Makokha v National Police Service Commission & 3 others (Petition E032 of 2023) [2023] KEELRC 1881 (KLR) (4 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 1881 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E032 OF 2023

B ONGAYA, J

AUGUST 4, 2023

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 2(1) 3, 10, 19, 20, 22, 23, 25, 27, 28, 41(1), 47(1) & (2), 50,162(A) & 258(1) OF THE CONSTITUTION OF KENYA.

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25,28, 41(1), 47(1&2) AND 50(1) OF THE CONSTITUTION OF KENYA, 2010

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

IN THE MATTER OF SECTIONS 4(6) OF THE NATIONAL POLICE SERVICE COMMISSION ACT NO. 30 OF 2011 (SUBSIDIARY LEGISLATIONS).

IN THE MATTER OF THE EMPLOYMENT ACT, 2007.

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

BETWEEN

COLLINS CHIVOLO MAKOKHA .... PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION .... 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE .... 2ND RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS .... 3RD RESPONDENT

ATTORNEY GENERAL .... 4TH RESPONDENT

JUDGMENT

1. The petitioner filed the petition on 21.02.2023 through M/S Musyoki Mogaka & Company Advocates. The petitioner prayed for:

   a. A declaration that the act of the 3rd respondent in relieving the petitioner of their duties is a breach of the latter's constitutional rights under article 27(1), (2) and (3), 28, 41, 48 and 50 of *the constitution* of Kenya and that the same is null and void for all intent and purposes.

   b. An order of judicial review of *certiorari* to quash the dismissal of the petitioner by the 3rd respondent from the directorate of criminal investigations made on 23.11.2021 for breaching the petitioner's right to fair trial under Articles 25, 47(1) and (2) of *the constitution* and section 4 of the *fair administrative action act*.

   c. An order of judicial review of *mandamus* to compel the respondents to reinstate the petitioner to the directorate of criminal investigations as his removal was unlawful, irregular and unjustifiable.

   d. In alternative and without prejudice to prayer (b) and (c) above, an order of payment of all dues to the petitioner in the period that he would have served from the date of removal from employment to the end the petition.

   e. Costs of this petition and interest thereon.

   f. Any other relief or order that this honourable court may deem fit to grant.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case is as follows:

   a. He was appointed by the 1st respondent *vide* a letter dated 01.01.1999 and has since served in various stations within the Republic of Kenya for 23 years.

   b. While serving in his last station, DCI Mpeketoni office, he was accused of defiling a minor. That he cooperated with the investigating officers and attended court diligently from the day he was arrested and arraigned in court.

   c. That the complainant and witnesses never attended court to prosecute their matter, and eventually on 21.12.2020 the court acquitted the petitioner under section 202 of the *Criminal Procedure Code*.

   d. Faced with the aforementioned charges, the petitioner had received an interdiction letter dated 10.09.2020 from the 3rd respondent and was put on half pay.

   e. After being acquitted by the court, on 31.03.2021 the 3rd respondent wrote to the petitioner, lifting his interdiction.

   f. On the same date, 31.03.2021, the petitioner received yet another letter from the 3rd respondent, asking him to show cause why he should not be removed from the National Police Service under public interest. That the issues raised in the show cause included the defilement matter, and an incident that happened in 2011 along Langata Road, where three suspects were fatally shot on suspicion of being in possession of firearms.

g. That as regards the incident along Langata road, an inquest file had been opened at Makadara Law Courts to establish who caused the death of the suspects who had been killed along the said Langata road. The court determined that neither the petitioner nor his colleagues caused the death of the suspects and set them at liberty.

h. On 24.05.2021 the petitioner responded to the show cause letter, and in turn on 23.11.2021 the petitioner received a letter removing him from service.

i. On 22.01.2022 the petitioner appealed against his removal, to which the 1st responded to through its letter dated 24.10.2022 and informed him that his appeal had been deliberated on and the same was disallowed.

j. It is the petitioner's case that he was never invited to or subjected to any disciplinary hearing neither was he accorded any hearing to respond to the allegations levelled against him.

3. The 3rd respondent by the grounds of opposition dated 02.03.2023 opposed the petition on the grounds that the application disclosed no cause of action as against the 3rd respondent, and sought for the 3rd respondent to be expunged from the proceedings.

4. The 2nd 3rd and 4th respondent filed the replying affidavit sworn on 24.04.2023 by Francis Ndiema, a Commissioner of Police attached to the Directorate of Criminal Investigations and through the office of the Hon. Attorney General. It was stated and urged as follows:

a. That there are precedents before the Court directing that nothing in law stopped the 2nd and 3rd respondents from carrying out independent internal disciplinary process over the same matter the petitioner was charged with in the criminal court, despite the petitioner having been acquitted of the criminal charges under section 202 of the *Criminal Procedure Code* on account of failure by the witnesses to appear in court.

b. That the process of disciplinary process is fair and procedurally correct if the petitioner responds to the allegations in the show cause by way of writing and that oral hearing during the disciplinary process is not a fast and hard rule.

c. That the offence which the petitioner was accused of, that is child defilement, is so grave that opting to retire him on public interest instead of dismissal was fair in the circumstances.

d. That the process leading to the petitioner being addressed show cause letter up to his appeal was handled fairly and lawfully in the sense that the petitioner was procedurally issued a notice to show cause dated 31.03.2021 to which he responded via letter dated 24.05.2021.

e. That although there was no physical hearing conducted, the petitioner was given an opportunity to be heard and he made his representations in writing *vide* letter dated 24.05.2021.

f. That the 3rd respondent deliberated his responses to the notice to show cause and came to the conclusion that his responses were unsatisfactory and, made the recommendation to the 1st respondent to remove the petitioner on grounds of public interest.

g. That the relationship between the petitioner and the 2nd and 3rd respondents is that of employment since there is a contract of employment in place, therefore, the petitioner ought to have filed an ordinary claim instead of a petition.

h. That the petition offends the doctrine of pleading particularity, and, that not every breach amounts to a breach of *the Constitution*.

5. The 1st respondent filed the replying affidavit sworn on 24.04.2023 by Peter Kiptanui Leley, the Chief executive officer of the National Police Service Commission. It was stated in the replying affidavit as follows:

    a. The petitioner was employed in the rank of Police Constable in September 1998.

    b. He was interdicted on 20.01.2011 on account of events on 19.01.2011 whereby the three suspects were arrested on suspicion of being in possession of firearm and the suspects were later fatally injured. That interdiction was lifted on 22.10.2011 and the petitioner transferred to Nyanza Region.

    c. On 31.08.2020 the petitioner was stationed at Mpeketoni when he was charged with the offence of defilement of a minor contrary to Section 8(1) (3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. On 21.12.2020 he was acquitted under section 202 of the *Criminal Procedure Code* on account of non-attendance of witnesses. The interdiction that had been imposed in view of the criminal charges was lifted by the letter dated 31.03.2021 and he was directed to report to the DCIO Mpeketoni for further instructions. The circumstances of the criminal charges including alleged defilement and impregnation of a minor were analysed against the weighty police duties protection of life and detection of crime.

    d. Thus, the show-cause letter dated 31.05.2021 was issued requiring the petitioner to explain why he should not be removed from the service on account of the allegations surrounding the defilement allegations. The letter to show cause also referred to the earlier interdiction about the Langata Road incident. The petitioner respondent that he had been acquitted in the criminal case and allegations had been false. On the Langata Road he replied the same was subject of an inquiry at Makadara Law Courts and he was exonerated. By letter dated 17.11.2021 the 1st respondent conveyed its decision per the annexed letter dated 03.11.2021 that the petitioner be removed in the interest of the service effective 02.11.2021. The 3rd respondent communicated the decision to the petitioner by the letter dated 23.11.2021. The petitioner appealed by his letter dated 22.01.2022 repeating his line and grounds of exculpation. There record shows the steps by the respondents to process the appeal and the 1st respondent by letter dated 04.10.2022 conveyed its decision that the appeal be disallowed and the sentence of removal upheld. The 3rd respondent conveyed the decision to the petitioner by the letter dated 24.10.2022.

6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.

7. To answer the 1st issue for determination, the Court returns that is so far as the petitioner alleged the violation of his constitutional rights, he was entitled to file the petition and was not obligated to file an ordinary action solely founded upon the contract of service. His case was that the contractual issues ran into the alleged constitutional violations. The Court would not frown at his chosen path to initiate the petition and the respondents' objections in that regard will collapse as unfounded.

8. To answer the 2nd issue, the Court returns that the respondents did not violate the petitioner's right to fair hearing or due process on account that he ought to have been heard. It is true that the right to be heard in an oral proceeding is consistent with provisions of Article 50. However, in the instant case it appears to the Court that the written representation by the petitioner to answer to the letter to show cause was sufficient due process. In particular, it appears that there were no contested facts about the allegations in the letter to show cause requiring an oral hearing with examination of witnesses. The

facts of the allegations constituting the reason for removal were settled between the parties. While the petitioner disputed the defilement allegations as untrue, the reason for removal appears to have been the fact of the ensuing suspicion, charge, and discharge on account the witnesses in the criminal case failed to show up. In other words, the main reason for removal was that circumstance of the suspicion and charge surrounding the allegation of defilement. Indeed, the petitioner did not ask to be heard and did not dispute the circumstances of proposed removal. The Court finds that in such circumstances it cannot be said that there had been a miscarriage of justice for want of *viva voce* hearing.

9. To answer the 3rd issue, the Court returns that the respondents acted unreasonably by invoking the earlier interdiction that had been lifted surrounding the Langata Road incident. However, the Court returns that unreasonableness did not by itself render the removal decision incurably defective as it was not the sole ground or the ground at all for the removal. The Court has already returned that the reason for the removal had been essentially about the suspicion about the alleged defilement as had been manifested in the charge and then the subsequent discharge for want of witnesses.

10. To answer the 3rd issue, the Court finds the acquittal of the petitioner under section 202 of the *Criminal Procedure Code* amounted to an unconditional discharge and it operated as a bar to any subsequent information or complaint for the same matters against the same accused person, the petitioner. The section states:If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.As submitted for the petitioner, immediately the petitioner was acquitted, section 218 of the *Criminal Procedure Code* took effect thus: The production of a copy of the order of acquittal, certified by the clerk or other officer of the court, shall without other proof be a bar to a subsequent information or complaint for the same matter against the same accused person. The petitioner has exhibited the certified proceedings in the criminal case including the acquittal order.

    The Court finds for the petitioner in upholding the opinion in *Mathew Kipchumba Koskei v Baringo Teachers SACCO* [2013] eKLR on principles to guide employers in event of a criminal element in an administrative disciplinary procedure thus: “Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

    a. Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.

    b. If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.

c. If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

d. To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."

The Court also upholds the petitioner's submission and upholds *Joshua Muindi Maingi v National Police Service Commission & 2 others* [2015] eKLR thus: "Turning back to provisions of section 88(4) of the *National Police Service Act*, the court finds, and as understood by the respondents in their submissions, that the section empowers the National Police Service Commission to retry police officers in what is called disciplinary action and without due regard (i.e. notwithstanding) acquittal or conviction by the criminal court. The court finds that to that extent section 88(4) is unconstitutional as it offends clear provisions of Article 50(2) (o) of *the Constitution*. The court considers that the petitioner is entitled to the declaration that section 88(4) of the *National Police Service Act* is unconstitutional in so far as it empowers the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers may have been acquitted or convicted by the court in criminal proceedings as the section is inconsistent with Article 50 (2)(o) of *the Constitution* and the section is null and void to the extent of that inconsistency. While making that finding, the court holds that where the court at the end of the criminal hearing has acquitted or convicted a police officer the Commission or the person or authority exercising powers of disciplinary control over the officer is thereby bound by the acquittal or conviction and the officer need not be subjected to a retrial in an administrative disciplinary process(under the section referred to as "disciplinary action") which essentially would be unconstitutional; all that needs to be done is imposition of appropriate punishment in view of the conviction; or resumption of duty or reinstatement or continuation in employment in line with the acquittal by the criminal court." And further: Turning back to provisions of section 88(4) of the *National Police Service Act*, the court finds, and as understood by the respondents in their submissions, that the section empowers the National Police Service Commission to retry police officers in what is called disciplinary action and without due regard (i.e. notwithstanding) acquittal or conviction by the criminal court. The court finds that to that extent section 88(4) is unconstitutional as it offends clear provisions of Article 50(2) (o) of *the Constitution*. The court considers that the petitioner is entitled to the declaration that section 88(4) of the *National Police Service Act* is unconstitutional in so far as it empowers the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers may have been acquitted or convicted by the court in criminal proceedings as the section is inconsistent with Article 50 (2)(o) of *the Constitution* and the section is null and void to the extent of that inconsistency. While making that finding, the court holds that where the court at the end of the criminal hearing has acquitted or convicted a police officer the Commission or the person or authority exercising powers of disciplinary control over the officer is thereby bound by the acquittal or conviction and the officer need not be subjected to a retrial in an administrative disciplinary process(under the section referred to as "disciplinary

action") which essentially would be unconstitutional; all that needs to be done is imposition of appropriate punishment in view of the conviction; or resumption of duty or reinstatement or continuation in employment in line with the acquittal by the criminal court.

It is words that form objects in our thoughts or minds. The objects as formed in our thought process or our minds define our actions and omissions. In the section, for avoidance of doubt, the phrase "disciplinary action" has been assigned the meaning of administrative disciplinary process entailing service of a charge or show cause notice setting out allegations, invitation of the police officer to defend one-self, and culminating in a finding of culpability or lack of it on the part of the officer. That is exactly what the respondents embarked to do in the instant case. The court finds such process to be a retrial with reference to acts or omissions for which the criminal court may have acquitted or convicted the police officer and therefore unconstitutional. The line is thin and the court declares that such process is not tenable constitutionally; what is tenable is for the Commission or the person or authority exercising disciplinary control to implement the decision of the criminal court by simply allowing the officer to continue in employment in view of the acquittal or by simply imposing one or other lawful punishment in view of the conviction. The smart play in the game once and there is no reason to deviate from that long standing and established constitutional position. The present case is on all walls similar to that earlier decided case. The petitioner was subjected to an unfair retrial through the ensuing disciplinary process after the acquittal by the trial court with competent jurisdiction.

11. The Court has considered the submissions for the 1st respondent on the Court of Appeal decision in *Teachers Service Commission v Joseph Wambugu Nderitu* [2016] eKLR thus: In *Kibe v Attorney General* Civil Appeal No. 164 of 2000 approved by Waki JA in the *Hon. Attorney General & another case* (*supra*) this Court was categorical that:

> "an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer's decision wrongful or unfair".

Lastly in *Geoffrey Kiragu Njogu v Public Service Commission & 2 others* (2015) eKLR this Court approved the reasoning of the Industrial Court in *James Mugera Igati v Public Service Commission of Kenya* (2014) eKLR where it is stated that "there is nothing in the Public Service Commission Regulations which suggest that disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials…." The Court is bound by the holding that criminal proceedings are separate from the disciplinary process. However, the present case is distinguishable in that in the instant case, the only reason the petitioner was removed from the service was on the account that he had been charged and then acquitted. Further, the holding by the Court of Appeal was that an acquittal in a criminal case did not automatically make an employee immune to disciplinary process – suggesting that each case must be considered on case to case basis upon the unique circumstances and, in appropriate circumstances, an acquittal

would render an employee immune to disciplinary proceedings. The Court has considered circumstances of the instant case and returns that it is such that the acquittal, nothing else being levelled against him, rendered the petitioner immune to the kind of disciplinary process leading to his removal from the service.

12. While making that finding, the Court has well been guided by the holding of the Supreme Court in in *Gladys Boss shollei v Judicial Service Commission & another* Petition No. 34 of 2014 [2022]KESC5(KLR)(17 February 2022) (Judgment) (Koome CJ &P, Mwilu DCJ, &V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ), *inter alia*,

> " 19. Article 50(1) of *the Constitution* referred to the right to a fair hearing for all persons, while article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of *the Constitution* listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.
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> 20. Although the right to a fair trial was encompassed in the right to a fair hearing in *the Constitution*, a literal construction of article 50(1) and 50(2) of *the Constitution* could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or *quasi* criminal nature whereas article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction within the parameters of articles 19 and 20 of *the Constitution* on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect." From that holding, it should be clearer that once the petitioner was acquitted, the doctrine of autrefois acquit applied even to the ensuing disciplinary process, albeit, being in the nature of a civil process.

13. The holding by the Supreme Court also appears to therefore shift the 2nd, 3rd, and 4th respondents' submission in reliance upon the Court of Appeal holding in *Omondi v Attorney General & 2 others* (Civil Appeal 20 of 2020) [2021]1 KECA 1086 (KLR) (3December 2021) thus: 30. Moreover, and as a general principle, we do not think there is merit in the assertion that an employer is prevented from terminating the employment of an employee on basis that the grounds for termination are not upheld by a criminal court. As this Court held in *Attorney General and another v Andrew Maina Githinji and another* [2016] eKLR employers are notbound by the outcome in criminal cases in undertaking disciplinary proceedings. And in *Teachers Service Commission v Joseph Wambugu Nderitu* [2016] eKLR, this Court stated: "It is our view that this Court has made itself clear on the issue as to whether a successful outcome of a criminal process against an employee has primacy over an internal disciplinary process against such an employee arising from the same set of circumstances. The two processes are distinct from each other." 31. It is therefore our finding that there is no merit in the complaint by the appellant that the learned Judge erred in concluding that there was a justifiable reason for his removal from the police service." Further, the Court considers that the instant case is distinguishable from the holding in *Omondi v Attorney General & 2 others* (Civil Appeal 20 of 2020) [2021]1 KECA 1086 (KLR) (3December 2021) because in that case the appellant had indeed admitted to being absent from duty as per paragraph 29 thereof and in paragraph 28, the Court of Appeal stated, "28.Based on the foregoing, and on a balance of probabilities, we are satisfied there was sufficient evidence presented before the learned trial Judge demonstrating a pattern of absenteeism on the part of the appellant and justifying the conclusion reached by the Judge that "there was a justifiable reason

for removing the [appellant] from the police service." The claim by the appellant that the reason for his removal from service was on account solely of the incident of desertion over which he was charged and subsequently acquitted is not borne out by the record. The evidence shows that that incident was only one in a series of incidents leading to the conclusion by the respondents that the appellant "was unlikely to become an efficient police officer". In the instant case the sole reason for the removal has been found to have been the suspicion in the defilement case for which the petitioner was acquitted and, the previous interdiction for which the petitioner was exculpated and lifted about the Langata Road incident, having been found unreasonable as an unfair stale consideration.

14. The Court has considered the gravity of the charge and defilement allegations in the criminal case for which the petitioner was acquitted. It is indeed tempting to consider the nature of the allegations and begin to get inclined to arriving at an attitude that even if the petitioner says it was untrue, he ought not be given that benefit of doubt and should be removed from the service as was done. However, the Court returns that such is a wrong and grossly unfair attitudinal inclination that is equally against the constitutional presumption of innocence and the entire constitutional regime on the right to a fair trial enshrined in Article 50 of *the Constitution* as the right to fair hearing. Thus Article 25 (a) declares that despite any other provision in *the Constitution*, the right to a fair trial shall not be limited. That right per Article 50 (2) (a) (i) and (o) includes the right to be presumed innocent until the contrary is proved; to remain silent, and not to testify during proceedings; and, not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. A reciprocal analysis is that had the petitioner been convicted, he would not have had the interdiction lifted or even had a chance to say that nevertheless, the disciplinary proceedings be decided in his favour and the respondents, in absence of any other thing or circumstance, must be bound by the effect of the acquittal in terms of the holding of the Supreme Court already referred to in this judgment in G*ladys Boss shollei v Judicial Service Commission & another* Petition No. 34 of 2014 [2022]KESC5(KLR)(17 February 2022) (Judgment). The Court is bound accordingly.

15. To answer the 4th issue, the Court returns that the petitioner has established violations of Articles 10, 27, 41, 47 and 50 of *the Constitution*. In the face of the acquittal, it amounted to mental torture, cruel, inhuman and degrading treatment and punishment to nevertheless remove the petitioner from the service in the manner it was done. Failing to remedy as found would render the constitutional provisions found to have been violated appear to lack vivacity. It was unreasonable and unlawful to remove him from the service on account of the suspicion and allegation of defilement that was in the criminal case and for which he was acquitted. The judicial review orders and declaration as prayed for will issue. The alternative relief on payment of dues is deemed abandoned by the petitioner as no submissions were made in that regard. The respondents should jointly or severally pay the petitioner's costs of the petition.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

1) The declaration that the act of the 3rd respondent in relieving the petitioner of his duties is a breach of the petitioner's constitutional rights under article 27(1), (2) and (3), 28, 41, 48 and 50 of *the constitution* of Kenya and that the same is null and void for all intent and purposes.

2) The order of judicial review of *certiorari* hereby issued to quash the dismissal of the petitioner by the 3rd respondent from the directorate of criminal investigations made on 23.11.2021 for breaching the petitioner's right to fair trial under Articles 25, 47(1) and (2) of *the constitution* and section 4 of the *Fair Administrative Action Act*.

3) The order of judicial review of *mandamus* hereby issued to compel the respondents to reinstate the petitioner to the Directorate of Criminal Investigations with full back payment and

benefits due effective the date of the impugned removal as his removal was unlawful, irregular and unjustifiable.

4) Respondents to pay the petitioner's costs of the petition.

5) The amounts due under order (3) above be payable less PAYE by 01.10.2023 and failing interest thereon at Court rates to accrue from the date of this judgment till full payment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 04TH AUGUST, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE