



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 122 OF 2018**

**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 OR  
FUNDAMENTAL FREEDOMS UNDER ARTICLE 10, 19(1), 27, 41, 43,  
47, 232, 246, AND 249 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE NATIONAL POLICE SERVICE COMMISSION ACT**

**AND**

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

**BETWEEN**

**EVANS MURIUKI MUTHURI.....1<sup>ST</sup> PETITIONER**

**ODIKARA OLING'A RUTH.....2<sup>ND</sup> PETITIONER**

**DAVID OCHOM.....3<sup>RD</sup> PETITIONER**

**LINET WANDIA NJAGI.....4<sup>TH</sup> PETITIONER**

**GEORGE BARASA.....5<sup>TH</sup> PETITIONER**

**- VERSUS -**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> May, 2019)

**JUDGMENT**

The petitioners filed the petition on 08.11.2018 through Musyoka Murambi & Associates Advocates. They prayed for judgment against the respondents 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 Officers' rights under Articles 27, 28, 40, 41, 43 and 47 of the Constitution of Kenya, 2010.
- b) A declaration do issue that Graduate Police Officers who are University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J have been discriminated against.
- c) An order of Mandamus do issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay all graduate constables Job Group J salaries with effect from date of respective graduation or enlistment to the service.
- d) Costs of the petition.

The petition was based on the attached supporting affidavit of David Ochom and exhibits thereto.

The petitioners (except the 5<sup>th</sup> petitioner) are Police Constables serving in the Administration Police Service (APS) or the Kenya Police Service (KPS) respectively. The 1<sup>st</sup> petitioner was recruited in the APS on 29.04.2016 and holds the Bachelor of Arts Degree in Economics and History from the Egerton University conferred on 04.12.2015. The 2<sup>nd</sup> petitioner was recruited on 12.01.2013 and while in the service of the KPS she enrolled for the Bachelor of Arts Degree in Criminology and Security Studies from Egerton University and was conferred the degree on 08.12.2017. The 3<sup>rd</sup> petitioner joined the APS on 29.04.2016 at a time he had completed studies for award of the Bachelor of Arts with Education - Secondary at Bugema University and was conferred the degree on 12.11.2017. The 4<sup>th</sup> petitioner is a graduate Police Constable who joined the APS on 11.09.2007. She enrolled for degree studies while in service and was conferred on 15.07.2016 the Bachelor of Arts Degree in Security Studies and Criminology from Mount Kenya University.

The petitioners (except the 5<sup>th</sup> petitioner) serve as police officers in the National Police Service at the rank of constable. Their case is that ordinary police constables serve at the rank in Job Group F while graduate police constables (meaning those who hold degree certificates) serve at pay Job Group J in the pay structure maintained by the 1<sup>st</sup> respondent. Further upon graduating the constables submit the degree certificates to the 1<sup>st</sup> and 2<sup>nd</sup> respondents to update the records and accordingly adjust their respective Job Group to J. Further the petitioners and other graduate constables have duly submitted their degree certificates to the 1<sup>st</sup> and 2<sup>nd</sup> respondents for upgrading to Job Group J. Such upgrading policy was implemented effective 01.01.1969 and on 26.07.1995 the Commissioner of Police received approval from the Permanent Secretary, Directorate of Personnel Management to consider and accordingly remunerate graduate police constables in the service at Job Group J. Further the 1<sup>st</sup> respondent's press statement on 19.03.2018 confirmed that payment of special salaries (Job Group J) to graduate police officers in the National Police Service was legally protected and was provided for in the service policy guidelines.

The petitioners' case is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been receiving degree certificates from graduate police officers in the service but have selectively and capriciously upgraded some and not others to pay Job Group J. Thus it is their case that conferring officers with degree certificates different pay Job Groups amounts to contravention of Articles 27 against discrimination, 41(1) on fair remuneration and working conditions, 43 on protection of petitioners' social security, 47 on fair administrative action, as well as the violation of values and principles in Articles 10 and 232.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit of No. 231313 George Kirigwi, SSP, currently, the Staffing Officer Directorate of Human Capital Development in the National Police Service. Their case is that the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and the National Police Service Career Progression Guidelines, 2016 do not provide for the rank of Graduate Constables and all officers are recruited to the rank of Police Constable as per the exhibited advertisements. Further the National Police Service Career Progression Guidelines, 2016 provide for minimum qualifications for every rank in the service. Further the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case was that the petitioners were misconceived and misdirected to rely on the letter DPM/1/1/10A.VOL.IV/(26) dated 26.07.1995 signed by Gaylord Avedi, EBS, Permanent Secretary, Directorate of Personnel. The letter noted that the Commissioner of police had established a programme for University Graduates being recruited into the Police Force and further noted that the aim of the programme was to provide the graduates with intensive training before placing them in the supervisory position and that within a period of three years the officers are adequately trained for appointment as Inspectors of Police. The letter further noted that in order to remunerate the officers appropriately, the Commissioner of Police had suggested that the officers, for purposes of differentiating them from ordinary constables, they be designated University Graduate Constables and be allowed to be paid at Job Group J in view of their academic qualifications. In that regard the Permanent Secretary had no objection to the officers being designated as such provided they retain the salary at Job Group J since that will eventually be beneficial to both the officers and the Police Force in terms of performance. The letter concluded, "**4. In order to facilitate this arrangement, I have instructed my officers to provide the Police Department with appropriate designation code, on the above lines.**" It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case that the letter cannot be validly invoked by the petitioners and it does not apply because the letter was to apply and benefit university graduates recruited as constables and then placed under intensive training. It did not apply to officers who were recruited as constables and then acquired degree certificates once already in the service. Further the letter was annulled when the National Police Service Act and the National Police Service Commission Act were enacted and particularly after the promulgation of the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and, the National Police Service Commission (Promotion) Regulations, 2015. Further the National Police Service Career Progression Guidelines, 2016 provide for a clear career progression process with clear entry levels and promotion from one rank to the next. Thus, it is the case for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the petition is deficient and discloses no justifiable cause to warrant the intervention by the Honourable Court and the same should be dismissed with costs.

The 1<sup>st</sup> respondent filed on 20.12.2018 the replying affidavit of its Secretary and Chief Executive Officer one Joseph Vincent Onyango. The 1<sup>st</sup> respondent's case is that under Article 246 of the Constitution of Kenya, 2010 it performs the functions of recruiting and appointing

persons to hold or act in offices in the National Police Service and to confirm appointments, determine promotions, transfers and observe due process in exercising disciplinary control over and removal of persons from the Service. The 1<sup>st</sup> respondent also performs any other function as may be prescribed by legislation. The 1<sup>st</sup> respondent became operational on 05.10.2012 when commissioners were appointed by gazette notice No. 95 of 03.10.2012. Recruitment into the Service and promotions are governed by the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and, the National Police Service Commission (Promotion) Regulations, 2015. The regulations are made under the National Police Service Commission Act, 2011. Further, the National Police Service Career Progression Guidelines, 2016 prescribe clear entry ranks and progression in the Service. The 1<sup>st</sup> respondent's case is that the petition is not anchored upon the prevailing law and regulations governing recruitment, appointment and promotions in the service and the letter DPM/1/10A/VOL.IV/26 dated 26.01.1995 had been overtaken with events. The National Police Service Act, 2011 provides in the 1<sup>st</sup> schedule for the ranks in the Service and the regulations as promulgated by the 1<sup>st</sup> respondent guide the recruitment and appointments and promotions in the Service. There is no rank known as graduate constable after promulgation of the prevailing regulations and career guidelines. The 1<sup>st</sup> respondent's further case is that it has not approved or emplaced any officer on the rank of graduate constable. The 1<sup>st</sup> respondent has further stated at paragraph 25 of the replying affidavit thus, **"25. That the Commission asserts that if there is any officer recruited after its inception and the development of the existing regulations on recruitment and promotions who is being designated as a graduate constable then the same is not pursuant to the approval of the Commission as envisaged in the promotions regulations 2015. Such an action is thus null and void to that extent and no one can claim to benefit from an illegality just because others have been benefiting. Contrarily, the law expects that corrective action be taken pursuant to the existing laws to avert the continuing illegality."**

The Court has considered the parties' respective cases, submissions and the material on record. The Court makes the following findings on the matters in dispute.

**First**, the Court has considered the payslips for officers designated as graduate constables and exhibited by the petitioners. The pay slip for March 2016 for 2006027521 for Mr. Joash Rotich Koriese designates him as Constable at total earnings of Kshs.35, 310.00. The same officer's pay slip for April 2016 designates him as Graduate Police Constable at total earnings of Kshs.100, 368.70. The same officer's payslip for October 2018 designates him as Graduate Police Constable at a total earning of Kshs.64, 350.00. The same unexplained variance in pay for the other pay slips exhibited is apparent. On the basis of those pay slips, the Court returns that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have continued to emplace officers to pay designation of Graduate Constables and as submitted for the petitioners, the emplacement has disadvantaged the petitioners in that regard. It is clear that the emplacement on the Graduate Constable pay scale has continued to be undertaken long after the promulgation of the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and, the National Police Service Commission (Promotion) Regulations, 2015. To that extent the Court returns that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted unreasonably in contravention of Articles 47, and further subjected the petitioners to unfair labour practices and unfair conditions of service in contravention of Article 41 of the Constitution. The respondents have not established any justifiable reason for the discriminate application of the emplacement of graduate constables to the preferential pay group. While mentioning the degree qualification, the same is retained as a general consideration in the National Police Service Career Progression Guidelines, 2016 and it has not been explained how some of the officers were emplaced upon the graduate constable pay group while the guidelines were already in place. The pay slip for 2003023528 Mr. Patrick O Oyongo shows no designation but there is no reason to doubt that he was emplaced on such pay group with total earnings of Kshs. 102, 035.45 as at April 2015. The Court returns that such unexplained discrepancies in the exhibited pay slips show arbitrary application of the pay job group.

**Second**, the Court has considered the petitioner's case that the letter DPM/1/10A/VOL.IV/26 dated 26.01.1995 had continued to apply whereas the respondents say it had been overtaken by events. The petitioners have relied on the press statement by the 1<sup>st</sup> respondent's Chairperson Johnstone M. Kavuludi dated 19.03.2018. In that statement the 1<sup>st</sup> respondent clarified as follows:

- 1) Payment of special salaries to graduate constables in the National Police Service is legally protected and provided for in the Commission's policy guidelines.
- 2) For officers to qualify for the payment in the category the officers must present their degree certificates to the Inspector General, the Deputy Inspectors General and the Director of Criminal Investigation respectively for processing and submission to the Commission for consideration and authentication.
- 3) The officers whose certificates meet the approval of the Commission in accordance with the guidelines are granted a special salary equivalent to the entitlement of an Inspector of Police.
- 4)The Inspector General in consultation with the Commission, if satisfied that the officers selected in the category meet standards required for entry into the rank of Inspector avails opportunity to the officers to proceed for training as Inspectors when vacancies are available.

The statement stated that the Commission had noted that there had emerged a number of irregularities in the payroll whereby some officers without the authorization of the Inspector General and approval of the Commission had been introduced into the payroll as graduate constables. Thus, the statement continued that the Commission had decided that the payroll be cleansed through an audit to identify, isolate and remove those officers who don't qualify for such payments and the Commission confirmed that the audit would be fast tracked. The statement concluded, **"In the meantime, following consultations with the Ministry of Interior and the Inspector General it has been decided that in order to ensure that officers meet their prearranged financial commitments, measures be taken for their salaries to be reflected in the March 2018 payroll. The affected officers have been advised to submit to the Commission through the Inspector General, their Degree Certificates, Transcripts and Testimonial for verification processing and approval."**

The Court has revisited the replying affidavits and nowhere do the respondents deny or respond to paragraph 32 of the supporting affidavit thus, **"32. That on 19 March 2018, the 1<sup>st</sup> Respondent's Chairman issued a press release in which he unequivocally confirmed that payment of special salaries (Job Group J salaries) to graduate police constables in the National Police Service was legally protected**

**and provided for in Service Policy Guidelines. Annexed hereto and marked DM7 is a true copy of the press release.**” Accordingly the Court returns that the press statement, on a balance of probabilities, sets out the 1<sup>st</sup> respondent’s prevailing policy on the graduate constables and the petitioners are entitled to benefit from the policy accordingly. The statement confirms that the National Police Service Career Progression Guidelines, 2016; the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 and, the National Police Service Commission (Promotion) Regulations, 2015 did not render the emplacement of constables being holders of degree certificates to pay level as that of Inspectors of police with the obligation on the Service to subsequently train them towards substantive promotion to the rank of Inspector of Police Job Group J. The 1<sup>st</sup> respondent’s policies in that regard are substantially similar to the policy as conveyed in the letter DPM/1/1/10A/VOL.IV/26 dated 26.01.1995 with apparent variation that it applies to all constables whether the degree is acquired before or after joining the Service. The Court finds accordingly.

**Third**, the Court returns that the petitioners have established a legitimate expectation that constables holding degree certificates are to be emplaced upon the pay level for an Inspector of Police (Job Group J) and second, to be facilitated training by the Service or the Inspector General towards effective preparation and subsequent promotion to the substantive position of Inspector of Police. Thus, as submitted for the petitioners per the **Halsbury’s Laws of England, 4<sup>th</sup> Edition, 2001 Re-issue** at page 212 paragraph 92 quoted by the High Court in **Kalpana H. Rawal –Versus- Judicial Service Commission & 4 Others [2015]eKLR**, thus, **“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.”** In the instant case the petitioners have established a consistent past practice and confirmed in the press statement by the 1<sup>st</sup> respondent’s Chairman that the policy exists and applies. Further as submitted for the petitioners, the petitioners have satisfied the preconditions for legitimate expectation as stated in the foregoing and cited case namely:

- a) there must be an express, clear and unambiguous promise given by a public authority;
- b) the expectation itself must be reasonable;
- c) the representation must be one which it was competent and lawful for the decision maker to make; and
- d) there cannot be a legitimate expectation against clear provisions of the law or the constitution.

The Court returns that the emplacement of constables holding degree certificates to a graduate constable pay level equivalent to that of an Inspector of Police is a clear promise by the government in the 1995 letter and confirmed by the 1<sup>st</sup> respondent’s press statement, the expectation is reasonable as is consistent with motivation of officers and in the best interest of the Service that constables acquire further and relevant knowledge; the 1<sup>st</sup> respondent was the competent constitutional and statutory authority to make and implement the promise; and the promise for such emplacement has not been shown to contravene any statutory or constitutional provision. The petitioner’s case is clear that constables holding the degree certificate be emplaced on the promised pay level and the same cannot be construed as undermining any of the regulations and guidelines as relied upon by the respondents. In any event, the policy being a decision by the 1<sup>st</sup> respondent as confirmed in the Chairman’s press statement, it stands on equal footing as the guidelines and the regulations which are all essentially promulgations by the same 1<sup>st</sup> respondent. Further, nowhere have the regulations or guidelines provided for payment or pay in specific circumstances and the Court finds that it was misconceived for the respondents to submit that the emplacement on the special pay level for constables holding a degree certificate had been overtaken by the regulations or guidelines. The Court further returns that the 1<sup>st</sup> respondent within its constitutional and statutory powers and functions was authorised to and can emplace an officer on such pay level as would be lawful, necessary, and the same being personal to the officer or a category of officers as the circumstances of individual cases would warrant such emplacement.

**Fourth**, the Court returns that except for violations of Article 47 on unreasonableness in the manner some of the officers have been awarded or denied the graduate constable pay level and the violation of Article 41 on fair labour practice and fair remuneration and working conditions, as submitted for the respondents, the petitioners failed to establish the alleged violation of the other cited constitutional provisions. In particular the petitioners did not place before the Court material and submissions to establish violation of Articles 27, 28, 40, and 43 of the Constitution and in terms of the submissions filed for 2<sup>nd</sup> and 3<sup>rd</sup> respondents accordingly. While making that finding the Court considers that discrimination on account of the grounds listed in Article 27(4) of the Constitution was not established in that regard. The Court returns that in such circumstances the established violations were limited to provisions of Articles 47 and 41(1) and (2) (a) and (b) of the Constitution. Further, the prayers sought will succeed but limited to implementation in accordance with the 1<sup>st</sup> respondent’s prevailing policy and procedure of emplacing constable graduates to salary equivalent to that of Inspector of Police, Job Group J.

Further the Court returns that the petition was about application of the pay level for graduate constables as already approved and applied in the Service. Thus the Court finds that it was misconceived for the 1<sup>st</sup> respondent to invoke **Teachers Service Commission- Versus- Kenya Union of Teachers (KNUT) & 3 Others [2015]eKLR**, where the Court of Appeal held that the Salaries and Remuneration Commission’s advisory was mandatory in that case where the teachers’ new salaries had to be set or determined.

In conclusion, judgment is hereby entered for the petitioners against the respondents for:

- a) The declaration that the respondents’ conduct and action amounts to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Officers’ rights under Articles 41(1) and (2) (a) and (b), and 47 of the Constitution of Kenya, 2010.
- b) The declaration that Graduate Police Officers who are University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J are entitled to be emplaced to pay scale of graduate constables equivalent to pay

of an Inspector of Police Job Group J and as per the prevailing 1<sup>st</sup> respondent's policy as clarified in the press release by the Chairperson on 19.03.2018.

c) The order of Mandamus is hereby issued directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay all graduate constables salaries equivalent to pay of an Inspector of Police Job Group J and as per the prevailing 1<sup>st</sup> respondent's policy as clarified in the press release by the Chairperson on 19.03.2018.

d) The respondent to pay the costs of the petition for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners.

**Signed, dated and delivered in court at Nairobi this Friday 17<sup>th</sup> May, 2019.**

**BYRAM ONGAYA**

**JUDGE**