



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

PET 61 OF 2015

CORPORAL THOMAS OTHOO.....PETITIONER/APPLICANT

VERSUS

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

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

DIRECTOR CRIMINAL INVESTIGATION.....3RD RESPONDENT

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

JUDGEMENT

1. The petition was brought on the basis of the following main facts:

a. The petitioner is an employee of the National Police Service as an investigator who has an excellent relationship with his employer professional colleagues. Government Ministries and also among the general public.

b. In the morning of 5th August, 2014 the petitioner was served with a waiver notice at 10.00 am to appear before IP Misiko at 8.30 am the same day to be charged in an Orderly Room Proceeding for the offence of discharging any weapon without order or without reasonable lawful cause.

c. That the petitioner remained within the police station vicinity the whole day waiting to be paraded before the presiding officer but no parading or any other instructions were ever given to him and at around 17:30 hrs the same day Uasin Gishu County Police Commander Mr Nyaga Muchungu SSP found the petitioner at the station and ordered for his arrest allegedly for failing to attend orderly room proceeding. This prompted the petitioner to retreat to lice quarters to await an inquiry to be carried out as he read malice an ill intention in the manner he was being handled.

d. Following the threats of the petitioner's arrest which was eminent and having a history of high blood pressure, the petitioner's situation worsened leading to his admission at Reale Hospital in Eldoret on 6th August, 2014 and granted sick off duty by a Doctor who managed him. Documents on the same were duly presented to the DCIO Eldoret and the OCS Eldoret whose Deputy IP Misiko

was the presiding officer.

e. The petitioner then sent the notification of his admission in Hospital and the petition asking for change of the presiding office to the OCS Eldoret police station who was handling the matter through G4S Courier Services which receipt of the same was acknowledged.

f. That it was alleged that the petitioner deliberately refused to cooperate with the presiding officer that resulted to his trial in absentia leading to punishment of dismissal from the service.

g. That the petitioner was not aware when the orderly room proceeding was conducted because the date and time (5/8/2014 at 8:30 am) indicated in the notification the petitioner was issued with had already passed and no any other information had been given to him by the presiding officer. This particular proceeding was conducted between 7/8/2014 and 18/9/2014.

h. That on the 11/8/2014 the petitioner sought for permission from the DCIO to travel to Kenyatta National Hospital in Nairobi to attend treatment as a result of a scheduled appointment on 12.8.2014 since he had been advised by a doctor from Reale Hospital in Eldoret to follow up his treatment at Kenyatta National Hospital since he had all along been managed there since 2012.

i. That the DCIO Eldoret had on various occasions previously granted the petitioner permission to attend treatment at Kenyatta National Hospital.

j. That the petitioner received a Dismissal letter from the 3rd respodne ton 12.6.2015 dated 2.6.2015 advising that he had been dismissed from the National Police Service with effect from 2nd June 2015 and he lodged an appeal against dismissal within the required time.

k. That despite lodging the appeal, the petitioner is apprehensive that the same might not succeed owing to the fact that he was never given an opportunity to participate in the disciplinary proceedings and therefore the proceeding do not have his input/evidence and since the petitioner received his salary for the month of June 2015 the respondents have threatened to stop the paying salary and allowances for the month of July, 2015.

l. The petitioner has been dismissed from service based on false allegations and faulty disciplinary process.

m. The petitioner has never been convicted of any disciplinary offence since enlistment and has all along maintained clean record of service and has continued to execute his duties and responsibilities as an investigator in the service.

n. In respect to the allegation that the petitioner failed to cooperate with the presiding officer during the orderly room proceeding is malicious, frivolous and vexatious a the petitioner ought to have been escorted by another officer to be able to face the disciplinary proceeding.

o. In respect of the accusation that the petitioner discharged any weapon without orders or reasonable lawful cause is both defective and a false accusation because the petitioner returned his Ceska pistol S/No F7845 and all the 15 rounds of ammunitions issued to him intact on 4.8.2014.

p. That the copies of proceedings forwarded to the 3rd respodnet about the orderly room proceedings concerning the petitioner were laced with concealed information alteration of documents and false recommendations.

q. That the alleged orderly room proceedings which were conducted in the absence of the petitioner plus the result of trial were never brought to the attention or supplied to the petitioner for purposes of filing the appeal.

r. That the notice was waived by a non gazetted officer purporting to be a gazetted officer by appending her signature to the waiver notice contrary to the provisions of section 2(1) of the National Police Service Act, 2011 therefore making the entire disciplinary proceedings illegal, unlawful and malicious.

s. That indeed the Ebby Mutali who signed the waiver notice is ranked as an Assistant Superintendent of police, a rank which does not qualify her to be a gazette officer.

t. That one of the grounds upon which the petitioner was dismissed is that he filed miscellaneous criminal application No. 113/2014 in Eldoret High Court, a ground which was misconceived as unconstitutional to the effect that the petitioner was being denied his right to access justice contrary to Article 50(1) of the Constitution of Kenya.

u. The petitioner's right to a fair trial and to a hearing was infringed upon as he was never given an opportunity to be escorted by a fellow officer appear before the presiding officer to face disciplinary proceedings or allowed even to call a witness and thereafter was condemned unheard for failing to attend the aforesaid proceedings hence trial in absentia contrary to the rules of natural justice under article 50 of the Constitution of Kenya.

v. The respondents are employing unfair labour practices contrary to the provisions of article 41 of the Constitution of Kenya.

2. The 2nd, 3rd and 4th respondent filed a reply to the petition through one Ebby Mutali who deponed on the main that:

a. That I totally deny the content of the petition and state that the petition as filed herein is totally premature, bad faith and an abuse of court process as the petitioner's appeal is pending for determination before the National Police Service Commission.

b. That I have been advised by counsel on record which advise I verily believe is true that this court has no jurisdiction to entertain this application as it will usurp the powers of the National Police Service Commission to objectively decide the petitioner's appeal before it lodged by the petitioner.

c. That the petitioner was aware of the Orderly Room Proceedings as Senior Sergeant 48639 Ngoche Joseph was detailed to parade the defaulter/petitioner before the presiding officer for proceedings to commence and indeed petitioner was aware of the proceeding as he went to court to file a petition vide H.C. Misc Application No 113 of 2014 which orders the court declined.

d. That the petitioner upon realizing that there was a Waiver Notice to be served upon him, which would subject him to Orderly Room Proceedings, made himself unavailable including absenting himself from duty. That I further state that whenever he needed to attend to the hospital, he would ask for permission which would be granted but on this period he never did the same.

e. That despite this, the petitioner appeared and signed the Waiver Notice of the Intended Orderly Room Proceedings dated 4th August, 2014.

f. That the petitioner move to seek admission at Reale Hospital was a calculated move to create a cover-up as the documents submitted indicates that he was an outpatient; whose condition was managed and allowed to go home. He visited the hospital back on 7.8.2014 for further check-up.

g. That there is no evidence that the petitioner sought for the presiding officer to be changed and even if the said request was made the same was not procedural as he had not appeared before the presiding officer to raise the same.

h. That the petitioner's failure to appear before presiding officer or his immediate superior DCIO or CCIO and his move to court to bar the proceeding vide Eldoret H. C. Misc App No. 113/2014 demonstrates that he was not willing to appear for the proceedings to commence against him.

i. That the petitioner had the opportunity to present his, input/evidence when he was served with waiver notice to appear for Orderly Room Proceeding but he chose not to attend, resulting to the trial in absentia. The fear raised by the petitioner is unfounded hence uncalled for as the applications before this court is pre-mature as the NPSC is yet to confirm his dismissal or purposes of stopping his salary and allowance after deliberating on his appeal.

j. That the petitioner in his appeal which is annexed on the notice of motion dated 30th June 2015 at paghe 42 paragraph 4, the officer admits that he used his weapon and despite the officer returning the firearm with the 15 ammunitions intact; investigations are still ongoing to establish the source of the ammunitions he used to replace the one he fired.

k. That the trial in absentia is guided by provisions of paragraph 16 part iv A of the FSO (Force Standing Orders) which were fully adhered to.

l. That I further state that the allegations are false and the petitioner appears to be ill informed as Assistant Superintendent of Police is a gazetted officer as provided for by the National Police Service Act, 2011.

m. That further, the provisions of the Statutes of Interpretation Act is clear that whenever the Principal Act is repealed, the rules and procedures remains in place in regard to applicability of the newly enacted Act are in so far as the same is not inconsistent with the provision of the Act.

3. In his submissions in support of the petition, Mr Magero for the petitioner submitted that the Police Act Cap 84 was repealed in its entirety alongside rules and regulation including Police Force Standing Orders hence the waiver notice and orderly from proceedings in this particular case were brought under Force Standing Order (FSO) which did not exist in law. Counsel further submitted that the Orderly Room Proceedings were illegal and unlawful as the petitioner was never given a hearing and sufficient time to prepare his defence contrary to rules of natural justice.

4. For instance counsel submitted that the process amounted to inhuman treatment to the extent that the respondent wanted the petitioner to appear before the presiding officer one and half hours earlier than the time of service. Further that the petitioner did not appear for the proceedings and was never given a hearing.

5. Counsel further submitted that the waiver notice was signed by an officer below the rank of superintendent of police hence not a gazetted

officer as required by the National Police Service Act. Mr Magero also submitted that the petitioner was dismissed on the main ground that he filed a suit being Eldoret HCC Misc 113 of 2014 which was contrary to article 236(b) of the Constitution and Section 46 of the Employment Act.

6. Counsel further submitted that the respondent victimised that petitioner by conducting disciplinary proceeding in his health status. Akuno for the respondent submitted that the alleged acts of the petitioner were acts subject to disciplinary actions under 8th schedule of the National Police Service Act since they accused the petitioners of the offence of discharging a weapon without order or without reasonable cause. According to counsel the petitioner appeared and signed the Waiver Notice of the intended Orderly Room Proceedings.

7. On the present petition, Counsel submitted that it was double standard for the petitioner to drag the respondent to court when he clearly and without justified reason refused to attend Orderly Room Proceedings to defend himself. Counsel further submitted that the petition before the court was brought prematurely since the petitioner's appeal over the dismissal was yet to be determined by the National Police Service Commission hence any determination by the court would have an influence on the commission to incline towards a certain direction without objectivity.

8. On 19th February, 2016, this court ruled that the petitioner questioned the merit and legality of the decision to dismiss him from the respondent's service however since the petitioner's appeal to the National Police Service had not been determined the court would await the outcome of the appeal. The court therefore stayed the petition for 90 days to enable the determination of the appeal. The 90 days period lapsed before the appeal was determined by NPSC. The matter was mentioned severally for the court to be appraised on the progress of the appeal but nothing tangible was reported to the court by the respondent concerning the progress of the appeal.

9. On 13th April, 2017 over one year after my ruling staying the petition pending the determination of the appeal NPSC, I lifted the stay order and granted the petitioner leave to proceed with the petition. On 8th June, 2017 the parties by consent agreed to dispose of the petition through written submission stopping here for a moment, whereas the court is in full agreement that where there is provision for internal dispute resolution mechanisms the court ought not to intervene in a matter until these processes are exhausted of course subject to exceptions when the court can prematurely interfere. However, where there is inordinate delay or outright dilatoriness it can no longer be available to the respondent to plead premature court intervention.

10. The requirement that internal mechanisms must be exhausted first, cannot be used to indefinitely keep a party aggrieved away from court's intervention. As outlined above, it's over two years since an order was made staying the petition pending the outcome of the appeal to NPSC. It is therefore no longer available to the respondent to contend that the court's intervention was prematurely sought.

11. The petitioner has complained that he was never granted an opportunity to be heard in that he never appeared before the Orderly Room Proceedings to defend himself due to his health condition. The petitioner further complained that he was required to sign waiver notice for an event that took place one and half hours earlier. The right to be heard is fundamental principle of natural justice codified in the constitution and the Fair Administrative Action Act.

12. Further there are numerous decisions of this court and courts of equal status emphasising the importance of the right to be heard. In the circumstances for whatever reason it might have been the court is not persuaded that the petitioner deliberately refused or ignored to attend the Orderly Room Proceedings to defend himself. In the circumstances there would be no need to await the outcome of the appeal to NSPC over a process that violated rules of natural justice.

13. The court in the circumstances overturns the petitioner's dismissal on the basis of the flawed Orderly Room Proceedings and orders fresh hearing in accordance with Force Standing Orders.

14. The claimant shall further have costs of the petition.

15. It is ordered.

Dated at Nairobi this 28th day of September, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 28th day of September, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.

