



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 126 OF 2016**

**AUGUSTINE MUTEMBEI MARANGU ..... PETITIONER**

*VERSUS*

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE DEPUTY INSPECTOR GENERAL, KENYA POLICE SERVICE...2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION .....4<sup>TH</sup> RESPONDENT**

Mr. Mugendi for petitioner

M/S Chesina for 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents

Mr. Ojwang for the 4<sup>th</sup> respondent

**JUDGMENT**

1. The petition was filed on 20<sup>th</sup> September 2016 seeking the following reliefs;

- a) A declaration that Article 47 and 50 of the Constitution have been violated.
- b) An order of prohibition prohibiting the respondents from conducting any disciplinary process and or removal of proceedings of the petitioner from Kenya Police service.
- c) A declaration that the act undertaken by the respondents in initiating the disciplinary process on 15<sup>th</sup> September 2016 and or removal proceedings of the petitioner from Kenya Police Service is null and void for all intents and purposes and is in breach of petitioners rights under Articles 47 and 50 (1) and (2) (0) of the Constitution.
- d) An order that the respondents terminates the disciplinary process initiated on 15<sup>th</sup> September 2016 and the panel hearing on 19<sup>th</sup> September 2016 and should not take disciplinary action against the petitioner.
- e) An order that the petitioner should not be victimized, harassed, discriminated against, unfairly treated or targeted on account of this court case.

f) An order restraining the respondents from terminating the petitioner's employment or summarily dismissing, transferring or demoting or stopping annual increment of the claimant or take any other adverse action against the petitioner on the basis of the disciplinary process initiated on the 15<sup>th</sup> September 2016.

g) Any other or further orders, writs and directions the Honourable Court considers appropriate and just to grant in the interest of justice.

h) That the costs of this petition be provided for.

2. The petition was accompanied by a notice of motion that was later amended on 22<sup>nd</sup> September 2016 seeking to stop disciplinary committee constituted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents chaired by Mr. Leonard Omollo CP and assisted by Mr. Sharma Boy SP and Mr. Nicolas Mina SP pending the hearing of the application.

3. The application was subsequently withdrawn and the parties chose to deal with the petition itself. Status quo was however to be maintained until the petition was heard and determined.

The petition is based on the following facts;

4. The petition seeks relief for contravention of the Constitution of Kenya, 2010 under Article 27, 28, 41, 47, 50, 165, 236, 260, 258 of the Constitution of Kenya, 2010.

5. That petitioner is a resident of Nairobi County and in the Republic of Kenya and at all material times the holder of the office of Commanding Station – Shauri Moyo Police Station a public office in the 1<sup>st</sup> respondent.

6. That the 1<sup>st</sup> & 2<sup>nd</sup> respondents commenced disciplinary proceedings against the petitioner on the 15<sup>th</sup> September 2016, without affording the petitioner an opportunity to interrogate the complaint levelled against him and or giving the petitioner time to respond to the allegations levelled against him.

7. That the 1<sup>st</sup> respondent's action in proceeding with the disciplinary proceedings acted outside the clear provisions of the National Police Service Act and the regulations there under in that the petitioner has been denied the chance to present his defence and or prepare for the hearing.

8. That actions by the 1<sup>st</sup> & 2<sup>nd</sup> & 4<sup>th</sup> respondents were unreasonable, ultra vires, null and void *ab initio*.

9. That the decision by the 1<sup>st</sup> respondent to require the petitioner to be subjected to disciplinary action by a disciplinary committee was without legal basis, unreasonable and the same is adverse against the petitioner for he was denied the right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

10. That the 1<sup>st</sup> respondent's actions violate the petitioners rights under Article 27(1), 41(1) and 47 & 50 of the Constitution for the following reasons:

- That the petitioner's right to equal protection before the law has been infringed.
- That the decision goes against the right to fair labour practices.
- That the decision offended the petitioner's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- The disciplinary proceedings as commenced do not comply with the requirements of due process as the petitioner has been denied a right to table his evidence and or respond to the allegations levelled against him.

11. That the impugned disciplinary process, contravene Article 47 and 50 of the Constitution since the petitioner has been denied the written reasons for him to face the disciplinary process as well as the

failure by the 1<sup>st</sup> respondent to issue to the petitioner notice to show cause why disciplinary proceedings should not be undertaken against him.

12. That the decision of the 1<sup>st</sup> respondent contained in the undated document signed by W. W. ABDUBA S. O. "B"7 violates Article 10(1), 47, 50, 232 and 235 of the Constitution for reasons that the actions goes against the principles of good governance as well as safeguards as to due process of the law.

13. That the purported disciplinary proceedings against the petitioner constitutes violation of the petitioners rights under Article 27, 28, 41, 47 and 50 of the Constitution.

14. That the decision by the 1<sup>st</sup> respondent to subject the petitioner to a disciplinary process that is alien to the law governing the petitioners employment is against the rules and the National Police Service Commission Act and the regulations thereunder.

15. The petition is supported by an affidavit and a further affidavit of the petitioner sworn on 19<sup>th</sup> September 2016 and 6<sup>th</sup> October 2011 respectively.

16. The petition was amended to include violation of Article 236 of the Constitution alleging victimization and discrimination inspite of his exemplary service to the Police Force.

17. An additional prayer for an order of certiorari to quash the disciplinary proceedings and the decision of the committee was also added. The National Police Commission was also added to the suit.

## **Response**

18. The National Police Service Commission, the 4<sup>th</sup> respondent filed a replying affidavit sworn to by Johnstone Kavuludi, the chairman of the Commission.

19. The Commission states that it has mandate under Article 246 (3) of the Constitution to observe due process, exercise disciplinary control over and remove persons holding or acting in offices with the service.

20. The Commission relies on Regulation 3 of the National Police Service Commission (Discipline) Regulations 2015 as follows;

21. *"Disciplinary by the Commission*

*3. (1) The Commission shall exercise disciplinary control over the Service.*

*(2) In these Regulations, "disciplinary control" includes-*

*a) the development and prescription of fair and clear disciplinary procedures and mechanisms in accordance with Article 47 of the Constitution;*

*b) ensuring compliance with the prescribed disciplinary procedures and guidelines formulated by the Inspector-General;*

*c) ensuring compliance with the due process in disciplining members of the Service;*

*d) receiving of regular reports from the Inspector-General on disciplinary matters handled by the Service;*

*e) reviewing or ratifying of disciplinary actions taken by the Inspector-General;*

*f) hearing and determining appeals from the members of the Service; and*

*g) observing due process, removing persons holding or acting in offices within the service.”*

22. That the applicant herein was enlisted in the Kenya Police service and the applicant’s letter of appointment *interlia* provides that upon acceptance of the same the applicant is subject to all regulations for officers of the Public service of Kenya which are now in force or which may be promulgated from time to time including disciplinary procedures.

23. That the applicant herein alleges that he was charged in unprocedural orderly room proceedings and that the disciplinary committee has proceeded to the hearing of his case in his absence.

24. That regulation 4 of the National Police Service (Discipline) Regulations 2015 states as follows;

*“Complaints against police officers*

*4. (1) The disciplinary process may commence upon occurrence of any of the following –*

*a) a complaint from a member of the public;*

*b) a complaint from a member of the Service;*

*c) a complaint from a state organ; or*

*d) an anonymous witness statement or other statement made for another investigation not necessarily commenced for purposes of police Service matters.*

*(2) .....*

*(3) .....*

*(4) .....*

*(5) .....*

*(6) .....*

*(7) .....*

*(8) .....*

*(9) .....*

*(10) Where an officer accused in a complain admits to an offence against discipline, appropriate disciplinary proceedings shall be taken by the appropriate disciplinary committee.”*

25. That following various public complaints on the conduct of the petitioner on diverse dates from 1<sup>st</sup> June 2016 to 31<sup>st</sup> July 2016 in Shauri Monyo Police Station where the petitioner is in charge, he allegedly released 20 prisoners without charging them.

26. That upon receipt of the said complaints, the National Police Service directed that investigations be conducted.

27. That after investigations were conducted the petitioner was found to have released twenty prisoners who were in custody without preferring any charge against them.

28. That pursuant to regulation 4 (10) of the National Police Service (discipline) Regulations 2015 a subordinate disciplinary committee was formed as a result of the outcome of the investigations and the

petitioner was informed of the same.

29. That the petitioner was notified of the said offence through a waiver notice as per the law and he signed it on 15<sup>th</sup> September 2016 at 10 a.m.

30. That the petitioner appeared for the disciplinary hearing on 19<sup>th</sup> September 2016 and all the facts were read to him where he requested for an adjournment which was granted and proceedings were to commence on 20<sup>th</sup> September 2016.

31. That further and without prejudice to the above, after the petitioner had requested for an adjournment, he failed to show up and did not communicate the reasons as to why he did not appear as required.

32. That regulation 12 of the National Police Service (Discipline) Regulations 2015 states;

*“Disciplinary hearings where the accused is absent.*

*12. (1) Where an officer fails to attend a disciplinary hearing despite evidence of notification of the date, venue and time of the hearing the disciplinary hearing may proceed in the absence of the accused officer and the presiding officer shall record the reasons for the accused officer’s absence.”*

33. That the subordinate disciplinary committee pursuant to regulation 12 and after deliberations agreed to conduct the proceedings in the absence of the petitioner. Further, Chief Inspector Mathew Chelimo was appointed to represent the interests of the petitioner herein.

34. That it is the Commission’s disputation that the petitioner has failed to prove any act of procedural unfairness, illegality or constitutional violation as alleged on the part of the Commission.

35. That further to the above, the law is very explicit that whoever alleges procedural unfairness or abuse of any fundamental human right must demonstrate clearly to the Court the instances or elements of unfairness and breaches of the law but a general quoting of the statutory law without proof should not suffice.

36. That in response to paragraph 12 of the petitioner’s supporting affidavit, it is the Commission’s contention that the petitioner despite being aware of the existing internal lawful appeal mechanisms including an appeal to the Commission, failed to exhaust all the existing mechanisms of appeal and instead rushed to court thus making his case premature.

37. That it is the Commission’s contention that the suit is misconceived, misinformed, bad in law and an abuse of the court process and it be dismissed with costs to the respondent.

38. The Commission prays that the petition be dismissed with costs.

### **Determination**

39. The issues for determination are;

(i) Whether the respondents violated the rights of the petitioner as alleged or at all.

(ii) What reliefs if any, is the petitioner entitled to.

### **Issue i**

40. The court is satisfied that the Kenya Police Service received numerous complaints against the management of Shauri Moyo Police Station of prisoners being kept for long and released under

questionable circumstances. These facts were confirmed by a fact finding mission conducted by Mr. Wilson Abduba Waqo SSP between 1<sup>st</sup> June 2016 and 31<sup>st</sup> July 2016.

41. It was also discovered from the occurrence Book, the cell register and the cash bail book that several prisoners arrested were released under questionable circumstances as no reasons were given for their release, inconsistencies in the OB and the cell register, no record of disposal was found and other prisoners were held for long periods of time without any explanation.

42. The petitioner was in-charge of the administration of Shauri Moyo Police Station and therefore obliged in law to ensure all laws and regulations pertaining to arrest, detention and discharge of prisoners are followed to the letter and proper records kept.

43. The petitioner was called to a disciplinary hearing on 16<sup>th</sup> September 2016 upon signing a waiver notice on 15<sup>th</sup> September 2016.

44. The petitioner had the right and was informed of the right to be represented and to call any witness in his defence. The proceedings commenced on 16<sup>th</sup> September 2016 and the petitioner was represented by one Mr. Ali Nuno. The proceedings were adjourned to 19<sup>th</sup> September 2016 on the petitioner's request to afford him more time to prepare his defence.

45. On 19<sup>th</sup> September 2016, the proceedings began as scheduled but during the session, Mr. Ali Nuno Dubat SSP excused himself from representing the petitioner, protesting the constitutionality of the process.

46. The petitioner was granted an adjournment to find a replacement from among his colleagues as prescribed by law but could not find one leading to an adjournment.

47. The proceedings were to continue on 20<sup>th</sup> September 2016 but the petitioner did not show up without any explanation. The disciplinary hearing proceeded in petitioner's absence, in terms of Regulation 12 (1) of the National Police Service (Discipline) Regulations 2015, cited earlier.

48. The petitioner filed this suit on the same day.

49. The respondents submit that there is no evidence whatsoever that the rights of the petitioner were violated as **alleged or at all whereas the petitioner submits to the contrary.**

50. The rules of natural justice encompass;

a) *Audi Alteram pertem* – the rule that no man shall be condemned unheard; and

b) *Nemo judex in re causa sua* – no man shall be a judge in his own cause.

51. The first rule is the right to be heard and the second is the rule against bias.

52. In **Simon Gakuo Vs. Kenyatta University and 2 others Misc. Civil Appl. No. 34 of 2009**, the High Court held;

*“The audi alteram pertem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the court room situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view.”*

53. From the evidence before court, the petitioner was afforded every opportunity to be heard. He was

given good notice; allowed representation; allowed adjournment when it became necessary; allowed to call witnesses if any but he absconded midstream, abandoned the disciplinary process and rushed to court notwithstanding that there was in terms of regulations an internal appeal process.

54. Clearly, the allegations against the petitioner were not without basis. The petitioner had a constitutional and statutory obligation to be fair and just to members of the public who were brought to Shauri Moyo Police Station.

55. The respondents, as his employer had a mandate and were entitled to interrogate any alleged misconduct that violated the rights of members of the public. What is good for the goose is good for the gander.

56. Section 50 (1) of the National Police Service Act No. 11A, 2011 requires the police officer in charge of a police station to keep proper records of the activities of that station. It reads;

*“(1) A police officer in-charge of a police station ..... shall keep a record in such form as the Inspector General may, in consultation with the Deputy Inspector General, direct and shall record all complaints and charges preferred, the names of all persons arrested and the offences with which they are charged.”*

57. In **Prof. Gitile Naiture Vs. University Council of Multi-media University College & another [2003] eKLR**, the court declined to grant an injunction restraining the employer from carrying out disciplinary process against the claimant on grounds that it was prerogative of the employer.

58. In **Corporal Thomas Othoo Vs. National Police Service Commission and 3 others (2016) eKLR** where the facts were substantively similar with the case at hand, the court frowned upon the ideal of having proceedings commenced while the petitioner had not exhausted all instances of internal process. In this case Abuodha J. observed that;

*“12 The court is open to entertain any matter which it has jurisdiction to do. However such jurisdiction is to be exercised in a way that is not seen to direct or control management discretion and policy on staff discipline, where in an employment relationship provisions are made for disciplinary mechanisms, these must be followed and exhausted before resort to the court. The only point when the court can interfere mid-course is in cases where such process is in serious breach of natural justice or fundamental rights or freedoms protected by the Constitution and international law. This jurisdiction is exercised under judicial review powers of the court.”*

59. This particular case has not met this threshold. For the reasons of fact and law set out herein before, the petition lacks merit and same is dismissed with no order as to costs.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of August, 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**