



**Namu v National Police Service Commission & 2 others (Employment and Labour Relations Petition E005 of 2023) [2023] KEELRC 1231 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1231 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E005 OF 2023**

**ON MAKAU, J**

**MAY 25, 2023**

**IN THE MATTER OF ARTICLES 1, 2, 3 (1), 10, 19, 21, 22,  
27(1), (2) & (3), 28,41 (1) & (2), 48 & 258 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

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

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
27 (1), (2) AND (3), 28, 41, (1) & 47 (1) & (2)**

**AND**

**IN THE MATTER OF NATIONAL POLICE SERVICE  
COMMISSION (TRANSFER AND DEPLOYMENT)  
REGULATIONS, 2015, LEGAL NOTICE NUMBER 89 OF 2015**

**BETWEEN**

**CPL SICILY GITUKU NAMU ..... PETITIONER**

**AND**

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



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

**THE DEPUTY INSPECTOR GENERAL, KENYA POLICE SERVICE ..... 3<sup>RD</sup> RESPONDENT**

**The right to fair labour practices is applicable to officers in the National Police Service.**

*The petitioner, an officer of the National Police Service, alleged that her constitutional rights of fair administrative action and fair labour practices had been violated by the respondents through frequent and punitive deployments. The court held that the right to fair labour practices was applicable to officers in the National Police Service; that the failure of the National Police Service to consider the family and rights of school going minors in the custody of a police officer before transferring or deploying the officer and especially female officers was a violation of the officer's right to fair labour practices.*

Reported by John Ribia

**Constitutional Law** – fundamental rights and freedoms – right to fair labour practices - limitations – limitation of the application of the rights or fundamental freedoms persons in the National Police Service – limitation of the right to fair labour practices - whether the right to fair labour practices applied to officers in the National Police Service - whether the failure of the National Police Service to consider the family and rights of school going minors in the custody of a police officer before transferring or deploying the officer and especially female officers was a violation of the officer's right to fair labour practices – articles 24(5) and 41

**Labour Law** – transfers – transfers vis-à-vis deployments in the National Police Service – difference - what was the difference between deployment and transfer as concerned persons serving under the National Police Service – whether frequent and speedy deployments amounted to being disguised transfers - sections 10 and 47; , regulation 6

**Civil Practice and Procedure** – pleadings – constitutional petitions – threshold - what threshold did constitutional pleadings have to meet to be considered by the court -

**Words and Phrases** – frequent – definition - occurring or done many times at short intervals - Oxford English Dictionary

**Brief facts**

The petitioner, an officer of the National Police Service, alleged that her constitutional rights of fair administrative action and fair labour practices had been violated by the respondents through frequent and punitive deployments. The petitioner sought for the acts of the respondents to frequently and speedily deploying her from Nakuru-Naivasha Police station (Traffic) to Kirinyaga-Kerugoya police station (Traffic) thereafter in less than two (2) weeks to Rongai Sub-County, Kambi ya Moto Police station with immediate effect and again within two (2) weeks to Central Regional Headquarters was discriminatory, a violation of her rights to fair labour practices and the right to fair administrative action. The petitioner contended that the frequent deployments amounted to illegal transfers in breach of the () and the (). The petitioner ultimately sought for the decisions to deploy her to be quashed and for an order directing the respondent not to interfere with the petitioner's discharge of duties at Kirinyaga-Kerugoya police station (Traffic).

The respondent alleged that the petition was premature because it was brought before the petitioner exhausted all the available internal mechanism. Specifically, it was alleged that regulation 6 of provided for the right to apply for a transfer or object to a transfer in writing on medical or compassion grounds of which the petitioner allegedly by-passed.

**Issues**

- i. What threshold did constitutional pleadings have to meet to be considered by the court?



- ii. What was the difference between deployment and transfer as concerned persons serving under the National Police Service?
- iii. Whether frequent and speedy deployments done in breach of the procedures under ( ) and the amounted to transfers.
- iv. Whether the right to fair labour practices applied to officers in the National Police Service.
- v. Whether the failure of the National Police Service to consider the family and rights of school going minors in the custody of a police officer before transferring or deploying the officer and especially female officers was a violation of the officer's right to fair labour practices.

### **Held**

1. If a person was seeking redress from the High court on a matter which involved a reference to the , it was important (if only to ensure that justice was done to his case) that he should set out with a reasonable degree of precision that of which he complained, the provisions said to be infringed, and the manner in which they were alleged to be infringed. The instant petition was pleaded with clarity and set out a detailed explanation and particulars of the alleged violations and the provisions of the alleged to have been infringed.
2. Regulation 6 of the did not refer to deployments but transfers. The procedure provided for objection was only availed to an officer in the event of a transfer, by the commission and not deployments by the Inspector General of Police like in the instant case. The suit was not premature or contrary to the doctrine of exhaustion of remedies.
3. In a span of a month the petitioner had been deployed to 3 different stations. The said deployments were frequent and speedy. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were using deployments to circumvent the provisions of the , ( ) and the ( ) which took away from him the mandate to transfer officers.
4. On January 23, 2023, the petitioner was deployed to Kerugoya and the records of the stations amended immediately. The petitioner was also paid transfer allowance as per the pay slip produced by the respondents. The action was contrary to the , and because transfers were the mandate of the commission while the 2<sup>nd</sup> respondent only did deployments which were meant to be temporary. All the deployments done in the instant case did not involve the National Police Service Commission. An officer in the petitioner's circumstance was justified to deem that a deployment by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent meant transfer.
5. A decision that was made without considering a relevant factor or by considering an irrelevant factor was not only unreasonable but irrational. Although the instant case dealt with transfer, the same principles applied to deployments. The deployments did not consider that the petitioner had reported to Kerugoya station only two weeks before the redeployment to Central Regional Headquarters. Even if she had no family to take care, the time she had been in the new station was a material factor to consider before deploying her to another station in a different county.
6. It was incorrect for the respondents to allege that they did not know that the petitioner had a young family. The court took judicial notice of the fact that the respondents had database of its officers' information including their spouses and children who must be factored in the medical cover provided by the respondents.
7. Article 3(1) of the enjoined the respondents to uphold all the tenets of the including recognition and protection of the family. Failure to consider the effects of the purported deployment on the petitioner's family and especially the school going children under her custody was failure to consider a relevant factor in the decision to deploy her. The decision was irrational.
8. Article 24 of the permitted limitation of a right or fundamental freedom under the Bill of rights by a statute, if the limitation was reasonable and justifiable in a democratic society. Article 24(5) provided that a provision in a legislation may limit the application of the rights or fundamental freedoms in article 31, 36, 37, 41, 43 and 49 to persons in the Kenya Defence Forces or the National Police Service.



- The respondents had not cited any provision of a statute that expressly stated that right to fair labour practices under article 41(1) did not apply to officers in the National Police Service.
9. The court was aware of provisions in some labour related statutes which expressly dis-applied the statute to officers in the police service. However, that did not mean that the said officers lost the right to fair labour practices but rather that their terms and conditions of service were regulated by a different statute that was unique to their service. Since articles 45 and 53 of the recognized and protected the family and rights of children to basic education among others, the National Police Service must consider the family and rights of school going minors in the custody of the police officer before transferring or deploying the officer and especially female officers. Failure to consider such was engaging in unfair labour practices.
  10. Article 24(5) and 27 of the did not include it in the list of rights which could be dis-applied by a provision in a statute. Rights and fundamental freedoms envisaged under article 27 of the applied to the officers in the National Police Service.
  11. The petitioner was deployed with many other officers in January, 2023 and again in February 2023. She had not proved that she was deployed discriminatively. No evidence was adduced to prove that other officers were spared from the deployment on account of family, school going children or recent posting.
  12. Frequent deployments which did not allow an officer to settle down at his new station amounted to unfair labour practices. The deployments also did not recognize and protect the petitioner's family, and were adversely affecting the education of the petitioner's minor children, who were school going. Even if an officer had executed an appointment or contract to serve anywhere in the country, the respondents had an obligation to act fairly taking into consideration all relevant factors before moving the office either on transfer or deployment.

*Petition partly allowed.*

#### **Orders**

- i. *The deployment of the petitioner from Nakuru to Kirinyaga was a transfer in disguise by the 2<sup>nd</sup> respondent acting ultra-vires. Further the frequent deployments and specifically the one done on February 13, 2023 from Kerugoya police station to Central Regional Headquarters Nyeri was irrational and an affront to her right to fair labour practices under article 41(1) of the , was null and void and was quashed.*
- ii. *The respondents were directed not to move the petitioner from Kirinyaga-Kerugoya police station (Traffic) except as contemplated by the law and without violating the provisions of article 45 and 53 of the with respect to protection of family and the right to education of her minor children.*
- iii. *Costs were awarded to the petitioner.*

#### **Citations**

##### **Cases**

1. Kenyatta, Uhuru Muigai v Nairobi Star Publication Ltd (Petition 187 of 2012, [2013] eKLR) — Applied
2. Matemu, Mumo v Trusted Society of Human Rights Alliance, Attorney-General, Minister for Justice and Constitutional Affairs, Director of Public Prosecutions, Kenya Section of International Commission of Jurists & Kenya Human Rights Commission (Civil Application 29 of 2014; [2014] KESC 6 (KLR)[2014] eKLR.) — Applied
3. Mugo, Peter Njeru v Nairobi City County (Petition 293 of 2014, [2015] eKLR) — Applied
4. Mwangi, Moffat v National Police Service Commission & Deputy Inspector General Kenya Police (Cause 1122 of 2015; [2017] KEELRC 1285 (KLR)[2017] eKLR) — Explained
5. Njeru, Anarita Karimi v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Explained
6. Republic v Deputy Inspector General of National Police Service & 32 others (Misc. Civil Application 93 of 2013 (JR), [2013] eKLR) — Applied



7. Republic v Deputy Inspector General Of National Police Service, Inspector General Of National Police Service & Joseph Odipo Ex-Parte Pc Stephen Mathenge (Judicial Review Miscellaneous Application 170 of 2014; [2015] KEHC 5948 (KLR)[2015] eKLR) — Explained
8. Republic v Inspector General of Police Ex parte Jackson Cheruiyot Maiyo (Miscellaneous Civil Application 412 of 2013; [2015] KEHC 5171 (KLR)[2015] eKLR) — Explained
9. Republic v Sacco Societies Regulatory Authority Ex Parte Joseph Kiprono Maiyo, Gerald Juma, N. Otiende & Julius Njeru Ndubai (Judicial Review Application 489 of 2017; [2017] KEHC 1647 (KLR) [2017] eKLR) — Applied
10. Rich Productions Limited v Kenya Pipeline Company & Public Procurement Oversight Authority (PPOA) (Petition 173 of 2014; [2014] KEHC 4539 (KLR)[2014] eKLR) — Explained
11. Narok County Council v Transmara County Council ((2000) 1 EA 161) — Applied

#### **Statutes**

1. Constitution of Kenya, 2010 — article 3(1),10,22(1),24(5)(d),27(1)(2)(3) (10),31,36,37,41(1),45,47,53,246(3) — Interpreted
2. Fair Administrative Action Act (act no 4 of 2015) — In general — Cited
3. National Police Service Act (act no 11A of 2011) — section 10,47 — Interpreted

#### **Advocates**

None mentioned

### **JUDGMENT**

1. By a petition dated March 2, 2023, the petitioner alleges that her constitutional rights have been violated by the respondents through frequent and punitive deployments. Therefore she prays for the following reliefs:-
  - i. A declaration that the acts of the respondents in frequently and speedily 'deploying' her from one station to another and currently deploying her from Nakuru-Naivasha Police station (Traffic) to Kirinyaga-Kerugoya police station (Traffic) thereafter in less than two (2) weeks to Rongai Sub-County, Kambi ya Moto Police station with immediate effect and again within two (2) weeks to Central Regional Headquarters is in breach of the petitioner's constitutional rights under article 27(10), (2) and (3) , 27(1), 41 and 47 of the Constitution and the National Police service Commission (Transfer and Deployment), Regulations 2015 and the same is null and void for all interests and purposes and the same be quashed.
  - ii. That pending the hearing and determination of this petition, conservatory orders of stay do issue staying the transfer of the petitioner from Kirinyaga police station (Traffic) to Central Regional Police Headquarters or any other sub-base or police station and do continue with the normal discharge of her duties at Kirinyaga-Kerugoya police station (Traffic) and restraining the respondents from taking any further steps in the 'deployment' of the petitioner.
  - iii. An order directing the respondents not to interfere in any way with the petitioner's discharge of her duties at Kirinyaga-Kerugoya police station Traffic, charge her or discriminate her in any way.



- iv. Any other or better order this court may deem mete and just grant.
2. The petition is supported by an affidavit sworn by the petitioner on even date. She has attached to the affidavit a bundle of six (6) documents marked S/403/I-VI to support her case.
3. The petitioner also filed a notice of motion dated March 2, 2023 seeking conservatory orders pending the hearing and determination of the petition. The respondents did not appear in court on March 6, 2023 as directed by the court and therefore the conservatory order was granted freezing the deployment of the petitioner from Kerugoya police station to Central Regional Headquarters, Nyeri pending the determination of the petition. The court further directed the respondent to file response to the petition and thereafter the petition to be disposed of by written submissions.

### **Factual Background**

4. The petitioner is a police officer having enlisted into the police service on June 30, 2007 and after completing her initial training, she was posted to various police stations including Gilgil police station (Nakuru-Naivasha) performing Traffic duties from March 16, 2017 to January 30, 2023. On January 23, 2023 she was deployed to Kirinyaga-Kerugoya Police Station (Traffic) duties with immediate effect but managed to report to the new station on January 30, 2023.
5. In a strange turn of events she was, on February 1, 2023 deployed to Rongai Sub-County, Kambi ya Moto police station with immediate effect. Two weeks later, she was on February 13, 2023 deployed to Central Regional Headquarters at Nyeri Operation Room. As a result she moved to this court to challenge the said frequent and speedy deployments because in her view they were violating her rights to fair labour practices and discriminatory contrary to article 41(1) and 27 of the Constitution respectively.
6. She bases the above conviction on the following:-
  - i. Under regulation 2, Legal Notice No 89 of 2015, the National Police Service Commission (Transfer and Deployment) Regulation, 2015 'deployment' means the temporary movement of an officer from one station to another station to undertake specific assignment, for a period not exceeding three months and in which the pay point remains at the original station in which the officer was initially posted prior to the 'deployment.'
  - ii. Under regulation 2, Legal Notice No 89 of 2015, the National Police Service Commission (Transfer and Deployment) Regulation, Transfer 'means the relocation of an officer from the current duty station to a new duty station and matters relating to the officer including the pay point of the officer is moved to the new duty station.'
  - iii. The frequent and consistent 'deployments' are being used in a manner to be construed that they are used as a disciplinary sanction to regulation 8(3) of the aforesaid regulations.
  - iv. Through camouflaged as 'deployment' the aforesaid three speedy 'deployments' are actually transfers as my pay point and commanders changed from Kirinyaga-Kerugoya police station, Rongai SubCounty, Kambi ya Moto police station and Central Regional Headquarters and my County Commander from Kirinyaga to Rongai police station and Nyeri County.



- v. The frequent and speedy 'deployments' are against the aforesaid regulations as they have not been sanctioned by the Commission.
  - vi. The speedy and frequent 'deployments' have been used in a manner to be construed as being used as a disciplinary measure contrary to regulation 3(2) of the aforesaid regulations.
  - vii. The speedy and frequent 'deployments' are discriminatory against me contrary to article 27(1) of the Constitution as they are without explanation or hearing yet the other 10,000 police officers in the Kenya Police Service are not being transferred in the same manner.
  - viii. The speedy and frequent 'deployments' violate my rights to fair labour practices as it is unfair to keep on transferring an employee frequently and speedily even before I settle in on station while there are over 10,000 officers who have remained in one (1) station for over five (5) years and more yet no explanation or reasons are offered for the frequent and speedy transfers.
  - ix. The frequent and speedy 'deployments' are violation of my rights to a fair administrative action as enshrined in article 47(1) of the Constitution and the Fair Administrative Action Act, 2015 as they are being used as a disciplinary sanction due to their uncalled-for frequency yet I have not been given reasons for the same or given an opportunity to be heard and it affects me adversely as I am a family lady with minor children who are in school and who are in my custody.
7. She contended that she has a right to petition the court under article 22(1) of the Constitution whenever her right and fundamental freedoms expressed and implied in the Constitution is denied, violated, infringed or threatened. She further contended that the respondents are bound by the National values and principles set out under article 10 of the Constitution including observance of human rights, rule of law, integrity, social justice, non-discrimination and accountability. Finally she contended that the impugned deployments are in fact transfers in disguise and they are therefore in violation of regulation 2, 3(1)(2)(3) and 8(1), (2)(9) of the National Police Service Commission (Transfer and Deployment) Regulation of 2015.
  8. The respondents are in denial of the alleged violations and aver that the deployment of the petitioner is neither punitive nor discriminatory. They aver that the deployment was done lawfully by the 2<sup>nd</sup> respondent who has the legal mandate to deploy officers based on the need for services among other reasons set out in the law. They denied knowledge of the purported deployment by a county police commander and contended the commander lacked jurisdiction to make the said deployment.
  9. It is the respondents' case that they are only aware of one deployment of the petitioner from Kirinyaga-Kerugoya (Traffic) to Central Regional Headquarters Operations Room effective February 10, 2023.
  10. They denied that the said deployment amounts to a transfer contending that the petitioner's pay point remains Kirinyaga as shown in her pay slip for March, 2023.
  11. They further denied that the deployment to the Central Regional Headquarters was discriminatory and contended that the petitioner was not deployed alone but rather a total of 9 officers were deployed. They also contended that the impugned deployment was in line with section 10 of the National Police Service Act which empowers the 2<sup>nd</sup> respondent to determine the distribution and deployment of offices in the service in the rank of Superintendent and below. The said mandate is reiterated under



the National Police Service Commission (Transfer and Deployment) Regulations, 2015 and the Police Service standing orders.

12. The respondents denied that the deployment constitutes a disciplinary sanction as alleged by the petitioner and clarified that there is no pending disciplinary issues against the petitioner warranting any disciplinary sanction.
13. They contended that the petition discloses no constitutional violations but rather an ordinary employment dispute which can be resolved through the channels provided by statute law without elevating it to a constitutional litigation. Therefore the respondents' averred that the petition is premature, an abuse of court process and lacking in merits, and prayed for the same to be dismissed with costs.

### Submissions

14. It was submitted for the petitioner that the 2<sup>nd</sup> respondent has transferred the petitioner three times between January 23, 2022 and February 13, 2023. That the said transfers have been disguised as deployments. It was submitted that the power to transfer police officers rests with the commission of under regulation 5(3) and article 246(3) of the Constitution. For emphasis reliance was placed on the case of Republic v Deputy Inspector General of National Police Service & 32 others [2013] eKLR and Republic v Inspector General of police Ex parte Cheruiyot Maiyo [2015] eKLR where the court held that the power to transfer police offices belongs to the commission and not Inspector General or his deputy.
15. It was further submitted that the frequent deployments, rescissions and diversions upon the petitioner in a short period of two weeks after her transfer to her current station is punitive, violates her right to fair labor practices, discriminatory, infringes the regulations on Transfer and Deployment 2015; and adversely affect her and her school going children who are in her custody. The children's right to education under article 53 of the Constitution is also affected by the frequent deployments and diversions.
16. It was further submitted that the frequent deployments are unreasonable, arbitrary and contrary to the petitioner's right to fair administration action under article 47(1) of the Constitution. It was submitted that the said article entitles every person to the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Therefore the court was urged to take steps to remedy the situation to stop the adverse and irreparable harm to the rights of petitioner and those of her family.
17. For emphasis, reliance was placed on the case of Republic v Deputy Inspector General of police service & 2 others ex parte PC Stephen Mathenge [2015] eKLR where the court held that failure to take into account the need to recognize and protect the family while exercising power to transfer an officer amounts to failure to take into account a relevant fact and therefore the decision is irrational.
18. The court was urged to uphold the petitioner's constitutional right in the same way and ensure that the 3<sup>rd</sup> respondent does not violate the same and operate with impunity. The court was also urged to award costs of the suit.
19. On the other hand, it was submitted for the respondents that they have not violated the rights and fundamental freedoms of the petitioner. It was further submitted that the petitioner does not meet the threshold of precise pleading of a constitutional petition as enunciated in the case of Anarita Karimi Njeru v Republic [1979] KLR 154 and affirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR.
20. It was further submitted that the petition and the supporting affidavit merely reveal normal case of breach of contract of service capable of redress in a normal suit and should not be elevated to



- constitutional petition. To fortify the foregoing, reliance was placed on *Uhuru Muigai Kenyatta v Nairobi Star Publication Ltd* [2013] eKLR where the court held that constitutional sanction should be reserved for appropriate and serious occasions and not every ill in the society.
21. It was further submitted that article 27 and 41 of the *Constitution* do not apply to persons in the National Police service like the petitioner by dint of section 47 of the *National Police Service Act*. It was submitted that the limitation of the said right is permitted under article 24(5) (d) of the *Constitution*.
  22. As regards the merits of the petition, it was submitted that the deployment of the petitioner was lawful and procedural. It was argued that the petitioner voluntarily accepted the appointment to serve in any station within Kenya and to be subject to all the regulations to be promulgated from time to time. It was further submitted that the deployment was done by the 2<sup>nd</sup> respondent who has the legal mandate to deploy police officers pursuant to section 10 of the *NPS Act* and paragraph 8 of the *National Police Service Commission (Transfer and Deployment) Regulations, 2015*. Therefore it was argued that the deployment is sanctioned by law and was procedurally effected.
  23. It was reiterated that the deployment of the petitioner was not initiated as a disciplinary sanction but rather to ensure balance of work. It was submitted also that the petitioner has not made known to the respondents the issue of two school going minors for consideration prior to the deployment. It was argued that the petitioner ought to have informed the respondents about the custody of the minors in order for the respondent to offer her the required support.
  24. It was reiterated that the petitioner has not been deployed frequently noting that she was in Gilgil Police station from March 16, 2017 to January 30, 2023 when she was deployed to Kerugoya police station. It was submitted that the County Police Commander Nakuru who purported to deploy the petitioner on February 1, 2023 to Kambi ya Moto police station had no authority to do so since the petitioner had left his jurisdiction and command.
  25. It was further submitted that the petition is premature and an abuse of court process because the petitioner filed the suit before exhausting internal mechanism provided under the *National Police Service Commission (Transfer and Deployment) Regulations, 2015*. It was argued that, the said regulations provide for appeal against deployment for consideration by the 2<sup>nd</sup> respondent.
  26. For emphasis reliance was placed on the case of *Narok County Council v Transmara County Council* [2000] 1 EA 161, *Peter Njeru Mugo v Nairobi City County* [2015] eKLR, *Republic v Sacco Societies Regulatory authority Ex parte Joseph Kiprono Maiyo & 3 others* [2017] eKLR and *Rich Productions Ltd v Kenya Pipeline Co Ltd & another* [2014] eKLR where the court held that where the law provides for other mechanism of seeking remedy, the said remedy should be followed to the end before filing suit in court of law.
  27. Finally the respondents submitted that the petitioner is not entitled to the reliefs sought since her deployment was done within the four corners of the law and the petitioner has failed to prove any illegality committed in the deployment. Further it was submitted that the respondent has demonstrated that it only deployed the petitioner and never transferred her as alleged. For emphasis reliance was placed on *Moffat Mwangi v National Police Service Commission & another* [2017] eKLR where the court held that an employer has the prerogative to deploy employees within its business or establishment and the court can only interfere with the said prerogative upon sufficient grounds being demonstrated and which grounds had been brought to the attention of the employer, but not given reasonable consideration.



## Issues for Determination

28. The issues for determination are:-
- a. Whether the petition meets the competence threshold.
  - b. Whether the suit offends the doctrine of exhaustion.
  - c. Whether the petitioner is a victim of frequent deployments
  - d. Whether the deployments/transfers are unreasonable and irrational.
  - e. Whether the rights of the petitioner have been violated by the said deployments.
  - f. Whether the reliefs sought ought to issue.

## Competence Threshold

29. The respondent contends that the petition does not meet the threshold of a constitutional pleading as enunciated by the High Court in the case of *Anarita Karimi Njeru, supra* and affirmed by the Court of Appeal in *Mumo Matemu case, supra*. The petitioner never submitted on that issue.
30. In *Anarita Karimi Njeru case*, the court held that:-
- ' If a person is seeking redress from the High court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.'
31. I have carefully perused the petition herein and in my own opinion, the petition meets the threshold set out above. The petitioner has pleaded with clarity her complaint about frequent deployments (transfers in disguise); the provisions of the Constitution namely article 27, 41 and 47 of the Constitution which have been infringed or threatened; and the manner in which they have been infringed. Paragraph 8, 9, 10, 11, 12 and 13 of the petition set out a detailed explanation and particulars of the alleged violation and the provisions of the Constitution alleged to have been infringed.

## Exhaustion Doctrine

32. The respondent alleges that the petition is premature because it was brought before the petitioner exhausted all the available internal mechanism. Specifically it was alleged that section 6 of the National Police Service Commission (Transfer and Deployment) Regulation, 2015 provides for the right to apply for a transfer or object to a transfer in writing on medical or compassion grounds of which the petitioner by-passed and came to court. Therefore in respondents' view, the 2<sup>nd</sup> respondent was denied the opportunity to consider and determine the grounds upon which the petitioner is objecting to the deployment.
33. Having read regulation 6 of the National Police Service Commission (Transfer and Deployment) Regulation, 2015, I am satisfied that it does not refer to deployments but transfers. The regulation states:-
- ' An officer may, make an application in writing and in accordance with the requirements set out in the standing orders, requesting for a transfer or raising an objection to an intended transfer on medical or compassionate grounds, for consideration by the Commission.'



34. Evidently, the procedure provided for objection is only availed to an officer in the event of a transfer, by the commission and not deployments by the Inspector General of Police like in this case. The suit is therefore not premature or contrary to the doctrine of exhaustion as enunciated in a legion of court decisions including the ones cited by the respondents herein.

### **Frequent Deployments**

35. The petitioner alleges that she has been subjected to frequent deployment which are in fact transfers in disguise. The respondents maintain that the deployment are not frequent but only one after the petitioner was transferred to Kerugoya police station.
36. I have perused the documentary evidence on record, and it is clear that by a police signal dated January 23, 2023, the petitioner was deployed by the 3<sup>rd</sup> respondent from Nakuru-Naivasha police station (Traffic) to Kirinyaga-Kerugoya police station (Traffic) with immediate effect. Interestingly on January 30, 2023 a signal was sent from Kerugoya police station stating that the petitioner had arrived in the station on 'transfer'. The signal requested Naivasha police station to amend its records.
37. Again on February 1, 2023, the County Commander Nakuru wrote to the Naivasha and Rongai sub counties police commander informing them that due to profound complaints against the petitioner, it had been decided that she be deployed to Kambi ya Moto police station (Rongai Sub-County), to do general duties. The deployment was with immediate effect. This deployment has been described by the respondents as invalid.
38. Finally, on February 13, 2023, the petitioner was deployed from his new station at Kerugoya police station to Central Regional Headquarters, Operations Room. This deployment has not been denied.
39. All the above deployments were done between January 23, 2023 and February 13, 2023. They were to take effect immediately. I have considered the same and agree with the petitioner that the said deployments were rather frequent and speedy. I gather support from the *Concise Oxford English Dictionary* which defines 'frequent' as follows:-

' Occurring or done many times at short intervals.'

### **Irrational Deployments**

40. To begin with it seems that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are using deployments to circumvent the provisions of the *Constitution, National Police Service Act* and the National Police Service Commission (Transfer and Deployment) Regulations which takes away from him the mandate to transfer officers. I say so because on January 23, 2023, the petitioner was deployed to Kerugoya and the records of the stations amended immediately. The petitioner was also paid transfer allowance as per the pay slip produced by the respondents herein.
41. The said action was contrary to the *Constitution*, the said Statute and Regulations because transfers is the mandate of the commission while the 2<sup>nd</sup> respondent only does deployments which are meant to be temporary. Evidently all the deployments done herein the commission has not been involved. An officer in the petitioner's circumstance is therefore justified to deem that a deployment by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent means transfer.
42. Apart from the foregoing, the petitioner contends that the deployment to the Central Regional Headquarters is unreasonable and irrational because it has come too soon after her transfer to Kerugoya. Further that, it adversely affects her family and especially her minor school going children. The respondents averred that the petitioner had not informed them about her minor children.



43. The emerging jurisdiction from our courts is that a decision that is made without considering a relevant factor or by considering an irrelevant factor is not only unreasonable but irrational. In case of *Republic v Deputy Inspector General of Police Service & 2 others ex parte PC Stephen Mathenge* [2015] eKLR, Odunga J as he then was held;
21. 'Article 3(1) of the *Constitution* enjoins every person to respect, uphold and defend the *Constitution*. Therefore, in exercising its statutory powers the executive ought to ensure that its action is geared towards the recognition and protection of the family unit as far as is practicable. To take actions which are meant to place the family unit in jeopardy would be violation of the need to recognize and protect the family therefore amounts in my view to failure to take into account a relevant factor. Where an officer is exercising statutory power, he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters see *Council of Civil Service Union vs Minister for the Civil Service* (1985) AC 374; *Associated provincial Picture Houses ltd vs Wednesbury Corporation* (1948) 1 KB 223.
22. To transfer a public officer without taking into account his family obligations not only affect the officer but his family as well such as the right to education as enshrined under article 43 of the *Constitution*.
23. By failing to consider the foregoing, I find that the respondents' decision was irrational. Whereas the applicant could properly be transferred from one station to another such transfer ought to have taken into account all relevant factors including family obligations and its protection. It is my view that this was what meant to be achieved by the relevant force Standing Orders.'
44. Although the above case dealt with transfer, the same principles apply to deployments. In this case the deployments did not consider that the petitioner had reported to Kerugoya station only two weeks before the redeployment to Central Regional Headquarters. Even if she had no family to take care, the time she had been in the new station was in my view, a material factor to consider before deploying her to another station in a different county.
45. Further, it is incorrect for the respondents to allege that they did not know that the petitioner has a young family. The court takes judicial notice of the fact that the respondents have database of its officers' information including their spouses and children who must be factored in the medical cover provided by the respondents. Accordingly, article 3 (1) of the *Constitution* enjoins the respondents to uphold all the tenets of the *Constitution* including recognition and protection of the family. Failure to consider the effects of the purported deployment on the petitioner's family and especially the minor children under her custody was failure to consider a relevant factor in the decision to deploy her.
46. Having found that the 3<sup>rd</sup> respondent failed to consider that the petitioner was just two weeks in a new station from a transfer and that she had a family and school going minors, who would be adversely affected by the deployment, the decision to deploy her to Nyeri on February 13, 2023 was irrational.

### **Violation of Rights**

47. The petitioner alleges that her rights to equal treatment and freedom from discrimination has been violated and also a right for fair labour practices. The respondents however aver that the rights under article 27 and 41 of the *Constitution* do not apply to the petitioner by dint of article 24 of the *Constitution*.



48. There is no doubt that article 24 of the Constitution permits limitation of a right or fundamental freedom under the Bill of rights by a statute, if the limitation is reasonable and justifiable in a democratic society. Sub article (5) provides that a provision in a legislation may limit the application of the rights or fundamental freedoms in article 31, 36, 37, 41, 43 and 49 to persons in the Kenya Defence Forces or the National Police Service. The respondents have not cited any provision of a statute that expressly states that right to fair labour practices under article 41(1) does not apply to officers in the National Police Service.
49. All that I am aware of are provisions in some labour related statutes which expressly disapply the statute to officers in the police service. However, that does not mean that the said officers lose right to fair labour practices but rather that their terms and conditions of service are regulated by a different statute that is unique to their service. Since article 45 and 53 of the Constitution recognizes and protects family and rights of children to basic education among others, the National Police Service must consider family and rights of school going minors in the custody of the police officer before transferring or deploying the officer and especially female officers. Failure to consider such relevant factors in my view, is engaging in unfair labour practices.
50. As regards the right under article 27, article 24(5) of the Constitution does not include it in the list of rights which can be disapplied by a provision in a statute. Consequently, I find and hold that rights and fundamental freedoms envisaged under article 27 of the Constitution apply to the officers in the National Police Service.
51. In this case the petitioner was deployed with many other officers in January, 2023 and again in February 2023. Consequently, she has not proved that she was deployed discriminatively. No evidence was adduced to prove that other officers were spared from the deployment on account of family, school going children or recant posting.
52. However, the frequent deployments which do not allow an officer to settle down to his new station in my view amounts to unfair labour practices. The deployments also do not recognize and protect the petitioner's family, and are in fact adversely affecting the education of the petitioner's minor children, who are school going. Even if an officer has executed an appointment or contract to serve anywhere in the country, the respondents have an obligation to act fairly taking into consideration all relevant factors before moving the office either on transfer or deployment.

### Reliefs

53. In view of the matters analyzed above, I make declarations that the deployment of the petitioner from Nakuru to Kirinyaga was in fact a transfer in disguise by the 2<sup>nd</sup> respondent acting *ultra-vires*. Further the frequent deployments and specifically the one done on February 13, 2023 from Kerugoya police station to Central Regional Headquarters Nyeri is irrational and an affront to her right to fair labour practices under article 41(1) of the Constitution and is therefore null, void and is hereby quashed.
54. The respondents are further directed not to move the petitioner from Kirinyaga-Kerugoya police station (Traffic) except as contemplated by the law and without violating the provisions of article 45 and 53 of the Constitution with respect to protection of family and the right to education of her minor children. The petitioner is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 25TH DAY OF MAY, 2023.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

