REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

Petition 224 of 2011

KIPKURUI LANGAT ……...…….. PETITIONER

VERSUS

THE POLICE COMMISSIONER/INSPECTOR GENERAL,

NATIONAL POLICE SERVICE ……..……...1ST RESPONDENT

HE HON ATTORNEY GENERAL…...……...2ND RESPONDENT

JUDGMENT

1. In his petition dated the 26th of October, 2011 and supported by his affidavit sworn on 20th October 2011, the petitioner seeks the following orders:

(a) **A declaration** that the petitioner fundamental rights, freedoms and legitimate expectation of service have been denied, breached, infringed, violated as the action of terminating his employment is illegal, unlawful, unconstitutional null and void.

(b) **An order of judicial review** of certiorari do issue calling the decision of the 1st respondent in terminating the employment of the petitioner to the high court quash it and re-instate the petitioner into service.

(c) **A declaration** that the 1st respondent's acts are *ultra vires* the specific provisions of force standing orders relating to the procedures of termination from service and as such the act to terminate the petitioner by the respondents is partial, arbitrary, unilateral and an act of abuse of public trust which is unprocedural without fair administrative action and devoid of law.

(d) Costs of this petition to be borne by the respondents.

2. The respondents oppose the petition and filed grounds of opposition dated 29th November, 2011 and a replying affidavit sworn by Boniface Nzioka Maingi, the Deputy-Commandant of the General Service Unit, on 23rd April 2012. The parties filed written submissions which were highlighted before me on 18th July, 2012.

The Petitioner's Case

3. Learned Counsel, Mr. Nyaberi presented the petitioner's case as contained in the petition, the affidavit in support, and the written submissions dated 19th March 2012. The petitioner states that he was enlisted into the Kenya Police Force on 2nd September, 1995 as a recruit Police Constable and was deployed into the General Service Unit (GSU). He rose through the ranks to his last position as a Sergeant of Police. In April 2007, he was posted to GSU Recce Company as a non Commissioned Officer (NCO) where he was in charge of Recce Company Cobra squad deployed at Solio Ranch. His responsibilities at the Ranch included supervision and deployment of personnel performing security duties in the Ranch and its environs to offer protection to the animals in the Ranch from poachers.

4. The petitioner states that he had executed his duties in an exemplary manner and he was even at some point in 1998 awarded Ksh. 100 for gallantry. He had also not been charged in any orderly room proceedings. He claimed that his engagement to the police force was regulated by the Police Act of 1970 and the rules commonly referred to as the Force Standing Orders, Cap 20 Laws of Kenya.

5. The petitioner claims that by a letter dated 12th January, 2007, allegations of misconduct were made against him by the Commandant, GSU. The allegations were to the effect that he was an accomplice, associate and or helper of suspected poachers. Following these allegations, he was removed from the Force in the interests of the Police Force.

6. The petitioner alleges that he was not accorded an opportunity to respond to the poaching allegations levied against him; that the letter dated 14th September, 2010 had required him to show cause in accordance with the Force Standing Orders but the procedures set out in the Force Standing Orders as to the discipline and removal of an officer from service were not followed; that neither formal charges were preferred against him nor orderly room procedures that would warrant the decision to remove him were undertaken.

7. The petitioner claimed that he was removed from the force on the basis of a provision not known in law as paragraph 30 (e) of the Force Standing Orders which was referred to in the

letter from the GSU Commandant dated 14th September 2010 did not exist. He argued that the GSU Commandant had created the said law, thus violating his right to fair administrative action.

8. The petitioner further contends that his terminal benefits were processed and deposited into his bank account without his consent; that he has been subjected to psychological torture and he therefore asks the court to find that his fundamental rights and freedoms were violated by the termination of his employment in a manner that was *ultra-vires* the Force Standing Orders.

9. The petitioner submits that his removal was in violation of Article 47 of the Constitution. There was no fair administrative action and the rule of law was not followed; that he does not know his accusers and those who wrote the letter to show cause and to dismiss him were his accusers, witnesses and judges. Further, the Force Standing Orders allow the Commissioner of Police or a Provincial Police Officer to remove a police officer if it is in the interest of the force or the public. The petitioner argues that the letter removing him from the force was signed by a Boniface Maingi for the commandant GSU. The petitioner therefore contends that the removal was unlawful as it was done by someone other than provided by the Standing Orders.

The Respondents' Case

10. In their written and oral submissions presented by Learned State Counsel, Ms. Lunyolo, the respondents oppose the petitioner's case and question both the competence of the petition and the jurisdiction of this court to deal with the matter. On the question of jurisdiction, the respondents contend that this is a labour matter under section 12(1) of the Labour Institution Act 2007 which gives the Industrial Court exclusive jurisdiction over labour matters and this court therefore has no jurisdiction to determine it. They argue that the Constitution at Article 162 and 165(5) takes this matter outside the jurisdiction of this court; that the relationship between the petitioner and the respondent is contractual and is governed by the employment law. They refer to the case of **Harrikisoon –v- Attorney General of Trinidad & Tabago(1980) A.C 265** and **Alphonse Mwangemi Munga & Others – v- Attorney General High Court Petition No. 564 of 2004** and submit that the matter before this court is not a constitutional matter and should be dealt with by the Industrial Court.

11. On the facts, the respondents contend that the petitioner was dismissed from service in accordance with the procedure set out in the Police Act and the Force Standing Orders; that he was afforded an opportunity to be heard by way of a "show cause" letter to which he responded, and that the respondent acted fairly and did not breach any of the rights of the petitioner.

13. In the affidavit sworn by Boniface Nzioka Maingi**,** the Deputy Commandant, GSU on the 23rd of April 2012, the respondents contend that after conductingroutine intelligence survey in the GSU security jurisdiction areas, they realized that there had been rampant poaching of rhinos in Solio Ranch when the petitioner was in charge. Several investigations were conducted by other agencies and the evidence incriminated the petitioner as an accomplice or as having helped and abetted suspected poachers. The mention of alleged involvement of the

petitioner in poaching had tarnished the name of the GSU and of the entire police force, and the petitioner could not be trusted any more with security level platoon command.

14. The respondents contend that the petitioner was advised by a letter dated 12th August 2010 to retire from the Force under the 12-20 year rule because he could no longer be entrusted with any responsibility as a Senior Non Commissioned Officer as the entire force had suffered great damage due to his alleged involvement in poaching and that removal proceedings against him were being contemplated.

15. The respondents contend that upon receipt of this letter, the petitioner wrote a letter dated 16th August 2010, requesting for the institution of removal proceedings against him. The respondents then sent a notice of intended removal to the petitioner requiring him to show cause why he should not be removed from the Force in the interest of the Force; that the petitioner responded to the notice following which a decision was made to remove him from the Force with effect from the 22nd of November 2010.

16. The respondents submit that the removal of the petitioner was in accordance with the law, specifically the Force Standing Orders, Paragraph 30(e), particularly the proviso thereto, and section 4 of the Police Act, which allows the Police Commissioner to delegate powers. They submit that the GSU Commandant properly exercised the powers delegated by the Police Commissioner; that all the notices required were served on the petitioner and he was given an opportunity to be heard. Further, they submit that he was given an opportunity to appeal, which he did. They argue that due process was followed and that there was no violation of Article 47 of the Constitution.

Findings

17. This petition calls for the resolution of two issues. The first is whether this court has jurisdiction to hear and determine the matter. If it has, then it should determine if there has been a violation of the constitutional rights of the petitioner guaranteed under Article 47 of the Constitution.

Jurisdiction

18. The respondents contend that the petition is an abuse of the court process as it contravenes section 12(1) of the Labour Relations Act which gives the Industrial Court exclusive jurisdiction to hear and determine labour disputes. Articles 162 and 165(5) of the Constitution, according to the respondents, take this petition outside the jurisdiction of this court as the dispute between the petitioner and the respondent is contractual and hence governed by employment rules. The respondents refer the court to the decisions in the case of **Harrikkisoon –v- Attorney General of Trinidad & Tabago, (1980) AC 256** and **Alphonse Mwangemi Munga -v- Attorney General, Nrb HCC Petition No. 564 of 2004** for the proposition that not every violation of the law amounts to a constitutional violation. On his part, the petitioner submits that the petitioner is properly before the court as the The Industrial Court was established under Article 162 and its jurisdiction under the Industrial Court Act is limited to labour matters while the petitioner s seeking a declaration of rights which this court has jurisdiction to issue under Article 165.

19. The position taken by the respondents is correct in so far as the court must have jurisdiction in order to adjudicate on the dispute between the parties. In ***Owners of Motor Vessel 'Lillian S' –v- Caltex Oil (Kenya) Limited[1989] KLR 1*,Nyarangi, JA** stated as follows at page 14 of the judgment:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step". (Emphasis added)

20. It is also correct that Article 162(2) provides for the establishment of a court with the status of the High Court to deal with matters pertaining to employment and labour relations. On the other hand, the jurisdiction to determine whether there has been a violation of any of the rights under the Bill of Rights is vested in the High Court. Article 165(3) provides as follows;

'Subject to clause (5), the High Court shall have—

(a) …..

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c)…..

21. The jurisdiction of the High Court under Article 165(3) is *'subject to clause (5)'* which prohibits the High Court from exercising jurisdiction over matters falling within the province of the Supreme Court and the courts established under Article 162(2). In July, 2012, the courts contemplated under Article 162(2) were established following the enactment of the Industrial Court Act, 2011, and the swearing in of judges of that court. The Judges of the Industrial Court were appointed on the 12th of July, 2012 and their appointment published in the Kenya Gazette on 19th July 2012 vide Gazette Notice No. 9797 of 19th July 2012. As the High Court (Majanja J) held in the case of **United States International University –v- Attorney General, Petition No. 170 of 2012 (unreported)**

*"**Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court."***

22. The position with regard to jurisdiction, as I see it, is that the Industrial Court established under Article 162 (2) of the Constitution has jurisdiction to hear and determine **both** disputes

relating to employment and labour relations and disputes relating to alleged violation of constitutional rights where such violations arise in an employment context. This, in my view, is the gist of the finding in the case of **United States International University –v- Attorney General (Supra),** and I agree with the reasoning of Majanja J in that case. Once the Industrial Court was established and was functional, then this court had no jurisdiction to entertain disputes relating to labour and employment even where such disputes related to alleged violations of the Bill of Rights.

23. This matter was, however, heard on the 18th of July 2012. The Industrial Court had not yet become operational. It was in my view within the court's jurisdiction and in the interests of justice, particularly bearing in mind the principle contained in Article 159 (2)(b) that ***'justice shall not be delayed'*** to hear and determine the matter.

Violation of Constitutional Rights

24. The petitioner contends that his removal from the Police Force was done in violation of his right under Article 47 of the Constitution to fair administrative action. He alleges that his removal was not done in accordance with the Force Standing Orders and that the respondent relied on a non-existent provision of the Force Standing Orders, Paragraph 30(e). The respondents have countered this argument by their submissions that the removal of the petitioner from the Force adhered fully to Article 47 of the Constitution and was in accordance with the procedure set out in the Force Standing Orders, in particular the provisions of paragraph 30(e).

25. The correspondence between the petitioner and the 1st respondent that is contained in the pleadings before me indicates that the 1st respondent sent the petitioner a letter dated 12th August 2010 advising him to retire from the Force under the 12-20 years rule as he could no longer be trusted with responsibility as a senior Non-Commissioned Officer and that removal proceedings were contemplated against him. In his response dated 16th August 2010, the petitioner opted for the institution of removal proceedings. On 14th September 2010, a 'Notice of Intended Removal' was served on the petitioner asking him to show cause why he should not be removed from the Force in the interest of the Force. The petitioner responded by his letter dated 6th October 2010. Thereafter, the petitioner was served with a removal letter dated 21st October, 2010, the date of termination of his employment being given as the 22nd of November 2010. The petitioner was given an opportunity to appeal, which he did to the Commissioner of Police. In a letter dated 6th January, 2011, a Mr. S.K.A Limo on behalf of the Commissioner of Police informed the petitioner that his appeal had been disallowed as it was found without merit, thus upholding his removal from the Force.

26. It is clear from the matters set out above that the petitioner was accorded fair administrative action in so far as his removal was concerned. He was notified in writing of the intention to remove him from the Force, and the reasons for such removal. He was asked to show cause in writing why he should not be removed; he chose to have removal proceedings instituted against him; he was given an opportunity to appeal and he exercised his right of appeal.

27. The petitioner alleges that the provision of law that he was removed under does not exist, and that the officer who removed him did not have power to remove him. The petitioner

provided a copy of the Force Standing Orders to the Court in a List of Authorities dated 29th May 2012 and filed in court on 4th June 2012. A perusal of the copy shows that it has several pages missing, among them pages 2, 4, 6, 8, 10, 12, 14, 16, and 18, 22, and 24, basically all the even-numbered pages of the Force Standing Orders. The Force Standing Orders in the petitioner's copy therefore jump from paragraph 27 to 31, excluding paragraph 28, 29 and 30.

28. The Court has however, perused a copy of the complete Standing Orders and confirmed that paragraph 30(e) does indeed exist. The Standing Orders are made pursuant to Section 5 of the Police Act. Paragraph 30(e) of the Force Standing Orders provides as follows:

"Any Inspector may be removed from the Force by the Commissioner of Police and any subordinate officer may be removed from the Force by the Commissioner of Police or Provincial Police Officer for any of the reasons set out hereunder;-

(e) if the Commissioner of police or provincial police officer as the case may be, considers that it is in the interest of the Force that he/she should be removed.

29. The proviso to Paragraph 30(e) states that

*'T**he Commissioner of Police or Provincial Police Officer may delegate to any officer of or above the rank of Assistant Commissioner of Police the powers to remove any member of subordinate officer' (sic)***

30. The procedure for an officer to be removed in the interests of the public or the Force is set out in paragraph 35 and 36 of the Force Standing Orders. Paragraph 35 provides as follows:

'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 or subordinate officer, full details of any warnings that may from time to time have been administered and details of any presentations 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 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 and 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.

31. 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 his case

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. There is clearly nothing in the process leading to his removal that was violated, and I find and hold that the 1st respondent acted in accordance with the provisions of the Force Standing Orders and in compliance with the Constitution in removing the petitioner.

32. The petitioner has questioned the reasons for his removal, alleging that he was removed without tangible evidence. In the letter dated 12th August 2010 which communicated the intention to remove the petitioner from employment, the 1st respondent states that

'Several investigations have been carried out by different agencies concerning this huge poaching and same reveals or incriminates you as one who was a helper/great associate of the suspected poachers.

Whereas there may be no tangible evidence to arraign you in court the indicators for your involvement in poaching have dented your image as a senior NCO hence you can no longer be entrusted with any responsibility.'

33. It seems clear that the 1st respondent had considered the results of the investigations carried out with regard to the alleged poaching and come to the conclusion that while there was insufficient evidence to charge the petitioner in court, it was not in the interests of the Force for the petitioner to remain within it.

34. This court can only interfere with the decision of the 1st respondent on its merits only if the decision was unreasonable and irrational on the principles set out in the case of **Associated Provincial Picture Houses Ltd –v- Wednesbury Corporation, (1948) 1 KB 223** where the court held that a decision could be interfered with on its merits if it was so unreasonable ***''that it might almost be described as being done in bad faith"***

35. The removal of the petitioner in this case followed internal investigations. He was subjected to the Police Force's internal process for removal, including the appellate process. There is nothing laid before me by the petitioner that would lead to the conclusion that the removal was so unreasonable as to have been done in bad faith. In the circumstances I find no merit in the petition and the same is hereby dismissed but with no order as to costs.

36. I am grateful to Counsel for the parties for their well-researched arguments and diligence in prosecuting this matter.

Dated Signed and Delivered at Nairobi this 5th day of October 2012

MUMBI NGUGI

JUDGE

Judgment delivered in open court in the presence of the parties

KAZUNGU - Court Clerk

MR. NYABERI for the Petitioner

MRS OKWARA for the Respondent

MUMBI NGUGI

JUDGE

5/10/2012