



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
PETITION NO.87 OF 2016

GEORGE KINGI RAMBAPETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSIONRESPONDENT

JUDGEMENT

The Petitioner filed his Petition on 2nd June, 2016 and seeking for orders that;

1. *A declaration that the petitioner's fundamental rights and freedoms have been violated.*
2. *An order of Certiorari do issue to quash the entire proceedings and the decision of the Respondent declaring that the Petitioner failed vetting and had been discontinued from the Kenya Police Service including the decision rejecting the petitioner's application for review.*
3. *An order for reinstatement of the Petitioner to his post as a senior Superintendent of Kenya Police Service as well as reinstatement of all his privileges including his salary.*
4. *An order substituting the respondent's decision with a declaration that there exists no material to find that the Petitioner had failed vetting.*
5. *Compensation to the Petitioner for the violation of his fundamental rights and freedoms.*
6. *Costs of the petition.*
7. *Any other relief that this Court may deem just to grant.*

The Petition

1. The petitioner, an officer in the National Police Service as a Senior Superintendent of the Kenya Police Service was last deployed to Kirinyaga County as the OCPD Kirinyaga East Sub County and the Respondent is an office established under Article 246 of the Constitution with the power to recruit and remove persons holding offices within the Kenya National Police Service.

2. The Petition is that the law governing the vetting of police officers is section 7 of the National Police Service Commission Act (NPSC Act) which provides for the Respondent to vet all officers to assess their suitability and competence and discontinue from the service any officer who fails such vetting. There are the National Police Service (Vetting) Regulations, 2013 (Regulations) governing the form and procedure to be used when vetting the officers. The petitioner's case is that his vetting was not conducted n

compliance with the law and regulations to the vetting of officer and the process was in violation of his rights and freedoms.

3. The Petition is also that prior to the vetting interview the Petitioner was required to fill a vetting questionnaire and avail documents required and under regulation 18(2) the Respondent was required to serve the Petitioner with any complaints or any adverse information it had which it intended to rely on so as to give the Petitioner time to give a written response to such adverse information. The Petitioner was not informed of any complaint or adverse allegations against him and was not served with any allegations against him that required him to give a response. He appeared before the vetting interview on 19th February, 2015 and subsequently, the Respondent by a decision on 9th October, 2015 that was transmitted to the Petitioner on 19th October, 2015 found that the Petitioner had failed vetting and proceeded to remove him from the Service.

4. In the decision of the Respondent two adverse findings were made against the Petitioner that;

The Petitioner was unprofessional and unethical in repackaging of relief food.

The Petitioner being a law enforcer was expected to curb vices of selling relief food rather than engage in such business.

5. The Petitioner was dissatisfied with these findings and applied for a review pursuant to regulation 33(2) (a) of the Regulations and on the grounds that there was an error in such findings as there was no evidence of the Petitioner repackaging any relief food; the petitioner's wife purchased food from traders and not from refugees and was therefore engaged in lawful trade; the Respondent failed to appreciate the matter of relief food provisions before making its findings; and Rule 4(c) of the Regulations was not followed where the Respondent was required to be imperatival and accord the Petitioner justice. Had the Respondent made enquiries on the matters of provision of relief food it would have been established that most relief food comprised of maize; most refuges form his area are of Somali community whose staple food is not maize but rice or pasta; the WFP is in direct control of relief food distribution and allow refugees to exchange their portions for other commodities such as cooking oil, rice, pasta, wheat flour and vegetables; the UN is aware of such practice and the Respondent cannot be found to complain about it; there was no theft from UN stores; the local authorities do not view the practice as an illegal trade and have proceeded to licence the traders in this respect; and to date the practice is on-going and had it been illegal the law ought to have addressed the same. The petitioner's wife and not the Petitioner engaged in the trade twice and have since ceased the business. The Respondent in vetting the Petitioner should have balanced his achievements and his shortcomings and seen his achievements outweighed his achievements. The Petitioner had a chequered career with promotions and the decision to remove him from the Service after serving for 35 years was harsh and excessive in the circumstances and an alternative sanction, if any would have been considered.

6. The Respondent invited the Petitioner for a review hearing on 4th February, 2016 and when he appeared with his advocate they were barred from addressing the Respondent forcing the Petitioner to self-represent. A Vetting Review Decision was delivered with a finding that the Petitioner had failed the vetting the earlier decision upheld. The Respondent further made findings that refugees engage in selling relief food given to them; the action of refuges in selling the food is prohibited by law; the Petitioner was involved in unethical conduct he was expected to control over the abuse of the same; the Petitioner did not provide any letter of authority in his name or to his wife with authorisation to engage in the business; and the conduct of the Petitioner in the business as a law enforcer is unacceptable and is evidence of criminality perpetrated by police officers.

7. The Petition is also that there was impropriety in the handling of the review application submitted by the Petitioner as he arguments made by the Respondent are self-defeating where there was a finding that selling of relief food by refugees is no prohibited by law but proceed to make a finding that the Petitioner engaged in illegal business; the documents supplied by the Petitioner were never put into account at the review hearing; 2 commissioners who signed the decision, Joseph Boinnet and Samuel Arachi were not part of the review hearing; the grounds made for review were never fully addressed; the issue of obtaining

authority to transport maize was never an issue at the initial hearing and vetting so as to arise at the review stage; and the Respondent failed to address the fact that the Petitioner had not engaged in repackaging of relief food and the trading in maize by his wife was sourced in the open market.

8. The Petition is also that the handing of the review application was contrary to natural justice and the regulations. The decision made by the Respondent against the Petitioner had factual errors; there was bias against the Petitioner when the Respondent became and accuser, investigator and judge of their own case against the petitioner; and the Respondent failed to abide by regulation 9(2) (d) and 28 for taking into account matters and information not submitted before it by any party and without giving the Petitioner sufficient notice over the same.

9. The Petition is supported by the annexed Supporting Affidavit of the Petitioner.

10. In reply to the petition, the Respondent filed **Replying Affidavit sworn by Johnston Kavuludi** and who avers that he is the chairperson of the Respondent with authority to reply herein. The Respondent commission is established under article 246(3)(b) of the constitution to observe due process, exercise disciplinary control over and remove persons holding or acting in the offices within the service. To the constitutional provisions is also the National Police Service Commission Act (NPSC Act) and its regulations, the National Police Service (Vetting) Regulations, 2013 to enable the Respondent carry out its mandate of vetting exercise on all police officers.

11. In removing an officer from service, the Respondent is bound by regulations 3, 4 and 14 so as to build confidence and trust in the service by application of fair procedures and objectivity. The Petitioner was taken through the due process and found to be unsuitable and incompetent to serve. Such was due to professional misconduct for engaging in selling of relief food which is unethical and an abuse of office as it was contrary to what was expected of him as an officer. The Respondent looked at the petitioner's confidential and personal file and records, looked at the integrity and financial probity of the Petitioner in terms of regulation 14 to arrive at its decision.

12. Mr Kavuludi also avers that the Petitioner appeared before the vetting panel on 19th February, 2015 where he was questioned extensively on his financial probity and professional conduct and when asked about the sources of frequent deposits and withdrawals noted in his account he could not give a coherent and detailed explanation. He was unable to articulate the professional repercussions of an officer engaging in a business which raises integrity issues.

13. The reply is also that when the Petitioner was questioned about sale of relief food for profit he was evasive, incoherent and contradictory in several instances. Regulation 18 read with regulation 19 provide that an officer is in default if he fails to fully or truthfully supply information required regarding his suitability or competence. The allegations made by the Petitioner in his supporting affidavit to the Petition that the Respondent erred in making a finding that relief food from United nations was wrongly on sale and the Petitioner was involved through his spouse is an afterthought as such explanations were never submitted during his vetting.

14. The Respondent in forming the vetting panel was guided by section 13 of the NPSC Act and regulation 10 and in making its decision the Respondent as guided by regulation 25. The decision made is that of the respondent, commission and not that of the vetting panel as held in **Petition No.6 of 2014 consolidated with JR Misc. Appl. Ns 11 and 12 of 2014 Immanuel Masinde Okutoyi versus National Police Service Commission & Another [2014] eKLR**. The Respondent is allowed to establish committee for better carrying out of its functions and in doing so is allowed to co-opt persons whose knowledge and skills are found necessary. The decision of the Respondent cannot therefore be found to be unlawful as alleged for his reason that all commissioners did not sign it or were not present at the hearing.

15. The Petitioner has failed to state how his rights were violated by the vetting panel and in regulation 33(2) provides the parameters to guide the Respondent in admittance of a review application which include discovery of new and important matter which was not within the knowledge of the officer at the

time of hearing after due diligence

16. In his further Replying Affidavit, Mr Kavuludi also avers that when the Petitioner was invited for his review application hearing, he submitted 6 letters allegedly allowing him to sell relief food but only 3 of such letters made reference to him in person. The letters dated October, 2015 but when the Petitioner was asked about the subject during his vetting he alleged to have obtained them after he failed vetting. The Petitioner had engaged in the sale of relief food from 2012 to 2013 and thus the licences he presented at his review ought to have been in his possession before 2015. The production of the licences after the fact was an afterthought as he had given a different explanation at his vetting. The Respondent as bound to look at the professional conduct of the Petitioner as held in **Republic versus National Police Service Commission ex parte James Ngumi Mutungi Misc. Appl. No.44 of 2016**.

Submissions

17. In submissions the Petitioner case is that his rights under article 47(1) and 50 of the constitution with regard to fair administrative action were violated when the Respondent failed to give him a hearing pursuant to the rules of natural justice. Section 4 of the Fair Administrative Act was also not adhered to when the Respondent failed to give the Petitioner reasons of action taken against him, there was no notice of charges against him in advance to enable him prepare his defence. Section 7(2) of the NPSC Act required the Respondent to ensure best practise in addressing the petitioner's case which was ignored in this case.

18. The Petitioner also submits that Petitioner was not supplied with the complaints against him if any before attending the vetting hearing. Such became a fundamental flaw contrary to principles set out in the case of **Byrne versus Kinematograph Renters Society Ltd [1985] 2 ALL ER 579**. The right to be heard is protected under the constitution and in doing so, the right to fair and due process must be safeguarded as under article 47 and 50 of the constitution as held in **County Assembly of Kisumu versus Kisumu County Assembly Service Board and others, Court of Appeal Case No.17 and 18 of 2015**. The failure by the Respondent to give the Petitioner a fair administrative action and hearing of his case was contrary to regulation 4(g).

19. The Petitioner was denied the right to be heard when the Respondent failed to give him all the evidence their heard against him before inviting him for the vetting process. The Petitioner therefore could only give limited answers to questions put to him. Regulation 30 allowed the Respondent to summon any witness with complaints or to give more information to matters before them. The Respondent did not allow the Petitioner to call witnesses from Daadab Refugee Camp or his wife who had purchased maize from Lagdera to sell in Kilifi. Had he been allowed to call officers in charge of relief food, he would have demonstrated the current practice of refugees exchanging their food ratios to buy desired commodities. The Respondent became the investigator and judge in their own cause. There was failure to observe the required standard of proof or give reasons for decisions arrived at and thus leading to bias and wrong findings.

20. The composition of the Respondent was challenged as different members who heard the Petitioner are the ones who signed the decision as held in **Eusebius Laibuta versus National Police Service Petition No.79 of 2014**. The orders sought should issue with costs.

21. The Petitioner has relied on the following cases – **Stephen Kemei Kiptum & 2 others versus National Police Service Commission; Immanuel Okutoyi Masinde versus National Police Service Commission Petition No.6 of 2014; Republic versus National Police Service Commission ex parte Daniel Chacha Chacha, JR No.36 of 2016**.

22. The Respondent in submissions states that the vetting panel was properly constituted in terms of regulation 10 where the Respondent is allowed to have different panels with different members to facilitate its work. Section 13 of the NPSC Act allow the Respondent to constitute committee and co-opt other members as held in; **Immanuel Okutoyi Masinde versus National Police Service Commission Petition No.6 of 2014**. ; **Immanuel Okutoyi Masinde versus National Police Service Commission**

Petition No.6 of 2014; the decision made by the Respondent on the Petitioner is signed procedurally following the records and decisions made by the vetting panel. The removal of the Petitioner followed a lawful process and present commissioners signed in terms of regulation 25.

23. The Respondent also submits that the petitioner's rights were not violated. There was procedural fairness as the Petitioner was invited for hearing before he was removed from the service on 9th October, 2015 for being found selling relief food. The Petitioner confirmed that together with his wife he was engaged in the business of selling relief food by repackaging it for resale. Such food is normally marked 'not for sale' and the Petitioner was required to ensure compliance yet he facilitated its repacking and sale.

24. The Petitioner personally revealed before the vetting hearing on 19th February, 2015 that he repackaged and sold relief food. There was no need to send the Petitioner any complaints or evidence in this regard to matters he had admitted to. In recognition to fair hearing rules and natural justice, the Petitioner was allowed a review hearing in terms of regulation 333 vide his application of 22nd October, 2015 which was admitted and heard but the verdict was the same, the Petitioner was found as unfit to continue in the Service. The new evidence submitted by the Petitioner during the review hearing ere 6 letters allegedly giving him licence to sell relief food but 3 such letters referred to other people and not the petitioner. The letters and licences relating to the Petitioner had been issued in October, 2015 which was obviously obtained after the vetting hearing in February, 2015. This was found to be an afterthought and an effort that did not give the Petitioner any credence in the sale of relief food as a law enforcing officer.

25. The removal of the Petitioner from service was fair in terms of chapter 6 of the constitution and article 232, the Public Officers Ethics Act and the Regulations. The Petitioner had not been faithful and truthful at his vetting hearing as required under regulations 18 and 19. Such conduct was put into account in arriving at the decision to remove the Petitioner from service as held in **Republic versus National Police Service Commission ex parte James Ngumi Mutungi Misc Appl No.44 of 2016.**

Determination

26. The Petition is based on facts that the Petitioner was not informed that there as a complaint or adverse allegations against him nor was he served with any adverse allegations against him or documentary evidence in support of any complaints or allegations that the Respondent used against him. That the findings by the Respondent that the Petitioner had failed at his vetting for the reason of unprofessional and unethical repackaging of relief food and that as a law enforcer he was expected to curb the vices of selling relief food rather than engage in such business were reasons without foundation as there was no evidence to support such findings; the Respondent had failed to appreciate that the selling of such relief food was done by the petitioner's wife in a lawful trading of relief food for other foodstuffs and that the Respondent failed to appreciate that such a practice of sale of relief food was common and known by UN agencies, local authorities and community.

27. The vetting of officers in the service of the National Police is governed by the NSPC Act and its Regulation's thereto. The principle purpose for the same is set out under section 7 of the NSP Act;

(2) Notwithstanding subsection (1), all officers shall undergo vetting by the Commission to assess their suitability and competence.

(3) The Commission shall discontinue the service of any police officer who fails in the vetting referred to under subsection (2).

The regulations also set out the principle objectives as;

3. The objective and purpose of the vetting—

(a) Build confidence and trust in the Service; and

(b) Ensure that the Service complies with Chapter Six of the Constitution and the principles of public service as set out in Article 232 of the Constitution and in the Public Officer Ethics Act.

28. To achieve the purpose and objections and carry its overall mandate, the Respondent is regulated under section 11 of the NPSC Act to;

Gather by any means it considers appropriate, any information and compel the production of such information as and when necessary;

Conduct investigations on any matters within its mandate;

Conduct public inquiries and publish the outcome of such inquiry;

Issue summons to witnesses; and

Take lawful disciplinary action on any officer under its control.

29. Such information can be obtained and receive through oral and written statements and of outmost important, the NPSC Act provisions under section 11 are not bound by the *strict rules of evidence*. In my view, the rationale is to enable the Respondent commission to call for evidence, material and information and give each officer a hearing in a fair and conducive environment that is not affronted by the strict rules of evidence as would be required in criminal proceedings.

30. Under the above framework, parties agree that the Petitioner was invited for his vetting hearing on 19th February, 2015 after he had submitted his questionnaire. On the submitted data by the Petitioner in his questionnaire were his financial statements. The Respondent commissioners were keen to find out about a deposit of Kshs.800, 000.00 into his account where he replied that;

Mr. George Kingi Bamba: Because of the proceeds were getting. ... the 800,000/- I borrowed from them [Susan and John Githinji], I was buying with my wife some maize so that it can be sold in Kilifi.

Mr. Kahiga Munai: you were buying maize from a refugee camp?

Mr. George Kingi Bamba: yes.

Mr. Kahiga Mungai: okay.

...

Mr. George Kingi Bamba: you know the Somalia don't take these cereals. They are being given and they are selling them; even now if you go there, you will find it is going on there.

Comm. Mary Owuor: you know as an OCPD thee you are giving us another dimension?

Mr. Kahiga Mungai: yes that is why I was wondering? So in short you were buying maize from Somalis who are given but they don't consume it?

Mr. George Kingi Bamba: yes

Mr. Kahiga Mungai: so it was government issued maize or relief?

Mr. George Kingi Bamba: relief from UN

...

Mr. Kahiga Mungai: food not for sale?

Mr. George Kingi Bamba: but it is being sold.

...

Chairman Johnston Kavuludi: the question is if there is food that is marked: not for sale, who is expected to enforce that order not for sale?

Mr. George Kingi Bamba: they are not being sold with those bags.

Mr. Kahiga Mungai: ... so we are saying there is always a good reason why any foodstuff is stamped – not for sale. do you know the good reason for it?

Mr. George Kingi Bamba: not for sale:

Mr. Kahiga Mungai: yes what is the reason why it would be stamped so?

Mr. George Kingi Bamba: so that it can go to the right persons.

...

Mr. George Kingi Bamba: yes and in fact it is not me who was directly involved in the buying of the maize, it is my wife. ... it was already repacked. Even you go there; you will find them already re-packed.

31. From the above hansard extract, the question about the cash deposit resulted in the Petitioner giving information about the sale of relief food and his involvement. He was there for the source of the information and it cannot be expected that the Respondent should have been the one to supply him with the information, evidence of witness to support the same.

32. The Petitioner by his own admission, he was involved in the sale of relief food marked not for sale. He was found to have engaged in such business contrary to his office for being unethical and unprofessional as the officer of the Service required to ensure such a practice does not occur. The vetting panel brought into question the petitioner's integrity as a serving officer and a reason for undermining the rule of law. That such conduct was an assault to the moral fibre of the police service and contrary to the law.

33. I find, on the basis of matters admitted by the Petitioner the Respondent was justified in arriving at its findings. The challenge that such findings contained factual errors on the face of the record is not a correct assertion after the Petitioner had confirmed that he and his spouse sold re-packaged relief food marked 'not for sale' and this was maize purchased from refugees. Such findings resulted in his removing from service after failing the vetting based on the purpose and its objectives outlined above.

34. The Petitioner re-affirms the Respondent findings in his Supporting Affidavit to the Petition at paragraph 40 that;

When my wife engaged in the subject business, it was only on two occasions and she bought maize not from refugees but from traders carrying on the business lawfully in the local market.

Had the Respondent bothered to acquaint itself with the refugee situation and their surrounding circumstances, it would not have made the strange findings that it did.

35. To the contrary, the Petitioner as the officer of the service responsible for law enforcement had a responsibility to ensure adherence to the law on the ground. It cannot be that the Respondent failed in its duties while he was the officer in charge bearing responsibility. On his own admissions and averments, I find the Respondent was under no duty to call witnesses, refugees, UN agencies or the local authorities in

the Lagdera area to give further evidence.

36. There may be unethical practices condoned by the UN agencies, WFP, local authorities such as the County Government, traders and social network of which the petitioner's wife AS a beneficiary, but the Petitioner as the officer of the Service in the midst of all these persons and agencies, was the law enforcer. The position held by the Petitioner cannot be equated to that of the other entities and persons; the Petitioner was a disciplined officer in the service until he was lawfully removed from the service.

37. In **Republic versus National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR** the Court in analysing a judicial review application here the applicant had challenged that he was not given a hearing at this review held that;

... regulation 10 of the vetting regulations states that:

(1) The Commission may, in order to ensure expeditious disposal of matters, constitute such number of panels and comprising such persons as the Commission shall determine.

(2) The Commission may establish panels comprising such number of its members and co-opted persons as it may deem necessary for the purpose of determining applications for review under regulation 33.'

[and that] ... section 13 of the National Police Service Commission Act which states that:

(1) The Commission may establish committees for the better carrying out of its functions.

(2) The Commission may co-opt into the membership of committees established under subsection (1) other persons whose knowledge and skills are found necessary for the functions of the Commission.

(3) Any person co-opted into the Commission under subsection (2) may attend the meetings of the Commission and participate in its deliberation, but shall have no power to vote.'

38. The findings above were reiterated from the findings in **Immanuel Masinde Okutoyi & Others versus National Police Service Commission & Another [2014] eKLR** on the findings that;

Section 7(2) of Cap 84 obliges all officers to undergo vetting by the Commission to assess their suitability and competence. Whether this is termed a function, business or an affair of the Commission it is clearly one of the duties of the Commission and under section 14(1) of Cap 185C ought to be conducted in accordance with Second Schedule. However, under section 13 thereof the Commission is entitled to establish committees for the better carrying out of its functions and in doing so is entitled to co-opt persons whose knowledge and skills are found necessary for the functions of the Commission and whereas these persons may attend the meetings of the Commission and participate in its deliberation, they have no power to vote. Accordingly, there is nothing inherently wrong in the Commission setting up committees or even the so called panels as long as they comply with the law.

39. At the vetting panel, the Petitioner was found culpable as charged. A charge sheet/statement/complaint/ by its nature is set to outline the allegations made against a person. On such basis, the subject person can make a general denial, total denial, partial denial or admit to its facts or even better, offer more facts. The Petitioner at his vetting though with specific allegations against him offered to admit facts and gave more information on the same. He engaged in the sale of relief food that had been sourced from refugees, repackaged and sold through his wife/spouse. That he did so as everybody else, even to this date is doing such business.

40. Engaging in an unlawful business on the basis that others are doing it or all else are involved

including UN agencies and local authorities does not make it legal or lawful. Such justification only confirms impunity. The Petitioner as a law abiding and enforcing officer ought to have appreciated these basic principles and complied. Integrity is not only going by what the larger society demand. The perception on the individual is key. How an officer of the rank of the Petitioner conducted himself on the face of all the malpractices, sale of relief food, his wife engaging in such sale, he became a direct beneficiary of unethical practices and conduct contrary to his call of duty. Such conduct interrogation is with the mandate of the Respondent in vetting the suitability of officers in the Service. Instead of enforcing the law, the Petitioner opted to partake of proceeds of ill-gotten goods and the benefits of it. How then can the Petitioner be trusted to live by the values and objectives of the Kenya Police Service? I find the decision of the Respondent in removing the Petitioner from the Service was based on good cause and the same was justified. Such decision is hereby confirmed.

Accordingly, I find the Petition lacking in merit and the remedies sought for reinstatement or payments of damages are not due. Petition is hereby dismissed. Each party to bear own costs.

Dated and delivered in open Court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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