

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E485 OF 2021

BETWEEN
SAMMY WABOMBA WASIEBA
PETITIONER

VERSUS
DIRECTOR OF PUBLIC PROSECUTIONS
.....1ST RESPONDENT

INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE (DIRECTOR INTERNAL AFFAIRS UNIT)
.....2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....
3RD RESPONDENT

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J U D G M E N T

Introduction

1. The Petition dated 15th November, 2021 is supported by the affidavit of similar date of Sammy Wabomba Wasieba (the Petitioner herein). The Petitioner challenges a decision by the 1st Respondent to prosecute him criminally, following investigations and subsequent recommendation by the 2nd Respondent into an incident he alleges occurred on 10.6.2019, during which, his lawfully issued firearm discharged accidentally. The Petitioner alleges bad faith because he had already been subjected to disciplinary procedure in respect of same incident, in which he faced two

counts, pleaded guilty to one pertaining to discharge of the firearm and was punished accordingly while he was acquitted on one involving the striking, use or threatening violence for lack of evidence.

2. He contends that the current criminal prosecution is an attempt to revive the charge he has been disciplinarily acquitted of, in violation of Article 50 (2) (o) of the Constitution which amounts to double jeopardy, given that he has undergone the prescribed disciplinary procedure under the National Police Service Act No. 11 of 2011.
3. The Petitioner thus seeks the following reliefs against the Respondents:
 - a) **A DECLARATION** be made by this Honourable Court that the 1st, 2nd and 3rd Respondents acted illegally by summoning the Petitioner with a view to charge him.
 - b) **A DECLARATION** be made by this Honourable Court that any charges whatsoever against the Petitioner are illegal and unconstitutional.
 - c) **AN ORDER FOR COMPENSATION** of the Petitioner be made by this Honourable Court for general damages for the distress, mental anguish, illegal summons and intended charging of the Petitioner,
 - d) **AN ORDER** awarding costs of this Petition to the Petitioner.
 - e) Any other further orders, writs and directions this court considers appropriate and just to grant for the purpose of enforcement of the Petitioner's fundamental rights.

Petitioner's Case

4. The Petitioner states that he is a police officer working in the National Police Service. At the time relevant to this case, he was of stationed at Industrial Area Police Station.
5. He depones that on 10th June, 2019, he had been assigned patrol duties within the Industrial Area section near the KCB Bank. That at the time he went for lunch, he decided to first carry out safety procedure of the firearm, AK 47, but he accidentally touched its trigger and it discharged ammunition into the air. This caused public anxiety and commotion. He immediately proceeded to the Police Station and informed his superior, the Officer Commanding Station, OCS.
6. Subsequently, he was charged with two offences against discipline namely; discharging a weapon without order or reasonable cause contrary to Section 88 (2) as read with Schedule 8 (2) 1 (0) of the National Police Service Act No. 11 of 2011. There was a 2nd Count, using, striking or unlawfully threatening violence against any police officer or any other person contrary to section 88(2) as read with schedule 1 (a) of the National Police Service Act No.11 of 2011.
7. He appeared before Subordinate Disciplinary Committee that was appointed for the disciplinary trial on 17.6.2019. The Subordinate Disciplinary Committee delivered its decision on 7.7.2019 wherein the Petitioner was found guilty on the first count after pleading guilty and was fined Kshs. 2500/-. He

was acquitted of the second count on the grounds that the statements did not meet the threshold of prosecution, and also, witnesses were not found. The decision was then forwarded to the Sub-County Commander on 8th July, 2019 and this marked the end of that matter. The Petitioner states that he was satisfied with that disciplinary procedure.

8. The Petitioner alleges that despite the foregoing, on 8.11.2021, the 1st, 2nd and 3rd Respondents, in bad faith, and in a manner prejudicial to his rights, issued him with summons he was to be criminally charged in Court for the offence of threatening to kill that emanated from the same incident that he faced before the Subordinate Disciplinary Committee. He contends that this is a violation of his rights under Article 50 (2) (o) of the Constitution as since it is an attempt by the 2nd Respondent through the 1st Respondent to revive a case that has already been concluded where all the parties had a right of appeal.

Respondents' Case

9. In addition to the 2nd Respondent filing a replying affidavit, the 1st, 2nd and 3rd Respondents also filed grounds of opposition as follows:

- i. THAT the Prayers sought by the Petitioner are unconstitutional as they seek to prevent the Director of Public Prosecutions from exercising his mandate as provided under Article 157 of the*

Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.

- ii.** *THAT Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.*
- iii.** *THAT the exparte applicant has not adduced reasonable evidence to show that the criminal proceedings has been instituted against him by the 1st respondent.*
- iv.** *THAT the exparte applicant has not adduced reasonable evidence to show that the criminal proceedings, if any, has been mounted for an ulterior motive and in bad faith.*
- v.** *THAT the exparte applicant must demonstrate that substantial injustice would otherwise result if the criminal proceedings were instituted against him.*
- vi.** *THAT there is a complaint against the exparte applicant related to threats to kill contrary to Section 223 of the penal code and it is in the public interest 3 that such complaint made to the police be investigated and the perpetrators of crimes are charged and prosecuted.*
- vii.** *THAT the complaint against the exparte applicant which is related to threats to kill contrary to Section 223 of the penal code should be put on the scales of justice and the same proven beyond reasonable doubt.*
- viii.** *THAT the complaint which is pending before the Internal Affairs Unit of the National Police Service has a complainant whose is also seeking justice as her claim has to be determined by the trial court.*
- ix.** *THAT the application is scandalous, frivolous and vexatious in that it is without substance or groundless or fanciful and it lacks bona fides and*

is hopeless or offensive and tends to cause the 1st, 2nd & 3rd respondents' unnecessary anxiety, trouble or expenses.

x. *THAT the orders sought are therefore not tenable against the 1st, 2nd & 3rd Respondents as the exparte applicant has not shown how the Respondents will infringe on the petitioner's constitutional rights if the orders sought are not granted.*

xi. *THAT the applicant has never been tried before any court of law*

2nd Respondent

10. The 2nd Respondent filed a replying affidavit through Mr. Daniel Ashikobe (ASP) sworn on 28th June, 2022. He stated that he was at the time a Police Officer attached to the Internal Affairs Unit (hereafter referred as the Unit) Investigations Section. He depones that he led a team of IAU Investigators tasked with investigating the conduct of PC Sammy Wamboba Wasieba who was formerly under the command of OCS Industrial Area Police Station of Nairobi County but by at the time of these investigations, he was working under the auspices of OCS Bungoma Police Station in Bungoma County.
11. He stated that the investigations into the conduct of the Petitioner was prompted by a complaint to the Unit by **Ms. Seline Awuor Mboya** who he had threatened to kill severally.

12. Concerning the averments made in the Petition by the Petitioner as well as in his affidavit in support, he refuted the same. He explained that while it is true that the Petitioner was assigned duties to guard Kenya Commercial Bank (hereafter referred to as KCB) on 10th June, 2019, on that material day, he left the Police Station aboard a motor bike and behind his colleague with whom they paired, No.105849 PC (W) Fatuma Hassan at the Station.
13. That according to the then Officer in charge Industrial Area Police Station (OCS), No. 232168 CI Henry Kandie, the Petitioner proceeded to Kamongo slum along Likoni road, alone and while armed with AK 47 rifle loaded with 30 rounds of live ammunition. That according to the OCS, he was seen threatening anybody on sight per (*annexture marked'DA1'*).
14. That the Petitioner threatened to kill the Vice Chairman of Kamongo village Mr. George Kimani alias Kimkam. It was during this incident that the Petitioner fired live ammunitions into the air to scare the crowd who had threatened to attack him for terrorising the villagers. That the villagers on their own volition teamed up under the leadership of area Chief Muraguri and Mr. Meltus Wanjala Wekesa Komongo village Chairman and reported the conduct of the petitioner at Industrial Area Police Station vide **OB No.26/10/6/2019** (*annexture 'DA4'*).

15. That while the Petitioner claims he went and reported the discharge of his firearm; he does not disclose the O. B entry he made in the Occurrence as is the practice. That the correct position is that the Petitioner appeared at the Station after the report had been made to the station that he was threatening villagers at Kamongo village and was thus disarmed by in charge armoury Sgt Jackson Kuloba (*per annexure 'DA 3'- the Statement of Sgt Kuloba*).
16. That on unspecified date within the month of June, 2019, the Petitioner called **Ms. Seline Awuor** into his house located within Kamongo village and threatened to kill her for allegedly refusing to disclose to him the person who touched his girlfriend in a local pub (*annexure 'DA 2'- the Statement of Ms. Seline Awuor*).
17. According to the 2nd Respondent, investigations established that the Petitioner aimed a gun and shot at Ms. Seline Awuor missing her narrowly. Ms. Awuor screams attracted the attention of Kamongo villagers within Industrial Area who came to her rescue upon hearing the gun shot.
18. The 2nd Respondent disputed the assertion made by the Petitioner that he was issued with show cause notice for committing disciplinary offence in that he threatened a person with violence yet the name of the person threatened with violence is neither mentioned in the show cause notice nor did the Petitioner refer to the person he threatened with violence in his response.

19. The 2nd Respondent maintained that the Petitioner threatened to kill Ms. Seline Awuor on different occasion yet Ms. Seline was not named in the particulars in the show cause notice to the Petitioner.
20. That following a complaint by Ms. Seline Owour to IAU, it requested the Inspector General of Police to allow the said Unit to conduct investigations into the complaint, (*annexture DA5-letter to the Inspector General from the unit dated 29th April 2020 and a response thereto from the office of the Inspector General of Police dated 13th May 2020 annexed- marked DA6*).
21. Regarding the allegation that the Petitioner underwent Subordinate Disciplinary Committee proceedings on 17.6. 2019 and that he was satisfied with the composition of the Committee and its judgement; the 2nd Respondent explained that the procedure under the National Police Service Commission Regulations is based on *Legal Notice No.90 and Chapter 30, Order 14(1) of the National Police Service Standings Orders*. That Section 89(2) of the National Police Service Act, requires that a Police Officer authorized to impose a penalty for a disciplinary offence, shall enter a record of such punishment, the date of the punishment and the offence for which it was inflicted on the record sheet of the Police Officer punished, a copy of which shall be forwarded to the National Police Service Commission for review and confirmation.

22. However, the aforesaid proceedings and punishment were incomplete and thus invalid because they were not forwarded to the National Police Service Commission for review and confirmation. Annexure- WWS 7 that the Petitioner heavily relies on was never forwarded in the prescribed manner under the law.
23. That in fact, the 2nd Respondent wrote to the Deputy Inspector General, Kenya Police Service and sought to be furnished with the profile of the Petitioner and established that the Petitioner's conviction was never documented as he has a clean record with no previous disciplinary convictions (*annexture- 'DA7'*).
24. That further, despite the Petitioner asserting that he was fined Kshs. 2500 for the disciplinary offence he had pleaded guilty to, none of his salary pay slip for the years 2019, 2020 or even 2021 confirmed any such deduction.
25. That concerning the assertion that he was acquitted on the second count due to insufficient evidence primarily because the witnesses' statements could not meet the threshold of prosecution, and also, due to the fact that witnesses could not be traced, the petitioner merely availed the record of the 1st count of discharging a weapon without a reasonable lawful order. He did not produce the proceedings for the second charge of threatening violence. Further, there is no

record of a charge of threatening to kill Ms. Seline Awuor that has been exhibited.

26. The 2nd Respondent contended that threatening to kill is a serious criminal offence under Section 223 of the Penal Code, Cap 63 Laws of Kenya which cannot be tried under the disciplinary procedure. That in accordance to Section 88(3) of the National Police Service Act, a Police Officer who commits a criminal offence is liable to criminal proceedings in a court of law. The Disciplinary Committee therefore cannot usurp the powers of the Court of law.
27. The 2nd Respondent deponed that after receiving complaint from Ms. Seline Awuor that the Petitioner threatened to kill her for refusing to yield to his sexual advances, it investigated the same and revealed that there is sufficient evidence to charge the Petitioner with offence of threatening to kill Ms. Awuor Contrary to Section 223 of the Penal Code and the petitioner's allegations that he was tried of the same offence therefore he is destined to suffer double jeopardy is unfounded.
28. Moreover, the waiver notice annexed to the petition-annexture 'SWW3,' which the Petitioner relied on indicates that Count II in the disciplinary proceedings pertained to "*unlawful strike, use or threatening violence against any Police Officer or any other Person contrary Section 88(2) as read with Eighth Schedule 1(a) of the NPS Act No 11 of*

2011" which is a distinct offence from that of threats to kill under Section 223 of the Penal Code which the Petitioner is to be charged with.

29. The frustration of Ms. Awuor with dithering at Industrial Area Police Station prompted her to lodge a complaint with the IAU, where she received a fair hearing.
30. The 2nd Respondent thus maintains that it has not violated the Petitioner's constitutional rights nor treated him in inhumane way by summoning him to appear at the Unit Headquarters to update him of the decision of the Director of Public Prosecutions to prefer criminal charges against him (*annexure 'DA 8' -DPP's directive*).
31. That in addition to Ms. Seline Awuor complaint, the Unit investigated another complaint against the Petitioner from one **Ms. Euphrasia Mugula Luvembe**, an employee of Nairobi West Hospital over the similar allegations of threats to kill where it was alleged that on 28th August, 2020, the Petitioner in the company of two heavily armed uniformed Officers, namely; No.110665 PC Kevin Nyongesa, No.107550 PC Martin Kimathi and an unknown civilian, stormed the hospital at around mid-day, forced entry into a room where Ms. Mugula was working and threatened her, causing panic within the hospital.
32. This matter has since been taken over by the Independent Policing Oversight Authority (*annexture 'DA9' and 'DA10'*).

33. The 2nd Respondent contends that this Court cannot interfere with the administrative process or constitutional mandate of other independent institution absent of a clear violation of the law which has not been demonstrated in the petition hence the petition is malicious, frivolous and an abuse of the Court process.

34. The 2nd Respondent through **Inspector Mr. Aggrey Busoga**, swore another affidavit that basically reiterated the contents of the affidavit of Mr. Daniel Ashikobe (ASP).

Petitioner Submissions

35. The Petitioner, through **Walubengo & Waningilo & Co. Advocates**, filed submissions dated 27.1. 2025 wherein he identified two issues for determination, namely:

- i. Whether further prosecution violates the Petitioner's rights under Article 50 and Article 50 (2) of the Constitution of Kenya 2010, considering he has already been penalised and acquitted of the intended second charge.*
- ii. Whether there has been an abuse of process due to procedural irregularities in handling the administrative and criminal matters.*

36. On the first issue, that is whether further prosecution violates the petitioner's rights under Article 50 and Article 50(2)(o) of the Kenyan Constitution 2010 considering he has already been penalized and acquitted of the intended second charge; Counsel submitted that Article 50 of the Constitution is fundamentally designed to ensure that justice is administered fairly, respects the rule of law, and protects the

rights of individuals accused of criminal offences or involved in civil disputes. He argued it is a violation of Article 50(2)(o) of the Kenyan Constitution (2010), to subject the Petitioner to a charge he has already faced penalties for and has been acquitted of by the Subordinate Disciplinary Committee sitting in its quasi-judicial capacity.

37. Counsel submitted that Article 50 not only protects the petitioner from further double prosecution but also upholds the integrity of the judicial system, fostering trust and confidence in legal proceedings, as it serves as a guardian of human rights and legal fairness. Petitioner relied on the case of ***David Ngugi Nganga v Republic[2018] eKLR*** where the Court found upheld the provisions of Section 176 Criminal Procedure Code in matter involving injuries of personal nature to promoting alternative modes of dispute resolution under Article 159(2)(c)) and faulted the trial magistrate in her ruling that did not take into account this principle when making the decision that accused had absconded as he had already reconciled with the complainant in count II and compensated him.
38. Counsel argued that the respondents' insistence on recharging the Petitioner is a misuse the court's process.
39. Regarding the 2nd issue; *Whether there has been an abuse of process due to procedural irregularities in handling the administrative and criminal matters*; it was contended on behalf of the Petitioner that fairness demands that multiple

punishments for the same act be avoided especially where administrative actions are sufficiently punitive. That the authority of administrative agencies is firmly rooted in the Constitution, Acts of Parliament, delegated legislation, and executive directives and thus essential that public administrators adhere to the law when making decisions, ensuring that their actions are lawful, reasonable, efficient, expedient, and procedurally fair. Counsel relied on ***Githunguri v. Republic (1986)*** where Court of Appeal highlighted that the pendency of charges and the threat of continuous harassment by the state amounted to abuse of process.

40. It was contended on behalf of the Petitioner that the continuation of the proceedings by the Prosecution after the administrative action against the Petitioner constitutes abuse in that it is oppressive, prejudicial and unfair to the Petitioner. Citing ***Dry Associates Limited v. Capital Markets Authority and Another [2012] eKLR*** Counsel submitted that administrative actions must respect fairness and reasonableness. Counsel argued that preferring subsequent criminal charges on the same facts after that disciplinary process undermined these principles.
41. In the Petitioners view, the Fair Administrative Action Act, 2015 was enacted to illuminate and expand the values espoused under Article 47 of the Constitution. Counsel contended that the Petitioner has never been confronted with the alleged statements in respect of the alleged other

complaints or sworn affidavits or the OB entries hence the right to fair administrative action has been violated.

2nd and 3rd Respondent's Submissions

42. The written submissions dated 20/2/2025 were filed on behalf of 2nd and 3rd Respondent by the Senior Litigation Counsel, Ms. Opio Immaculate. In her submissions, counsel isolated and highlighted the following issues:

- a) Whether the summoning of the Petitioner violates his rights under article 50 (2)(0) the Constitution.**
- b) Does the doctrine of double jeopardy apply in employment disciplinary cases where a criminal element exists?**
- c) Whether the Petitioner is entitled to the reliefs sought and the costs of the Petition.**

43. Tacking the first issue; Whether the summoning of the Petitioner by the 2nd Respondent violates his rights under article 50(2)(o) of the Constitution Counsel argued that it does not.

44. This is because the 2nd Respondent is a creature of Article 243 of the Constitution. The Internal Affairs Unit, under the 2nd Respondent exercises the functions delineated under Section 87 (2)(4) of the National Police Act no 11 of 2011 which among others authorizes it to receive, and investigate complaints against the police, promote uniform standards of

discipline and good order in service and keep record of facts of any complaint and to recommend appropriate action in respect of any that are found to be engaging in unlawful conduct. That aligns with Article 244 of the Constitution which stipulates that the National Police Service shall strive for the highest standard of professionalism and discipline among its members, prevent corruption, promote and practice transparency as well as complying with constitutional standards of human rights and fundamental freedoms.

45. Among the recommendations the Unit may make under Section 87 (5), include: the interdiction of an officer; suspension of an officer; administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer; or any other lawful action.
46. According to counsel, the 2nd Respondent in this matter received several complaints against the petitioner from different parties and at different times. Some of the complaints were made after the supposed hearing by the Subordinate Disciplinary Committee, for example, the complaint by Ms. Euphrasia Mugula Luvembe. This means that clearly, the complaints could not have formed part of the issues canvassed at the said disciplinary hearing.
47. Further, that the complaints by Ms. Seline Awour, did not form part of the disciplinary hearing. This is evidenced by

the '*notice to show cause*' which captures a different offence from the offence that the Petitioner is being summoned.

48. Lastly, after the supposed disciplinary hearing, the petitioner's proceedings and punishment were not forwarded to the National Police Service Commission as required under Section 89(2) of the National Police Act for review and confirmation, this rendered the proceedings incomplete, null and void.
49. Counsel further submitted that the fine imposed by the disciplinary committee was never paid and to date the Petitioner's records neither reflect the said proceedings nor the outcome as the disciplinary process was never completed to begin with.
50. On whether the doctrine of double jeopardy applies in disciplinary cases where there is a criminal element; counsel referred to the principle of double jeopardy as anchored in Article 50(2)(o) of the Constitution and Section 138 of the Criminal Procedure Code, CAP 75. She argued that the doctrine specifically applies in criminal proceedings because acquittal or conviction only applies in criminal matters not administrative proceedings. She cited the ***Khan & 2 others v Capital Markets Authority (Appeal 2 of 2022) [2024] KECMT 376 (KLR) (2 February 2024)*** in support of that position in which quoted the following paragraph:

"Moreover, the court in Republic v Public Service Commission of Kenya Ex parte James Nene Gachoka, Nairobi Misc. Application 516 of 2005 [2013] eKLR

found that the principle of double jeopardy does not apply to administrative proceedings such as those carried out by the Tribunal. The prohibition contemplated by the provision is that of a person undergoing trial for the same offence for which he was tried, convicted or acquitted....[14] The phrase „tried for that offence or for any other criminal offence“ found in section 77(5) of the repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings. Disciplinary proceedings cannot be equated to a „trial for an offence“ so as to attract the defence of double jeopardy doctrine. As such, disciplinary action, professional or otherwise, being of a civil nature, is not a punishment given by a court. The Supreme Court of the United Kingdom in case of R (on the application of Coke- Wallis) v Institute of Chartered Accountants of England & Wales [2011] UKSC1 noted that principles of autrefois acquit did not apply to disciplinary matters, which were civil not criminal proceedings. Lord Collins noted that, “[60] The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.” (See also Daniel Ndung’u v Director of Public Prosecutions and another Nairobi Petition No. 69 of 2012 [2013] eKLR).”

51. As to whether the Petitioner is entitled to the reliefs sought and the costs of the Petition, Counsel argued that that costs follow the event and thus prayed that the Petition be dismissed for lack of merit with costs to the Respondents.

Submissions By The 1st, 2nd and 3rd Respondents

52. The submissions, dated 12.6.25, were filed by Mr. Achochi Henry Nyabuto, an Assistant Director of Public Prosecutions.

53. Counsel stressed that the decision to charge is made by the 1st respondent under Article 157(6) of the Constitution of Kenya and takes into account the interests of the victim, the rights under article 50 and 157(11) of the Constitution of Kenya.
54. That under Section 24 of the National Police Service Act, the Police are mandated to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed.
55. Counsel argued that summoning of the petitioner to record a statement was in accordance with the law and the principles of natural justice and does not in any way infringe on his rights. He relied on **Rhodah Mutete Mutuku v Inspector General, National Police Service & 2 others [2019] eKLR**, where it was held that

“Investigations are a fundamental step in the justice chain to ensure that people are not charged unnecessarily and therefore cannot be said to be a threat to the petitioner’s right unless the investigations have been conducted unprocedurally and/or for ulterior motive....”

56. Counsel urged this Honourable Court to exercise restraint and allow state institutions to execute their mandates and cited the case of **Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another (2012) EKLR**, where the court held that:

“The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime..... The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.”

57. It was vehemently submitted that the jurisdiction of this court to interfere with the exercise of the 1st respondent’s discretion in making prosecutorial decisions should be exercised sparingly and in the clearest of cases as was held in ***Douglas Maina Mwangi vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2013***, where the Court stated:

“When dealing with the decision as to whether or not to prosecute, the office of DPP exercises independent judgment and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, in bad faith or amounts to an abuse of process.... I do not find any reason or ground to intervene in that decision nor is it the obligation of the court to supervise the minutiae of investigation and prosecution.”

58. Counsel submitted that the Petitioner has not demonstrated the illegality of the DPP in making decision to charge him. He maintained that the 1st respondent acted in public interest in making decision to charge the petitioner and in particular, properly applied Article 157(6), (11).
59. On the claim of a likelihood of double jeopardy if the Petitioner is charged before a court of law having previously been subjected to orderly room proceedings, Counsel referred to the Black’s Law Dictionary, Tenth Edition, on

definition of double jeopardy as ‘The fact of being prosecuted or sentenced twice for substantially the same offence’ and the case of **Itebete v Republic (Miscellaneous Criminal Application E081 of 2022) [2022] KEHC 16439 (KLR) (24 November 2022) (Ruling)**, where it was held that :

“The doctrine applies to matters that are strictly criminal in nature and there is no evidence on record to that effect. Filing of a civil case does not amount to double jeopardy”.

Further, the case of **Geoffrey Gekone v Capital Markets Authority appeal no. 5 of 2018**, the court observed that:

“The wording of Article 50(2) leads one to draw the inference that the principle can only apply in criminal proceedings”.

In addition, the case of James **Nene Gachoka, Nairobi Misc. Application 516 of 2005 [2013] eKLR** at para 14, Justice D.S. MAJANJA (as he then was) held that disciplinary proceedings cannot be equated to

‘a trial for an offence’ so as to attract the defence of double jeopardy doctrine.’

60. It was thus the Respondents case that the petitioner has not established any basis for the Court to grant any of the orders sought.
61. The 1st , 2nd and 3rd respondents prayed that the petitioner’s petition be dismissed with costs.

Analysis and Determination

62. Having regard to the pleadings, the submissions of Counsel and the evidence, this Court finds the following to be the issues for determination in this Petition:

- a. Whether the double-jeopardy principle under Article 50 (2) (o) of the Constitution applies in relation to a decision of a disciplinary trial where the facts also disclose commission of criminal offence.**
- b. Whether given the facts and the circumstances of this case, the Petitioner is entitled to the reliefs sought.**

Whether the double-jeopardy principle under Article 50 (2) (o) of the Constitution applies in relation to a decision of a disciplinary trial where the facts also disclose commission of criminal offence

63. This Petition presents a unique question, where the Petitioner alleges that the underlying facts that formed the basis of the disciplinary proceedings against him overlap with the facts that the Respondents are relying on as the basis for the criminal prosecution yet he has already been subjected to the disciplinary process in relation to the conduct complained of. This is however vehemently disputed by the Respondents who have argued that the two instances are distinct. However, even assuming that what the Petitioner contends is correct, would the fact that he had been subjected to a disciplinary committee process by his employer be a factor in barring subsequent prosecution for the crime if the facts disclose the commission of an offence?

Rather, does double jeopardy principle extend beyond the criminal cases to also incorporate employment-related disciplinary punishments?

64. **Article 50 (2) (o) of the Constitution** provides:

‘Every accused person has the right to fair trial, which includes the right =

o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.’

65. Under the **Criminal Procedure Code**, Cap 75, the principle is captured under **Section 138** thus:

“A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of that offence shall, while the conviction or acquittal has not been reversed or set aside, not be liable to be tried on the same facts for the same offence.”

66. The emphasis as can be discerned from the Constitution and the Criminal Procedure Code is *‘is an acquittal or conviction in a trial for a criminal offence.’* Most decisions cited by the Respondents were emphatic that the application of the double jeopardy principle is only confined to criminal cases and has no application to related disciplinary punishments even when those facts overlap.

67. Nevertheless, the trajectory taken by the Supreme Court decision of **Nyagol v Judicial Service Commission & Anor E105 of 2024 [2024] November, Judgment** shows

that there may be exceptional circumstances when this general approach can be departed from thus underscoring the broad objective behind the double-jeopardy principle, which is, the need to prevent oppression, harassment or multiple punishments for the same conduct. It is thus safe to state that each case must be considered on its own merits.

68. In the above cited Supreme Court case, Nyagol, a magistrate was charged with corruption that involved an attempt to influence a judicial outcome. She was acquitted after the trial. Nevertheless, JSC went ahead with the disciplinary process based on the same facts of the acquittal notwithstanding. The Supreme Court found that the subsequent disciplinary process by the Judicial Service Commission violated the double jeopardy principle for it punished her for substantially the same facts upon which she had been tried and acquitted. The Court reasoned thus:

“77.... This court has also had occasion to weigh in on this discourse in the case of Steyn vs Ruscone, SC Application No 4 of 2012; [2013] KESC 11 (KLR) where we posited that a party cannot present their dispute before one forum or court and subsequently present the exact dispute over the same subject matter before another forum, even where both fora have jurisdiction. Further, in Wetangula & Another vs Kombo & 5 Others, SC Petition No 12 of 2014 ;2015] KESC 12 (KLR), we held that section 87(1) of the Elections Act cap 7 of the Laws of Kenya, allows for electoral malpractice with a criminal underpinning to be prosecuted under the relevant criminal law process. This in itself does not violate double

jeopardy since election proceedings are not in the same category of “trial for an offence” and are sui generis nature.

78. *Applying the foregoing to the issue at hand, we note that the ELRC, on its part, interpreted the fresh charges of August 22, 2017 which it found to be dissimilar to those of September 4, 2015, to amount to double jeopardy. We disagree with the ELRC’s exposition of double jeopardy. According to our reading and understanding of the Constitution, double jeopardy applies when there has been a previous conviction or an acquittal on a charge, not when 2 proceedings over the same cause are subsisting.*
79. *Ordinarily, criminal proceedings may be prosecuted alongside civil proceedings. See section 93A of the Criminal Procedure Code, cap 75 of the Laws of Kenya....*
81. *We have also set out above the offences in the criminal case and the charges drawn by the respondents. Are they similar? To answer this question, the ingredients of the offences must be set out. In this connection, we find guidance in the TP Gopalakrishnan Case (Supra) and Sangeetaben Mahendrabhai Patel Case (Supra) where the Supreme Court of India held **that “... The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence...***
84. *To our minds, the charges dated August 22, 2017 read against the facts of the case constitute the same issue as the subject of the criminal charges. Considering the definitions set out above, we do not doubt that the offences/ issues in the cases are similar and we, therefore, agree with the **appellant that the respondents contravened the principle of double jeopardy.**”*

69. The jurisprudential take home from the above Supreme Court decision is that double jeopardy principle enshrined in Article 50 (2) (o) is not to only to be restricted to the traditional criminal trial but is to serve the broader constitutional value of preventing oppression, injustice or multiple punishments for the same underlying conduct irrespective of whether the subsequent proceedings are administrative or quasi-judicial. Consequently, if an employee is charged with a criminal offence but is eventually acquitted, applying disciplinary sanction such as dismissal of the employee based on the same facts will most likely attract the application of the double-jeopardy principle as seen in Nyagol case.
70. The finding by the Court affirms that while the disciplinary process can co-exist with the criminal process, there would be a challenge if it is clear that that the Respondent, without any new evidence or facts, wants to achieve what the already concluded process did not achieve by using the same facts in an attempt to secure a different result-the double jeopardy will apply even in quasi-judicial proceeding it if it exactly mirrors the already resolved matter in a different forum.
71. That means that the Court must thus closely scrutinize the facts in issue to determine if the intended criminal prosecution or disciplinary proceedings, as the case may be,

is a replica of what has already been fully dealt with. This therefore leads me to the next issue, which is;

Whether given the facts and the circumstances of this case, the Petitioner is entitled to the reliefs sought.

72. According to the Petitioner, he faced two offences against discipline before the Subordinate Disciplinary Committee namely- *Count I-discharging a weapon without orders without lawful cause* contrary to **Section 88 (2) as read with Eighth Schedule 1 (o) of the National Police Service Act No. 11 of 2011** and *Count II* where he was charged with *unlawful strike, use or threatening violence against any police officer or any other person* contrary to **Section 88 (2) as read with Eighth Schedule 1 (a) of the National Police Service Act No. 11 of 2011.**
73. The Petitioner stated that he pleaded guilty to *Count 1* and was convicted and fined *Kshs. 2500/-* pursuant to Section 89 (j) of the National Police Service Act, No. 11 of 2011. On count II, he was acquitted by the Subordinate Disciplinary Committee for lack of evidence as the available statements did not meet the threshold of prosecution and also due to non-availability of witnesses.
74. The Respondents refuted the narrative given by the Petitioner. Firstly, they attacked the completeness of the disciplinary proceedings and contended that they were irregular, null and void as the record was not forwarded for

confirmation by the Commission as required by Section 89 (2) of the National Police Service Act, and as such, there was no record of the same that was found even after the inquiry was conducted with the office of the Deputy Inspector General of the National Police Service.

75. Further, the Respondents insisted that the offence of *threats to kill under Section 223 of the Penal Code* is distinct from the offence against discipline referred to in the said *Count II- which is based on Section 88 (2) as read with Eighth Schedule clause 1 (a) of the National Police Service Act- of 'unlawful strike, or use or threaten violence against any police officer or person.'*
76. Furthermore, that the complainant in that count II that the Petitioner faced before the Subordinate Disciplinary Committee is not even disclosed. Moreover, that facts constituting the complaint by Ms. Seline Awour had taken place previously, not the 10.9. 2019, hence could not have been the subject of the proceedings before the Subordinate Disciplinary Committee.
77. One of the key factors to consider in successfully raising a defence of the double-jeopardy is that there must have been a full trial on merits. The Subordinate Disciplinary Committee was conducting a quasi-judicial proceeding. The question thus becomes, was the process undertaken completed as contemplated by law? The 2nd Respondent was categorical that this process was not completed and even the record of

those proceedings could not be found with office of the Deputy Inspector General. That in fact, what was obtained showed that the Petitioner had a clean record.

78. **Section 89 (2)** of the National Police Service Act No. 11 of 2011 states:

“A police officer authorised to impose a penalty for a disciplinary offence, shall enter a record of such punishment, the date of the punishment and the offence for which it was inflicted on the record sheet of the police officer punished, a copy of which shall be forwarded to the Commission for review and confirmation”

79. It is apparent that that the procedure prescribed under the law was not followed to the letter. The disciplinary proceedings were thus a shambolic exercise as there are no official record of the same that was held by the National Police Service. This court cannot thus be called upon to base its findings on a process that lacks legal completeness when even the record of payment of the fine imposed is subject of speculation.

80. Moreover, it is also pertinent to demonstrate clearly that surmount the disciplinary offence for which he was subjected to the trial mirrors what the Respondents seek to prosecute him of in terms of the factual matrix. If the offences are different, then double jeopardy does not exist.

81. This means that the elements of both offences must be similar or substantially similar. The question thus becomes are the elements of the offence of **‘unlawful striking, or**

use or threaten violence against any police officer or any other person’ contrary to **Section 88 (2) as read with regulation 1 (a) of the Eighth Schedule of the National Police Service Act No. 11 of 2011** similar or substantially similar to the offence of ‘threats to kill under **Section 223 (1) of the Penal Code** which provides that ‘**Any person who without lawful excuse utters, or directly or indirectly cause any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment to ten years.**’

82. In my humble view, the elements of these two offences are wide apart, while the *actus reus* of the offence against discipline focusses on general immediate violence manifested through striking, using violence or threats of violence. On the other hand, the offence of ‘**threats to kill**’ focusses on the specific message, the intent to kill, not just merely threatening violence. The threat must be ‘*specifically to kill.*’ That communication can be written or oral, direct or indirect and need not be immediate either.
83. The punishment in case of conviction is also quite different. While the punishments prescribed by Section 89 are majorly administrative remedies with none prescribing imprisonment, the offence of threatening to kill is defined as a felony attracting ten years imprisonment.

84. In my view, the elements of Count II which the Petitioner faced before the Disciplinary Committee- striking or using or threatening to use violence are quite dissimilar to an offence under Section 223 of the Penal Code which comprises of actual threat to kill, in this case, a specified person, Ms. Seline Awour.
85. In fact, Ms. Seline Awour was not named in the said count II which the Petitioner was tried for in the Subordinate Disciplinary Committee. And even assuming she was, that cannot preclude the trial on subsequent charge of threatening to kill because it is a different offence with distinct elements. Moreover, it is a matter which would be beyond the jurisdiction of the Subordinate Disciplinary Committee to hear because it does not form part of disciplinary offences under Section 88 of the National Police Service Act, hence as per Section 88 (3) is an offence for which the Petitioner is to be tried before a Court of law. Section 88 (3) provides:

“A police officer who commits a criminal offence, as against law shall be liable to criminal proceedings in a court of law”

86. Consequently, even taking it as argued by the Petitioner that he faced a disciplinary offence of striking, using or threatening violence before the Subordinate Disciplinary Committee, that cannot exonerate him from being subsequently charged for the felonious offence of threats to

kill if the facts disclose that offence as the elements of these two offences are quite distinct.

87. The other factor to consider is that of the of same transaction test. The Petitioner insisted that the incident complained of, and which is the subject of his intended prosecution, arose from the same facts or transaction hence is incapable of being criminally prosecuted having been disciplinarily dealt with already. The Respondent vehemently opposed that assertion arguing the incidents are separated both in time, location and the victims involved.
88. There is no indication on record that in the previous charge against the Petitioner before the Subordinate Disciplinary Committee, Ms. Seline Awour's complaint formed part of what the Subordinate Disciplinary Committee dealt with. Likewise, her statement is not showed to be among those that the Committee found incapable of sustaining Count II thereof. On the other hand, the Respondents insisted that the incidents occurred on different occasions and involved different complainants. For instance, the incident of 10.6. 2019 according to the Respondent was directed at the Vice-Chairman of Kamongo Estate, a Mr. Kimkam.
89. These incidents thus stand separately in time and the victims involved. Applying the balance of probabilities standard, this Court is satisfied that the Petitioner has not established the incidents occurred simultaneously as part of same factual matrix and the Respondent's assertion that the

incidents were separated in time and involved different victims prevails.

90. This Court thus finds on the basis of evidence on record these incidents stand independently and are not one transaction capable of being used as the basis for the application of the double jeopardy principle that prohibits multiple punishment for the same conduct.
91. Having regard to the foregoing, the Court finds that this Petition to be a hopeless attempt to interfere with the lawful execution of Constitutional and statutory mandates of the Respondents without any lawful justification.
92. Given the facts and the law, the Court is satisfied that the Petitioner is not under the threat of being subjected to double jeopardy and no malice has been proved against the Respondents for the investigation and recommendation for the prosecution in respect of the complaint of threats to kill against the Petitioner.
93. The Petition is thus dismissed with costs to the Respondents.

Dated, signed and delivered virtually at Nairobi this 30th day of January, 2026.

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L N MUGAMBI
JUDGE