



Achieng v Cabinet Secretary, Ministry of Education & another (Petition E019 of 2023) [2023] KEELRC 3103 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3103 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E019 OF 2023**

B ONGAYA, J

NOVEMBER 27, 2023

IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION

-AND-

IN THE MATTER OF: ARTICLES 1,2,3,4,10,19, 20,21,22,23,24,25,28, 41,47,48,50,159,162,232,258 AND 259 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF: THE EMPLOYMENT ACT, NO 11 OF 2007

-AND-

IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, NO 20 OF 2011

-AND -

IN THE MATTER OF: LABOUR RELATIONS ACT, NO 14 OF 2007

BETWEEN

GEORGE OWINO ACHIENG PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT



RULING

1. The 1st respondent has filed an amended notice of preliminary objection dated 11.10.2023 through learned Litigation Counsel Vivian Kirina for the Attorney General and upon the following grounds:
 - a. That the court lacks jurisdiction to admit, hear and determine the petition as it has been filed by the claimant outside the mandatory statutory limitation period prescribed by section 90 of the *employment act* 2007, section 4(1)(a) of the *Limitation of Actions Act*, Cap 22 laws of Kenya and section 3(2) of the *public authorities limitation act*, cap 39 laws of Kenya.
 - b. That the petitioner is circumventing the Employment and labour relations court by relying on the constitutional provisions having realized that the manner is statute barred under the parent acts which give effect to constitutional rights.
 - c. That the petitioner has not demonstrated with precision how her fundamental rights and freedoms under the Constitution have been violated or are threatened and has not produced any evidence to prove the alleged violations contrary to the principles espoused in the *locus classicus* decision in *Mumo Matemu -v- Trusted Society of Human Rights Alliance* (2013) eKLR and *Annarita Karimi Njeru* (1979)eKLR.
 - d. That the suit is an abuse of the court process.
 - e. That the suit is incompetent and ought to be struck out with costs.
2. In reply the Petitioner has filed grounds of opposition dated November 14, 2023 through Midenga & Company Advocates. It is urged as follows:
 - a. The 1st respondent has not filed a substantive response to the petition hence the notice of preliminary objection is fatally defective and a gross abuse of the court process.
 - b. The preliminary objection does not raise any pure point of law; the said preliminary objection raises issues pertaining to the exact date when it is deemed that the petitioner was dismissed from employment owing to the 2nd respondent's decision rendered on 09.12.2021 which disallowed the petitioner's application to review the 1st respondent's decision dated 05.10.2016; which issues are evidentiary and cannot be canvassed *vide* a preliminary objection as purported by the 1st respondent.
 - c. The cause of action arose from an employer employee relationship hence the Honourable Court has jurisdiction to entertain the matter pursuant to article 162(2) (a) of the *constitution* of Kenya, section 12(1) of the *employment and labour relations court act*, no. 20 of 2011 and rule 7(1) of the *employment and labour relations court (procedure) rules*, 2016.
 - d. The violations complained of by the petitioner are continuing hence the petitioner cannot be termed as time barred as alleged by the 1st respondent.
 - e. The petitioner has set out with degree of precision his complaint, the provisions infringed and the manner in which they are alleged to be infringed in strict compliance with the decisions in *Anarita Karimi Njeru vs. The republic* [1979] eKLR and *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.



- f. The petitioner has complied with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules) which provide the ingredients of a constitutional petition.
 - g. On the whole the 1st respondent's preliminary objection is manifestly misconceived, replete with juristic shortcomings and incompetent, misconceived, bad in law and merely intended to frustrate and delay the hearing and determination of the petition which is rather straight forward.
 - h. It is in the interest of justice that the instant preliminary objection be dismissed with costs to the petitioner.
3. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
 4. The preliminary objection is that the petition is trapped by the avoidance principle. That instead of filing a suit after dismissal, the petitioner failed to do so with the consequence that the three years of limitation under section 90 of the Employment Act have since lapsed. The petition is therefore being filed to circumvent the statutory time of limitation. The Court is in agreement with that ground in the preliminary objection. The petitioner has pleaded that he was dismissed on 05.10.2016 for gross misconduct. While he appealed to the 2nd respondent on 11.11.2016, the 2nd respondent disallowed the appeal on 15.03.2017 on grounds that the petitioner lacked financial integrity in breach of the code of conduct. The petitioner applied for review by the letter dated 27.03.2018 but the 2nd respondent disallowed the review by the letter dated 09.12.2021. From 05.10.2016, the three years of limitation were lapsing on 05.10.2019. The petitioner's case is that by letter dated 03.09.2020 the Director of Public Prosecutions returned that there would be no prosecution as the issue between the petitioner and the complainant one Japheth Muli relating allegation of the soliciting of Kshs.10,000.00 had been a private matter resolved between the petitioner and the said Muli. The Court has carefully considered the petition. It is that the claim is actually time barred under section 90 of the Employment Act. Nothing stopped the petitioner from moving promptly after the summary dismissal on 05.10.2016. It is not shown that the appeal or review to the 2nd respondent operated as a stay of the summary dismissal. All allegations in the petition point to one issue, whether the termination on 05.10.2016 was fair or lawful, or, not. There is nothing in the petition to explain the belated action outside the time of limitation and nothing to suggest that there are alleged violations going beyond the cause of action flowing from the summary dismissal. The application for review was declined on 09.12.2021 and as a continuing injury under section 90 of the Employment Act, the 12 months limitation period after cessation thereof lapsed on 09.12.2022 but petition was filed belatedly on 01.02.2023.
 5. There is no live cause of action before Court and each party will bear own costs.

In conclusion, the preliminary objection is hereby upheld and the petition dismissed with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 27TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

