



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
PETITION NO. 64 OF 2014
(Formerly High Court Nairobi Petition No. 243 of 2013)

CHARLES KINANGA ARUMBA.....CLAIMANT

VERSUS

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

Mr. Omwenga

Mr. Moimbo

JUDGMENT

1. The Petition dated 21st March 2013 was filed on 14th May 2013 seeking for orders *inter alia*;

- a. That it be ordered that the dismissal of the Petitioner from his duties is unconstitutional and the Petitioner be reinstated to his place of work as a corporal.
- b. That the orderly proceedings and subsequent dismissal of the Petitioner be quashed and be replaced with an order reinstating the Petitioner as a police officer.
- c. The Respondent be condemned to pay the costs of the Petition.

The Petition is founded on the grounds that:

2. The Petitioner was employed as a police constable on 1st September 1998 and was attached to General service Unit (IL) at Rwaraka Headquarters.
3. That on or about 6th December 2004, the Petitioner received a call from his brother stating that the petitioner's wife who was pregnant had developed complications and had been taken to ANKH Hospital in Nairobi where she had an immature delivery and the child died subsequently.
4. That the Petitioner sought permission of his immediate superior number 40396/811095586 Corporal Thomas Nyaga with whom, the Petitioner was on duty at the United States of America Embassy at Gigiri Nairobi and the said corporal, permitted the Petitioner to visit his wife at ANKH Hospital.

5. The Petitioner surrendered his firearm to the said Corporal Thomas Nyaga with ammunition.
6. The Petitioner took his wife home, upon her discharge from hospital and upon arrival at the General Service Unit Headquarters, a sentry at the main gate informed the Petitioner that the Petitioner was wanted by officer in charge I.P. Mairan.
7. The Petitioner was charged with the offence of leaving place of duty before regularly being relieved to which the Petitioner pleaded not guilty on 7th December, 2004.
8. On 8th December 2004, orderly proceedings were conducted and the Petitioner was dismissed with immediate effect from 9th December 2004.
9. The Petitioner dissatisfied with the dismissal filed an appeal on 12th December 2004. The Appeal was dismissed by a letter dated 22nd March 2012 received by the Petitioner on 15th March 2013. The letters dismissing the Appeal was produced and marked 'CK6'. It took about 12 years for the Respondent to consider and determine the Appeal dated 12th December 2004, produced and marked 'LK5.'
10. The Petitioner submits that the orderly proceedings were unprocedural in that;
 - i. The Petitioner was not given notice of intended orderly proceedings.
 - ii. No charges were served on the petitioner prior to the orderly proceedings.
 - iii. The 1st Respondent disregarded the evidence by the Petitioner that Corporal Thomas Nyaga number 403966/811095586 had given permission to the Petitioner to attend an emergency.
 - iv. The 1st Respondent failed to appreciate that Corporal Thomas Nyaga was charged and found guilty of neglecting to make a report which was his duty to do that the Petitioner had left his place of duty.
11. The 1st Respondent showed open bias in not believing the Petitioner during the initial hearing as well as the appeal.
12. No reasons were given for rejecting the appeal.
13. The 1st Respondent failed to appreciate that the Petitioner had genuine and compelling reasons to leave his place of duty.
14. The 1st Respondent took over eight (8) years to determine the appeal and this contravened the constitutional rights of the Petitioner.
15. The Petitioner prays that the Court finds the dismissal of the Petitioner was unfair, unconstitutional and contravened the rules of natural justice and the same be nullified and set aside.
16. The 2nd Respondent filed a Replying Affidavit on 5th March 2015 in which it admits the particulars of employment of the Petitioner and that on 6th December 2004, the Petitioner was on duty at the United States Embassy at Gigiri within Nairobi area.
17. The Respondent states that the Petitioner left the duty Station without being regularly relieved contrary to Police Regulations.
18. That as a result of absconding from duty, the Petitioner was charged in orderly room proceedings and was subsequently convicted and sentenced to dismissal from the Police Force.

19. The waiver notice of intended orderly room proceedings and a copy of Defaulter sheet are attached to the Affidavit.

20. A statement of evidence by No. 74302 / 9802157 PC Charles Arumba is also attached.

21. The Respondent denies having violated any of the cited provisions of the Constitution as alleged or at all.

22. The Petitioner was informed of the conviction and dismissal from the Police Force and advised on his right of appeal per annex CK4.

23. The document acknowledges that the Petitioner had no record of previous offence.

24. The Petitioner was advised of right of Appeal to the Commissioner of Police within seven (7) days from date of dismissal which was 9th December 2004.

25. The notice of Appeal was filed timeously on 12th December 2004.

26. The Respondent states that the Appeal against sentence of dismissal to the Commissioner Police, was considered by the Headquarters Disciplinary appeal's Board; The Board disallowed the Appeal for lack of merit and upheld the orderly room proceedings on 22nd March 2012.

27. The Respondent further states that in terms of Section 108 of the Police Act, Cap 84 (Repealed) and the Forces Standing Orders, the Commissioner of Police was the final appellate authority in disciplinary matters concerning officers below the rank of Inspector of police. The matter was therefore considered as finalized. The Petitioner has exhausted his right of appeals and this suit be dismissed.

28. Determination

i. Was the Petitioner given administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair in terms of Article 47 of The Constitution of Kenya 2010?

ii. If the answer to (i) above is in the negative, what remedy is available to the petitioner.

Issue I

Pleadings

29. The Petitioner pleaded in his Petition a possible defence to the offence that led to his dismissal in paragraphs 2, 3, 4 and 5 of the petition. The defence may be summarized as follows;

30. On the 6th December 2004, while stationed at the United States of America Embassy at Gigiri Nairobi, on duty, with his immediate senior Corporal Thomas Nyaga, The Petitioner received an emergency call from his brother that his wife had been taken to ANKH Hopsital in Labour and had developed complications and their baby had died following an immature delivery.

31. The Petitioner sought permission from his immediate senior to rush to attend to his wife and baby which permission was granted by Corporal Thomas Nyaga to whom he handed over his rifle and rushed to hospital.

32. That upon arrival at the Hospital, his wife was discharged and he took her to his house and he went back to work at the General Service Unit Headquarters. The Petitioner was immediately charged with the offence of leaving the place of work before regularly being relieved to which he pleaded not guilty the following day on 7th December 2004.

33. The Respondent in its Replying Affidavit sworn to by Senior Superintendent of Police, Charles Naiba did not make a single comment on the defence offered by the Petitioner to the charge facing him. In fact, no minutes of the orderly room proceedings was produced to show whether or not the defence by the Petitioner was considered at all and if so what weight was given to the emergency situation that had led to his rushing to hospital with permission from his senior.

34. The Respondent did not comment at all to the fact that the Petitioner was given permission to attend to the emergency.

35. This evidence by the Petitioner is not controverted at all and the Court takes it as the truth of what happened on 6th December 2014.

36. Orderly room proceedings are criminal in nature and there are lawful defences to these offences. The offence against the Petitioner was not one of strict liability to which no defence was possible. It is unlawful for the Respondents to proceed as they have on the basis that no defence was possible against the offence of leaving a duty station before a reliever arrives.

37. The Court is of the considered view that the Petitioner was not given enough notice of the offence against him to prepare himself to defend himself. The Court is also of the considered view that the Respondents did not take into consideration the defence put forth by the Petitioner.

38. It is therefore prudent to conclude, as the Court proceeds to do that the Petitioner did not get a fair hearing from the 1st Respondent and the administrative action taken against him was not reasonable and procedurally fair given the circumstances of the case.

39. It is common cause that the Petitioner was aggrieved by the decision of the 1st Respondent and exercised his right to appeal the decision within seven (7) days.

40. It is admitted that the Appeal was lodged on 12th December 2004, after the dismissal was communicated on 9th December 2004. It is also not in dispute that the Commissioner of Police communicated the outcome of the Appeal on 22nd March 2012, approximately eight (8) years from the date the Appeal was lodged.

41. This delay by the 1st Respondent is so inordinate such that it is a complete negation of the provision of Article 47 of the Constitution. This administrative action or inaction violated the right of the Petitioner to an administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. This conduct was also a violation of Article 50(1) of the Constitution which provides

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

42. The Petitioner has pleaded and submitted that the orderly room tribunal was outright biased against him, did not consider his defence and the Commissioner of Police took eight (8) years to consider his Appeal.

43. The effect of this mis-action by the 1st Respondent meant that the Petitioner remained without employment, in limbo, without knowing what to do or expect from about eight (8) years.

44. The Petitioner has as a result suffered gross abuse and injustice at the hands of his employer emanating from a family tragedy, which resulted to the death of his child.

45. It is the Court’s considered view that a society that operates in total disregard to basic tenets of humanity; a community that completely lacks empathy for a fellow human being in the face of personal calamity and loss cannot be successful in its basic objectives that depend on the very humanity to

succeed.

46. There is no nature of employment or task that is so superior to the pain of a parent that has just lost a child as to subject such a parent to serve and not be allowed to attend to the loss of his child and sickness of his wife.

47. The Respondent has not contradicted the stark evidence by the Petitioner that he duly handed over to his immediate senior officer who was humane enough to understand what had befallen him.

48. The services of our Armed Forces must be founded on principles of fairness, humaneness and justice. With this, all other endeavours will be possible.

49. The Court upholds the petition and orders.

- a. The dismissal of the Petitioner from his duties was unconstitutional and the Petitioner be reinstated without loss of any remuneration and benefits to his place of work as a corporal.
- b. The orderly room proceedings, the subsequent dismissal and Appeal proceedings are quashed.
- c. The Respondents to jointly and severally ensure that the petitioner returns to work within thirty (30) days from the date of this judgment.
- d. The Respondents to pay costs of the suit.

Dated and Delivered at Nairobi this 28th day of August, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE