



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISCELLANEOUS APPLICATION NO. 77 OF 2013**

**REPUBLIC.....APPLICANT**

**- VERSUS -**

**INSPECTOR GENERAL OF POLICE .....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EX PARTE**

**ZELEA JAKAA AKIRU**

**JUDGMENT**

1. By Notice of Motion dated 24<sup>th</sup> December 2013 and filed on the 8<sup>th</sup> January 2014 upon leave granted by the Court on 23<sup>rd</sup> December 2013, the applicant filed judicial review proceedings for specific orders as follows:

***1. This Honourable Court do hereby grant an order of Prohibition to the Applicant directed against the Inspector General of Police, the Director of Criminal Investigations and the Honourable Attorney General essentially prohibiting them from interdicting, suspending and or sacking the applicant due to her conduct while on duty as the acting officer commanding police station Makupa Police station on the 5<sup>th</sup> December 2013 till the determination of this case.***

***2. This Honourable court do hereby grant an order of certiorari to the applicant against the Inspector General of Police through the Kenya Police Commander Mombasa County quashing his decision to interdict the applicant following her official conduct at Makupa Police Station on the 5<sup>th</sup> December 2013. (sic)***

Although not in the same terms as the reliefs sought in the Statement filed under Order 53 rule 1 of the Civil Procedure Rules, the substance of the orders sought is the same, that is to prohibit the respondents from interdicting, suspending or sacking the applicant for what she did on the 5<sup>th</sup> December 2013, and the quashing of her interdiction.

2. Following developments in the matter by way of commencement of orderly room proceedings against her the applicant sought under certificate of urgency a review of the court order of 23<sup>rd</sup> December 2013 which granted leave without an order for leave to operate as a stay, so that the Orderly Room proceedings are stayed pending the hearing of the Notice of Motion. The court directed that the main Notice of Motion proceed to hearing and in the meantime the status quo to be maintained by an interim order granted at the ex parte stage on 10<sup>th</sup> January 2014.

## **BACKGROUND**

3. Ms. Zelea Jakaa Akiru, No.61247 (the applicant) was enlisted in the Kenya Police Service on 8<sup>th</sup> September 1990 as a recruit constable rising to the rank of Inspector of Police deployed as a Deputy Officer in Charge of Station (Deputy OCS) at Makupa Police Station, Mombasa.

4. It is alleged that on 5<sup>th</sup> December 2013, while in that position, she released suspects whom the court remanded in police custody for four days to enable the police conduct further investigations.

5. She was arrested the next day – 6<sup>th</sup> December 2013 - and charged with the offense of committing an act disrespectful to judicial proceedings contrary to section 121 (f) of the Penal Code. The particulars of the offence were that on 5<sup>th</sup> December 2013, the applicant released on cash bail four remandees prisoners who had been remanded for four days on 5<sup>th</sup> December 2013 in contempt of a court order issued the same day by the Chief Magistrate's Court at Mombasa.

6. The County Police Commander at the time, Robert K. Kitur (the county commander) whose office represents the office of the Inspector General of Police (the 1<sup>st</sup> respondent), interdicted the applicant effective 6<sup>th</sup> December 2013, pending clearance of the charges leveled against her.

7. It would appear that the charge against the applicant were on the 11<sup>th</sup> December 2013 substituted with the charge of disobedience of lawful order contrary to section 131 of the Penal Code with the same particulars of releasing the said suspects on cash bail.

8. On 31<sup>st</sup> December 2013, disciplinary proceedings through police orderly room procedure were commenced and scheduled to take place on the 9<sup>th</sup> January 2014.

## **THE APPLICATION**

9. The applicant being aggrieved by the decision to interdict and charge her, represented by D. N. Omari Advocates, approached this court by way of judicial review proceedings. Following leave granted on 23<sup>rd</sup> December 2013 (which was not to operate as stay), the applicant filed the Notice of Motion dated 24<sup>th</sup> December 2013 seeking orders as set out above.

10. In her Statement supporting the judicial review application, the applicant pleaded that under section 87 of the National Police Service Act no. 11A of 2011, the 1<sup>st</sup> respondent is obligated to establish an internal affairs unit to receive and hear complaints against a particular police officer who shall be subjected to laid down procedure and process where she should defend herself. This failure by the 1<sup>st</sup> respondent to convene an internal affairs unit amounts to abuse of due process of the law. She accused the 1<sup>st</sup> respondent for failing to convene or establish such unit, and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for mis-advising the 1<sup>st</sup> respondent to arbitrarily interdict the applicant without subjecting her to due process. She complained that the respondents were continuing to harass her both at her work place and at her residence.

11. She contended that the respondents were exercising their powers and authority contrary to the law, exhibited open bias, arbitrariness and favoritism in dealing with the applicant to her detriment. The respondents' conduct, she stated, was contrary to the law and equity and was against the principles of

natural justice. The 1<sup>st</sup> respondent was said to have abused his office by not following the law. The applicant urged that it was in the best interest that the orders sought be granted to sustain the letter and spirit of the National Police Service Act (the NPS Act) and the Constitution of Kenya.

12. Before the application could be heard, the applicant was summoned to the County Police Headquarters to appear before the Disciplinary Committee on 10<sup>th</sup> January 2014. Apprehensive that she was likely to be dismissed from the service hence rendering this judicial review proceedings nugatory, the applicant sought review of the order of 23<sup>rd</sup> December 2013 for leave not to operate as stay. The application was granted staying the disciplinary proceedings, which stay has been extended from time to time pending the inter parties hearing of the application for review, as aforesaid.

### **THE RESPONDENTS' CASE**

13. The county commander swore a Replying Affidavit on 28<sup>th</sup> January 2014 opposing the application for judicial review pointing out first, that prayer 1 of the Notice of Motion Application dated 24<sup>th</sup> December 2013 had been overtaken by events and hence not capable of being granted.

14. Secondly, he revealed that the Internal Affairs Unit, whose functions are provided by section 87 (2) of the NPS Act has since been formed and was at the time being headed by Mr. Leo Ijora Nyongesa, DCP in acting capacity pending vetting of police officers pursuant to section 7 of the NPS Act and deals only with complaints against police.

15. Thirdly, he affirmed that while section 88 of the NPS Act deals with disciplinary offenses, the applicant as any officer in service is also subject to the law and regulations in force, including the Force Standing Orders, which is evident in her signed letter of appointment which provides that, "*You will be subject to all regulations for officers of the Public Service of Kenya which are now in force or which may be promulgated from time to time.*"

16. The current force standing orders, as well as the Civil Service Code of Regulations, 2006, it was averred, both provide for interdiction from duty of officers in service at paragraph 25(i) (a) and section G.32 respectively. The applicant's interdiction was therefore carried out in accordance with the law, rules and regulations currently in force.

17. Fourthly, the respondents claimed that per section 88(3) and (4) of the NPS Act, an officer can face both criminal proceedings in court, such as the charge the applicant is facing, and still be subject to internal disciplinary proceedings. The application was said to be ill conceived, bad in law, and an affront to the law to the extent that it amounts to interference with the independence of the Inspector General of Police which is protected under Article 245 (4) of the Constitution of Kenya, 2010.

### **THE SUBMISSIONS**

18. The parties each filed written submissions in support of their case. For the applicant, the submissions dated 18<sup>th</sup> July 2014 were filed by M/S D. N. Omari & Co Advocates taking issue with the letter of interdiction, which was said to have been issued ultra vires since – it was contended - the author appeared to have been personally interdicting the applicant, did not cite the law, did not issue a prior warning, and did not give the applicant a chance to be heard. The applicant's alleged misconduct was said to have been done with the full knowledge of the county commander, and was intra vires the applicant's authority. The 2<sup>nd</sup> respondent was faulted for failing to conduct proper investigations before charging the applicant and failing to properly advise the 1<sup>st</sup> respondent. The 3<sup>rd</sup> respondent, it was said, had an obligation to offer legal advice to the 1<sup>st</sup> respondent, and its failure resulted in the need to file the present application. The county commander being the complainant in the criminal court case was also faulted for appointing SOSTHENES MAKURI to preside over the orderly room proceedings, yet he was a junior officer of the 1<sup>st</sup> respondent. He cited the case of ***R vs. The Kenya National Examination Council ex parte Kemunto Regina Ouru (Suing through father and next friend James Ouru) and 128 others***, Eldoret HC Misc. Appln. No. 1 of 2009.

19. The respondent's submissions were dated 6<sup>th</sup> August 2014 filed by Mr. Richard Ngari Litigation Counsel for the Attorney General. It was submitted that the applicant was not interdicted without cause as alleged but that she was properly booked under OB No.43/6/203. The letter clearly gave the reason for her interdiction, while the charge sheet cited section 131 of the Penal Code which she had breached. She pleaded not guilty to the charges on 9<sup>th</sup> December 2013. The respondents submitted that the action taken against her was within the permissible limits of the law as per the Force Standing Order and the Civil Service Code of Regulations. The respondents urged that the disciplinary process commenced by the respondents would have afforded the applicant ample opportunity to defend herself. The authority cited by the applicant was distinguished for the reason that in this case, there exist detailed rules for conducting the proceedings.

### **ISSUES FOR DETERMINATION**

20. The issue before the court is whether an order for certiorari will be made to quash the 1<sup>st</sup> Respondent's decision to interdict the applicant. In considering the issue, the court must determine the question whether there exists a right to be heard before interdiction of a police officer under the National Police Service Act.

21. The order of Prohibition sought raises no practical issue as it seeks to prohibit the respondents 'from interdicting, suspending and or sacking the applicant due to her conduct while on duty as the acting officer commanding police station Makupa Police Station on the 5<sup>th</sup> December 2013 till the determination of this case' so that it expires with the judgment in this matter.

### **DETERMINATION**

22. The National Police Service has a constitutional obligation to strive for the highest standards of professionalism and discipline among its members. In doing so, it must also comply with constitutional standards of human rights and fundamental freedoms. Article 244 of the Constitution of Kenya, 2010 so far as material provides:

*"244. The National Police Service shall—*

*(a) strive for the highest standards of professionalism and discipline among its members;*

*(b) ....*

*(c) comply with constitutional standards of human rights and fundamental freedoms;"*

23. The applicant is entitled to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This court has previously held in the case of ***R vs. Minister for Internal Security and Provincial Administration & 4 others ex parte CPL James Mwita (2013) eKLR*** in an application for leave to file for Judicial Review that the disciplinary procedure under the Force Standing Orders is valid. This is despite the Internal Affairs Unit envisaged under the National Police Act of 2011 not being operational. Disciplinary proceedings against police officers are provided for under Section 89 of the National Police Service, and are to be carried out in accordance with the Force Standing Orders. Section 89 (3) of the NPS Act is in terms as follows:

*"89. (3) All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall comply with Article 47 of the Constitution."*

24. Under Article 10 the principles of the Constitution include the rule of law which means, in my view, in this context that where a law, not being declared unconstitutional, provides for a procedure for dealing with a matter, be it of disciplinary nature or enforcement of rights and duties or obligations, it should be given effect in accordance with the principle of the Rule of Law. This is the holding of the Court in

**Speaker of National Assembly v. Njenga Karume** [2008] 1 KLR 425, which has been approved and followed in numerous decisions to the point that it is now trite that where the constitution or statute makes provision or a mechanism for dealing with particular disputes that procedure ought strictly to be followed.

25. Section 25 (i) (a) of the chapter 20 of Police Standing Orders provide that –

*“The Commissioner of Police may interdict from duty any police officer and a Gazetted Officer may interdict from duty any Inspector or subordinate officer, pending any inquiry into the disciplinary offence or into the conduct of any such officer under the provisions of the Code of regulations for the Officers of the Government service, or under the provisions of the Police Act or of any other written law. An officer should not normally be interdicted unless he/she is alleged to have been guilty of an offence of such gravity that a recommendation for his/her dismissal may follow conviction.”*

26. The power of interdiction is also set out in the Civil Service Code of Regulations at Regulation G.32 (1) as follows:

*“The Powers of interdiction and or suspension should be exercised only in the circumstances set out in Regulations 23 and 24 of the Public Service Regulations. Accordingly, an officer may be interdicted only if proceedings which may lead to his dismissal are being taken or about to be taken or when criminal proceedings are being instituted against him.”*

27. I find that the in interdicting the applicant, the Mombasa County Police Commander acted pursuant to the provisions of Police Force Standing Orders section 25(i) (a) which allows interdiction of an officer pending inquiry into his/her conduct of *“under the provisions of the Code of Regulations for the Officers of the Government service, or under the provisions of the Police Act or of any other written law.”* The Police commander was, however, bound by Article 244 (c) of the Constitution to **“comply with constitutional standards of human rights and fundamental freedoms.”** In particular, as provided for under section 89 (3) of the NPS Act, the Police Commander was required to observe the requirements of fair administrative action under Article 47 of the Constitution, which include the right to a fair opportunity to be heard before a decision is taken that affects the rights of a person.

28. I agree with Ibrahim J. as he then was in ***R. v. The Kenya National Examination Council ex parte Kemunto Regina Ouru & 128 Ors.***, Mombasa HC Misc Appl. No. 1 of 2009 where in considering an application for among other relief certiorari to quash the decision of the respondent canceling the examination results for the applicants on the grounds of cheating, the court said:

*“As indicated earlier, I find that section 28 of the Rules envisage and contemplate a process of investigations before a final disposal of any consequent disciplinary or other proceedings. For there to be a disciplinary process which may lead to punishment, the suspect or perceived offender surely has a right to be heard or an opportunity to make representations? How can investigations be completed and a conviction made and sentence meted out before some form of hearing takes place during which the suspect is called upon to answer or respond to the charges? With respect it would be an absurdity in judicial interpretation of rules 28 to hold that the council has absolute, arbitrary and unilateral power and discretion to find a suspect candidate guilty of an irregularity and cancel his/her examination without some modicum of process. Such a situation would be abhorrent and negate all notions and principles of the Rule of Law”*

29. Could it be argued, as does the respondents, that the present case is, however, distinguishable from the facts of the case in ***Ouru*** because in this case there is no finalized decision for the punishment of the applicant and that there is only a preliminary action awaiting the disciplinary proceedings of the applicant and the criminal prosecution at both which proceedings the applicant will be granted an opportunity to be heard fully and, if desired, with assistance of counsel? I do not agree. Interdiction is a form of a partial punishment of the applicant which consistently with section 89 (3) of the National Police Service Act calls for opportunity to be heard before it is meted out.

30. I would consider that in interdicting the applicant at half pay, in accordance with the Standing Orders, the 1<sup>st</sup> respondent through the County Police Commander, Mombasa, has already imposed a punishment upon the applicant without granting her an opportunity to make any representation she may desire to have considered in arriving at a decision on the matter. This is a clear breach of the right to fair hearing in accordance with fair administrative action under Article 47 of the Constitution which the police service is enjoined to observe by Article 244 of the Constitution and section 89 (3) of the National Police Service Act. In these circumstances, the applicant is entitled to an order of certiorari to quash the interdiction having been made without giving her any opportunity to be heard.

### **CRIMINAL AND DISCIPLINARY PROCEEDINGS AGAINST THE APPLICANT**

31. The applicant is apprehensive that she will not enjoy fair treatment when the presiding officer is of a junior rank than that of the complainant. The complainant in this case, she has identified as the County Commander by virtue of his self authored letter dated 6<sup>th</sup> December 2013. However, without getting into the merits of the applicant's alleged conduct, it would appear the county commander signed this letter in his official capacity, and in any event it was not his direct order that the applicant is alleged to have disobeyed unlike the situation in *ex parte Cpl. James Mwita*, supra, where the senior police officer who set up the Order room proceedings was the complainant in the charge that the applicant police driver had defied orders to pick him up. The rank of the intended presiding officer – SOSTHENES MAKURI – has not been disclosed. The applicant has not proved that there is any real danger of bias if the orderly room proceedings were to continue as planned. On the other hand, the orderly room proceedings is the procedure prescribed for disciplinary proceedings against police officers.

32. Under section 87 of the new Police Service Act there are provisions of the establishment of an Internal Affairs Unit with a mandate for **receiving and investigating complaints against the police** rather for **disciplinary proceedings of police officers**, as follows:

#### **“87. Internal Affairs Unit**

(1) There is established an Internal Affairs Unit (hereinafter referred to as “the Unit”) of the Service which shall comprise of—

- (a) an officer not below the rank of assistant Inspector-General who shall be the Director;
- (b) a deputy director; and
- (c) such other staff as the Unit may require.

(2) The functions of the Internal Affairs Unit shall be to—

- (a) **receive and investigate complaints against the police;**
- (b) promote uniform standards of discipline and good order in the Service; and
- (c) keep a record of the facts of any complaint or investigation made to it.”

Section 88 of the NPS Act is clear that the power to conduct disciplinary proceedings exists notwithstanding any criminal prosecution for the conduct of a police officer against the law.

33. Section 88 of the National Police Service Act provides for disciplinary offences as follows:

#### **“88. Disciplinary offences**

(1) *Every police officer shall be an officer in the Service and shall be, subject to the law and regulations from time to time in force relating to the Service.*

*(2) The offences against discipline include the offences prescribed under the Eighth Schedule.*

*(3) A police officer who commits a criminal offence, as against law shall be liable to criminal proceedings in a court of law.*

*(4) Notwithstanding subsection (3) the Commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal.”*

Therefore, a police officer who commits an offence as against the law shall be prosecuted in criminal proceedings in accordance with section 88(3) of the National Police Service Act, and also face disciplinary action under section 88(4) of the Act.

34. The Director of Public Prosecutions (DPP) has constitutional duty to prosecute offences under Article 157 of the Constitution and in the exercise of such mandate, the DPP may use the police investigators and prosecutors as may have happened in this case, and I would, therefore, find that the 2<sup>nd</sup> respondent acted within his powers to file criminal prosecution. The Prosecution would, of course, be expected to bring charges only where the investigations reveal an offence. However, whether the investigations leading to the arrest and charge of the applicant were properly done, if at all, will be established before the trial court in its decision whether the applicant has a case to answer or whether the prosecution proves the case beyond reasonable doubt upon full hearing in accordance with section 215 of the Criminal procedure Code. The court cannot, in exercise of its judicial review jurisdiction of Order 53 of the Civil Procedure Code, consider the merits of the criminal charges facing the applicant and determine whether proper investigations were conducted in the alleged offence, and consequently, whether the applicant is guilty or not guilty as charged.

35. Under the criminal trial the applicant will be afforded all the Article 50 rights including the right to a fair trial which is in accordance with Article 25 of the Constitution not subject to limitation. If the rights of the applicant are breached in the criminal trial setting, the accused will be at liberty to lodge an appeal on the merits or file a constitutional application for their enforcement and protection. Such is not the application before the court.

36. The Orderly Room proceedings confirm inquiry under the provisions of the Police Act [the National Police Service Act] for the alleged release of suspects from lawful custody in breach of an order of the Court, which is the basis for interdiction under Standing Order 25 (i) (a) set out above. Consistently with the criminal offence with which the applicant is charged according to charge sheet in Mombasa Chief Magistrate’s Court Criminal Case No. 2966 of 2013, it is provided under section 1 (g) of the Eighth Schedule of the Act, on **Offences Against Discipline** that it is an offence against discipline for any officer to:

***“(g) willfully disobey any lawful command or order;”***

37. The right to be heard is both an ingredient both of the right to fair administrative action under Article 47 of the Constitution and the right to fair hearing under Article 50 of the Constitution. In a matter such as the one before the court which has both criminal and disciplinary processes are invoked, the right to be heard is important to both settings.

### **Findings**

38. The 1<sup>st</sup> respondent has power to interdict a police officer pending inquiry into his conduct under the National Police Service Act, subject to the observance of the principle of fair administrative action under Article 47 of the Constitution. The 1<sup>st</sup> respondent through the County Police Commander did not afford the applicant any opportunity to be heard before the decision to interdict her was made. The DPP, however, has power to lodge criminal prosecution based on investigations conducted by the 2<sup>nd</sup> respondent and the cogency of evidence revealed by such investigations may only be determined by the

criminal trial court. The Orderly Room procedure is the mechanism prescribed by the Standing Orders for the trial of discipline offences, as opposed to complaints which are processed under the Internal Affairs Unit under section 87 of the National Police Service Act. The Police have authority to commence disciplinary action under section 88 (4) of the National Police Service Act notwithstanding criminal prosecution for the conduct which is against the law and also constitutes an offence against discipline. Accordingly, although the court finds that the applicant is entitled to an order of certiorari to quash the interdiction of the applicant, the same is declined in discretion because the applicant has already been charged in separate proceedings with a criminal offence respecting the alleged conduct and quashing the interdiction, in the circumstances, would not serve a practical purpose.

### **Orders**

39. Accordingly, for the reasons set out above, the ex parte applicant's Notice of Motion dated the 24<sup>th</sup> December 2013 is declined. The interim order restraining the conduct of Orderly Room proceedings against the ex parte applicant is hereby discharged. The 1<sup>st</sup> respondent is at liberty to proceed with the Orderly Room proceedings subject to the requirements of section 89 (3) of the National Police Service Act to ***'comply with Article 47 of the Constitution.'***

40. Each party will bear its own costs.

**DATED SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF JANUARY 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Omari for the Applicant

No appearance for the Respondents

Mr. Murimi Court Assistant.