



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

PETITION NUMBER 119 OF 2016

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 21(1) & (2), 27(1),(2) & (3), 28, 40(3), 41(1), 43(1) (e),
47(1) &**

(2), 50(1), (2) (a), (b) (e) & (j) AND 252(1) (d) OF THE CONSTITUTION OF KENYA 2010

BETWEEN

FELISTER WAITHIEGENI MUGWERU.....PETITIONER

-VERSUS-

THE NATIONAL POLICE

SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL OF THE .

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed the Petition herein on 25th August 2016 seeking the following prayers:

- a) A declaration be and is hereby made that the 1st Respondent's decision to refuse to reinstate the Petitioner to the National Police Service is unconstitutional, unlawful, null and void *ab initio*.
- b) A declaration be and is hereby made that the withholding of the Petitioner's pension amounts to violation of the Petitioner's constitutional right to property and social security under Articles 40 (3) and 43 (1) (e) of the Constitution of Kenya 2010 and that the same is unlawful, null and void for all intents and purposes.
- c) A declaration be and is hereby made that the Orderly Room Proceedings held on the midnight of 2nd October 2009 that led to the Petitioner's dismissal from the National Police Service violated the Petitioner's constitutional right to fair trial and that the Petitioner's dismissal from the National Police Service is unconstitutional, unlawful, null and void for all intents and purposes.
- d) An order nullifying the outcome of the Orderly Room Proceedings against the Petitioner held on 2nd October, 2009
- e) An order compelling the 1st Respondent to forthwith reinstate the Petitioner to the National Police Service.
- f) An order directing the 1st Respondent to forthwith compensate the Petitioner for lost employment benefits including unpaid salary dues for all the time the Petitioner has been out of employment at the National Police Service with interest at court rates.

[At the time of the Petitioner's dismissal on 2nd October, 2009 the Petitioner's salary was Kshs.26,400 per month. Therefore, her lost salary dues as at the date of this Petition are Kshs.26,400 x 83 months = Kshs.2,191,200. Salary increments should be factored in compensating the Petitioner's lost employment benefits]

g) An order nullifying the decision to withhold the Petitioner's pension and gratuity benefits and directing the 1st Respondent to forthwith release to the Petitioner her pension and social security benefits.

h) General damages for violation of the Petitioner's constitutional rights in the process leading to the unlawful dismissal of the Petitioner from the National Police Service.

i) Costs of the Petition.

j) Any other relief that the Court may deem fit and just do grant the Petitioner.

2. The 1st Respondent filed its Grounds of Opposition on 30th July 2018. The 2nd and 3rd Respondents filed their joint Replying Affidavit, sworn by Grace Chepkoech, on 9th February 2017. The parties agreed that the Petition be heard by way of written submissions.

Petitioner's Case

3. The Petitioner, Felister Waithiegeni Mugweru, states that she was recruited to the then Kenya Police Force, (currently known as the Kenya National Police Service) in 1989 and was deployed to various stations across the country. She avers that she was unlawfully dismissed from the 1st Respondent on 2nd October 2009 vide a dismissal letter dated 2nd October 2009 for allegations that she had failed to book a detained motor cycle for the offence of riding without a licence. At the time of her dismissal, the Claimant held the position of Sergeant.

4. The Petitioner contends that she was subjected to the Orderly Room Proceedings on 1st October 2009 at 11.15 pm on a charge of being guilty of an act to the prejudice of good order and discipline contrary to regulation 3 (41) of the Police Regulation. The Presiding Officer, Chief Inspector Samuel Makori found the Petitioner guilty and convicted her and forwarded the proceedings to a higher authority for sentencing. On 2nd October 2009 the Provincial Police Officer in charge of Nairobi dismissed the Petitioner on the basis of the conviction by the Presiding Officer. She contends that the procedure followed to dismiss her was flawed because the Presiding officer failed to recommend and advice on the appropriate sentence to his seniors and that resulted to the arbitrary decision by the Provincial Police Officer to dismiss her from service. She further contends that she was harassed, intimidated and denied representation during the Orderly room Proceedings.

5. The Petitioner appealed against her conviction and sentence on 7th October 2009 to the Commissioner of Police but by the letter dated 25th March 2010, the Commissioner of Police informed her of the dismissal of the appeal.

6. The Petitioner was also charged in Anticorruption Case Number 29 of 2009 which was later on withdrawn and the Petitioner discharged under Section 87 (A) of the Criminal Procedure Code. The Petitioner was subsequently charged in Anti-corruption case Number 13 of 2012 but after the trial, she was acquitted. Thereafter she made applications to the 1st Respondent for her reinstatement but when she got no response she filed the petition herein.

1st Respondent's Case

7. The 1st Respondent avers that she does not have the mandate to re-open matters concluded before it was established and as such she denies having, in any way, infringed upon the Petitioner's rights and freedoms.

She further avers that the suit is time barred and the reliefs sought are not justified.

The 2nd and 3rd Respondents' Case

8. The 2nd and 3rd Respondents confirm that the Petitioner was enlisted as a police Constable from 25th March 1989 and rose through the ranks to become a Sergeant. That on 30.9.2009 she failed to book a detained motor cycle in the Detained vehicle Register as required and demanded a bribe of Kshs.1,000 from the owner to secure release of the vehicle. That the owner of the vehicle reported the matter to the Anti-Corruption Commission who laid a trap using treated Kshs.1,000 and the petitioner was arrested.

9. The 2nd and 3rd Respondents further aver that the Petitioner was notified of the intended Orderly Room Proceedings pursuant to Paragraph 16 (vii) of the Force Standing Orders. They contend that the Petitioner neither made an application for representation as required under Paragraph 16 (vii) of the Force Standing Orders nor presented a police officer to represent her. They further aver that the Provincial Police Officer passed the sentence in accordance with the set down procedure after the presiding officer, who was not mandated to pass sentence, convicted the petitioner and forwarded the Orderly Proceedings as provided in Chapter 20 Paragraph 16 (x) (r) of the Force Standing Orders. The 2nd and 3rd Respondents further aver that the orderly proceedings were conducted without undue delay as required under Chapter 20 Paragraph 16 (ii) of the FSO and maintained that the proceedings can be carried out at any time it is considered in the public interest.

10. The 2nd and 3rd Respondents state that on 27th October 2009 the Petitioner was charged with soliciting for a benefit contrary to Section 39 (3) (a) as read with section 48 (1) of the Anti-corruption and Economic Crimes.

11. Finally, the 2nd and 3rd Respondents aver that the National Police Service Commission directed that all appeals that were handled by the Commissioner of Police be disallowed and as such the petitioner could not be reinstated.

Petitioner's Submissions

12. The Petitioner submitted that this matter falls under both the Repealed Constitution and the Constitution of Kenya, 2010. For the reasons that the decision dismissing the Petitioner was made before the promulgation of the Constitution and the decision refusing to reinstate the Petitioner and her acquittal was made after the promulgation of the Constitution 2010.

13. The Petitioner cited the case of **Joseph Sitonik v Attorney General & Another [2012] eKLR** where the Court held that disciplinary proceedings facing police officers were subject due process in accordance with the principles set out under Section 77 (9) of the retired Constitution and the rules of natural justice. She also cited the Supreme Court decision in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** to urge that the new constitution applies to this case because the doctrine of retrospectively does not apply to the Constitution as it does to statutes.

14. The Petitioner further submitted that her dismissal was unconstitutional because the criminal justice system under the anti-Corruption and Economic Crimes Act No. 3 of 2003 was set in motion before the Petitioner's exhaustion of the disciplinary appeal process under the Police Act hence the appeal mechanism under the Police Act was by operation of law suspended until the conclusion of the corruption case. That she appealed against the dismissal on 7.10.2009 and the criminal charges were commenced on 5.10.2009 and as such, the decision by the Police Commissioner on 25.3.2010, dismissing her appeal was premature because the criminal case was not concluded until 6.5.2014.

15. The Petitioner further submitted that Orderly Proceedings violated her constitutional rights to fair hearing and fair administrative action because the presiding Officer lacked jurisdiction to try her for misconduct which was criminal in nature, she was not given adequate time to prepare for her defence, was denied assistance of another police officer, the proceedings took place in the absence of the Complainant, Petitioner's Defence was not considered, the sentence was unlawful for being excessive and the reason for dismissal of her appeal were not given. He urged that the Orderly Room proceedings were in violation of the **Anti-Corruption and Economic Crimes act No. 3 of 2003** and relied on a myriad of authorities that including **Matthew Kipchumba Koskei v Baringo Teachers Sacco [2013] eKLR** and **Joshua Muindi Maingi v National Police Service Commission & 2 others** where the court held that, where an employee commits misconduct which amounts to a criminal offence, the employer should stay administrative disciplinary process pending the outcome of the criminal proceedings.

16. As against the 1st respondent, the Petitioner submitted that the refusal to reinstate her was unconstitutional because under Section 10 (1) (f) of the National Police Service Commission Act she is expected to develop fair disciplinary procedure. That the refusal to reinstate the petitioner, amounted to contravention of the national values and principle of respect to human dignity.

17. Finally, the petitioner submitted that her right to property was also violated because her Pension and gratuity have been withheld by the National Police service. She urged that her right to pension and gratuity that had accrued for 20 years was her property that cannot be forfeited due to an unfair and unjustified dismissal from the police service. She therefore prayed for the reliefs sought in her petition.

1st Respondents submissions

18. The 1st Respondent argued in its submissions that it was opposed to its inclusion in the suit as it is not mandated to re-open matters that were lawfully concluded before its establishment. That the Petitioner National Police Service Commission Act cannot be applied retrospectively as the Petitioner was charged in the Orderly Room Proceedings in 2009 yet the Act was enacted in 2011. In support the 1st Respondent relied on the case of **Overseas Private Investment Corporation & 2 others v Attorney General [2013] eKLR** where Justice Majaja held that the cardinal principle is that the law looks forward and not backwards and cited the **Samuel Kamau Macharia Case**.

19. The 1st Respondent submits that the Petitioner has not demonstrated how the Commission has failed to discharge its mandate in developing the fair disciplinary procedure and in upholding due process. In addition, she submitted that the Petitioner's failure to institute suit immediately after the Commissioner of Police informed her of the dismissal of her appeal rendered her current petition time barred and relied on **Johnstone Ogechi Mose v National Police Service Commission [2017] eKLR**.

20. The 1st respondent further submitted that the Petitioner was not subjected to double jeopardy since orderly proceedings are not criminal in nature since the Orderly Room Proceedings were internal proceedings to inquire into the conduct of the Petitioner in the particular incident. That Orderly proceedings are administrative process and therefore, the Petitioner's position that the persons appearing in Orderly Room proceedings are accused person is a misapprehension of the law.

The 2nd and 3rd Respondents' Submissions

21. The 2nd and 3rd Respondents submitted that the right to fair hearing depends on the character of the decision making body as held in **Lloyd v McMahon [1987] AC 625, 720**. That the Orderly Room Proceedings herein were fair as there was compliance in Paragraph 16 (x) of the FSO which requires that accused be notified of the intended proceedings 24 hours before the commencement of inquiry. In support of this they relied on the case of **Stephen Munga v Minister for Interior & National Coordination and Republic v Minister for Interior and National Coordination & 3 Others Ex-parte PC Stephen Munga [2015]**.

22. The 2nd and 3rd Respondents further argued that the Petitioner's allegation that she was not granted time to respond prepare her defence is contrary to the position that she participated in the proceedings and relied on the case of **Kipkurui Langat v Police Commissioner/Inspector General, National Police Service & Another [2012] eKLR** where the Court held:

"Given the above provisions, I find nothing that indicates a violation of the provisions of Article 47 of the Constitution. The Petitioner was given an opportunity to present against his removal in the interests of the Force, and was afforded an opportunity to appeal against the decision to remove him as was required under the procedure set out in paragraph 35 and 36 of the Force Standing Orders."

23. The 2nd and 3rd Respondent further submitted that a proceeding cannot be rendered unfair on ground that it was speedily done. They relied on the case of **Republic v Attorney General & 2 others Ex-Parte No. 85214 Robert Magige [2013]**. They argued that the Provincial Police Commissioner perused the proceedings and passed the sentence in accordance with procedure and based on the gravity of the offence committed.

24. In addition, they argued that the police service is not bound by the decision of the Anti- Corruption Court acquitting the petitioner and relied on **David Kemei v Energy Regulation Commission [2013]eKLR** where it was held that employment disciplinary process is an internal and private mechanism which is not subject to criminal process which is a public process.

25. They therefore urged that the Petitioner was not entitled to Pension and Gratuity by dint of **section 2 of the Pensions Act Cap 189** because she was dismissed from the force for misconduct. In addition, they urged that reinstatement of the Petitioner should not be ordered because she was not unfairly dismissed and that relief is not practical.

They further denied the claim for salary after dismissal contending that it is not justified. Finally, they denied the claim for general damages contending that the Petitioner has not proved any valid ground to justify such relief.

Analysis and determination

26. There is no dispute that the petitioner was a police officer enlisted with the respondents until she was dismissed from service on 2.10.2009. There is further no dispute that she appealed against the dismissal and before it was determined, she was arrested and charged with corruption under the ACEC Act. Lastly, there is no dispute that her said appeal was dismissed on 25.3.2010 before her corruption case ended on 6.5.2014 with an acquittal. The issues for determination herein are:

- a) Whether the petition is time barred.
- b) Whether the petitioner's dismissal was unconstitutional.
- c) Whether dismissal of the appeal was unconstitutional.
- d) Whether refusal to reinstate the petitioner is unconstitutional
- e) Whether withholding of petitioners pension and gratuity is unconstitutional
- f) Whether the reliefs sought should be granted.

Whether the petition is time barred

27. The issue of time bar is a substantive issue which goes to the jurisdiction of the court and as such it should always be determined as a matter of priority in any proceedings. Without jurisdiction, a court cannot validly determine any dispute on merits and any attempt to do would be a nullity. In this case, there two causes of actions involved .The first one relates the dismissal through Orderly Room Proceedings, which crystalized on 25.3.2010 when the Commissioner of Police notified the Petitioner that her appeal against the dismissal from service was unsuccessful. The second cause of action relates to the refusal by the 1st respondent to reinstate the petitioner and pay her pension and gratuity, accrued on 6.5.2014 when he was acquitted from the corruption charges in the Anti-Corruption Case No. 13 of 2012.

28. The Petitioner filed her Petition on 25th August 2018. This was after making two applications for reinstatement on 5th November 2014 and 22nd October 2015. From this chronology of events herein alot has happened between the time the Petitioner appeared in the Orderly Room Proceedings and the time she file her Petition. The 1st Respondent argues that the Petition is time barred because it was not filed within 6 years of the time of limitation or within 3 years as provided under Section 90 of the Employment Act.

29. However, the Petitioner contends that the appeal mechanism was suspended to the conclusion of the anti-corruption cases and as such, the appeal ought to have been heard and determined only after the conclusion of the corruption case. In addition she submitted that the Employment Act does not apply to the Kenya Police service by dint of **Section 3 (2) (b) of the Employment Act** which provides:

“3. (1) This Act shall apply to all employees employed by any employer under a contract of service.

(2) This Act shall not apply to—

(a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);

(b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force;

(c) the National Youth Service; and

(d) an employer and the employer's dependents where the dependants are the only employees in a family undertaking.”

30. This position was rightly stated in **Euticus Guantai Nkunja v National Police Service Commission & 2 others [2017] eKLR** where

Justice Byram Ongaya held:

“The 1st issue for determination is whether the suit is time barred. The petitioner was dismissed by the letter dated 08.03.2010 effective 23.02.2010. The respondent submits that the petition is time barred under section 90 of Employment Act, 2007 prescribing 3 years of limitation for suits founded upon dismissal. The court has considered that section 3 (2) (b) of the Act provides that the Act does not apply to, amongst others, the Kenya Police. That suggests that the cited section 90 of the Act would therefore not be available in the present case. The 1st respondent has thereby failed to establish the provision of law under which the petition would be time barred.”

31. This suit was brought by way of a Petition alleging the infringement of petitioner’s rights as a result of her dismissal from the Police Force. That being the case, it would not be time barred especially considering that it is not founded on the Employment Act which does not apply to the Kenya Police. The aspect for consideration is whether the Petitioner filed her suit without undue delay. The issue of in-ordinate delay was discussed in **Henry A. Chogo & another v Attorney General & 3 others [2016] eKLR** where the court held that:

“The issue of limitation of time has been dealt with in several cases. It is true that under Section 90 of Employment Act a claim arising out of an employment relationship should be filed 3 years after the occurrence of the breach.

This case is however not of that category being a claim for breach of constitutional rights and freedom (see James Kanyिता Nderitu vs. Attorney General and Another Nairobi Petition No. 180/2011 (unreported), Peter Kagume and Others vs. Attorney General Petition No. 128/2006 (unreported) and Purity vs. Attorney General (2002) UKPC 20, Wachira Waheire vs. Attorney General Nairobi HC Misc. Appl. No. 1184 of 2003 (2010) eKLR).

In the case of Richard Wasilwa Wafula vs. Commissioner of Police & 2 others (2014) eKLR Majanja J found that for the Petitioner in this Petition filed in 2012 for atrocities committed in 1995. Courts (supra) have held that provisions of Public Authorities Limitation Act cannot defeat the right to seek relief for constitutional violations. However, the grant of relief may be defeated by inordinate delay.

In the case of Leonard Mutua Munyao & Another vs. Attorney General & Another Pet No. 229/2013 (2014) eKLR, the Petitioners claimed infringement of their rights in 2003 which claim the Court entertained for the reasons that a claim for a constitutional infringement cannot be defeated by reason of limitation.

It is therefore the finding of this Court that in the instant matter, though events complained of occurred in 2003, limitation will not bar the Petitioners from seeking relief for constitutional violation.”

32. It is common knowledge that the petitioner in this case never impugned her termination after the dismissal of her appeal to the Commissioner of Police but waited until her acquittal then she made two applications for reinstatement, which were ignored by the 1st Respondent and then filed this petition on 25.8.2016. From 25.3.2010 to 25.8.2016 was obviously an inordinate delay before challenging the orderly room proceedings of 2009 and 2010.

33. However, considering the circumstances of this case and the fact that the dispute relates to constitutional infringements, the delay of 6 years did not render the causes of action time barred. The constitution does provide for limitation period and there are numerous persuasive and binding precedents, including the one referred to above, which are unanimous that there is no limitation period for one to challenge constitutional infringements.

Whether the petitioner’s dismissal was unconstitutional.

34. The Petitioner contended that Orderly Room Proceedings were not properly conducted and as such her constitutional rights to fair hearing and fair administrative action violated were because the presiding Officer lacked jurisdiction to try her for misconduct which was criminal in nature, she was not given adequate time to prepare for her defence, was denied assistance of another police officer, the proceedings took place in the absence of the Complainant, Petitioner’s Defence was not considered, the sentence was unlawful for being excessive and the reason for dismissal of her appeal were not given.

35. The Respondents, however, contended that the proceedings were properly conducted under Chapter 20 of the Force Standing Orders (FSOs). They further contended that the petitioner was accorded a fair hearing under paragraph 16(x) of the FSOs and that the waiver of the 24 hours’ notice before the commencement of the orderly room proceedings is permitted by Paragraph 16(x)(vii) of the FSOs for a reason. That the petitioner was supplied with the charges vide the waiver notice before the hearing and as such, she had adequate time to prepare her defence. That the charges were again read during the hearing and her plea recorded as required paragraph 16 (e) of the FSOs. They further contended that the petitioner slept on her right to apply for assistance from another police officer as required under paragraph 16(vi) of the FSO. That the speedy conclusion of the proceedings and the sentencing by the PPO was permitted and did not render the proceedings unfair.

36. After considering the rival contentions by both sides, I find that the Orderly Room Proceedings were conducted in accordance with the provisions of the FSOs and the constitution and as such, the speed with which they were concluded did not render them unfair and unconstitutional. First, the waiver of 24 hour notice before the start of the hearing was permitted by the FSOs. Paragraph 16(x) (viii) of the FSO provides:

“(viii) an accused person shall, at least 24 hours before the commencement of such inquiry be notified of the alleged offence against discipline into which it is proposed that an inquiry shall be held... provided that notice need not be given where an immediate example is required, or where the provincial or any gazette officer, considers it expedient or in the public interest that an inquiry should proceed forthwith.”

37. Second, the petitioner's right to representation a police officer during the orderly room Proceedings was subject her requesting but in this case, the petitioner never requested. Paragraph 16(x) (vi) of the FSO provides:

“(vi) in all cases , the accused may apply for a police officer above the rank of an inspector to assist him/her in his/her defence, and in all the cases in which a gazetted officer considers it to be in the interest of the accuse such officer shall be appointed.”

Although under paragraph 16(x) (c) the presiding Officer had a duty to enquire whether the accused officer needs assistance from another officer, the petitioner never raised any objection to proceeding without an assisting police officer. I would find that she never suffered any prejudice because she ably defended herself by cross examining witnesses and even tendered defence and filed an appeal.

38. Third, the petitioner was served with the charges through the waive notice, they were again read to her again before taking plea and thereafter she participated in the hearing by ably cross examining witnesses and also tendering her defence. The foregoing view is fortified by the fact that the petitioner signed on all the charge sheet, proceedings and the judgment. Paragraph 16(x)(e) of the FSO provides:

“the details of the alleged offence against discipline shall be read to the accused in a language which he/she understands and he/she shall be required to plead thereto, and the plea shall be recorded in his/her own words and he/she shall be required to sign such record.”

39. Fourth, I would hasten to find that the orderly Room Proceedings were not rendered unfair by the late night proceedings and the speedy conclusion of the proceedings. Finally, the passing of sentence by the PPO against the petitioner after conviction in the Orderly Room proceedings was permitted by the FSOs because according to the Presiding Officer, the offence was serious and it required a sentence, which he was unqualified to pass. Paragraph 16 (r) of the FSO provides:

“if, having regard to the gravity of the offence against discipline and to the accused's record of service, the Presiding Officer is of the opinion that the punishment he is empowered to award is insufficient, he may remit the proceedings to an officer of more senior rank, who may proceed to award punishment against the accused.”

Whether dismissal of the appeal was unconstitutional.

40. The Petitioner contended that the dismissal of her appeal by Commissioner of Police on 25.3.2010 was unconstitutional because it was done prematurely before the conclusion of the criminal proceedings under the Anti-Corruption and Economic Crimes Act No.3 of 2003. In her view, when the criminal justice system under the Anti-Corruption and Economic Crimes Act No.3 of 2003 was set in motion, the Petitioner's disciplinary appeal process under the Police Act was by operation of law suspended until the conclusion of the corruption case.

41. I disagree with the foregoing but agree with the respondents that the criminal process by the state and the internal disciplinary mechanism are distinct and parallel processes and the latter should not await or be bound by the outcome of the former unless that position is expressly provided under the contract of employment or a letter from the employer. The foregoing view is fortified by ***David Kemei v Energy Regulation Commission [2013] eKLR*** where Ndolo J held that criminal proceedings was not a bar to disciplinary process.

42. On the other hand, it has to be appreciated that, even before the Petitioner in this case was charged at the Anti-Corruption Court, her Orderly Room Proceedings had already been concluded by a dismissal, save for her appeal to the commissioner of Police. Consequently, I find that the issue of suspension of disciplinary process by dint of section 62(1) ACEC Act pending the outcome of the corruption case is out of question since all what the claimant was waiting from the Commissioner of Police was either confirmation or quashing of the dismissal. Based on the foregoing opinion, I further find that the advice by the Kenya Anti-Corruption Commission, that the petitioner be suspended on half pay under section 62(1) of ACEC Act pending trial of her corruption charge to have been not only unsolicited but also too late and incapable of implementation.

Whether refusal to reinstate the petitioner is unconstitutional

43. The 1st Respondent argued that it did not have the mandate to re-open matters which were lawfully concluded before it was established. The Petitioner in rebuttal stated that the matter was not lawfully concluded and contended that the 1st respondent had the full mandate to reinstate her to the service after being acquitted from the corruption charges she was facing. ***Article 246(1) of the Constitution*** establishes the 1st Respondent with the following mandate:

- a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
- b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and
- c) perform any other functions prescribed by national legislation.

44. In ***Attorney General & 2 others v Independent Policing Oversight Authority & another [2015] eKLR*** the Court of Appeal held:

***“The responsibility to recruit police officers constitutionally reposes on the NPSC under Article 246(3) in the following terms:-
The Commission shall—***

a. recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and

transfers within the National Police Service;

b. observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and

c. perform any other functions prescribed by national legislation.

The functions referred to in (d) above are expanded by section 10 (1) of the NPSC Act. Section 10 (2) then gives the Commission the power to delegate to the Inspector-General the recruitment, appointment, and promotion of police officers under the rank of sergeant. Section 10(5)(a) of the NPSC Act however commands that such delegation must be in writing, and if it is not, then there cannot be transfer of authority to recruit from the Commission to the IG.”

45. In view of the said provision of **Article 246 (3) (a), (b) &(c) of the constitution and Section 10 & 11 of the National Service Commission Act**, it is clear that the 1st respondent is in charge of the human resource function in the National Police Service which functions she took over from the Commissioner of Police in the former regime through operation of the law. She cannot play hands off and allege that she has no business engaging in matters that occurred before her creation. The Petition herein involves HR dispute commenced by a dismissed police officer who seeks for reinstatement and for her pension. She is right at the center of the duel and therefore she is properly joined herein because any orders given herein will her.

46. Turning now to the question of reinstatement, the petitioner contended that she was entitled to a reinstatement after acquittal from the corruption charges and contended that the refusal by the 1st respondent to reinstate her amounted to contravention of the national values and principle of respect to human dignity. The 1st respondent on the other hand, urged that she could not revive matters that were closed before she came into being. In addition, she urged that the petitioner was not dismissed unfairly, and further the relief is not practical in her opinion. At the risk of repeating my earlier view herein above, I wish to restate that the respondents were not bound by the outcome of the corruption case trial in deciding whether to continue engaging the petitioner. The outcome of the trial does not undo concluded disciplinary proceedings unless provided by a statute, contract or written undertaking from the employer.

47. My foregoing sentiments notwithstanding, I have carefully evaluated the rival contentions above and I agree with the respondent that reinstatement of the petitioner to the service was impractical. It is common knowledge that the police service is a disciplined service and herein Kenya it has metamorphosed substantially in terms of administration, command and control since the dismissal of the petitioner in 2009 going by the aforesaid constitutional and statutory provisions. Consequently, it is my view that reinstating her to the service after being away and about for almost 10 years would not only have

complicated matters for the respondents but also for herself because the circumstances have since changed in a big way.

Whether withholding of petitioners pension and gratuity is unconstitutional

48. The petitioner contended that her constitutional right to property and social security under Article 40(3) and 43 (1) (e) of the constitution was violated by the 1st respondent by withholding her Pension and gratuity that had accrued for 20 years. In her view, her the right to the accrued pension and gratuity is her property that cannot be forfeited due to an unfair and unjustified dismissal from the police service, which was not supported by a valid reason. The respondents contended that the forfeiture of the pension and gratuity was justified by **section 2 of the**

Pensions Act Cap 189.

49. I have perused the Pensions Act. The relevant provision of the Pensions Act is not section 2 but section 5 which provides that:

“(1) Every officer shall have an absolute right to pension and gratuity.

(2) The right to pension and gratuity shall not apply in respect of compensation for past services, nor shall anything in this Act affect the right of the government to dismiss any officer at any time and without compensation.”

(3) Where an officer has completed ten years of pensionable service, the benefits accruing to the officer under the Act shall vest in that officer and shall become payable in such manner and at such times as may be determined under this Act.”

50. The forgoing has been the law since the 1999 amendment to the Act and because the petitioner herein was in service for 20 years until her dismissal in 2009, she was entitled to her pension and/or gratuity subject to subsection (3). After careful consideration of the provisions of subsection (2) above, I do not think it says that a public officers who is dismissed from service shall automatically lose his/her pension or gratuity. In my view, the said subsection is only an exception to the mandatory provisions of subsection (1) and (3) and it should only be applied in exceptional circumstances with justifiable reason(s). I would hasten to state that the reason(s) must be communicated to the dismissed officer in writing and an opportunity be accorded to impugn the reason since under subsection (1) the pension is absolute right.

51. In this case, the petitioner was dismissed for releasing a detained vehicle without permission allegedly after receiving a bribe of Kshs.1, 000. The said offence was proved to be untrue after the complainant admitted under oath that the petitioner never solicited for the bribe and clarified that it was another officer whose named he mentioned but no action was taken against the complaint and or the other corrupt officer. In my opinion the respondents should have release or caused to be released the petitioner’s pension or gratuity whichever she was entitled immediately after her acquittal since there was no justifiable reason to continue withholding it. I consequently, return that the withholding of the petitioners pension and or gratuity is unconstitutional and violates her right to property.

Whether the reliefs sought should be granted.

52. On the basis of my holding herein above that the petitioner's right to fair hearing was not violated during the Orderly Room Proceedings and her subsequent dismissal and rejection of her appeal, I decline to make declaration that the said Orderly Room Proceedings held 2.10.2009 and the dismissal from the National Police Service were unconstitutional, unlawful, null and void for all purposes and intent. I also decline to order nullification of the outcome of the Orderly Room Proceedings held on 2.10.2009 or award any compensatory damages as prayed.

53. Again on the basis of my holding herein above that the respondents were not bound by the outcome of the Anti-corruption Court, and that the reinstatement of the petitioner after such a long period was impractical, I decline to make declaration that the refusal by the 1st respondent to reinstate the petitioner to the National Police Service was unconstitutional, unlawful, null and void *ab initio*. I also decline to compel the 1st respondent to reinstate the petitioner because section 12(3) of the ELRC Act bars the court from ordering reinstatement after expiry of 3 years from the date of the termination.

54. However, on the basis of my holding that section 5(2) of the Pensions Act does not provide for an automatic disqualification of dismissed public officer from right pension, I make declaration that the withholding of the Petitioner's pension and/or gratuity amounts to violation of the Petitioner's constitutional right to property and social security under Articles 40 (3) and 43 (1) (e) of the Constitution of Kenya 2010 and that the same is unlawful for all intents and purposes. Consequently, I nullify the decision by the respondents to withhold the Petitioner's pension and/or gratuity benefits and direct the 1st Respondent to forthwith release or cause to be released to the Petitioner, her pension and social security benefits.

Conclusion and disposition

55. I have found that the petitioner's right to fair hearing was not violated during the Orderly Room Proceedings and her subsequent dismissal and rejection of her appeal by the Commissioner of Police. I have further found that the refusal by the 1st respondent to reinstate the petitioner to the National Police Service after acquittal was not unconstitutional firstly, because the respondents were not bound by the outcome of the Anti-corruption Court case, and secondly, because reinstatement of the petitioner was impractical after such a long period after the dismissal. Finally, I have found that, under section 5(2) of the Pensions Act, dismissal of a public officer does not automatically disqualify him/her from accrued pension and/or gratuity benefits. Consequently I enter judgment for the petitioner **declaring the decision by the respondents to withhold her pension and/or gratuity benefits unconstitutional, and it is hereby nullified and the 1st Respondent directed to forthwith release or cause to be released to the Petitioner, her pension and/or social security benefits subject to section 5(3) of the Pensions Act.**

56. The petitioner is also awarded cost of the suit plus interest.

Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018

ONESMUS N. MAKAU

JUDGE