



Maingi v General & 4 others (Employment and Labour Relations Petition 108 of 2017) [2024] KEELRC 952 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 952 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 108 OF 2017**

AN MWAURE, J

APRIL 5, 2024

BETWEEN

PATRICK MUNYAO MAINGI PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

THE COMMISSIONER OF POLICE 3RD RESPONDENT

THE NATIONAL POLICE SERVICE 4TH RESPONDENT

THE PUBLIC SERVICE COMMISSION 5TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed an Amended Petition dated 18th June 2020.

Petitioner’s Case

2. The Petitioner avers that he was enlisted as a police officer on 12/7/1976. He served diligently and faithfully in the police force and rose through the ranks and in July 1992 while working for the Directorate of Security Intelligence, he was promoted to the rank of Chief Inspector of Police.

3. The Petitioner avers that on 01.08.1994, together with one Acting Inspector of Police, Charles Kamunya Kigo instructed by Chief Inspector of Police Josephat Situma who was the Acting Section Head to proceed to Nyandarua Lodge, River Road and arrest Arnold Mukiisa (Ugandan) and interview him to ascertain his particulars and mission in Kenya.



4. The Petitioner avers that they carried out the exercise, arrested the suspect and booked him at Kileleshwa Police Station, interviewed him and wrote a comprehensive interview report to the Director of Intelligence which was forwarded to Nyati House by PSIO Nairobi area, Mr Kieti DCP. The Petitioner and his co-police officer then released the suspect because he had a valid Ugandan passport approved by immigration authorities.
5. The Petitioner avers that in early September 1994, he was called by Mr Kieti minus the Acting Inspector of Police, Charles Kigo and was asked whereabouts of Arnold Mukiisa. He informed him that they released the suspect after the interview as was the usual practice. It was unnecessary to hold a suspect and he had proper travel documents approved by the Kenyan immigration authorities.
6. The Petitioner avers that on 7th October 1994, the Petitioner, his co-police officer and AG IP Charles Kamunya Kigo were served with interdiction letters effective same date.
7. The Petitioner avers that subsequently a shoddy and hurriedly pre-arranged room proceedings were hastily conducted which he asserts fell short of the laid down procedures as he was neither served with a notice of intended orderly room proceedings nor given a chance to be represented or call witnesses including AG IP Charles Kigo who they carried the exercise together with.
8. The Petitioner avers that he was dismissed from the police force vide a letter dated 19.04.1995 effective 07.10.1994, the date of interdiction. Both the interdiction and dismissal letters were not copied to the Commissioner of Police against the laid down procedures as per the Police Act, Cap 85, Laws of Kenya.
9. The Petitioner avers that he was dismissed on allegation of bribery by a hostile intelligence service officer, gross misconduct and contravention of D.S.I operation regulations.
10. The Petitioner avers that if the Director of Intelligence had evidence of bribery, he should have been charged in a court of law but he was never prosecuted because accusations were unfounded, fictitious, in bad faith and driven by ulterior motive for unknown reasons.
11. The Petitioner avers that he was not informed of his right to appeal against the Police Act, the code of Regulations of the Police Service, *the Constitution* and rules of natural justice.
12. The Petitioner avers that his co-police officer AG IP Charles Kamunya Kigo was reinstated and he was left in the cold despite the fact that they were both involved in the assignment of arresting, interviewing and subsequent release of the suspect. This was discriminatory and had no basis at all.
13. The Petitioner avers that he filed an appeal against his dismissal dated 4/5/1995 but it was dismissed vide a letter dated 9/5/1996.
14. The Petitioner avers that he appealed again on 17/9/1998 to the Head of Public Service and Secretary to the Cabinet and on 8/7/2009, the appeal was found to be meritorious, the dismissal was improper and the decision to dismiss him from the police force was rescinded and he was accordingly reinstated to the police service with effect from 7/10/1994.
15. The Petitioner avers that the reinstatement letter stated in clause c that the period between 7/10/1994 and the period he resumed duty be treated as leave without pay.
16. The Petitioner avers that the Respondent's action was not anchored in any law and amounts to unfair labour practice and violation of his constitutional right to fair remuneration, legitimate expectation, fair hearing, right not to be subjected to inhuman/degrading treatment, right to human dignity, right to equal protection before the law and right to fair labour practices as provided in section 70,74(1), 77 and 84 of the Repealed Constitution.



17. The Petitioner avers that he had to wait for 15 agonizing years to be reinstated to the police force and this caused him untold suffering depression, he lost means of earning a livelihood. It affected his family life and his children had to drop out of school due to lack of money.
18. The Petitioner avers that due to the nature of his work and training in the disciplined forces he was unable to secure any other employment and this aggravated his suffering.
19. The Petitioner avers that after he was reinstated, he continued reporting to the police headquarters, however, he was not posted to any work station and his salary was not reinstated for over 6 years.
20. The Petitioner avers that he was forced to write a complaint to the Secretary of the Public Service Commission dated 25/01/2010 stating he had not been posted, his salary had been withheld and vide a letter by the Secretary is what forced them to react and posted him to a work station and reinstated his salary.
21. The Petitioner avers that he worked and retired honourably on 24/11/2016 but he was not compensated for 15 years that he was illegally dismissed out of the force and this greatly affected both his lumpsum payment of his pension and the monthly pension rates.
22. The Petitioner avers that he was illegally dismissed from the force, he missed promotions, salary increments, allowances and all other benefits associated with active employment and he suffered loss and damage.
23. The Petitioner avers that he requested relevant authorities to be paid his dues for the period he was interdicted and illegally dismissed after reinstatement to no avail.
24. The Petitioner avers that he was unable to file this petition for fear of being victimized and haunted out of the police force again and immediately after retirement for fear his dues would be unreasonably withheld as they previously did to his salary.
25. The Petitioner avers that the long and continuous utter breach of constitutional rights and is still being caused solely by the actions of the Respondents and/or their agents, servants and/employees and thus this court has jurisdiction over all claims for relief sought under section 70,74(1),77 and 84 of the Repealed Constitution.

Respondents' Case

26. In opposition to the Petition, the Respondents filed their Replying Affidavit dated 14th November 2019.
27. The Respondents aver that the Petitioner and AD. IP Charles Kamunya were instructed by their section head to go to Nyandarua Lodge and arrest a Ugandan National by the name Arnold Mukiisa and hand him over to the OCS Kileleshwa police station. The suspect was to be interrogated by the Petitioner and thereafter charged with the offence of being in the country illegally.
28. The Respondents aver that the Petitioner booked the suspect at Kileleshwa Police Station, interviewed and released him without knowledge of the Provisional Security Intelligence Officer (PSIO) and OCS who was not briefed to prefer charges against the suspect.
29. The Respondents aver that Petitioner's action amounted to misconduct, he was interdicted on 7/10/1994.



30. The Respondents aver that the Petitioner and AG. IP Charles Kamunya were charged separately in orderly room proceedings with the offence of being guilty of an act, conduct, disorder and neglect to the prejudice of good order and discipline contrary to regulation 3(41) of the Police Regulation.
31. The Respondents aver that the Petitioner was found guilty by the Presiding Officer but due to the seriousness of the offence, the presiding officer forwarded the proceedings to the Director of Security Intelligence for award of sentence.
32. The Respondents aver that the Petitioner was dismissed from government service with effect from 7/10/1994 while AG. IP Charles Kamunya was acquitted after it was established that he was following instructions issued by the Petitioner who was of senior rank to him.
33. The Respondents aver that the Petitioner was informed of his right to appeal to the Public Service Commission. The Petitioner lodged his appeal through the Commissioner of Police and forwarded to the Public Service Commission by the Office of the Permanent Secretary, Provisional Administration.
34. The Respondents aver that the Petitioner's appeal was heard by the Public Service Commission but was disallowed and sentence of dismissal was upheld. The Petitioner further sought for review of the decision, the Commission considered his request and rescinded their earlier decision on the dismissal.
35. The Respondents aver that the Petitioner was reinstated and informed of the decision vide the commission's letter dated 29/04/2010 which further stated that the period between 7/10/1994 and the date he resumed duty be treated as leave without pay.
36. The Respondents aver that the Petitioner was notified of the proceedings by being served with a waiver notice by a gazette officer as indicated in the defaulter sheet.
37. The petitioner aver that the proceedings were hurried and that is contrary to the truth. The proceedings commenced on 7/11/1994 and completed 3/02/1995 with several adjournments being granted.
38. The Respondents aver that the Director did not charge him with a criminal offence. However, disclosure of a criminal offence does not bar the commencement of internal disciplinary proceedings against any member.
39. The Respondents aver that the Petitioner was paid his pension by the Pension Department, Ministry of Finance and this is evidenced through a letter dated 19/12/2016.
40. The Respondents aver that it is a principle in employment matters that one gets paid for work done, the Petitioner cannot claim payment for the period he was away.

Petitioner's Submissions

41. The Petitioner submitted that the 4th Respondent took over the Human Resource function with regard to the Kenyan Police Service, a function previously held by the Public Service Commission.
42. The Petitioner submitted that Section 33 of Schedule 6 of *the Constitution* of Kenya, 2010 provides for the transitional from *the Constitution* of Kenya 1963 to *the Constitution* of Kenya, 2010, on succession of institutions, offices, assets and liabilities. He further relies on the case of *Eliud Wefwafwa Luucho & 3 Others v Attorney General* [2017] eKLR. It is the Petitioner's submission that the interpretation of these provisions proves that the 4th Respondent is liable for the actions of its predecessor, the Public Service Commission, being its legally recognized successor, specifically over the human resource function of the Kenyan Police Service.



43. The Petitioner submitted that had he been guilty of the charges leading to his dismissal, he would not have been reinstated to service. This means that the Respondents realized that his dismissal was unfair had no other option but to reinstate him. Therefore, the Petitioner's dismissal was unfair and in breach of his fundamental constitutional right to fair labour practices and fair remuneration, right to legitimate expectation, fair hearing, right not to be subjected to unhuman/degrading treatment, right to human dignity, right to equal/secure protection.
44. The Petitioner submitted that the Respondents action of reinstating his Co-Officer, AG IP Charles Kamunya Kigo and leaving him in cold despite the fact that they were both involved in the assignment of arresting, interviewing and the subsequent release of the suspect Mr. Arnold Mukiisa, was discriminatory and biased.
45. The Petitioner submitted that he was never informed of his right to appeal as is required, contrary to the provisions of the Police Act, the code of Regulations of the police service, *the constitution* and rules of natural justice.
46. The Petitioner submitted that the Respondents' decision to treat the period between 7/10/1994 and his reinstatement as leave without pay is not anchored in any law and amounts to an unfair labour practice. Further he had to wait 15 years to be reinstated owing to the unfair dismissal, causing him untold suffering, depression, loss of his livelihood, affecting his family life and due to the nature of his work and training in the disciplined forces, being unable to secure any other employment, the Petitioner suffered an injustice and untold damages.
47. It is the Petitioner's submission that he has sufficiently proved that he was illegally and unlawfully kept out of the police service from 1995 – 2009. During this period, he suffered untold mental anguish, his family lost its sole breadwinner necessitating his children to drop out of school and further, he missed out on promotions, salaries, benefits and salary increments.

1st, 2nd, 3rd and 5th Respondents' Submissions

48. The Respondents submitted that the Petitioner and AG.IP Charles Kamunya were charged separately in Orderly room proceedings with the offence of being guilty of an act, conduct, disorder and neglect to the prejudice of good order and discipline contrary to regulation 3(41) of the police regulations. They were duly notified of the intended Orderly Room proceedings by being served with a waiver notice by a gazette officer as per chapter 20 paragraph 16(vii) of the Force Standing Orders. Therefore, the Petitioner was duly notified within the right timelines.
49. The Respondents submitted that the Petitioner was found guilty and dismissed from government service with effect from 7/0/1994 while AG.IP Charles Kamunya was acquitted after it was established that he was following instructions issued by the Petitioner who was of senior rank to him.
50. The Respondents submitted that the Petitioner had indicated his intention to be represented but failed to appoint an officer to represent him or call any witnesses. Further, the Petitioner's allegations that the proceedings were hurried is also contrary to the truth, the proceedings commenced on the 7/11/1994 and were completed on the 3/02/1995 with several adjournments being granted.
51. It is the Respondents' submission that the Petitioner caused the delay in determination of his appeal as he addressed his appeal to the Head of the Public Service and not the Public Service Commission. This is evidenced by his own annexures to the pleadings. He only wrote to the Commission in June 2004, therefore, the Petitioner's interdiction and his subsequent dismissal was legal, fairly and procedurally lawful.



52. The Respondent submitted that the Petitioner was reinstated and was informed of the decision that the period between 7/10/1994 and the date he resumed duty be treated as leave without pay. The Petitioner accepted these terms and he has not shown that he appealed and/or tried to negotiate the terms of reinstatement.
53. It is the Respondents submission that the Petitioner's allegation that he did not file this petition earlier due to fear of victimization and being haunted out of the police force are untrue as that there are systems and policies in place to protect any officer who wishes to raise an employment issue with their respective ministries. The Petitioner was free to engage the Commission and the courts however he failed to do so willingly therefore the Petitioner filing of this suit was as an afterthought.

4th Respondent's Submissions

54. The 4th Respondent submitted that the matter is an employment dispute that has been disguised as a constitutional violation issue in an attempt to limit the application of the Limitation of Actions Act. This was dealt with in Benjamin Wachira Ndiithi v Public Service Commission & Another [2014] eKLR.
55. The 4th Respondent submitted that the Petitioner once reinstated, he ought to have begun proceeding or an internal mechanism for the alleged period he was not paid. However, he waited until he retired to lodge this suit claiming the alleged unpaid dues almost after a decade.
56. It is the 4th Respondent's submission that the suit is time barred under the Limitation of Actions Act and Public Authorities Limitation of Actions Act as the Employment Act is not applicable in the present case as it is excluded by section 3(2)(b) by dint of the employment contract being one with the police service. It relied on Daniel Kago Gachanja v Inspector General & 2 Others [2020] eKLR.
57. The 4th Respondent submitted that section 2 of the Public Authorities Limitation of Actions Act provided that no proceedings founded on contract shall be brought against the government or local authority after the end of 3 years from the date which the cause of action arose. Therefore, the Petition has been instituted after the stipulated timeframe.
58. It is the Respondent's submission that this court does not have jurisdiction to hear and determine the Petition as the same has been filed out of time as prescribed by section 2 of the Public Authorities Limitation of Actions Act.
59. The 4th Respondent submitted that it was not in existence at the time the course of action arose in this petition hence liability cannot be apportioned to the Commission for actions that took place before its coming to force.
60. The 4th Respondent submitted that the Petition failed the threshold of filing constitutional petition as set in Anarita Karimi Njeru v Attorney General [1979] KLR 154 and Mumo Matemu & 5 Others, Supreme Court Petition No. 12 of 2013 [2015] eKLR as it does not state the alleged constitutional provisions violated and acts and omissions complained of with reasonable precision.
61. The 4th Respondent submitted that the issues raised are purely employment and industrial related issue hence a remedy can be found as purely employment claim/cause and not a constitutional petition.
62. It is the 4th Respondent's submission 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 Constitution, instead of the jurisdiction aptly prescribed under statute.



63. The 4th Respondent submitted that it has demonstrated that the 4th Respondent has not in any way violated the Petitioner's rights and freedoms as it was not in existence during the time the Petitioner made the allegations.

Analysis and Determination

64. The issues for this court's determination are:
- a. Whether the Petition is time barred.
 - b. Whether the Petition raises any violation of the Petitioner's human right or fundamental freedom and/or Constitution provisions.
 - c. Whether the 4th Respondent is responsible for the acts and omissions of its predecessor.
 - d. Whether the petitioner is entitled to be paid all his dues in form of unpaid salaries, allowances and all other benefits he is entitled to and/or he became entitled to by virtue of being employed in the police service during the 15 years period he was illegally/unfairly interdicted and dismissed from the force
 - e. What orders ought to be issued by this Honourable Court.

Whether the Petition is time barred.

65. The petitioner was terminated from employment on 7th October 1994 on allegations of having received a bribe from a wanted person a citizen of Uganda. He appealed the decision but was declined on 5th September 1996.
66. On 17/8/1998 he appealed to the Public Service and Secretary to the Cabinet and his appeal was found to be meritorious and the decision to dismiss him was rescinded and was reinstated to his job on 8th July 2009. However, the reinstatement letter despite backdating his reinstatement to 7th October 1994 also ordered that the period he was dismissed it was to be treated as unpaid leave and he would not be paid from 1994 to 2009.
67. The petitioner worked for the police force until he retired on 24th November 2016.
68. The petitioner therefore having been reinstated to his position the law and specifically section 49 (3) (a) provides that where an employee is reinstated he will be treated in all respects as if he employee had not been terminated.
69. As per by law provided therefore the petitioner was an employee of the Police Force up to the date of his retirement in 2016 and his case is therefore not time barred having been filed on 27th November 2017 and amended petition dated 18th June 2020 which he avers he got a court order dated 3rd June 2020 to amend the same.
70. The issue of whether petitioner raises any constitutional issues the court notes how the petitioner was dismissed from his employment in 1994 and was finally reinstated in 2009. He was accused of the offence of bribery. The court has not been provided with the evidence of bribery and the details. The dismissal letter dated 19th April 1994 he was informed he was dismissed from Government service for gross misconduct of releasing a Ugandan prisoner. That is all that is stated in the letter.
71. The period the commissioner of police took and the respondents to determine his appeal was unreasonably long. Section 70 of the repealed constitution guarantee every person fundamental rights



and freedoms and section 74(1) of the said repealed constitution guarantee no person shall be subject to torture or inhuman or degrading punishment or other unfair treatment.

72. To keep a person out of employment for 15 years with no pay and no valid reason and only to reinstate him and withhold all his salary for all those years was both inhuman and degrading. He says he suffered depression and his children failed to attend school. Even though there may be no evidence of these averments however it does not require rocket science to deduce that it would be very difficult for a chief inspector of police to secure a job after dismissal from the forces.
73. Even in the 2010 Constitution of Kenya provides that every person has a right to fair labour practice including fair remuneration.
74. The court is persuaded by the case of *Anarita Karimi Njeru vs The Republic 1976-1980 KLR* where court held as follows:

“we would however, again stress that if a person is seeking redress from the high court on a matter which involves a reference to *the constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

75. In view of the foregoing, the court is persuaded the petitioner’s constitutional rights are violated.
76. The other third issue as to whether the 4th respondent is responsible for the acts and omissions of its predecessor. The 4th respondent is the National Police Commissioner who alleges was not in existence when the course of action arose.
77. Article 246(3) of *the Constitution* of Kenya provides as follows:-

“The commission shall-

- a. 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
- b. Observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the service, and perform any other functions prescribed by national legislation.”

78. The 2010 Constitution schedule 6 section 33 provide:-

“An office or institution established under this constitution is the legal successor of the corresponding office or institution established under the former constitution or by an act of Parliament in force immediately before the effective date whether known by the same or new name.

The court finds and holds that the 4th respondent is liable for the actions of its predecessor having taken over the human resource functions of the police force which were then conducted by the public service commission.

79. The court having considered the pleadings in this petition, the submissions and the citations is convinced the petitioner has proved its case on balance of probability vide the amended petition dated 18th June 2020. Judgment is therefore entered in favour of the petitioner and various reliefs are deserved.



Reliefs awarded.

80. The court finds that the petitioner having been reinstated to his employment he was entitled to his salary and other dues. The respondent clearly reinstated him. If he meant to re-engage him afresh he should have made it clear as provided in section 49 (3)(b) of the [Employment Act](#).
81. As it is, the court does not need to address prayer A since petitioner was already reinstated to his position. Similarly for prayer B, the court has held that petitioner was treated against fair labour practices and so will not say any more on prayer B.
82. As for prayers C & D the same are justified but contrary to prayers D the court orders the parties to agree on the salaries and benefits due to the petitioner for the years the petitioner was out of employment to the date of reinstatement having been a good number of years in order to get more accurate figures with the consensus of the parties. The court will mention the case on 7th May 2024 to receive the figures agreed on and give final award.
83. The petitioner is also given compensation for violations of his rights at 10 months equivalent based on his salary at retirement but prayer G is speculative and is not granted. The court to be advised on his salary at retirement.
84. Costs are awarded to the petitioner.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of [the Constitution](#) which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of [the Constitution](#) and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

