



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1122 OF 2015

MOFFAT MWANGI CLAIMANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

DEPUTY INSPECTOR GENERAL KENYA POLICE 2ND RESPONDENT

RULING

1. The Claimant, through application dated 29th June, 2015 is seeking for orders that the Respondents be barred from effecting the deployment of the Claimant to the new station or taking disciplinary action for failure to comply with the deployment order or any action that would prejudice him as an officer of the 1st Respondent. The application is supported by the affidavit of the Claimant and on the grounds that he has been in the service of the Kenya Police Service AND currently attached to Milimani Law Courts and has been deployed to Wajir County.
2. Further grounds in support of the application are that where the Claimant is deployed from Nairobi County to Wajir County, this will cause him hardship since he is ailing and requires constant medical attention but such ailment has not inhibited the performance of his duties. The health of the Claimant, social wellbeing and employment status is at risk with deployment and will jeopardise his further and future treatment. The Claimant is aware that as an officer he can be posted to any area and seeks the reconsideration by the Respondent of his health, life and wellbeing.
3. That the law recognises objecting to a transfer as compassionate ground or medical grounds is not recognised in deployment instances and thus seek the court to reconsider his deployment and more so the Respondents finding that this will cause him hardship and thus seek the orders set out in the application.
4. In his affidavit, the Claimant avers that he was enrolled as a Police Officer in 1998 and has diligently undertaken his duties. By notice dated 12th May, 2015 the 2nd Respondent deployed him to Khorof Haran Police Post. The Claimant applied for a reconsideration and seeking deferral of the deployment through the county commander. The deferral was requested for on medical grounds as the Claimant has been attending Psychiatric clinics and treatment at Mathari Hospital in Nairobi.
5. In reply, the 1st Respondent filed **Relying Affidavit on 30th November, 2015 and sworn by Johnson Kavuludi** and avers that he is the chairman of the National Police Service Commission, the 1st Respondent and a constitutional commission with mandate under article 246 of the constitution. The 1st Respondent has the mandate to transfer any officer within the service and the deployment of any officer is to allow movement of officers from station to station for specific assignment for a set period of time.

6. The Claimant joined the service in 1998 and his service is governed by the National Police Service (Transfer and Deployment) Regulations, 2015 that allow for a transfer as each officer has agreed to serve in any place in the country. The mandate to deploy officers lie with the 2nd Respondent and upon which the Claimant was deployed to Wajir County.

7. The 1st Respondent was not aware of the medical condition suffered by the Claimant and there are no records filed on any ailment or treatment in 2014. The functions of the Respondents are to ensure national security is addressed and carry their mandate without discrimination.

8. The 1st respondent shall seek to be removed from these proceedings as they have no role in the deployment of officer in the Kenya Police Service and the decision taken by the 2nd Respondent as allowed under the Regulations has no bearing on the 2nd Respondent's role. The deployment of the Claimant was never brought to the attention of the 1st Respondent.

9. The 2nd Respondent filed **Replying Affidavit on 28th October, 2015 sworn by Gladyce Ogonda** who avers that as the Staff Officer Personnel 3 for the Kenya Police Service, by letter of appointment issued to the Claimant on 25th February, 1999 he is liable to be posted to any station within the country. The Claimant accepted this term of his service. The Claimant has now been deployed from Milimani Law Court to Wajir County together with 209 other officers in the service.

10. The deponent also avers that the allegations by the Claimant that he developed medical problems in February, 2014 and was diagnosed with mental problems which requires constant medical attention is surprising as he failed to inform his superiors of such a condition. The Claimant failed to avail medical records to the Respondents for administrative purposes and only raised the same upon deployment which is in bad faith. Perusal of the treatment note, treatment was on 23rd February, 2014 and there are no further records of treatment. The Claimant was to be on prescription medical monthly for a period not specified and to be reviewed yet there is no record of such a review or his current medical status. It is a condition pertinent that for a police officer to continue serving, it is mandatory that he must be mentally and physically fit to discharge his duties efficiently. This is in accordance with Force Standing Orders, Chapter 20 paragraph 30 (c).

11. The Claimant in his affidavit avers that his condition has not hindered him from performing his duties. The assertion that there will be no medical services available is not correct as health services are a devolved function to the counties in accordance to the constitution and can be easily accessed to his new station.

12. The assertion that Wajir is prone to terrorist attacks, bandit and other offences is contrary to the police service that is tasked with the role of maintaining law and order and promotion of national security. The application should be dismissed with costs.

13. The Claimant in his Supplementary Affidavit filed on 9th November, 2015 avers that his deployment as not anticipated since his ailment arose as a surprise. The ailment has not handicapped him in the performance of duty. That it is common knowledge about the security situation in Northern region of the country and this will not help in his medical condition. That the noted medical condition should be given consideration.

Submissions

14. The parties filed their written submissions.

15. The Claimant has reiterated his application. The Claimant also filed Supplementary Submissions. That the 2nd Respondent did not demonstrate fair administrative action towards him in the deployment. His letter to reconsideration of review was not replied to; he has received threats of disciplinary action for failure to comply with the deployment; and the responses to the medical condition are only speculative.

The suit is properly commenced and in any event the 1st Respondent is not aware of the deployment of the Claimant effected by the 2nd Respondent. The 1st respondent is a necessary party herein.

16. The 1st Respondent submits that the application is bad in law as held in **Paul Ng'ang'a Nyaga and 2 others versus AG & 3 others [2013] eKLR** that the process of the court must be used properly and honestly and in good faith. The Claimant is only advancing his own benefit because he does not want to go to Wajir County. Where the Claimant was sick as alleged the doctor who attended to him would have stated so and the remedial action to be taken. An officer in the service of the Kenya Police Service can be placed anywhere for service and the application herein is premature as held in **M/s Master Power Systems Limited versus Public Procurement Administrative Review Board and 2 others [2015] eKLR**.

17. The 1st Respondent also submits that as its role is set out under the constitution and does not include the deployment of officers but this is vested on the 2nd Respondent, they ought not to be a party herein. Where the Claimant has been deployed as a punishment, the Regulations give a redress which the Claimant has not utilised.

Determination

18. It is the prerogative of an employer to deploy employees within any business or establishment. Such is to ensure balance of work and based on the need. Such prerogative can only be interfered with by the court where the employee who has challenged the deployment is able to demonstrate sufficient grounds and which grounds were brought to the attention of the employer, but the same were not given reasonable consideration.

19. In **Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR** the court held that;

With regard to labour relations and employment matters, there is now a legal duty on an employer to give an employee reasons or reason for any action taken being matters the employer genuinely believed to exist and which caused the employer to take such action. It does not end there as the employer, even where there is a genuine reason or reasons to give to the employee with regard to any action taken the same must be assessed as to its validity, fairness and reasonableness. It goes even further as where an employee who feels aggrieved by such action and there is a reason or reasons given which the employee believes [is not] genuine, such complaint must be lodged with the industrial Court and what is crucial to assess if the procedure applied by the employer while arriving at the subject action or decision.

20. In his regard, the employer must be fair and ensure that the subject employee has received due consideration in terms of any complaints or matters brought to the attention of the employer. In **Elizabeth Washeke and 62 Others versus Airtel Networks and Another, Cause No. 1972 of 2012**;

Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.

21. The application by the Claimant is premised on the grounds that he should not be deployed from Milimani Law Court to Wajir County due to his health status. The Claimant has attached annexure “MMiii” a medical note from Ministry of health, Psychiatric Services, Long Prescription from Mathari Hospital. The note indicates the Claimant was discharged from the facility with additional medication by Dr Mugo.

22. The Claimant filed his application on 30th June, 2015 and a Supplementary Affidavit on 9th November, 2015. The health condition being his main basis for his application and reason for seeking reconsideration of his deployment, I find not effort by the Claimant to explain his situation further.

23. The challenge by the Respondents is that even where the Claimant was unwell and required treatment, he never filed his medical records with them or makes available information as to his health status for the Respondents to be appraised of the same. The Claimant has not followed this thread of challenge at all. In the Further Affidavit, the Claimant has opted to address the security situation is the new station instead of going to the core of his application.

24. Even where the Claimant, by the nature of his service is not subject to the application of the provisions of the Employment Act, 2007 I find a best practice therein in terms of a person who while in employment and is sick, unwell or is ailing can apply. Section 34 of the Employment Act sets a reasonable standard and practice that can apply across the board. The subject employee/officer/person that is ailing, sick, unwell must bring this to the attention of the employer or the other party within a reasonable time about his circumstance. Where an employee of officer is unwell and receives treatment, a medical certificate must be presented with the employer. If I may borrow from the Act, section 43(3) states;

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

25. The Claimant made no effort to inform or bring to the attention of the Respondents his medical needs or condition. The Claimant then remained available for deployment as required by his appointment and service. Nothing stopped the 2nd Respondent from effecting or reviewing the deployment. I find he 2nd Respondent made the deployment reasonably and with fairness.

26. The medical note is dated 23rd February, 2014. There is no further record of treatment after this date. These are records that remained in the custody of the Claimant and never submitted with the respondents. As such the Respondents cannot be faulted as having acted unlawfully or without justification as there exists a mandate to transfer or deploy officers anywhere within the country.

27. The Claimant is seeking to rely on his medical condition as reason as to why he should not be deployed from his current station to a new station. The duty is on him to demonstrate his circumstances and not the respondents.

28. It is not in dispute that upon the appointment of the Claimant in 1998 he accepted to serve anywhere within the country. Such commitment was taken seriously and with it, the Claimant was deployed at Milimani Law Courts. In this station the Claimant asserts that he has served diligently. The Claimant also asserts that his medical condition has not prevented him from performing his duties in any manner.

29. It is common cause that officer in the service of the Respondents serve a distinct role for the nation. Such officers deal with security within the borders of the Republic of Kenya. Where the Claimant asserts that he has no handicap in serving at his current station, such service is therefore available within the borders of the Republic.

30. The Claimant has simply ambushed the Respondents with his medical condition upon his notice for deployment. This was never brought to the attention of the Respondents at any moment prior to the deployment. Sickness or illness while at work and in the service is not a secret. For an employer to effectively be able to give an officer the required support, such information must be brought to the attention of the employer within a reasonable time and not be used as a bargaining chip where there is deployment.

31. In any event the Regulations now give provisions on how an officer such as the Claimant, where

aggrieved by a deployment can seek redress. The Claimant has not exploited this mechanism. Such a mechanism is within the shop floor and the facts set out by the Claimant as to his medical condition should have best been addressed at this level before filing claim herein. To file suit, the Claimant reduced his avenues of engagement.

32. I find no sufficient cause set out by the Claimant as to why the orders sought should issue. The essence of the application and Memorandum of Claim are the same. With the application not being granted, to allow the claim to stand would be academic.

33. The 1st Respondent has challenged the joinder herein. With the above analysis and findings dealt, such is addressed as a result.

The application by the Claimant is hereby declined save that there shall be no disciplinary action taken against the Claimant for filing this suit noting the subsisting orders were given on the basis that interim orders were necessary pending the hearing of the application now dismissed.

Dated, delivered in open court at Nairobi this 16th day of March, 2017.

M. MBARU

JUDGE

In the presence of:

.....

.....