



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 10 of 2013

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF PROHIBITION**

AND

**IN THE MATTER OF: NATIONAL POLICE SERVICE ACT 2011 SECTION 88 (2) (9)
(ORDERLY PROCEEDING)**

AND

IN THE MATTER OF: FORCE STANDING ORDER PARAGRAPH 16 (IV) CAP 20

AND

**IN ACCORDANCE WITH ORDER 53 RULES 1, 2, 3 AND 4 OF THE CIVIL PROCEDURE
RULES**

AND

SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

REPUBLIC

-VERSUS-

**MINISTER FOR INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION.....1ST
RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2ND
RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION KALOENI.....3RD
RESPONDENT**

**DEPUTY OCPD S.P JOHN KIPYEGO.....4TH
RESPONDENT**

**OCS C.I. SAMUEL BII.....5TH
RESPONDENT**

AND

EX-PARTE

**CPL JAMES
MWITA.....APPLICANT**

RULING

INTRODUCTION

1. The Applicant who is a police driver of the rank of Corporal attached at Kaloleni police station of Kaloleni Division of Kilifi County seeks leave to commence judicial review proceedings to prohibit disciplinary Orderly Room proceedings against him initiated by the Deputy Officer Commanding Police Division, (OCPD) Kaloleni for offence against discipline allegedly for failure to obey a lawful command to drive the Deputy OCPD to a named destination. The Deputy OCPD then initiated disciplinary proceedings against the Applicant by causing him to be booked in the occurrence book with the offence of disobeying lawful command and later appointing the Officer Commanding Station (OCS) Mariakani, who is an officer under him, as the presiding officer of the Orderly Room proceedings. The Applicant is apprehensive that he will not be afforded a fair trial as the Deputy OCPD who is the complainant is also

the appointing authority of the presiding officer of the Orderly Room disciplinary proceeding and therefore also, according to the Applicant, in charge of the outcome of the entire disciplinary proceeding. Hence the application for leave to file an application for the judicial review order of prohibition against the Orderly Room proceeding.

APPLICATION

2. By chamber summons dated 12th February, 2013, the Applicant seeks leave of the court to commence judicial review proceedings and prays for two principal orders, as follows:

1. That the ex-parte Applicant James Mwita be granted leave to apply for a prohibitory order to bring to the High Court and prohibit the Chief Inspector Mr. Samuel Bii Officer Commanding Station – Mariakani, the Presiding Officer from carrying on Orderly Room proceedings scheduled to take place on 14th February, 2013.

2. That the grant of leave to apply for the aforesaid prohibiting order do operate as a stay of the said Orderly Room proceedings scheduled to take place on 14th February, 2013.

3. Pursuant to Order 53 Rule (1) (4) proviso of the Civil Procedure Rules, the application was heard *inter partes* on 14th February 2013, after a Replying Affidavit sworn by the Deputy Officer Commanding Police Division of Kaloleni sworn on the 13th February, 2013 was filed. Counsel for the parties, Mr. Waithera for the Applicant and Mr. Eredi for the Respondents, then made oral submissions and ruling was reserved for the 19th February, 2013.

4. The principal complaints by the Applicant are that:

(a) The Deputy OCPD by appointing an officer under his direct command in the Kaloleni Police Division to conduct the Orderly Room proceeding in which he is the Complainant is acting as a judge in his own cause and the Applicant cannot obtain a fair trial.

(b) The law as it stands requires that an Internal Affairs Unit be established under section 87 (1) of the National Police Service to deal with complaints against the police.

(c) The Applicant's right to choose a representative at the Orderly Room proceeding is curtailed by the appointment of the Chief Inspector OCS of Mariakani Police Station, Kaloleni Division as the only other officer of similar rank, as the Applicant is required to choose as representative, is the Chief Inspector OCS of Kaloleni, thus denying him choice of representative under section 89 (1) of the National Police Service Act, 2011.

(d) The Applicant is entitled to fair administrative action under Article 47 of the constitution.

5. For the Respondents, it was submitted that the Orderly Room Proceedings which had already commenced on 14th February, 2013 should not be stopped as there was no material before the court to show that the Applicant would not be afforded a fair trial in that:-

(a) Although the new Police Service Act established the Internal Affairs Unit, the same had not been established and disciplinary proceedings were still being conducted in accordance with the existing procedure under the police force standing orders.

(b) As the matter involves a disciplined force the proceedings must be dealt with urgently so that discipline in the force is upheld.

(c) The procedure by way of Orderly Room proceedings is fair as the Applicant will be represented by an officer of his own choice not necessarily from the Police Division; the parties will bring witnesses and the Presiding Officer's verdict is not final but only a recommendation.

6. Counsel for the Respondents also relied on the Replying Affidavit of the Deputy OCPD whose paragraphs 8 – 15 respond to the issue of fair trial as follows:-

“8. That I immediately initiated disciplinary proceedings as per the standing orders of the Police Service Act by instructing Senior Sergeant Katambuki who was present to book the incident in the occurrence book which is the required procedure in disciplinary cases.

9. I later wrote a signal to Chief Inspector Bii, the OCS Mariakani Police Station to be the Presiding Officer over the allegation of indiscipline of the Applicant.

10. I am in charge of discipline by virtue of being the Deputy OCPD as I am a gazetted officer at the Divisional level.

11. I am entitled to take disciplinary action immediately as and when the case occur regardless of whether I was the Complainant or not.

12. That action should be taken expeditiously.

13. That the Presiding Officer is supposed to notify the accused and convene a hearing so that both the accused and the Complainant can prepare for the hearing.

14. That the Applicant is given a right to be represented by an officer of the same rank as the Presiding Officer within the area of jurisdiction.

15. That it was imperative that the Orderly Room proceedings be presided over by the OCS Mariakani because his rank which should be an Inspector or Chief Inspector qualifies him and not because he is my friend.”

THE LAW

7. The duty of the court at the stage of leave to file judicial review proceedings is to determine whether the Applicant's case raises an arguable case [See **Meixner & Another v. Attorney General (2005) 2 KLR 189** and **H.W.R. Wade and C.F. Forsyth Administrative Law, 9th Edition (2004) at page 656**].

8. I have considered the Law applicable to the Applicant's situation as follows: -

(a) Under section 88 (1) of the National Police Service Act, 2011 every police officer is subject to the law and regulations from time to time in force relating to the Service.

(b) Although the Internal Affairs Unit has not been operational under the new Act of 2011, the procedure existing under the police force standing orders is saved by section 131 (b) of the Act in terms that:

“131 (b) Any rule, regulation or standing order or other administrative measure taken or issued under the Police Act or the Administrative Police Act in force immediately before the commencement of this Act, shall be deemed to have been made and issued under this Act.”

Accordingly, disciplinary procedure under the force standing orders is valid.

(c) Under section 89 (3) of the National Police Service Act, 2011 on disciplinary proceedings against police officer who commits an offence against discipline as the Applicant has been charged: -

“All disciplinary proceedings under this part shall be in accordance with service internal disciplinary procedures approved by the (National Police service) Commission and shall comply with Article 47 of the Constitution.”

(d) Article 47 (1) of the Constitution provides that **“Every person has the right to fair administrative**

action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

(e) Under section 89 (4) of the National Police Service Act, 2011:-

“A police officer facing disciplinary action may be accompanied by another police officer of his choice for assistance or support.”

Under this provision, the Applicant may choose a police officer outside the Kaloleni police Division and of any rank higher or lower than that of the Presiding Officer.

(f) In accordance with the Police Standing Orders, Revised Edition (2001) (very kindly supplied by the Deputy OCPD through his counsel herein) the power to deal with offences against discipline is provided for under section 15 of Cap 20 of the Standing Orders as follows:

“Subject to and in accordance with the provisions of Appendix 20A to this chapter any offence against discipline may be inquired with, and if the officer so empowered to inquire is satisfied that the offence has been proved, he/she may award against the officer one of the punishments he/she is empowered to award as prescribed in that appendix.”

Under Appendix 20A the officer empowered to inquire with offence and/or to award punishment in case of an officer below the rank of Inspector, as the Applicant herein, is **“Officer of or above the rank of Inspector”**.

FINDINGS

9. Applying the legal provisions set out above on the facts of the case as presented by the Applicant and Deputy OCPD (3rd Respondent), I find that the Applicant has demonstrated an arguable case because there is likelihood of breach of the right to fair hearing pursuant to the rules of natural justice and Article 47 of the Constitution in the case where the Deputy OCPD is the complainant and the appointing authority of the Chief Inspector ranked Presiding Officer to the Applicant's disciplinary proceedings.

Without casting aspersion on the integrity of the Presiding Officer and/or the Deputy OCPD who implicitly admits that the former is his friend, the rule of natural justice that a person should not be a judge in his own cause would to a reasonable man appear to have been breached, or likely to be breached. The principle that justice must be done and be seen to be done applies to this situation.

10.I, however, agree that disciplinary matters within a disciplined force such as the Police and the Armed Forces should be dealt with expeditiously to contain and halt cases of indiscipline which would negatively impact the essential service of the Force.

ORDERS

11. Accordingly, while granting leave to the Applicant to commence judicial review proceedings as prayed and directing that the grant of leave do operate as a stay of the Orderly Room proceedings before the OCS, Mariakani which commenced on the 14th of February, 2013 and adjourned to the 19th February 2013, I must grant liberty on the part of the Respondents to initiate fresh disciplinary proceedings against the Applicant before an empowered officer in terms of section 15 of the Police Force Standing Orders on Discipline and Appendix 20 A thereof.

12. For avoidance of doubt, the challenge before the court and the order for leave granted relate only to the prohibition of the proceedings before the OCS Mariakani as prayed in the application. It does not bar the appointment by the OCPD for the Kaloleni Police Division, or any other gazetted officer, of another qualified Presiding Officer of the rank prescribed under the Standing Orders in a manner that gives the Applicant ample choice of representation by a suitable police officer from within or outside the police Division. Accordingly, the disciplinary process against the Applicant may go on before a differently constituted Presiding Officer in accordance with the law.

13.Costs in the cause.

Dated and delivered this 19th February, 2013.

**EDWARD MURIITHI
JUDGE**

In the presence of:

Mr. Waithera for Applicant

Mr. Eredi for the Respondent

Miss Linda Osundwa - Court Clerk