



REPUBLIC OF KENYA



KENYA LAW
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**Wafula v National Police Service Commission (Petition 1 of 2022)
[2022] KEELRC 13566 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13566 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION 1 OF 2022
DN NDERITU, J
DECEMBER 15, 2022
IN THE MATTER OF AN APPLICATION FOR
ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER
ARTICLES 19, 20, 21, 22, 23, 31, 47, 48, 49, & 50 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF AN APPLICATION BY:-

BETWEEN

JASPER NYONGESA WAFULA PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION RESPONDENT

RULING

I. Introduction

1. In a petition dated June 20, 2020 the petitioner prays for: -
 - a. An order compelling the respondent to reinstate the petitioner back to service.
 - b. A declaration that the orderly room proceedings held on March 6, 2004 that led to the petitioner's dismissal from the National Police Service violated the petitioner's constitutional right to a fair trial and that the petitioner's dismissal from the National Police Service was unconstitutional, unlawful, null and void.
 - c. A declaration that the orderly room proceedings held on March 6, 2004 and the subsequent criminal trial that proceeded against the petitioner was unlawful and in violation of section



12(iv) of the *Kenya Police standing orders*, section 62 of the *Police Act* and article 50 (2) (a) of the *Constitution*.

- d. An order directing the respondent to forthwith compensate the petitioner for lost employment benefits including unpaid salary, dues for all the years the petitioner has been out of unemployment at the National Police Service with interest at court rates.
 - e. General damages for violation of the petitioner's constitutional rights leading to the unlawful dismissal of the petitioner from service.
 - f. An order for costs of the petition.
 - g. Such other orders as this honourable court may deem fit to grant.
2. Originally, the petition had been filed in the High Court but the same was transferred to this court (ELRC) as it is the appropriate forum for matters employment and labour relations.
 3. On May 19, 2022 the respondent filed a notice of preliminary objection (PO) dated February 28, 2022 raising the following issues for preliminary determination by this court, before the petition is certified ready for hearing: -
 1. That the suit herein is time barred.
 2. That the commission has no mandate to reopen disciplinary matters concluded before its inception.
 3. That the petitioner has not demonstrated how his constitutional rights have been infringed by the respondent.
 4. That this suit is frivolous, vexatious, bad in law and an abuse of court process.
 5. That the suit herein is brought in bad faith and should be dismissed with costs to the respondent.
 4. On May 18, 2022 when the matter came up in court for directions, Miss Moenga appeared for the petitioner and Miss Rwenji for the respondent. The court directed that the PO be heard first, before any other business in the matter, and that the same be heard by way of written submissions.
 5. Counsel for the respondent filed her written submissions on May 19, 2022 and counsel for the petitioner on May 30, 2022.

II. Submissions by the respondent's counsel

6. The respondent admits that the petitioner was a police officer in the Kenya Police enlisted from 1987. It is submitted that in March, 2004 the petitioner was involved in what the employer, the Kenya Police, considered to be gross violation of the code of conduct and as such the petitioner was subjected to disciplinary process by way of orderly room proceedings. It is submitted that the petitioner was convicted in the orderly room proceedings and dismissed from the service with effect from March 16, 2004.
7. While the orderly room proceedings were going on, the petitioner was also facing criminal charges arising from the same incident that gave rise to orderly room proceedings. However, the petitioner was acquitted of the criminal charges in October, 2007.



8. The petitioner appealed for reversal of the findings in the orderly room proceedings to the commissioner of police, as that was the procedure applicable then, but the appeal was dismissed in March, 2004.
9. Counsel argues that after the appeal to the commissioner of police in 2004 the petitioner had a right to exercise his rights to approach a court of law for an appropriate remedy as he deemed fit. Likewise, the petitioner had a right to approach a court of law for an appropriate remedy after he was acquitted of the criminal charges in 2007.
10. Counsel has submitted that it is indolent, unlawful, and an abuse of the court process for the petitioner to wait for over 16 years to come to court over a matter that is clearly and evidently time barred. In any event, counsel further submits, the respondent did not exist when the constitutional and legal breaches or violations complained of by the petitioner were allegedly committed.
11. Counsel submits that the law on limitation applicable to the complaints by the petitioner is section 4 of the [Limitation of Actions Act](#) and that the petitioner ought to have filed his claim in court within six (6) years from the date when the action arose as the claim is based on a contract of service. Counsel has cited [Johnson Ogechi Mose v National Police Service Commission](#) (2017) eKLR, [Daniel Kago Gachanja v Inspector General of Police & 2 Others](#) (2020) eKLR, and [John Miriti Mbarire v Attorney General](#) (2014) eKLR in support of that proposition.
12. Counsel further submits that the remedy of reinstatement is not available to the petitioner as the same may only be awarded within three (3) years of dismissal or termination under section 12 of the [Employment and Labour Relations Court Act](#).
13. Counsel submits that the disciplinary process carried and executed in the orderly room proceedings against the petitioner were procedural and lawful and even the appeal to the commissioner of police was properly filed. However, Counsel submits that after the appeal was dismissed the petitioner had the right to file court proceedings within the timelines set by the law. It is submitted that after failing to exercise his legal options within the law of limitation, the petitioner cannot now find a new combatant in the form of the respondent, a stranger to the matter, and expect this court to find in his favour long after the limited time of six (6) years has expired.
14. It is submitted that it would be unlawful and unconstitutional for the respondent to reopen a matter that was lawfully and procedurally dealt with by the commissioner of police who had jurisdiction over the matter then. Counsel passionately argues that this matter is time barred and that disguising a belated employment claim as a constitutional petition cannot redeem the situation as this petition is clearly an abuse of the court process.
15. Counsel submits that this petition does not muster the threshold of a proper constitutional petition as set out in [Godfrey Paul Okutoyi v Habil Olaka](#) (2018) eKLR, [Anarita Karimi Njeru v Republic](#) (No 1) (1979) KLR 154, and [Mumo Matemu v Trusted Society of Human Rights Alliance](#) (2014) eKLR.
16. Counsel concludes that this petition is a classic example of abuse of court process as the same is opportunistic, filed in bad faith, time barred, frivolous, and vexatious. This court is urged to dismiss this petition for the foregoing reasons.

III. Submissions by the petitioner's counsel

17. Counsel for the petitioner has argued that constitutional petitions cannot be time barred. Counsel has cited [Eliud Wafwafwa Luucho & 3 Others v Attorney General](#) (2017) eKLR and [Pascal Barasa Olaimo & 75 Others v Attorney General](#) (2019) eKLR to lay emphasis on that point.



18. Counsel has submitted that article 47 of the Constitution grants the petitioner a right to fair administrative action and that the orderly room proceedings denied the petitioner that right considering that he was acquitted of the criminal charges that were based on the same alleged misconduct.
19. Counsel further submits that the respondent has been properly joined in this petition as a successor to the duties and obligations that had been bestowed upon the then Kenya Police. Counsel has cited article 262 of the Constitution and sixth schedule, part six, section 31.
20. In conclusion counsel argues that the petition herein has merit and prays that the PO be dismissed with costs.

IV. Issues for determination

21. This court has carefully gone through the petition along with all the other materials filed along with it, the notice of the PO, and the submissions by counsel for both parties as summarized above. The following issues commend themselves to this court for determination: -
 - a. Is this petition time barred?
 - b. Does this petition muster the threshold of a constitutional petition?
 - c. Costs

V. Limitation of time

22. I will deliberately begin with the issue of limitation because if the answer to the first issue comes out in the affirmative, that finding shall dispose of the matter and it would then be academic to deal with the second issue. In any event, in the opinion of this court, the second issue may require a full hearing for the same to be determined.
23. Section 12(3)(vii) of the Employment and Labour Relations Act provides that this court may grant “an order of reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law.” The necessary implication of this provision is that any person seeking an order of reinstatement shall file and have a cause concluded within three years from the date of dismissal or termination.
24. Section 90 of the Employment Act provides as follows: -

“Notwithstanding the provisions of section 4(1) of the Limitation 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(of) or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
25. Before the enactment of the Employment Act no 11 of 2007 which came into operation on June 2, 2008 the limitation of time in employment and labour relations was governed by the Limitation of Actions Act wherein an action based on a contract of service in employment could only be filed within six years from the date that the action arose. This means that any cause of action based on employment and labour relations or a contract thereof was to be filed within six years. From June 2, 2008 such action could only be filed within three years based on the provisions of section 90 of the Employment Act as cited above.



26. What the petitioner is complaining of is a dismissal that was effected by Kenya Police on March 6, 2004. There is no explanation whatsoever on why the petitioner failed to file his claim within six years as provided for under the *Limitation of Actions Act* as that was the law applicable at that time. The six years expired in 2010.
27. Even if this court was to be so gratuitous and assume that time started running after the petitioner was acquitted of the criminal charges on October 11, 2007 it is still clear that he ought to have filed his claim in court by 2013. No explanation whatsoever has been given as to why the petitioner failed to beat the deadline on limitation.
28. Counsel for the petitioner is of the opinion that there is no time limitation in matters constitutional petitions. This is a complete misinterpretation and misrepresentation of the law. If that were to be the law then each and every litigant who fails to act within time would craft his claim in such a way as to appear to be a constitutional petition and claim to be without time limitation. This would create a situation where the law on limitation would be rendered superfluous, irrelevant, and useless. Litigation would not come to an end and a state of litigation anarchy would reign.
29. The matter before court is a simple and straight forward matter of dismissal from employment that the petitioner considers to have been unfair. That is not a matter that would call for a constitutional petition. In fact, and in law, this petition amounts to a classic example of abuse of court process.
30. From the pleadings filed and the arguments advanced by counsel, the petitioner has no explanation as to why he did not file his claim within six years of the dismissal. This court has no powers or jurisdiction to enlarge or extend that limited period and in any event no application was filed for such request before this petition was filed. In this regard this court is in concurrence with the decision in *Johnstone Ogechi Mose v National Police Service Commission (supra)* and *John Miriti Mbarire v Attorney General (supra)*.
31. This petition is distinguishable from *Pascal Barasa Olaimo & 75 Others v Attorney General (supra)* in that in this case the petitioners clearly explained the circumstances under which they delayed filing their claim. In any event, their claim, unlike this petition, was based on gross violation of their constitutional rights under the “Nyayo” regime.
32. Even if there were any constitutional issues for determination in the petition, which is not the case, this court holds the view that the delay in filing this petition has been inordinate, unreasonable, and without any explanation. That delay is inexcusable.
33. This court disagrees with counsel for the petitioner that there is no time limitation in constitutional petitions. The learned judge in *Pascal Barasa Olaimo* case (*supra*) had this to say about cases alleging constitutional rights violations before the promulgation of the new Constitution in 2010– “However, these reasons shall at some point cease to carry any reasonable weight because since the promulgation of the 2010 constitution, the circumstances in Kenya have largely shifted in favour of enlarging space for ventilation of any past and present violation of human rights and fundamental freedoms such that it is no longer tenable for any aggrieved person to wait longer than necessary to file their cases. These prolonged delays degrade the ability of the state to get witnesses and provide records in defence when the cases are filed so much late in the hour to their loss and prejudice.”
34. The alleged violations in this petition took place in 2004 (over 18 years ago) and the office that initiated and carried out the orderly room proceedings, that of the commissioner of police, has since been abolished and replaced with that of the inspector general of police. The Kenya Police Force has since been renamed National Police Service and many other constitutional and statutory changes have occurred in those offices and institutions. There is now the National Police Service Commission which did not exist in 2004 and which deals with human capital issues within the National Police Service.



35. It would be highly prejudicial and unreasonable to expect the respondent herein to defend a matter in which it did not participate and which was handled and finalized before it existed. It is important to note that the respondent was not created to replace the Kenya Police Force. The National Police Service is the outfit that replaced the Kenya Police Force.
36. In the circumstances, the transition clauses in the Constitution do not apply in this matter as the petition is clearly a fishing expedition by the petitioner in total violation and abuse of the court process. The foremost sacred duty of this court is to do justice at all times to all those who come before it. It would amount to gross injustice to the respondent if this petition was allowed to proceed beyond this point.
37. The PO by the respondent is well taken and meets the description of a proper PO as set out in *Mukhisa Biscuits Co Limited v East End Distributors Ltd* (1969) EA 696.
38. Without the necessity of dealing with the other issues raised in the PO this one issue on time limitation disposes the petition as this court returns that this petition was filed out of time and the same was filed to beat the time deadline set under the Limitation of Actions Act and the Employment Act as cited elsewhere in this ruling.
39. For all the foregoing reasons the petition is struck out with no order as to costs.

VII. Disposal

40. This court issues the following orders –
 - a. The preliminary objection by the respondent is upheld and the petition is found to be time barred and an abuse of court process.
 - b. The Petition is accordingly struck out.
 - c. No order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF DECEMBER, 2022.

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DAVID NDERITU

JUDGE

