



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 798 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

STEPHEN MULUNGU KYALO.....CLAIMANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

RULING

1. Before me for determination is a preliminary objection dated 29th June 2020. The Respondent opposes the claim on the grounds that:

1. The suit is time barred.
2. The suit is frivolous, vexatious, bad in law and an abuse of Court process
3. The Claimant has not demonstrated how his constitutional rights have been infringed by the Respondent.
4. The suit herein is bad in law brought in bad faith and should be dismissed with costs to the Respondent.

2. The factual background of the suit is as follows:

3. The Claimant was enlisted to the Kenya Police Force on 12th May 1975 and upon acceptance of the same was subject to all regulations of officers in the public service applicable from time to time.

4. On 12th June 1991 while attached to the Criminal Investigations Department Narcotics Section, the Claimant was arrested for theft of motor vehicle registration No. G.K. 5966 which was detained at the Langata Police Station Government Vehicles Investigation Yard and was charged in the Chief Magistrates Criminal Case No. 4304 of 1991, convicted and sentenced to three years imprisonment. He was interdicted from duty effective June 1991 in accordance with paragraph 25, Chapter 20 of the Force Standing Orders. Appeals to the High Court and Court of Appeal fell through. The Claimant was dismissed from the Police Force on 24th February 1993.

5. An appeal to the then Commissioner of Police yielded no positive results as is an appeal to the Respondent by letter dated 29th March 2016.

6. The Claimant filed the case herein on 6th May 2016 claiming half salary since 12th June 1991, general damages, interest and certificate of service. On 14th October 2019, a notice of charge of advocates was filed. On 5th May 2020, an amended memorandum of claim was filed claiming dues from 12th June 1991 to 30th June 2013 when the Claimant would have retired from the police force at the age of 60.

7. The Respondent identifies three issues for determination.

8. The Respondent submits that after the Claimant had approached all the available internal mechanism, he had the option to approach the courts for a remedy if his rights had been violated but did not do so for over 23 years. In addition, the Claimant was procedurally terminated before the Respondent came into existence.

9. It is submitted that the Claimant did not institute the claim herein within the duration prescribed by the Limitation of Actions Act, applicable then, or within three years as provided by Section 90 of the Employment Act, 2007 as time started running from the date of

dismissal on 24th February 1993. The decision in **Johnstone Ogechi Mose v National Police Service Commission [2017] eKLR** is relied upon to buttress the submission as are the decisions in **Daniel Kago Gachanja v Inspector General & 2 others [2020] eKLR**, **Haron Onyancha v National Police Service Commission & another [2017] eKLR**, **Iga v Makerere University [1972] EA 65**, **Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd [2019] eKLR** and **Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104** to demonstrate the objective of the law of limitation of actions.

10. As regards the Respondent's mandate to re-open the disciplinary matters concluded before its establishment, it is submitted that public bodies are required to act within their powers. The decision in **Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR** is relied upon to illustrate the submission that the Respondent is required to operate within its mandate as prescribed by Article 246(3) of the Constitution of Kenya, 2010.

11. It is submitted that before the Respondent was operationalised, the mandate to hear appeals on disciplinary matters was vested on the Commissioner of Police and his decision was final. A person aggrieved by the decision had the option to apply for review of the decision by a court of law.

12. It is the Respondent's submission that it has no jurisdiction to reopen disciplinary matters procedurally concluded by the duly mandated person as doing so would be *ultra vires*.

13. As to whether the suit is frivolous, vexatious, bad in law and abuse of court process, the decisions in **Fremar Construction Co. Ltd v Minakshi Navin Shah [2005] eKLR**, **Trust Bank Limited v H.S. Amin & Company Ltd & another [2000] KLR 164** as well as **Peter George Antony D'Costa v Attorney General & another [2013] eKLR** and others are relied upon to demonstrate when a suit is considered frivolous, vexatious or an abuse of court process.

14. It is further submitted that the suit should be dismissed on this ground as well.

15. As regards violation of constitutional rights, it is submitted that the cause herein has not pleaded breach of any constitutional provisions or violation of rights and/or fundamental freedoms.

16. The decisions in **Godfrey Paul Okutoyi v Habil Olaka & Another [2018] eKLR**, **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR** as well as **Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others [2013] eKLR** are relied upon to urge that no material has been placed before the Court to show violations of the Claimant's constitutional rights as alleged.

17. It is submitted that the Claimant's indolence for 23 years since dismissal renders the claim herein stale.

18. In conclusion, it is submitted that Claimant has not faulted the disciplinary process at the appellate stage.

Claimant's Submission

19. As to whether the Claimant's suit herein is statute barred, the Claimant submits that the Claimant was interdicted on 19th June 1991 due to criminal proceedings, was evicted from the Langata Police Lines in 1998 and could therefore not have been dismissed on 24th February 1993.

20. That the claim herein is based on the Claimant's retirement on 30th June 2013 while still on interdiction. Section 27(1) of the Public Service Superannuation Scheme Act, 2012 is relied upon to urge that since the Claimant's date of birth is unknown it should be deemed to be 1st July 1953 and since the claim was filed on 5th March 2016. It is within the three years prescribed by Section 90 of the Employment Act since time started running on 1st July 2013 when the Claimant attained the age of 60.

21. It is submitted that the Claimant was not served with a dismissal letter dated 24th February 1993 nor has a copy been filed. That the half pay the Claimant was entitled to receive from 19th June 1991 to 1st July 2013 was not paid. Section 44 of the Police Act, Cap 84 (repealed) is relied upon to urge that the Claimant remained a police officer until he attained retirement age on 30th June 2013, the interdiction and imprisonment notwithstanding.

22. That without a formal dismissal process and letter, the Claimant attained retirement age in 2013 while still on interdiction as per Section 44 of the Police Act, 1961.

23. That there is no material before the Court to show that the Claimant was taken through a disciplinary process and the Respondent's inaction cannot be meted on the Claimant.

24. It is submitted that sending an employee on interdiction indefinitely is inhuman and an unfair labour practice under Article 41 of the Constitution of Kenya, 2010. The decision in **Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another [2012] eKLR** is relied upon to buttress the submission.

25. Further, the Claimant submits that the National Police Service Commission is the proper Respondent since it took over the functions of the Public Service Commission in relation to the National Police Service.

26. It is the Claimant's case that the claim is not frivolous since the Claimant has not been subjected to the rules of natural justice including

discharge from the police force until he retired in June 2013.

27. Pushing the case further, it is submitted that since the Respondent has not placed a dismissal letter on record, time could not start running under the Limitation of Actions Act or the Employment Act, 2007 and only retirement age could trigger it.

28. The Claimant prays for dismissal of the preliminary objection.

Analysis and Determination

29. The issues that commend themselves for determination are as follows: -

- i. Whether the preliminary objection herein meets the threshold;
- ii. Whether the Claimant's action is time barred;
- iii. Whether the suit is frivolous, vexatious and abuse of court process;
- iv. Whether the Claimant's constitutional rights have been violated.

30. As to whether the Respondent's preliminary objection meets the threshold, neither of the parties submitted on the issue.

31. On matters preliminary objection, the first point of call is the decision in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (1969) EA. 696** where the Court states as follows:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation ... is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

32. Since the duration within which a suit must be filed is a legal issue, the test prescribed in the **Mukisa Case** is satisfied.

33. Needless to emphasise, a preliminary objection based on limitation of time is a threshold question which is determinative of the suit before the Court.

34. The law on limitation of actions before 2nd June 2008 when the Employment Act, 2007 came into operation was the Limitation of Actions Act, Cap 22, Laws of Kenya.

35. Section 4(1) of the Limitation of Actions Act provides that:

- 1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**
 - a. actions founded on contract;**

36. 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 on 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.

37. In **Leisure Lodges Limited v Amirali Shariff [2019] eKLR** the Court of Appeal underscored the critical nature of limitation of time. The Court expressed itself as follows:

"It has long been laid firmly that limitation is a jurisdictional issue and therefore can be raised at any stage of the proceedings... From the language of section 4 aforesaid, as a general rule, the courts are barred from entertaining suits that are brought after the expiration of statutory period..."

38. In **Gathoni v Kenya Co-operative Creameries Ltd (supra)** Potter JA stated as follows

The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.

39. In **Iga v Makerere University (supra)** Law Ag V.P. stated as follows:

“... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaintiff, the Plaintiff must be rejected.”

40. Finally, in **Johnstone Ogechi Mose v National Police Service Commission (supra)** the Court stated that:

“Under the applicable section 4 of the Limitation of Actions Act, the suit then based on a contract of service was to be filed within 6 years of the time of limitation; or within 3 years from the date of dismissal under section 90 of the current Employment Act, 2007.”

41. The Court is in agreement with and is guided by these sentiments.

42. I will now proceed to apply the foregoing provisions and propositions of law to the circumstances of this case.

43. It is not in dispute that the Claimant was offered employment by the Kenya Police effective 12th May 1975 by letter dated 25th August 1975 which he accepted on 24th October 1975.

44. It is also common ground that the Claimant was interdicted on 19th June 1991 for the offence of stealing a motor vehicle belonging to the Ministry of Health, was charged, convicted and sentenced to a three year jail term. Appeals at the High Court and Court of Appeal were unsuccessful. While on interdiction, he was entitled to half pay effective 12th June 1991 and is claiming full pay from June 1991 to 30th June 2013 when he attained retirement age 60 years.

45. The Claimant submits that he occupied a police house until he was forced out in 1998 yet he is claiming Kshs.10,735/- as the electricity bill he paid from July 1991 to 30th June 2013 since he was residing outside the police line houses.

46. That he was illegally out of employment for 22 years.

47. At this juncture, it is elemental for the Court to determine when the Claimant's cause of action arose in order to ascertain when time started running as he alleges that time started running on 1st July 2013 when he attained retirement age.

48. Paragraph 11.1 of the amended memorandum of claim states that:

“The claimant was a sergeant (Job Group PG-C/3) at the time of interdiction on 12th June 1991. His claim is based on the same position he held as at the time until he attained retirement age of sixty (60) years on 30th June 2013 as provided for under Section 27(1)(a) of the Public Service Superannuation Scheme Act No. 8 of 2012 ... The unpaid basic salary as from June 1991 to 2013 is as herein below.”

49. When did the cause of action in this case arise? Put another way, when did Claimant become entitled to complain or obtain a remedy from their employer through the Court. See **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR**.

50. In the totality of the documents on record and submissions by Counsel, it is clear that the Claimant's cause of action for unpaid salary accrued in July 1991 after the interdiction in June and the running of time was uninterrupted. Being a contract of service, the applicable law was the Employment Act 1977, Cap 226, Laws of Kenya, which had no limitation clause. Consequently, the provisions of the Limitation of Actions Act and in particular Section 4(1)(a) cited above was the relevant law.

51. In **Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another [2016] eKLR** the Court of Appeal cited with approval the following sentiments expressed in **Divecon v Samani (1995 – 1998) I EA 48** at page 54

“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action...”

52. The Claimant's contention that time started running on the date of retirement since the Respondent has not produced a dismissal letter is puzzling.

53. First, the Claimant has not explained or demonstrated his attainment of retirement age entitled him to sue as the cause of action accrual date yet he had been out of employment for 22 years with no pay.

54. Second, the claim for unpaid salary is dated June 1991 which is contradictory to the professed cause of action actual date.

55. Third, the Claimant would like the Court to believe that he was on interdicting for 22 years including the years he was in jail and remained an employee for the entire duration while not rendering services to the Respondent and searching for employment elsewhere.

56. It is clear to the Court that the date of attainment for retirement age is chosen as the cause of action accrual date to defeat the provisions of the Limitation of Actions Act as the law applicable before the Employment Act, 2007 came into operation.

57. Finally, the belated attempt by the Claimant's Counsel dated 29th March 2016 to salvage the claim is to no avail. The letter is explicit that the police kit and clothing were withdrawn and he had to vacate the police house allocated to him and more importantly, his salary was stopped and that was the accrual date of the Claimant's cause of action.

58. For the foregoing reasons, the Court is satisfied that the Respondent has on a balance of probabilities shown that the preliminary objection is merited.

59. In the upshot, the suit by the Claimant is struck out for being time barred.

60. Each party shall bear its own costs.

61. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE