REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 1 OF 2007

(Industrial Cause No. 15 of 2013)

JOSEPH WAMBUGU KIMENJU.....PLAINTIFF

Versus

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

a) Facts of the case

1. The Plaintiff in this suit is a former police officer who was removed from service sometime in June, 2006.

2. The reason for his removal was that on 5th February, 2002 while attached to Saba Saba Police Post within Murang'a Police Station, Murang'a Police Division, after booking off duty he went to the Township presumably for a drinking spree where he picked a quarrel with a watchman namely Stephen Magochi Eliud over unknown issues. He was alleged to have rained numerous hard blows and kicks on the said Stephen Magochi Eliud and left him writhing in pain. Later the watchman was found unconscious by a good Samaritan who took him to Murang'a District Hospital from where he succumbed to death. An inquest was conducted at the conclusion of which the Magistrate conducting the inquest recommended that the plaintiff be charged with the offence of murder.

3. The plaintiff was accordingly tried for the offence murder before Khamoni J. (as he then was) but was acquitted without being put on defence as the Judge was of the view that the evidence adduced before him was so insufficient that it could not, in a murder trial establish a case to require the accused person to be put on his own defence. According to the judge, no sufficient evidence was adduced to show the accused committed the offence.

4. Despite his acquittal the Provincial Police Officer, the plaintiff's superior, recommended that the plaintiff was not the right officer to be retained in the service and that the plaintiff's interdiction be lifted from the date he was charged in court and removal proceedings be instituted.

5. The plaintiff in his testimony before the court testified that upon discharge he was paid his final dues. He however argued that when a person is charged and acquitted for lack of evidence he or she ought to

be reinstated as no offence was committed. He admitted that while in Wajir he had two disciplinary cases which were resolved and he was fined Kshs.100 for each hence these could not have been reasons for his removal. He therefore sought the intervention of this court to order the defendant to compensate him for unlawful removal from the force. According to him he was never asked to show cause why he should not be removed from the force and further he did not attend any of the proceedings that culminated in his removal.

6. The defendant called three witnesses who were senior police officers familiar with the matter and Force Standing Orders. According to DW1 Mr. Khalicha Roba, the Police Force is governed by Force Standing Orders. It was his testimony that since the recruitment of the plaintiff in the force in 1986 he had had three disciplinary offences. One was in August, 1988 when he disobeyed a command and another in April, 1989 when he absented himself from duty for 7 days without any lawful cause for these offence he was charged and fined Kshs.100. Further between 14th March, 1989 and 8th April, 1989 the plaintiff absented himself from duty without lawful cause. This was against Force Standing Orders. He was fined and ordered to forefeit salary for 26 days.

7. It was Mr. Roba's testimony concerning the death of Mr. Magochi that the plaintiff while at Saba Saba Patrol Base was assigned night duties with two other officers. They signed off duty however the plaintiff left the police lines to the shopping centre from where he picked a quarrel with the deceased and assaulted him leading to his death.

8. According to Mr. Roba, a Police Officer on off-duty ought to be in the police lines unless permitted to leave. He stated that the plaintiff did not have permission to be out of the police lines.

9. Mr. Roba contended that the acquittal of the plaintiff was not a bar to further disciplinary proceedings so long as it did not contain the same facts. According to him, proper procedure was followed in the removal of the plaintiff.

b) Submissions by Counsel

10. Mr. Ng'ang'a for the plaintiff in his closing submissions argued that article 33 (iii) of Force Standing Orders was clear that any member of the inspectorate or subordinate officer should submit such representations as he may wish to the Commissioner of Police or Provincial Police Officer. According to Mr. Ng'ang'a, the evidence of DW1 was clear that there was no report showing that the claimant was ever issued with a show cause letter. He therefore submitted that the only interference that could be drawn was that the claimant was in the dark on the proceedings against him. The procedure, according to counsel was therefore unlawful as per Section 45(c) of the Employment Act 2007.

11. Mr. Muthuri for the respondent for his part submitted that after the claimant was acquitted in the Criminal case, the PPO Central Province recommended to the Commissioner of Police that even though the plaintiff was acquitted for lack of evidence he was unsuitable to continue serving considering the nature of the offence with which he was charged and the circumstances. According to counsel, the Commissioner of Police was aware of the high standard of proof in criminal cases placed on the prosecution and the erosion of public trust the claimant had attracted. The Commissioner therefore acted properly and within the law to remove the claimant under paragraph 30(e) of the Standing Orders.

12. Mr. Muthuri further submitted that the Employment Act, 2007 which the claimant sought to rely on did not apply in this case since the plaintiff was a member of Kenya Police Service which is expressly excluded from the Act.

13. In conclusion counsel submitted that the claimant was not entitled to any claim having been paid all his dues upon discharge from the force.

c) The decision

14. The determination of this dispute revolves over one issue only. That is whether after the trial and acquittal it was lawful for the defendant to discharge the plaintiff from the police force. The issue of applicability of the Employment Act 2007 to this suit is quite clear that it does not by virtue of section 3(2)(b) and the court says no more on that point.

15. The Supreme Court of India in the case of **G. M. Tank v State of Gujarat & Another Civil appeal No. 25 of 2006** (www.indiankanoon.org/doc/1212741 accessed on 25/9/2013) has stated as follows:

"If the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, even in case of acquittal proceedings may follow where acquittal is other than honourable.... Normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental inquiry on the very same charges or grounds or evidence, but the fact remains, however, that merely because the accused is acquitted, the power of the authority concerned to continue departmental inquiry is not taken away nor its discretion in any way fettered."

16. What this implies is that the accused must receive a honourable acquittal and that the inquiry by the employer must be on the same facts and evidence. So what is honourable acquittal" The Supreme Court of India in the **G. M. Tanks** case cited above stated as follows:

"..... the acquittal by the criminal court was honourable as it was based on the fact that the prosecution did not produce sufficient material to establish its charge."

17. It therefore means that an acquittal by a criminal court would not debar an employer from exercising power in accordance with rules and regulations governing the conduct and operations of the employment relationship. The two proceedings, that is criminal and disciplinary proceedings operate in different fields and have different objectives. Whereas the object of a criminal trial is to inflict appropriate punishment on the offender, the purpose of the disciplinary proceedings is to deal with the delinquent in accordance with the internal mechanism and to impose penalty in accordance with the internal rules and procedures.

18. Further, in criminal trials, an incriminating statement made by an accused person in certain circumstances is totally inadmissible in evidence while such strict rules of evidence and procedure would not apply to internal disciplinary process. Furthermore the degree of proof which is necessary to order a conviction is different from the degree of proof necessary to take disciplinary measures against an employee. In criminal cases the burden of proof is ordinarily on the prosecution and the standard of proof is beyond reasonable doubt while in disciplinary proceedings all the management needs is some prepondarance of probability that the accusations leveled might have occurred.

19. The plaintiff in this case was discharged from the force primarily on the basis of the allegations against him that made him be prosecuted for murder. The trial court acquitted him of the charges for lack of sufficient evidence. Such an acquittal as was held in **G. M. Tanks** case referred to earlier in this judgment, is a honourable acquittal. It was therefore oppressive and unfair to use the same allegations and evidence to discharge the plaintiff from the force.

20. Having so found, the next question is: Is the plaintiff right to move the court for remedies sought" In

other words, does the court have jurisdiction to entertain the matter as filed"

21. Section 35 of chapter 20 of the Kenya Police Standing order provides in the relevant part as follows:

"..... any member of the Inspectorate or subordinate officer may be removed from the force on grounds that it is in the public interest or in the interest of the force so to do and in respect of such removal, the following procedure shall apply:

(a) When the police officer having charge of the division or formation in which the member of Inspectorate or subordinate officer is serving considers that such member of Inspectorate or subordinate officer should be removed from the Force on the grounds that it is in the public interest or in the interest of the Force so to remove him/her, he/she shall submit to the Commissioner of Police or Provincial Police Officer as the case may be, a full report, including confidential report, on the work, conduct and efficiency of such member of Inspectorate subordinate officer, full details of any warnings that may from time to time have been administered and details of any representations that the member of Inspectorate or subordinate officer may have made in reply to such warnings;

(b) The Commissioner of Police or Provincial Police Officer as the case may be, may at his/her discretion, notify the member of Inspectorate or subordinate officer in writing of the grounds upon which it is proposed to remove him/her from the Force and shall invite him/her to submit, before a day to be specified, such representations he/she may wish to make;

(c) If the Commissioner of Police or provincial Police Officer as the case may be, is satisfied, having regard to all reports representations made in the matter, that it is in the public interest or in the interests of the force, as the case may be, he/she may remove the member of Inspectorate or subordinate officer from the Force, and shall notify him/her in writing of the effective date of such removal.

22. Section 36(ii) provides that any subordinate officer may appeal to the Commissioner of Police and (iii) provides that such appeal shall be submitted in writing through the normal police channels not more than seven days after the receipt by the officer of the notification of his or her removal.

23. The plaintiff admits receiving the letter dated 19th June, 2006 communicating his removal from the force in July, 2006. He however did not specify the date of receipt of the removal letter.

24. The court has noted that by a letter dated 20th July, 2006, the plaintiff appealed against his removal communicated to him by the letter dated 19th June, 2006. In this letter of appeal the plaintiff contended that the two disciplinary offences referred to in his removal letter were petty and could not have warranted his removal. He further argued that the murder charges against him were dismissed by the trial court, meaning no offence was committed. More importantly, the plaintiff questioned who sent him the show cause letter, as he was sure he never received any such letter. This question is answered by a letter dated 26th June, 2007 written by Mr. Joshua Opiyo (filed as plaintiff's bundle of documents). This letter states in part:

"It is apparent that the provisions of service of a show cause letter was not followed. In that case remedy is to presume that the ex-officer was removed as per paragraph 33 c(v) which inter alia provided that the Commissioner of Police or Provincial Police Officer as the case may be at his discretion may order removal from the Force and the Commissioner of Police or Provincial Police Officer as the case may be, may pay to such inspector or subordinate officer one month salary in

lieu of notice".

25. It is clear that the plaintiff was not given a show cause letter. Section 35(b) of the Force Standing Orders makes it a discretionary requirement that the Commissioner of Police or Provincial Police Officer may at his/her discretion, notify the officer concerned in writing of the grounds upon which it is proposed to remove him/her and shall invite such officer to submit representations he/she may wish.

26. The decision to remove an officer from service is a very drastic decision. It is a decision that will obviously affect such officer's livelihood especially in this country where paid work is not easy to find. It is therefore important that the officer being considered for removal be accorded an opportunity to be heard.

27. The right to be heard is an old and recognized principle of Constitutional and Administrative Law. Under article 47(1) of the Constitution, every person is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub article (2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

28. This court has stated in the case of **Grace Kazungu & another Vs NSSF cause No. 703 of 2010** that:

"The fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under consideration so that an explanation or response can be prepared and thirdly, they will be provided with the opportunity to make submissions to the case".

29. Lord Denning in the case of **Abbot Vs Sullivan [1952] 1 KB 189**

at p. 198 observed as follows:

"... bodies which exercise monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of natural justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.

30. Rule 35(b) of the Force Standing Orders that places the discretion to issue or not, a notice to show cause to an officer being considered for removal from the force, entirely on the commissioner of Police or Provincial Police Officer, not only negates the fundamental principle of natural justice but also amounts to unfair administrative process contrary to article 47 of the Constitution. To that extent section 35(b) of the Force Standing Orders is hereby declared invalid and construed as if the issuance of notice to show cause was an essential and non-discretionary process before a removal is effected. For all it matters, the plaintiff may have had a very weak or no defence at all to allegations against him but to deprive him of a chance to present his case no matter how weak was a violation of the fundamental principles of natural justice.

31. Having found as above, does the plaintiff have a remedy before this court" Section 3(2) (b) of the Employment Act, 2007 excludes Kenya Police Service from the Act. The same position prevailed under section 1(2) of the repealed Employment Act (cap 226). Further section 36(ii) of the Force Standing Orders provides for appeals (in the case of the plaintiff) to the Commissioner of Police and is silent on

what happens in the event that an appellant is not satisfied with the decision of the commissioner of the Police.

32. The court has found that the plaintiff was not accorded a fair administrative process in removing him from the force. He is therefore entitled to a remedy since there cannot be a right without a remedy.

33. In his plaint filed in this court on 9th January, 2007, the plaintiff seeks among others compensation for wrongful termination of service. Since the provisions of the repealed Employment Act and the current Act expressly excludes Kenya Police Service from the application of the Act, compensation if any at all can only be ordered under article 22(1) read together with 23(3) of the constitution. The quantum thereof is however left to the discretion of the court.

34. Although the current Constitution was promulgated after the accrual of the cause of action in this suit, the right to be heard is a fundamental principle of natural justice enjoyed by humans by their very essence. It is therefore a critical element in managing human relations in an open and democratic society that respects the rule of law. What the Constitution and indeed any municipal or international law instrument does to these fundamental rights is to recognize and incorporate them as part of such constitution or laws.

35. For this reason it cannot be contended that merely because the present Constitution which provides remedies for breach of these fundamental rights, was promulgated after the accrual of the plaintiff's cause of action, he cannot benefit from its provisions. The constitution simply re-energised and provided a framework for recognition and treatment of a pre-existing right.

36. Since the discretion to assess reasonable compensation in cases of breach of fundamental rights is left to the court, it is important that such assessment is done with fairness and appreciation of circumstances under which such breaches may have occurred.

37. The plaintiff in this case was a police officer, hence a member of a disciplined force. The nature of service is such that high standards of discipline are demanded. To this extent mere suspicion of involvement in acts that may bring the force to disrepute may trigger disciplinary measures.

38. The plaintiff was implicated in a murder case, an offence which in its very nature is quite serious. He was however acquitted on the basis that the evidence tendered by the prosecution did not meet the threshold to sustain a charge of murder. This however did not mean the evidence could not attain the threshold for proof in a disciplinary process.

39. The evidence may well have been satisfactory for purposes of removing the plaintiff from the force however the process adopted by the defendant in removing the plaintiff was flawed as it deprived him of an opportunity to be heard in his defence.

40. The plaintiff was removed from the Force at the age of 38 years. It may well be that if the proper process was followed, his removal from the Force may have been been justified. Further his letter of appointment to the Force dated 24th November, 1996 provided that the plaintiff would be subject to regulations for officers of the Public Service issued from time to time. The retirement age for public servants has been changed from 55 years to 60 years hence the plaintiff reasonably expected to work until the retirement age of 60 years. However taking into account the vagaries of life such as premature death, retirement on ill-health or removal from service as was done, the plaintiff's employment could have ended prematurely. Further taking into account the nature of breach by the defendant, which in the opinion of the court was not so grave, and the fact that in compensating the plaintiff he will be receiving a

lumpsum, the court considers an award of 5 years salary as a reasonable compensation for his wrongful removal from the Force. That is to say the plaintiff is awarded: **16,800 x 60 months = 1,008,000.** The award shall be subject to statutory deductions. The plaintiff is further awarded interest on the decretal sum and costs of the suit.

41. It is so ordered.

Dated at Nyeri this 4th day of October, 2013.

NELSON ABUODHA J.

JUDGE

Delivered in open Court in the presence of Kioni for the Plaintiff and in the absence of the Respondent.

NELSON ABUODHA J.

JUDGE