



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 30 OF 2016

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 19, 20, 21, 22, 23, 31, 47, 48, 49, 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PETITIONER AND JURISDICTION IN CASES OF DISPUTES BETWEEN EMPLOYER AND EMPLOYEE AND IN THE MATTER OF UNFAIR TERMINATIONS SECTIONS 47 AND 87 OF THE EMPLOYMENT ACT NO. 11 OF 2007 LAWS OF KENYA

AND

IN THE MATTER OF VETTING OF JAMES NGUMU MUTUNGI SSP-217943 P/NP. 1977022065

AND

IN THE MATTER OF AN APPLICATION BY:-

JAMES NGUMU MUTUNGI.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. James Ngumu Mutungi (Petitioner) was enlisted into the Kenya Police Service in 1977 as a Police Constable and in the course of time was promoted severally, the latest rank held being Senior Superintendent of Police.
2. On or around 9 October 2015, the National Police Service Commission (Respondent) served the Petitioner with a letter notifying him of the results of the vetting exercise carried out pursuant to section 7 of the National Police Service Act.
3. According to the letter of notification, the Respondent made a decision that the Petitioner be discontinued from service on account of incompetence, lack of professionalism and diligence, lack of integrity, discipline and decorum.
4. The Petitioner being aggrieved with the decision applied for a review through a letter dated 21 October 2015 by dint of section 33(2)(c) of the National Police Service Vetting Regulations.

5. The Petitioner followed up the review application with another letter dated 23 October 2015 referenced *Forth Clarification/Submissions for consideration in my Review Application*.

6. The Respondent, through a letter dated 25 January 2016 informed the Petitioner that it had considered the application for review and found it unmerited in terms of Regulation 33 of the National Police Service (Vetting) Regulations 2013.

7. The rejection of the review application prompted the Petitioner to move the High Court in Nairobi vide Judicial Review Application No. 44 of 2016 on 19 February 2016 (reported as *Republic v National Police Service Commission & Ar Ex Parte James Ngumu Mutungi* (2016) eKLR).

8. In the Judicial Review Application, the Petitioner sought

a. THAT this Court do grant the Applicant orders of Certiorari to quash the Respondent's decision to remove the applicant from the National Police Service dated 9th October, 2015 and leave so granted to operate as a stay.

b. THAT this Court do grant the Applicants orders of prohibition to restrain the Respondent from taking further and or any steps that would cause the Applicant to be removed from the National Police Service and or from discharging his duties as such.

c. THAT all necessary and consequential orders and directions be given.

d. THAT the costs of this application be provided for.

9. The High Court dismissed the judicial review application on 21 July 2016 and this must have precipitated the instant proceedings which were launched on 17 August 2016 seeking

(a) An order to quash the decision made by the National Police Service Commission on a letter dated 25th January, 2016 where and when the Commission denied to hear the application for review by the Petitioner/Applicant.

(b) An order directing the *National Commission Police Service* to hear and make a finding on the review application made by JAMES NGUMU MUTUNGI within 14 days.

(c) *A declaration that the Petitioner Constitution rights to a credible and a fair hearing has been violated and consequently issue an order quashing the decision made by National Police Service Commission on a letter dated 25th January, 2016.*

(d) An order for costs of the petition.

(e) Such other orders as this Honourable Court may deem fit to grant.

10. The Petition was accompanied with a Motion under certificate of urgency but the Petitioner subsequently informed the Court on 8 September 2016 that he was abandoning it (Respondent filed a preliminary objection on same day asserting that the Petition was *res judicata*).

11. The Court therefore gave directions as to filing of appropriate process and mode of determination of the Petition (record and submissions) and in this regard the Respondent filed a replying affidavit sworn by its Chairman in opposition to the Petition.

12. The Petitioner filed written submissions on 12 October 2016 while the Respondent filed its submissions on 18 November 2016. The submissions were highlighted on 24 November 2016.

13. Although the parties did not settle Agreed Issues for determination, the Court after considering the

material before it has identified 3 key issues as arising for determination and these are, *whether the Petition is res judicata, whether the application for review dated 21 October 2015 was admitted and heard by the Respondent and whether there is a right to make oral representations during consideration of a review application.*

Res judicata

14. The Respondent contended that the questions posed in the present Petition had been presented before the High Court in Judicial Review Application No. 44 of 2016 and therefore stood determined.

15. But that cannot be correct.

16. First for the sake of clarity, it should be stated that there was an internal application for review made to the Respondent through the letter of 21 October 2015 and the judicial review application to the High Court commenced on 19 February 2016.

17. Second, the judicial review application was in respect of the Respondent's decision taken on 9 October 2015 to discontinue the Petitioner from service.

18. And Odunga J who dealt with the judicial review application was alert to the distinction for in paragraph 17 the Judge observed In these proceedings it is important to note that the decision being challenged before this Court is the decision made by the Respondent on 9th October, 2015 and not the decision made on the application for review on 25th January, 2016. This raises the issue whether the applicant having applied for review of the decision made on 9th October, 2015 can properly challenge the said decision which was whether rightly or wrongly affirmed on review. In my view, to permit parties who have unsuccessfully challenged a decision through other alternative legal avenues to do so again by way of judicial review would amount to an abuse of the process of the Court....

19. And in fashioning an appropriate remedy, Odunga J observed that in my view to quash the decision of 9th October, 2015 while leaving the one of 25th January, 2016 would be in vain and would serve no useful or practical significance as it would leave the latter decision intact.

20. In my view, the question presented before this Court is technically not *res judicata* but of abuse of court process.

21. In this respect, it is perplexing that the Petitioner did not challenge both the decision to remove him from service and consideration/rejection of review, when at the time he moved Court on 19 February 2016, he was aware of both decisions.

22. This could have been what prompted Odunga J to make reference to the abuse of court process.

23. For me, I would observe that parties should not be allowed to litigate in instalments. When moving Court the whole case and facts available at the material time ought to be disclosed to the Court.

24. Further, it is noteworthy that the Petitioner made no mention in his papers that he had filed the judicial review application and that the same had been dismissed. That was a material and relevant fact which required disclosure.

25. The Respondent however did not raise concerns of abuse of process and material non-disclosure.

Whether application for review of 21 October 2015 was admitted and considered

26. The Petitioner's application for review made to the Respondent was premised on Regulation 33(2)(c) which provides that 33(2) *The Commission shall not grant a request for review unless the request is based -*

(c) on any reason the Commission considers just and proper.

27. In my view, the mere fact that the Respondent in its letter of 25 January 2016 acknowledged receipt of the Petitioner’s application for review and informed him that because it was not merited and therefore not admitted is sufficient evidence that the application was considered but without oral representations from the Petitioner.

Oral representations during review consideration

28. What the Petitioner appears to contest without explicitly coming out on is that he should have been granted audience to make oral representations during the review application and the basis for such contention are the rules of natural justice and Regulation 33 of the National Police Service (Vetting) Regulations, 2013.

29. I have perused the said regulation severally and has not found any express requirement that a police officer seeking review thereunder ought to be given an opportunity to make oral representations.

30. In terms of case law, Ongaya J in *Margaret Nyarua Theuri v National Police Service Commission* (2016) eKLR considered the question of individual appearance and legal representation during consideration of a review application by the National Police Service Commission under the National Police Service (Vetting) Regulations and reached a conclusion that

The procedure adopted by the respondent must be such that the applicant participates individually and that the applicant is accorded all fairness to assess the information the respondent would have used to reach its decision.

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The Court considers that where the matters in issue involve evidence to establish facts in issue, then the general rule is that a hearing will largely be appropriate than not.

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it would be desirable but not mandatory for the applicant to enjoy legal representation during proceedings by the respondent on the application for review....

31. Ongaya J premised his conclusion having regard to Articles 10, 27, 47, 50 and 232 of the Constitution.

32. In the present case, the Petitioner raised matters of evidence and flowing from the *dicta* by Ongaya J which I endorse, I would find that the ends of justice and fairness required that he be granted an opportunity to make oral representations and/or respond to further inquiries from the Respondent.

Forum shopping

33. The Respondent faulted the Petitioner for commencing the instant proceedings in Nakuru rather than in Nairobi where he had instituted the Judicial Review proceedings.

34. The Petitioner made no response to this issue and without speculating, the Court can only observe that though it has no territorial jurisdictional limitations, proceedings should be instituted where the subject matter arose, one of the parties reside or where costs to the other party would be minimised.

Appropriate remedies

35. With the above conclusions, it is my view that the proposed order (b) in the Petition is merited and the Court hereby directs that

An order do issue directing the National Police Service Commission to hear oral representations and make a finding on the review application made by JAMES NGUMU MUTUNGI within 14 days.

36. Because of the abuse of court process concerns and proper venue of commencing action, the Court orders that the Petitioner pay costs of the Respondent.

Delivered, dated and signed in Nakuru on this 24th day of February 2017.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Mongeri instructed by Mongeri & Co. Advocates

For Respondent Mr. Odunga instructed by Paul Ojwang, Litigation Counsel, National Police Service Commission

Court Assistants Nixon/Daisy