



Case Number:	Petition 2 of 2015
Date Delivered:	05 Jun 2015
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nyeri
Case Action:	Judgment
Judge:	Byram Ongaya
Citation:	Joshua Muindi Maingi v National Police Service Commission & 2 others [2015] eKLR
Advocates:	Wahome Gikonyo & Company Advocate for the Petitioner Makori Okello litigation Counsel for the Attorney General
Case Summary:	<p style="text-align: center;">High Court declares section 88(4) of the National Police Service Act that provides for disciplinary proceedings as unconstitutional</p> <p style="text-align: center;">Joshua Muindi Maingi v National Police Service Commission & 2 Others</p> <p style="text-align: center;">High Court of Kenya at Nyeri</p> <p style="text-align: center;">Petition No 2 of 2015</p> <p style="text-align: center;">B Ongaya J</p> <p style="text-align: center;">June 5, 2015</p> <p style="text-align: center;">Reported by Andrew Halonyere</p> <p>The petitioner was subject to criminal proceedings in Anti-Corruption Case No. 2 of 2012 in the Chief Magistrate's Court at Nyeri. The petitioner in that case was charged with 7 counts under the Anti-Corruption and Economic Crimes Act. The charges included corruptly soliciting for a benefit</p>

contrary to section 39(3)(a) as read with section 48(1) of the Act; corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48(1) of the Act; and concealing evidence contrary to section 66(1)(c) as read with section 66(2) of the same Act.

The trial court found that the evidence could not sustain a conviction on all counts as the petitioner was given the benefit of doubt and was acquitted under section 215 of the Criminal Procedure Code on all the 7 counts.

After the acquittal the petitioner wrote to the 3rd respondent asking for the lifting of the suspension in accordance with section 62(3) of the Anti-Corruption and Economic Crimes Act.

The 3rd respondent lifted the interdiction and directed the petitioner to report back on duty awaiting further instructions.

At a later date the petitioner was notified to show-cause why he should not be removed from the service pursuant to the provision of Cap 20 Section 35(a) of the Service Standing Orders.

The petitioner thereafter brought a petition before the High Court seeking *inter-alia*, declaration that the act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service based on the concluded anti-corruption case was in breach of the petitioner's constitutional rights under articles 27(1) (2) and (3), 28, 41 and 50 of the Constitution and that the same was null and void for all intents and purposes.

Issues

- I. Whether the petitioner could be subjected to administrative disciplinary procedure upon similar or substantially similar allegations for which the petitioner was acquitted in the criminal case.
- II. Whether section 88(4) of the National Police Service Act is unconstitutional in so far as it empowered the National Police Service Commission to retry police officers in a disciplinary process with respect to

acts or omissions the officers might have been acquitted or convicted by the court in criminal proceedings

- III. Whether the petitioners intended removal from the service on account of matters for which the petitioner was acquitted was an unfair labour practice that contravened article 41 (1) of the Constitution.

National Police Service Act

Section 88(4)

Notwithstanding subsection (3) the Commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal.”

Held

1. The respondents could not act against the acquittal finding and they could not initiate, continue or conclude such administrative disciplinary proceedings once the petitioner was acquitted, since the Anti-Corruption and Economic Crimes Act No. 3 of 2003 provided the clear legal regime to be followed by the employer in instances of criminal proceedings against a public officer under the Act so much so that the findings on the allegations as leveled against the petitioner under the Act was in the exclusive jurisdiction of the trial criminal court as prescribed in that Act.
2. It would defeat the purpose of the Anti-Corruption and Economic Crimes Act No. 3 for the respondents to purport to reinvestigate or make alternative findings in view of the allegations that were leveled. If such invention of administrative disciplinary procedure were to be allowed, then the whole purpose for which the Act was enacted would be rendered nugatory.
3. For the offences that were under the Anti-Corruption and Economic Crimes Act No. 3 that coincided with the public officer's alleged misconduct or poor performance, the clear legislative provision and intention

was that the same be conclusively investigated and concluded in accordance with the provisions of that Act. The legislative intention was to remove such cases from the administrative disciplinary powers and discretion of the individual employers in the public or state services.

4. Where legislation constituted a framework of a path and flow of events in specified situations without ambiguity like in the instant case, it would have been unlawful to act in contravention of the provisions of the statute.
5. The role of the judgment in the criminal case as against cases of unfair dismissal or as against the employer's power to initiate, continue and conclude administrative disciplinary cases, like in the instant case, was to establish the reason for the termination, usually beyond reasonable doubt. Thus once the criminal court returned a finding that the employee was not guilty as charged, the employer was bound by the findings of the criminal court and the employee could not be punished or subjected to disciplinary proceedings on account of allegations substantially similar or similar to those in the criminal court proceedings.
6. Section 88(3) of the National Police Service Act was not worded to override the clear provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The provision did not entitle the Commission or any person or authority acting on behalf of the Commission to invoke that provision in a manner that undermined the established tenets of justice. One such fundamental tenet of justice was that with respect to criminal charges, the criminal court's decision and finding was conclusive as against all other authorities in so far as the liability of the accused person was concerned with respect to the particulars of the charges. Such other authorities could not walk in the shadow of the criminal court's decision or finding so as to bewitch the decision or finding by purporting to revisit the decision or finding with pretended jurisdiction and clear distortion

of the accused person's liability or innocence except through the criminal justice process of criminal appeals or revisions.

7. Article 50(2) (o) was clear that every accused person had the right to a fair trial including not to be tried for an offence in respect of an act or omission for which the accused person had previously been either acquitted or convicted. Once the petitioner was acquitted, it was the court's finding that outside the criminal appeal or revision process, no other authority could subject the petitioner to a retrial with respect to the acts or omissions for which he was acquitted. It was immaterial that such retrial was fashioned and styled as administrative disciplinary process or a process under the Service Standing Orders, it was unconstitutional, null and void.
8. Section 88(4) of the National Police Service Act is unconstitutional in so far as it empowered the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers might have been acquitted or convicted by the court in criminal proceedings. The section is inconsistent with article 50 (2)(o) of the Constitution and null and void to the extent of that inconsistency.
9. Where the court at the end of the criminal hearing has acquitted or convicted a police officer the Commission or the person or authority exercising powers of disciplinary control over the officer bound by the acquittal or conviction and the officer is not required to be subjected to a retrial in an administrative disciplinary process (under the section referred to as "disciplinary action" which essentially would be unconstitutional. all that was required to be done was imposition of appropriate punishment in view of the conviction, or resumption of duty or reinstatement or continuation in employment in line with the acquittal by the criminal court.
10. The phrase "disciplinary action" has been assigned the meaning of administrative

disciplinary process entailing service of a charge or show cause notice setting out allegations, invitation of the police officer to defend one-self, and culminating in a finding of culpability or lack of it on the part of the officer. That was exactly what the respondents embarked to do in the instant case. Such a process was a retrial with reference to acts or omissions for which the criminal court might have acquitted or convicted the police officer and therefore it was unconstitutional.

11. The disciplinary proceedings as initiated was in contravention of the clear provisions of section 62(3) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Lifting of the suspension or interdiction as it was called in the instant case brought the case to an end without a legitimate recourse to fresh disciplinary proceedings in that regard.
12. The petitioner's intended removal from the service on account of matters for which the petitioner was acquitted was an unfair labour practice that contravened article 41 (1) of the Constitution. The findings by the criminal court and the lifting of the interdiction permanently exculpated the petitioner from the matters which he had been charged with in the criminal case, as the same would never constitute a legitimate reason for the petitioner's removal from employment.
13. The respondents reasons contravened the petitioner's right to equality before the law and the right to equal protection and equal benefit of the law including enjoyment of all rights as provided for in article 27(1) and (2) of the Constitution. In particular the petitioner had established that he was subjected to a retrial in contravention of the Constitution and the provisions of the relevant legislation had not been complied with in letter and effect.
14. At the time the petitioner moved to court, the offending disciplinary process had not been concluded and action in accordance with that section had not accrued. Therefore the issues of legality and constitutionality of the offending

disciplinary process were properly subject to the court's jurisdiction and not the administrative review and confirmation process as prescribed in the section.

15. The act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service based on the concluded anti-corruption case in Anti-Corruption Case was in breach of the petitioner's constitutional rights under Articles 27(1) and (2), 41(1), 47(1) and 50 (2) (a) and (o) of the Constitution and that the same proceedings was null and void for all intents and purposes.

Petition allowed.

The petitioner to serve the judgment within 7 days upon the respondents, the Attorney General, the Law Reform Commission, and the Commission for the Implementation of the Constitution for appropriate action.

Cases

East Africa

1. *Geoffrey Mworira v Water Resources Management Authority & 2 others* Constitution Petition No 4 of 2015 – (Followed)
2. *Koskei, Mathew Kipchumba v Baringo Teachers SACCO* Cause No 37 of 2013 – (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1, 2, 3(1); 10; 19; 20; 21; 22; 27(1) (2) (3); 28; 41 (1); 47(1) (2); 48; 50(1) (2) (a) (o); 244(b); 245(4) ; 246(b) ; 258 – (Interpreted)
2. Constitution of Kenya Supervisory and

	<p>Protection of Fundamental Rights and Freedoms of the Individual (High Court Procedure Rules) 2013 (Constitution of Kenya, 2010 Sub Leg) rules 4, 10, 11, 13, 20 – (Interpreted)</p> <p>3. Anti-Corruption and Economic Crimes Act, 2003 (Act No 3 of 2003) sections 39(3) (a); 48(1); 62(1) (3) – (Interpreted)</p> <p>4. Criminal Procedure Code (cap 75) section 215 – (Interpreted)</p> <p>5. National Police Service Act, 2011 (Act No 11A of 2011) section 88(1), (2), (3) (4); 89 (2) – (Interpreted)</p>
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered for the petitioner against the respondents
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 2 OF 2015

SERGEANT JOSHUA MUINDI

MAINGI.....PETITIONER

VERSUS

**THE NATIONAL POLICE SERVICE COMMISSION.....1ST
RESPONDENT**

THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE2ND RESPONDENT

THE DEPUTY INSPECTOR GENERAL, KENYA POLICE SERVICE.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2015)

JUDGMENT

The petitioner filed the petition on 15.04.2015 through Wahome Gikonyo & Company Advocate. The petitioner invoked Articles 1,2,3(1), 10, 19, 20, 21, 22, 27(1) (2) and (3), 28, 41 (1), 47(1) and (2), 48, 50(1) (2) (a) and (o), and 258 of the Constitution. The petitioner also invoked rules 4, 10, 11, 13 and 20 of the Constitution of Kenya Supervisory and Protection of Fundamental Rights and Freedoms of the Individual (High Court Procedure Rules) 2013. The petitioner alleged the contravention of fundamental rights and freedoms under Articles 27(1), (2) and (3), 28, 41(1), 47(1) and 50(1), (2) (a) and (o) of the Constitution. The petitioner prayed for judgment against the respondents for:

1. A declaration that the act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service based on the concluded anti-corruption case is in breach of the petitioner's constitutional rights under Articles 27(1) (2) and (3), 28, 41 and 50 of the Constitution and that the same is null and void for all intents and purposes.
2. That pending the hearing and final determination of this petition, conservatory orders of stay do issue staying the removal proceedings of the petitioner from the Kenya Police Service.
3. An order directing the respondents to reinstate the petitioner to his employment without loss of benefits if any removal is effected.
4. Any other or better order the court may deem mete and just to grant.

The respondents opposed the petition by filing the replying affidavit of Makori Okello, learned litigation counsel at the Office of the Attorney General.

The petitioner was enlisted in the National Police Service with effect from 21.03.1987. At all material time he was deployed to serve as deputy officer commanding police station at Nairutia Police Station.

The petitioner was subject to criminal proceedings in Anti-Corruption Case No. 2 of 2012 in the Chief

Magistrate's Court at Nyeri. The petitioner in that case was charged with 7 counts under the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The charges included corruptly soliciting for a benefit contrary to section 39(3)(a) as read with section 48(1) of the Act; corruptly receiving a benefit contrary to section 39(3) (a) as read with section 48(1) of the Act; and concealing evidence contrary to section 66(1)(c) as read with section 66(2) of the same Act. It was alleged in that case that the petitioner committed the offences on 31.10.2011. In a judgment delivered on 16.12.2014, the honourable trial court found that the available evidence could not sustain a conviction on all counts as the petitioner was given the benefit of doubt and was acquitted under section 215 of the Criminal Procedure Code on all the 7 counts.

After the acquittal the petitioner wrote to the 3rd respondent on 8.01.2015 asking for the lifting of the suspension in accordance with section 62(3) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Section 62(1) of the Act provides that a public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge. The petitioner had been interdicted accordingly with effect from 25.05.2012 and he wrote for lifting of the interdiction as per section 62(3) of the Act which provides thus, **"The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted."** By the letter dated 18.03.2015, the 3rd respondent lifted the interdiction with effect from the date it had been imposed. The petitioner was directed to report back to duty awaiting any further instructions.

Subsequently, the petitioner received another letter also dated 18.03.2015 which stated as follows:

"RE: SHOW CAUSE LETTER

You were enlisted into the Kenya Police Service with effect from 21.03.1987 as a Police Constable.

During the period you have served in the Kenya Police, you have not earned yourself any commendation or award but you were charged in orderly room proceedings on 3/12/1991 for the offence of being guilty of an act to the prejudice of good order and discipline. You pleaded guilty and you were sentenced to a fine of Kshs.350/=.

In addition to the above, you were interdicted from duty with effect from 4th November 2011 after you were charged in court with seven counts under the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The case was fully heard in court and on conclusion you were discharged under section 215 of the Criminal Procedure Code.

In view of the above, I have been directed by the Deputy Inspector General, Kenya Police Service to ask you to show-cause why you should not be removed from the Service under the provision of Cap 20 Section 35(a) of the Service Standing Orders.

Your representations if any should be received here within 7 days failure to which you will be removed from the service without any further reference to you.

C.P.C SIGNAL NPS/NYIC/B/EST/1/21/VOL.1/85 DATED 18/3/2015 REFERS.

Signed

SAMMY MAKOKHA

O.C.P.D KIENI WEST”

The petitioner replied to the show-cause letter by his letter dated 19.03.2015. He stated that the orderly room proceedings had taken place about 20 years ago and thereafter he had improved in his performance and discipline as he had been promoted through the ranks upon his superiors' recommendations on account of his good work. The petitioner further replied that he had been acquitted on all counts in the criminal case and he was entitled to resume duty under section 62(3) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The petitioner pleaded that he had served for over 28 years and he was keen to serve for 14 years until the mandatory retirement age. The petitioner further stated that he had a young family which depended on him for livelihood and education. He further stated that he had a clean record of over 25 years so that the cited section 35(a) of the Force Standing Orders did not apply.

By the letter dated 3.02.2015, the Regional Police Coordinator for Central Region wrote to the 3rd respondent narrating the petitioner's employment record, the charges in the criminal case, the petitioner's acquittal in that case and concluding with a recommendation thus, **“There is no doubt that the officer committed the offences charged with and owing to the seriousness of the offences, I recommend for:**

- 1) Uplifting of the interdiction w.e.f from 4th November 2011.**
- 2) Instituting removal proceedings from the service on public interest as per Cap. 20 Section 35(a) of the FSO.**

I enclose two copies of certified court judgment dated 16th December 2014 for your perusal and further necessary action.

Please advice.

[L.K. KIENG] MBS

REGIONAL POLICE COORDINATOR

CENTRAL REGION”

In the circumstances, the petitioner became apprehensive that unless the court intervenes, the respondents would proceed to remove the petitioner from public service in total violation of the petitioner's rights as enshrined in the Constitution. It was the petitioner's case that once the court found that he was not guilty as charged in the criminal case, the respondents could not find him guilty of the same offences as such subsequent findings would be in violation of Article 50(2) (a) and (0) of the Constitution.

Upon application by the petitioner, on 16.04.2015 the court made interim orders thus, **“3. That pending the inter-parties hearing of the Notice of Motion or further orders by the court, the respondents by themselves or by their agents or employees are hereby directed to stay all proceedings that may lead to the removal of the petitioner from service of the National Police Service and the petitioner shall continue in employment with full salary, allowances and other benefits and in particular no further proceedings flowing from the letter dated 3rd February, 2015 and reference**

number PF/NO.53419/146 by L.K.Kieng (MBS), Central Regional Police Coordinator shall be undertaken.”

By consent of the parties, that interim order was extended on 12.05.2015 till the hearing and determination of the petition. While that interim

order was in place, the respondents addressed to the petitioner the letter dated 7.05.2015 PF/NO.53419 TJ/3 as follows:

“RE: REMOVAL FROM THE KENYA POLICE SERVICE

This is further to my letter B/EST/1/21/VOL.19/22 of 17th March 2015 notifying you of the intended removal from the Kenya Police Service. You were called upon to show cause why you should not be removed from the service.

Your show cause reply letter addressed to the Deputy Inspector General through this office dated 19th March 2015 was received.

Your representation has therefore been critically analyzed and hence lacked merit in that you were given benefit of doubt by the court and acquitted under section 215 of the Criminal Procedure Code which itself is a conviction. The offences committed under Anti-Corruption and Economic Crime Act are serious and the Service does not entertain officers who do not conform to the service norms.

Therefore, having been dissatisfied in regard to all the reports and your representations made in the matter thereof, it is in the interest of the Service that you are removed under provisions of Chapter 20 Section 35(d) of the Service Standing Orders for activities prejudicial to the Good Order.

You have been given 30 days with effect from 7th May 2015 and your removal from the Service will be effective from 7th June 2015.

You will surrender all items of kit and Government liability and pay for deficit if any.

You will be informed by separate letter by the Personnel Department, Kenya Police Service, the benefits that will follow your exit in the Service.

On behalf of the Deputy Inspector General, Kenya Police Service, I wish you best of luck in your future endeavours.

You have 7 (seven) days to appeal through the right channel against the above decision if you are not satisfied.

Signed

[L.K. KIENG] MBS

REGIONAL POLICE COORDINATOR

CENTRAL REGION.”

That letter was brought to the court's attention by the application for contempt filed for the petitioner on 11.05.2015. After the parties' respective advocates made submissions on the issue of the apparent disobedience of the interim orders and in view of that removal letter, the court made an order on 12.05.2015 with the consent of the parties thus, **"2.(b) The letter dated 7.05.2015 Ref. No. PF/No.53419 conveying removal of the petitioner from the Kenya Police Service is hereby stayed as the interim orders earlier made will be obeyed by the respondents."**

The court has considered the petition, the supporting affidavit, the exhibits, the replying affidavit and the submissions made for the parties. The court makes the following findings with respect to the issues in dispute.

The **1st issue** for determination is whether the petitioner could be subjected to administrative disciplinary procedure upon similar or substantially similar allegations for which the petitioner was acquitted in the criminal case. It was submitted for the respondents that under section 88(1), (2), (3) and (4) as read with section 89 of the National Police Service Act, all police officers could face disciplinary proceedings notwithstanding the fact that previously they had been charged, convicted or acquitted in respect to any criminal offence.

Section 88 of the National Police Service Act provides as follows:

- 1) Every police officer shall be an officer in the service and shall be subject to the law and regulations from time to time in force relating to the service.**
- 2) The offences against the discipline include the offences prescribed under the 8th schedule.**
- 3) A police officer who commits a criminal offence, as against the law shall be liable to criminal proceedings in a court of law.**
- 4) Notwithstanding subsection (3) the Commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal.**

It was submitted for the respondents that in view of the provisions of section 88(4) of the National Police Service Act, the respondents were entitled to continue with the administrative disciplinary proceedings as it was being done and even after the acquittal of the petitioner in the criminal case.

For the petitioner it was submitted that the applicable law was the cited section 62(3) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 so that the petitioner was entitled to have the interdiction lifted and to continue in employment accordingly. It was submitted that the recommendation and assertion in the letter dated 3.02.2015 thus, **"There is no doubt that the officer committed the offences charged with and owing to the seriousness of the offences, I recommend for:**

- a) Uplifting of the interdiction w.e.f from 4th November 2011.**
- b) Instituting removal proceedings from the service on public interest as per Cap. 20 Section 35(a) of the FSO."** was in clear contravention of Article 50(2) (a) which entitled the petitioner to be presumed innocent until the contrary was proved; and further contravened Article 50 (2) (o) which entitled the petitioner not to be tried for an offence in respect of which the petitioner as an accused person in the criminal case had previously been acquitted in that criminal trial.

The court has considered the rival submissions. The court upholds its opinion in the case of **Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru.** With respect to employer’s administrative disciplinary proceedings where a criminal element exists, the court stated as follows:

“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

a) Where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer’s decision without involving the relevant criminal justice agency.

b) If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.

c) If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer’s administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

d) To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee’s misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process.”

In the present case the provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 applied. The petitioner was interdicted on half pay in line with section 62(1) of the Act which prescribed as much. The court finds that the provisions of section 62(3) that the public officer ceases to be suspended if he is acquitted also applied. Indeed, the petitioner was accordingly allowed to resume duty upon the acquittal as it is clear that the interdiction was lifted. To that extent the court finds that the respondents complied with the said section 62(3) of the Act.

The pertinent issue is whether the effect of lifting of the suspension or interdiction as it was called in this case upon acquittal meant that, on issues before the criminal court, the petitioner had been found not guilty and the employer, the respondents, could not initiate, continue and conclude administrative disciplinary proceedings against the petitioner on grounds similar or substantially similar to the charges in the criminal case. In the opinion of the court, the respondents could not act against the acquittal finding - the respondents could not initiate, continue or conclude such administrative disciplinary proceedings once the petitioner was acquitted. The court considers that the Anti-Corruption and Economic Crimes Act No. 3 of 2003 provided the clear legal regime to be followed by the employer in instances of criminal proceedings against a public officer under the Act so much so that the findings on

the allegations as leveled against the petitioner under the Act was in the exclusive jurisdiction of the trial criminal court as prescribed in that Act. The court holds that it would defeat the purpose of that Act for the respondents to purport to reinvestigate or make alternative findings in view of the allegations that were leveled, found to fall under the provisions of the Act and for which the trial criminal court acquitted the petitioner. If such invention of administrative disciplinary procedure were to be allowed, then the whole purpose for which the Act was enacted would be rendered nugatory. It is the opinion of the court that for the offences under that Act that coincided the public officer's alleged misconduct or poor performance, the clear legislative provision and intention was that the same be conclusively investigated and concluded in accordance with the provisions of that Act. The legislative intention, in the opinion of the court, was to remove such cases from the administrative disciplinary powers and discretion of the individual employers in the public or state services. The court further holds that where legislation constitutes a framework of a path and flow of events in specified situations without ambiguity like in the instant case, it would be unlawful to act in contravention of the provisions of the statute.

The court has considered the provisions of Section 88 of the National Police Service Act. Subsection (3) provides that a police officer who commits a criminal offence, as against the law shall be liable to criminal proceedings in a court of law. Subsection (4) provides that notwithstanding subsection (3) the Commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal. First the court holds that under subsection (3), only courts have jurisdiction to make findings of criminal liability against a police officer. Under the section, the court further holds that administrative disciplinary proceedings would only deal with findings and imposition of punishment for offences by a police officer against discipline and which offences are set out in the 8th schedule to the Act. The court further holds that the powers of the Commission to take disciplinary action under subsection (4) must be understood against the principles guiding administrative disciplinary action by employers in cases with a criminal element as earlier upheld and quoted in this judgment. In the opinion of the court the role of the judgment in the criminal case as against cases of unfair dismissal or as against the employer's power to initiate, continue and conclude administrative disciplinary cases, like in the instant case, is to establish the reason for the termination, usually beyond reasonable doubt. Thus once the criminal court returns a finding that the employee is not guilty as charged, the employer is thereby bound by the findings of the criminal court and the employee cannot be punished or subjected to disciplinary proceedings on account of allegations substantially similar or similar to those in the criminal court proceedings.

The court has reflected upon the provisions of section 88(4) of the National Police Service Act thus, **"4) Notwithstanding subsection (3) the Commission may take disciplinary action against a police officer who commits a criminal offence, whether leading to disciplinary action, conviction or acquittal."** First, the subsection is not worded as to override the clear provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Second, it is the opinion of the court that the provision does not entitle the Commission or any person or authority acting on behalf of the Commission to invoke that provision in a manner that undermines the established tenets of justice. One such fundamental tenet of justice is that with respect to criminal charges, the criminal court's decision and finding is conclusive as against all other authorities in so far as the liability of the accused person is concerned with respect to the particulars of the charges. Such other authorities cannot walk in the shadow of the criminal court's decision or finding so as to bewitch the decision or finding by purporting to revisit the decision or finding with pretended jurisdiction and clear distortion of the accused person's liability or innocence except through the criminal justice process of criminal appeals or revisions. Thus, Article 50(2) (o) is clear that every accused person has the right to a fair trial including not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. Once the petitioner was acquitted, it is the court's finding that outside the criminal appeal or revision process, no other authority could subject the petitioner to a retrial with respect to the acts or omissions for which

he was acquitted. In the opinion of this court, it is immaterial that such retrial was fashioned and styled as administrative disciplinary process or a process under the Service Standing Orders; it was unconstitutional, null and void.

Turning back to provisions of section 88(4) of the National Police Service Act, the court finds, and as understood by the respondents in their submissions, that the section empowers the National Police Service Commission to retry police officers in what is called disciplinary action and without due regard (i.e. notwithstanding) acquittal or conviction by the criminal court. The court finds that to that extent section 88(4) is unconstitutional as it offends clear provisions of Article 50(2) (o) of the Constitution. The court considers that the petitioner is entitled to the declaration that section 88(4) of the National Police Service Act is unconstitutional in so far as it empowers the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers may have been acquitted or convicted by the court in criminal proceedings as the section is inconsistent with Article 50 (2)(o) of the Constitution and the section is null and void to the extent of that inconsistency. While making that finding, the court holds that where the court at the end of the criminal hearing has acquitted or convicted a police officer the Commission or the person or authority exercising powers of disciplinary control over the officer is thereby bound by the acquittal or conviction and the officer need not be subjected to a retrial in an administrative disciplinary process (under the section referred to as “**disciplinary action**”) which essentially would be unconstitutional; all that needs to be done is imposition of appropriate punishment in view of the conviction; or resumption of duty or reinstatement or continuation in employment in line with the acquittal by the criminal court.

It is words that form objects in our thoughts or minds. The objects as formed in our thought process or our minds define our actions and omissions. In the section, for avoidance of doubt, the phrase “**disciplinary action**” has been assigned the meaning of administrative disciplinary process entailing service of a charge or show cause notice setting out allegations, invitation of the police officer to defend one-self, and culminating in a finding of culpability or lack of it on the part of the officer. That is exactly what the respondents embarked to do in the instant case. The court finds such process to be a retrial with reference to acts or omissions for which the criminal court may have acquitted or convicted the police officer and therefore unconstitutional. The line is thin and the court declares that such process is not tenable constitutionally; what is tenable is for the Commission or the person or authority exercising disciplinary control to implement the decision of the criminal court by simply allowing the officer to continue in employment in view of the acquittal or by simply imposing one or other lawful punishment in view of the conviction. The smart play in the game once and there is no reason to deviate from that long standing and established constitutional position.

In the present case, after the criminal court found the petitioner not guilty, the recommendation in the letter of 3.02.2015 went behind that court finding and asserted thus, no doubt the petitioner committed the offences as charged. Again in the unlawful and offending letter of 7.05.2015, it was stated that the criminal court had returned a conviction against the petitioner but which was obviously not true. The court finds that section 88(4) of the National Police Service Act did not entitle the Commission or its agents or servants to distort findings of the criminal court as it was done in the present case.

To answer the 1st issue for determination, the court returns that the petitioner could not be subjected to administrative disciplinary procedure upon similar or substantially similar allegations for which the petitioner was acquitted in the criminal case.

The 2nd issue for determination is whether the petitioner's fundamental rights and freedoms or constitutional protections have been violated. The court makes findings as follows:

1. 1) The court has considered the recommendation and assertion in the letter dated 3.02.2015 thus, **“There is no doubt that the officer committed the offences charged with and owing to the seriousness of the offences, I recommend for:**

a) Uplifting of the interdiction w.e.f from 4th November 2011.

b) Instituting removal proceedings from the service on public interest as per Cap. 20 Section 35(a) of the FSO.” In the criminal proceedings, the contrary had been established, that is, that the petitioner was not guilty as charged and was therefore acquitted. The court finds that in making that recommendation and assertion, the same was a clear initiative to disregard the petitioner's acquittal. As submitted for the petitioner, that amounted to a summary trial for a second time by an incompetent authority in total disregard of the concluded court processes. It was a decision in nature of a judgment finding that the petitioner was guilty as though the author was a court of appeal in an appeal against the criminal trial court's decision but which was not true. The court finds that the petitioner's rights in Article 50(2) (a) and (0) were thereby contravened.

2) Article 47(1) of the Constitution entitled the petitioner to administrative action that was expeditious, efficient, lawful, reasonable, and procedurally fair. As submitted for the petitioner, the court finds that the disciplinary proceedings as initiated was in contravention of the clear provisions of section 62(3) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. In the opinion of the court, lifting of the suspension or interdiction as it was called in this case brought the case to an end without a legitimate recourse to fresh disciplinary proceedings in that regard.

3) The court further finds that the petitioner's intended removal from the service on account of matters for which the petitioner was acquitted was an unfair labour practice that contravened Article 41 (1) of the Constitution. The court holds that by reason of the findings by the criminal court and the lifting of the interdiction, the petitioner was thereby permanently exculpated from the matters for which he had been charged with in the criminal case as the same would never constitute a legitimate reason for the petitioner's removal from employment.

4) The court finds that the respondents by reasons already stated earlier in this judgment contravened the petitioner's right to equality before the law and the right to equal protection and equal benefit of the law including enjoyment of all rights as provided for in Article 27(1) and (2) of the Constitution. In particular the petitioner has established that he was subjected to a retrial in contravention of the Constitution and provisions of the relevant legislation had not been complied with in letter and effect.

The 3rd issue for determination is whether the petitioner is entitled to the court's intervention through remedies as prayed for and whose effect is legitimate interference of the respondent's exercise of powers of disciplinary control over the petitioner. In the ruling delivered on 15.05.2015 in **Geoffrey Mworira –Versus- Water Resources Management Authority [2015]eKLR** the court stated thus, **“The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with**

the breach through the employer's internal process.”

In this case the petitioner has established that the respondents are proceeding in contravention of the petitioner's constitutional rights and the clear provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. Thus, the court finds that the petitioner is entitled to the court's intervention in the manner the respondents are exercising powers of disciplinary control over the petitioner as the respondents' employee. Thus, the court finds that in the circumstances, the respondents' submission that the petition was calculated to undermine or limit the respondents from discharging their constitutional and statutory duties under Articles 244(b), 245(4) and 246(b) of the Constitution and under sections 88 and 89 of the National Police Service Act was not justified. It was submitted for the respondents that the petitioner had not exhausted the remedies specifically set out in section 89(2) of the National Police Service Act entailing forwarding of the record in the disciplinary case to the Commission for review and confirmation. The court finds that at the time the petitioner moved to court, the offending disciplinary process had not concluded and action in accordance with that section had not accrued. The court further finds that the issues of legality and constitutionality of the offending disciplinary process were properly subject to the court's jurisdiction and not the administrative review and confirmation process as prescribed in the section.

To answer the 3rd issue for determination, the court returns that the petitioner is entitled to the court's intervention through remedies as prayed for and whose effect is legitimate interference with the respondent's exercise of powers of disciplinary control over the petitioner.

The 4th issue for determination is whether the petitioner is entitled to the remedies as prayed for. The petitioner has showed that the employer is proceeding in a manner that is in contravention of the provision of the Constitution and legislation. The petitioner has established that the employer is proceeding in a manner that is manifestly unfair. In the circumstances of the case the intervention by the court to protect the petitioner's rights will meet the ends of justice.

In conclusion judgment is entered for the petitioner against the respondents for:

1. The declaration that the act of the respondent in serving the petitioner with a notice to show cause and initiating removal proceedings from the Kenya Police Service based on the concluded anti-corruption case in Anti-Corruption Case No. 2 of 2012 in the Chief Magistrate's Court at Nyeri is in breach of the petitioner's constitutional rights under Articles 27(1) and (2), 41(1), 47(1) and 50 (2) (a) and (o) of the Constitution and that the same proceedings is null and void for all intents and purposes.
2. That the letter dated 7.05.2015 reference No. PF/NO.53419 TJ/3 conveying removal of the petitioner from the Kenya Police Service or any removal proceedings or decision founded upon matters subject to or similar to or substantially similar to that in Anti-Corruption Case No. 2 of 2012 in the Chief Magistrate's Court at Nyeri is and shall be null and void as the petitioner is entitled to continue in employment without a break and with full benefits.
3. The declaration that section 88(4) of the National Police Service Act is unconstitutional in so far as it empowers the National Police Service Commission to retry police officers in a disciplinary process with respect to acts or omissions the officers may have been acquitted or convicted by the court in criminal proceedings as the section is inconsistent with Article 50 (2) (o) of the Constitution and the section is unconstitutional, null and void to the extent of that inconsistency.
4. The petitioner to serve this judgment within 7 days upon the respondents, the Attorney General, the Law Reform Commission, and the Commission for the Implementation of the Constitution for appropriate

action in view of order (3) above.

5. The respondents shall pay the petitioner's costs of the petition.

Signed, dated and delivered in court at **Nyeri** this **Friday, 5th June, 2015**.

BYRAM ONGAYA

JUDGE



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