



Mathenge & 4 others v Inspector General of Police & 3 others; Kenya Human Rights Commission (Interested Party) (Judicial Review Application 032 & 41 of 2021 (Consolidated)) [2022] KEELRC 4872 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4872 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 032 & 41 OF 2021 (CONSOLIDATED)
MN NDUMA, J
SEPTEMBER 29, 2022

BETWEEN

AYUB GIKONYO MATHENGE 1ST APPLICANT
MBUSIRO CHRISTINE DOROTHY 2ND APPLICANT
ROBINSON KIPKORIR CHERUIYOT 3RD APPLICANT

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

AS CONSOLIDATED WITH

JUDICIAL REVIEW APPLICATION 41 OF 2021

BETWEEN

JOHN KARIUKI 1ST APPLICANT
MESHACK MUTUKHO 2ND APPLICANT

AND

CHAIRMAN, NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT
OFFICE OF THE INSPECTOR GENERAL 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT



AND

KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY

The decision to demote graduate officers recruited and appointed under specific terms of service was a violation of the officers' rights to fair labour practices and fair administrative action.

A provision of the law may not be applied retroactively if it infringed upon a person's fundamental rights and freedoms and if it impaired obligations under contracts.

Reported by John Ribia

Constitutional Law - *fundamental rights and freedoms – right to fair labour practices – right to fair administrative action – where graduate officers who were recruited and appointed under the terms of service in job group 'J' but were being demoted to job group 'F' without notice or any sort of hearing – whether such conduct violated the graduate officers' right to fair labour practices and right to fair administrative action – articles 10, 41 and 47; (2015) sections 4 and 7.*

Statutes – *application of statutes – retrospective application – circumstances where statutory provisions could apply retroactively - where graduate officers who were recruited and appointed under the terms of service in job group 'J' but were being demoted to job group 'F' without notice or any sort of hearing – where the demotion was based on the retroactive application of section 10 of the as read with articles 245 and 246 of the - whether a law could be retrospectively applied when it impaired the obligation under contracts and violated fundamental rights and freedoms - whether the provisions of the Constitution; the Police Service Act, 2011; and the Regulations made thereunder could be applied retrospectively against graduate officers who were recruited and appointed under the terms of service in Job Group 'J' to warrant their demotion to job group 'F' - what procedure, if any, ought to be followed in demoting graduate officers who were recruited and appointed under the terms of service in Job Group 'J' but were being demoted to job group 'F' without violating the vested rights of the officers and without violating the law - , articles 245 and 246; section 10.*

Brief facts

The applicants were Police Officers employed on various dates between the years 2006 to April 2014 as Graduate Constables in job group 'J'. The applicants enjoyed the terms and conditions of service as per Job Group 'J' until March, 2018 when the 1st respondent directed that the officers be reduced to job group 'F' and their gross salary was reduced to that of job group 'F'. In April 2018, the 1st and 2nd respondents restored the applicant's pay to that of job group 'J' plus all arrears salary which remuneration, the applicants continued to enjoy until November 2021 when the applicants were again demoted in rank to job group 'F' from job group 'J' and their remuneration was reduced accordingly.

Aggrieved the applicants filed the instant constitutional petition in which they contended that their demotion was unconstitutional and a violation of their rights to fair administrative action and fair labour practices, especially having been done without notice or a hearing. The respondents contended that their actions did not breach any rights or any law; they contended that statute and the Constitution granted them the power and mandate to demote the officers.

Issues

- i. Whether the demotion of graduate officers who were recruited and appointed under the terms of service in job group 'J' but were being demoted to job group 'F' without notice or any sort of hearing was a violation of the graduate officers' rights to fair administrative action and to fair labour practices.
- ii. What were the circumstances in which a law could be retrospectively applied?
- iii. Whether a law could be retrospectively applied when it impaired the obligation under contracts and violated fundamental rights and freedoms.



- iv. Whether the provisions of the Constitution; the Police Service Act, 2011; and the Regulations made thereunder could be applied retrospectively against graduate officers who were recruited and appointed under the terms of service in Job Group 'J' to warrant their demotion to job group 'F'.
- v. What procedure, if any, ought to be followed in demoting graduate officers who were recruited and appointed under the terms of service in Job Group 'J' but were being demoted to job group 'F' without violating the vested rights of the officers and without violating the law?

Held

1. The reduction in salary and rank was not preceded by a notice to the applicants of the decision and the decision was implemented by the respondents without giving the applicants an opportunity to be heard. The applicants' protestation of the decision was ignored by the respondents and the applicants did not have any opportunity to be heard on review and or appeal of the adverse decision that had befallen them.
2. The recruitment of graduate police constables in job group J was founded on a circular issued on January 1, 1969 by the then Commission of Police and a letter issued on July 26, 1995 by the Permanent Secretary responsible for police service at the time. The applicants were all appointed prior to the enactment of and regulation 4 of the , under which any person who entered the service as a police constable, was to, regardless of the academic qualifications rise through the ranks as provided in the Regulation and in the Career Progression Guidelines for National Police Service Uniformed Personnel, 2016. The applicants were employed on the graduate terms before coming into effect of the which established the 1st and 2nd respondents.
3. For non-criminal Legislation; all statutes other than those which were merely declaratory or which related only to matters of procedure on evidence were *prima facie* (on the face of it) prospective, and retrospective effect was not to be given to them unless by express words or necessary implication. A retroactive law was not unconstitutional unless it:
 1. was in the nature of a bill of attainder;
 2. impaired the obligation under contracts;
 3. divested vested rights; or
 4. was constitutionally forbidden.
4. The legislation relied upon by the respondents fell foul of requirements (b) and (c) above in that the regulations impaired the obligation under the contract of service between the applicants and the 1st and 2nd respondents and the Regulations and the letter of November 17, 2021 written pursuant to the said Regulations divested the rights of the applicants which they had for a long time enjoyed under job group 'J' and demoted to Job Group 'F' with the concomitant/salary in the low job Group.
5. The provisions of articles 245 and 246 of the as read with the provisions of section 10 of the as amended in 2014 did not expressly give retroactive effect to the 1st and 2nd respondents with respect to terms and conditions of service of Graduate police constables enjoying terms and conditions of service under job group 'J'.
6. The 1st and 2nd respondents were given powers by the and the) and Regulations made thereunder to demote and reduce the salary of graduate police officers without following due process. There was no attempt by the respondent from the deposition to give notice or any sort of hearing opportunity to applicants. The respondents made no pretence or any apologies regarding their failure to involve the applicants before making the very adverse decision against them. Their conduct violated articles 10, 27, 41, and 47 of the . The decision was arbitrary, unreasonable, unlawful, and a blatant violation of the accrued rights of the applicants from the date of their recruitment to that when they were demoted for no good cause and their remuneration reduced to their great loss and detriment
7. None of the constitutional, statutory, or regulatory provisions relied upon by the respondents expressly or impliedly vested in them any retroactive authority to divest the applicants of their accrued rights under job group 'J' to which they were legitimately recruited and appointed under the erstwhile laws,



regulations, and circulars applicable to the police service as and when each of the applicants was recruited and appointed to police service.

8. The respondent's decision contained in the letter dated November 17, 2021 was unlawful, unreasonable, and void *ab initio* for lack of due process and retroactive application of legislation to the appointments in violation of their rights under article 27, 41, and 47 read with sections 4 and 7 of the , 2015.

Petition allowed.

Orders

- i. *Declaration issued that the 1st and 2nd respondents' unilateral decision to reduce graduate officers recruited on diverse dates pay from job group 'J' to job group 'F' offended the provisions of articles 10, 27, 41, and 47 of the as read together with section 4 and 7 of the .*
- ii. *Declaration issued that the unilateral decision to reduce graduate officers' pay from job group 'J' to job group 'F' was arbitrary, unreasonable, and unlawful.*
- iii. *An order of Certiorari was issued to bring into Employment and Labour Relations Court for purposes of quashing the decision to reduce graduate officers pay from job group 'J' to job group 'F' revealed in the November, 2021 payslip is issued.*
- iv. *An order of Prohibition prohibiting the 1st and 2nd respondents either by themselves, their agents or servants, from in any manner reducing graduate officers' pay the subject of this application from job group 'J' to job group 'F' as in the letter dated November 17, 2021 issued by the 1st respondent was issued.*
- v. *An order of mandamus was issued compelling the 1st and 2nd respondents to pay and/or continue to pay graduate officers the subject of the consolidated application salary equivalent to individuals in job group 'J' as they used to earn prior to the unilateral, unreasonable and unlawful decision to reduce their pay.*
- vi. *Costs were to follow the outcome.*

Citations

Cases

1. Anarita Karimi Njeru v The Republic (Criminal Appeal 4 of 1979; [1976] -803 KLR 1272) — Explained
2. Attorney General and 2 others v Evans Muriuki Muthuri and 4 others (Civil Appeal No 352 of 2019); — Explained
3. Attorney General and Law Society of Kenya and another ([2017] eKLR) — Explained
4. Meme v Republic and another (Miscellaneous Criminal Application 495 of 2003; [2004] eKLR) — Explained
5. Ministry of Internal Security and Another v exparte Schan Noorani & another (Miscellaneous Application 615 of 2017; [2018] eKLR) — Explained
6. Republic v Betting Control and Licensing Board Exparte Advanced Gaming Limited [(Judicial Review Miscellaneous Application 403 of 2018; [2019] KEHC 9546 (KLR)) — Mentioned
7. Republic v Kenyatta University- ex-parte Martha Waihuini Ndung'u (Miscellaneous Civil Application 111 of 2018; [2019] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 10, 10(2); 27; 27(4); 28; 41; 41(1)(2); 47; 232(1); 243(3); 245; 245(1); 246 — Interpreted
2. Fair Administrative Action Act (Act No 4 of 2015) — Section 4, 7(2); 47 — Interpreted
3. National Police Service Act (Act No 11A of 2011) — Section 10, 10(1) — Interpreted
4. National Police Service Commission Act (Act No 30 of 2011) — Section 10 — Interpreted
5. National Police Service Commission (Recruitment and Appointment) Regulations, 2015 (Act No 30 of 2011) — Regulation 4 — Interpreted



Advocates

Musyoki Mogaka & Company Advocates for Ex-parte Applicant

Mumma and Kanjama Advocates for Exparte Applicant

Gichira, Macharia, Matsetse & Company Advocates for Interested party

Attorney general for Respondents

JUDGMENT

1. Judicial review application No 032 and 41 were duly consolidated, with 032 being the lead file. The court granted interim orders in both applications and pursuant to a notice of motion application dated February 7, 2022, the court found that the national police service commission was in-

“Open, blatant and willful defiance of the court orders issued on December 5, 2021 by this court by failure to withdraw the letter it had issued reducing the grade and remuneration of *ex-parte* applicants.”
2. The *ex-parte* applicants in the consolidated application seek the following orders:
 - (a) A declaration that the 1st and 2nd respondents’ unilateral decision to reduced graduate officer recruited in 2013 pay from Job Group J to Job Group F offends among others the provision of articles 10, 27(4), 41, and 47 of the *Constitution of Kenya, 2010* as read together with section 4 of the *Fair Administrative Actions Act of 2015*.
 - (b) A declaration that the 1st and 2nd respondents unilateral decision to reduce graduate officers recruited in 2013 pay from Group J to Job Group F amounts to discriminating the said graduate officers.
 - (c) *Certiorari* to bring into the High Court for purposes of quashing the decision to reduce graduate officers pay recruited into the service in 2013 from Job Group J to Job Group F revealed through the November, 2021 pay slip.
 - (d) Prohibition prohibiting the 1st and 2nd respondents either by itself, its agents or servants from in any manner further reducing graduate officers pay who were recruited into service in 2013 from Job Group J to Job Group F. revealed.
 - (e) *Mandamus* compelling the 1st and 2nd respondents to pay and/or continue to pay graduates officers recruited in 2013 salary equivalent to individuals in Job Group J as they used to earn prior to the unilateral decision to reduce their pay.
4. The applicants in E032 were appointed in Job Group J on July 26, 2006 and September 26, 2007 respectively whereas the applicants in E041 were recruited about the year 2013 in Job group ‘J’.
5. The application is supported on grounds set out on the face of the notices of motion and in the supporting affidavits of the applicants that may be summarized that the Inspector General by a letter dated November 17, 2021 addressed to Deputy Inspector General of police directed that the applicants’ salaries be reduced from that earned in job group ‘J’ to that earned in job Group ‘F’ and effectively demoted the applicants.
6. That the said directive was irregular, unlawful, arbitrary and issued in excess of authority since under section 10 of the *National Police Service Act*, which provides for the functions of the 1st respondent



- does not include the power to hire, fine or demote members of the National Police Service, including applicants herein.
7. That the duty to recruit, promote and demote members of the National Police Service officers lies within the functions of the 2nd respondent, the National Police Service Commission.
 8. That the 2nd respondent did not delegate any of its powers of demotion in writing to the 1st respondent before the impugned action was taken.
 9. That section 12 sets out the standard of service to be observed by the 1st and 2nd respondents, and the respondents are bound by that statutory mandate.
 10. That the demotions and salary reduction was carried out without notice, Public participation, consultation and or consent of the affected police officers and was unlawful, unreasonable, irregular and contrary to article 10(2) 41(1) & (2), and 47 of the Constitution and also violated provisions of section 4 of the Fair Administrative Action Act, 2015.
 11. That article 10(1) provides: -
 - “ 10(1) The national values and principles of governance in this article bind all state organs, state officers, public officers and all persons whichever any of them
 12.
 - (c) Makes or implements public policy decisions.”
 13. . That the values not observed by the respondents include: -
 - (b) human dignity, equity, social justice, inclusiveness, equally human rights non-discrimination.
 - (c) good governance, transparency and accountability.
 14. That article 41 violated by the respondents provides: -
 - “ 41(1) Every person has the right to fair labour practices.
 15. That the decision to arbitrarily, and without notice reduce the salary and job group of the applicants amounted to unfair labour practice in violation of the said article.
 16. That article 41(2) provides: -
 - “ 41(2) Every worker has the right-
 - a. To fair remuneration
 - b. To reasonable working conditions.”
 17. That the arbitrary demotion and reduction in salary of graduate officers violate this article also in that the applicants had contractual and statutory right to be recruited in job group J just like other graduate officers in public service and only to be promoted to higher ranks subject to good service and only to be demoted upon due process and only on disciplinary grounds and in accordance with the police disciplinary code applicable. That reduction to grade ‘F’ was unlawful, and unfair labour practice.



18. Furthermore, article 27, provides that: -
- (1) “Every person is equal before the law and has the right to equal protection and equal benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”
19. That the 1st and 2nd respondents violated the rights of the applicant to be protected against arbitrary and unreasonable demotion in rank and reduction of salary they had enjoyed for many years since recruitment.
20. That the applicants were grossly embarrassed by the sudden reduction of salary as seen from the payslips attached to the application which show the full effect and import of the unlawful decision of the respondents in that officers were left upon deduction of the various contributions made based on the gross salary earned under job ‘J’; but now demoted to job group ‘F’ had been left with net monthly salary ranging from as low as Kshs 455.10, 11,893.80, 14,700.65 and 17,600.
21. This state of affairs was degrading to the officers and violated their human dignity protected under article 28 of the Constitution which provides: -
- “Every person has inherent dignity and the right to have that dignity respected and protected.”
22. That the conduct by the respondents did not represent and or protect the dignity of the applicants by subjecting them to financial embarrassment not of their own making while diligently serving Kenyans in the Police Service.
23. The applicants further stated that the conduct by the respondent violated article 47 read with section 4 of Fair Administrative Action Act which provides: -
- 47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
24. That the demotion in rank and reduction in salary was administrative action which adversely affected the applicants without the respondents following any fair procedure; was unreasonable, unlawful and no written reasons before and/or after the decision was given to the applicants to the detriment of the applicants.
25. That the court grants the reliefs sought by the applicants in the consolidated petitions.
- The interested party made submissions in support of the petition and submitted that a party statutorily or constitutionally cannot act outside its well-set and established parameters. That the 1st and 2nd respondents draw their mandate from article 245 and 246 of the Constitution as well as from statute.
26. Article 245(1) establishes the office of the Inspector General of the National Police Service whose role shall be: -
- (a)



- (b) Independent command over National Police Service and perform any others functions prescribed by Legislation.
27. That the clear role of the Inspector General is set out under section 10 of the [National Police Service Act](#), number 11 of 2011. That the Inspector General is not conferred with any authority to set the remuneration of the police officers.
28. Article 246 on the other hand establishes the office of the National Police Service Commission whose functions are: -
- “ 3(a) recruit and appoint persons to hold or act in office in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
- 29.
- (b) observing due process exercise disciplinary control over and removing person holding or acting in office within the service; and
- (c) Perform any other functions prescribed by national legislation.
30. The impugned letter that reduced graduate officers recruited in 2013 pay from Job Group ‘J’ to Job Group ‘F’ attached to the application dated November 17, 2021 was written to the Deputy Inspector General by the Inspector General on the said date. That said letter makes no reference whatsoever to the National Police Service and it is concluded in three words
- “ I direct that you adjust the salaries of officers of other ranks in job Group ‘J’ to what is earned by their counterparts in respective ranks.
31. The interested party submits that the said directive lacks constitutional and/or any statutory legitimacy and is ultra vires both article 245(1) of the [Constitution](#) and section 10 of the [Police Service Act, No 11 of 2011](#).
32. That in the absence of any report, recommendation and/or advisory opinion from the salaries and Remuneration Commission, the respondents acted *ultra vires* and in violation of article 47 of the [Constitution](#).
33. That section 7(2) of the [Fair Administrative Actions Act](#), provides for grounds of review of any administrative Act. The grounds include: -
- Ulterior motive, bias; abuse of discretion; procedural impropriety; violation of Legitimate expectation; abuse of power; failure to take into account relevant matters, or unreasonableness.
35. That the impugned decision is caught by almost all these grounds and stands to be set aside,
36. That in the case of [Republic v Kenyatta University- ex-parte Martha Waihuini Ndung’u](#) [2019] eKLR is set out the five mandatory procedures that must be followed in performance of an administrative duty as follows: -
- (a) Adequate notice of the nature and purpose of the proposed administrative action.
- (b) A reasonable opportunity to make representations; After the decision is taken.



- (c) A clear statement of the administrative action;
- (d) Adequate notice of any right of review or internal appeal and
- (e) adequate notice of the right to request reasons

38. Again, a proper reading of the impugned letter by the 1st respondent is lacking in all the above respects. The applicants were not given any notice; any opportunity to make representations before or after the decision; no opportunity for review or appeal; no reasons given and their Legitimate expectation to continue earning a salary in Job Group ‘J’ in terms of their letters of appointment attached to the application was abruptly, arbitrarily un-procedurally curtailed. That the decision was unlawful, and unreasonable and it be quashed as prayed in the consolidated applications.

39. The interested party further cited the case of *Republic v Betting Control and Licensing Board and another – exparte Outdoor advertising Association of Kenya* [2019] eKLR where the court opined that: -
 ‘procedural fairness contemplated under article 47 and *Fair Administrative Action Act* demand a right to be heard before a decision affecting one’s right is made. Whether or no a person was given a fair hearing of his case will depend on the circumstance and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De smiths: Judicial Review of Administrative Act, it is asserted-

“The emphasis that the courts have recently placed on implied duty to exercise discretionary powers firstly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle.”

40. The Interested Party submits that the decision by the respondents was illegal, unreasonable; unfair administrative action and unfair labour practice in violation of articles 41 and 47 of the *Constitution of Kenya 2010*, and the provisions referred to hereinbefore. That the applications be granted as prayed.

41. The 1st, 2nd and 3rd respondents in their response to the application state that the applicants were enlisted in the National Police Service on diverse dates as police constables and upon acceptance of the same, they agreed to be bound by the terms of the service including all laws and regulations promulgated from time to time. That article 246 of the *Constitution* establishes the Police Service Commission as set out earlier in this judgment.

42. That the Commission became operational on 5th November, 2012. That the Commission in order to achieve its constitutional mandate and functions has developed several Regulations including The National Police Service, Commission (Recruitment and Appointment) Regulation, 2015 and the National Police Service Commission (promotion) Regulations, 2015. The regulations give clear guidelines on how the mandate of the Commission under article 246 of the Constitution and section 10(1) of the *National Police Service Commission Act*, 2011 is to be exercised.

43. That article 232(1) of the *Constitution* provide fair competition and merit as the basis of appointments and promotions.

44. That the letter by the then Permanent Secretary titled “Remuneration of University Graduates recruited into the Police Force” in July, 1995, is relied upon by the applicants to assert their entitlement to remuneration in Job Group ‘J’ despite the prevailing Legal regime that regulates terms and conditions of service of police officers. That the letter cannot constitute a valid legal foundation of the claims made by the applicants whose terms of service are provided in the *National Police Service Act*,



and regulations made thereunder that the respondents have not violated any of the alleged statutory and/or constitutional rights of the applicants.

45. That the application do not meet the threshold in the case of *Anarita Karimi Njeru v Republic* [1976] KLR 1272 in which it was held as follows: -

- (i) Constitutional violations must be pleaded with a reasonable degree of precision.
- (ii) The article of the Constitution which entitles rights to the petitioner must precisely be enumerated and how one is entitled to the same.
- (iii) The violation must be particularized in precise manner.
- (iv) The manner in which the alleged violation was committed and to what extent.

46. The 2nd respondent further rely on the case of *Meme v Republic and another* [2004] eKLR in which it was held;

“where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains.”

47. The 2nd respondent deposes that the current operative law with regard to police recruitment, appointment, promotion, transfer, discipline and deployment are the regulations as developed and gazetted by the National Police Service Commission upon its inception. All the previous regulations, circulars and/or directives relating to the human resource functions of the National Police Service were rendered obsolete upon enactment of the new laws and gazetting of the new regulations and guidelines by the Commission.

48. The 2nd respondent cites the case of *Attorney General v Law Society of Kenya and another* [2017] eKLR where the Court of Appeal stated: -

“Similarly, in terms of section 23 of the Interpretation and General Provisions Act, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interest, rights and or obligations enshrined under such law.”

49. The 2nd respondent further rely on the Court of Appeal decision in Nairobi Court of Appeal Civil Appeal No 352 of 2019 – *Attorney General and 2 others v Evans Muriuki Mutburi and 4 others* where the court stated: -

“39. In the instant case, we agree that there was an express, clear and unambiguous promise given by a public authority *vide* the circular issued on January 1, 1969 and letter dated July 26, 1995. The representation was competent and lawful for the decision- maker to make as the appellant had authority to issue the circular. The circular issued on January 1, 1969 was issued by the then Police Commissioner and the letter dated July 26, 1995 was authored by the Commissioner of Police as authored and/or with the approval of the permanent secretary.

40. In our view however, the ground shifted with the subsequent enactment of the law with the coming into force of the Constitution of Kenya, 2010 which



birthed the 2nd and 3rd applicants under articles 245 and 246 and provided for the enactment of statutory legislation and regulation in respect of Police recruitment, promotions, remuneration etc. It was on this basis that the [National Police Service Commission Act](#) was enacted.”

50. That the applicants have also deliberately failed to produce their respective appointment letters which indicate their designation upon being recruited and appointed as police officers. The applicants have not approached the court in good faith.
51. That regulation 4 provides the basis upon which any person may enter the police service and graduate constable is not one of those categories provided in the regulation. That the applicant cannot therefore seek to be elevated to the rank of Inspector of Police since they are not inspectors of police but were illegally earning the same salary as inspectors of police and the Commission has taken corrective measures to rectify the same as mandated by the law applicable.
52. That the letters the applicants rely on are obsolete and have no force of the law. The applicants have also not adduced evidence to show how they qualified as graduate police officers in terms of the letter which is now obsolete.
53. That the court has no authority to reinstate the officers’ basic salary, allowance and assign designation to that of Job Group ‘J’ from ‘F’. The 2nd respondent relies on the case of Nairobi Court of Appeal Civil Appeal No 352 of 2019 – [Attorney General & 2 others v Evans Muriuki Muthuuri & 4 others](#) where the court held the salaries are determined by the commission in consultation with the Salaries and Remuneration Commission hence the orders sought in the application if granted would violate the mandate of the Commission provided in the Constitution and the [National Police Service Act](#) and that of the Salaries and Remuneration Commission.
54. The 1st and 3rd respondents replying Affidavit sworn to by Mr George Kirigwi a Commissioner of Police working at the National Police Service Headquarters as a staffing officer, Human Capital Development, reiterates the deposition and submissions made by the 2nd respondent regarding the mandate conferred on the 2nd respondent under article 246 of the [Constitution](#) to recruit and appoint persons to hold offices in the National Police Service, confirm appointments, determine promotions and transfers and exercise disciplinary control over the police service. That the 2nd respondent may delegate some aspects of its powers to the 1st respondent through an instrument in that regard.
55. That the [National Police Service Act](#), 2011 was enacted in terms of articles 245 and 246 of the [Constitution](#). That in terms of section 10 of the Act; the 2nd respondent has powers to determine terms and conditions of service of police officers.
56. That the 2nd respondent pursuant to its mandate issued the career progression guidelines for the National Police Service Uniformed personnel in November, 2016 which are administered by the 1st respondent in conjunction with the 2nd respondent. That the 1st and 2nd respondents have since issuance of the career progression Guidelines carried out promotional interviews and have between the year 2020 and 2021 been able to admit over 1102 police constables with university degrees for promotional courses and the process is ongoing. Further the 1st and 2nd respondents recognizes that promotion is a continuous process and part of success management system and are continuing in that respect.
57. That after due consultation, a decision was made to harmonise and place all Police Constables with University Degrees qualifications at the same level. This was recorded in Annexure “GK” National Police Service Commission /1/18/10 Vol XXVII (83) dated November 12, 2021.



58. That further to foregoing, the 2nd respondent has since issued circular No 1 of 2021 Ref NPSC/1/28/1/001/III (75) dated December 23, 2021 – implementation of policy directions of the ceasure of payment of upgraded salaries to graduate police constable and other connected matters in exercise of its constitutional mandate on human capital development matters marked ‘GK2.’
59. That the 1st respondent subsequently implemented the 2nd respondent’s instructions by directing the deputy inspector general of the kenya police service, administration police service and the director, directorate of criminal investigations to effect the variations.
60. That the 1st and 2nd respondent have compiled the data of all police constables with university degrees qualifications and all personnel possessing specialized skills and are in the process of determining suitable job placements based on individual line of specialization as well as in undertaking the promotional process.
61. That the applicants as seen in their pleadings have been carrying out general investigations like any other police constable hence should not be allowed to abuse court process to maintain a salary scale in their favour contrary to the dictates of law and principles of natural justice as the same is bound to disrupt the human resource administration process. Further, there are other police constables who hold university degree qualifications but are not in job Group ‘J’ hence the maintenance of the applicants on a salary scale different from other police constables with University degree qualification and performing similar work as the applicant is inimical to the 2nd respondent’s mandate of harmonization of terms and conditions of service for the personnel in National Police Service.
62. That this is in keeping with the principles of equity, equality and non-discrimination provided under article 10 of the Constitution read with article 232(1) thereof.
63. That Nairobi Court of Appeal in Civil Appeal No 352 of 2019 (*supra*) held that salaries are determinable by the 2nd respondent in conjunction with Salaries and Remuneration Commission hence interfering with implementation of the decision made *vide* the letter Ref NPSC/1/8/10/Vol XXVII (83) dated 12/11/2021 amounts to usurping the constitutional mandate of the 2nd respondent.
64. That pursuant to a Circular No 107 of 2021 issued by the 2nd respondent,
 - (a) A university degree or other qualifications obtained by a member of the service, at any rank, does not lead to an automatic salary upgrade or promotion in the service.
 - (b) The 1995 authority letter on graduate constable applies to a specific category of police officers as aforementioned and was superseded by the promulgation of the Constitution in August, 2010 which established the commission and the salaries and remuneration commission, in whose sole mandate the granting of any authority to determine or vary any police officer’s terms of service rests.
 - (c) The practice of automatic salary upgrades based on submission of degree certificates and purported reliance on the 1995 Authority letter is hereby ceased with effect from August, 2010, being the date when the Constitution was promulgated which established the commission and the Salaries and Remuneration Commission in whose sole mandate the granting of any authority to determine or vary any officer’s terms and condition of service rests.”
65. The circular made several other directives as set out in paragraphs 24 (d) to (k) in the replying affidavit.
66. The 1st and 3rd respondent pray that the application be dismissed with costs.



67. The parties filed written submissions and list of authorities which the court has carefully considered together with all depositions and annexures by the parties.

Determination

The issues for determination in this suit are as follows: -

- a. Were the applicants appointed in job group 'J' with commensurate remuneration up to the time they were demoted to lower job Group 'F' with a lower salary?
 - b. If the answer to (a) is in the affirmative, did the 1st and 2nd respondent violate the rights of the applicants protected under article 10, 27, 41 and 47 of the Constitution read with section 4 and 7 of Fair Administrative Action Act, 2015?
 - c. Is it lawful to implement adverse statutory provisions and regulations retroactively to the loss and detriment of the applicants?
 - d. What remedies if at all, are the applicants entitled to.
68. In answer to issue (a) above, a careful analysis of the evidence adduced by the applicants and that adduced by the respondents has led the court to the conclusive fact that the applicants were employed on various dates between the years 2006 to April, 2014 as Graduate Constables in Job Group 'J'. The applicants enjoyed the terms and conditions of service as per Job Group 'J' until March, 2018 when the 1st respondent directed that the officers be reduced to Job Group 'F' and their gross salary was reduced to that of Job group 'F'. In April, 2018, the 1st and 2nd respondents restored the applicant's pay to that of Job Group 'J' plus all arrear salary which remuneration, the applicants continued to enjoy until November, 2021 when the applicants were again demoted in rank to job Group 'F' from Job Group 'J' and their remuneration was reduced accordingly.
69. The court is satisfied that the decision was taken by the 1st and 2nd respondents but was implemented by the 1st respondent vide the letter dated November 17, 2021.
70. From the depositions made by the applicants and the responses by the respondents, the court is satisfied that the reduction in salary and rank was not preceded by a notice to the applicants of the decision and the decision was implemented by the respondents without giving the applicants any opportunity to be heard. The applicants' protestation of the decision was ignored by the respondents and the applicants did not have any opportunity to be heard on review and or appeal of the adverse decision that had befallen them.
71. It is common cause that the recruitment of graduate police constables in job group j was founded on a circular issued on January 1, 1969 by the then Commission of Police and a letter issued on July 26, 1995 by the permanent secretary responsible for police service at the time.
72. It is also a fact that the Court of Appeal in Nairobi Court of Appeal Civil Appeal No352 of 2019, Attorney General v Evans Muriuki Muthuuri & 4 others pronounced itself in an application where Graduate police officers who had been recruited under Job Group 'F' had obtained orders from Employment and Labour Relations Court to have their job status upgraded to Job Group 'J' to match the terms of the applicants herein who had been recruited earlier on better terms they were enjoying. The Court of Appeal in reverting the decision of Employment and Labour Relations Court stated: -

“In our view however, the ground shifted with the subsequent enactment of the law with coming into force of the Constitution of Kenya, 2010 which birthed the 2nd and 3rd



appellants under articles 245 and 246 and provided for the enactment of statutory legislation and regulations, in respect of Police recruitment, promotions, remuneration, etc. It was on this basis that the [National Police Service Commission Act](#) was enacted.”

73. The Court of Appeal went on to say while referring to section 10 of the [National Police Service Commission Act](#), number 3 of 2011, amended by Act Number 3 of 2014 to include section 10 on functions of the Commission which states: -

“In addition to the function of the commission under article 243(3) of the [Constitution](#), the Commission shall-

- a. On the recommendation of the Inspector General develop and keep under review all matters relating to human resource policies of members of the service;
- b. With the advice of the salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the service and staff of the commission.”

74. The respondents rely on these provisions to justify the reduction in rank and salary of the applicants from Job group ‘J’ to ‘F’. It is common cause that the applicants were all appointed prior to the enactment of Act Number 3 of 2014 and regulation 4 of the [National Police Service Commission \(Recruitment and Appointment\) Regulations, 2015](#), under which any person who enters the service as a police constable, shall regardless of the academic qualifications rise through the ranks as provided in the Regulation and in the Career Progression Guidelines for National Police Service Uniformed Personnel, 2016. It is also apparent that some of the applicants were employed on the so-called graduate terms before coming into effect of the Constitution of Kenya, 2010 which established the 1st and 2nd respondents.

75. The question for determination which was not before the Court of Appeal in *Evans Muriuki Muthuuri* case (*supra*) is whether the provisions of the Constitution; the Police Service Act, 2011; and the Regulations made thereunder could be applied retrospectively against graduate officers who were recruited and appointed under the terms of service in Job Group ‘J’ to warrant their demotion to Job Group ‘F’ and what procedure, if any, ought to be followed for that to happen lawfully and without violating the vested rights of the applicants.

76. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#), the Supreme Court had this to say on retroactive application of the provisions of the Constitution and statutory provisions including regulations made thereunder as in the present case;

“(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. *Black’s Law Dictionary* (6th Edition) to which we have been referred defines retroactive law as: “A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring; or rights accruing before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past one that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.”



(60). “Most constitutions in common law jurisdictions almost invariably frown upon retroactive criminal statutes.....

(61) As for non-criminal Legislation; the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure on evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless by express words or necessary implication. It appears that this was the intention of the Legislature (*Halsbury’s Laws of England*, 4th Edition Vol 44 at page 570). A retroactive law is not unconstitutional unless it:

- (i) is in the nature of a bill of attainder;
- (ii) impairs the obligation under contracts;
- (iii) divests vested rights
or
- (iv) is constitutionally forbidden.”

77. It is apparently clear that the Legislation relied upon by the respondents falls foul of requirements (ii) and (iii) above in that the said regulations impair the obligation under the contract of service between the applicants and the 1st and 2nd respondents and the said regulations and the letter of November 17, 2021 written pursuant to the said regulations divests the rights of the applicants which they had for a long time enjoyed under job group ‘J’ and now, demoted to Job Group ‘F’ with the concomitant / salary in the low job Group.

78. The provisions of article 245 and 246 of the [Constitution](#) read with the provisions of section 10 of the [Police Service Act](#) as amended in 2014, do not expressly give retroactive effect to the 1st and 2nd respondents with respect to terms and conditions of service of Graduate police constables enjoying terms and conditions of service under Job group ‘J’.

79. It cannot also by necessary implication be said that the 1st and 2nd respondents were given powers by the Constitution of Kenya, 2010 and the [NPSA](#) and Regulations made there under to demote and reduce salary of graduate police officers without following due process.

80. Indeed, there was no attempt by the respondent from the deposition to give notice or any sort of hearing opportunity to applicants. As a matter of fact, the respondents make no pretence or any apologies regarding their failure to involve the applicants before making the very adverse decision against them. This conduct clearly violates articles 10, 27, 41, and 47 of the Constitution as set out vividly in the consolidated application. The decision was arbitrary, unreasonable, unlawful and a blatant violation of the accrued rights of the applicants from the date of their recruitment to that when they were demoted for no good cause and their remuneration reduced to their great loss and detriment – See the case of [Republic v National Land Commissions & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees \(St Joseph Mukasa Catholic Church Kabawa West](#) [2018] eKLR on the principles applicable. The Supreme Court in [Samuel Macharia](#) case went on to say the following about retrospective application of constitutional provisions;

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation; A Constitution looks forward and backward vertically and horizontally as it seeks to re-engineer the social order, it gusts for its legitimate object of rendering political good. In this way, a Constitution may and



does not embody retrospective provisions or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the Constitution, if the words, used in a particular provision are forward looking and do not contain even a weave of retroactivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their right Legitimately accrued before the commencement of the Constitution.” (emphasis added)

81. It is the conclusion of the court that not any of the Constitutional, statutory or regulatory provisions relied upon by the respondents expressly or impliedly vest in them any retroactive authority to divest the applicants of their accrued rights under Job Group ‘J’ to which they were legitimately recruited and appointed under the erstwhile laws, regulations and circulars applicable to the police service as and when each of the applicants was recruited and appointed to police service.
82. In answer to issue No 11, the respondent’s decision contained in the letter dated November 17, 2021 was unlawful, unreasonable and void ab initio for lack of due process and retroactive application of Legislation to the appointments in violation of their rights under article 27, 41, and 47 read with section 4 and 7 of the *Fair Administrative Action Act, 2015*.
83. In the final analysis, the court enters the following verdict in favour of the applicants as against the respondents jointly and severally, having satisfied the requirements for grant of discretionary and executive orders sought in the consolidated applications – See *Republic v Principal Secretary, Ministry of Internal Security & another v ex-parte Schan Noorani & another* [2018] eKLR.
 - a. A declaration is issued that the 1st and 2nd respondents’ unilateral decision to reduce graduate officers recruited on diverse dates pay from Job Group ‘J’ to Job Group ‘F’ offends the provisions of articles 10, 27, 41, and 47 of the Constitution of Kenya, 2010 as read together with section 4 and 7 of the Fair Administrative Actions Act of 2015.
 - b. A declaration is issued that the unilateral decision to reduce graduate officers’ pay from Job Group ‘J’ to Job Group ‘F’ was arbitrary, unreasonable and unlawful.
 - c. An order of *Certiorari* to bring into Employment and Labour Relations Court for purposes of quashing the decision to reduce graduate officers pay from Job Group ‘J’ to Job Group ‘F’ revealed in the November, 2021 payslip is issued.
 - (d) An order of Prohibition prohibiting the 1st and 2nd respondents either by themselves, their agents or servants, from in any manner reducing graduate officers’ pay the subject of this application from Job Group ‘J’ to Job Group ‘F’ as in the letter dated November 17, 2021 issued by the 1st respondent is issued.
 - (e) An order of *mandamus* is issued compelling the 1st and 2nd respondents to pay and/or continue to pay graduate officers the subject of the consolidated application salary equivalent to individuals in Job Group ‘J’. as they used to earn prior to the unilateral, unreasonable and unlawful decision to reduce their pay.
 - (f) Costs to follow the outcome.

DATED AND DELIVERED AT NAIROBI (ONLINE) THIS 29TH DAY OF SEPTEMBER, 2022.

MATHEWS N. NDUMA

JUDGE



Appearances

Musyoki Mogaka & Company Advocates for Ex-parte Applicant.

Mumma and Kanjama Advocates for Exparte Applicant

Gichira, Macharia, Matsetse & Company Advocates for the Interested party

The Attorney general for the respondents – Benda Opiyo Litigation

Counsel.

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