**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CONSTITUTIONAL PETITION NO 8 OF 2015**

**IN THE MATTER OF CONSTITUTIONAL REFERENCE UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA 2010**

**P C (W) BRENDA ACHIENG OKWACH……………..…. 1ST PETITIONER/APPLICANT**

**PC (W) IMMACULATE ANYANGO OKONG'O……..…...2ND PETITIONER/APPLICANT**

**PC (W) CHRISTINE CHIMWENE ADHIAMBO….…...….3RD PETITIONER/APPLICANT**

**VERSUS**

**CHARLES ROTICH SP, OCPD, NYERI CENTRAL……..……...…..…1ST RESPONDENT**

**KENNEDY OTIENO, ACTING INSPECTOR, NYERI CENTRAL.……2ND RESPONDENT**

**STELLA RUTTO…………………………….................…………3RD RESPONDENT**

**HON. ATTORNEY GENERAL……………………..................……4TH RESPONDENT**

## JUDGEMENT

By a petition dated 5th March 2015, expressed under the provisions of Articles **50 (1), (2) (a), (c,) (d), (g), (I), (k),** and **(4)** of the Constitution of Kenya 2010, (Protection of the fundamental rights and freedoms of the individual), Practice and Procedure Rules 2001, as read together with Chapter **4** of the Constitution, Section **3A** of the Civil Procedure Act[1] and all enabling provisions of the law filed in this court the same day, the Petitioners herein, **PC Brenda Achiend Okwach, PC (W) Immaculate Anyango Okong'o and PC (W) Christine Chimwene Adhiambo** moved this honourable court seeking the following orders against the respondents:-

i. *A declaration that the petitioner's fundamental rights and freedoms under Article **47** Article **50 (1), (2) (a), (c), (d), (g), (I), (k),** and **(4)** of the Constitution of Kenya 2010 have been violated.*

ii. *A declaration that the Petitioners are entitled to a fair trial as enshrined under article 50 of the constitution pursuant to allegations that they assaulted one **Stella Rutto** on or about 3rd day of March 2015.*

iii. *A declaration that Section **87 (2), (3), (4)** and **(6)** of the National Police Service Act, 2011[2] are*

*unconstitutional in as far as they provide for a procedure for hearing offences against discipline by police officers, as they directly conflict with the fundamental rights as protected under Article* ***50 (1), (2) (a), (c,) (d), (g), (I), (k),*** *and* ***(4)*** *of the Constitution of Kenya 2010.*

iv. *Any further orders, writs, directions as this Honourable Court may deem fit to grant.*

v. *The costs of the suit, with interests at court rates.*

The petition is supported by the three separate affidavits annexed thereto sworn by the petitioners and whose content are essentially the same. Specifically, the three petitioners in their identical affidavits aver that on 4th day of March 2015, at around **8.30am** they were instructed by acting **Inspector Kennedy Otieno** to appear before him at **4.00pm** to answer to allegations of striking a one **Stella Rutto,** the third Respondent herein. While in the said office the Petitioners aver that they were confronted by two police officers, namely, a one **Insp. Otieno** and **CPL Bunuke** and that **Insp. Otieno** purported to <u>read to them a charge of striking fellow police officer,</u> namely the third Respondent herein at 2000hrs at Nyeri Police Station, but they refused to take the plea and that the said officer deliberately failed to disclose to them the particulars of the alleged charge by supplying them with a copy of the charge sheet. Each of the Petitioners avers in her affidavit that they sought an adjournment to enable them to exercise their rights as enshrined in Section **88 (3)** and Section **89 (4)** of the national Police Service Act. Under the said section the, the Petitioners avers that they are entitled to seek representation by another officer of their choice for assistance and support.

However, the presiding officer insisted that the disciplinary action had to proceed for hearing and determination at 1400 hrs on 5th March 2015. They were also informed that there was a notification from the OCPD, Nyeri Central, **Mr Charles Rotich (SP**), instructing him that the Petitioners be subjected to a disciplinary action popularly known as **"waiver."** The Petitioners' state on oath in their aforesaid affidavits that the purported hearing by way of **'waiver'** will not accord them rights to a fair hearing as enshrined in Article ***50 (1), (2), (c,) (g), (j), (k),*** *and* ***(4)*** *of the constitution and added that they <u>had no faith the disciplinary process by the OCPD, which was being</u>* ***<u>'suspiciously' hurried and taken"</u>*** *<u>and added that they were being subjected to tribal discrimination orchestrated by the third respondent, the OCD and a Mr. Charles Rotich.</u>*

The Petition was accompanied by a notice of motion seeking interim orders pending the hearing and determination of this Petition which orders were grated *ex-parte* on 6th March 2015 in the first instance and the application was scheduled for hearing *inter partes* on 20th April 2015. On the said date the aforesaid interim order was confirmed by consent pending the hearing and disposal of this Petition and that the parties agreed to have the Petition dispensed with by way of written submissions.

In opposition to the Petition the respondents filed two replying affidavits one sworn by **Kennedy Otieno,** the second Respondent stating inter *alia that* the applicants Petition is premised on generalities, conjectures, suppositions, and overt premature presumptions, and insist that he was the presiding officer at the disciplinary proceedings and the first petitioner herein pleaded **not guilty** and sought time to bring a representative pursuant to the provisions of Sections **88 (3)** and **89 (4)** of the National Police Service Act. He avers that the 1st petitioner was given time to bring a representative and instead she went to court and obtained a court order and denies that her constitutional rights were violated. He denies the specific allegations in the 1st Petitioners affidavit and in particular avers no specific details have been offered by the first Petitioner on the alleged violation of her rights. In support of the foregoing, the second respondent annexed a hand written copy of the proceedings, defaulter charge sheet and waiver notice.

Similarly, in reply to the second Petitioners' affidavit, the second Respondent maintains that she declined to take her plea indicating that she desired to have a representative police officer to be present during the taking of the plea pursuant to Sections **88 (3)** and **89 (4)** of the National Police Service Act and cited contradictions in her affidavit and added that no specific details of the alleged violation were cited.

With regard to the third Petitioner, the second respondent avers that he was also the presiding officer

during the proceedings in question, and that she declined to take a plea indicating that she desired to have a representative police officer pursuant to the provisions of Section **88 (3)** and **89 (4)** of the National Police Service Act cited above. He also cited contradictions in her affidavit, and like the others maintained that no specific details of the alleged violations were cited.

The second Respondent reiterated that he initiated the disciplinary proceedings after receiving complaint of the alleged assault pursuant to the provisions of Sections **87, 88** and **89** of the National Police Service Act and added that the third respondent is entitled to her constitutional rights to freedom and security, dignity, and enjoyment of her rights under Articles **29 (c), (f), 28, 27,** of the Constitution and the National Police Service Act sections **87, 88, & 89.**

The second Respondent maintained that the Petitioners were adequately informed of their charges as is shown by their list of documents, and that they were accorded a fair administrative action and reasonable opportunity to vindicate themselves. The second respondent maintains that Petition is misconceived, bad in law, incompetent and an abuse of the Court process and that the Petition is against the Rule of Law and is calculated to unduly pursue gain and not enforcement of any constitutional right. The second Respondent also averred that the Petitioners have not demonstrated how their constitutional rights have been violated and that the declarations sought to the effect that the provisions of section **87 (2), (3), (4), (5) and (6)** of the National Police Service Act are unconstitutional is misconceived, incompetent, lacks merit and is untenable and sought that the Petition be dismissed with costs.

Also on record is the replying affidavit of **Charles Rotich, SP**, the first Respondent who adopts the replying affidavit of second Respondent and adds that he gave instructions for the disciplinary proceedings to be instituted following allegations of assault by the third Respondent. He denied the allegations in the Petition and maintained that the Petitioners were duly informed of the allegations against them and that the documents exhibited by the Petitioners do support the fact that they were informed of the allegations against them.

The parties filed their written submissions and left it to the court to determine this Petition.

In their submissions, the Petitioners counsel high-lighted the facts of the Petitioners case and a summarized the contents of the Replying affidavits. Counsel for the Petitioners then proceeded to submit on the law and cited the provisions of Sections **87 (2), (3), (4), (5), (6)** and **89 (1)** of the National Police Service Act and Article **47 (1), 50 (1), (4)** and **244** of the Constitution. Counsel for the Petitioners also cited Section **250** of the Penal Code[3] the Criminal Procedure Code[4] which makes provision for the procedure to be followed in criminal cases. I will revert to the above cited provisions of the law in detail later in this judgement.

In a nutshell, the Petitioners counsel submitted that:-

i. *The petitioners will greatly be prejudiced in the event the disciplinary proceedings continue, under the provisions of the National Police Service Act 2011.*

ii. *That the charges disclose an offence under the provisions of section 250 of the Penal Code.*

iii. *That the petitioners are being tried in a process that is the preserve of the court.*

iv. *That the Criminal Procedure Code clearly stipulates the procedure(s) to be followed in the event of criminal proceedings are preferred against a person.*

v. *The potential consequences of such proceedings as captured in Section **89 (1)** of the National Police Service Act.*

vi. *From the circumstances, the 1st and 2nd respondents do not intend to avail to the Petitioners their rights to a fair hearing even their right to a fair administrative action as enshrined under Article **47** of the Constitution.*

vii. *It’s not clear why the 1st and 2nd respondents do not wish to subject the Petitioners to a fair public trial if they deem the evidence against them sufficient.*

viii. *That the Petitioners will only get justice if the matter is heard in a court of law.*

Counsel for the Petitioners further submitted that the disciplinary process provided for under Section **87 (2), (3), (4), (5)** and **(6)** of the National Police Service, grossly contravenes the Petitioners rights to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as enshrined in Article **47** of the Constitution and rights enshrined in Article **50 (1)** of the Constitution. He adds that Article **244 (c)** of the Constitution obligates the National Police Service to comply with Constitutional standards of human rights and fundamental freedoms.

In Support of his position, counsel for the PetitionerS cited two authorities, namely, **Sergent Joshua Muindi Maing vs The National Police Service Commission & 2 others**[5] and **Geoffrey Mworia vs. Water Resources Management Authority.**[6] I will comment on the relevancy or otherwise of these two decisions to the present case later in this judgement.

The gist of the Respondents’ counsels submissions is that under Section **87, 88 (1), (2), (3)** and **(4)** as read together with Section 89 of the National Police Service Act[7], all police officers can face disciplinary proceedings in respect of offences listed in Schedule **8** of the said Act. The Respondents counsel also cited the provisions of Articles **244 (b), 245 (b)** and **246 (b)** of the Constitution of Kenya 2010. The Respondents counsel also cited the provisions of sections **87, 88, & 89** of the National Police Service Act and several court precedents which are rich in jurisprudence on constitutional interpretation and implored this court to be guided by relevant provisions of the law which the counsel pointed out, legal principles and case law in adjudicating this Petition. In the opinion of counsel for the Respondents, the Petition before the court is premature and the Petitioners Constitutional rights have not been violated, that the third Respondent is entitled to her Constitutional rights of freedom and dignity, and that the Petitioners have not established that their Constitutional rights have been violated, and further the petition is merely aimed at limiting the Respondents statutory and legislative mandate. Further, it is submitted that the Petitioners had not exhausted the remedies spelt out under Section **89 (2)** of the National Police Service Act and proceeded to distinguish the cases cited by the petitioners counsel from the facts of the present case and urged the court to dismiss the petition.

I have carefully analysed, evaluated and considered the affidavits and annextures filed by both parties in this case, I have read and understood the documents filed by both parties, I have considered the rival the submissions filed for both parties, I have examined the sections of the law referred to by both parties and the authorities cited and generally the law applicable in cases of this nature and I now make the following findings.

It is my considered opinion that the Petition raises the following three issues:-

i. Whether the Sections **87 (2), (3), (4), (5)** and **(6)** of the National Police Service Act are unconstitutional in as far as they provide for a procedure for hearing offences against discipline by police officers and or whether they are in direct conflict with the fundamental rights as protected under Articles **50 (1), (2), (a), (b), (c), )d), (g), (j), (k), (k),** and **(4)** of the constitution of Kenya 2010.

ii. Whether the petitioners fundamental rights and freedoms under articles **47, 50 (1), (2), (a), (b), (c), (d), (g), (j), (k), (k),** and **(4)** of the constitution of Kenya 2010 have been violated or threatened.

iii. Whether the petitioners are entitled to the reliefs sought in the petition.

In addressing issue number one above, its important to point out that this will involve interpreting the various sections of the National Police Service Act that are alleged to be unconstitutional and also the relevant provisions of the Constitution that are alleged to be offended by the sections complained about. In this regard it’s important to bear in mind the relevant guiding principles. In this connection, I find

useful guidance in the case of **The Institute of Social Accountability & others vs The National Assembly & Others**[8] cited by the Respondents' counsel whereby the court stated as follows:-

i. *Under Article **259** of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution.*

ii. *There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.**[9]** (The court should start by assuming that the Act in question is constitutional).*

iii. *In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.*

iv. *The constitution should be given a purposive, liberal interpretation.*

v. *That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.**[10]***

I stand guided by the above principles and bear in mind the words in the Namibian case of **State vs Acheson[11]** *'…….The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.'*

In my view, the disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case.[12]The privy council in the case of **Minister for Home Affairs and Another vs Fischer**[13] while interpreting the Constitution of Bermuda stated that:-

> *"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation… It is important to give full recognition and effect to those fundamental rights and freedoms…..."*

**Lord Wilberforce**, while delivering the considered opinion of the court in the above case observed:-

> *"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms….."*

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of **Anthony Ritho Mwangi and another vs The Attorney General**[14] where the court stated:-

> *"Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations*

*and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."*

**Ringera J** put it more succinctly in **Njoya and Others vs Attorney General[15]** when he observed that the Constitution is a living document and not like an Act of Parliament when he observed that:-

*"the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles"*

In the celebrated case of **Ndyanabo vs Attorney General[16] Samatta CJ** had this to say:-

*"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows;* ***first,*** *the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As* ***Mr. Justice E.O Ayoola,*** *former Chief Justice of Gambia stated….. "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."* ***Secondly,*** *the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."*

Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. In this regard, I endorse fully the presumption of Constitutionality which was powerfully expressed by the Supreme Court of India in the case of **Hamdarddawakhana vs Union of India Air[17]** where the respected Court stated:-

*"In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."*

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

This court has been called upon to determine the Constitutionality or otherwise or some sections of the National Police Service Act and as a basis for so doing I wish to state some crucial guiding principles. First, statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:

i. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.
ii. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.
iii. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully.

There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete*. The implication is that when the language is clear as in the sections complained about, then it is not necessary to belabour examining other rules of statutory interpretation.

In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.[18] The other key point for the court to consider will interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.[19] And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

The other issue for this court to satisfy itself is the question of jurisdiction. Article **165 (3) (d) (i) & (ii)** of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of this constitution or of any law is in consistent with, or in contravention of, this constitution.

An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of purported statutes. Thus, I now examine the relevant Constitutional provisions and the sections of the National Police Service Act complained of in this petition. Bu first it's important to note that Article **244 (d)** of the Constitution of Kenya 2010 provides that the National Police Service shall ‘train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity while Article **246 (2) (b)** and **(c)** provide that:-

> *(b) the commission shall, observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service;*
>
> *(c) perform any other functions prescribed by national legislation.*

The applicants complain that Sections **87 (2), (3), (4), (5)** and **(6)** of the National Police Service Act are unconstitutional in as far as they provide for a procedure for hearing offences against discipline by police officers, as they directly conflict with the fundamental rights as protected under Articles **50 (1), (2), (a), (c), (d), (g), (j), (k),** and **4** of the Constitution of Kenya 2010. It's necessary to closely examine the said provisions to determine their constitutionality or otherwise.

Article **50** of the constitution guarantees the right to a fair hearing. It provides:-

1. *Every person has right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*
2. *Every person has the right to a fair trial, which includes the right-*

a. *to be presumed innocent until the contrary is proved;*
b. ..
c. *to have adequate time and facilities to prepare a defence;*
d. *to a public trial before a court established under this Constitution;*
e. ..
f. …
g. *To choose, and be represented by, an advocate, and to be informed of his right promptly;*
h. ..
i. ..
j. *To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
k. *To adduce and challenge evidence*
l. *L….to…..q…*

*(3)…………*

*(4) Evidence obtained in a manner that violates any right or fundamental freedom in the bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*

The Petitioners' case is that Sections **87 (2), (3), (4), (5)** and **(6)** of the National Police Service Act contradict the above constitutional provisions. Other that maintaining that the above sections are unconstitutional, the Petitioners have not in my view given details or grounds of the alleged unconstitutionality of the sections complained. Nevertheless, this court cannot deviate from its own duty of determining the constitutionality of an impugned statute. In my view, every law has to pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of this power of judicial review, as explained by Indian nine-judge bench in the case of the **Supreme Court Advocates on Record Association & Others vs Union of India[20]** is the theory that the Constitution which is the fundamental law of the land, is the 'will' of the 'people', while a statute is only the creation of the elected representatives of the people; when, therefore, the "will" of the legislature as declared in the statute, stands in opposition to that of the people as declared in the constitution-the "will" of the people must prevail.

I find associate myself with the words of the Supreme Court of India in the case of **Namit Sharma vs Union of India[21]** where the court had this to say:-

> *"An enacted law may be constitutional or unconstitutional. Traditionally, this court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of the constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened......"*

Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases where breach of fundamental right is claimed. Violation of a fundamental right itself renders the impugned action void.[22] A law which violates the fundamental right of a person is void. In such cases violation, the Court has to examine as to what factors the court should weigh while determining the constitutionality of statute. The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on

grounds that it infringes a fundamental right, what the court has to consider is the *"direct and inevitable effect "* of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment of the National Police Service Act should be borne in mind. The Act is one of the post 2010 pieces of legislation enacted to give effect to the relevant provisions of the new constitution. Among the key pre-2010 public sectors that had lost public confidence and needed urgent reform is the Police force. Thus any interpretation of these provisions should bear in mind this history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.[23]

This brings to light the provisions of Article **244 (a)** which provides that the National Police Service shall strive for the highest standards of professionalism and discipline among its members. This was one of the areas in the Police force that required reforms. That is evidently one of the objects and functions of the National Police Service and any interpretation of the said Act must bear in mind the said history mentioned earlier, the objects of the legislation in question and the alleged violation of fundamental rights and balance the two.

With the provisions of Article **244** in mind it's easy to conclude Section **87** of the National Police Service Act is geared to actualize the objectives stated in the said Article. Section **87 (2)** complained of provides as follows:-

(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.

More relevant to the case before this court are the clear provisions of Section **87 (3)** of the said Act which stipulates that **"In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution.** Article **47** of the Constitution provides that *"every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair".* Clearly the drafters of this Act had so great regard for the Constitution that they deemed it fit to include such a provision in the Act.

Section **87 (4)** gives power to the Unit to investigate misconduct and hear complaints:-

a. *From members of the Service or members of the Public;*
b. *At the direction of a senior officer;*
c. *On its own initiative; or*
d. *On the direction of the Inspector- General; or*
e. *at the request of th Independent Police Oversight Authority.*

Section **87 (5)** provides that the Authority to intervene and take over the investigations when they have reason to believe the investigations are inordinately delayed or manifestly unreasonable. Subsection **(6)** recommends the disciplinary actions to the commission.

Another key constitutional safeguard appears at Section **89 (3)** which provides that:-

> *"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."*

An appellate procedure is provided for under sub-section **(5)** which provides that *"A officer aggrieved by the decision may appeal first at the County level, then to the Inspector-General and then to the Commission in accordance with regulations."* The Eighth Schedule to the Act lists the offences against discipline and the offence facing the petitioners is listed therein. Under the said Schedule, it is an offence against discipline for any person to:-

a. *Unlawfully strike or use or threaten violence against any police officer or any other person.*

I have carefully examined the provisions of Sections **87 (2), (3), (4), (5)** and **(6)** of the National Police Service Act, the Constitutional provisions listed by the petitioners in paragraph three of the petition, namely Articles **50 (1), (2), (a), (c), (d), (g), (j), (k),** and **4** of the Constitution and applying the rules of statutory interpretation referred to earlier in this *judgement* and guided by the precedents cited herein, I find that the sections complained of are not in any manner inconsistent with the constitution. In fact, as pointed out earlier, the drafters of the said Act recognized the superiority of the constitution and inserted clauses declaring that all proceedings shall be consistent with Article **47** of the constitution. Clear defined procedures have also been provided in the Act, with guaranteed right to be represented by a police officer of the choice of the person facing the disciplinary proceedings and a clear right of appeal.

I find nothing in the Petition to demonstrate that that the Petitioners will suffer prejudice if they go through the said process. On the allegation that the Petitioners would prefer to undergo through a criminal trial under Section **250** of the Penal Code, in take the view that law does not allow the elect which one they prefer. The only safe guard is that the process must be in accordance with article 47 of the constitution and the proceedings must not violate their constitutional rights. As found out later in this judgement, courts are reluctant to direct employers what action to take in such cases especially so when the process is prescribed in the legislation. The court can only intervene in the event of a breach of the law. Similarly, I do not agree with the Petitioners advocates that the disciplinary process subjected to police officers under the Act is the preserve of the criminal process under the Criminal Procedure Act. These are two different processes clearly provided under the law. The only point to note is that where a person has been tried and acquitted by the court, then as was held in the case of **Sgt Maingi** discussed below, the employee cannot be subjected to disciplinary proceedings after being cleared by a court of law.

In view of the foregoing conclusions, I find that the answer to the issue number one is in the negative.

I proceed to determine the second issue, namely:-

> *Whether the petitioners fundamental rights and freedoms under articles* ***47, 50 (1), (2), (a), (b), (c), (d), (g), (j), (k), (k),*** *and* ***(4) of*** *the constitution of Kenya 2010 have been violated or threatened.*

The petitioners' complaint is that their rights under the above articles have been violated. Article **22 (1)** of the Constitution provides that:-

> *"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."*

I do not doubt the petitioner's right to bring this case. Article **22** grants them the right to do so. What needs to be determined is whether or not their rights have been denied, violated, infringed or threatened. The jurisdiction of this court is not in doubt. Article **23 (1)** provides that *"the High Court, has jurisdiction, in accordance with article* ***165****, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."*

Earlier in this judgement I summarized the case for both the petitioners sand the respondents and it will suffice to state here that in their identical affidavits, the petitioners complaint is that on 4.3.2014 they were instructed to appear before the second Respondent at 4.00pm to answer charges of striking the third Respondent, that each one of them refused to take a plea and they applied to exercise their rights under Section **88 (3)** of the National Police Service Act and that they were informed that the hearing would

proceed on 5.3.2015 and that they would be subjected to a disciplinary action popularly known as **"waiver".**

This account is disputed by the respondents through the affidavit of the second Respondent who states that the first Respondent actually took a plea after he read the charges to her and she pleaded **not guilty** and was accorded an opportunity to avail a representative officer only to bring a court order while the second and third Respondents declined to take the plea desiring to bring a police representative and their request was granted. Copies of the proceedings for all of them were annexed to the second Respondent's affidavit. On the whole the respondents counsel opines that the petitioners' case was filed prematurely.

I have carefully studied the material before me and I find myself in agreement with the respondents advocates that the Petitioners rushed to court prematurely to stop the disciplinary proceedings and as at the time they moved the court there was nothing to show that their rights had been denied, violated, infringed, or threatened to warrant this courts intervention. The disciplinary process is provided for under the law which as pointed out earlier contains Constitutional safe guards and clearly recognize that the process must conform to the constitution.

On whether the case was filed to court prematurely, I stand guided by the decision in the case of **Francis Mbugua vs Commissioner of Police & 2 others**[24] where the court expressing agreement with the decision in the case of **Elory Kraneveld vs AG & 2 Others[25]** held:-

> *"Whereas every person has right to the protection of the Constitution, it is not I all cases that orders as prayed should be granted. I say so because the petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157 (4) of the Constitution. Further, whether or not the investigations leading to the petitioner's arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature."*

The above passage offers useful guidance to this case. The petitioners had only been summoned to take a plea which they claim to have declined even though the documents submitted by the respondents suggest otherwise. They rushed to court alleging breach of their fundamental rights but they have failed to particularize the breach or give details. They allege that the particulars of the offence were not given to them even though they have attached to their application some documents which suggest otherwise. In am not satisfied that the Petitioners were not informed of the offence as they want the court to believe. My position in this regard is premised on nothing else but the affidavits sworn by the Petitioners. Each one of them states on oath on the said affidavits that:-

> *"That acting Inspector Otieno purported to read to me a charge of striking fellow police officer by the name Stella Rutto apparently at 2000 hrs at Nyeri Polce Station"*

Notwithstanding the choice of the word purported, in my clear understanding is that they were informed the nature of the offence, and again my so holding is supported by their next statement in their affidavits that it *"I refused to take a plea."* They all state that they refused to take plea, but the first Respondents version is in my view more credible as explained below and is supported by copies of the proceedings.

The two authorities cited by the petitioners counsel are totally distinguishable from the facts of the present case. In fact the cases largely support the respondent's case. For example reliance was made on the case of **Sgt Joshua Muindi Maingi vs The National Police Service Commission and 2 others**[26] where the Petitioner had been charged with a criminal offence and was acquitted by the court and the respondents in the said case sought to initiate disciplinary proceedings under Section **88 (1), (2), (3)** and **(4)** notwithstanding the fact that the petitioner had been cleared by the court. Indeed sub-section **(4)** provides that the commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal. The said sub-section was

in my view correctly declared unconstitutional in the said case owing to the acquittal of the petitioner of the same charges by a court of law. Also, the Anti-Corruption and Economic Crimes Act under which the Petitioner in the said case was charged provides for reinstatement of an employee in case of acquittal by the court. Thus, the facts of the said case are totally different from the present petition.

The petitioners have also sought to rely on the case of **Geoffrey Mworia vs. Water Resources Management Authority.**[27] Again I find the principles stated in the said decision unhelpful to the Petitioners case. The principles were enunciated as follows:-

> *"The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process"*

The conditions upon which a court can intervene as set out above are lacking in the present case. The disciplinary process is well spelt out in the Act and the Act recognizes that the process must conform to the constitution. As at the time the Petitioners moved to court nothing had been done in contravention of the law or the Constitution. More important still, they have not proved any threat to their rights. The process in provided for under the law governing their employment. The process was being conducted by the persons empowered under the law. No threat or allegation of breach of natural justice has been alleged or proved. More important still, the petitioners were impatient to exhaust the internal dispute resolution procedure. Section **87 (5)** provides that the authority may intervene where the process is inordinately delayed or manifestly unreasonable while an appellate process lies under Section **88 (5).**

I have carefully examined the petition and the submissions of their advocates and the only clear complaint is that the Petitioners were apprehensive that the disciplinary process would be not be fair, though they offer no reasons to back their fear. As I found out earlier, the disciplinary process is provided for under the law and that there is evidence that there was a complaint against them and they were informed of the nature of the complaint as evidenced by the documents annexed to their affidavits, the Petition lacks specific details of the nature of the rights that have been denied, violated, infringed or threatened. I find that the allegations of violation of Constitutional rights are too generalized. A court can only resolve a violation or infringement that has been clearly pleaded or stated. This was the holding of the court in the case of **John Kimanu vs Town Clerk, Kangema**[28] where the court citing **SWN vs GMK**[29] made the following observations:-

> *"Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is twofold. First the respondent must be I a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to men but specific rights defined and protected by the constitution. It is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the Constitution that has been abridged"*

In the **Ugandan case of Charles Onyango Obbo & another vs A.G**,[30] it was held that:-

> *"In other commonwealth jurisdictions who have operated written constitutions for much longer periods than ours, it has been determined that it is the duty of a person who complains that his rights and freedoms have been violated to prove that indeed the state or any other authority has taken an action under the authority of a law or that there is an act or omission by the state which*

> *has infringed on any of the rights or freedoms of the petitioner enshrined in the constitution. Once that is established, it is the duty of the state or that other authority which seeks to restrict a guaranteed right or freedom to prove that the restriction is necessary within limits prescribed by the constitution."*

In the present petition the Petitioners have failed to discharge the burden of prove to the required standard. I find that Petition before me to be rather speculative and in a way unclear on manner in which the alleged rights have been violated or threatened. The Petitioners did not allege due process was not followed when they appeared for plea. In fact in their own words they sought time to bring a police representative and it was granted. Then they moved to court, a move that I have found to have been premature.

There is no material before the court to show why and how they will suffer prejudice if they are subjected to the proceedings. The fact that the proceedings have a consequence under Section **89 (1)** is not a ground for the Petitioners to be excluded from the process. What is important is that due process must be followed and there is nothing to show that it will not be followed.

I have carefully considered the petitioners case and the relevant law and I find that their rights have not been violated or threatened. The upshot is the answer to issue number two is in the negative.

On the third issue, namely; whether the petitioners are entitled to the reliefs sought in the petition, having answered issues one and two above in the negative, I find that prayers one and two of the Petition totally unsupported by the law and the material before the court conclude that the said prayers cannot be granted.

As for prayer 2, namely *'a declaration that the Petitioners are entitled to a fair trial as enshrined under Article **50** of the Constitution pursuant to the allegations that they assaulted one Stella Rutto on or about the 3rd day of March 2015,* I concur that this is indeed their constitutionally guaranteed right I find no difficulty in granting the said prayer.

Accordingly I make the following orders:-

i. Prayers **1** and **3** of the Petitioners Petition are hereby dismissed.
ii. Prayer **2** of the Petition is hereby allowed.
iii. The Petitioners shall bear the costs of this Petition.

Orders accordingly

Dated at Nyeri this **29th** day of **September** 2015

**John M. Mativo**

**Judge**

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[1] Cap 21, Laws of Kenya

[2] Chapter 84 Laws of Kenya

[3] Cap 63, Laws of Kenya

[4] Cap 63, Laws of Kenya

[5] Petition No. 2 of 2015, High Court of Kenya, Employment & Labour Relations, Nyeri

[6] Constitutional Petition No. 4 of 2015, Nyeri

[7] Chapter 84, Laws of Kenya

[8] Petition No. 71 of 2013, Nairobi, Judgement delivered on 20.2.2015 by Lenaola J, Ngugi J & Majanja J.

[9] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[10] See Tinyefunza vs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[11] {1991} 20 SA 805, Cited in Petition no 71 of 2013, see note 7, supra

[12] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[13] {1979} 3 ALL ER 21

[14] Nairobi Criminal Application no. 701 0f 2001

[15] {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)

[16] Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[17] {1960} 554

[18] Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, Kansas Law Review, {1954} Vol 3 at page8-9

[19] Ibid page 9

[20] {1993} 3SCC 441

[21] Writ Petition (Civil) No. 210 of 2012

[22] A.R. Antually vs Nayak & Another {1988} 2 SCC 602

[23] See Article 1 of the Constitution of Kenya 2010

[24] Pet. No. 79 of 2012

[25] Pet No.153 of 2012

[26] Supra note 4

[27] Supra note 5

[28] NBI Pet. No. 1030 OF 2007

[29] {2012} eKLR

[30]High Court of Uganda, Constitutional Petition No. 15B of 1997, see Judgement of Twinomujuni JA