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REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. E207 OF 2022

IN THE MATTER OF SKEWED & IRREGULAR
APPOINTMENT OF PRINCIPAL ADMINISTRATIVE
SECRETARY (PAS)

AND

IN THE MATTER OF ARTICLE 155 OF THE
CONSTITUTION (2010)

AND

IN THE MATTER OF RULE 4,10,11,13 OF THE
CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION AND PROTECTION OF FUNDAMENTAL
FREEDOMS)- HIGH COURT PRACTICE AND PROCEDURE
RULES 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLE 3,10,27,73,75 AND 232 OF THE CONSTITUTION OF

KENYA

AND

IN THE MATTER OF ARTICLES

1,2,3,10,23,27,28,41,54,55,56,73,75, 159,162,179,201,232, 249, 258

AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RIGHT TO INCLUSIVITY, 2/3

GENDER RULE, NON-ETHNIC MARGINALIZATION AND

NON-DISCRIMINATION

IN THE MATTER OF THE EMPLOYMENT AND LABOUR

RELATIONS COURT ACT

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

IN THE MATTER OF THE FAIR ADMINISTRATIVE

ACTION ACT, 2015

-BETWEEN-

DR. MAGARE GIKENYI J. BENJAMIN..... PETITIONER

- VERSUS -

HON. ATTORNEY GENERAL 1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

NATIONAL ASSEMBLY.....3RD RESPONDENT

AND

BERNICE SILAAL LEMEDEKET..... 52ND INTERESTED

PARTY (Petition as relating to the 1st to 51st interested parties
having been determined by the ruling delivered by the Court on
27.04.2023)

LAW SOCIETY OF KENYA53RD INTERESTED PARTY

FREDRICK BIKERI54TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Tuesday 25th July, 2023)

JUDGMENT

1. The petitioner drew and filed the petition dated 05.12.2022. The

petitioner prayed for:

a) (spent).

b) (spent).

c) A declaration that the purported press release and/or gazette
notice or/and any document of the purported appointment of
52nd interested party into a position of Principal
Administrative Secretary without constitutional, statutory
and all enabling provisions of the law inter alia Article

10,73,75, 155 and 201 of the Constitution is unconstitutional, *ultra vires* and therefore invalid, null and void ab initio.

- d) The court is pleased to issue an order of judicial review by way of CERTIORARI, quashing the respondent's press release and or gazette notice no. 14712 (Vol. CXXIV-NO.256) or/and any document of the purported nomination/appointment of 52nd interested parties and/or any other person nominated as principal administrative secretary without considering statutory and constitutional provisions.
- e) An order of judicial review by way of PROHIBITION, prohibiting the 52nd interested party from acting in any way or manner as principal administrative secretary on account of the appointment vide press release or/and Gazette Notice gazette notice No. 14712(Vol.CXXIV-NO.256 dated on/around November-December, 2022.
- f) (spent).
- g) A declaration that the skewed appointments/action of respondent persons in gazette notice no. 14712(Vol. CXXIV-NO 256) and 52nd interested party as principal administrative

secretaries without constitutional and statutory provisions is contrary to article 1,2,3,10,27,54,55,56,73,75,201 and 232 of the Constitution, 2010.

h) A declaration that the unprocedural establishment and/or assignments of the office/position of the principal administrative secretary as accounting officer has no legal, statutory and constitutional underpinning and hence unconstitutional null and void.

i) That any other order or/and modification of petitioner's prayer(s) which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.

j) Costs of this Petition to be borne by respondents.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 05.12.2022. The petitioner's case is as follows:

a) His Excellency the President did not initiate public participation on the function and creation of the office of principal administrative secretary (hereinafter PAS)

b) The position of PAS does not exist both in the Constitution

of Kenya and the law and is contrary to Article 155(2) of the Constitution

- c) The creation of the office of PAS is a waste of public resources since the 52nd interested party would be accounting officer, work which is supposed to be performed by the principal secretary in relevant state department
- d) The role of the 52nd interested party will be similar to the principal secretary hence duplication of roles, bloating the already blotted civil service and depleting the country's scarce financial resources. No evidence has been provided to the extent that the principal secretaries have been overwhelmed so as to require the assistance of principal administrative secretary.
- e) That Article 201(d) of the Constitution 2010 orders us in mandatory terms that public money shall be used in a prudent and responsible way.
- f) That the office would increase public expenditure and will lead to loss of public money and that it will not be a prudent way of managing financial resources and will set in process

a *domino effect* which will effectively deplete scarce resources.

g) That it is in the interest of justice that appointment of the principal administrative secretary to the government be declared an illegality and a nullity since the same is aimed at rewarding the major ethnic community and men to the chagrin of women, people with disabilities and other ethnic communities in the country who are considered “unimportant”. That there is no role of gender discrimination and political marginalization in the country in this 21st century.

3. The 1st respondent filed the replying affidavits dated 25.01.2023 and 14.06.2023 of Felix K. Koskei the Chief of Staff and Head of the Public Service, and Peter Kiptanui Leley, the Chief Executive Officer of the National Police Service Commission, respectively and, both filed through the Hon. Attorney General. It was stated and urged as follows:

a) The office of the principal administrative secretary/accounting officer, national police service was lawfully established and competitively filled by the national police service commission.

- b) The appointment of the principal administrative secretary of the national police service was made by the national police service commission under article 246 of the constitution and not by His Excellency the President. His Excellency the President merely declared public the appointment of the 52nd interested party owing to the novelty and public interest nature of the position.
- c) That in pursuit of financial autonomy recommended in numerous publicly available reports; including the Ransley Report and the Waki Report, and independence guaranteed by the Constitution under Article 245 of the Constitution of Kenya, the commission while observing due process established the office of the principal administrative secretary within the national police service structures to capably deal with the financial accounting at the national police service and therefore vide minute 211/10/2022 the Commission during its meeting held 05.10.2022 created the office of the principal administrative secretary and accounting officer of the national police service.

- d) That pursuant to articles 234(3) and 246(3) of the Constitution, 2010, the Commission on the 11.10.2022 vide minute 221/10/2022 appointed among candidates recommended to His Excellency the President for appointment of Principal Secretaries one Bernice Sialaal Lemedeket the 52nd interested party to the position of principal administrative secretary and accounting officer to the national police service and issued an appointment letter dated 09.12.2022 signed by the chairperson of the commission.
- e) That the transfer of the accounting/administrative responsibility of the national police service from the principal secretary for the state department for the time being responsible for police services to the newly established office of the principal administrative secretary was instituted as a transitory measure informed by the need to fill the position with a candidate qualified for appointment as a principal secretary.
- f) That the appointment of the 52nd interested party was drawn from the list of the candidates shortlisted and interviewed for the position of principal secretaries by the public service

commission in accordance with the prudent principle of inter-dependent administrative function of government agencies as laid by the supreme court in the matter of the Interim Independent Electoral Commission [2011] eKLR.

- g) That accounting function for the national police service has historically been domiciled under the ministry for the time being responsible for police services and the transfer of this accounting function was novel and in public interest.
- h) That it is in public interest that there is change in government policy in support of the financial autonomy of the national police service and the National Police Service Commission as constitutional entities and the transfer of accounting function as acknowledged of this legal standing.
- i) That the acknowledgement of this change of financial accounting policy in the service was publicly declared by His Excellency the President of Kenya who is the head of the National Security Council under which the service is classified in discharge of its national security functions.

4. The 1st respondent's submissions were dated on 23.06. 2023 and filed through the learned Senior State Counsel Mr. Odukenya Wycliffe for the Attorney General. Mr. Ogosso Advocate for the 2nd respondent stated that he would not file submissions but relied upon the 2nd respondent's replying affidavit by Remmy N. Mulati, MBS, the Deputy Commission Secretary sworn on 10.02.2023. the simple answer to the dispute at hand on the part of the 2nd respondent is stated in paragraph 18 thus, "18. That the Commission has no Constitutional or statutory role in the appointment of the Principal Administrative Secretary (PAS) or the Accounting Officer for the National Police Service." The 3rd respondent the National Assembly did not file submissions and did not participate in the dispute as relates to the residual matters about appointment of the 52nd interested party. The petitioner relied on his final submission dated 20.02.2023. The 52nd interested party did not file a replying affidavit or submissions. Counsel for the 1st respondent submitted that he as well appeared for 52nd interested party. The petitioner describes the 53rd and 54th interested parties

as parties interested in the rule of law and constitutionalism but they never took part in the petition proceedings.

5. The Court has considered the material on record and returns as follows.
6. The 1st issue for determination is whether the National Police Service Commission had the necessary constitutional and statutory power to establish and make an appointment to the office of Principal Administrative Secretary/Accounting Officer, of the National Police Service. The letter of appointment of the 52nd interested party is exhibit PKL 1 on the replying affidavit of Peter Kiptanui Leley sworn on 14.06.2023. The letter is dated 09.12.2022 and signed by the Commission Chairperson Eliud N. Kinuthia, CBS, OGW, HSC. The letter addressed to the 52nd interested party Mrs. Bernice Sialaal Lemedeket conveys the decision of the Commission meeting held on 11.10.2022 under minute 221/10/2022 that the 52nd interested party be appointed as the Principal Administrative Secretary (PAS) / Accounting Officer of the National Police Service with effect from 02.11.2022. Further the letter stated that the appointment was pursuant to Commission

mandate to appoint and confirm appointments as stipulated in Article 246 (3) (a) and Article 234 (3) (c) (iv) of the Constitution of Kenya 2010. The duties and responsibilities were stated thus, “As the Principal Administrative Secretary/ Accounting Officer, National Police Service (PAS-NPS) your overall duty is to provide strategic leadership and ensure efficient and effective administration and management of civilian, financial and inventory of resources in the National Police Service. In addition, you will carry out duties and responsibilities of an accounting officer as stipulated in section 147 (1) of the PFM Act.”

7. The letter provided specific managerial or supervisory responsibilities including:

- a) Develop a strategic plan for National Police Service.
- b) Provide strategic leadership to the National Police Service.
- c) Develop and implement an effective performance management system at the National Police Service.
- d) Participate in Commission meetings as may become necessary.
- e) Prepare and submit reports.

- f) Supervise and guide on implementation of Human Resource decisions of the Commission.
 - g) Chair the NPS Civilian Staff Human Resource Advisory Committee (NPS CSHRAC) and recommend civilian human resource matters to the Commission.
 - h) Spearhead reforms and transformation of the National Police Service in accordance with the Government Manifesto.
8. The letter provided for specific operational responsibilities as follows:
- a) Approve resource requirements for operations of the National Police Service.
 - b) Authorised officer for the National Police Service civilian members of service as may be designated by the Commission from time to time.
 - c) Prepare establishment and structure for civilian staff of NPS and submit to the Commission for approvals.
 - d) Prepare annual report for NPS and submit to the relevant authorities.

- e) Facilitate the achievement of goals and objectives of the Government in National Police Service.
- f) Implement performance contracting system for the civilian staff at the National Police Service.
- g) Promote the values and principles spelt out in Article 10 and 232 of the Constitution of Kenya in the National Police Service and submit to NPSC.
- h) Facilitate the achievement of of goals and objectives of the Government in the National Police Service.

9. The specific financial responsibilities were stated in the appointment letter as follows:

- a) Negotiate with the National Treasury and defend the budget before Parliament.
- b) Accounting officer for National Police Service.
- c) Prepare financial reports and achievement of targets and present to the relevant authorities.
- d) Ensure effective and efficient procurement, utilization of financial, human, assets and other resources within the National Police Service.

- e) Carry out duties and responsibilities of an accounting officer as stipulated in Section 147 (1) of the PFM Act.
 - f) Payroll management and administration and ensure compliance with Commission policies, regulations and decisions.
10. The appointment letter set out the specific responsibilities for physical assets as follows:
- a) Maintain an inventory of physical assets of the National Police Service.
 - b) Ensure repair and maintenance and serviceability of the physical assets of the National Police Service.
 - c) Ensure efficient utilization and prevent wastage.
 - d) Management of procurement and disposal of physical assets in accordance with Public Procurement and Disposal Act.
11. The letter stated that the appointment was on a contract term of service for 5-years renewable subject to satisfactory performance upon performance evaluation. It was an appointment for a gross salary of Kshs. 621, 250.00 and other benefits including provision of official transport car of engine capacity not exceeding 3000cc; a


medical cover; retirement gratuity of 31% of annual pensionable emoluments for the term served; group life insurance 3 times of annual pensionable emoluments; group personal accident 3 times of annual pensionable emoluments; car loan upto Kshs. 6,000,000 and mortgage benefit loan of up to Kshs. 30,000,000; Daily Subsistence Allowance for local and foreign travels as reviewed and advised by the SRC from time to time; airtime of Kshs.20,000.00 per month; security provided as advised by the Inspector General of Police and shall not be commuted to cash; Annual Leave Allowance Kshs. 50,000.00; and, work injury benefit per the Work Injury Benefits Act.

12. It is submitted for the 1st respondent that the power vested in the Public Service Commission to establish and create offices does not apply to offices in the National Police Service by reason of the exemption in Article 234 (3) (iv). The Court finds that submission not challenged and it is the correct constitutional position. It is however misguided when it is submitted that the National Police Service Commission Could create the impugned office in accordance with Article 246 (3) which provides that the National

Police Service Commission shall recruit and appoint persons to hold and act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service. The Court finds that while the provision presupposes that there will exist offices with respect to which the National Police Service shall exercise the prescribed powers and functions, the provision by itself does not vest in the Commission the power and function to establish or even abolish offices in the National Police Service. While it is the position as submitted for the 1st respondent that Article 252 (1) (c) on general functions and powers of all constitutional Commissions and Independent Offices include to recruit their own staff, in the instant case the impugned office is not in the establishment of the National Police Service Commission and the Court also returns that that provision does not confer a power to establish or abolish offices.

13. To address the dispute, the Court has considered Article 243 (4) which provides that the Parliament shall enact legislation to give full effect to the Article which essentially establishes the National Police Service. Article 246(3) (c) provides that the National Police

Service Commission shall perform any other functions prescribed by national legislation. Again Article 252 (d) provides that each constitutional commission and each holder of an independent office may perform any functions and exercise any powers prescribed by legislation in addition to the functions and powers conferred by the Constitution.

14. Thus to answer the question whether the National Police Service Commission had the power and function to establish the impugned office, the enabling legislation has to be carefully evaluated. The first relevant statute is the National Police Service Commission Act, Cap 185C. Section 10 of the Act provides that in addition to  the functions of the Commission under Article 246(3) of the Constitution, the Commission shall:

- (a) keep under review all matters relating to standards or qualifications required 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) ensure that the Service is efficient and effective;
- (k) hear and determine appeals from members of the Service;
- (l) develop policies and provide oversight over training in the Service;

- (m) approve training curricula and oversee their implementation; (n) investigate, monitor and evaluate the organization, administration and personnel practices of the Service;
- (n) receive and refer civilian complaints to the Independent Policing Oversight Authority, the Kenya National Commission on Human Rights, the Director of Public Prosecutions or the Ethics and Anticorruption Commission, as the case may be, where necessary;
- (o) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the Service;
- (p) evaluate and report to the President and the National Assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the Service;
- (q) monitor and evaluate the performance of the Service;
- (r) receive complaints and recommendations from police associations registered in accordance with the applicable law;
- (s) perform such other functions as are provided for by the Constitution, this Act or any written law.

15. The Court has considered the additional powers and functions of the National Police Service Commission and they do not include establishment and abolition of offices in the National Police Service.

16. The other relevant statute is the National Police Service Act Cap.84. Section 22(1) of the Act Provides that the Kenya Police Service shall consist of the Ranks set forth in the First Schedule and they include: 1. Deputy Inspector-General. 2. Assistant Inspector-General. 3. Senior Superintendent. 4. Superintendent. 5. Assistant Superintendent. 6. Chief Inspector. 7. Inspector. 8. Senior Sergeant. 9. Sergeant. Corporal. 11. Constable. Section 22(2) provides that the Cabinet secretary may on the advice of the Commission from time to time, by Order published in the Gazette, amend the Schedule. Section 25 of the Act provides that the Administration Police Service shall consist of the Ranks set forth in the Second Schedule and they include: 1. Deputy Inspector-General. 2. Assistant Inspector-General. 3. Senior Superintendent. 4. Superintendent. 5. Assistant Superintendent. 6. Chief Inspector. 7. Inspector. 8. Senior Sergeant. 9. Sergeant. 10. Corporal. 11.

Constable. Similarly, the section provides that the Cabinet Secretary may on the advice of the Commission from time to time, by Order published in the Gazette, amend the Schedule. Section 33 of the Act provides that the Directorate of Criminal Investigations shall have such number of officers as may be assigned from time to time by the Commission on the recommendation of the Directorate. The Act defines thus, "police officer" means an Administration Police officer or a Kenya Police Officer, and includes officers of the Directorate of Criminal Investigations and reservists. The Court returns that the officers assigned to the Directorate of Criminal Investigations are those drawn from the Ranks of the Kenya Police Service and the Administration Police Service because the law does not prescribe Ranks or offices unique to the Directorate. It is important to note that Article 243 (2) of the Constitution provides that the National Police Service shall consist of the Kenya Police Service; and the Administration Police Service. Thus, the Court holds that the Directorate of Criminal Investigations is constituted out of the officers of the Scheduled

Ranks in the Kenya Police Service; and the Administration Police Service.

17. In view of the foregoing, the Court returns that the National Police Service exercises its constitutional and statutory mandate strictly over the officers of the National Police Service being the Ranked offices duly established under the National Police Service Act per the Scheduled Ranks for the Kenya Police Service and the Administration Police Service. The offices or ranks are created or established by the Parliament per the First and Second Schedules to the Act. The Ranks or Offices cannot be changed except by the Cabinet Secretary on the advice of the National Police Service Commission from time to time and by Order published in the Gazette amending the Schedule.

18. The numbers of the officers to hold the Ranks in the first and second Schedules to the National Police Service Act are determined according to provisions of section 4 of the Act on the composition of the National Police Service. The section provides thus: (1) The National Police Service shall consist of such maximum number of officers as shall be determined from time to

time by the National Security Council in consultation with the Commission. (2) The Service shall consist of the ranks set out in the First and Second Schedules. (3) Police officers shall have seniority according to their position as set out in the First and Second Schedules.

19. It therefore appears to the Court and it is the holding that the National Police Service Commission was not vested with the constitutional or statutory authority to create the impugned office of the Principal Administrative Secretary or Accounting Officer, National Police Service (PAS-NPS). Further, the Court holds that no office shall exist in the National Police service outside the Ranks provided for in the first and second Schedule to the Act.

20. The Court has reflected upon the appointment letter dated 09.12.2022 and its reference to National Police Service Civilian Staff. The Court returns that the Constitution and the National Police Service Act do not envisage that there will be such civilian staff within the Ranks of the National Police Service because no such civilians are envisaged within the Ranks of the National Police Service. The Court returns that within the Scheduled Ranks

the National Police Service and the National Police Service Commission are required, in accordance with relevant statutory provisions, to formulate progressive entry character qualifications including academic, professional as well as university, college or technical qualifications, as well as, career growth or promotional progression that enable the Service to meet all its human resource needs within its ranked officers. Thus the additional function of the Commission under section 10(1) (a) of the National Police Service Commission Act is keep under review all matters relating to standards or qualifications required of members of the Service. That is an urgent goal towards the enhanced realization of constitutional objects and functions of Service in Article 244 of the Constitution namely to:

- a) strive for the highest standards of professionalism and discipline;
- b) prevent corruption and promote and practice transparency and accountability;
- c) comply with constitutional standards of human rights and fundamental freedoms;

- d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and
- e) foster and promote relationships with the broader society.

21. The Court further observes that section 17 of the National Police Service Commission Act empowers the Commission to appoint staff necessary for or the proper discharge of its functions under this Act, upon such terms and conditions of service as it may determine, taking into account gender, county and ethnic balancing. Further, the Public Service Commission may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the purposes of the Commission. There appears to be no due process with elaborate provisions for the Commission to establish or abolish offices within its secretariat and the Court considers that to be yet another urgent matter requiring legislative intervention to guide the National Police Service Commission on how to establish or create offices in its establishment. In that regard, the procedures such as

are provided under the Public Service Commission Act, 2007 and the Service Regulations thereunder can be a useful starting point.

22. The 2nd issue is whether the National Police Service Commission was vested with authority to appoint an accounting officer as it purported to do. The Commission invoked Section 147 (1) of the Public Finance Management Act. The Section relates to the role of the accounting officer of a county assembly which shall be to monitor, evaluate and oversee the management of their public finances. The appointment was obviously misconceived. The Public Finance Management Act defines accounting officer in section 2(1) thus: “accounting officer” means— (a) an accounting officer of a national government entity referred to in section 67; (b) an accounting officer of a county government entity referred to in section 148; (c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or (d) in the case of the Parliamentary Service Commission, the Clerk of the Senate. Section 67 of the Act provides thus: (1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the

different national government entities as may be specified in the different designations. (2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office. (3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity. Section 68 of the Public Finance Management Act provide for the responsibilities of accounting officers for national government entities, Parliament and the Judiciary. Subsection 68(1) provides the general responsibility thus: An accounting officer for a national government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is— (a) lawful and authorized; and (b) effective, efficient, economical and transparent. Subsection 68(2) enumerates the roles thus:

- (a) ensure that all expenditure made by the entity complies with subsection (1);
- (b) ensure that the entity keeps financial and accounting records that comply with this Act;
- (c) ensure that all financial and accounting records the entity keeps in any form, including in electronic form are adequately protected and backed up;
- (d) ensure that all contracts entered into by the entity are lawful and are complied with;
- (e) ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safeguarding and maintenance;
- (f) bring any matter to the attention of the Cabinet Secretary responsible for the entity, or the Chief Justice or the Speaker of the National Assembly if, in the accounting officer's opinion, a decision or policy or proposed decision or policy

of the entity may result in resources being used in a way that is contrary to subsection (1);

- (g) prepare a strategic plan for the entity in conformity with the medium term fiscal framework and fiscal policy objectives of the national government;
- (h) prepare estimates of expenditure and revenues of the entity in conformity with the strategic plan referred to in paragraph (g); (i) submit the estimates of the public entity which is not a state corporation to the Cabinet Secretary;
- (i) submit the estimates of a public entity which is a state corporation to the Cabinet Secretary responsible for that state corporation who, after approving it, shall forward it to the Cabinet Secretary;
- (j) prepare annual financial statements for each financial year within three months after the end of the financial year, and submit them to the Controller of Budget and the Auditor-General for audit, and in the case of a national government entity, forward a copy to the National Treasury;

- (k) take appropriate measures to resolve any issues arising from audit which may remain outstanding;
- (l) provide information on any fraud, losses, or any violation of subsection (1) and explanation for the actions taken to prevent a similar problem in future;
- (m) provide the National Treasury and any other office, where relevant, with any information it may require to fulfil its functions under this Act; and,
- (n) in case of a national government entity, carry out such other functions as may be specified by the Cabinet Secretary.

23. The Court has considered the foregoing provisions against the provisions of the National Police Service Act. Sections 23, 26, and 34 enumerate the functions of the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations, for each of them respectively, (reproducing section 23 and which applies to the other two with appropriate modification or reference) thus:

- a) be responsible for the effective and efficient day-to-day administration and operations of the Kenya Police Service;
- b) implement policies and directions of the Service in relation to the Kenya Police Service;
- c) prepare the budget, planning and provision of support for the Kenya Police Service;
- d) establish and maintain police stations, outposts, units or unit bases in the counties and determine the boundaries of the police stations, outposts or unit bases and establish a facility in each police station for receiving, recording and reporting of complaints from members of the public;
- e) manage, monitor and evaluate the Kenya Police Service;
- f) undertake the supervision of the Kenya Police Service;
- g) co-ordinate training in the Kenya Police Service;
- h) provide internal oversight of the Kenya Police Service;
- i) establish and maintain a relationship between the Kenya Police Service and the community;
- j) improve transparency and accountability in the Kenya Police Service;

- k) co-operate and engage in joint security operations with the Deputy Inspector-General, in charge of the Administration Police Service, other Government departments or other security organs to ensure the safety and security of the public;
- l) implement the decisions of the Inspector-General; and
- m) perform such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by this Act or by any other written law.

24. The provision is that in the performance of their enumerated respective functions the the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations are each answerable to the Inspector General of Police as the overall head of the National Police Service. Thus section 10 of the National Police Service Act enumerates the functions of the Inspector General to include:

- a) implement policy decisions;
- b) audit of police operations and functioning;
- c) co-ordinate all police operations;

- d) advise the Government on policing matters and services;
- e) prepare budgetary estimates and develop a policing plan before the end of each financial year, setting out the priorities and objectives of the service and the justification thereof;
- f) determine the establishment and maintenance of police stations, posts, outposts, units or unit bases in the county and determine the boundaries of the police stations, outposts or unit bases;
- g) determine the distribution and deployment of officers in the Service and recommend to the Commission and the County Policing Authorities;
- h) organize the Service at national level into various formations, units or components;
- i) recommend the establishment of, manage and maintain training institutions, centers or places for the training of officers joining the service and other officers;
- j) commission research and benchmark against best practices;


- k) issue guidelines on community policing and ensure co-operation between the Service and the communities it serves in combating crime;
- l) provide the command structure and system of the Service for the efficient administration of the Service nationally;
- m) subject to the Constitution and this Act. or any written law, cooperate with and implement the decisions of the Independent Policing Oversight Authority;
- n) designate any police station, post, outpost, unit or unit base as a place of custody;
- o) promote co-operation with international police agencies;
- p) establish and devolve the services of the Internal Affairs Units that are able and equipped to conduct investigations into police misconduct in a fair and effective manner and report directly to the Inspector General;
- q) monitor the implementation of policy, operations and directions of the Service;
- r) issue and document Service Standing Orders;

- s) cooperate with other public or private bodies to provide reliable police statistics on crime rates, detection rate, public confidence in the police, number of complaints against the police, as well as personnel statistics;
- t) act on the recommendations of the Independent Policing Oversight Authority, including compensation to victims of police misconduct; and,
- u) perform any other lawful act on behalf of the Service


25. Section 119 of the Act on annual estimates provides thus: (1) At least three months before the commencement of each financial year, the Inspector-General shall cause to be prepared the estimates of the revenue and expenditure of the Service for that year. (2) The annual estimates shall make provision for all the estimated expenditure of the Service for the financial year concerned, and in particular shall provide for— (a) the payment of salaries, allowances and other charges in respect of the staff of the Service; (b) the payment of pensions, gratuities and other benefits which are payable out of the funds of the Service; (c) the maintenance of the assets of the Service; (d) the funding of operations, training,

research and development of activities of the Service; (e) the creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment, and in respect of such other matters as the Service may consider appropriate. Section 120 on approval of annual estimates provides thus: The annual estimates shall be approved by the Service before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for approval, and after the Cabinet Secretary has given approval, the Service shall not increase any sum provided in the estimates without the consent of the Cabinet Secretary.

26. The Court has considered the provisions of the National Police Service Act and returns that the role of an accounting officer as defined in section 2(1) of the Public Financial Management Act is clearly vested in the Inspector General of the National Police Service as assisted by the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations - and each of the three being answerable to the Inspector General of

Finance 

Police. Section 67 (2) of the Public Management Act is clear that except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office. The Court holds that the person responsible for administration of the National Police Service is the Inspector General of the National Police Service and he is accounting officer of the Service by reason of the wide statutory roles as cited earlier in this Judgment. The Inspector General of National Police Service ought therefore be designated by the Cabinet Secretary under the Public Finance Management Act as the Accounting Officer – and in event of a vacancy in the office of the Inspector General of the National Police Service or for one reason or other, the Inspector General in not available or able to perform ~~to~~ ^{the} role of an accounting officer, then the Cabinet Secretary under the Public Finance Management Act ought to designate either of the deputies, the Deputy Inspector General of Kenya Police Service, or, the Deputy Inspector General of the



Administration Police Service, to perform the role of an Accounting Officer in the Service in event of such intervening period. The Cabinet Secretary assigned by the President to administer the National Police Service Act performs the oversight role over the budgetary issues of the Service by approving the estimates and after which approval, the Service cannot deviate therefrom.

27. To answer the 2nd issue, the Court returns that the National Police Service Commission did not have the relevant authority to make an appointment of an ~~Authorized~~ ^{Accounting} officer as it purported to do.

28. To answer the 3rd issue, the Court returns that the role of an accounting officer for the National Police Service has been shown to be wholly vested in the Service and in particular the Inspector General of the National Police Service as assisted by the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations by reason of the statutory provisions. The Court therefore returns that the petitioner was misconceived in urging and submitting that the Principal Secretary responsible for

the National Police Service should be the accounting officer for the National Police Service. It is true that Principal Secretaries administer state departments assigned to them. However, Article 245 (4) of the Constitution provides that the Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to:

- a) The investigation of any particular offence or offences;
- b) The enforcement of the law against any particular person or persons; or
- c) The employment, assignment, promotion, suspension or dismissal of any member of the National Police Service. In that way, the National Police Service is assured operational independence with functional accountability. The Court has considered Executive Order No. 1 of 2022 on Organization of the Government of the Republic of Kenya made in January, 2023 and signed by the President on 06.01.2023. Under the Ministry of Interior and National Administration

there is established the State Department for Internal Security and National Administration and a Principal Secretary is assigned as Dr. Raymond V.O Omollo, PhD. The functions include policy on internal security, policy on national crime research and management, policy on training of security personnel and others. The policy functions in the findings of the Court are consistent with the role of the Cabinet Secretary Article 245 (4) of the Constitution. It was misconceived for the petitioner to urge that the Principal Secretary is assigned the role of Accounting Officer in the National Police Service as that would undermine the design of the Service per the National Police Service Act and the Constitution that the Service is accorded financial capacity to by itself formulate and implement its budgets with the Inspector General of National Police as the Accounting Officer. Invariably, the principal secretaries being administrators of the state departments assigned to them, they are the designated Accounting Officers for assigned departments per sections 2(1) definition of accounting officer as read with sections 67

and 68 of the Public Finance Management Act, 2012. The National Police Service is constitutionally designed to operate with autonomy and it is not assigned to a Principal Secretary but the Inspector General is vested with all functions and authority to administer the Service. Accordingly, by operation of the constitutional and statutory provisions, the Inspector General of the National Police Service is the designated Accounting Officer of the Service.

29. The Court has considered the petitioner's case on the wastage of public resources in the manner the impugned office was established and an appointment made thereto by the National Police Service Commission. The Court finds that the assignments obviously duplicate those vested in the Inspector General of the National Police Service as assisted by the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations. Second, it refers to a cadre of officers known as civilians and which the Court has found to be inconsistent with the constitutional and statutory composition of the National Police

Service. Most important the impugned appointment and the office enjoyed remuneration and benefits which were not said to have been based on the advisory or determination of the Salaries and Remuneration Commission (SRC) per Article 230 (4) as read with Article 259 (11) and Article 201 of the Constitution. To answer the 4th issue the Court therefore returns that the manner of establishment of the office and making of the appointment thereto was not in the best interest of the national economy and prudent use of the scarce resources per the constitutional values and principles cited by the petitioner including as provided in Articles 10, 201 and 232 of the Constitution.

30. To answer the 6th issue, the Court returns that the appointment of the 52nd interested party was in clear contravention of the constitutional values and principles as envisaged in Articles 10, 232, 73 and 75 of the Constitution. It was an appointment to a fictitious office that had not been established at all and to roles already vested in the Inspector General of the National Police Service as assisted by the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration

Police Service, and, the Director of the Criminal Investigations. Other roles like to oversight civilians in the National Police Service was with respect to strange persons outside the Ranks established for the National Police Service under the National Police Service Act.

31. The 6th issue is on remedies. The Court returns as follows:

- a) The petitioner is entitled to the declaration that the purported press release and/or gazette notice or/and any document of the purported appointment of 52nd interested party into a position of Principal Administrative Secretary without constitutional, statutory and all enabling provisions of the law inter alia Article 10,73,75, and 201 of the Constitution is unconstitutional, *ultra vires* and therefore invalid, null and void ab initio.
- b) The petitioner has established that Court be pleased to issue an order of judicial review by way of CERTIORARI, quashing the respondent's press release and or gazette notice no. 14712 (Vol. CXXIV-NO.256) or/and any document of the purported nomination/appointment of 52nd interested

parties and/or any other person nominated as principal administrative secretary without considering statutory and constitutional provisions.

- c) The petitioner has established a case for an order of judicial review by way of PROHIBITION, prohibiting the 52nd interested party from acting in any way or manner as principal administrative secretary on account of the appointment vide press release or/and Gazette Notice gazette notice No. 14712(Vol.CXXIV-NO.256 dated on/around November-December, 2022 or appointment by the letter by the National Police Service Commission dated 09,12,2023 Ref. No. NPSC/SEC/1/3/1A/VIOL.I(59).
- d) The petitioner has established he is entitled to the declaration that the skewed appointments/action of respondent persons in gazette notice no. 14712(Vol. CXXIV-NO 256) and 52nd interested party as principal administrative secretary without constitutional and statutory provisions is contrary to article 1,2,3,10,27,54,55,56,73,75,201 and 232 of the Constitution, 2010.

- e) The petitioner has established the case for the declaration that the unprocedural establishment and/or assignments of the office/position of the principal administrative secretary as accounting officer has no legal, statutory and constitutional underpinning and hence unconstitutional null and void.
- f) The petitioner has succeeded and is awarded costs of the petition payable by the 1st respondent and other parties to bear own costs of the proceedings.

In conclusion, judgment is hereby entered for the petitioner against the 1st respondent for:

- a) The declaration that the purported press release and/or gazette notice or/and any document of the purported appointment of 52nd interested party into a position of Principal Administrative Secretary without constitutional, statutory and all enabling provisions of the law inter alia Article 10,73,75, and 201 of the Constitution is unconstitutional, *ultra vires* and therefore invalid, null and void ab initio.

- b) The order of judicial review by way of CERTIORARI, hereby issued and quashing the respondent's press release and or gazette notice no. 14712 (Vol. CXXIV-NO.256) or/and any document of the purported nomination/appointment of 52nd interested parties and/or any other person nominated as principal administrative secretary without considering statutory and constitutional provisions.
- c) The order of judicial review by way of PROHIBITION, prohibiting the 52nd interested party from acting in any way or manner as Principal Administrative Secretary on account of the appointment vide press release or/and Gazette Notice gazette notice No. 14712(Vol.CXXIV-NO.256 dated on/around November-December, 2022 or appointment by the letter by the National Police Service Commission dated 09,12,2023 Ref. No. NPSC/SEC/1/3/1A/VIOL.I(59).
- d) The declaration that the skewed appointments/action of respondent persons in gazette notice no. 14712(Vol. CXXIV-NO 256) and 52nd interested party as principal administrative secretary without constitutional and statutory provisions is

contrary to article 1,2,3,10,27,54,55,56,73,75,201 and 232 of the Constitution, 2010.

- e) The declaration that the unprocedural establishment and/or assignments of the office/position of the principal administrative secretary as accounting officer has no legal, statutory and constitutional underpinning and hence unconstitutional null and void.
- f) For avoidance of doubt and consistent with the findings in this Judgment and the prayer for an order deemed fit so as to achieve objects of justice for majority of Kenyans as a whole it is hereby declared as follows:
 - i. The Inspector General of the National Police Service is the designated Accounting Officer of the National Police Service by operation of the provisions of the Constitution in Article 245 as read with the functions and duties or roles of the Inspector General provided in the National Police Service Act and the definition, appointment or designation and responsibilities of Accounting Officer provided in sections 2(1), 67 and

68 of the Public Finance Management Act, 2012 respectively.

- ii. The Inspector-General shall discharge the responsibilities of an Accounting Officer as as assisted by the Deputy Inspector General of Kenya Police Service, the Deputy Inspector General of the Administration Police Service, and, the Director of the Criminal Investigations in the discharge of their respective functions as prescribed under the National Police Service Act.
- iii. The National Police Service Commission shall exercise its constitutional powers in Article 246 (3) and functions and the additional statutory powers per the National Police Service Commission Act with respect to the police officers whose offices are established per the Ranks in the First and Second Schedules to the National Police Service Act and whose numbers are determined per provisions of section 4 of the Act.
- iv. That within the Scheduled Ranks the National Police

Service is required, in accordance with relevant statutory provisions, to formulate progressive entry character qualifications including academic, professional as well as university, college or technical qualifications, as well as, career growth or promotional progression policies that enable the Service to meet all its human resource needs within its ranked officers and as per the additional function of the Commission under section 10(1) (a) of the National Police Service Commission Act to keep under review all matters relating to standards or qualifications required of members of the Service.

v. The National Police Service Commission may delegate to the Inspector- General, subject to the Constitution or written law, the power to promote or appoint police officers under the rank of sergeant per section 10 of the National Police Service Commission Act.

g) The petitioner is awarded costs of the petition payable by the 1st respondent and the other parties to bear own costs of the

proceedings.

Signed, dated and delivered by video-link and in court at Nairobi

this Tuesday 25th July, 2023.


BYRAM ONGAYA
PRINCIPAL JUDGE