



**Marwa v National Police Service Commission & 3 others (Constitutional Petition E195 of 2022) [2024] KEELRC 2292 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2292 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION E195 OF 2022**

**K OCHARO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**POLICE CONSTABLE DAVID MWITA MARWA ..... PETITIONER**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE  
COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**DEPUTY INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE  
COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**Background**

1. By a petition herein dated 14<sup>th</sup> October 2022, the Petitioner sought against the Respondents; a declaration that the decision made on 23<sup>rd</sup> August 2002 dismissing him from the National Police Service without conducting disciplinary/orderly-room proceedings or hearing and the prior subjecting the Petitioner to Criminal Proceedings in Nairobi CMCC Criminal Case No. 2230 of 2002 were unconstitutional and in violation of the Petitioner’s rights under Articles 41, 47, 50, 236 and 159 of *the Constitution* of Kenya; an order for reinstating him to the position held before the said dismissal without any loss of rank/insignia, salary and allowances and other benefits entitled to him; an order directing the Respondents to pay him salary and allowances from the date of dismissal until reinstatement, in the alternative order for payment of his terminal dues calculated to the date of Judgment; damages for the violation of his constitutional rights; and costs and interest.



2. In response to the Petition, the 2<sup>nd</sup> to 4<sup>th</sup> Respondents filed a Notice of Preliminary Objection dated 13<sup>th</sup> March 2023 challenging the jurisdiction of the Court to entertain the present petition on the premise that the same is time barred having been filed outside the time limit under Section 90 of the [Employment Act](#) 2007.
3. Following the directions by this Court issued on 18<sup>th</sup> September 2023 for filing of submissions by the parties for and against the preliminary objection, the 2<sup>nd</sup>-4<sup>th</sup> Respondents filed written submissions dated 27<sup>th</sup> April 2023, and the 1<sup>st</sup> Respondent those dated 20<sup>th</sup> November 2023 in support of the objection, while the Petitioner filed his dated 19<sup>th</sup> May 2023, against the same.

### **Submissions by the Parties.**

4. The 1<sup>st</sup> Respondent distilled two issues for determination on the preliminary objection, thus; whether the petition before this court has been filed within the stipulated time; and whether the Petition raises any constitutional issues which show a violation of his rights.
5. It was submitted that the petition herein is an ordinary employment claim that has been disguised as a constitutional petition solely to defeat the application of the [Limitation of Actions Act](#) and the Public Authorities [Limitation of Actions Act](#). This Court should not succumb to the Petitioner's scheme. To bolster the submission that employees should not be allowed to clothe employment claims to appear like constitutional matters to defeat the limitation of actions statutory stipulations, reliance was placed on the decision in Benjamin Wachira Ndiithi vs Public Service Commission & another [2014] eKLR.
6. It was further submitted that to determine whether or not a matter has been filed out of time, the date of the cause of action regarding the controversy between the parties must be established. In employment matters, the cause of action arises on the date of termination, regardless of whether the existing internal disciplinary mechanism available for the aggrieved former employee has been initiated. To support this point, reliance was placed on the case of Benjamin Wachira [supra].
7. In the instant matter, there cannot be a doubt that the cause of action arose on the 23<sup>rd</sup> of August 2002 when the Petitioner was dismissed from service, which is more than 21 years.
8. It was argued that for purposes of determining whether the instant suit is time-barred, the law applicable is the [Limitation of Actions Act](#) and Public Authorities Actions Act, the [Employment Act](#) is not applicable as the contract of service in issue relates to police service. To fortify this submission the case of Samson Leteipa Ole Kimongo v Inspector General, National Police Service & 2 Others [2022] eKLR.
9. Section 2 of the Public Authorities [Limitation of Actions Act](#) provides that no proceedings founded on contract shall be brought against the Government or Local Authority after the end of three years from the date on which the cause of action accrued. Undeniably, the petition herein was filed long after the six years contemplated in the provision. The lapse in time renders this Court without jurisdiction to adjudicate this matter. It should down its tools.
10. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents identified three issues for determination; whether the petition is time-barred; whether the Court has jurisdiction to extend time; and whether the petitioner is entitled to the reliefs sought.
11. Relying on the provisions of section 3[2] of the Public Authorities [Limitation of Actions Act](#), the Respondents argue that the petition herein being one founded on contract, was filed out of time, and resultantly is time-barred by operation of the law. The petitioner herein was dismissed from service on 7<sup>th</sup> April 2003. The instant petition was filed on 14<sup>th</sup> October 2022, approximately 19 years after the



- cause of action arose. The time for purposes of filing the petition lapsed in April 2006. To support this submission, they placed reliance on the case of *James Mugeria Igati v Public Service Commission* [2014] eKLR.
12. The Respondents further relied on the Court of Appeal decision in the case of *Thuranira Karuri vs- Agnes Nebeche, Civil Appeal No. 192 of 1996*, where the Court held that Limitation goes to the Jurisdiction of the Court and a suit that is time-barred is incompetent and should be struck out.
  13. Relying on the decision in *Nicodemus Marani v Timsales Limited, Industrial Cause No. 204 of 2013* and *Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Embakasi Girls Secondary School*, the 2<sup>nd</sup> to 4<sup>th</sup> Respondents submitted that this Court does not have jurisdiction to extend time for filing of suits emanating from contracts of service.
  14. They urged the Court to find that the petition is time-barred and offends the mandatory provisions of section 3[2] of the Public Authorities Limitations Act and that the Petitioner is circumventing the *Employment Act* and *Labour Relations Act*, by relying on the constitutional provisions having realized the matter is statute-barred.
  15. Resisting the preliminary objection, the Petitioner submitted the preliminary objection by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents is one that does not fit in the description of a proper preliminary objection. It raises a matter, limitation of time, which in the circumstances of this matter can only be ascertained by interrogating factual issues. As such, the preliminary objection should be declined. To support the point, he placed reliance on the cases of *Borniface Akusala & Another vs. Law Society of Kenya & 12 others*, and *Samuel Waweru vs Geoffrey Muhoro Mwangi, Nakuru Civil Case No. 489 of 2013*.
  16. The Petitioner further submitted that a preliminary objection must be seen to flow from a party's pleadings. The 2<sup>nd</sup> to 4<sup>th</sup> Respondents have not filed any pleadings. Therefore, their preliminary objection is not firmly founded.
  17. It was further submitted that he was dismissed under a letter dated 23<sup>rd</sup> August 2002, which he received on 7<sup>th</sup> April 2003. He filed his appeal to the commissioner of police on 20<sup>th</sup> April 2003. The outcome of his appeal was not communicated to him until 21<sup>st</sup> July 2022, when he received a letter containing the verdict dated 6<sup>th</sup> May 2005. This was more than 18 years after the filing of the appeal.
  18. The delay in informing him of the outcome of the appeal for the length of the period stated above, was an affront to his rights under Articles 35, 41, 50, and 159 of *the Constitution*.
  19. The Petitioner contended that time started running for purposes of limitation of time in July 2022, when he became aware of the decision of his administrative appeal. Therefore, the time limitation in Section 90 of the *Employment Act* or any other statute cannot militate against his petition herein. To buttress this submission, reliance was placed on the decision in *Police Constable Henry Nyakoe Obuba v National Police Service Commission and others- Nyeri Petition No. 14 of 2015*
  20. The Petition raises serious constitutional violations including the lack of an expeditious administrative action, contrary to Article 47 of *the Constitution*; A violation of the stipulations, of Articles 50 and 236 that require a fair hearing and due process, and Article 41 which speaks to unfair labour practices, considering that he was not taken through orderly room proceedings before being removed from the service.
  21. The Petitioner contended that the instant matter is in character a constitutional matter. It falls within the definition that the Court accorded in *Petition No 442 of 2015, Kevin Turungu Ithangi v The Kenya Judges and Magistrates Association*, wherein the holding in *Peter Mungai Ngengi v Mama Ngina Kenyatta and Another* [2015] eKLR.



22. The petitioner concluded his submissions by stating that in the totality of the circumstances the Respondent's preliminary objection lacks merit, it should be dismissed and the petition be allowed to be heard on merit.

### **Analysis and Determination.**

23. I have carefully considered the preliminary objection raised by the 2<sup>nd</sup> to 4<sup>th</sup> Respondents, their submissions and the 1<sup>st</sup> Respondent's submissions, both in support of the objection, and the Petitioner's response submissions, and the following issues emerge for determination;
- i. Whether the Petition herein is a properly presented constitutional petition.
  - ii. Whether the instant petition is time barred.
24. The Respondents contend that the matters raised in the instant petition, are matters that flow from a contract of service and the controversy emanating therefrom could duly be interrogated and determined under the relevant statute[s], as an ordinary employment claim, and not under constitutional litigation pursuant Constitutional provisions, and based on alleged violation of constitutional rights.
25. I get the Respondents as contending that the doctrine of Constitutional avoidance, [ though they didn't expressly submit on the doctrine] militates against the Petitioner's petition. I have carefully considered the facts and grounds upon which the petition is premised; the cited constitutional stipulations and rights violations, the description of the alleged violations, the remedies sought in the petition, and the fact that the petition, and therefore some vital issues raised therein for instance that the verdict on the Petitioner's administrative appeal was communicated to him after 18years of the date of the appeal inclusive, remain unchallenged as the Respondents haven't filed their responses, and find it not difficult to conclude that the controversy raises constitutional issues that could only be adequately litigated under *the Constitution* following the procedure identified thereunder.
26. It is my conclusion, therefore, that I am not persuaded that the Petition is an ordinary employment claim camouflaged as a constitutional petition to defeat the limitation of time trap.
27. I now turn to consider whether the petition is time-barred having been filed long after the statutory period set out in the provisions of Section 3[2] of the Public Authorities Limitations Act, Cap 39 Laws of Kenya, and Section 90 of the *Employment Act*, 2007. Having found that the instant matter was properly initiated as a constitutional petition, the question that then springs up is, does the statutory limitation of time apply to petitions where a violation of *the Constitution* and or constitutional rights is the subject matter?
28. Jurisprudence on this question is now rich. There is a consensus by the Courts as reflected in several judicial precedents that the statutory limitation of causes of action does not apply to those causes of action that arise out of a violation or threatened violation of *the Constitution*, constitutional rights. See cases of Dominic Arony Amollo vs Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, and *Otieno Mak'Onyango vs Attorney General and another, Nairobi HCCC No. 845 of 2003*, (unreported).
29. Faced with the question, the Court of Appeal in the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR, after reviewing various decisions on the question, held;

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss



the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in *the Constitution*, the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in *the Constitution*. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.

In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits....”

30. Having stated as I have, I find it imperative to state where constitutional litigation is initiated long after the cause of action arose, the Court is faced with the task of interrogating the controversy, may strike out the petition, on the ground that the delay in initiating the matter was inexplicably and inordinately long, and that the justice and circumstances of the case demand the striking out. I hold this is the spirit that was captured by Majanja J. [as he then was], in *James Kanyita Nderitu vs A.G and Another, Petition No. 180 of 2011*, when he held;

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of *the constitution*, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”

31. The circumstances of this matter do not call for the striking out of the petition, considering the premise hereinabove [paragraph 25].
32. In the upshot, I find the preliminary objection wanting in merit.  
It is hereby dismissed. The petition shall be heard on its merits.
33. It is so ordered.

**READ, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Mageto for the Petitioner

No appearance for 1<sup>st</sup> Respondent

Ms. Akuno for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

Respondents

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

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**OCHARO KEBIRA**  
**JUDGE**

