



**Ondago v National Police Service Commission & 4 others; Chairperson  
Commission on Administrative Justice (Interested Party) (Petition  
E013 of 2024) [2025] KEELRC 1426 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1426 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E013 OF 2024  
NZIOKI WA MAKAU, J  
MAY 14, 2025**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 28,  
41(1), 47(1 & 2), 48, 50, 162 (A) AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 25, 28, 41(1), 47 (1&2) AND 50(1) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 13, AND 20 OF THE CONSTITUTION  
OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF SECTION 4(6) OF THE NATIONAL POLICE SERVICE  
COMMISSION ACT NO. 30 OF 2011 (SUBSIDIARY LEGISLATIONS)**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF SECTION 41 AND 45 OF THE EMPLOYMENT ACT**

**BETWEEN**

**PAUL OKOTH ONDAGO ..... PETITIONER**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**



**DEPUTY INSPECTOR GENERAL OF ADMINISTRATION POLICE  
SERVICE ..... 3<sup>RD</sup> RESPONDENT  
COUNTY AP COMMANDER GARISSA COUNTY ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**THE CHAIRPERSON COMMISSION ON ADMINISTRATIVE  
JUSTICE ..... INTERESTED PARTY**

### **JUDGMENT**

1. The Petitioner was employed as an Administration Police Constable on 9<sup>th</sup> May 2011 and posted to Garissa Provincial Headquarters. He asserts in his Petition that on 17<sup>th</sup> August 2013 at 2.00am he was assigned a mission alongside other officers to head to the Galmagala AP Division in Bura, Fafi Sub County. What awaited them was a horrific scene—four of their fellow officers had been brutally gunned down, the camp lay in ruins, and their residences had been reduced to ashes. The Petitioner asserts the team gathered the bullet-riddled bodies of their fallen colleagues and transported them to the Masalani airstrip for evacuation to Nairobi. The very next morning, the County Administration Police Commander convened a “Tamaam Parade” where Paul, along with five other officers, was tasked with guarding the now-compromised Galmagala Police Division. This posting carried with it a heavy cloud of danger—this was reportedly the fifth attack on the division, allegedly by Al-Shabaab terrorists, and the area had gained notoriety for its insecurity.
2. Later that evening, the gravity of their assignment deepened when a local elder warned them of another imminent attack. Given the horrific scene they had just witnessed and their inadequate arms—G3 rifles with only two magazines of twenty rounds each—they saw the assignment as a certain death sentence. Attempts to relay the intelligence to their superiors proved futile as communication masts had been destroyed by the militants, leaving them completely cut off. Faced with the threat of a repeat of the previous day’s massacre, Paul and his colleagues made the difficult decision to retreat to Garissa to deliver the intelligence in person. Upon arrival, they were ordered to surrender their weapons and ammunition and were informed that they would be relieved of duty. The following day, they met with the County Administration Police Commander and explained their decision, citing the threat and the breakdown in communication.
3. The Petitioner asserts that however, events took a harsh turn in April 2014 when he was transferred to Ugunja Sub-County headquarters. His salary was withheld, and on 19<sup>th</sup> September 2014, he was formally dismissed from the Police Service. The grounds for dismissal were cowardice and disobedience of lawful orders—offences deemed incompatible with service in the disciplined forces. According to the Petitioner the dismissal was retrospectively carried out to justify the withholding of his salary. He further claimed that his appeal was ignored and never addressed, denying him a fair hearing. As the sole breadwinner for his family, he asserted that his termination was not only procedurally flawed but also a violation of his constitutional rights. Consequently, he filed this petition seeking the following reliefs:
  - a. The acts of the Respondents in dismissing him from the Police Service is a breach of the Petitioner’s constitutional rights under Articles 25(c), 28, 41(1) and (2), 50(1) of the Constitution of Kenya and that the same are null and void for all intents and purposes.



- b. That the refusal by the 1<sup>st</sup> Respondent to communicate, consider and/or make any findings with respect to his appeal is unlawful and unconstitutional.
  - c. That the entire disciplinary proceedings against him contravened his rights to a fair hearing and fair administrative action and the same are therefore unlawful and void ab initio.
  - d. An order of judicial review of Certiorari to issue to quash his dismissal through the orderly room proceedings of the 19<sup>th</sup> August 2013 at Garissa County Headquarters.
  - e. An order of Certiorari to issue to quash his dismissal by the 1<sup>st</sup> Respondent vide the letter dated 5<sup>th</sup> May 2014 and received on 12<sup>th</sup> September 2014 for being unconstitutional and lacking procedural propriety without loss of benefits, rank or position.
  - f. An order of Mandamus to compel the 1<sup>st</sup> Respondent to reinstate him to the Police Service as his dismissal was unlawful, irregular and unjustifiable.
  - g. An order directing the Respondents to compensate him for the violation of his fundamental rights under the bill of rights in the Constitution.
  - h. The Respondents be compelled to expunge the record of the flawed disciplinary process from his service record.
  - i. An order directing the 1<sup>st</sup> Respondent to forthwith compensate him for the loss of employment benefits including unpaid salary dues for all the time he has been out of employment at the National Police Service inclusive of any salary increment within the said period up to the time the Petition is heard and determined.
  - j. General damages for blatant violation of his rights as well as for pain and suffering occasioned upon him by the Respondents' actions.
  - k. In the alternative to reinstatement, he be entitled to pension and accrued benefits from the time of termination to the time of determination of this suit to the period of lawful retirement from service.
  - l. Costs and interest to be borne by the Respondents.
4. In response, the 1<sup>st</sup> Respondent, through an affidavit sworn by its CEO Mr. Peter Leley, defended the dismissal, stating that the Petitioner had defied a lawful order to remain at Galmagala Division. The 1<sup>st</sup> Respondent argued that his actions constituted gross misconduct warranting disciplinary action. It further claimed due process was observed, noting that factors like length of service and the seriousness of the offence were duly considered. The 1<sup>st</sup> Respondent also stated that the Petitioner had not requested additional time to present a defence before the disciplinary panel. Regarding the appeal, the 1<sup>st</sup> Respondent maintained that it was time-barred according to Chapter 30, section 30 of the Service Standing Orders and Regulation 22 of the National Police Service Code Discipline Regulations 2015. Additionally, it argued that reinstatement was not viable beyond three years from the date of dismissal as per section 12(3)(vii) of the Employment and Labour Relations Court Act. The 1<sup>st</sup> Respondent concluded by urging the court to dismiss the Petition, citing lack of evidence to demonstrate a breach of constitutional rights or procedural law.
  5. The Interested Party filed a replying affidavit but uploaded it in an unreadable format and failed to avail a hard copy as provided for under the Rules of this Court. The submissions filed were therefore of no benefit to this determination and were a waste of effort on the part of the Interested Party.



6. In his rejoinder, the Petitioner reaffirmed via a further affidavit dated 19<sup>th</sup> February 2025 that their withdrawal from Galmagala was not an act of cowardice, but a necessary decision due to the lack of communication channels. He also reiterated that no formal charges had been presented to him, nor was he afforded the opportunity to prepare a defence or consult legal counsel. He maintained that no disciplinary committee had been constituted, thus invalidating the orderly room proceedings that led to his dismissal.
7. The Petition was canvassed by way of written submissions.

### **Petitioner's Submissions**

8. The Petitioner submits that his dismissal from employment was both procedurally and substantively unfair. He affirms that the process leading to his termination violated the Constitution, the National Police Service Act, the Service Standing Orders, and the Fair Administrative Action Act. In support of this claim, the Petitioner asserts that he was not given a fair opportunity to prepare for the orderly room proceedings, contrary to Article 50(2)(c) of the Constitution. He relies on the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture & Technology* (2014) eKLR, where the court emphasized the necessity of clearly outlining charges against an employee and providing adequate time for the preparation of a defence. The Petitioner further submits that the disciplinary process failed to comply with Article 246 of the Constitution, which mandates adherence to due process by the National Police Service Commission in the exercise of disciplinary control. Additionally, he cites Article 47, which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. He asserts that he was neither served with any documents nor provided with a charge sheet, thereby impeding his ability to prepare a proper defence. On this he again, he refers to the *Rebecca Ann* (supra) case, which affirmed that employees are entitled to access documents held by the employer that may assist in preparing their defence. The Petitioner also highlights breaches of the National Police Service Standing Orders, noting that the disciplinary committee that heard his case consisted of only one member, contrary to section 14, which requires a minimum of three members. He further asserts that he was not informed of his right to be accompanied by a colleague during the proceedings, in violation of section 14(3)(b), as read together with section 18(1).
9. With respect to his appeal against the dismissal, the Petitioner submits that it remains unheard to date, in contravention of his legal rights. He cites Article 50(1)(q) of the Constitution, which guarantees the right to appeal, and section 14(4) of the National Police Standing Orders, which similarly affirms this right. Consequently, the Petitioner submits that his dismissal from employment was unjustified and urges the court to grant the reliefs sought.

### **Interested Party's Submissions**

10. The Interested Party submits that the Petitioner complied with the exhaustion doctrine by lodging an appeal in accordance with the National Police Service Act and the National Police Service Commission Regulations, 2015. In support of this, they cite Section 9(2) of the Fair Administrative Action Act, which bars courts from reviewing administrative actions unless all internal appeals, reviews, and other available remedies have been exhausted. The Interested Party emphasizes on the fact that the Petitioner lodged a formal complaint and subsequently appealed to the 1<sup>st</sup> Respondent. The Interested Party further acknowledges the court's constitutional authority to hear and determine the petition, as granted under Article 165(3) of the Constitution. To underscore the importance of the exhaustion doctrine, the Interested Party relies on the definition found in *Black's Law Dictionary* (11<sup>th</sup> Edition) and draws support from several judicial precedents, including *Jeremiah Memba Ocharo v Evangeline*



Njoka & 3 others [2022] eKLR, Speaker of National Assembly v Njenga Karume [1992] KLR 2, Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015]eKLR and Krystalline Salt v Kenya Revenue Authority [2019] eKLR.

11. Regarding the alleged violation of the Petitioner’s right to fair administrative action, the Interested Party submits that this right was indeed infringed. They point to the 1<sup>st</sup> Respondent’s failure to determine the Petitioner’s appeal. To support this position, they reference the definition of “administrative action” as outlined in the 11<sup>th</sup> Edition of Black’s Law Dictionary, section 2 of the *Commission on Administrative Justice Act*, the *Fair Administrative Action Act*, and various constitutional provisions. To the effect that administrative action is any decision or act by a public body that affects the rights of individuals to whom the action relates. The Interested Party further emphasizes the Petitioner’s entitlement to efficient, reasonable, and procedurally fair administrative action, as guaranteed under section 4 of the *Fair Administrative Action Act*. They also invoke the Court’s powers under Articles 22 and 23 of the *Constitution*, as well as section 7(2)(j) of the *Fair Administrative Action Act*, to enforce fundamental rights and review administrative decisions. In support of their argument, they rely on the case of Republic v County Government of Kilifi [2021] eKLR, where the court found that a delay in resolving the Ex-parte Applicant’s issue amounted to a violation of the right to fair administrative action. In conclusion, the Interested Party urges this Court to allow the Petition herein.
12. The Respondents did not deem it befitting to favour the Court with any submissions.

### **Disposition**

13. The Petitioner herein asserts violation of his constitutional rights. It is common ground that he was a Police officer based in a terrorist prone zone at the time – August 2013. He is said to have been part of a sextet that exhibited cowardice and flagrant disobedience of a lawful order by declining to serve at Galmagala Police Post in Fafi, Garissa County. Prior to the day of the alleged display of cowardice, the Petitioner and his colleagues had attended to Galmagala AP Division in Bura, Fafi Sub County after an incident the day before – 17<sup>th</sup> August 2013. The Petitioner asserts that they came upon a horrific scene—four of their fellow Police Officers had been brutally gunned down, the camp lay in ruins, and their residences had been reduced to ashes. The Petitioner informed the Court that the incoming team gathered the bullet-riddled bodies of their fallen colleagues and transported them to the Masalini airstrip for evacuation to Nairobi. The Petitioner asserted that the very next morning, the County Administration Police Commander convened a “Tamaam Parade” where he, along with five other officers, was tasked with guarding the now-compromised Galmagala Police Division. The Petitioner posited that this posting carried with it a heavy cloud of danger—this was reportedly the fifth attack on the division, allegedly by Al-Shabaab terrorists, and the area had gained notoriety for its insecurity.
14. The Petitioner asserted that later that evening, the gravity of their assignment deepened when a local elder warned them of another imminent attack and given the horrific scene they had just witnessed and their inadequate arms—G3 rifles with only two magazines of twenty rounds each—they saw the assignment as a certain death sentence. The Petitioner asserts that attempts to relay the intelligence of this imminent attack to the superiors proved futile as communication masts had been destroyed by the terrorists, leaving the team completely cut off. The Petitioner held that faced with the threat of a repeat of the previous day’s massacre, he and his colleagues made the difficult decision to retreat to Garissa to deliver the intelligence in person. Upon arrival, they were ordered to surrender their weapons and ammunition and were informed that they would be relieved of duty. The following day, they met with the County Administration Police Commander and explained their decision, citing the threat and the breakdown in communication.



15. The Respondents through the CEO of the 1<sup>st</sup> Respondent assert that the Petitioner wilfully disobeyed a lawful command by deserting his duty station. When the Petitioner was formally dismissed from the Police Service the grounds for dismissal indicated were cowardice and disobedience of lawful orders—offences deemed incompatible with service in the disciplined forces. The Respondents assert the dismissal was proper and after due process.
16. The Petitioner was taken through the orderly room proceedings of 21<sup>st</sup> August 2013. The record indicates the Petitioner was allowed to ask questions of the two witnesses presented by the Police Service. The two indicated that the Petitioner abandoned his post by first attempting to leave immediately the posting was made and later making his way back to the camp in the company of the other officers. The Petitioner had been appointed on 9<sup>th</sup> May 2011 and was serving his second year as a corporal.
17. The testimony given by <sup>CIP Francis Gikeri</sup> the first witness for the Service was as follows:

I can very well remember that on 16/08/2013 at around 7.30pm when I was called by the County Commander and informed me that at 4.00 am the following day I prepare 10 APS including me to accompany him to Fafi District, Galmagala Division where our officers were attacked by al- shabaab and unfortunately 4 APS were gunned down. On 17/08/2013 at around 4.00am the 10 officers were all prepared including the accused to proceed to Galmagala. At around 6.00am we took off with the County Commander towards Galmagala and arrived at around 10.00am. We saw the same as reported to us when the incident happened. We witnessed the destruction caused including the residential houses and communication room. We also witnessed 4 APS who were already gunned down and lying in a pool of blood. We loaded the deceased bodies on to our GK Land Rover and taken to Masalani where they were airlifted to Nairobi. We spent the whole night there until the following day 18/08/2013 guarding the area. On 18/08/2013, at around 10.00am we had a brief meeting with the local chief and area elders where they were assured by the County Commander that the area will be guarded 24 hrs with instruction from DIG APS. Later the County Commander called for a team up parade with the officers and informed them that they will remain at Galmagala post to guard the area as directed by DIG APS as the County Commander made the necessary arrangement to transfer officers from within the County to the Division. While at the team up parade the County Commander appointed Senior Sgt Otieno from the County Hqs and Cpl Abass from Fafi Sub County to be the incharge of the officers to be left at Galmagala for temporary security of the area. The County Commander mandated me to select those to be left behind, the accused being one of them. After selecting them the County Commander left leaving me behind as I prepared to leave with the lorry. Instead of going back to the camp, the officers regrouped at the sentry box where they all boarded the lorry. I instructed them to alight from the lorry and they agreed except one APC Joseph Maina Muigai who refused saying he does not want work anymore. We started our journey back to the County Headquarters and arrived at around 4.00pm of 18/08/2013. On the same day at around 7.00 pm while at the camp with CIP Hillow and Cpl Jorum Mvoi we saw a group of armed men approaching from the gate coming towards the camp. I sent Cpl Mvoi to find out who the officers were. The CPL reported back to me that they are the officers who were left to remain at Galmagala Division. I instructed Senior Sergeant Abdi Sheikh to take their details and inform them to return their firearms to the armoury. I reported the matter to the County Commander.



18. The Petitioner was asked if he had any questions for CIP Francis Gikeri and he replied that he had none. The next witness was Cpl Mvoi who stated the following:

I can very well remember that on 16/08/2013 at around 7.30pm, I was instructed by S/ Sgt Sheikh to prepare 10 officers who will escort the County Commander to Galmagala Division which was attacked by al shabaab. We left county headquarters on 17/08/2013 and arrived at Galmagala at around 10.00am and witnessed the body of our officers who were killed by al shabaab. We spent the night at Galmagala and the following day 18/08/2013 at around 11.00am the County Commander instructed that some officers from the County Headquarters and others from Fafi will remain in Galmagala to provide security to the public. Thereafter I left with the County Commander back to Garissa and arrived at around 4.00pm. At around 7.00pm while at the camp, to my surprise the officers we left at Galmagala came back to Garissa without permission, the accused being one of them. I informed CIP Gikeri about the same and instructed me and S/Sgt Sheikh to inform the officers to return their rifles to the armory, which I did without hesitation.

19. The Petitioner was asked if he had any question for CPL Mvoi and he said he had none. In his own statement, the Petitioner stated thus:

On Friday 16/08/2013, one Cpl Jorum Mvoi came to my house and instructed me that tomorrow at 3.00am I should be ready at the armory, which he did not brief me where we were heading. On 17/08/2013 at 3.00am I reported to the armory and I was ordered to collect a rifle and 3 magazines each with 20 rounds. After that we went to the county Commanders residence and that is where I was informed that we were heading to Galmagala division our officers were attacked by unknown assailants. When we reached there at around 9.00am we found our 4 officers lying on the ground dead, each one with bullet wounds not less than 20 rounds. We placed them on our GK vehicle where they were taken to Masalani and later airlifted to Nairobi. After that I assessed the situation and patrolled around the camp and saw that our officers have been attacked dangerously and their houses burnt. When we asked the locals, they told us that the assailants came in large numbers and our officers were caught unaware. All of us spent the following night at Galmagala after we were instructed to remove everything including the solar system and our dead officers belongings. The next day on 18/08/2013, the County Commander issued an order that some officers must remain at Galmagala. Then he instructed CIP Gikeri to choose officers to remain in the camp which I was one of those to remain. We tried to ask our County Commander some questions but never advised us on what to do and went to his vehicle and left us with the Chief Inspector. Due to the situation on the ground, I asked myself so many questions such as why our officers died, why the government provide helicopter to airlift the body of our officers only if they have died, why would they not bring the helicopter and enough strength to pursue the assailants. Therefore I left the area as tactical withdrawal to save my life.

20. The Petitioner from the above account made a decision to leave his post. As a disciplined officer he knew the ramifications of such a move. It is indeed true one can be permitted to leave a zone as the one the Petitioner was in, however there are consequences. The display of cowardice exhibited by the officers left at Galmagala did not differ from that of APC Joseph Muigai who left on the material day with the officers retreating to Garissa.
21. In the Orderly Room proceedings, there is no indication that the Petitioner had come across intelligence that the area would be attacked again. There is no evidence adduced to show there was such intelligence shared. The Petitioner did not mention any such thing and only spoke of his



disillusionment with his service. He says he had serious soul searching prompting him to depart for Garissa in what he termed “tactical withdrawal” to save his life. Tactical withdrawal in military parlance is a calculated retreat, often with danger associated with the manoeuvre which is geared to either exposing an enemy to the potential for an ambush, leading the enemy to booby traps or cornering them so as to annihilate them. The Petitioner did not lure the enemy into a trap, he did not use this tactic to ensure a victory for his team. Instead, it was used as a tactic to leave the post, a surrender of territory or ground at best. This cannot have been anywhere near a tactical retreat. Usually, a tactical retreat is undertaken in the throes of combat and not when there is no enemy in sight or when there is no imminent attack which the manoeuvre is supposed to forestall. When the Petitioner was given the opportunity at the Orderly Room proceedings to offer a defence to the charges preferred against him which were – a willfully disobedience of a lawful order given to him by the Garissa County Commander to temporarily remain in Galmagala Division where 4 AP Officers were killed by suspected al shabaab militia; and a charge that on the same material day he left his place of work, which is Galmagala Division without permission, before he was relieved.

22. The two charges were proved in the testimony at the Orderly Room proceedings. In line with the Constitution of Kenya, the Petitioner was accorded his rights under Articles 25(c) and 50(1) – a right to fair trial, his dignity was respected in terms of Article 28, a right to fair labour practice in terms of Articles 41(1) and (2). No where in his Petition has it been demonstrated that the rights were abridged save for the matter of his appeal.
23. The Petitioner upon being dismissed from service preferred an appeal. There was no communication made to him in regard to this aspect of his trial. The Interested Party asserts there was violation of the Petitioner’s right to fair administrative action. It pointed to the 1<sup>st</sup> Respondent’s failure to determine the Petitioner’s appeal and asserts that a violation to fair administrative action should result in remedy.
24. Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In this case it is clear there was lethargic and inefficient administrative process. The Petitioner would be entitled to recover for this. The dismissal from service was from all accounts one that has little sympathy from the standpoint of the employer. When one offers their services in defence of a nation, there are attendant risks and one is death or injury. Desertion in the face of the enemy or shirking responsibilities, physically fleeing from combat and generally avoiding difficult situations due to fear is a serious offence. One can get dishonourable discharge to even more severe punishment like death. The departure from Galmagala by the Petitioner and his colleagues was not a tactical retreat. By their nature, tactical retreats – as is garnered from the expression, involve moving soldiers (combatants) or military equipment away from one position to a safer area or a pause to reorganize for a counterattack. The purpose of a tactical retreat is to avoid being overrun, to help the troops preserve strength, or ensure the fighting force gains a more advantageous position for engagement. Examples of tactical retreat include withdrawing from a poorly defended position to a stronger one where there may be trenches, caves or places to hide from direct enemy fire. It may also involve creating a trap for the enemy by drawing them into a specific area before launching a counterattack to annihilate the enemy.
25. Since the Petitioner did not undertake any such manoeuvre with his team, their actions were similar to running away from the battlefield for which a soldier would probably be court martialed or killed. The Court returns that the Petitioner’s termination of service was within the remit of the 1<sup>st</sup> Respondent and was effected within the confines of the law. As such, there would be no remedy on that aspect of the Petition.
26. The Petition is only successful to the extent that a declaration is made that the refusal by the 1<sup>st</sup> Respondent to communicate, consider and/or make any findings with respect to his appeal is unlawful



and unconstitutional. The Court having discerned that only administrative failures were proved, the Petitioner is awarded a sum of Kshs. 500,000/- plus costs in respect of the sum so awarded.

Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 14<sup>TH</sup> DAY OF MAY 2025**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

