



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 13 OF 2016

EUTICUS GUANTAI

NKUNJA.....PETITIONER

VERSUS

**NATIONAL POLICE SERVICE COMMISSION.....1ST
RESPONDENT**

**INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....2ND
RESPONDENT**

**DEPUTY INSPECTOR GENERAL, ADMINISTRATION POLICE SERVICE.....3RD
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 19th October, 2017)

JUDGMENT

The petition was filed on 23.12.2016 through Mwirigi Kaburu & Company Advocates. The petitioner prayed for judgment against the respondent for:

- a) A declaration that the conduct of the orderly room proceedings on 17.02.2010 was flawed in procedure.
- b) A declaration that the dismissal of the petitioner from his duties was unconstitutional, unlawful, unreasonable and unfair and was predicated upon skewed and biased findings uncorroborated by the evidence on record and the subsequent dismissal be quashed.
- c) An order that the petitioner be reinstated without loss of any remuneration benefits and rank.
- d) An order for the compensation for wrongful and unlawful dismissal from the Kenya Police Service.
- e) The petitioner be awarded costs of the petition.

The petitioner was enlisted in the National Police Service in 2006 and upon completing his training at APTC, he was posted at Mandera East District for one year and transferred to Eldoret East in 2009. The petitioner’s further case is that on a date the petitioner has not disclosed, while he was serving at Uhuru Camp in Eldoret East, the petitioner and other officers had shot in the air to disperse an angry mob at the Camp which was baying for blood of another officer upon allegations that a school student had been

found in that officer's house. Later that camp was closed and three days after the shooting incident, the petitioner was ordered to report at APTC for retraining.

At paragraph 8 of the petition, the petitioner has pleaded thus, **“8. The petitioner avers that while on duty at the APTC on 16/2/2010, he was arrested by the duty sergeant who ordered for the incarceration of the petitioner in cells at the quarter guard and on 17/2/2010, the petitioner was subjected to an orderly room proceedings and on 8/3/2010, the petitioner received a letter from the commandant dismissing the petitioner from the police service with effect from 23/02/2010”**

The petitioner's case is that the orderly room proceedings carried out on 17.02.2010 contravened the petitioner's rights under Article 47 and 50 of the Constitution of Kenya, 2010. The petitioner's further case is that he appealed against the dismissal decision in January 2012 and a decision on appeal has not been rendered thereby violating the petitioner's rights under Article 47. The petitioner's grounds of appeal are that the reasons for the dismissal had not been established. The petitioner's further case is that by a letter dated 26.04.2013 the commandant APTC expressed the opinion that the petitioner was not subjected to fair judgment and the said officer called for a review of the petitioner's case. That letter of 26.04.2013 addressed to the Deputy Inspector General, Administration Police Service stated as follows:

**“RE: APPEAL AGAINST DISMISSAL P/NO. 20060663357 EX-APC EUTICUS
GUANATAI NKUNJA**

The above named EX-AP officer has appealed against his dismissal from the service on 8th March, 2010 after an orderly room proceeding.

After perusing the orderly room proceedings and listening to the Ex-APC, the legal officer at our College found the sentence imposed to be excessive in view of the circumstances of the case. A copy of the legal opinion on the same is attached for your perusal.

It is on this regard that we request his case to be reviewed in pursuant to a fair judgment.

Signed

P.M MURIITHI, OGW, HSC, ACAP

For: COMMANADNT

ADMINISTRATION POLICE TRAINING COLLEGE”

Despite service, the 2nd and 3rd respondents did not enter appearance, did not file replying affidavits, and did not attend at the hearing.

The 1st respondent filed ground of opposition on 19.09.2017 through as follows:

- a) That the 1st respondent lacks the mandate to reopen the petitioner's case which is now time barred.
- b) The petitioner has not demonstrated how his rights have been infringed by the 1st respondent.
- c) The suit is bad in law, brought in bad faith without the disclosure of all the material facts and should be dismissed with costs to the respondent.
- d) That the suit is frivolous, vexatious, and bad in law and an abuse of court process.

The 1st respondent in the submissions has attached correspondence which shows that the petitioner's appeal had been determined on merits and it would therefore be unfair to require the 1st respondent to

reopen the case. Whereas the 1st respondent has annexed the material about the administrative appeal on the final submissions and not on a replying affidavit, the court finds that the petitioner's case is that there was a pending appeal but does not pray for orders that the appeal be determined. On that basis, the court is inclined to find that there is no pending administrative appeal in the present matter.

The **1st issue** for determination is whether the suit is time barred. The petitioner was dismissed by the letter dated 08.03.2010 effective 23.02.2010. The respondent submits that the petition is time barred under section 90 of Employment Act, 2007 prescribing 3 years of limitation for suits founded upon dismissal. The court has considered that section 3 (2) (b) of the Act provides that the Act does not apply to, amongst others, the Kenya Police. That suggests that the cited section 90 of the Act would therefore not be available in the present case. The 1st respondent has thereby failed to establish the provision of law under which the petition would be time barred.

The **2nd issue** for determination is whether the petitioner has established that his rights have been violated as protected under Articles 47 and 50 of the Constitution, 2010. It is the respondent's case that the Articles could not be invoked retrospectively but the court finds that the Constitution of Kenya 2010 would apply in view of the administrative appeal process that was invoked – so that the cause of action spread into the time when the Constitution of Kenya 2010 had come into operation.

The respondent further urges that the petitioner has not provided evidence to support his allegations.

The court has revisited the material on record. At paragraph 12 of the petition the petitioner alleges that his rights under section 77(9) of the former Constitution and under Articles 47 and 50 of the Constitution of Kenya, 2010 had been violated. In particular the petitioner states that his right to natural justice had been violated. The petitioner at paragraphs 8 and 9 of the supporting affidavit states that he was arrested and then dismissed without an opportunity of being heard. The respondents have not denied that evidence by the claimant. The court returns that the petitioner has established that his constitutional right to a fair determination of the disciplinary case during the orderly room proceedings was violated. The court finds that Article 47 (1) was violated as the dismissal was unreasonable and procedurally unfair.

The **3rd issue** for determination is whether the petitioner is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The court returns that the claimant has established and is entitled to the finding that the orderly room proceedings on 17/02/2010 were flawed.
- b) The court returns that the petitioner is entitled to the declaration that the termination of his employment was unfair as it contravened Article 47(1) of the Constitution.
- c) As over three years have lapsed since the termination, the court returns that the claimant is not entitled to reinstatement in view of section 12 (3) (viii) of the Employment and Labour Relations Court Act, 2011. Reinstatement will in any event be difficult to implement in view of the disadvantages the petitioner has already suffered in terms of lost or overtaken opportunities in promotions and training.
- d) The claimant has prayed for compensation for unfair termination and the court considers that within the principles in section 49 of the Employment Act, 2007, the court would be guided that a maximum of 12 months' gross salaries as at time of dismissal would meet the ends of justice. However, the petitioner's case and claim is purely based on the contravention of Article 47(1) or denial of due process. The court has considered that the claimant had served for 6 years and further considered the previous record of service. The petitioner has not challenged his culpability while he served at Uhuru Camp in Eldoret East and the events leading to his being subjected to retraining at APTC and the Uhuru Camp being closed. In the circumstances of the case, the court considers that an award of Kshs. 500,000 for violation of section 47(1) will meet the ends of justice in this case.

In conclusion, judgment is hereby entered for the claimant against the respondents, jointly and severally for:

- a) The declaration that the orderly room proceedings on 17/02/2010 were flawed.
- b) The declaration that the dismissal of the petitioner's employment was unfair.
- c) The respondents to pay the petitioner **Kshs.500, 000.00** by 31.12.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- d) The respondents to pay costs of the petition.

Signed, dated and delivered in court at **Nyeri** this **Thursday, 19th October, 2017.**

BYRAM ONGAYA

JUDGE