



**Magambo v Attorney General & 2 others (Employment and Labour Relations
Petition 98 of 2023) [2024] KEELRC 13519 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13519 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 98 OF 2023
MN NDUMA, J
DECEMBER 19, 2024**

BETWEEN

JACKSON MURIUKI MAGAMBO PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 2ND RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 3RD RESPONDENT

RULING

1. The petition dated 23rd May 2023, was filed on 31st May 2023 by the Petitioner seeking the following reliefs: -
 - i. This honourable court be pleased to make a declaration that the decision of the 3rd Respondent to deduct the Petitioner's salary for the period between 2016 to 2018 is in contravention of the Petitioner's rights as enshrined under Article 41(1) and 47 of the Constitution of Kenya and the same be and is hereby quashed and
 - ii. This honourable court be pleased to make a declaration that the delay by the 3rd Respondent in communicating the vetting, review verdict to the Petitioner for a period of two years was in violation of the Petitioner's fundamental rights as enshrined under Articles 25(c), 28, 41(1) and Article 47 of the Constitution of Kenya and the same be and is hereby quashed and/or set aside.
 - iii. This honourable court be pleased to make a declaration that the actions of the 2nd and 3rd Respondents in terminating the employment services of the Petitioner which termination was through the Directorate of Criminal Investigation and communicated two years after the 3rd



Respondent rendered its verdict was in violation of the Petitioner's constitutional rights as enshrined under Article 28, 41(1) and 47 of the Constitution.

- iv. The Respondents be and is hereby directed by an order of mandamus to refund/pay back the Petitioner's salary deducted from the period between 2016 and 2018 without any loss of benefits.
 - v. This honourable court be pleased to award the Petitioner compensation for the losses caused by the 2nd and 3rd Respondents herein on account of violation of his fundamental rights and freedoms.
 - vi. That on account of the Petitioner's removal from the National Police Service in violation of his constitutional rights, the honourable court be pleased to order that the Petitioner be deemed to have been in active service till his retirement age without any loss of salary and/or other employment benefits and the Respondents be ordered to pay the Petitioner such sums equivalent to his salary and benefits from the date of termination till retirement.
 - vii. Cost of this petition be awarded to the Petitioner
 - viii. Any other order the honourable court may deem fit to grant be made.
2. The facts of the petition discerned from the petition are that he was vetted by the 3rd Respondent and the 3rd Respondent delivered its verdict on 14/1/2016 and determined that the Petitioner had failed the vetting process and recommended his discontinuance from service as a member of the National Police Service.
 3. The Petitioner applied for review of the decision and the review application was admitted by the 3rd Respondent on 20/7/2016 and a hearing date was set for 25/7/2016. That no communication came from the 3rd Respondent on the outcome of the review application until 19/2/2018 upon inquiry by the Petitioner that Directorate of Criminal Investigation informed the Petitioner that the review application was unsuccessful. The Petitioner was informed further that the effective date of his removal was 6/12/2018.
 4. That the Petitioner had continued to draw a salary from the police service and remained an active member of National Police Service until the date of the said letter being 6/12/2018.
 5. That the Petitioner never received a formal verdict on the review application from the 3rd Respondent to date.
 6. That the communication from DCI retired the Petitioner from service and his pension was tabulated less Kshs. 2,992,254.00 being the salary earned between 20th July 2016 and 18th December 2018 during which time the Petitioner was in active service pending communication of the verdict by the 3rd Respondent.
 7. That the actions by the Respondents violated his fundamental rights and freedoms under Article 27, 28, 41 and 47 of the Constitution being that he was not treated equally in the eyes of the law, his dignity was violated, the action against him constituted unfair labour practice and was unfair administrative action against the Petitioner. That the court is empowered under Article 22, 23 and 165(3)(b)(6) to hear the matter and accord appropriate remedies to the Petitioner.
 8. The 1st and 2nd Respondents filed a notice of preliminary objection dated 7/3/2024 to wit: -
 1. That the amended petition is time barred and offends the mandatory provision of section 3(2).



2. That the Petitioner is circumventing the relevant Labour Laws by relying on the constitutional provisions having realized that the matter is statute barred.
 3. That the amended petition is an abuse of the court process.
9. Parties filed written submissions on the preliminary objection and the issues raised for determination are: -
- i. Whether the petition is time barred.
 - ii. Whether the Principle of constitutional avoidance is applicable in this case.
10. Reliance is placed by the objector on the provisions of section 3(2) of the *Public Authorities Limitation Act*, which provides:-
- “No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date of which the cause of action occurred.”
11. The question that the court must determine is whether the petition before court is founded on contract or that it is a matter that validly raises violation of constitutional rights of the Petitioner enshrined in the *Constitution* of Kenya 2010.
12. The matters raised in the petition include, inter alia, failure by the 3rd Respondent to communicate the outcome of the application for review of the vetting outcome for an inordinately long period exceeding two (2) years therein violating the rights of the petitioner under Articles 27, 28, 41 and 47 of the *Constitution*.
13. The alleged violation is compounded by a factual averment in the petition that the Petitioner was double jeopardized by that fact of delay in that upon his retirement he was deducted pension dues in the sum of Kshs. 2,992,254.00, in respect of that period in which the 3rd Respondent was in default of communicating to him and had therefore continued to earn a salary which was subsequently deducted by the 3rd Respondent from his pension dues even though the 3rd Respondent was to blame for the delay and that delay in itself forms the basis of the alleged violation of constitutional rights.
14. The Court of Appeal in *Safe Pack Limited versus Henry Wambenge and 11 others* (2019) eKLR affirmed that there is no timeline to filing constitutional petitions and stated thus: -
36. The question therefore is whether the Judge was right in rejecting the contention that Petitioner’s claim was not time barred. As the Judge correctly stated, Article 67 of the *Constitution* does not place a time limit within which redress under the provision may be sought. But does that mean that time for seeking redress for constitutional violation is forever at large” It does not. In *Wellington Nzioka Kioko versus Attorney General* [2018] eKLR, this court, in an appeal arising from a decision of the High Court on a petition for a declaration that the fundamental rights and freedoms of the Petitioner herein had been violated, upheld the High Court that institution of claim over 30 years after the cause of action had arisen constituted inordinate delay. The court expressed that whereas there is not limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The Court adopted, with approval, a decision of the High Court



in the case of *James Kanvita Nderitu versus Attorney General and another, Petition No. 180 of 2011* where Majanja expressed that:

“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 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.”

15. The Court of Appeal further held in the matter of Dominic Arony Amolo versus Attorney General Nairobi HC Misc. Civil case No. 1184 of 2003 (0.5) 2010 eKLR, Otieno; Otieno Mak’Onyango versus Attorney General and another Nairobi HCC No. 845 of 2003 that:

“In our view subject to the limitation of Article 24 of 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...”

16. In the present matter the petition raises valid constitutional violation issues for determination pursuant to Article 27, 28, 41 and 47 of the Constitution of Kenya 2010. These are matters that cannot be restricted to the contract of employment between the Petitioner and the 2nd and 3rd Respondents. In the court’s view these are genuine and valid allegations of violations of human rights of the Petitioner by the 2nd and 3rd Respondents which require adjudication upon.

17. Furthermore, the matters complained of culminated on 18th December 2018 and the petition was filed on 31st May 2023 about four years and five months from the date the alleged violations crystalized.

18. This court is of the firm view that where a suit discloses credible violation of human rights, a period of four years cannot be categorized as inordinate delay to extinguish the possible action against the state as in this petition.

19. The court is fortified by the decision of the Court of Appeal in the matter of Land Registrar and 4 others versus Nathan Tirop Koech and 4 others 2018 eKLR where the Court held that,

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground the trial Judge erred in failing to dismiss the petition on account of delay, acquiescence and lacking has no merit unless expressly stated in the Constitution, the period of limitation in the limitation of Action Act, do not apply to violation of right 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.”

20. The court further notes that the provisions of Employment Act, 2007 do not apply to the issues of vetting raised in the petition. The decision of the Court of Appeal in the case of Attorney General and another versus Andrew Maina Githinji and another Civil Appeal No. 21 of 2013 (2016) eKLR cited by the Respondents is not applicable in the case at hand.

21. Furthermore, the issues of avoidance articulated by the courts in the Mombasa Industrial Court Petition 1 of 2023 Josephat Ndirangu versus Henkel Chemicals EEA, 2013 eKLR; Francis; per Radido J. Atonye Anyika. The Kenya Police Service and another, E&LRC Petition 37 of 2017 per



Mbaru J. and Nairobi HC Petition No. 564 of 2004 Alphonse Mwangemi Mlunga and 10 others versus African Safari Club Limited [2008] per Nyamu J. are not applicable to the circumstances of this case.

22. Accordingly, the preliminary objections by the Respondents lack merit and are dismissed with costs in the cause.

DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Muriuki for Petitioner

Mr. Odukenya for 1st and 2nd Respondent

Ms. Chebet for 3rd Respondent

Mr. Kemboi – Court Assistant

