



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION 15(E022) OF 2021

-BETWEEN-

EVANS MURIUKI MUTHUURI.....1ST APPELLANT
ODIKARA OLING'A RUTH.....2ND APPELLANT
DAVID OCHOM.....3RD APPELLANT
LINET WANDIA NJAGI.....4TH APPELLANT
GEORGE BARASA.....5TH APPELLANT

-AND-

ATTORNEY GENERAL.....1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT
INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

*(Being an appeal from the Judgment of the Court of Appeal at Nairobi
(W. Karanja, Asike-Makhandia & Gatembu, JJA) delivered on 23rd September
2021 in Civil Appeal No. 352 of 2019)*

Representation:

Mr. Albert Simiyu appearing together with Ms. Cynthia Omuya for the Appellants
(Musyoka Murambi & Associates)

Ms. Brenda Opiyo h/b Mr. Odukenya for the Respondents
(Attorney General's Chambers)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The genesis of this dispute can be traced back to a circular issued on 1st January 1969 where the then Police Commissioner granted graduate police officers in the rank of constable a salary higher than their counterparts who were not graduates. Over time, this practice developed into a policy within the police force (as it was then known) as evinced by a subsequent letter from the Permanent Secretary in Charge of Personnel Management dated 26th July 1995. In that letter, the Permanent Secretary directed that graduate police constables be “differentiated” and designated as University Graduate Constables and placed in Job Group J.

[2] It is apparent from the pleadings before us, that the program was intended to encourage graduates with degrees in the relevant fields to apply for recruitment in the lower echelons of the police force which guaranteed them a higher salary than those in the same cadre but without a degree. It appears to us that the programme was designed to entrench professionalism in the police force.

[3] It should be apparent that the two documents, the 1969 circular and the letter of 1995, predate the current Constitution which was promulgated in 2010. Article 244 of which defines the functions and objects of the National Police Service (the force has come to be known). The Article enjoins the service “**to strive for the highest standards of professionalism and, to train staff to the highest possible standards of competence and integrity**” so as to respect human rights and fundamental freedoms and dignity.

[4] The Constitution also establishes the National Police Service Commission (named in the proceedings as the 2nd respondent) and the office of the Inspector-General (the 3rd respondent). The National Police Service Commission (NPSC) under Article 246(3)(a) is the body mandated to “**recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service**”.

[5] Pursuant to the Constitution, the National Police Service Act was enacted in 2011 to make further provisions in respect of the National Police Service. By section 28 thereof, the 2nd respondent is empowered to make regulations generally for the better carrying into effect of any provisions of the Act, and in particular to provide for: **“(a) appointments, confirmation of appointments, promotions and termination of appointments.”**

[6] Based on this, the 2nd respondent has made the National Police Service Commission (Recruitment and Appointment) Regulations, 2015. In November 2016, it also promulgated the Career Progression Guidelines for the National Police Service Uniformed Personnel. These two instruments, in addition to the Constitution and the National Police Service Act, are critical in the determination of this petition, bearing in mind also that the Constitution has also created the Salaries and Remuneration Commission **“to set and regularly review the remuneration and benefits”** of all State officers: and to advise the national and county governments on the remuneration and benefits of all other public officers.

B. LITIGATION BACKGROUND

i. Before the Employment and Labour Relations Court

[7] At the time of filing the Petition before the Employment and Labour Relations Court (ELRC), the 1st to 4th Appellants were police constables serving in either the Administration Police Service (APS) or the Kenya Police Service (KPS), respectively having been recruited on varying dates between 2007 and 2016. While in service, they enrolled and completed University studies attaining bachelor's degrees in different fields. For example, the 1st appellant graduated with a Bachelor of Arts Degree in Economics and History, the 2nd and 4th appellants with Bachelor of Arts Degree in Criminology and Security Studies and the 3rd appellant got a bachelor's degree in arts with Education.

[8] We need to point out at this stage that the 5th appellant was not a member of the police service. He was described in the petition before the ELRC as a law-and-order enthusiast and police rights activist. He has participated in all the proceedings beginning in the ELRC, the Court of Appeal and this Court.

[9] As indicated earlier, the appellants' Petition was anchored on the contents of the aforementioned circular of 1st January 1969 and the letter of 26th July 1995. They also sought to rely on a press release of 19th March 2018 by the then Chairperson of the 2nd respondent, Mr. Johnston M. Kavuludi, confirming that payment of special salaries (Job Group J) to graduate police officers in the National Police Service was legally protected and was provided for in the service policy guidelines.

[10] The gravamen of the appellants' case was that the 2nd and 3rd respondents had been receiving degree certificates from graduate police constables in the service but had selectively and capriciously upgraded some to Job Group J and ignored others with similar qualifications. This, according to them, amounted to preferential treatment in contravention of Articles 10, 27, 41(1), 43, 47, and 232 of the Constitution.

[11] Consequently, they asked the trial court to declare that the respondents' conduct, and action amounted to denial, violation, infringement and/or threat to their fundamental rights and freedoms under the aforesaid Articles of the Constitution. They also sought a declaration that Graduate Police Officers who are on a salary scale below Job Group J but similarly qualified as their colleague Graduate Police Officers in Job Group J have been discriminated against; an order of *mandamus* directing the 1st and 2nd respondents to pay all graduate constables Job Group J salaries with effect from the respective dates of their graduation or enlistment to the service; and an order for costs to be borne by the respondents.

[12] In opposing the Petition, the respondents contended that the appellants' claims were misconceived and misdirected for relying on both the circular of 1st January 1969 and the letter dated 26th July 1995. The letter, for instance, was to apply and benefit only those police constables who were, at the time of recruitment, university graduates, and who were then placed under intensive training. It did not apply to officers who were recruited as police constables and then, while already in service acquired degree certificates. In addition, they argued that the letter was annulled by operation of the law when the National Police Service Act (**NPS Act**)

and the National Police Service Commission Act (**NPSC Act**) were enacted and following the promulgation of the National Police Service Commission (Recruitment and Appointment) Regulations, 2015 (**Recruitment and Appointment Regulations**), the National Police Service Commission (Promotion) Regulations, 2015 (**Promotion Regulations**) and the National Police Service Career Progression Guidelines, 2016 (**Career Progression Guidelines**). These, according to the respondents, are the only documents that provide clear career progression with defined entry levels and promotion from one rank to the next. None of them provide for the rank of graduate constable as all officers are recruited to the rank of police constable in terms of the public advertisements for recruitment.

[13] In conclusion, the respondents urged the trial court to find that the Petition lacked merit as it was not anchored upon the prevailing law and regulations governing recruitment, appointment and promotions in the police service; that the letter dated 26th July 1995 had been overtaken by events; and that the First Schedule to the NPS Act, does not recognize a rank known as graduate police constable.

[14] In a judgment delivered on 17th May 2019, the ELRC (*Ongaya, J.*) allowed the Petition on the basis of the evidence of some pay slips exhibited by the appellants allegedly belonging to officers designated as graduate police constables, which showed a difference in their earnings from those of the appellants, yet both categories were in the rank of police constables. Because of this variance, the learned Judge held that the 2nd and 3rd respondents had acted unreasonably and in contravention of Article 47; and that they also subjected the appellants to unfair labour practices and unfair conditions of service in contravention of Article 41 of the Constitution.

[15] The court further held, on a balance of probabilities, that the Press Statement released on 19th March 2018 by the 2nd respondent's chairperson, set out the 2nd respondent's prevailing policy on the graduate constables; and that the appellants were accordingly entitled to benefit from the policy. What was more, the court went

on, the statement confirmed that the Career Progression Guidelines, the Recruitment and Appointment Regulations and the Promotion Regulations, did not render invalid the emplacement of constables being holders of degree certificates to pay level as that of inspectors of police. In this regard, the court concluded that the 2nd respondent's policies in that regard were substantially similar to the policy conveyed in the letter dated 26th July 1995 with apparent variation that it applied to all constables, whether the degree is acquired before or after joining the service.

[16] Third, the court found that, going by the established past practice, the appellants had a legitimate expectation that police constables holding degree certificates are to be emplaced upon the pay level for an Inspector of Police (Job Group J) and to be facilitated to undergo training by the respondents towards effective preparation and subsequent promotion to the substantive position of Inspector of Police. The expectation was reasonable as it was consistent with motivation of officers and in the best interest of the service. As a corollary, the 2nd respondent was the competent constitutional and statutory authority to make and implement the promise; and that the promise for such emplacement had not been shown to contravene any statutory or constitutional provision.

[17] Save for the foregoing findings in favour of the appellants, the court rejected the rest of their claims alleging violation of the other cited constitutional provisions.

[18] In the result, the court ultimately allowed the Petition, declaring that the respondents' conduct and action amounts to a denial, violation, infringement and/or a threat to a violation of the fundamental rights and freedoms of the appellants, for which it issued an order of *mandamus* directing the 2nd and 3rd respondents to pay all graduate constables salaries equivalent to that of an Inspector of Police (Job Group J) in accordance with the prevailing policy and as clarified in the press release by the Chairperson on 19th March 2018. Costs were awarded to the 1st to 4th appellants.

ii. Before the Court of Appeal

[19] This determination aggrieved the respondents who moved to the Court of Appeal by a memorandum of appeal raising 8 grounds. Upon considering these grounds, the Court of Appeal, for its part, condensed them into three issues and framed the following question for its determination; *whether the declaration that Graduate Police Constables were entitled to be emplaced to pay scale of graduate constables' equivalent to pay of an Inspector of Police Job Group J was valid; whether the respondents' "legitimate expectation" was valid; and whether the Order of mandamus was properly issued.*

[20] Beginning with the second issue, the Court of Appeal found that there was an express, clear and unambiguous promise given by a public authority in a circular issued on 1st January 1969 and a letter dated 26th July 1995. The maker of the representation contained in the two documents was legally competent to make them at the time they were made.

[21] However, in the court's view, the ground shifted upon the promulgation of the Constitution in 2010 and the enactment of the NPSC Act No. 30 of 2011. That shift birthed the 2nd and 3rd respondents under Articles 245 and 246 with further provisions in the NPSC Act and NPS Act.

[22] Specifically, the court found that the Constitution has established the Salaries and Remuneration Commission (SRC) one of whose functions is to set and review the remuneration and benefits of all State officers and other public officers; that this role is recognized in the NPSC Act that requires that only with the advice of the SRC, can the NPSC determine the appropriate remuneration and benefits for the police service and staff of the NPSC; and that it ought to follow from these developments that, neither the press release of 19th March, 2018 nor the letter and circular in question could supersede the provisions of the Constitution and the law. The court, for this reason, held that the contents of the press release of 19th March 2018 did not give the appellants any legitimate expectation. Instead, it opined that the appellants and other degree holders in the police service should submit their

papers to the 2nd and 3rd respondents for consideration as to their qualifications for promotion to the corresponding job groups; and that such emplacements and salary grading would also have to be done in consultation with SRC.

[23] In setting aside the order of *mandamus* directing the 2nd and 3rd respondents to pay all graduate constables salaries equivalent to that of an Inspector of Police Job Group J, the appellate court stated that, since the role of SRC in determining benefits and remuneration was obligatory, it was in error for the learned Judge to circumvent and indeed usurp this role; and further that, on the authority its decision in ***Ben Chikamai and another v. Machithi and Another***, Civil Appeal No 313 of 2018; [2020] eKLR, the Press Statement, a policy paper or letter cannot override clear provisions of the law.

[24] On the question of discrimination, the court held that there was no evidence that those graduate constables who had been promoted were promoted purely on the basis of the presentation of the degree certificates without any other considerations.

[25] Consequently, in a judgment delivered on 23rd September 2021, the court found merit in the appeal and allowed it, setting aside the judgment of the ELRC in its entirety, directing parties to bear their own costs both in the Court of Appeal and before the ELRC.

iii. Before the Supreme Court

[26] It is that decision of the Court of Appeal that the appellants have challenged in this appeal as of right pursuant to Article 163(4)(a) of the Constitution on 9 grounds. They seek that we order:

- i. *The appeal to be allowed.*
- ii. *The Judgment and Orders of the Court of Appeal to be set aside.*
- iii. *A declaration that the respondents' conduct, and action amounted to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Officers' rights under Articles 27, 28, 40, 41, 43 and 47 of the Constitution.*

- iv. *A declaration that Police Officers who are University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J have been unfairly discriminated against.*
- v. *An Order of mandamus directing the 1st and 2nd respondents to pay all graduate constables Job Group J salaries with effect from the date of respective graduation or enlistment to the service; and*
- vi. *For costs.*

C. PARTIES' SUBMISSIONS

i) *The Appellant's submissions*

[27] In their submissions, the appellants proposed three issues for determination:

- i. *whether the Court of Appeal erred in law in finding that the appellants' legitimate expectation to receive salary increment after obtaining their respective undergraduate degrees was not enforceable.*
- ii. *whether the Salaries and Remuneration Commission must be engaged before salaries and benefits already being paid to other public servants with the same qualifications and job description, can be paid to the other public servants who subsequently qualify for such pay; and*
- iii. *which party should settle the costs of the appeal?*

[28] Confirming that the Court's jurisdiction has been properly invoked, the appellants relied on Articles 22(1), 22(2)(c), 163(3)(b)(i), 27(1) and (4), 41(1) and (2), 48, 230(4), (5)(c) and (d), 249(1) and (2) and 258 of the Constitution, which they have been cited as the basis of bringing this appeal.

[29] On the first ground, the appellants have argued that contrary to the respondents' case that the circular of 1969 and letter of 1995 were no longer applicable after the promulgation of the Constitution and the enactment of new Statutes and Regulations, the policy contained in both the circular and the letter has since been promulgated into law through Regulation 12 of the Promotion Regulations. The Regulation, according to the appellants provides for horizontal career development, which they explain to mean a non-promotional reward

scheme such as higher financial incentives to members of the National Police Service, irrespective of whether the member is promoted or not.

[30] In their view, it would be unfair, contrary to the rules of natural justice and grossly unconstitutional to apply the Career Progression Guidelines made in 2016 retrospectively to the appellants and other police constables who became entitled to increased pay and promotion before the operationalization of the Guidelines.

[31] They have maintained that, due to the foregoing, the 1st to 4th appellants being members of the National Police Service had a legitimate expectation that after completion of their university studies and obtaining degrees, they would receive higher financial incentives which was the trend from 1969 to 1995 in conformity with the intention to reward qualification, boost morale and intellectual growth in the service.

[32] The press release of 19th March 2018 was, in their opinion a clear demonstration that, even after the promulgation of the Constitution and the passage of relevant laws, the policy continued to be applied. The appellants having relied on past practice and promise had legitimate expectations that they would receive the same treatment as their graduate colleagues and the respondents were accordingly estopped and could not resile from the obligation, in accordance with the following decisions: ***Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others*** SC Petition No. 14, 14A, 14B & 14C of 2014, ***Kalpana Rawal v. Judicial Service Commission & 4 Others*** [2015] eKLR, ***Re Westminster City Council***, (1986) A.C. 668 AT 692 and ***Oindi Zaippeline & 39 Others v. Karatina University & Another*** [2015] eKLR.

[33] They pointed out that the circular, the letter and the press release in question were express, clear, lawful and an unambiguous promise and the makers were competent and had lawful authority to issue them, giving the appellants a legitimate expectation that they would benefit from the arrangement.

[34] In the appellants' view, the Court of Appeal failed to evaluate the disparity of salaries paid to other police constables who had similar qualifications and were

performing the same functions as the appellants; that the court failed to consider the appellants' evidence which clearly pointed to some officers who graduated in the year 2016 and were designated graduate police constables and whose salaries were upscaled to the level of Job Group J in line with the spirit of horizontal career progression highlighted in the Promotion Regulations; that this differential treatment amounted to unfair discrimination and was in contravention of Article 27(4) of the Constitution, Section 12(1) of the Salaries and Remuneration Commission Act and the practice of the National Police Service; and that the respondents have failed, neglected and/or refused to remunerate the appellants at the same level as other graduate police constables who have the same educational qualifications, are on the same rank and perform the same duties.

[35] They claim that despite the respondents insisting that the appellants cannot seek to benefit from an illegality and further that there is no designation known as graduate constable in the NPS ranking structure, the respondents have not taken any practical action to correct the alleged illegality.

[36] On the role of SRC, the appellants have submitted that all they are seeking are benefits that their fellow graduate police constables were and are already receiving and not new salaries; that it is only when new salaries or benefits are to be introduced that SRC would be consulted for concurrence under Article 230(4) of the Constitution; that the learned judge of the ELRC was correct in his appreciation of the *ratio decidendi* in the case of **Teachers Service Commission v. Kenya Union of Teachers (KNUT) & 3 Others** [2015] eKLR and in distinguishing the facts and circumstances in that decision from those in the present case, noting that, unlike the present case, the SRC opinion was mandatory in the **Teachers Service Commission v. Kenya Union of Teachers (KNUT) & 3 Others** (supra) as the TSC (the appellant in that case) was setting new salaries.

ii) Respondent's submissions

[37] The Respondents rely on the Replying Affidavit sworn on 16th December, 2022 by Silas Oloo Mc'Opiyo, the 2nd Respondent's Chief Executive Officer and

their joint written submissions, where they have reiterated their arguments in the ELRC and Court of Appeal, that the circular of 1969 and letter of 1995 were no longer applicable after the promulgation of the Constitution, the establishment of the 2nd and 3rd respondents and the enactment of new statutes and regulations to guide in the process of recruitment and promotion of police officers. They have also prayed for striking out of the 5th appellant's name from the proceedings for the reason that he is not a police officer and therefore lacks the *locus standi* to bring the present petition.

[38] The respondents fault the appellants for blowing hot and cold; seeking a declaration that they have been discriminated against and at the same time seeking to be paid higher salaries and allowances than other officers of the same rank, with whom they were recruited at the same time and performing similar functions, without any proof of special training beyond the degree certificates they hold. In any case, both courts below were unanimous in their conclusion that there was no evidence of the appellants being discriminated against, which decision the appellants have not appealed against. They, therefore, urge the Court not to interfere with the findings of both the ELRC and the Court of Appeal.

[39] In addition, the respondents have accused both the appellants and the learned trial Judge of relying on inadmissible and illegally obtained pay slips to demonstrate the existence of a cadre of graduate police constables and the basis for a claim of legitimate expectation; and that this was done despite the fact that the officers whose pay-slips were presented were not parties to the proceedings, neither did they swear affidavits confirming the ownership or authenticity of the pay slips nor authorized their use in the proceedings. In any case, the respondents contend, a pay slip alone, without more, cannot define the terms of employment or be the basis for a claim of legitimate expectation.

[40] Agreeing with the Court of Appeal, the respondents have reiterated that the appellants had failed to prove that they had a legitimate expectation to be placed in Job Group J automatically upon acquiring degree certificates; that the Court of Appeal applied its mind to the contents of the circular of 1969, letter of 1995, the

provisions of the Constitution, the NPSC Act and the Regulations on recruitment, Career Progression Guidelines, Promotion Regulations and other laws governing the NPSC.

[41] The respondents argue also that the concept of horizontal career development was introduced by the appellants for the first time in the proceedings before this Court, without the ELRC or the Court of Appeal expressing their opinions on the concept. This Court, for that reason, according to the respondents, cannot determine the question.

[42] Was the advice of SRC mandatory? According to the respondents, the press release of 19th March 2018 did not make it automatic that the mere presentation of a university degree would entitle an officer to earn a salary attached to an Inspector. They argued that there is instead a whole process, starting with the declaration of vacancies, selection of candidates who must possess specified relevant requirements, and upon selection the successful candidates must undergo specialized training as inspectors, before being considered for promotion or enjoying the salary and other remuneration attached to Job Group J.

[43] A blanket upgrading of all police officers with degree certificates to the rank of Inspector of Police (Job Group J) would have far-reaching legal, financial and operational implications within the National Police Service. The resultant wage bill will be fiscally unsustainable. In any case, the rank of an Inspector of Police is a position of operational command and control, with greater supervisory responsibilities.

[44] Responding to the appellants' claim that nothing has been done to cure the inconsistencies brought about by the previous policy documents, the respondents have submitted that all the police constables who were earning the salaries of Inspectors outside the present guidelines have reverted to their rightful pay Group of Job Group F. This decision was, however, challenged in the ELRC in **JR Application No. E032 of 2021; Ayub Mathenge Gikonyo & 4 Others v AG & Others** where *Nduma Nderi, J.* delivered judgment in April 2022 and declared that the respondents' unilateral decision to reduce graduate officers' pay

from job group ‘J’ to job group ‘F’ offended Articles 10, 27, 41, and 47 of the Constitution as read together with section 4 and 7 of the Fair Administrative Actions Act.

[45] The respondents have taken out a notice of motion in the Court of Appeal, being **Civil Application No. E211 of 2022** under Rule 5(2)(b) to stay those orders. The application, we were informed, is pending hearing, and we say no more about it.

D. ISSUES FOR DETERMINATION

[46] From our own re-evaluation of the foregoing arguments, the pleadings and the decisions of the two superior courts below, we consider the following to be the issues falling for our determination.

- i. Whether the appeal before this Court meets the constitutional threshold under Article 163(4)(a) of the Constitution.*
- ii. Whether the Court of Appeal erred in finding that the Appellants did not have any “legitimate expectation”; and*
- iii. Whether the Court of Appeal erred in finding that the opinion of SRC was obligatory in the circumstances of this dispute.*
- iv. Who bears the costs?*

E. ANALYSIS AND DETERMINATION

[47] Before we turn to consider each of these issues, we must dispose of the two preliminary points raised by the respondents in their submissions. First, they have argued that the ELRC lacked jurisdiction in the first place to entertain the Petition before it because it did not raise any constitutional issues and secondly, that the 5th appellant’s name be struck out from these proceedings for being a busybody. On the latter question, it is apparent from the record that the 5th appellant has all along, from the ELRC through to this Court been a party, though it is common factor that he is not a police officer. In terms of Rule 36 of the Supreme Court Rules, we conclude that the 5th appellant has the *locus standi* to be in this appeal.

[48] The short answer to the first question regarding the jurisdiction of the ELRC to entertain the dispute is that, apart from the fact that the respondents have not cross-appealed this issue, we note that this question is being introduced for the first time before us. It was neither raised in the ELRC nor determined by the Court of Appeal. The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See ***Odd Jobs v. Mubia*** [1970] EA 476. This was not the case here. We cannot, in those circumstances, consider or determine the question in *vacuo* without the benefit of the opinions of the learned Judges of the two superior courts below.

Both objections must therefore fail.

i) *Jurisdiction under Article 163(4)(a) of the Constitution*

[49] Given this Court's special and circumscribed jurisdiction, before considering the merits of arguments in any appeal before it, as a matter of practice, it first ascertains if it has properly been moved. As *Nyarangi, JA* said in his long-established and classic statement in the ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*** [1989] eKLR, jurisdiction is everything. If we find, for instance, that we do not have jurisdiction, we must down our tools at that point, save in exceptional circumstances. In this appeal, the respondents have contended that this Court lacks jurisdiction to entertain the Petition since the appellants' contracts of employment do not have statutory underpinnings as to render a breach thereof actionable by way of constitutional petition; and that the appellant's grievance before the ELRC did not raise any constitutional issues.

[50] It is settled that appeals from the Court of Appeal will lie to this Court under Article 163(4) of the Constitution, either on matters of constitutional interpretation and application, or upon certification, by either the Court of Appeal or this Court, on matters of general public importance.

[51] It is apparent to us from the Record of Appeal, that all through from the chain of courts starting with ELRC, to the Court of Appeal through to this Court, the issue has remained the interpretation and application of Articles 27, 41 and 47 of the

Constitution. Our simple answer to this question, is that the Court is clothed with the requisite jurisdiction to determine the instant appeal.

ii) Whether the Court of Appeal erred in finding that the Appellants did not have any legitimate expectation

[52] Cumulatively, the appellant's case on legitimate expectation was that the 2nd respondent had established a consistent past practice of extending higher financial and promotional incentives to graduate police constables spanning over a period of 51 years; that this was a clear promise by the government evinced in the circular of 1969, the letter of 1995 and the 2nd respondent's press statement of 19th March 2018; that relying upon this promise the appellants enrolled into accredited institutions of higher learning and obtained university degrees in order to grow in their careers and progress in life through salary increment and promotions; and that upon presentation of their degree certificates, they expected the respondents to emplace them in Job Group J automatically.

[53] To these claims, the respondents asserted that the appellants were misconceived and misdirected to rely on the letter dated 26th July 1995 as it did not apply to them. The letter was to apply and benefit only university graduates recruited as police constables having obtained a degree and then placed under intensive training. While they concede that, this may have been the case in the past, the circular of 1969 and letter of 1995 ceased to be applied after the promulgation of the Constitution, the creation of the 2nd and 3rd respondents and the enactment of new Statutes and Regulations. The process of recruitment and promotion of police officers are now regulated by these instruments, none of which makes provision for the rank of Graduate Constables because all officers to be recruited at that rank are only recruited in accordance with advertisements. There cannot be any claim to legitimate expectation.

[54] The Court of Appeal in determining this question relied on the decision by this Court in ***Communications Commission of Kenya & 5 other v. Royal Media Services Limited & 5 others*** (supra) and succinctly summarized the principles on legitimate expectation as follows:

- “a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable.**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

[55] We did recently restate this very principle in *Kenya Revenue Authority v. Export Trading Company Limited*, SC Petition 20 of 2020; [2022] KESC 31 where we explained further that:

“52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

53. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate.”

[our emphasis]

[56] Was the expectation by the appellants to be emplaced on the same pay level as an officer of the rank of Inspector under Job Group J upon presentation of their degree certificates legitimate? It is not in doubt that the appellants were employed on diverse dates between 2007 and 2016. For example, the 1st appellant was employed in 2016, the 2nd appellant in 2013, the 3rd appellant in 2016 and the 4th appellant in 2007. It is also common ground that their respective degree

certificates were conferred upon them between 2015 and 2017. What then was the applicable law during the period in question?

[57] It is well documented that the origin of recruitment of graduate police constables at the level of Job Group J was a circular issued on 1st January 1969, followed on 26th July 1995 by a letter. We underscore the fact that at the time the letter of 1995 and the circular of 1969 were issued, none of the appellants had been employed in the former police force. The 2nd respondent was also nonexistent. Save for the 4th appellant who was employed in 2007, the rest of the appellants were employed after the promulgation of the Constitution and the establishment of the 2nd respondent in 2011. The Recruitment and Appointment Regulations and Promotion Regulations were subsequently developed in 2015. Therefore, the provisions of the Constitution, the NPS Act and the NPSC Act, the Recruitment and Appointment Regulations, 2015, the Promotion Regulations, 2015 and the Career Progression Guidelines, 2016 to which we have made reference applied to the appellant at the time they received their degrees between 2015 and 2017.

[58] In view of the foregoing fact, it must, of necessity follow that recruitment and promotions in the Kenya Police Service can only be done strictly in accordance with the Constitution and the law. Like the Court of Appeal, we find that at the time the appellants approached the respondents to consider their promotions or salaries enhancement, the ground had shifted. It follows, by necessary implication that the circular of 1969 and the letter of 1995 could not form the basis of the claim of legitimate expectation. We shall return to these documents in so far as some of them provide for graduate constables. But we stress that in the hierarchy of laws, no policy paper or letter can override written law.

[59] What then do we make of the press release of 19th March 2018 by Johnston M. Kavuludi? The context of the press release is important in answering this question. From the contents, it is apparent that the release was a reaction to some misrepresentation in the media regarding an alleged decision by the 2nd respondent about the payment of salaries of graduate constables and officers with disabilities.

[60] In addition to this, the release confirmed that payment of special salaries to graduate constables was legally protected and were in fact provided for in law. It then gave additional conditions that had to be met for graduate constables to be considered. First, the graduate constables had to present their degree certificates to the Inspector General (IG), Deputy Inspector General (DIG) and the Directorate of Criminal Investigations (DCI) for processing and subsequent submission to the 2nd respondent for consideration and authentication. Second, if the officer's certificates met the approval of the 2nd respondent in accordance with the guidelines, the officer would only be granted a special salary equivalent to that of an Inspector, if the IG, in consultation with the 2nd respondent were satisfied that the officer selected in that category met all the other standards required for entry into the rank of Inspector. And that was not all. The officer concerned had to proceed for intensive training for a period of 3 years before emplacement to the rank of Inspector; again, only when vacancies were available and announced.

[61] It was necessary to clarify this procedure in the press because the 2nd respondent was concerned about graduate constables who had unprocedurally been introduced into the payroll as graduate constables without authorization of the IG and approval by the 2nd respondent. In order to correct the widespread illegitimate infiltration of the payroll, the 2nd respondent indicated in that press release that he would embark on an audit of the payroll to remove those officers who did not qualify for such payments. It is this audit that resulted in some officers being demoted from Job Group J to Job Group F, culminating in the institution of ***Mathenge & 4 others v Inspector General of Police & 3 others; Kenya Human Rights Commission (Interested Party)*** (Judicial Review Application 032 & 41 of 2021 (Consolidated)) [2022] KEELRC 4872 (KLR) before the ELRC. *Nduma Nderi, J.* declared on 29th September, 2022 that the unilateral decision to reduce graduate officers' pay from Job Group 'J' to Job Group 'F' without giving them an opportunity to be heard was arbitrary, unreasonable and unlawful. This matter, from what we were told during the hearing, is now before the Court of Appeal.

[62] But all said, the rationale for intensive training of candidates who already are in possession of a degree at the point of recruitment before emplacement to the position of an Inspector cannot be missed, bearing in mind the onerous supervisory role that comes with the rank of Inspector.

[63] The release merely confirmed that payment of special salaries (Job Group J) to graduate police officers in the National Police Service was legally protected and was provided for in the new service policy guidelines.

[64] While the press release was in fact an express promise issued by a public authority, the chairperson of the 2nd respondent, it was addressing a specific category of officers and a specific problem; it merely restated the procedure of promotion of graduate police constables in accordance with the terms of the Promotion Regulations, Recruitment and Appointment Regulations and made no reference to old policy documents. In any case the press release could not replace the law or these guidelines and regulations.

[65] We confirm, first, that there is no rank in the police service categorized as “Graduate Police Constables”. Under Section 22 and the First Schedule of the National Police Service Act, there are thirteen (13) ranks in the Kenya Police Service, with the Inspector General at the apex and Constables hold the nadir position in the hierarchy. Secondly, we confirm that the Career Progression Guidelines developed by the 2nd respondent indeed make provision for two distinct entry points into the police service at the lowest level, the constable, PG 1. One can either be a holder of a Kenya Certificate of Secondary Education (KCSE) with a mean grade of D+ and above or have a Bachelor’s Degree in fields like Criminology, Law, Police Science, Education, Public Administration, Strategic Management, Human Resource Management, Physical Education, Music, Media and Public Relations.

[66] This is in addition to a raft of other requirements, such as Basic Police Training Course lasting not less than nine (9) months; be a Kenyan citizen; physically and medically fit; have no criminal record; met the requirements of

Chapter Six of the Constitution, and must **“be between the age 18 and 28 years and 30 years for graduates”**.

[67] Indeed, therefore, the procedure applied before 2010 under the 1969 circular and the letter of 1995 became obsolete and inoperative once the new ones were introduced. It is no longer mere presentation of a degree certificate by a constable to qualify for promotion to the rank of inspector. A little more is required, as demonstrated in the preceding paragraphs.

[68] It is an absurdity to read into the press release a promise by the Chairperson that the mere presentation of a degree certificate, irrespective of where it was obtained, or its authenticity or relevance, the officer would automatically be upgraded and be entitled to the salary of an inspector.

[69] Was there proof of the appellants being unfairly treated? To corroborate their claim of legitimate expectation and discrimination and, further to rebut the respondents’ assertion that the position of graduate constables was not recognized, or did not exist, the appellants relied on and produced copies of pay slips allegedly belonging to their colleagues.

[70] The pay slips on record belong to three different officers: Joash Rotich stationed at Nakuru Provincial Police Office; Esther Chepkemoi Chebus of Kirinyaga OCPD; and Patrick Oyongo of Nairobi Embakasi OCPD. The pay slips show a steep rise in the salaries of these individuals upon designation as Graduate Police Constables. At some point, the earnings appear to have been reduced. What is interesting about Patrick Oyongo’s pay slips is that in all of them, his designation is not indicated. Without full terms of employment, particulars of the owners of the pay slips, and in the absence of their involvement in the proceedings as witnesses or by way of express authority in the form of affidavits or other depositions, the pay slips were of no evidential significance. Further, the pay slips were not certified as true copies of the original by the 2nd respondent who is the employer of all police officers and custodian of the pay slips. In terms of Section 35 of the Evidence Act, the pay slips were inadmissible.

[71] Although generated and kept by the 2nd respondent, a pay slip is the personal property of the employee to whom it belongs. It contains sensitive confidential personal information. If evidence of a pay slip is not properly obtained, there may be a violation of the owner's right to privacy and a violation of data protection laws.

[72] We stress what we said in *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others*, Petition No. 4 of 2017 [2017] eKLR, that a party intending to present a document in evidence must satisfy the requirements of the Evidence Act. We also stated that if the document belongs to a third party, then it is imperative that the source of the document and how it was obtained be explained. We summed up the law as follows:

“The Petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information.”

[73] Although the above case relates to an election petition, the issue before the Court, just like here was, whether the evidence obtained in an unlawful or questionable manner may be admitted as evidence. The principles are the same. Documents belonging to third parties must flow freely from them to whoever wishes to use them in court. It is unacceptable to use 'self-help' or clandestine means to obtain documents as doing so would be detrimental to the administration of justice.

[74] This determination taken together with the unexplained discrepancies in the pay slips, leads us to an inevitable conclusion on this issue, that if the evidence of the pay slip is excluded, the appellants cannot prove that there was a differential treatment of officers holding the same qualifications and performing the same duties and their claim to legitimate expectation falls flat. The respondents'

contention that the position of graduate constables does not exist has not been controverted.

[75] Contrary to the submissions by the respondents that the appellants only raised the concept of horizontal career development before this Court for the first time, the truth is that it was in fact raised for the first time in the appellants' submissions of 21st September 2020 before the Court of Appeal at paragraph 42. The Court of Appeal in its judgment, however, did not address itself to the question. We cannot blame the court because the question was not pleaded and argued before the trial court. It is common factor that this concept is now recognized and formulated in Regulation 12 of the Promotion Regulations, which provides for alternative avenues for career development as follows:

“12. (1) The Commission may establish other human resources development mechanisms and processes to be known as horizontal career development.

(2) Horizontal career development may include a non-promotion reward scheme, where a member of the service is offered higher financial incentives and other career development opportunities and rewards irrespective of whether the member is promoted or not.” [our emphasis]

[76] In the first place, this regulation makes the scheme non-promotional. The reward is in the form of either higher financial incentives or other opportunities and rewards. The regulation vests in the 2nd respondent full discretion in the formulation and implementation of the scheme. In its implementation, the 2nd respondent takes into consideration several factors.

[77] In any event, the case presented by the appellants before the ELRC was specific that, as Graduate Police Officers of the rank of constable they were entitled, as a matter of right to a grant of salaries at the scale of Job Group J, equivalent to an Inspector. They indeed instituted the action in the ELRC to enforce those rights.

[78] For all the reasons we have given, we reiterate in conclusion of this ground that the appellants could not rely on the circular of 1969 and the letter of 1995 as the basis of their legitimate expectation well after the promulgation of the Constitution, the establishment of the 2nd respondent and the enactment of the National Police Service Act and the National Police Service Commission Act, the Recruitment and Appointment Regulations, the Promotion Regulations and the Career Progression Guidelines.

[79] Concomitantly, we find that the press release of 2018 could not form the basis of legitimate expectation as it was simply a clarification of a specific situation. It restated the requirements for consideration for the promotion of a graduate constable. This ground of appeal therefore fails.

iii. *Whether the Court of Appeal erred in finding that the SRC opinion was obligatory in nature in the proceedings*

[80] Whereas the respondents contended that upgrading the pay group of all police officers below the rank of inspector with degree certificates to that of inspectors of police in Job Group J would have both legal, financial and operational implications within the National Police Service and the public wage bill; and that the same can only be issued within the confines of the law and in consultation with the SRC, the appellants, for their part, maintained that they were seeking benefits which their fellow graduate police constables were already in receipt of, and therefore the input of the SRC would not be necessary; and that the salaries have already been set for a specific job group, in which they belong by virtue of having acquired a degree but to which the respondents have failed to grant them.

[81] Article 230(4) of the Constitution vests the responsibility upon the SRC to:

“a. set and regularly review the remuneration and benefits of all State officers; and

b. advise the national and county governments on the remuneration and benefits of all other public officers. [our emphasis]

In discharging its mandate, the SRC is guided by the principles set out in Article 230 (5) of the Constitution, which require, among others, that SRC ensures: fiscal sustainability of the total public compensation bill, transparency and fairness in the public Service.

[82] Whereas Article 230(4)(b) integrated SRC in the determination of matters relating to remuneration and benefits of public officers, this provision must be read alongside other provisions of the Constitution which confer power to some of the Chapter Fifteen commissions to review and make recommendations on the conditions of service of public officers under them. For instance, Article 234(2)(g) empowers the Public Service Commission (PSC) to, “**review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service**” with the exception of State offices, an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic. The Article also does not apply to an office or position that is subject to the Parliamentary Service Commission, Judicial Service Commission (JSC), Teachers Service Commission (TSC) and NPSC. See Article 234(3).

[83] Likewise, Article 172(1)(b) empowers JSC to “**review and make recommendations on the conditions of service**” of the staff of the Judiciary. The JSC is equally granted the power to review and make recommendations on the conditions of service of judges, except those terms and conditions that relate to their remuneration. In other words, the JSC is at liberty and exercises freedom to determine and review the conditions of service of the staff of the Judiciary.

[84] A reading of the PSC Act and the Judicial Service Act (JS Act) also shows that, in reviewing and making recommendations on those conditions of service, consultation with SRC is not mandatory.

[85] Compared to the role SRC plays in the foregoing two commissions, Section 10 of the NPSC Act provides specifically for the role of SRC in the NPSC’s functions as follows:

“(1) In addition to the functions of the Commission under Article 246(3) of the Constitution, the Commission shall—

- (a) on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;**
- (b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;** [our emphasis]

[86] In this regard, the Court of Appeal correctly observed that the NPSC Act had specifically been amended in 2014 to include the role of SRC in the functions of the NPSC. From a reading of Section 10(1)(b) aforesaid, the 2nd respondent can determine the appropriate remuneration and benefits for the National Police Service only with the advice of the SRC. The 2nd respondent cannot by any means, as the appellants suggest, proceed to determine the **benefits of graduate police constables** without the advice of the SRC. Its role is mandatory and must be obtained prior to taking any action that requires that advice. The advice is binding in terms of Article 259(11) of the Constitution which directs that:

“(11) If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.” [our emphasis]

[87] The role of SRC, therefore, does not come into play only when the 2nd respondent is determining new salaries as submitted by the appellants. Its advice is also required at the point of reviewing any salary or benefit for a particular job

group. We have closely examined the role of SRC under Section 11 of the Salaries and Remuneration Commission Act (**SRC Act**) which states:

“Functions of the Commission:

In addition to the powers and functions of the Commission under Article 230 (4), the Commission shall—

- (a) inquire into and advise on the salaries and remuneration to be paid out of public funds.**
- (b) keep under review all matters relating to the salaries and remuneration of public officers.**
- (c) advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.**
- (d) conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;**
- (e) determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;**
- (f) make recommendations on matters relating to the salary and remuneration of a particular State or public officer;**
- (g) make recommendations on the review of pensions payable to holders of public offices; and**
- (h) perform such other functions as may be provided for by the Constitution or any other written law.” [our emphasis]**

[88] Police officers are public officers within the meaning of Article 260 of the Constitution as their remuneration and benefits are payable directly out of the

funds provided by Parliament. As mentioned earlier, the NPSC Act requires the advice of SRC in determining the salaries and benefits for its officers.

[89] Moreover, the SRC (Remuneration and Benefits of State and Public Officers) Regulations (**SRC Regulations**) stipulate that besides carrying out a periodical four-year review of the remuneration and benefits of state and public officers, SRC is mandated to undertake special reviews to “**ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service**”. See Regulations 4 and 6(1) respectively.

[90] Therefore, according to the SRC Regulations, if a public organization like the NPSC, which requires the advice of SRC, was desirous of reviewing allowances or any remunerative benefits of any cadre of police officers, the Regulations stipulate the procedure to be followed and the factors to be considered.

[91] From the foregoing, it is discernible that where the SRC has already given its advice and salaries were set and subsequently implemented in accordance with that advice, should any public organization wish to review the existing allowances or any other remunerative benefits including extending any other form of incentives, it must submit the proposals to the SRC for consideration.

[92] If the NPSC wished to ensure it attracted and retained professional skills of police constables who are holders of degrees by reviewing their remuneration packages upwards to that of Job Group J, to actualize their horizontal career development, SRC has to be consulted. If the NPSC were to proceed to independently review the salaries of police constables with degrees in the manner suggested by the appellants, it would be tantamount to usurping the mandate of SRC.

[93] In the instant case, we have no proof, first, that SRC had determined the benefits of graduate constables or that the salaries had been reviewed and that the SRC granted the 2nd respondent approval to treat the salaries of graduate constables differently from those who were not graduates.

[94] We wish to emphasize that in the decision of **Teachers Service Commission** (supra) which the appellants rely on, the Court of Appeal (*Githinji, Koome (as she then was), Mwilu (as she then was), Azangalala & Odek, J.J.A.*) was unanimous that no valid salary and/or benefit of a state or public officer, shall ensue from a process that ignores the role of SRC. The court held that the advice by SRC under Article 230(4)(b) of the Constitution is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers.

[95] In conclusion, we agree with the finding of the Court of Appeal in the instant appeal that the respondents cannot be ordered or directed to interfere with the appellants' salaries without involving the SRC. This ground also fails.

[96] In view of the foregoing, we come to the inevitable conclusion that the appellants have failed to prove that after the establishment of the 2nd respondent, the 2nd and 3rd respondents have been selectively and capriciously receiving degree certificates from some graduate police constables and ignoring others with similar qualifications.

[97] We accordingly dismiss this appeal for want of merit, but wish to emphasize that police officers who are holders of degrees from recognized universities and other such institutions must follow the law and the guidelines, by submitting their applications to the authorized bodies for consideration of whether to grant either a promotion or a reward under the horizontal career development scheme.

F. COSTS

[98] Costs follow the event but are at the discretion of the Court. This has been said by the courts time without number. See our decision in **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai Estate of & 4 others**; SC Petition 4 of 2012; [2013] eKLR. Although this is not a public interest litigation matter, the circumstances of this dispute militate against condemning the unsuccessful parties, the appellants to pay costs. Instead, we order parties to bear their own costs.

H. ORDERS

[99] In light of the above, we order that:

- i) *The Petition dated 28th October 2021 is hereby dismissed.*
- ii) *Parties to bear their own costs.*
- iii) *We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 23rd day of June, 2023.

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

**I certify that this is a true copy
of the original**

REGISTRAR
SUPREME COURT OF KENYA