



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 5 OF 2020

CONSOLIDATED

WITH

PETITION NO. 6 OF 2020 AND PETITION NO. 7 OF 2020

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 21, 22, 27(1), (2) & (3), 28, 41(1) &(2), 47(1), 48 & 258 OF THE
CONSTITUTION OF KENYA 2010**

AND

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

AND

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 27(1), (2) & (3), 28, 41(1) & (2) AND 50(2)**

AND

**IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION DISCIPLINE REGULATIONS 2015 (LEGAL
NOTICE NO.90 OF 2015)
BETWEEN**

- 1. CPL. HENRY THURANIRA RUUTI**
- 2. PC JAMES KIOKO MUENDO**
- 3. PC YUSSUF OSMAN ABDULLAHI.....PETITIONERS**

VERSUS

THE NATIONAL POLICE SERVICE.....1ST RESPONDENT

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DEPUTY INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....3RD RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....4TH RESPONDENT

JUDGMENT

1. The Petitioners were all police officers who seek redress arising from the same transactions. In their Petitions which were consolidated for purposes of hearing, the Petitioners seek the following relief:

- a. A declaration that the removal letters dated 27th March 2020 are in breach of the Petitioners' rights under Articles 41, 47 and 50 of the Constitution and the same be declared null and void for all intents and purposes.
- b. A conservatory order of stay be issued staying the Respondents letters dated 27th March 2020 removing the Petitioners from the service with effect from 30th April 2020 and the Petitioners to continue serving as police officers with full salary without any interference or victimization from the Respondents, their servants, agents and or employees.
- c. An order of *certiorari* to bring into this court the letter dated 27th March 2020 and the judgment dated 11th October 2018 and quashing the same and reinstate the Petitioners if already removed from the service.
- d. An order prohibiting the Respondents from initiating any further disciplinary action against the Petitioners based on the same facts.
- e. Any other orders as the court may deem fit and just to grant.

The 3 Petitioners are all Policemen serving in various positions within the Police Force presently posted at Mathira East Sub County. The Petitioners 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 assert they were subsequently served with notice to show cause letters 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 (also known as Legal Notice No. 90 of 2015) which disciplinary hearings were heard by Chief Inspector Obonyo. The Petitioners assert that after hearing them, they were found not guilty of the two counts but 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. They assert they were also served with another show cause notice for the same offenses they had been acquitted of and were found guilty on 11th October 2018 and fined by the presiding officer. The Petitioners assert that while this was going on they were served with a signal dated 19th 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 5th November 2019 served with a notice to show cause based on the same allegations requiring them to show cause why they should not be removed from the Service. The Petitioners assert that they were served with a notice removing them from the Police Service without being heard with effect from 30th April 2020. The Petitioners assert the purported removal is in violation of their rights to natural justice, fair administrative action, fair labour practices, legitimate expectation and protection against 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, the rule of law, integrity, social justice, non-discrimination and accountability. The Petitioners assert that they were not heard contrary to their rights under Article 47(1) of the Constitution, Section 4(3) of the Fair Administrative Actions Act 2015 and the right to fair labour practices. It was argued by Counsel for the Petitioners Mr. Wahome during the hearing of the Petition that the Petitioners were being subjected to removal for offences they had already been punished for. It was submitted that under Legal Notice No. 90 of 2015 under Regulation 15(3), when it comes to removal the Petitioners ought to have been heard yet they were not. The Petitioners argue that Regulation 15 is not available to the Respondents as the Petitioners were already dealt with under Regulation 9. The Petitioners assert that the charges they faced resulted in an acquittal by Chief Inspector Obonyo who presided in the judgment rendered on the 2 charges. It was submitted that the judgment was signed by the prosecuting officer, the assistant presiding officer, the orderly room NCO and the Petitioners.

After this acquittal, the National Police Service Commission (Discipline) Regulations 2015 (legal Notice Number 90 of 2015) does not provide for or contemplate any further proceedings. The Petitioners assert that Article 50(2)(o) of the Constitution provides for the right to fair trial which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. The Petitioner submitted that it was noteworthy that Legal Notice Number 90 of 2015 does not provide for a retrial after such an acquittal. The Petitioners assert that in total violation of Article 50(2)(o) of the Constitution and the rules of national justice against double jeopardy and Legal Notice No 90 of 2015, on 11th August 2018 the Petitioners were charged again with the same offences by Superintendent of Police Robert Mabera ostensibly "to set immediate example". The Petitioners state that on 11th October 2018 a verdict of guilty was returned in spite of the earlier acquittal and the Petitioners thereafter sentenced to a fine of Kshs. 3,000/- and 3,078/- respectively by another presiding officer, Chief Inspector Simon Ndiwa. They assert that this is in clear violation of Article 50(2)(o) of the Constitution. The Petitioners salaries were deducted in furtherance of the punishment and the Petitioners assert that this deduction itself was unlawful and unconstitutional as it emanates from an act which is itself a nullity. The Petitioners assert that they were served with another illegal signal dated 19th August 2019 requiring them to refund Kshs. 138,000/- to unknown persons and pay Kshs. 34,500/- for reasons not stated and were not afforded a hearing. The Petitioners state that they appealed against the illegal sentences vide their letter dated 5th September 2019 and their interdiction was subsequently uplifted on 18th October 2019. To their surprise they were again served with a Notice to Show Cause dated 6th November 2019 based on the same allegations and they replied through their letter of 11th November 2019. They assert that without being given a chance to be heard contrary to Article 47 (1) of the Constitution, Section 4(3) of the Fair Administrative Action Act, 2015 and the right to fair labour practices provided for under Article 41 of the Constitution, the right not to be tried twice under Article 50 of the Constitution, the right against double jeopardy and legitimate expectation they were notified of the intention to remove them from service. The Petitioners assert the Respondents are bound by the national values and principles set out under Article 10 of the Constitution which include observance of human rights, the rule of law, integrity, social justice, non-discrimination and accountability. The Petitioners submitted that after the acquittal no further proceedings could be contemplated. The Petitioners asserted that acquittal is a certification of 'not guilty' as defined in **Black's Law Dictionary**. The Petitioners argue that no retrial under Article 41, 47 and 50(2)(o) could arise as the provisions of LN 90 of 2015 were to the effect that the officers could be fined or an order of stoppage of salary be

issued. The Petitioners argued that the words ‘not guilty of the charge’, ‘guilty’ and ‘acquitted’ are used and one cannot fine an employee unless the proceedings are in the nature of a criminal matter and one does not acquit unless the proceedings are of a criminal nature. It was argued that the punishment meted out should only be after appeal and confirmation by the National Police Service Commission. They relied on the case of **Joshua Muindi Mainigi v National Police Service Commission & 2 Others [2015] eKLR**. The Petitioners thus urged the grant of the reliefs sought in the Petition with costs.

2. The 1st Respondent opposed the Petition and filed a Replying Affidavit sworn by Joseph Vincent Onyango the Chief Executive Officer of the 1st Respondent. It was deponed that the 1st Respondent executed its mandate as it 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 under the National Public Service Commission Act and Article 246(3) of the Constitution of Kenya. The 1st Respondent asserts that in order to achieve its Constitutional mandate it developed some regulations among them the National Police Service Commission (Discipline) Regulations 2015 and has always discharged its mandate and related functions with outmost fidelity to the Constitution of Kenya. The 1st Respondent asserts that even when it comes to disciplinary issues, it 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. The 1st Respondent argued that the discipline process is further guided by Chapter 30 of the Service Standing Orders duly issued by the Inspector General of the National Police Service and it was stated that the Petitioners were on duty within Mathira Area in Nyeri County when they intercepted a motor vehicle Reg. No. KBU 017U which was headed to Nairobi from Moyale. It was asserted that aboard the Mitsubishi Isuzu lorry were fifteen aliens of Ethiopian origin and 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 finally agreed upon. The 1st Respondent asserts that the money was received vide mobile phone and the Petitioners shared the bribe and released the vehicle upon the payment of the bribe. The 1st Respondent maintained that when the vehicle was later arrested at Makutano, the occupants were booked at Makutano Police Station and charged at Embu Law Courts. It was there that the driver and its occupants were found guilty and 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 3rd Petitioner was positively identified and subsequently the other Petitioners inculpated and all were interdicted from duty from 20th March 2017. It was averred that an inquiry file was opened and the recommendation made was that the Petitioners be charged in a court of law with the offences of aiding and abetting the escape of prisoners contrary to Section 124 of the Penal Code in addition to a charge of receiving a bribe. The 1st Respondent asserted 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 1st 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. It was stated that during the orderly room proceedings aforesaid, the Petitioners begged for forgiveness and upon the conclusion of the orderly room proceedings the same were forwarded to the Directorate of Criminal Investigations Headquarters for decision. The 1st Respondent maintained that was when it 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. The 1st Respondent argued that in order 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 also to the complainants as well. The 1st Respondent argued that consequently the second subordinate disciplinary committee was constituted and the Petitioners were issued with a waiver notice in accordance with Chapter 30 paragraph 15 of the Service Standing Orders, fresh orderly room proceedings 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 11th 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. It was argued that the action of the 1st Respondent was guided by Article 244 which required the Force to maintain a standard of integrity and observe due process. The 1st 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 1st Respondent argued that the first orderly room proceedings were forwarded to the command at Directorate of Criminal Investigation (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 1st 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. The 1st Respondent submitted that the Petitioners were not to be retired in the public interest as counsel for the Petitioners suggests. It was argued that there was no double jeopardy and that during the second disciplinary hearing there was new evidence and information that came out which was not present at the first disciplinary hearing.

3. The 1st Respondent submitted that the Director of Criminal Investigations recommended the Petitioners 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. The 1st Respondent submitted that the Petitioners were duly issued with show cause letters and subsequently notices of removal from the National Police Service. The 1st Respondent asserted that the Commission vide a meeting held 11th 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. The 1st Respondent relied on the case of **Jeremiah Gitau Kiereini v Capital Markets Authority and the Attorney General [2013] eKLR** where Majanja J. stated that the double jeopardy rule strictly applies to criminal offences and not disciplinary proceedings or proceedings of an administrative nature such as the one concerning the petitioner. In the case of **Republic v**

Public Service Commission of Kenya Ex parte James Nene Gachoka [2013] eKLR, in which the question was whether the Public Service Commission could commence disciplinary proceedings against an employee for gross misconduct or negligence upon acquittal by the Court of an offence related to employment and based on the same facts, the court stated as follows:

The prohibition contemplated by the provision is that of a person undergoing trial for the same offence for which he was tried, convicted or acquitted... The phrase tried for that offence or for any other criminal offence⁷ found in section 77(5) of the repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings. Disciplinary proceedings cannot be equated to a trial for an offence so as to attract the defence of double jeopardy doctrine. As such; disciplinary action professional or otherwise being of a civil nature is not a punishment given by a court.

4. The 1st Respondent relied on the case of **Daniel Ndung'u v Director of Public Prosecutions & Another [2013] eKLR** and submitted that in the above Jeremiah Kiereini case the judge added that *the fact that there were previous investigations did not preclude CAM from appointing the Committee to test the veracity of the issues emanating from the forensic report or affording the persons mentioned in the report an opportunity to respond to the allegations. Furthermore, the investigation by the CAM in these circumstances does not constitute harassment of the petitioner as it was carrying out its statutory mandate. What is important is that even where there have been previous investigations, the process adopted by CAM must be fair and whether such a process is fair depends on the circumstances of each case.* The 1st Respondent submitted that as held in the said case the proceedings before the Committee did not violate the principle against double jeopardy as the process was not a criminal trial and the petitioner was not the “accused” hence Article 50 of the Constitution could not apply in the circumstances. The 1st Respondent submitted that the purpose of disciplinary proceedings is not to punish but to protect the public, maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour that is expected of officers who are required to uphold the rule of law. It was submitted that the Petitioners were not subjected to double jeopardy as alleged as disciplinary proceedings are not criminal in nature and is not a punishment given by court but they are an administrative process which cannot attract the defense of the double jeopardy doctrine. On the question as to whether the Petitioners are entitled to the remedies sought, the 1st Respondent submitted that the Respondents did not in any way infringe on the Petitioners’ rights and or subjected them to double jeopardy and are thus not entitled to the orders sought. The 1st Respondent submitted that under Article 246(3) of the Constitution, the Commission has the mandate to exercise disciplinary control over and remove persons holding or acting in offices within the Service. This envisages the Commission having the responsibility to support the human resource management of the Service administratively while ensuring professionalism and discipline is maintained in the Service. It further submitted that Article 244 of the Constitution provides that the National Police Service shall strive for the highest standards of professionalism and discipline among its members, to prevent corruption and promote and practice transparency and accountability. The Service is also required to train staff to the highest possible standards of competence and integrity. The 1st Respondent submitted that the administrative proceedings carried out against the Petitioners was in fulfilment of the mandate of the Commission and the Service. The 1st Respondent thus sought that that the Petitioners case as against it be dismissed with costs for being meritless and an abuse of the court process.

5. The Petitioners before me argued that they were not afforded a hearing. They responded to the notice to show cause dated 6th November 2019 and upon responding to the notice to show cause did not receive any other communication. They assert they were not invited to a hearing but only received the letters that purported to dismiss 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 11th May 2018 and acquitted hence the plea of double jeopardy. 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 action by the employer violated Articles 41, 47 and 50(o) and fair labour practices as once a person is disciplined there should be no further disciplinary proceedings. The Petitioners are right about them not being subjected to multiple disciplinary hearings over the same matter. Having been acquitted of the charges and being fined and then proposed for removal from service seems to run counter to the Forces Standing Orders as the Orders do not contemplate a retrial over the same facts. Once the first tribunal discharged the Petitioners it was not open to re-charge them and punish them again. The Standing Orders no doubt provide for a slew of sanctions but these are to be imposed at once and not in successive retrials over the same facts. It would seem the second administrative tribunal was geared to achieve only one purpose which was to remove the officers from the service. Given the analysis above and in consideration of all the material before me, I find and hold as follows:

- a. A declaration do and is hereby issued that the removal letters dated 27th March 2020 are in breach of the Petitioners’ rights under Articles 41, 47 and 50 of the Constitution and the same are null and void for all intents and purposes.
- b. An order of *certiorari* do and is hereby issued to bring into this court the letter dated 27th March 2020 for quashing the same and reinstate the Petitioners if already removed from the service.
- c. An order do and is hereby issued prohibiting the Respondents from initiating any further disciplinary action against the petitioners based on the same facts.
- d. The parties to each bear their own costs for the Petitions as the employment relationship continues.

It is so ordered.

Dated and delivered at Nyeri this 16th day of July 2020

Nzioki wa Makau

JUDGE