freedoms of the petitioners as to fair labour practice and fair and just administrative action guaranteed by Article 41 (1) and 47 (1) and (2) of the constitution.

vii) An order of judicial review in the nature of *certiorari* do issue to remove into the High Court and to quash the decision to dismiss the petitioners from the national police Service purportedly made by the 2nd respondent Deputy Inspector General of the national Police Service dated 29th November 2013.

viii) An order of judicial review in the nature of prohibition do issue prohibiting the 3rd respondent from endorsing, ratifying and/or acting upon the unlawful decision of the dismissal of the petitioners from the National police Service purportedly made by the 2nd respondent Deputy Inspector General of the National Police Service dated 29th November 2013.

ix) An award of such terminal dues to the petitioners as the court shall assess equal to the petitioners' unpaid salary and allowances for 3 months worked and equivalent of the petitioners' salary and allowances for the remainder of their term of service up to the projected retirement age of 60 years.

x) An award of general and exemplary damages as may be assessed by this court for the violations of the fundamental rights and freedoms of the petitioners as to human dignity, freedom from cruel, inhuman and degrading treatment, freedom from slavery and/or servitude, the right of access to information, the right to fair labour practice and the right to fair and just administrative action guaranteed by Articles 28, 29(1), 30(1), 35 (1) (), 41 (1) and 47 (1) and (2) of the constitution of Kenya.

xi) Costs of the petition

xii) Interest on all monetary awards

The petitioners are former Administration Police Officers attached to the Rapid Deployment Unit (RDU) at Administration Police Headquarters Embakasi Nairobi. The 1st petitioner was appointed to the Administration Police Service on 11th September 2007 under Police Number 2007112612. His last salary as at November 2013 was Kshs.32,610.

The 2nd petitioner was appointed into the Administration Police Service on 23rd February 2009 under Police Number 2009030078 and his last salary as at November 2013 was Kshs.31,470.

Petitioner's Case

The petitioners were among officers assigned and deployed to relieve their colleagues at Todonyang near the Kenya-Ethiopia Border and set off on 26th October 2013. According to petitioners, while at Lodwar en-route to Todonyang on 28th October 2013 a dispute and misunderstanding arose between the members of the RDU and their seniors over non-remittance of their subsistence and welfare allowance while on duty in the hardship area of Todonyang. Following the said dispute the petitioners and eight of their colleagues were recalled from duty and ordered to return to Nairobi where they arrived on 2nd November 2013 at night.

On 3rd November 2013 at about 7.30 a.m., they were summoned to appear for Orderly Room Proceedings without prior notification and without being served with charges against them. The 1st petitioner who was the first to appear before the Orderly Room Proceedings drew the attention of the panel presided over by Chief Inspector Stephen Nyasani to the lack of notice and charges and requested for adjournment of the proceedings to facilitate service of the charges and preparation of their defence upon which the proceedings were adjourned *sine die* without allocating a date for resumption of the proceedings.

The petitioners continued with their duties but at the end of December 2013 their salaries were not paid. They sought explanation from the Chairperson of the National Police Service through their advocate by letter dated 2nd January 2014 which was acknowledged by letter dated 3rd January 2014 from the CS/Chief Executive Officer to the effect that the commission would revert once they received information from the Service.

On 15th January 2014 the CS/Chief Executive Officer of the National Police Service Ojango Omumu wrote to the counsel for the petitioners as follows –

“*NATIONAL POLICE SERVICE COMMISSION*

P.O. Box 47363 – 00100

5th Floor, Sky Park Plaza

Woodvale Close, Westlands

NAIROBI

Our Ref: NPSC/1/8/13/VOL.IV/546

Date: 15th January 2014

Mbugua Mureithi & Co. Advocates

Commissioner for Oaths & Notaries Public

Josem Trust House, 4th Floor

P.O. Box 52969 – 00200

NAIROBI

RE: STOPPAGE OF SALARY AND FAILURE TO COMMUNICATE ADMINISTRATIVE DECISION

Reference is made to your letter No. MM/AJ/APS/10/1/13 of 2nd January 2014 on the above subject.

We have investigated and found that the officers turned mutinous and refused to obey lawful orders as a result of which they were suspended pending their dismissal.

The Commission is in the process of reviewing the matter and we shall revert to you once we have made a final decision.

SIGNED

Ojango Omumu

CS/CHIEF EXECUTIVE OFFICER”

On 4th February 2014 the petitioners together with their eight colleagues were served with letters of summary dismissal with effect from 29th November 2013. The letters of dismissal which were identical are reproduced below –

“ADMINISTRATION POLICE SERVICE

ADMINISTRATION POLICE

HUMAN RESOURCE UNIT

P.O. Box 30510 – 00100

NAIROBI, KENYA

Ref No. P/NO. 2007112612/30

APC EDWIN KOSGEI KIBOR

P/NO 2007112612

THRO’

29th November 2013

THE COMMANDING OFFICER

RDU

RE: DISMISSAL FROM THE ADMINISTRATION POLICE SERVICE

Reference is made to Orderly Room Proceedings conducted against you at RDU Headquarters on 3rd November 2013 in which you were charged pursuant to Section 88 (2) of the Eighth Schedule of the National Police Service ACT in that;

Count I: You wilfully and knowingly disobeyed a lawful command and order given to you by P/No. 1988071768 IP Cyrus Githae to board a vehicle transporting to Todonyang for operation change over on 29th October 2013 contrary to Section 88 (2) 1(g) of the

Eighth schedule National Police Service Act.

Count II: *You used inappropriate language that was threatening, disrespectful and in subordinating towards IP Cyrus Githae and the NCO's accompany you for operation duties in Todonyang contrary to Section 88 (2) 1(c) of the Eighth schedule National Police Service Act.*

Count III: *You used language that was obscene, abusive and insulting to fellow officers accompanying you for operational duties contrary to Section 88 (2) 1(b) of the Eighth schedule National Police Service Act.*

Count IV: *You absented yourself on two occasions from your designated rest points while on transit on 29th and 30th October 2013 from Makutano and Lodwar AP camps respectively while armed with a G3 rifle without prior permission contrary to Section 88 (2) 1(h) of the Eighth schedule National Police Service Act.*

Count V: *You failed to attend team-up parade on 30th October 2013 and 30th November 2013 without reasonable cause contrary to Section 88 (2) 1(p) of the Eighth schedule National Police Service Act.*

Count VI: *You were negligent in your performance of guard duty assigned to you while in transit for operation duties on 28th and 29th November 2013 contrary to Section 88 (2) 1(t) of the Eighth schedule National Police Service Act.*

Count VII: *You knowingly made false accusation against the Commanders of Rapid Deployment Unit without material fact affecting their character contrary to Section 88 (2) 1(p) of the Eighth schedule National Police Service Act.*

All the above charges are serious offences warranting severe disciplinary action in accordance with civil servants rules as per the COR and NPSC Act 2011.

In accordance to the powers conferred by NPSC Act 2011, it is not the intention of the Administration Police Service to retain you and has been decided that you be and are hereby SUMMARILY DISMISSED from the Administration Police Service with effect from the date of this letter.

On dismissal you lose all benefits entitlement had you left the service through the normal way.

Your benefits will therefore include;

- a) Refund of WCPS contributions as stipulated on civil service code of regulations.*
- b) NSSF Government share contribution upon your registration.*

This office also notified you of your right to appeal to the National Police Service Commission within 30 days of receipt of this letter.

Upon receipt of this letter you should sign declaration form for officers leaving the Government Service and surrender all government property that may be in your possession.

SIGNED

P. NDIRIMA

For: DEPUTY INSPECTOR GENERAL

ADMINISTRATION POLICE SERVICE

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P/File"

It is on the basis of the foregoing that the petitioners allege that their fundamental rights and freedoms under Articles 28, 29 (f), 30 (1) 35 (1) (a), 41 (1), 47 (1) and (2) and 246 (3) (b) have been violated by the respondents.

In a further affidavit sworn on 19th October 2015, the 2nd petitioner avers

summarises their case as follows –

- i) "That the dispute that is the genesis of this petition concerning the failure of the RDU to provide my colleagues and I with any allowances for the deployment to Todonyang arose early in the trip on 26th October 2013 at Nakuru when IP CYRUS GITHAE as the officer commanding our deployment could not provide us with money for lunch.*

ii) That the underlying dispute over allowances for the deployment was not resolved and my colleagues and I never received our due allowance.

iii) That despite the serious failure by the RDU to provide my colleagues and I with our rightful and basic subsistence and food allowance my colleagues and I still agreed and persevered to proceed on the deployment up to our destination at Todonyang to serve our country.

iv) It is the RDU command that was in breach of duty and discipline in failing to provide my colleagues and I with the basic subsistence allowance for our survival during the deployment in a remote, hardship and insecurity-prone area.

v) Further to subparagraphs (i) to (iv) above, it is evident that the disciplinary action taken against my nine colleagues and I was simply victimization for raising a genuine, reasonable, merited and extremely serious grievance.

vi) That there was no prior service or any service at all on my colleagues and I of charges preferred at the alleged Orderly Room Proceedings.”

Respondents' Case

The respondents filed a replying affidavit of CYRUS GITHAE, Inspector of Police Number 1988071768 in which he deposes that he is deployed at RDU of the Administration Police. He deposes that at the time material to this petition he was the Operations Commander of the team comprising 74 officers including the petitioners that was traveling to Todonyang RDU Base for a shift changeover.

The team left RDU Base at Headquarters in Nairobi on 26th October 2013 and had stopovers at Kapenguria Lokichar and Lodwar. Just before Lokichar on 28th October 2013 one of the lorries broke down and a mechanic was called to repair it. As they were about to commence their journey after the repairs, a number of officers including the petitioners refused to board the lorries demanding to be paid their operation allowance before they could proceed. He tried to persuade them to drop their demands for about 3 hours but they insisted, compelling him to call RDU Headquarters to report the incident upon which he was directed to order the rebellious officers to ground their arms and ammunition and surrender the same to Lodwar Sub-county Administration Police Armory. The officers however refused and insisted that they will surrender their weapons at the RDU office at Headquarters in Nairobi.

The rebellious officers eventually relented on 30th October and agreed to drop their demand for payment of operation allowance and the team proceeded to Todonyang.

Githae deposes that the petitioners are bound by Force Standing Orders whose fundamental principle of discipline among officers states –

“All police officers must promptly obey all lawful orders given to them by a person in lawful authority over them and must at all times act in obedience to the provisions of the Police Act (now the National Police Service Act) and Regulations of the Standing Orders and of the Code of Regulation.”

Githae deposes that the acts of disobedience by the petitioners compromised the functions of the Administration Police and in general prejudiced the function of the police particularly with regard to provision of security and protection of life and property. He deposes that on 3rd November 2013 Orderly Room Proceedings were commenced against the rebellious officers, that they were charged with offences against good order and discipline as stipulated under Section 88 (2) of the National Police Service Act as read with Schedule Eight thereunder but the petitioners refused to be taken through the proceedings. They were found culpable and sentenced to dismissal. He deposed that the dismissal was a legitimate sentence.

Submissions

The petition was by consent of parties disposed off by way of affidavits and written submissions. In the submissions filed on behalf of the petitioners. It is submitted that –

1. It is not disputed that the petitioners were both employed as Administration Police Officers (APs). The 1st petitioner was employed on 11th September 2007 while the 2nd petitioner was employed on 23rd February 2007. The petitioners have averred that they both served the Administration Police Service with singular dedication, loyalty and without any disciplinary incident and the 2nd petitioner was in fact awarded with a commendation for his brave role in countering the terrorist who attacked West Gate Mall on 21st October 2013.

2. It is also common ground that the petitioners' last station was the Rapid Deployment Unit (RDU) at AP Headquarters, Embakasi, Nairobi and their respective monthly earnings were Kshs.32,610/= and Kshs.31,470/= respectively.

3. It is also common ground that on 26th October 2013 together with other RDU colleagues the petitioners left AP Headquarters, Nairobi on assignment and deployment to Todonyang near the Kenya-Ethiopia Boarder. It is also common ground that Todonyang is a hardship area.

4. It is also common ground that on 28th October 2013 while at Lodwar en-route to Todonyang, a dispute and misunderstanding arose between the members of RDU on the said deployment and their seniors at AP Headquarters over non-remittance of their subsistence and welfare allowance on this assignment.

5. It is also common ground that even after filing to resolve the dispute over allowance, the petitioners and their colleagues still persevered and proceed to Todonyang for duty.
6. It is also common ground that on 31st October 2013 having arrived at Todonyang and already deployed on duty the two petitioners and eight of their RDU colleagues were recalled from duty by their seniors at the AP Headquarters, Nairobi and ordered to return to Nairobi immediately.
7. The petitioners have averred which is not contradicted that it took three (3) days travelling by road from Todonyang to Nairobi and they arrived at the AP Headquarters at Embakasi on the night of 2nd November 2013.
8. The petitioners also averred which is also not contradicted that the following day on 3rd November 2013 barely twelve (12) hours after they arrived in Nairobi without being notified or served with any charges they were summoned to appear for disciplinary Orderly Room Proceedings presided by one Chief Inspector Stephen Nyasani.
9. The petitioners also averred which is not contradicted that not having been served with the charges or notice thereof, the 1st petitioner being the first to appear before the panel in the Orderly Room Proceedings requested for an adjournment of the proceedings to facilitate service of the charges and preparation of defence and the panel obliged and adjourned the proceedings indefinitely without allocating a date for resumption of proceedings.
10. The petitioners averred that at the end of December 2013 while still at their RDU station and being allocated duties they realized that the 1st to 3rd respondents had not remitted their December 2013 salary.
11. The petitioners averred that on realization of the matters at paragraph 10 above they engaged their counsel on record who through the letter dated 2nd January 2014 to the 3rd respondent the petitioners informed the 3rd respondent of the underlying dispute between them and the 1st and 2nd respondents and of the indefinite Orderly Room Proceedings and inquired over the stoppage of their salary for the month of December 2013. To the petitioners' surprise, the 3rd respondent wrote to their advocates on record informing them that it had not been notified by the 1st and 2nd respondents of the substance of counsel's letter and promised to revert 'once they had information from service.'
12. The petitioners aver that on 4th February 2014 while still on duty and awaiting a substantive response from the 3rd respondent as promised, they were served with identical letters of summary dismissal by the 2nd respondent backdated to 29th November 2013 and signed by one P. Ndirima on behalf of the 2nd respondent and were ordered to leave their station.
13. The petitioners further aver that upon receipt of the said letters of summary dismissal on 6th February 2014 their advocates wrote to the 3rd respondent bringing to its attention the said development and urged the 3rd respondent to revoke the summary dismissals in light of lack of authority or power on the person purporting to have dismissed the petitioners from service.
14. The petitioners also aver that the 3rd respondent replied to their advocates' letter vide its letter dated 15th January 2014 but delivered to the advocate on 15th February 2014 in which the 3rd respondent indicated that it had since investigated the matter and found that the petitioners "turned mutinous and refused to obey lawful orders as a result of which they were suspended pending their dismissal". The 3rd respondent also indicated that it was "in the process of reviewing the matter" and would revert once it had "made a final decision".
15. Between the date of the 3rd respondent's letter of 15th January 2014 and the date of filing this petition on 2nd May 2014 the 3rd respondent had not reverted to the petitioners' advocates with the promised "final decision" and in fact to date the 3rd respondent has never communicated its "final decisions."
16. The petitioners have also averred that contrary to the position of the 3rd respondent, they were never informed of any such "suspension pending dismissal" nor served with any letters of suspension on any allegation pro to the said letter by the 3rd respondent. It is curious that as at 15th February 2014 when the 3rd respondent wrote to the petitioners' advocates informing them of the alleged "suspension pending dismissal" the petitioners had already been dismissed from service vide the 2nd respondent's letter dated 29th November 2013. It is therefore evident that the 3rd respondent was in the dark as to what was happening to the petitioners yet it is the body responsible for taking such actions against the petitioners.
17. Through the petitioners' advocates' letter, the petitioners' advocates in accordance with Article 35 of the constitution requested the 3rd respondent to furnish them with a copy of the purported Orderly Room Proceedings leading to dismissal of the petitioners and their colleagues. As earlier stated the 3rd respondent has never responded to the said letter and never furnished the petitioners with a copy of the alleged Orderly Room Proceedings.
18. The petitioners content that the 3rd respondent abdicated its constitutional mandate of disciplining them by delegating the said mandate to the 1st and 2nd respondent and purporting to endorse the unlawful decision of dismissal by a junior officer of the 2nd respondent of an undisclosed rank.
19. The petitioners averred which was not contradicted that upon dismissal that were never paid any dues including the salary for the months of December 2013 to February 2014 a period they continued being deployed and assigned duties by the 1st and 2nd

respondents.

20. The petitioners averred that they are both married with young families are now unemployed and undergoing extreme hardships since it is difficult to secure another employment given their special training as police officers.

21. The petitioners aver that they were victimized for raising a real, genuine, reasonable and serious grievance relating to their condition of service.

22. Despite attempts at an out of court settlement and notice of intention to sue having been given the respondents adamantly refused to settle the petitioners claim prompting the suit herein.

It is the submission of the petitioners that the replying affidavit of IP CYRUS GITHAE is the response of the 1st and 2nd respondents and that the 3rd and 4th respondents did not file any response to the petition. It is submitted that IP Githae did not preside over the Orderly Room Proceedings nor was he the Officer prosecuting having been only a witness. That his affidavit is therefore not a rebuttal of the petitioners' claim.

The petitioners rely on the decision in **REPUBLIC -VS- OTIENO KAJWANG & ANOTHER EX-PARTE MOHAMUD MUHUMED SIRAT [2009] eKLR** in which the court stated that the rule of hearsay evidence applies to evidence as well as documents and that an affidavit by a person who did not take the actions complained of has little if any weight at all.

It is further submitted that the affidavit of IP GITHAE does not relate to the 1st petitioner EDWIN KOSGEI KIBOR at all as the record of Orderly Room Proceedings does not bear his name leading to the conclusion that the 1st petitioner was dismissed without being taken through disciplinary proceedings. It is submitted that the replying affidavit did not respond to averments in paragraphs 9 to 24 of the 2nd petitioners' affidavit to the effect that the petitioners were allocated duties between December 2013 and February 2014 in accordance with duty rosters exhibited as exhibits EKK3 to EKK7 yet they were not paid any salary for the period. That this is proof of contravention of Articles 28, 29 (f) and 30 (1) of the constitution which preserve, protect and demand respect of human dignity and protection from cruel, inhuman or degrading treatment and being held in slavery or servitude.

It is submitted that the averments in IP GITHAE's affidavit that the petitioners declined to participate in Orderly Room Proceedings did not state by who and how the Orderly Room Proceedings were commenced and whether the petitioners and their colleagues were given requisite notice of the Orderly Room Proceedings.

Further that he did not dispute the averments of the petitioners that they arrived from Todonyang on the night of 2nd November 2013 and were charged on the morning of 3rd November 2013, or that the proceedings were adjourned indefinitely upon the application of the petitioners and their colleagues to give them time to prepare for the hearings. It is submitted that IP GITHAE was incompetent to swear to the averments as he was only a witness. The petitioners rely on the case of **JOSEPH SITONIK -VS- ATTORNEY GENERAL & ANOTHER [2012] eKLR** in which it was held that –

“According to the uncontested evidence of the petitioner, he was not given

an opportunity to defend himself in accordance with the provisions of the Standing Orders....In the circumstances I find that the proceedings leading to the dismissal of the petitioner were conducted in breach of Standing Orders on discipline and as a result the petitioner's right to a fair hearing guarantee by Section 77 (9) of the constitution was violated..”

It is submitted that the respondents violated Articles 236, 50 and 47 (1) and (2) of the constitution by ambushing the petitioners on the morning of 3rd November 2013.

It is submitted that Chapter 20 of the Forces Standing Orders which make provision of discipline provides at Section 16 (x) (a) that –

“(a) The Presiding Officer shall ascertain from the accused whether he/she has been notified in writing of the alleged offence against discipline as required in subparagraph (vii) above.”

It is further submitted that the Section 16 (10) (a) (b) and (c) of the Forces Standing Orders obligates the presiding Officer to make a full written record of the reason for proceeding without the accused and for appointment of an officer senior to the accused to represent the accused thus –

“16 (iv) (a) If an Inspector or a subordinate officer having been properly instructed refuses to attend an inquiry into an offence against discipline for which he/she is charged or having attended as required, wilfully obstructs the holding of such inquiry may be held in the absence of the accused as though he/she were in fact present (b) when it becomes necessary to carry out or compete an inquiry in the absence of the accused as provided for in subparagraph (a), the Presiding Officer shall appoint another officer of or above the rank of Inspector and not below that of the accused to represent the interest of the accused at the inquiry. The evidence relevant to the disciplinary offence will be recorded and the Presiding Officer may give consideration to the inclusion of evidence at the request of the officer representing the representative will be required to countersign the proceedings at their close and Presiding Officer will record in full, his/her reason for conducting the inquiry in the absence of the accused so as to establish clearly that no other course of action was open to him/her.”

It is submitted that IP GITHAE did not mention in his affidavit that the petitioners and their colleagues were at one time on suspension as

averred in the letter of the 3rd respondent dated 15th January 2104. It is submitted that the summary dismissal of the petitioners was unprocedural, high handed and oppressive and violated Article 47 (1) and (2) of the constitution. The petitioners relied on the case of **EUTICUS GUANTAI NKUNJA -VS- NATIONAL POLICE SERVICE** where the court held –

“The respondents have not denied that evidence by the claimant. The court returns that the petitioner has established that his constitutional right to a fair determination of the disciplinary case during the Orderly Room Proceedings was violated. The court finds that Article 47 (1) was violated as the dismissal was unreasonable and procedurally unfair.”

It is submitted that the letters of dismissal having been under the signature of the Deputy Inspector General of the National Police Service signed on his behalf by P. NDIRIMA whose rank was not disclosed, the dismissal was irregular and in violation of Article 246 (3) of the constitution which provides that –

“The Commission shall...

(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service, and

(c) perform any other functions prescribed by national legislation.

It is submitted that Section 10 of the National Police Service Act provides that –

“10 (a) In addition to the functions of the Commission under Article 246 (3) of the Constitution, the Commission shall - ...

(h) exercise disciplinary control over persons holding or acting in office in the service; ...

(k) hear and determine appeals from members of the service.”

It is submitted that the discipline and dismissal of police officers vests in the 3rd respondent who has no power to delegate to the 1st and 2nd respondents. The respondents rely on the case of **REPUBLIC -VS- DEPUTY INSPECTOR GENERAL OF NATIONAL POLICE 232 OTHER [2013] eKLR** where the court stated –

“[12] It is therefore clear that the powers to inter alia determine promotions and transfers within the National Police Service Commission was given to the Commission and any legislation which purported to take away such powers and place them on any other body would have been inconsistent with the constitution... [17] It is therefore clear that the unilateral decision by respondents to transfer the applicants was not in accordance with the law. The action was ultra vires their powers and hence was null and void.”

It is submitted that it is obvious from correspondence between counsel for the petitioners and the 3rd respondent that the 1st respondent was not working hand in hand with the 3rd respondent.

It is submitted that the respondents failed to furnish the petitioners with copies of Orderly Room Proceedings.

It is submitted that the petitioners are entitled to the prayers sought reinstatement but in view of the passage of time the prayer for reinstatement may not be practical and they should instead be awarded damages relying on the case of **JOSEPH SITONIC (supra)** where the court stated –

“[35] Since the proceedings were fatally flawed, it follows that the process that led to the dismissal is declared null and void. Such a declaration would ordinarily result in reinstatement of the petitioner to his position or an order that the disciplinary proceedings be conducted afresh to accord to provisions of the law.

[36] I do not think this is a proper case for reinstatement of the petitioner in order that the proceedings be carried out afresh. The petitioner was dismissed from the Police Force in 2008. Over four years have now elapsed since his dismissal from the disciplined forces. The Police Force is a disciplined force and I am of the view that reinstating the petitioner to the force after such a long absence would not be in the interests of either the petitioner or the public. Similarly, given the lapse of time it may be impossible to have a fair adjudication conducted.

[40] I am alive to the fact the petitioner would but for his dismissal have earned living for the foreseeable future and would probably have earned a pension in old age. The process that led to his dismissal has been impugned and in ordinary circumstances he would have been reinstated to his position. For reason I have alluded to at paragraphs 35 and 36 above and in order to do full justice in light of my jurisdiction under Section 84 (2) of the constitution. I direct the petitioner and the respondents to agree within the next thirty days on such sum as is necessary to put the petitioner in a position he would have been had he not been dismissed improperly. Should the parties fail to agree I shall hear the parties on the appropriate award to grant.”

The petitioners further relied on the case of **PETER M. KARIUKI -VS- ATTORNEY GENERAL [2014] eKLR** where the court stated –

“Having found that the appellant’s trial was vitiated by the violations that attended it as detailed in this judgment, we would allow the appeal and quash the appellant’s conviction by the court martial. We would also allow the appellant’s claim for Kshs.22,965,460

being his salary arrears and allowances, the tabulation of which the respondent has not challenged.”

It is submitted that damages for violations of fundamental rights are at the discretion of the court. Given the egregious and casual manner in which the rights of the petitioners pray for an award of Kshs.1,500,000/= general damages for each of the petitioners. They relied on the case of **JOSEPH MWENDA MBUKO-VS- PROVINCIAL POLICE OFFICER, CENTRAL POLICE & 2 OTHERS [2013] eKLR** where the petitioner was awarded general damages in the sum of Kshs.1,000,000/=. It was held thus –

“...The remedy to which the petitioner is entitled to is clearly set out under Article 23 (3) (e) of the constitution of Kenya 2010 whether pleaded or not, the fact of breach of fundamental rights will in appropriate cases attract the remedy and the remedy is at the discretionary of the court. In the instant case the petitioner would be adequately compensated for the pain and suffering he has undergone all those years by way of momentary compensation... (b) That as a result of braches aforesaid the petitioner has been unfairly treated a subjected to serious economic hardship and deprived of the right to livelihood and I order compensation in global sum of Kshs.1,000,000/= for violation of his rights by the respondents jointly and severally.”

The petitioner further submit that they are entitled to costs.

Respondents’ Submissions

For the respondent it is submitted that a dispute arose between the Commanding officers and the petitioners with regards to operations allowance which the petitioners were insisting to be paid before embarking on the deployment and that it took more than three hours to persuade the petitioners to drop their demands on the basis that their demands were administrative in nature and the same was being handled by the Rapid Deployment Unit Headquarters in Nairobi.

It is submitted that in pursuit to persuade the petitioners to drop their demands, the Commanding Officer issued a lawful order to the petitioners to ground their arms and ammunition and surrender the same to the Lodwar Sub-County Administration Police Armory for safekeeping in which the petitioners refused to abide to an order from a Commanding Officer. That in accordance to the Force Standing Orders the fundamental principle of discipline among officers is that ‘all police officers must promptly obey all lawful orders given to them by a person in lawful authority over them and must at all times act in obedience to the provisions of the Police Act (now the National police Service Act) and the Regulations of the Standing Orders and of the Code of Regulation.’

The respondents submit that the petitioners’ disobedience compromised the functions of the Administration Police and in general prejudiced the function of the police and in particular, the provision of security and the protection of life and property which is anchored on the constitution.

It is submitted that on the basis of these acts and others the respondents on 3rd November 2013 commenced Orderly Room Proceedings and disciplinary process within the police service where the petitioners were charged with seven counts with offences against good order and discipline as stipulated by Section 88 (2) of the National Police Service Act as read together with schedule Eight thereunder.

That on the actual date for appearance of the petitioners before the disciplinary panel the petitioners refused to be taken through the proceedings and the same refusal was recorded and the panel found the petitioners culpable and sentence to dismissal.

That vide a letter dated 29th November 2013 the petitioners were summarily dismissed from service and notified on their right to appeal to the National police Service Commission within 30 days.

The respondents submits that the National Police Service Commission receive communicating with regards to the disciplinary process and action with regards to the petitioners herein, deliberated on the dismissals and upheld the summarily dismissal of the petitioners and the commission ratified the petitioners’ dismissal.

That the petitioners herein were given an opportunity to appear before the disciplinary panel to face the seven counts charges they each faced however all the petitioners refused to attend the Orderly Room Proceedings to defend themselves and the disciplinary panel forwarded the resolution to the National Police Service Commission which in turn ratified the resolution to dismiss the petitioners herein.

That the respondents followed the laid down procedure under the Constitution, the National Police Service Act, Police Standing Orders and the Employment Act. That the petitioners were given a right to appeal within 30 days to the National police Service Commission who has the final constitutional mandate in the employment of the petitioners.

That the petitioners did not appeal to the National Police Service Commission however the National Police Service Commission deliberated and ratified the decision of the disciplinary committee.

That the summary dismissal of the petitioners was in accordance with the Employment Act for the petitioners being in the disciplinary force disobeyed a lawful order from their commanding officer refused to attend the disciplinary panel and were given an opportunity to appeal to the National police Service Commission within 30 days.

That the petitioners’ dismissal from service was constitutional, lawful and the petition herein lacks merit and the same should be dismissed with cost.

Determination

I have considered the pleadings documents attached to the affidavits, submissions and authorities cited by both parties. The issues for determination are whether the petitioners were given a fair hearing before they were dismissed, whether the letter of dismissal having been signed on behalf of the Deputy Inspector General of Administration Police Service by an officer whose designation is not disclosed is valid and whether the petitioners are entitled to the prayers sought.

Fair Hearing

The right to a fair hearing is enshrined in Article 47 (1) and 50 (1) of the constitution.

Article 47 (1) provides that –

47. Fair administrative action.

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

Article 50 (1) provides that –

50. Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Article 50 (2) (b) and (c) provides for an accused person charged before a court or tribunal to be informed of the charges with sufficient detail to answer and to have adequate time and facilities to prepare a defence.

In the present case, the respondent did not deny that the petitioners arrived at the headquarters in the evening of 2nd November 2013 and were summoned to Orderly Room Proceedings the next morning at 7.30 am without being notified of the charges against them.

Section 5(1) of the Police Act empowers the Commissioner of Police to issue administrative orders, to be called Force Standing Orders, not inconsistent with the Constitution or provisions of the Act for the general control, direction and information of the Force. Disciplinary proceedings in the Police Force are governed by Chapter 20 of the Force Standing Orders (Revised Edition 2001[1962]) (hereinafter '*the Standing Orders*').

The Standing Orders make provision for discipline generally under Section 16(x) which sets out the procedure for conduct of disciplinary proceedings as follows:-

16 (x). In all inquiries, the proceedings shall be conducted in the following manner:-

(a) The Presiding Officer shall ascertain from the accused whether he/she has been notified in writing of the alleged offence against discipline as required in subparagraph (vii) above,

(b) When the provision to subparagraph (vii) above has been invoked, the Presiding Officer shall so inform the accused and the reason shall be recorded in the proceedings.

(c) The Presiding officer shall inquire from the accused whether he/she wishes to be assisted in his/her defence by a police officer who should not be above the rank of the presiding officer and must be serving within the same province.

(d) When an accused person wishes to be so assisted in his/her defence, the Presiding officer shall consider the application and may make recommendations to the Officer in Charge of the division or formation in which the accused is charged or stationed.

(e) The details of the alleged offence against discipline shall be read to the accused in a language which he understands and he/she shall be required to plead thereto, and the pleas of the accused shall be recorded in his/her own words and he/she shall be required to sign such record.

(f) When the accused admits his/her guilt, a plea of guilty shall be recorded in his/her own words (in unambiguous terms) and he/she shall be convicted thereof.

(g) When the accused denies his/her guilt, a plea of not guilty shall be entered by the Presiding Officer who shall proceed to record the substance of the evidence of the witnesses,

(h) Each witness shall be examined separately in the presence of the accused,

(i) Each witness may be cross-examined by the accused or by the police officer appointed to assist him/her in his/her defence, as the case may be, and may thereafter be re-examined by the police officer appointed under subparagraph (v) of paragraph 16 above.

- (j) The evidence of each witness may be given on oath or affirmation if this appears to be necessary, on the directions of either the Commissioner of Police or the Provincial Police Officer or at the discretion of the Presiding officer.
- (k) At the close the evidence in support of the alleged offence against the discipline the Presiding Officer shall, if he/she considers that no offence has been disclosed, acquit the accused and he/she shall record in writing his/her reasons for so doing.
- (l) If at the close of the evidence in support of the alleged, offence against discipline, the Presiding Officer is of the opinion that sufficient evidence has been adduced against the accused to put him/her on his/her defence, he/she shall once again inform the accused of the substance of the allegations against him/her, and inform him/her that he/she has the right to give evidence on his/her own behalf and to call such witnesses in his/her defence as he/she may wish;
- (m) The Presiding Officer shall inform the accused that if he/she gives evidence on his/her own behalf he /she will be liable to cross-examination;
- (n) The presiding officer shall record the evidence of the accused, if any, and shall then record the evidence of the witnesses for the defence in the same manner as that prescribed in subparagraph (g) above,
- (o) When all the evidence has been recorded the president Officer shall review it, prepare a summary, showing the reasons for his/her findings, record a verdict and shall convict or acquit the accused as the case may be,
- (p) Before awarding punishment against the accused the Presiding Officer shall inform him/her that he/she may make a statement in mitigation or sentence and he/she shall record such statement which will be signed by the accused,
- (q) Having considered the accuser's statement in mitigation of sentence and his/her record of service, the Presiding officer shall award punishment against the accused.
- (r) If, having regard to the gravity of the offence against the discipline and to the accuser's record of service, the presiding officer is of the opinion that the punishment he/she is empowered to award is insufficient, he/she may remit the proceedings to the officer of a more senior rank, who may proceed to award punishment against the accused;
- (s) When in any inquiry the Presiding officer is of the opinion that the offence has been proved against the accused, but is of the opinion that, having regard to the accused's record of service, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is inexpedient to award any proceedings to conviction make an order dismissing the charge;
- (u) The accused shall be informed of the finding and sentence and of his/her right to appeal under paragraph 24 of this Chapter;
- (v) If the accused does not wish to appeal, the Presiding Officer shall so record in the proceedings and the accused shall sign such record.

xi. When any inquiry or part of an inquiry is conducted in a language not understood by the accused, the presiding officer shall appoint a police officer or other person to act as interpreter. Such appointment shall be recorded in the proceedings.

xii. The Presiding Officer may, at any time in an inquiry, order the production or any document which he/she considers will assist him in arriving at a fair and just verdict.

xiii. The Presiding officer may, at any time in an inquiry, in order to obtain proof of any relevant fact or to clarify any point in the evidence of any witness ask such witness any questions he/she considers necessary.

From the rules set out above it is clearly demonstrated that Police Officers facing disciplinary proceedings are by law entitled like any other citizen to due process. These principles in my view accord to the principles of Article 47 (1) and 50 (1) and (2) of the Constitution of Kenya 2010 and adhere to the rules of natural justice and conduct of disciplinary proceedings. The police force is obliged to follow them to the letter.

The record of the Orderly Room Proceedings annexed to the replying affidavit of CYRUS GITHAE do not contain the name of the 1st petitioner among the eight names listed. There is therefore no evidence that the 1st petitioner was subjected to Orderly Room Proceedings at all while the proceedings that the 2nd petitioner was subjected to offend the rules of natural justice and were contrary to the Force Standing Orders which the respondents are bound to follow to the letter. As was stated by the **Court of Appeal** in the case of **PETER M. KARIUKI (supra)** –

“The effect of such violations is to vitiate the trial to such an extent that it amounts to no trial.”

The process that the 2nd petitioner was subjected to, having been with no prior notification of charges, was in violation of the Force Standing Orders and the trial was therefore a nullity.

The petitioners further pointed out that the letters of dismissal were signed by an officer whose rank was not disclosed on behalf of the Deputy Inspector General Administration Police Service. Under Article 246 (3) (b) it is the role of the National Police Service Commission to –

“Observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.”

As correctly pointed out in the petitioners’ submissions, there appears to have been no consultation between the Deputy Inspector General Administration Police Service and the National Police Service Commission. The Commission was not aware of the dismissal of the petitioners by 15th January 2014, long after their dismissal on 29th November 2013.

Justice Odunga in the case of **Republic -vs- Deputy Inspector General of National Police (supra)** sobered that

“...It is important that both the Inspector General of Police and the Commissioners of the National Police Service Commission work together for the wellbeing of this nation.”

I entirely agree with him and would reiterate the same sentiments here.

Based on the evidence before the court I find that the dismissal of the petitioners violated Articles 47 (1) and (2), 50 (1) and (2). The deprivation of salary for the months of November and December 2013 and January to 4th February 2014 when they were at work amounts to unfair labour practice under Article 41 of the Constitution and a violation of the legitimate expectations of the petitioners to be paid for work done. The respondents further violated Article 246 (3) of the constitution by not according the petitioner due process.

Remedies

The petitioners prayed for a total of 12 orders numbered from (i) to (xii). All of them can be summarised under four heads as follows –

- (i) A declaration that the respondents violated the petitioners’ rights under Articles 28, 39 (1), 30 (1), 47(1) and (2), 35 (1), 41(1) and 246 (3) (b).
- (ii) An award of unpaid salaries and allowances for three months worked and equivalent of salary and allowances for the remainder of their term of service up to the projected retirement age at 60 years.
- (iii) General and exemplary damages
- (iv) Costs and interest.

I have already found that the respondents violated the petitioners constitutional rights under Articles 47 (1) and (2), 50 (1) and (2) and 41 of the constitution. I declare accordingly.

1. Having been terminated by letters received by them on 4th February 2014 the petitioners are entitled to salary withheld from November 2013 to 4th February 2014 as follows –

EDWIN KOSGEI KIBOR

Kshs.32,610 for November 2013

Kshs.32,610 for December 2013

Kshs.32,610 for January 2014

Kshs.4,348 for February 2014

Total Kshs.102,178/=

LINNUS OYEMBA MUKOLWE

Kshs.31,470 for November 2013

Kshs.31,470 for December 2013

Kshs.31,470 10 for January 2014

Kshs.4,196 for February 2014

Total Kshs.98,606/=

2. I award each of them one month's salary in lieu of notice.

For EDWIN KOSGEI KIBOR Kshs.32,610

For LINUS OYEMBA MUKOLWE Kshs.31,470.

3. I award each of the petitioners general damages in the sum of Kshs.1,000,000/=.

4. The respondents shall pay petitioners' cost to be taxed.

5. Item 1 above (withheld salary) will attract interest from date of filing petition. The other items shall attract interest from date of judgment.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE