



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 84 OF 2016

MICHAEL MUCHIRI NYAGA.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The petition dated 27th May, 2016 the Petitioner averred in the main as follows:

a. The petitioner's particular grievance is that the respondent has violated his rights guaranteed under Articles 41,47 (1) & (2) and Article 50(1) of the Constitution of Kenya, 2010 ("the Constitution"). It is this violation that has prompted the petitioner herein to approach this honourable court by filing this petition.

b. This petition is founded on the constitution whose supremacy is recognized under Article 2 (1) which "...binds all persons and all state organs at both levels of government". Every person including the respondent is under a constitutional obligation to respect, uphold and defend the constitution. Instructively, any act or omission in contravention of the constitution is invalid by operation or Article 2 (4) of the Constitution.

c. Article 10 of the Constitution embodies National Values and Principles of Governance, which bind state officers in interpreting and applying the constitution. These values include the rule of law, human dignity, human rights, good governance, equity and social justice.

d. Chapter 4 of the constitution contains the Bill of Rights which in Article 20 permits every person to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and mandates the court to adopt an interpretation that gives the greatest efficacy to the right or fundamental freedom in question and in so doing, to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

e. This petition is anchored on the provisions of Articles 35 (1); 41: 47 (1) & (2); 50 (1) and Article 162(2) (A), 165 (6) & (7) of the Constitution.

f. The law governing the vetting of officers of the police service is set out in Section 7 of the National Police Service Act ("NPS Act") which provides that the respondent shall vet all officers to assess their suitability and competence and discontinue from the service any officer who fails the vetting.

g. The petitioner avers that his vetting was not conducted in compliance with the laws and regulations relating to the vetting of officers of the NPS and the entire process infringed on his constitutional rights and freedoms.

h. Prior to the vetting interview, the petitioner was required to fill out a vetting questionnaire and avail, which he did, certain vital documents including the following: Bank statements for the two (2) years preceding the vetting exercise; copy of pin certificate and ID card for the spouse; Tax compliance certificate; curriculum Vitae; and copies of educational and professional certificates.

i. Prior to the vetting interview, the respondent was required under regulation 18(2) of the National Police Service (vetting) Regulations to serve the petitioner with any complaint or any adverse information it had and which it intended to rely on. On the petitioners part, he was to be accorded time to give a written answer to the adverse information if any.

j. The petitioner avers that he was neither informed that there was any complaint or adverse allegation against him or was he served with any adverse allegations against him or documentary evidence in support of any complaints or allegations that the respondent would have had against him.

k. The petitioner appeared for a vetting interview before the respondent's vetting panel on or around 14th March, 2015.

l. Subsequent to the vetting interview, the respondent in a decision signed by all the Commissioners on 9th October, 2015 but transmitted to the petitioner on 15th October, 2015 found that the petitioner had failed vetting and proceeded to remove the petitioner from the service.

2. The petition was supported by the affidavit of the petitioner who deponed on the main that:

a. That I am a career Police Officer and prior to the filing of the Petition herein, I was serving in the Kenya Police Service in the rank of Senior Superintendent of Police posted to Kang'undo in Machakos County as the OCPD.

b. That I joined the Kenya Police on 8th September, 1990 as a constable and I have over the years risen through the ranks due to hard work and dedication.

c. That in addition to meeting the requisite entry requirements, I have pursued other courses and attended various workshops to enhance my skill and competence in carrying out my duties.

d. That upon enactment of the National Police Service Act, the respondent was tasked with the mandate of vetting all officers of the National Police Service with the objective of assessing their suitability and competence and also tasked with the mandate of discontinuing the services of any officer who fails the vetting.

e. That pursuant to the vetting mandate of the respondent, I was asked to fill up vetting forms which I did and forwarded the same to the respondent herein before the vetting exercise.

f. That prior to the vetting exercise, the respondent was required under Regulation 18(2) of the National Police Service (vetting) Regulations to serve me any complaint or any adverse information it had and which it intended to rely on and on my part I was to be accorded time to give a written answer to the adverse information.

g. That I was neither informed that there was any complaint nor was I served with any adverse allegations against me.

h. That I was also not furnished with any documentary evidence in support of any complaints or allegations that the respondent would have had against me.

- i. That I attended the vetting exercise on 14th March 2015 during which I was interviewed by the members of the vetting panel.
- j. That the respondent thereafter delivered its findings in a decision dated 9th October, 2015 which I only received on or around 15th October, 2015.
- k. That in the aforesaid decision, the respondent purportedly found that I had failed the vetting and discontinued my employment with the National Police Service.
- l. That I underwent a vetting interview and by a decision dated 9th October, 2015, I was found to have failed vetting and discontinued from employment with the Kenya Police Service on the grounds that:-
 - i. My explanation on the sources of my wealth was evasive, incoherent and contradictory
 - ii. My failure to offer a plausible explanation regarding my deposits revealed a lack of conformity with my known earning which pointed to possible involvement in corruption activities.
 - iii. I was wilfully withholding information on the sources of my cash deposits which casted doubts on my integrity.
 - iv. I must have earned my income in unclear circumstances thus leading to my lack of financial probity.
- m. That I was wholly dissatisfied with the finding in the vetting decision and I consequently and initially applied for a review in person on 22nd October 2015 under the provisions of Rule 33 of the National Police Service (vetting) Regulations 2013.
- n. That subsequently, I procured the services of the law firm of Guandaru Thuita & Co Advocates to take over the handling of my review application and through the said firm, I elucidated & expounded my previous grounds and attached several affidavits and exhibits in support of my Review Application.
- o. That the grounds upon which I sought review included the facts that:-
 - i. I was not in a proper state of mind and body during the vetting interview and it would have been unjust and unfair to maintain the decision when the factors that contributed to my state of mind were not of my own making.
 - ii. I had neither been supplied with a complaint summary sheet nor responded to any contrary to the findings made in the vetting decision.
 - iii. I was prejudiced by the fact that I filled my Vetting Declaration forms way back in February 2014 before the sensitization that occurred later in May 2014 and consequently, in filing the forms I did not take into account many factors that I would have, had the benefit of a prior sensitization.
 - iv. I legitimately received numerous travel and subsistence allowance which the commission had neither fully appreciated nor seen the supporting documents.
 - v. I carried on several businesses with my siblings whose nature and details were not clearly articulated or understood by the commission due to the limited nature of the interview.
 - vi. I also carried out a second hand clothing business during my tenure in Lodwar which due

to the vetting environment was not revealed.

vii. I had documentary evidence and testimony from witnesses who were and are still ready to shed light on my financial transactions and had the commission taken their testimonies, it would have reached a different verdict.

viii. It was in the interest of Justice and the National Police Service to review my vetting.

p. That while awaiting the review hearing, my advocates on record wrote to the respondent inquiring on how the Commission intended to carry out the review.

q. That the respondent wrote back to my advocate and informed them that it will be **“...an interview session which grants the officer another opportunity to present and articulate issues relating to the five parameters of vetting...”**

r. That the respondent also informed my advocates that they may sit during the sessions but were not going to be allowed to make any submissions or directly engage the interview panel in any manner.

s. That I would have wished to have been presented by my advocates in making the submissions at the review hearing but owing to the letter from the respondent on legal representation, I felt I had been denied the right to such representation and I reluctantly directed my Advocate not to attend.

t. That on 3rd February 2016, I appeared for the review hearing and I had to do the presentation myself and I canvassed the grounds for review and answered queries raised by the panelists present.

u. That subsequently, the respondent delivered its vetting review decision and it found that I had failed to discharge myself from the earlier findings and the initial vetting decision was upheld.

v. That in the said review decision, the respondent made findings to the effect that:-

i. My application had been admitted to allow me to explain the queries into earnings which I had been unable to earlier do due to exhaustion having travelled from Marsabit.

ii. I had alluded to business activities which I was engaged in and which I had neither declared prior to my initial vetting interview nor before the review hearing.

iii. I failed to produce documents to support the explanations I gave during the review hearing only insisting that I had been running businesses with my sisters.

iv. My explanations on the source of my wealth were evasive, incoherent and contradictory in several instances.

v. My non-declaration did not enable the commission to fully interrogate my financial probity and it was actually an attempt to deceive the Commission.

3. The respondent in its replying affidavit sworn by Mr Johnstone Kavuludi deponed in the main that:

a. That pursuant to the mandate stipulated in the Constitution, the National Police Service Act and the Betting Regulations, the Commission started the vetting of police officers in December, 2013 starting with the most senior police officers of the ranks of SDCP 1 & 2, DCP, S/ACP, ACP, SSp, SP and ASP and by the end of November 2015 the Commission had vetted 1778 police officers of the aforementioned ranks.

b. That I know of my own knowledge that after the vetting process of the rank of SDCP 1 & 2,

DCP, S/ACP, SSP, SP and ASP was complete, 87 police officers, amongst them the petitioner herein, were found to be unsuitable and incompetent to continue to serve.

c. That I am aware that the petitioner herein was removed from the service after he had failed to give plausible explanations as regards the substantial deposits noted in his bank statement which the petitioner submitted to the commission prior to the vetting.

d. That I am aware that before removing the petitioner herein, the Commission looked at the petitioner's confidential and personal file and further the Commission was guided by regulation 14 of the vetting regulations which require the Commission to look at the integrity and financial probity of an officer when determining his or her suitability and competence to continue in the service.

e. That the petitioner herein appeared before the vetting panel on 14th March 2015 where he was questioned extensively on his financial probity.

f. That the petitioner herein when asked about the sources of frequent deposits and withdrawal noted in his account to which he could not give a coherent and detailed explanation.

g. That further and without prejudice to the foregoing, the petitioner was unable to articulate himself when he was asked the sources of his wealth.

h. That regulation 18 of the National Police Service (vetting) Regulations 2013 as read together with regulation 19 provide that an officer is in default if he or she fails to fully or truthfully supply all information required regarding his or her suitability or competence.

i. That I am further advised by the advocate on record which advise I verily believe to be true that the decision of the Commission is for the Commissioners and not for the vetting panel.

4. In his closing submission, Mr. Thuita for the petitioner submitted that the petitioner had never had a complaint against him for the last 26 years he was in service. When the members of the public were asked to submit views and complaints, none was made against the petitioner. According to counsel, the respondent made a judgment that the petitioner respondent to a complaint summary sheets that had been served upon him. This according to Mr. Thuita was an apparent error on the face of the record as there was no complaint, there was no complaint summary sheet and the petitioner did not answer any.

5. Counsel further submitted that under regulation 4(g) of the Vetting Regulations, vetting shall be done in a transparent manner allowing the person undergoing the vetting to know and assess the information that has been used by the commission to reach its decision. However his client was subjected to a most opaque process in contravention of regulation 4(g). according to counsel, his client does not know to date information that was used by the commission on its decision.

6. On the issue of whether the petitioner was allowed to fully take part in the vetting hearing as required by rules of natural justice, counsel submitted that the question and answer session did not allow the petitioner to state his case as he desired. He was limited to giving answers to the questions asked only. Further the petitioner had asserted that he had taken two days to travel from Marsabit through difficult terrain to reach his vetting venue in Eldoret. According to counsel, the petitioner was extremely exhausted from the journey and proceeded to face the vetting team in that state. The petitioner was clearly not in a proper state of mind, a fact that the respondent concurred with when it allowed his application for review to be heard. Mr. Thiuta further complained that his client was not allowed during the vetting to refer to evidence that he desired. Further, the respondent did not allow the petitioner to call witnesses of his own.

7. Regarding legal representation, counsel submitted that under section 4 (3) (e) and the Fair Administrative Action Act, the petitioner was entitled to legal representation during his review hearing. However, the respondent only allowed counsel to be present but was not allowed to make any submission

on behalf of the petitioner or directly engage the interview panel in any manner. This according to counsel was a denial of the petitioner's right to counsel in a matter as grave as this one.

8. Regarding standard of proof, counsel submitted that the respondent appeared to have deliberately moved away from this requirement. According to Mr. Thuita, for there to be a proof of fact on a balance of probability there must be some basic evidence pointing to the existence of the facts. The findings were therefore not supported by the required evidence.

9. Counsel further faulted the vetting panel for failing to give reasons for their decisions as required by Section 4(2) of the Fair Administrative Action Act. According to counsel, the vetting decision made sweeping findings that were not backed by any reasons at all.

10. Mr. Thuita further faulted the vetting panel for being biased since they failed to provide adequate notice to the petitioner on the full details of the adverse suspicions facing him. The petitioner was not given an opportunity to avail documents, call witnesses or even examine the documents beforehand.

11. Mr. Thuita further submitted that the vetting decision was signed by strangers. According to counsel, during the exercise the panel kept mutating. He submitted that the vetting regulations require that a panel be constituted and is expected that such panel would consider the issue from the beginning to the end. According to counsel only two commissioners namely commissioner Murshid Mohammed and Ronald Musengi took part in the petitioners vetting from commencement to the end.

12. Ms. Brenda Opiyo for the respondent on her part submitted that the respondent had demonstrated that and proved that it accorded the petitioner utmost procedural fairness as contemplated in the constitution and other laws guiding vetting process. According to counsel, the respondent unequivocally explained that the petitioner was first removed from service on 9th October 2015 after procedural and lawful vetting on the ground that he wilfully misled and concealed information relating to his sources of income, failed to offer plausible explanation on suspicious deposits noted in his bank accounts which violated provisions of Regulation 18 of the Police Service (Vetting's Regulations 2013) thereby raising serious issues on his financial probity.

13. Ms Opiyo further submitted that it was evident from the hansard record that the petitioner failed to truthfully disclose his sources of income during the declaration of wealth way before the vetting started. Instead, the petitioner mentioned numerous businesses and dealings as justification for his income and suspicious deposits on the vetting day.

14. Concerning absence of any complaint from the public, counsel submitted that it was a clear misapprehension of the law guiding the vetting process for the petitioner to purport that he could not be asked questions relating to his sources of income and deposits without a formal complaint having been lodged against him. According to counsel, the vetting process was not a criminal or quasi-criminal exercise but a statutory process mandating the respondent to vet all the officers in the service to determine their competence and suitability to continue serving in the police service regardless of what is contained in their work record. The filing of a complaint against the officer was not a precursor for vetting as the petitioner mistakenly believed. According to counsel therefore, the commission can thus ask questions without limitation regarding the officers work record and financial probity even in the absence of a complaint.

15. Concerning legal representations, counsel submitted that the petitioner was duly notified that he was free to appear with his counsel but it was the petitioner who was to answer questions during the vetting for purposes of clarifying issues raised and not the advocate. The advocate could however offer technical advice and seek clarification on the petitioner's behalf from the panelist where there was need which has been the procedure. Counsel therefore submitted that it was erroneous to allege that the petitioner was not permitted legal representation.

16. Regarding the allegation that the vetting decisions was not arrived at and signed procedurally. Counsel submitted that this lacked any legal basis since regulation 25(4) of the vetting regulations clearly

provide that the decision shall be recorded in writing, signed by all Commissioners who decided the matter and sealed with the common seal of the commission. According to counsel, these provisions do not restrict decision making to the commissioners who participated in the hearing since the proceedings are recorded in the hansard record verbatim and print-outs are later used in determining whether an officer is suitable to continue serving or not.

17. According to Ms Opiyo therefore, the respondent had demonstrated that the decision to remove the petitioner from the service and subsequent review was lawfully and procedurally arrived at and signed by the commissioners who decided the matter on behalf of the commission as contemplated under regulation 25. According to counsel, permission to the commission to co-opt members into panels is provided for under Section 13 of the National Police Service Act and under Regulation 10, as co-opted members are barred from participating in decision making which is a preserve of the commissioners.

18. Having summarized the factual background of the petition as well as the respondents response and further having considered submissions by counsel for the petitioner as well as counsel for the respondent, the issues for the court to resolve are first, whether the respondent afforded the petitioner a fair opportunity to be heard. That is to say whether he was presented with the allegations against him in reasonable time and allowed to call witnesses.

19. Second, whether the decision arrived at to vet him out of the Force was properly arrived at. That is to say was it proper for the commissioners who never participated in the proceedings to deliberate and sign the decision to declare the petitioner unfit to continue in service. Concerning the first question, the court has carefully considered the detailed affidavit filed by the petitioner in support of the petition and the main frame seems to be that the petitioner was not in a proper state of mind and body during the vetting interview having travelled from Marsabit through difficult terrain to reach the vetting venue in Eldoret. According to him, he was exhausted. The other issue raised by the petitioner is that during the vetting he was not allowed to refer to evidence he desired to and was not allowed to call witnesses of his own.

20. The respondent did not seem to have responded to these serious allegations. Mr Kavuludi in his replying affidavit seemed to have dwelt more on the failure of the petitioner to explain his sources of income. He described the complaints by the petitioner as afterthought.

21. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This provision of the Constitution is replicated and or echoed under section 4 of the Fair Administrative Action Act subsection 3 of the Act provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard.

22. The petitioner as observed earlier complained that he was exhausted from having travelled when he appeared before the interview panel hence was not in a proper state of mind to properly go through the vetting process. He further complained that he was never given an opportunity to call witnesses to rebut the accusations against him. The respondent did not present any credible counter to these serious allegations. It merely dismissed them as an afterthought. As was held by my brother Odunga J in the case of **Immanuel Masinde Okutoyi & Others Vs National Police Commission**, it is imperative that allegations made against a police officer be availed to him or her in good time to enable him or her adequately respond thereto. To confront an officer with allegations when their source cannot be vouched is unfair.

23. Concerning the second issue on the validity of the decision herein, Mr Thuita for the Petitioner complained that during the exercise the panel that dealt with the petitioner kept on mutating yet the vetting regulations required that a panel be constituted and this panel is the one which is expected to consider issues from the beginning to the end. According to Mr Thuita the only Commissioners who took part in the petitioner's vetting from commencement to the end were Commissioner Murshid Mohammed and Ronald Musengi yet in the vetting decision all the Commissioners including those who never took

part signed the decision.

24. In response to this submission, Mr Ojwang for the respondent contended that regulation 54(4) of Vetting Regulations provide that the decision shall be signed by all Commissioners who decided the matter. According to Mr Ojwang, the regulations do not restrict the decision making to Commissioners who participated in the hearing since the proceedings are recorded in the hansard verbatim and print outs are used in determining whether an officer is suitable to continue serving or not.

25. The court holds a different view of Regulation 54(4). This regulation clearly provides that, the decision shall be signed by the Commissioners who decided the matter. It does not require all the Commissioners including those who did not decide the matter to sign the decision. Further, the decision making process requires that the person doing so interacts with the issue about to be decided extensively. If the matter to be decided involved oral hearing the person to ultimately decide the matter should participate in such hearing.

26. It is only by so participating that such a person may gain a deeper understanding of the issue through observing the demeanour and predisposition of the person being questioned and his or her witnesses. It makes nonsensical the oral hearing process if it can be said that the proceedings are after all captured verbatim in the hansard and print outs would be made to persons deciding the matter. To say so is tantamount to saying there is no need for the panel to conduct oral hearing since officers can be interviewed on location, their answers recorded on tape and replayed somewhere to people who have never met them to decide if they are fit to continue serving. Such a process cannot be supported by a Court of Justice

27. In the case of **Republic Vs Complaint Commission Media Council of Kenya & 2 Others** the court observed that procedural impropriety is one of the grounds for seeking and granting Judicial Review. This has been described as failure to act fairly on the part of the decision making authority in the process of taking a decision.

28. The appending of a signature on the decision is an authentication that the person signing has fidelity in the decision in that it was arrived at after a fair hearing process. Reading of hansard printout in some backroom after the oral hearing which that person reading never attended does not constitute procedural fairness. It is as it were, a procedural impropriety.

29. In conclusion the court orders as follows concerning the petition:

- a. The Petitioner's fundamental rights were violated
- b. An order of *certiorari* do issue to quash the entire proceedings and the decision of the respondent made on 9th October, 2015.
- c. The petitioner be deemed to have been in service with full salary and benefits from 9th October, 2015 pending a fresh vetting and outcome thereof.
- d. The petitioner shall be vetted afresh in conformity with the vetting regulations and rules of natural justice generally.
- e. The petitioner shall have costs of the petition.

30. It is so ordered.

Dated at Nairobi this 17th day of March, 2017

Abuodha J. N.

Judge

Delivered this 17th of March, 2017

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.

Abuodha J. N.

Judge