Attorney General v Director of Criminal Investigations & 2 others; Kigen & another (Exparte Applicants) (Judicial Review E019 of 2024) [2024] KEELRC 13289 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13289 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW E019 OF 2024

AN MWAURE, J

NOVEMBER 28, 2024

BETWEEN

THE HON. ATTORNEY GENERAL .... APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS .... 1ST RESPONDENT

INSPECTOR GENERAL NATIONAL POLICE SERVICE .... 2ND RESPONDENT

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

AND

EMMANUEL KIPKORIR KIGEN .... EXPARTE APPLICANT

RAYMOND RAHA NGAO .... EXPARTE APPLICANT

RULING

Introduction

1. The ex-parte applicants filed a Notice of Motion dated 20th May 2024 seeking orders that:

    1. Spent

    2. This Honourable court be pleased to issue an order of certiorari to quash the decisions made on 9th January, 2024 dismissing the ex-parte applicants from the National police service for breaching the Ex-parte applicants' right to fair trial under Articles 25,47(1) and (2) of *the constitution* and section 4 of the *Fair Administrative Action Act*.

3. This Honourable Court pleased to issue orders of prohibition directed to the 1st, 2nd and 3rd Respondents prohibition of the respondents herein, their servants and/or agents or any other persons acting with their authority from further continuing with the interdiction of the Ex-parte applicants and/or from removing the ex-parte applicants herein from employment as police officers.

4. This Honourable court be pleased to issue orders of prohibition directed to the 1st, 2nd and 3rd respondents, prohibiting the respondents from effecting the decision made against the Ex-parte applicants on 9th January, 2024 purporting to unlawfully remove them from their position as police officers with the terms of the national police service.

5. This Honourable court be pleased to issue orders of Mandamus directed to the respondents herein, compelling them to reinstate the Ex-parte applicants to the national police service and to their respective ranks and duties previously held at the time of interdiction and lawful removal and further orders for the payment of all their duties rightfully owed to the applicants.

Applicants' Case

2. The 1st and 2nd ex-parte applicants were employed by the National Police Service on 17th September 1990 and 17th January 2001 respectively. Both the 1st and 2nd ex-parte applicants served as investigators at the Anti- Narcotics Unit of the Directorate of Criminal Investigations in the rank of Chief Inspector of Police and Corporal.

3. The ex-parte applicants allege they were interdicted by the 1st Respondent vide a letter dated 30th October 2015 which they received on 11th November 2015.

4. The ex-parte applicant were accused of tampering with seized substances which amounted to gross misconduct.

5. The ex-parte applicants aver that they individually wrote to the 1st Respondent on 24th January 2023 after a long period of 7 years without receiving any communication demanding for formal communication to be taken in order for their interdiction to be lifted.

6. The ex-parte applicants aver that as a result of their communication, the 1st Respondent issued them with show cause letters on 25th August 2023 on why they should not be removed from the National Police Service.

7. The ex-parte applicants aver that both forwarded their responses on 5th September 2023, and the 1st respondent dismissed them vide letter dated 9th January 2024, communicated on 22nd January 2024.

8. The ex-parte applicants claim that the respondents did not adhere to the provisions outlined in the *National Police Service Act* and the Police Service Standing Orders, which constitute a violation of their rights as guaranteed by Articles 47 and 50 of *the Constitution*.

9. The ex-parte applicants contend that the delay in the inquiry process was both unfair and unreasonable, and they were denied due process and an opportunity to be heard.

Respondents' Case

10. In opposition to the application, the 1st Respondent filed a Replying Affidavit dated 15th July 2024 sworn by Francis K Ndiema and the 3rd Respondent filed a Replying Affidavit dated 15th July 2024 sworn by Peter Leley.

Ex-parte Applicants' submissions

11. The ex-parte applicants submitted that the notice to show cause letters were issued in bad faith and was an attempt by the respondents to cover up the appalling treatment they received. The letter of interdiction provided entirely different and unacceptable reasons, while the notice to show cause letter, which were issued eight years later, presented a list of unfounded allegations not mentioned in the initial letter. Furthermore, after responding to the notice to show cause letter, the applicants did not receive any further communication from the respondents.

12. The ex-parte applicants submitted that they were never invited to any hearing and only received letters dismissing them from service and the action taken was in bad faith and violated their right to be heard.

13. The ex-parte applicants relied on the case ofBoard of Education vs Rice (1911) A.C 179 where Lord Loreburn LC said:

> " that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything'."

14. In Twinobusingye Severino vs Attorney General case, Constitutional Petition No. 47 of 2011 the Constitutional Court of Uganda stated that if an authority acts outside its legal powers, or makes unreasonable decisions that cannot be justified, it is the court's duty to declare such decisions invalid when challenged by an aggrieved party with standing.

15. The ex-parte applicants submitted that the decision to dismiss them was an afterthought as they were not informed about the reasons for the inquiry file No. 11/2015 or the concerns involved and were never invited to the inquiry. The ex-parte applicants further submitted that the procedures outlined in *the Constitution* 2010, *National Police Service Act*, Service Standing Orders, and National Police Service Commission (Discipline) 2015 were not followed, leading to an unorthodox and unlawful process that prejudiced them and violated their rights.

16. The e-xparte applicants submitted that they were not given a fair hearing or informed of the charges against them in a timely manner, which they argue is a breach of natural justice and procedural fairness.

17. In Gathigia vs Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587 the court cited the case Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77 which set out the general principles of guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 as follows:

    1. Follow prescribed procedures.
    2. If no procedures exist, conduct a fair inquiry.
    3. Act justly, in good faith, and listen to both sides.
    4. Ensure the accused knows the accusations.
    5. Provide a fair chance to correct or contradict prejudicial statements.
    6. Share relevant information with both sides and allow comments on any communications received during the inquiry.

18. In conclusion, the ex-parte applicants urge this Honourable Court to quash the dismissal decision, prohibit further interdiction, and compel their reinstatement with full benefits.

1st Respondent's submissions

19. The 1st respondent submitted that the ex-parte applicants have not demonstrated any special circumstances to justify the orders sought as the relationship is an employer-employee relationship governed by private law and cannot benefit from public law remedies.

20. In Republic versus Professor Mwangi S. Kimenyi, Permanent Secretary, Ministry of Planning & Another, Civil Appeal No. 160 of 2008 (2013) eKLR, Warsame, Otieno Odek and Kantai JJA, held that Judicial review remedies, which are discretionary and fall under public law, are not typically applicable to private employment contracts. The court cited the case of R-V- British Broadcasting Corporation – Ex Parte Lavelle (1983)1 WLR 1302, which emphasized that disciplinary procedures arising from employment contracts are private and do not warrant judicial review. In employer-employee relationships, if a contract is terminated wrongly, the employee can seek damages, not certiorari. The court also cited the case in Republic -V- Judicial Service Commission Ex parte Stephen Pareno HC Misc. Civ. App No. 1025 of 2003, it was noted that public law remedies are inappropriate for employment disputes, and private law remedies are more suitable, especially when a significant break has occurred between the employee and employer.

21. The 1st Respondent submitted that due process was followed in the ex-parte applicants' interdiction and dismissal as they were interdicted on 30th October, 2015, to investigate allegations of tampering with seized narcotic substances which constituted as gross misconduct. The said interdiction letters detailed the allegations, and an inquiry confirmed the need for disciplinary charges.

22. The 1st Respondent also submitted that the show cause letters issued on 25th August, 2023, gave the ex-parte applicants a chance to respond, which they did without citing any procedural issues and the interdiction was lawful and meant as a temporary measure.

23. The 1st Respondent submitted by denying any undue delay, stating that the complexity of the inquiry justified the time taken. The 1st Respondent states that it has the authority over its disciplinary procedures, which the court should not interfere with.

24. In Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal no.108 of 2009 the Court of Appeal held that decision-making bodies, outside of courts and those with statutory procedures, are in control of their own processes. As long as they achieve appropriate fairness, they can decide how to proceed.

25. The 1st Respondent submitted that the application is premature as the applicants are accused of bypassing internal mechanisms and making unfounded allegations against the Respondents, particularly the Directorate of Criminal Investigations, without first following the procedures outlined in the Service Standing Orders (SSO).

26. The 1st Respondent cited paragraph 57(1) Chapter 30 of the Service Standing Order that states as thus:

> "Any police officer, who is to be removed from the Service under the provisions of paragraph 52 to 56, may appeal against such removal to the National Police Service Commission".

27. The 1st Respondent submitted that the ex-parte applicants did not appeal to the National Police Service Commission's decision to remove them from service, despite being given the option to do so in their removal letters.

28. In the case of National Assembly v Karume (1992) KLR 21 where the court stated:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

29. In conclusion, the 1st Respondent prays that the application should be dismissed as it lacks merit.

3rd Respondent's submissions

30. The 3rd respondent submitted that the ex-parte applicants failed to exhaust the available internal remedy mechanisms before approaching the court. The 3rd respondent argues that there are internal procedures for appeal and review outlined in the *National Police Service Act* and the Discipline (Regulation) 2015.

31. The 3rd Respondent submitted that Section 10(1)(k) of the *National Police Service Act* provides for the hearing and determination of appeals dealing with transfers, promotion and appointments as well as interdictions, suspensions and dismissal relating to the appointment of any member of the service.

32. The 3rd Respondent submitted regulations 20, 21 and 22 of the National Police Discipline Regulations 2015. The outline of the procedure for review and appeals. The regulation provides an aggrieved party may apply for review when there is an error on the face of the record, new important facts which were not considered by the Commission by way of oral hearing, written submissions or both.

33. The 3rd Respondent submitted that regulation 21 of the Discipline Regulations 2015 provides that an aggrieved officer can appeal the decision of the disciplinary hearing to the appellate authority within the service and the decision of the disciplinary proceedings shall lie with the Commission which can be heard by oral hearing, written submission or both.

34. In Secretary County Public Service Board Wajir County Government V Hulbhai Gedi Abidille (2017) eKLR the court cited the case of Republic v National Environment Management Authority ex-parte Sound Equipment Ltd, [2011] eKLR, this Court observed: -

> .....Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

35. The 3rd Respondent submitted the ex-parte applicants had a right to appeal when they were dismissed but instead approached this Honourable Court through judicial review under section 9 of the *Fair Administrative Action Act*.

36. The 3rd Respondent has submitted that since the ex-parte applicants filed to exhaust the internal mechanism provided, the ex-parte applicants are not entitled to the reliefs sought and the application should be dismissed.

Analysis and determination

37. After carefully considering the pleadings and submissions by both parties, I find that the two main issues for determination are whether due process was followed and whether they are entitled to the reliefs sought.

38. It is not disputed that the ex-parte applicants were employed by the respondents as investigators at the

39. According to the National Police Service Standing Orders before an officer is interdicted, Subsection 5 provides establishment of a unit known as the internal affairs unit. Standing Orders. Subsection 5(4) of the Service Standing Order provides as follows:

> The Unit shall have power to recommend the following disciplinary actions to the Inspector-General—
>
> (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.
>
> (2) Where the Unit recommends disciplinary action against an officer a duplicate of the inquiry file containing recommendations shall be sent to the Commission.

40. The issue of contention is that the applicants were interdicted on 30th October 2015 on allegations of tampering with seized substances which amounts to gross misconduct. The letter shows that it is from OC Anu from DCI headquarters and does not show if the person is part of the internal affairs unit.

41. Also in the interdiction letters, the 1st Respondent did not indicate how long the applicants were to be interdicted but they were receiving half salary and they were required to return all items.

The interdiction letter dated 30th October 2015 signed by Luke Migot is very general. It provides no details of the misconduct and does not disclose the period of interdiction.

42. Section 14 of the National Police Disciplinary Regulations 2015 provides as follows:

14.

> (1) An officer under investigation, may be interdicted by the Inspector-General or an authorized officer to facilitate investigations.
>
> (2) An interdiction of an officer shall not mean removal from office.
>
> (3) An interdicted officer shall continue to be subject to all laws, Regulations, Service Standing Orders and Guidelines relating to the Service.
>
> (4) An officer under investigation may, depending on the nature of the case, be interdicted pending the investigation.
>
> (5) Where the officer is interdicted, the officer shall surrender his or her Certificate of Appointment to the supervisor.

(6) Despite any provision in this regulation, the officer's appointment shall not cease only because of such interdiction or suspension.

(7) While an officer is interdicted or suspended, the officer's powers, privileges and benefits shall be suspended, but the officer shall continue to be subject to the discipline and penalties provided under the *National Police Service Act*, 2011, as if the officer had not been interdicted or suspended.

(8) An officer who has been interdicted from duty will be entitled to half salary as well as to remain in the accommodation as provided to the officer.

(9) Notwithstanding paragraph *(8)*, during an officer's interdiction or suspension as the case may be, the officer may be required to proceed to his permanent residence and to report to the local police station or post as prescribed in the Service Standing Orders.

43. The respondents did not initiate any disciplinary action against the ex-parte applicants until the applicants inquired about the lifting of their interdiction. It was only after this inquiry, nearly eight years after the interdiction began, that the respondents issued show-cause letters to the ex-parte applicants. No action had been taken during the entire duration of the nearly eight years of interdiction.

44. In article 47(1) of *the Constitution* it is provided as follows:-

Fair Administrative action

47.

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

45. The respondent in the court's considered opinion failed to comply with article 47(1) of *the Constitution* as a failure to communicate to a person for over eight years is neither expeditious, lawful or even procedurally fair and reasonable.

46. The respondent also did not invite the ex-parte applicants for hearing and directly removed them from service vide the letter dated 9th January, 2024 without giving them an opportunity to be heard.

47. Section 10(1) (f) of the *National Police Service Commission Act* provides that the Commission is obligated to ensure the National Police Service operates efficiently and effectively. The National Police Service's refusal to follow the due process against the applicants have adversely affected their fundamental rights. Therefore, the Service should have fast-tracked the hearing because the issue at hand was gross misconduct which is a serious offence.

48. The defence raised by the respondent apart from averring that the applicants did not address the issues in their notice to show cause was that they also did not exercise the doctrine of exhaustion. They are said not to have resulted to the available internal mechanisms and that they should have first approached the Directorate of Criminal investigations before going to court for their recourse.

49. The court finds the respondents did not comply with the procedure provided in police Service Commission Disciplinary Regulations 2015.

The officer who is undergoing disciplinary proceedings must be informed of his offence and given an opportunity to respond to his accusations. He should then be given a hearing date and he should also call witnesses if he so wishes.

The respondent did not follow the procedure provided in its regulations.

50. As to the doctrine of exhaustion the court would not expect the parties of resolve their matters internally where there is a clear violation of the fundamental rights of a party. In this case interdicting an employee for over eight years is a clear violation of their rights.

51. In GEOFFREY MUTHIGA KABIRU & 2 OTHERS -VS- SAMUEL MUNGA HENRY & 1756 OTHERS (2015) eKLR the court stated:-

    59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex-parte The National Super Alliance Kenya (NASA) (supra) after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

    > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

    60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

    61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed respectively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others (2018) e KLR.

52. In the circumstances, the court finds the ex-parte applicants fundamental rights were breached when they were put on interdiction without clear reasons and were condemned to interdiction of over eight years until they wrote to the Respondents and only then were they issued with a notice to show cause. After their response to the notice to show cause they were dismissed without being accorded any audience.

53. The court finds the ex-parte applicants are entitled to their reliefs as per the Notice of motion application dated 20th May 2024 and so the same are granted and the ex-parte applicants are ordered to be reinstated to their employment with immediate effect.

54. Each party will meet their costs of the application.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28 DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

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.

ANNA NGIBUINI MWAURE

JUDGE

ELRC JUD. REV. NO E019 OF 2024 RULING PAGE 25 OF 25