



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO. 12 OF 2013

PETER KIRIMI NDERIPETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The Petitioner PETER KIRIMI NDERI is a police Officer. At the time of filing this petition he was stationed at Eldama Ravine Police Station.

He filed this petition through Gitobu Imanyara & Co. Advocates by his Petition dated 17th Decembr 2012 and filed in court on 18th Decembr 2012 seeking the following orders:-

- a. His fundamental right to equal protection and equal benefit of the law under Article 27 (1) of the Constitution has been violated.
- b. His fundamental right to expeditious,efficient, lawful and procedurally fair hearing and determination of his Complaint in the form of appeal guaranteed under Article 50 (1) of the Constitution has been violated.
- c. His fundamental right to administrative action that is expeditious, efficient, lawfully reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution has been violated.
- d. A declaration that the Petitioner is entitled to compensation for breaches of his fundamental rights as particularized above.
- e. An order consequential to the above declaration in Paragraph (d) quantifying the amount of compensation by the Respondent.
- f. That the Petitioner be compensated the Kshs. 5,000/- that was deducted from his salary.
- g. That this Honourable court order that the decision of the Respondent delivered on 5.8.2011 reducing in rank the Petitioner form Corporal to Constable be quashed and he be paid his dues and Salary arrears as Corporal.
- h. Costs of this Petition with interest.
- i. In on the above.
- j. Further or other orders as the Honourable Court shall deem just.

The Petitioner's case is that in May 2011 he was attached to Kariobangi Police Traffic Department . On 13th May 2011 he was performing his duties of controlling and regulating traffic at the Kariobangi Roundabout in Nairobi together with his colleague Police Constable Wilson Mariri when an Officer by the name Nancy Ngunjiri No.230156 from the Government Vehicle check Unit ordered him to leave his duties and to appear for orderly room disciplinary proceedings on 18th May 2011. The orderly room proceedings are the disciplinary process for police Officers.

The Petitioner was on 15th May 2011 charged with the offence of leaving his place of duty before he was regularly relieved contrary to regulation 3(11) of the Police Regulations. The Petitioner contends that the orderly room proceedings were malicious and unfounded, that he was not allowed any reasonable opportunity to defend himself and that the proceedings were in breach of the Police Act and natural justice. Following the orderly room proceedings the Petitioner was deployed to Salgaa Police Base from where he received a letter dated 4th August 2011 from the Traffic Police Commandant informing him of the outcome of the orderly room proceedings. The letter reads as follows:-

“Ref: EST/1/14/VOL.XXIV/78

4/8/2011

NO. 62999 CPL PETER KIRIMI NDERI

Thro”

PTEO Rift Valley

P O Box 41

NAKURU

RE: ORDERLY ROOM PROCEEDINGS

On 18th day of May 2011, you were charged in orderly room proceedings as follows:-

OFFENCE

Leaving his place of duty before he is regularly relieved contrary to regulation 3 sub regulation 11 of the Police Regulations.

PARTICULARS

On the 13th day of May 2011 at around 12.00 pm at Kariobangi roundabout within Nairobi Province without reasonable cause leaves your place of duty before you were regularly relieved.

You pleaded not guilty and evidence in support of the charges adduced. It was found that you had a case to answer. You defiantly refused to give your defense with no apparent reasons.

Eventually, the Presiding Officer found you guilty as charged and convicted. You were offered a chance to mitigate which you again refused to do. You were sentenced to Kshs. 5,000/-.

However, owing to circumstances, gravity, seriousness of the offence and your subsequent conduct and behavior, the sentence has been enhanced to reduction in rank from corporal to constable with effect from 30th June 2011.

You are once again notified that your defiance and disobedience to orders has no basis in this era of police reforms. You are setting a very bad precedent to others and you are advised to refrain from such habits.

You have a right to appeal to Commandant Traffic through the normal channel within seven days on receipt of this letter.

[signed]

ALFRED MAKOMA

FOR COMMANDANT TRAFFIC DEPARTMENT”

The Petitioner contends that he was not afforded an opportunity to defend himself or call any witness. He appealed against the decision on 16th August 2011 but to date has not received any communication on the outcome of the appeal. That as a result he has suffered loss and damage.

The Respondent filed a replying affidavit of Titti Ayiera, an Acting Superintendent of Police and a Legal Officer in the National Police Service sworn on 12th February 2013. The Respondent also filed submissions on 31st October 2013. The Respondent avers that the Petitioner was charged, subjected to a hearing under the orderly room proceedings and convicted.

The Respondent submitted that the Petitioner was given an opportunity to be assisted in his defence but declined and opted to defend himself and that the petitioner cross-examined witnesses who were called to give evidence against him. The Petitioner was put on his defence and the proceedings adjourned to allow the petitioner to prepare his defence. At the hearing of his defence the Petitioner declined to give evidence or call witnesses. That upon being convicted he declined to give any mitigation. That the petitioner was fined Shs. 5000/- which the Commandant enhanced to include a demotion from the rank of Corporal to Constable.

The Respondent submitted that the Petitioner was given a fair hearing in accord with Chapter 20 of the Forces Standing Orders, the Principles of Article 47 (1) and Article 50 (1) of the Constitution of Kenya (2010). That the Petitioner’s appeal has not been heard due to the reforms in the National Police Service which saw the abolition of the Commissioner of Police and the appointment of the Inspector General. That the Petitioner should wait for the outcome of his appeal.

The Respondent further submitted that the Petitioner has not demonstrated how his rights under Article 27 (1) have been violated as he was not discriminated.

The Respondent concludes that since there is no evidence of violation of the Petitioners’ rights he is not entitled to refund of Kshs 5000 deducted from his salary upon conviction, dues and salary arrears as Corporal or any other compensation. The Respondent prays that the Petition be dismissed with costs to the Respondent.

The Respondent relied on the case of **Joseph Mwenda Mbuko V Provincial Police Officer, Central Police & 2 others [2013] eKLR** where the court defined what constitutes a fair hearing as follows:-

“A fair hearing implies that the accused person is presumed innocent until the contrary is proved, is informed of the charge with sufficient details to answer it, to have adequate time and facilities to prepare a defence, to choose to be represented by, an advocate and to be informed by his rights promptly, to be informed in advance of evidence the prosecution intends to rely on and to have reasonable access to that evidence, to adduce and challenge evidence and the evidence against him not to be selectively adduced or deny producing any evidence simply because it is not supportive of the charge. The opportunity must be a fair, reasonable and full of effective opportunity subject to expeditious disposal of the matter, bringing finality to the dispute and preventing an abuse of the court process.”

The Petitioner herein alleges in his appeal against conviction and sentence that he did not leave his place of work, that there was a deficit in deployment as they were supposed to be four officers but only two were available as the other two were engaged elsewhere and that he had made a report of the deficit, that he was clearing jam when Madam Nancy Ngunjiri arrived at his location of deployment and that she was able to call him to where she was. He further alleges in the appeal that he was transferred to Rift Valley during the proceedings and this denied him a fair hearing, that his witnesses were not allowed to make their statements, that Madam Ngunjiri hand picked the Officer to hear his disciplinary case and deliberately directed that the case be heard in Ruaraka Traffic headquarters although the investigations were carried out in Pangani.

Article 27 (1), 47(1) and 50(1) when which the petitioner alleges his rights have been violated provide as follows:-

27. 1) Every person is equal before the law and has the right to equal protection and equal protection and equal benefit of the law.

47. 1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

50. 1) 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.

The Respondent has submitted that the Petitioner was given a fair hearing. However, in the face of denial of a fair hearing by the petitioner, the Respondent has not filed the record of the orderly room proceedings to prove that the petitioner was actually accorded a fair hearing. The affidavit of Titi Ayiera makes allegations which are not within his knowledge in respect of the proceedings which he did not attend. His affidavit cannot controvert the allegations of the Claimant.

The Respondent has not denied that the orderly room proceedings were held in Ruaraka Traffic Headquarters yet the investigations were held at Pangani, that the Claimant did not call any witnesses that it is alleged this was out of petitioner's choice. The Respondent has further not denied that the Petitioner was transferred to the Rift Valley during the course of the orderly room Proceedings.

The most glaring evidence of violation of the Petitioners rights are in the enhancement of his sentence from a fine of Shs. 5000 to a demotion in rank from Police Corporal to Police Constable and the attendant reduction of his salary by a person who did not sit in his disciplinary case allegedly owing to circumstances, gravity seriousness of the offence and the petitioner's conduct and behavior which are not specified. This was done after he had been sentenced to Shs. 5000 by the Officer presiding over his case.

The second glaring violation of the Claimants rights under Article 50 is that his appeal filed on 16th August 2011 has not been heard to date allegedly due to the reforms being undertaken in the National Police Service. The Respondent audaciously submits that the petitioner should wait for his appeal to be dispensed with, and further, that there is no evidence by the petitioner that the appeal will not be dispensed with. This is absurd to say the least.

I find that the petitioner has demonstrated that his rights under Article 47(1) and 50(1) have been violated.

I therefore make the following orders:-

1. I declare that the Petitioners rights under Article 47 and 50 have been violated by the Respondent.
2. I declare the demotion of the Petitioner from Corporal to Constable null and void and quash the same.

3. I order the Respondent to re-instate the Petitioner to the rank of Corporal without loss of salary and any other benefits that would have become due to him but for the demotion.
4. I order the Respondent to refund the sum of Shs.5000 fine deducted from the Petitioner's salary as a consequence of the Orderly Room proceedings held on 18th May 2011.
5. I order the Respondent to pay the Claimant's costs for this petition.

Orders accordingly.

Delivered and signed in open court on 22nd May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Marangu holding brief for Imanyara for Claimant

No appearance for Respondent