



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CONSTITUTIONAL PETITION NO. 3 OF 2017**

**IN THE MATTER OF: BREACH OF THE CONSTITUTION, FUNDAMENTAL RIGHTS AND FREEDOMS ESPECIALLY ARTICLE 1(1), 1(3)(C), 2, 3, 6, 10, 19, 20, 21, 22, 23, 27, 28, 47, 50, 249 AND 159(2)(E) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 88(3) AND 90(3) OF THE NATIONAL POLICE SERVICE ACT, CAP 84 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 12(3) OF THE INDUSTRIAL COURT ACT, NO. 20 OF 2011 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT, 2015 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 4, 10, 11, 22, 23 & 24 OF THE CONSTITUTION KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**BETWEEN**

**BIKETI WANGILA.....PETITIONER**

**AND**

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

**JUDGMENT**

1 The Petitioner filed his petition on 31<sup>st</sup> January 2017 seeking the following:

- I. An order for declaration that the Respondent's conduct and action amount to denial, violation, infringement and or threat to the fundamental rights and freedoms of the Petitioner.
- II. An order of *certiorari* bringing to this honourable court for purposes of quashing the decision to remove the Petitioner from the National Police Service communicated by a letter dated 1<sup>st</sup> July, 2010 and that dated 4<sup>th</sup> September 2012.
- III. That this honourable court be pleased to invoke its power under Chapter 10 of the Constitution and Article 22 and 23 of the Constitution thereof to revoke and/or set aside the decision of the Respondent of 1<sup>st</sup> July 2010 and 4<sup>th</sup> September 2012.
- IV. An order for declaration that the letter dated 1<sup>st</sup> July 2010 reference No. B/EST/1/15/VOL.II/140 conveying dismissal of Petitioner from Kenya Police Service is and shall be null and void as the Petitioner is entitled to continue in employment without a break and with full benefits.

V. That this honourable court be pleased to order that the Petitioner be paid his salary and other benefits accrued from the time his salary was stopped to date.

VI. That the costs of the Petition be provided for.

VII. That this honourable court be pleased to make further orders as it may deem fit to grant.

The petition was supported by the grounds set out in the petition itself and the supporting affidavit of the Petitioner. The brief summary of the grounds was that the Kenya Police Service breached the Constitution of Kenya by denying the Petitioner his fundamental rights and freedoms. His affidavit deponed that he was taken through orderly room proceedings and was dismissed from service. He appealed his decision and the communication of the outcome of his appeal was only made in September 2012 after he complained to the Ombudsman. He thus sought the relief set out in his petition.

2. The petition was undefended by the Respondent who did not file any response. The Petitioner was heard on 21<sup>st</sup> February 2018. He stated that he was employed in 1995 by the Kenya Police Force in General Service Unit for 12 years and was then transferred to the traffic department where he served for 3 years. In 2010 an inquiry was opened in connection with bribery claims by 3 members of the SACCO which operates on the Kangare-Kandara-Thika route in Murang'a South. He was charged in orderly room proceeding with his colleague ex-polic constable John Musau. The charge was that they were receiving bribes from matatu operators and that the only 3 witnesses to testify were the owners of one SACCO and not the drivers of the vehicles. The 3 witnesses claimed to be the owners of matatus but did not indicate which matatus. He testified that his witness the OCS Kandara did not get an opportunity to testify as he was denied the chance to do so. He stated the orderly room proceedings were conducted by one who was the investigator, the prosecutor and judge. He testified that the letter of dismissal was not given to him but he managed to get a copy and subsequently got the official copy which indicated he had a right to appeal which right he exercised within the 7 days. He waited for feedback and there was none despite several visits to Police headquarters. He sought the assistance of the Ombudsman and the responses by the Respondent were slow and on 19<sup>th</sup> May 2014 he received communication on his appeal which was to the effect that his appeal had been heard and disallowed in 2013. He was never called before the appeal board and it was strange as the letter communicating the hearing was in 2012 while the appeal was claimed to have been in 2013 the following year. He sought review and there was no response prompting the filing of this petition. His alleged offence was one he could be charged with in a court of law but he was not charged. He sought declaration that his dismissal was unlawful and seek the cancellation of the decision made unlawfully and unconstitutionally. He also sought an order compelling the payment of his salary for July 2010 as well as an order compelling the Respondent to allow his reinstatement without a break in the service. He sought compensation for his suffering. That marked the end of oral testimony.

3. The Petitioner filed submissions on 15<sup>th</sup> March 2018 shortly after judgment had been reserved for 14<sup>th</sup> May 2018. In his submissions, he framed the issues for determination as follows:-

- a. Whether the proceedings in the orderly room proceedings leading to the conviction of the Petitioner and eventual dismissal from service were procedural.
- b. Whether the proceedings at the orderly room against the Petitioner were carried out with a predetermined outcome.
- c. Whether the Petitioner was entitled to be heard on appeal as a constitutional right.
- d. Whether the Petitioner was denied a chance to be heard on appeal.
- e. Whether the investigation, prosecution, hearing and conviction of the Petitioner by the same solo person violates the right to a fair hearing and administrative action.
- f. Whether the appeal was heard and the Petitioner's failure to be afforded a choice to be heard on appeal violated his right to be heard.
- g. If the acts of the Respondent to sit and try an offence of bribery and extortion was beyond their scope.

The Petitioner submitted that the Respondent was in breach of the provisions of Article 47 and 50(2) of the Constitution by allowing the presiding officer to investigate the offence prosecute the charges, preside over the case and convict him. He denied that he was ever afforded a chance to be heard by a lawful, reasonable and procedurally fair tribunal. The case of **Emmanuel Nyiro Chai v National Police Commission & 3 Others [2017] eKLR** was cited. In that case Nduma Nderi J. stated that *it is now accepted that any decision made in violation of natural justice is a nullity and ought to be quashed. In the instant case, the petitioner was dismissed by the Commandant of the General Service Unit on the recommendation of impugned orderly room proceedings.* The Petitioner argued that the cardinal principle of law that no man should be a judge in his own cause was violated in during the orderly room proceedings as the investigating officer acted as the accuser, the investigator, the prosecutor and the judge in the same cause. He submitted that there was no way the officer could have failed or questioned his findings and that the Petitioner's die was cast the moment he appeared before the investigating officer to face the charges leveled against him. He urged the court to be guided by the finding in the Nyiro Chai case above where Nderi J. held that the petitioner had no chance as the stakes were skewed against him which offended the rules of natural justice. The Petitioner submitted that the decision made was tainted for lack of impartiality as the likelihood of bias was very high in the circumstances. The case of **King Woolen Mills Ltd formerly known as Manchester Outfitters Suiting Division Ltd & Another v Standard Chartered Financial Services Ltd & 2 Others [1995] eKLR** was cited on the propositions on the likelihood of bias and the court was urged to find the presiding officer who was the investigator and the judge in the orderly room proceedings was biased and his decision to find the Petitioner guilty should not be allowed to stand but should be set aside. Orderly room proceedings were of quasi-judicial nature and the principles of fair trial as enshrined in Article 47 of the Constitution ought to have been adhered to. The Petitioner relied on the case of **Ernst & Young LLP v Capital Markets Authority & Another [2017] eKLR** where Mativo J. held

The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

.....

Natural justice has been described as "fair play in action the principles and procedures which in any particular situation or set of circumstances are right and just and fair."<sup>[38]</sup> Its rules have been traditionally divided into two parts: *Audi alteram partem*– the duty to give persons affected by a decision a reasonable opportunity to present their case. *Nemo judex in causa sua debet esse* – the duty to reach a decision untainted by bias. "Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it."

The Petitioner urged the court to be guided by the above finding and hold that the orderly room proceedings were not conducted procedurally and violated Article 47(1) and 50 of the Constitution. The Petitioner urged the court to be guided by case of **Joseph Mwendwa Mbuko v Provincial Police Officer, Central Police & 2 Others [2013] eKLR**. The Petitioner submitted that he had a right to be heard on his appeal. He relied on the case of **Charles Kiranga Anumba v National Police Service Commission & Another [2015] eKLR** where the court held that the delay in communicating the outcome of the appeal was inordinate such that it was a complete negation of the provisions of Article 47 of the Constitution that provided for an expeditious, efficient, lawful and reasonable and procedurally fair administrative action.

4. The Petitioner sought redress through the petition relating to his dismissal. He cited various decisions in his support. The Petitioner was dismissed in July 2010 after orderly room proceedings. He pursued the matter of his appeal after he received communication of his dismissal. He did not file a suit for redress upon his realisation that he had been dismissed. His appeal against the Respondent's dismissal from service on 29<sup>th</sup> July and 28<sup>th</sup> July 2010 respectively. A reminder was sent on January 2013. It is clear from the said letter that the appeals were made the dismissal on 26<sup>th</sup> July 2010. He acknowledges in his joint appeal that the dismissal was communicated to him on 26<sup>th</sup> July 2010. The petition was filed on 3<sup>rd</sup> September 2017 over 7 years after the dismissal. In my view, the delay was unconscionable.

5. In the case of **Maurice Adongo Anyango v Kenyatta International Convention Centre [2018] eKLR**, the Court of Appeal (Waki, Makhandia & Musinga JJ.A), the Court of Appeal held as follows citing the case of **Sanghani** "certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining.....Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance **Speaker of the National Assembly v Karume** (supra). The appellant's claim was based on a contract of employment. A specialized court exists to deal with employment matters...

6. The wise words of the Court of Appeal hold here. The Claimant has had knowledge of the foundation for a claim since July 2010. Why he never moved court before 2017 is beyond me. He should have filed the suit in time instead of attempting to sneak in a claim under the Petition. In my view, the petition lacks merit and I dismiss but make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of May 2018**

**Nzioki wa Makau**

**JUDGE**