REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO.14 OF 2015

POLICE CONSTABLE HENRY NYAKOE OBUBA.....PETITIONER

VERSUS

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

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

DEPUTY INSPECTOR GENERAL OF THE KENYA POLICE SERVICE.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th May, 2016)

JUDGMENT

The petitioner filed the petition on 08.09.2014 through M'Njau & Mageto advocates. The petitioner invoked Chapter 4 of the Bill of Rights, Articles 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 25, 27(1) (2) and (3), 28, 35, 41(1) and (2), 48, 49, 50(1) (2) (a) and (o), 159(2) (D), 162, and, 246 (1), (2) and (3) of the Constitution of Kenya. The petitioner prayed for judgment against the respondents for:

a. A declaration that the act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service (formerly Kenya Police Force) based on the concluded Meru Chief Magistrate's Court Criminal Case No. 1764 of 2000 and 696 of 2000 was a breach of the petitioner's constitutional rights under Articles 27(1) (2) and (3), 28, 41, 47, 50, 159 of the Constitution of Kenya, sections 45 as read with section 35(1) (c) of the Employment Act, 2007.
b. Reinstatement of the petitioner to the position he held prior to the said removal and accumulated salary and allowances from 31.08.2000 amounting to Kshs. 7, 878, 600.00.
c. Costs and interests be provided for.
d. Any other relief which the honourable court deems meet and just to grant.

The petitioner filed the petition together with the Notice of Motion dated 8.09.2015 supported with the petitioner's affidavit.

The respondents filed on 09.05.2016 the replying affidavit of Francis O. Makori Advocate, Litigation Counsel, for the Attorney General. The respondents also filed on 18.03.2016 the affidavit of Jane Kiio and the further affidavit of Francis O. Makori sworn on 17.03.2016 to oppose the petition.

The petitioner filed on 15.03.2016 his supplementary affidavit sworn on 15.03.2016.

The petitioner was enlisted in the Kenya Police Service on 31.08.1996. He underwent training at the Kenya Police College, Kiganjo and then at the Isiolo Provincial Training Centre for paramilitary training ending in August 1997. The petitioner was deployed at Isiolo Police Division until 1999 when he was transferred to Meru Police Division.

On 31.08.2000 the petitioner was arraigned in the Meru Chief Magistrate's Court in Criminal Case No. 1764 of 2000 and charged with the offence of manslaughter contrary to section 204 of the Penal Code. Prior to that, the petitioner had on 06.04.2000 been charged in Criminal Case No. 696 of 2000 with the offence of desertion from the force contrary to regulation 3(1) of the police regulations.

For the charge of manslaughter, contrary to section 202 and 205 of the Penal Code, in Criminal Case No.1764 of 2000 the trial court found that the prosecution had not proved beyond reasonable doubt that the accused had killed the deceased and the petitioner was acquitted on 2.07.2002 under section 215 of the Criminal Procedure Code, Cap 75.

In Criminal Case No. 696 of 2000 where the petitioner was charged with the offence of desertion from the force contrary to regulation 3(1) of the police regulations, the trial court found that the prosecution had failed to offer the necessary evidence against the petitioner and accordingly discharged the petitioner on 18.12.2000 under section 210 of the Criminal Procedure Code.

The petitioner was interdicted effective 31.08.2000 on half monthly salary and full allowances in view of the criminal charges. After the conclusion of the criminal cases, the interdiction was lifted by the letter dated 24.07.2002 and the petitioner was directed to resume duty with full benefits. The Provincial Police Officer, Eastern Province addressed to the petitioner a notice of intention of removal of the petitioner from the police force dated 1.03.2004. The notice reminded the petitioner that he was enlisted in the force on 31.08.1996 and he had served for 7 and a half years but during that short period he had been charged and acquitted and discharged in the two criminal cases as set out earlier in this judgment. The notice stated that after taking into consideration various factors including the petitioner's personal conduct it was contemplated that the petitioner is removed from the police force in accordance with regulations spelt under paragraph 30(b) Chapter 20 of the Force Standing Order. The notice notified the petitioner that the removal decision was under contemplation and gave him ten days to forward his written representations citing reasons for his otherwise retention in the service. Further if the petitioner failed to reply within the specified ten days he would be assumed to have no reasons to remain in the service and removal action would follow without further reference to the petitioner.

The petitioner replied by his letter of 18.03.2004. The substance of his reply was as follows:

a. He was acquitted or discharged in the criminal cases.
b. He had a clean record of service and endeavored to improve his mobility in career by sitting and passing two police examinations namely station administration and evidence law.
c. He mitigated that he was a family man with three primary school going children and with guardianship of his school going siblings. He was also the guardian to the four children of his deceased sister. He also took care of his old and ailing father. He pleaded that he was the only bread winner in his family with the said several dependants and the family depended upon his continued employment. He requested for an opportunity to continue serving in the police force.

By the letter dated 23.04.2004, the O.C.P.D Makueni forwarded the petitioner's reply to the Provincial Police Officer, Eastern Province and stating in the forwarding letter thus, **" Despite having been acquitted of the murder and the desertion charges, the officer, in his representation have not given any proper reason why the action of removing him should not be taken.**"

By the letter dated 27.05.2004, the Provincial Police Officer, Eastern Province conveyed to the petitioner that a decision had been made to remove the petitioner from the police force because he had failed to give convincing reasons why he was to be retained in the force and with a right of appeal to the Commissioner of Police within 7 days. The petitioner appealed by his letter of 01.07.2004 by enclosing a copy of his original reply to the notice of intended removal. The petitioner wrote reminder letters about determination of the pending appeal the last such letter being the one received on 08.04.2015 at the Kenya Police Headquarters, Force Registry.

At paragraph 54 of the petition the petitioner has pleaded that on 1.07.2004, the petitioner filed an appeal to the then Commissioner of Police now the Inspector General through Eastern Provincial Police Officer which appeal has never been decided or its decision, if any, communicated to the petitioner 11 years thereafter. At paragraph 55 the petitioner states that he has subsequently written letters dated 04.09.2013, 19.01.2015 and 8.04.2015 as a reminder and pleading with the respondents, particularly the 3rd respondent, to comply with the law by making the final decision on the petitioner's appeal and communicating the same to him but the petitioner has not received any response at the time of filing the petition.

The court has considered the pleadings, the evidence and the submissions.

The 1st issue for determination is whether the petitioner's constitutional rights were contravened or violated as alleged. After the removal decision, the petitioner was advised to appeal. The petitioner appealed by his letter dated 01.07.2004. It is not in dispute that the petitioner's appeal has never been determined and the outcome has never been conveyed to the petitioner. As submitted for the petitioner the court returns that the petitioner's right under Article 47(1) to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was violated as the appeal was not considered and determined within reasonable time. The court finds that failure to determine the appeal and convey the decision as happened in the case was not expeditious, efficient, lawful, reasonable, or procedurally fair. A process that kept the petitioner waiting for the outcome of the appeal and without replies to the petitioner's reminders about the pending appeal, in the findings of the court, was unfair and it amounted to injustice as it was unfair administrative process. The court further returns that it was unreasonable for the respondents to require the petitioner to show cause why he should not be removed from the service on account of showing reasons why he should be retained in the service. The court's considered opinion is that a public officer, as per Article 236 of the Constitution, shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court finds that it was an unfair labour practice contrary to Article 41(1) and contrary to Article 47(1) of the Constitution for the respondents, without allegations of poor performance or ill health or misconduct and the petitioner having met all qualifications to join and continue in the service, to nevertheless require the petitioner to give reasons for his continued retention in the service. The court finds that doing so amounted to unreasonableness as per Lord Greene in **Associated Provincial Picture Houses Limited – Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683** thus, **"It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."**

In referring to the decisions in the criminal cases where the court had acquitted or discharged the petitioner, without urging any particulars of misconduct or ill health or poor performance or other

justifiable grounds for the intended removal of the petitioner from the service, the court finds that the respondents had failed to take or to initiate a reasonable administrative action (the intended removal of petitioner from office) as envisaged in Article 47 (1) of the Constitution as there were no genuine or valid or any reasons for such removal action.

In this case it is not said that the respondents intended to subject the petitioner to removal on account of the matters the petitioner had been acquitted or discharged in the earlier criminal cases. If that were the position or desired position when the notice for removal was issued against the petitioner, then the court upholds its opinion in **David Nyamai and 7 others –Versus- Del Monte Kenya Limited [2015]eKLR** where in the ruling delivered on 04.12.2015 the court stated thus,

"The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under sections 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee. Firstly, and on that ground alone, the court finds that the claimants' cause of action was not time barred."

The court further upholds its opinion in disciplinary cases against employees where in the opinion of the employer there exist a criminal element as set out in the guiding applicable principles in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru**. At page 13 to 14 of the judgment, the court stated as follows:

"Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

a. **Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.**
b. **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
c. **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the**

employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

d. **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."**

The court further upholds its holding in the judgment delivered on 05.06.2015 in **Sergent Joshua Muindi Maingi –Versus- The National Police Service Commission and 2 others [2015]eKLR** thus,

"Turning back to provisions of section 88(4) of the National Police Service Act, the court finds, and as understood by the respondents in their submissions, that the section empowers the National Police Service Commission to retry police officers in what is called disciplinary action and without due regard (i.e. notwithstanding) acquittal or conviction by the criminal court. The court finds that to that extent section 88(4) is unconstitutional as it offends clear provisions of Article 50(2) (o) of the Constitution. The court considers that the petitioner is entitled to the declaration that section 88(4) of the National Police Service Act is unconstitutional in so far as it empowers the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers may have been acquitted or convicted by the court in criminal proceedings as the section is inconsistent with Article 50 (2)(o) of the Constitution and the section is null and void to the extent of that inconsistency. While making that finding, the court holds that where the court at the end of the criminal hearing has acquitted or convicted a police officer the Commission or the person or authority exercising powers of disciplinary control over the officer is thereby bound by the acquittal or conviction and the officer need not be subjected to a retrial in an administrative disciplinary process(under the section referred to as "disciplinary action") which essentially would be unconstitutional; all that needs to be done is imposition of appropriate punishment in view of the conviction; or resumption of duty or reinstatement or continuation in employment in line with the acquittal by the criminal court."

In the present case it is not said that the 1st, 2nd and 3rd respondents were retrying the petitioner (in an administrative removal process) based on matters for which the petitioner had been acquitted or discharged. All the respondents did was to require the petitioner to show why he should not be removed from the service by giving reasons for his retention. The court has found that action amounted to contravention of Articles 47(1), 236(b) and 41(1) of the Constitution, 2010. The court reckons that the offending actions were before the Constitution of Kenya, 2010 but further that the undetermined administrative appeal process (as is founded upon the matters the court has found to have been unreasonable) would fall within the operation of the Constitution of Kenya, 2010 as a continuing injury of contravention of rights and protections under the Constitution. The court therefore returns that the petitioner is entitled to the declaration accordingly.

The court while making that finding has considered the Court of Appeal decision in **Attorney General and Another –Versus- Andrew Maina Githinji and Another [2016] eKLR** that employers were not bound by outcome in criminal cases in undertaking administrative disciplinary proceedings and that the cause of action in employment disputes accrued from the date of the dismissal. First in the present case there was no dismissal and the petitioner's cause of action is founded upon contravention of rights being a continuing injury by reason of the undetermined administrative appeal and further contravention of constitutional rights and freedoms based upon unreasonableness. The petition was therefore not time barred as the petition is founded upon lawfulness or otherwise of the removal decision and the pending administrative appeal where the petitioner is urging that all these things run into each other, they are alive and they are ripe for a determination by the court. The court finds as much and further finds that it was not a case of breach of the contract of employment but one of contravention of the constitutional rights and protections the petitioner enjoyed and was entitled to.

The **2nd issue** is whether the petitioner is entitled to any of the remedies as prayed for. The court has already found that the petitioner's rights and protections under Articles 47(1), 236(b) and 41(1) of the Constitution, 2010 were contravened and the petitioner is entitled to the declaration accordingly.

It is clear that the petitioner made an administrative appeal which has never been determined. The court considers that the undetermined appeal is the reason for the present case and as the decision appealed against has been found not to meet the constitutional test, the court finds that on the whole the administrative appeal could only be determined in favour of the petitioner as it is rooted in a removal that the court has found was unreasonable and unconstitutional. The court returns that there is no established bar to the declaration that the petitioner is entitled to reinstatement in the service of the Kenya Police Service with effect from 31.08.2000 with orders that the period between 31.08.2000 and the date the petitioner reports to the 3rd respondent to resume work being not more than 10 days from the date of this judgment be treated as leave without pay so that there is no break in the petitioner's service. The only reason advanced is that there have been changes in the Police Service and the petitioner has been out for a long time. The court considers that nothing would prevent the petitioner from learning and catching up and which is a continuous process in employment in a developmental organization like the Kenya Police Service. The court has further made consideration that for the period since the reinstatement the petitioner might not have worked elsewhere and it is not clear whether he engaged in alternative gainful venture or not- the court has considered that the petitioner applied for and was given a certificate of discharge from the service with a view of seeking alternative employment and he might have mitigated his losses in that regard. While making that finding the court further considers that under Article 23(3) (a) of the Constitution, the court can make a relief declaring rights of the parties. The court has considered that under section 3(2) (b) of the Employment Act, 2007 the Act does not apply to the Kenya Police so that submissions made for the respondents in reliance to that Act would not apply. It could be that a convenient and fair remedy would entail the possibility and option of the petitioner moving on. The petitioner prayed for any other relief which the honourable court deems meet and just to grant. Under Article 23 (3) (e) of the Constitution, a compensation of Kshs. 3, 000,000.00 will balance justice in this case. While making that finding the court has considered that the petitioner will have the option of seeking alternative employment and the compensation as made will go to mitigate his losses in view of the otherwise unreasonable removal while at the same time giving the parties an opportunity to move on separately.

In conclusion judgment is hereby entered for the petitioner against the respondent for:

a. The declaration that the respondents in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service (formerly the Kenya Police Force) based on the concluded Meru Chief Magistrate's Court Criminal Case No. 1764 of 2000 and 696 of 2000 was in breach of the petitioner's constitutional rights and protection under Articles 47(1), 236(b) and 41(1) of the Constitution, 2010.
b. The declaration that the petitioner is entitled to reinstatement in the service of the Kenya Police Service with effect from 31.08.2000 with orders that the period between 31.08.2000 and the date the petitioner reports to the 3rd respondent to resume work being not more than 10 days from the date of this judgment be treated as leave without pay so that there is no break in the petitioner's service.
c. In alternative to (b) above the respondents to pay the petitioner a sum of Kshs. 3,000,000.00 being compensation under Article 23 (3) (e) of the Constitution for violation of the petitioner's constitutional rights and protections per order (a) above; and to pay by 01.10.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
d. The respondents to pay the petitioner's costs of the petition.

Signed, dated and **delivered** in court at **Nyeri** this **Friday, 13th May, 2016.**

BYRAM ONGAYA

JUDGE