



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E024 OF 2021

**IN THE MATTER OF ARTICLES 3, 10, 19(1), 20, 22, 23, 27, 41, 43, 47, 159, 162, 246, 249, 258 AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 10,
19(1), 27, 41, 43, 47, 232, 246 AND 249 CONSTITUTION OF KENYA, 2010.**

AND

IN THE MATTER OF NATIONAL POLICE SERVICE COMMISSION ACT, CHAPTER 185C LAWS OF KENYA.

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION (PROMOTIONS) REGULATIONS, 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA.

BETWEEN

NEHEMIAH KIPKORIR TERER.....1ST PETITIONER

WYCLIFF MABWA.....2ND PETITIONER

KARIUKI N GATHONI.....3RD PETITIONER

WILFRED ANYONA MISENTE.....4TH PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE..2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioners filed the Petition dated 18th February 2021 against the 3 Respondents seeking for:

a. A declaration that the Respondents' conduct and action amounts to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Constables rights under Articles 27, 28, 40, 41, 43 and 47 of the Constitution of Kenya 2010;

b. A declaration do issue that Graduate Police Constables who are University graduates whose applications for the position of Cadet Inspector in the National Police Service have been ignored and disregarded by the Respondents while at the same time calling for applicants with the same education qualification from the general public for the said position have been discriminated against.

c. An order of prohibition do issue directed at the 1st and 2nd Respondents to cease from conducting any interviews, recruitment or employment of any new employees as Cadet Inspectors to the National Police Service without undertaking staff audit, qualification, assessments, promotions and right job placements for the existing Graduate Police Constables.

d. An order of *mandamus* do issue directed at the 1st and 2nd Respondents to fairly and impartially consider and respond to the applications for promotion to the position of Cadet Inspector by the Petitioners and all Graduate Police Constables within 30 days of the order.

e. Costs of this Petition.

f. Any other relief that this honourable court may deem just and fair to order.

2. The Petitioners are Graduate Kenya Police Constables stationed at different police stations in Kenya and working with the Kenya Police Service (KPS) in the National Police Service (NPS). They aver that they hold university degree certificates from various Universities in Kenya, some earned before joining the service and others earned in the course of their employment by the 1st Respondent. They assert that under the National Police Service Commission (Promotions) Regulations, 2015 (hereinafter "Promotion Regulations 2015"), Police Constables who attain university degree certificates are eligible for actual promotion or non-promotion reward scheme (horizontal career development) where a member is offered, *inter alia*, higher financial incentives irrespective of whether the member is promoted or not. That factors that determine promotion in the NPS include availability of appropriate vacancy and an officer satisfying the criteria for promotion or successfully undergoing a promotional course or training. That following various complaints by the Petitioners and other Graduate Police Constables, the 1st and 2nd Respondents between 2nd and 5th May 2018 undertook a nationwide exercise for verification and authentication of degree certificates attained by various Police Constables with the aim of auditing, rationalization and placement to determine the vacancies that exist vis-a-vis the qualified personnel. They assert that the exercise reported that a total of 3,739 Graduate Police Constables holding various University Degree certificates and constitute a pool of graduates from which the NPS can pick officers to be re-designated as cadets. They aver that however no promotions have been awarded by the 1st and 2nd Respondents since the said exercise of May 2018. They aver that further, on 1st September 2020 the Deputy Inspector General of Police issued a circular (signal) to all regional/formations commanders and all directorates communicating that the 1st Respondent was looking to create a database of professional skills held by personnel in the NPS for placement in fields that match their professional qualifications. The Petitioner that they and other qualified Graduate Police Constables thus submitted their credentials to their respective commanders and directorates but there has since been no response and or any form of communication from the 1st and 2nd Respondents. They aver that to their surprise, the 1st and 2nd Respondents have proceeded to advertise to the general public 300 vacancies in the NPS for the position of Cadet Inspectors, to the exclusion of current members of the NPS. That the only major qualification the applicants for the said position are required to possess is an undergraduate degree from a recognized institution. They aver that this recruitment exercise is discriminatory to the Graduate Police Constables and will further strain the taxpayer as public funds will be utilized to train new recruits into the NPS when in fact the Graduate Police Constables are available, qualified and ready for promotion but are locked out of the exercise.

3. The Petitioners aver that the 1st and 2nd Respondents' actions have negatively affected the morale of officers and their right to fair labour practices in contravention of Article 41(1) of the Constitution. The Petitioners aver that the Petitioners and other Graduate Police Constables continue to suffer discrimination at the hands of the 1st and 2nd Respondents against the dictates of Article 27 of the Constitution having been denied promotion opportunities and a chance to competitively apply for the vacancies in the position of Cadet Inspectors as other qualified members of the public. They aver that the Respondents' failure to properly implement the Petitioners' salary increment threatens the social security of the Petitioners guaranteed in Article 43 of the Constitution and that the Respondents declining to process the applications for promotion violates their right to fair administrative action under Article 47 of the Constitution. The Petitioners further aver that in the circumstances, the Respondents violated their respective Constitutional duty to heed to national values as posited by Article 10 and are also enjoined to observe principles of public service under Article 232 of the Constitution.

4. The 1st Respondent filed a Replying Affidavit sworn on 15th September 2021 by Joseph Onyango who avers that the Petition as crafted is premised on a misinterpretation of the existing laws relating to the human resource functions of the NPS Commission and clearly not anchored on any known law/regulation. That whereas the 1st Respondent Commission is responsible for the recruitment for all persons within the NPS, candidates appointed to the vacant positions include those from within the Service and also from outside the Service for functions that do not require a police service background. He avers that on 2nd February 2021 the Commission advertised the recruitment of Cadet Inspectors open to both current police officers and members of the public as is provided for in the Regulations. That out of the 17,865 applicants 776 were current Police Officers including the Petitioners herein and that the Petitioners were thereafter shortlisted for the Cadet Inspectors of Police positions. That despite there being a complaint management mechanism which addresses complaints related with the recruitment process, the Petitioners have not reported any complaint to the Commission and have instead rushed to this Court to obtain orders. He further avers that it is irrational for the Petitioners to associate and equate the recruitment exercise of Cadet Inspectors of Police to promotions within the NPS as the two are different processes in the NPS. That he is aware that the Petitioners were either not successful in their applications (1st and 4th Petitioners) or refrained from applying for any promotion vacancies and attending any promotion interviews (2nd and 3rd Petitioners). Further, the 2nd Petitioner lacks the requisite police examination qualifications to attend any promotional interviews while the 4th Petitioner is not eligible for promotion as he has not yet been confirmed in appointment. He asserts that the regulations also allow officers to appeal to the Commission against a promotion, delay or failure to promote or the demotion of an officer but the Petitioners have never appealed in relation to a delay or failure to be promoted from one rank to another. He further avers that it is the 1st Respondent's contention that the Petitioners have not established an arguable case with likelihood of success. That the Constitution and all other relevant laws provide that a party must exhaust all available internal mechanisms of appeal and dispute resolution mechanisms before filing a dispute in court. That the Petitioners have also failed to demonstrate how the 1st Respondent has violated their rights as alleged or at all and that the Petition herein being premature, ought to be dismissed with costs to the 1st Respondent.

5. The 2nd and 3rd Respondents filed a Replying Affidavit sworn on 17th September 2021 by George Kirigwi who avers that the recruitment of Cadet Inspectors is in public interest and informed by the need to fill in gaps in areas of professionalism identified by the Respondents and essential to service delivery. That the advertisement of Cadet Inspectors' vacancies prioritised interests in the fields of medicine, engineering, forensic science, ballistics, education and law and that recruitment for the same concluded after shortlisting and interviewing stages and that the successful candidates are currently undertaking their respective training courses in various police colleges. That contrary to the Petitioners' allegations, recruitment of specialists into the Service was open to both police officers and members of the public and that the 1st, 3rd and 4th Petitioners were not shortlisted as they had exceeded the mandatory required age of thirty (30) years. Further, the 1st and 4th Petitioners did not fulfill the mandatory grade requirement of a C+ in either English or Kiswahili languages in Kenya Certificate of Secondary Education (KCSE) Examinations. That the 2nd Petitioner was shortlisted, attended interview on 25th March 2021 but was not successful.

6. He further avers that contrary to the Petitioners' allegations, possession of a degree is not an entitlement to promotion, which is a defined process and based on merit. That the Police Signals referred to by the Petitioners purposed at collecting a skills inventory of officers within the NPS, did not state, promise or create any expectations of promotions as alleged, since promotions are subject to a clear and competitive process. That the Petitioners should not be allowed through court process to arm-twist recruitment or promotion in their favour contrary to the dictates of law, the principles of natural justice and equity. It is also his averment that the Petitioners have failed to uphold the disclosure principle by failing to disclose their participation in the recruitment process. That the Petitioners in seeking precedence over members of the public for the advertised Cadet Inspectors vacancies, have adopted a rigged interpretation of the Constitution and relevant laws and are therefore in violation of the doctrines of fair competition, transparency, inclusiveness and appointments on merit. That the Petitioners have also violated Article 159 of the Constitution and the Doctrine of Exhaustion which requires that a party exhaust all available dispute resolution mechanisms provided for by the law before filing a dispute in court. Mr. Kirigwi further avers that the judgment in **Evans Muriuki Muthuri & 4 Others v The National Police Service Commission & 2 Others [2019] eKLR** is a subject of a pending appeal in **Nairobi Court of Appeal Civil Appeal No. 352 of 2019 - National Police Service Commission & 2 Others v Evans Muriuki Muthuri & 4 Others** and hence cannot be relied on by the Petitioners in the instant suit. He asserts that the Petitioners are not entitled to the reliefs sought since the Petition is unsupported and overtaken by events. The Petition was dispensed by way of written submissions.

7. Petitioners' Submissions

The Petitioners submit that under Regulation 19(2) of the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 (hereinafter "Recruitment and Appointment Regulations, 2015"), civilian appointments are only proper where it is not necessary for the candidates to have a police service background. The Petitioners submit that under Regulation 20 of the Recruitment and Appointment Regulations, the interdependence of the NPS Recruitment Regulations and the NPS Promotion Regulations is illustrated that in recruiting civilians as specialists (Cadet Inspectors), such recruits must be limited to a small number as not to negatively affect the career development of rank and file officers, which only happens through promotions. That the Respondents disregarding these clear provisions means they have condemned the Petitioners and other Graduate Police Constables to stagnate in one rank for years without any hope for career development. The Petitioners submit that the said recruitment exercise by 1st and 2nd Respondents amounts to discrimination of the Graduate Police Constables contrary to Article 27(4) of the Constitution of Kenya because the maximum age limit of 30 years imposed on applicants automatically locked out more than 80% of qualified Graduate Police Constables whereas the age limit for recruitment of police constables is ordinarily between 18 to 28 years. That the issue of age limit imposed on internal staff when applying for positions advertised to the general public has been held to be unlawful and unconstitutional; in the case of **Jared Juma v Kenya Broadcasting Corporation & 3 Others [2014] eKLR**, an age limit of 45 years imposed on applicants for the position of Managing Director was declared unconstitutional. Further, the 2nd Respondent in shortlisting successful candidates subjected the Petitioners to extraneous and superfluous qualification criteria including past performance at board interviews, status of confirmation of appointment in the Service, and performance in police law examination while the civilian applicants were not subjected to the same. They rely on the case of **Republic v Kenya School of Law & Another Ex parte Otene Richard Akomo & 41 Others; Council of Legal Education (Interested Party) [2020] eKLR** where the Court relied on the South Africa Constitutional Court in **Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12** which laid down the test to be applied by courts in determining whether a claim based on unfair discrimination should succeed. Firstly, on whether the provision differentiates between people or categories of people, they submit that the Graduate Police Constables who applied for the advertised vacancies of cadet inspectors were differentiated from civilian applicants to the same position. Secondly, on whether the differentiation amount to unfair discrimination, they submit that the differentiation was on specific grounds of age and extraneous and superfluous qualification criteria imposed on the Graduate Police Constables and not on the civilians, which amount to unfair discrimination. Thirdly and finally, on whether the provision can be justified under the limitations clause of the Constitution they submit that the burden of proof lies on the Respondents to show that the aforesaid discriminatory treatment of the Graduate Police Constables is justified under Article 24 of the Constitution.

8. The Petitioners further submit that whereas their right to fair administrative action is guaranteed under Article 47(1) and (2) of the Constitution, they together with other applicants who applied for the position of cadet inspectors and or attended board interviews have never been advised of the outcome of the said interviews and the reasons thereof. They submit that in the case of **Regina v Secretary of State for the Home Department Ex parte Doody [1994] 1 AC 531** Lord Mustill expressed the duty to give reasons under common law and which case was cited with approval by the Court of Appeal in **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** where Githinji J. (as he then was) stated that the right to be given reasons for an administrative decision is as of right if the decision will affect a right under the Bill of Rights and held that the word "right" in Article 47(2) means a right under the Bill of Rights. It is the Petitioners' submission that their case meets the threshold for grant of the reliefs sought having established that they and other Graduate Police Constables' rights under Articles 27, 28, 41, 43 and 47 of the Constitution of Kenya have been infringed by the 1st and 2nd Respondents. They pray that this Honourable Court grants the Petition dated 18th February 2021 as prayed.

9. 1st Respondent's Submissions

The 1st Respondent submits that its functions which include recruitment and appointments, promotions, transfers and disciplinary control within the NPS accrue to it under Article 246 of the Constitution of Kenya which also establishes the National Police Service Commission. That the developed the Recruitment and Appointment Regulations 2015 and the Promotion Regulations 2015 are intended to give clear guidance on how the core mandates and functions of the Commission as stipulated under Article 246 and the National Police Service

Commission Act 2011 are to be carried out. It submits that Regulation 4 of the Recruitment and Appointment Regulations, 2015 provides that a person may enter the Police Service as a Police Constable, on higher ranks through a Cadet Entry scheme, as specialists or as civilian staff. It submits that Regulation 7 of the Promotion Regulations 2015 provides that promotions shall be determined by the existence of a vacancy, when an officer satisfies the criteria for promotion and when an officer successfully undergoes a promotional course or training and that Regulation 11(2) provides that a member of the Service may apply for a position in the NPS that entails a promotion from their current position.

10. It is the 1st Respondent's submission that the Petitioners' assertion that they are entitled to direct and instant promotion because they hold educational certificates is legally untenable as there are clear laws and regulations guiding the recruitment and promotion of officers within the Service. That more so, it is now trite law that no adjustment or review of remuneration of public officers can be implemented without the advice of the Salaries and Remunerations Commission (SRC) and which position is supported by the cardinal principle that any alleged legitimate expectation should not be contrary to the prevailing laws and the public institution. It relies on the case of **Republic v Engineers Board of Kenya Ex parte Godfrey Ajoung Okumu [2018] eKLR** and the Court of Appeal decision in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR**. The 1st Respondent submits that the anticipated improvement in the terms of services for the Officers can only be effected within the confines of the law and by the involvement of all relevant institutions. The 1st Respondent urges the Court to find that the alleged legitimate expectation by the Petitioners is contrary to the existing clear provisions of the law, thus void and unsustainable in law. The 1st Respondent further submits that the listed alleged violations in the application are baseless and offend the principles as enunciated in the case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** and emphasized by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR** the requirement to frame issues in constitutional petitions with reasonable precision. As to whether the Petitioners exhausted all the available internal mechanisms of Appeal and dispute resolution as guided by Article 159 of the Constitution, the 1st Respondent submits that contrary to Regulation 21 of the Recruitment and Appointment Regulations 2015 and Regulation 14 of the Promotion Regulations 2015, the Petitioners failed to report their complaints and file their appeal relating to their delayed promotions. For this argument it relies on the case of **Kenya Revenue Authority v Universal Corporation [2020] eKLR**.

11. 2nd and 3rd Respondents' Submissions

The 2nd and 3rd Respondents submit that the fundamental right and freedom of the Petitioners have not been interfered with in any way and no proof has been produced before this court to illustrate how the Petitioners' rights and freedoms have been breached by the Respondents. The 2nd and 3rd Respondent submits that as stated in the case of **Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission & 5 Others [2013] eKLR**, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. They deny the allegations of discrimination and submit that the recruitment of cadets is conducted subject to Section 10 of the National Police Service Act and Section 28(f) of the National Police Service Commission Act and is applicable to all citizens of Kenya. Further, that setting out minimum requirement in a hiring process is set out for everyone who is interested in being a cadet and does not amount to discrimination. They cite the case of **John Harun Mwau v Independent Electoral and Boundaries Commission & Another [2013] eKLR** where the Court held that:

“[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the Constitution.”

12. The 2nd and 3rd Respondents further submit that they have not in any way breached the Petitioners' dignity and or failed to respect the same, the Petitioners right to property has not been interfered with in anyway, and that no allegations and proof have been submitted to this court by the Petitioners on breaches of Articles 28 and 40 of the Constitution.

13. The 2nd and 3rd Respondents also submit that the Respondents have not discriminated against the Petitioners in any way and that recruitment of cadet inspectors is in public interest and pursuant to the provisions of Article 244(a) of the Constitution of Kenya and Regulations 3, 4 and 5 of the Recruitment and Appointment Regulations 2015. That as they have pleaded, the 1st, 3rd and 4th Petitioners failed to meet the mandatory age required for applicants while the 2nd Petitioner did not perform well in his interview compared to other candidates. For the promotions, the 1st and 4th Petitioners did not qualify for the promotion after attended the last promotional board in or around September/October 2020 while the 2nd and 3rd Petitioners abstained altogether. The 2nd and 3rd Respondents submit that the Petitioners have thus failed to demonstrate how the actions of the 1st Respondent were discriminatory against the Petitioners. They submit that the Petitioners are therefore not entitled to any form of compensation and have not suffered any damages to be awarded damages.

14. The ripeness of a matter is predicated on the occurrence of the necessary steps before the matter is open for adjudication by a court. Put another way, the claim is "ripe" when the facts of the case have matured into an existing or substantial controversy warranting judicial intervention. In this case the Petitioners have not exhausted the process that the Respondents have in place in relation to the appeals that may emanate from the decisions to either not promote or overlook the Petitioners in the impending promotions. It is uncontroverted that instead of preferring an appeal to the Petitioners have come to Court contrary to Regulation 21 of the Recruitment and Appointment Regulations 2015 and Regulation 14 of the Promotion Regulations 2015 which behoove the Petitioners to report their complaints and file their appeal relating to their delayed promotions. Secondly, there was material non-disclosure as the Petitioners did not bring forth their full case and concealed the fact of application, shortlisting and interview in respect of some of the Petitioners in the impugned recruitment. Having failed to exhaust the mechanism under the Respondent's regulations and procedures this claim is not ripe for determination by the Court. The Petition is premature, devoid of merit and is hereby struck out with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2021

NZIOKI WA MAKAU

JUDGE