



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 21 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th July, 2018)

ERIC SANGURA NASOKO.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION.....4TH RESPONDENT

H. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

1. The Petitioner filed suit on 16th March 2017 through the firm of C.M Advocates seeking damages for violation of the Constitution and Fundamental rights and freedoms.
2. He avers that on or about 12th January 1996 he was appointed as a Police Constable to the National Police Force, (as it then was), with effect from 31st August 1996 subject to the Police Act, 1970 now repealed. At all times of employment, he served the National Police Service in the said capacity diligently and ardently with an excellent disciplinary record and track under the terms of his appointment.
3. He states that on or about 12th August 2005, he was arrested by the 3rd and 4th respondent and charged in **Nairobi Milimani, Chief Magistrate Court Anti-Corruption Case No. 31 of 2005 Republic Vs Eric Sangura Nasoko** for allegedly soliciting a bribe in the course of duty within Pangani Area in Nairobi County contrary to the Ant-corruption & Economic crimes Act No. 3 of 2003.
4. He further avers that he was unrepresented in the case as he could not afford legal services due to the sudden freeze on his earning and on or about 4th June 2009, the 2nd Respondent immediately dismissed him from the National Police Service.
5. He avers that he was never subjected to any disciplinary process within the service whether before the interdiction or after the said dismissal.
6. He avers that the 2nd Respondent did not conduct independent investigations and or disciplinary procedures on the matter at all and on or about 2014, he applied and succeeded to lodge an appeal out of time in Nairobi against the judgment of the Magistrates Court in Nairobi, Criminal Case No.31/2005, which by a ruling dated 16th March 2016, the High Court rendered a decision on his Appeal where in the Ruling, the Honourable Court quashed the Subordinate Courts conviction and set aside the sentence thereof against him and ordered a refund of the fine paid consequent to the sentence by the Magistrate Court, ordered a retrial of the case, released him on bond of Kshs.50,000 and directed him to present himself before the 2nd and 4th Respondents for preparation of charges and fresh charge on or about 23rd March 2016.
7. He avers that despite several subsequent inquiries, the 4th Respondent has to date failed, ignored and or neglected to prepare fresh charges as ordered by Court and or advise him of its intention not to proceed with the charge in order to enable him seek reinstatement to employment with the 1st and 2nd Respondents.

- 8.** He avers that on or about 18th May 2016 and on diverse dates in June 2016, the 4th Respondent officers orally advised the Petitioner in the course of the latter's follow up on the matter that the case had been referred to the 3rd Respondent for directions pursuant to the latter's powers under Article 157(6) of the Constitution which despite formal inquiries by the Petitioner to the 3rd Respondent on the case on diverse dates between March 2016 to date.
- 9.** He avers that the 3rd Respondent has to date failed to exercise its powers under the Constitution to charge and or advise the Petitioner otherwise to enable the Petitioner pursue his employment with the 1st and 2nd Respondent.
- 10.** The 3rd and 4th Respondents unresponsive conduct has condemned and continues to condemn the Petitioner to indefinite anxiety for over a year now; during which time he has failed to institute fresh charges and or otherwise give written reasons of no intention to charge in compliance with the ruling of the Court.
- 11.** He further avers that even after being served with the ruling/ Order in Nairobi, HC Criminal Case No. 103/14, the 1st and 2nd Respondents have refused, failed and or ignored to reinstate him to interdiction status pending the outcome of the retrial and or a decision not to charge by the 3rd and 4th Respondents and on or about 15th June 2016.
- 12.** The 1st Respondent contended that it cannot consider his case for Appeal until the 4th Respondent has rendered a decision not to proceed with the case.
- 13.** He contends that he was an officer of the rank of a Police Constable with benefits including and not limited to possibility of progressive promotions in the service, salary increments and benefits, allowances, pension at retirement age of 65 years that are attendant to his appointment and service as determined by the 1st and 2nd Respondent's Human Resource Policy.
- 14.** He states that the Respondents have condemned him to endless psychological torture by indefinitely delaying to communicate and advise on the matter with finality thus infringing on his right of access to information that they hold on whether they'll charge him or not; information which is required for the exercise or protection of his rights and fundamental freedoms as enshrined under Article 35 of the Constitution which led the legal process to set aside the conviction of the trial Court for over 8 years, between 2009 and 2016, making the Petitioner to be inhibited from lodging an appeal within the time prescribed by the dismissal letter.
- 15.** He states that the continued termination from the force without any benefits based on a finding of the Court that has already been set aside is unfair and unlawful. The termination has subjected him to untold suffering, disrepute, ridicule and diminished his employability for over 6 years due to the manner and alleged reasons of disengagement from the Service.
- 16.** The 2nd respondent filed their reply to the petition where they aver that the petition is made in bad faith and has no legal basis at all and is time barred hence should be dismissed. They state that it is clear from the ruling that his appeal partially succeeded and he was ordered to appear at Kilimani Police Station for preparation of fresh charges. It is hence their case that his criminal case is still Alive and pending and has not been fully determined therefore it will not be prudent to reinstate or otherwise consider the application by the petitioner when a retrial was ordered, a matter that is still pending before the Director of Public Prosecution and other authorities which issue of reinstatement can only be substantively determined upon the conclusion of the matter in question.
- 17.** They state that the petitioner will suffer no prejudice if the status quo is to be maintained until the matter is finally put to rest and if the petitioner was to be reinstated as applied for and then convicted upon a retrial, the service will suffer irreversible financial implications.
- 18.** The 6th Respondent filed their grounds for opposition where they aver that this Honourable Court lacks Jurisdiction to hear and determine the matters raised and that the application and petition herein are grossly incompetent, defective and an abuse of the court process as the petitioner is merely attempting to lodge an appeal through the back-door having failed to exercise that right.
- 19.** The 4th Respondent filed their replying affidavit where they aver that the Petitioner's prosecution had a factual foundation as evidenced by the fact that he was placed on his defence by the trial Court and was ultimately convicted by the said Court.
- 20.** They also state that the decision of the trial court was not reversed on merit by the High Court as it was not in a position to determine the case on merit due to the missing trial Court file and hence ordered a retrial in the interests of justice, making the Petition frivolous and vexatious hence not disclosing any cause of action against the 4th Respondent.
- 21.** The petitioner filed his further affidavit where he avers that the 4th Respondent affidavit clearly confirms that the 1st and 2nd Respondent's impugned decisions to interdict and terminate his employment was exclusively based and arose from the allegations and malicious criminal charges by the 3rd and 4th Respondents.
- 22.** He states that this Court has jurisdiction to determine employment matters and or incidental matters relating to employment contract pursuant to Section 12 of the Employment & Labour Relations Court Act and Article 162(2) a of the Constitution hence the claims against the 4th Respondent are properly in this Court.
- 23.** He further avers that the allegations by the 4th Respondent that he solicited or took a bribe as purported in the replying affidavit consequently leading to his loss of employment are malicious causing him to loss his pension benefits, salary earnings and related benefits hence the Petition discloses violations and threat of further violations of his fundamental rights and freedoms by the 4th Respondent, he therefore prays that the Petition be allowed.

24. The 1st Respondent filed their Grounds of Opposition where they aver that it is not their mandate to investigate and or prosecute persons in Court. They also state that they have not in any way infringed on or denied the Petitioner his fundamental rights and freedoms either as claimed or at all as there is no material evidence whatsoever placed before the Court to demonstrate any violation of the Applicant's rights.

25. The 3rd Respondent filed their Grounds of Opposition where they aver that the jurisdiction of this Court is limited to employment dispute of claim and not the conduct of criminal prosecutions. They also deny that they are the Petitioner's employer and that there is no evidence indicative that their input was sought with regard to the Petitioner's employment, interdiction or dismissal as the issue surrounding his employment can only be addressed by his employer and the 5th Respondent. They also aver that the Court has no power to grant relief sought by the Petitioner against them hence pray that the petition be dismissed with cost.

26. The Petitioner filed his further affidavit where he avers that the 2nd and 5th Respondent's affidavit is an afterthought, vexations and discloses no reasonable explanation in law or fact why they have not caused and/or reinstated his employment since 16th March 2016 when the High Court set aside the judgment and sentence of the chief Magistrates Anticorruption Case No, 31/2005 as required by the law at the time or presently hence failure by the Respondent to take the relevant steps to ensure his clearance or reinstatement for over 2 years despite having known the clear provisions of law is inexcusable actuated by improper motives, unreasonable and ultra vires the law.

27. He further avers that the Respondents are in breach of his legitimate expectation to public officers to act fairly, justly and promptly on his matter as required by statute and the constitution. He states that the dismissal and interdiction letters in his employment record caused by the Respondents have greatly prejudiced his efforts to get any gainful employment hence prays that the petition be allowed.

Submissions

28. The Petitioner filed his submissions where he submits that the Respondents maliciously, discriminatively, unfairly and unlawfully in breach of statute and the Constitution flaunted his rights to employment as the conviction of the Anti-corruption Court against him was overturned on 16th March 2016 hence the Petition was in law entitled to be reinstated to the National Police Service with effect from the said date pending the fresh charges and retrial if any, would be preferred.

29. He avers that in failing to charge him afresh and or failing to issue an undertaking to the 1st to 3rd Respondent, the 4th Respondent breached Section 25 and 63(2) of the Anti-Corruption and Economic Crimes Act (ACECA) and the 1st, 2nd, 4th and 5th Respondents unlawfully denied him his earnings and removed/kept him away from employment since 16th March 2016 without any lawful excuse or ground.

30. He further submits that the 1st Respondent is in breach of section 10(h) and 10(4) (f) of the Commission (Disciplinary) Regulations 2015 and Article 246 of the Constitution. It is trite in law that the 1st and 3rd Respondents filed Grounds of Opposition in this matter hence the facts set out in his affidavits are true and not disputed.

31. The 2nd Respondent is obligated under the law to review the 2nd Respondent's decision to dismiss him from National Police Service. No reasons have been preferred by the Respondents for failure to reinstate him to employment, failure to charge or retry him within reasonable time and pay him all his benefits which fact raises reasonable presumption of discrimination, selective application of law, bias, malice, lack of accountability, unprofessionalism, inefficiency and disrepute to public office making his dismissal unlawful and illegal.

32. He submits that he satisfies the legal threshold set in the Court of Appeal decision in **Anarita Karimi Njeru (Supra)** on the issue of jurisdiction of this Court over disputes or violation of fundamental rights ancillary to and incidental to employment contract, he avers that this is settled in case of **Okiya Omtatah Okoiti Vs President of Kenya & 9 others [2016] Eklr.**

33. He further avers that the 1st and 2nd Respondents are bound by the decision of the High Court of 16th March 2016 and cannot subject him to an internal disciplinary process over the same set of facts having chosen to rely on the criminal case to dismiss him. He relied on the case of **Kenya Petroleum workers Union Vs Kenya Pipeline Company Limited [2014] eKLR.**

34. He therefore prays for reinstatement without loss of benefits or earnings and payment of damages equal to the lost earnings since 12th August 2005.

35. The 1st respondent filed their submissions where they submit that it derives its mandate from the Constitution of Kenya 2010 and its functions are further listed under Section 10 of the National Police Service Commission meaning that in the disciplinary issues, the commission only reviews, ratifies or annuls decisions of the service on any particular officer since the disciplinary process as per the National Police Service Commission (Disciplinary Regulations) 2015 commences at the service.

36. They aver that the Petition has not demonstrated how the commission has failed to discharge its mandate as it is yet to receive any written communication from the 3rd Respondent indicating that it shall not be taking the Petitioner through a retrial as ordered by the Appellate Court to enable it take appropriate administrative action since the Petitioner's case is yet to be conclusively determined to determine his guilt or innocence.

37. They further aver that they have explicitly demonstrated its constitutional mandate relating to the operations of the police service which mandate as illustrated from the foregoing does not include investigation, arrest or prosecution.

38. They relied on the case of **Republic Vs National Police Service Commission & 3 others Ex-Parte: David Kinuthia Kariuki [2017] Eklr.** Hence submit that the suit against them is misconceived, bad in law, vexatious and an abuse of the Court process and therefore it is

only just that the claim as against the 1st Respondent be dismissed.

39. The 2nd and 5th Respondents filed their submissions where they submit that the law applicable to this suit is Section 90 Laws of Kenya, which provides that a suit based on employment contract must be filed within 3 years and criminal charges are not bar to an employee alleging unfair dismissal from his employment from instituting suit against the employer before this Court. While the criminal trial before the Courts was ongoing, the Claimant was at liberty to institute suit against the Respondents and their employer for any unfair labour practices against them. That this Court is therefore not clothed with the requisite jurisdiction to extend time to file the suit out time hence submit that the criminal charges did not bar the petitioner from moving to civil Court within 3 years from the date the cause of action arose to enable him protect his employment rights. They relied on the case of **Lt Col. Peter Ngari Kagume & others Vs The Attorney General, H. C. Petition No. 128 of 2006.**

40. They also submit that the instant Petition is statute barred and this Honourable Court has no jurisdiction to entertain the matter at all and moreover, the matter is prematurely before Court as the due processes are still pending as directed by this Court to the 3rd and 4th Respondent hence pray that the instant Petition be dismissed with costs to the 2nd and 5th Respondents.

41. The 4th Respondent filed their submissions where they submit that the Petitioner was not on suspension neither was he on interdicted as alleged but that he had actually been terminated from employment of 1st Respondent by the time the appeal was determined.

42. They state that the Petitioner has failed to prove his allegations of unfair treatment and discrimination therefore this allegation must therefore be struck out. The alleged incidences of bias, discrimination and violation of constitutional rights have not been proved with clarity and precision as is demanded by the holding of the court in the case of **Anarita Karimi Njeru v Republic Miscellaneous Criminal Application No. 4 of 1979 [1979] Eklr.**

43. They aver that the petitioner does not fulfil the threshold for reinstatement as provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act, No. 20 of 2011, Section 90 of the Employment Act, 2007 is couched in mandatory terms and limits the period within which a suit under the Act can be filed against an employer by the employee to 3 years from the date the cause of action arose, therefor this Court should find that the Petitioner's suit is time barred as the same was filed on 17/3/2017 more than 8 years from the date The cause of action arose.

44. They relied on the case of **Attorney General & another Vs Andrew Maina Githinji & another [2016] eKLR.** They also submit that the dispute filed herein is an employment dispute/claim which this Court does not have the requisite jurisdiction to determine this issue and would be acting *Ultra Vires* its jurisdiction should it delve into that realm.

45. They further aver that an order of prohibition prohibiting the 3rd and 4th Respondent from instituting fresh charges against the Petitioner in relation to the facts leading to Anti-corruption case is powerless against a decision which has already been made as such an order is issued serves to prohibit that which is ongoing and not that which has already been done, therefore granting orders sought by the applicant will in essence interfere with the legal mandate of the Respondent, a position which will serve to hurt public interest thus the Petition is frivolous and vexatious and does not disclose any cause of action against the 4th Respondent. They therefore urge the Court to dismiss this Petition with cost to the 4th Respondent.

46. The Petitioner filed his supplementary submissions where he submits that under section 10(4) of the NPSCA, the 1st Respondent has the duty to monitor compliance with observance of due process in disciplining the members within the service which include review and to ratify disciplinary actions taken by the 2nd Respondent.

47. He submits that the Petition is not time barred as Section 3 (2) b of the Employment Act shall not apply to the National Police Service. Notably, he was dismissed from work on 3rd June 2009 pursuant to the dismissal letter. They submit that there is no limitation period for matters of violation of human rights and the constitution. He relied on the case of **Kiluwa Limited & another Vs Commissioner of Lands & 3 Others [2015] eKLR.**

48. He submits that the Petition herein has not been filed with inordinate delay. The dismissal letter of 4th June, 2009 indicated that the dismissal would take effect from 3rd June, 2009. The dismissal letter was issued after the judgment of the Anti-corruption court convicting the Petitioner which was delivered on 3rd June, 2009 and upon conviction, he served a term of 14 days in prison and was released on 15th June 2009 after paying a fine of Kshs. 46,750/=.

49. He had previously paid a sum of Kshs. 10, 000/= to Court as cash bail during trial and between 2009 and 2013. He applied in vain for certified copies of the proceedings and judgment of the Magistrates Court record in **Nbi, Milimani, Criminal Case No. 31/05** but the Court file in the said matter could not be traced which consequently frustrated his efforts to lodge the Appeal in time but in 2014, he successfully applied for leave to appeal out of time which leave was granted and he filed Nairobi, High Court Criminal Appeal No. 103 of 2014, **Eric Sangura Nasoko vs Republic** against the judgment of the Magistrates Court in Nairobi, **Criminal Case No. 31/2005**. He made all the reasonable steps and efforts through the legal mechanisms of the Court to ensure that the subordinate Court avails its record to the High Court for fair, expeditious and just disposal of the dispute but the Subordinate Court never availed the Court file, therefore the allegation that the Petition is statute barred is an afterthought, misconceived and res-judicata. The same was raised and or ought to have been raised in **Nbi, HC. Misc. No. 400/13** and were dismissed by the High Court when it granted leave to file appeal out of time.

50. He avers that this court has discretion in ordering reinstatement in accordance with Section 3(2) of the Employment Act which excludes the application of the Act to the Kenya police. Subsequently, any limitations on the remedies for wrongful termination under Section 49 cannot apply to the Petitioner hence invite the Court to examine the peculiar circumstances of this case. The dismissal of 3rd June, 2009 was based on a conviction which was quashed on 16th March, 2016, his interdict and dismissal from employment was based and informed by ACEC Act. Therefore, there is no time limitation for reinstatement under the ACEC Act making 4th Respondents submissions misconceived

as dismissal was backdated to take effect from the date of conviction. Subsequently, the dismissal became open to challenge from the date the conviction was quashed on appeal. He humbly prays that this court therefore treats 16th March, 2016 as the date the cause of action arose and find his case meritorious of reinstatement to meet the ends of justice. He relied in the case of **Samson Ole Kisirkoi v Maasai Mara University & 3 others [2018] eKLR**.

51. He further avers that to the extent that the 3rd and 4th Respondents have failed to institute fresh charges as was ordered by Lady Justice C.W Ngenje-Macharia in her ruling of 16th March, 2016, his rights continue to be violated as he is in a state of indefinite anxiety not knowing whether and when the Respondents will file charges. It is now well settled by the judicial precedent in **Stanley Munga Githunguri v Republic [1985] eKLR** that preferment of charges against any person after prolonged period of time since the action was committed is vexatious and abuse of court process. It is noteworthy that the alleged complaint was allegedly committed 9th August 2005, which is over 13 years ago.

52. The High Court ordered retrial upon charges being preferred on or before 23rd March 2016. It is over 2 years since the said judgment yet nothing has been done. Article 23(3) of the Constitution provides for orders of judicial review as among the remedies that this court can give upon finding a constitutional violation hence submit that nothing limits the discretion of this court in issuing the remedy and pray that the Petition be granted.

53. I have examined all the averments of both parties. This Petition make interesting legal principles which are the issues for determination:-

1. When this Petition is time barred.

2. Whether the Respondents have acted in breach of the Ethics and Anti-corruption Commission Act Section 62 and 63.

3. Whether the Respondent's action violated the Petitioner's rights under Article 27, 35, 43, 47, 50, 73(1) and 87(4) of the Constitution.

4. What remedies if any this Court can grant in the circumstances.

54. The 1st issue raised herein by the Respondents is on the issue of time. If indeed this Petition is time barred, then this Court has no jurisdiction to handle it.

55. The 2nd and 5th Respondents submitted that this Petition is time barred by virtue of Section 90 of the Employment Act 2007. Section 90 of Employment Act provides as follows:-

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

56. In addressing this issue, the Respondent cited various case law amongst them being Civil Appeal No. 21/2015 (Nyeri) where the learned JJA Waki, Nambuye and Kiage in a majority decision of Waki and Kiage JJA upheld a Preliminary Objection dismissed by the High Court (Ongaya J) and held that Section 90 of Employment Act limits time within which to file a Cause to 3 years from the time the cause of action arose.

57. I would like to distinguish this decision with the current Petition. The Cause in Civil Appeal No. 21/2015 (supra) was a normal employment claim. The current matter before me is a constitutional petition. In his respect I wish to point out that the issue of imitacion in constitutional petition has been decided in several Petitions where Justice Lenaola (as he then was) in **Njuguna Githiru vs Attorney General (2016) eKLR** stated as follows:-

“The question of limitations of time in regard to allegations of breach of fundamental rights have in many cases been raised by the State and that is why in Joan Akinyi Kabasellah and 2 Others vs Attorney General, Petition No 41 of 2014 the Learned Judge observed that:

“Nonetheless, I take into account the views of the court with regard to limitation in respect of claims for enforcement of fundamental rights. In a line of cases such as Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) [2010] eKLR, Otieno Mak’Onyango vs Attorney General and Another, Nairobi HCCC NO 845 of 2003 (unreported), Courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

I note also the sentiments of the court in James Kanyiita vs Attorney General and Another, Nairobi Petition No. 180 of 2011 that: ‘Although there is no limitation period for filling proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under Section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State, in any of its manifestations, should be vexed by an otherwise stale claim.’

In the present case, I am satisfied that no prejudice has been occasioned to the respondent by the filling of the present claim.”
(Emphasis added)

Notwithstanding the above position, I am also alive to the obita dictum in Gerald Gichohi and 9 Others vs Attorney General Petition No. 487 of 2012 where it was stated that:

“It is true that the State today cannot shut its eyes for the failings of the past. It must pay the price for its historical faults. I must also agree with the Petitioners’ submission that the instant petition should be approached in the context of transitional injustices especially now that there is a new dispensation under Constitution 2010. Time is ripe for addressing past injustices that included gross violations of fundamental rights and freedoms as witnessed in the past.”

In agreeing with the above decision, I must also agree with the Petitioner that the dictates of transitional Justice cannot be ignored. Transitional justice is a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses, with Kenya being no exception. This Court in previous decisions has stated that these measures include criminal prosecutions, truth and justice commissions, reparations programs, and various kinds of institutional reforms. Having so said however, it is imperative for a Petitioner to demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance.”

58. From the foregoing authorities and analogy, I do find that the Petition is not time barred. The events complained of occurred in 2016. This is when the Petitioner’s expectation to either be re-tried or acquitted occurred. The High Court in **Criminal Appeal No. 103/14** made a finding ordering a retrial of the Petitioner on or before 23rd March 2016. No charges were preferred against the Petitioner prompting the filing of this Petition on 20th March 2017. In my view the period between March 2016 and March 2017 cannot be said an inordinate period of delay.

59. On the 2nd issue, the Petitioner has alleged violation of the law and in particular Section 62 and 63 of Anti-Corruption and Economic Crimes Act (ACECA). Section 62 and 63 of ACECA states as follows:-

“62 ..A public officer or state office who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge until the conclusion of the case: provided that the case shall be determined within twenty four months.

.....

63.. Suspension etc, if convicted of corruption or economic crime:-

1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.

2) the public officer ceases to be suspended if the conviction is overturned on appeal.

3) The public officer shall be dismissed if:-

a) The time period for appealing against the conviction expires without conviction being appealed or

b) The conviction is upheld on appeal.....”.

60. My understanding of these provisions of the law is that when a public officer is facing a charge under the ACECA, then he stands interdicted or suspended with ½ pay so long as the hearing of the case does not go beyond 24 months.

61. The Petitioner herein was charged before the Anti-corruption Court Case No. 31/2005 on 10.8.2005.

62. The hearing of this case took some time because judgement was rendered on 3-6-2009 when he was convicted by the Subordinate Court. If the 1st Respondent had desired to invoke the provisions of Section 62 of the ACECA by dismissing him after the 24 months period, they would have been justified but they did not.

63. The Petitioner remained on suspension and was only dismissed after he was convicted by the Magistrate’s Court.

64. The dismissal seems to have been spontaneous with the conviction and the 1st Respondent did not give the Petitioner time to exercise his right of appeal.

65. Under Section 63 of ACECA, he would have remained on suspension until the period of the appeal was exhausted. The 1st Respondent were seemly in a hurry and dismissed him even before he could file any appeal and before the period within which an appeal ought to have been filed had lapsed.

66. In either case, the 1st Respondent acted without regard to Section 62 and 63 of the Anti-Corruption and Economic Crimes Act (ACECA) by dismissing the Petitioner without waiting for him to file an appeal or exhaust the time within which an appeal ought to have been preferred.

67. The Petitioner went ahead still and appealed the conviction in High Court Criminal Appeal No. 103/2014. The High Court considered this appeal and allowed it ordering a retrial.

68. Had the 1st Respondent observed the timelines expected they would have exercised their duties properly but having acted in a hasty manner by dismissing the Petitioner, were placed in a catch 22 position by the High Court when a retrial was ordered.

69. In my view, the order of the High Court placed the Petitioner in the same position of facing criminal proceedings in which case he was to revert back to the circumstances envisaged under Section 62 and 63 of Anti-Corruption and Economic Crimes Act (ACECA) 2003.

70. It is therefore my finding that the 1st Respondent acted in breach of the law vis avis Anti-Corruption and Economic Crimes Act (ACECA) by dismissing the Petitioner prematurely and without due regard to the law.

71. On the issue No. 3, the Petitioner has submitted that his rights under the various articles of the Constitution were breached. The Petitioner has averred that after the High Court ordering a retrial, he presented himself to the 2nd and 3rd Respondent as ordered by the Court. He was advised by the 4th Respondent that the matter was still under review and that he would be contacted on further directions and or charge.

72. He has made subsequent physical visits and inquiries with the 4th Respondent on the matter but todate the 4th Respondent has failed, ignored and/or neglected to prepare fresh charges as ordered by the Court or given any advice of its intention not to proceed with the charge in order to enable him seek reinstatement back to his employment with the 1st and 2nd Respondents.

73. Since the Respondents have not given the Petitioner any formal communication on the matter, the Petitioner is right in submitting that his rights under the Constitution have been infringed upon.

74. Article 35 of the Constitution proves as follows:-

1) "Every citizen has the right of access to:

a) information held by the State; and

b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

3) The State shall publish and publicize any important information affecting the nation.

75. The fact that the Respondents have not been able to communicate to the Petitioner any decision they may wish to take against him, his right under Article 35 of the Constitution have been infringed upon.

76. Article 47 of the Constitution states as follows:-

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

2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-

a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b) promote efficient administration

77. Article 50(1) and (2) of the Constitution also state as follows:-

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.

2. Every accused person has the right to a fair trial, which includes the right:

(a) to be presumed innocent until the contrary is proved;

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

(c) to have adequate time and facilities to prepare a defence;

- (d) to a public trial before a court established under this Constitution;*
- (e) to have the trial begin and conclude without unreasonable delay;*
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;*
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- (i) to remain silent, and not to testify during the proceedings;*
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
- (k) to adduce and challenge evidence;*
- (l) to refuse to give self-incriminating evidence;*
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not:*
 - (i) an offence in Kenya; or*
 - (ii) a crime under international law;*
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*

78. It is my finding that the Petitioner's right to fair administration action and fair hearing under Articles 47 and 50 of the Constitution have also been infringed upon by the Respondents.

79. The 1st Respondent had submitted that they were not in existence when the events complaint of occurred. However, the National Police Service Commission after its establishment under Article 246 of the Constitution has powers under Article 246(3)(b) to observe due process, exercise disciplinary control over and remove persons holding or acting in office within the services

80. These duties are the Human Resource functions of the Commission which were previously performed by the Commissioner of Police before the 2010 Constitution came in force. The 1st Respondent cannot therefore run away from this responsibility by fanning ignorance.

81. It is my finding that indeed the rights of the Petitioner to a fair hearing, to informance, to economic well-being under Article 43 of the Constitution continue to be infringed upon and his prayers in that respect are valid.

82. From the foregoing analysis, I find him and award him the following reliefs:-

- 1. A declaration that the Petitioner's rights enshrined in the Bill of Rights have been grossly violated and/or infringed by the Respondents especially Articles set out in this judgement.**
- 2. A declaration that failure by the 3rd and 4th Respondent to charge the Petitioner and ensure a retrial is conducted and concluded or otherwise give reasons not to charge within reasonable time as directed by the Court Nairobi High Court 103/2014 is unlawful, illegal and a violation of the Constitution.**
- 3. An order of Mandamus directing the 1st and 2nd Respondent to reinstate the Petitioner to the Nairobi Police Service with effect from the date of dismissal and that he be place on interdiction terms pending the decision on whether to charge him or not.**
- 4. The 3rd and 4th Respondent are directed to determine whether to charge the Petitioner or not within 30 days and communicate the same to the Petitioner immediately.**
- 5. Costs to be borne by the Respondents.**

Dated and delivered in open Court this 11th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mutoro for Petitioner – Present

Nyoike holding brief for Jemutai for 4th Respondent – Present

Kioko for 2nd and 5th Respondent