



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.48 OF 2018

PARTRICK MWITA MARTINUS.....PETITIONER

- VERSUS -

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

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

DEPUTY INSPECTOR GENERAL OF ADMINISTRATION POLICE SERVICE.....3RD RESPONDENT

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

(Before Hon. Justice Byram Ongaya on Friday 23rd November, 2018)

JUDGMENT

The petitioner filed the petition on 30.05.2018 through M’Njau & Mageto Advocates. The petitioner prays for judgment against the respondents for:

- a) A declaration that the alleged disciplinary proceedings of 20.01.2014 conducted by the respondents before the commission of the offence and the resultant decision made to suspend the petitioner from service on 15.08.2015 and subsequent dismissal of the petitioner from the National Police Service did not take place and therefore the suspension and dismissal was null and void, unconstitutional and in violation of the petitioner’s rights under Article 41, 47, 50, 159 of the Constitution.
- b) A permanent injunction to restrain the respondents and their agents, servants, and employees or anybody acting on their behalf from confirming dismissal and or termination and ill treatment of the petitioner in any manner on account of having brought this petition to the Honourable Court.
- c) Reinstatement of the petitioner to the position he held prior to the said dismissal without any loss of rank or insignia, salary and allowances and any other benefits entitled to him amounting to Kshs. 560, 000.00.
- d) Damages as compensation for the unconstitutional violations under Article 23 of the Constitution of Kenya 2010.
- e) Costs and interest.
- f) Any other relief which the Honourable Court deems fit and just to grant.

The 4th respondent filed a preliminary objection on 13.06.2018 that the petition was *res judicata* because Cause 423 of 2015 between the same parties about the same subject matter was dismissed on the grounds that it was statute barred and there was no appeal or review of the ruling and the petitions seeks to circumvent that earlier decision. The same was filed through K. Motende, for Attorney General.

The 1st respondent filed on 03.11.2018 the replying affidavit of its Chief Executive Officer one Joseph Vincent Onyango. The 2nd and 3rd respondents did not file any papers to oppose the petition.

There is no dispute that the petitioner was appointed as an Administration Police Constable in the service of the Government of Kenya effective 20.05.2009 and by the letter of appointment of the same 20.05.2009. The claimant continued in the service until he was served the letter of suspension dated 15.08.2016. The letter stated that there had been orderly room proceedings against the claimant on 20.01.2014 upon the following two counts:

1. On 25.02.2015 at around 2130hrs the petitioner committed an act of plunder and wanton destruction of property contrary to section 88(2) (1) (s) of the National Police Service Act, 2011.

2. On the same date and time at Ugunja Sub – County the claimant was negligent in performance of his duty contrary to section 88(2) (1) (f) of the National Police Service Act, 2011.

The letter suspended the petitioner from exercising the functions of his office pending finalisation of the case by the 1st respondent.

By the letter dated 17.03.2017 the petitioner wrote to the 1st respondent's Chairperson and stated that he was not aware of any orderly room proceedings and the counts or charges as was referred to in the letter of suspension. He appealed for consideration.

By the letter dated 22.05.2017 the 3rd respondent conveyed to the petitioner that the 1st respondent by the letter dated 20.12.2016 had approved that the petitioner be and was thereby dismissed from the Administration Police Service effective 09.12.2016.

The petitioner appealed against the dismissal by his letter dated 26.05.2017 stating that the dismissal was unfortunate and unfair because he was never served with the notification as laid down in the disciplinary procedures of the 1st respondent as no orderly room proceedings took place. He stated that on 20.01.2014 when the orderly room proceedings are said to have taken place he was stationed at Sigomere Division. He concluded that he be reinstated back into the service to continue giving splendid service to his country and its people. He did not get a response and being dissatisfied he filed the present petition.

The petitioner's main case is that the orderly room proceedings alleged to have taken place on 20.01.2014 were fictitious and therefore there was no basis for the suspension and subsequent dismissal from service.

The record of the purported orderly room proceedings is exhibited on the replying affidavit filed for the 1st respondent. The Court has considered that record and the following discrepancies can be disclosed:

1. There is no documented record of the invitation given to the petitioner to attend the proceedings.
2. The record shows that they were before IP Japhet Langat at the Sub County Headquarters on Friday 20.01.2014 at 1030hrs.
3. Count I alleges that on 25.02.2015 at around 2130 the petitioner committed an act of plunder and wanton destruction of property contrary to 8th schedule 1(s). It is obvious that as at the alleged date of the orderly room proceedings on 20.01.2014, the alleged date of the offence, 25.02.2015 had not come.
4. Count II states that on same date (25.02.2015) the petitioner at Ugunja Sub County was negligent in performance of his duties contrary to 8th schedule 1(t). Similarly, the alleged date of the offence was long after the date of the alleged orderly room proceedings.
5. On previous conviction, it is recorded that the petitioner was on 29.12.2014 charged for threatening to shoot fellow colleague at Ruwe AP post and at the same time being drunk while in uniform. It obvious that the alleged "**previous conviction**" was for alleged charge on 29.12.2014 which could not have been previous to the date of the alleged orderly room proceedings, 20.01.2014.
6. The particulars of the offence allege that on 25.02.2015 the petitioner assaulted one Jennifer Aluoch Oyango at Ugunja tearing her clothes and destroying her merchandise contrary to 8th schedule 1(s). The same date he was negligent in performance of his duties as a police officer to protect life and property. The date is clearly changed from that in the counts and is long coming after the alleged date of the orderly room proceedings.
7. The record of purported orderly room proceedings is signed by Mr. Japhet Langat (IP) on 23.07.2015 and by Sub –County Commander Mr. Gabriel B. Mutua (SP) on 27.07.2016, and by Mr. John Murage (SSP) County Commander, Siaya on 30.07.2015 and also on 22.04.2016. The Court notes that the long time that lapsed in signing the record has not been explained.
8. The attached statement said to be by the complainant one Jennifer Aluoch Oyango is dated 03.03.2015 and she states she recall 25.02.2015 at 2130 when she met an Administration Police Officer who attached her. The statement states that on 26.12.2015 is when she recorded her statement at the police station (but the statement exhibited – which presumably is that one she recorded, is dated 03.03.202015).

To explain the many discrepancies, the replying affidavit at paragraph 15 states, "**That it is clear from the proceedings that an erroneous date was captured for the orderly room proceedings and the Officer has deliberately chose to capitalise on the error. An error on the dates should therefore not be a basis of invalidating disciplinary decisions where an officer is accused of grave violations.**"

The court finds that the maker of the replying affidavit has not explained the basis of the statement that the date of the purported orderly room proceedings as recorded was an error. It is not clear why the officers who are stated to have been directly involved in the purported orderly room proceedings were not called to provide evidence and show that the petitioner's case that the proceedings were fictitious had no basis – the petitioner having raised that position to the 1st respondent in his letter of 17.03.2017 challenging the suspension and then in his appeal of 26.05.2017. The Court returns that despite the ample time the respondents have had to resolve and answer to the petitioner's assertion that there was no orderly room proceeding as was relied upon to suspend and to dismiss him, the respondents have not investigated the case and resolved the petitioner's grievances. In view of the many discrepancies indentified in the purported orderly room proceedings and in view of the respondents' failure to offer a reasonable explanation in that regard, the Court returns that on material before the Court,

the Claimant has established that indeed, the orderly room proceedings were fictitious. In such circumstances, the suspension and the dismissal lacked foundation as they were in contravention of the petitioner's rights and protections as prayed for. The Court returns that a fiction cannot constitute due process as envisaged in Article 236 of the Constitution of Kenya 2010 on protection of public officers.

It was said that the suit was premature because the petitioner's appeal dated 26.05.2017 against the dismissal had not been considered and determined. The Court returns that it was not clear to the Court how the 1st respondent having dismissed the petitioner again invited the petitioner to appeal to the same 1st respondent against that decision and as the right to so appeal was conveyed in the dismissal letter of 22.05.2017. The Court holds that it was not within due process for a decision maker to entertain an appeal against its own decision as such procedure would not add any value towards expeditious and just determination of disputes. The Court further considers and holds that it could be that a decision maker could have a window to review its own decision upon such procedural conditions and safeguards that promote expeditious, proportionate and just determination of the disputes as may arise before the decision maker. In any event the Court returns that the appeal was received for the 1st respondent on 29.05.2017 and the petition filed on 30.05.2018 after the lapsing of about one year. The respondents and in particular the 1st respondent offered no reasonable or any explanation for such inordinate delay in acting on the petitioner's appeal. The Court returns that the petitioner was entitled to move the Court in the manner he did.

The 4th respondent provided no justification and material to support the preliminary objection and the same is deemed abandoned and obviously not justified at all.

In conclusion judgment is hereby entered for the petitioner against the respondents jointly and severally for:

- a) The declaration that the alleged disciplinary proceedings of 20.01.2014 conducted by the respondents before the commission of the offence and the resultant decision made to suspend the petitioner from service on 15.08.2015 and subsequent dismissal of the petitioner from the National Police Service effective 09.12.2012 did not take place and therefore the suspension and dismissal was null and void, unconstitutional and in violation of the petitioner's rights under Article 41, 47, 50, and 159 of the Constitution.
- b) The permanent injunction to restrain the respondents and their agents, servants, and employees or anybody acting on their behalf from confirming dismissal and or termination and ill treatment of the petitioner in any manner on account of having brought this petition to the Honourable Court.
- c) The reinstatement of the petitioner, effective 09.12. 2016, to the position he held prior to the said dismissal without any loss of rank or insignia, salary and allowances and any other benefits.
- d) The respondents to pay the petitioner all monthly salaries and allowances as prevailing on 09.12.2016 to date together with all pay withheld during the suspension period and the quantum be computed, served and recorded in Court on a convenient mention date; and thereafter the respondent to continue paying the claimant the salary and allowances in accordance with the contract of service.
- e) The payment of the quantum in (d) above to be effected by 31.01.2019 failing interest at Court rates to be payable thereon from the date of the judgment till full payment.
- f) The claimant to report to the 3rd respondent not later than 30.11.2018 for deployment and assignment of duty.
- g) The respondents to pay costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 23rd November, 2018.

BYRAM ONGAYA

JUDGE