Attorney General v Olaimo & 75 others (Civil Appeal 49 of 2020)
[2025] KECA 212 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 212 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 49 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 7, 2025

BETWEEN

THE HON ATTORNEY GENERAL ..... APPELLANT

AND

PASCAL BARASA OLAIMO & 75 OTHERS ..... RESPONDENT

(An appeal arising from the Ruling and Order of the Employment and Labour Relations Court of Kenya at Kisumu (Nduma Nderi J.) dated 31st July, 2019, in Petition No. 38 of 2016)

JUDGMENT

1. The respondents are ex-service officers of the Kenya Air Force. They filed an amended petition dated 13th April, 2018, before the Employment and Labour Relations Court at Kisumu, alleging violation of their rights prescribed under Section 70(a),72(3),74(1) and 77 of the former Constitution of Kenya. The respondents averred that they served in the Kenya Air Force at the time of the attempted coup of 1st August 1982, to overthrow the then Government of Kenya led by the President Daniel Toroitich Arap Moi. They alleged that between 1st and 4th August 1982, the respondents were arrested by officers of the Kenya Army on suspicion of having participated in the attempted coup. That in total disregard of the law, the Kenya Army officers subjected them to torture, cruel, inhuman and degrading treatment, including stripping them naked in public, forcing them to move on their knees on concrete floors, whipping and kicking them with military boots. That they were detained incommunicado in various military and police stations. That while in custody, they were tortured and treated inhumanly, all in a bid to coerce them to confess to having participated in the failed coup attempt.

2. The respondents prayed for declaration that their rights under Sections 70(a),72(3),74(1) and 77 of the former Constitution were violated; general damages for the alleged violations; a declaration that the petitioners were and still are members of the Kenya Air Force, having never been members of the

82' Air Force; full retirement benefits; terminal benefits; damages for wrongful dismissal; and cost of the petition.

3. The appellant filed an application dated 2nd January, 2019, seeking to strike out and/or dismiss the petition for being time barred, by dint of Section 3 of the Public Authorities Limitation Act and Section 90 of the *Employment Act* 2007. The appellant averred that the petition was lodged over thirty-one (31) years from the date when the cause of action was alleged to have arisen. That the respondents failed to seek leave of court to file the petition out of the prescribed statutory timelines, and failed to give a reasonable explaination for the delay. The appellant contended that the court ought not aid the indolent petitioners.

4. The respondents, in response filed a replying affidavit dated 24th January, 2019, sworn by Gideon Mutoro Musukuya. They urged that the petition was originally filed before the High Court at Kitale before being transferred to the Employment and Labour Relations Court at Kisumu. That the petition is constitutional in nature and that there is no limitation of time when one seeks redress for past violation of human rights. They urged that they suffered cruel, inhuman and degrading treatment under the Retired President Daniel Toroitich Arap Moi's regime, and that their hesitation to file the suit under the same regime was justified, as they were under the constant watch of the provincial administration. They asserted that issues of redress for violation of human rights and freedoms fall under the doctrine of transitional justice, where historical injustices maybe redressed, even after a long period of time has passed since the cause of action accrued.

5. Nduma J., in a ruling dated 31st July, 2019, found that the respondents' petition was not time barred, as it fell under the category of transitional justice under the new constitutional dispensation, and that the reasons for the delay advanced by the respondents were sufficient. The learned Judge therefore dismissed the appellant's preliminary objection.

6. Aggrieved by this decision, the appellant lodged the instant appeal, founded upon six grounds of appeal. In summary, the appellant urged that the learned trial Judge erred in fact and in law: in finding that a period of 32 years delay in lodging the suit did not amount to inordinate delay; by failing to take into account compelling evidence submitted by the appellant in support of the application, as well as the binding decisions of the Court of Appeal placed before it; by failing to find that the delay in filing the suit highly prejudiced the appellant's right to a fair hearing guaranteed under Article 50 of the Constitution; and that the ruling was against the weight of the evidence adduced and the law.

7. The appeal was canvassed by way of written submissions. V. G. Kabi, Learned State Counsel appearing for the appellant, faulted the learned trial Judge for playing the role of the litigants, suo moto, by advancing reasons for the delay in filing the petition, and by doing so, advocating for the respondents. In particular, counsel cited paragraph 22 of the ruling where the learned trial Judge held that majority of the respondents were based in rural areas, and were therefore more handicapped than their counterparts based in towns and cities who were able to lodge their petitions earlier. Counsel argued that this issue was never raised by the respondents in their replying affidavit. It was counsel's submission that *the Constitution* ought to be interpreted holistically so as to balance the rights of all the parties.

8. Learned State Counsel further argued that the Superior court lacked jurisdiction to entertain the petition as the alleged infringement occurred more than three decades before the suit was lodged. Counsel urged us to find that the appellant was entitled to the right to a fair hearing guaranteed by Article 50 of *the Constitution*, and that the delay occasioned by the respondents in filing their petition had exposed them to hardships such as death of plausible witnesses, loss of memory due to effluxion of time and destruction or loss of key documents and records. Counsel relied on precedents set by this Court which were elaborated in the written submissions. Counsel contended that the respondents

failed to demonstrate cogent reasons or cause for the delay in filing their petition, and further, failed to avail any evidence of the alleged torture. In the premises, counsel invited us to allow the appeal as prayed.

9. The respondents were absent during the hearing of the appeal and did not file any written submissions.

10. This being a first appeal, the role of the first appellate court was well settled in the case of Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR, where this court observed thus:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

11. Having evaluated the record of appeal, the parties' written submissions and authorities cited, we find that the issue arising for our determination is whether the Employment and Labour Relations Court had jurisdiction to entertain the respondents' petition, on account of the doctrine of laches, which is the issue that was set out in the appellant's preliminary objection that was dismissed by the trial court.

12. The courts have consistently held that limitation of time under the *Limitation of Actions Act* does not apply in respect to constitutional petitions which allege violation of fundamental human rights. However, in the same breath, the courts are entitled to consider whether there has been inordinate delay in the filing of such claims in Court, before it can consider whether or not to grant the reliefs sought by the petitioners.

13. It was not disputed that the respondents' cause of action arose in 1982, when they were arrested and detained in connection with the attempted coup by Kenya Airforce officers. The petition was filed in 2014, approximately thirty- two (32) years after the cause of action arose. It was the appellant's case that the petition was an abuse of the court process, as it was an employment claim cloaked under the guise of a constitutional petition, in a bid to circumvent the statute of limitation that bars such claims to be brought before the court three years after the cause of action had arisen. The appellant faulted the respondents for failing to seek extension of time before lodging their petition outside statutory timelines. The appellant further argued that the respondents failed to give reasonable explaination why they took so long to lodge their claim. The appellant urged that the delay in filing the claim infringed upon its constitutional right to a fair trial.

14. The respondents on their part maintained that the petition raised triable issues which were constitutional in nature, and were pegged on infringement of their fundamental human rights and freedoms, and as such, the statute of limitation did not apply in this case. They asserted that they were hesitant to file the petition during the former President Moi's regime as they were under constant surveillance by the provincial administration. They further cited financial constraints as another hurdle in their quest to seek appropriate justice.

15. Upon re-evaluation of the issues in dispute in this appeal, we are not convinced of the reasons advanced by the respondents for their failure to lodge the claim in time. Even if we were to accept the assertion made by the respondents that they were unable to lodge their claim during former President Moi's regime, no explaination was given as to why they failed to file the same immediately after President Moi left office in 2002. The respondents' claim that financial constraints prevented them from filing the petition earlier is not plausible as they had the option of filing their claim as paupers. There was no indication that the respondents even considered that route.

16. In Peter M. Kariuki v Attorney General [2014] eKLR, this Court observed as follows:

> " We have already adverted to the fact that the appellant filed his constitutional petition some twenty-three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place awhile back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.
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> In Kamlesh Mansuklal Damji Pattni & Another V Republic (supra), the High Court noted that *the Constitution* did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay."

17. In Wellington Nzioka Kioko v Attorney General [2018] eKLR, this Court held thus:

> " On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, she considered several persuasive decisions of the High Court for instance *Wamahiu Kihoro Wambugu vs A.G. Petition No. 468 of 2014*; Mugo Theuri vs. A.G, Ochieng' Kenneth Kogutu vs Kenyatta University and 2 others, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrongdoer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact."

18. From the foregoing, it is our view that the delay of thirty-two

    (32) years in lodging the claim was not sufficiently explained by the respondents. The reasons for the delay advanced by the respondents were not sufficient or reasonable, and this is evident even from the decision of the learned trial Judge when dismissing the preliminary objection, stated that he did so with hesitation. We find that the learned trial Judge did not exercise his discretion judicially nor did he consider the applicable law when he dismissed the appellant's Preliminary Objection.

19. For these reasons we find merit in this appeal which we allow.

As a result, we set aside the ruling of 31st July, 2019, by Nduma J. We substitute it with an order of this Court allowing the appellant's Preliminary Objection dated 2nd January, 2019, and thereby strike out the respondent's petition before the trial court.

20. Each party to bear their own costs.

21. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY,2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.