



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 39 OF 2016

(h) Costs of the Petition and interest thereon.

2. The Petition is based on facts set out in part B paragraphs a - h of the Petition as follows:-

(a) The Petitioner was enlisted into the Kenya Police Service with effect from 23rd February, 2009, as an Administrative Police Constable. The Petitioner was on probation for a period of one year and thereafter his employment confirmed.

(b) By his appointment, the Petitioner was subject to the regulations for officers in the Kenya Police Service and was eligible for employment until the attainment of the compulsory retirement age of 60 years.

(c) The Petitioner discharged his duties diligently under his contract of service at various stations within the County of Kakamega at the time earning a gross salary of Kshs.30,736.00 per month.

(d) On the 17th October, 2013 the Petitioner while off duty was summoned on phone by his senior, the Sub-County Commander of Kakamega East, to avail himself at Kakamega County Commander's Offices. On the same day the Petitioner was subjected to orderly room proceedings to answer to disciplinary charges leveled against him.

(e) After being subjected to orderly room proceedings, the Petitioner continued discharging his duties in accordance with his contract of service and as assigned until the 25th July, 2014 when he was summarily dismissed from service.

(f) Though issued with the dismissal letter on the 25th July, 2014, the Petitioner had been summarily dismissed from service on the 31st November, 2013. During that period, the Petitioner continued to be assigned duties which he discharged accordingly.

(g) Despite being assigned official duties from the time the Petitioner was subjected to orderly room proceedings (17th October, 2013) to his dismissal (25th July, 2014), the Petitioner's salary was unlawfully withheld occasioning him mental stress, economic hardship and rebuke from his family and colleagues.

(h) The Petitioner was not accorded a fair hearing and is aggrieved by the decision of the Respondents to dismiss him from service for being unlawful, unconstitutional and in breach of his rights guaranteed under the Constitution.

3. The Particulars of unconstitutional conduct by the Respondents are set out in part C of the Petition as follows:-

(a) The composition of the disciplinary committee was prejudicial and biased against the Petitioner. The alleged Complainant in Court 1 (the Sub-county Commander of Kakamega East) was among the officers in the panel and acted as the Complainant, the Prosecutor and the Judge contravening the provision of Article 50(1) of the Constitution for not being fair and impartial.

(b) The Petitioner was not notified in writing or otherwise of the impending charges against him and was not provided with sufficient details or evidence to respond appropriately during the hearing contrary to Article 50 (2) (b) of the Constitution.

(c) Being unaware of any disciplinary charges against him, the Petitioner was called on phone by his senior, the Sub-County commander of Kakamega East, on the 17th October, 2013 to attend the orderly room proceedings on the same day. The Petitioner was not accorded adequate time and facilities to prepare for his defence thus contravening the provision of Article 50(2) (c) of the Constitution.

(d) The Petitioner was not informed of his right to be assisted in his defence by a police officer. This was contrary to the provisions of the Force Standing Order and the spirit of Article 50(2) (g) of the Constitution.

(e) The Petitioner was not informed in advance of the evidence the Respondents intended to rely on and was not allowed any access to the said evidence. The Respondents' action/omission was inconsistent with Article 50(2) (j) of the Constitution.

(f) The Petitioner was not informed of his right to adduce evidence and to challenge evidence adduced against him contrary to the provision of Article 50(2) (k) of the Constitution.

(g) The Petitioner was not accorded an opportunity to cross-examine the complainant in count 1(the Sub-County commander of Kakamega East) on his allegations against him.

(h) The recipient of the alleged anonymous letter (the Governor of Kakamega County) or any of his representatives was not summoned to appear as a witness to prove receipt of the said letter of otherwise thereby prejudicing the Petitioner's

Case.

(i) By the nature of the charges, no independent witnesses were availed to adduce evidence against the Petitioner and therefore the charges were not proved as alleged.

(j) The Petitioner was not given an opportunity to make a statement in mitigation against his conviction and sentence.

4. The Petitioner states that the aforesaid conduct by the Respondents amounted to unfair Labour Practice contrary to provisions of Article 41(1) of the constitution.
5. That the decision to summarily dismiss the Petitioner from service was irregular, unlawful and contrary to law and the provisions of Article 47(1) of the Constitution in that the 3rd Respondent was not involved in dismissing the Petitioner Contrary to Article 246(3) (b) of the Constitution and Section 10(1) (a) of the National Police Service Commission Act, 2011.
6. The dismissal also violated section 89 (2) and (6) of Act. That the Petitioner was tried and convicted on count II which at the time did not constitute an offence under the 8th schedule of the National Police Service Act, 2011 in violation of the Principle of Legality.
7. The Petitioner was not treated with dignity in violation of Article 28 of the Constitution. That the right to fair trial may not be limited in terms of Article 25(c) of the constitution.
8. Wherefore the Petitioner prays that the Petition be allowed in its entirety and the remedies set out in paragraph (a) – (h) be granted.
9. The Petition is supported by affidavit of the Petitioner sworn on 23rd November, 2016 attesting to the facts set out in the Petition.

Response

10. The petition was responded to by the 3rd Respondent, National Police Service Commission vide a replying affidavit of Johnstone Kavulundi, the Chairman of the Commission sworn on 3rd February, 2017 and filed on 8th February, 2017.
11. The Commission in the main states that the Petition has no merit and ought to be dismissed with costs for reasons set out therein.
12. That on diverse dates, the Petitioner sent anonymous letters to the County Governor Kakamega County informing him that a number of officers in that County were corrupt.
13. That in June 2013 the Petitioner further posted on face book that Kakamega East Sub-county was for Kisii's and Kalenjin ethnicities.
14. That on or about 17th October, 2013 and pursuant to the National Police Service Commission Discipline Regulations 2015 and section 88 and the eighth schedule of the National Police Service Act, 2011 the Petitioner was charged in orderly room proceedings for the above offences.
15. That the Petitioner was dismissed from the National Police Service with effect from 31st November, 2013 by a letter dated 1st April, 2014 written and signed by one P. Ndirima for Deputy Inspector General Administration Police service.
16. That the letter outlines the reason for the summary dismissal.
17. That the Petitioner appealed to the National Police Service Commission against the dismissal on 5th August, 2014. The Appeal was tabled before the National Police Service Commission appeals Board and the Commission is in the process of conveying the decision of the Board to the Petitioner.
18. That the Petitioner has not proved any act of procedural unfairness, illegality or constitutional violation as alleged or at all.
19. That the suit is premature, misconceived, misinformed, bad in Law and an abuse of the court process and it be dismissed with costs to the Respondents.

Determination

20. The issues for determination are as follows:-

- (a) Whether the Constitution and conduct of the orderly room proceedings violated the Petitioner's right to fair administrative action, fair hearing and was in violation of the rules of natural justice.
- (b) Whether the Petition is premature and ought to be struck-off.
- (c) What remedies, if at all, should be granted to the Petitioner.

Issue (a)

21. In a Petition of this nature, a Petitioner is required to cite with precision. The provisions of the constitution that have been violated, manner of violation and the remedy sought. These standards were set in **Stephen Nyarangi Ouma & another Vrs George Magoha & 7 others [2014] eKLR** where the court stated:-

“As a basic minimum, a Petitioner is required to cite the provisions of the constitution which have allegedly been violated, and

*the manner in which they have been violated, and the remedy which he seeks for that violation – See **Annarita Karim Njeru v Republic (1976 – 1980) I KLR 1272**. In demonstrating the manner in which there has been a violation, a Petitioner should present before the court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation.”*

22. From a thorough reading of the Petition and the supporting affidavit of the Petitioner vis a vis, the replying affidavit by commissioner Kavulundi, the following facts have been proved for failure by the Respondent to specifically rebut the same:-

(I) The Petitioner did not receive a written notice of the intention to charge him with specified offences but instead received a telephone call from his in charge, the Sub-County Commander of Kakamega East and instructed to avail himself at the office of the County Commander of Kakamega on the same day. On his arrival, he was subjected to orderly room proceeding. The Petitioner was not served with a waiver notice on the material date, in terms of the regulations.

(II) The Petitioner having been unaware of any investigations for any alleged offence prior to the summons, was not prepared for his defence and his right to a fair hearing was greatly impaired to his loss and detriment.

23. Furthermore, the case of **Bernard Mbaru Mbaru v National Police Service Commission [2017] eKLR** is opportune in the following respect:

(i) The person the subject of first count against the Petitioner, the in-charge, Sub-County Commander of Kakamega East, who effectively was the complainant in count 1 was a member of the disciplinary panel which recommended punishment of the Petitioner.

(ii) The Sub-County Commander of Kakamega East became a Prosecutor and Judge in his own case in violation of one of the cardinal rules of natural justice, *nemo iudex in causa sua* (being a Judge in own cause). This effectively violated Article 47 and 50 of the constitution in that the Petitioner was not accorded fair administrative action and requirement of a fair hearing before the panel was pre-empted by the inclusion of the complainant in the disciplinary panel. See decision of **Odunga J in Republic v Kenya National Highways Authority Ex parte John Mwaniki Kiarie [2016] eKLR** on constitution of disciplinary panels.

(iii) The Petitioner was charged under section 88(2) of the Eighth schedule of the Police Act. The offence in count II against the petitioner is not enumerated in the said schedule. It follows therefore, that the Petitioner was charged with non-existent offence, contrary to the venerable principles of legality. This in itself is a further violation of Articles 47 and 50 of the constitution. It is pertinent to note that orderly room proceedings are Criminal in nature as was stated in **Charles Kinanga Arumba v National Police Service Commission & another [2015] eKLR**. It is therefore imperative that persons be charged with known offences. Officers cannot be expected to wade in the dark, not knowing whether or not what they do, especially in social media platforms constitutes a disciplinary offence or not. Officers just like ordinary citizens are entitled to enjoy the freedom of expression and fair hearing guaranteed under Article 33(1) of the constitution. The Respondent was obliged to bring the comments made by the Petitioner within the exceptions under Article 33 (2) and (3) of the constitution. Not even a feeble attempt to justify the action taken by the Respondent on facts was made by the Respondent in the replying affidavit. A sense of being ‘god’ is palpable in the Respondent’s narrative on this matter.

24. For the aforesaid reasons, the Petitioner has proved his case on a balance of probabilities.

Issue (b)

25. As at the time the Replying Affidavit was filed on 8th February 2017, more than three (3) years from the time the Petitioner was summarily dismissed and more than two (2) years from the date the petitioner noted his appeal on 5th August 2014, there was yet no decision made by the 3rd Respondent regarding the Appeal.

26. The Petitioner is entitled to file a constitutional petition at any time, as soon as his right or freedom has been threatened or violated. The plea of immaturity is misconceived and dismissed.

Issue (c)

27. The Petitioner has proved its case and the Petition is allowed. However, the court at this point will consider the remedies available to the Petitioner as set out in the Petition itself having regard to the peculiar facts of the case and the relevant law applicable.

28. In **Joseph Mwenda Mbuko & Provincial Police Officer, Central Police & 2 others [2013] eKLR**, **J. A. Makau** awarded the Petitioner Kshs.1 Million for violation of Petitioner’s rights under Article 47(1) and 50(1) and (2). The suit is similar to the present one in that the petitioner had been summarily dismissed following orderly room proceedings.

29. In **Bernard Mbaru Mbaru v National Police Service 2017 eKLR**, the court quashed the decision to remove the Petitioner from Police Service and reinstated him without loss of salary, benefits and privileges that appertain to the office. The court found that the Respondent had violated the Petitioner’s right under Article 47 of the constitution as read with section 4 of the Fair Administrative Act, 2015.

30. In **Emmanuel Nyiro Chai v National Police Commission & 3 others [2017] eKLR**, the court also quashed the decision by the police commission discharging the Petitioner from the police service and reinstated the Petitioner without loss of remuneration and seniority.

31. Considering the above, and the circumstances of the case, the court makes the following orders:-

(a) The Petitioner's dismissal from the Police Service by the decision made on 31st November 2013, and the letter dated 1st April, 2014 was unconstitutional, null and void for violating articles 47(1) and 50(1) of the constitution of Kenya 2010.

(b) The Respondents are directed to reinstate the Petitioner to the National Police Service without loss of salary, benefits and status.

(c) The Petitioner be paid all arrear salary and benefits from date of removal with interest at court rates till payment in full.

(d) The Respondents to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Lusweti & Nabutola Co. Advocates for the Petitioner

Legal Counsel, National Police service Commission

Chrispo – Court Clerk