



**Omuse v National Police Service Commission (Cause 2123 of 2017)
[2024] KEELRC 1289 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1289 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2123 OF 2017**

JK GAKERI, J

MAY 27, 2024

BETWEEN

JOEL CHACHA OMUSE CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Memorandum of Claim filed on 19th October, 2017 alleging arbitrary wrongful and illegal dismissal from employment.
2. It is the Claimant's case that after training as an Administration Police Officer in 2006, he was posted to Lamu District Commissioner's Office in April 2017 until 2008 when he was transferred to the Rapid Deployment Unit (RDU) Nairobi but in 2009, he was posted to Kipipiri District Commissioner's Office and Mwatate's DC's Office in 2010 where he allegedly developed mental illness that affected his work and was treated at Mathari Hospital, Nairobi and posted to Chwele's DC's Office, Bungoma where the illness recurred and was again treated at the Mathari Hospital.
3. It is the Claimant's case that he recovered and was posted at the Webuye's DCs Office where he worked for 9 months without pay and was unlawfully dismissed from employment by letter dated 19th September, 2011, but learnt of the dismissal 2 months later.
4. It is the Claimant's case that he was not accorded an opportunity to defend himself.
5. The Claimant prays for;
 - i. An order of reinstatement.
 - ii. General damages for wrongful dismissal.
 - iii. Unpaid salaries from 1st January, 2011 to 30th November, 2011 Kshs.144,720/=.



- iv. Any other remedy deemed appropriate.
- v. Interest on any monies found due.
- vi. Costs of this suit.

Response

6. By its response dated 4th May, 2022, the Respondent admits that the Claimant was trained and worked as an Administration Police Officer but denies his alleged mental illness.
7. It is the Respondent's case that the Claimant was taken through orderly room proceedings for the offence of conduct to the prejudice of good order and discipline on 5th July, 2011 for having;
 - i. Left his place of work on 6th April, 2011.
 - ii. Been drunk and disorderly while on duty.
 - iii. Handled a gun while under the influence of alcohol.
 - iv. Broken out of the AP line for 5 days from 5th April, 2011 to 13th April, 2011.
8. It is the Respondent's case that the Claimant pleaded guilty to the four charges and was convicted and the sanction was dismissal with loss of benefits.
9. That the Claimant provided no evidence of having notified his supervisors about his mental illness, hospitalization or treatment.
10. That the proposed punishment was confirmed by the District Commissioner and the Provincial Commissioner and the Claimant was removed from service on 4th April, 2011 and the same was communicated by letter dated 19th September, 2011 and he appealed to the Public Service Commission which referred the matter to the police and the Claimant appealed again in 2019 to the County Administration Police Commander in Bungoma and copied the Respondent 8 years later.
11. The Respondent maintains that the Claimant's dismissal was substantively and procedurally fair and the suit ought to be dismissed.

Claimant's evidence

12. On cross-examination, the Claimant admitted that his employment was terminated in 2011, more than 4 years before 2017.
13. That in Bungoma, Central, he worked at the Customer Care Desk as the employer did not want him to handle a firearm.
14. He could not recall his supervisor at the DC's Office who was a Senior Sargent. That he received the letter of dismissal 4 months later and filed an appeal on 30th August, 2019 and had an advocate all through.
15. On re-examination, the witness testified that he was not guilty of the counts and was not summoned by the National Police Service before dismissal.
16. Although the Claimant's father had recorded a witness statement, he did not testify.
17. The Respondent did not adduce evidence in court but availed a copy of the Claimant's appeal dated 30th August, 2019 as the Claimant had copied the Respondent.



18. Equally, it also provided a copy of the Claimant's appointment letter dated 18th January, 2007, copy of the dismissal letter dated 19th September, 2011 effective 4th April, 2011, copy of the Claimant's appeal to the Public Service Commission by his advocate dated 8th March, 2012 and finally the Public Service Commission letter to the Permanent Secretary, Office of the President citing lack of jurisdiction to hear the appeal.

Claimant's submissions

19. Counsel for the Claimant isolated no specific issues but addressed the Claimant's mental illness and in particular the letters by Dr. Bukusi dated 9th September, 2011 and Dr. Gatere dated 3rd November, 2011. Both letters relate to the same period of hospitalization in September to November 2011.
20. Counsel submitted that the Claimant's mental illness affected his work which led to his dismissal after a period of about 5 years of diligent service.
21. That the charges leading to the Claimant's dismissal arose about five months before the Claimant's admission at Mathari Hospital.
22. Counsel urged that although Section 20(1) of the Administration Police Act permitted the District Officer, District Commissioner, Provincial Commissioner or other public officer authorised by the Provisional Commissioner to dismiss an officer, the Claimant was a mentally challenged person and could not have wilfully disobeyed lawful orders or be responsible for his conduct and the Commission could have retired the officer.
23. Counsel submitted that he was aware that the termination took place on 19th September, 2011 and the suit was filed on 19th October, 2017 and was also aware of the provisions of Section 3(2) of the [Public Authorities Limitation Act](#) on the 3 year limitation period.
24. Counsel submitted that if a Respondent does not plead limitation as a defence, it cannot take advantage of Rule 4(1) of the Civil Procedure Rules, 2010 and cited the Court of Appeal decision in *Stephen Onyango Achola & another v Edward Hongo Sule & another* [2004] eKLR.
25. That the Claimant remained under a mental disability until he instituted this suit in 2019 and it was unfair for the Claimant to render services for 9 months without pay and be dismissed.

Respondent's submissions

26. Counsel addressed the Claimant's termination and the reliefs sought.
27. Concerning termination of employment, counsel submitted that the Claimant was taken through Orderly room proceedings and found guilty, information his claim ignores in totality by advancing the argument of mental illness prior to the proceedings and after to demonstrate that he was unwell.
28. Counsel urged that there is no proof of extended hospitalization in April 2011 when he committed the offences and the Claimant could not explain whether he presented the treatment notes to his supervisor in Bungoma as none had any acknowledgment.
29. That the Commission referred to by the Claimant is not the Respondent but the Public Service Commission.
30. Counsel urged that the Claimant was notified of the right of appeal.
31. As regards the reliefs sought, counsel submitted that the Claimant is suing a party it had not approached for any relief and took too long to seek the reliefs.



32. Counsel further urged that the remedy of reinstatement was unavailable by virtue of provisions of the *Employment and Labour Relations Court Act*, 2011 and Public Authorities Limitations Act.
33. Counsel further urged the court to admit the answers given by the Claimant in court at the instance of the court as evidence that the suit is statute barred.
34. That the court should not interfere with process undertaken by employers in consonance with their policies as held in *Geoffrey Mworira v Water Resources Management* [2015] eKLR.
35. Counsel urged the court to take judicial notice of the fact that the Claimant's dismissal took place many years ago and the court's jurisdiction is restricted to employment and labour relations matters.
36. That the Claimant had not demonstrated the basis of claiming the equivalent of 12 months' salary or 9 months salary.

Findings and determination

37. It is common ground that the Claimant was employed by the Government of Kenya as an Administration Police Officer from 19th June, 2006 and worked in Lamu, Kipipiri, Mwatate, Nairobi and Bungoma.
38. The Claimant alleges that he developed some mental illness while working at the Mwatate District Commissioner's Office in 2010.
39. Copies of documents availed by the Claimant reveal that between 12th and 16th November, 2010, the Claimant was accorded 5 days to go home to resolve domestic issues and was scheduled to resume duty on 17th November, 2010.
40. Similarly, a document dated 3rd December, 2010 from Mathari Hospital Psychiatric Services states that the Claimant was discharged from the hospital and would be on medication for 3 months. It is unclear on when he was admitted.
41. Noteworthy, by a handwritten letter dated 31st December, 2010 to the Commandant Administration Police, through the District Commander Administration Police, Mwatate, the Claimant sought a transfer to Bungoma District to enable his parents visit him owing to the sickness. Other documents show that the Claimant was admitted at the Mathari Hospital on 20th September, 2011 and discharged on 7th November, 2011 as confirmed by Dr. Gatere's letter dated 8th November, 2011.
42. Regrettably, Dr. Bukusi's letter dated 9th September, 2011 makes no reference to the date of admission or discharge and is as such unhelpful as is the E.E.G Request Form on record, which has neither a signature nor date.
43. It is common ground that the Claimant's employment was terminated by the Government vide letter dated 19th September, 2011 effective 4th April, 2011.
44. The issues that commend themselves for determination are; whether the Claimant's suit against the Respondent is sustainable and whether the Claimant is entitled to the reliefs sought.
45. Concerning the sustainability of the Claimant's suit against the Respondent, parties have adopted opposing positions with the Claimant's counsel submitting that the Claimant's mental illness was the cause of the disciplinary offence.



46. Respectfully, the court is unable to agree with the submission as the Claimant neither claimed or alleged nor adduced evidence to demonstrate that the mental illness contributed to the leaving of his place of work on 6th April, 2011 to indulge in drinking while in possession of a fire arm.
47. This may be gleaned from the documentary evidence on record and in particular, letter dated 31st December, 2010 requesting for a transfer from Mwatate to Bungoma Central. This letter was very specific as to where the Claimant wanted to be transferred to and why.
48. A cursory reading of the letter reveals that the illness had not affected his capacity or ability to comprehend and make decisions.
49. Earlier on 12th November, 2010, the Claimant had sought and was granted leave to go home to resolve domestic issues and leave was granted.
50. The foregoing resonates with the medical reports and letters by Dr. Bukusi and Dr. Gatere of Mathari Hospital.
51. None of them suggests that the Claimant was unfit to work or should be accorded any accommodation at the work place.
52. In fact, none of the documents on record outlines the symptoms or diagnosis. A medical report addressed to the employer would have laid bare the Claimant's condition and treatment including the duration.
53. Based on the documents from Mathari Hospital, there is nothing to suggest that the Claimant's mental abilities had any challenge.
54. It is common ground that the Claimant was taken through orderly room proceedings on 5th July, 2011 at the DC's Office Bungoma Central District on 5 counts and was found guilty and a recommendation for dismissal made and was approved as evidenced by the letter dated 19th September, 2011 from the Office of the President, Nairobi and was informed of his right to appeal to the Public Service Commission which declined to hear the appeal on the premise that it had no jurisdiction and the Commissioner of Police does not appear to have acted in accordance with the letter by the Public Service Commission.
55. The fact that the Claimant appealed and his appeal was not heard and determined ought to have been raised as a constitutional issue in a petition which was the only route available to the Claimant in 2017 when this suit was instituted.
56. The operative appellate system at the time failed the Claimant, the Respondent did not.
57. It is common ground that National Police Service Commission is one of Commissions established by *the Constitution* of Kenya under Article 246(3)(b). The Commission exercises disciplinary, control over and remove persons holding or acting in offices within the service among other functions.
58. It is equally not in dispute that the *National Police Service Act*, 2011 became operational on 30th August, 2011, long after the Claimant's disciplinary hearing had taken place and a recommendation made.
59. From the communication between the Office of the President and the Public Service Commission, it is decipherable that the National Police Service Commission had not been operationalized in 2011 and could not have heard the Claimant's appeal.
60. Finally, the Claimant did not adduce any evidence of hospitalization or treatment after March 2012 when his advocate lodged an appeal to the Public Service Commission vide letter dated 8th March, 2012.



61. Documents on record reveal that by March 2017, the Claimant had engaged another advocate and another in October 2017 who filed the instant suit.
62. The court is left wondering why the Claimant who had the capacity to engage an advocate in early 2012 and early 2017 and who has not demonstrated that he was indisposed or under treatment could not file a suit to enforce his rights.
63. As adverted to elsewhere in this judgment, counsel for the Claimant admitted that he was well aware of the provisions on limitation of time under the *Public Authorities Limitation Act*, but argued that as the Respondent had not raised it as a defence, it was not of the moment by virtue of Rule 4(1) of the Civil Procedure Rules, 2010 and cited various decisions of the High Court, Environment and Land Court and the Court of Appeal.
64. The Court of Appeal decision cited was delivered on 30th April, 2004 and thus pre-dates the provisions of the *Employment Act*, 2007, *Employment and Labour Relations Court Act*, 2011 and the Employment and Labour Relations Court Procedure (Rules), 2016.
65. The Civil Procedure Rules, 2010 only apply to the extent provided for by the Rules, 2016 and to the extent the procedure in question is not covered by the rules.
66. Simply stated, the Civil Procedure Rules, 2010 do not generally apply to the Employment and Labour Relations Court processes.
67. Concerning limitation of time for claims filed pursuant to the provisions of the *Employment Act*, 2007, the provisions of Section 90 of the Act is unambiguous that;

“Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within 12 months next after cessation thereof.”
68. This provision is couched in mandatory tone and does not confer upon the court any discretion to extend the limitation of time.
69. As the Claimant had a contract of service with the employer and is challenging his dismissal in 2011, the claim falls under the provisions of the *Employment Act*, 2007 and inevitably those of Section 90 of the Act.
70. Significantly, there is sufficient judicial authority for the proposition that since limitation of time is a question of law and implicates the court’s jurisdiction, it need not be raised by any party. The court may do so suo motu.
71. In *Kenya Airways Ltd v Donald Osewe Oluoch* [2014] eKLR, Nduma Nderi J. expressed himself as follows;

“Indeed, if the matter is not raised by either party, the court has an obligation to suo motu raise the matter and determine it in the interest of justice and economical use of the court’s time. A court either has jurisdiction to hear and determine a matter or it does not have. If it has no jurisdiction, it must strike out the suit and down its tools.”
72. A. Kaniaru J. expressed similar sentiments in *Njoka v Gichuki* [2023] KEELC 22583).



73. In the instant case, it is common ground that the Claimant was dismissed from employment by letter dated 19th September, 2011 and the dismissal was effective 6th April, 2011 and by simple arithmetic, the action became statute barred in April 2014 as the suit was commenced on 19th October, 2017, 6 years after the dismissal.
74. Even assuming that the termination took effect on 19th September, 2011, the claim was still statute barred.
75. Although counsel for the Claimant argued that the Claimant was labouring from a disability from 2012 and there was no evidence that he had been healed, the Claimant, as adverted to elsewhere in this judgment furnished no evidence to demonstrate that he could not have filed the suit in 2012, 2013 and 2014. He adduced no evidence of hospitalization, being attended to or treated at the Mathari Hospital or any other hospital.
76. The dearth of evidence on the Claimant's illness or treatment after termination of employment is apparent.
77. Based on the evidence on record, it is the finding of the court the Claimant has failed to prove on a balance of probabilities that he was labouring under a mental disability which either caused or contributed to his failure or neglect to file the instant suit within 3 years of dismissal from employment.
78. Regrettably and for unexplained reasons, the Claimant whose advocate had threatened to file a constitutional reference in early March 2017 did not do so to safeguard the Claimant's rights.
79. The instant claim is subject to the law on limitation of actions.
80. In the upshot, the Claimant's suit against the Respondent is struck out on account of being statute barred.
81. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF MAY 2024

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE



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