



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 4 OF 2015

EMMANUEL NYIRO CHAI.....CLAIMANT

VERSUS

THE NATIONAL POLICE COMMISSION.....1ST RESPONDENT

THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE DEPUTY INSPECTOR GENERAL IN CHARGE

OF THE KENYA POLICE SERVICE.....4TH RESPONDENT

Mr. Agina for the petitioner

Mr. Mbotany for respondent

JUDGMENT

1. The petition was filed on 15th December 2014. It is accompanied with a verifying affidavit and the petitioner's documentary evidence. The said pleadings was duly served upon the Attorney General for and on behalf of the 2 – 4 respondents on 15th January 2015. It was also served upon the Secretary/Chief Executive Officer of the National Police Service Commission.

2. The pleading was also reserved upon the Attorney General on 14th day of March 2016. On both occasions affidavit of service were duly filed in court.

3. The counsel for the respondent has attended this court on numerous occasions but to date have refused to obey the courts directions on the need to file and serve a response.

4. On 13th June 2016, the court in the presence of State Counsel Odukenya for the Attorney General ordered that parties do file written submissions and matter be mentioned on 20th July 2016 for a judgment date.

5. As things stand today not even an appearance has been filed by the respondents.

6. In the circumstances the petitioner hereby invokes Rule 21 of the Employment and Labour Relations Court (Procedure) Rules and prays that the court to determine this petition on the basis of pleadings, affidavits, documents filed and submission of the petitioner.

7. Further to the foregoing provision Rule 15 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice and Procedure Rules 2013 obligates the respondents to respond within fourteen days of service of a petition by way of a replying affidavit and if any document is relied upon it shall be annexed to their replying affidavit.

8. Then in Rule 16, provision is made governing failure to respond within stipulated time that *“if the respondent does not respond within the time stipulated in Rule 15, the court may hear and determine the petition in the respondent’s absence.”*

9. The silent fact upon which the petition is founded are as follows:-

(i) The petitioner was an employee of the National Police Service Commission, a Sergeant at the time of the wrongful termination of his service.

(ii) In the scheme of Kenya Constitution whereby each institution must reflect the face of Kenya he was the only member of his ethnic group in the police force holding the rank of a sergeant.

(iii) On the 14th day of March 2011, the petitioner was served with a waiver notice of intended Orderly Room Proceedings dated 15th March 2011 by one Jonathan Wanyama.

(iv) The inquiry was to be held at GSU Kibera Camp immediately and was to be presided over by IP ISAAC OTHOKO.

10. The offence to be inquired into was: -

(i) Idle and negligence in the performance of his duty contrary to Rule 3 (24) police regulations.

(ii) The particulars of offence No. 76423/99030131/SGT EMMANUEL CHAI (DCE) In that between 31st January 2011 and 18th February 2012 at KIBERA GSU CAMP within Nairobi County you were idle and negligent in the performance of your duty whereas the NCO in charge Armoury of No. 34 Platoon L Company, you issued six (6) G3 Rifles 8/Nos 6515596, 6591144, 673785, 65166555, 6738727 and 6591197 to sentries manning Kibera GSU Main gate and the former head of state Kabarnet Gardens Barrier without entering them in any records as required of you and in the process one G3 magazine with 19 rounds of 7.62 mm balls got lost on 18th February 2011.

11. The Orderly Room Proceedings was allegedly held on 22nd March 2014 and it is alleged that the petitioner pleaded guilty and that the presiding officers did not pass sentence but remitted the proceedings to the General Service Unit Headquarters for a deferent sentence to be passed.

12. The GSU Commandant sentenced the petitioner to a dismissal from the Kenya Police with effect from 29th March 2011 with forfeiture of all retirement benefits and leave accrued.

13. The petitioner was denied access to certified record of the proceedings and had to write an appeal without.

14. The Police Commissioner did not respond to the appeal until after 2nd October 2012 alleging that the petitioner’s appeal lacked merits and is thus disallowed.

15. That is instructive to note that neither the GSU Commandant nor the Inspector General authored any decision. All that the petitioner received are documents signed by surrogates purporting to be acting for the GSU Commandant and the Inspector General of Police.

16. The petitioner was an exemplary Police Officer as is evident from his promotion to Corporal on 25th July 2007 and Sergeant on 4th January 2011 quite a feat for a person without a godfather in the force.
17. The petitioner had never been to the Orderly Room Proceedings as an accused throughout his service of 11 years; he maintained a clean record of service and had continued to execute his duties with diligence and dedication.
18. That the record of the Orderly Room Proceedings have never been availed to the petitioner thus forcing him to suspect that it was faced with falsehood and out rightly malicious recommendations as summarized in the letter to him dated 29th March 2013 i.e. for deterrent sentence to be meted to him.
19. The purported orderly room proceedings were thus malicious, frivolous and vexatious hence the refusal to avail the same to him in spite the provisions of Article 35 of the Constitution of Kenya 2014.
20. That the respondent's actions against the petitioner are contrary to Article 41 of the Constitution and Section 34 of the National Police Service Act 2011.
21. That the respondent clearly denied the petitioner fair trial, fair administrative action, he was not allowed to be accompanied or be represented by a colleague nor was he informed that he was entitled to assistance as provided for in Section 83(4) of the National Police Service Act.
22. The petitioner was not allowed to call witness and was deceived into a fraudulent plea bargaining that he would be given a lenient sentence of a fine of Kshs.3,7000/= only in exchange for plea of guilty.
23. The panel that sealed the petitioner state was irregularly and illegally constituted and no wonder it proceeded unprocedurally and arrived at a wrong decision.
24. These illegally empanelled Orderly Room Proceedings panel made unfair, unjust and total unlawful findings.
25. That the allegations against the petitioner were not booked in the police occurrence book as by Police Standing Orders ordained.
26. The petitioner was dismissed from the force without issuing to him a government liability certificate, ket clearance only a certificate of discharge. This is highly irregular.
27. The provisions of the Kenya Police Standing Orders were grossly violated as well as of the Kenya Police Service Act.

Issues for determination

28. The petitioner puts forth the following as the main issues for determination:-

- (i) Was the waiver of intended Orderly Room Proceedings valid as it did not indicate the originator?
- (ii) Were the orderly room proceedings of 22nd March 2011 reasonable and procedurally lawful?
- (iii) Was the GSU Commandant sentence, procedural, lawful and proportionate to the alleged offence?
- (iv) Was the dismissal from the Kenya Police Force lawful?
- (v) Is the petitioner entitled to the prayers sought?

(vi) Who is to pay the costs hereof?

29. Article 245 of the constitution provides as follows: -

(i) There is established the office of the Inspector General of the National Police Service

(ii) The Inspector General

a) Is appointed by the President with the approval of the parliament and

b) Shall exercise independent command over the National Police Service and perform any other functions prescribed by national legislation.

(iii) The Kenya Police Service and the Administrative Police Service shall each be headed by a Deputy Inspector General appointed by the President in accordance with recommendation of the National Police Service Commission.

(iv) That that the Inspector General has power to:

a) Investigation of any particular offence or offences.

b) The enforcement of the law.

30. It is now accepted that any decision made in violation of the principle of natural justice is a nullity and ought to be quashed. In the instance case, the petitioner was dismissed by the Commandant of the General Service Unit on the recommendation of impugned Orderly Room Proceedings.

31. The Orderly Room Proceedings were preceded by a report from the Investigation Officer who recommended a charge of loss of Government items and a fee of Kshs.3,702/= and the value the lost. For such an offence the most severe punishment is dismissal. Other punishments are: -

Reprimanded

Interdiction

Reduction of rank

32. OCL Company Mr. Wanyama is the one who served the waiver notice of intended Orderly Room Proceedings upon the petitioner.

33. The Orderly Room Proceedings was concluded by IP Ochoko who was the in charge of the petitioner.

34. The investigations were done by Charles Naibei for GSU Headquarters. It is evident that the petitioner's superiors were the complainants, investigators and the judges. He had no chance as the stakes were skewed against him. This offends the rule of natural justice.

35. In **Republic versus murder/Internal Security and Provincial Administration and 4 others exparte CPL – James Mwika (2013)** Deputy OCPD had appointed an officer under his direct command (the OCS – Mariakani) to conduct Orderly Room Proceedings in which he was the complainant while gradually granting leave to apply for renew orders the said.

36. That the applicant has demonstrated an arguable case because there is likelihood of breach of the right to fair hearing pursuant to the rules of natural justice and Article 47 of the Constitution in the case where the Deputy OCPD is the complainant and the approving authority of the chief inspector ranked presiding officer to the applicant's disciplinary proceedings.

37. The court further stated: -

“The rule of natural justice that a person should not be a judge in his own cause would to a reasonable manner appear to have

been breached or likely to be breached. The principle that justice must be done and be seen to be done applies to the situation.”

38. Applying the legal principles and provisions of the law set out in the petition and this submission to the case, it is submitted that the petitioner has demonstrated infringement of his constitutional rights as set in this petition more so in respect of his right to a fair administrative action.

39. The Presiding Officer did not appoint or summon any Police Officer to present the case by presenting evidence if any upon which the accusations were grounded. This is a mandatory provision Chapter 29 Section 16 (v) of the Force Standing Orders hence there was no trial whose findings were forwarded to the commandant GSU for deterrent sentencing.

40. The petitioner has sufficiently demonstrated that the Orderly Room Proceedings against him was tainted with illegality, irrationality and procedural impropriety and ought to be quashed. In the Uganda case of **Pepstale versus Kabaka District Local Government count and others (2008)2 EA 300** the Court held that.

41. The petitioner urges the Honourable Court to find that the Orderly Room Proceedings were procedurally defective and hence the petitioner’s dismissal was not supported by the evidence and subsequently the proceedings were null and void ab initio.

Determination

42. The petition was not opposed and upon a careful consideration of the petition itself, the verifying affidavit and the attachments thereto and having agreed fully in its submission filed by the counsel for the petitioner, makes the following orders: -

(i) That petitioner’s fundamental rights under Articles 23(1) and (3) 3(c), 27(1) (2) and (4), 47(1), 2 and 3, 50(1) and 2 of the Constitution of Kenya 2010 were violated by conduct of the Orderly Room Proceedings of 22nd March 2011 which was flawed in procedure.

(ii) The sentence imposed by the Commandant upon the petitioner violated his fundamental rights under Articles 41(1), 4(1) and 50 of the Constitution of Kenya 2010.

(iii) The decision of the Police Commission discharging the petitioner from the Kenya Police Force be and is hereby quashed.

(iv) The petitioner be and is hereby reinstated into the Kenya Police Service without loss of seniority and remuneration forthwith.

(v) The petitioner be paid his salary from March 2011 to date plus interest thereon at court rates till payment in full.

(vi) Costs to follow the outcome.

Dated and delivered at Nairobi this 24th day of February 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE