



**Republic v The National Police Service Commission & 3 others; Monyenye (Exparte Applicant)
(Judicial Review E001 of 2023) [2024] KEELRC 759 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 759 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
JUDICIAL REVIEW E001 OF 2023**

JW KELI, J

APRIL 11, 2024

**IN THE MATTER OF APPLICATION BY DENIS MARONGA MONYENYE FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW ORDRS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE NATIONAL POLICE
SERVICE ACT AND THE KENYA CONSTITUTION 2010**

AND

IN THE MATTER OF ARTICLES 47 OF THE CONSTITUTION OF KENYA,2010

AND

**IN THE MATTER OF THE AW REFORM ACT
SECTIONS 8 AND 9, CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF ARTICLES 27,28,41,47,48,50,
236(B) OF THE CONSTITUTION OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE SUB-COUNTY POLICE COMMANDER KAKAMEGA . 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

DENNIS MARONGA MONYENYE EXPARTE APPLICANT



JUDGMENT

1. The Ex parte Applicant (hereinafter “Applicant”) is a Police Constable attached to the Kakamega Police Station -Traffic Section as a Police Rider. On the 17th of November 2023, the Kenya Police, Sub-County Police Commander, Kakamega Central, Valerian Obore, issued the Applicant, with a letter of interdiction from duty on the basis that he had been arrested by EACC officers from Bungoma within Kakamega Township on allegations of receiving a bribe of Kshs. 2000/, an offence under the *Bribery Act*.
2. The Applicant, being aggrieved by the 3rd Respondent’s decision, then filed the instant judicial review proceedings by way of Chamber Summons dated 27th November 2023, and seeking the following orders:-
 - i. The Honourable Court be pleased to grant leave to the Applicant to institute judicial review proceedings for orders of Certiorari and Prohibition against the decision to interdict the applicant as per the communication/ letter dated 17th November 2023.
 - ii. The leave granted to operate as stay of the decision to interdict the applicant and reinstate his salary to full pay.
 - iii. The status quo may remain and the applicant may continue to operate in current position capacity and/or duties
 - iv. The Court be pleased to remove into this Court and quash the proceedings, decision and /or directives as per the interdiction letter dated 17th November 2023.
 - v. The costs of the application may be in the motion.
3. The Applicant filed his verifying affidavit sworn on the 27th of November 2023 to support the grounds stated in the application. He annexed as DM1 the letter of interdiction dated 17th November 2023.
4. The court granted leave to the Applicant ex parte on 27th November 2023, to institute judicial review proceedings against the decision to interdict the applicant as per the communication/ letter dated 17th November 2023 and directed for hearing inter partes on whether or not the leave should operate as stay.
5. The Hon Attorney General through Stafford Nyauma, Principal State Counsel entered appearance for all the respondents on the 5th of December 2023 and that was it. No response was filed. The Respondents did not even appear for the hearing inter partes.
6. The court delivered its ruling on 11th December 2023, declining the order that leave to operate as a stay and confirmed its decision of 27th November 2023 granting leaving to the ex parte applicant to institute judicial review proceedings against the decision to interdict him.
7. The Applicant on 22nd December 2023 filed the substantive Notice of Motion Application dated 20th December 2023 seeking reliefs that:
 - i. An Order of Certiorari to remove into this Honourable Court and quash the decision of the third respondent conveyed by the Officer Commanding station on behalf of the 1st and 2nd Respondents vide the letter dated 17.11.2023 purporting to interdict the Applicant with effect from 27.10.2023.
 - ii. Costs of and incidental to the application be provided for.



- iii. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.
8. The Notice of Motion judicial review application was based on the grounds on the face of the application and as outlined in the Exparte Applicant's supporting affidavit sworn on 20th December 2023 that:-
9. The 1st, 2nd, and 3rd respondents are in breach of the rules of natural justice; and the purported disciplinary action against him is illegal, arbitrary, and unreasonable, as he was neither summoned to defend himself against the charges he was accused of; nor even of the impending process that led to his interdiction.
10. Contrary to Articles 27,28,41, 47, 50, 236(b) of the Constitution, and section 87 of the National Police Service Act, his rights were violated.
11. The disciplinary action against the Exparte Applicant was taken without any communication or advice from the Internal Affairs Unit, thus violating the Service Standing Orders provided by the National Police Act.
12. The decision to interdict the Exparte Applicant was without substantive proof.
13. The Sub-County Police Commander acted ultra vires its powers under the Service Standing Orders in making the decisions purporting to interdict the Exparte Applicant.
14. The purported interdiction was illegal abinitio as no charges had been preferred against him on the allegations of bribery; no Orderly Proceedings were commenced; and he could thus not be an accused person as required by the applied law under Paragraph 47(2)(4) of the Kenya Police Service Standing Orders.
15. The interdiction letter has a retrospective effect to the date when the alleged offence was committed demonstrating the Respondent's intention of not according to the Exparte Applicant an opportunity to be heard and access justice.
16. The said retrospective effect was also applied to calculate the subsistence of the leave to appeal and thus denied the applicant the opportunity to challenge the decision illegally made internally.
17. The interdiction letter was addressed on 17th November 2023 and furnished to the Exparte Applicant on the 21st November 2023 and when he received his pay slips, his salary was half against his legitimate expectation (DM 3).
18. As per Justice Radido's finding in *Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others* (2015 eKLR, no interdiction that amounts to disciplinary action against a police officer is allowed unless the police officer has had a chance to defend himself/herself; ascertaining the essentials under Article 47 (1) and 246(3)(b) of the Constitution and Section 87(3) of the National Police Service Act.
19. The decision to interdict the Exparte Applicant was purely a manhunt, as the letter indicated the Exparte Applicant could appeal the decision yet he was not given a chance to defend himself as per rule 9(1-10) of the National Police Service Commission (Discipline) Regulations 2015(DM-2), where an accused ought to be notified of the offence he is accused of within 3 calendar days to show cause why disciplinary action should not be taken against him, which procedure was not complied with by the 1st Respondent through the 3rd Respondent.



20. The Hon. Attorney General through Stafford Nyauma, Principal State Counsel entered a second appearance for all the respondents on the 15th of February 2024. The Respondents did not file a response to the Exparte Applicant's Motion or appear in the proceedings.

Directions

21. The court on 26th February 2024 directed the parties to canvass the application by way of written submissions. The Exparte Applicant's written submissions drawn by Makonjio Nyaberi & Co. Advocates were dated 28th February 2024 and received in court on 29th February 2024. The Respondents did not file any submissions.

Determination

Issues for determination.

22. The Exparte Applicant in his submissions addressed the following issues:-
- a. Whether the Ex-Parte Applicant was entitled to a hearing before interdiction.
 - b. Whether the Exparte Applicant was fit for interdiction.
 - c. Whether the interdiction was issued upon following the right process.
23. The Application for judicial review order was unopposed. The court having considered the case was the opinion that the issues placed before it for determination was whether the judicial review application was merited by considering the following sub- issues :-
- i. Whether the interdiction was issued in compliance with the law
 - ii. Whether the order sought was merited.

Whether the interdiction was issued in compliance with the law

Exparte Applicant's submissions

24. The grounds of the application are as outlined above. No evidence was tabled in defence hence the facts are unchallenged. The Exparte Applicant was a policeman. He was thus subject to the provisions of *the Constitution* and the *National Police Service Act* as far as disciplinary processes are concerned. The Exparte Applicant produced a letter of interdiction on the grounds that he was arrested by Ethics and Anti- Corruption Commission officers from Bungoma for apparently taking a Kshs. 2000 bribe while on duty at Kakamega. The Exparte Applicant states that he was not charged with any offence. That he was not subjected to fair hearing before the decision of interdiction and payment of half salary. The Exparte Applicant states that the disciplinary procedure under section 87 of the *National Police Service Act* was not followed prior to his interdiction. Section 87 provides for the functions of the Internal Affairs Unit to be :-

- o receive and investigate complaints against the police;
- 2(a)
(b) promote uniform standards of discipline and good order in the Service; and
- (c) keep a record of the facts of any complaint or investigation made to it.



- 2A) Without prejudice to subsection (2), the unit may where necessary investigate and recommend appropriate action in respect of any Found engaging in any unlawful conduct.
- 3) In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution.”
- 4) The Internal Affairs Unit shall investigate misconduct and hear complaints—
 - (a) from members of the Service or members of the public;
 - (b) at the direction of a senior officer;
 - (c) on its own initiative; or
 - (d) on the direction of the Inspector-General; or
 - (e) at the request of the Independent Police Oversight Authority.
- 5) The Unit may recommend the following disciplinary actions to the Inspector-General after the investigations under 87 subsection 5
 - a. the interdiction of an officer;
 - b. the suspension of an officer;
 - c. the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer; or
 - d. any other lawful action.”

25. The exparte applicant further relied on the The National Police Service Commission (Discipline) Regulations, 2015 (22nd May, 2015 Legal Notice No. 90)to submit that he was not accorded a fair hearing before the decision and there has been no compliance with the procedural requirements of fair hearing to wit:-

- “9. (1) Disciplinary proceedings shall be conducted in accordance with these Regulations the Service Standing Orders and any guidelines issued by the Commission from time to time.
- (2) Where an offence against discipline is committed by an officer, the officer's supervisor may take a corrective action, where applicable, pending the commencement of disciplinary process.
- (3) The accused officer shall be notified of the offence accused of having committed and shall be accorded an opportunity of at least three calendar days within which to show cause why disciplinary action should not be taken against him or her.
- (4) Where a disciplinary hearing is scheduled, an officer accused of a disciplinary offence shall be given at least seven calendar days' notice before the date of the hearing.
- (5) The notice under paragraph (4) may, in exceptional circumstances, be waived and the hearing held in accordance with the Service Standing Orders.



- (6) Where paragraph (5) is invoked, the presiding officer shall record the reasons for such waiver in writing.
 - (7) Where applicable or relevant, the officer who is the subject of the hearing may call witnesses or other evidence on his or her behalf, at the officer's own cost.
 - (8) The disciplinary hearings before the Disciplinary Committees shall be conducted expeditiously and without undue delay or technicalities and any delay in the disposal of the proceedings beyond twenty-eight days shall be reported to the Commission together with the reasons for such delay.
 - (9) The recommendations of the Disciplinary Committee shall be forwarded to the Commission for confirmation and approval and the Commission shall subsequently communicate the disciplinary action to be taken on the officer through the Inspector General.
 - (10) The recommendations of the Subordinate Disciplinary Committee shall be forwarded to the Inspector-General or authorized officer as prescribed in the Service Standing Orders, for confirmation and approval and the Inspector-General or authorized officer shall subsequently communicate or implement, where applicable, the disciplinary action to be taken on the officer, taking into consideration the provisions of regulation 10.”
26. The Exparte Applicant submits that the issuance of the interdiction letter was unlawful ab- initio as he was not charged with the alleged offence nor were investigations conducted. The Exparte Applicant stated that the procedure followed was to be in compliance with article 47 of *the Constitution* as stated under section 87 (3) of the *National Police Service Act* to wit :
- “ In the performance of its functions, the Unit shall be subject to Article 47 of *the Constitution*.”
27. The Exparte Applicant states that the Police Internal Affairs Unit was to make a recommendation of interdiction to the Commission after the investigations which he says was not done in compliance with Article 47 of *the Constitution*. The Exparte Applicant states that the 2015 regulations clause 3 (4) provides that:- ”Every disciplinary process shall observe due process as provided under Article 47 and Article 246(3) (b) of *the Constitution*.”
28. To buttress the foregoing submissions the Exparte Applicant relied on several decisions of the Court.
29. In Elizabeth Gathoni Murimi & another v DCIO Nakuru Railways Police Staton & 3 others [2015] eKLR where Justice Radido held:-
- “21. In the present case, there is no iota of evidence that the Internal Affairs Unit recommended the interdiction of the Claimants. Such a recommendation would have been a sine qua non for the Commission itself or any of its delegates to purport to exercise the power to interdict.
30. In conclusion, the Court finds and declares that the interdiction of the Claimants by the 3rd Respondent was unlawful and in contravention of *the Constitution* and *National Police Service Act*.
31. The Court orders the Respondents to restore the Claimants to their offices without loss of any benefits from date of interdiction.
31. As a parting shot, should the National Police Service Commission wish to pursue disciplinary action against the Claimants it should comply with the law.”



32. In *Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others*(2015) e KLR where Justice Radido having considered a claim by a police officer interdicted by Officer Commanding Police Division upon being booked for inquiries of offence of robbery with violence and unlawful confinement held:- “In light of the above, the Court finds and holds and proceeds to declare that:
- a. The action of the DivPOL Bernard M. Kioko to interdict the Petitioners through letters B/EST/1/15/VOL.XVI/4, B/EST/1/15/VOL.XVI/5, B/EST/1/15/VOL.XVI/7 and B/EST/1/15/VOL.XVI/9 were ultra vires the *National Police Service Act*.
57. The Court orders that:-
- That the interdiction of the Petitioners be lifted and all withheld salaries and benefits be paid forthwith.
- ii. Each party to bear own costs.
- For the avoidance of doubt, the Internal Affairs Unit of the National Police Service is at liberty to conclude its investigations and make appropriate recommendations to the National Police Service Commission.”
33. In *Republic v Inspector General of Police & 2 others Exparte Zelea Jakaa Akiru*(2015)e KLR where Justice Muriithi of HC held that: “ The right to be heard is both an ingredient both of the right to fair administrative action under Article 47 of *the Constitution* and the right to fair hearing under Article 50 of *the Constitution*. In a matter such as the one before the court which has both criminal and disciplinary processes are invoked, the right to be heard is important to both settings.”

Decision.

34. The facts before the court was that the Exparte Applicant, a Police Constable attached to Kakamega Police Station Traffic section as a police rider was interdicted effective 27th October 2023 by the Kakamega Central Sub- County Police Commander , Valerian Obore, on allegations of having been arrested by EACC officer from Bungoma within Kakamega Township on allegation of receiving bribe contrary to section 6(1)(a) as read with section 18(1) of the *Bribery Act* 2016. He was alleged to have received a bribe of Kshs. 2000 from a driver to evade a traffic offence. The interdiction was stated to be pursuant to paragraph 47(2)(4) of Cap 30 SSO. Under the letter the Exparte Applicant was granted 7 days to appeal. The exparte applicant states the letter dated 17th November 2023 was furnished on him on 21st November 2023.
35. The Exparte Applicant stated that he had not been charged for the alleged offence hence was not an accused person for paragraph 47(2)4) of the Kenya police service standing orders to apply to him. That his rights under *the Constitution* of fair hearing were violated to wit article 47, 50 and 236 (b) and section 87 of the *National Police Service Act*. Paragraph 47 (1 and 2) of the Kenya Police Service Standing orders provides as follows:- “47. (1) The Inspector-General may interdict from duty any police officer pending any inquiry into a disciplinary offence or into the conduct of any such officer under provisions of the Code of Regulations for officers of the Government Service, or under the provisions of *the Constitution*, the *National Police Service Act*, 2011 or of any other written law. (2) A police officer shall not be interdicted unless he is accused of an offence of such gravity that a recommendation for his dismissal may follow conviction. “
36. In the instant case the Exparte Applicant told the court he had not been charged with any offence in a court of law. The court then returns that the Kakamega Central Sub County Police Commanding Officer did not correctly apply the order in issuing the interdiction which is a disciplinary measure.



- The Exparte Applicant was wrongfully interdicted as he had not been charged with a criminal offence before a court of law over 20 days since the alleged incident.
37. The Exparte Applicant states that his right to fair hearing before the interdiction were violated. The court holds that regulations are subject to the enabling Act of parliament. The National Police Service Commission under article 244 of *the Constitution* is mandated to: - “c) comply with constitutional standards of human rights and fundamental freedoms;”
 38. Section 89 *National Police Service Act* No. 11 A of 2011 provides as follows: “89(3) All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall comply with Article 47 of *the Constitution*.”
 39. Article 47 of *the Constitution* provides as follows: - “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”
 40. Justice Muriithi HC in Republic v Inspector General of Police & 2 others Ex Parte Zelea Jakaa Akiru [2015] Eklr in an almost similar matter where the accused was charged with a criminal case (in the instant case the Exparte Applicant was not charged)held: “38. The 1st respondent has power to interdict a police officer pending inquiry into his conduct under the *National Police Service Act*, subject to the observance of the principle of fair administrative action under Article 47 of *the Constitution*. The 1st respondent through the County Police Commander did not afford the applicant any opportunity to be heard before the decision to interdict her was made.”
 41. The court finds that the decisions in Kazungu Ngumbao and Elizabeth Gathoni were delivered before the amendment of the act and The National Police Service Commission (Discipline) Regulations, 2015 delegating the disciplinary of police officer to the Inspector General or authorized officer. Indeed justice Radido foresaw that in Elizabeth Gathoni Murimi & another v DCIO Nakuru Railways Police Staton & 3 others [2015] eKLR paragraph 20 “Although I did not hear addresses from the parties, it also appears that there are inconsistencies between the statutory role given to the Internal Affairs Unit to recommend interdiction of officers facing disciplinary action (section 87(6) of the *National Police Service Act*), and the role of ‘authorised officers’ arising out of the Regulations. But that discussion should wait an appropriate case.” The said regulations define “authorized officer” means the Inspector-General or an officer who is authorized by the Inspector-General initiate disciplinary action against an officer;’
 42. Section 10 *National Police Service Commission Act* 2014 provides:- “10(4) The disciplinary control envisaged under Article 246(3)(a) of *the Constitution* shall mean— (a) the development and prescription of fair and clear disciplinary procedures in accordance with Article 47 of *the Constitution*; (b) development, and prescription of disciplinary procedures and mechanisms; (c) monitoring compliance by the Inspector General with the prescribed disciplinary procedures and guidelines issued by the Commission; (d) monitoring compliance with the due process in disciplining members of the Service;” The import of this provision is that the disciplinary powers of the commission can be exercised by the inspector general through his authorised officer subject to compliance with article 47 of *the Constitution*.



43. The court finds that the interdiction letter issued to the Exparte Applicant was in breach of the provisions of article 47 of *the Constitution* and Section 89 *National Police Service Act* No. 11 A of 2011 and the Police Service Standing Orders section 47(2) (supra).
44. The Kakamega Central sub-county Police Commander in writing the interdiction letter on 17th November 2024 several days after the alleged incident did not allow the exparte applicant to be heard on the allegations and no criminal charge had been made. The officer was in office since the alleged incident of 27th October 2023 and not charged with any offence or interrogated watering down the gravity of the alleged conduct per section 47(2) of the police service standing orders to wit:-“ (2) A police officer shall not be interdicted unless he is accused of an offence of such gravity that a recommendation for his dismissal may follow conviction.”
45. In the upshot I find the interdiction letter dated 17th November 2023 was issued in violation of the provisions of article 47 of *the Constitution* and section 89(3) of the *National Police Service Act* and the Police Service Standing Orders.
46. The Application is allowed.
47. The court enters judgment for the Exparte Applicant. The Court hereby issues An Order of Certiorari to remove into this Honourable Court and quash the decision of the third respondent conveyed by the Kakamega Sub County Police Officer Commanding station on behalf of the 1st and 2nd Respondents vide the letter dated 17.11.2023 purporting to interdict the Applicant with effect from 27.10.2023.
48. The Court further orders that:-
 - a. That the interdiction of the Exparte Applicant be lifted and all withheld salaries and benefits be paid forthwith.
 - b. Each party to bear own costs.
49. In obiter and for avoidance of doubt the 1st and 2nd Respondents are at liberty to carry out disciplinary hearing against the Exparte Applicant in accordance with *the Constitution* and the relevant law and procedures.
50. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 11TH DAY OF APRIL 2024

J.W. KELI

JUDGE

In the presence of:

Court Assistant: Brenda Wesonga

For Ex -Parte Applicant : Omenta

For Respondents: Absent

