



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MILIMANI LAW COURTS**

**PETITION NO. 318 OF 2018**

**IN THE MATTER OF ARTICLES 3(1), 22(1) & (2)(c), 23, 48, 50(1),**

**AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF**

**ARTICLES 1, 2, 3(1), 10, 73, 129, 131(2)(a)&(e), 232(1)(d), (e), & (f), AND 259(1) OF THE CONSTITUTION**

**IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS UNDER ARTICLES 47 OF THE CONSTITUTION**

**IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE**

**FAIR ADMINISTRATIVE ACTION ACT; AND SECTIONS 4, 5, 6, 7, AND 8 OF THE**

**STATUTORY INSTRUMENTS ACT**

**IN THE MATTER OF RULES 4, 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE NEW POLICE**

**STRUCTURE MERGING THE KENYA POLICE SERVICE AND THE ADMINISTRATION**

**POLICE SERVICE**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

## JUDGMENT

### THE PETITION

1. The Petitioner through a Petition dated 14<sup>th</sup> September 2018 and supporting affidavit by Okiya Omtatah Okoiti sworn on even date seek the following reliefs:-

**a) A declaration that the reforms or changes announced by H.E. Uhuru Muigai Kenyatta, the President of Kenya, on 13<sup>th</sup> September 2018 of thereabouts, in the National Police Service, including changes in the structure and command of the National Police Service, the integration of Kenya Police Service and the Administration Police Service, the change of uniforms, the rebranding of colleges, and the introduction of housing allowances for junior officers are unconstitutional and, therefore, invalid null and void.**

**b) An order:**

**i) Permanently prohibiting the respondents and their agents and any persons howsoever acting from giving effect howsoever to the reforms of changes announced by H.E. Uhuru Muigai Kenyatta, the President of Kenya, on 13<sup>th</sup> September 2018 of thereabouts, in the National Police Service, including changes in the structure and command of the National Police Service, the integration of Kenya Police Service and the Administration Police Service, the change of uniforms, the rebranding of colleges, and the introduction of housing allowances for junior officers.**

**ii) Quashing the document by the National Police Service titled, *INFORMATION PACK: Policy Framework and Strategy for Reorganization of the National police Service and Provision of Decent and affordable Housing for Police Officers and Integration with Communities and Neighborhoods*.**

**iii) Compelling the respondents to pay to the petitioner the costs of the suit.**

**c) Any other relief the court may deem just to grant.**

### THE PETITIONER'S CASE

2. The Petitioner's case as presented in his Petition, supporting affidavit sworn on 14<sup>th</sup> September 2018, and supplementary affidavit sworn on 23<sup>rd</sup> November 2018 is that the reforms titled "***New Dawn For Kenya Police As President Kenyatta Enacts Major Reforms In Structure , Command and Housing (policy)***" announced in the national television and radio on or about 13<sup>th</sup> September 2018 by the President and published through his website in the National Police Service, including changes in the structure and command of the National Police Service, the integration of Kenya Police Service and the Administration of Police Service, the change of uniforms, the rebranding of colleges, and the introduction of housing for junior officers are unconstitutional and therefore, invalid null and void for contravening ***Articles 10 (2) (a) , 232 (1) (d) , 143, 145 , 47 (1) of the Constitution*** , the provisions of the ***Statutory Instruments Act, 2013 and the Fair Administration Act, 2015***.

### THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' CASE

3. The Respondents filed a replying affidavit sworn by Dr. (Eng.) Karanja Kibicho CBS on 16<sup>th</sup> October 2018 and filed on 17<sup>th</sup> October 2018. He deposes that the policy was developed strictly in the confines and within the contextual letter and spirit of ***Articles 240(3), 248(8) and 245 (4) of the Constitution of Kenya*** and in furtherance of well documented earlier police reforms and recommendations.

4. He avers that by dint of ***Article 245(b) of the Constitution and Sections 8(1) , 8A (1) and 2, 10 (f-h) of the National Police Service Act***, the policy herein does not interfere with the Independent Command of the Inspector General of Police to organize the Service within the Constitution and the law.

5. He contends that the policy will not merge the Kenya Police Service and the Administration Police Service but it makes and proposes re-alignment of duties constituent with the independent command power of the Inspector General. Further, the reorganization of the National Police Service will eliminate wastage accruing from overlapping of roles and functions, strengthen structure of command and control and enhance optimal utilization of personnel and other resources.

6. It is further stated that the policy was developed within the framework of ***Articles 243 (2), 245 (2) (b), 245 (4) and Sections 10(f-i) and 126(1) (a-d) and 126 (2) (b) of the National Police Service Act, 2011*** hence does not violate the Constitution or any law and its implementation does not require Constitutional or Statutory amendments.

7. It is contended that in light of ***Sections 126(1) (a-d) and 126 (2) (b) of the National Police Service Act***, the Petition herein is contrary to the Constitution of Kenya and the principles espoused therein as well as the United Nations Human Habitat policies on decent housing as it seeks to challenge a policy that seeks to provide decent and affordable housing to Kenyans in the National Police Service.

8. It is stated further that the process of developing the policy was participatory and consultative as espoused under ***Articles 10 (2) (a) and 232(1) (d) of the Constitution of Kenya 2010*** as hereunder:

**i) On 5<sup>th</sup> April, 2018, the Inspector General National Police vide letter Ref. No. NPS/IG/SEC/1VOL.1/ (95) appointed a special**

team of police officers and commissioned it to examine the structure, command and control of the Service at national, regional, county and sub county level and their capacity to deliver policing in a more and efficient manner. The team also looked at the extent of the persisting problem of housing for police officers and conducted structured focus group discussions with officers of all ranks from 33 counties in 8 regions.

ii) In April, 2018, the Inspector General National Police Service commissioned a private housing consultancy and mandated them to evaluate the challenges of the current system of housing police officers with a view to propose alternative approaches that would expedite the Government efforts in promoting affordable and decent housing for all police officers.

iii) On the 19<sup>th</sup> July 2018 , the Inspector General National Police Service, issued a signal reference NPS/IG/Sec/6/1/8 VOL.II/144 to Deputy Inspector General Kenya Police Service and Deputy Inspector Administration Police Service, Director, Directorate of Criminal Investigations, Regional Police Commanders and Commanders of Formations and specialized Units requiring them to consult with the police officers and submit memoranda on how to improve efficiency and effectiveness in the national Police Service.

iv) On 7<sup>th</sup> August 2018, the Cabinet Secretary for Interior and Coordination of National Government convened a consultative meeting with the National Assembly Departmental Committee on Administration and National Security, and the Senate Committee on Administration and National Security at Intercontinental Hotel whose deliberations provided a strategic insight for re-examination of the National Police Service structure and systems of command and control, pointing out the areas where efficiency and effectiveness needed improvement.

v) On 19<sup>th</sup> -22<sup>nd</sup> August 2018, the National Departmental Committee on Administration and Security held a retreat at Windsor Hotel during which the committee discussed 16 recommendations that they forwarded to the Inspector General Police Service for consideration and inclusion in the Policy framework and strategy on improving efficiency and effectiveness in the National Police Service.

vi) On 9<sup>th</sup> August 2018 the state department of Interior organized a National Policing Consultative Forum at Kenya School of Government made up of 11 MDAs from the Governance Justice Law and Order Sector (GJLOs), Kenya Private Sector Alliance, Civil society organizations who constitute Police Reforms Working Group and other Non-Governmental organizations working on security and governance programmes. A total of 100 participants from various institutions including the Judiciary, ODPP, EACC, Prisons, State Department of Interior, KEPSA and private security service industry attended the forum/ the agenda was how to improve efficiency and effectiveness in the National Police Service and address the persisting problem of housing for police officers as well as integrate police within communities and neighborhoods.

vii) The Cabinet Secretary, the Principal Secretary Interior and the Inspector General National Police constituted the top policy level team which included Chief Finance Officer Kenya Police Service (KPS), Administration Police Service (APS), Directorate of Criminal (DCI), and prisons, Human Resource Officers from KPS, APS, DCI and prisons and Directors Planning and Operations from KPS, APS, DCI and Prisons for development of the policy framework and strategy.

viii) On 13<sup>th</sup> September 2018 , a National Security Conference was convened and graced by the President who joined other stakeholders to usher and launch in a new and transformative model of policing in his capacity as espoused in Articles 131 (1) (a-e) , 240(3) (4) and (6) of the Constitution and Executive Order No. 1 of 2018 dated 5<sup>th</sup> June 2018.

9. It is contended that the provisions of the reference by the petitioner to processes and arguments in the final report of committee of experts on constitutional review is misplaced entirely as these were raw input processes and the final product was the Constitution of Kenya ,2010. Hence the report has no authority nor probative value other than that which formed the content of the Constitution.

#### **ANALYSIS AND DETERMINATION**

10. Having carefully considered the Petition, the Respondents' response, and parties' rival submissions and from the same the following issues arise for determination:-

a) *Whether the process of formulation and development of the policy was done within the confines of the Constitution and the law.*

b) *Whether there was public participation in the formulation and development of the policy as required by the Constitution.*

c) *Whether the Respondents complied with statutory instruments Act.*

d) *Whether the orders sought in the Petition should issue.*

#### **A. WHETHER THE PROCESS OF FORMULATION AND DEVELOPMENT OF THE POLICY WAS DONE WITHIN THE CONFINES OF THE CONSTITUTION AND THE LAW.**

11. The Petitioner contend that the impugned policy should be declared null and void on the following grounds; first, that the President and the task force have no power under the Constitution to effect changes in the structure, command and functioning of the National Police Service, which is a precinct of the Inspector General of Police; secondly, that the impugned policy did not undergo public participation as required by law; and lastly, the impugned policy did not comply with the Statutory Instruments Act and the Fair administrations Act.

12. The Petitioner on the first ground argue that the President and the task force sought to exercise the mandate of the Inspector General of Police, contending further that it is only by amending **Articles 243 and 245 of the Constitution** that the National Police Service can be changed to reorganize and integrate the two formations as envisaged in the impugned policy.

13. The Respondents urge on their part, that the formulation and development of the policy was done within the confines of the Constitution and the law. It is Respondents position that the Constitution and the national Police Service Act donates power to the Respondents to develop policy that is aimed at attaining the highest standard of professionalism among its members. The purpose of the policy is urged was to give effect to provisions of the Constitution and the Independent command of the Inspector General.

14. It is important to cite and consider the relevant Articles in support of Respondents position. **Article 245(4) of the Constitution** states that:-

***“The Cabinet Secretary responsible for Police Services may lawfully give a direction to the Inspector General with respect to any matter of policy for the National Police Service...”***

15. **Article 245(4) of the Constitution** reproduced herein above is clear that the 1<sup>st</sup> Respondent herein has powers to lawfully issue policy guidelines to the Inspector General of the National Police Service as long as the guidelines are limited to matters of policy. Further, **Article 240(3) of the Constitution** provides that the national Security Council Chaired by the President shall exercise supervisory control over national security organs (of which the National Police Service is one) and **Article 240(8) of the Constitution** provides that the Council shall ***“Integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively.”*** From the clear Constitutional provisions, herein above, I find that it is therefore provided that the formulation and development of policy herein is well anchored within the Constitution.

16. The Respondents have clearly demonstrated in the replying Affidavit, that the policy does not in any way interfere with the Independent command and control of the National Police Service by the Inspector General. The Inspector-General of the National Police Service has an independent command and control over the National Police Service by the Inspector General. The Inspector-General of the National Police Service has an independent command and control over the National Police Service as provided for in the Constitution under **Article 245(b) and Sections 8, 8(A)(1&2) and 10 of the National Police Service Act**. This accordingly means that he has the command of personnel and resources in a manner that is free from outside control and not subject to another authority except for the manner prescribed for in the Constitution of Kenya.

17. For clarity it is important to emphasize that the Independent command means commanding the various sub components of command and control in a disciplined service. These include personnel matters from recruitment, training, deployment, transfer, promotions, performance, discipline and accountability. It also includes arrangement of instruments of command (ranks) in a hierarchical manner, transfer of services intra and extra services and other Government institutions, determination of strength of service, formations and specialized units, financial resources and police equipment and other assets. On the other hand **Section 10(f) (h) of the National Police Service Act** mandates the Inspector General among others, to determine distribution and deployment of offices, organize service into various Formations, Units and components and recommend establishment, management and maintenance of police training institutions and centers.

18. Clear reading and consideration of **Article 245 (b) and Sections 8(1), 8(a) (1) and (2), 10(f-h) of the National Police Service Act** clearly demonstrates that the Policy herein does not in any way interfere with the Independent Command of the Inspector General of Police to organize the service within the Constitution and the law since 1<sup>st</sup> Respondent’s job is limited to lawfully giving direction on matters of policy.

19. I note that the Petitioner argues in paragraph 23 of the Petition that the President and the Taskforce purported to direct or discharge the functions of the Inspector General of the National Police Service by altering the command of the National Police Service and therefore violated **Article 245 of the Constitution**.

20. I have considered the aforesaid averments and I find it to be totally erroneous and unsupported by the Information Pack exhibited by the Petitioner and, a thorough reading of the frequently asked questions and answers (FAQS). I find that the Information Pack exhibited by the Petitioner is indeed issued by the Inspector General, National Police Service.

21. From the foregoing I find that the Respondents acted within the confines and powers donated to them by the Constitution and the National Police Act. In support of the contention that the Respondents acted within the confines of the law in issuing the impugned policy reliance is placed in the case of **National Media Group & 7 others vs. Attorney General & 4 others Nairobi high Court Petition No. 30 of 2014 consolidated with Petition No. 31 of 2014** wherein a three Judge bench of Justices Isaac Lenaola, Justice Mumbi Ngugi and Justice Weldon Korir at paragraph 169 held that:-

***“...We are of the view that there is nothing unconstitutional in granting the Cabinet Secretary in charge of information and communication the power to issue policy guidelines of a general nature in respect of matters that are within his Cabinet docket...”***

22. I find it fair and reasonable, as I deal with this matter to state, that the National Police Service is established under **Article 243 of the Constitution**. That it comprises of the Kenya Police Service and Administration Police Service. **The National Police Service Act 2011** under **Section 28** establishes the Directorate of Criminal Investigation under the command of the Inspector General. **The National Police Service Act** under **Section 19(1)** mandates the Inspector General to issue and document Service Standing orders as administrative orders for general command and control of the service.

23. The Petitioner herein alleges in paragraph 22 of the Petition that the policy herein has provisions that offend **Article 243 of the Constitution** to the extent that the changes are contrary to the structure of the National Police Service Commission. I find that the Petitioner’s

allegation are not genuine since the policy does not merge the Kenya Police and the Administration Police and no evidence has been adduced by the Petitioner to support his misinformed conclusion on the policy he is challenging.

24. I find contrary to the Petitioner's contention and allegations that the policy document is well intentioned and is in the public interest and meant to give effect to the provision of **Article 244 of the Constitution**, that provides for the objects and functions of the National Police Service, to include striving for highest standards of professionalism and discipline, prevention of corruption, complying with constitutional standards of human rights and fundamental freedoms, and training staff to the highest possible standards of competence and integrity. In addition I have no doubt, that the policy was issued in public interest since the re-organization will eliminate the wastage of the meager public resources, that is caused by the overlapping roles and functions, help in strengthening the structure of command and control, enhance optimal utilization of personnel and other resources.

25. I find the objects and functions of the impugned policy are universal to all members of the National Police Service regardless of which service, formations or specialized unit that a police officer serves. The spirit and letter of the **Article 244 of the Constitution** is to have one National Police Service which serves common objectives and functions. Where a police officer is deployed to execute this objective is a function of exercising independent command of the Inspector General irrespective of the service the officer belongs to in the National Police Service. However, it is clear that a police officer cannot belong to two constituent services at the same time neither can a police officer be subjected to two different commands at the same time.

26. Upon perusal of the Petitioner's supporting documents I note the Petitioner admits that the Administration Police is not being disbanded but remains as provided for in the Constitution. I therefore find that the envisaged reorganization and integration is aimed at enhancing effectiveness and efficiency of the service and should therefore be viewed within the framework of independent command of the Inspector General as provided for under **Article 245(2)(b) of the Constitution** and **Section 10 of the National Police Service Act** as well as **Service Standing Orders**.

27. I now turn to consider the policy as regards Police housing and the intended Police allowance, I find that the National Housing policy as contained in **Sessional Paper No. 3 of 2004** reiterates the need for decent and affordable housing for all Kenyans. **Article 43(1)(b) of the Constitution** provides that every Kenyan has a right to accessible and adequate housing and to reasonable standards of sanitation.

28. I note that the **National Police Service Act 2011** is silent on the matter of police housing. However the **Service Standing orders Chapter 49**, provides for management and command of police lines but silent on who is eligible for housing in police lines. In addition it is deponed by the Respondents, in the Respondents replying affidavit that the National Police currently has no regulatory policy on housing but is currently under development by the National Police Service Commission. The Service therefore depends on housing policies issued to civil servants by the State Department of Housing, which is in under in absence of its housing policy.

29. It is imperative to note that the Employment Act on the other hand requires employers to provide housing facilities to its workers; this may not necessarily mean construction of houses, outright purchases or leasing as it has been the case in the National Police Service. The Policy is well intentioned since it advocates for the provision of affordable house allowances at market rates to all members of the National Police Service. I therefore find that the noble goal of the policy is to advance **Article 43**, on rights to housing by providing police officers with affordable and decent residential housing and enable them to integrate with civilian communities in their residential areas and neighborhood. I find it improper, and out rightly malicious, if any Kenyan of goodwill would misinterpret the policy and argue that the policy document was issued outside of the law and seek orders that are tantamount to denying the members of the National Police Service housing allowance to enable them live a deceit life with their family and enable them serve Kenyans better and with dignity as provided in the Bill of Rights.

30. I now turn on the issue of changing police uniforms and rebranding Police colleges as challenged by the Petitioner. As noted earlier on, I repeat that, the Inspector General of National Police Service has Independent Command and control which is a Constitutional mandate under **Article 245(b), Section 8(1) and 8A (a)(2) of the National Police Service Act**.

31. Additionally **Section 10 of the National Police Service Act**, the functions and powers of the Inspector General are clearly outlined as follows:-

**“10(1)(a) implement policy decisions**

**(i) Recommend the establishment of, manage and maintain training institutions, centers or places for the training of officers joining the service and other officers;**

**(u) Perform any other lawful act on behalf of the Service.”**

32. It is clearly noted that the aforesaid legal provisions under **Section 10 of the National Police Service Act** are in regard of the house management and housekeeping roles within the National Police Service which the Inspector General is mandated to undertake. It is noted and appreciated that while the Inspector General is mandated to undertaking these functions, the Inspector General exercises an independent mandate and is not within the control of any person and/or authority and his actions can only be questioned, if they offend the express provisions of the Constitution or any written law.

33. Upon consideration of the parties rival submissions and relevant constitutional and statutory provision stated herein above, as well as the parties rival pleadings, I find that the Respondents have clearly demonstrated that the impugned policy was issued within the confines and powers donated to the Respondents by the Constitution and the law. I further find the impugned policy is well intentioned and intended to implement provisions of the Constitution and the Independent command of the Inspector General. The same therefore cannot, contrary to the Petitioner's submission be faulted in any way.

**B. WHETHER THERE WAS PUBLIC PARTICIPATION IN THE FORMULATION AND DEVELOPMENT OF THE POLICY AS REQUIRED BY THE CONSTITUTION.**

34. The Petitioner averred that the Respondents have not exhibited evidence of public participation and that whatever was exhibited were consultations within the National Police Service, the concerned government departments, and with some selected institutions. He also argued that the new police uniform was not subjected to a uniform design competition. For these arguments, he relied on; **Articles 1, 4(2), 10, 201 (a), 47, 232(1) (d), 73 (1)(b) and the preamble of the Constitution; Sections 2, 3, 4 and 5 of the Fair Administration Act 2015; Section 2, 92 (c), 100 and 101 of the Public Procurement and Asset Disposal Act 2015 (PPADA);** the Guidelines for Public Participation in Policy Formulation and numerous decisions quoted in his submissions.

35. The Respondents in response to the Petitioner's contention on lack of public participation urge that there was adequate public participation in the formulation and development of the Policy herein. The Respondents further appreciate the salient provisions of **Article 10(2)(a) and 232(1)(d) of the Constitution**, that provide for the involvement of the people in policy making as one of the national values and principles of Governance.

36. The Respondents further contend, that there was adequate public participation during the formulation of the policy and that all major stakeholders were consulted before the impugned policy was finalized and the implementation process initiated. The Respondents set out different occasions on which public participation took place before various bodies and institutions running from 5<sup>th</sup> April 2018 to 13<sup>th</sup> September 2018 being as follows:-

*a) On 5<sup>th</sup> April 2018, the Inspector General of the National Police Service via signal Ref. No. NPS/IG/SEC/1VOL1995) Service appointed a special team of police officers and commissioned it to examine the structure, command and control of the service at national, regional, county and sub-county levels and their capacity to deliver policing services in an efficient and effective manner.*

*The team also looked at the extent of the persisting problem of housing for police officers. The team conducted structured focus group discussions with officers from all ranks from 33 counties in 8 regions. The IG also engaged a private consultant to inquire into the state of police housing, who carried out an independent exercise county wide between March and May 2018. See exhibit "KK3" in the replying affidavit of Dr. Karanja Kibicho sworn on 16<sup>th</sup> October 2018.*

*b) On 19<sup>th</sup> July 2018 the Inspector General of National Police issued a Signal Ref. No. NPS/IG/SEC/6/1/8 VOLII/144 to the Deputy Inspector General NPS, Deputy Inspector General, APS, Director DCI, Regional Police Commanders and Commanders of Formations and Specialized units requiring them to consult with Police Officers and submit memoranda on how to improve efficiency and effectiveness in the national Police Service and how to address the persisting problem of housing in the National Police Service. The Services held consultations using a bottom up approach starting from County forum, for police officers, County Commander's forum, Regional Commander's forum and National forums at service and formation levels. See exhibit "KK 5a" and "KK 5b" in the replying affidavit of Dr. Karanja Kibicho sworn on 16<sup>th</sup> October 2018.*

*c) On 7<sup>th</sup> August 2018, the Cabinet Secretary for Interior and Coordination for National Government convened a consultative meeting with the National Assembly Departmental Committee on Administrative and National Security and the Senate Committee on Administrative and national Security at Intercontinental Hotel, Nairobi. The deliberations of the House Committees provide strategic insight for re-examination of the National Police Service structures and systems of command and control, pointing out areas where efficiency and effectiveness needed improvement. See Exhibit "KK 61" and "KK 6b" in the replying affidavit of Dr. Karanja Kibicho sworn on 16<sup>th</sup> October 2018.*

*d) On 9<sup>th</sup> August 2018 the State Department of Interior organized a National Policing Consultative Forum at the Kenya School of Government (KSG). The National Policing Consultative Forum is made up of 11 MDAs from Governance Justice Law and Order Sector (GJLOS), Kenya Private Sector Alliance, Civil Society Organizations who constitute Police Reforms Working Groups and other Non-Governmental Organizations working on security and Governance Programmes. A total of 100 participants from various institutions including the Judiciary, ODPP, and EACC, Prisons, State Department of Interior, KEPSSA and private security industry attended. See exhibit "KK 7" in the replying affidavit of Dr. Karanja Kibicho sworn on 16<sup>th</sup> October 2018.*

*e) A technical team of experts worked to collect and collate the various inputs. Members of the team include Chief Finance Officers from KPS, APS, DCI and Prisons, Human Resource Officers from KPS, AOS, DCI and Prisons and the Directors Planning and operations from KPS, AOS, DCI and Prisons.*

*f) On 13<sup>th</sup> day of September 2018, a National Security Conference was convened and graced by the President who joined other stakeholders to usher and launch in a new and transformative model of policing.*

37. I note that the Respondents in their replying affidavit contend that there were adequate public participation during the formulation of the policy and all major stakeholders were consulted before the impugned policy was finalized and implementation process initiated. They further submitted that the petitioner has not adduced evidence to the effect that there was lack of public participation. They relied on this proposition in the cases of **Moses Munyendo & 908 Others vs The Hon. Attorney General (Nairobi High Court Petition No. 16 of 2005 at Par. 18); Consumer Federation of Kenya (COFEK) v Public Service Commission Nairobi Petition No. 263 of 2013 [2013] eKLR;** and **Nairobi Metropolitan PSV Sacco's Union Limited & 25 Others vs County of Nairobi Government & 3 Others [2013] eKLR.**

38. The Respondents further contend that at all different sessions of public participation enumerated hereinabove in paragraph 36 of this judgment, they satisfied the principle of public participation in the policy formulation and development process based on the circumstances

of this case.

39. In determining whether there has been public participation, the Court is required to interrogate the entire process leading to the enactment of the policy from the formulation of the policy to the process of implementation of the policy. It is no doubt, that the clamour for Police reforms has been ongoing in Kenya for a long time now. The 2008 Panel of Eminent African Personalities chaired by former UN Secretary-General Kofi Annan to mediate in the crisis following Kenya's contested 2007 General Elections identified the review and definition of role, functions and command of Administration Police as a priority for action in the medium and long term.

40. It further appreciated that the CIPEV Report that gave rise to the 2009 National Taskforce on Police Reforms chaired by retired Justice Philip Ransley mandated to pursue recommendations on police reforms. In its report, the taskforce recommended integration of the two Services not then but at any other appropriate time that the Government and leadership of National Police Service may deem fit especially when sufficient common police personnel management policies, operational standards and oversight including accountability mechanisms have been attained for both Kenya Police and Administration Police. Currently, the National Police Service through the leadership of the Inspector General has built greater synergy in closing the police cultural gap between the Kenya Police Service and Administration Police Service and their constituent Formations and Specialized Units. See a copy of the Ransley Taskforce Report marked "KK 2".

41. To buttress the above reliance is placed in the case of *Moses Munyendo & 908 others vs. The Hon. Attorney General Nairobi High Court Petition No. 16 of 2005*. Where Justice Majanja held that:-

***"I do not think it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention that the first Petitioner, "I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meeting to enrich nay of the law" is not necessarily decisive of the lack of public participation. Such an argument was dismissed by Lenaola J., in Consumer Federation of Kenya (COFEK) vs. Public Service Commission Nairobi Petition No. 263 of 2013 [2013] eKLR thus, "[13] ...The Petitioner has latched on to the phrase "participation of the people" in a selective and selfish manner. I have said that there is no express requirement that "participation of the people" should be read to mean that "the people" must be present during interviews but taken in its widest context that their in-put is recognized." (Emphasis mine)***

42. I note that in the instant Petition, the Petitioner similarly makes allegations that *Article 10(2) (b) and 232(1) (d) of the Constitution* were violated and that the public was not consulted before the changes were effected but fails to give any evidence to support the claim. I note however in this Petition, it has been demonstrated by the Respondents that various stakeholders and public participation sessions enumerated in paragraph 36 of the Judgment are adequate and therefore the Petitioner cannot latch onto the idea that the policy is bad in law and unconstitutional for lack of public participation.

43. To buttress the above proposition reliance is placed in the case of *Nairobi Metropolitan PSV Sacco's Union Limited & 25 Others vs. County of Nairobi Government & 3 others 92013) eKLR*, in which the Court observed that:-

***"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." (Emphasis mine)***

44. Upon consideration of the evidence on record as demonstrated by the parties, I find that the Respondents have demonstrated that there was reasonable and adequate public participation in the circumstances of the case in the formulation and development of the policy as required by the Constitution. I find no merits on Petitioner's contention that there was lack of public participation in the formulation and development of the policy as required by the Constitution.

### **C. WHETHER THE RESPONDENTS COMPLIED WITH STATUTORY INSTRUMENTS ACT.**

45. The Petitioner contends that there was no evidence that the Respondents complied with the Statutory Instruments Act and the Fair Administration Action Act when enacting the policy. Further, it is urged the Respondents did not involve Parliament as required at *Section 11(1)(d) of the Statutory Instruments Act* hence impugned policy is fatal by virtue of *Section 11(4) of the said statute*.

46. The Respondents on their part urged that they complied with the said statutes, in the formulation of the impugned policy. They also submitted that the Petitioner has failed to demonstrate to the required standards in law that the impugned policy is likely to materially and adversely affect the legal right of the interests of a group of persons or in the general public contrary to the rules enunciated in *Anarita Karimi Njeru v Republic (1976 -1980) KLR 1272* and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012*.

47. It is noted that by virtue of *Section 2 of the Statutory Instrument Act 2013*, a policy is a statutory instrument. *Section 4 of the Act* provides for the making, scrutiny, publication and operation of statutory Instruments. *Section 5 of the Act* obligates the regulation making authority to make consultations with the relevant stakeholders before making a statutory instrument.

48. *Section 6* of the said Act obligates the regulation making authority to provide for a regulatory impact statement about the Instrument, where the Instrument is likely to impose significant costs on the community or a party of the community. *Section 9 of the Act* further provides for instances where the regulatory statements may be unnecessary. *Section 11 of the Act* obligates the Cabinet Secretary responsible for a regulation – making authority to within seven sitting days after the publication of a statutory Instrument, to ensure that a copy of the statutory instrument is transmitted to the responsible clerk for tabling before Parliament.

49. Fair Administration Act provides for the application of the Act, *Section 4* provides for the right to administrative action which is

expeditious, efficient, lawful, reasonable and procedurally fair and **Section 5** provides for Administration Action affecting the public.

50. I find that the Respondents complied with the Fair Administration Actions Act and the Statutory Instruments Act. The respondents have adduced evidence of consultations with the stakeholders and those likely to be affected with the policy. They have further indicated that the impugned policy will not impose significant costs on the community or a party of the community. The Petitioner has not adduced any evidence to the contrary. He has not demonstrated that the impugned policy is likely to impact the community and therefore a need for an impact statement on financial assessment. On the allegation of **Section 11(1) of the Statutory Instruments Act**, the said allegation is premature as the petition was filed within the seven days required for the tabling of the policy before Parliament.

#### **D. WHETHER THE ORDERS SOUGHT IN THE PETITION SHOULD ISSUE.**

51. The Petitioner in the instant Petition seeks a prayer that this Court should issue a declaration that the reforms or changes announced by H. E. The President of Kenya on 13<sup>th</sup> September 2018 or thereabouts, in the National Police Service, including changes in the structure and command of the National Police Service, the integration of Kenya Police Service and the Administration Police Service, the change of uniforms, the rebranding of colleges, and the introduction of housing allowance for junior offices are unconstitutional and therefore invalid, null and void.

52. The declaratory orders sought by the Petitioner are contrary to **Article 240 of the Constitution**, which establishes the National Security Council consisting among others the President and the Cabinet Secretary responsible for internal security, the 1<sup>st</sup> Respondent herein and provides that the National Security Council chaired by the President shall exercise supervisory control over National Security Organs among them the National Police Service. **Article 240(8) of the Constitution** provides that the National Security Council shall **“Integrate the domestic, foreign and military policies relating to national security in order to enable the national security organs to co-operate and function effectively.”**

53. The President is the Chairperson of the National Security Council consisting among others the Cabinet Secretary responsible for internal security, the 1<sup>st</sup> Respondent herein and provides that the National Security Council chaired by the President shall exercise supervisory control over National Security Organs among them the National Police Service and therefore there is nothing unconstitutional about the President performing his constitutional duties, noting, that he only made the alleged pronouncements as a participation stakeholder in the context of **Article 131 and 240 of the Constitution** and not as the Policy formulator.

54. I therefore find the declaration sought at paragraph 25 of the Petition cannot issue since even the Petitioner’s annexure number 1 at page 17 show that the constituent services of the National Police Service will remain as provided for in the Constitution and that the Administration Police Service is not being disbanded.

55. In view of the aforesaid I find that the impugned policy is constitutional and that the Petitioner has failed to adduce evidence to the contrary.

56. The Petitioner further seek an order to permanently prohibit the Respondents and their agents and any persons from giving effect to the reforms or changes announced by H. E. The President of Kenya on 13<sup>th</sup> September 2018 or thereabouts, in the National Police Service, the integration of Kenya Police Service and the Administration Police Service, the change of uniforms, the rebranding of colleges, and the introduction of housing allowance for junior officers. Under **Article 245(b) of the Constitution** and **Sections 8(1), 8(a) (1) and (2) of the national Police Service Act**, the Inspector General has Independent Command and control of the National Police Service, which means that he has command of personnel and resources in a manner, that is free from outside control and not subject to another authority except for the manner prescribed in the Constitution of Kenya.

57. The Independent command, further entails commanding the various sub components of command and control in a disciplined service. These include personnel matters and recruitment, training, deployment, transfer, promotions, performance, discipline and accountability. It also includes arrangement of instruments of command (ranks) in a hierarchical manner, transfer of services intra and extra services and other Government institutions, determination of strength of service, formations and specialized units, financial resources and police equipment and other assets. It should therefore be appreciated that the Independent command is so important and goes to the core of the powers conferred by the Constitution upon the Inspector General of the National Police Service and I find that this Court should resist the Petitioner’s invite into issuing the said orders as it would amount to this Court’s interference with the independent command of the Inspector General of the National Police Service and which would be contrary to clear constitutional provisions.

58. The Petitioner is also seeking that this Honorable Court do issue an order quashing the document by the National Police Service titled, **“Information pack: Policy Framework and Strategy for Reorganization of the National Police Service and Provision of Decent and Affordable Housing for Police Officers and Integration with Communities and neighborhoods.”** The order sought by the Petitioner is unknown in law. In any event the document titled Information Pack, is only a guide to members of the public and not capable of quashing as sought by the Petitioner.

59. To buttress the aforesaid reliance is placed in the decision by Odunga J, in **Judicial Review Application No. 266 of 2014** in which it was held that:-

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision.”**

*The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479." (Emphasis added)*

60. In considering whether to grant or not to grant the prayers, I find that it is incumbent upon the Petitioner to demonstrate that the document complained of is tainted with illegality, irrationality or procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. For example acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality, irrationality is when there is such gross unreasonableness in the decision taken or act done. I find in the instant Petition the Petitioner has failed to demonstrate any factors requisite for a decision and/or policy to be quashed. The Petitioner has not demonstrated existence of any illegality; irrationality or any impropriety required for orders sought to be issued.

61. *The upshot is that the Petition is without merit. Accordingly the Petition is dismissed. Each party to bear its own costs.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER, 2021.**

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**J. A. MAKAU**

**JUDGE OF THE HIGH COURT OF KENYA**