



**Ndiege v Judicial Service Commission (Petition E088 of 2023)
[2023] KEELRC 3387 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E088 OF 2023**

B ONGAYA, J

DECEMBER 20, 2023

**IN THE MATTER OF VIOLATION OF THE RIGHT TO FAIR LABOUR PRACTICES,
FAIR ADMINISTRATIVE ACTION, AND FAIR HEARING AS EMBODIED IN
ARTICLES 41, 47 & 50 RESPECTIVELY OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

AND

**IN THE MATTER OF APPLICATION OF THE JUDICIARY
HUMAN RESOURCE POLICY AND PROCEDURE MANUAL**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JAMES OTIENO NDIEGE PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated April 19, 2023 through the firm of Charles Gomba & Company Advocates. The petitioner prayed for:



- a) A declaration that the respondent's actions and/or omissions amount to an infringement and violation of the petitioner's rights to Fair Administrative Actions under Article 47 of the Constitution and a fair hearing under Article 50 of the Constitution.
 - b) A declaration that the petitioner had a legitimate expectation that the respondent would comply with the procedure as outlined in its Human Resource Policies and Procedures Manual and the respondent's failure to do so violated this right.
 - c) The petitioner be re-instated to his position and all his back salary, allowances benefits and other legal dues from the date of judgment until payment in full.
 - d) In the alternative, an order that the petitioner be compensated by way of general damages for violation of his rights to Fair Administrative Actions under Article 47 of the Constitution and a Fair Hearing under Article 50 of the Constitution.
 - e) Aggravated damages
 - f) Exemplary damages.
 - g) 12 months' salary compensation for unlawful termination of Kshs.2, 036, 880.00 as pleaded in paragraph 14 of the petition.
 - h) Costs.
 - i) Interest at court rates.
2. The petition is supported by the affidavit by James Otieno Ndiege, the petitioner herein sworn on April 19, 2023 and exhibits thereto filed together with the petition. The petitioner's case is as follows:
- a) The petitioner was employed by the respondent initially in the capacity of Executive Officer II earning a basic salary of Kshs.78, 740/-. That the petitioner performed his duties diligently and to the respondent's satisfaction and was on October 19, 2009 upgraded from PLS 8 to PLS 9 with effect from July 1, 2009. In addition, his salary was increased over time. In the year 2016 the petitioner's gross monthly salary of Kshs.169, 740/-.
 - b) The petitioner avers that on or about August 16, 2016 he received a charge letter of even date laying out charges of absencing himself from lawful duties without due permission. He further states that he was simultaneously served with a suspension letter dated August 16, 2016 duly signed by the Chief Registrar of the Judiciary, Hon Anne Amadi.
 - c) The petitioner maintains that the charges were baseless as no evidence was adduced to support the same. He was nonetheless given 21 days to respond to the same. The petitioner avers that he did respond to the charges vide his affidavit sworn on September 5, 2016 giving a detailed account of the circumstances of his case. The petitioner further states that he received communication from the respondent on 11.10.2016 vide the letter dated October 6, 2016 informing him that his case would be placed before the respondent for appropriate proceedings. That the petitioner was subsequently invited for a disciplinary hearing that took place on March 5, 2018 before the respondent's Human Resource Management Committee. The petitioner attended the hearing and was further invited for a further hearing that took place on April 3, 2018. The hearing was nonetheless postponed to June 7, 2018 when the hearing proceeded.
 - d) That the petitioner received a letter of dismissal from the respondent on March 27, 2019. The letter informed of his right to request for a review of the decision and not to appeal. That on



September 18, 2019 the petitioner lodged his appeal with the respondent, which was declined by the respondent who communicated its decision to uphold the petitioner's dismissal vide the letter dated July 1, 2020 on the ground that no new material facts had been advanced by the petitioner.

- e) The petitioner pleaded that he was never invited for hearing of his appeal and that the said decision was shrouded in secrecy thus violating his Constitutional rights on fair administrative action and fair hearing as embodied in articles 47 and 50 of the Constitution of Kenya, 2010 as read with section 4 of the Fair Administrative Action Act and section 45 of the Employment Act, 2007.
 - f) That the respondent's actions were in further breach to the mandatory statutory requirements as provided under sections 41 and 43 of the Employment Act, 2007. The petitioner further faults the respondent for failing to conduct disciplinary hearing on dates as communicated postponing them and also for failing to prove the reason for his ultimate termination. The petitioner maintains that the respondent's failure to invite him for his appeal or review hearing and decision arrived at ex-parte was unlawful and unfair within the meaning of section 45 of the Employment Act, 2007.
 - g) The petitioner urged the honourable court to find his petition with merit and to allow it in terms of the reliefs sought therein.
3. In response to the petition, the respondent filed the replying affidavit sworn by Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the Judicial Service Commission, on October 4, 2023, through the firm of G & A Advocates LLP In the affidavit the respondent state that the petitioner was terminated from employment on the premise of a valid and substantive ground and that in doing this due procedure was followed as required under the Constitution of Kenya and the Employment Act, 2007 as read together with the respondent's Human Resource Policies and Procedures Manual. The respondent urged that the petitioner was accorded a fair hearing having been invited to the first disciplinary hearing that proceeded on June 7, 2018 where the respondent called the Hon Deputy Registrar, Isabella Barasa to testify on its behalf in the presence of the petitioner herein. That the petitioner was accorded an opportunity to cross examine the respondent's witness. Upon conclusion of the disciplinary hearing, the petitioner was found to be guilty of gross misconduct and as a result was dismissed from the respondent's employment.
 4. The respondent contends that neither its Manual nor the Judicial Service Act, 2011 makes it mandatory for it to consider a review in the presence of an employee and therefore the petitioner's absence at the review application and/or hearing is not termed as a mistrial. It argues that it acted fairly and procedurally as contemplated in its Human Resource Policies and Procedures Manual, the Judicial Service Act, 2011, the Employment Act, 2007 and the Constitution of Kenya, 2010.
 5. The respondent further averred that the petition as filed lacked substance and merit and therefore urged the honourable court to dismiss it in its entirety with costs to the respondent.
 6. In further response to the petition the respondent filed a notice of preliminary objection dated July 17, 2023 raising the following grounds that:
 - a) By virtue of the doctrine of Constitutional avoidance, this suit is incompetent, frivolous, vexatious and an abuse to the Court process.
 - b) The petition filed herein does not meet the criteria established in Anarita Karimi Njeru v Republic (1979) eKLR.



- c) The dispute involves matters within the ambits of the *Employment Act*, and as such, the petition is time barred.
 - d) The petition filed is inordinately delayed without any lawful or proper justification.
 - e) The petitioner's petition is res judicata, bad in law, vexatious, incompetent and an abuse to the Court process.
 - f) The claim is tantamount to trifling with the Court and is an abuse of the Court process.
7. Parties were thereafter directed to file their respective submissions to the preliminary objection and the petition. The Court has considered the material on record and makes its findings as follows.
 8. To answer the 1st issue, the Court finds that parties were in a contract of service. The respondent employed the petitioner on April 29, 2004 as an Executive Officer II.
 9. To answer the 2nd issue, the contract of service was terminated by the respondent's letter of summary dismissal dated March 27, 2019 on account of habitual absence from work without permission and per paragraph 21 Part IV of the 3rd schedule of the *Judicial Service Act*, 2011. He was entitled to apply for review within 6 months from March 27, 2019. He appealed or applied for review by his letter dated September 18, 2019 which was within the 6-months. by letter dated July 1, 2020 the respondent informed the petitioner that the review application was considered but was disallowed in view that there were no new material facts advanced.
 10. To answer the 3rd issue, the Court returns that the suit is time barred and is res judicata as urged in the notice of preliminary objection. The claimant had filed ELRC Cause 793 of 2019 at Nairobi against the respondent in a statement of claim dated November 14, 2019. The application for review had not been determined per letter of July 1, 2020 but he knew he had been dismissed by the respondent on March 27, 2019. While his administrative appeal or application for review was pending, the Court considers that nothing prevented the claimant from urging the unfairness and violation of rights, if any, in that earlier case. As at filing of the petition, the Court finds that indeed the three years of limitation to challenge the dismissal had already lapsed. The petitioner says he is aggrieved because he was not orally heard on the appeal or application for review. However, he has not shown that an oral hearing of the appeal had been agreed upon or prescribed by regulation or policy. As urged for the respondent it appears that ground of grievance will collapse as unjustified and article 47 on fair administrative action or article 50 on fair trial cannot be said to have been violated as urged for the petitioner. Even if the appeal or review decision were quashed or set aside, it appears to the Court that the initial dismissal decision which had not been challenged in the initial suit and the cause of action based on that dismissal is found time barred, the dismissal would remain in place. That dismissal cannot be challenged in the instant petition because the three years of limitation in section 90 of the *Employment Act* have since lapsed. Per the submissions and case for the respondent, the Court finds that the case for challenging the dismissal is not only res judicata for failure to urge the claim in the earlier case, but also, the same would not be successfully challenged in the instant petition as the claim is time barred and no good reason shown for the belated purported challenge of the dismissal. For the stated reasons, the Court finds that the preliminary objection will succeed that the instant petition was time barred as to challenge the dismissal and was as well fettered by the doctrine of res judicata. The petitioner failed to challenge the dismissal in the earlier suit and the cause of action being time barred and res judicata, the petitioner set out to circumvent those fetters to the suit for remedies under the *Employment Act* by filing the instant petition. The respondent's objection that the petition is filed to avoid available reliefs under the *Employment Act* is as well upheld because once the time barring and res judicata became apparent, the instant petition was filed. While making that finding, the Court considers that nothing has been



shown to suggest the administrative review application that was pending barred the petitioner from challenging the impugned dismissal. In that regard, the notice of preliminary objection will succeed as found by the Court.

11. The Court has considered the long period the respondent took to communicate the decision on the review and each party to bear own costs of the petition.

In conclusion judgment is entered for the respondent for orders:

- 1) The notice of preliminary objection is upheld as found in this judgment.
- 2) The petition is dismissed.
- 3) Each party to bear own costs of the notice of the preliminary objection and the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

