



REPUBLIC OF KENYA



KENYA LAW
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**Katheka v National Police Service Commission & another (Petition
17 of 2023) [2023] KEELRC 2959 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2959 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 17 OF 2023
B ONGAYA, J
NOVEMBER 17, 2023**

BETWEEN

PETERB KILONZO KATHEKA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

RULING

1. The petitioner filed the application by the notice of motion dated 18.06.2023 through Guandaru Thuita & Company Advocates. The application invoked Section 16 of the [Employment & Labour Relations Court Act](#) and Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#) and all enabling provisions of the law. The application seeks the following orders:
 - i. That portion of the judgment and decree issued by the Hon. Justice Byram Ongaya on 25.05.2023 which found that the petition was time barred in respect of an application for certiorari be reviewed.
 - ii. That portion of the judgment and decree issued by the Hon. Justice Byram Ongaya on 25.05.2023 which found that the prayer for reinstatement is time barred be reviewed.
 - iii. That in place of the impugned portions, the Court allows the prayers of back salaries from date of dismissal.
 - iv. That the costs of this application be provided for.
 - v. That such further and other relief be granted as this Court deems fit and expedient in the circumstances.



2. The application is based on the grounds on the face of the motion and further supported by the Petitioner's supporting Affidavit sworn on 18.06.2023, in which he avers that:
 - i. That this Honourable Court delivered its decision in favour of the petitioner on 25.05.2023, which decision the petitioner states that this Honourable made errors apparent on the face of the record and failed to grant some of the reliefs sought on the grounds of the same being time barred.
 - ii. That the initial vetting decision dated 06.12.2016 was automatically stayed when the petitioner filed an application for review of the decision on 29.12.2016 and that time did not run until the review decision was pronounced.
 - iii. That this Honourable Court erroneously indicated that the vetting review decision was dated 22.08.2017 yet the same was dated 07.11.2017, this being the date the decision was signed by the 1st respondent's commissioners.
 - iv. That on the basis of the above date the petitioner's application of certiorari was not time barred the same having been filed on 11.04.2018, which is well within the six (6) months period of the decision hence was not time barred.
3. The petitioner further faults this Honourable Court's holding that the claim of reinstatement being time barred and maintains that there is no provision in the [National Police Service Act](#) or the [National Police Commission Act](#) that bars an order for reinstatement.
4. The petitioner states that the import of quashing the 1st respondent's decision would mean that he remained in employment and would be entitled to back salaries and an order of reinstatement.
5. The petitioner urged this Honourable Court to find his application with merit and to allow it in the interest of justice.
6. The respondents opposed the application by filing the replying affidavit of Peter Kiptanui Leley, the Chief Executive Officer of the National Police Service and the 2nd respondent through the office of the Attorney General by filing grounds of opposition dated 31.10.2023. The respondents in their responses state as follows:
 - a. That the petitioner has failed to meet the threshold for grant of the reliefs sought in his application dated 18.06.2023 as set out under Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#).
 - b. That on issues reinstatement, this Honourable Court is guided by the provisions of section 12 (3) (vii) of the [Employment and Labour Relations Court Act](#) and not the [National Police Service Act](#) or the [National Police Service Commission Act](#).
 - c. That the remedy of reinstatement is not an automatic right of an employee. The remedy is discretionary and largely involves balancing the interest of the parties and is guided by the timelines as set out under section 12 (3) (viii) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) that stipulates the timeframe in which the remedy would be allowable.
 - d. The application is ill conceived on the ground that it is made with an aim of processing and payment of retirement benefits for the petitioner despite the fact that he has not been in the 1st respondent's employment.
 - e. The respondents state that the Honourable Court, on the issue of reinstatement, is functus officio and that the grounds as raised in the petitioner's application lean towards dissatisfaction



with the Court's decision which ought to be challenged by way of lodging an appeal and not an application for review.

- f. In conclusion the respondents urged this Honourable Court to find the instant application devoid of merit and to dismiss it with costs.
7. Parties filed their respective submissions to the application. The court has considered all the material in that regard and returns as follows.
8. To answer the 1st issue, the Court returns that as submitted for the respondents, an order for reinstatement is governed by section 12 (3) (vii) of the *Employment and Labour Relations Court Act* and not the *National Police Service Act* or the *National Police Service Commission Act*. The applicant's assertion that the section does not apply is found misconceived. Further, in seeking the review, the Court returns that the applicant is asking the Court to change the reasoning in the judgment which should properly go on appeal. The prayer for review is declined as it is based on no known ground for review.
9. To answer the 2nd issue, the Court returns that as per the submissions by the 1st respondent the applicant was removed from the service on 06.12.2016 following his vetting and upon the applicant's seeking a review, the removal decision was upheld on 07.11.2017. The Court finds that there would appear to be an error apparent on record at paragraph 23(c) and review would be allowable by deleting 22.08.2017 and inserting 07.11.2017. However, Court has considered the record and confirms that while the petitioner blames the Court for the error, the prayer in the petition was express thus, "(c) An order of judicial review to quash the 1st respondent's decisions of 06.12.2016 and 22.08.2017." That was the prayer. The applicant is not honest in alleging that the Court made an error or that there is an error apparent on record. The petitioner (applicant) is bound by the relief as prayed for in the petition. The Court in making the findings in the judgment was bound by the parties' respective pleadings. The Court also considers that even if the decision upholding the removal made on 07.11.2017- were to be quashed, the initial removal decision of 06.12.2016 would remain on record. By filing the application for review in the manner it is prayed, the applicant is seeking to amend his prayer in the petition belatedly after judgment and also without disclosing that in fact, it was a mistake in his pleadings and not the manner in which the Court considered his own pleading and relief as had been expressly made. The Court cannot entertain such unclean hands and exercise its discretion in the manner the applicant seeks to mislead the Court.
10. To answer the 3rd issue, for the stated reasons, the application must be liable to dismissal. Considering the history and circumstances of the case, each party to bear own costs of the application.

In conclusion the application for review dated 18.06.2023 is hereby dismissed and each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 17TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

