



**Ndieyira v Inspector-General of Police & 3 others (Petition E038 of 2020)
[2024] KEELRC 2455 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E038 OF 2020
K OCHARO, J
SEPTEMBER 26, 2024**

IN THE MATTER OF: ARTICLES 10, 20, 21, 22, 23, 25,28, 41(1), 47, 50, 73, 75,159(2), 165(3), 232, 236, 244 (C) AND 246 (3) (B) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF: THE CONTRAVENTIONS OF ARTICLES 10, 22, 23, 28, 35(1), 41, 47(1) AND (2), 50, 73, 75, 232, 236, 244 (C) AND 246 (3) (B) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011

AND IN THE MATTER OF: THE FORCE STANDING ORDERS (REVISED EDITION 2001 [1962] AND IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007

BETWEEN

CALISTUS WANJALA NDIEYIRA PETITIONER

AND

THE INSPECTOR-GENERAL OF POLICE 1ST RESPONDENT

**THE DEPUTY INSPECTOR-GENERAL IN CHARGE OF ADMINISTRATION
POLICE 2ND RESPONDENT**

THE NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner commenced these proceedings against the Respondents by a Petition dated 6th August 2020 seeking: -
 - a. A declaration that the purported Orderly Room Proceedings initiated against the petitioner by the Officer of the 2nd Respondent on 3rd November 2013 was arbitrary, unfair, oppressive and in violation of the Petitioner's right to a fair hearing as guaranteed by Article 50 of *the*



Constitution and an outright breach of the procedures as laid down in the Service Standing Orders in force by then.

- b. A declaration that the stoppage of the Petitioner's salary while still on duty for the three months of December 2013 to February 2014 by the Respondents was arbitrary, oppressive and in violation of Petitioner's fundamental right to fair labour practices as guaranteed under Article 41 (1) of the Constitution.
 - c. A declaration that the decision to dismiss the Petitioner from the National Police Service purportedly made by the 2nd Respondent's letter dated 29th November 2013 was in breach of Article 246 of the Constitution, Section 89(6) of the Constitution and Sections 41 (2) and 45 of the Employment Act.
 - d. A declaration that the failure by the 3rd Respondent to revoke the summary dismissal of the Petitioner by the 2nd Respondent was unconstitutional, null and void.
 - e. A declaration that the failure by the 3rd Respondent to inform the Petitioner of any 'suspension pending dismissal' nor serve him with any letters of suspension on any allegation was arbitrary, oppressive, and in violation of the Petitioner's fundamental right to fair and administrative action guaranteed by Article 47 (1) and (2) of the Constitution and Section 4 of the Fair Administrative Actions Act.
 - f. A declaration that refusal to supply the Petitioner with copies of the Orderly Room proceedings and decisions made therein leading to the Petitioner's dismissal was a violation of the Petitioner's fundamental right to access to information guaranteed by Article 35 (1) of the Constitution.
 - g. A declaration that the 3rd Respondent's action of delegating its mandate of disciplining the Petitioner to the 1st and 2nd Respondent and purporting to endorse the unlawful decision of dismissal by a junior officer of the 2nd Respondent of an undisclosed rank was unconstitutional, unlawful, and ultra vires Article 246 (3) (b) of the Constitution.
 - h. An order of judicial review in the nature of certiorari do issue to remove into the High Court and to quash the decision to dismiss the Petitioner from the National Police Service purportedly made by the 2nd Respondent vide a letter dated 29th November 2013.
 - i. An award of such terminal dues to the Petitioner as the Honourable Court shall assess equal to the Petitioner's unpaid salary and allowances for 3 months worked and equivalent to the Petitioner's salary and allowances for the remainder of his term of service up to the projected retirement age of 60 years.
 - j. An award of general and exemplary damages as may be assessed by the Honourable Court on the violations of the fundamental rights and freedoms of the Petitioners as to human dignity, right to access to information, right to fair labour practices, right to fair administrative action and the right to fair trial espoused in Articles 28, 35 (1), 41 (1), 47(1)(2), 50, 236 and 246 of the Constitution.
2. The Petition was filed alongside the Supporting Affidavit of the Petitioner sworn on 6th August 2020.
 3. In response to the Petition, the 3rd Respondent filed a Replying Affidavit sworn by PETER LELEY, its Chief Executive Officer, on 18th September 2023. The other Respondents didn't file any document in response to the Petition.



4. When this matter came up for directions on 8th May 2023, this Court directed that the Petition be canvassed by way of written submissions. This culminated in the Petitioner's Submissions dated 13th September 2023; the 3rd Respondent's Submissions dated 18th September 2023; and the 1st, 2nd, and 4th Respondent's Submissions dated 15th September 2023.

Petitioner's case

5. It was Petitioner's case that he was employed in February 2005 as an Administration Police Officer No. P/NO 2005006019, and his last station was the Rapid Deployment Unit (RDU) at the Administration Police Headquarters, Embakasi Nairobi.
6. On 26th October 2013, the petitioner together with his colleagues, were deployed to Todonyang near the Kenya-Ethiopia Border, a hardship Area. On 28th October 2013, while at Lodwar en route to Todonyang, a dispute arose between them [members of the unit on deployment] and their seniors at AP Headquarters over the non-remittance of their subsistence and welfare allowance for the assignment. Notwithstanding that the dispute remained unresolved, the petitioner and his colleagues persevered and proceeded to Todonyang for duty.
7. He further stated that on 31st October 2013, while at their new station, Todonyang, the seniors at the AP Headquarters, Nairobi, recalled him and some of his colleagues from duty and ordered them to return to Nairobi immediately. In compliance with the directive, they travelled back and arrived in Nairobi on the night of 2nd November 2013.
8. The petitioner stated further that the following day, 3rd November 2013, without being notified or served with any charges, and without being given time to prepare his defence and statements, he was summoned to appear for disciplinary Orderly Room Proceedings presided by one Chief Inspector Stephen Nyasani. In the circumstances, he was forced to ask for an adjournment of the proceedings to enable, service of the charges on him, and prepare adequately for his defence. The panel acceded to his request and adjourned the proceedings indefinitely.
9. Notwithstanding the forgoing premises and the fact that he was still serving and being allocated duties, surprisingly the Respondents withheld payment of his December 2013 salary.
10. The Petitioner stated that he was prompted to seek legal counsel. His Counsel wrote a letter dated 30th December 2013 to the 3rd Respondent, reminding them of the orderly Room Proceedings that had been deferred indefinitely and seeking clarification on the act of withholding his salary. In its response, the 3rd Respondent indicated that they were unaware of the two issues raised and promised to revert "once they had information from service."
11. On 4th February 2014, while still on duty and awaiting a substantive response from the 3rd Respondent as promised, he was served with a letter of summary dismissal dated 29th November 2013. He again wrote to the 3rd Respondent informing them of the dismissal and petitioned for its revocation. According to him, the person who purported to dismiss him from the service lacked the authority to do so.
12. The petitioner further stated that through its letter dated 15th January 2014, the 3rd Respondent responded to his Counsel's letter. In the letter, they stated that they had investigated the matter and found that on the material day, he turned mutinous and refused to obey lawful orders, and as a result, was suspended pending dismissal. It was in the process of making a final decision.
13. He asserted that surprisingly, he hadn't been informed of any suspension pending dismissal. Further, despite the assurance, the 3rd Respondent never communicated a final or any decision taken.



14. He further contended that despite requesting a copy of the purported Orderly Room Proceedings culminating in his dismissal from service, as of right under Article 35 of *the Constitution*, the request didn't elicit any action on the part of the Respondents.
15. According to him, the 3rd Respondent improperly and unlawfully delegated disciplinary authority to the 1st and 2nd Respondents and purported to endorse an unlawful decision by a junior officer of the 2nd Respondent with undisclosed rank.
16. The Petitioner asserted that he continued being deployed and assigned duties, however, his salary for December 2013- February 2014.
17. Further, the Respondents' action against him was retaliatory. He was victimized for raising real, genuine, and serious grievances relating to his condition of service of service while under deployment.
18. It was his case, that the 2nd Respondent didn't have the power to dismiss him from the service. Further, the dismissal was in breach of Section 41 (2) and 45 of the *Employment Act*, Article 50 of *the Constitution*, and Section 16 of the Force Standing Orders since it was effected without the Respondents first hearing him, and considering his representations on the alleged accusations
19. He was dismissed before any lawful disciplinary proceedings were initiated and undertaken against him and denied his salary for three months unjustifiably. This violated the provisions of the *National Police Service Act* and the *National Police Service Commission Act*. Further, it infringed on his rights to fair labour practices and fair administrative action under Articles 41 and 47, of *the Constitution* of Kenya 2010, respectively.
20. The finding that he was guilty of gross misconduct was absent of fair and valid reason[s], thus affronting the provisions of Sections 43 and 45 of the *Employment Act*, 2007. Further, the 3rd Respondent's failure to supply his Counsel with copies of the Orderly Room Proceedings despite a request for the same was a violation of his right to access information contrary to Article 35 of *the Constitution*.
21. He further states that the 3rd Respondent should have revoked the summary dismissal on account of lack of authority or power on the person who purported to dismiss from the service fell short of its constitutional mandate under Article 246 (3) (b) of observing due process, exercising disciplinary control over and removing persons holding or acting in offices within the Service. The Petitioner highlights Section 89 (6) of the *National Police Service Act* which provides that the various disciplinary sanctions outlined therein will only take effect after review and confirmation by the National Police Service Commission, the 3rd Respondent herein.
22. It is contended that the 3rd Respondent violated the Petitioner's right to fair administrative action under Article 47 (1) and (2) of *the Constitution* by failing to inform him of any 'suspension pending dismissal' and serving him with any letters of suspension.
23. Finally, he contended that his right under Article 28 of *the Constitution* to inherent dignity and the right to have that dignity respected and protected was violated.
24. That the actions of the 2nd Respondent are ultra vires the provisions of Sections 89(6) of the *National Police Service Act*, Section 10 of the *National Police Service Commission Act*, and Section 4 of the *Fair Administrative Action Act*. The 2nd Respondent sought to amend *the Constitution* of Kenya, 2010 by the back door and gave himself the authority and functions of the National Police Service Commission, by single-handedly dismissing a member of the Police Service without the approval of the 3rd Respondent.



The Respondents' case

25. The 3rd Respondent stated that it is an independent Commission established by Article 246 of *the Constitution* and charged with the mandate including to recruit and appoint persons to hold or act in offices in the service, confirm appointments, determine promotions and transfers, within the service, observing due processes, disciplinary control, and remove persons holding or acting in offices within the National Police Service and any other prescribed by National legislation.
26. The Petitioner was enlisted into Service in 2005, posted to the Administration Police Service and was deployed to the Rapid Deployment Unit until his dismissal. On or about 29th October 2013 the Petitioner with other officers were tasked with undertaking operational activities in Todonyang which they defied citing that they ought to be given allowances first.
27. The Respondent stated that due to the wilful refusal to undertake duties the Petitioner was charged in Orderly Room Proceedings with the following charges: wilfully and knowingly disobeying a lawful command and order given to him by IP Cyrus Githae to board a vehicle transporting him to Todonyang for an operation on 29th October 2013 contrary to section 88(2)1(g) of the Eighth schedule of the *National Police Service Act*; using inappropriate language that was threatening, disrespecting and insubordination towards Cyrus Githae and the NCO's accompanying him for the operation contrary to section 88 (2) 1(c) of the Eighth schedule of the *National Police Service Act*; using language that was obscene, abusive and insulting to fellow officers accompanying him for operational duties contrary to section 88 (2) 1(b) of the Eighth schedule of the *National Police Service Act*; and absenting himself on two occasions from his designated rest points while on transit on 29th and 30th October 2013 from Makutano and Lodwar AP Camps respectively, while armed with a G3 rifle without prior permission contrary to section 88 (2) 1(h) of the Eighth schedule of the *National Police Service Act*.
28. The Respondent further stated that the Petitioner was subsequently charged on 3rd November 2013 in Orderly Room Proceedings with the above-stated offenses and the prosecuting officer proposed dismissal from service as punishment for the Petitioner.
29. The decision was then forwarded to the 3rd Respondent for deliberation and analysis of the facts vis a vis the sentence. The 3rd Respondent deliberated upon the same and agreed with the recommendation to dismiss the Petitioner from the Service. Subsequently, the Petitioner was dismissed from Service on 29th November 2013 and was issued with a dismissed letter through his then Commanding Officer.
30. The 3rd Respondent insisted that the Petitioner was present during the Orderly Room Proceedings conducted on 3rd November 2013, so he was granted the right to a fair hearing. At no point did the Petitioner request for more time to enable him to prepare for his defense adequately. He continued and participated in the hearing.
31. It was further asserted that at the time the Petitioner was committing the offenses the Force Standing Order in effect and defined the presiding officer as a police officer authorized to inquire into offenses under the powers conferred by paragraph 15, hence the allegation by the Petitioner that the 3rd Respondent abdicated its Constitutional mandate by allowing disciplinary proceedings to be conducted by the 1st and 2nd Respondents are baseless and fabrications.
32. It was contended that the actions of the Petitioner of refusing to continue with the journey to Todonyang and inciting other officers not to continue until their allowances were paid, amounted to picketing under Article 41 of *the Constitution*. While this fundamental right is protected and guaranteed, the same is limited and not applicable to police officers by dint of Article 24 (5) (d) and Section 47 (2)(3)(f) of the *National Police Service Act*.



33. The Rapid Deployment Unit, to which the Petitioner is deployed, was established to have a well-trained and well-equipped force that would be deployed at short notice. It is designed to be highly trained, agile, mobile, responsive, and well-equipped to operate in high-threat environments. The Petitioner's conduct negated the essence of having a Rapid Deployment Unit, and could not be tolerated among the disciplined forces, especially in such a unit. In such units, orders should be carried out first to ensure neutralization of the threats facing the County.
34. Lastly, the 3rd Respondent argued that the Petitioner erred in anchoring his petition on the provisions of the Employment Act as their applicability on matters involving those serving in the Police Service is excluded by dint of section 3 (2) (b) of the Employment Act. The Court was urged to disregard the quoted sections of the Employment Act.

Issues for Determination

35. I have carefully studied the Petitioner's petition, the verifying affidavit thereof, the 3rd Respondent's response, and the submissions filed herein by the parties and the following issues emerge for determination: -
 - a. Whether the 1st and 2nd Respondents' decision for the dismissal of the Petitioner from the National Police Service, was ultra vires;
 - b. Whether the Respondents violated the Petitioner's Constitutional rights as aforesaid;
 - c. What reliefs if any can be availed to the Petitioner?

Whether the 1st and 2nd Respondents' decision for the dismissal of the Petitioner from the National Police Service was ultra vires

36. I understood the Petitioner as arguing that the 3rd Respondent committed a legal error by allowing the 1st and 2nd Respondents to initiate and carry out Orderly Room Proceedings, and arrive at the decision that the Petitioner should be dismissed from the service as they did in the subject matter. Hence, his argument that the 1st and 2nd Respondent acted ultra vires.
37. While analyzing the ultra vires principle and its justification at law, the Court in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant [2019] eKLR* expressed itself as follows: -

“The ultra vires principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The court's function is to police the boundaries stipulated by Parliament. The ultra vires principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense, the ultra vires principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised. It must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The ultra vires principle thus conceived provided both the basis for judicial intervention and established its limits.”



38. Mativo J, in the above-cited case, relied on the English case of Council of Civil Service Unions v. Minister for the Civil Service [1984] UKHL 9 where Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action ultra vires. These grounds are illegality, irrationality and procedural impropriety. He went further to state that later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely proportionality. On illegality, the Court stated:

“What Lord Diplock meant by “Illegality” as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term “Irrationality” by succinctly referring it to as “unreasonableness” in the Wednesbury Case. [22] By “Procedural Impropriety” His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere...

Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did, and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple ultra vires and errors as to precedent facts. Errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.”

39. Therefore, for this Court to determine whether the decision of the 1st and 2nd Respondents herein to dismiss the Petitioner from service was ultra vires, I must consider the relevant laws and ascertain how they empower the Respondents’ decision-making process[es].

40. Article 246(1) of *the Constitution* establishes the National Police Service Commission, the 3rd Respondent herein, with the following mandate:

- a. recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
- b. observing due process, exercising disciplinary control over and removing persons holding or acting in offices within the Service; and
- c. perform any other functions prescribed by national legislation.”

41. Section 10 (1) (h) of the *National Police Service Commission Act* Cap 89 of the Laws of Kenya provides that one of the functions of the 3rd Respondent is to:

“exercise disciplinary control over persons holding or acting in office in the Service”.

42. Under Section 10 (4) of the Act, the disciplinary control envisaged under Article 246(3)(a) of *the Constitution* is defined to 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;
 - e. receiving regular reports from the Inspector-General on disciplinary matters handled by the National Police Service;
 - f. reviewing or ratification of disciplinary actions taken by the Inspector-General;
 - g. hearing and determining appeals on disciplinary matters from members of the Service.”
43. I have carefully considered the wording of Section 10 (4) as read together with Section 10 (3), and have no doubt in my mind that Subsections 4[c], [d],[f]and [g], explicitly speak to the fact that disciplinary proceedings against those in the service, isn’t necessarily exercisable by the 3rd Respondent directly. It for example recognizes the 1st Respondent’s authority to undertake disciplinary action against an officer. Subsection 4[g] provides appellate powers on the 3rd Respondent over appeals by members of the service. What does this imply? Clearly, it does that a person outside of the 3rd Respondent is allowed to make decisions that can be appealed against to the 3rd Respondent.
44. My above conclusion is supported by Regulation 4 of the National Police Service Commission (Discipline) Regulations which provides that:

“Complaints against police officers

1. The disciplinary process may commence upon occurrence of any of the following—
 - a. a complaint from a member of the public;
 - b. a complaint from a member of the Service;
 - c. a complaint from a state organ; or
 - d. an anonymous witness statement or other statement made for another investigation not necessarily commenced for purposes of police Service matters.
2. Where an incident under subsection (1) occurs, such complaint shall be investigated by the most senior officer available or by an authorized officer in the manner prescribed in the Service Standing Orders.
3. In exceptional circumstances, where the offence against discipline is clearly manifest as to render investigations unnecessary, the officer in charge may immediately issue a notification to the appropriate disciplinary committee to conduct the disciplinary proceedings.
4. During the investigation, statements may be collected from the complainant, any witnesses available and from the officer being accused.
5. Where the complaints or reports and investigation disclose offences against discipline, the report of the investigation along with a notification shall be forwarded to the appropriate disciplinary committee to commence disciplinary proceedings.
6. The appropriate disciplinary committee shall upon conclusion of the disciplinary proceedings make a recommendation to the Inspector-General or authorized officer on the disciplinary action to be taken.
7. Upon conclusion of the disciplinary proceedings and on receipt of the recommendations of the appropriate disciplinary committee, action may be taken by the Inspector-General or the



authorized officer in accordance with the procedure set out in these Regulations and the Service Standing Orders.

8. Investigations into complaints against police shall be notified to the Internal Affairs Unit, upon commencement of the investigations.
 9. Where investigations under this section disclose offences against discipline, the officer in charge shall be required to inform the Internal Affairs Unit of the notification issued to the appropriate disciplinary committee to conduct proceedings to enable a record of the same to be maintained.
 10. Where an officer accused in a complaint admits to an offence against discipline, appropriate disciplinary proceedings shall be taken by the appropriate disciplinary committee.
 11. An authorized officer or an officer-in-charge, as prescribed in the Service Standing Orders, may, subject to these Regulations and any other applicable procedure, take corrective action immediately against an officer who is manifestly culpable of a disciplinary offence pending the disciplinary proceedings before the appropriate disciplinary committee in accordance with these Regulations and the Service Standing Orders.”
45. Undeniably, Regulation 4(7) sanctions action by the Inspector General of Police or an authorized officer, a person, against whom a recommendation for disciplinary action has been made by the appropriate disciplinary committee.
46. “Authorized officer” is defined in Regulation 2 as;
- “the Inspector-General or an officer who is authorized by the Inspector-General to initiate disciplinary action against an officer”.
47. Per Section 89 of the *National Police Service Act* Cap 84 of the Laws of Kenya, and Regulation 13 (4) of the National Police Service Commission (Discipline) Regulations, the actions that the Inspector General of Police is authorized to take include
- a. reprimand;
 - b. suspension;
 - c. an order of restitution;
 - d. stoppage of salary increments for a specified period of time, but not exceeding one year;
 - e. reduction in rank;
 - f. dismissal from the Service; or
 - g. any combination of the punishments provided under this section;
 - h. confinement to barracks or police residential quarters;
 - i. reduction of salary by not more than one-third of the basic salary for a period not exceeding three months; and
 - j. a fine not exceeding a third of basic salary.”
48. In light of the above, I find no difficulty in concluding that the 3rd Respondent didn’t act in any manner, improperly, by allowing the disciplinary proceedings against the Petitioner, and that the 1st and 2nd



Respondents exercised authority contemplated by the law. The doctrine of ultra vires urged by the Petitioner doesn't come to the aid of his case.

Whether the Respondents violated the Petitioner's Constitutional rights and the Constitution.

49. The Petitioner contended that the 3rd Respondent, by allowing the 1st and 2nd Respondents to initiate and conduct disciplinary proceedings against him, and determine that he merited a summary dismissal from the service, and subsequently failed to recall the decision, amounted to a violation of Article 246 which establishes it and sets out its mandate. Having analysed the relevant law as I have hereinabove, and concluded that the 1st and 2nd Respondent didn't act ultra vires, I am unpersuaded by the Petitioner's position that there was a violation.
50. I note that the Petitioner didn't challenge the decision either, by appeal or application for review by the 3rd Respondent.
51. Article 10 of the Constitution of Kenya 2010, provides the National Values and Principles of Governance, one of them as espoused under Sub article 2[a], is the rule of law. The rule of law requires inter alia that where the law has set out principles, and or matters guiding the conduct of the citizenry, or individuals or legal entities, such set principles, and or matters, must be adhered to, or taken into consideration. As will come out shortly hereinafter, the Petitioner's various rights were infringed, and certain statutory requirements were breached. Article 10[2][a] was violated by the Respondents.
52. Force Standing Orders Chapter, (Revised Edition 2001[1962]) (hereinafter 'the Standing Orders'), set out a detailed procedure to be followed in disciplinary proceedings, under Section 16: -

“.....16. (vii) An accused person shall, at least 24 hours before the commencement of such inquiry, be notified in writing of the alleged offence against discipline into which it is proposed that an inquiry shall be held. Such notice shall be in accordance with Appendix 20C of this chapter. Provided that notice need not be given in any inquiry where an immediate example is required, or where the Provincial or any Gazetted Officer, considers it expedient or in the public interest that an inquiry should proceed forthwith.

(viii) An accused person may call witnesses on his/her own behalf in any inquiry...

(x). In all inquiries, the proceedings shall be conducted in the following manner: -

- a. The Presiding Officer shall ascertain from the accused whether he/she has been notified in writing of the alleged offence against discipline as required in subparagraph (vii) above,
- b. When the provision to subparagraph (vii) above has been invoked, the Presiding Officer shall so inform the accused and the reason shall be recorded in the proceedings.
- c. The Presiding officer shall inquire from the accused whether he/she wishes to be assisted in his/her defence by a police officer who should not be above the rank of the presiding officer and must be serving within the same province.
- d. When an accused person wishes to be so assisted in his/her defence, the Presiding officer shall consider the application and may make recommendations to the Officer in Charge of the division or formation in which the accused is charged or stationed.



- e. The details of the alleged offence against discipline shall be read to the accused in a language which he understands and he/she shall be required to plead thereto, and the pleas of the accused shall be recorded in his/her own words and he/she shall be required to sign such record.
- f. When the accused admits his/her guilt, a plea of guilty shall be recorded in his/her own words (in unambiguous terms) and he/she shall be convicted thereof.
- g. When the accused denies his/her guilt, a plea of not guilty shall be entered by the Presiding Officer who shall proceed to record the substance of the evidence of the witnesses,
- h. Each witness shall be examined separately in the presence of the accused,
- i. Each witness may be cross-examined by the accused or by the police officer appointed to assist him/her in his/her defence, as the case may be, and may thereafter be re-examined by the police officer appointed under subparagraph (v) of paragraph 16 above.
- j. The evidence of each witness may be given on oath or affirmation if this appears to be necessary, on the directions of either the Commissioner of Police or the Provincial Police Officer or at the discretion of the Presiding officer.
- k. At the close the evidence in support of the alleged offence against the discipline the Presiding Officer shall, if he/she considers that no offence has been disclosed, acquit the accused and he/she shall record in writing his/her reasons for so doing.
- l. If at the close of the evidence in support of the alleged, offence against discipline, the Presiding Officer is of the opinion that sufficient evidence has been adduced against the accused to put him/her on his/her defence, he/she shall once again inform the accused of the substance of the allegations against him/her, and inform him/her that he/she has the right to give evidence on his/her own behalf and to call such witnesses in his/her defence as he/she may wish;
- m. The Presiding Officer shall inform the accused that if he/she gives evidence on his/her own behalf he /she will be liable to cross-examination;
- n. The presiding officer shall record the evidence of the accused, if any, and shall then record the evidence of the witnesses for the defence in the same manner as that prescribed in subparagraph (g) above,
- o. When all the evidence has been recorded the presiding Officer shall review it, prepare a summary, showing the reasons for his/her findings, record a verdict and shall convict or acquit the accused as the case may be,
- p. Before awarding punishment against the accused the Presiding Officer shall inform him/her that he/she may make a statement in mitigation or sentence and he/she shall record such statement which will be signed by the accused,



- q. Having considered the accuser's statement in mitigation of sentence and his/her record of service, the Presiding officer shall award punishment against the accused.
- r. If, having regard to the gravity of the offence against the discipline and to the accuser's record of service, the presiding officer is of the opinion that the punishment he/she is empowered to award is insufficient, he/she may remit the proceedings to the officer of a more senior rank, who may proceed to award punishment against the accused;
- s. When in any inquiry the Presiding officer is of the opinion that the offence has been proved against the accused, but is of the opinion that, having regard to the accused's record of service, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is inexpedient to award any proceedings to conviction make an order dismissing the charge;
- u. The accused shall be informed of the finding and sentence and of his/her right to appeal under paragraph 24 of this Chapter;
- v. If the accused does not wish to appeal, the Presiding Officer shall so record in the proceedings and the accused shall sign such record.
- xi. When any inquiry or part of an inquiry is conducted in a language not understood by the accused, the presiding officer shall appoint a police officer or other person to act as interpreter.

Such appointment shall be recorded in the proceedings.

- xii. The Presiding Officer may, at any time in an inquiry, order the production or any document which he/she considers will assist him in arriving at a fair and just verdict.
- xiii. The Presiding officer may, at any time in an inquiry, in order to obtain proof of any relevant fact or to clarify any point in the evidence of any witness ask such witness any questions he/she considers necessary.

53. The above is reinforced by Regulation 11 of the National Police Service Commission (Discipline) Regulations which provides that:

“Conduct of disciplinary proceedings

- 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 the 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.”
54. The pertinent question, that arises in this case, is whether the Respondents complied with the above set out procedure involving notifying the Petitioner of the charges against him, undertaking a hearing, considering his representations, and then reaching a decision, which was then communicated to the Petitioner.
55. This 3rd Respondent argued that there was due compliance with the procedural requirements aforesaid and that the Orderly Room Proceedings produced by the 3rd Respondent as Exhibit “PK1” attached to their Replying Affidavit, are a testament to it. This Court has carefully considered the material placed before it by both parties on this matter, and notes that; the alleged proceedings are expressed to have been held on 3rd November 2013 at 1100 hours; the Petitioner’s assertion that he and his colleagues arrived back in Nairobi in the night of 2nd November 2013; and the Respondents didn’t place forth any document before this Court to show that the Petitioner was notified of the charges against him in writing and granted three days to show cause why disciplinary action shouldn’t be taken against him.
56. The Court further notes that the Petitioner wasn’t given seven days to prepare for the disciplinary hearing. No waiver notice has been tendered in evidence by the Respondents to justify non-adherence to the requirement.



57. Furthermore, from the Orderly Room Proceedings, it is clear that the Petitioner was not allowed to cross-examine the witnesses whose evidence was relied on by the prosecution, on the basis that they were still deployed in Todonyang and could not make their way back for the hearing.
58. The Respondents didn't discount the Petitioner's assertion that he was not notified of the decision to suspend him pending dismissal within a reasonable time. It only dawned on him that such a decision existed after he made inquiries.
59. Considering the foregoing cumulatively, leads to an inescapable conclusion that the decision to dismiss the Petitioner from the service, was destitute of procedural fairness. His right under Article 47 of *the Constitution* was violated thereby.
60. The Petitioner contended that with no justification, the 3rd Respondent withheld his salary for three months. I have carefully considered the Respondent's response to the petition, and note that the Respondent didn't refute the Petitioner's evidence or reasonably justify their act of withholding the salary. In my view, the action was arbitrary and one which does not have a place in a world that should be free from slavery. The Petitioner's right to fair labour practices was violated. Withholding the salary amounted to a deprivation of fair remuneration and reasonable working conditions, contrary to what is guaranteed under Article 41 of *the Constitution*.
61. It was the petitioner's case that despite requesting for the Orderly Room Proceedings through his Counsel, the Respondents failed to furnish him with the same. I have indeed noted that the demand for the proceedings was one of those that the Petitioner's Counsel made in his letter of 6th February 2014. I take a clear view that in the circumstance of the matter, inclusive of the impact of the dismissal from employment on any individual, the Petitioner was entitled to the information he sought, the Respondents didn't have a reason to deny him the same. His right to access information under Article 35 was violated.

What reliefs if any can be granted to the Petitioner?

62. The petitioner sought various declarations against the Respondents. Having reached the conclusions I have hereinabove, I hereby return and declare that the Respondents contravened the Constitutional stipulations under Article 10, and violated the Petitioner's rights under Articles 35, 41, 47 and 50 of *the Constitution*.
63. By reason of the premises hereinabove, I find no difficulty in concluding that the Petitioner's claim for unpaid salary for the three months is founded. He shall be paid his salary from December 2013 to February 2014.
64. I decline to grant the claim for the Petitioner's salary and allowances for the remainder of his term of service up to the projected retirement age of 60 years, for the reason that this prayer is not anchored in law. There was also no such provision in the Petitioner's contract of employment. I gather support for my said findings from the case of D.K. Marete vs Teachers Service Commission [2020] eKLR where the Court of Appeal held thus:
 26. On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in *Engineer Francis N.*



which held as follows:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word “permanent employment?”

27. Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails.”
65. With regard to the claim for general and exemplary damages, having held that the Petitioner’s constitutional rights were violated, I award general damages for violation of his Constitutional rights assessed at Kshs. 1,000,000 [one million]. I decline to award exemplary damages as these are only awardable in exceptional circumstances, which the Petitioner didn’t place forth material to establish. Exceptional circumstances as were set in the English case of *Rookes vs Bernard* (1964) 1 ALL ER 367.
66. In the upshot, Judgment is hereby entered for the Petitioner against the Respondents in the following terms;
- a. It is hereby declared that the Respondents contravened the Constitutional stipulations under Article 10, and violated the Petitioner’s rights under Articles 35, 41, 47 and 50 of *the Constitution*.
 - b. That the Respondents shall pay him damages for the said violation in the sum of KShs. 1,000,000.
 - c. Interest on the awarded sum at court rates from the date of this Judgment till full payment.
 - d. The Respondents shall bear the costs of this suit.

READ, DELIVERED AND SIGNED THIS 26th DAY OF SEPTEMBER, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Buloa for the Petitioner.

Ms. Akuno for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

