



**Rukaria v National Police Service & 3 others (Petition
E214 of 2022) [2023] KEELRC 1389 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1389 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E214 OF 2022**

J RIKA, J

MAY 31, 2023

BETWEEN

JOSEPH KINOTI RUKARIA PETITIONER

AND

NATIONAL POLICE SERVICE 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

INSPECTOR-GENERAL OF POLICE 3RD RESPONDENT

THE HON ATTORNEY-GENERAL 4TH RESPONDENT

RULING

1. The Petitioner was appointed a Police Constable on 26th February 1995. He worked in the Administration Police Service.
2. He was charged with the offence of assault causing grievous bodily harm, while stationed at Naro Moru, Nyeri County, on or about December 2000.
3. He was interdicted, and his entire monthly salary stopped immediately. The Standing Orders provided that the Claimant receives half-salary, during the period of interdiction.
4. He was tried and convicted before the Senior Resident Magistrate's Court Nyeri, in Criminal Case No. 3437 of 2000, and fined a sum of Kshs. 5,000. He appealed at the High Court Nyeri, which allowed the Appeal on 18th August 2005.
5. He subsequently wrote to, and visited the Respondents' Offices, demanding to be reinstated. The Respondents did not reinstate him. He received no response to his letters from the Respondents.
6. He brings this Petition seeking the following orders: -



- a. Declaration that the Petitioner’s rights enshrined in the Bill of Rights have been grossly violated and/ or infringed by the Respondents, especially under Articles 25, 27 [1] [2] [4], 28, 35, 41, and 47 of the Constitution.
 - b. An order of mandamus directing the 1st and 2nd Respondents to pay the Petitioner unpaid dues and benefits accruing from December 2000.
 - c. The Respondents to pay the Petitioner compensation and damages.
 - d. Costs.
 - e. Interest.
 - f. Any other suitable relief.
7. The 2nd Respondent filed Grounds of Opposition dated 21st March 2023. The Grounds are: -
- a. The Petition is substantively an employment cause, disguised as a constitutional petition, in what can be termed as constitutional avoidance, as set out in Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2014] eKLR.
 - b. The 2nd Respondent draws its mandate from Article 246 of the Constitution that established it, and the mandate does not extend to reopening disciplinary matters concluded before its inception.
 - c. The Petition is frivolous and in abuse of the court process as it is 17 years inordinately delayed, in light of Section 3[2] of the Public Authorities Limitations Act, which places a limitation of 3 years on filing of proceedings founded on contract, from the date the cause of action accrued.
 - d. The Petitioner has not demonstrated how the 2nd Respondent has violated his constitutional rights as the events complained of, were employer-employee relations, before promulgation of the Constitution in 2010, when the 2nd Respondent was inexistent.
 - e. Termination of the Petitioner’s contract was conclusively dealt with by the Commissioner of Police of the then Kenya Police Force, under Section 14 of the repealed Kenya Police Force Act [Cap 84], following the Petitioner’s conviction over criminal charges.
 - f. The Petitioner has not been in the employment of the Respondents after his conviction on 1st August 2001, and cannot be said to have accrued any salaries or benefits.
 - g. The Petitioner seeks equitable remedy. The Court should find there is inordinate delay and ought to dismiss the Petition under the maxim

“equity aids the vigilant, not the indolent.”
 - h. The Petition has no merit.
8. 1st, 3rd and 4th Respondents filed a Notice of Preliminary Objection dated 9th January 2023, which basically raise the same issues, raised by the 2nd Respondent in its Grounds of Opposition, listed above. These are: that the Petition is time-barred; the cause of action arose in 2005; 17 years have passed since then; the Petition is in abuse of the court process; and is incompetent.
9. It was agreed by the Parties that the Preliminary Objection by the Respondents, is argued on the strength of written submissions. Parties confirmed filing and exchange of written submissions at the last appearance before the Court, on 18th April 2023.



10. The 2nd Respondent submits that in Industrial Court Cause No. 1201 of 2012, *Banking Insurance and Finance Union v. Bank of India*, it was held that contracts of employment are subject to the law of limitation of time, under the *Limitations of Actions Act*, Cap 22 the Laws of Kenya, and Section 90 of the *Employment Act*. The criminal proceedings did not stop time from running, as held in *Riungu v. Attorney-General & Another* [2023] KEELRC 60 [KLR] [20th January 2023]. The Claimant was at liberty to approach the Industrial Court in the year 2006. The Court does not have power to extend time, the 2nd Respondent submits, relying on *Wafula v. National Police Service Commission*, [Petition 1 of 2022] KEELRC, 13566 [KLR]. The Court does not have the discretion to extend time. In *Bernard Murage v. Fine Serve Africa Limited & 3 Others*, [2015] eKLR, it was held that not each and every violation of the law, must be raised as a constitutional issue. Where there exists an alternative remedy through statutory law, it is desirable that such statutory remedy should be pursued first. The Court will not determine a constitutional issue, when a matter may properly be decided on another basis, under the principle of constitutional avoidance, discussed in the Supreme Court decision, *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*, [2014] eKLR.
11. 1st, 3rd and 4th Respondents make similar submissions as the 2nd Respondent. The Petition is time-barred under Section 3[2] of the *Public Authorities Limitation Act*. The Court of Appeal in *Beatrice Kabai Adagala v. Postal Corporation of Kenya* [2015] eKLR, restated that a Claim based on a contract of employment must be filed within 3 years. Limitation goes to jurisdiction of the Court, as held by the Court of Appeal, in *Thuranira Karauri v. Agnes Ncheche*, Civil Appeal o. 192 of 1996. The Petitioner has circumvented the *Employment Act*, by pursuing the Petition. In *Francis Atonya Ayeka v. The Kenya Police Service & Another* [2017] eKLR, the Court held that it does not matter what name is assigned to a Pleading; what matters is the nature of the claim and remedies sought. The Petition filed herein is an employment dispute, couched as a Petition, to circumvent the law on limitation of time.
12. Relying on *Edward Akang'o Oyugi & 2 others v. The Attorney- General* [2019] eKLR, the Petitioner submits that there is no limitation with respect to Constitutional Petitions, alleging violation of fundamental rights. In *Stephen Gaitbo Njihia & 5 Others v. Attorney- General* [2016] eKLR, the Court held that the effect of statutes of limitation is not to extinguish claims, but to prevent a Claimant from prosecuting stale claims. The Petition herein is not stale. There are no alternative remedies available to the Petitioner. Rights conferred by statute are not fundamental rights under the Bill of Rights, as held in *Godfrey Paul Okutoyi & Others v. Habil Olaka & Another* [2018] eKLR.

The Court Finds : -

13. The Petitioner states that he was falsely accused of assault, or about 20th December 2000. He was interdicted. His salary was stopped from the month of December 2000. He has not exhibited the letter of interdiction, with a specific date of interdiction.
14. He states that he was tried in the Chief Magistrate's Court at Nyeri, which convicted him, but was set free by the High Court on Appeal, on 18th August 2005.
15. His position is that he asked to be reinstated after his Appeal succeeded, but the Kenya Police Force / Service did not act on his request.
16. There was obviously a cause of action which arose at the very least, after the Petitioner was acquitted on Appeal, and applied for reinstatement, which was not granted.
17. The Kenya Police Force did not formally discharge the Petitioner from service. There is no evidence on record, of any decision made by the Kenya Police Force, after interdiction. There was no letter of termination of service, issued to the Petitioner before or after the criminal and appellate proceedings.



An Employer has the responsibility to formally bring a contract of employment to an end, to avoid a situation where Parties are in doubt whether, mutuality of obligations subsists.

18. There were fundamental violations, but in the view of the Court, these were contractual breaches, which were subject to remedial action through the existing statutory law. The Petitioner seeks unpaid dues and benefits accruing from December 2000, as well as compensation. These are remedies which are governed by Statute, and there is no reason for the Petitioner to sidestep Statutes, and seek remedy under the Constitution. He ought to have pursued remedies under Statute, and if no remedies were available, it would have been open to him, to ask the Court to declare the relevant Statute unconstitutional for its remedial deficiency.
19. The Petition is indeed an employment dispute, which is disguised as a Constitutional Petition, to overcome the barrier of limitation of time, imposed by the Public Authorities Limitation Act, the Limitation of Actions Act, and The Employment Act.
20. As held in Interim Independent Electoral Commission S.C Constitutional Application No. 2 of 2011 [2011] eKLR, limitation goes to the jurisdiction of the Court, and a suit that is time-barred is incompetent and should be struck out. The position was upheld by the Supreme Court in Samuel K. Macharia & Another v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, where it was emphasized that a Court's jurisdiction flows from the Constitution or Legislation or both.
21. The Court agrees with the submissions of the 2nd Respondent that, it should not determine a constitutional issue, when the matter may have properly been determined under Statute, as held in Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2014] eKLR. The Petitioner could have presented his dispute when the cause of action arose, under the relevant Statute. He delayed unreasonably, and upon realisation that he was time-barred under multiple Statutes, devised a means of approaching the Court through a Constitutional Petition. The Constitution of Kenya is not meant to be a default mechanism, allowing indolent litigants to revive dead causes of action.
22. The Court would also agree with the Respondents' position that the Petition was presented after an inordinate delay. The Petitioner was not vigilant. He was acquitted on 18th August 2005. He spent the period between 2005 and 2022 writing numerous letters to the Commissioner of Police, Police Spokesperson, Deputy Inspector-General, and the Inspector- General, asking to be reinstated. A reasonable man would have approached the Court at the earliest, once he realized a response from his Employer on reinstatement, was not forthcoming. Delay was unreasonable and the Petitioner was not vigilant. He slumbered on his right. The Respondents would be hard put, to call witnesses and gather documents, over 20 years since the Petitioner left employment.
23. The decision of the High Court cited by the Petitioner, Edward Akong'o Oyugi & 2 others v. The Attorney-General [2019] eKLR, in submitting that there is no limitation with respect to Constitutional Petitions alleging violation of fundamental rights, does not apply to every Constitutional Petition filed before the Court. It does not apply to contractual, employment disputes which are disguised as Constitutional Petitions. The High Court was addressing serious violations by the State, of the Petitioners' fundamental rights and freedoms, which included physical torture, cruel, inhuman and degrading treatment. The Court dealt with historical injustice and transitional justice, suggesting that in correcting past State failings, the Court was not limited by time. In redressing historical injustices, and on matters of transitional justice, Courts have held that the Constitution looks backwards and forwards, unencumbered by the ebb and flow of the years. This cannot apply to disputes on contracts of employment, which are to be resolved in accordance with the relevant contracts, statutes and human resource instruments, and within the time-limits stated in these laws and



instruments. The Petitioner herein alleges contractual violations- indeterminate interdiction, lack of formal termination, non-payment of benefits- and seeks employment remedies. The *Oyugi case* above concerns gross violations by the State, of individual rights and freedoms, and not contractual breaches. The *Oyugi case* could not be determined without resort to the *Constitution*, and there is no time-bar, in correcting historical violations by the State, against an individual. Contractual breach is clearly subject to Statutes of Limitation.

24. A fair hearing would be compromised if this Petition is to proceed. Article 50 [1] of the *Constitution* under whose banner the Petition is brought, states that every person has a right to have any dispute that can be resolved by the application of law, decided in a fair and public hearing before a Court, or if appropriate another independent and impartial tribunal or body.

25. Lastly, the Court observes that although the High Court at Nyeri quashed the Petitioner's conviction for the charge of assault, it was the finding of the High Court that: -

“It is evident that the accused misused his position as a police officer, by causing the arrest of the complainants. This did not however change the offence of affray into one of assault”

26. Although the Kenya Police Force did not respond to the Petitioner's pleas for reinstatement, it is highly unlikely that any Public Service Employer would recall a Public Service Employee, who had been found by the High Court, to have abused Public Office.

27. The Petitioner ought to accept his departure from the Police Service, and move on.

It is Ordered:-

- a. Preliminary Objection filed by the Respondents is sustained.
- b. The Petition is declined.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION NO. 6 [2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020.

JAMES RIKA
JUDGE

