



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR MISC. CIVIL APPLICATION NO. 412 OF 2013**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**INSPECTOR GENERAL OF POLICE.....RESPONDENT**  
**Ex-parte**  
**JACKSON CHERUIYOT MAIYO**  
**JUDGEMENT**

1. The ex-parte Applicant, Jackson Cheruiyot Maiyo is a police constable in the National Police Service. The Respondent is the Inspector General of Police, an office created by Article 245 (1) of the Constitution. Through the notice of motion dated 26<sup>th</sup> November, 2013, the Applicant prays for orders:

**“1. THAT this Honourable Court do grant an order of certiorari by way of judicial review by calling for and quashing the decision of the RESPONDENT issued on 28<sup>th</sup> October 2013 and Marching Order dated 8<sup>th</sup> November 2013 transferring the Ex-parte Applicant from his current police post at Diplomatic Police Unit to Fino Police Station in Mandera.**

**2. THAT this Honourable Court do grant an order of prohibition by way of judicial review prohibiting the RESPONDENT from transferring the applicant from his current post at Diplomatic Police Unit to Fino Police Station in Mandera until the Respondent complies with the law.**

**3. THAT the costs of this Application be provided for.”**

2. The application is supported by a statutory statement dated 12<sup>th</sup> November 2013 and amended on 25<sup>th</sup> September, 2013. It is also supported by the verifying affidavit sworn by the Applicant on 12<sup>th</sup> November, 2013.

3. The Applicant’s case is that he has served as a police officer for eighteen years and at the time of his transfer he was attached to Diplomatic Police Unit. He averred that on or about 21<sup>st</sup> September, 2013 he was among the police officers who responded to a terrorist attack at Westgate Mall in Westlands, Nairobi. He helped to secure and lock motor vehicle registration number KAS 575X which had been

used by the attackers and as a consequence, he was summoned to testify before the Senate National Security Committee.

4. According to the Applicant, some individuals within the police force were not pleased with this fact and immediately after he testified a signal dated 28<sup>th</sup> October, 2013 was received from the police headquarters, and a marching order was issued on 8<sup>th</sup> November, 2013, transferring him to Fino Police Station in Mandera. He asserted that although the Deputy Chief Whip of the Senate wrote to the Respondent querying why the officers were transferred after testifying before the Senate Committee, there was no response to the letter.

5. The Applicant averred that he wrote to the Respondent asking that his transfer be rescinded on medical grounds, as he had been involved in a road accident in which he had sustained liability at 30%, but his request was not considered.

6. The Applicant therefore prays for judicial review orders on the grounds that he was not afforded an opportunity to be heard before his transfer was effected and this contravenes Article 47 of the Constitution; that the Respondent has no powers to effect transfer of police officers as such powers are vested upon the National Police Service Commission; and that the Respondent's decision was discriminative.

7. The Respondent opposed the application through the replying affidavit sworn on 1<sup>st</sup> April, 2014 by Kipchanga Kitoo the Deputy Director of Personnel of the Kenya Police Service. According to Kipchanga Kitoo, he had the necessary authority to issue the directive requiring the deployment of the Applicant by virtue of powers delegated to him by the Respondent. It is his case that the Applicant being a member of the National Police Service was liable to be posted to any station within Kenya to discharge the usual duties of a police officer. Further, that officers were normally transferred after serving in a station for three years and the Applicant's transfer was long overdue as he had served in the Diplomatic Police Unit for seven years.

8. It is Kipchanga's case that by virtue of Article 245 of the Constitution, the Respondent is mandated to exercise independent command over the National Police Service as well as to perform any other functions prescribed by national legislation. Further, that Section 10 of the National Police Service Act outlines the functions of the Inspector General which includes determination of the distribution and deployment of officers in the National Police Service and making recommendations to National Police Service Commission and county policing authorities.

9. The Respondent rubbished the Applicant's claim that he testified before the Senate National Security Committee and that his testimony had not pleased some people in the National Police Service.

10. Looking at the application before this Court, I find that the issue for determination is whether the Respondent has powers to transfer a police officer. Odunga, G. V., J tackled that question in **Nairobi H.C. Misc Civil Application No. 93 of 2013 (JR), Republic v The Deputy Inspector General of National Police Service & 2 others ex-parte PC Morris Sagala & others** and concluded that:

**“It is therefore clear that the powers to *inter alia* determine promotions and transfers within the National Police Service was given to the Commission and any legislation which purported to take away such powers and place them on any other body would have been inconsistent with the Constitution since to create two centres with the same powers was bound to cause confusion in the administration of the police service. Kenyans must have had a good reason for removing the powers of transfer of the members of the Service from the predecessor of the Inspector General, the Commissioner of Police, to the Commission. Since the Inspector General is a Member of the Commission, it is expected that where a need for transfer of the Members of the Police Service arises he would be able to explain this position and the Commission would be able to take appropriate steps.”**

11. The same Judge firmly reiterated this position in **Nairobi High Court Misc. Civil Case No. 226 of**

2013, *International Centre for Policy and Conflict v Attorney General & 2 others* when he stated that:

**“Article 246 of the Constitution which establishes the Commission sets out in Clause (3) the powers of the said Commission and these are to:**

*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.*

**Clearly, the powers to *inter alia* determine promotions and transfers within the National Police Service lie with the Commission.”**

12. The Respondent is correct that Article 245(2)(b) of the Constitution provides that the Respondent **“shall exercise independent command over the National Police Service, and perform any other functions provided by national legislation.”** In my view, this provision does not, however, give the power to the Respondent to transfer members of the National Police Service.

13. It is also noted that Article 245(4) provides that:

**“The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to–**

**a. the investigation of any particular offence or offences;**

**b. the enforcement of the law against any particular person or persons; or**

**c. the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”**

14. Article 245(4) the Constitution simply clarifies the circumstances under which the Respondent cannot be directed on the performance of his duties. It does not in any way authorise the Respondent to transfer police officers.

15. On the other hand, according to Article 246 (3) of the Constitution, the National Police Service 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 the offices within the Service; and**

**(c) perform any other functions prescribed by national legislation.”**

16. The power to determine transfers within the National Police Service belongs to the National Police Service Commission. It ought to be involved in the transfer of police officers. The drafters of the Constitution must have found it important to give the power of transfer to the Commission. This could have been informed by the historical background in which police officers were transferred at the whim of their seniors. It is therefore important that transfer of police officers be carried out by the Respondent only after consultation with the Commission.

17. Where there is no evidence of the Commission's blessings, as is the case herein, the logical conclusion is that the transfer is unconstitutional. As observed by Odunga, G. V., J in **International Centre for Conflict and Policy**, the Constitution must be obeyed at all times, whatever the inconveniences. He opined that:

**“It follows and I reiterate that the Inspector General of Police has no unilateral powers to *“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”*. This Court is aware of attempts to twist the provisions of the Constitution to suit temporary convenience. That however will not do. Express provisions of the Constitution, the Supreme law of the land, ought not to be sacrificed at the altar of expediency. Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud.”**

18. The Applicant had also submitted that he was entitled to a hearing before his transfer. He also claimed that his transfer was discriminatory. Having concluded that his transfer was unconstitutional, I do not find it necessary to address these other issues.

19. The end result is that the application succeeds and an order of certiorari is issued as prayed by the Applicant. There is no need to issue an order of prohibition as the Applicant can still be transferred so long as the transfer is legal. In view of the relationship between the Applicant and the Respondent, I do not find it appropriate to award costs in this matter. There is therefore no order as to costs.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of April , 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**