



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. 57 OF 2019

IN THE MATTER OF: ARTICLES 22(1) AND 23(1) OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 19, 20, 25, 27, 28, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 3(C), 4 AND 7 OF THE FAIR ADMINISTRATION ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT

BETWEEN

MUKHTAR SALAT MOHAMED.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

THE INSPECTOR GENERAL

NATIONAL POLICE SERVICE.....2ND RESPONDENT

THE DEPUTY INSPECTOR GENERAL

ADMINISTRATION POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The Petitioner seeks the following declarations in his Petition dated 28th February 2019 as against the Respondents:-

a. A declaration that the Respondents violated the constitutional rights of the Petitioner.

b. A declaration that the orderly proceedings dated 26th March 2012 leading to the Petitioner’s dismissal from the National Police Service by the letter dated 12th May 2012 were unconstitutional, null and void.

c. The Honorable Court do quash the orderly proceedings dated 26th May 2012 and the letter dismissing the Petitioner from the Kenya Police Service for being unconstitutional.

- d. An order directing the Respondents to reinstate the Petitioner to the National Police Service with no loss of rank, salary, pension and any other benefits accruing to him.
- e. An Order directing Respondents jointly and severally to pay the Petitioner damages equivalent to 3 million being damages suffered by the Petitioner upon his loans being rivalled by the banks upon his dismissal and subsequent listing on the CRB.
- f. The Respondent to pay Petitioner damages equivalent to 12 months' salary for unlawful termination (12 x 33,756=405,072/-)
- g. Payment of the Petitioner's salary and all other accruing benefits in arrears from the date of dismissal to the date of reinstatement.
- h. Interest above at Court rates.

2. The Petitioner averred that he was employed by the National Police Service as an Administrative Police on 8th November 1999. He averred that he was dismissed from employment on 12th May 2012 through a letter from the then District Commissioner Fafi District in Garissa after an allegation that he had assaulted a civilian with his firearm. The Petitioner averred that he was arrested on 25th January 2012 and charged in Court but acquitted by the said court on 25th April 2012. He averred that Orderly Proceedings were conducted against him in his absence on the same offences as those in the criminal case and whereat he was found guilty and recommended for dismissal. He avers that he wrote numerous letters to the 3rd Respondent seeking to have his matter reviewed by way of appeal but was never given the opportunity to defend himself. The Petitioner averred that the only response he received was from the Administrative Police asking him to pursue his case before them upon being vested with the mandate and authority to handle employment issues relating to the welfare of officers. He averred that after the functions of the 1st Respondent were operationalized on 3rd October 2012 his numerous appeals to the 1st Respondent thereafter between 2014 and 2018 did not receive any response nor indication that he would be heard. He asserts that his rights to fair administrative action, fair labour practice, right to access information and to be treated with dignity were violated contrary to Articles 47, 41, 351(1) and 28 of the Constitution of Kenya. The Petitioner averred that since he had worked for the Police Service for 11 years, he is yet to get a job after his unceremonious dismissal and that such cruelty should not have been meted upon him considering his dedicated service. The Petitioner averred that he has also suffered financial hardships as his loans were recalled by the bank and he was listed on CRB for defaulting on the payments.

3. The Petitioner avers that termination of his employment was unprocedural, ill-conceived, incompetent and unconstitutional because he was not given a fair hearing as per Article 50 of the Constitution. The Petitioner averred that this is because he was not notified in writing or otherwise of the impending charges against him and was not provided with sufficient details or evidence to respond appropriately for the hearing contrary to Article 50(2)(b) of the Constitution. The Petitioner averred that he was also not informed of his right to be assisted in his defence by a police officer contrary to the provisions of the Forces Standing Order and Article 50(2)(g). The Petitioner averred that he was neither informed in advance of the evidence the Respondents intended to rely on nor allowed any access to the said evidence contrary to Article 50(2)(j). The Petitioner averred that the 2nd and 3rd Respondents proceeded to convict him in unprocedural Orderly Proceedings as the matter in question was already *sub judice* in the criminal proceedings before the Chief Magistrates court. He avers that even after his dismissal, the 2nd and 3rd Respondents did not avail to him certified proceedings to enable him prepare for his appeal against the dismissal. The Petitioner averred that the decision to summarily dismiss him from service was irregular, unlawful and contrary to law in that the 1st Respondent was not involved in his dismissal contrary to Article 246(3)(b) of the Constitution and Section 10(1)(a) of the National Police Service Commission Act, 2011. He further avers that under Article 25(c) of the Constitution, the right to fair trial may not be limited. That this Court is vested with jurisdiction to assess such attempt of violation of the Bill of Rights and to apply any relevant provisions of the law to determine whether there is violation of fundamental rights and freedoms and to issue appropriate orders accordingly. The Petitioner prays that the Petition be allowed in its entirety and the remedies set out in the prayers be granted.

4. In his Supporting Affidavit, the Petitioner avers that he earned a gross salary of Kshs 33,756/- and annexes a copy of his payslip as proof. He also annexes in his affidavit, certified copies of court proceedings, copies of the orderly proceedings and letters he wrote in his bid to appeal against the decision to dismiss him from service. He asserts that as can be shown in annexed copies of monthly divisional returns, he was present and on interdiction throughout the period it is alleged he deserted duty.

5. In response, the 1st Respondent filed a Replying Affidavit sworn on 17th July 2019 by its CEO, Joseph Vincent Onyango who avers that it is evident from the pleadings that the Petitioner was dismissed from the service with effect from 24th April 2012, which was before the establishment and operationalization of the Commission. That prior to establishment of the Commission, disciplinary matters and subsequent appeals were the preserve of the Commissioner of Police and the Public Service Commission. He further avers that when the 1st Respondent got seized of the matter on 21st February 2014 after the Petitioner served it with a new appeal against dismissal, it wrote to the Service in a letter dated 9th September 2014 seeking an update and information regarding the appeal. He asserts that the Commission later wrote a reminder to the Service on the same matter in its letter dated 24th February 2016 and further subsequent reminders to enable it deliberate and bring the matter to a conclusion. He further avers that in a letter dated 27th May 2019, the Service while forwarding instructions to enable them respond to the Petition herein, affirmed that the Petitioner's appeal had already been heard and dismissed for being meritless. He avers that the Petition against the 1st Respondent is therefore baseless since the Commission cannot assume jurisdiction on disciplinary matters that were heard and fully determined prior to its establishment and operationalization. Further, that the Petitioner has filed this suit with the sole aim of circumventing the limitation period since there is no proven fact or evidence of any constitutional violation to warrant the filing of a constitutional petition. That the 1st Respondent urges the Honourable Court to thus find and hold that no violation either by way of commission or omission was committed by the 1st Respondent, the issues having commenced and lawfully concluded before its establishment. He avers that the Commission's contention is that the suit is misconceived, misinformed, bad in law and an abuse of the court process and should be dismissed with costs to the Respondents.

6. The Petition was dispensed by way of written submissions. The Petitioner's submissions were to the effect that the Petition is premised on the non-derogable right enshrined under Article 22(1) of the Constitution of Kenya which gives every citizen the right to approach any court in this country when their right has been violated or is about to be violated by any individual or state organ. That he correctly apprehended

that his termination was out of malice since his employer charged him in court for trumped up charges and when the same was withdrawn, the Respondent had already done a parallel disciplinary process to terminate him. It is the Petitioner's submission that since the employment relationship in the present matter was established in 1999 before the enactment of the Employment Act 2007, Section 90 of the Employment Act on the limitation of filing claims cannot apply retrospectively. That the period of 6 years also set under Section 4 of the Limitation of Actions Act on filing of actions in contract also lapsed but that the Constitution has given reprieve to victims whose rights under the Constitution have been violated. Further, that the Petition herein does not arise out of an employment contract and cannot be construed or deemed to be synonymous with a cause of action for breach of an employment contract. That this Court ought to find that this matter is founded on a violation of the Petitioner's rights as enshrined in the Constitution and has no limitation period. The Petitioner cites the case of **Joan Akinyi Kabasellah & 2 Others v Attorney General [2014] eKLR, Petition No 41 of 2014** in support of this submission. He submits that it is evident he was keen to comply with the need to exhaust internal remedies existing within the Police Force even though there was a clear disconnect in terms of transition between the Administration Police and the National Police Service Commission. That the confusion in terms of jurisdiction and transfer of functions also largely contributed in delaying his matter because as he followed up with the Administration Police unit, he would be told that such functions were in the purview of the 1st Respondent and which would take him back to square one. That it is clear he did not have a trial before a competent tribunal nor was he subjected to the procedure laid out at Section 10 of the National Police Service Act which empowers the 2nd Respondent to issue administrative orders (Force Standing Orders) in line with the Constitution. The Petitioner cites the case of **Joseph Migere Onoo v Attorney General [2015] eKLR, Petition No. 424 of 2013** where the Court stated that a court must always consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence. Further, that the Court of Appeal in **Wellington Nzioka Kioko v Attorney General [2018] eKLR, Civil Appeal 268 of 2018** cited with approval the case of **James Kanyिता Nderitu v Attorney General & Another [2012] eKLR, Petition No. 180 of 2011** and affirmed that even though there is no limitation period for filing constitutional petitions, the same must not be filed without promptitude and the petitioner must provide plausible reasons for not filing it earlier in the day. The Petitioner submits that the declaration by the Court of Appeal strengthens his argument that had it not been for the Respondents frustrating him and making him believe he was going to get an opportunity to defend himself, he would not have waited for 6 years before filing a petition. The Petitioner submits that he has duly outlined to this Court and presented documentary evidence showing how his rights and fundamental freedoms were violated by the Respondents in this matter and that he should thus be compensated for the loss he has incurred at the hands of the Respondents. Further, that Article 23 enumerates to this Court the appropriate reliefs it can grant including a declaration of rights of injunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom not justified under Article 24, compensation and an order of judicial review. The Petitioner submits that this court therefore has jurisdiction to quash the dismissal letter for violating his right; order for his compensation; and can equally bring into this court for purposes of quashing, the offending orderly proceedings. He relies on the reasoning by Lady Justice Wilfrida Onkwany in the case of **Reuben Njuguna Gachukia & Another v Inspector General of the National Police Service & 4 Others [2019] eKLR, Constitutional Petition No. 436 of 2017** on what amounts to fair or appropriate compensation or relief. He further submits that the Privy Council in the famous case of **Siewchand Ramanoop v The AG of Trinidad & Tobago, PC Appeal No. 13 of 2004** held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. That judicial experience and philosophy show that the award of damages for constitutional violations is a public law remedy within the discretion of a trial court, but which discretion is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. The Petitioner submits that it is not enough for the Respondents to simply claim limitation of actions and not address the salient issues raised in the Petition.

7. The 2nd, 3rd and 4th Respondents' submitted that the Petitioner's right to bring a claim against them is extinguished under the statutes governing the times within which employment claims must be filed considering his employment was terminated on 12th May 2012. That equity aids the vigilant not the indolent and since the Petitioner filed the instant Petition 7 years after termination of his employment contract, the Petition is therefore time-barred. They rely on the decision in **Benjamin Wachira Ndiithi v Public Service Commission & Another [2014] eKLR Cause No. 953 of 2010** that elevation of a dispute into a constitutional petition does not jettison the statutes of limitation governing the contractual dispute at the core. The Respondents also cite the Court of Appeal decision in **Divecon Limited v. Samani [Civil Appeal Number 142 of 1997]** to buttress the point that statutes of time limitation are in the nature of jurisdictional law, rather than procedural law. They urge the Court to decline jurisdiction. They further submit that the Petitioner slept on his right for an inordinately long time and as such, the instant Petition should fail with costs to the 2nd, 3rd and 4th Respondents. That the Court should note the Petitioner was not barred from safeguarding his employment rights before the Honourable Court even as he pursued other avenues to air his grievances. It is their submission that the actions of the Petitioner amounted to fundamental breach of his contract of service. That it is undisputable that the Petitioner's acquittal in the said Criminal Case No. 138 of 2012 was as a result of withdrawal by the Complainant in the subject criminal case on 25th April 2012 after choosing to forgive the Petitioner, and not because the Petitioner was found innocent or the case proved beyond reasonable doubt. That an employer is not barred from instituting disciplinary proceedings on an employee even though the matter had previously been considered in court and an acquittal issued. This was the position in **Geoffrey Kiragu Njogu vs. the Public Service Commission [2014] eKLR, Civil Appeal No. 57 of 2014** where it was further stated that an acquittal of an employee's criminal charges does not settle issues of misconduct if any, against such an employee. The 2nd, 3rd and 4th Respondents submit that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. That the court in **Attorney General v Andrew Maina Githinji & Another [2016] eKLR, Civil Appeal No. 21 of 2015** stated that while an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair. That moreover, the Petitioner is a habitual offender having earlier been convicted on 3 counts namely: being absent without permission for 17 days; sending threatening messages to one Sgt. Omar and area District Officer; and reporting on duty at another station without being officially transferred. They submit that the termination of the Petitioner's employment was fair, lawful and justifiable. That the Petitioner is not entitled to any prayers sought in the instant Petition as the Petition is not well seized before the Honourable Court, does not disclose any constitutional issue and no rights of the Petitioner have been violated by the Respondents.

8. The Petitioner seeks relief before this Court asserting that his Constitutional rights were infringed by the Respondents. He asserts that his right to fair administrative action was impaired as was his right to be heard before a competent tribunal. He asserts that his dismissal from service was without basis. The Respondents counter this by asserting that the matter was between the Petitioner and the predecessor of the 1st, 2nd and 3rd Respondents and is filed 7 years too late. Termination of employment was on 12th May 2012. The fact that the Petition was filed 7 years later suggests that the Petitioner was, despite there being adequate opportunity for him to move Court a bit casual in his approach. The actions he complains of were allegedly performed by bodies and offices that no longer exist having been swept away post 2010 Constitution. I am in agreement with Ndolo J. in the case of **Benjamin Wachira Ndiithi v Public Service Commission & Another (supra)** that elevation of a dispute into a constitutional petition does not jettison the statutes of limitation governing the contractual dispute at

the core. Before he moved this Court the Petitioner must have been alive to the provisions governing his conduct and as such the alleged infringement of his rights did not occur outside the scope of his employment with the National Police Service. I am persuaded that the Petition was crafted to attempt to circumvent the provisions of the law on limitation. I find no merit in the Petition which is hereby dismissed with costs to the 2nd, 3rd and 4th Respondents.

It is so ordered.

Dated and delivered at Nairobi this 16th day of March 2021

Nzioki wa Makau

JUDGE