



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

PETITION NO 13 OF 2015

STEPHEN KEMEI KIPTUM.....1ST PETITIONER

EMMANUEL KENGA KARISA.....2ND PETITIONER

PETER MWAU MUINDE.....3RD PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSIONRESPONDENT

Mr Esmail for the Petitioners

Mr Ojwang for the Respondent

JUDGEMENT

1. The petition was filed on 28th January 2015 by the three petitioners who are senior police officers at the rank of Assistant Commissioner of Police.
2. The petitioners allege that the respondent has violated their rights guaranteed under Article 27(1); 35(1) 40 (1) & 47(1) & 2 and Article 50(1) of the Constitution of Kenya 2010. The petitioners further allege Article 2(1) 2 (4) and 10 of the Constitution apply in the determination of the suit.
3. The provisions of Article 27 (1) on equality and freedom from discrimination; Article 28 on Human dignity; 35 (1) on Access to information; 40 (1) & (2) on protection of Rights to property; 47(1) & (2) on fair administrative action and 50 (1) on fair hearing have been reproduced in the body of the petition.

Facts of the petition.

4. On or about March 2014, the three petitioners were subjected to a vetting process by the respondent in accordance with the provisions of section 7 of the National Police Service Act. Through a decision dated 22nd May 2014, and transmitted on 28th May 2014, the respondent informed the petitioners that they had failed the vetting and were removed and or dismissed from the National Police Service.

5. Aggrieved with the vetting results, the petitioners individually sought a review of their respective removals from the service by an application for review dated 4th June 2014. By letter dated 7th January 2015, the petitioners were informed that their respective review applications were not successful and the respondent confirmed its decision to dismiss the petitioners from the employment of the National Police Service.
6. The petitioners approached court and rely on the petition itself, supported by their respective supporting affidavits and supplementary affidavits sworn on 17th September 2015. The court issued conservatory orders dated 28th January 2015 and same were confirmed in a ruling delivered on 18th March 2016.
7. The petitioners seek;
 - a. A declaration that the petitioners rights under Articles 47(1); 50 (1) and 40 of the constitution have been violated by the respondent
 - b. A judicial review order of *certiorari* to remove into the High court and quash forthwith the respondent's decisions issued on 22nd May 2014 and 7th January 2015 dismissing the petitioners from the National Police Service.
 - c. A judicial review order of *mandamus* compelling the respondent to reinstate the 1st and 3rd petitioners into the service of the National Police Service.
 - d. A declaration that the 2nd petitioner retired honourably and without blemish on his record as an officer in the National Police Service on the attainment of the mandatory retirement age.

Response

8. The petition is opposed vide a replying affidavit sworn by Mr Johnstone Kavuludi the Chairman of the National Police Service Commission sworn on 13th March 2015 and a further replying affidavit sworn by the same deponent on 15th June 2015. In summary the respondent posits that the three petitioners were removed from office for valid reasons and in terms of a fair procedure. That the removal was supported by the relevant constitutional provisions, the National Police Service Act, the Leadership and Integrity Act and the Public Officers Ethics Act.
9. The court will move to analyze and determine the cases of the respective petitioners seriatim.

Analysis and determination

Stephen Kemei Kiptum

10. The 1st petitioner was charged with the offence of abuse of office in that on 23rd November 2013 he threatened Ms Selina Cherono Songok, security officer together with her colleagues after they refused him forceful access to LR No 9399/16 in Nandi Hill Township. The petitioner responded to the complaint by a letter dated 3rd February 2013 an he explained that he had visited Land LR Nos 9399/32, 9399/34 and 9399/36 Nandi Hills following an advertisement by Ms Watis auctioneers for sale of these parcels of the land in the Nation newspaper of 17th November 2013. The petitioner had gone to view the properties on 23rd November 2013 and subsequently participated in the auction on 29th November 2013.
11. The petitioner was in the company of Bank officials who were to finance the purchase of the land when he went to view the land parcels. The security guards informed them that they had instructions from the owner of the land to refuse them entry. They obliged and left. The encounter was amiable without any confrontation. The 1st petitioner denied the charge as malicious falsehood instigated by the owner of the land Mr Tony Keth against people he had learnt were interested to buy his land.
12. During the interview, the 1st petitioner was questioned about misappropriation of Kshs 420,000 for a junior officer. The amount was meant to compensate the said junior officer for the injury sustained as a result of a road accident. The 1st petitioner repaid the money in 2012 after intervention by the Commissioner of Police then. The respondent states that when the 1st

- petitioner was questioned by the GSU Commandant who inquired on the misappropriation of the said fund, the 1st petitioner was arrogant, in disciplined and lacked courtesy. The respondent states that the 1st petitioner was guilty of insubordination and gross misconduct. That the 1st petitioner had admitted the misappropriation of funds and repaid the same.
13. The respondent further states that the purview of vetting under regulations 7 and 14 (2) (b) of national police vetting regulation permitted the commission to look into the present and past record of the petitioner. The respondent denies that the 1st petitioner was discriminated or received unequal treatment as alleged by the 1st petitioner in that Hon Sarah Omollo (Rtd) who was the chair of the review panel recused herself from hearing the review application because she and 1st petitioner had worked together before and did so to avoid conflict of interest. That this did not compromise the review panel as alleged by the 1st petitioner or at all.
14. That the finding of guilt was based on concrete evidence and should be upheld by the court. The 1st petitioner was found guilty on the following grounds;
- a. In relation to the incident regarding threatening of security guards, the respondent found that the 1st petitioner stated that he had access to state house thus finding him to be arrogant and intimidating of innocent civilians.
 - b. Regarding the alleged misappropriation of funds, the respondent confirmed the allegations of misappropriation against the 1st petitioner on the basis that he had repaid the money to the officer concerned.
15. The 1st petitioner objected to this finding because there was no prior allegations that he had claimed to have access to statehouse and so he had not responded to it. That this amounted to a denial of natural justice and offends the principle of audi *alteram partem* and amounts to unfair administrative action in violation of Article 47(1) of the constitution. The counsel for the petitioner submitted that in **Immanuel Masinde Okutoyi & Others Vs National Police Service Commission and another [2014] eKLR Odunga J** held;
- “It is however imperative that the allegations made against a police officer be availed to him or her in good time to enable him or her adequately respond thereto. To confront an officer with allegations when their source cannot be vouched is in my view unfair”.*
16. With regard to the finding that the 1st petitioner had intimidated a security officer stating he had access to statehouse, the court has analyzed the charge preferred against the 1st petitioner and is satisfied no such allegation was made in the charge sheet. The 1st petitioner therefore had no opportunity to respond to the allegation. The respondent acted against the dictates of natural justice and in violation of Article 47(1) of the constitution in making the aforesaid finding on the basis of a nonexistent allegation.
17. With regard to the allegation of misappropriation of funds, the 1st petitioner had explained that the failure to pay sum of Kshs 420,000 to a junior officer was an accounting error. The 1st petitioner also explained that he paid the money in obedience to a directive by the Commissioner. The 1st petitioner denies that he admitted that he had misappropriated the funds.
18. Counsel for the 1st petitioner submits further that even if the 1st petitioner was guilty of misappropriation of funds the 1st petitioner had already been punished by the Commissioner of Police by being ordered to pay the money from his own funds. That to revive the complaint and dismissing him from the service based on the same issue concluded by the Commissioner of police amounts to being punished twice for the same offence and offends the rule against double jeopardy.
19. The counsel for 1st petitioner submits therefore that the decision by the respondent was unreasonably. Counsel relied on the definition of unreasonableness by Lord Greene in **Associated Provincial Picture Houses Ltd Vs Wednesbury Corporation [1947] 2 All ER 680** when he stated;

“In the present case we have heard a great deal about the meaning of the word “unreasonable” 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 ‘unreasonable’ in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance a person entrusted with a 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 those 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 is Lawful within the powers of authority. Warrington 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”

20. Whereas it was unreasonable for the respondent to find that the 1st petitioner had used ‘connection to statehouse’ to intimidate a security officer in the absence of any evidence to that effect or affording the 1st petitioner opportunity to address the matter, this cannot be said of the finding that by agreeing to refund a sum of Kshs 420,000 to a junior officer, the 1st petitioner had by implication admitted that he had inappropriately used his office to misappropriate the amount in the first place.
21. This evidence was not irrelevant or extraneous in determining the suitability or not of the 1st petitioner to continue serving a high office in the National Police Service in the new constitutional dispensation in which the nation has placed a premium on the national values of humility, integrity, accountability among others contained in chapter 6 of the Constitution of Kenya 2010.
22. The court cannot therefore fault the finding of the commission in finding the 1st petitioner guilty of abuse of office and deeming him unsuitable to continue serving the National Police Service. The court rejects that the facts of the case fit the description of double jeopardy as set out by Nduma J in **Dismas Juma Wanasibwa Vs National Police Service and two Others [2014] eKLR**.
23. I find this explanation by the 1st petitioner to be ingenious and in capable of belief. The court finds that the respondent did not err in arriving at the conclusion that the 1st petitioner had abused his office by misappropriating money meant to compensate a junior officer who had sustained injury in the course of duty. The court cannot fault the procedure followed by the respondent in this regard. The 1st petitioner was given opportunity to defend himself and his explanation was found by the respondent to be untruthful. **The dismissal of the 1st petitioner is upheld.**

Emmanuel Kenga Karisa

24. The 2nd Petitioner faced two complaints before he appeared before the vetting board to wit;
- That he had given two contradicting document examination reports in criminal case No 88 of 2010 involving acquisition of title deed documents to land No Nairobi/block 103/54 by forged documents.
 - That 2nd petitioner colluded with No 231249 C.I John Kaikai of BFIU to maliciously exonerate people of AFC who had signed documents said to have been used in committing fraud to the tune of Kshs 34.4 million and then charging one Lawrence Bukoro with the offence in case No CR 13/1.2012 and yet he was not part of the vice.
25. The 2nd petitioner responded to the charges denying the allegations and explaining the facts surrounding the two complaints. The 2nd petitioner was vetted on 7th March 2014 and a decision dismissing the petitioner from service was made on 22nd May 2014 on grounds that he exhibited professional negligence in submitting contradicting reports to the court and further that he lacked financial probity for failing to explain how he acquired his assets.
26. The 2nd petitioner submits that the respondent ignored the 2nd petitioner’s response in relations to the two reports submitted by him and proceeded on a misguided irrational and unreasonable

- hypothesis that there is a prohibition on the use of photocopies for purposes of conducting document examination. That none of the respondent's members are document examiners by profession. They had absolutely no knowledge in the field of document examination. They proceeded on their own myths and hypothesis instead of independently verifying the international practice by document examiners on the examination of photocopies. The respondent failed to take into consideration the fact that both of the 2nd petitioner's reports the one using a photocopy and the one using the original documents were submitted before the trial court.
27. The respondent also failed to take into account that the 2nd petitioner testified in the case. The explanation given by the 2nd petitioner regarding the matter was reasonable and it was irrational and unreasonable for the respondent to punish the 2nd petitioner while disregarding the explanation. The two reports submitted were based on the photocopy and the original respectively. The 2nd petitioner had requested for more documents from the investigating office to no avail. The respondent erred in imputing irregularity or corrupt motive on the 2nd petitioner without any basis. The respondent did not find out the trial court's view on the evidence submitted by the 2nd petitioner.
28. The case was still pending before court and the involvement by the respondent in the matter violated the subjudice rule in expressing probable outcome of a criminal case pending before court. The respondent further did not appreciate the role of a document examiner in the court process. The 2nd petitioner was an expert witness and not an officer of the court as was wrongly found by the respondent. It is also not the role of the 2nd petitioner to ensure a conviction for the prosecution at all costs as implied in the commission's decision.
29. John Paul Osborn a forensic document examiner since 1982 and practicing in New Jersey in his website – **Osborn and Sow – Forensic Document Examination. Examination of photocopies, Available at www.osbornandson.com** states;

“While it is possible to make examinations and report on problems of handwriting, signatures, typewriting and other such matters from photocopy reproductions (rather than original documents) in most cases the original is preferable for a variety of reasons. Most reports (verbal or written) based on studies utilizing copies are rendered as ‘Qualified’ as certain evidence may be difficult or impossible to observe from these reproductions. If examinations of questioned or disputed material must be made preliminarily or exclusively, from ‘photocopies’ it is important that clearest reproduction be made available for such examinations. The clearest copies are generally those which were made directly from the original. Copies of copies or multi generation copies are increasingly less desirable as the number generations increase”.

30. The 2nd petitioner concludes that the commission's decision to fault his testimony while the case was still pending in court was wrongful, unlawful, irrational and without due factual basis and should be nullified for being grossly unreasonable and the court so finds:
31. With regard to the finding that the 2nd petitioner lacked financial probity, was evasive, incoherent and unconvincing in his explanation regarding his wealth, the 2nd petitioner submits that this finding is without basis, is false and untrue and is not borne out by the Hansard record of proceedings of the vetting interview page 95 -116.
32. Under Regulation 9 and 28, the respondent has wide powers to conduct investigations and bring to its attention all information regarding the 2nd petitioner's assets and means of acquisition of the said assets. However, counsel for 2nd petitioner submits that the finding by the respondent was not supported by any evidence of lack of financial impropriety or irregular acquisition. The commission disregarded the approximate value of assets provided by the 2nd petitioner and his response on how he acquired them to find that his explanation was not plausible. Basing the findings on conjecture and disregard of explanation given by 2nd petitioner without any concrete basis violated the 2nd petitioner's right to a fair hearing and to a fair administrative action contrary to Article 47 and 50 of the constitution.
33. That the respondent failed to apply the requisite standard of proof on a balance of probability in finding the 2nd petitioner guilty of impropriety. Applying the standard of reasonableness as

enunciated by Lord Greene in Associated Provincial Picture Houses Case, (supra), the court is of the considered view that the decision of the Commission in finding the 2nd petitioner guilty of impropriety was irrational, without basis and was arrived at by relying on irrelevant and extraneous factors. That the commission disregarded, the plausible explanation given by the 2nd petitioner and its finding was unreasonable, null and void. The court so finds;

Peter Mwau Muinde

34. The 3rd petitioner did not have any written complaints submitted to him for a response prior to being vetted. The 3rd petitioner appeared for his vetting on 5th March 2014 and by a decision dated 22nd May 2014 he was dismissed from the service on account of an alleged conflict of interest as a result of his directorship in a corporate body that owned and managed buses for hire. It is submitted by counsel for the 3rd petitioner that the respondent made the following erroneous and baseless conclusions;
- a. The transport business engaged in by the 3rd petitioner was in conflict of interest with his duties as a CID officer
 - b. The 3rd petitioner concealed the business he was engaged in and the source of his wealth.
 - c. The 3rd petitioner grossly under valued his assets despite most of the buses being relatively new.
 - d. The 3rd petitioner lacks financial probity.
35. It is the submission by Mr Ishmael for the petitioner that the respondent's decision to remove the 3rd petitioner from service on account of the above was irrational, unreasonable and absurd. That the respondent failed to appreciate that the buses and motor vehicles were all owned by a corporate entity which in law is distinct and separate from the 3rd petitioner. That there is no law in place in Kenya that prohibits a civil servant or a CID officer for that matter from being a director of a company that does any lawful business and the business of transport in particular unless the business is shown on a preponderance of evidence to be in direct conflict with specified duties performed by the officer.
36. That the respondent failed to appreciate the meaning of conflict of interest which connotes a real or seeming incomparability between one's private interests and one's public or fiduciary duties see **Blacks law Dictionary 8th Edition page 319**. That the 3rd petitioner was not involved in day to day running of the transport business nor was he involved in the day to day enforcement of traffic laws. In any event, officers enforcing traffic laws would be dealing with a separate corporate body and would not necessarily identify the vehicles with the 3rd petitioner.
37. The respondent's finding of a 'likelihood' that the 3rd petitioner's matatus will not be subjected to the consequences arising from breach of traffic rules and regulations is not only irrational and unreasonable but is demonstration of the height of speculation and conjecture the respondent engaged in. With respect to the allegation that the 3rd petitioner concealed the business he was engaged in, it is the submission by counsel for the 3rd petitioner that this is not borne out of the Hansard record of proceedings of the 3rd petitioner's vetting interview.
38. The respondent's findings are erroneous and contradict the 3rd petitioner's declaration of assets and liabilities in which he listed the vehicles under the heading "buses for hire and ferrying passengers". It was unreasonable for the respondent to state that it was not clear to the panelists what this meant. Indeed the 3rd petitioner explained to the panelists that he had long ago declared to the Commissioner of Police that he was involved in matatu business when a signal was sent to all provinces requiring police officers to declare if they were involved in transport business. The counsel for 3rd petitioner submits that failure by the panel to recognize these clear facts presented to them by 3rd petitioner is evidence of impartiality and bias against the 3rd petitioner.
39. Thirdly, with regard to the allegation that the 3rd petitioner had concealed his net worth through a gross undervaluation of his assets, counsel for the 3rd petitioner submits that a finding of undervaluation presupposes that a valuation was done in the first place. Valuation involves a forensic analysis of various factors in relation to motor vehicle including the purchase price of the

- vehicles, depreciation rate annually and the condition of the vehicle inter alia.
40. It is a fact that unlike land, vehicles depreciate in value drastically over time. Also vehicles in the transport business depreciate much faster due to over use and bad road conditions. The 3rd petitioner was not required to conduct a professional valuation but to give a layman estimate of the net worth of his assets. There was no evidence before the panel to lead to the finding that the vehicle were 'relatively new'. This was sheer speculation and erroneous finding probably derived from the registration numbers of the motor vehicles given by the 3rd petitioner in the declaration form. There being no physical inspection of the vehicles the finding was irrational, biased and outright unreasonable.
41. The respondents are under obligation in terms of Regulation 9 and 28 of the vetting Regulations to conduct investigations including enlisting services of experts in order to determine all the issues before it in an impartial and unbiased manner. The respondent failed to do this. The respondent also grossly erred by not investigating how the motor vehicles were acquired. If they had done so, it would have been clear that the 3rd petitioner's company was still servicing a loan from a going concern towards acquisition of the vehicles.
42. It is submitted that how this would be disproportionate to the 3rd petitioner's income is beyond grasp. In conclusion, counsel submits that the finding by the commission that the 3rd petitioner's explanation regarding the source of wealth was evasive, incoherent and contradictory in several instances is not borne out by the record of proceedings. The respondent acted on speculation, assumptions and conjecture.
43. There was not an iota of evidence regarding wrong doing by the 3rd petitioner in relation to flouting traffic laws. The respondent did not adhere to the standard of proof required of it under the Regulations, that of proof on a balance of probabilities.
44. The respondent submitted that the decision to dismiss the 3rd petitioner from the police service was based on concrete evidence of conflict of interest between the 3rd petitioner and the respondent regarding his transport business; that he concealed the business he was engaged in; that he grossly undervalued his assets and that he lacked financial probity.
45. The respondent urges the court to uphold the findings by the respondent as against the 3rd petitioner. That the offences were proved against the 3rd petitioner and the decision to dismiss him from service was rational, reasonable and lawful considering all the circumstances of the case.
46. There is no evidence to support the finding by the respondent that the 3rd petitioner violated section 71 of the national Police Service Act, section 16 of the Leadership Act and section 12 of the Public Officers Ethics Act.
47. Section 71 (1) of the National Police Service Act, provides;

“No member of the service other than a Reserve Police Officer shall engage in any trade, business or employment, outside the scope of his duties as an officer of the service if the trade, business or employment is in conflict of interest with the performance of the police officer's duties”.

48. No evidence was led to the effect that the 3rd petitioner was involved in traffic duties at any one time during his tenure as a CID officer. There was no evidence at all that at any one time, the vehicle owned by the company in which the 3rd petitioner was a director were given preferential treatment by traffic officers. No evidence was led at all to show that the traffic department was aware of the directorship of the 3rd petitioner in the company that owned the vehicles.
49. No adverse record of the 3rd petitioner during his long service with the police was produced and relied upon by the commission in arriving at the decision that the 3rd petitioner's employment as a CID officer was untenable on the grounds of conflict of interest. In any event, the 3rd petitioner was not presented an opportunity to make an election to divest in the company and transfer his interest for value to another person so as to continue serving the police service diligently. Indeed no evidence was led to show that the performance of the 3rd petitioner was wanting in any aspect at all in the police service except the purported conflict of interest which was based on

assumptions, speculations and conjecture.

50. The court finds that the decision by the respondent to dismiss the 3rd petitioner from police service was unreasonable, and was based on non-existent evidence, on irrelevant and extraneous matters and was therefore unlawful, null and void.

51. It is opportune to note that the three petitioners were re-vetted and the decisions of the vetting panel were upheld in respect of the three petitioners. It is the court's finding except in respect to the 1st petitioner that the review process did not and could not validate decisions that were in the first place irrational, unlawful and null and void. The court will therefore say no more with regard to the re-vetting of the three petitioners. It is the court's finding that the vetting of the 2nd and 3rd petitioners was unfair and offended the provisions of article 47 (1) and 50 (1) of the Constitution of Kenya 2010.

52. In the final analysis, the court makes the following orders;

- a. **The court declares 2nd and 3rd petitioner's right under Article 47 (1) and 50 (1) of the constitution were violated by the respondent by dismissing them from service in the National Police Service without adhering to the tents of procedural fairness, fair hearing nor any objective, rational or fair grounds for the decision taken.**
- b. **The 3rd petitioner's right under Article 40 of the Constitution was violated and undermined by the respondent for dismissing him from the service of the national Police Service on alleged conflict of interest arising from his ownership and shareholding of a corporate body operating motor vehicles in the transport sector.**
- c. **A judicial review order of certiorari is issued to remove into the employment and Labour Relations Court and quash forthwith the respondent's decisions issued on 22nd May 2014 and 7th May 2015 dismissing 2nd and 3rd petitioners from the National Police Service.**
- d. **A judicial review order of mandamus is issued compelling the respondent to reinstate the 3rd petitioner into the service of the national Police Service.**
- e. **A declaration is issued that the 2nd petitioner retired honourably and without blemish on his record as an officer in the national Police Service on the attainment of the mandatory retirement age.**
- f. **The petition by the 1st petitioner is dismissed.**
- g. **The respondent to pay costs of the petition in respect of the 2nd and 3rd petitioners.**

Dated and delivered at Nairobi this 24th day of June 2016

MATHEWS N. NDUMA

PRINCIPAL JUDGE