



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

JUDICIAL REVIEW NUMBER 1 OF 2016

IN THE MATTER OF: AN APPLICATION BY JOEL ATUTI NYAKANGO AND BARNABA KIMELI RUTTO FOR LEAVE TO APPLY FOR ORDERS OF CERTIO -RARI AND PROHIBITION

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE COMMISSION ACT AND THE SERVICE STANDING ORDERS AND THE REGULATION MADE UNDER THE ABOVE

AND

IN THE MATTER OF: THE DISCIPLINARY COMMITTEE PROCEEDINGS AGAINST JOEL ATUTI NYAKANGO AND BARNABA KIMELI RUTTO

BETWEEN

REPUBLIC

VERSUS

1. THE NATIONAL POLICE SERVICE COMMISSION

2. THE NATIONAL POLICE SERVICE

3. THE INSPECTOR GENERAL OF POLICE

4. FRANCIS MWANGI, REGIONAL POLICE COMMANDER, COAST REGION ... RESPONDENTS

EX- PARTE

1. JOEL ATUTI NYAKANGO

2. BARNABA KIMELI RUTTO APPLICANTS

Rika J

Magolo & Company Advocates for the Applicants

Paul Ojwang' Litigation Counsel for the 1st Respondent

Ruth C. Lutta, Senior State Counsel for the 2nd, 3rd & 4th Respondents

JUDGMENT

Rule 28 [1] [a], EMPLOYMENT & LABOUR RELATIONS COURT RULES 2016

Background

1. The 2 *ex-parte* Applicants were employed as Traffic Officers, stationed at Makupa Police Station within the County of Mombasa. The 1st Applicant served for 13 years, the 2nd for 16 years. They were assigned night patrol duty by their Station Head, on 10th January 2016. While on duty, at Saba Saba area of Mvita Sub-County, they state they spotted a Matatu registration number KAU 023 Z, parked and picking passengers along the road, thereby obstructing other traffic.

2. The 2 Police Officers attempted to arrest the Matatu Driver. The Matatu Driver resisted arrest, and attempted to drive away. The Police Officers, driving a Police Vehicle, Ford Ranger registration GKB 234 H, gave a chase, blocked the Matatu and arrested its crew, comprising the Driver and a Conductor.

3. While the Police Officers were executing their duty, unbeknown to them, the President of Kenya, his Excellency Uhuru Kenyatta, accompanied by the First Lady, were on their way from Moi Airport Mombasa, heading towards Nyali. When the President reached Saba Saba area, it is said the 2 Police Officers blocked his motorcade with their Ford Ranger. Worse for the 2 Officers, it is said they were seen by the Presidential team, receiving a bribe from the Matatu Crew subject matter of their arrest.

4. The 2 Police Officers were promptly arrested and charged under Police Orderly Room Proceedings, with the offences of Negligence in Performance of Duty, Contrary to 8th Schedule (Section 88 (2) Sub-Regulation 1 (t) of the National Police Service Act 2011; and Committing an act which amounts to corruption under any Law in Force in Kenya, contrary to the 8th Schedule (Section 88 [2] Sub-Regulation 1 (a) of the National Police Service Act 2011.

5. They were both heard between 11th January 2016 and 15th January 2016. They were in custody throughout the hearing. Hearing in the case of the 2nd Applicant, Joel Atuti Nyakango was presided over by ASSP Geoffrey Walumbe. Walumbe concluded there was no evidence to support the 2nd Count relating to corruption. He found the 2nd Applicant guilty on Court 1, with respect to negligence in performance of duty. Walumbe then forwarded the file to the County Police Commander for 'decision and sentencing' stating that the circumstances in which the offence was committed, needed the advice of the County Police Commander.

6. The 1st Applicant, Barnaba Kimeli Rutto appeared before SP Zacchaeus Ng'eno. There was a 'Judgment' against the 1st Applicant, which was quite brief, and made in rather ambiguous language. SP Zacchaeus Ng'eno found the 1st Applicant guilty as charged. This would mean unlike the 2nd Applicant, the 1st Applicant was found guilty of the offence of corruption. The Presiding Officer, unlike his Colleague in the case of the 2nd Applicant, is not shown to have referred the 1st Applicant's case file to the County Police Commander for 'decision and sentencing.'

7. After the Police Orderly Room Proceedings, the Coast Regional Police Commander Francis W.

Mwangi wrote to both Applicants, advising them that they had been dismissed from Police Service with loss of all benefits, with effect from 15th January 2016. It is not clear from the record if the Coast Regional Police Commander, was acting on behalf of the Mombasa County Police Commander in the case of the 2nd Applicant, whose file had been forwarded to the Mombasa County Police Commander at the close of the Police Orderly Room Proceedings for ‘decision and sentencing.’

8. Coast Regional Police Commander’s letter to the 2nd Applicant told the 2nd Applicant, the 2nd Applicant was lucky, to have been acquitted of the offence of corruption. “ *However, you were lucky to have been acquitted of Count 2, in that despite the Witnesses including Civilians who saw you receiving money, they sympathized with you and opted not to vividly mention it for they were afraid you might be charged in Court for this more aggravated offence [sic] ... Remember your action could have resulted into a national disaster if the Driver of his Excellency the President was not keen enough.*” The Applicants were advised they could lodge Appeal to the Deputy Inspector General of Police, against the decision of the Regional Police Commander, within 7 days of receiving the dismissal decision. They appealed, which brought into the picture the 1st, 2nd and 3rd Respondents.

9. The 1st Respondent received the dismissal letter addressed to the Applicants by Francis W. Mwangi, Regional Police Commander. On 22nd January 2016, the 1st Respondent wrote to the Inspector General advising that:-

- a. Article 246 [3] of the Constitution of Kenya, mandates the Commission to have disciplinary control over Police Officers.
- b. Section 89 [6] of the National Police Service Act, provides that disciplinary sanctions under subsection [1] [e] and [f] only take effect after approval and confirmation by the Commission.
- c. The Coast Regional Police Commander acted *ultra vires* and the purported dismissal cannot stand.
- d. The Inspector General was advised therefore, to ask Coast Regional Police Commander to make recommendations to the Inspector General, and if satisfied, the Inspector General to submit to the Commission for Commission’s determination.

10. The Inspector General wrote to the Commission on 26th January 2016 forwarding the Police Orderly Room Proceedings, and giving case summaries. It is not clear if the matter was reverted to the Coast Regional Police Commander as advised by the Commission; instead, it was the Inspector General, now engaging directly with the Commission. Interestingly, the letter from the Inspector General alleges that the 2nd Applicant was seen by the President of the Republic of Kenya, receiving a bribe from a Matatu Driver, while in the presence of the 1st Applicant. It is further revealed that H.E. the President, informed his Escort Commander, and directed action be taken against the 2 Police Officers. The letter states also that the 2 Police Officers were found guilty and convicted accordingly. It is not stated that the 2nd Applicant, who is alleged to have been seen by H.E. the President receiving a bribe, was acquitted of the charge of bribery in the Police Orderly Room Proceedings. The Inspector General recommended that the 2 Police Officers are dismissed from Service, in accordance with Section 89 [1] [f] of the National Police Service Commission Act, as read together with the Disciplinary Regulations 2015

11. Having received the Inspector General’s letter, the Commission wrote to the Inspector General on 8th February 2016, stating that the 2 Police Officers obstructed the Presidential Motorcade, by parking their patrol car in the middle of Saba Saba – Nyalali Road, on 10th January 2016. It was stated the 1st Respondent’s Board met on 28th January 2016, and determined the Applicants are dismissed from Police Service. The Commission gave obstruction of the Presidential Motorcade, in the letter dated 8th February 2016, as its sole reason for dismissing the Applicants. Nothing was said of corruption.

12. It is against this background that the Applicants apply for Orders:-

a. The Honourable Court be pleased to direct by an Order of Certiorari, that the decision of the 4th Respondent, namely Francis W. Mwangi dated 15th January 2016, be removed into this Court for quashing, and to proceed to direct that the same decision is quashed.

b. The Honourable Court be pleased to Order and direct that an Order of Prohibition, prohibiting the Respondents, by themselves and any of their agents from instituting, commencing or in any manner attempting to commence disciplinary proceedings against the Applicants with regard to the incident of 11th January 2016 be issued.

[Court notes correct date as per documents on record, is 10th January 2016. The Applicants in their Supporting Affidavits state the incident occurred on 10th January 2016. The Defaulter Sheets state it was on 10th January 2016. The date given in the Notice of Motion, 11th January 2016, is erroneous. It is ordered the date of the incident stated in the Notice of Motion is amended to read 10th January 2016, in the place of 11th January 2016]

13. The Respondents filed their Replying Affidavits, Grounds of Opposition and Submissions on various dates. The principal Replying Affidavit was sworn by 1st Respondent's Chairman Johnston Kavuludi, on 7th March 2016. Parties' Counsel submitted on the Substantive Application for Judicial Review, on the 17th November 2016.

Applicants' Submissions

14. The Applicants submit they sought leave of the Court before pursuing the substantive Orders. They properly invoked the jurisdiction of the Court. Facts are largely not in dispute. The Applicants were Police Traffic Officers. They were on duty on 10th January 2016 as summarized above. They were arrested while on duty, after they were alleged to have obstructed the Presidential Motorcade, and taken a bribe from Matatu crew. They were taken through disciplinary proceedings and dismissed from Service.

15. They submit proceedings leading to their dismissal were illegal. They were not allowed to defend. The outcome was itself illegal.

16. It is submitted for the Respondents that the Commission rescinded the decision of the Coast Regional Police Commander, and directed proceedings to be re-done. A rerun of the proceedings, the Applicants submit would not cure the initial proceedings and outcome.

17. 1st Applicant's Supporting Affidavit contains an extract of the Police Occurrence Book from 10th January 2016. They were to be charged with the offences of obstruction and receiving bribe. The Matatu Driver was to be charged with bribing. The Driver was never charged, because it was confirmed he did not offer the Applicants any bribe.

18. The Applicants were taken through Police Orderly Room Proceedings. They were in custody throughout. The proceedings should have been conducted as any other criminal trial is conducted, before the Magistrate's Court. Article 50 of the Constitution of Kenya on fair hearing, was violated. How were the Applicants to prepare and conduct their cases, while in custody?

19. Charges were altered. Initially the Applicants were told they would be charged with soliciting bribe and blocking Presidential Motorcade. They were charged with negligence in the performance of duty.

20. The Police Orderly Room Proceedings were presided over by individual Police Officers. The National Police Service Commission [Discipline] Regulations, 2015, state Subordinate Disciplinary Committee is made up of a Presiding Officer, an Assistant Presiding Officer, and an Officer appointed by the immediate Commanding Officer. No such Committee was convened. There were no valid proceedings.

21. At the end of the trial, the Presiding Officer decided the offences called for more serious discussion.

He forwarded the file to another Officer who sacked the Applicants. The sacking Officer did not hear the Applicants.

22. The Commission concedes the Officers who sacked the Applicants initially, did not have authority to do so. The Commission, sitting in Nairobi, directed a rerun of the process, then in the end sacked the Applicants. It was not possible to cure the default in the first process, by directing a rerun. The *ultra vires* decision was not curable.

23. The Applicants were not made aware of the proceedings in Nairobi. Even if Nairobi had lawful authority to act against errant Police Officers, such authority could not be exercised lawfully, without involving the Applicants. They were not involved and the Commission's decision, whichever way one looks at it, cannot stand.

24. The Applicants appealed the initial decision on 19th January 2016. The 1st Respondent wrote on 22nd February 2016, stating the first decision was illegal. The Appeal therefore became redundant. It has no effect on the Application for Judicial Review. It is inconsequential. The decision of the Commission of February 2016 cannot stand. If the earlier proceedings were defective, subsequent decision arising from such proceedings cannot stand. The Applicants submit they are not merely complaining about the rank of the Presiding Officers; they complain about the constitution of the disciplinary organ.

1st Respondent's Submissions

25. The 1st Respondent submits the Applicants were granted a fair hearing. Where a Police Officer is alleged to have committed an offence, a Disciplinary Committee is convened. The SP presided. The Coast Police Regional Commander became involved because the offence was 'higher.' He dismissed the Applicants without looking at the law.

26. The letter of dismissal was copied to the Commission. The Commission realized dismissal was done without following the law. It rescinded the decision. This is clear in the Reply filed by the 1st Respondent. After rescinding the decision, the Commission was informed the Applicants were subjected to fresh disciplinary proceedings. The Commission's Board met on 28th February 2016, and determined to dismiss the Applicants.

27. The 1st Respondent submits the Applicants were found to have blocked the Presidential Motorcade, endangering the life of H.E. the President.

28. There was an allegation the Applicants were seen taking a bribe. The law allows the Commission to take administrative action.

29. The Applicants lodged an Appeal against dismissal in January 2016. That Appeal has not been determined. Their Application for Judicial Review is therefore premature. Where a Body is given a mandate in dealing with grievances and disputes internally, the internal procedure must be exhausted. The Court cannot interfere with the authority of quasi-judicial Bodies. It was stated in the ***Court of Appeal of Kenya, Civil Appeal between Speaker of National Assembly v. Njenga Karume [2008] 1 KLR 425*** that, where there is a clear procedure for redress of any particular grievance prescribed by the Constitution, or by an Act of Parliament, that procedure should be strictly followed

30. The Application is frivolous within the meaning of the ***High Court Case Trust Bank Limited v. Amin & Company Limited & Another [2000] KLR 164***. An action is frivolous when it is without substance, is fanciful, vexatious or lacking in *bona fides*. The process of the Court must be used properly, honestly and in good faith. These principles apply to the current Application. The Court has an obligation to prevent improper use of the remedy of judicial review as held in ***Nairobi H.C.C.C. Number 363 of 2009 between Stephen Somek Takwenyi & Another v. David Mbutia Githare & 2 Others***.

31. It is submitted for the 1st Respondent that the Applicants did not file a copy of the decision of the 1st

Respondent Commission. Their Application does not conform to Order 53 Rule 7 [1] of the Civil Procedure Rules, which requires the decision sought to be quashed, is filed with the Court. The Applicants only attached the decision which was rescinded by the Commission. In **Nairobi Miscellaneous Application Number 4 of 2011, R v. Land Disputes Tribunal, Kajiado North, ex parte Racheal Gathoni Mbai & Another**, it was ruled that Courts do not act on assumptions. It was necessary for the Applicants to bring the decision of the Commission before the Court. In case an *ex parte* Applicant is unable to obtain the decision sought to be quashed, he should satisfy the Court on his failure through an Affidavit. The Court must be certain that the decision exists.

32. Section 49[4] of the National Police Service Act requires Police Officers to perform their roles in a manner that is lawful. Section 49 [10] demands Police Officers respect the Law, Regulations and Service Standing Orders, and to the best of their ability, oppose any violations of these laws. The Commission is mandated under Article 246 [3] [b] of the Constitution, to observe due process and exercise disciplinary control over Police Officers.

33. The 1st Respondent acted constitutionally in rescinding the decision of the Coast Regional Police Commander, and subsequently, in dismissing the Applicants from Police Service.

34. In order to succeed in an Application for Judicial Review, it was the decision of the Court in **Pastoli v. Kabale District Local Government Council & Others [2008] 2 E.A. 300**, that an Applicant must show the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. It is wrong for the Applicants to say their removal was irrational, improper or illegal.

35. Judicial Review is concerned with the decision making process, not the merits of the decision itself. The Court of Appeal of Kenya sitting in Mombasa restated this position in **CA Civil Appeal Number 185 of 2001, Municipal Council of Mombasa v Republic & Umoja Consultants Limited**, guiding that:-

- The Court would concern itself with such issues as to whether the decision-makers had jurisdiction.
- Whether the Persons affected by the decision were heard before the decision was made.
- Whether the decision maker took into account irrelevant matters, or failed to take into account relevant matters.
- The Court should not act as a Court of Appeal, going into merits of the decision by examining if, for example, the decision was founded on sufficient evidence.

36. Fair hearing was observed. Procedural fairness as observed in **Nairobi H.C Petition Number 337 of 2013 Joseph Mbalu Mutava v. AG & Another** depends on circumstances of each particular case. Rules of Natural Justice are not engraved on tablets of stone. There should be no additional procedural safeguards, more than necessary in attainment of fairness, as held in the English case **Lloyd v. McMahon [1987] AC 625 at 702**. Procedural fairness as defined in **Michael Fordham's Judicial Review Handbook, 4th Edition at page 1007**, is a flexi-principle. Natural justice is entirely contextual; there are no universal rules as to what is needed to be procedurally fair; and the content of duty depends on particular function and circumstances of individual case.

37. Lastly the 1st Respondent submits, **citing Nairobi H.C JR Number 88 of 2013, Republic v. Kenya Power & Lighting Company Limited & Another, [2013] e-KLR**, that it is not enough for an Applicant in Judicial Review to claim a Tribunal has acted illegally, unreasonably or in breach of Rules of Natural Justice. The actual sins of a Tribunal must be exhibited for the Orders to be granted.

2nd, 3rd and 4th Respondents' Submissions

38. The Attorney-General for the rest of the Respondents, adopts the Submissions made by the 1st Respondent. Applicants were fairly heard. They have not demonstrated procedural impropriety, illegality or irrationality. They were arrested to be charged with several offences. Upon investigation, the offence of negligence was shown to have been committed by the Applicants. They abandoned a Police Vehicle on the road, obstructing traffic. Proceedings followed under Police Orderly Room Regulations. Procedure

was proper. It was only the sentencing which was flawed.

39. The Applicants filed an Appeal against the decision to dismiss them from Service. The Appeal has not been heard and determined. They have come to Court prematurely. Respondents urge the Court to reject the Application.

Questions arising

- i. Is the Application premature, and improperly before the Court?
- ii. Have the Applicants shown procedural impropriety, illegality and/ or irrationality?
- iii. Do they merit Certiorari and Prohibition?

The Court Finds:-

40. Parties agree Applicants were employed as Police Officers, attached to the Traffic Section, Makupa Police Station, in Mombasa County. The 1st Applicant Rutto had, as of January 2016, served for 13 years. His Colleague, 2nd Respondent Nyakang'o, had served for 16 years. It is agreed on 10th January 2016, the 2 Officers were assigned night patrol duty around Saba Saba area, Mvita Sub-County, in Mombasa.

41. They drove to Saba Saba. 2nd Applicant was the Driver of the Police Ford Ranger vehicle, which the Officers drove to Saba Saba area. While there, they noticed a Matatu which they believed was dropping and picking passengers at undesignated areas. They stopped the Matatu.

42. While they engaged with the Matatu one way or the other, the Presidential Motorcade appeared on the scene. It was alleged the Applicants had abandoned their Ford Ranger on the road, obstructing the Presidential Motorcade. They were in addition, seen by the President, receiving a bribe from the Matatu Crew.

43. It is common ground that the Applicants were arrested, and kept in Police custody. They were charged under Police Orderly Room Proceedings, with offences of negligence in performance of duty, and committing an act which amounted to corruption. They were under trial between 11th January 2016 and 15th January 2016.

44. The record of these proceedings reveal there was more than one Decision made against the Applicants. The Court shall look at each of the Decisions.

45. The 2nd Applicant appeared before ASSP Geoffrey Walumbe. After hearing Witnesses, who included Police Officers attached to the Presidential Escort, Walumbe made the following **1st Decision:-**

- PC Joel Atuti Nyakang'o is guilty of the offence of negligence.
- No Witnesses 'highlighted' the corruption offence, so the Defaulter is innocent.
- The matter is forwarded to the County Police Commander for 'decision and sentencing' as the circumstance in which the offence was committed needs his advice.

46. The 2nd decision relates to the 1st Applicant, who appeared before SP Zacchaeus Ng'eno. **The 2nd Decision** was that:-

- Barnaba Kimeli Rutto is guilty as charged for the offence of negligence.
- He is guilty as charged, of the offence of corruption.

As pointed above, the 2nd Decision was not referred to the County Police Commander for further action. The Court has not seen any material making such reference. It is not clear how 'Judgment' against the 1st

Applicant was to be executed. The Decisions by Walumbe and Ng'eno were made on 13th January 2016.

47. The 3rd Decision is that made against the 2nd Applicant, by the Coast Regional Police Commander, in the letter dated 15th January 2016. **The 3rd Decision** is this:-

- The 2nd Applicant was correctly found guilty by Walumbe on the count relating to negligence.
- He was lucky to have been acquitted for the offence of corruption. There were Witnesses, including Civilians, who saw the 2nd Applicant being bribed. These Witnesses sympathized with 2nd Applicant, because they were afraid the 2nd Applicant would be charged with an aggravated offence.
- The 2nd Applicant's negligence could have resulted in a national disaster if the Driver of H.E. the President, was not keen enough.
- The 2nd Applicant was dismissed from Service.
- He lost benefits which would have been due to him under existing Pension Scheme.
- The 2nd Applicant had a right of appeal. He could lodge his Appeal to the Deputy Inspector General of Kenya Police Service, within 7 days of receiving the letter of dismissal.

48. The 4th Decision is similarly dated 15th January 2016, and made by the same Officer, Coast Regional Police Commander Mwangi. It is a decision against the 1st Applicant Rutto. It was determined:-

- The Presiding Officer SP Ng'eno properly found the 1st Applicant guilty of the offences charged with.
- The 1st Applicant was responsible for the Police Patrol Vehicle and did not castigate the 2nd Applicant for leaving the Vehicle on the road.
- Ironically, the 1st Applicant was not apologetic and this made him irresponsible and unaccountable.
- The 1st Applicant was dismissed from Police Service.
- He forfeited all benefits due to him under the Pension Scheme.
- He was at liberty to appeal against the decision to the Deputy Inspector General of Police.

49. The 5th and last Decision was made on 28th January 2016. It is from the 1st Respondent Commission addressed to the Inspector General, but not addressed to the Applicants. **The 5th Decision** is this:-

- The Applicants obstructed the Presidential Motorcade by parking their Patrol Car, GKB 234 H in the middle of Saba Saba – Nyali road, Mombasa.
- Barnaba Kimeli Rutto and Joel Atuti Nyakang'o are dismissed from Police Service with effect from 28th January 2016.

50. The Applicants lodged Appeals against the 3rd and 4th Decisions, in their separate letters dated 19th January 2016. The Appeals were lodged with the Deputy Inspector General of the Police. The Appeals were against the 3rd and 4th Decisions made by Francis Mwangi, dated 15th January 2016. It is submitted by the Respondent, first, that the Appeals have not been heard, and therefore the Application for Judicial Review is premature. Second, Order 53 [7] [1] of the Civil Procedure Rules requires a copy of the decision sought to be quashed, is filed with the Application. The Applicants have not filed a copy of the **5th decision**.

51. The Applicants answer is that their respective Appeals were overtaken by events, once the 1st Respondent intervened upon finding the Decisions of Francis Mwangi, Coast Regional Commander, to have been illegal.

52. The Court is satisfied with the position taken by the Applicants. They appealed to the Deputy Inspector General on 19th January 2016. Before those Appeals could be considered, the 1st Respondent Commission wrote to the Inspector General advising that the 3rd and 4th Decisions were made contrary to

Article 246 [3] of the Constitution, and Section 89 [6] of the National Police Service Act. It was the advice of the Commission that Francis Mwangi acted *ultra vires*, and his Decisions could not stand. The Inspector General agreed with the advice of the Commission, and forwarded the Orderly Room Proceedings and case summaries to the Commission, culminating in the 5th Decision.

53. The Applicant's Appeals were rendered redundant, the Commission having conceded that they were dismissed from Service by the Coast Regional Police Commander illegally. They could not pursue the Appeals. It would serve no purpose, as the Decisions appealed against, had been rendered redundant through the intervention of the Commission. The Application for review is not premature, as there are no Appeals capable of being pursued.

54. With regard to Order 53 of the Civil Procedure Rules, there is no evidence shown by the 1st Respondent, that it placed in the hands of the Applicants the 5th Decision made by the Board, on 28th January 2016. The resolution of the Board is not shown to have been availed to the Applicants such as would enable them to file a copy with the Court. The existence of such a decision, is captured in the letter dated 8th February 2016, filed by the 1st Respondent, addressed to the Inspector General, and not indicated as served or copied to the Applicants. It would be asking too much of the Applicants to require them to file a decision coming from a process which they did not take part in.

55. It suffices that the existence of the series of 5 Decisions made by the Respondents against the Applicants, is obvious in the records filed by all the Parties. The decision in ***Republic v. National Highway Authority & 7 Others*** was that, it is important for an Applicant to attach impugned decision, so as for the Court to satisfy itself about the time the decision was made, and to be certain that the decision exists. The timing and existence of the 5 Decisions subject matter of this Judicial Review cannot be doubted.

56. ***The Court finds the Application for Judicial Review is properly and maturely before the Court.***

57. In ***Republic v. Kenya Power & Lighting Company Limited & Another [2013] e-KLR***, the High Court of Kenya, citing ***Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 ALL ER 935***, laid down the grounds upon which administrative action, is subject to control by judicial review. These are:-

- **Illegality.** The decision-maker must understand correctly the law that regulates his decision making power, and must give effect to it.
- **Irrationality.** It refers to a decision which is so outrageous in its defiance of logic, or accepted moral standards, that no sensible Person, applying his mind to the question to be decided, could have arrived at the decision. This ground is known as 'Wednesbury unreasonableness,' characterized after the English case of ***Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B. 223***.
- **Procedural Impropriety.** This relates to failure by the Administrative Tribunal to observe Rules that are laid down in Legislative Instrument, by which the Tribunal's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

58. The 2nd question is therefore whether the 5 Decisions made by the Respondents, can be faulted for illegality, irrationality, and procedural impropriety.

59. The Decisions must be examined individually against these tests. Different Public Officers and Organs dealt with the charges against the Applicants, at different times, culminating in the decision to dismiss Applicants from Service, with loss of benefits. Although the Applicants have not specifically pleaded each of the Decision, and asked for quashing against each, at the core of their grievances is that they were dismissed from Service illegally, irrationally and improperly.

60. The Decisions by Francis Mwangi best capture the core of the Applicants' grievances. These were the Decisions which arose from the earlier Decisions of the 2 Presiding Officers, and gave rise to the

Decision of the 1st Respondent. The 1st Respondent alleges to have recalled Mwangi's Decisions. There was nothing placed before the Court showing the Decisions made by Mwangi were, by a resolution of the 1st Respondent Board's annulled. The 1st Respondent asked the Inspector General to have the Officer, presumably Mwangi, make recommendation to the Inspector General, who would in turn make his own recommendations to the Commission for ultimate Decision. At no time does the Commission, or the Inspector General for that matter, inform the Applicants that the 3rd and 4th Decisions had been rescinded, by whom, and advise how the Applicants would participate in the second process. The Decisions made by Francis Mwangi were not removed from the scene by the Respondents, and because of their centrality with regard to the other Decisions, can suitably be the focal point of Judicial Review.

61. Supplementing the Kenyan and English Authorities quoted at paragraph 56 above is the ***Kenya Court of Appeal decision, Municipal Council of Mombasa v. Republic & Another***. The principles are that Judicial Review:-

- Is concerned with the decision-making process, not the merits of the decision.
- How the decision was arrived at?
- Did those who made the decision have the power?
- Were the Applicants heard before the decision?
- Did the decision-maker consider irrelevant matters and/ or fail to consider relevant matters?

62. Disciplinary Proceedings against Police Officers in Kenya are regulated under The National Police Service Commission [Discipline] Regulations, 2015.

63. Regulation 3 states that the Commission shall exercise disciplinary control over the Service. Regulation 4, requires every disciplinary process shall observe due process, as provided under Article 47 and Article 246 [3] [b] of the Constitution.

64. Where a complaint is lodged against an Officer, it is to be investigated by the most Senior Officer. All investigations into complaints against Police Officers are to be notified to an organ known as Internal Affairs Unit on commencement. An appropriate Disciplinary Committee is convened if investigations disclose an offence could have been committed. The Internal Affairs Unit is once again to be notified about the outcome of investigations.

65. 2 forms of Disciplinary Committees are mentioned in the Regulations. First, Regulation 7 provides for a Disciplinary Committee to deal with Officers above the rank of Assistant Superintendent. This Committee is made up of Deputy Inspector General of Police, or in his/ her absence, a Commissioner from the 1st Respondent, 4 other Members appointed by the Commission, with 2 Members each from the Kenya Police Service, and the Administration Police Service. This Committee is described in the Regulations as the National Police Service Disciplinary Committee.

66. The 2nd Disciplinary Committee is mentioned under Regulation 8, under the title of Subordinate Disciplinary Committee. It is responsible for disciplining of Officers of the rank of Chief Inspector and below. It comprises a Presiding Officer appointed by the immediate Commanding Officer. The Presiding Officer shall not rank below Inspector, or below the Accused Officer. It also has as a Member an Assistant Presiding Officer appointed by the immediate Commanding Officer. Third, this Committee has an Officer appointed by the immediate Commanding Officer to observe proceedings. Fourth, there is a Prosecutor prosecuting the offence, being an Officer authorized to enquire into the offence the Accused is charged with, and being of a higher rank than the Accused Officer, and of a lower rank than the Presiding Officer. To cap it, the Regulation states an Officer may be accompanied by another Officer of his/ her choice during the hearing, for assistance.

67. The Applicants submit they were heard by Individual Police Officers- Walumbe and Ng'eno. There were no Disciplinary Committees convened. The Police Orderly Room Proceedings support this Submission. It is shown there were no Disciplinary Committees, of any shade, constituted in accordance with the Regulations. There was procedural impropriety and illegality with regard to the convening and

composition of the Disciplinary Committees.

68. The proceedings show the Presiding Officers acted without Prosecutors. The Presiding Officers discharged the role of the Prosecutor, leading Witnesses, and re-examining them. This was another instance of procedural impropriety and illegality.

69. The offences over which the Applicants were arrested and charged, took place on 10th January 2016. The charge documents were prepared in the next few days, and 5 days after the offences were allegedly committed, the Applicants were convicted. It is not captured in the record whether the Internal Affairs Unit was at any time, involved.

70. Regulation 9 [4] provides that where disciplinary hearing is scheduled, an Accused Officer shall be given at least 7 calendar days' notice before the hearing date. The notice may be waived in exceptional circumstances. Where there is waiver, the Presiding Officer shall record the reasons for the waiver in writing.

71. The Court has read such Waiver Notices signed by the Applicants the day after they allegedly committed the offences, on 11th January 2016. Unfortunately, neither Walumbe nor Ng'eno recorded the reasons for waiver. They do not say whether there were exceptional circumstances, and give reasons if the answer was in the affirmative, why the circumstances were exceptional. The rushed hearing was compounded by the fact that the Applicants were throughout, in Police custody, and obviously impaired with regard to adequate preparation, in defending themselves.

72. After the National Police Service Disciplinary Committee hears allegations against Officers, it is required to make recommendations and forward the same to the Commission for approval. Similarly the Subordinate Committee makes recommendations and forwards the same to the Inspector General or Authorized Officer for confirmation and approval. Granted that the 1st Respondent has disciplinary control over the Service under the Constitution, the Inspector General or Authorized Officer cannot give a final decision without the approval of the Commission. Any Regulation suggesting the Inspector General, or his Authorized Officer could take any final disciplinary action against a Police Officer, without recourse to the 1st Respondent Commission, would be inconsistent with Article 246 [3] [b] of the Constitution, and therefore null and void to the extent of the inconsistency.

73. Walumbe, though not clearly a Disciplinary Committee established under the Regulations, forwarded his findings to the Coast Regional Police Commander, presumably an Authorized Officer. There were findings, but no recommendation on what action should be taken against the 2nd Applicant. A recommendation should go beyond the findings, and suggest a sanction, or pardon. Even assuming Walumbe presided over the 2nd Applicant's disciplinary hearing validly, he did not in the end forward any recommendations to an Authorized Officer. He washed his hands off, and shied away from committing himself through making recommendations, leaving the 2nd Applicant entirely at the mercy of the County Police Commander. This was another instance where the proceedings did not conform to the governing legislative instrument. Walumbe, without the Court appearing to delve into the substantive decision, must nevertheless be commended for absolving the 2nd Applicant of the offence of bribery. It took courage, against very heavy odds.

74. SP Ng'eno adopted a different approach. He read a 'Judgment,' finding the 1st Applicant, guilty as charged. The Regulations as seen above, do not give any Presiding Officer, or Disciplinary Committee, the mandate to make Judgments. The mandate is to give recommendations. SP Ng'eno, unlike ASSP Walumbe, does not indicate if he forwarded any 'Judgment' or recommendations, to an Authorized Officer or the Inspector General.

75. The Presiding Officers did not respect the Applicants' right to be heard as free men. The Applicants were kept locked throughout. They were treated like suspects facing felonies and beyond the grant of Police Bonds. They were not taken before any Criminal Court, or Traffic Court, and charged with any criminal or traffic offences. The Regulations require disciplinary process observes due process under

Article 47. It cannot be administratively fair, if an Accused Officer, is detained while the hearing goes on. There is persuasion in Applicants' Submission that they should have been availed the same constitutional protections, commonly available to Accused Persons in criminal trials and other quasi-judicial proceedings. They were deprived of fair administrative action under Article 47; and deprived of fair hearing under Article 50. The Applicants should readily have been granted Police Bonds, allowed the benefit of Counsel if they so wished to have, and given sufficient time to prepare their defences. Keeping them under lock and key, while the proceedings went on for 5 days, only succeeded in confirming that there was no fair hearing at all.

76. There is enormous evidence showing the proceedings conducted by ASSP Walumbe and SP Ng'eno, suffered undisguised illegality and procedural impropriety.

77. The Court turns to the 3rd and 4th Decisions, which bear the imprimatur of Coast Regional Police Commander, Francis Mwangi.

78. Both are faulty, from the outset, in that they did not flow from a legal and proper process below.

79. The Decisions by Mwangi against the Applicants broke the boundaries of illegality and procedural impropriety, leading into the wasteland of Wednesbury irrationality.

80. Mwangi found that the 2nd Applicant was lucky to be acquitted of the 2nd Count on corruption. He alleged, without basing his allegation on anything recorded in the proceedings that there were Witnesses who saw the 2nd Claimant Joel Atuti Nyakang'o receive a bribe from the Matatu Crew.

81. The 2nd Applicant was cleared of the allegation relating to corruption by Walumbe. There was evidence from Officers of the Presidential Escort, which was to the effect that these Officers merely witnessed the Applicants engaged in some form of a tussle, with the Matatu Crew. The Court has not seen evidence of any Officer who unequivocally stated he saw any of the Applicants receive a bribe.

82. The Court has cautioned itself that in issue is the process rather than the substance of the impugned decision. To understand the concept of irrationality of a decision, the Court cannot avoid examining certain aspects of the evidence, giving rise to the finding of irrationality.

83. The record did not, plainly speaking, show the Applicants took any form of inducement from the Matatu Crew. They in fact arrested the Crew, arrested the Matatu, and even as the Officers were being arrested by their fellow Officers, had the Crew and the Matatu at Makupa Police Station. The Matatu Driver recorded a statement, denying that he gave any bribe to the Applicants, and was not charged with the offence of bribery.

84. The Applicants explained the Matatu Crew darted away to avoid arrest. The Applicants gave chase, blocked the Matatu, and arrested the Crew. What the Presidential Escort witnessed was a tussle between vigilant Officers of the law out to apprehend resisting Matatu Crew. Presidential Escort Simon Wanyoike testified he saw the 2 Police Officers try to snatch something from the Crew. The Applicants in their evidence testified the Matatu Crew resisted moving out of their Vehicle, and the Applicants had to physically remove the Crew, from their Vehicle. It is to be recalled the incident took place at night. Would the Applicants receive a bribe and proceed to arrest the Matatu and its Crew? The Matatu Driver Jilo Omar recorded a statement with the Police. He conceded he was picking and dropping passengers at undesignated areas. He stated the Applicants took away his car keys. This statement appears to be in agreement with the evidence of Presidential Escort Simon Wanyoike, who stated he saw the Police Officers snatch something from the Matatu Crew. Could taking away of the keys have been mistaken for a bribe changing hands?

85. Francis Mwangi nonetheless states there were Witnesses, including Civilians who saw the 2nd Applicant receive the bribe. There is no record anywhere, of such Civilians. He states the Witnesses sympathized with the 2nd Applicant. There is no record of a sympathizing Witness. He states these

Witnesses opted not “to vividly mention it.” There is no evidence given by any Witness, who opted not to “vividly mention it.” It was quite irrational of the Coast Regional Police Commander to revise evidence, and introduce irrelevant matters, suggesting an Accused Officer who had been cleared by the Presiding Officer, was guilty. Worryingly, he suggests that the President was in danger, and the 2nd Applicant’s actions could have resulted in national disaster. He states national disaster was avoided only because the President’s Driver was “keen enough.” The security and safety of the President of this Country must not be trivialized. There is need for Senior Officers such as Mwangi, whilst commenting on the subject of the security of the Head of State, to have some sense of proportionality and avoid scare-mongering. No Witness from the Presidential Escort suggested that H.E. the President was at any time in danger, or that the Country was on a precipice of national disaster. There is no such evidence from the President’s Driver. The Commandant of the Presidential Escort, Njoroge Mbugua, did not state that the President was in danger, or the Country on the verge of a disaster.

86. Similar irrelevancies permeated the 4th Respondent’s decision against the 1st Applicant. The Regional Commander faulted Rutto for not castigating Nyakang’o. He does not state what Regulation or Standing Order required the 1st Applicant to castigate the 2nd Applicant, what form the castigation should take, and to what end. Rutto was found guilty of corruption by Ng’eno. Mwangi said nothing on the evidence relating to corruption with regard to Rutto. He simply approved and confirmed what was considered a Judgment by Ng’eno.

87. The Regional Commander confirmed the finding of guilt on the count relating to negligence in both disciplinary cases. Again the Court does not intend to veer into analyzing the merit of the decision on the charge negligence resulting in obstruction of the Presidential Motorcade, but in passing, and in looking at the rationality of the decision, will highlight some of the evidence relating to the count.

88. The evidence of the Driver to the Commandant of the Presidential Escort, PC King’ori Mwangi, illustrates the common finding of guilt on obstruction of the Presidential Motorcade, was not a decision rationally arrived at. He testified he drove the leading car in the convoy. The drive was on a dual carriageway. He maintained the right side of the road. He noticed a pothole on the road which made him to slow down. He did not say he was slowed down by the Applicants’ Vehicle. He was slowed down by a pothole. On the left lane was a Police Car [Applicants’]. It was on the road and with hazard lights on. The Escort Commander shouted at the Police Officers to remove their Vehicle from the road. The Applicants acted swiftly removing the Vehicle from the left lane as ordered by the Escort Commander. By the time the Applicants removed their Vehicle, PC King’ori Mwangi, leading the convoy had already driven past the Police Vehicle which was alleged to be obstructing the Presidential convoy. 2 other Presidential Escort Vehicles had already driven past. The Commandant’s evidence was that there were a total of 5 cars in the Presidential Convoy. 3 of these had gone past the Applicant’s Ford Ranger, by the time the Ford Ranger was removed from its parking. There was adequate road space for passage of other Vehicles. Other Officers testified there was no warning prior to the arrival of the President, that he would be using the route, requiring Police to clear all obstructions. What was the decision of the Coast Regional Police Commander, affirming the finding that the Applicants obstructed the Presidential Motorcade, based on? The lead Escort in the Presidential convoy, and 2 other Escorts, drove past the Applicants’ vehicle without trouble. If the Presidential Convoy slowed down, the evidence suggests it was slowed down by a pothole, not by any act of the Applicants.

89. The 3rd and 4th Decisions were discredited by the 1st Respondent Commission. The 2nd and 3rd Respondents, by their corrective actions, agreed with the 1st Respondent that the Decisions were founded on constitutional and legal quicksand. These Decisions were illegal, procedurally improper, and quite irrational. It was important for the Coast Regional Police Commander to act as a quasi- Judicial Officer, discharging his function composedly, legally, properly and rationally. He allowed his emotions to get the better of his judgment. He did not examine the evidence before him and make an independent affirmation or disaffirmation. He compounded the defects of the process contained in the initial proceedings, by resorting to irrelevancies.

90. The last Decision is that made by the 1st Respondent Commission.

91. The Commission is to be commended for bringing it to the attention of the other decision-makers that the process was illegal from the start, and the outcome of no legal effect. It correctly affirmed its constitutional mandate in disciplining of Police Officers. After raising the red flag, it is doubtful that the Commission took correct measures, in cleaning up the murk created by the other decision-makers.

92. The Commission had advised the Inspector General to seek recommendations of the Coast Regional Commander, and if the Inspector General was satisfied with the recommendations, to forward the same to the Commission for its determination.

93. The Inspector General simply forwarded the disciplinary proceedings. He also gave a summary of the facts as understood by him. He states both Officers were found guilty, without even pointing out that the 2nd Applicant was absolved of the offence of bribery by the Presiding Officer.

94. The Commission did not examine if the Inspector General had followed its advice. It convened its Board and endorsed the sacking of the Applicants, on the ground that they had obstructed the Presidential Motorcade. The 1st Respondent said nothing on the charge of corruption, leaving any reasonable Person to wonder whether this grave charge was left sticking on the 1st Applicant's career, or was silently removed from his record.

95. The 1st Respondent did not involve the Applicants at all, even after concluding the original proceedings were tainted with illegality, procedural impropriety, and unsupported by the Constitution of Kenya. Rather than clean the whole mess by first calling the files, and rescinding the Decisions from the Coast Police, the Commission asked the Inspector General to rectify the paperwork, and endorsed a process that was flawed to the core. At paragraph 26 of this Judgment, the 1st respondent submits it was informed the Applicants were subjected to fresh disciplinary proceedings. There were no fresh proceedings.

96. Regulation 16 [1] states that a disciplinary action taken by the Police Inspector General shall be subject to review by the Commission. If there are defects in the proceedings leading to the disciplinary action, review by the Commission should result in direction that proper proceedings are redone, with the defects in the initial process corrected, and the Accused Officer given the benefit of a fresh hearing.

97. The advice by the Commission to the Inspector General did not cure the illegality, procedural impropriety and irrationality in the process. It did not change the fundamental flaws in the Orderly Room Proceedings shown above. It did not change the fact that the Applicants were heard by Individual Police Officers, rather than by Disciplinary Committees properly constituted. It did not erase the conclusion by the Commission that Mwangi acted *ultra vires*. The advice did not cure the illegality, procedural impropriety and irrationality, shown to have been present in the Decisions of Francis Mwangi. Ultimately, the Commission relied on the same proceedings it had faulted, in bringing damnation upon the Applicants, and in terminating their careers. The Court is satisfied the 1st Respondent should have gone further, and not simply stop at rectification of the paperwork.

98. The Application for Judicial Review is allowed, and the following Orders granted:-

a. An order of Certiorari is hereby granted, bringing into this Court for purposes of being quashed, the proceedings leading to, and determinations of the Respondents dated 13th January 2016, 15th January 2016, and 28th January 2016, dismissing the Applicants from Police Service, which proceedings and determinations are hereby quashed.

b. An order of Prohibition, prohibiting the Respondents by themselves and/ or any Agents, from instituting, commencing or in any manner attempting to commence disciplinary proceedings against the Applicants with regard to the incident of 10th January 2016, is granted.

c. Costs to the Applicants.

Dated and delivered at Mombasa this 17th day of February 2017.

James Rika

Judge