



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 111 OF 2017

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER CHAPTER
ARTICLE 19, 20, 21, 22, 23, 31, 47, 48, 49, 50 OF THE CONSTITUTION OF KENYA AND**

IN THE MATTER OF AN APPLICATION BY PATRICK MUIRURI

**KAMAU, JOHN MWANIKI MUGO AND JAMAL BARE MOHAMED FOR AN ORDER OF STAY OF INTERDICTION,
CONSERVATORY ORDER AGAINST THE RESPONDENTS FROM DISMISSING THE APPLICANTS AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA CHAPTER ARTICLE 19, 20, 21, 23,31, 47, 48, 49, 50 AND THE
EMPLOYMENT ACT, NATIONAL POLICE ACT AND ALL OTHER ENABLING PROVISIONS BETWEEN**

PATRICK MUIRURI KAMAU.....1ST PETITIONER

JOHN MWANIKI MUGO.....2ND PETITIONER

JAMAL BARE MOHAMED.....3RD PETITIONER

AND

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

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE COUNTY COMMANDER MACHAKOS COUNTY...3RD RESPONDENT

THE OCPD MACHAKOS POLICE STATION.....4TH RESPONDENT

INSPECTOR NJOROGE.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners are all Police Officers. On 23.12.2017 they were arrested by their colleagues from Police Headquarters Nairobi on allegation of collecting bribes from public vehicles while performing traffic duties within Machakos township. Thereafter they were interdicted on half salary vide a signal sent by the 4th respondent on 24.12.2017. They were however aggrieved and brought this suit contending that the 4th Respondent did not have the legal mandate to interdict them and that they were denied hearing. They therefore prayed for the following reliefs:-

a. A declaration that the Petitioners' rights to a fair hearing have been violated by the Respondents.

b. A mandatory injunction be issued compelling the respondents to allow the applicants to report to work/station and access their offices/station as before and to continue working in the same capacity and rank as before without being victimized or being transferred.

- c. An order prohibiting, stopping and restraining the Petitioners from being arrest, victimized and prosecuted in any form or manner howsoever in connection to the facts and events leading to institution of this Petition.
- d. A declaration that the respondent's act of interdicting the petitioners was unfair, unreasonable and unprocedural and a further order nullifying the same.
- e. An order to reinstatement back to work of the petitioners in the station in which they were working and in the capacity in which they were working before without any demotions or transfers.
- f. An order for costs of the petition.
- g. Such other orders as this Honourable Court may deem fit to grant

2. The first respondent filed Grounds of Opposition contending that the said respondent has the mandate to interdict an officer pending disciplinary proceedings; that no appeal was lodged to her by the petitioners against the decision to interdict them; and that the petitioners have not indicated any violation of the law or their rights by her to warrant her joinder to the suit. She therefore prayed for the suit to be dismissed for being frivolous and abuse of the process of the court.

3. The rest of the respondents filed a replying affidavit through the 4th respondent Mr. Joseph Tenai sworn on 19.10.2018. He deposed that the petitioners are police officers stationed at Machakos Traffic Base.

He further deposed that following numerous complaints from members of the public against Traffic Police Officers demanding bribes along Machakos – Kangundo road, the Deputy Inspector General of Police organized an operation along the route on 23.12.2017 and the petitioners were arrested and handed over to him on allegations of demanding an collecting bribes from road users.

4. He further deposed that on 24.12.2017 he interdicted the petitioners on half pay pending inquiry into the said offence under paragraph 47(i) of the service standing orders (SSOs). He further deposed that he had the legal mandate to interdict the petitioners under Regulation 14 of the National Police Commission (Discipline) Regulations 2015 which allows the inspector of police or delegated officer of the rank of senior superintendent of police (SSP) to interdict an officer pending inquiry into the offence. He therefore denied that the interdiction was done ultra vires. He concluded by stating that the suit was prematurely brought because the petitioners are bound by the law and internal disciplinary process before going to court.

5. Contemporaneously with the petition, the petitioners filed the Notice of Motion dated 26.12.2017 seeking conservatory orders to stay the interdiction and reinstate them to their job but it was not granted. However on 28.12.2017, the court ordered status quo that is, interdiction to be maintained pending interpartes hearing of the

motion 4.1.2018 when it was extended till the interpartes hearing of the motion on 29.1.2018. However, on the said date, the application was adjourned until 27.2.2018 but the interim order was not extended. On 13.6.2018, the petitioners abandoned the Notice of Motion and the parties agreed to dispose of the petition by written submissions. The petitioners filed theirs on 7.9.2018 and the respondents filed on 22.10.2018.

Petitioner's Submission

6. The Petitioners submitted that the 4th Respondent's signal dated 24.12.2017 interdicting them from their duty was irregular, unlawful and unlawful. They further submitted that the 4th respondent has no power to discipline them or in any way attempt to change their employment status. They also submitted that it is only the 1st respondent, as the petitioners employed, who can discipline them and such power cannot be delegated to any other person without express notice. That under Article 246(3) of the constitution and section 10 of the NPS Act, it is only the 1st respondent who can appoint, promote and transfer persons within the National Police Service, and exercise disciplinary control over and remove person holding or acting in office within the service.

7. In addition to the foregoing, the petitioners submitted that the interdiction was premature unlawful and unconstitutional because

under section 62(1) of the Anti-Corruption and Ethics Act 2003, interdiction of a police officer can only be done after being charged with corruption or economic crime. They therefore prayed for the interdiction to be reversed because it was also done in breach of their right to fair administrative action as enshrined under Article 47 of the constitution. The Petitioner did not, refer to any judicial precedents.

Respondents' Submissions

8. The respondents submitted that the petitioners were lawfully interdicted by the 4th respondent on half pay on 24.12.2017 in accordance with Paragraph 47(i) of the SSOs after being arrested and handed over to him on allegation of soliciting and receiving bribes from motorists along Machakos-Kangundo road on 23.12.2017. They further urged that the 4th respondent has authority to interdict the petitioners and he never acted ultra vires. They contended that under the said paragraph 47(i) of the SSOs, the Inspector General of Police can interdict an officer pending the inquiry into a disciplinary offence if dismissal may follow conviction. That the power to interdict is delegated to the County or Formation commander not below the rank of an SSP.

9. The respondents further submitted that under Regulation 14 of the NPSC (Discipline) Regulations 2015, an office under investigation may be interdicted by the inspector General of Police or an authorized

officer to facilitate investigations. They submitted that the petitioners were lawfully subjected to Orderly Room proceedings by being served with a Notification on 26.12.2017 for corruption allegations and untidiness under paragraph 15(1) of the SSOs but they refused to acknowledge receipt.

10. The respondent submitted that under section 88 of the NPS Act, a police Officer in the service is subject to the laws and regulations in force relating to the service. They further submitted that paragraph (99) of the 8th schedule of the NPS Act, provides that corruption by a police officer is offence against the service. They further contended that they had the option of failing to charge the petitioners with criminal case and instead use administrative process to protect the service from delinquent employee behavior. They therefore contended that they the disciplinary process followed was lawful.

11. The respondent submitted that the suit herein is premature because it was brought before exhausting the internal disciplinary mechanism provided to them including appeal to the first Respondent if indeed they were aggrieved by the interdiction. They further maintained that the petitioners have not proved that their rights were contravened or that any law or the constitution were contravened by the interdiction. They cited many judicial authorities but non was presented to the court for perusal.

Analysis and Determination

12. There is no dispute that the petitioners were enlisted as police officers doing traffic duties at the Machakos Traffic Base. There is also no dispute that they were arrested and handed over to the 4th Respondent on allegation of corruption and untidiness on 23.12.2017. There is further no dispute that they were interdicted on half pay by the 4th respondent on 24.12.2017 for the said offense pending inquiry into their discipline. The issues for determination are:-

- (a) Whether the 4th respondent had the legal mandate to interdict the petitioners.
- (b) Whether the interdiction violated the petitioners rights under the law and the constitution.
- (c) Whether the reliefs sought should be granted.

Legal mandate to interdict

13. Paragraph 14 of the NPSC (Discipline) Regulations 2015, provides that:-

- (1) An officer under investigation, may be interdicted by the Inspector General or an authorized officer to facilitate investigation.*
- (2) An interdiction of an officer shall not mean removal from office.*
- (5) Where the officer is interdicted, the officer shall surrender his or her Certificate of Appointment to the Supervisor.*
- (8) An officer who has been interdicted from duty will be entitled to half salary as well as remain in the accommodation as provided to the officer.*

14. From the foregoing provisions of the regulations, it is clear that the interdiction of the petitioners was only a temporary corrective action pending disciplinary proceedings. The said interdiction fall, within the provisions of Regulation 2 of the said Regulations which defines corrective action as an immediate and temporary measure taken by an immediate supervisor against an officer in order to avert further commission of the offence or misconduct pending commencement of disciplinary processes. The immediate supervisor in my view includes the immediate commanding officer who under Regulation 2 of the said Regulation is defined as an officer who has powers of command over the accused officer. In view of the said definition, it is not difficult to deduce that, under paragraph 47(i) of the SSOs the 4th Respondent had the power to interdict the petitioners because, first he had powers to command them and his rank was Senior Superintendent of police.

Violation of Rights

15. The petitioners contended that their rights were violated by the interdiction because it was done by unqualified person, it was done prematurely before commencement of corruption charges, and finally because they were not accorded any prior hearing. The respondents have denied the alleged violations of the petitioners' rights and maintained that the petitioners have not proved the same.

16. I have carefully considered the rival submissions, affidavits and the petitioner. There is no doubt that the petitioner seek relieves for alleged violations of their constitutional rights as enshrined in the cited provisions of the constitution being Article 21, 22, 23, 31, 47, 48, 49 and 50. To being with, it is my finding that the petition is poorly pleaded and below the standard required of a constitutional case. It lacks particulars of the alleged violations of the cited provisions of the Bill of Rights in the constitution. All what the petitioners have done is to cite the provisions of the constitution violated and failed to give particulars of specific violation. As a result of the said poor pleading, the petition fell below the competence threshold established by *Anarita Karimi Njeru v Republic [1979]eKLR* it must fail. In the said case it was held that:-

“We would again stress that, if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

17. The foregoing threshold was followed by the Court of Appeal in *Mumo Materu Vs Trusted Society of Human Rights Alliance & 5 others [2013]eKLR* where it was held as follows:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are function of precise legal and factual claims.....”

The petition before referred to Articles 1,2,3,4,10,19,20, and 73 of the constitution in the title. However, the petition provided little or no particulars as to the allegations and the manner of the infringement. For example, in paragraph 2 of the petition, the first respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further paragraph 4 of the petition alleged that the Government of Kenya had overthrown the constitution, again without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect to the spirit of the constitution and rule of law, against without any particulars.”

18. In addition to the foregoing incompetence of the petition, the affidavit evidence filed by the petitioners fell short of proving the general statements of the alleged violations of their rights by the respondents. As already found herein above, the 4th respondent as Formation Commander Machakos Police Division with the rank of SSP he had the mandate to interdict the petitioners for the gross misconduct of corruption pending disciplinary Inquiry under the SSOs and the Nation Police Service Act and the relevant Regulations.

19. On the other hand the petitioners have not proved that they were entitled to a hearing before the interdiction under the law or regulations. They never cited any provisions of the law or Regulations or SSOs to support their allegation that a prior hearing was required before the interdiction. It is however undisputed fact that the 4th respondent served them with a Notice to Show Cause why they should not face disciplinary process as required by paragraph 15 (i) of the SSOs but they refused to acknowledge receipt. In my view, it is clear that the internal disciplinary mechanism was set in motion by the said notification and the interdiction and it is the petitioners who jumped ship. They abandoned their employer’s disciplinary process and prematurely brought this suit to insulate themselves from the process.

20. As regards the petitioners’ contention that the interdiction was premature, I am of a different view. First they have not produced any evidence or cited any law to prove that interdiction of an officer can only be done after being charged with corruption offences under the ACEC Act. It is trite that an employer in the public service can interdict or suspend its employee pending disciplinary process or trial of Criminal case. In this case, the National Police Service Act, Regulations and SSOs form part of the contract between the petitioners and the Respondents. As already observed above, the Inspector General of Police or authorized person or supervisor or county or Formation Commander, has the power to interdict an officer pending Inquiry into his discipline. The petitioner were interdicted after being arrested and presented to the 4th Respondent for alleged corruption and untidiness. As already held herein above, the interdiction came after the disciplinary process was set in motion. Consequently I agree with the defence that the interdiction was not premature, and this petition lacks merits.

Reliefs

21. Due to the failure to meet the competence threshold for a constitutional reference I decline to grant the reliefs sought.

Conclusion and disposition

22. I have found that the 4th Respondent has the legal mandate to interdict the petitioners pending Inquiry into their discipline. I have further found that the petition has not met the competence threshold and is bereft of merits because the alleged violations of the rights under the constitution have not been pleaded with precision setting out the particulars thereof.

Consequently I dismiss the petition with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March 2019

ONESMUS N. MAKAU

JUDGE