



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 103 OF 2016

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 29TH JUNE, 2017)

GIBSON KAHINGE WAHOME PETITIONER

-VERSUS-

NATIONAL POLICE SERVICE.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The Notice of Motion Application before the Court is dated 13th July, 2016, whereby the Petitioner seeks for orders:

1. That the Application be certified as urgent and be heard ex parte in the first instance.

2. That pending hearing and determination of this application, this Honourable Court be pleased to stay the decision by the 1st Respondent through the OCPD Marsabit made on 5th February, 2013, to interdict the Petitioner.

3. That a Judicial Review Order of Certiorari do issue to quash the decision by Matthew Kutoh, OCPD Marsabit, made on 05/02/2013 purporting to interdict the Petitioner.

4. That this Honourable Court be pleased to issue an Order of injunction compelling the 1st Respondent to lift the interdiction of the Petitioner, reinstate the Petitioner to work and release all withheld salaries and benefits since 5.2.2013 to the Petitioner forthwith.

5. That costs of this application and the suit be borne by the 1st Respondent.

2. The Application is premised on the following grounds:

a. That the Petitioner was interdicted by the OCPD Marsabit acting ultra vires on the grounds

that the Petitioner had been arrested and charged in Kibera Criminal Case No. 405 of 2013 on 4th February, 2015.

b. That the above case was terminated by the prosecution on 2.2.15 and the Petitioner discharged under Section 87(a) on grounds that the Complainant had refused to appear in Court until her items had been recovered.

c. That this was after the complainant and other prosecution witnesses had refused to appear in Court for a period of 2 years when the case had been scheduled for several hearings.

d. That since the case was terminated, the Petitioner has variously approached the 1st Respondent for reinstatement but the 1st Respondent has declined on grounds that discharge of charges under Section 87(a) entitles the 2nd Respondent to initiate fresh charges based on the same facts and thus the Petitioner is under continuous investigation.

e. That the 1st Respondent has advised the Petitioner to approach the criminal Court to substitute the order for discharge with one for acquittal under Section 210 as a prerequisite for reinstatement. This is not legally possible since the Court became functus officio after the orders for discharge.

f. That the 2nd Respondent has lost interest in the aforementioned charges and has no intention to proceed with the charges or initiating fresh charges based on the same facts.

g. That by so doing, the 1st Respondent has infringed on the Petitioner's labour rights and other fundamental rights.

h. That the Petitioner has thus been placed under legal dilemma necessitating him to approach this Court.

i. That the Petitioner was framed for the charges. At the time of the alleged offences, he was on duty in Marsabit.

j. That upon interdiction, the Petitioner is on half pay and as a result of the fact that his salary has been withheld since 2013, he is in a dire financial needs and he is unable to support his family.

k. That as a result, the Petitioner has been unable to pay critical bills for his dependants including medical bills and school fees.

l. That further, the Petitioner has been bypassed by promotions as a result of the framed up charges.

m. That it is fair and just that this Honourable Court does intervene to uphold the Petitioner's constitutional and labour rights.

3. The Application is supported by the Petitioner's affidavit wherein he restates the grounds on the face of the application and prays for the application to be allowed as drawn.

4. The 1st, 3rd and 4th Respondents have opposed the Application by filing grounds of opposition wherein they state that Section 87(a) of the Criminal Procedure Code, Cap 75 is not an acquittal because it does not operate as a bar to subsequent proceedings against the accused on account of the same facts. Further that Section 88(3) of the National Police Service Act, Cap 84 provides that:

“Any police officer who commits a criminal offence, as against the law shall be liable to criminal proceedings in a Court of law.”

5. Additionally that Section 88A of the National Police Service Act provides that:

“Where a police officer is interdicted from duty in accordance with the Force Standing Orders or any other written law, the officer’s appointment shall not cease only because of such interdiction. Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance but the officer shall continue to be subject to the same discipline and penalties, and to the same authority, as if he had not been interdicted.”

6. The Respondents submit that the decision made to interdict the Petitioner made on 5.2.2013, was made in accordance with the relevant laws.

7. Further they submit that the orders of certiorari sought by the Petitioner cannot issue as the application has been filed out of time contrary to Order 53 rule 2 of the Civil Procedure Rules, 2010 and reasons for filing out of time have not been provided.

8. They also submit that the Respondent is not barred from filing a review or appeal from the decision of the criminal Court. They pray for the application to be dismissed with costs.

9. The 2nd Respondent filed grounds of opposition wherein they state that the Petition does not disclose any constitutional issues against them to warrant enjoinder in the proceedings herein. That the claim as contained in the application is in regard to the Petitioner’s interdiction which is the mandate of the National Police Service the 1st Respondent herein headed by the Inspector General of Police the 3rd Respondent herein. The application is intended to direct the Respondent’s on how to carry out their statutory obligations and mandatory duties. That the office of Director of Public Prosecutions is a constitutional independent office which is guided by the law.

10. They pray that their name be expunged from the Petition.

Petitioner/Applicant’s submission

11. The Petitioner has summed issues for determination as:

a. Whether the decision to interdict the Petitioner by Mr. Mathew K. Kutoh was ultra vires and unconstitutional;

b. Whether failure by the Respondents to lift the Petitioner’s interdiction and to pay all withheld salary is unlawful and unconstitutional;

c. Whether the Director of Public Prosecutions is a proper party;

d. Whether a party seeking judicial review Orders under Article 22 and 23(3) needs to invoke the Civil Procedure Rules; and

e. Whether an order of certiorari can issue under Article 23 after the lapse of six months;

Whether the decision to interdict the Petitioner by Mr. Mathew K. Kutoh was ultra vires and unconstitutional

12. They submit that, the law on Police disciplinary process has changed dramatically following the enactment of the Constitution 2010. Post 27th August 2016, this power was conferred upon the National Police Service Commission established under Article 246. This power was operationalized in 2011 following the enactment of the National Police Service Act and the National Police Service Commission Act which empowered the commission with disciplinary control over persons holding office within the service. However, following the commencement of the National Police Service Commission (Amendment) Act 2014, the power was conferred on the Inspector General of Police.

13. That the Petitioner herein was interdicted on 5th February 2013 at which point the disciplinary powers lay with the commission. They cite the case of **Kazungu Ngumbao Jeremiah & 3 others vs. Attorney General and 2 others [2015] Eklr** whose facts were pari material with the instant case and where the Court held as follows:

“.....the decision to interdict as of March 2014 therefore should have been that of the National Police Service Commission and not the Inspector General or his delegate, Director of the internal affairs unit or the senior investigative officer assigned duties in the county... In the present case, it is clear that the decision to interdict the Petitioners was not taken by the National Police Service Commission and on this score the interdictions were unlawful (the power has since the commencement of the National Police Service (Amendment) Act, 2014 been apparently given to the Inspector General)”.

14. That in the instant case, the decision to interdict the Petitioner was taken by the OCPD Marsabit through the letter dated 5th February 2013. The said officer did not quote nor cite the source of his authority. He did not say whether he was acting on behalf of the National Police Service Commission or the Inspector General. As a consequence, the presumption that he was acting on his own has not been displaced. Therefore, on the basis of the aforesaid provisions and the cited authority, we humbly submit that the decision was substantively *ultra vires*.

15. They submit that the decision to interdict was not taken in accordance with the principles of natural justice. As such, the cardinal principle of the right to be heard was breached. Article 246 of the Constitution, Section 87(3) of the National Police Service Act and Section 10(1)(f) of the National Police Service Commission requires the service and the commission to abide by Article 47 of the Constitution while discharging their functions.

16. Further that the said Article requires that Administrative Actions to be expeditious, efficient, lawful, reasonable and procedurally fair. In addition, the Article further provides that, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

17. The Petitioner also submits that the requirement for procedural fairness has now been cemented following the commencement of the National Police Service Commission (Discipline) Regulations 2015. The said regulations provide an elaborate procedure from the institution of complaint, institution and proceedings of a disciplinary committee and decisions therefore.

18. That even where the disciplinary offence is manifest, a hearing is not indispensable. Regulation 4(3) of the National Police Service Commission (Discipline) Regulations 2015 provides as follows:

“In exceptional circumstances, where the offence against discipline is clearly manifest as to render investigations unnecessary, the officer in-charge may immediately issue a notification to the appropriate disciplinary committee to conduct the disciplinary proceedings”.

19. They hold the view that had the Respondents afforded the Petitioner any hearing at all, they could have established that on the dates the alleged robbery with violence took place, the Petitioner was on duty in Dukana Police Station in Marsabit County as the Arms Movement Register and Occurrence book extracts annexed to the application demonstrate. They therefore could have established that there was no disciplinary offence warranting interdiction.

Whether failure by the respondents to lift the petitioner’s interdiction and to pay all withheld salary is unlawful and unconstitutional

20. It is submitted on behalf of the Petitioner that Regulation 2 of the National Police Service Commission (Discipline) Regulations 2015, defines interdiction as follows:

“a disciplinary measure where an officer is discontinued from the service for a specified period

of time but continues to be paid on half of his monthly salary....”

21. They contend that the period for interdiction must be specified and it cannot run indefinitely.

22. The Petitioner states that he has been denied reinstatement on grounds that the 2nd Respondent can initiate fresh charges pursuant to Section 87(a) of the Criminal Procedure Code however, the 2nd Respondent has not shown any indication either to this Court or to the Petitioner that he intends to file fresh charges.

23. They further submit that once the trial Court makes final orders, it becomes *functus officio* and cannot make any further orders. That leaves the Petitioner with the option for appeal and/or revision.

24. With regard to appeal, they state that the decision to terminate the case having been in favour of the Petitioner, there was no logic in appealing the same. With regards to revision, they are of the view that the High Court has previously held that it does not have powers under Section 364 of the CPC to substitute the orders for discharge with one for acquittal (**Peter Njuguna Mburugu & 2 Others vs. Republic [2012] eKLR**). That leaves the Petitioner with no other recourse apart from this Court.

25. It is the Petitioner’s further submission that the actions of the Respondents are in breach of his Constitutional rights as follows:-

a. Fair administrative actions under Article 48.

26. The decision to interdict and reinstate the Petitioner is administrative in nature. Pursuant to Article 47(1), the Petitioner is entitled to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It is clear that the Petitioner has been denied the above right.

27. From the evidence, it is clear that administrative action herein has been dragged since 2013. It has taken the Respondents 18 months (and counting) since the charges were terminated yet there is no sign of the interdiction being lifted. Similarly, there has been inexcusable delay by the 2nd Respondent to either initiate fresh charges or communicate altogether to the 1st Respondent that it has no such intention.

28. In addition, that the Petitioner has been denied reinstatement and release of all his withheld salary unlawfully. That there is no lawful reason why the Petitioner’s interdiction should not be lifted. The demand that he moves the Court to substitute the said charges with acquittal is unfair, impractical and unreasonable.

b. Fair Labour Practices under Article 41 of the Constitution.

29. They cite the case of **Michael Meegesh Sangiriaki vs. Narok County Government [2014] eKLR**, it was held:

“.....fair labor practice although not defined in Kenya would include expeditious investigations of allegations of misconduct in employment by an employer. In the case of A V B (2003) IRLR 405, it was held that a delay in the conduct of investigations might of itself render the dismissal process unfair. In my view, this jurisprudence from a comparative jurisdiction holds true even in our circumstances...”

30. In the instant case, since the Plaintiff was charged in the year 2013, the 1st and 3rd Respondents have never independently investigated the allegations against the Petitioner as submitted above. Had they done so, they would have found no disciplinary offence. Hence, pegging reinstatement on facts they themselves have never investigated is unreasonable. We humbly submit that failure to conduct investigations on the alleged disciplinary offence amounts to unfair labour practice.

Whether Director of Public Prosecutions is a proper party

31. They submit that the Director of Public Prosecutions is a necessary party and that it was necessary for the Director of Public Prosecutions (DPP) to appear and inform the Court whether or not he has any further interest to charge the Petitioner afresh so that the matter can be settled once and for all.

Whether a Party seeking Judicial Review Orders under Article 22 and 23(3) needs to invoke the Civil Procedure Rules

32. They submit that judicial review orders are some of the Orders that can now be issued by a Constitutional Court. Article 23(3) states:

***“In any proceedings brought under Article 22, a court may grant appropriate relief, including
.....***

a. An order of judicial review

33. Further that Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) practice and procedure Rules, 2012 states that it is the rules shall be applicable to all proceedings made under Article 22.

34. Also that, Rule 7(1) of the Employment and Labour Relations Court (Procedure) Rules states that a party who wishes to institute a Petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

Whether an order of certiorari can issue under Article 23 after the lapse of six months

35. They submit that the order of certiorari sought herein is a constitutional remedy to the said breach of the Petitioner’s rights. It is not anchored on Civil Procedure Rules and the 6 month’s rule does not apply.

36. They cite the case of **Kenneth Kiplagat Kimaiyo and 3 others vs. County Government of Elgeyo Marakwet and 2 others [2016] eKLR** where the Court stated as follows-

“.....Article 23 of the Constitution of Kenya gives the Courts the authority to uphold and enforce the bill of rights. The High Court and Courts of equal status have jurisdiction in accordance with Article 165 to hear and determine application for redress of denial, violation or infringement of or threats to, a right or fundamental freedom in the bill of rights”.

37. In any proceedings under Article 22 (or Article 70) of the Constitution, a Court may grant appropriate relief including an injunction. I agree with Mr. Korir that the Government Proceedings Act and Civil Procedure Act do not apply to such proceedings as it applies to purely civil proceedings commenced under the Civil Procedure Act. Moreover, the bill of rights is an integral part of Kenya’s democratic state and applies all law and binds all state organs and all persons regardless of status and therefore the remedies specified in Article 23(3) of the Constitution apply to all state organs which include the County Government of Elgeyo Marakwet.

38. The Petitioner prays that the application herein be allowed with costs to the Petitioner/Applicant.

39. In submissions the 1st, 3rd and 4th Respondents have summed their issues as:

- 1. Whether the Petitioner’s interdiction was lawful.***
- 2. Whether the Petitioner should be reinstated.***
- 3. Whether the prayer for an order of certiorari is time barred.***

40. They submit that the Petitioner’s interdiction was lawful. The functions of the National Police Service

Commission and the functions of the office of Inspector General of Police are outlined in Articles 245 and 246 of the Constitution of Kenya, 2010. Article 245 provides that it is the mandate of the Inspector General of the Police to maintain the discipline in the service.

41. The said Respondents further submit that an interdiction is a form of discipline and hence the same falls within the Jurisdiction of the Inspector General of Police. Article 245 of the Constitution further gives the Inspector General of Police powers to delegate certain functions of his office. The function of maintaining discipline of the police service including interdiction is one of the functions that the Inspector General of Police has delegated to the OCPD. The interdiction of the Petitioner was thus lawful.

42. On the 1st issue they submit that an interpretation of Section 87 of the Criminal Procedure Code is that, where an accused has not been called upon to make his defense, he is entitled to be discharged, but the discharge is not a bar to subsequent prosecution. However where the accused has been called to make his defense he is entitled to be acquitted and refer to the case of **Peter Njuguna Mburugu and 2 others versus Republic [2012]eKLR** to buttress this position.

43. Section 88A of the National Police Service Act on the other hand provides that:

“Where a police officer is interdicted from duty in accordance with the Force Standing Orders or any other written law, the officer’s appointment shall not cease only because of such interdiction. Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance but the officer shall continue to be subject to the same discipline and penalties and to the same authority as if he had not been interdicted”.

44. They are of the view that at the time of withdrawal from prosecution, the Claimant herein had not been put to his defense and hence was not entitled to an acquittal. This is because a fresh charge may be instituted against him at any time. Under the National Police Service Act, the Claimant remains interdicted until he is convicted, whereupon he will be discharged from duty or until he is acquitted whereupon he is reinstated.

45. The Respondents further submit that the Petitioner is suffering as a result of a provision of the law taking into account that the interdiction took place in year 2013 and the withdrawal was done in the year 2015. During the period of 3 years while he was on interdiction he was only entitled to half of his salary.

46. Additionally they submit that, a closer look at Section 88A of the National Police Service Act essentially reveals that during the period of interdiction, an officer remains an employee of the National Police Service and as such cannot seek alternative employment. That in as much as the 1st and 3rd Respondents empathize with the Petitioner’s condition, the said Respondents are under the mandate to enforce law and order. The Petitioner’s remedy would be to proceed as advised and seek a review of the withdrawal or appeal against the said withdrawal.

47. They pray for the application to be dismissed with costs.

48. The issue to determine by this Court is whether the Applicant/Petitioner has established a prima facie case with the likelihood of success to warrant issuance of orders sought. In determining whether there is a prima facie case, this Court will consider whether the interdiction meted upon the Petitioner Applicant was lawful or not.

49. The Applicant was interdicted on 5.2.2013 vide a letter of even dated addressed to him by the OCPD North Horr. The letter read as follows:

“I wish to inform you that you are hereby interdicted from duty with effect from 4/2/2013. This is as a result of your current and subsequent arraignment before Court charged with criminal offence of Robbery with violence contrary to Section 296(2) of the Penal Code by CID Dagoretti vide case file No.144/22/2013.

You are informed that by reason of this interdiction, you have not ceased to be a police officer but that your powers, privileges and benefits vested to you as a police officer shall be in abeyance during your interdiction. You will continue to be subject to the same discipline and penalties. Take note that any disciplinary offence committed by you during interdiction will be viewed seriously”.

50. The criminal case where the Petitioner was charged is Kibera CM’s Court Criminal Case No.405 of 2013 and the proceedings are attached which show that the Petitioner was discharged under Section 87(a) of Criminal Procedure Code on 2.2.2015.

51. The Respondents have submitted that the Applicant was properly interdicted through powers conferred upon the Inspector General of Police in Articles 245 and 246 of the Constitution. That Article 245 provides that it is the mandate of the Inspector General of Police to maintain discipline in the service.

52. The interdiction was done by OCPD through delegation from the office of the Inspector General of Police.

53. The Applicants on their part submit that the decision to interdict him was ultra vires and unconstitutional. This they aver flows from the 2010 Constitution which has conferred the powers to discipline the Police on the National Police Service Commission (NPSC) established under Article 246 of the Constitution. That this power was operationalized in 2011 following the enactment of the National Police Service Act and the National Police Service Commission (NPSC) which gives the National Police Service Commission (NPSC) disciplinary control over persons holding office within the service. That this power has however reverted to Inspector General of Police following commencement of the National Police Service Commission (NPSC) (Amendment) Act 2014.

54. The Applicant was interdicted on 5th February 2013 at which point the National Police Service Commission (NPSC) Act 2011 stated as follows at Section 10:

a. “on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;

b. with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;

c. approve applications for engagement by police officers in trade and other businesses, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;

d. co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;

e. provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;

f. develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;

g. investigate and summon witnesses to assist for the purposes of its investigations;

h. exercise disciplinary control over persons holding or acting in office in the Service;

i. promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service;

j. deleted by Act No. 3 of 2014, s. 3 (c);

k. hear and determine appeals from members of the Service.....”.

55. It is clear that at the time the Petitioner was being disciplined, the power to discipline as from 23.3.2012 rested upon the National Police Service Commission (NPSC).

56. On 22.4.2014, the Act was amended and the law then states as follows at Section 10:

“Functions of the Commission in addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall:-

a. on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;

b. with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;

c. approve applications for engagement by police officers in trade and other businesses, in accordance with the law relating to matters of leadership and integrity under Article 80 of the Constitution;

d. co-operate with other State agencies, departments or commissions on any matter that the Commission considers necessary;

e. provide for the terms and conditions of service and the procedure for recruitment and disciplinary measures for civilian members of the Service;

f. develop fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;

g. investigate and summon witnesses to assist for the purposes of its investigations;

Provided that:-

i. the Commission shall not undertake investigations on criminal matters;

ii. where, in the course of disciplinary investigations the Commission identifies violation of any written law, whether civil liability or criminal offence, the Commission shall recommend the prosecution of the offender in accordance with the law;

Provided that disciplinary proceedings by the Commission or the Inspector-General shall not be affected by any criminal or civil action commenced under paragraph (ii).

h. exercise disciplinary control over persons holding or acting in office in the Service;

i. promote the values and principles referred to in Articles 10 and 232 of the Constitution throughout the Service.

57. The power to discipline officers serving in the Police Service Commission were then transferred to the Inspector General of Police and handled by the National Police Service Section 10(4) of the National Police Service Commission Act which states as follows:

a. “the development and prescription of fair and clear disciplinary procedures in accordance with Article 47 of the Constitution;

b. development, and prescription of disciplinary procedures and mechanisms;

c. monitoring compliance by the Inspector General with the prescribed disciplinary procedures and guidelines issued by the Commission;

d. monitoring compliance with the due process in disciplining members of the Service;

e. receiving regular reports from the Inspector-General on disciplinary matters handled by the national Police Service;

f. reviewing or ratification of disciplinary actions taken by the Inspector General;

g. hearing and determining appeals on disciplinary matters from members of the Service.....”.

58. It therefore follows that the interdiction of the Petitioner herein emanated from a wrong source being the OCPD North Horr probably with delegated powers from the Inspector General who did not have the powers to do so.

59. With this position, it is my finding that the Applicant has a prima facie case as against the Respondents.

60. The interdiction having followed a criminal case instituted by the police and the Director of Director of Public Prosecutions (DPP) being the one with authority to institute criminal process in Kenya, the Director of Public Prosecutions (DPP) cannot be said to aver that they have no say in the instant case and should be excluded from this case.

61. I therefore find for the Applicant herein has a prima facie case with a likelihood of success and I find for him but given the nature of the orders he seeks I will order the status quo to be maintained but the hearing of the case be expeditiously done so as to allow full hearing and determination of the Petition herein.

62. Costs in the cause.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Muriithi for Petitioner – Present

Montende holding brief for Miss Kinyua for Respondent – Present