



**Attorney General & 2 others v Muthuri & 4 others (Civil Appeal
352 of 2019) [2021] KECA 41 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 41 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 352 OF 2019
W KARANJA, MSA MAKHANDIA & SG KAIRU, JJA
SEPTEMBER 23, 2021**

BETWEEN

**ATTORNEY GENERAL 1ST APPELLANT
NATIONAL POLICE SERVICE COMMISSION 2ND APPELLANT
INSPECTOR GENERAL OF POLICE 3RD APPELLANT**

AND

**EVANS MURIUKI MUTHUURI 1ST RESPONDENT
ODIKARA OLING'A RUTH 2ND RESPONDENT
DAVID OCHOM 3RD RESPONDENT
LINET WANDIA NJAGI 4TH RESPONDENT
GEORGE BARASA 5TH RESPONDENT**

(Being an Appeal from the entire Judgment of the Employment and Labour Relations Court at Nairobi (Byram Ongaya, J.) delivered on 17th May, 2019 in ELRC Petition No. 122 of 2018)

JUDGMENT

1. The respondents herein filed before the Employment and Labour Relations Court (ELRC) a petition dated 8th November, 2018 and sought orders as follows as against the appellants herein:-
 - “a) A declaration that the respondents’ conduct and action amounts to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Officers’ rights under Articles 27, 28, 40, 41, 43 and 47 of the *Constitution of Kenya, 2010* of Kenya, 2010.



b) A declaration do issue that Graduate Police Officers who are University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J have been discriminated against.

c) An order of Mandamus do issue directed at the 1st and 2nd respondents to pay all graduate constables Job Group J salaries with effect from date of respective graduation or enlistment to the service.

d) Costs of the petition.”

2. In their petition the petitioners, (respondents herein) averred that all of them (except the 5th respondent) served as police officers in the National Police Service at the rank of constable; that ordinary police constables served at the rank in Job Group F while graduate police constables served at pay Job Group J in the pay structure maintained by the 1st appellant; that upon graduating the constables would submit the degree certificates to the 1st and 2nd appellants to update the records and accordingly adjust their respective Job Group to J. Further the respondents and other graduate constables had duly submitted their degree certificates to the 1st and 2nd appellants for upgrading to Job Group J.
3. It was the petitioners’ case that the 2nd and 3rd appellants had been receiving degree certificates from graduate police officers in the service but had selectively and capriciously upgraded some and not others to pay Job Group J; that conferring officers with degree certificates different pay and Job Groups amounted to contravention of the Constitution of Kenya 2010, more particularly Articles 27 against discrimination, 41(1) on fair remuneration and working conditions; 43 on protection of petitioners’ social security, 47 on fair administrative action, as well as the violation of values and principles in Articles 10 and 232.
4. In response to the petition, the 2nd appellant filed a replying affidavit sworn by its Secretary and Chief Executive Officer one Joseph Vincent Onyango on 19th December, 2018. The 1st appellant’s case was that it performs the functions of recruiting and appointing persons to hold or act in offices in the National Police Service (NPS); to confirm such appointments; determine promotions, transfers and observe due process in exercising disciplinary control over and removal of persons from the Service; that recruitment into the Service and promotions were governed by the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and the National Police Service Commission (Promotion) Regulations, 2015.
5. Further, that the regulations were made under the National Police Service Commission Act, 2011; that the National Police Service Career Progression Guidelines, 2016 prescribed clear entry ranks and progression in the Service; that the petition was not anchored upon the prevailing law and regulations governing recruitment, appointment and promotions in the service; that there was no rank known as graduate constable after the promulgation of the prevailing regulations and career guidelines; that it had not approved or placed any officer on the rank of graduate constable.
6. The 1st and 3rd appellants relied on the replying affidavit of No. 231313 George Kirigwi, SSP, the Staffing Officer Directorate of Human Capital Development in the National Police Service sworn on 14th December, 2018. Their case was that the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and the National Police Service Career Progression Guidelines, 2016 did not provide for the rank of Graduate Constables and all officers were recruited to the rank of Police Constable as per the exhibited advertisements.
7. Further, the National Police Service Career Progression Guidelines, 2016 provided for minimum qualifications for every rank in the service; that the respondents were misconceived and misdirected to



rely on the letter DPM/1/1/10A.VOL.IV/(26) dated 26th July, 1995 signed by Gaylord Avedi, EBS, Permanent Secretary, Directorate of Personnel Management which provided that the Commissioner of police had established a program for University Graduates being recruited into the Police Force and further noted that the aim of the program was to provide the graduates with intensive training before placing them in the supervisory position and that within a period of three years the officers were adequately trained for appointment as Inspectors of Police.

8. The letter further noted that in order to remunerate the officers appropriately, the Commissioner of Police had suggested that for purposes of differentiating the graduate officers from ordinary constables, they be designated 'University Graduate Constables' and be allowed to be paid at Job Group J in view of their academic qualifications.
9. In that regard the Permanent Secretary had no objection to the officers being designated as such provided they retain the salary at Job Group J since that would eventually be beneficial to both the officers and the Police Force in terms of performance.
10. It was the appellants' case that the letter could not be validly invoked by the respondents as it did not apply to them because the letter was to apply and benefit university graduates recruited as constables and then placed under intensive training. It did not apply to officers who were recruited as constables and subsequently acquired degree certificates. Further, that the letter was annulled when the *National Police Service Act* and the , 2015 and, the *National Police Service Commission (Promotion) Regulations, 2015*.
11. Further, that the National Police Service Career Progression Guidelines, 2016 provided for a clear career progression process for clear entry levels and promotion from one rank to the next; that the petition was deficient and disclosed no justifiable cause to warrant the intervention by the Honourable Court and the same should be dismissed with costs.
12. The learned Judge after considering all the pleadings before the court, entered judgment for the respondents against the appellants and granted;
 - a) The declaration that the appellants' conduct and action amounted to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Officers' rights under Articles 41(1) and (2) (a) and (b), and 47 of the Constitution of Kenya, 2010.
 - b) The declaration that Graduate Police Officers who were University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J were entitled to be emplaced to pay scale of graduate constables equivalent to pay of an Inspector of Police Job Group J and as per the prevailing 1st respondent's policy as clarified in the press release by the Chairperson on 19.03.2018.
 - c) The order of Mandamus was issued directed at the 1st and 2nd appellants to pay all graduate constables salaries equivalent to pay of an Inspector of Police Job Group J and as per the prevailing 1st appellant's policy as clarified in the press release by the Chairperson on 19.03.2018.
 - d) The appellants to pay the costs of the petition for the 1st, 2nd,3rd and 4th respondents.
13. Aggrieved by the above findings, the appellant filed a Record of Appeal and a Memorandum of appeal dated 30th July, 2019 featuring 8 grounds. The appellants fault the learned Judge for, inter alia, holding that the letter by the then Permanent Secretary dated 26th July, 1995 still had legal effect; in disregarding the evidence and submissions by the appellants; failing to appreciate judicial precedents



- by the Court of Appeal that a promise made in contravention of existing laws does not give rise to an enforceable legitimate expectation; holding and equating the press release by the then 2nd appellant's Chairperson to a policy on graduate constables which applies to all constables whether the degree is acquired before or after joining the police force.
14. Further, the learned Judge is said to have erred in fact and in law in assuming jurisdiction to vary salaries and allowances without the advice of the Salaries and Remuneration Commission; in holding that the National Police Service Career Progression Guidelines 2016 accords an automatic pay upgrade to graduate officers; in allowing the petition and directing the appellants to upgrade pay group for all police constables with degree certificates to that of an inspector of police Job group J without regard to the legal, financial and operational implications; in granting orders without due regard to the prevailing laws and the public interest given the implication of the judgment on the general public wage bill.
 15. The appellants filed submissions and a list of authorities dated 4th August, 2020. They have condensed the issues for determination as follows; whether the letter by the then PS dated 26th July, 1995 still has legal effect despite the new regulations and guidelines as promulgated by the 2nd appellant; whether the learned Judge was right in disregarding the evidence and submissions by the appellants that changes in pay as demonstrated by the pay slips was done un-procedurally and could not be the basis for the respondents' claims; whether the learned Judge erred in failing to appreciate the precedents from the Court of Appeal on legitimate expectation; whether the Judge erred in equating a press release to a policy; whether the Judge erred in assuming jurisdiction to vary salaries without the advice of SRC and whether the Judge erred in allowing the petition.
 16. On whether the letter by the then PS dated 26th July, 1995 still has the legal effect despite the new regulations and guidelines as promulgated by the 2nd appellant, the appellants submit that the current operative law with regard to police recruitment, appointment, promotion, transfers, discipline and deployment were the regulations developed and gazetted by the 2nd appellant upon its inception; that all the previous regulations, circulars and/or directions relating to the human resource functions of the National Police Service were rendered obsolete upon the enactment of the new laws and gazettelement of the new regulations and guidelines by the 2nd appellant.
 17. They further submit that section 10(1)(b) of the *National Police Service Commission Act, 2011* states that the Commission shall with the advice of the Salaries and Remuneration Commission determine the appropriate remuneration and benefits for the Service; that the 2nd appellant cannot therefore contravene this precise provision of a Statute and increase the salaries of officers on the basis of a letter which has been rendered void upon enactment of relevant laws. For this assertion they rely on *Attorney General vs Law Society of Kenya & Another*.
 18. On whether the learned Judge was right in disregarding the evidence and submissions by the appellants that changes in pay as demonstrated by the pay slips was done un-procedurally and could not be the basis for the respondents' claims, the appellants submit that the approval on the adjustments in the remunerations relating to officers in the National Police Service rests with the 2nd appellant with the advice of the Salaries and Remuneration Commission. It is also the mandate of the 2nd appellant to approve changes in designations and ranking structures in the National Police Service; that any other person who assumes this role does so ultravires the law; that Regulation 5 of the National Police Service Commission (Promotion) Regulations 2015 stipulates that all promotions shall be in accordance with the standards relating to the job descriptions and specifications for all civilian and uniformed police positions as approved by the 2nd appellant.
 19. Therefore, if there is any officer recruited after its inception and the development of the existing regulations on recruitment and promotions, who is being designated as a graduate constable then the



same is not pursuant to the approval of the 2nd appellant as envisaged in the Promotion Regulations 2015; that such an action is thus null and void to that extent and no one can claim to benefit from an illegality just because others have been benefiting. On the contrary, the law expects that the 2nd appellant takes corrective action pursuant to the existing laws to avert the continuing illegality and such actions are already being taken. They rely on *Five Forty Aviation Limited vs Erwan Lanoë*.

20. On whether the learned Judge erred in failing to appreciate the precedents from the Court of Appeal on legitimate expectation, the appellants submit the assertion of breach of legitimate expectation even though denied, is legally untenable due to the indisputable fact that there are clear laws and regulations guiding the recruitment and promotion of officers within the Service; that it is trite law that the requirement that no adjustment or review in remuneration of public officers can be implemented without the advice of the line Permanent Secretary is no longer the operative law and the respondents could also not have qualified to benefit under its terms were it to be still operative; any adjustments in the respondents' remunerations can only be effected in accordance with the existing laws and any alleged promises for increased remunerations ultra-vires the law are unenforceable.
21. On whether the Judge erred in equating a press release to a policy, the appellants submit that the respondents have relied on an alleged unsigned press release attributed to the then Chairperson of the 2nd appellant which was made on 19th March, 2018. The authenticity and admissibility of the alleged press release as evidence is questionable; that the unsigned press release made by the then Chairperson did not have legal basis as it cannot be traced to any legal grounding for evaluation nor rationale; that the learned Judge thus erred in equating the said Press Release to a policy as it was informal and it did not go through development and implementation as is required by law.
22. On whether the Judge erred in assuming jurisdiction to vary salaries without the advice of SRC and whether the Judge erred in allowing the petition, the appellants submit that the law bestows the mandate of reviewing the terms of service of police officers upon the 2nd appellant which mandate should only be discharged with the advice of the Salaries and Remuneration Commission. They submit and urge the Court to take note and be persuaded that the learned Judge could not grant orders for increased basic salaries and allowances for police constables without the due involvement and authorization of relevant constitutional actors particularly the SRC and the 2nd appellant without any legal foundation.
23. On whether the learned Judge erred in allowing the petition, it is the appellants' position that the order by the learned Judge directing the 2nd appellant to upgrade the pay group of all police officers with degree certificates to that of Inspector of Police being job group I would have both legal and economic ramifications and can only be issued within confines of the law and in consultation with the SRC; that the Honorable Judge in his finding failed to consider the legal, financial and operational implications the order would have within the National Police Service and the public wage bill.
24. In addition, they submit that the job description of a Constable is very different from the job description of an Inspector; therefore paying a Constable the salary of an Inspector would be wholly wrong and would jeopardize the command structure because an Inspector's position is a command position that is supervisory in nature and in charge of greater responsibilities. To pay a Constable, which is the lowest rank in the Service, the salary of an Inspector on account of the Constable having acquired a University Degree would upset the command structure and would go against the principle of equal pay for equal work done.
25. They thus urge the Court to find that the Judge erred in directing the 2nd appellant to upgrade the pay group of all police officers with degree certificates to that of Inspector of Police being job group J as it would have serious legal, financial and operational implications and ramifications.



26. The 1st - 5th respondents filed submissions in which they have identified the issues for determination to be whether the appellants have violated the respondents' legitimate expectation to receive salary increment after obtaining their respective undergraduate degrees, whether the 1st to 4th respondents and other Graduate Police Constables (GPCs) are entitled to receive a salary increment equivalent to Job Group J after obtaining their respective bachelor's degrees, whether the provision of the circular issued on 1st January, 1969, letter dated 26th July, 1995, Press Release dated 19 March, 2018 have legal effect despite the new regulations and guidelines on police recruitment, appointment and promotion as promulgated by the 2nd appellant, whether the court acted ultra vires in awarding the respondents herein salaries equivalent to Job Group J in line with the 2nd appellant's prevailing Policy and Regulations and who should bear the costs of this appeal.
27. On whether the appellants have violated the respondents' legitimate expectation, the respondents submit that there was the circular issued on 20th January 1969, where a program was started dubbed Horizontal Career Growth for GPCs by paying them a salary much higher than what was paid to Police Constables without bachelor's degrees, also based on the then Commissioner of Police receiving approval from the line Permanent Secretary on 26th July, 1995, to consider and accordingly remunerate GPCs in the Service with a salary equivalent to that of an Inspector of Police and by the 1st appellant's Press Release dated 19th March, 2018 in which the chairman reaffirmed the clear procedure to be followed.
28. It is the respondents' position that based on this past practice and promise that had been in existence for over 51 years, they relied on these directives and past practice and took out loans, made various life plans with the expectation that once their salaries were increased, they would comfortably fulfill their plans. They rely on the Supreme Court decision in *Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others* to buttress the submission that the Regulations and Guidelines such as National Police Service Commission (Promotion) Regulations, 2015 cannot be held to override legitimate expectation that arose before their enactment and cannot operate retrospectively. Even if they did, they are not in conflict with the said directives but are an enactment of the long-standing policy and practice by the 2nd appellant.
29. On whether the 1st to 4th respondents and other GPCs are entitled to receive a salary increment equivalent to job Group J after obtaining their respective undergraduate degrees, having established that the respondents and their fellow GPCs had a legitimate expectation that fulfills the test laid out in the CCK Case, the respondents submit that they are entitled to receive a salary increment equivalent to Job Group J after they attained their respective undergraduate degrees.
30. On whether the provisions of the circular issued on 1st January, 1969, letter dated 26th July, 1995 and the Press Release of 19th March, 2018 have legal effect despite the new regulations and guidelines as promulgated by the 2nd appellant, they submit that the policy communicated through the circular, letter and press release are not in conflict with the provisions of the new regulations and guidelines; that on the contrary, the new regulations and guidelines enact the policy contained in the said circular, letter and press release into law.
31. On whether the court acted ultra vires in awarding the respondents salaries equivalent Job Group J, they submit that the learned Judge substantively considered the authority on record filed by the 1st appellant being *Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT) & 3 Others (2015) eKLR* and distinguished the facts and circumstances in that case from the current case noting that in that case, the opinion of the SRC was mandatory as TSC was setting/determining new salaries while in the present case, the respondents were only seeking benefits which their fellow GPCs were and are still getting while the respondents and other GPCs are denied.



32. They urge the Court to dismiss the appeal with costs.
33. The appeal was heard virtually and proceeded by way of written submissions with brief highlights by learned counsel Mr. Ondukenya and Ms. Sarah Muthiga appearing for the appellants and Mr. Simiyu Murabi appearing for the respondents respectively.
34. We have considered the appeal alongside the petition before the trial court, responses thereto, submissions and indeed the entire record before us as evidenced by our summary above. Rule 29 of the Court of Appeal Rules enjoins us to fully re-evaluate the said record and arrive at our own conclusion. See also *Selle vs Associated Motor Boat Company Ltd* , which expounds on this revered duty imposed on this Court on first appeal.
35. From a careful perusal of the record of appeal, parties' submissions and the authorities the legal issues arising for determination can be compounded principally to be:
- (i) whether the declaration that Graduate Police Constables were entitled to be emplaced to pay scale of graduate constables equivalent to pay of an Inspector of Police Job Group J was valid;
 - (ii) whether the respondents' "legitimate expectation" was valid ; and
 - (iii) whether the Order of Mandamus was properly issued.
36. We start with the principle of legitimate expectation. This principle has been unraveled and demystified by the courts in several cases. The Supreme of Kenya in Petition No. 14 of 2014, *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (supra) pronounced itself as follows:- (we quote in extenso)

"Legitimate expectation" is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re South African Veterinary Council vs Szymanski* :

"...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation".

In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation....

37. The concept of "legitimate expectation" was more succinctly propounded in the South African case, *South African Veterinary Council vs Szymanski 2003 (4) S.A. 42 (SCA)* at [paragraph 28]: the Court held expressed itself follows:-

"The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation include the following:

- i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public



administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

- (ii) The expectation must be reasonable: Administrator, *Transvaal v. Traub* (*supra* [1989 (4) SA 731 (A)] at 756I - 757B); De Smith, Woolf and Jowell (*supra* at 417 para 8-037).
- ii. The representation must have been induced by the decision-maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j.
- iii. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v. Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.”

From the foregoing decisions the germane principles that emerge can be succinctly summarized as follows:-

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution. (Emphasis applied).

These are the principles we must apply to determine whether the respondents' claim on legitimate expectation passes muster.

38. While we are in total agreement with the law as extensively and succinctly articulated above, we must reiterate that the 'legitimate expectation' must be predicated on the law, and mere promise or conduct of the authority giving rise to the expectation will not suffice. The decision of the Supreme Court that we have just cited adds that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate (*South African Veterinary Council vs Szymanski* 2003 ZASCA 11); clear statutory words override any contrary expectation, however founded (*R. vs DPP ex parte Kebilene* and *Republic vs Nairobi City County & Another, ex parte Wainaina Kigathi Mungai*); the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (*Republic vs Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd*).
39. In the instant case we agree that there was an express, clear and unambiguous promise given by a public authority vide the circular issued on 1st January, 1969 and letter dated 26th July 1995. The representation was competent and lawful for the decision-maker to make as the appellant had authority to issue the circular. The circular issued on 1st January, 1969 was issued by the then Police Commissioner and the letter dated 26th July, 1995 was authored by the Commissioner of Police as authorized and/or with the approval of the Permanent Secretary.



40. In our view however, the ground shifted with the subsequent enactment of the law with the coming into force of the Constitution of Kenya 2010 which birthed the 2nd and 3rd appellants under Articles 245 and 246 and provided for the enactment of statutory legislation and regulations in respect of police recruitment, promotions, remuneration etc. It was on this basis that the National Police Service Commission Act was enacted.
41. The National Police Service Commission, Act Number 30 of 2011 was amended by Act Number 3 of 2014 to include Section 10 on functions of the Commission, which states,
- “In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall—
- (a) on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;
- (b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;
42. The above provision put paid the circular issued on 1st January, 1969 and letter dated 26th July, 1995 which the respondents seem to be relying on to leverage their expectation. The respondents cannot rely on the two documents to invoke the doctrine of “legitimate expectation”. We note further, that the statute having been passed in the year 2011 and specifically amended in 2014 to include consultation with the Salaries and Remuneration Commission, then it follows that the Press Release of 19th March, 2018 could not have effect, rather it could not supersede the law as promulgated.
43. We have also closely looked at the contents of the Press Release of 19th March, 2018 and noted that the same do not give the respondents any legitimate expectation. The press release specifically states that the respondents and others degree holders should submit their papers to the 2nd and 3rd appellants who would then consider the same along with other qualifications and determine whether the respondents and other graduates would qualify for promotion to the job groups where some graduate police constables are emplaced. Such emplacements and salary grading would also have to be done in consultation with SRC as provided in the National Police Service Commission Act.
44. From the foregoing, we are not persuaded that the respondents’ expectation was predicated on any law. They did not in our view prove that they had
- “legitimate expectation” of being placed in Job group J automatically after obtaining the degree certificates.
45. On whether the mandamus order was appropriately issued, in Teachers Service Commission (TSC) vs Kenya Union of Teachers (KNUT) & 3 Others (supra) the Supreme Court held,
- “Having regard to the mischief that the institutionalization of SRC under the Constitution was intended to cure the principles of public finance and fiscal responsibility, the budgetary process and the complexity of salaries and benefits determination for public officers, I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.” (Emphasis supplied)



46. With the above holding, it is quite clear that the Salaries and Remuneration Commission in determining benefits and remuneration is obligatory in nature and cannot be wished away. The appellants cannot therefore be ordered or directed to interfere with the respondents' salaries without involving the SRC.
47. Indeed, even assuming that the Press Statement was explicit on the promotions, which we have found it was not, as clearly held by this Court in its decision in *Ben Chikamai and another vs Machithi and Another* a policy paper or letter cannot override clear provisions of the law.
48. Before we conclude, on the issue of discrimination, our finding is that we have no evidence that those graduate constables who have been promoted were promoted purely on the basis of presentation of the degree certificates without any other considerations. We are, therefore, unable to conclude that the respondents herein were discriminated against and their rights under Article 27 of the Constitution violated.
49. In sum, for the fore going reasons we come to the conclusion that this appeal has merit and is for allowing. We allow it and set aside the judgment of the ELRC delivered on 17th May, 2019 in its entirety with orders that parties bear their own costs both here and before the ELRC.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

Signed

DEPUTY REGISTRAR

