



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION NO. 6 OF 2014
CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF CONTRAVENTION AND OR ALLEGED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 41, 47,
50,236(b) OF THE CONSTITUTION, 2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF EMPLOYMENT ACT NO. 11 OF 2007

KAZUNGU NGUMBAO JEREMIAH 1ST APPLICANT

NICHOLAS KIRONGO 2ND APPLICANT

JAMES ROTI 3RD APPLICANT

YAGAN KIPSANG 4TH APPLICANT

v

THE ATTORNEY GENERAL 1ST RESPONDENT

THE NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

JUDGMENT

1. The 4 Petitioners filed a Petition before Court on 4 April 2014 alleging contravention of fundamental rights and freedoms, and seeking

- i. *A declaration that the action of the Div Pol in issuing letter B/EST/1/15/Vol. XVI/8 of interdiction is ultra vires and the same is unprocedural and unwarranted.*
- ii. *The rights of the Petitioner under Article 27, 28, 41, 47, 50, 236(b) of the Constitution, 2010 and the National Police Service Act Section 87 have been infringed.*
- iii. *The communication dated 19th March, 2014 B/EST/1/15/Vol. XVI/8 amounts to disciplining the Petitioners unheard and should be lifted.*
- iv. *The interdiction be lifted and salaries reinstated.*
- v. *Costs.*

2. Together with the Petition, the Petitioners filed a Motion under certificate of urgency seeking orders

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2. *THAT this Honourable Court be pleased to grant interim orders lifting the interdiction of the applicants vide a signal/communication B/EST/1/15/Vol. XVI/8 dated 19th March, 2014 and reinstating their salary already deducted until this application is heard inter partes.*

3. *THAT this Honourable be pleased to grant interim orders lifting the interdiction of the applicants vide a signal/communication B/EST/1/15/Vol. XVI/8 dated 19th March, 2014 and reinstating their salary already deducted until this application is heard and determined.*

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3. The motion was placed before Ongaya J and he ordered that pending *inter partes* hearing of the motion, the Petitioners withheld half salary be released effective 19 March 2014, and that the order be implemented by the Divisional Police Officer Nakuru police division.

4. On 8 May 2014, Ongaya J summoned the Divisional Police Officer Nakuru to attend Court on 12 May 2014 and confirm whether the withheld salaries had been paid.

5. On 12 May 2014, the Judge vacated the order on payment of withheld pay. The Judge also gave the parties opportunity to negotiate and compromise and also conclude the pending disciplinary cases against the Petitioners.

6. On 17 October 2014, when the Petition was placed before me after the transfer of Ongaya J, I directed the Respondents to file and serve replying affidavits to the Petition and fixed 20 November 2014 for hearing of the Petition.

7. The parties made submissions as scheduled.

Petitioners' case/submissions

8. The Petitioners case is that they were interdicted from office as Police Officers through a signal B/EST/1/15/VOL.XVI/8 signed by Bernard M. Kioko HSC DIVPOL NAKURU.

9. The interdiction arose out of a complaint made to the Police on 3 March 2014 about loss of Kshs 400,000/- from a motor vehicle owned by a complainant while being arrested.

10. The Petitioners contended that the interdiction was unfair and unjust because an inquiry had not been commenced by the Internal Affairs Unit of the 2nd Respondent by the time of interdiction; that the Internal Affairs Unit had not made any recommendations to interdict the Petitioners; that they had not been accorded a hearing prior to interdiction and this was contrary to Article 47 of the Constitution and section 87 of the National Police Service Act; that the complainant had not made a report of robbery with violence and unlawful confinement and therefore there was no substance to the reason advanced by the DIVPOL of *serious inquiry of robbery with violence and unlawful confinement*.

11. For the Petitioners, it was urged that the wrong procedure was used to interdict them and that section 87 of the National Police Service Act was not followed. The officer who interdicted the Petitioners, it was submitted, had no powers to interdict them and the interdiction was *ultra vires*.

12. The Petitioners further contended that they had not been receiving half salary as ordered by the Court at the interlocutory stage.

13. It was further submitted that Article 236 of the Constitution protects public officers and it had been breached.

14. According to the Petitioners, their rights to equality before the law and protection of the law (Article 27(1)), inherent dignity (Article 28), fair labour practices (Article 41(1)), and fair administrative action (Article 47) had been violated or threatened with violation.

Respondents' case/submissions

15. The Respondents filed a 9 point Replying Affidavit sworn by one Collins Wekesa Ngavu on 8 May 2014.

16. According to the Respondents, a complaint against the Petitioners was made on 3 March 2014 by a named person alleging the Petitioners had violently robbed her of Kshs 400,000/- in the course of arrest. After the complaint was made, investigations were carried out by the Internal Affairs Unit and the investigations were still ongoing, and that it was thought fit to interdict the Petitioners pending the outcome of the investigations.

17. It was submitted on behalf of the Respondents that section 87 of the National Police Service Act provided for investigation of allegations of misconduct against police officers and that section 25(1) of Part A of the Force Standing Orders provided for interdiction and that the Petitioners were interdicted by an authorised officer.

18. According to the Respondents, the Petitioners were getting half salary from time of interdiction.

Petitioners' rejoinder

19. In a brief rejoinder, the Petitioners countered that pursuant to section 131 of the National Police Service Act, 2011, the Force Standing Orders were not applicable because they had not been reviewed to bring them in conformity with the Constitution within 12 months.

Issues for determination

20. After considering the pleadings, affidavits, documents filed and respective parties' submissions, the Court has identified the questions for determination as, whether the Petitioners were entitled to a hearing before interdiction, whether the interdictions were procedural, whether any of the Petitioners fundamental rights and freedoms had been breached and appropriate relief.

Whether Petitioners were entitled to a hearing before interdiction

21. Within the employment relationship, interdiction or any other disciplinary process is based either on contractual authority or statutory underpinning, otherwise there may be breach of contract or statutory unfairness flowing from the constitutional normative provision on fair labour practices.

22. The Petitioners did not anchor their case on contractual breach or protection, and the Court will therefore examine the Constitutional architecture and look at the statutory framework on discipline of police officers.

23. The Employment Act, 2007 being a statute of general application in regard to employment, does not have any provision in regard to a hearing before interdiction. The protection granted to employees through section 41 of the Act is a hearing before termination of services if the ground is based on *misconduct, poor performance or physical incapacity*.

24. Section 3 of the Employment Act expressly ousts its application to members of the Police Service. Officers of the Police service may therefore not found a right to a hearing before interdiction on the Employment Act, 2007.

25. The Court must therefore turn its attention to any specific statute regulating members of the Kenya Police Service. The principal statute is the National Police Service Act.

26. Both parties made fleeting reference to the National Police Service Act and more particularly section 87 of the Act and the Force Standing Orders (the Respondents counsel undertook to furnish the Court with the relevant part of the Force (Service) Standing Orders but by time of preparation of this judgment, the same had not been made available).

27. Section 87 of the National Police Service Act provide

1) There is established an Internal Affairs Unit (hereinafter referred to as “the Unit”) of the Service which shall comprise of—

(a) an officer not below the rank of assistant Inspector-General who shall be the Director;

(b) a deputy director; and

(c) such other staff as the Unit may require.

(2) The functions of the Internal Affairs Unit shall be to—

(a) receive and investigate complaints against the police;

(b) promote uniform standards of discipline and good order in the Service; and

(c) keep a record of the facts of any complaint or investigation made to it.

(3) In the performance of its functions, the Unit shall be subject to Article 47 of the Constitution.

(4) The Unit shall investigate misconduct and hear complaints—

(a) from members of the Service or members of the public;

(b) at the direction of a senior officer;

(c) on its own initiative; or

(d) on the direction of the Inspector-General; or

(e) at the request of the Independent Police Oversight Authority.

(5) Notwithstanding subsection (4) (e) the Authority may at any time intervene and take over the investigations when they have reason to believe the investigations are inordinately delayed or manifestly unreasonable.

(6) The Unit may recommend the following disciplinary actions to the Commission—

(a) **the interdiction of an officer;**

(b) the suspension of an officer;

(c) the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer; or

(d) any other lawful action.

(7) The Unit shall be located in separate offices from the rest of the Service.

(8) The Director shall assign a senior investigating officer in every county who shall be responsible for police internal affairs in that county.

(9) The Units shall report directly to the Assistant Inspector-General who shall subsequently report directly to the Inspector-General.

(10) There shall be an effective relationship and regular reporting by the Internal Affairs Unit to the Independent Police Oversight Authority, Coroners, the Chief Firearms Licensing Officer as well as the Commission.

(11) The Unit shall not be subject to the control, direction or command of the Kenya Police, Administration Police or the Directorate.

28. The Court cannot find any explicit provision in the primary Act itself entitling a police officer to a hearing before a decision to interdict is taken. What section 87(3) of the Act has done is to incorporate the right to fair administrative action into the investigation process carried out by the Internal Affairs Unit.

29. Article 47(1) of the Constitution has made procedural fairness part of the right to fair administrative action.

30. The primary role of the Internal Affairs Unit is to carry out investigations. These investigations, in my view are to establish or bring forth the facts upon which disciplinary action may be taken.

31. In the course of investigations, the Unit will invariably need to hear from the officers under investigations within the parameters set out in the Force Standing Orders as may be applicable.

32. After the Unit has carried out investigations, it makes recommendations to the National Police Service Commission.

33. In my understanding, the Commission is under an obligation to hear the representations made by the concerned officer before suspending or interdicting him/her. The right to a hearing therefore becomes crystallised after the Internal Affairs Unit has made recommendations and before the Commission takes any action such as interdiction or suspension.

34. I would therefore answer the first question in the affirmative and hold that a police officer is entitled to a hearing before interdiction or suspension by virtue of Article 47(1) of the Constitution as read with section 87(3) of the National Police Service Act.

Whether the interdictions were procedural

35. The Court will now examine whether the process leading to the interdiction of the Petitioners were procedural.

36. The Petitioners alleged that their interdiction was improper because the decision to interdict was not made by an authorised officer. The decision to interdict was communicated to each of the Petitioners by Bernard M. Kioko who signed the interdiction letters as Officer Commanding Police Division, Nakuru. The letters were dated 19 March 2014.

37. On the same date, the Officer Commanding Police Division sent a signal to Police Headquarters notifying headquarters of the interdiction of the Petitioners.

38. Section 87(8) of the National Police Service Act allows the Director of Internal Affairs Unit to assign a Senior Investigating officer in each county to be responsible for police internal affairs.

39. Under the applicable statutory framework in March 2014, the functions and powers of the Internal Affairs Unit were limited to receipt of complaints against police officers and investigation of the complaints and to make recommendations to the National Police Service Commission. The recommendations include the interdiction of an officer as a disciplinary action.

40. 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 delegatee, Director of the Internal Affairs Unit or the senior investigative officer assigned duties in the county (the Court is cognizant of Article 245(1)(b) and 245(4)(c) which on the surface appears to be inconsistent with Article 246(3)(c) but considers there may be no disharmony, but because no legal arguments were led, says no more).

41. The Court was not informed on whose authority the *Div Pol* was acting in interdicting the Petitioners from service.

42. And for the Commission to take disciplinary action against an officer it should comply with the peremptory requirements of Article 47(1) of the Constitution.

43. The Court has also considered the provisions of Article 246(3)(b) which provides that

The Commission shall-observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service.

44. 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*).

45. The Petitioners also challenged the interdictions on the ground that no inquiry had been conducted and that the decision to interdict was taken before granting them an opportunity to be heard. The Petitioners made reference to Article 47(1) of the Constitution.

46. Although the Petitioners did not cite section 89 of the National Police Service Act, there is a provision therein which is material. Section 89(3) provide that

All disciplinary proceedings under this Part shall be in accordance with the Service internal disciplinary procedures as approved by the Commission and shall comply with Article 47 of the Constitution.

47. The aforesaid provision expressly incorporates the right to fair administrative action into the disciplinary process involving officers of the Police Service.

48. The Court therefore needs to examine whether the interdiction of the Petitioners was a disciplinary process within the meaning of Part X of the Act or an investigation to establish the facts upon which to commence disciplinary process against the Petitioners.

49. The functions of the Internal Affairs Unit include to *receive and investigate complaints against the police; and to investigate misconduct and hear complaints— from members of the Service or members of the public.*

50. The facts as presented in the instant case are that a complaint was made and received by an Inspector of Police, Omollo. The report was booked in the OB of even date.

51. It is not clear on the facts whether Inspector Omollo was an officer assigned by the Director of Internal Affairs Unit. The Act requires the Internal Affairs Unit to be located at separate offices from the Police Service. The Court would therefore take it that the complaint was made generally to the Police Service in respect of a suspected criminal offence and not disciplinary issue.

52. The interdiction letters clearly informed the Petitioners that the interdiction would wait the outcome of inquiries into allegations of robbery with violence and unlawful confinement.

53. Under the applicable statutory framework in March 2014, the functions and powers of the Internal Affairs Unit were limited to receipt of complaints against police officers and investigation of the complaints and to make recommendations to the National Police Service Commission. The recommendations include the interdiction of an officer as a disciplinary action.

54. The purported interdiction by the *Div Pol* and for that matter any other officer or entity was and would be improper and unprocedural.

55. Because of the conclusions reached, the Court considers it is not desirable to discuss whether the Petitioners fundamental rights and freedoms were violated or threatened with violation.

Conclusion and Orders

56. In light of the above, the Court finds and holds and proceeds to declare that the

i. action of the DivPOL Bernard M. Kioko to interdict the Petitioners through letters B/EST/1/15/VOL.XVI/4, B/EST/1/15/VOL.XVI/5, B/EST/1/15/VOL.XVI/7 and B/EST/1/15/VOL.XVI/9 were *ultra vires* the National Police Service Act.

57. The Court orders that

- i. That the interdiction of the Petitioners be lifted and all withheld salaries and benefits be paid forthwith.
- ii. Each party to bear own costs.

58. For the avoidance of doubt, the Internal Affairs Unit of the National Police Service is at liberty to conclude its investigations and make appropriate recommendations to the National Police Service Commission.

Delivered, dated and signed in open Court in Nakuru on this 23rd day of January 2015.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Muthanwa

For Respondents Mr. Kirui, Litigation Counsel,

Office of the Attorney General



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