



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 5, 6 & 7 OF 2020

1. CPL. HENRY THURANIRA RUUTI

2. PC JAMES KIOKO MUENDO

3. PC YUSSUF OSMAN ABDULLAHI.....PETITIONERS

VERSUS

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

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

THE DEPUTY INSPECTOR GENERAL NATIONAL POLICE SERVICE....3<sup>RD</sup> RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....4<sup>TH</sup> RESPONDENT

RULING

1. The Petitioners are at all material times, all Policemen serving in various positions in the Police Force serving at Mathira East Sub County. They all assert that they were served interdiction letters in March 2017 by Superintendent Charles Kipchumba the then DCIO Karatina for allegedly aiding prisoners to escape and for receiving a bribe contrary to Section 124 of the Penal Code and the Bribery Act 2016 respectively. The Petitioners were subsequently served with a notice to show cause letter for the same allegations to which they replied and while waiting for the responses to the NTSC were charged with a disciplinary offence under Regulation 9(3) of the National Police Service Commission (Discipline) Regulations 2015 (Legal Notice No. 90 of 2015) which disciplinary hearings were heard by Chief Inspector Obonyo and after the hearing the Petitioners were found not guilty of the two counts and in spite of the finding of 'not guilty' were served with a waiver notice in August 2015 under Regulation 9(5) of the National Police Service Commission (Discipline) Regulations 2015 together with another show cause notice for the same offenses they had been acquitted of. The Petitioners assert that they were found guilty on 11<sup>th</sup> October 2018 and fined by the presiding officer. The Petitioners assert that while this was going on they were served with a signal dated 19<sup>th</sup> August 2019 requiring them to refund Kshs. 138,000/- to unknown people and pay an additional sum of Kshs. 34,500/-. The Petitioners assert that their salaries were deducted to settle the fines and charges levied though they appealed the sentence meted out. The Petitioners assert that to their dismay they were again on 5<sup>th</sup> November 2019 served with a notice to show cause based on the same allegations to show cause why they should not be removed from the Service. The Petitioners assert that they were served without being heard with a notice removing them from the Police Service with effect from 30<sup>th</sup> April 2020. The Petitioners assert the intended removal is in violation of their rights to natural justice, fair administrative action, fair labour practices, legitimate expectation and double jeopardy. The Petitioners contend that the Respondents are bound by the national values and principles set out in Article 10 of the Constitution which includes the observance of human rights, rule of law, integrity, social justice, non-discrimination and accountability. The Petitioners assert that they were not heard contrary to Article 47(1) of the Constitution, Section 4(3) of the Fair Administrative Actions Act 2015 and the right to fair labour practices. Conservatory orders were issued by the Court on 22<sup>nd</sup> April 2020 staying the implementation of the letters intending to remove the Petitioners from the Force effective 30<sup>th</sup> April 2020 pending the hearing and determination of the application *inter partes*. There is an affidavit on record that the Orders were served on all the Respondents herein and only the 1<sup>st</sup> Respondent filed any response upon service.

2. The 1<sup>st</sup> Respondent is the only party that responded by filing a Replying Affidavit sworn by Joseph Vincent Onyango the Chief Executive Officer of the 1<sup>st</sup> Respondent. He deponed that the 1<sup>st</sup> Respondent in executing its mandate under the National Public Service Commission Act and Article 246(3) of the Constitution of Kenya has the remit to recruit, appoint and confirm appointments, determine promotions and transfers as well as exercise disciplinary control over and remove persons holding or acting in offices within the Service. The deponent asserts that in order to achieve its Constitutional mandate the 1<sup>st</sup> Respondent developed some regulations among them the National Police Service Commission (Discipline) Regulations 2015. He deponed that he was aware that the 1<sup>st</sup> Respondent has always discharged its mandate and related functions with utmost fidelity to the Constitution of Kenya. He further deponed that even when it comes to disciplinary issues, the 1<sup>st</sup> Respondent has the mandate to review, ratify or annul decisions of the Service on any particular officer since the disciplinary process as per the Regulations always commences from the Service. He deponed that he discipline process is further guided by Chapter 30 of the Service Standing Orders duly issued by the Inspector General of the National Police Service. He deponed that the Petitioners together with another Police Officer were on duty within Mathira Area in Nyeri County when at around 3.00am they intercepted a motor vehicle Reg. No. KBU 017U which was headed to Nairobi from Moyale and aboard the Mitsubishi Isuzu lorry were fifteen aliens of Ethiopian origin. He deponed that the Petitioners commandeered the vehicle to Karatina Police Station Yard but never booked the arrests in the Occurrence Book as required by law but embarked on negotiating with the aliens in order to buy their freedom where a bribe of Kshs. 138,000/- was agreed

upon. He deponed that the money was received vide mobile phone and the Petitioners shared the bribe and released the vehicle upon the payment of the bribe. He deponed that the vehicle was later arrested at Makutano and the occupants booked at Makutano Police Station and charged at Embu Law Courts where the driver and its occupants were found guilty. He deponed that the aliens and the driver protested and demanded the refund of the monies paid at Karatina Police Station. The complaint was made by the driver of the lorry and an identification parade was conducted where the 3<sup>rd</sup> Petitioner was positively identified and subsequently the Petitioners were interdicted from duty from 20<sup>th</sup> March 2017. He averred that an inquiry file was opened and the recommendation was that the Petitioners be charged in a court of law with the offences of aiding prisoners to escape contrary to Section 124 of the Penal Code and receiving a bribe. He deponed that the Director of Public Prosecutions recommended that the Petitioners be dealt with administratively and subsequently the Petitioners were brought before a subordinate disciplinary committee per Chapter 30 Paragraph 14 of the Service Standing Orders and Regulations 4(1), 4(3) and 6 of the National Police Service (Discipline) Regulations 2015. The 1<sup>st</sup> Respondent asserts that paragraphs 15, 16, 17, 18, 20 and 21 of the Service Standing Orders were complied with in line with the provisions of Article 47 and 50 of the Constitution of Kenya. He deponed that during the said orderly room proceedings the Petitioners begged for forgiveness and upon the conclusion of the orderly room proceedings forwarded the same to the Directorate of Criminal Investigations Headquarters for decision. He deponed that it was established that the material evidence to prove Mpesa transaction of the bribe from the driver of the lorry to the Petitioners was suspiciously and errantly omitted from the disciplinary proceedings. He deponed that to illustrate that the Service observed due process and fair hearing, it ordered a retrial to ensure that justice is served not only to the Petitioners but to the complainants as well. He deponed that the second subordinate disciplinary committee was constituted and the Petitioner was issued with a waiver notice in accordance with Chapter 30 paragraph 15 of the Service Standing Orders. He deponed fresh orderly room proceedings were conducted and the Petitioners' rights and fundamental freedoms were observed in accordance with Articles 47 and 50 of the Constitution. That after the orderly room proceedings were concluded the same were forwarded to the Directorate of Criminal Investigations Headquarters where the sentence imposed were confirmed and an order of restitution of the Kshs. 138,000/- was made as provided for under Section 89 of the National Police Service Act 2011. He deponed the Petitioners were informed of their right to appeal the sentence imposed and they did not contest the same and that the Director of Criminal Investigations recommended the Petitioner's removal from the Service to the National Police Service Commission in accordance with Chapter 29 paragraph 7(d) as read together with Chapter 30 paragraph 52(1)(a) of the Service Standing Orders and that the Petitioners were duly issued with a show cause letter and subsequently a notice of removal from the National Police Service. He deponed that the Commission vide a meeting held on 11<sup>th</sup> June 2019 subsequently approved the lifting of interdiction and the institution of removal proceedings of the Petitioners on grounds of gross misconduct and poor work record. He deponed that the second orderly room proceedings were conducted due to the fact that there was new evidence that arose which was not availed during the first orderly room proceedings.

3. The Petitioners argued their motion of 14<sup>th</sup> April 2020 for stay pending the hearing and determination of the Petition herein and a conservatory order staying the letter of 27<sup>th</sup> March 2020 which had intention of removing the Petitioners from work. The Petitioners argued that they were not afforded a hearing as they responded to the notice to show cause dated 6<sup>th</sup> November 2019 and upon responding to the notice to show cause never got any other communication nor any invite to come for a hearing only a letter that dismissed them from service. It was argued that the letters were uncalled for and amounted to double jeopardy. The Petitioners argued that they had initially been charged with the same offences and found innocent of the charges on 11<sup>th</sup> May 2018 and acquitted. The Petitioners argued that they could not be charged again for the same offences before another officer. They argued that upon being charged again they were found guilty and fines imposed. The Petitioners argue that the second disciplinary process that resulted in their fines run counter to Article 50(2)(o) of the Constitution and the principle of double jeopardy and that after the illegal sentence the interdiction was lifted and the notice of show cause and removal letters were issued. The Petitioners argued that no justice would be served at the retrial as it seemed there was particular outcome that was desired and having failed to achieve it in the first orderly room proceedings subjected the Petitioners to the second trial. It was argued this violated Articles 41, 47 and 50(o) and fair labour practices as once a person is disciplined there should be no further disciplinary proceedings.

4. In response to the motion, the 1<sup>st</sup> Respondent argued that the action of the 1<sup>st</sup> Respondent was guided by Article 244 which required the Force to maintain a standard of integrity and observe due process. The 1<sup>st</sup> Respondent argued that it could remove people in the service for cause and that it had detailed disciplinary process under the Service Standing Orders which is an administrative process not a criminal process. The 1<sup>st</sup> Respondent argued that the first orderly room proceedings were forwarded to the command at DCI and the command upon perusal found crucial evidence had not been presented and they set up another independent panel and also took action against the first panel for the omissions. It was argued that this did not amount to double jeopardy as there was new information that had not been presented to the panel. It was argued that the National Police Service Act under Section 89 provides for a combination of sanctions that can be imposed including fines, reprimand and removal. It was argued that the actions of the Petitioners brought the National Police Service to ridicule and the process of removal was guided by the verdict of guilty pronounced in the orderly room proceedings. The 1<sup>st</sup> Respondent argued that it was a very serious offence due to the severity of the terror threats and corruption and that the removal process was under consideration but had not been concluded.

5. The Petitioners in their motion have raised the spectre of a possible impairment of their fundamental rights and freedoms as they allege they are being punished twice for the same offence having been subjected to the disciplinary process and fined and that having satisfied the disciplinary sanctions imposed it was not open to the Respondents to subject them to additional punishment. As the matter is not concluded it is imperative that the non-removal from the service be maintained pending the hearing and determination of the Petition as once the removal is effected the only remedy would be reinstatement or damages and even the reinstatement would be tenuous at best granted the current circumstances. In the final analysis the Petitioners will have a conservatory order suspending their removal pending the determination of this Petition. As the speedy determination of the Petition will result in either a confirmation of the removal process or rejection of the removal process and given the sensitive nature of the Petitioners' jobs the Petition will be fast tracked and upon the delivery of this Ruling there shall be directions as to the next steps in ensuring the determination of the Petition within the next 45 days.

It is so ordered.

**Dated and delivered at Nyeri this 28<sup>th</sup> day of May 2020**

**Nzioki wa Makau**

JUDGE