



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. E006 OF 2021

GEOFFREY KAMANDE KARIUKI.....PETITIONER

VERSUS

1. THE CABINET SECRETARY, MINISTRY OF HEALTH

2. THE PUBLIC SERVICE COMMISSION

3. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

J U D G M E N T

1. In a Petition dated 14th April 2021 and filed in this Court on 20th April 2021, the Petitioner states:-

a. that the Petitioner was employed by the Ministry of Health in 1991 as a Health Records and Information Technician and worked at Kwale Hospital and Kinango Hospital in Kwale County between 1991 and 1994, before being transferred to Hola District Hospital in Tana River County in September 1994.

b. that in April 1996, the Petitioner was verbally dismissed from employment and his salary stopped at the instigation and verbal instructions of the Provincial Medical Officer, Dr. Shariff.

c. that the Petitioner sought intervention of Officials at the Ministry of Health Headquarters and he was informed that his termination was rescinded and he therefore resumed his duties, but his salary was not reinstated.

d. that the Petitioner worked without pay or any communication from his employer regarding his case for three years and that as such, the Petitioner was constructively dismissed.

e. that there were no charges, investigations, proceedings or formal procedures leading upto the Petitioner's termination from employment.

f. that the Petitioner's attempts to appeal and follow up on the matter at the Ministry of Health were defeated when he was informed that his file was lost.

g. that the Petitioner sought the assistance of the Commission on Administrative Justice to intervene on his appeal after trying to follow up for many years without success; and the commission commenced its inquiries with the Ministry of Health and the Public Service Commission.

h. that upon intervention by the Commission on Administrative Justice, the Petitioner appealed against the dismissal on 28th May 2018 and his appeal was admitted out of time.

i. that one and a half years later, the Petitioner was informed that his appeal was disallowed by the 2nd Respondent without any hearing or due process being followed or reasons being furnished.

j. that the Petitioner further applied for review of the decision to the Secretary, Public Service commission on 12th August 2019 and one year later, vide a letter of 26th August 2020, the 2nd Respondent disallowed the Petitioner's application for review and closed his file without any hearing or due process being followed or reasons being furnished.

2. The Petitioner pleads that he has suffered, and is likely to suffer injury because:-

- a. the inhuman manner of dismissal was disruptive of the Petitioner's life and caused him to suffer distress, mental torture, embarrassment, humiliation, pain and anguish.
- b. the Petitioner's labour rights and rights to fair administrative action have been infringed upon.
- c. the Petitioner undeservedly lost employment at the age of 29 years and was unable to pursue his career as a Health Records and Information Technologist.
- d. the Petitioner and his family's socio-economic rights were grossly violated due to the changed economic situation.
- e. the Petitioner's right to dignity, quality life and livelihood were violated.

3. The Petitioner stated that his rights to fair administrative action and to fair labour practices under Articles 37 and 41 of the Constitution were infringed on as the entire process of dismissal and appeal were unprocedural in that:-

- a. the verbal dismissal and stoppage of the Petitioner's salary without any investigation, charge or hearing was an unfair labour practice.
- b. the dismissal and later rescinding of the dismissal, resumption of duties but not the salary were unfair labour practices.
- c. the disciplinary procedures for the public service were totally disregarded, in particular the mandatory requirement for investigations, notice to show cause, charge, disciplinary hearing, procedures for suspension of salaries and requirement for expeditious action.
- d. failure to follow any due process provided by law caused the Petitioner to work for three years without salary.
- e. the Petitioner was dismissed without final dues and certificate of service.
- f. the decision of the 2nd Respondent was arbitrary, biased, delayed and procedurally unfair.
- g. no reason was given to the Petitioner for the denial of his appeal and application for review.
- h. the Petitioner's constitutional rights to fair administrative action, fair trial and the right to be heard were infringed upon.
- i. the 2nd Respondent did not carry out any investigations, and (did not comply with) the procedure of the Employment Act (Cap 266) or applicable ILO conventions during the entire process.
- j. the right to access to information in the Petitioner's personnel file was denied in contravention of Article 35(1) of the Constitution of Kenya, 2010.

4. The Petitioner further stated that his arbitrary dismissal, the process and manner thereof was manifestly illegal, unlawful, invalid and was a mockery of justice.

5. The Petitioner also pleaded the provisions of Articles 10(2) (c), 232 and 236 of the Constitution. He further gave particulars of contravention of Article 35 on access to information as follows:-

- a. the Petitioner's several requests for information to assist him to agitate for his rights without response.
- b. the Petitioner was a victim of 2007/2008 post-election violence, and as a result many of his employment records were lost and destroyed.
- c. the Petitioner later realized that there were documents in his personnel file that he was not aware of.
- d. the Petitioner, having been denied access to information in his personnel file by the 1st and 2nd Respondents could not be able to address some of the matters that could have assisted his appeal.
- e. the 1st and 2nd Respondents on the other hand had an unfair advantage of full access to the information.

6. The Petitioner pleaded violation of Article 249 of the Constitution and stated that:

- a. the 2nd Respondent was under the control and direction of the Ministry of Health officials.
- b. the Ministerial Human Resource Management Advisory Committee (MHRMAC) first reviewed the appeal before making a

recommendation to the 2nd Respondent upholding the dismissal, which action was unprocedural, invalid and illegal, and was geared to influence the 2nd Respondent.

c. all communication to, and from the 2nd Respondent to the Petitioner were channeled through the Ministry of Health.

d. no rules, guidelines or standards or form on how to prepare or lodge appeals and applications for review have been provided, thereby creating an unfair system of adjudication.

e. the Public Service Commission Regulations 2005 precede the Constitution 2010 and are unfair under current constitutional dispensation.

f. the Ministry of Health had contacts with the 2nd Respondent without the Petitioner's knowledge, thereby compromising the independence of the 2nd Respondent.

g. some of the documents were deliberately left out from the file send to the 2nd Respondent by the Ministry of Health, and despite being made aware, the 2nd Respondent took no action.

h. The 2nd Respondent rubber stamped the decision of the Ministry of Health without any enquiry or independent verification.

i. an appellate body sanctioned and upheld as fair a situation where an employee worked for three years without pay, was verbally dismissed without any charges or disciplinary hearing and was terminated three years after the alleged offence occurred.

7. The Petitioner pleaded discrimination and undignified treatment contrary to Articles 27,28 and 48 of the Constitution and stated:-

a. that the Petitioner is a person living with disability since birth.

b. that the Petitioner was treated in an inhuman, degrading, contemptible and undignified manner when his salary was stopped verbally, he worked for three years without pay, his personnel file was misplaced to frustrate him resulting to a delay of 21 years in determining his appeal.

c. the Petitioner was treated in an abusive and rude manner by officials of the 1st and 2nd Respondents for pursuing his rights.

d. the decision on appeal was delayed causing the Petitioner immense hardship in following up the matter.

e. the 2nd Respondent's offices are located in Nairobi, making them very difficult to access by a disabled person.

8. The Petitioner sought the following reliefs:-

a. a declaration that the decisions of the 2nd Respondent denying the appeal and application for review were invalid and unconstitutional.

b. a declaration that termination of the Petitioner's employment by the Ministry of health was unlawful and unfair.

c. an order directing the 1st Respondent to reinstate the Petitioner to his employment.

d. compensation for loss of earning @ksh.7,727 plus annual increments from April 1996 to July 1999.

e. compensation for loss of earnings plus annual increments from July 1999 to date of reinstatement.

f. in the alternative, compensation for unlawful and unfair termination.

g. an order directing the 1st Respondent to provide the information requested by the Petitioner.

h. General damages.

i. Costs of the cause and interest.

9. The petition was supported by the Petitioner's affidavit sworn on 14th April 2021 and filed together with the Petition. The affidavit largely replicated the averments made in the petition, and which I have set out in paragraph 1 of this judgment. The Petitioner, however, deposed in detail the following matters:-

a. that after the Petitioner was verbally dismissed by the provincial Medical Officer for attending an interview at Kenya Medical Training College on 26th March 1996, he was never informed of the decision and only noticed he was the only one at the Hospital (where he worked) who was not receiving salary in April and May.

b. that the Petitioner sought intervention of officials at the Ministry of Health headquarters and was told that his termination had been rescinded and resumed duties, but his salary was not reinstated and he worked for three years without a salary.

c. that when the Provincial Medical Officer (Dr. Shariff) visited Hola Hospital where the Petitioner worked and noticed the Petitioner, the Petitioner was told to leave the hospital staff quarters.

d. that after the Petitioner sought the intervention of the Commission on Administrative Justice and the Commission commenced inquiries with the Ministry of Health and the Public Service Commission, the Ministry of Health responded to the Commission vide a letter dated 11/4/2019 stating that the Petitioner had been terminated on 17th July 1999.

e. that the dismissal letter was never issued to the Petitioner.

f. that the Ministry of Health's said letter (dated 11th April 2019) further stated that the Ministerial Human Resource Management Advisory Committee had deliberated on the Petitioner's appeal, upheld the dismissal and referred the case to the Public Service Commission with a recommendation that the dismissal be upheld.

g. that the Public Service Commission disallowed the appeal and informed the 1st Respondent accordingly vide a letter dated 12th June 2019.

h. that the Petitioner was not consulted regarding deliberations of the MHRMAC or the reference to or proceedings of the 2nd Respondent.

i. that the Petitioner's application to the Secretary Public Service Commission (made on 12th August 2019) was disallowed vide a letter dated 26th August 2020 and the Petitioner's file was closed.

j. that the Claimant was not given hearing of any form or reasons for the 2nd Respondent's decision.

k. that the Petitioner is a person living with disability and was treated in a discriminatory manner due to his physical status in order to frustrate him in the pursuit of his labour rights.

10. On 13th September 2021, the Respondents filed an affidavit in reply to the petition, sworn by SIMON K ROTICH, the 2nd Respondent's Secretary/CEO, on 1st September 2021. It is deponed in the said Replying Affidavit, *inter- alia*:-

a. that the Petitioner was employed by the Ministry of Health upto 22nd May 1995 when he was dismissed.

b. that the Petitioner was dismissed formally following the correct procedure, and communication on the dismissal was made vide a letter reference No. 538442/39 dated 17th July 1999 and reasons for the dismissal were communicated therein.

c. that the Petitioner's failure to follow up on the matter and to appeal his dismissal within the stipulated time and his failure to adduce evidence shows guilt for absconding duty, (this) being the reason for the Petitioner's dismissal.

d. that the Petitioner is guilty of laches and he is precluded from raising a matter 19 years after he was dismissed; as the matter is prejudicial to the Ministry as many of the officers who handled the matter are retired and even deceased.

e. that the petition is time barred and should be struck off since it is filed 19 years after the communication of dismissal.

f. that limitation of time in employment matters is limited under Section 4 of the Limitation of Actions act to six years while the Employment Act also limits Courts on employment matters.

g. that the 2nd Respondent has the necessary power to dismiss an appeal summarily should it be found not to be supported by any grounds.

h. that the Petitioner's absence at the appeal stage was not prejudicial to him as the process was to examine whether the Petitioner raised justifiable and new grounds to support it.

i. that the Petitioner does not deny absconding duty, which led to his dismissal but challenges the process.

j. that lack of documentation as the Petitioner avers, though unfortunate for him, is also prejudicial to the Respondents as they would have no way of disapproving the Petitioner's allegations against them.

k. that the Petitioner has not provided sufficient proof of disability and has not stated when he became disabled, and should not be allowed to rely on disability without providing further particulars.

l. that the Petitioner has failed to display discrimination and undignified treatment in the hands of the Respondents' agents.

11. Neither the Petitioner nor the 2nd Respondent exhibited copies of the Petitioner's dismissal letter alleged to be dated 17th July 1999, which the Petitioner denies receiving, and which he says he became aware of upon intervention of the Commission on Administrative Justice in the year 2019. On the other hand, the Respondents deponed that the Petitioner was dismissed vide a letter dated 22nd May 1995. This letter has also not been exhibited by the Respondents.

12. Parties filed and exchanged written submissions pursuant to the Court's directions in that regard. The matter came up before me for highlighting of the filed submissions on 14th December 2021, but only counsel for the Petitioner highlighted. Counsel for the Respondents opted to rely on his written submissions as filed. I have considered the submissions filed and presented.

13. Having considered the petition and the affidavit filed in response thereto, issues that fall for determination appear to me to be as follows:-

a. whether the petition is properly before this Court.

b. whether the Petitioner is entitled to the reliefs sought.

14. On the first issue, although the Petitioner has presented his claim by way of a constitutional Petition, **what the Petitioner is seeking to enforce are purely employment rights**. The issue as to whether rights in employment and labour relations matters addressed within a contract of employment should be addressed through a constitutional petition was addressed by the Court of Appeal in the case of SUMAYYA ATHMANI HASSAN –VS- PAUL MASINDE SIMIDI & ANATHOR [2019]eKLR as follows:-

“It is evident that the petition was hybrid combining violations of various rights, employment rights under the employment Act and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the Employment Act.

The Article 41 rights are enacted in the employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in BARBARA DE KLERK (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the Communication's Commission Case (supra).”

15. Still on the fact that parties enforcing rights outlined under the Employment Act should file a claim and not a (constitutional) Petition, the Court in FRANCIS ATONYA AYEKA –VS- KENYA POLICE SERVICE & ANOTHER [2017] eKLR stated as follows:-

“...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

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 to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.

The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the Employment Act and the Labour Relations Act give effect to Constitutional rights.”

16. As demonstrated in paragraph 2 of this Judgment, the petition herein seeks declaratory orders regarding a decision on appeal to the Public Service Commission, denial by the Public Service Commission of an application for review of the Commission's decision, a declaration that the termination of the Petitioner's employment by the Ministry of Health was unlawful and unfair, an order directing the 1st Respondent to reinstate the Petitioner to employment, compensation for loss of earnings, an order directing the 1st Respondent to provide the information requested by the Petitioner, general damages, costs and interest.

17. The Petition herein is clearly an employment suit/claim which is presented as a Constitutional Petition over twenty (20) years from the time the cause of action is shown to have arisen.

18. The Petitioner has not sought declaration of invalidity of the provisions of the Employment Act or any other statute under which his employment rights are enforceable. The delay involved before moving the Court vide the petition herein has also not been validly explained. The Petitioner has not explained what action he took after his employment was verbally terminated in April 1996 and his salary stopped, or in 1997 when he was told to vacate the hospital staff quarters. There was a constitution and employment laws then under which he could have moved the Court. The over twenty years delay is not explained by the allegation that the Petitioner's personnel file was missing. Alleged disappearance of the Petitioner's personnel file was a reason enough for the Petitioner to move the Court for appropriate orders.

19. The Respondents cited the case of WELLINGTON NZIOKA KIOKO –VS- ATTORNEY GENERAL [2018] eKLR where the High

Court (Mumbi Ngugi, J) found that the Petitioner's claim had been brought after inordinate delay and that the inordinate delay had not been explained. The Court rendered itself as follows:-

“...it is prejudicial to the state, and therefore to the general public, for parties to sleep on their rights and then wake up, decades later, with no explanation of the delay, and allege violation of rights...in the circumstances, I am constrained to find that not only has the Petitioner in this case failed to establish a violation of his constitutional rights, he was also guilty of inordinate delay in lodging his petition.”

20. The foregoing decision of the High Court was upheld by the Court of Appeal in the case of WELLINGTON NZIOKA KIOKO –VS- ATTORNEY GENERAL [2018] eKLR (being Civil Appeal No. 268 of 2016) where the Court of Appeal, in upholding the High Court's decision, stated:-

“...whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay.....

...when a person suffers a wrong of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce evidence that is necessary to support the claim. It also accords the purported wrong doer the opportunity to address the grievance and if possible remedy it. That way, both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrong doer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”

21. It is my finding that for the foregoing reasons, the petition herein is not properly before this Court. It follows that reliefs sought by the Petitioner cannot be granted. Accordingly, the petition herein is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Katisya for Petitioner

No appearance for Respondent