



**Kirui v National Police Service Commission & 2 others (Judicial Review
E033 of 2022) [2023] KEELRC 3377 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3377 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E033 OF 2022
MN NDUMA, J
DECEMBER 20, 2023**

BETWEEN

CHARLES CHEPKONGA KIRUI APPLICANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

NATIONAL POLICE SERVICE 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Judicial Review application was filed on the 30th November 2022 seeking an order in the following terms :-
 1. Spent
 2. An order of *certiorari* to remove into this Honourable Court and quash the entire proceedings and the decisions of the 1st respondent dismissing the applicant from the National Police Service made on 17th January, 2011.
 3. An order of *mandamus* directed at the 1st and the 2nd respondents compelling them to pay applicant's salary arrears effective from the month of January, 2011.
 4. An order of *mandamus* directed to the 1st and the 2nd respondents compelling immediate reinstatement of the applicant to his position as a Police Constable as he was before the unfair and unlawful dismissal in the National Police Service.
 5. The costs of this application be in the cause.
 6. Any other order that this Honourable Court will be pleased to issue in the circumstances.



2. It is clear from the facts set out on the face of the application that the cause of action is the dismissal of the applicant from the National Police Service made on 17th January 2011.
3. The respondents filed a notice of preliminary objection dated 19th October 2020 including the following issues inter alia:-
 - i. The application herein is scandalous; frivolous and vexatious.
 - ii. The application herein offends Section 4(1)(e) of *Limitation of Actions Act* Cap 22 Laws of Kenya.
 - iii. The application is therefore incompetent and should be dismissed by this Honourable Court.
 - iv. The application is an abuse of the court process, lacks merit and is ill advised.
4. The petitioner filed written submissions without regard to the preliminary objection which the court has carefully considered together with the authorities filed alongside the submissions.
5. The issue for determination is whether the suit is time barred.
6. At the outset the court is of the considered finding that the dispute disclosed in this matter is an employment matter arising from termination of an employment contract between the applicant and the 1st respondent which ordinarily ought to be filed before this court by way of a statement of claim in terms of The *Employment and Labour Relations Court (Procedure) Rules 2016*.
7. The limitation period of this suit is therefore governed by section 90 of the *Employment Act* 2007, which reads:-

“Limitations - 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.”

8. In the case of *Attorney General and another v Andrew Maina Gitinji and another* Civil Appeal No 21 of 2015, the Court of Appeal per Waki and Keya JA were categorical that a suit based on employment contract cannot be filed upon expiry of the limitation period of three years period provided under section 90 of the *Employment Act*, 2007 as read with the limitation of action Acts Cap 22 Laws of Kenya, Section 4(1). The Court held per Waki JA that:-

“Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and so I hold’

And in *Beatrice Kabai Adagala v Postal Corporation of Kenya*, Civil Appeal (Application No 28 of 2014, the Court of Appeal held that

‘Much as we sympathise with the Appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract must be filed within 3 years. As this court has stated, in the case of *Devicon Limited v Samani* (1995) (1998) 1 EA P. 48 a decision



relied upon by Radido J in *Josephat Ndirangu v Henkel Chemicals Ltd* (2013) eKLR. The limitation period is never extended in matters based on contract'

9. It is the court's finding that the reasoning applies to all suits founded on a contract of employment be they be brought by way of a judicial review application or a petition, provided the cause of action is the termination or fundamental breach of the contract of employment leading to separation of the parties. The cause of action arises from the date of the separation. In the present case, the cause of action clearly arose on 17th January 2011 and the limitation period of three years expired on 18th January 2014. This suit was filed therefore more than six years from the date the limitation period lapsed.
10. This suit cannot be sanitized by any pretext based on the provisions of Article 22, 23 and 47 of the Constitution of Kenya 2010 or the Provisions of Section 6, 7 and 9 (4) of the Administrative Action Act No 4 of 2015 which Act, came into force long after the cause of action had arisen. The Act cannot therefore operate retroactively in respect of this suit.
11. The preliminary objection is therefore upheld and the judicial review application is struck off having been filed out of the limitation period. The suit is simply statute barred by dint of section 90 of the Employment Act 2007 read with section 4(1) of the Limitation of Actions Act cap 22 Laws of Kenya and is struck off for want of jurisdiction to entertain it.
12. It is so ordered.

MATHEWS N. NDUMA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

