



**Makori v Public Service Commission & another (Petition
98 of 2018) [2025] KEELRC 1624 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1624 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 98 OF 2018
CN BAARI, J
MAY 29, 2025**

BETWEEN

VICTOR MAKORI PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

OFFICE OF THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. This judgment relates to the Petitioner's petition dated 24th September, 2018, wherein, he seeks the following reliefs: -
 - a. A declaration that the actions and omissions of the Respondents by refusing to compute and pay terminal benefits and pension for the Petitioner are illegal, unlawful, unprocedural, unjustified, inhuman, discriminatory and in violation of the Constitution, more so in breach of Petitioner's Fundamental rights and Freedoms as espoused under Articles 23(1), 27, 28, 41(1), 47 and 57 of the Constitution of the Republic of Kenya.
 - b. A declaration that the actions and omissions of the Respondent by refusing to compute and pay, terminal benefits and pension for the Petitioner are illegal, unlawful, unprocedural, unjustified, inhuman, discriminatory and in violation of the provisions of the Employment Act and the Public Service Act.
 - c. An order for general, exemplary and punitive damages on an aggravated scale for the pain and suffering caused by the Respondent's actions and/or omissions.
 - d. An order compelling the Respondent to forthwith compute terminal benefits due owing and payable to the Petitioner on account of the years worked without loss of benefits.



- e. An order compelling the Respondent to forthwith compute and release the pension amount due, owing and payable to the Petitioner. In the alternative an order compelling the Respondent to forthwith reinstate the Petitioner on the Respondent's pension roll, forthwith and without loss of pension.
 - f. An order for general damages for malicious and unlawful prosecution.
 - g. Interest on (c), (d), (e) and (f) above at rate of 18% p.a.
 - h. Costs of this Petition.
2. In opposition, the Respondents filed grounds of opposition dated 10th April, 2025, wherein, it argues that the 1st Respondent's mandate in respect of the matter in issue is functus officio amongst other grounds.
 3. Parties sought to canvass the petition by way of written submissions. Both parties filed submissions.

The Petition

4. The Petitioner's case is that he was employed as a police officer on or about 31st July 1975, and confirmed on 5th November 1980 on completing probation through a letter reference number PF/211408/76.
5. The Petitioner avers that such confirmation admitted and settled him as a permanent and pensionable officer of the 1st Respondent with effect from 19th May 1977.
6. The Petitioner contends that through the confirmation of appointment he became eligible to receive pension at full rate to be calculated from 19th May 1975.
7. It is his case that he was similarly appointed as a fingerprint assistant on 31st October 1978 in the service of the Government of Kenya w.e.f. from 1st November 1977, at a basic salary of 399 × 489 × 2 - 594 p.a.
8. That in the fullness of time, he worked for an aggregate 22 years during which period, he continued to earn a full scaled salary and contributed monthly towards his pension and terminal benefits as statutorily mandated.
9. The Petitioner further states that he was falsely accused and charged with an offense under Section 357 of the [Penal Code](#) allegedly for making a document without authority.
10. The Petitioner states that the trial was delayed, but he was finally acquitted on 12th August 1999 under Section 210 [Criminal Procedure Code](#) for lack of evidence.
11. The Petitioner states that he was unlawfully confined, incarcerated imprisoned and treated in the most inhumane manner. He states further that the entire process leading up to his arraignment was actuated by malice, bad faith and undertaken in total violation of his freedoms as then enshrined in the [Constitution](#).
12. The Petitioner avers that despite being acquitted as pleaded hereinabove, the 1st Respondent declined to reinstate him in service and instead, elected to unfairly dismiss him from service without any benefits whatsoever.
13. The Petitioner avers his appeals to be reinstated and/or paid termination benefits and Pension have been completely ignored by the 1st Respondent who is a constitutional body mandated under Article 234 (1) of the [Constitution](#) to deal with such grievances.



14. The Petitioner avers that the Respondents have equally refused to pay him his pension and accrued terminal benefits as mandated by Provision of the Employment Act, 2007, which refusal borders on illegalities.
15. The Petitioner avers further that such blatant refusal is against Article 41 of the Constitution which entitles him to fair labour practices.
16. It is the Petitioner's position that the refusal by the Respondents smacks of illegalities, witch-hunt and impropriety, and violates his Constitutional right to fair labour practices envisaged under Article 41 (1) of the Constitution.

The Respondents' Reply

17. Through the grounds of opposition intimated above, the 1st Respondent, through the 2nd Respondent states: -
 - i. That the Petitioner was dismissed from service with effect from 28th August 2000 and his 1st and 2nd appeals were disallowed on 8th May 2002.
 - ii. That based on the then existing legislations, an officer who is dismissed from service forfeits any claim to the retirement benefits he would have been otherwise entitled to had he left service in the normal manner.
 - iii. That the Pension regime for public officers at the time; was that pension was non contributory or free, hence the officer did not have to contribute a part of his salary in order to secure his benefits.
 - iv. That the 1st Respondent has been mis-joined in the proceedings.
 - v. That the pension benefits are paid by the pension department and not the Public Service Commission, and therefore, the Public Service Commission was wrongly sued in this matter.
 - vi. That there is no cause of action against the 1st Respondent or at all.
 - vii. That the Petitioner has not demonstrated with precision how his fundamental rights and freedoms under the Constitution have been violated or are threatened, and has not produced any evidence to prove the alleged violations, contrary to the principles espoused in the case of Mumo Matemu v. Trusted Society of Human Rights Alliance (2013) eKLR and Annarita Karimi Njeru (1979) KLR 154.
 - viii. That the 1st Respondent's mandate in respect of the subject matter in the proceedings is fundus officio, and prays that it be expunged from the proceedings or in the alternative, the petition be dismissed against it with costs. The Petitioner's Submissions
18. It is the Petitioner's submission that before he was terminated from employment, he had already earned his right to pension having been confirmed to be permanent and pensionable and having worked for over 22 years. It is submitted that once an employee has earned his right to pension, that right cannot be lost for reason of the employee having been dismissed from work.
19. The Petitioner sought to rely in the case of Otieno v Teachers Service Commission [2024] KEELRC 1630 {KLR) for the holding that:

“...It is indeed true as held herein that pension already earned is a right and cannot be taken away from an employee for whatever reason”



20. It is further submitted that the Petitioner's right to pension cannot be taken away on account of dismissal from work, and further that the Petitioner was acquitted of the charges that led to his dismissal and as such, there is absolutely no reason why he should not be paid his pension for work done over 22 years, and actual deduction done from his salary by way of pension contributions.
21. The Petitioner finally urges this court to allow the petition and order that the Respondents calculates and pay the Petitioner's pension.

The Respondents' Submissions

22. It is the Respondents' submission that at the material time, the legal regime governing pensions and retirement benefits for public officers was clearly articulated in the *Pensions Act* (Cap. 189), the Public Service Commission Regulations. 1985 (now repealed). and the Code of Regulations for the Public Service (1992 Edition). That these legal instruments set out the specific grounds upon which a public officer would be entitled to pension or gratuity, and that dismissal from service was expressly excluded as a qualifying ground for such benefits.
23. It is the Respondents' further submission that the Petitioner, having been dismissed from the National Police Service, was disqualified by law from receiving any pension or terminal benefits. It submits that the law applicable at the time imposed a clear and unambiguous forfeiture of such benefits upon dismissal.
24. The Respondents further submit that the Petitioner's entitlement, if any, could not arise outside the statutory framework in place as at the date of dismissal, particularly in view of the fact that the prevailing pension scheme was non-contributory in nature, hence the Petitioner had no proprietary interest in the pension fund that could be claimed outside the statutory eligibility criteria.
25. The Respondents placed reliance in the Court of Appeal's decision in *Republic v Judicial Service Commission ex parte Kiarie Cithinji* [2014] eKLR where it was held that pension benefits are statutory, and can only be accessed upon fulfilment of the laid-down legal requirements.
26. The Respondents submit that any reliance by the Petitioner on the *Constitution* of Kenya, 2010 or subsequent legislation such as the *Public Service Commission Act*, 2017 is misplaced and untenable. That the law is clear that unless expressly stated, legislation and constitutional provisions do not apply retrospectively. Reliance was had to the decision in *Judicial Review Application Ell38 of 2020 Republic v Joe Mucheru. Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kasait, Data Commissioner (Interested Party)* (Judicial Review Application E1138 of 2020) (2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment). where the Court held:-

“The principle of retroactive application of the law meant that the courts, in the exercise of their function of interpreting the law in cases which came before them, viewed themselves as bound by the rule of construction that no law was to be given an operation from a time prior to its enactment unless Parliament had expressly provided that it was to have such an or unless the words of the Act could have no meaning except by the application to this past time.

Legislation could be retrospective in its application and such an intention had to be either apparent from the statute in question...”
27. The Respondents submit that the pension scheme applicable to the Petitioner was non-contributory, and that he did not contribute any portion of his salary to a pension fund and therefore had no vested



or accrued right capable of surviving dismissal. The Respondents submit further that this distinguishes his situation from that of officers under contributory schemes where personal contributions may create a legal entitlement even upon separation. That given the absence of any such contribution, there is no legal or equitable basis for the retrospective conferment of benefits.

28. It is submitted that the applicable law at the time of the Petitioner's dismissal expressly precluded any entitlement to pension and terminal benefits for officers dismissed from service. That the Petition is therefore unmeritorious and ought to be dismissed with costs to the Respondents.
29. It is the Respondents' prayer that the Petitioner's suit be dismissed with costs.

Analysis and Determination

30. I have considered the petition, the grounds of opposition and the parties' submissions. The singular issue for determination is whether the Petitioner merits the orders sought.
31. The Petitioner contends that he is entitled to payment of terminal benefits and pension, having been in the permanent and pensionable service of the Government from 19th May 1977.
32. It is the Petitioner's contention that despite being acquitted of charges that were falsely levelled against him, the 1st Respondent declined to reinstate him in service, and instead, elected to unfairly dismiss him from service without any benefits whatsoever. He argues that the 1st Respondent's refusal to reinstate him is a violation of his rights under Articles 23(1), 27, 28, 41(1), 47 and 57 of the Constitution and the Employment Act, 2007.
33. It is the Petitioner's position that he had already earned his right to pension having worked for over 22 years, and which right he contends cannot be lost for reason only that he was dismissed from service.
34. The Respondents on their part, argue that the Petitioner was dismissed from service with effect from 28th August 2000 and his 1st and 2nd appeals disallowed on 8th May 2002, and that based on the legislations existing at the time, an officer who is dismissed from service forfeits any claim for retirement benefits he would have otherwise been entitled to, had he left service in the normal manner.
35. It is their assertion that the pension regime for public officers at the time, was none contributory, hence the Petitioner did not contribute a part of his salary in order to secure his benefits.
36. The law applicable to pension claims at the time of the Petitioner's dismissal is the Pension Act, Cap. 189 of the laws of Kenya. Section 5(1) of the Pensions Act (Cap 189) states thus:-

“No officer shall have an absolute right to compensation for past services or to pension. gratuity or other allowance; nor shall anything in this Act affect the right of the Government to dismiss any officer at any time and without compensation.”
37. Section 6 of the same Act, further limited the circumstances under which pension could be granted, and which did not include dismissal for misconduct. Additionally, Regulation 29 of the Public Service Commission Regulations, 1985 (repealed) provided:-

“Subject to any law for the time being in force, a public officer who is dismissed shall forfeit all rights or claims to a pension, gratuity. annual allowance or other retiring award.”
38. It is therefore clear that the legal regime that was applicable to pensions and retirement benefits for public officers at the time of the Petitioner's dismissal, spelt out the specific grounds under which a public officer would be entitled to pension, gratuity or any other terminal benefit for that matter.



These laws expressly excluded persons who were dismissed from the service as a qualifying for pension benefits.

39. The Petitioner brought this petition under the provisions of the Constitution of Kenya, 2010 and the Employment Act, 2007. It goes without saying that these laws were not in force at the time the cause of action in the instant suit accrued. The Court further notes that the labour rights that the Petitioner now argues were violated, did not exist as such at the time of the Petitioner's dismissal.
40. Further, the Petitioner's reliance on the Constitution of Kenya, 2010 and the Employment Act, 2007 cannot hold, since the two do have retroactive application. Additionally, and as was correctly submitted for the 1st Respondent, except where it is expressly provided, neither legislation nor Constitutional provisions applies retrospectively.
41. In *Republic v Joe Mucheru. Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) (2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment)*, the Court opined:-

“The principle of retroactive application of the law meant that the courts, in the exercise of their function of interpreting the law in cases which came before them, viewed themselves as bound by the rule of construction that no law was to be given an operation from a time prior to its enactment unless Parliament had expressly provided that it was to have such an or unless the words of the Act could have no meaning except by the application to this past time.

Legislation could be retrospective in its application and such an intention had to be either apparent from the statute in question...”

42. Further, in the case of *Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)* the Court stated:-

“.....For non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence, are prima fade prospective. and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

43. By dint of the foregoing, it is evident that neither the Constitution of Kenya 2010 nor the employment Act, 2007 can retrospectively confer benefits on the Petitioner, having been dismissed from service long before their enactment.
44. In the end, I find and hold that the petition herein, lacks merit and is for dismissal. It is hereby dismissed with no orders on costs.
45. Judgment of the court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 29TH DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Chege present for the Petitioner



Ms. Karbolo h/b for Ms. Mochoge for the Respondents

Ms. Esther S- C/A

