



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 34 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MAINA NG'ANG'A alias APOSTLE NGANGA AND 3 OTHERS.....APPLICANT

RULING

1. For determination is the application filed on 5th May 2019 by **Patrick Kahindi Baya** the 4th Respondent herein. Expressed to be brought under Article 159 of the Constitution “and all enabling provisions of the Law”, the motion seeks several prayers, two of which remain live. Prayer 3 seeks an order to suspend the letter interdicting the Applicant dated 24/8/2015 pursuant to the determination of **Limuru CM’s Traffic Case No. 730 of 2015** in which the Applicant had been charged. Prayer 4 seeks an order directing that the Applicant be **“reinstated to his employment fully in the same rank as he was (or higher) before interdiction and without loss of benefits.”**
2. The grounds on the face of the motion are that despite the acquittal of the Applicant on the charges preferred against him in Limuru CM’s Traffic Case No. 730 of 2015 *vide* the ruling dated 7th May 2018, the Applicant remains interdicted, which constitutes a violation of the Applicant’s rights to freedom from discrimination, to fair administrative action and fair hearing, all guaranteed by the provisions of Articles 27(1), 41(1), 47(1) and 50 (2) of the Constitution, respectively.
3. The motion was supported by the affidavit sworn by the Applicant reiterating the above, and further asserting that his continued interdiction on half pay has severely affected the Applicant’s ability to provide for his dependents and that it is in the interest of justice that the interdiction letter **“be rendered null and void and the Applicant be allowed to resume employment with full benefits and privileges appurtenant thereto.”**
4. On 12th June 2019 the Director of Public Prosecutions (DPP) filed a replying affidavit sworn by one **Charles Otieno Otiende** an Assistant Superintendent of Police who states that he is based in the Personnel Directorate at the Police Service Headquarters. He confirmed the interdiction of the Applicant following the institution of and during the pendency of the criminal case before the Chief Magistrates Court at Limuru, pursuant to the provisions of the National Police Service Act and clarified that such interdiction does not signify removal but that the powers, privileges, benefits shall during such interdiction be in abeyance, pursuant to the Service Standing Orders and the National Police Service Commission (Discipline) Regulations of 2015 while the interdicted officer is entitled to half pay during interdiction.
5. The deponent states further that while it is true that the proceedings in the lower court have terminated, by virtue of this appeal the court process has not ended, hence no administrative action as envisaged in the Service Standing Orders can be taken with regard to the interdiction. Moreover, that no application had been made to the Inspector General for the reinstatement of the Applicant’s full salary. The deponent therefore asserts that the application is premature; that the issues raised in the application arise from an employment relationship and cannot be canvassed in a criminal process; and that this court has no jurisdiction to entertain the application or to grant the reliefs sought therein. Finally, it is asserted that the Applicant has not particularized the manner in which his rights have been infringed. None of the Applicant’s Co-Respondents participated in the application.
6. During the oral canvassing of the motion, the Applicant’s counsel reiterated the affidavit material filed. Concerning the nature of the dispute and objections arising therefrom, counsel submitted that the matter before the court was not a labour dispute but an application to enforce the Applicant’s rights to fair labour practices under Article 41 of the Constitution and the appellate court had the necessary jurisdiction to deal with the application under the provisions of Articles 20 – 23 of the Constitution.
7. Expanding this argument, counsel stated that the issues arising from the motion do not constitute a labour dispute but rather relate to rights impacted upon by the criminal process, which rights had crystallized upon the acquittal of the Applicant in the lower court, which court is now *functus officio*. Defending the filing of the motion in this appeal, counsel asserted that the Applicant could not approach the Employment and Labour Relations Court [ELRC] because the alleged violations did not arise out of a labour dispute. He cited in support of his arguments the Court of Appeal decision in **Daniel N. Mugendi v Kenyatta University and 3 Others [2013] eKLR**. Counsel stated that

the Applicant's key grievance related to the failure by his employer to reinstate him despite the termination of the criminal proceedings in the lower court and that the pendency of an appeal cannot justify his continued interdiction.

8. The application was opposed by the DPP who placed reliance on the replying affidavit. It was argued that the appeal herein constitutes an ongoing criminal process and therefore the Applicant cannot ask the court to order his reinstatement. Particularly because, the office of the Inspector General is an independent office under Article 245 of the Constitution and that the court can only interfere with its powers and mandate where there is justification. In the DPP's view the Applicant ought to seek judicial review of the Inspector General's failure to reinstate him upon the termination of the trial before the lower court.

9. In a brief rejoinder counsel for the Applicant asserted that the interdiction did not arise from a disciplinary but a criminal process and that the Applicant's labour rights have been violated through non-reinstatement.

10. The court has considered the matters canvassed in respect of the application. The basic facts surrounding the motion are not in dispute. These include the fact that the Applicant is a police officer of the rank of Inspector of Police in the National Police Service; that in August 2015 he was placed on interdiction upon being charged jointly with his Co-Respondents before the CM's Court Limuru in Traffic Case No. 730 of 2015 – **Republic v James Maina Nganga alias Apostle Ng'ang'a and 3 Others**; that at the close of the prosecution case, all the Accused persons were acquitted on 4th May 2018; that the DPP subsequently filed the present appeal against the acquittal; and that this notwithstanding, the Applicant has yet to be reinstated as his interdiction has not been lifted.

11. It is pertinent to observe at this point that neither the Inspector General of Police nor the National Police Service are direct parties to the appeal before the court or the motion itself. In my considered view, the Applicant's motion stands or falls on two related fronts, namely, the appropriateness of the procedure used to bring the application and the forum before which the motion has been brought. The determination of these matters primarily depends on the answer to the compound question: What is the nature of the primary matter, and the dispute raised by the motion? There can be no dispute that the primary matter herein is a criminal appeal brought by the DPP pursuant to the provisions of the Criminal Procedure Code. The appeal, and the trial before the lower court belong to the criminal process.

12. The interdiction of the Applicant was effected as a consequence of his being charged with criminal offences in the lower court, pursuant to the provisions of Section 87 of the National Police Service Act. That Section falls under Part X – Offences against Discipline by Police Officers – which establishes the Internal Affairs Unit whose functions include the receipt and investigation of complaints against police officers and the making of appropriate recommendations. Section 87(6) provides that:

“The Unit may recommend the following disciplinary actions to the Inspector General –

a) The interdiction of an officer

b)”

13. The interdiction letter to the Applicant is dated 24th August 2015 and is signed by one **Samuel Bore**, whose designated is stated to be Regional Traffic Enforcement Officer, Nyeri. The letter is to the following effect:

“NO 233848 IP PATRICK KAHINDI BAYA

SUBJECT:INTERDICTION FROM DUTY

As you are aware of the ongoing court case against you before CHIEF MAGISTRATES Court Limuru on 21/8/15 and charged with

Count: i) Conspiracy to defeat justice contrary to section 117(a) of the Penal Code.

ii) Neglect of official duty contrary to section 129A(c) of the Penal Code.

The Inspector General National Police Service has invoked the requirement of Section 87(6)(a) of the National Police Service Act 2011 and interdicts you on half pay w.e.f. 21st August 2015. By this interdiction, you do not cease to be a police officer provided that the powers, privileges and benefits vested in you as a police officer shall, during your interdiction, be in abeyance, but shall continue to be subject to the same discipline and penalties and to the same authority as if you had not been interdicted. The interdiction is intended to pave way for the determination of the ongoing court case on you. Acknowledge receipt of this letter through normal channels.” (sic).

14. What I hear the Applicant complain about in the instant motion is that despite the determination of his trial before the lower court, he has not been reinstated. Hence, his assertion of infringement of his right to fair labour practices, fair administrative action, and the like. On the other hand, the deponent to the replying affidavit asserts that the interdiction cannot be revisited as the present appeal is a continuation of the criminal process which must terminate first. Article 162 provides for the system of courts in Kenya. Article 162(2) provides specifically for the establishment of courts with the status of the High Court to hear and determine dispute relating to employment and labour relations and environment and the use and occupation of, and title to land. Although Article 23(1) clothes the High Court with jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom it is now beyond disputing that the ELRC “has jurisdiction and authority to consider the claim of breach of fundamental rights as pertain to industrial and labour relations matters” as stated in **Daniel Mugendi v Kenyatta University and 3 Others**.

15. Section 12 (1) of the Employment and Labour Relations Court Act provides that:

“The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act and any other written law which extends jurisdiction to the Court relating to employment and labour relations including –

a) disputes relating to or arising out of employment between an employer and an employee”.

16. It is true that the Applicant’s interdiction was a consequence of being arraigned in court to answer criminal charges. However, the interdiction itself was not trial related in the true sense of the word but informed by the disciplinary procedure provided for in the National Police Service Act. The Labour Relations Act defines an employment matter as **“a matter concerning any terms or conditions of or affecting employment.”** There can be no dispute that the issues raised by the instant application relate primarily to the application of the disciplinary procedure by the police authorities which the Applicant views as violating his rights. This appeal on the other hand, represents a challenge to the determination regarding criminal culpability as made in the lower court and only provides the substratum within which the dispute in the application arises, but is itself not concerned with determinations regarding employment rights.

17. The application by the Applicant is therefore a dispute arising from the relationship between the Applicant (employee) and the National Police Service (his employer) the latter who are not even parties in this appeal. The proper forum before which the Applicant ought to present that dispute is the Employment and Labour Relations Court. In the circumstances the court strikes out the motion dated 15th May 2019.

SIGNED AND DELIVERED ON THIS 12TH DAY OF JUNE 2020.

C. MEOLI

JUDGE

In the presence of:

Mr. Makokha for the Applicant

Mr Mokua for the DPP

C/A Kevin