



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO 29 OF 2014

PETER ADIKA.....PETITIONER

VS

NATIONAL POLICE SERVICE COMMISSION....1ST RESPONDENT

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

JUDGMENT

Introduction

1. The Petitioner in this petition is an ex-Police Corporal attached to the Highway Patrol Unit Headquarters - Ruaraka, Nairobi. The 1st Respondent is a constitutional commission established under Article 246 of the Constitution charged with the human resource function within the National Police Service. The 2nd Respondent is the Inspector-General of the National Police Service appointed under Article 245 of the Constitution to exercise independent command over the National Police Service and is a member of the National Police Service Commission.

The Petition

2. The Petitioner was enlisted in the Kenya Police Service on 25th March 1989. He graduated as a Police Constable in the same year and in April 2005 he attained the rank of Corporal. He served for an uninterrupted period of 21 years.

3. On 13th September 2010, while stationed at the Highway Patrol Unit Headquarters – Ruaraka in Nairobi, the Petitioner and his colleagues Corporal Okuta and Constable Masunzu were deployed to control traffic along Thika Road.

4. The Petitioner had on him the sum of Kshs.1,800.00 in denominations of Kshs.200.00 (3 notes), Kshs.100.00 (11 notes) and Kshs.50.00 (2 notes). He folded the money and put it in a small notebook which he then placed under his white cover.

5. By about 10.00 am, the traffic had eased and the Petitioner and his colleagues decided to go back to the office at Ruaraka to await the next assignment. They sought a ride from a motorist and as they were entering the motorist's car, a police vehicle stopped ahead of them. The Petitioner and his colleagues were summoned to the police vehicle where they found the then Deputy Traffic Commandant, Samwel Kimaru. They were driven in the boot of the police vehicle to Ruaraka Traffic Headquarters.

6. A physical search conducted by Kimaru found money on the Petitioner and his colleagues as follows:
 - a. Corporal Okuta- Kshs.1,300.00
 - b. Constable Masunzu – Kshs.100.00
 - c. The Petitioner – Kshs.1,800.00
7. Corporal Okuta and Constable Masunzu who had kept their money in their trouser pockets were released back to their duties but the Petitioner was charged because he had kept his money under his white cover which was not considered a proper place to keep money.
8. On 14th September 2010, Kimaru appointed Acting Superintendent of Police, Jonathan Katsole to preside over orderly room proceedings against the Petitioner. On the same day, the Petitioner was charged with the offence of acting to the prejudice of good order and discipline contrary to Regulation 3(41) of the Police Regulations.
9. During the orderly room proceedings, Kimaru and two other witnesses testified against the Petitioner. The Petitioner states that Kimaru's statement was recorded without his knowledge. At the conclusion of the hearing, the Presiding Officer forwarded the proceedings to Kimaru who passed a dismissal sentence against the Petitioner.
10. It is the Petitioner's case that the entire process leading to his dismissal was undertaken without recourse to the laid down procedures and violated the following fundamental rights:
 - a. The right to fair labour practices under Article 41(1) of the Constitution;
 - b. The right to fair administrative action under Article 47(1) of the Constitution;
 - c. The right to fair hearing under Articles 25(c) and 50(1) of the Constitution;
 - d. The principles of natural justice.
11. The petition sets out the following particulars of violation and breach:
 - a. The Respondents initiated proceedings on a legally non existent complain. There was no complainant against the Petitioner in the orderly room proceedings that led to his dismissal;
 - b. Samwel Kimaru, who was the then Deputy Traffic Commandant acted as the complainant, the main witness and judge in the Petitioner's case;
 - c. Kimaru passed judgment in a case over which he did not preside;
 - d. The Petitioner was not availed any notice of the charges against him to enable him prepare his defence before the conduct of the orderly room proceedings;
 - e. The Petitioner was not given a chance to be represented by a senior police officer during the orderly room proceedings;
 - f. There were no independent investigations to authenticate the allegations against the Petitioner;
 - g. Contrary to the provisions of Article 50(1), the Petitioner was not availed the right to have the dispute resolved by application of relevant laws in a fair and public hearing and before an independent and impartial tribunal.
12. The Petitioner states that the Respondent did not respond to his appeal which was forwarded to the

Inspector-General of Police on 2nd November 2011. He further pleads that he was not availed his right to fair administrative action contrary to the provisions of Article 47(1) of the Constitution as his appeal has been pending for more than three years.

13. The Petitioner therefore avers and submits that the decision to dismiss him from the Police Service and the Respondent's refusal to hear his appeal constitute a violation of his fundamental rights and freedoms as enshrined in the Constitution.

14. The Petitioner goes on to state that from the Respondent's decision to dismiss him from the Police Service, he was sent away empty handed after a 21 years' service and he has been subjected to ridicule and embarrassment.

15. He seeks the following:

- a) A declaration that his fundamental rights as guaranteed under Articles 25(c), 41(1), 47(1) and 50(1) of the Constitution have been violated
- b) A declaration that Respondent's decision to dismiss him and failure to hear and determine his appeal is unfair and unlawful
- c) An order for reinstatement without loss of benefits or in the alternative:
 - i) One month's salary in lieu of notice.....Kshs.25,955.00
 - ii) Payment of salary from the time of dismissal until determination of this petition at Kshs.25,955.00 per month
 - iii) Statutory damages for unlawful and unfair dismissal at 12 months' salary being Kshs.29,535x12 months....Kshs.354,420.00
 - iv) Other terminal dues that he would have been entitled to under normal termination including his lump sum and monthly pension
- d) Costs of the petition

The Respondent's Reply

16. In a replying affidavit sworn by Superintendent of Police, Titi Ayiera it is deponed that on 3rd September 2010 at about 1030 hours, a report was made to the Deputy Traffic Commandant by a caller who alleged having seen a police officer taking a bribe from a bus driver at the Muthaiga bus stage.

17. The Deputy Traffic Commandant accompanied by Mrs. Nancy Gunjiri, Ag SP and Corporal James Omuse drove to the scene where they found the Petitioner, No 66934 CPL Peter Odhiambo and No 70920 PC Nelson Masunzu.

18. The Deputy Traffic Commandant took the Petitioner and his two colleagues to the Traffic Headquarters where he informed them of the allegation against them and instructed them to declare and produce any money in their possession.

19. The Petitioner at first declared that he had no money but when the Deputy Traffic Commandant stated that he would conduct a body search, the Petitioner produced Kshs.100.00. The search which was conducted in the presence of superior police officers from the Unit revealed that the Petitioner had Kshs.1,800.00 in form of notes crumpled and hidden under his white cap cover which he had failed to declare.

20. The Petitioner was therefore charged with and convicted of committing an act to the prejudice of

good order and discipline contrary to Regulation 3(41) of the Force Standing Orders. Following his conviction and sentence, the Petitioner was informed of his right of appeal. The Headquarters Disciplinary Board declined the Petitioner's appeal thus upholding his conviction and sentence. This decision was communicated to the Petitioner by letter dated 16th December 2013 which notified him of a further right of appeal to the National Police Service Commission which right the Petitioner did not exercise.

Determination

21. The issues for determination in this petition are as follows:

- a) Whether the Petitioner's dismissal amounts to a violation of his fundamental rights under the Constitution;
- b) Whether the Petitioner's dismissal was lawful and fair;
- c) Whether the Petitioner is entitled to the remedies sought.

The Petitioner's Fundamental Rights

22. The Petitioner claims that by his dismissal, his rights under Articles 25(c), 41(1), 47(1) and 50(1) of the Constitution were violated. Labour rights are now protected under Article 41 of the Constitution. However, this elevation has not jettisoned the applicable law on employment and labour relations. Not every termination of employment would amount to a violation of rights under the Constitution.

23. In my view, the principle that a dispute arising out of a matter that is adequately covered under statute ought to be determined in accordance with the applicable statute remains good law. As held by the Court in *Kemrajh Harrikissoon vs the Attorney General of Trinidad and Tobago [1979] UKPC 3* the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is misused as a general substitute for the normal procedures for invoking judicial control of administrative action.

24. I have looked at the petition now before the Court in this light and find that it does not raise any issues outside a normal employment relationship that would call for constitutional intervention. In addition, this Court has stated elsewhere that action taken by an employer against an employee does not fall within the definition of administrative action under Article 47 of the Constitution. (see *Prisca Kemboi & 2 Others v Kenya Post Office Savings Bank [2014] eKLR*).

The Dismissal

25. The Petitioner claims that his dismissal from the Police Service was without any justifiable cause and that the proceedings leading to the dismissal were in contravention of the law.

26. He complains that the Deputy Traffic Commandant played the role of complainant, witness and judge. He also takes issue with the summary manner in which his case was handled. Section 3(2) of the Employment Act, 2007 puts application of the Act beyond the reach of disciplined forces, including the Kenya Police. It follows therefore that the procedural requirements under this law were not applicable to the Petitioner's case and in handling the case, the Respondents adopted the procedure provided under the Police Regulations.

27. From the evidence provided by the Respondents, the Petitioner appended his signature to the waiver notice which gave way to immediate commencement of the orderly room proceedings. Further, from the record of the orderly room proceedings, the Petitioner was afforded the opportunity to cross examine the three witnesses appearing at the proceedings. Finally, the Petitioner was issued with a detailed dismissal letter dated 24th September 2010 citing the charge against him as well as the disciplinary procedure leading to the dismissal.

28. The Petitioner does not deny that he was found with currency notes under his white cap cover, a fact that he had initially concealed. It seems to me that the place the money in issue was found is rather unusual and consequently the Court finds that on a balance of probability, the Respondents had a valid reason for dismissing the Petitioner.

29. The Court also finds that the Petitioner was taken through the disciplinary procedure properly applicable to Police Officers. The Respondents produced documents to show that the Petitioner's appeal was considered and disallowed by the Headquarters Disciplinary Appeals Board and the claim that the appeal remains pending has no basis.

30. For the foregoing reasons, the Court finds the petition to be without merit and proceeds to dismiss it with no order for costs.

31. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF JULY 2015

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JUDGE

Appearance:

Mr. Namada for the Petitioner

Mr. Kihara for the Respondents