



Ondieki v National Police Service Commission & 2 others (Cause 15 of 2020) [2022] KEELRC 13232 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 15 OF 2020
CN BAARI, J
NOVEMBER 17, 2022**

BETWEEN

SIMON ORWARU ONDIEKI CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The claimant lodged this claim *vide* a memorandum of claim dated February 10, 2020, and filed on February 14, 2020. His claim is for the award of the following reliefs:
 - a. A declaration that the decision by the 1st respondents to terminate his employment was procedurally unfair and substantively unjustified.
 - b. A declaration that his termination was wrongful, unfair and unlawful.
 - c. An order for payment of one (1) month's salary at Kshs 117,630.00 *in lieu of* notice
 - d. An order for payment of 12 month's salary at Kshs 1,411,560.00 as compensation for wrongful and unfair termination.
 - e. Interest on (c) and (d) above at the court's rates from the date of termination until payment in full.
 - f. Damages for wrongful, unfair and unlawful termination.
 - g. Damages for diminished employability.
 - h. Costs of this suit; and



- i. Any other orders that the court may find fit to grant in the interests of justice.
2. The Office of the Attorney General entered appearance for the respondents on June 18, 2020, and further lodged a notice of preliminary objection dated July 27, 2020, seeking to strike out the suit on the basis that it is statute barred.
3. A response to the claim was filed on February 11, 2021, together with a witness statement and a bundle of documents in support of the respondents' case.
4. The case was heard on January 25, 2022, when the claimant testified in support of his case. He adopted his witness statement and produced the documents filled in support of his case.
5. The respondents' case was heard on July 5, 2022, where the respondents presented one Moses Mutisya, a Senior Police Superintendent to testify in their defence. He adopted his witness statement and produced documents filed in the matter.
6. Submissions were filed for all the parties.

The Claimant's Case

7. The claimant's case is that he was in the employment of the 1st respondent having been enlisted in the force on July 4, 1981, as a recruit constable, and rose through the ranks to the position of acting inspector of police earning a monthly salary of Kshs 117,630.00 until his termination on October 27, 2003.
8. It is his case that for the entire period that he was in the service of the 1st respondent, he carried out his duties professionally and diligently and to the satisfaction of his superiors, and has in fact received accolades for his good performance and has never at any one time been sanctioned for unsatisfactory performance.
9. The claimant states that on or about September 6, 2003, he was deployed as the supervisor of traffic patrol on block iii within the Nairobi Business District which comprised of Tom Mboya Street, Accra Road, Rive Road, Luthuli Avenue, Kencom Stage, Citi Hall Way, Mama Ngina Street, Kenyatta Avenue and all the adjacent areas, when a video was taken along Tom Mboya Street/Accra junction showing traffic officers harassing and soliciting bribes from motorists.
10. The claimant further states that he was not among the traffic officers captured on the video clip harassing and taking bribes from motorists, and in fact, did not see or witness any of the traffic officers under his supervision interacting or taking bribes from motorists as he was patrolling an expansive area.
11. The claimant states that subsequently, on or about October 10, 2003 he was marched to orderly room before Presiding Officer, the D/OCPD Kilimani, one Mr Solomon Makau SP, to answer to charges of idleness and negligence in the performance of duty contrary To Regulation 392(4) of the Police Regulations and being guilty of an act to the prejudice of good order and discipline contrary to regulation 3(41) of the Police Regulations.
12. The claimant avers that both charges and particulars were read to him and he pleaded not guilty on both counts. The claimant further states that the orderly room was conducted and two prosecution witnesses called to give their testimony, which testimony in no way implicated him.
13. The claimant further states that during the orderly room proceedings, he was not accorded the chance to call witnesses to testify on his behalf, thus he was not accorded a fair and just hearing as per the procedures laid down in the Force Standing Orders.



14. It is the claimant's case that on or about October 27, 2003, he received a letter dismissing him from the force.
15. The claimant states that he is aggrieved by the decision to terminate his employment owing to his exemplary performance and accolades received during his 22 years of employment at the National Police Service.
16. The claimant further states that his termination was illegal, unlawful, unfair and wrongful, as he is not guilty of any misconduct and was not accorded a fair and just hearing before the termination.
17. The claimant states that on or about October 28, 2003, he appealed to the Public Service Commission against his dismissal from the National Police Service, but to date his appeal has not been conclusively heard and determined despite numerous follow up letters.
18. The claimant states that lack of action from the Commissioner and the Public Complaints commission forced him to turn to the Office of the Ombudsman for assistance on the hearing of his appeal, which culminated in a letter to the Public Service Commission on September 20, 2017 on the appeal.
19. The claimant states that the secretary of the Public Service Commission responded to the aforementioned letter stating that whereas the Commission had received the Claimant's Appeal, the Commissioner of Police did not forward the claimant's personal files, hence his appeal was not determined.
20. It is the claimant's further case that he has suffered and continues to suffer financially and mentally due to the unfair treatment by the respondents, and prays for the award of the relief listed in his statement of claim.

The Respondents' Case

21. The respondents' case is that the claimant was enlisted into the police service as a Police Constable on the July 4, 1981, and that by accepting the letter of appointment the claimant was to be bound by the terms of service and all laws, regulations and orders promulgated from time to time affecting the service.
22. It is the respondents' case that at the time of the claimant's dismissal he had accumulated a total of three disciplinary offences. It is the respondents' further case that it is not true that the claimant has never been sanctioned for unsatisfactory behaviour.
23. The respondents state that on September 3, 2003, an anonymous complaint was sent to Kenya Anti-Corruption Commission alleging that police officers were taking bribes from matatu operators along Tom Mboya/Accra Road junction.
24. The respondents further state that on September 6, 2003, Inspector John Muturi from Kenya Anti-Corruption Commission intelligence section was tasked to conduct investigations on the complaint, following which he conducted surveillance of the area, and took videos and photographs of police officers harassing matatu drivers at the watch of the claimant, who was present but did not stop the illegal activities of his officers as was required of him.
25. It is the respondents' case that on September 6, 2003, it was established that while assigned duties of the in-charge patrol covering Kencom Stage, Mama Ngina Street and Tom Mboya/Accra Road junction and the adjacent areas, the claimant neglected his duties and left junior officers without supervision which lead to them harassing and soliciting bribes from matatu operators.



27. The respondents state that it was also established that the claimant failed to take administrative action against No 2xxx0 PC Cyrus Ndegwa police rider who had left his place of duty and was harassing matatu operators along Tom Mboya Street.
28. The respondents state that upon conclusion of investigations, it was found that there was sufficient evidence to take administrative action against the claimant, and that he was notified of the intended orderly room proceedings by being served with a waiver notice before being charged.
29. It is the respondents' case that on October 10, 2003, the claimant was charged in Orderly Room Proceedings with two counts, one of the charges was being idle and negligent in performance of duty contrary to regulations 3(24) of the Police Regulation.
30. The respondents state that the charges were read to the claimant in English, a language he understood, and he pleaded not guilty to both counts, following which, full proceedings were conducted with two prosecution witnesses testifying, including Inspector John Maturi who conducted investigations on the harassment of matatu operators at the watch of the claimant.
31. The respondents state that the claimant was afforded the opportunity to cross-examine witness, which he did as evidenced by the proceedings.
32. The respondents state that at the end of the prosecution's case, the presiding officer found that the evidence adduced was adequate to place the claimant on his defence. The respondents further state that the claimant opted to testify on his own defence and was cross-examined by the presiding officer.
33. The respondents state that at the close of the proceedings the claimant was found guilty and convicted accordingly. It is the respondents' further case that proceedings were remitted to the Commissioner of Police for award of sentence and that the claimant was demoted to the rank of sergeant on the 1st count, and dismissed from service on the second count.
34. It is the respondents' case that the claimant was dismissed with effect from October 23, 2003, through a letter PF/CONF/40686/10/28, and was served with the notice of dismissal through the Provincial Police Officer. The respondents further aver that the claimant's dismissal took into account the offence committed, the gravity thereof, the seniority and length of service, his statements in mitigation and his record of service.
35. The respondents state that the claimant was informed of his right of appeal to the Public Service Commission, and that he lodged his appeal through the Commissioner of Police on October 28, 2003.
36. The respondents state that the claimant's appeal was first considered by the Kenya Police Headquarters Disciplinary Appeals Board on January 13, 2006, which appeal was disallowed by the Commissioner of Police and the conviction upheld and the claimant informed of that decision on January 19, 2006.
37. It is the respondents' case that the claimant's appeal was forwarded to the Public Service Commission by the Office of the Commissioner of Police on December 16, 2008.
38. The respondents state that the Public Service Commission did not communicate the outcome of the claimant's appeal to the Commissioner of Police for purposes of informing the claimant and that the Kenya Police therefore did its part in conclusively handling the claimant's appeal as per the police procedures.
39. The respondents state that following the claimant's dismissal, which he is fully to blame on account of indiscipline, he is not entitled to reinstatement, any salary, and compensation from the respondents.



The Claimant's Submissions

40. It is submitted for the claimant that the respondent ought to have exhibited evidence not only of the waiver notice but also of service, and further submit that for having failed to do so, the respondents infringed on the claimant's right to prepare for the hearing.
41. The claimant submits that he was not accorded sufficient time to contact his witnesses, and for them to get the necessary clearance to be absent from their duty posts.
42. The claimant submits that the presiding officer ought to have analysed the evidence and given reasons for his decisions, which he did not. The claimant further submits that the presiding officer did not consider that the claimant was in charge of an expansive area nor the fact that the investigator did not see any money exchange hands, and neither did he call for the motorists to be availed to confirm the allegations.
43. The claimant submits that as per the evidence on record, he had a clean record and the punishment if any, should have been proportionate to the conduct while taking into account his exemplary service. He sought to rely on the holding of Justice Ongaya in *Antony Muritu Njoroge v Commissioner of Police* another for this proposition.
44. It is further submitted that the claimant has proved sufficiently that his dismissal was both procedurally unfair and substantively unjustified, and prays that judgment be entered for the claimant as prayed.

The Respondents' Submissions

45. It is submitted for the respondents that the defined period for a contractual claim is three years, and which has since lapsed as the claimant, in this case, was dismissed in October, 2003, from the Police Force. The respondents further submit that this suit was instituted on February 10, 2020, about sixteen (16) years later, hence, the proceedings in this suit would consequently amount to a nullity since the claim is time-barred and as such, this court lacks jurisdiction to hear and determine the same.
46. The respondents submits that the claimant's inaction to supervise the junior officers amounted to an offence that is subject to disciplinary action as per the Service Act, and regulations and therefore they had reasonable cause to institute the Orderly Room Proceedings.
47. The respondents further submit that due procedure was followed as the claimant was accorded a fair hearing and that his assertion that he was not given a chance to call witnesses to testify on his behalf, is an act to misguide the court on the conduct of the Orderly Room Proceedings.
48. It is submitted for the respondents that the claimant is not entitled to any of the orders sought for reasons that the termination was fair and justified, as his actions amounted to gross misconduct which was subject to disciplinary action as per the law.

Analysis and Determination

49. I have considered the pleadings herein, the witnesses' testimonies and the submissions by both parties. The issues that fall for determination are: -
 - i. Whether the suit is statute barred
 - ii. Whether the claimant was unfairly terminated
 - iii. Whether the claimant is entitled to the reliefs sought.



Whether the suit is statute barred

50. The respondents contend that the suit herein is time barred. When a cause of action is statute barred, a court has no jurisdiction to deal with the matter. On this premise, the court has to pause and first deal with the issue of jurisdiction stemming from the question of time limitation before addressing any other issues in the case, going by the now settled dicta that jurisdiction is everything and without which a court must down its tools.
51. The claimant's claim is premised on a contract of service, and which by law has a limited period within which one must lodge their claim. Section 90 of the *Employment Act*, 2007, states as follows:
- “Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, 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.”
52. From the provisions of section 90 of the *Employment Act*, a claim premised on an employment agreement or contract, should be instituted within three years upon the accrual of the cause of action. The claimant herein was however terminated in the year 2003, when the *Employment Act* was not in force, hence the cause of action could not have accrued under this law.
53. Section 4 (1) of the *Limitation of Actions Act* states: -
- “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;
-”
54. Further, section 3 (2) of the *Public Authorities Limitation Act*, provides that an action for a contract claim against the Government should be instituted within three years from the date on which the cause of action accrued.
55. In *Maria Machocho v Total (K)* Industrial Cause No 2 of 2012, Radido, J. expressed as follows:
- “Before the coming into operation of section 90 of the *Employment Act*, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in section 4(1) of the *Limitation of Actions Act*, and it was 6 years. Section 90 of the *Employment Act* has now amended the *Limitation of Actions Act* to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the *Employment Act*“
56. In the case of *Samson Leteipa Ole Kimongo v Inspector General, National Police Service & 2 others* [2022] eKLR, also cited by the respondents, Justice O. Makau opined: -
- “...The suit herein is against officers and an organ of the government of Kenya and therefore the petitioner ought to have commenced his suit within three years from February 25, 2002 when he was dismissal. The said period lapsed on February 24, 2005, but he filed the suit on June 4, 2021, more than 19 years from the date of the impugned dismissal. In the



circumstances, I find and hold that the suit is time barred by dint of section 3(2) of the PALA Act and it is therefore incompetent.”

57. The claimant herein was dismissed from the service of the respondents on October 23, 2003, while the instant suit was lodged on February 14, 2020, slightly over sixteen (16) years later. In *Gathoni v Kenya Co-operative Creameries Ltd* civil application No 122 of 1981, Potter, J. observed in obiter that;
- “The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
58. The claimant’s assertion is that he appealed against his dismissal to the Public Service Commission in the year 2008, but did not receive a response to his appeal until later in the year 2017. The issue then becomes whether the late determination of the claimant’s appeal affects the accrual of the cause of action.
59. The Court of Appeal in *Attorney General v Andrew Maina Gitinji & another* (2016) eKLR, held that once the employee received the termination letter, the termination took effect and the cause of action accrued, and that was the date time began to run.
60. Further, in Nrb industrial cause No 953 of 2010 *Benjamin Wachira Ndiithi v Public Service Commission & another* (2014) eKLR, it was held that the fact that an employee whose employment has been terminated seeks review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.
61. In the case of *Peris Maina v Nairobi City Water & Sewerage Company Limited* (2018) eKLR, Ongaya J stated as follows on when time starts to run in employment related disputes:
- “As submitted for the respondent, the administrative appeal proceedings did not postpone or adjourn the running of the time of limitation after the dismissal...”. This position was again affirmed in the case of *Hilarion Mwabolo v Kenya Commercial Bank* (2013) eKLR, where the court stated that:
- “... termination kicks in from the date stated in the termination letter...”
62. Again in *David Ngugi Waweru v Attorney General & another* (2017) eKLR, the Court of Appeal stated that the time of dismissal or termination is the time contained in the letter of termination/ dismissal and not the time of conclusion of internal disciplinary mechanisms.
63. Going by the foregoing decisions of the court and the laws cited, there is no doubt in my mind that the cause of action in the instant suit accrued on October 23, 2003. The suit having been filed in 2020, is ten years late by section 4(1) of the *Limitation of Actions Act* and thirteen years (13) late by section 3(2) of the *Public Authorities Limitations Act*. The suit is statute barred.
64. Proceeding to determine the other two issues is in my view, an academic exercise. The two thus fall by the way side.
65. I find and hold that this suit is statute barred, and the court lacks jurisdiction to entertain the same, and must now down its tools.
66. The suit is struck out in its entirety with no orders on costs.
67. Judgment accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
17TH DAY OF NOVEMBER, 2022.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Achieng present for the Claimant

N/A for the Respondents

Christine Omollo- C/A

