



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT

AT BUNGOMA

PETITION NO. 11 OF 2021

(FORMERLY PETITION NO. 45 OF 2021 AT KISUMU)

IN THE MATTER OF ARTICLES 10,19,20,21,23,27,50,232,&249

AND

IN THE MATTER OF VIOLATION OF COSTITUTIONAL

LIBERTIES AND FREEDOMS

BETWEEN

BERNARD MALESI.....PETITIONER

AND

THE TSC.....1ST RESPONDENT

THE CHAIR BOM,SHICHINJI SEC. SCHOOL.....2ND RESPONDENT

R U L I N G

1. The Ruling is on the Preliminary objection by Respondent dated 2nd August 2021.

2. The Petitioner Benard Malesi filed a Petition dated 9th July, 2021 seeking Judgement for :-

(a) A declaration that the disciplinary procedure set out in regulations 151 (2),(3) and 156(2),(7) are unconstitutional as they are contrary to Articles 10,50,232 and 249 of the constitution.

(b) A declaration that the 1st Respondent owes the Petitioner and others a duty of care to ensure that a constitutional disciplinary process has been put in place as per the provisions of Articles 10,50,232 and 249.

(c) That the Petitioner's rights under article 50 were breached as the 1st constitution leading to his unfair/unjust dismissal.

(d) That the Petitioner is entitled to general damages for breach of his rights under articles 10,50, 232 and 249 of the constitution.

(e) The process leading to the Petitioner's dismissal being unconstitutional the Petitioner be/and is hereby reinstated with full benefits.

(f) All the benefits, salary arrears accruing to the Petitioner since date of his interdiction be paid by the 1st Respondent.

(g) The 2nd Defendant do pay the Petitioner general damages for failing to adhere to principles of natural justice and in contravening article 50 of the constitution leading to unlawful dismissal of the Petitioner.

3. The Respondent entered appearance and filed Notice of Preliminary Objection dated 2nd August 2021 stating to be a point of law and praying for the Petition to be struck out with costs to the Respondent.

The grounds of the preliminary objection being:-

(1) The subject matter and the Petition herein is statutory time barred and grossly offends the mandatory Provisions of Section 90 of the Employment Act No. 11 of 2007.

(2) The Honourable court has no jurisdiction to hear and determine the petition.

(3) The 2nd Respondent is not a judicial person and no suit can ensue against him.

4. In response to the preliminary objection filed grounds of opposition to the preliminary objection which are dated 19th November 2021 being

(a) The petition, being a constitutional one is not subject to the laws of Limitation and in particular Section 90 of the Employment Act 00.11 of 2007.

(b) The Honourable court has unlimited jurisdiction to hear and determine this petition.

(c) The 2nd Respondent is legal capable of suing and being sued.

(d) The Preliminary objection lacks merit and is only aimed at delaying the hearing and determination of this matter and should be dismissed with costs.

(e) The Respondent has no defence upon which the preliminary objection is grounded and the petition remains unopposed.

5. The court issued directions that Preliminary Objection by the Respondents be canvassed by way of written submissions. The 1st Respondent's written submissions are dated 13th December 2021 filed by Cavin Anyuor Advocate on the 14th December, 2021. The Petitioner's submissions are dated 17th January, 2022 filed by Oscar Wachilonga & Associates Advocates on the 20th January, 2022.

Whether court has jurisdiction to hear and determine the petition

6. The Petitioner submits that this court has jurisdiction under Article 162 (1) of the Constitution. The court finds that this is not a contested issue of this court having jurisdiction to determine constitutional questions in Employment and Labour Disputes. The issue is lack of jurisdiction based on limitation of time under Section 90 of the Employment Act, 2007 which provides as follows:-

“Notwithstanding the provisions of Section 4 (1) of the Limitations 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 damages within twelve months next after the cessation thereof”.

7. The Petitioner submits the court has jurisdiction to handle prayers a, b, c and d of the Petition as there is no time limit in the interpretation of Constitution and whether a party's rights have been infringed by a body purporting to act unconstitutionally. The buttress his point the Petitioner relies on the decision by Justice Mathews Nduma Nderi in *Pascal Barasa & 2 others -vs- AG Petition No. 38 of 2016 eKLR* where the court held in Paragraph 13 as follows: *“ the question of limitation of time in regard to allegation of breach of human rights and fundamental freedom have in many cases been raised by the state and in the case of Joan Akinyi Kaba Sellah & 2 Others -vs- AG Petition No. 41 of 2014 the Judge observed that “ nevertheless I take into account the views of the court with regard to Limitation in respect of claim for enforcement of fundamental rights in line of such cases as Dominic Aaron Amollo -vs- AG Nairobi HCC MISC. 1184/2003 or (20201) eKLR, Otieno Mak Onyango -vs- AG and another HCC 845 (2003) (unreported) courts have constantly held that there is no limitation with respect to constitutional petition alleging the violation of fundamental rights.*

8. The Petitioner submits that the 1st Respondent is created under Article 237 (2) of the Constitution as an Independent Commission and it declares under Section 4 of its Act that in exercise of its powers it is guided by Articles 10,232, 53 249 (1) of the constitution and that those provisions form basis of the petition.

9. The Petitioner submits that he was dismissed on ground of having impregnated a student at 2nd Respondents school which he says he came to discover was a set up and was dismissed on false allegations which would not have seen light of the day had proper mechanism that will ensure the investigation and appeal confirm to the provisions of the TSC Act and Constitution and the story of the Petition herein used to show that indeed the 1st Respondent failed to adhere to its own principles and that of the constitution to set up a constitutional disciplinary process that will ensure the principles of Articles 10,50,232 are adhered to and therefore this examination of the disciplinary process intended by petition cannot be said to be time barred. That the petition cannot be said to be abuse of the process.

10. The Court finds it has jurisdiction to determine the petition under article 162(2)(a) of the Constitution.

On whether or not the claim is time barred.

11. The cause of action arose on dismissal on 6th September 2021 (page 80) of the petitioner's bundle of documents. 3 years lapsed or about 7th September 2015. That means the claim is time barred under Section 90 of the Employment Act. The Petitioner says that Section 90 does not apply in a Constitutional Petition hence the objection has no basis and has cited authorities of the court referred to earlier.

12. The Respondent submits that earlier on the Petitioner filed JR MISC Application No. 7 of 2013 Benard Malesi -vs Teachers Service Commission & Another (2015) eKLR . The same was heard and determined and dismissed for being time barred by dint of order 53 Rule 2 of the Civil Procedure Rules.

13. The 1st Respondent submits that that the Petition is time barred by dint of Section 90 of the Employment Act as it is filed nine (9) years after the Petitioner was dismissed from service on 6th September 2012 (page 80 of the Petition). The action ought to have been filed within 3 years of dismissal, that is on 6th September 2015 under Section 90 of the Employment Act. That it is admitted that the relationship between the Petitioner and the 1st Respondent was that of employer - employee hence uncontested fact that the subject matter of the dispute is within purview of the Employment Act, 2007.

14. The Respondent submits that Section 90 of the Employment Act, 2007 is douched in mandatory terms and prohibits filing any suit (including Constitutional Petition) outside the statutory limitation period of 3 years. That this Petition was filed on 9th July, 2021, 6 years outside the statutory time bar. That the subject matter is a contractual dispute and cannot be elevated to a constitutional issue.

15. The 1st Respondent submits that the dispute before court is purely contractual disguised as a constitutional matter purposely to evade the limitation of time. The Respondent further submits that the court's jurisprudence is clear, that the elevation of a simple labour dispute cannot jettison the application of the substantive and procedural law on employment. The Respondent has cited many authorities which the court has considered among them *Petition No. 1 of 2013 Josephat Ndirangu -vs- Henkel Chemicals (EA) Limited (2013) eklr Justice Radido held:-*

“In my view a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right fair labour practices is given effect in various statutes of Employment Act and the labour Relations Act are primary”. Justice Nduma Nderi in Petition NO. 19 of 2014 John Miriti Mbarire -vs- AG cited the case of Kemrajh HarrilaSoon -vs AG of Trinidad and Tobago (1979) ISKPC 3 where the court held that the value of the right for redress for breach of fundamental rights and freedoms is diminished when it is unsuited as a general substitute for the normal procedures for involving judicial control of administration act. The Judge proceeded to hold that the petitioner's claim was founded on contract and therefore subject to the limitation.

16. In another case of *Joseph Muturi Mbariah & Another -vs Copuncil of JKUAT (2013) eKLR Justice Mbaru held, ‘direct reliance on fundamental rights as contained in the constitution is impermissible when the right in issue is regulated by legislation as is actually the case with employment Act which directly regulates fair Labour practices. Which includes suspension termination and dismissal. When a legislation is enacted to give effect to a constitutional right a litigant cannot by pass the legislation and rely directly on the constitution without challenging that legislation as falling short of the constitutional standard’.*

In another decision *Petition No. 16 of 2014 Zachary Onyambu Manani -v- Teachers Service Commission (2018) eKLR Justice Maureen Onyango held:-“I thus agree with the Respondent that this is a contractual matter that is governed by employment law and the only reason the petitioner filed a petition was in the hope of evading the law on the limitation “.*

17. The court finds the foregoing authorities sound in law and persuasive to effect that the substantive dispute is a contractual matter governed by statutory law. The court takes into consideration that there is no time/limit perse in respect to enforcement of fundamental rights. The question the court then addresses is whether the petition before the court violates the provisions of Section 90 of the Employment Act , whether the Petition discloses constitutional issues which are not covered by Employment law.

18. The Petitioner states that the process of his dismissal violates rights to natural justice and fair trial under Article 50 that regulation 147 (4) hampered his right to fair hearing as he was not supplied with statements of witnesses due to that regulation. The Petitioner does not state the actual challenge with the regulation and does not state he requested and was not supplied with the statements. Even if this was the case, the same can still be canvassed by Court as fair hearing is compressively covered under sections 43, 45 and 41 of the Employment Act.

19. The Petitioner alleges that the interdiction letter was drafted by TSC, the investigations report was prepared by agent (employee) of TSC and disciplinary Committee is comprised of the employees of TSC plus some Commissioners. That the 1st Respondent acted as the investigator, prosecutor and Judge at the same time in violation of Articles 10,50, 232 & 249 emphasizing principles of government and impartiality. The relevant law on procedural fairness in termination of employment is the Employment Act. Section 43 (2) of the Employment Act states that “ *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the serves of the employee”.* The court finds that the employer is entitled to under that law to investigate and conduct the disciplinary proceedings on any reason which it believes to exist for terminating the Employment contract. There is nothing unconstitutional about that impugned process which is also defined under Section 41 of the Employment Act.

20. The court has perused the entire Petition and found that the issues raised concern challenge of procedural fairness in dismissing the petitioner from employment . The same issues can be articulated under a normal claim and remedies sought under the petition granted if the claim is proved. The remedies for unfair and unjust dismissal are elaborated under Section 49 of the Employment Act.

21. On whether regulation 151 (2) (3) on composition of disciplinary panel the court has already found nothing wrong with the composition of disciplinary panel as it is the employer's roles to discipline its employees. On regulation 156 which addresses powers on review, the

court finds nothing unconstitutional for in any case of review even in court, the powers of the court/ tribunal are limited to discovery of new evidence or fact which at the time of hearing was not within the knowledge of the teacher or error or mistake apparent on face of record. The court notes the powers on review under the impugned regulation 156 (2) are extended to include “there was fundamental flaw in the procedure of the Commission and the decision was made in breach of written law’. The court finds the said regulation on review powers to be sound in law.

22. The court is thus inclined to agree with the 1st Respondent that the petitioner has framed his claim as a constitutional petition to evade statutory limit of his claim by dint of section 90 of the Employment Act. The court took notice that the same issues challenging the disciplinary process against the Petitioners were raised in *JR MISC. Application No. 7 OF 2013 reported as Benard Malesi -vs- Teachers Service Commisison & Another* (2015) eKLR and dismissed for being time barred by dint of order 53 Rule 2 of the Civil Procedure Rules. The Petitioner was still within time then to file a claim under the Civil Procedure Rules but went on slumber for the next 6 years only to wake up and decide to sue the Respondents under a constitutional Petition waving the card that constitutional petitions are unlimited on time for filing. Even if the court were to apply the Limitation of Actions Act, contractual claims are time barred where cause of action is over 6 years. According to the pleadings and (page 80 of Petition) letter of dismissal dated 6th September 2012, giving rise to cause of action, 6 years after the Section 90 limitation of claim to 3 years, the petitioner’s claim is way out of time. The court finds that the right to fair trial under article 50 and principle for impartiality and governance under articles 10 and 232 are implemented under sections 41, 43 and 45 of the Employment Act and further there is no justification why the claim was not brought under the Employment Act as the remedies sought are available under section 49 of the employment Act.

The court finds the petition is an abuse of the court process. The court finds that this was a contractual claim under the Employment Act falling under employer employee relationship and disguised as a constitutional Petition. The court finds that the Petitioner’s claim is founded on Employment contract and is therefore subject to limitation under Section 90 of the Employment Act and thus the court has no jurisdiction to grant orders sought.

23. On joinder of 2nd Respondent, the court finds joinder of parties is not a fatal issue as a party is at liberty to apply and be removed from proceedings.

CONCLUSION AND ORDERS

24. The preliminary objection succeeds. The Petition is struck out for being an abuse of court process and for the claim which is founded on employment contract being time barred.

25. Costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF FEBRUARY 2022

J. W. KELI,

JUDGE.

In the Presence of :

Court Assistant: Brenda Wesonga

Petitioner: - Absent

1st Respondent

2nd Respondent :- D.Ochieng Advocate holding brief for Musundi Advocate.