



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 41 OF 2016**

*(Formerly Petition No. 64 of 2016)*

**IN THE MATTER OF ARTICLES 22, 23, 15 & 249 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
UNDER ARTICLE 47 (1) & 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTION 6 & 12 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF  
2015**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT & NATIONAL POLICE  
SERVICE COMMISSION ACT**

**BETWEEN**

**SEBASTIAN KIRUNYA LIMBITU.....PETITIONER**

*VERSUS*

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

Mr. Mwangela for the petitioner

Mr. Ojwang for the respondent

**JUDGMENT**

**1.** The petitioner seeks reliefs set out in the petition filed on 19<sup>th</sup> February 2016 as follows:-

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 1<sup>st</sup> respondent declaring that the petitioner had failed vetting been discontinued from the Kenya Police Service including the Decision summarily rejecting the petitioner's application for review.
3. Compensation to the petitioner for the violation of his fundamental rights and freedoms.
4. Any other relief that this honourable court may deem just to grant.

2. The petition is based on grounds set out in the body of the petition as follows:-

- a) The applicant is a senior superintendent of police and his current posting is at Bungoma County where he is the OCPD Bungoma South.
- b) The petitioner attended a vetting interview before the 1<sup>st</sup> respondent on 21<sup>st</sup> March 2015 and by a decision of 9<sup>th</sup> October 2015, the 1<sup>st</sup> respondent purportedly found that the petitioner had failed the vetting and discontinued his employment with the Kenya Police Service on the alleged grounds that; he has a poor work record captured by the many disciplinary infractions that range from sheer indiscipline, laxity in his work, disregard for the law, rules and set down procedure; further that he has a care free attitude towards his duties and that his continued stay in the service would be disgraceful, unproductive and would erode public confidence in the service.
- c) The petitioner applied for review pursuant to the provisions of Regulation 33 of the National Police Service (vetting) Regulations, 2013.
- d) The 1<sup>st</sup> respondent instead of inviting the petitioner for a review hearing summarily dismissed the application for review without providing any reasons whatsoever and without considering that there was no provision for summarily striking out under the vetting regulations.
- e) The 1<sup>st</sup> respondent in finding the applicant unsuitable to continue in the service relied on purported grounds in a final warning letter Ref. No. P/CONF/215425/88 dated 18/8/2010 which grounds are irregular, unprocedural, illegal and unconstitutional specifically because;
  - i. The applicant was never given an opportunity to be heard.
  - ii. The applicant had already received ample punishment on the matters which he had been found wanting.
  - iii. Some of the grounds upon which the applicant was found wanting related to matters out of his control.
  - iv. Some of the grounds upon which the applicant was found wanting relate to unsubstantiated allegations.
  - v. The treatment of the applicant by the 1<sup>st</sup> respondent is discriminatory as some of the grounds he was found wanting had not been used against his colleagues who have since been declared fit to continue serving.
- f) The applicant was purportedly served with a 'final warning letter' yet he had never been served with any other prior notice or warning letter.
- g) That in July 2010 while serving as OCPD, Nyeri the applicant was accused of nominating more officers to be considered for promotions yet it was a decision of the entire Division Board and the same decision was sanctioned by the P.P.O'S representative. Additionally this had also been the trend by virtually all OCPDs.

h) That the applicant was required to provide reasons why he nominated more officers, yet at the time he was to give the explanation, he was on leave which leave had been approved by his senior who wanted a response. This obviously meant that the applicant was denied the right and opportunity to respond.

i) That the applicant is being punished for a mistake that he has already been amply punished for, where as a pay officer in the year 2000 he had lost/misplaced salaries which amounts he fund raised and paid back in full.

j) The applicant is blamed for failing to prevent demonstrations on 3/11/2008 at Homba Forest at the foothills of Mt. Kenya yet all the officers including the OCS of the specific area were unaware of any planned demonstrations.

k) The applicant is made liable for allegedly harassing and assaulting members of the public while drunk yet the alleged complainants withdrew the complaints and the applicant has never been charged or convicted of the offence more than 15 years since the occurrence of the alleged incident.

l) The 1<sup>st</sup> respondent made obvious errors in finding him culpable of mistakes that were beyond his control.

m) The petitioner avers that his right to fair administrative action under Article 47 and right to a fair hearing under Article 50 (1) of the Constitution of Kenya has been violated.

n) The Decision lacked fairness by all standards.

3. The petitioner prays that the petition be allowed.

## **Response**

4. The petition is opposed vide a replying affidavit by Johnstone Kavuludi the Chairman of the National Police service Commission as follows;

(i.) That the National Police Service Commission (hereinafter referred to as the Commission) is mandated under Article 246 (3) (b) of the Constitution to *inter alia* observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.

(ii.) That the Commission is mandated under Section 7 (2) of the National Police Service Act together with Regulation 4 (a) of the National Police Service (Vetting) Regulations 2013 (hereinafter referred to as the Vetting Regulations) to carry out the vetting exercise on all police officers.

(iii.) That Section 7 (3) of the National police Service Act read together with Regulation 32 of the Vetting Regulations gives the Commission the power to discontinue the service of any police officer who fails the vetting on grounds of being unsuitable or incompetent.

(iv.) That the Commission in vetting police officers, is guided by the Constitution, the National police Service Commission Act, the National Police Service Act and the Vetting Regulations.

(v.) That in removing the officer from the service, the Commission is bound by Regulation 3, 4 and Regulation 14 of the Vetting Regulations.

(vi.) That the said regulation states as follows:

*Regulation 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*

*Regulation 4 “in conducting the vetting process, the Commission shall be guided by the following principles–*

- (a) subject to Regulation 8, all officers of the Service shall undergo vetting, individually;*
- (b) the vetting process shall be implemented consistently and the same procedural principles shall be applied in all cases;*
- (c) vetting shall be done in accordance with the values and principles set out in Articles 10, 27, 47, 50 and 232 of the Constitution;*
- (d) vetting shall take into account the need to protect national security as defined in Article 238 of the Constitution of Kenya;*
- (e) the Commission shall be guided by the principles and standards of impartiality, natural justice and international best practice;*
- (f) the vetting process shall not be bound by strict rules of evidence and the proof applicable shall be that of a balance of probabilities;*
- (g) vetting shall be done in a transparent manner allowing for the person undergoing vetting to know and assess the information that has been used by the Commission to reach its decision.”*

*Regulation 14” (1) in vetting an officer, the Commission shall consider, assess and determine the suitability and competence of the officer.*

*(2) The Commission shall, in determining the suitability and competence of an officer, consider –*

- (a) whether the officer meets the constitutional or other criteria required by law for recruitment and appointment of an officer;*
- (b) the past record of an officer including conduct, discipline and diligence;*
- (c) the integrity and financial probity of the officer; and*
- (d) the human rights record of the officer”*

*(vii.) That pursuant to the mandate stipulated in the aforementioned Constitution, the National Police Service Act and the Vetting 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.*

*(viii.) That after the vetting process of the rank of SDCP 1 & 2, DCP, S/ACP, ACP, SSP, SP and ASP was complete, 87 police officers, amongst them the applicant herein were found to be unsuitable and incompetent to continue to serve.*

*(ix.) That the petitioner appeared for the vetting on 21<sup>st</sup> March 2015*

*(x.) That the Commissioner relied on both the personal and confidential file of the officer to assess*

his conduct and discipline.

(xi.) That from the aforementioned files and the vetting Hansard record, it was evident that indeed the petitioner herein was guilty of gross misconduct and wanting in discipline. This was captured by the many disciplinary infractions in his file ranging from sheer indiscipline, laxity in his work and disregard for the law, rules and set procedures.

(xii.) That the petitioner by his own admission during the vetting interview stated that he had beat up civilians while he was an OCPD Kitui and at a time when he was on duty while drunk.

(xiii.) That the petitioner admitted to misusing the salary funds that was meant for junior officers under him and when asked further he admitted refunding the same to the government.

(xiv.) That from the foregoing it is evident that the petitioner could not be trusted to continue serving in the National Police Service.

(xv.) That in removing the petitioner herein the Commissioner was guided by Regulation 14 (2) (b) (d) of the vetting regulations which requires the Commission to look at the past record including conduct, discipline and diligence of the officer and also the human rights record of the officer.

(xvi.) That it is wrong for the petitioner to say that the Commission was acting in bad faith and abused its power by removing him based on the numerous disciplinary issues which were in his confidential and open file yet he was unable to defend himself during the vetting against the disciplinary shortcomings in his record.

(xvii.) That vetting is not a disciplinary issue but is a combination of the analysis of the record of an officer from their inception in the service, disciplinary record, professional conduct, financial probity, integrity of an officer and their human right record.

(xviii.) That in any case the mandate of the Commission during vetting is to look at the past and current record of the officer in order to arrive at a decision of whether the said officer should continue to serve or not.

(xix.) That the petitioner has not shown how the Commission vetting panel has violated his constitutional rights as indicated in the celebrated case of **Anarita Karimi Njeru –vs– The Republic (1976 – 1980) KLR 1272.**

(xx.) That further regulation 33(2) of the Vetting Regulations provides the parameters to guide the Commission in admittance of a review application which are:

a. On the 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.

b. On some mistake or error apparent on the face of the record; or

c. On any reason the Commission considers just and proper

(xxi.) That pursuant to the said regulation, the Commission did not admit the petitioner's application for review as it was not merited and the petitioner was notified of the same vide a letter dated 25<sup>th</sup> January 2016.

(xxii.) That it is not in all cases that a party must be accorded an opportunity to be heard and hearing does not in all cases entail oral submission or oral hearing.

## Determination

5. The following issues are for determination in the matter: -

- (i.) Whether the changes made in the panel that vetted the petitioner at the time of making the final decision negated the vetting process?
- (ii.) If the vetting process in any case violated constitutional rights and fundamental freedoms of the petitioner.
- (iii.) What remedy if at all is available to the petitioner.

### Issue (i)

6. It is not in dispute the vetting interview was conducted by five (5) people, namely; Johnstone Kavuludi; Mary Owuor, Gaylord Avei, Fredrick Mwizi Mbithi and Esther Jowi as evidenced by the Hansard.

7. It is also not in dispute that the decision dated 9<sup>th</sup> October, 2015 was arrived at by Johnstone Kavuludi, Mary Owuor, Ronald Musengi Murslid Mohammed, Joseph Boinnet and Samuel Arachi. Only two of the decision makers were present at the interview, namely, Johnstone Kavuludi and Mary Owuor.

8. As at that time, the Inspector General of Police, Joseph Boinnet, had not been appointed as such and did not participate in the vetting but he signed and therefore sanctioned the decision to remove the petitioner.

9. The court in **Eusebius Karuti Laibuta Vs. National Police Service Commission [2014] eKLR** held that:

*“Fairness in any administrative or adjudication process requires that those who make a decision be the same people who sit at the hearing where a hearing has been concluded as opposed to where a decision is based merely on documentary evidence.”*

10. Furthermore, in **Republic Vs. Complaints Commission, Media Council for Kenya** the court held that where a decision is made by persons who were not consistently at the hearing but only appeared to sign the decision, the decision was unfair as the rules of natural justice have not been observed.

G. V. Odunga J. stated;

*“Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion.*

*In this case, in the course of the hearing the composition of the panel was altered with one commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision.*

*Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision from the evidence it is clear that only two Commissioners Peter Mwaura and Priscilla Nyokabi sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting judicial review and this has been described as a failure to act fairly on the part of the decision in making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision..... The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find.”*

11. Can this be said of the case in *casu*? It is without doubt, that four (4) of the people who made the decision to remove the petitioner from the Police Service did not participate in the vetting process in which oral testimony was given by the petitioner in addition to the written response and documentation the petitioner presented to the panel.

12. Regulation 10 of the Vetting Regulation provides;

*“(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.”*

13. Section 13 of the National Police Service Commission provides for committees as follows:-

*“Committees of the Commission*

*(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 the deliberations but shall have no power to vote.”*

14. On this, Odunga J. said in **Immanuel Masinde Okutonyi and others V. National Police Service Commission & Another [2014] eKLR** as follows:-

15.

proceedings to facilitate just deliberations and decision making as they did.

**19. In Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the court expressed itself as here under:-

*20. “There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time been used, but whatever standard is adopted one essential is that the person concerned must have had a reasonable opportunity of presenting his case.”*

**21. In Simon Gakuo Vs. Kenyatta University and 2 others Misc. Civil Application No. 34 of 2009**; The court held:

*“The audi alteram partem 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 any 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. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc.”*

**22.** In the present case, having considered the facts of the inquiry in the vetting process and considering the admission that majority of the Commissioners who made the decision to remove the petitioner from the Police Service, being four (4) out of six (6) did not actually participate in interviewing the petitioner and after giving due weight to the finding by **Odunga J. in Eusebius** case (supra) that fairness in any administrative or adjudication process requires that those who make a decision be the same people who sat at the hearing where the hearing was concluded as opposed to where a decision is based merely on documentary evidence, I find that the procedure followed by the Commission failed the fairness test and therefore in violation of the *audi alteram partem* rule. Accordingly, the changes made in the panel that made the decision undermined procedural fairness of the vetting process and the exercise was unlawful, null and void.

## **Issue ii**

**23.** As to whether the respondents violated constitutional rights and fundamental freedoms of the petitioner set out in the petition, the court has analysed the contents of the verbatim record of the vetting process and has come to the conclusion that the allegations made against the petitioner, especially regarding his past record of service were not without substance. The petitioner had indeed received final warning letters for various misconduct including the following:-

**24.** He admitted that he had beaten members of public while drunk. He was serving as the OCPD Kitui at the time. The petitioner admitted he had over reacted due to drunkenness in that occasion. However, the officer was interdicted, investigations carried out and he was reinstated.

**25.** The officer also admitted loss of Kshs.483,555.95/= entrusted to him to pay GSU officers.

**26.** The officer was interdicted, investigated and was given final warning letter.

**27.** The petitioner attributed the loss to a failure to crosscheck the actual amount received by himself before he left GSU Headquarters.

**28.** Other allegations regarding nominating more officers for promotion in 2010 and failure to prevent demonstrations in 2008 had also been investigated and concluded earlier and there was no basis of revisiting them in the vetting. The principle of legality and the rule against double jeopardy was not observed.

29. The petitioner was in service for over 32 years and held the rank of senior superintendent. He was then 55 years with only five years to retirement.

30. The vetting process did not unearth any new cases of misconduct against the petitioner. The panel delved solely with matters that the petitioner had been charged with, suspended, investigated, reprimanded, reinstated and given final warning.

31. It was no longer valid for the commission to revisit the issues without evidence of any new act or omission by the petitioner that warranted activation of the final warning letter he had received years earlier.

32. The court relies on the decision of **Gibson Kiplagat Langat V. Alitex Enterprises Limited 2015 eKLR** where the court found:

*“The claimant thus suffered double jeopardy in that he was punished at suspension and later dismissed from the same offences. The court therefore finds that the respondent had no valid reason for terminating the claimant’s employment and the termination was substantively unfair.”*

33. Also see **Dismas Juma V. Wanasibwa Vs. National Police Service and two others [2014] eKLR**.

34. The court distinguishes this case from its decision in **Stephen Kemei Kiptum & 2 others Vs. National Police service Commission [2016] eKLR** in that no evidence was led to show that Stephen Kemei Kiptum had already undergone a disciplinary process and had been punished for it, except his admission that he had refunded the money he had misappropriated to the junior officers who had been victims of his mischief.

35. For these reasons, the respondents violated Article 47 (1) of the Constitution that guaranteed the petitioner the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

### **Issue iii**

36. In determining the appropriate remedy for the petitioner, the court has considered the following authorities: -

In **Arnaecherry Limited –vs– Attorney General [2014] eKLR 6** the court held that Judge Lenaola (as he then was) favourably quoted the South African case of **Ntandazeli Fose –vs– Minister of Safety and Security CCT 14/96 (1997) ZACC 6** before awarding the petitioner shs.3,000,000/= for breach of his constitutional right to property under article 40 of the constitution.

*“I would suggest that the nature of a remedy is determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under Section 7(4) (a) differs from the object of a common law remedy..... I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violations are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our Constitutional promise..... [96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture afford it.”*

37. In **Dick Joel Omondi –vs– Hon. Attorney General [2013] eKLR 6** the court held that a petitioner whose constitutional rights have been violated should be compensated in the following words:-

*“It is now settled law that a party whose constitutional rights are found to have been violated by the state is entitled to damages. The quantum of damages is in the discretion of the Court, taking into account the nature of the violations.”*

**38.** In the present case, the petitioner a long serving officer of the police service who rose to the rank of Senior Superintendent was removed from office on account of matters he had been disciplined for and punished previously in violation of the principle of legality. This amounted to double jeopardy and negated the procedural fairness of the vetting process in violation of Article 47 of the constitution. This in addition to the fact that the decision was made by a majority of officers who did not take part in the vetting process. The officer deserves redress in monetary terms. At the same time this court is vindicating the constitution and delivering the promise it gave to the people of Kenya that human rights and fundamental freedoms are guaranteed and inviolable. That the Courts of Law shall forever keep vigil against intended and real violations as is evident in the present case.

**39.** In the final analysis, the court makes the following orders: -

(i.) The petitioner’s fundamental rights and freedoms have been violated.

(ii.) An order of certiorari is hereby issued to quash the entire proceedings and the decision of the 1<sup>st</sup> respondent declaring that the petitioner had failed vetting and had been discontinued from the Kenya Police Service including the decision summarily rejecting the petitioner’s application for review.

(iii.) The petitioner is awarded damages in the sum of Kshs. 3 million for the violation of his right to fair administrative action under Article 47 of the Constitution of Kenya 2010.

(iv.) Costs to follow the outcome.

(v.) The award in (iii) above is payable with interest at court rates from date of filing petition till payment in full.

**Dated, Signed and Delivered at Nairobi this 23<sup>rd</sup> Day of October 2017**

**MATHEWS NDERI NDUMA**

**JUDGE**