



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 8 OF 2014**

**(FORMERLY NAIROBI H.C. PET. NO. 3 OF 2014)**

**IN THE MATTER OF LIFTING OF INTERDICTION FROM EMPLOYMENT**

AND

**IN THE MATTER OF INTERDICTION LETTER DATED 7<sup>TH</sup> OCTOBER, 2011**

AND

**IN THE MATTER OF ARTICLES 2, 10, 19, 21,22,23,24,47 AND 50(2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF A THREAT TO INFRINGEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS**

AND

**IN THE MATTER OF INTENDED DISCIPLINARY PROCEEDINGS AFTER AQUITTAL IN THE CIRINAL CASE NO. 3951 OF 2011-CHIEF MAGISTRATE COURT AT THIKA**

AND

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMES) PRACTICE AND PROCEDURE RULES 2013**

AND

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

BETWEEN

**DISMAS JUMA WANASIBWA ..... APPLICANT / PETITIONER**

VERSUS

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

**DIRECTORATE OF CRIMINAL INVESTIGATION ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

Mr. Mathenge for the Petitioner

Mr. Ojwang for the Respondent

**JUDGMENT**

1. The Petitioner is a police officer attached to Ruiru Police Station holding the rank of a constable. He has sued his employer the National Police Service as the 1<sup>st</sup> Respondent, the Directorate of Criminal Investigation as the 2<sup>nd</sup> Respondent and the Inspector General of Police as the 3<sup>rd</sup> Respondent.

2. The Respondents have replied to the Petition via a replying Affidavit of Robert Muriithi (D.C.I.O.) District Criminal Investigations Officer currently based in Ruiru Police Station deposed to on 12<sup>th</sup> March 2014.

3. **Basis of the Petition**

The Applicant was interdicted from work on 7<sup>th</sup> October 2011 arising from an allegation of desertion of duty for twenty three (23) days.

4. It was alleged that the Applicant went on annual leave without approval, knowledge or consent of his superior being the DCIO.

5. The Applicant was arrested and charged before the **Chief Magistrate's Court at Thika in Criminal case No. 3951 of 2011** for desertion. The D.C.I.O and another officer testified in support of the charges.

Applicant was however acquitted on 29<sup>th</sup> September 2012 for lack of sufficient evidence to disclose an offence in terms of **Section 210** of the **Criminal procedure Code**.

6. In short, the Court found that the prosecution had failed to establish a *prima facie* case of desertion and found no need to put the Applicant on his defence.

7. The Applicant, upon acquittal applied for reinstatement and lifting of the interdiction and after a lengthy wait, he was informed of the intention to subject him to orderly room proceedings by a letter dated 19<sup>th</sup> June 2012 hence the Petition moved a notice of motion seeking interim relief. No interim orders were granted in this matter.

8. The Petitioner alleges that on 18<sup>th</sup> July 2011, he applied for compassionate leave to enable him attend to his brother's funeral.

9. That pursuant to the application, he was found to be eligible for twenty five (25) days leave which was recommended by his supervisor, the DCIO and he proceeded on leave on 19<sup>th</sup> July 2011. That the leave was due to end on 22<sup>nd</sup> August 2011 as per the leave application form attached to the Supporting Affidavit and marked 'DJWI'.

10. The Petitioner avers that without his knowledge, awareness or any communication whatsoever, his leave was cancelled and he was considered a deserter.

11. The Petitioner avers that the intended proceedings against him is an abuse of the legal process and is malicious and ill conceived in view of his acquittal by a competent Court.

12 That there is a threat to infringe on his right to a fair hearing under **Article 50(2)** by subjecting him to an unfair disciplinary process.

13. The Petitioner prays for;

- a. declaration that the intended disciplinary proceedings in relation to wilful disobedience of a lawful command is illegal, unobjective, unprocedural and unfair since the issues had already been addressed during the criminal proceedings.
- b. declaration that the Petitioner is entitled to fair administrative procedure under **Article 47** of the **Constitution**.
- c. declaration that the Petitioner is entitled to a fair hearing under **Article 50(2)** of the **Constitution**.

14. **Response**

In the Replying Affidavit of Robert Muriithi the DCIO, the Respondent avers that the Petitioner was granted five (5) days compassionate leave by the DCIO Gatundu to attend the funeral of his late brother, a fellow police officer and was to report on 25<sup>th</sup> July 2011. Prior to that he had been notified of his transfer by the D.C.I.O. Ruiru to Sololo Police Station via CID SEC.POL I/2/29/VOL.IX/278 dated 15<sup>th</sup> July 2011 annexed to the Replying Affidavit and marked 'RM2'.

15. That the Petitioner never reported back on duty nor made any efforts to contact his in charge and after the expiry of twenty one (21) days he was declared a deserter. That the Petitioner resurfaced on 30<sup>th</sup> September 2011, after sixty four (64) days of absence from work when he presented himself before Court and warrant of arrest was lifted. He was then formally charged on 5<sup>th</sup> October 2011. The investigation diary is annexed and marked 'RM3'.

16. That the officer was acquitted by the Court on 21<sup>st</sup> September 2012 under **Section 210** of the **CPC**.

17. That even if it was true, which is denied, that the Petitioner had been granted twenty five (25) days leave, he overstayed by twenty nine (29) days.

18. The Respondent denies that, it granted the Petitioner annual leave as alleged or at all. The leave form presented by the Petitioner is annexed and marked 'RM4'. The form indicates that the Applicant applied for sixty (60) days leave on 18<sup>th</sup> July 2011, to proceed on 19<sup>th</sup> July 2011.

19. The officer-in-charge recommended twenty five (25) days leave on 18<sup>th</sup> July 2011 with an indication that the Petitioner was eligible for forty five (45) days. At the bottom of the form is indicated that twenty five (25) days were approved from 19<sup>th</sup> July 2011 to 22<sup>nd</sup> August 2011 and the officer was to return on 23<sup>rd</sup> August 2011. This part was signed by Office Assistant on 22<sup>nd</sup> July 2011.

20. The letter dated 19<sup>th</sup> June 2013, instructing Principal CID Officer, Central province to commence orderly room proceedings against the Petitioner is annexed and marked 'RMS'.

21. The letter is signed by Mr. Gedion M. Kimilu, for the Director Investigations and places reliance on the Court proceedings to conclude that the Petitioner proceeded on leave without approval and ought to have returned after five (5) days compassionate leave.

22. The Respondent urges the Court to dismiss the Petition with costs.

23. The following issues are for determination:

- a. whether or not intended conduct of orderly room proceedings, on a matter that has been concluded by a Court of law amounts to double jeopardy and therefore a violation of the right to a fair

administrative action under **Article 47** of the **Constitution** and the Right to fair hearing under **Article 50(2)** of the **Constitution**.

b. if the answer to (a) above is in the affirmative what remedy is available to the Petitioner

24. **Issue I**

It is common cause that Petitioner applied for sixty (60) days leave but the DCIO, his immediate supervisor recommended that he proceeds on twenty five (25) days leave. Meanwhile the Petitioner had been granted five (5) days compassionate leave to go and bury his brother a fellow police officer.

That the Petitioner proceeded on leave on 19<sup>th</sup> July 2011, upon depositing that leave application form with his superior on 18<sup>th</sup> July 2011.

25. Subsequently the Officer Commanding Police Division (OCPD) did not approve the leave application. The OCPD however did not indicate on the leave Application form whether he had approved or rejected the recommended leave days.

26. By the time the OCPD refused the leave application, the Petitioner had already left and it is common cause that no communication was sent to him whether by telephone, signal or in writing indicating to him that the leave he had applied for and recommended by the DCIO had not been approved.

27. There is no documentation indicating that the Petitioner was only granted five (5) days compassionate leave. This is only said by the DCIO in the Replying Affidavit.

28. The Petitioner was declared deserter after twenty one (21) days from 19<sup>th</sup> July 2011, counted from 19<sup>th</sup> July 2011. If indeed the Petitioner had been granted five (5) days compassionate leave as alleged by DCIO, then twenty one (21) days ought to have started to run five (5) days after 19<sup>th</sup> July 2011.

29. In any event this should have been preceded by a communication to the Petitioner's leave address which was provided as Kimilili Police Station, the station nearest to his home. This did not materialize.

30. Police orderly room proceedings are governed by **Section 12(iv)** of the Kenya Police Standing Orders which provides;

*“when a police officer has been tried and acquitted of a criminal charge, the evidence at that trial may reveal that, in spite of such acquittal, he / she is guilty of a disciplinary offence, in which case he / she may be charged for such offence provided that such other disciplinary charge arises out of his / her conduct only in the matter and does not raise substantially the same issues on which he / she was acquitted”*

and **Section 62** of the **Police Act**, which provides;

*“nothing in this Act shall exempt any police officer from being proceeded against under the provisions of any other law in force in respect of any action or omission constituting an offence under any of the provisions of this Act provided that no police officer shall be punished twice for the same offence.”*

31. A perusal of the judgment of the Chief Magistrate discloses that, the Court made a specific finding to the effect that;

- i. the OCPD did not properly reject the leave applied for since he did not sign nor indicate such rejection in the leave application form;
- ii. that notwithstanding that the Applicant had left on 19<sup>th</sup> July 2011 to bury his brother, and had indicated the nearest address for purposes of communication, no communication was made to him

by way of police signal or otherwise to tell him that the leave he had applied for was not approved by the OCPD;

- iii. that the Applicant was declared a deserter prematurely and that the evidence by the police witness who handled the matter did not disclose a *prima facie* case against the Applicant to warrant placing him on his defence.

32. This being the case, and having read the notice of intended orderly proceedings dated 19<sup>th</sup> June 2013 to the effect;

*“after going through the Court proceedings and the content of the forwarding letter, it is clear the officer’s leave request was not approved and that he failed to report back in time after expiry of five (5) days off granted to enable him facilitate the burial of his late brother.*

*The officer’s conduct of disregarding his DCIO’s instructions to report back indicate ‘I don’t care attitude’ which is a gross misconduct not acceptable within the National Police Service”*

clearly shows, the intended orderly room proceedings arises out of the alleged conduct of the Applicant the subject of the criminal trial which conduct raises substantially the same issues on which the Applicant was acquitted.

33. The intended action clearly contravenes **Section 12(iv)** of the **Kenya Police Standing Orders** as read with **Section 62** of the **Police Act**.

It follows therefore, once the respondents decided to press a criminal charge of desertion against the Petitioner, then they had waived the right to conduct orderly room proceedings against him on the same facts. The fate of the Petitioner was predicated on the outcome of the desertion trial before the Chief Magistrate.

The acquittal by the Chief Magistrate put an end to the matter.

34. It is the Court’s considered view that subjecting the Petitioner to a 2<sup>nd</sup> internal trial which is quasi-criminal in nature amounts to double jeopardy and a violation of the right to fair Administration action protected under **Article 47(1)** of the **Constitution**.

The provision reads;

*“every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”*

35. The intended orderly room proceedings, following criminal charges for desertion on the same facts is not a lawful administrative action nor is it procedurally fair. It is either or but a person may not be subjected to both processes seriatim. Such conduct is *ipso facto* unlawful as it subjects the subject to double jeopardy.

36. **Remedy**

Accordingly, the Court issues the following orders;

- a. declares that the intended orderly room proceedings in relation to wilful disobedience of a lawful command is unlawful and in violation of **Section 12(iv)** as read with **Section 62** of the **Police Act**.
- b. declares that the intended orderly room proceedings against the Petitioner is in violation of **Article 47(1)** of the **Constitution** in that it is not lawful and the same contravenes the principle against double jeopardy;
- c. the Respondent to pay the costs of this Petition.

*Dated and Delivered at Nairobi this 10<sup>th</sup> day of December, 2014.*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**