



REPUBLIC OF KENYA



**Wariahe v Teachers Service Commission (Employment and Labour Relations
Petition E011 of 2023) [2023] KEELRC 2777 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E011 OF 2023
ON MAKAU, J
NOVEMBER 3, 2023**

BETWEEN

FRANCIS MWANGI WARIAHE PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

Introduction

1. This ruling relates to the respondents notice of preliminary objection date 26th June 2023 which stands on the ground that the petition herein is statute barred by dint of section 90 of the *Employment Act*. The facts leading to the suit are that the petitioner was employed by the respondent as a teacher in 2001. From 2017 to 2019 he was stationed at [particulars withheld] Secondary School and his gross monthly salary was Kshs. 97,750/=. He was served with an interdiction letter on 8th October 2018 by BOM Secretary of the School for allegation of sexual harassment and exposing students to pornography. He attended disciplinary hearing on 13th February 2019 and thereafter received a dismissal letter dated 21st March 2019. He appealed on 6th June 2019 but the appeal was dismissed on 5th June 2020.
2. He then filed the Petition herein on 14th June 2023 seeking the following reliefs against the Respondent:
 - a. A declaration that the interdiction from 8th October 2018 to 13th February 2019 was in breach of the Petitioner's right under Articles 41(1), 47(1) and (2) and 50 (2)(o) of the *Constitution of Kenya* 2010 and the same is null and void for all purposes.
 - b. A declaration that the dismissal letter dated 21st March 2019 as well as the Notice of Removal from the register of Teachers dated 21st March 2019 were in breach of the Petitioner's right under Articles 41(1), 47(1) and (2) of the *Constitution of Kenya* 2010 and the same is null and void for all purposes.



- c. An order compelling the Respondent to reinstate the Petitioner without any loss of benefits.
 - d. Upon grant of prayer (iv), an order of prohibition be issued directed against the Respondent prohibiting them from dismissing the Petitioner from the Teachers Service Commission.
 - e. An order of compensation being one (1) year's salary as damages for unfair and unlawful termination.
 - f. Costs of the Petition and interest at court rates.
 - g. Any other or better order that this Court may deem fit and just to grant.
3. The Respondent filed the instant Preliminary Objection which was canvassed by way of written submissions.

Respondent's submission

4. The Respondent submitted that it subjected the Petitioner to inclusive and elaborate disciplinary proceedings which culminated in his summary dismissal from service vide a letter dated 21st March 2019. It further submitted that under section 90 of the *Employment Act*, the petitioner ought to have filed suit to challenge the dismissal on or before 21st March 2022. However, he filed the suit on in June 2023, more than four years from the time when the cause of action arose. Therefore, it urged the court to dismiss the petition with costs.
5. The Respondent also argued that the Court lacked the jurisdiction to extend time after the lapse of the statutory time and in support of its argument relied on the case of *Benjamin Wachira Ndathi v Public Service Commission* [2014] eKLR where the Court cited the Court of Appeal decision in *Divecon v Samani* [1995-1998] 1 EA 48 at page 48.
6. For emphasis, it cited *Hilaron Mwabolo v Kenya Commercial Bank* [2013] eKLR, *Fred Mudave Gogi v G4S Security Services (K) Ltd* [2014] eKLR and *Attorney General v Andrew Maina & Another* [2016] eKLR where this courts were unanimous that section 90 of the *Act* is couched in mandatory terms and the limitation period cannot be extended.

Petitioner's Submissions

7. The Petitioner submitted that his cause of action accrued on the date the commission issued its final decision on 5th June 2020 and which decision marked the finality of the disciplinary process. It is his contention that the limitation of action started running on the 5th June 2020 and ought to have lapsed on 5th June 2023. He contended that the Petition was filed on 16th May 2023 as per the invoice generated by the Court's registry and therefore, his claim was filed within the limitation period as provided for under section 90 of the Employment Act.
8. For emphasis, he cited Regulation 159 of the Teachers Service Commission Code of Regulations for Teachers, 2015. He further cited the case of *D.T Dobie Company Kenya Limited v Muchina* 1982 KLR 1 at page 6. He also cited the case of *Speaker of the National Assembly v Karume* (1992) KLR and *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 Others* (2015) eKLR, where the Courts upheld the doctrine of exhaustion. He argued that the delay in filing the suit was caused by the Respondent who failed to render its decision in good time.
9. He reiterated that the Respondent grossly violated his Constitutional right to fair labour practices, right to Fair administrative action and right to fair hearing during the disciplinary proceeding. As a result, the entire procedure mala fides and an abuse of due process. He submitted that as a consequence



of the Respondent's actions, he is entitled to protection from the Respondent's abuse of office which would ruin his well-earned career and reputation as a teacher of many years of experience.

Issues for determination and analysis

10. Having considered the petition, objection and the rival submissions filed, the only issue that fall for determination is whether the Petition herein is time barred. Section 90 of the [Employment Act](#), 2007 provides that:

“Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#) (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

11. The respondent's case is that the three-year period within which the petitioner ought to have file suit lapsed on 21st March 2022 but he filed more than a year later. The petitioner, however, contends that time started to run on 5th June 2020 when the respondent delivered the final decision on his appeal. He relied on Regulation 159 of the [Teachers Service Commission Code of Regulations for Teachers](#), 2015 which states as follows as follows:

“The Commission may upon concluding disciplinary proceedings dismiss a teacher on the grounds contemplated under Part XI which dismissal shall take effect from the date of the determination of the disciplinary proceedings.”

12. Having considered the material placed before the court, I disagree with petitioner's submissions. Time never stop running due to internal appeal process. The fact that he had a right to pursue internal appeal mechanism, no law barred him from filing suit in the event he noticed that the employer was delaying the internal process unreasonably.

13. The correct interpretation of section 90 of the [Employment Act](#) is that a cause of action founded on employment or contract of service arises at the time when an employee is notified that his/her employment has been terminated. It is at that time when the aggrieved party acquires the right to approach the court. In this case, the Petitioner received communication that his employment had been terminated on 21st March 2019. He then opted to pursue review of the decision on 6th June 2019 and the decision of the review was rendered by the respondent on 5th June 2020. As at that time, the petitioner still had almost two years within which to file suit before the lapse of the limitation period but he went to sleep.

14. The Court of Appeal, in the case of [David Ngugi Waweru v Attorney General & another](#) [2017] eKLR expressed itself as follows: -

“We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court? Was it at the time he received the letter of dismissal on 29th April, 2004 or at the time he received the letter converting the dismissal to termination in public interest on 13th July, 2006 or after the decision of the JR court on 17th June, 2009? The answer, we think, is the 29th April, 2004. For it bears no logic for a cause of action to accrue and then, instead of proceeding to court, the aggrieved party pursues an appellate disciplinary process that would take him outside clearly stated statutory limitation periods. The detour to the JR Court was a calculated risk since, as stated in the *Boniface Inondi Otiemo case (supra)*, time did not stop



running. In any event, it seems the appellant has himself to blame since time had not run out by the time the JR Court was through with him. He had more than a year to file his claim within the statutory limit but he did not. We have considerable sympathy for him, especially considering the sentiments expressed by the JR Court, but the law must take its course.”

15. It is clear from the chronology of events set out in the petition that the suit was filed more than three years from the time when the cause of action arose. The internal appeal process ended before the lapse of the limitation period but the petitioner slept on his right to approach the court. Consequently, I find that the petition is statute barred and this court’s jurisdiction over the cause of action is extinguished.
16. Further the court cannot extend the time within which to sue under a contract. I gather support from *Beatrice Kahai Adagala v The Postal Corporation of Kenya* [2015] eKLR where the Court of Appeal held that:

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within three 3 years. As the court stated in *Divecon Limited v Samani* [1995-1998] 1 EA p. 48 ... the limitation period is never extended in matters based on contract.”

17. For the reasons highlighted above, I allow the Preliminary Objection by the Respondent and dismiss the petition with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

