



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NUMBER 23 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION ACT NO. 30 OF 2011

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION (PROMOTIONS) REGULATIONS, 2015

AND

IN THE MATTER OF INTENDED ORDERLY ROOM PROCEEDINGS

AND

IN THE MATTER OF AN APPLICATION BY:-

REPUBLIC.....APPLICANT

VERSUS

THE OFFICE OF THE ATTORNEY GENERAL..... 1ST RESPONDENT

THE DEPUTY INSPECTOR GENERAL OF POLICE..... 2ND RESPONDENT

THE COUNTY COMMANDER NAKURU3RD RESPONDENT

THE SUB-COUNTY COMMANDER NAKURU EAST.....4TH RESPONDENT

CHIEF INSPECTOR HOSEA KOECH.....5TH RESPONDENT

POLICE CONSTABLE AMOS KIPKOSGEY..... 6TH RESPONDENT

MRS HELLEN LIMO.....7TH RESPONDENT

R U L I N G

1. On 22nd October 2019 No. 234703 CI Solomon Kiritu the then Officer Commanding Station (OCS) Bondeni Police Station received a letter dated 18th October 2019, ref SEC POL 1/2/8/VOL.1/NKU C/150. It was written through the Sub County Commander Nakuru East. This is the letter.

“RE: COMPLAINT AGAINST OCS BONDENI POLICE STATION NO. 234703 CI SOLOMON KIRITU INQUIRY FILE

NO. 1/2019

Be informed that the above inquiry file was opened to the effect that on 26th November, 2018 at Bondeni Police Station under Sub County Commander Nakuru East, M/s Hellen Limo, Chief Inspector Hosea Kipkoech of IAU and PC Amos Kipkosgei of Eldoret Police Station complaint against you.

The file was forwarded to Deputy Inspector General of Kenya Police Service and having carefully perused the inquiry file, Deputy Inspector General approved the recommendations and therefore directs that you be charged in Orderly Room Proceedings for the **offence of being idle and negligence in performance of your duties.**

I am therefore constituting a disciplinary committee to conduct your orderly room proceedings. On a date to be communicated to you.

(STEPHEN N. MATU)

COUNTY POLICE COMMANDER

NAKURU.” (emphasis added)

2. On 23rd October 2019 he filed an application under Certificate of Urgency seeking leave to apply for an order of *certiorari* to quash the said letter, and for the leave to operate as a stay of the intended orderly room proceedings.

3. By an order issued on 24th October 2019, *Lady Justice Hon. Mulwa* granted the prayers.

4. On 5th November 2019 the ex parte applicant filed Notice of Motion dated 1st November, 2019 seeking the order:

“1. THAT an order of certiorari to move into the High Court and to quash the letter dated 18th October 2019 of an intended orderly room proceedings against the applicant.

2. THAT costs of the application be borne by the Respondent.”

5. The application was supported by his affidavit sworn on 1st November 2019 and the annexures thereto the grounds on the face of the application being that:

1) The County Police Commander through the said letter had informed him of an intended orderly room proceedings against him which were yet to be commenced.

2) He was aggrieved by the same because if instituted he stood to suffer irreparable loss and damage.

3)“This court has powers to intervene and correct fundamental errors of law made by a subordinate tribunal if such an error goes to the jurisdiction or appears even on the face of the record or constituting a fundamental misdirection on the part of that subordinate court.”

6. In his affidavit he set out the factual background to the application. In brief, that at all material times he was the OCS Bondeni Police Station when on 6th September 2019 he received information from officers at Lanet Police Post that one CI Hosea Kipkoech had approached them to assist him to trace one of his missing daughters. They accompanied him to the alleged hideout only for the story to change and for him to say that he wanted to arrest one Jesse Mwaniki Kibothi and motor vehicle registration KBP 914R Toyota Succeed. They arrested the two (2) and escorted them to Lanet Police Post as evidenced by OB entries. However while at Lanet Police Post and contrary to known procedure, CI Kipkoech demanded that both the motor vehicle and the prisoner be released to him. The two officers at Lanet Police Post became suspicious, and instead called him, the ex parte applicant, who directed that both motor vehicle and suspect be escorted to Bondeni Police Station. He met with CI Kipkoech, and they agreed that motor vehicle and suspect be detained pending collection by STAPOL Eldoret. Why? Because there had been a stolen motor vehicle signal circulated by Eldoret Police Station over the said motor vehicle ref. C/CR1/9/VOLII/18 dated 26th November 2018, OB 52/6/11/18, OB 153/26/11/2018. The suspicion over IP Kipkoech conduct was that he was not the investigating officer, and he was not from Eldoret Police Station. The ex parte applicant could not understand why he could not wait for the OCS Eldoret to collect their suspect and exhibit so he refused to give in to his demands to release the motor vehicle and the suspect to him.

7. The situation got murkier when later CI Kipkoech later came with one PC Amos Kipkosgei who claimed to have been sent by the OCS Eldoret. Now already highly suspicious of CI Kipkoech, the ex parte applicant demanded police identification documents from PC Kipkosgei, who was not in uniform. He did not have them. The ex-parte applicant rang the OCS Eldoret who confirmed he was on his way to Nakuru to collect the suspect and exhibit and was not aware of CI Kipkoech and PC Kipkosgei, and who instructed that the same not to be released to any other person but himself. The OCS Eldoret CI Wamae arrived at around 8.30 p.m. and arranged to pick the prisoner and the motor vehicle the next day.

8. Meanwhile IP Peter Ng’etich was the acting OCS Eldoret at the station while CI Wamae was on his way to Nakuru. He claimed to have sent PC Kipkosgei to collect the prisoner and the exhibit. This, to the exparte applicant was against standing orders because a lone police officer could not be allowed to escort the prisoner and exhibit. This is what No. 235661 IP Peter Ng’etich stated in his statement dated 17th

September 2019.

“I am the above named police officer currently attached to the above station as the officer in charge crime.

I do recall very well on the 6th day of September 2019 at around 1100 hours while in the office when one Hellen Jepkorir who is a complainant in a case of theft of motor vehicle. She told me that the motor vehicle that she had reported having been stolen vide Eldoret OB. 153/26/11/2018 had been recovered in Nakuru Town and detained at Nakuru police station by one CI Koech. The records of the vehicle as reported by the complainant in the OB is KBP 914R probox succeed. I had to confirm the same by talking to CI Koech through the phone who affirmed having recorded the same and one suspected in custody.

Immediately I had to arrange for the collection of the prisoner and the vehicle by sending an officer namely PC Kipkosgei in the company of the complainant. CI Koech whom I had earlier on known told me he was travelling to Eldoret and would accompany the officer in escorting the vehicle and the suspect to Eldoret. Thus to reduce the cost, one officer was enough to travel to Nakuru.

At around 1400 hours, I received a call from CI Koech who told me to talk to the OCS where the vehicle and the suspect was detained through the phone and confirm if I had sent them to collect them. I talked with him through CI Koech's phone and I told him I had sent PC Kipkosgei who was in company of the complainant to collect the vehicle and the suspect. He however told me that he was not going to release the vehicle to strangers and that they should produce their COA's first. He further told me through the phone that he wanted witnesses' statements, the log book for the vehicle and the owner before release the vehicle. I had to explain to him that all that he was asking was at Eldoret Police Station and that no one knew that he will require them as he was not an investigator.

After about an hour, the said Koech called back informed me that the OCS had refused completely to release the vehicle despite him (OCS) knowing him very well that he was a police officer. I had to inform my OCPD and County Police Commander on the situation so that he can intervene for the vehicle to be released.

It was until late in the evening on the very day when I conducted the officers in Nakuru who told me that the OCS had finally accepted to release the vehicle but because it was late at night, they had to spend a night at Nakuru.

On the 7th day of September, 2019 at around 0900 hours, PC Kipkosgei called me that he was at Bondeni Police Station waiting for the complainant and CI Koech to join him so that they can collect their client and the vehicle. After 30 minutes, CI Koech called back saying that he has been denied the suspect plus the vehicle by the said OCS. I told them that we were in church attending North rift Disciplined Service Prayer day. After the service at around 1500 hours I informed my county command of the issue about the further resistance of the OCS Bondeni in releasing the vehicle and the suspect. At that time CI Koech, PC Kipkosgei and the complainant had decided to come back to Eldoret and had reached Salgaa when I told them to stop and go back as the county commander was communicating with the OCS concerned. Finally the vehicle and the suspect were released in the evening after intervention from senior officers.

That is all I wish to state for now.”

9. When the OCS Eldoret C I Wamae, arrived on 7th September 2019 both PC Kipkosgei and CI Kipkoech refused to accompany him and the prisoner to Eldoret. In his statement of 17th September 2019 he stated.

“I am the above named Chief Inspector of Police currently the ward commander Eldoret Police Station.

I do recall very well on 6th September 2019 afternoon I was called by CI Kiritu the Ward Commander Bondeni Police Station who informed me that there was a motor vehicle which been intercepted and detained at the station awaiting collection by Stapol Eldoret. As I was not aware of the same as it was stolen from Eldoret around November 2018 and by the I was not employed at Eldoret, I told him to wait as I inquire about the particulars but he informed me there was even a reminder signal dated 2/9/2019 being a circulation of stolen motor vehicle Reg. No. KBP 914R Probox white in colour which was stolen from one Limo Helen and signed by crime IP Ngetich of Eldoret Police Station.

I was on off duty. I was prompted to go to Bondeni after I learnt that it was only one officer from Eldoret who was to escort both the prisoners and the motor vehicle. On arrival I found an officer by the name of chief inspector Koech from vigilance having some word exchange with CI Kiritu and I opted to go and came back the following day ready to collect the prisoner and the recovered motor vehicle. The following day 7/9/2019 I met PC Kipkosgey of Eldoret Police Station and CI Koech who claimed had demanded to be handed over the motor vehicle escort Eldoret. I informed him that am the OCS Eldoret and as per the OB 46 of 6/9/2019 it is clearly indicated that both prisoner plus motor vehicle detained pending collection by Stapol Eldoret. He told me to be careful as some thieves are coordinating with same police officers he knows better and steal vehicles. I advised him if he had an issue with OCS Bondeni should follow the normal procedure but I should take the motor vehicle back to Eldoret.

Booked vide Bondeni OB 44 of /9/2019 and arrived to Eldoret vide Eldoret OB 45/7/9/2019 safely with prisoner, motor vehicle and two officers from Bondeni namely IP Kimeli and PC Kirwa. The suspect was charged before court and later I was informed through Mobile Phone by Mr. Kitavi D/OCPS Nakuru East to record my statement in line with what I heard and saw during confrontation between CI Koech and CI Kiritu.

That's all I have to state.

SIGNED BY

CI SOLOMON WAMAE.”

10. In addition to this the owner of the alleged stolen motor vehicle Hellen Limo wrote a letter of complaint to the Sub County Commander dated 7th September 2019 in which she accused the ex parte applicant of refusing to assist to have the suspect booked at the police station. She stated that the ex parte applicant claimed that the suspect was a victim of circumstances, forcing the arresting officers to forcefully book the suspect at Bondeni Police Station. She alleged that when IP Ngetich called from Eldoret to have the suspect released from the cells to officers he had sent, the ex parte applicant refused demanding that the original logbook of the motor vehicle be produced. Hellen Limo stated;

- “ a) The OCS conduct to be investigated.
- b) The complainant faced unnecessary cost and frustration.
- c) The OCS also claimed that he is untouchable even to his sub county commander has he been able to cancelled his transfers severally.
- d) The motor vehicle theft network is well conversant to him.
- e) Aiding suspects to escape justice.”

11. By a letter dated 10th September, 2019 the ex parte applicant wrote a letter of complaint against the said No. 232833 CI Hosea Koech of Internal Affairs unit, to the Inspector General, with copies to;

“The Chairman of the National Police Service Commission.

Deputy Inspector General KPS

Director of Criminal Investigation

Director of Internal Affairs Unit

Director of National Intelligence

Director of EACC

Director of Public Prosecution

The Chairman IPOA

Regional County Commander Rift Valley Region

County Commander Nakuru

Sub County Commander Nakuru East

Sub County Criminal Investigation Officer.”

He reiterated the facts set out herein above and queried the conduct of the said CI Koech, and the said No. 73196 Amos Kipkosgei, for acting against the police SOPs with regard to how to deal with a suspect arrested by a different police station. Their refusal to comply, the fact that the OCS Eldoret Police Station was not aware of their activities, and the efforts by CI Koech to paint the ex parte applicant as a crooked police officer, yet he had numerous commendations from the community served by Bondeni Police Station, CI Koech’s involvement of the press, and a certain Whatsapp Group to carry on this. He sought the assistance of Independent Police Oversight Authority (IPOA) to investigate CI Koech. He annexed extracts from the Whatsapp Group and the Newspaper Standard of 10th September 2019. He received a response from the National Police Service Commission (NPSC) dated 17th September 2020, ref NPSC/1/8/13/2/VOL.XXX VII/(22) to the effect that the IG was in a better position to investigate the said complaint.

The commendations from the community led to commendations by Sub County Police Commander on 14th December, 2018, County Police Commander dated 20th April, 2014 Regional Police Commander of the same date, and letter from office of the Inspector General dated 11th April, 2018.

“The same congratulates OCPD Nakuru Division and OCS Bondeni Police Station for the good work they have done within a short period.

Through their dedication to security concerns, the public's negative attitude towards police officers has changed for the better. Security has tremendously improved and specifically during Christmas, New Year and other holidays.

The Inspector General, National Police Service has directed that you commend the officers for their good work and response to public security needs."

12. In a Replying Affidavit sworn on 14th November 2019 Stephen Matu the County Police Commander gave the alternative facts.

"3. THAT on 6th September 2019 at 1230 hours Chief Inspector Hosea Koech reported to Lanet Police Post theft of a Motor Vehicle Reg. No. KBP 914R Toyota Succeed while in colour, which was stolen in Eldoret town.

4. THAT Chief Inspector Koech stated that the Motor Vehicle was sighted within Lanet area and requested the Officer Commanding Police Post (OCPP) to assist in the recovery. The motor vehicle was recovered and one suspect Jessy Mwaniki Kibuthu was arrested and escorted to Bondeni Police Station pending transfer to Eldoret.

5. THAT Chief Inspector Koech accompanied by No. 73196 Police Constable Amos Kipkosgei approached the Officer Commanding Police Station, Bondeni (ex parte applicant herein) in attempt to transfer the suspect and motor vehicle to Eldoret Police Station but they were unsuccessful because they could not properly identify themselves as police officers.

6. THAT the Officer Commanding Police Station, Bondeni (ex parte applicant herein called the Officer Commanding Police Station Eldoret to confirm If he had sent officers to transfer the suspect and motor vehicle to Eldoret and he stated he was unaware of because he was out of statio handling a personal issue.

7. THAT the Officer Commanding Police Station, Bondeni (ex parte applicant herein) dismissed Chief Inspector Koech accompanied by No. 73196 Police Constable Amos Kipkosgei and maintained that he would not hand over the suspect and exhibit to unknown officers purporting to be officers from Eldoret Police Station.

8. THAT Chief Inspector Koech and the Officer Commanding Police Station, Bondeni (ex parte applicant herein) both entered into the occurrence book the events of that day being OB 58/6/9/2019 and O59/6/9/2019 herein enclosed marked as.

9. THAT the sub County Police Commander intervened in the matter and ordered Officer Commanding Police Station, Bondeni (ex parte applicant herein) to release the Motor Vehicle to the Officers from Eldoret but he defied the order.

12. THAT a complaint was filed against the ex parte applicant was taken to the Regional Commander by the complainant, owner of the stolen motor vehicle, Hellen Limo the 7th respondent herein vide letter dated 7th September, 2019. Herein enclosed is the letter marked as SMM 1.

14. THAT after inquiry into the complaint, investigating officer, Daniel Kitavi forwarded the inquiry file to me for further action vide letter dated 20th September, 2019. Herein annexed is the letter dated 20th September, 2019 marked as SMM3.

15. THAT I forwarded the same to the Regional Police Commander recommending that No. 234703 Chief Inspector Solomon Kiritu be charged in orderly room proceedings pursuant to Section 88(2) as read together with eight schedule Section 1(t) of the National Police Service Standing Orders. Herein annexed is the letter dated 27th September, 2019 marked as SMM4."

He annexed to his affidavit the statement of all the police officers who were involved in this scenario. The officers from Lanet Police Station, who stated that CI Koech first went to them pretending that the suspect they eventually arrested had disappeared with his (CI Koech's) university student daughter. PC Kosgei conceded that he was not carrying his Certificate of Appointment when he presented himself before the OCS Bondeni seeking to have the suspect released to him. That it is the CI Koech who actually caused disturbance at the police station issuing threats to the OCS Bondeni Police Station. That the CI Koech and PC Kosgei's conduct forced the OCS Bondeni Police Station to call the OCS Eldoret who was not aware that PC Kosgei and CI Koech had gone to collect the suspect.

"14. THAT after inquiry into the complaint, investigating officer, Daniel Kitavi forwarded the inquiry file to me for further action vide letter dated 20th September, 2019. Herein annexed is the letter dated 20th September, 2019 marked as SMM3.

15. THAT I forwarded the same to the Regional Police Commander recommending that No. 234703 Chief Inspector Solomon Kiritu be charged in orderly room proceedings pursuant to Section 88(2) as read together with eight schedule Section 1(t) of the National Police Service Standing Orders. Herein annexed is the letter dated 27th September, 2019 marked as SMM4."

13. In a Supplementary Affidavit sworn on 4th May 2020, the ex parte applicant deponed that the report made by CI Koech was about his missing daughter. That neither CI Koech nor PC Kosgei had their C of A and CI Koech was not from Eldoret but internal affairs. That despite the stay orders of this court the orderly room proceedings were conducted and a decision taken as evidenced by the letter here below:

"RE: DEPLOYMENT MEMEBRS OF INSPECTORATE

The Deputy Inspector General Kenya Police Service has vide his letter SEC. POL. 1/2/5/2/VOL.XXXIX/12 dated 6th November, 2019 approved the deployment of the following officers with immediate effect to report by 18th November, 2019.

S/No.	F/No.	Rank	Name	Deployed from		Deployed To
1	232969	CI	PATRICK OSURU OMBECHI	NAKURU	SOP NAKURU EAST	OCS BONDENI
2	233751	CI	ANDREW SWA MOLO	P/HQRS	OPERATIONS	COUNTY HQRS
3	234703	CI	SOLOMON NDUGI KIRITU	NAKURU	OCS BONDENI	WAJIR SOP WAJIR NORTH
4	237459	IP	BARNABAS KIBOR	NYANDARUA	OC CRIME OLKALAU	SALGAA TRAFFIC BASE

Counsel filed submissions. Mr. Mong'eri for the ex parte applicant. Ms. Cheruiyot for the Attorney General.

14. Ex Applicant Submissions

It was argued for the applicant that the orderly room proceedings were decided upon because the applicant refused to obey orders of his senior to release the suspect to CI Koech and PC Kosgei, yet he had good reason not to. That the said proceedings were intended have him dismissed from the service. Relying on **Council of Civil Service Unions vs Minister for Civil Service [1984] 3 All ER 935** cited with approval in **Republic v Kenya Power & Lighting Company Limited & Another [2013] eKLR**, the grounds upon which Administration action is subject to control by Judicial Review:

- illegality,
- irrationality (Wednesbury unreasonableness) **Associated Provincial Picture Houses Limited vs Wednesbury Corporation [1984] I.K. B 223**
- Procedural impropriety

He also relied on **Municipal Council of Mombasa vs Republic & Another Civil Appeal Number 185 of 2001** where the Court of Appeal laid down the principles of Judicial Review. That Judicial Review is concerned with *the decision making process* not the merits of the decision, *how the decision was arrived at, whether those who made it had the power to do so, whether the applicants were heard before the decision was made, whether the decision maker considered irrelevant matters and/or failed to consider relevant matters*. That considering the circumstances of this matter, the decision to subject the applicant to the intended orderly room proceedings was;

“so outrageous in its defiance of logic or accepted moral standards that no sensible person, applying his mind to the question to be decided could have arrived at the decision... that the applicant acted cautiously, reasonably and within his powers in the manner in which he handled the arrested, cautiously, reasonably and within his powers.”

The Respondents' submissions

In response Ms. Cheruiyot argued that the orderly room proceedings were preferred because the applicant **refused to obey a lawful order**. That the chronology of events did not matter, the only thing was that **he refused to obey the lawful command of his superiors** who are the custodians of the said processes, that it was only right for the ex -parte applicant to obey the said order **to release the suspect and the motor vehicle**. That the explanation given herein by the ex parte applicants for the reason not to release the suspect, ought to have been given in the orderly room proceedings and not before this, that by doing so he was inviting this court to look at the merit of the decision, yet Judicial Review is not about the MERIT of the decision but the process of the decision making.

15. In the written submissions the respondent laid out issues for determination.

- 1. Whether the application raises factual issues that are not triable within the purview of Judicial Review?**
- 2. Whether the decision to institute orderly room proceedings against the ex parte applicant is lawful?**
- 3. Whether the decision to institute orderly room proceedings against the ex parte applicant is procedural?**
- 4. Whether the orders sought should be granted?**

16. On the first issue relied on **Republic vs Attorney General & 4 Others exparte Diamond Hashin Lalji & Ahmed Hashim Lalji [2014] eKLR**.

“Judicial review only determines whether the decision maker had the jurisdiction, whether the persons affected by the

decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters. It follows that where an applicant brings judicial review proceedings with a view to determine contested matters of fact and in effect urges the court to determine the merits of two or more different versions presented by the parties, the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved...

17. On the second issue, she argued relying on **Council of Civil Service Unions Case** above. That the decision failed the illegality test as it was founded on **Section 88 of the National Police Service Act** and the decision was not arbitrary.

18. On the third issue, the counsel relied on **Article 47 of the Constitution, Section 4 of the Administrative Act, 2015** and argued that the letter was only a step to the undertaking of disciplinary measures, hence no procedural impropriety had been committed.

19. On the fourth issue, relying on JNN (a minor) MNM suing as next friend is **Naisula Holdings Limited t/a N school [2018] eKLR** that the test of reasonableness, is to be applied in the context of life realities. That the allegations of 5th, 6th, 7th respondent, fed the decision of 3rd respondent to authorize the proceedings.

20. On whether the orders sought were tenable, that in **Republic vs National Water Conservation & Pipeline Corporation & 11 Others [2015] eKLR** that a Judicial Review that does not have any whiff of illegality, irrationality or procedural impropriety is a signal for the court to lay down its tools.

Analysis

21. I have set out each side of the circumstances of this peculiar case .

22. I have considered the submissions, both oral and written and the authorities cited by each party.

23. The issue for determination is whether, on the principles of Judicial Review, the orders sought are merited.

24. The applicant is challenging the decision to subject him to orderly room proceeding. It is this decision that this court is being asked to look into in the light of the laid down principles on judicial review.

25. The first peculiar thing about these proceedings is that the key complainant, the person at whose behest these proceedings began namely Hellen Jelimo, did not enter any appearance or file any proceedings in response despite being served. Why? it would appear, because her car was recovered, the suspect was charged in court, and that is all that mattered to her.

26. The second peculiar thing is that the respondent did not avail the order from the superiors that the ex parte applicant is said to have refused to obey. Neither did any of his superiors commit to having actually issued a direct order to him to release the said suspects, man and motor vehicle to C I Koech.

27. The third peculiarity, is that the third respondent despite stay orders of this court, proceeded exparte and conducted the orderly room proceedings. This is what comes out of the signal dated 30th January 2020 which states clearly that the exparte applicant to report to the County POL Nakuru.

“On or before 4th February 2020 following the outcome of his inquiry file No. 1/2019.”

The outcome must have come out of a process, and the process was the orderly room proceedings. How did that happen, if not in utter contempt of the orders of this court? The complete silence on the part of the respondents on this issue remains remarkable. So, if the 3rd respondent can proceed in the face of the stay orders issued herein to proceed with the inquiry, can it be said that the application is baseless? It sets the court’s antenna on the high as to the presence of illegality, irrationality, unreasonableness, in the actual decision to have the applicant subjected to orderly room proceedings.

28. On Legality:

I. It was submitted and indicated that the proceedings were under the provisions of **Section 88(1)** of the **National Police Service Act** states:

“S.8. Disciplinary offences

(i) Every police officer shall be an officer in the Service and shall be, subject to the law and regulations from time to time in force relating to the Service.”

ii. The charge is framed under Section (1) (t) of the Eighth Schedule which states:

“1. It shall be an offence against discipline for any police officer to—

(t) be negligent in the performance of his duty;”

iii. To arrive at the charge, the Respondent's position is that the decision was based on **investigations** conducted Daniel Kitavi who was No. 231962 the rank of ASP, and was the Deputy Sub County Commander.

iv. Here is the process: he states that

- a. he received a complaint letter from the 7th respondent against the exparte applicant,
- b. it was sent to him by the 3rd respondent.
- c. His brief was to open an inquiry file which is all he did.

v. The 3rd respondent's position is that this officer was the Investigating Officer. It would be expected that as the investigating officer he would do more than just put together a bunch of statements but would investigate the 7th respondent's complaint then, make a recommendation. There is nowhere this process is captured, so what was the basis of the 3rd respondent's recommendation for orderly room proceedings?

vi. The submissions by the respondent are that the applicant's offence was refusing to obey a lawful order from his superiors. However, reading the proposed charge for the orderly room proceedings it is evident that that was not the basis. The exparte applicant is expected to answer a charge of **"neglect of duty, and being idle and disorderly."** The gist of the respondent's case is that the applicant disobeyed lawful orders of his superiors and that was the crux of the case against him. A perusal of the annexures does not reveal any orders from the alleged superiors, no statement from any of the alleged superiors, no complaint recorded by any of the alleged superiors.

29. From the foregoing one can see that the law cited does not found a position for the charges.

30. The inconsistency as to the reason for the orderly room proceedings points to **irrationality** in the process.

31. On irrationality and unreasonableness:

i. How did the 3rd respondent arrive at the decision? Ostensibly by reading the statements that were put together in the inquiry file by ASP Kitavi.

ii. A reading of those statements, whiffs out the irrationality and unreasonableness of that decision, and the fact that the 3rd respondent failed to take into account the relevant matters, viz.

- That the applicant was the OCS Bondeni
- That the suspects (person and exhibit) were in his custody.
- That there was an OB entry indicating that they would remain in his custody pending collection from STAPOL Eldoret
- That the CI Koech began the whole arrest process through lies to the officers at Lanet Police Station.
- That neither he CI Koech nor PC Kipkosgei had their C of As, an admitted fact.
- That the senior person whose lawful order the ex parte applicant refused to obey did not record a statement.
- That on the face of the witness statements this was an issue between Eldoret Police Station and Bondeni Police Station and the two OCSs dealt with it
- That the reading of the alleged complainants statement dated 16th September 2019 recorded in Eldoret at 10.00 hours was suspect.

"MRS HELLEN LIMO C/O 0725-583307

STATES AS FOLLOWS

I am the above names lady married and working at KPLC.

I do recall on 26/11/2018 at about 7.30 p.m. when I was from work to my resident when packed my car Reg. KBP 914 succeed white in colour at Sokomo Chepkoilel fence and I went to buy some vegetables at the market. When I returned back I found my car missing. Later I passed the message and went searching all around the town.

On 6/9/2019 my neighbour namely Hosea Kipkoech called me and informed me that he had spotted my car within Lanet. He told me to inform IP Ngetich the investigating officer in Eldoret Police Station about the recovery. I went straight to the station and met the investigating officer who talked with Kipkoech over the phone. Kipkoech agreed with him to send officers to go to Nakuru to escort the prisoner and the car back to Eldoret. The OCS at the time at Eldoret Police Station was said to be on sick off therefore IP Ngetich was in charge of the station.

Later Kipkoech called me and informed me that the OCS Bondeni Police Station wanted to see me before he released the car. I was not prepared but I had gone to Nakuru with her ID and original log book. He was later called by IP Ngetich but

still he could not listen.

The officers arrived at around 1300 hours together with the complainant and I introduced them to the OCS. Instead he refused to hand over the prisoner and forced me to book the report vide Ob 22/6/9/2019 OB 24/6/9/2019 and OB 57/6/9/2019. The OCS asked me if I know how many transfers he has cancelled and if I know his god fathers. We later reported to her OCPD who talked to him through his cell phone but still he rudely talked to her.

We also requested him to give as police officer to go for other mentioned suspects but he could not assist us saying all his officers were engaged. He later talked to some suspects as KITI yard who were mentioned by the suspect. We spent some other two days in Nakuru until the complainant engaged a lawyer is when we left Nakuru. Later the deputy OCPD informed me to record a statement to this effect.

FURTHER STATEMENT

I asked him why he called me all the way to Eldoret. I engaged a lawyer since if he was not ready to listen to her boss who else could he listen to.

I therefore lodged my complaint with intention of knowing:

- (a) Why did the OCS called me from Eldoret to Nakuru only to suffer at his cost.
- (b) If the OCS Bondeni is a professional officer as the station was fill with other complaints.
- (c) Why did I had to encounter unnecessary cost in the hands of OCS who could have been the first officer to assist me.
- (d) My car was recovered after one year in his area and he seems to know the theft network at Bondeni.

I later decided to make my complaint and later request by the deputy OCPD to record my statement.”

iii. How is it possible that Hellen would be the complainant and at the same time be the one to introduce police officers to the OCS Bondeni Police Station? Did the 3rd Respondent really read this statement?

iv. It would be expected that the investigating officer would have noticed these issues and made recommendations on them.

v. The totality of the evidence on the circumstances under which the decision to bring orderly room proceedings against the ex parte applicant do not only have a whiff, Wednesbury unreasonableness. Any person taking into consideration the circumstances of this case would not logically arrive at the decision arrived at.

32. In addition the failure by the alleged superiors on whose complaint the 3rd Respondent is said to have acted , and whose lawful order the ex parte applicant is alleged to have refused to obey , to file any statements to that effect provides a basis for procedural impropriety. How would a decision be arrived at that the ex parte applicant had disobeyed a non-existent lawful order?

33. It is my view that from the facts placed before me the ex parte applicant acted rationally, cautiously, and within his legal mandate is refusing to release a suspect to an officer who had already acted in a suspicious manner, and who tried to bully him to do what he considered unprocedural.

34. Fidelity to the law, public policy and the Constitutional principles and values set out under Article 10 must remain our true north. The era of ambiguous orders from opaque persons ‘above’ is done. The exparte applicant detained the suspects until they were collected by the OCS of the station where the offence was committed. What was so wrong about that? Public Officers are every day being held personally responsible for certain actions taken while in office. He did just that.

35. It is on that basis that I issue an order of certiorari to move into this court and to quash the letter dated 18th October 2019 of an intended orderly room proceedings against the applicant.

36. THAT costs of the application be borne by the Respondents

Dated and Signed at Nakuru this 9th October 2020.

Mumbua T. Matheka

Judge

In the presence of:- VIA ZOOM

Edna Court Assistant

Mong'eri & Co. Advocates; Ms. Moenga for Mong'eri

OAG: N/A Edna CA: I did not serve the AG

Court. Why? Because I did not have their data

Ms. Moenga: Please call Ms. Cheruiyot for the AG. I do not wish to adjourn again

Later:

Ms. Moenga for Mong'eri for ex applicant

Mr. Weche HB for Ms Cheruiyot for the respondents

Judgment delivered via ZOOM this 16th Day of October 2020

Mumbua T Matheka

Judge