



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NUMBER 61 OF 2015

CORPORAL THOMAS OTHOO.....PETITIONER/APPLICANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

DIRECTOR CRIMINAL INVESTIGATION.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The petitioner herein by a petition dated 30th June, 2015 sought orders among others that:-
 - a. A declaration that the disciplinary proceedings conducted by the respondents between the 7th and 19th August, 2014 and the resultant decision made on 2nd June, 2015 dismissing the petitioner from service was unconstitutional and in violation of the petitioner's rights under Articles 41,47,50, 159 of the Constitution of Kenya, sections 45 as read with section 53(1) (c) of the Employment Act, 2007.
 - b. A permanent injunction to restrain the respondents and or their agents servants or employees from dismissing and or terminating and or stopping payment of salary, and or evicting the petitioner from government premises and or withdrawing government kit and equipments and or ill treatment in any manner for having brought this petition to this honourable Court.
 - c. Reinstatement of the petitioner to the position he held prior to the said dismissal without any loss of rank/insignia, salary and allowances and any other benefits entitled to him.
2. The salient facts upon which the petition was based were:-
 - a. The Petitioner was an employee of the National Police Service was an investigator who had an excellent relationship with his employer, professional colleagues, Government Ministries, and also among the general public.
 - b. In the morning of 5th August 2014 the petitioner was served with a waiver notice at 10.00

- a.m. to appear before I.P. Misiko at 8.30 a.m. the same day to be charged in an Orderly Room Proceedings for the offence of discharging any weapon without order or without reasonable lawful cause.
- c. That the petitioner remained within the police station vicinity the whole day waiting to be paraded before the presiding officer but no parading or any other instructions were ever given to him and at around 17.30hrs the same day Uasin Gishu County Police Commander Mr. Nyaga Muchungu SSP found the petitioner at the station and ordered for his arrest allegedly for failing to attend Orderly room proceeding. This prompted the petitioner to retreat to police quarters to await an inquiry to be carried out as he read malice and ill intention in the manner he was being handled.
 - d. Following the threats of the petitioner's arrest which was eminent and having a history of high blood, the petitioner's situation worsened leading to his admission at Reale Hospital in Eldoret on 6th August 2014 and granted sick off duty by a Doctor who managed him. Documents on the same were duly presented to the DCIO Eldoret and the OCS Eldoret whose Deputy IP Misiko was the presiding officer.
 - e. The petitioner then sent the notification of his admission in Hospital and the petition asking for change of the presiding officer to the OCS Eldoret police station who was handling the matter through G4s Courier services which receipt of the same was acknowledged.
 - f. That it was alleged that the petitioner deliberately refused to cooperate with the presiding officer that resulted to his trial in absentia leading to punishment of dismissal from the service.
 - g. That the petitioner was not aware when the orderly room proceeding was conducted because the date and time (5/8/2014 at 8.30 a.m.) indicated in the notification the petitioner was issued with had already passed and no other information had been given to him by the presiding officer. This particular proceeding was conducted between 7/8/2014 and 19/8/2014.
 - h. That on the 11/8/2014 the petitioner sought for permission from the DCIO to travel to Kenyatta National Hospital in Nairobi to attend treatment as result of a scheduled appointment on 12/8/2014 since he had been advised by a doctor from Reale Hospital in Eldoret to follow up his treatment at Kenyatta National Hospital since he had all along been managed there since 2012.
 - i. That the petitioner received a dismissal letter from the 3rd respondent on 12/6/2015 dated 2/6/2015 advising that he had been dismissed from the National Police Service with effect from 2nd June, 2015 and he lodged an appeal against dismissal within the required time.
 - j. That despite lodging the appeal, the petitioner is apprehensive that the same might not succeed owing to the fact that he was never given an opportunity to participate in the disciplinary proceedings and therefore the proceeding do not have his input/evidence and since the petitioner received his salary for the month of June, 2015 the respondents have threatened to stop the paying salary and allowances for the month of July, 2015.
 - k. The petitioner had been dismissed from service based on false allegations and faulty disciplinary process.
 - The petitioner had never been convicted of any disciplinary offence since enlistment and had all along maintained clean record of service and had continued to execute his duties and responsibilities as an investigator in the service.
 - m. In respect of the allegation that the petitioner failed to cooperate with the presiding officer

during the orderly room proceeding is malicious, frivolous and vexatious as the petitioner ought to have been escorted by another officer to be able to face the disciplinary proceedings.

- That the copies of proceedings forwarded to the 3rd respondent about the orderly room proceedings concerning the petitioner were laced with concealed information, alteration of documents and false recommendations.
 - That the alleged orderly room proceedings which were conducted in the absence of the petitioner plus the result of trial were never brought to the attention or supplied to the petitioner for purposes of filling the appeal.
- p. That the notice was waived by a non gazzeted officer purporting to be a gazette officer by appending her signature to the waiver notice contrary to the provisions of section 2(1) of the National Police Service Act, 2011 therefore making the entire disciplinary proceedings illegal, unlawful and malicious.
- q. The petitioner's right to a fair trial to a hearing was infringed upon as he was never given an opportunity to be escorted by a fellow officer to appear before the presiding officer to face disciplinary proceedings or allowed even to call a witness and thereafter was condemned unheard for failing to attend the aforesaid proceedings hence trial in absentia contrary to the rules of natural justice under article 50 of the Constitution of Kenya.
- r. The respondents are employing unfair labour practices contrary to the provisions of article 41 of the Constitution of Kenya.

3. The respondent in opposition to the petition filed a replying affidavit through one Ebby Mutali who described herself as a Police Officer attached to the Directorate of Criminal Investigations as the DCIO Eldoret Airport. She deponed on the main as follows:-

- a. That he totally denies the content of the Petition and states that the petition as filed herein was totally premature, bad faith and an abuse of court process as the Petitioners appeal is pending for determination before the National Police Service Commission.
- b. That he had been advised by counsel on record which advise he verily believes is true that this Court has no jurisdiction to entertain this application as it will usurp the powers of the National Police Commission to objectively decide the Petitioners Appeal before it lodged by the petitioner.
- c. That the petitioner was aware of the Orderly Room proceedings as Senior Sergeant 48639 Ngoche Joseph was detailed to parade the defaulter/petitioner before the Presiding Officer for proceedings to commence and indeed petitioner was aware of the proceeding as he went to Court to file a petition vide H.C. Misc. Application No.113 of 2014 which Orders the Court declined.
- d. That the petitioner upon realizing that there was a Waiver Notice to be served upon him, which would subject him to Orderly Room Proceedings, made himself unavailable including absenting himself from duty. That he further states that whenever he needed to attend to the hospital, he would ask for permission which would be granted but on this period he never did the same.
- e. That despite this, the Petitioner appeared and signed the Waiver Notice of the Intended Orderly Room Proceedings dated 4th August 2014.
- f. That the petitioner move to seek admission at Reale Hospital was a calculated move to create a cover-up as the documents submitted indicated that he was an outpatient: whose condition was managed and allowed to go home. He visited the hospital back on 7/8/2014 for check-

up.

- g. That there is no evidence that the petitioner sought for the Presiding Officer to be changed and even if the said request was made the same was not procedural as he had not appeared before the Presiding Officer to raise the same.
- h. That the Petitioner's failure to appear before Presiding Officer of his immediate superior DCIO or CCIO and his move to Court to bar the proceeding vide Eldoret H.C. Misc. App. 113/2014 demonstrated that he was not willing to appear for the proceedings to commence against him.
- i. That, the petitioner had the opportunity to present his, input/evidence when he was served with waiver notice to appear for Orderly Room Proceeding but he chose not to attend, resulting to the Trial in absentia. The fear raised by the petitioner is unfounded hence uncalled for as the applications before this Court is pre-mature as the NPSC is yet to confirm his dismissal for purposes of stopping his salary and allowance after deliberating on his appeal.
- j. That, the petitioner in his appeal which is annexed on the notice of motion dated 30th June 2015 at page 42 paragraph 4, the officer admits that he used his weapon and despite the officer returning the firearm with the 15 ammunitions intact. Investigations are still ongoing to establish the source of the ammunitions he used to replace the one he fired.

4. Further the 1st respondent through its Chairman Mr. Johnston Kavuludi filed a replying affidavit in which he deponed on the main that:

- a. That on 15th June, 2015, the Commission received an appeal letter from the petitioner herein against that the petitioner claims to be unlawful dismissal from service.
- b. That even before the Commission could write to the Inspector General of Police seeking for detailed information as regard the petitioner's claim of unlawful dismissal, and even before the Commission determined the petitioner's appeal; the petitioner served the Commission with the suit papers alleging among other claims that the Commission has illegally dismissed him from service.
- c. That he was advised by the advocate on record which advice he verily believe to be true that the petition and the application herein is premature as the issues raised by the petitioner in his appeal has not been determined.
- d. That he is further advised by the advocate on record which advice he verily believe to be true that it was wrong for petitioner/applicant to seek the assistant of this Honorable Court without exhausting the internal disciplinary mechanism.

5. In his submissions in support of the petition. The petitioner through his Counsel Mr. Mageto submitted that the petitioner was dismissed by the 3rd respondent who had no powers or jurisdiction hence exceeded its powers as he was not the petitioner's employer contrary to section 34 of the National Police Service Commission Act. Counsel further submitted that the petitioners right to a fair trial, fair administrative action and a hearing were infringed upon as he was never given an opportunity to be accompanied by a fellow officer to the disciplinary proceedings as required by section 89(4) of the National Police Service Act or allowed to call a witness and that the petitioner was condemned unheard contrary to rules of natural justice. Concerning the charge of discharging a weapon without orders or reasonable or lawful cause, counsel submitted that this charge was defective because there was evidence that the petitioner returned his ceska pistol s/no F7845 and all the 15 rounds of ammunition intact on 4th August, 2014 and there was no discharge as alleged.

6. Regarding Orderly Room proceedings, Counsel submitted that these were conducted in absence of the petitioner and further that the petitioner was never supplied with copies of the proceedings to enable him file an appeal. Counsel further submitted that the DCIO-Eldoret was aware of the petitioner's health condition but maliciously failed to liaise with the presiding officer to postpone the proceedings because of vested interest.

7. Regarding waiver notice, counsel submitted this was done by an officer of the rank of an Assistant Superintendent who was a non gazetted officer was making the entire proceedings illegal and malicious. Mr. Mageto further submitted that one of the grounds for the Petitioner's dismissal was the fact that he filed a suit in High Court Eldoret seeking to stop the disciplinary proceedings which ground was unconstitutional as it amounted to denying the petitioner his right of access to justice.

8. The respondents in their submissions in opposition, submitted that the acts the petitioner was accused of were subjects of disciplinary action under 8th schedule of National Police Service Act. According to Ms. Akuno for the respondent, the petitioner appeared and signed the waiver notice of the Intended Orderly Room proceedings. And the Petitioner was aware of the Orderly Room proceedings and that Senior Sergeant Ngoche Joseph was detailed to parade him before the Presiding Officer for proceedings to commence but the petitioner refused to attend instead he chose to petition the Court via Eldoret HCCC No. 113 of 2014 asking the Court to stop the proceedings. Counsel therefore submitted that the failure by the Petitioner to attend the proceedings made the respondent to try him in absentia and that trial in absentia was guided by the provisions of paragraph 16(iv) A of the Force Standing Orders.

9. Regarding the timing of the petition, Counsel submitted that the petition was premature because the petitioner's appeal over the dismissal was still lying before the National Police Commission and that the determination of the same by the Court would influence the Commission and deprive it of objectivity. In support of this submission Counsel relied on the case of **Francis Mbugua v. Commissioner of Police & 2 others.**

10. The Court has reviewed the motion and the petition. The Court has further carefully considered the affidavits filed by parties herein in defences of their respective positions in the matter. The petitioner's complaints are on the face of it serious and raise serious fundamental questions of law that this Court has jurisdiction to determine. The claim that the petitioner was dismissed from service without being heard and that in dismissing him procedure as laid down in Force Standing Orders were not followed are serious questions of constitutional and administrative law. The Constitution which is embedded in this respect on one of the fundamental principles of natural justice that a person no matter how weak or useless his or her defence is must not be condemned unheard. Further this Court as a specialist Court with exclusive jurisdiction over employment and labour relations matters is concerned with ensuring that separation from employment relationship is done in accordance with statutory employment law as well as practices obtaining in the employment industry generally.

11. There is however the complaint by the respondent that the petitioner has prematurely moved the Court since he has not exhausted the internal complaint handling mechanism within the respondent's organization. That is to say, the petitioner has since dismissal filed an appeal to the respondents Appeals Board and that the appeal was yet to be decided. The respondent therefore contends that any decision the Court may make in the petition while the appeal is pending would impair the objectivity of the Appeals Board.

12. The Court is open to entertain any matter which it has jurisdiction to do. However such jurisdiction is to be exercised in 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 the fundamental rights or freedoms protected by the Constitution and

international law. This jurisdiction is exercised under judicial review powers of the Court.

13. The petition before me does not invoke the judicial review powers of the Court. It instead questions the merit and the legality of the decision to dismiss the petitioner from the respondent's service. As has been severally stated by this Court and Courts of the same tier in the judicial hierarchy and above, judicial review is concerned with the decision making process and not the decision itself. The latter being in the purview an appeal or review. The Court is therefore in concurrence with the respondent that the petition before the Court is premature and ought to await the outcome of the petitioner's appeal to the Chairman National Police Service Commission.

14. The Chair National Police Service Commission is hereby directed to hear and determine the said appeal within 90 days of this judgment. In the meantime the petition stands stayed.

15. Any party to the petition be at liberty to apply thereafter.

16. It is so ordered.

Dated at Nairobi this 19th day of February 2016

Abuodha J. N.

Judge

Delivered this 19th day of February 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge