



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 49 OF 2017**

(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> June, 2018)

**DR. KENNEDY ODHIAMBO OWINO.....PETITIONER**

**AND**

**NATIONAL POLICE**

**SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR-GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**DEPUTY INSPECTOR-GENERAL (AP)...3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. The Petition before Court is one dated 31<sup>st</sup> May 2017. Later on orders for amending the Petition were allowed and an Amended Petition was filed on 10<sup>th</sup> October 2017 which was brought Under Rules 3, 4(1), 8, 10, 11, 13, 14 and 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking prayers:-

**1. A DECLARATION that, by purporting to terminate the services of Petitioner, the 2nd and 3rd Respondents acted both illegally and unconstitutionally since termination of service of members of the National Police Service is a function, which is exclusively within the domain and mandate of the 1st Respondent.**

**2. A DECLARATION that by summarily dismissing the Petitioner from his employment without any notice of wrongdoing and failing to accord him reasonable opportunity to be heard, the Respondents, jointly and severally, infringed the Petitioner's right to fair hearing and due process, the cardinal Rules of Natural Justice.**

**3. A DECLARATION that the Respondents' actions including the illegal termination of the Petitioner from service (which termination has since been declared by the 1st Respondent to have been illegal, anyway), the 2nd and 3rd Respondents' refusal to communicate to the Petitioner the outcome of his appeal, and the refusal by the 2nd and 3rd Respondents to effect the 1st Respondent's directives to reinstate the Petitioner into service from the 1st Respondent, severally and collectively constitute unfair labour practices by the Respondents and consequently, the actions therefore infringe upon the express provisions of Article 41(1) and (2) (b) of the Constitution of Kenya 2010.**

**4. A DECLARATION that the Respondents, severally and collectively, breached the Petitioner's right to livelihood as protected by Article 26(1) of the Constitution of Kenya, 2010.**

**5. A DECLARATION that the Respondents' actions of sending the Petitioner away from the Administration Police Training College at 7.30pm without notice whatsoever, subjected the Petitioner to inhuman and degrading treatment which undermined his right to respect and dignity as protected under Article 28 of the Constitution of Kenya 2010.**

**6. A DECLARATION that the 2nd and 3rd Respondents' refusal to reinstate the Petitioner back into the service of the National Police Service is discriminatory given that it is was only him who was singled out of all the other police officers together with whom the Petitioner's appeal had been determined. All the other officers with whom their appeals were determined with that of**

*the Petitioner's, have formally been contacted and they have all been reinstated back into service of the National Police Service.*

**7. A DECLARATION that the human resources function for members of the National Police Service is constitutionally and statutorily vested in the 1st Respondent.**

**8. A DECLARATION that the 2nd and 3rd Respondents, whether severally or collectively, lack any constitutional and lawful authority to dismiss any member of the National Police Service from service because such a function is within the exclusive mandate of the 1st Respondent.**

**9. A DECLARATION that the 2nd and 3rd Respondents' refusal to formally communicate to the Petitioner the outcome of the Petitioner's appeal is a breach of the Petitioner's right to access of information held by the state, which information he needed in order to enable him protect his fundamental rights and freedoms under the Constitution, hence such refusal clearly breaches the provisions of Article 35(1) of the Constitution of Kenya 2010.**

**10. A DECLARATION that the 2nd and 3rd Respondents' refusal to formally communicate to the Petitioner the outcome of his appeal to date, also constitutes a breach, violation and/or infraction of the Petitioner's right to an expeditious, efficient, reasonable and procedurally fair administrative action as guaranteed by Article 47(1) of the Constitution of Kenya, 2010.**

**11. A DECLARATION that by purporting to issue the letter dated 19th July 2017 (Ref. No.: NPSC/1/28/1/Vol. II (1)), the Secretary/CEO of the 1st Respondent not only acted ultra vires, but also unconstitutionally and illegally hence making the said letter to have been of no legal consequence and effect.**

**12. A DECLARATION that any action(s) taken and/ or decision(s) made pursuant to the illegal letter dated 19th July 2017 (Ref. No.: NPSC/1/28/1/Vol. II (1)), are both unconstitutional and illegal hence the same be declared to have been void ab initio.**

**13. AN ORDER OF CERTIORARI be issued so as to remove into this Honourable Court, for the purpose of quashing, the offending letter purportedly authored by the Secretary/CEO of the 1st Respondent and dated 19th July 2017 (Ref. No.: NPSC/1/28/1/Vol. II (1)).**

**14. A MANDATORY ORDER directing the 2nd and 3rd Respondents to immediately and unconditionally release to the Petitioner the communication from the 1st Respondent regarding the outcome of his appeal.**

**15. A MANDATORY ORDER directing the 2nd and 3rd Respondents to reinstate the Petitioner back into the service of the Administration Police of the National Police Service and promote him to the rank of Inspector, a promotion to which he was entitled to immediately upon his graduation from completion of the Cadets' Promotion Course.**

**16. A MANDATORY ORDER directing the 1st, 2nd and 3rd Respondents to pay the Petitioner, in full, special damages arising from all the outstanding emoluments and benefits that he would have otherwise earned from the time he was illegally terminated i.e. September 2014 until such time as to when he will be reinstated back into service. As at the end of May 2017, the amount outstanding, excluding the amounts accrued from annual increase together with salary increases due to promotion, is was equivalent to Kenya Shillings two million eighty three thousand ninety six (Kshs 2,083,072.00/=) only.**

**17. A MANDATORY ORDER directing the Respondents to pay the Petitioner a reasonable amount in form of general damages as recompense for the losses and inconveniences suffered from the clearly unconstitutional and illegal acts committed by the Respondents collectively.**

2. An order that Judgement be entered for the Petitioner as follows:

**a. General damages against the Respondents for losses and inconveniences suffered by the Petitioner.**

**b. specific damages to be calculated at rate of the Petitioner's pay as at September 2014, when he was upon his illegal dismissal, including all attendant benefits, pension, medical cover, insurance, housing and utilities, from September 2014 until the time of his reinstatement back into service. As at the end of May 2017, the amount outstanding is equivalent to Kenya Shillings two million, eighty three thousand ninety six (Kshs 2,083,072.00/=) only.**

**c. Interests on (a) and (b) above at court rates until full payment;**

**d. Costs consequent upon this Petition be borne by the Respondents, in any event, on indemnity basis;**

**e. The Honourable Court do make any such other or further Orders as it may deem fair, just and expedient in the circumstances in enforcing violation of fundamental rights of the Petitioner.**

3. The Petition is supported by the Affidavit of one Kennedy Odhiambo Owino the Petitioner wherein he deponed that he was selected to join the Administration Police Service and thereafter the Recruits' Training Course between 9<sup>th</sup> May 2011 and 31<sup>st</sup> August 2012 at the Administration Police Training College (APTC) in Embakasi where he graduated.

4. After his successful completion of the Recruits' Training Course he was appointed Administration Police Graduate Constable (APC) under service number 2011340515 and an appointment letter dated 5<sup>th</sup> July 2013 issued to him. He was earning a gross salary of Kshs. 55,250.00.

5. He avers that he was later nominated to attend a 4 months cadet (Inspector) promotion Course which he successfully completed and was scheduled to graduate (Pass-out) on 19<sup>th</sup> September 2014 but was stopped through a letter dated 15<sup>th</sup> September 2014 authored by the Deputy Inspector general (APS) which summarily dismissed him from the Administration Police Service.

6. He avers that at the time of his termination, his gross salary was 65,096.00. He states that he appealed to the 1<sup>st</sup> Respondent through his immediate superior the Commanding Officer for Planning, Training and Research (AP) through a letter dated 22<sup>nd</sup> September 2014 but the prosecution of the appeal was delayed. He therefore had to lodge a complaint with the Commission on Administrative Justice (Office of the Ombudsman) which wrote a letter to the 1<sup>st</sup> respondent but the 1<sup>st</sup> Respondent failed to respond to the letter and the CAJ wrote another letter which the 1<sup>st</sup> Respondent replied to and stated that the appeal was under process.

7. He further avers that the 1<sup>st</sup> Respondent Board had disposed of his appeal and the decision communicated to the National Police Service refusing to reinstate him. The decision to refuse to reinstate the Petitioner by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent is an action that is not only unconstitutional but is also without any legal basis, the unlawful termination of his services has irreparably injured his reputation and standing among his family members, peers and society in general. He continues to say that the termination has also hurt his financial standing to the extent that he had to withdraw his children from Utawala academy due to inability to afford school fees.

### Submissions

8. The Petitioner filed his submissions where he submits that the National Police Service, being an agent of the State, was under the obligation to communicate that decision to the Petitioner without any unreasonable delay and act on it in line with the directives of the National Police Service Commission.

9. Section 10(1) (f) of the National Police Service Commission Act obligates the Commission to ensure that the National Police Service discharges its mandate in an efficient and effective manner and the decision by the National Police Service to refuse to furnish the Petitioner with the decision of the outcome of his appeal, as determined by the National Police Service Commission, has adversely affected his fundamental rights and, as such, the National Police Service ought to have furnished him with written reasons for the refusal.

10. He further states that the National Police Service lack the power and authority to stop any communication between the National Police Service Commission and an individual member of the National Police Service, and/or vice versa.

11. The Petitioner further submitted that the decision by the National Police Service to intercept the communication relating to the outcome of the Petitioner's appeal was without constitutional and lawful basis. As a consequence, he urges the court to pronounce itself firmly upon the matter by declaring the impugned action of the National Police Service as being unlawful.

12. He further submits that the actions of the Respondents, individually and collectively, including his termination from employment and subsequent refusal to reinstate him despite the success of his appeal, constitute flagrant violations to his constitutional and legal rights as has been submitted under Article 23(3), as read together with Articles 162(1)-(3) and 165(5) of the Constitution of Kenya and that the reliefs sought by the Petitioner are limited to those that can rightfully be granted by this Court in exercise of its Constitutional and Human Rights enforcement jurisdiction under Article 23(3) as read together with Articles 162(1), (3) and 165(5), of the Constitution of Kenya. Therefore, he prays the Court to grant any remedy it deems appropriate including an award of damages as sought in the Petition.

13. The Respondents filed their submissions where they submitted that the Commission is mandated under Article 246(3) of the Constitution of Kenya 2010 to:

**a) .”recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;**

**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.”**

14. They states that it is the Commission's contention that the Petitioner herein was dismissed by the National Police Service and not the National Police Service Commission as required by the law, as Article 246(3) of the Constitution of Kenya 2010 gives the sole mandate of dismissing an officer to the National Police Service Commission and not the Service. The Commission further contends that the issues subject of this suit was never brought to its attention as clearly contemplated by the law.

15. The Commission was not aware of the dismissal of the Petitioner and it was only seized of these facts upon the Petitioner lodging an appeal against the dismissal. Section 89(5) of the National Police Service Act 2011 as the law gives the Commission the mandate to hear an officer's appeal where an officer feels or has been aggrieved by a decision, Section 89 of the National Police Service Act 2011.

16. They also state that from the foregoing Act it is clearly stipulated that the Service shall forward any punishment to the Commission for review and confirmation. Further, all disciplinary proceedings must be approved by the Commission. The sanctions under Section 89(1) (e) (f) being reduction in rank and dismissal only take effect after approval and confirmation by the Commission. This is replicated in regulation 13 of National Police Service Commission (Discipline) Regulations 2015.

17. He further stated that this procedure was clearly not followed in this particular suit as evidenced by the proceedings. It is the Commission's submission that it found that the Service acted ultra vires in dismissing the Petitioner without its approval hence the decision

to reinstate him until procedural disciplinary process was conducted. The violation of the law by the Service in dismissing the petitioner was therefore incurable by any other administrative action except rescinding of the decision. Hence it is not clear why despite clear directions from the Commission as evidenced by the several letters written to it as annexed to the replying affidavit sworn by the Commission's Chairperson, the Service opted not to inform the petitioner of the outcome of his appeal and to implement the resolutions.

18. They aver that the commission's CEO also wrote to the Service on the 21st September 2017 reminding it to communicate to the petitioner procedurally on the outcome of the appeal and to effect the resolution of the Board to allow the settling of the matter. This has not been complied with either and in view of the foregoing, it is evident that the Commission lawfully discharged its mandate in determining the Petitioner's appeal and subsequently gave directions which have not been complied with.

19. They aver that the commission should thus not be sanctioned for the omissions of third parties who have deliberately without justification opted to breach the law and procedure, they humbly pray that the court do find that it lawfully discharged its mandate and did not in any manner violate the rights of the petitioner and as such the claim as against it should be dismissed.

20. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposed the Petition. They filed their replying affidavit deponed to by one Stephen Gitari on 22/8/2017. Stephen Gitari deponed that he is a Legal Officer in the Administration Police Service and was therefore conversant with the facts giving rule to the current Petition and had authority to swear the affidavit on behalf of the Respondents.

21. He stated the chronology of events leading to this case and stated that the Petitioner was appointed to the Administration Police on 9.5.2014 and was dismissed on 15/9/2014 while undergoing a cadets' course at the Administration Police Training College on 26.8.2014 for disobeying lawful orders by failing to appear before Orderly Room proceedings contrary to Section 88(2) as read together with part 1(g) of the National Police Service Act.

22. He deponed that the Petitioner also willfully disobeyed lawful orders by failing to report for Range, Field Craft and Technical Exercise at Kedong Field Training Camp.

23. The Respondents aver that the dismissal was as a result of orderly room proceedings conducted against him on 27.8.2014 where he was charged with 4 offences against discipline pursuant to Section 88(2) of 8<sup>th</sup> Schedule of National Police Service Act. The charge sheet was attached as Appendix SMG 3.

24. An earlier decision had been made to reinstate the Petitioner vide a decision made on 19.7.2016 (SMG 5) but that this was rescinded on 19.7.2017 by the National Police Service Commission.

25. They submit that the Petitioner never completed his course and was dismissed while the course was on going.

26. I have considered the Petitioner's averments and submissions and responses filed herein by the Respondents plus their submissions. I note from the record that the Petitioner was appointed to the service on 9.5.2011 vide a letter dated 5.7.2013. He was to remain on probation for 1 year from that date.

27. Vide a letter dated 15.9.2014 written by the National Police Service and signed by one P. Nduruma – (DIG) Deputy Inspector General Administration Police Service, he was dismissed from the Administration Police Service on various grounds.

28. The Petitioner appealed this decision on 22/9/2014 to the Chairman of the National Police Service Commission but was never informed of the outcome of his appeal.

29. The main contention by the Petitioner is that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent lacks any constitutional and lawful authority to dismiss any member of the National Police Service from service as this function is exclusively the mandate of the 1<sup>st</sup> Respondent. In essence the Petitioner contends that whatever dismissal was done was done without authority and is therefore null and void.

30. Article 246(1) of the Constitution of Kenya 2010 establishes the National Police Service Commission. The functions of the Commission are specified under Article 246(3) as follows:-

***a) Recruit and appoint persons to hold or act in offices in the service, confirm appointments and determine promotions and transfers within the National Police Service.***

***b) Observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service (Emphasis is mine).***

***c) Perform any other functions prescribed by National Regulation".***

31. Thus it is the 1<sup>st</sup> Respondent who has this power to perform the functions of dismissing any person from the National Police Service.

32. The National Police Service Commission Act No. 30 of 2011 also provides functions of the Commission which include the following:-

***a) .....***

b) .....

c) *Developing fair and clear disciplinary procedures in accordance with Article 47 of the Constitution.*

d) *Exercising disciplinary control over persons holding or acting in office of the service.*

e) .....

f) *Ensuring the service is efficient and effective.*

g) *Hearing and determining appeals from members of the service.*

h) .....”

33. My understanding of both the Constitution and the National Police Service Act is that only the 1<sup>st</sup> Respondent has exclusive jurisdiction to dismiss members of the National Police Service.

34. It is apparent in this case that the letter dismissing the Petitioner emanated from an officer of the National Police Service and not the 1<sup>st</sup> Respondent. This letter indeed came from a source without authority.

35. The Petitioner appealed this decision to the National Police Service Commission and this is in line with the provisions of the National Police Service Commission Act that they should consider appeals from the members of the National Police Service.

36. The 1<sup>st</sup> Respondent where as they have admitted in this Petition that the National Police Service acted ultra vires their mandate, they failed to consider the appeal filed by the Petitioner and have never communicated to the Petitioner the outcome of the appeal of at all.

37. It is my finding that the action of the Respondents was unlawful, unfair and ultra vires. The act of dismissing the Petitioner by persons not clothed with the power makes the entire decision annuity.

38. In the circumstances, I find the Petitioner has established his case and I make the following finding:-

*1. A Declaration that by purporting to terminate the services of the Petitioner by the National Police Service was illegal and unconstitutional since termination of service of members of the National Police Service is a function which is exclusively within the domain of the 1<sup>st</sup> Respondent.*

*2. A Declaration that the 1<sup>st</sup> Respondent failed to discharge its mandate by failing to consider an appeal of the Petitioner and submit the results thereof infringing upon his right to fair labour practices and a right to access information as provided for under Article 41, 47 and 351(1) of the Constitution.*

*3. An order directing the Respondents to pay the Petitioner all his withheld salaries and benefits received from the time of his illegal dismissal from September 2014 to date.*

*4. The Respondent to pay the Petitioner damages equivalent to 3 million being damages suffered by the Petitioner upon his loans being recalled by the banks upon his dismissal and subsequent listing on the CRB.*

*5. The Respondent to pay Petitioner damages equivalent to 12 months' salary for unlawful termination = 12 x 65,096=781,152/=*

*Total damages = 3,781,152/=*

*6. The Petitioner is also entitled to any pension earned to date.*

*7. Costs of this Petition be borne by the Respondents.*

Dated and delivered in open Court this 11<sup>th</sup> day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioner – Absent

OduKenya holding brief for Akuno for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

1<sup>st</sup> Respondent – Absent