

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 30 OF 2017

IN THE MATTER OF: ARTICLES
1,2,10,22,23,27,28,41,47,48,159 OF
THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 41 AND
47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE
EXPECTATION

BETWEEN

JULIUS

WESONGA

MUTOKA

.....PETITIONER

VERSUS

NATIONAL MUSEUMS OF KENYA
.....RESPONDENT

JUDGMENT

1. By a Petition dated 13th January 2022, the Petitioner petitioned this Court for the following orders and reliefs;

a) A declaration that the Petitioner's rights as enshrined in the Constitution with respect to fair employment practices had been infringed by the acts/or omissions of the Respondent.

b) A declaration that the Petitioner's dismissal was irregular, unlawful, and unconstitutional;

c) A declaration that the Petitioner is deserving of his due salary allowances and benefits from 8th June 2001 to December 2016, amounting to Kshs 1,634,640.00.

d) A declaration that the Petitioner is entitled to all emoluments pertaining to the Petitioner's employment rightfully due to the Petitioner as compensation for termination before attaining the age of retirement.

e) A declaration that the Petitioner is entitled to Severance pay calculated as per the Employment Act,2007.

f) A declaration that the Petitioner is entitled to gratuity pay.

g) A declaration that the Petitioner is entitled to leave entitlements.

h) A declaration that the Petitioner is deserving of damages for wrongful termination to be assessed by this Honourable Court;

i) A declaration that the Petitioner is due and deserving of his insurance benefits for the years worked with the Respondent, amounting to Kshs.262,848.00.

j) A declaration that the letter of termination dated 8th June 2001 is irregular, unlawful, and unconstitutional, and thus the Petitioner be reinstated to his employment with the Respondent.

k) Costs and Interests.

2. The Respondent resisted the Petition through a Replying Affidavit dated 21st March 2017, sworn by Ann Muturo, its Director, Administration and Human Resources Manager. The Respondent charged that the petition having been filed more than fifteen years after the Petitioner's dismissal on 8th June 2001, is time-barred and therefore incompetent. Further, the petitioner was lawfully dismissed on account of gross misconduct.

Petitioner's case

3. The Petitioner relies on the Constitution, noting that the Preamble sets out Kenya's aspirations for governance founded on human rights, equality, democracy, social justice, and the rule of law.
4. He cites Article 1(1), affirming that sovereign power belongs to the people and is exercised according to the Constitution.
5. He further refers to Article 2(1), which declares the Constitution as the supreme law binding all persons and state organs.

6. The Petition is grounded in Article 10, which sets out national values and principles of governance, including patriotism, national unity, rule of law, democracy, participation, human dignity, equality, human rights, non-discrimination, good governance, integrity, and transparency.
7. The Petitioner invokes Article 22(1), giving every person the right to institute proceedings for violation or threat to rights in the Bill of Rights.
8. Article 23(1) and Article 165 are cited as granting this Court jurisdiction to determine applications for redress of violations of fundamental rights.
9. He relies on Article 27, which guarantees equality before the law and equal protection and benefit of the law.
10. Article 28 is cited for the right to inherent human dignity and its protection.
11. The Petitioner also invokes Article 41(1), which secures the right to fair labour practices, including fair remuneration and reasonable working conditions.

12. Articles 47 and 48 are relied upon in relation to fair administrative action.
13. The Petitioner states he was employed by the Respondent on 15th November 1990 on permanent and pensionable terms. He served as Chief Shop Steward in Job Group "B", earning a gross annual salary of K£531, which the Respondent reviewed annually based on merit and performance. He rose to the position of Attendant by the time of dismissal. He diligently served the Respondent until 8th June 2001, when his employment was terminated.
14. The termination followed allegations that the Petitioner assaulted a colleague, which resulted in his prosecution in Criminal Case No. 248 of 2000. He was later acquitted.
15. Following the prosecution, the Respondent proceeded to issue him with a letter dated 6th April, 2001, inviting him for a disciplinary hearing on the allegation that he had engaged in in unlawful conduct at the workplace. The disciplinary hearing was slated for 12th

April, 2001. He attended the hearing but was not granted an opportunity to defend himself.

16. The Petitioner contends he was entitled to be formally notified by the Curator of any investigation into alleged criminal conduct before the matter could be escalated to the head office. The Curator did not follow this procedure. The failure, amounted to victimization and a scheme to have him dismissed.

17. By a letter dated 8th June 2001, he was dismissed from service, effective 28th June 2001.

18. The Petitioner asserts that during the criminal prosecution, he was placed on half salary and required to repeatedly report to Kapenguria or Kitale Police Stations. In his view, this amounted to servitude.

19. The Petitioner asserts that at termination he earned a monthly salary of Kshs. 9,730. He claims that the acts of the Respondent unjustifiably caused him loss of salary. He is entitled to all the salary he would have earned from 2001 to 2016, amounting to Kshs. 1,634,640.

20. His efforts pursuing his insurance benefits after the dismissal did not yield any fruits. He claims as against the Respondent, insurance benefits valued at Kshs. 262,848.

Respondent's case

21. According to the Respondent, the Petitioner has deliberately framed an ordinary employment dispute as a constitutional petition with the intention of evading the statutory limitation period applicable to employment claims. She contends that the constitutional route cannot be used to circumvent clear provisions of the Employment Act and Limitation of Actions Act.

22. They assert that the Petition is hopelessly time-barred since it challenges a termination that occurred on 8th June 2001, yet the present proceedings were initiated more than fifteen years later. This extensive lapse of time, and inaction by the Petitioner renders the Petition fatally defective and a good candidate for striking out.

23. The Petitioner was employed by the Respondent on 18th October 1990 as an Attendant and formally took up

his duties on 15th November 1990. The contract of employment explicitly provided that the Respondent retained the right to terminate the petitioner's contract with or without notice or payment in lieu, depending on the circumstances.

24. It is asserted that shortly after employment commenced, the Petitioner began to exhibit a consistent pattern of misconduct. One of the earliest incidents was recorded on 22nd April 1992, when the Petitioner made a written admission that he had been burning charcoal within the Museum forest area, contrary to workplace rules and conservation policies.

25. On 28th May 1992, the Petitioner was served with his first formal written warning following serious allegations of assault, theft, and the setting of a fire along a nature trail. This warning was intended to caution the Petitioner and provide an opportunity to rectify his behaviour, yet it did not achieve the intended corrective effect.

26. Despite these warnings, the Petitioner continued to engage in various acts of indiscipline and received several verbal cautions. On 16th November 1993, the Respondent

issued a further written warning, expressly indicating that any further misconduct would result in escalated disciplinary action, including the possibility of dismissal.

27. She states that concerns regarding the Petitioner's conduct did not abate. In 1996, valuable exhibits disappeared at the Kitale Museum, prompting the Respondent to issue a memorandum cautioning all staff, including the Petitioner, about security lapses and potential internal involvement. The Petitioner was among those suspected of laxity or involvement.

28. The Respondent further asserts that matters worsened on 20th September 1996, when the Petitioner assaulted his supervisor, Mr. Vick Miroya. The incident was formally documented and forwarded to its headquarters for action. This event marked a significant escalation in the Petitioner's pattern of violent behaviour.

29. It is contended that due to the growing number of complaints, the Petitioner was transferred to the Kapenguria Museum in February 1997. However, the change in environment did not bring about improvement.

On 29th January 1999, the Petitioner allegedly harassed other staff members, prompting the Curator to issue a comprehensive report on 1st February 1999 outlining the Petitioner's continued indiscipline.

30. The Respondent states that the Petitioner was consequently summoned to a disciplinary hearing scheduled for 8th April 1999, where he was expected to respond to accusations of gross misconduct. The hearing took place as planned and that the Petitioner was accorded an opportunity to defend himself.

31. After reviewing the Petitioner's defence, the Disciplinary Committee found it unsatisfactory and issued a further warning on 29th April 1999. It also recommended that the Petitioner be transferred immediately due to the disharmony he was causing within the workplace. For operational reasons, the transfer was deferred, and the Petitioner remained at Kapenguria.

32. On 19th May 2000, the Petitioner assaulted another employee, Mr. Benson Pusia, inflicting injuries serious enough to require hospital admission. This assault resulted

in the Petitioner being charged in Kapenguria Criminal Case No. 248 of 2000. A detailed report of the assault and the Petitioner's conduct was forwarded to the Director General on 30th May 2000.

33. Subsequently, the Petitioner was interdicted on 14th June 2000 due to his persistent acts of gross misconduct. During the interdiction, the Petitioner was placed on half salary and required to report to the Curator once a week, a standard administrative measure meant to maintain oversight while investigations and disciplinary processes continued.

34. The criminal case was later withdrawn after the complainant opted for an amicable out-of-court settlement. A report confirming the withdrawal was submitted to the Director General on 23rd February 2001, together with a recommendation that the Petitioner be transferred.

35. It is further stated that notwithstanding the withdrawal of the charges, the Respondent proceeded to address the disciplinary aspects of the matter. The

Petitioner was issued with a fresh notice requiring him to attend a disciplinary hearing on 12th April 2001. He duly attended the hearing and participated in the proceedings.

36. After evaluating the evidence and the Petitioner's overall employment record, the Disciplinary Committee reached the conclusion that the Petitioner's continued acts of physical violence constituted gross misconduct. Accordingly, the Petitioner was informed on 8th June 2001 that his employment had been terminated.

37. The Petitioner thereafter lodged an appeal through his trade union, but the appeal was abandoned when the union withdrew it on 5th September 2001. Following the withdrawal, the Petitioner proceeded to clear with the Respondent and was paid all terminal dues owing to him.

38. The Respondent argues that they exercised considerable patience over the years despite the Petitioner's long record of indiscipline, repeated warnings, and multiple violent incidents. The Respondent acted on valid grounds and followed due process at every stage, including issuing notices, convening hearings, and

allowing the Petitioner to be heard before decisions were made.

39. The Respondent argues that the withdrawal of the criminal case was not an acquittal on the merits and that the standards of proof in criminal trials and employment disciplinary processes are different and independent. Further, the Petitioner received all his terminal dues after clearing.

Petitioner's submissions

40. The Petitioner's Counsel, first addresses the issue of limitation, of time raised by the Respondent. He submits that limitation of time is a jurisdictional issue which must be raised at the earliest opportunity. To buttress this point, he places reliance on **Jeremiah Ojwang Ojak v Central Bank of Kenya [2012] eKLR**. In the instant petition, the Respondent didn't raise the matter, limitation of time at the earliest opportunity possible. They are raising the same too late in the day when the petition is already heard. This immensely prejudices the Petitioner.

41. The foregoing notwithstanding, he submits, that limitation does not apply to claims based on violation of constitutional rights, and cites **Safe Pak Limited v Henry Wambega & 11 Others [2019] eKLR**, to support the submissions. Consequently, as instant the Petition concerns alleged constitutional violations, it is properly before the court.

42. In answer to Respondent's position that the Petition, is an ordinary claim camouflaged as a constitutional petition to defeat the statutory limitation of time under the Employment Act, the Petitioner's Counsel argues that under section 12 of the Employment and Labour Relations Court Act, this Court has the requisite jurisdiction to determine both employment and constitutional claims arising from labour relations.

43. On whether the Petitioner's rights were violated, it is submitted that the Respondent lacked valid grounds to dismiss him. The Petitioner contends that the alleged misconduct did not meet the threshold for summary dismissal under section 17 of the repealed Employment

Act, Cap. 226, particularly because he was released from custody within 10 days on bond in the criminal matter. The Court was urged to consider that the disciplinary hearing was undertaken 10 [ten] months after his interdiction. If indeed the infraction was serious enough to justify termination, the Respondent would have dismissed him immediately rather than allowing him to continue working on half pay.

44. Counsel further submitted that the Petitioner's right to a fair hearing under Article 50(1) and (2) of the Constitution was violated. He argues that the Respondent failed to provide adequate opportunity to sufficiently defend himself before the Disciplinary Committee. The invitation letter dated 6th April 2001, did not specify the grounds for the disciplinary hearing. The Respondent merely referred to the letter dated 14th June 2000, issued ten months earlier. The significant passage of time between the two letters created uncertainty and prejudice to the Petitioner's ability to prepare for his defence. He relies on **Onjira John Anyul v University of Nairobi [2019] eKLR**, where the court affirmed that Article 50 applies to quasi-criminal disciplinary processes and

requires procedural fairness, including proper notice and impartiality.

45. The Petitioner further argues that the Respondent unreasonably delayed the disciplinary process, noting that nearly a year passed between his interdiction and the hearing. This offended Article 50(2)(e) of the Constitution on the right to trial without unreasonable delay. To fortify this submission, he cites **Njuki v Independent Electoral and Boundaries Commission (Constitutional Petition E021 of 2023)**.

46. Lastly, it is argued that in light of the absence of valid reasons, lack of procedural fairness, undue delay, and denial of representation, the Respondent violated the Petitioner's constitutional rights and that the termination was unfair, unlawful, and unconstitutional.

Respondent's submissions

47. The Respondent argues that the Petition dated 21st March 2017 seeks various remedies arising from an employment dispute, including declarations of unlawful dismissal and payment of extensive financial benefits. The

Respondent maintains that these claims are improperly framed as a constitutional petition to avoid statutory timelines.

48. The Respondent submits that the Petition is fatally defective on account of inordinate delay. It argues that although constitutional petitions alleging human rights violations generally lack strict limitation periods, courts have consistently held that inordinate and unexplained delay is a ground for dismissal. The Respondent relies on **Calvin Ouma Magare & 18 others v DPP & 4 others [2022] eKLR** and **Wellington Nzioka Kioko v Attorney General [2018] eKLR**, where courts emphasised that stale claims should not be revived after excessive delay without justification.

49. The Respondent further submits that the Petition offends the doctrine of constitutional avoidance. It argues that this is an ordinary employment dispute that should have been filed under the Employment Act, not disguised as a constitutional claim. The Respondent cites this

Court's decision in **Aliela v Kenton College Trust & another [2023] KEELRC 226**

50. On procedural fairness, the Respondent argues that the dismissal complied with Section 41 of the Employment Act. The Petitioner was notified of the allegations against him, given a hearing date, attended the disciplinary session, made representations, and had the right to be accompanied. He also exercised his right to appeal but abandoned the process. This, the Respondent submits, satisfies the requirements of procedural fairness, as restated in **Violet Kadala Shitsukane v Kenya Post Savings Bank [2020] eKLR**.

51. Regarding substantive justification, the Respondent relies on Section 43 of the Employment Act, which requires an employer to prove reasons that it genuinely believed to exist. The Respondent maintains that the Petitioner's long history of misconduct, culminating in a violent assault causing a broken arm, provided a proper and valid basis for termination. The Respondent cites **Kenya Power & Lighting Company v Aggrey Lukorito Wasike [2017] eKLR**, where the Court of Appeal held

that the employer's belief in the employee's misconduct, on a balance of probabilities, is sufficient ground for termination.

52. The Respondent argues that the Petitioner's reliance on acquittal is misplaced, as the acquittal resulted from withdrawal under Section 204 of the Criminal Procedure Code, not a finding of innocence. Moreover, the standard of proof in criminal law does not apply to employment disputes.

53. The Respondent submits that the Petitioner had a repeated pattern of misconduct stretching from 1992 to 2000, including theft, threats, harassment, and multiple assaults. These events were reported, investigated, and led to earlier warnings and disciplinary action. The Respondent submits that it demonstrated patience and afforded the Petitioner multiple opportunities to reform, but the misconduct persisted.

54. Given the clear procedural compliance, valid grounds for dismissal, and the Petitioner's history of indiscipline, the Respondent submits that the termination was lawful,

fair, and in accordance with Sections 41, 43 and 45 of the Employment Act.

55. Further, the Respondent argues that the Petition is wholly unmerited, fatally incompetent, and an abuse of the court process. Consequently, the Respondent urges the Court to dismiss the Petition in its entirety, as the Petitioner is not entitled to any of the remedies sought.

Analysis and determination

56. I have carefully considered the material placed before me by the parties herein well as their submissions and in my considered view, the following issues emerge for determination:

a) Whether the petitioner's petition herein meets the threshold for a properly crafted and presented petition.

b) Whether the Respondent violated the Petitioner's rights put forth in the petition or any of them.

c) Whether the termination of the petitioner's employment was procedurally and substantively unfair.

d) Whether the Petitioner is entitled to the reliefs sought in the petition or any of them.

e) Who should bear the cost of the Petition?

Whether the petitioner's petition herein meets the threshold for a properly crafted and presented

57. The Respondent vigorously and firmly contended throughout its replying affidavit as well as the submissions that the Petitioner's Petition does not meet threshold of a well-presented petition. The Respondent presents this position on two fronts. First, the—constitution avoidance principle militates against the petition. Second, the petition has been filed with significant and unexplained delay.

58. It is worth stating that after the promulgation of the 2010, Constitution there has been a surge in litigants constitutionalizing every dispute, a practice that the Court abhor. Based on the doctrine of constitutional avoidance, such litigations often fail.

59. **The Court in KKB V SCM & 5 others [Constitutional Petition 014 of 2020] KEH 289 [KLR]** on the doctrine, Justice Mativo [as he then was], stated and I agree, thus;

"Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justifiability. In broad terms, justifiability governs the limitations on Constitutional arguments that courts will entertain. It encompasses three main principles which are standing, ripeness and mootness. The doctrine of avoidance was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor. [20011121 ZL 501 Is], Ebrahim JA said the following: -

".....Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether

there has been in addition, a breach of the Declaration of Rights....”

66. The Constitutional Court of Zimbabwe in **Chewira & others vs- Minister of Justice Legal and Parliamentary Affairs & others** held;

"As we have already seen, in the normal run of things courts are generally loath to determine a constitutional issue in the face of alternative remedies. In that event they would skirt and avoid the constitutional issue and resort to the available alternative remedies."

67. The Supreme Court of Kenya in the case of **Communications Commission of Kenya & 5 others v — Royal Media Services Limited & 5 others** [20141 eKLR stated on the principle;

"256. The Appellant in this are seeking to invoke the "principle of avoidance" also known as "Constitutional avoidance", The principle of avoidance entails that court will not determine a

constitutional—issue, when a matter may be properly decided on another basis.....”

69. In the case of **Kituku vs The Council of Legal Education and another [2023] [KEELRC 1357 [KLR]** this court held as follows:

"The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow only to be travelled on, in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under the Constitution. Where a matter can be handled through other processes, the best course is to allow them be under those processes. It matters not that alternatively; they can be dealt with under a constitutional litigation."

70. It is worth stating therefore that where legislation is enacted to give effect to a constitutional right, a litigant cannot bypass that legislation and directly rely on the

Constitution, without challenging that legislation as falling short of constitutional standards or alleging that the statute in question is deficient in the remedies that it provides. If direct reliance on the Constitution is not avoided, two streams of jurisprudence shall result. A situation that won't be pleasant both to the Courts and the Citizenry

71. I have carefully considered the issues raised and presented, in the Petitioner's petition. They are largely on the procedural and substantive fairness of the termination of the Petitioner's employment and entitlement to some unpaid benefits. Consequently, I come to an inevitable conclusion that substantive remedies sought by the Petitioner, do not depend upon the "Constitutional issues" raised his petition. The reliefs sought are reliefs that ought to have been sought under the Employment Act and Fair Administrative Act in an ordinary Claim, through the procedure provide or under the Employment and Labour Relations Court Act, and the Practice and Procedure Rules of this court.

72. At this point I must state that a mere allegation that a human right or fundamental freedom, or the Constitution has been or is threatened to be, violated is not sufficient to attract the Court to engage its jurisdiction under the provisions of the Constitution, instead of the jurisdiction under statute.
73. By reason of the premises, I find that the applicability of the avoidance principle militates against the petitioner's petition herein. The grievance of the petitioner is improperly presented to this Court for interrogation. The petition should fail at this point, therefore.
74. Having found as I have hereinabove, I find it unnecessary to consider the other issues. By reason of the foregoing premises, I strike out the petitioner's petition herein.
75. Assuming that I am wrong on the foregoing finding, I would still dismiss the petition on the following grounds;
- I. All the events, the basis for the instant petition happened during the tenure of the retired Constitution. Inexplicably, the petition is wholly premised on the stipulations of the Constitution of

Kenya,2010, without a mention of a single provision of the retired Constitution or an indication that the petition is anchored on the old Constitution. The Provisions of the new Constitution are not meant to apply retrospectively.

II. Undeniably, the petition was filed 15 years after the events complained of took place. This extensive delay was not explained at all by the Petitioner. I am not persuaded by the Petitioner's Counsel's submissions that the issue was belatedly raised. I note it was raised in the replying affidavit. The Petitioner, if he had any explanation to offer, he ought to have sought leave to, and file, a supplementary affidavit. He did not. He cannot be heard to claim that the issue is being inappropriately raised.

76. In the upshot, the Petitioner's petition hereby fails. Each party to bear its own costs.

Read, Signed and Delivered this 27th Day of November 2025.

OCHARO KEBIRA

JUDGE

ORIGINAL