



Republic v National Police Service & another; Nyachiro (Exparte Applicant) (Judicial Review Application E006 of 2020) [2023] KEELRC 1378 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E006 OF 2020**

J RIKA, J

MAY 31, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL POLICE SERVICE 1ST RESPONDENT

THE HON ATTORNEY- GENERAL 2ND RESPONDENT

AND

KENNEDY MONG'ARE NYACHIRO EXPARTE APPLICANT

JUDGMENT

Rika J

Court Assistant: Emmanuel Kiprono

Okemwa & Company Advocates for the Applicant

Ernest Kioko, Senior State Counsel for the Respondents

1. The Ex-Parte Applicant obtained leave of the Court to file this Judicial Review Application for the prerogative writs of Certiorari, Prohibition and Mandamus, on October 19, 2020.
2. He filed the substantive Application the following day November 20, 2020. He prays for the aforesaid prerogative writs, and damages under Article 23 [e] of the *Constitution*.
3. He explains in his Supporting Affidavit, that he was enlisted in the National Police Service on May 1, 1998. At the time of filing the Application, he had served for 32 years, and was attached to the Diplomatic Police Unit, in the rank of Police Sergeant.



4. He was interdicted by the 1st Respondent on July 28, 2015, following criminal proceedings brought against him, in Kibera Chief Magistrate's Court Criminal Case No 2956 of 2014.
5. He was acquitted on April 12, 2020.
6. He had earlier applied for early retirement, on June 13, 2013. The Applicant had been offered a permanent job by his Church, the Seventh Day Adventist. This job offer was to be confirmed upon the Respondent's confirmation that the Applicant was no longer in service.
7. He alleges that the job offer was competitive, and created internal wrangles. Consequently, he was framed up by his competitors with the offence of robbery with violence, or neglecting to prevent a felony.
8. He continued to work for the 1st Respondent, because there was no formal response to his application for early retirement.
9. Upon acquittal, the 1st Respondent did not lift the Applicant's interdiction. It instead charged the Applicant with the offence of engaging in other employment or office, without the authority of the Commission, contrary to the *National Police Service Act*.
10. A copy of the orderly court room proceedings, indicates that that the Applicant pleaded guilty, and was sentenced to pay a fine of Kshs 3,000. The proceedings took place at Diplomatic Police Unit, on August 23, 2019.
11. On July 13, 2020, the 1st Respondent wrote to the Applicant, informing him that the orderly court proceedings, which had been forwarded to the Police Headquarters, had been returned to his Station, for correction.
12. It was stated that the charge sheet was not correct. It ought to have read, 'Engaging himself in any other employment or office, without the authority of the Commission, contrary to Section 88[2], Subsection 1 [jj] of the 8th Schedule of the NPS Act No 11 of 2011.' The previous charge referred to Section 6, Subsection 2 [jj] of the *National Police Service Act*.
13. It is this decision taken on July 13, 2020, that is the subject matter of this Application for Judicial Review.
14. The Respondents filed Grounds of Opposition dated February 13, 2023 and Notice of Preliminary Objection dated February 16, 2023.
15. The Objection contains 2 Grounds- that the Application is fatally defective and incompetent, as it offends Order 53 Rule 2 of the *Civil Procedure Rules, 2010*; and is frivolous and vexatious. The Grounds of Opposition are related to those in the Objection. It is restated that the Application is misconceived and an abuse of the Process of the Court. It is stated that acquittal in the criminal proceedings does not absolve the particular Employee from disciplinary proceedings, because the 2 processes are distinct. Lastly, the Respondents state that it is within the mandate of the 1st Respondent to discipline the Applicant.
16. The Court directed on March 2, 2023, that the Preliminary Objection is joined to the substantive Application, heard and determined together, by way of Written Submissions. Parties confirmed filing and exchange of Submissions on April 24, 2023.
17. The issues are whether the decision made by the 1st Respondent, to reopen orderly court room proceedings against the Applicant is lawful and fair; whether it should be sustained; or whether it should be interfered with by the Court by issuing of prerogative writs, sought by the Applicant.



The Court Finds: -

18. It is not clear why the Respondents object to the Application under Order 53 Rule 2, which governs leave to bring Application for Judicial Review. The record indicates leave was granted on October 19, 2020, by Hon Justice Onesmus Makau. Leave so granted was to operate as stay of the 1st Respondent's decision of July 13, 2020.
19. The Court stated on granting leave, that leave is granted to an Ex-Parte Applicant, upon the Court being satisfied that there is a prima facie case. The Court was satisfied that there is a prima facie case, and the Application cannot be frivolous and vexatious. The 2 Grounds in the Preliminary Objection have no merit, and Preliminary Objection is declined.
20. The decision by the 1st Respondent, dated July 13, 2020, was without doubt, contrary to Articles 47, 50 of the Constitution of Kenya and the Fair Administrative Action Act.
21. Article 47[1] provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
22. Article 50[1] states that every person has the right to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a Court, or if appropriate another independent and impartial tribunal or body.
23. The job offer from the Seventh Day Adventist was made way back on August 8, 2012. Although the offer was not confirmed, because the 1st Respondent did not release the Applicant through early retirement, the 1st Respondent charged the Applicant with the offence of engaging in any other employment, in the year 2019.
24. The charge, coming after 7 years was neither expeditious, efficient, reasonable, nor fair.
25. The charge was only presented, after the Applicant was acquitted in the criminal proceedings, on May 2, 2019, and after the Applicant wrote to the 1st Respondent asking for his interdiction to be lifted.
26. The Applicant was taken through orderly room proceedings on August 23, 2019. A charge sheet was read to him. He pleaded guilty and was convicted. A fine of Kshs 3,000 was imposed on him.
27. The matter should have rested at that. Reopening of proceedings, to allow the 1st Respondent correct the charge sheet, was contrary to Articles 47 and 50 of Constitution. It exposed the Applicant to double jeopardy. Legal processes must be final. Article 50 [2] of the Constitution prohibits the prosecution of an accused person for an offence in respect of an act or omission, for which the accused person, has previously either been acquitted or convicted. This principle has long been recognized in criminal law, under the doctrine of autrefois convict or autrefois acquit. Although orderly room proceedings are administrative, quasi-judicial, rather than criminal, the 1st Respondent would not be within the law under Article 47 and 50 of the Constitution, to reopen proceedings and retry the Applicant, over the same offence he had been convicted. Fair hearing does not allow any Court, Independent and Impartial Tribunal or Body, to reopen proceedings to enable correction of the charge sheet. More so, when the accused has been presented with the charges, the facts verified, a plea of guilty recorded, and sentencing done. It is immaterial that the orderly room proceedings were conducted by a subordinate disciplinary panel. The panel had full administrative authority to try the Applicant and acquit or convict him.
28. The decision is reviewable under Section 7 [2] of the Fair Administrative Action Act because the decision was procedurally unfair; it was materially influenced by an error of law; there was unreasonable delay in presentation of orderly room proceedings; the administrative action, in particular reopening



of orderly room proceedings violates the Applicant's legitimate expectation not to be tried twice for the same offence; and reopening proceedings is in abuse of power. The initial orderly room proceedings were brought after an inordinate delay of 7 years, and only after the Claimant asked for lifting of interdiction, following his acquittal in the criminal proceedings. The criminal charges had no discernible relationship with the offence of engaging in any other employment. These proceedings were themselves presented contrary to the principles of fair administrative action. The decision to reopen unfair and unlawful orderly court room proceedings, would only compound these violations against the Applicant.

29. The 1st Respondent, in its letter of July 13, 2020 to the Applicant, stated that, 'interdiction cannot come to a conclusion without the conclusion of the proceeding.' Legal processes must come to an end, and once convicted, the Applicant legitimately expected that the legal process against him, in the nature of orderly room proceedings, had come to an end. There was no reason to keep the interdiction in place, and recycle orderly room proceedings.
30. The Applicant applied for early retirement to enable him take up employment with the Seventh Day Adventist. He expressed his desire to terminate his service, through early retirement. His OCS, Diplomatic Police Unit, forwarded a no-objection letter to the 1st Respondent's Head Office. There was no reason why the 1st Respondent did not reply to the Applicant's request. Parties could have parted ways back in 2013. The Respondents could have avoided the muddled processes of interdiction and orderly room proceedings by acceding to the Applicant's request for early retirement. The offence of engaging in other employment, was made against this background. It was the responsibility of the 1st Respondent to give the Applicant an answer. Why keep silent, and bring charges against the Applicant 7 years later, alleging he had engaged in other employment?
31. The letter of interdiction dated July 28, 2015 placed the Applicant on monthly half-salary, until he was cleared of the criminal charges by the Court. He was cleared on May 2, 2019, but the 1st Respondent did not lift interdiction. He merits an order of Mandamus lifting interdiction, and restoring to him withheld half monthly salary, from July 28, 2015.
32. The decision made by the 1st Respondent on July 13, 2020 was administratively unfair and unlawful.

It Is Ordered: -

- a. An order of Certiorari is granted, to remove into this Court and quash the decision of the 1st Respondent, made on July 13, 2020.
- b. An order of Prohibition is granted against the 1st Respondent, by itself, agents, employees, and/or any other person[s] whomsoever, or howsoever acting on, with and/or under its instructions, prohibiting it from re-opening orderly room proceedings, or taking any further disciplinary action in light of the decision made vide the letter dated July 13, 2020.
- c. An order of Mandamus is granted against the Respondents by themselves, their agents, employees, and or any other person[s] whomsoever or howsoever acting on, with and/or under their instructions, compelling the 1st Respondent to lift the interdiction of the Applicant, and to pay his dues with effect from July 28, 2015.
- d. Having granted the orders above, the Court is of the view that an order of general damages is not merited.
- e. No order on the costs.



DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTIONS 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY 2023.

JAMES RIKA

JUDGE

