



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 91 OF 2016**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010 ARTICLES 10, 19(2); 20 (1),  
(2), (3) & (4); 21(1); 23 (3); 35 (1); 41: 47 (1) AND (2); 50 (1); 258 (1); AND 259 (2)**

**-AND-**

**IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT, 2011**

**-AND-**

**IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT, 2011**

**-AND-**

**IN THE MATTER OF: THE NATIONAL POLICE SERVICE (VETTING) REGULATIONS,  
2013**

**-AND-**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**-AND-**

**IN THE MATTER OF: THE VETTING OF GAZETTED OFFICERS IN THE RANK OF  
SUPERINTENDENT OF POLICE**

**-BETWEEN-**

**BENARD MBARU MBURU.....PETITIONER**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION...RESPONDENT**

Mr. Thuita for petitioner

M/S Opiyo for respondent

**JUDGMENT**

1. The petition was filed on 20<sup>th</sup> May 2016 and amended on 2<sup>nd</sup> March 2017 seeking the following reliefs:

- (i.) A declaration that the petitioner's fundamental rights and freedoms have been violated.
- (ii.) An order of certiorari do issue to quash the entire proceedings and the decision of the respondent declaring that the petitioner had failed vetting and had been discontinued from the administration police service including the **Vetting Review Decision**.
- (iii.) An order of reinstatement of the petitioner to his post as a superintendent of the Administration Police Service as well as reinstatement of all his privileges including his salary.
- (iv.) An order substituting the respondent's decision with a declaration that there exists no materials to find that the petitioner had failed vetting.
- (v.) Compensation to the petitioner for the violation of his fundamental rights and freedoms.
- (vi.) Cost of this petition.
- (vii.) Any other relief that this Honourable Court may deem just to grant.

2. The petition is based on the grounds that may be summarized as follows; -

- (i.) The allegations made against him lacked particulars and supporting document and were therefore not substantiated. This denied the petitioner the right and opportunity to know the proper charge facing him.
- (ii.) The petitioner was ambushed with specific allegations of extortion during the hearing and thus had no adequate notice to respond adequately to these specific allegations made during the vetting.
- (iii.) No direct evidence was adduced by the persons who allegedly made accusations against him.
- (iv.) The petitioner denies having made any admission as to his guilt contrary to the findings by the vetting board.
- (v.) The findings by the vetting board was not supported by any evidence and was erroneous materially.
- (vi.) The petitioner was not afforded opportunity to appear before the review panel before it dismissed the petitioner's application for review.

3. The petitioner prays the petition be allowed as prayed.

### **Response**

4. The petition was responded to by a replying affidavit of Mr. Johnston Kavuludi, the Chairman of the National Police Service Commission.

5. The respondent outlined its constitutional and statutory mandate to vet and dismiss the petitioner as mandated under Article 246 (3) (b) of the constitution, Section 7 (1), (2), (3) of the National Police Service Act, as read with Regulations 3, 4, and 14 of the National Police Service (Vetting) Regulations 2013.

6. That 87 police officers including the petitioner were removed from service upon completion of the vetting exercise of the police officers of the rank of SDCP 1 and 2, DCP, S/ACP, ACP, SSP, SP and ASP;

7. That the petitioner was in particular removed as provided by Regulation 14 (2) (b) of the vetting regulations. The complaint against the petitioner was sent to him on 21<sup>st</sup> October 2014 in terms of regulation 18 (2). The court has perused the letter and summary of the complaint.

8. The petitioner responded to the complaint by a letter dated 10<sup>th</sup> December 2014. The court has also perused the response.

9. That on 17<sup>th</sup> March 2015 and 19<sup>th</sup> March 2015, the petitioner appeared before the vetting panel in Eldoret and was questioned on the various allegations made against him.

10. As set out in the replying affidavit, the petitioner was questioned on;

(i.) Deployment of officers to private institutions when the petitioner was the Divisional Administrator police Commander in that he assigned officers to escort private companies which in turn paid him a specific amount monthly. That the petitioner did not follow due process in aforesaid assignments and the petitioner was unable to give clear explanations to the questions put to him during the vetting session. The panel therefore found the petitioner guilty of deploying officers to private businesses without following the law and the officers receiving money directly instead of the said amount being deposited in the appropriate in Aid fund.

11. Mr. Kavuludi further depones that pursuant to regulation 4(f), of the vetting regulations, the commission found the petitioner guilty of the offence on a balance of probability and this formed the basis of his removal. The respondent deposes that in any event the petitioner admitted having provided security service to Hass petrol station for 8 days and later wrote a letter to them requesting payment of Kshs.24,000/=.

12. That upon the initial removal, the petitioner applied for review in terms of Regulation 33 of the vetting regulations on 22<sup>nd</sup> October 2015.

13. That review, in terms of Regulation 33 (2) could only be based on discovery of a new and important matter which was not within the knowledge of or could not be produced by the officer at the time the determination or finding sought to be reviewed was made provided that the lack of knowledge on the part of the officer was not due to lack of due diligence or on some mistake or error apparent on the face of the record.

14. The respondent deposes that the petitioner's application for review did not meet the aforesaid criteria and the commission declined to admit the application for lack of merit. That it was therefore not necessary to give the petitioner oral hearing before a review panel.

15. The respondent contend therefore that the petitioner was given adequate notice of the complaints he faced and was given a fair hearing before an adverse decision was made against him hence the removal was merited and the petition be dismissed with costs.

## **Determination**

16. The parties filed written submissions in support of the respective positions. Upon considering the competing depositions, supporting documents and submissions filed, the court has delineated the following issues for determination;

(i.) Whether the procedure followed by the respondent in vetting and removing the petitioner from police service violated the rules of natural justice?

(ii.) Whether the finding by the review panel is supported by evidence presented before the review panel.

(iii.) What remedies are available to the petitioner.

## Issue i

17. Regulation 4 (a) of the National Police Service (Vetting) Regulations 2013 provides;

**“4. In conducting the vetting process, the commission shall be guided by the following principle: -**

**(b) the vetting process shall be conducted consistently and the same procedural principles shall be applied in all cases;**

**(c) vetting shall be done in accordance with the values and principle sets out in Article 10, 27, 47, 50 and 232 of the constitution;”**

18. Furthermore, and more relevant to this petition, Regulation 18 (2) provides;

**“whenever a complaint or any adverse information has been received by the commission against an officer, a summary of the complaint including any relevant documentation pertaining to that complaint as received by the commission and on which the commission intends to rely in the process shall be served upon the officer.”**

19. There is no dispute that the petitioner only received the summary of the complaints made against him. The four complaints were as follows;

(i.) It is alleged that you are a tribal boss and that you only transfer other tribes and you remain with kikuyu officers and that 50 percent of every posts are headed by persons from your tribe.

(ii.) It is alleged that you allow kikuyu constables to own businesses within Eldoret town.

(iii.) You are alleged to be corrupt in that you extort money from businesses within Eldoret town which is collected by your officers. You also collect money from illicit brewers, which is collected by your juniors and then taken to your office every Monday. It is further alleged that you assign officers to escort private companies which in turn pay you a specific amount every month.

(iv.) You are alleged to be corrupt as you extort money from junior officers in order for them to retain their posts.

20. It is without doubt that the notice of complaint does not contain the specific charges presented to the petitioner at the hearing.

21. The written response by the petitioner was specific to the four general allegations given to him.

22. At the hearing however the petitioner was confronted with specific charges of having provided security for cash in transit for Hass Petrol station in respect of which money was paid directly to the officers and that he had deployed police officers to provide security to Hass Petroleum station for eight (8) days and requested in writing for payment of Kshs.24,000/= which arrangement was irregular. He was shown payment vouchers at the hearing which had not been attached to the complaint notice.

23. The petitioner was accused of giving contradictory answers regarding the matter and was as a result found guilty and removed from office.

24. The officer had in his answers attempted to recall what had happened in respect of Hass Petroleum and from the answers he gave, it was clear that he was surprised by this new information and was not prepared to give clear answers on what had transpired a long time ago. Nonetheless the petitioner explained that Kshs.24,000/= was paid in respect of eight (8) officers who were doing patrol in the area

around Hass petrol station at the request of the business community. The officers were paid Kshs.500/= for lunch. The petitioner said there was an emergency arrangement due to increased insecurity in the area especially during weekends and holidays.

25. In their written findings, the commission found that the petitioner had admitted providing security to a petrol station and writing a letter to them requesting the sum of Kshs.24,000/= as lunch allowances for security offered to the petrol station on three different emergency occasions. The commission found that the explanation given by the officer in the course of his response was not coherent. The commission found that it had come to their attention that there were many police officers guarding private premises and funds paid are not channeled to the government but is instead directed to senior police officers. The commission noted that the contradictory statements offered by the petitioner were meant to deceive the commission.

26. The commission found that “*the officer by his own admission has failed to follow the laid down procedure in the allocation of security to private business entities ..... from the forgoing the commission is of the considered view that the officer is involved in unethical practice and as such unsuitable to serve in the service*”.

27. Section 4 of the Fair Administrative Act 2015 provides *inter alia*;

**“1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**2. Every person has the right to be given written reasons for any administrative action that is taken against him.**

**3. 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-**

**a. Prior and adequate notice of the nature and reasons for the proposed administrative action.**

**b. An opportunity to be heard and to make representations in that regards.”**

*(emphasis mine)*

28. Courts have variously restated the requirements for a fair hearing.

29. In the Court of Appeal at Kisumu, **County Assembly of Kisumu, and 82 others –vs– Kisumu County Assembly Service Board and 6 others, Civil Appeal No. 17 and 18 of 2015 (consolidated) [2015] eKLR**, while confirming the decision of Wasilwa J., Maraga, Musinga and Murgor JJA, relied on the decision of Lord Denning in **Kanda –vs– Government of Malaya** as follows;

*“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”*

30. In asserting the inviolability of the rule of natural justice, *audi alteram partem* (no person should be condemned unheard) the court stated as follows:

**“whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled; in granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what in legal parlance is referred to as the right to**

**“notice and hearing” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must allow sufficient time to interrogate the allegations and seek legal counsel where necessary.” (emphasis mine)**

31. Did the notice of complaint given to the petitioner contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him?

32. Having established the charge which the petitioner was eventually found guilty of and therefore removed from service, that is, having provided security service to Hass petrol station in Eldoret, on various dates and having requested payment of the said service to the tune of Kshs.24,000/= contrary to law and procedure followed within the police force, it is without hesitation that the court answers the question in the negative.

33. Consequently, the respondents violated the right of the petitioner to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and by so doing violated Article 47 of the Constitution of Kenya 2010 as read with Section 4 (1) and (3) (a) of the Fair Administrative Act, 2015.

34. Lord Denning restated in **Selvarajan –vs– Race Relations Board** that;

*“The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it.”*

35. The respondent cannot be allowed the luxury of failing to provide specifics of the charges facing the petitioner, surprise him with invoices, letters and information from members of the public at the hearing which they chose deliberately or negligently to avail the petitioner before he attended the vetting proceedings followed by intense questioning in circumstances in which the petitioner was clearly not prepared to adequately and coherently rebut the barrage of allegations and then base the finding of guilt of the petitioner on this new information and his failure to eloquently and candidly explain these allegations.

36. This is a classical case of failure to provide ‘substantial information with sufficient details’ resulting in violation of the first limb of the rule of natural justice aforesaid.

37. Accordingly, the petition succeeds and the court makes the following orders;

a. The petitioner’s right under Article 47 of the Constitution 2010 as read with Section 4 of the Fair Administrative Act, 2015 as set out above was violated.

b. An order of *certiorari* do issue to quash the entire proceedings and the decision of the respondent declaring that the petitioner had failed vetting and had been discontinued from the Administrative Police Service.

c. The petitioner be reinstated to his position as Superintendent of the Administration Police Service without loss of salary, benefits and privileges that appertains to the office.

d. Costs to follow the outcome.

**Dated, signed and Delivered at Nairobi this 8<sup>th</sup> day of September 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**