



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 12 OF 2020

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 25(c), 28, 35, 41, 43, 47, 48, 50, 55, 159, 161, 165, 244, 245, 246 and 247 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

THE ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 23, 33, 43, 47, 48, 50, 55, 159, 165, AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF RULES 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT OF 2015

BETWEEN

WYCLIFFE NYANDIGISI.....PETITIONER

V

ATTORNEY GENERAL..... 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

DEPUTY INSPECTOR GENERAL OF POLICE, KENYA POLICE SERVICE....4TH RESPONDENT

DIRECTOR OF INTERNAL AFFAIRS5TH RESPONDENT

COMMANDANT, KENYA RAILWAYS AND PORTS POLICE6th RESPONDENT

RULING

1. Wycliffe Nyandigisi (applicant) was enlisted into the Kenya Police in 1999.
2. On 4 May 2018, the applicant was arrested. The arrest was followed with a suspension on 5 May 2018 pending arraignment before the Magistrates Court, Milimani on 10 May 2018. The suspension letter set out some 6 allegations against the applicant.
3. Life became unbearable for the applicant and on 11 March 2019, he wrote to the National Police Service Commission requesting to be granted half salary as he did not have any other source of income. The applicant sent similar letters to the Inspector General of Police, the Deputy Inspector General of Police and the Director Internal Affairs Unit of the Police.
4. The Director Internal Affairs Unit informed the applicant on 2 April 2019 that it was the National Police Service Commission which could lift his suspension.
5. The Deputy Inspector General on his part advised the applicant to follow the right channel with the appeal through a letter dated 15 April

2019.

6. On 23 July 2019, the Director of Public Prosecutions entered a nolle prosequi, effectively having the charges against the applicant being terminated.
7. The applicant renewed his plea to have the suspension lifted on 25 July 2019 and on 30 July 2019.
8. In a response dated 20 August 2019, the National Police Service Commission informed the applicant that his case was under consideration.
9. On 2 January 2020, the Deputy Inspector General of Police notified the applicant that his suspension had been lifted and that he would be deployed accordingly.
10. The lifting of the suspension was not for long, for on 16 January 2020, the Commandant, Kenya Railways and Ports Police issued to the applicant, a Notice of Intended Removal from the Police Service with effect from 1 March 2020. The notice set out the grounds for removal and requested the applicant to show cause before 30 January 2020 why he should not be removed from the Police Service.
11. The applicant on 26 January 2020, responded to the *show cause* by writing to the Chief Executive Officer of the National Police Service Commission and the Director, Internal Affairs Unit alleging that the show cause was malicious.
12. The applicant moved the Court on 29 January 2020 through a Petition contending that the removal proceedings offended Articles 47 and 50(2) of the Constitution.
13. Filed together with the Petition was a motion under a certificate of urgency seeking orders staying the removal proceedings, reinstating to office and restoration of instruments of office, payment of salaries during suspension and supply of documents pertaining to the case.
14. The Court gave directions as to the hearing of the application on 25 February 2020.
15. The Respondents filed grounds of opposition, a replying affidavit and submissions in opposition to the application on 27 February 2020.
16. The applicant also filed a further affidavit and submissions on the same day. The Court took arguments during the same session.
17. The Court has given due consideration to the parties opposing contentions.

Conservatory order

18. The primary ground advanced by the applicant in seeking conservatory orders interdicting his intended removal from the Police Service is that he would be exposed to double jeopardy having been discharged by the Magistrates Court on charges based on similar facts which the Respondents are pressing against him.
19. The applicant in this respect drew the attention of the Court to the proposition in *Rosemelle Anyango Mutoka v Judicial Service Commission* (2019) eKLR that it is a sound principle of criminal justice which applies in equal force ... that a person cannot be tried and convicted on the same facts over which he or she has been previously convicted or acquitted (*autre fois acquit, autre fois convict*).
20. The applicant also relied on a passage in *Joshua Muindi Mainji v National Police Service Commission & 2 Ors* (2015) eKLR that an employee could not be subjected to administrative disciplinary procedures on substantially similar allegations on which an acquittal had been made.
21. The applicant also contended that the removal proceedings were unreasonable, irrational and tainted with malice and this a violation of his legitimate expectation and the right to fair administrative action as envisaged under Article 47 of the Constitution and the Fair Administrative Action Act.
22. According to the applicant, he had established a *prima facie* case warranting the grant of conservatory orders.
23. The Respondents were of a contrary view.
24. They asserted that the applicant having been discharged under section 82 of the Criminal Procedure Code was susceptible to removal proceedings under chapter 30 paragraphs 48(i) and 56(i) of the Service Standing Orders. In the view of the Respondents, the discharge of the applicant could not operate as a bar to the removal proceedings.
25. The Respondents, citing the Court of Appeal decisions in *Attorney General & Ar v Andrew Maina Githinji* (2016) eKLR and *Kibe v Attorney General* (2003) eKLR urged that the correct legal position was that an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by the employer.
26. The criminal process and a disciplinary process have distinct objectives and purposes. Even the standards of proof are different.
27. This Court would, therefore, endorse and apply the holding by the Court of Appeal in the *Githinji* and *Kibe* decisions over the position

taken by this Court differently constituted in the *Joshua Muinde* case.

28. The applicant did not suggest that the Respondents do not have the authority under the applicable statutes and the Service Standing Orders to initiate the removal proceedings. He did not challenge the validity of the provisions providing for the removal proceedings.

29. It is now widely accepted in our jurisprudence that the Court should intervene in disciplinary proceedings only in the most exceptional of cases. The applicant did not demonstrate any exceptional circumstances.

30. The Court is, therefore, unable to agree with the applicant that the removal proceedings exposed him to double jeopardy.

31. The Court finds that the applicant has not made out a case for grant of a conservatory order.

Withheld salaries during suspension/restoration of uniform and certificate of appointment

32. The applicant was only reinstated on 20 January 2020 and the Respondents contended that the issue of accrued salaries was an administrative and was being addressed.

33. In all fairness, since the suspension of the applicant was withdrawn, the Respondents should process any accrued salaries if at all and also restore the uniform and certificate of appointment.

Access to information

34. The applicant made a general request to be furnished with all correspondences, records and documents relating to his case. However, he did not set out details of such information.

35. The Court, in the circumstances, cannot make an order at large. If the applicant wants specific records, he ought to the first instance make a formal request to the Respondents.

Conclusion and Orders

36. From the foregoing, the Court finds and holds that the applicant did not make a case for grant of conservatory orders.

37. However, the Court directs that the Respondents process and pay the applicant's remuneration from time of suspension to date the suspension was lifted.

38. Costs to abide the Petition.

Delivered, dated and signed in Nairobi on this 13th day of March 2020.

Radido Stephen

Judge

Appearances

For applicant Mr. Wahome instructed by W M Njagi & Associates

For Respondents Ms. Akuno, Senior State Counsel, Office of the Attorney General

Court Assistant Judy Maina