



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL CAUSE 1365 OF 2004**

**IN THE MATTER OF: AN APPLICATION TO APPLY FOR ORDERS OF CERTIORARI,  
PROHIBITION AND MANDAMUS**

**-AND-**

**IN THE MATTER: CONSTITUTION OF KENYA**

**-AND-**

**IN THE MATTER OF THE SERVICE COMMISSIONS ACT**

**-AND-**

**IN THE MATTER OF THE POLICE ACT**

**-AND-**

**IN THE MATTER OF: PENSIONS ACT**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**JULIUS ODOL NOBERTS.....1<sup>ST</sup>**  
**APPLICANT**  
**PETER JOSEPH KIMUNDI.....2<sup>ND</sup>**  
**APPLICANT**  
**GEORGE OSEWE WANGA.....3<sup>RD</sup>**  
**APPLICANT**  
**TOBIAS MICHAEL SENYELI.....4<sup>TH</sup>**  
**APPLICANT**  
**STEPHEN K. ARAP SOI.....5<sup>TH</sup>**  
**APPLICANT**  
**JOHNSON KORIR.....6<sup>TH</sup>**  
**APPLICANT**  
**FREDRICK KIPKEMBOI ROTICH.....7<sup>TH</sup>**  
**APPLICANT**  
**TITUS KARURI NDUNGU.....8<sup>TH</sup>**  
**APPLICANT**

<b>RONALD M. MBENGELI.....</b>	<b>9<sup>TH</sup></b>
<b>APPLICANT</b>	
<b>DAVID BETT.....</b>	<b>10<sup>TH</sup></b>
<b>APPLICANT</b>	
<b>JOHN MUEMA NZAU.....</b>	<b>11<sup>TH</sup></b>
<b>APPLICANT</b>	
<b>DUNCAN K. MUEKE.....</b>	<b>12<sup>TH</sup></b>
<b>APPLICANT</b>	

**VERSUS**

<b>PUBLIC SERVICE COMMISSION OF KENYA.....</b>	<b>1<sup>ST</sup></b>
<b>RESPONDENT</b>	
<b>THE COMMISSIONER OF POLICE.....</b>	<b>2<sup>ND</sup></b>
<b>RESPONDENT</b>	
<b>THE HON. ATTORNEY GENERAL.....</b>	<b>3<sup>RD</sup></b>
<b>RESPONDENT</b>	

**JUDGMENT**

The applicants in this application being **MISCELLANEOUS CIVIL CAUSE NO. 1365 OF 2004** filed this application on 21<sup>st</sup> October 2004. The Applicants are:-

1. Julius Odol Roberts
2. Peter Joseph Kimundi
3. George Osewe Wanga
4. Tobias Michael Senyeli
5. Stephen K. Arap Soi
6. Johnson Korir
7. Fredrick Kipkemboi Rotich
8. Titus Karuri Ndungu
9. Ronald M. Mbengeli
10. David Bett
11. John Muema Nzau
12. Duncan K. Mueke.

The said application in the notice of motion dated 21<sup>st</sup> October, 2004 sought the following orders:-

- 1. This Hon. Court be pleased to issue an order of Certiorari to remove into the High Court and quash the decision of the 1<sup>st</sup> Respondent dated 5<sup>th</sup> May, 2004 retiring the Applicants from the Police Force and/or the decision of the 1<sup>st</sup> Respondent ratifying approving and/or endorsing a decision to retire the Applicants taken by other persons.**

2. **This Hon. Court be pleased to issue an order of Mandamus, compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to or reinstate the Applicants in the Police Force as Gazetted Officers.**
3. **This Hon. Court be pleased to issue an order of Mandamus, compelling the Respondents to retain the Applicants in the Police Force as Gazetted Officers until retired or their appointments otherwise terminated in accordance with the law.**
4. **This Hon. Court be pleased to issue an order of Prohibition, prohibiting the Respondents from retiring or otherwise terminating the appointments of the Applicants in the future as Gazetted Officers of the Kenya Police Force otherwise than in accordance with the law.**
5. **The costs of this application be provided for”**

Before filing the said Notice of Motion, the Applicants had filed an application for leave to file the Notice of Motion seeking judicial review orders. I granted the ex parte leave on 15<sup>th</sup> October, 2004.

In their statutory statement which is the principle pleading for purposes of the Judicial review order, the Applicants set out the facts relied upon as follows:-

1. On or about 5<sup>th</sup> May, 2004, the 2<sup>nd</sup> Respondent convened a press conference whereat he announced to the electronic and print media that thirty seven (37) Gazetted Police Officers, amongst them the Applicants, had been retired to facilitate reorganization of the Police Force.
2. The 2<sup>nd</sup> Respondent was quoted in the Daily Nation of Thursday, May 6, 2004 as stating in his three (3) paragraph statement to the press as follows:-

**“This reorganization is driven by the desire to promote discipline, efficiency and inculcate professional work ethics in the police, measures that will translate into quality service delivery to our people...”**

**I wish to commend the retiring officers for their dedicated and patriotic service to the nation and urge them to be good ambassadors of the police in their future undertakings...**

**Brig. Ali expressed his commitment to transforming the Kenya Police into modern and efficient force that is responsible to the needs of the citizens in accordance with the Government reforms Strategy”**

3. The first time the Applicants heard of their retirement was over the electronic media in the evening of 5<sup>th</sup> May, 2004 and subsequently read in the print media of the 6<sup>th</sup> May, 2004 that they had been retired.
4. On diverse dates after the 6<sup>th</sup> May, 2004 the Applicants received letters dated 6<sup>th</sup> May, 2004 which were identical in contents referenced “retirement on re-organization of Government, abolition of office” The said letters signed for the Commissioner of Police purported to convey a decision of the 1<sup>st</sup> respondent. The applicants do not know whether they were retired on grounds of re-organization of Government and/or abolition of office.
5. On or about 5<sup>th</sup> May, 2004, the 1<sup>st</sup> Respondent wrote to the 2<sup>nd</sup> Respondent conveying a decision of the 1<sup>st</sup> Respondent, that thirty seven (37) Gazetted Officers, amongst them the Applicants, be retired from the Public Service or reorganization of Government/abolition of office with effect from 5<sup>th</sup> May, 2004.
6. The 1<sup>st</sup> Respondent acted in violation of the Constitution and the law by being prompted to act under instructions from the office of the president through its letter Ref.No.OP/PA.1/32/VI of 3<sup>rd</sup> May, 2004.
7. The 1<sup>st</sup> respondent simply approved and/or endorsed a decision taken by persons other than the body

vested with the power to appoint and terminate the services of Gazetted Officers.

8. Members of Parliament have raised in the National Assembly on not less than seven (7) occasions, the manner in which the 1<sup>st</sup> Respondent complied with all legal provisions governing such matters or whether it simply rubber stamped decisions taken by other persons. Regrettably, the 1<sup>st</sup> Respondent has taken refuge under the cover of the Constitution of Kenya which it is unfortunately busy breaching.

9. At all material times, the power to appoint and remove the Applicants from office of a Gazetted Officer of the Kenya Police Force was vested in the 1<sup>st</sup> Respondent by virtue of the provisions of section 107 (1) of the Constitution of Kenya.

10. This Hon. Court has the power and constitutional authority to entertain questions whether the 1<sup>st</sup> Respondent has exercised its functions in accordance with the Constitution of Kenya or any other law as expressly provided for by Section 123(8) of the Constitution of Kenya.

11. The 1<sup>st</sup> Respondent has no power or legal authority to abolish any office in the Public Service, reorganize the Government and/or to terminate services purportedly for the purposes of reorganizing government.

12. The Applicants handed over the very same offices to other Gazetted Officers to man them. Accordingly, none of the offices held by the Applicants were abolished as a matter of fact. The ratio of Police officers to citizens is presently 1:1,000 far below the ratio of accepted International Standards. Indeed the police force strategic plans are to reduce the ratio to 1:650. Reorganization of the Police Force therefore calls for police officers not a reduction thereof.

13. The applicants who joined the police force as police constables rose through the ranks to become Gazetted Police Officers who did not have pending disciplinary proceedings and they had served lengthy durations without any adverse reports regarding their conduct or discharge of duty being made in their annual performance, evaluation, assessment and appraisal forms. The Applicants rendered exemplary service and in the words of the 2<sup>nd</sup> Respondent ‘ **“their integrity, efficiency and effectiveness came about as a result of devotion to duty, commitment and interests in police work”**’

14. The Applicants had not reached the mandatory retirement age nor had they opted for voluntary early retirement.

15. The Applicants retirement was done capriciously, whimsically and in a degrading, humiliating, high handed and unreasonable manner motivated by unreasonable consideration such as ethnicity, victimization, politics, malice, sheer display of raw power and abuse of authority calculated to send shock and awe throughout the Police Force. The mode of mass retirement and the manner in which it was communicated to the affected officers was callous to the extreme and demonstrates a good measure of sadism. The speed with which the 1<sup>st</sup> Respondent dealt with the issue is most suspicious and smacks of maladministration.

16. The decision of the 1<sup>st</sup> Respondent should be vitiated for its failure to accord the Applicants natural justice as envisaged and contemplated by all the governing laws.

17. Immediately after announcing through the electronic and print media, the retirement of the Applicants, their salaries were stopped and those already transmitted to banks recalled in fragrant disregard of the provisions of the Pensions Act.

18. The Applicants have not been paid their pension, gratuity or other allowances payable under the pension legislation and in total disregard of Section 16A of the Pensions Act, their services have not been retained until the payment in full of the gratuity payable to them.

19. The 1<sup>st</sup> Respondent had, pursuant to Section 13 of the Service Commission Act, published the Public

Service Commission (Police Force) Regulation, hereinafter referred to as the P.S.C. Police Regulations to govern *inter alia* the appointments, confirmations, promotions and termination of employment between, amongst other persons, Gazetted Officers of the Kenya Police Force and the 1<sup>st</sup> Respondent.

20. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not comply with the Regulation 18 of the P.S.C. Police Regulations governing the procedure of how termination of appointment of Gazetted Officers is to be carried out in the event of abolition of Gazetted Officers.

21. The P.S.C. Police Regulations expressly provide that Gazetted Officers likely to be adversely affected by any decision to be taken by the 1<sup>st</sup> Respondent or any recommendations to be made by the 2<sup>nd</sup> Respondents must be afforded an opportunity to be heard and all the rights auxiliary to natural justice.

22. The P.S.C. Police Regulations do not envisage or contemplate Officers of the Kenya Police Force being retired through press conferences, the electronic and print media. They provide for a fair, humane, civilized and dignified method of affording affected officers the opportunity to be heard before any fundamental decision is taken and a procedure of notification of intended retirement and/or dismissal from Public Service.

23. The applicants do not have a right of appeal against the decision of the 1<sup>st</sup> Respondent given that the right of appeal is restricted to disciplinary proceedings by regulation 36 of the P.S.C. Police regulations.

The reliefs sought have already been set out herein above. The Applicants filed verifying Affidavits respectively.

The Respondents filed a Replying Affidavit in response sworn by Peter L.N. Kiilu. The Senior Deputy Secretary of the Public Service Commission on 17<sup>th</sup> February, 2005 and on in the said Affidavit, he deposed as follows:-

**“1. That I am male adult of sound mind and the Senior Secretary of the Public Service Commission hence competent to swear this affidavit in opposition to the Notice of motion in the matter with due authority from the Commission to do so.**

**2. That I am aware of the decision of the Commission relating the Applicant and the matters in issue in this case.**

**3. That the Public Service Commission retired the applicants on the ground that the police department was under re-organization for better efficiency and economy necessitating the retirement of the applicants.**

**4. That in retiring the applicants the Public Service Commission acted independently as mandated in Section 106(12) of the Constitution of the Republic and in accordance with its constitutional powers as provided for under Section 107(1) of the Constitution. At all material times the Commission acted in accordance with the law and the process initiating action emanated from the police department. This is evidenced by the letter of 5<sup>th</sup> May 2004 Ref. No. PSC3/37/9 which was produced by the applicants and which was directly addressed to the Commissioner of Police.**

**5. That the parliamentary proceedings produced by the applicants shows that the parliament has conclusively decided the issue raised before it in this matter so that under the doctrine of separation of powers these proceedings” before the court are an abuse of the due process of the law and constitutionalism. Further I produce marked “PLNKI” the**

**true copy of the letter by the Commission in response to the parliamentary proceedings and whose contents the Parliament agreed with as evidenced by the letter ref.No.NA/2004/DC-G/146 dated 24<sup>th</sup> June, 2004.**

6. That in retiring officers on the ground of re-organization of a department for better efficiency and economy, age of the officers is an immaterial consideration.

7. That the decision to retire the officers was grounded only on re-organization for better efficiency and economy in the police department and not any other consideration as alleged by the applicants.

8. That flowing from the Commission's decision the applicants have applied for and received their pension's benefits in accordance with laid down procedures. I produce marked "PLNK2" the true copy of the schedule of pension payment by the Pensions Department as at 7<sup>th</sup> December 2004. The officers have been paid normal and additional pension as prescribed in law.

9. That the applicants cannot justify payment of salary for no services rendered and after the decision retiring them duly acknowledged by the applicants.

10. That the Commission had inherent powers to entertain any complaint in respect of the exercise of its constitutional powers. Up to the filing of this case none of the applicants had filed a complaint with the Commission in respect of the retirement decision and no appeal was made to the Commission.

11. That the applicants were retired on re-organization of the police department and regulation 18 referred to by the Applicants which deals with retirement on abolition of officers is not applicable in this case. In addition, all officers are retained in public service in public interests and in best interests of the service.

12. That the decision to retire the applicants was conveyed by the Commission through the Commissioner of Police who is the head of the police department.

13. That I have been advised by the Commission's lawyers in this matter and I believe it to be true that:-

(a) Mandamus may not issue as there was no demand and the Commission has not refused to perform or exercise any of its constitutional powers and duties;

(b) Certiorari should not issue as the challenged decision has not been produced or the prayer is in respect of unascertainable Decision that has not been produced as required in law;

(c) Mandamus is misplaced because it is sought against all the respondents and yet not all the respondents have a legal obligation to perform what is sought against them;

(d) Prohibition is misplaced because the Commission does not intend to act unlawfully against the applicants; and

(e) Certiorari and mandamus cannot be sought in respect of a single proceeding.

14. That in the circumstances and based on the matters I have stated in this affidavit, it is proper that the Honourable Court dismisses this case preliminarily....."

The Applicants were retired from the Public Service together with 25 others Gazetted Officers. Some of these officers being aggrieved similarly filed their own judicial review application. These were Miscellaneous Civil Application Case No. 1457 of 2004 in which the Applicants were:-

1. Nicodemus Were Diffu
2. Charles Ngwono Ontita

3. Jonathan Kipkirui Chelule
4. Joel Kiprugut Maru
5. Peter Mwangi Kimani
6. Geoffrey Murage Miigwa
7. Sevelino G.Kubai
8. Reuben Wambua Kauthi
9. David Kipyegon Kiprotich
10. Barnaeas Chepsiror Muge
11. Victor Mathenge Wagura
12. Ezra Ouma
13. Charles Otieno Onyuka
14. George Barasa Mukhwana

**AND**

**Miscellaneous Civil Case No. 1492 of 2004** in which the Applicants are:-

1. Charles Nguli Mukungi
2. Jackson Wachira Githambo

All the 28 Applicants are represented by the firm of Kilukumi and Company Advocates.

On the 16<sup>th</sup> August, 2005 there was an order of consolidation of the three applications to be heard together. This order was made by consent of counsel for the Applicants, Mr. Kilukumi and Mrs. Kajwang from the Attorney General for the Respondents.

The hearing commenced on 23<sup>rd</sup> May, 2005 and was heard on 23<sup>rd</sup> May, 2005, 20<sup>th</sup> July, 2005 and 3<sup>rd</sup> August, 2005. The matter could not proceed on 3<sup>rd</sup> August 2005 as Mr. Kilukumi was not well. There were several subsequent adjournments.

I was then transferred to the High Court, at Eldoret in early 2006 before the matter was concluded. The files were subsequently sent to Eldoret and the matter mentioned before me on 24<sup>th</sup> January 2007. A mention date was given for 28<sup>th</sup> February 2007 as counsel for the Applicant was not present. On 28.02.2007, none of the counsel attended court and I gave another mention for 16<sup>th</sup> March, 2007. On 16<sup>th</sup> March, 2007 there is no record in the file but counsel for the Applicants attended court on 19.3.2007 and took a hearing date for 27<sup>th</sup> April, 2007.

Both counsels were present on 27<sup>th</sup> April, 2007 but it was realized that the original court file in respect of **Misc. Application No. 1365 of 2005** had not been brought to Eldoret and had been left in Nairobi. The other two were available. The pilot files in which the proceedings were being recorded were **Misc. Application No. 1365 of 2004**.

As counsel had travelled all the way from Nairobi and a lot of time had been lost since I was transferred

to Eldoret, it was agreed that the hearing should continue and the recording be done **in Misc. Application No. 1492 of 2004** before a date for judgment was given.

The said file was not found immediately and was only received at Eldoret on 16<sup>th</sup> November 2007 just before the Christmas vacation and Elections of 2007.

Counsel made oral submissions which are on record. At the end of his submissions counsel for the Application withdrew prayers 2, 3 and 4 of the Application. This means that the prayers or remedies which remain and are sought in the application are:-

- 1. An overview of Certiorari to remove into the High Court and quash the decision of the 1<sup>st</sup> Respondent dated 5<sup>th</sup> May, 2004 retiring the Applicants from the police force and/or the decision of the 1<sup>st</sup> Respondent ratifying, approving and/or endorsing a decision to retire the Applicants taken by other persons.**
- 2. The costs of the application be provided for.**

The letter and /or decision complained of and dated 5<sup>th</sup> May, 2004 was written by the Secretary, Public Service Commission of Kenya Mr. S.S. Boit. It read as follows:-

*“5<sup>th</sup> May, 2004*

*The Commissioner of Police*

*Police Headquarters*

**NAIROBI**

**RETIREMENT FROM THIS SERVICE ON RE-ORGANIZATION OF GOVERNMENT/ABOLITION OF OFFICE , OFFICE OF THE PRESIDENT (POLICE DEPARTMENT)**

*I am directed to convey the decision of the Public Service Commission that:-*

- 1. Mr. Zebedeo Onguti; No.212370, Senior Deputy Commissioner of Police II (Job Group PG/12),*
- 2. Mr. Tobias Senyeli, No. 210800.*
- 3. Mr. Nixon Boit Sigowa, No.215636*
- 4. Mr. George O. Wanga, No.212047; and*
- 5. Mr. Peter Kimundi, No.209712, all Deputy Commissioners of Police (Job Group PG /11).*
- 6. Mr. Justus N. Nyaga, No.211552.*
- 7. Mr. Stanley T. Ndirangu, No.212095*
- 8. Mr. Daniel Kimutai Serem, No.214100; and*
- 9. Mr. Kimutai Soi, Mo.213565, all Senior Assistant Commissioners of Police (Job Group PG/10).*

10. *Mr. Nicodemus Diffu, No.214004, Acting Senior Assistant Commissioner of Police (Job Group PG/10).*
11. *Mr. Johnson Kibor Korir, No.214803,*
12. *Mr. Fredrick Rotich, No.215372; and*
13. *Mr. Wilfred Kariithi, No.211382, all Assistant Commisioenrs of Police (Job Group PG/9).*
14. *Mr. Peter Ohanya No.214433, Acting Assistant Commissioner of Police (Job Group PG/9).*
15. *Mr. Peter Shitindo, No. 213843.*
16. *Mr. Daniel Cheptoo, No.216323,*
17. *Mr. David Bett, No.217437,*
18. *Mr. Jonathan Chelule, No.215393*
19. *Mr. Reuben Katithi, No.217211.*
20. *Mr. David Kipyegon, No.212852.*
21. *Mr. Joel Maru, No.215418.*
22. *Mr. Wilfred Matutu, No.214099,*
23. *Mr. Charles Mukungi No. 213763.*
24. *Mr. John Momanyi, No. 215357.*
25. *Mr. Joel Langat, No.215007.*
26. *Mr. Charles Ontita, No.215727.*
27. *Mr. Christopher Magut, No.....*
28. *Mr. Titus Kiruri Ndungu, No.218060*
29. *Mr. Joseph Mutuku Munyao, No.214101.*
30. *Mr. Julius Oduol, No.217788.*
31. *Mr. Ronald Mbegeli, No.217922*
32. *Mr. Sevelino Kubai, No.217408.*
33. *Mr. Geoffrey Miigwa, No.212388.*
34. *Mr. Vitalis Bwowa Aula, No.215337.*

35. Mr. Mwangi Kimani, No.214210; and

36. Mr. Mwenia Nzau, No. 214212, all Senior Superintendents of Police (Job Group PG/8) and

37. Mr. Dancan Mwebe, No.217104, Acting Superintendent of Police (Job Group PG/7).

All in the Office of the President (Police department) be retired from the Service on Re-organization of Government/Abolition of Office w.e.f. 5.5.2004.

Please take the necessary action accordingly.

S.S. BOIT, EBS

SECRETARY

**PUBLIC SERVICE COMMISSION OF KENYA”**

The applicants were aggrieved by this decision hence the applications for judicial review orders.

I have carefully considered the applications by way of Notice of Motion, the Statement, the respective Verifying Affidavits together with annexures, the Replying Affidavits and the submissions by Counsel.

The questions for determination by this court in my opinion are:-

1. Whether the applicants are Gazetted Officers of the Kenya Police Force as on 5<sup>th</sup> May, 2004.
2. Who has the power to appoint and remove the Applicants from the said office(s) if they are of such position and rank?
3. How were the Applicants were removed from their employment or office? Were they retired from service on re-organization of Government or their offices abolished?
4. If they were retired, was such retirement in accordance with the law?
5. If their offices were abolished were such abolition of office in accordance with the law and did it have the effect of removing the applicants from office or terminating their employment?
6. Were the Applicants to be given notice of their termination of employment and accorded natural justice as envisaged and contemplated by any governing laws?
7. Whether the Applicants are entitled to an order of certiorari.
8. Who is to pay the costs of the legal proceedings?

I will endeavor to answer each question in seriatim:-

**1. Whether the Applicants are Gazetted Officers of the Kenya Police Force as on 5<sup>th</sup> May 2004.**

A “Gazetted Officer” in the Kenya Police Force under **Section 2 of the Police Act** means a Police Officer holding one of the ranks specified in Part 1 of the First Schedule in the Police Act, Chapter 8 of the Laws of Kenya. The Public Service Commission. (Police Force) Regulations refer to the said meaning by reference. In the First Schedule the Ranks of the Force in order of Seriatim are:-

**PART 1**

Gezatted Officers;

Commissioner.  
Deputy Commissioner.  
Assistant Commissioner,  
Senior Superintendent.  
Superintendent.

## **PART II**

Inspectorate  
Chief Inspector  
Inspector,  
Cadet Inspector,

## **PART III**

Subordinate Officers:

Senior Sergeant.  
Sergeant.  
Corporal  
Constable.

According to the letter of 5<sup>th</sup> May, 2004 all the named officers are said to be gazetted officers. However during submission, Counsel for the Applicants stated that six (6) of them were from the Inspectorate. Since there is no dispute that the Applicants' employment could only be terminated by the Public Service Commission, the law applicable to all of them is the same.

**Sections 107 and 108** of the Constitution provide for the appointment and removal of members of the Kenya Police Force. **Section 107** provides as follows:-

**“107 (1) subject to this Constitution, the power to appoint persons to hold or act in officers in the public service and in the service of Local authorities (including the power to confirm appointments of the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall vest in the public service:.....”**

**Section 108** deals specifically with the members of the Kenya Police and which is applicable in this case. It provides, inter alia: -

**“108 (1) the power to appoint a person to hold or act in the offices of the Commissioner of Police shall vest in the President.**

**(2) The power to appoint persons to hold or act in the officers in the Kenya Police Force (except the officer of Commissioner of Police), including the power to confirm appointments, the power to exercise disciplinary control over person holding or acting, in those offices and the power to remove those persons from office shall vest-**

**(a) In the case of offices of or above the rank of Assistant Inspector, or such rank other than the rank of Assistants Inspector as may be specified for the purposes of this Section by or under an Act of Parliament, in the Public Service Commission.**

**(b) In the case of offices below the rank of Assistant Inspector, or such other rank as may be specified as aforesaid, in the Commissioner of Police.....”**

As the Applicants herein were either Gazetted Officers or in the Inspectorate of the rank of Chief Inspector and Inspector (Above Assistant Inspector), then they could only be removed from office by the

Public Service Commission in accordance with the law and procedures set out in the Constitution and the Service Commission Act, Chapter 185 of the Laws of Kenya.

**3. How were the Applicants removed from their employment of office? Were they retired from service on re-organization or were their offices abolished?**

The heading of the letter dated 5<sup>th</sup> May, 2004 was headed.

**“RETIREMENT FROM THE SERVICE ON RE-ORGANIZATION OF GOVERNMENT/  
ABOLITION OF OFFICE ...”**

I am directed to convey the decision of the Public Service Commission that:-

1. Mr. Zebedeo Onguti; No.212370, Senior Deputy Commissioner of Police II (Job Group PG/12),
2. Mr. Tobias Senyeli, No. 210800.
3. Mr. Nixon Boit Sigowa, No.215636
4. Mr. George O. Wanga, No.212047; and
5. Mr. Peter Kimundi, No.209712, all Deputy Commissioners of Police (Job Group PG /11).
6. Mr. Justus N. Nyaga, No.211552.
7. Mr. Stanley T. Ndirangu, No.212095
8. Mr. Daniel Kimutai Serem, No.214100; and
9. Mr. Kimutai Soi, Mo.213565, all Senior Assistant Commissioners of Police (Job Group PG/10).
10. Mr. Nicodemus Diffu, No.214004, Acting Senior Assistant Commissioner of Police (Job Group PG/10).
11. Mr. Johnson Kibor Korir, No.214803,
12. Mr. Fredrick Rotich, No.215372; and
13. Mr. Wilfred Kariithi, No.211382, all Assistant Commisioenrs of Police (Job Group PG/9).
14. Mr. Peter Ohanya No.214433, Acting Assistant Commissioner of Police (Job Group PG/9).
15. Mr. Peter Shitindo, No. 213843.
16. Mr. Daniel Cheptoo, No.216323,
17. Mr. David Bett, No.217437,

18. Mr. Jonathan Chelule, No.215393
19. Mr. Reuben Katithi, No.217211.
20. Mr. David Kipyegon, No.212852.
- 21 .Mr. Joel Maru, No.215418.
22. Mr. Wilfred Matutu, No.214099,
23. Mr. Charles Mukungi No. 213763.
24. Mr. John Momanyi, No. 215357.
25. Mr. Joel Langat, No.215007.
26. Mr. Charles Ontita, No.215727.
27. Mr. Christopher Magut, No.....
28. Mr. Titus Kiruri Ndungu, No.218060
29. Mr. Joseph Mutuku Munyao, No.214101.
- 30 .Mr. Julius Oduol, No.217788.
31. Mr. Ronald Mbegeli, No.217922
32. Mr. Sevelino Kubai, No.217408.
33. Mr. Geoffrey Miigwa, No.212388.
34. Mr. Vitalis Bwowa Aula, No.215337.
35. Mr. Mwangi Kimani, No.214210; and
36. Mr. Mwenia Nzau, No. 214212, all Senior Superintendents of Police (Job Group PG/8) and
- 37.Mr. Dancan Mwebe, No.217104, Acting Superintendent of Police (Job Group PG/7),

All in the office of the President (Police Department) be retired from the service on Re-organization Government/Abolition of office with effect from 5<sup>th</sup> May 2004

Please take the necessary action accordingly.

**SECRETARY**

**PUBLIC SERVICE COMMISSION OF KENYA**

c.c. The Permanent Secretary/Administration  
Office of the President

**NAIROBI**

The Permanent Secretary/Director

Director of Personnel Management

**NAIROBI**

The letter was addressed to the Commissioner of Police and not the respective Applicants. It is trite law that each of the appointment of each of the Applicants to the Police Force was separate and distinct contractual/and personal relationship regulated by the law. Their appointments were not collective or en-mass. So the manner of effecting and notifying the retirement/abolition of office is definitely unusual.

Regulation 16 of the Public Service Commission (Police Force) Regulations provides for situation of Retirement on reaching retirement age. The law and procedure is set out therein. Regulation 17 deals with and provides for retirement on the grounds of ill-health .

As is discernible from the letter in question none of these grounds were cited as the reasons for the retirement or removal of any of the Applicants from office.

I have carefully perused the Constitution, the Service Commissions Act, the Public Service Commission (Police Force) Regulations and the Police Act and did not find any provisions for the Retirement of Gazetted Officer and Inspectorate above the rank of Assistant Inspector on grounds of **“Re-organization of Government”**. This situation or grounds is not provided for in the Constitution. The Service Commissions Act and the Regulations.

What does “Re-organization of Government” mean? It is deemed that the Government does Re-organizations and/or reforms in its day-to-day management of its affairs etc. But why should this affect a police officer’s employment unless it is under-pinned on the law? What has the Government Re-organization of its work and services have to do with the employment of a humble police officer whether Gazetted Officer or in the Inspectorate?

I refer to the Replying Affidavit of Mr. Peter Kiilu, and find no allegations that there are pending Disciplinary Proceedings against any of the officers or at the very least that this is a ground for the purported retirement.

The alleged “Re-organization of Government” is neither defined nor described and none of the Applicants was notified of them and how it is necessary to retire him so that the Government can be Re-organized.

In Mr. Kiilu’s, Replying Affidavit sworn on 17<sup>th</sup> February, 2004 it is deponed, inter alia, that:-

**“7. That the decision to retire the officers was grounded only on Re-organization for better efficiency and economy in the police department and not any other consideration as alleged by the Applicants. ....”**

**11. That the Applicants were retired on Re-organization of the police department and Regulation 18 referred to by the Applicants which deals with retirement on abolition of office is not applicable in this case. In addition, all officers are retained in Public Service in public interest and in the best interest of the service .....**”

Counsel for the Respondent also submitted on the same lines and stated that no office was abolished.

If this in the correct position, the 1<sup>st</sup> Respondents have not explained in its letter of 5<sup>th</sup> May, 2004, why it referred to the term **“abolition of office.”** The letter which had the effect of removing the Applicants from their employment was a serious matter that cannot be taken lightly. There is no claim of an error or mistake. As far as this court is concerned unless the letter is retracted, it will construe the contents and give the words there ordinary and usual meaning. The 1<sup>st</sup> Respondent purportedly removed the Applicants from their offices and employment for two combined reasons:-

- Re-organization of Government.

- Abolition of office.

The 1<sup>st</sup> Respondent cannot change its position now after sending the Applicants home. It cannot have its cake and eat it.

I do find that the 1<sup>st</sup> Respondent having stated on oath that Regulation 18 which deals with abolition of office is not applicable in this case, then the letter dated 5<sup>th</sup> May 2004 was written unreasonably, unfairly and even maliciously considering the effect and all circumstances. How can this court now truly know on which ground the removal purportedly took place.

**4. If they were retired, was the retirement in accordance with the law?**

I have already found that there is no provision in law for the removal of Gazetted Officers and the Inspectorate over the rank of Assistant Inspector on grounds of Re-organization of Government. And since the 1<sup>st</sup> Respondent has recanted the ground of abolition of office, then it follows that there could not be any lawful or legal termination of the Applicant’s employment respectively.

**5. If their offices were abolished were such abolition of office/s in accordance with the law and did it have the effect of removing the Applicants from office or terminating their employment?**

Under Section 24 of the Constitution then in force the power to abolish any “office” in Government in the Republic of Kenya vests in the President of the Republic Kenya and no other person, body or authority.

The definition of “office” in **Section 25** includes, membership of the public service. It is therefore clear that Regulation 18 is not applicable in any case in respect of the abolition of state office referred to. Regulation 18 deals with the termination of appointment of the holder of a Gazetted office which has been abolished and the election of the Public Service Commission as to which holder is to be terminated/removed and which ones are to be retained.

As a result the purported retirement on grounds of abolition of office was unconstitutional illegal and a nullity. On this ground alone the letter of 5<sup>th</sup> May, 2004 is a nullity and the Public Service Commission did not have the jurisdiction to abolish any office and in any case no office was ever abolished. This has now been conceded by the 1<sup>st</sup> Respondents.

I therefore do hold that the said letter complained of did not have the effect of removing the Applicants from office or terminating their employment.

In passing, the letters dated 6<sup>th</sup> May 2004 by the Commissioner of Police to the Applicants conveying the decision by the Public Service Commission retiring the Applicants and/or “abolishing” their offices included statements which are not in the letter from the Commission and dated 5<sup>th</sup> May 2004. I find this quite puzzling as the Commissioner of Police stated the Public Service Commission had retired the Applicants under the above provisions as contained in Regulation G.35 (1) (e) of Code of Regulations.

Regulation G.35 (1) of the Code states that:-

**“G.35 (1). The powers set out below are among those vested in the Public Service Commission of Kenya and the Judicial Service Commission.**

- (a) .....
- (b) .....
- (c) .....
- (d) .....

**(e) Termination of appointment and on abolition of office”.**

This letter clearly shows that the Respondents intended to remove the Applicants purportedly also on the basis of abolition of the offices of the Applicant. The Public Service Commission had not expressly made such a statement and one wonders where the Commissioner of Police obtained the authority or jurisdiction to declare that the Public Service Commission invoked its powers under G.35 (1) (e) of the Code of Regulations. Infact, the law is that it is Regulation 18 of the Public Service Commission (Police Force) Regulations that confers on the Commission the discretion to terminate the services of an office holder whose office has been abolished where one or more such offices remain. The Commissioner of Police certainly acted ultra vires, the law in usurping the functions of the Public Service Commission.

**6. Were the Applicants entitled to notice of their termination of employment and accorded natural justice as envisaged and contemplated by the law?**

From the unrebutted evidence on or about 5<sup>th</sup> May, 2004 the 2<sup>nd</sup> Respondent convened a press conference at which he announced to the electronic and print media that thirty seven (37) Gazetted Police Officers and some from the Inspectorate had been retired to facilitate the re-organization of the Police Force. The 2<sup>nd</sup> Respondent was quoted in the “Daily Nation” of Thursday May, 6, 2004 as making the statement to the press that, there has been referred to in the Statement.

The first time the Applicants heard of their retirement was over the electronic media in the evening of 5<sup>th</sup> May, 2004 and subsequently read in the print media of 6<sup>th</sup> May, 2004. By this time none of them had received the letter of retirement or given notice of such retirement, the reasons and an opportunity to be heard or to make any kind of representations.

The Applicants in paragraph 19 of their Statement complaining that:-

**“The Applicants retirement was done capriciously, whimsically and in a degrading, humiliating, high handed and unreasonable manner motivated by unreasonable consideration such as ethnicity, victimization, politics, malice, sheer display of raw power and abuse of authority calculated to send shock and awe throughout the Police Force. The mode of mass retirement and the manner in which it was communicated to the affected officers was callous to the extreme and demonstrated a good measure of sadism. The speed with which the 1<sup>st</sup> Respondent dealt with the issue is most suspicious and smacks of maladministration.”**

Very strong words indeed but I think that the Applicants were entitled to feel the pain and hurt that they did and to use these strong words. They were treated harshly cruelly and unfairly despite the fact that they were being commended for their dedicated and patriotic service to The Nation. They did not deserve such treatment. **Lord Diplock** in the famous case of **R - V-S ELECTRICITY COMMISSIONERS 1924 1KB 171** stated:-

**“Whenever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decisions either for error or law in reaching it, or for the failure to act fairly to observe either one or the other of the two fundamental rights accorded to him of the rules of natural justice or fairness, Viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it. And to the absence of personal bias against him on the part of the person by whom the decision falls to be made.”**

This fundamental tenets or principles of Natural Justice are essential and pillars in good governance and administration. The Public Service Commission and Commissioner of Police violated these cardinal rules to the detriment of the Applicants as senior and Respected Officers in the Kenya Police Force.

In this case the employment of the Applicant is protected under the Constitution and the Commissions Services Act. It has been held by the Court of Appeal that even in where the office is not that of a state

office or off an office envisaged by the Public Service Commission so long as an employee is in Public Service he must be treated lawfully and fairly by the Public authority employing him. The Court of Appeal in the case of **PETER OKECH KADAMAS AND JOHN MONDAY ODUOR OLOO –V- MUNICIPALITY OF KISUMU 1982 -88 1 KAR 68**, referred with approval to the decision of **Lord Wilberforce** in

**R –V- BERKSHIRE HEALTH AUTHORITY, Exp. WALSH (1984) 3 WLR, 818** in which he said:-

**“The Public may have no interest in the relationship between servant and master in an “ordinary” case but where the servant holds office in a great public service the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them .... It follows that if in the exercise of my discretion I conclude that the remedy of Certiorari is appropriate, it can properly go against the Respondent authority.”**

This brings me to the last substantive question.

#### **7. Whether the Applicants are entitled to an order of certiorari to be made?**

The answer is clearly in the affirmative. The first principle ground for the grant of the order of Certiorari is the the 1<sup>st</sup> Respondent, the Public Service Commission did not have the jurisdiction to retire the Applicant on any of the purported two grounds they cited in its decision. There is no provision for the retirement of the Applicants on grounds of Re-organization of Government. Secondly, the Public Service Commission has no mandate to abolish an office in Public Service. This is the exclusive realm and preserve of the President of the Republic of Kenya. The letter dated 5<sup>th</sup> May, 2004 was a nullity ab initio.

The Respondents submitted that Certiorari should not issue as the challenged decision has not been produced as required by law. I do not comprehend this as it is clear to me that it is the letter dated 5<sup>th</sup> May, 2004 to each Applicant which is impugned and challenged. It has been annexed to the verifying Affidavits and it is extrinsic and speaks for itself. It is capable of being called up and removed in the High? Court and quashed by an order of Certiorari.

If the issue of jurisdiction had not arisen, I certainly would have still given the order of Certiorari on the ground that the rights of the Applicants were violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent i.e. breach of their fundamental rights to Natural Justice. If I am wrong on jurisdiction, which I doubt, I hereby grant the orders on this basis.

As a result, without any hesitation for the reason given herein, I do grant an order of Certiorari as prayed in the Notice of Motion dated 21<sup>st</sup> October 2004. As stated earlier, the Applicant abandoned the prayers for Orders of Mandamus and Prohibition.

#### **8. COSTS**

As costs follow the event, I do hereby award costs to each of Applicants as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Orders Accordingly.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF APRIL 2012**

**M.K. IBRAHIM**  
**JUDGE**

**DATED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF JULY 2012.**

**M. WARSAME**  
**JUDGE**