



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

PETITION NO.E2 OF 2020

LUCY CHEPKEMOI.....PETITIONER

-VERSUS-

SOTIK TEA COMPANY LIMITED.....RESPONDENT

RULING

1. The Petitioner herein filed this Petition on the 27th November, 2020 seeking to assert her constitutional right which had been purportedly breached by the Respondent who discriminated her and dismissed her from employment due to her disability (lost eyesight) which she lost while working for the Respondent.

2. The Petitioner stated that she was employed by the Respondent on the 5th April, 2006 as a secretary earning a monthly salary of Kshs. 13,000/- and worked for the Respondent till July, 2014 when she fell ill and was diagnosed with eye complication and unfortunately in 2016 she lost her eyesight.

3. She stated that she enrolled at the Kenya Institute of Special Education in 2017 to learn how to cope and was registered as a person living with disability by registration number NCPWD/P/331516 however on 9th March, 2017 the Respondent issued her with a notice of intended termination of employment on medical grounds.

4. She stated that she sought for protection against the eminent termination from the national Council for persons living with disability however on 19th May, 2017 the Respondent actualized its threats and dismissed her from employment.

5. The Respondent entered Appearance on the 10th February, 2021 and filed a Preliminary Objection on the 16th March, 2021 based on the following grounds:-

1) That the employment and labour Relations Court has no jurisdiction to hear and determine the suit and or make any of the orders prayed for in the Petition as the same are statute barred by dint of section 90 of the employment Act 2007 No. 11 of 2007.

2) The claimant whose right to institute proceedings for alleged unfair and or wrongful termination having lapsed on 19th May, 2020 lacks capacity to agitate any cause against the Respondent.

6. This Ruling is therefore in respect of the Preliminary Objection raised by the Respondent which Court found is necessary to decide first since it touches on its jurisdiction.

7. The parties agreed to dispose of the Preliminary Objection by way of written submissions with the Respondent filing on the 29th June, 2021 and the Petitioner on the 28th June 2021.

Respondent's Submissions.

8. It was submitted on behalf of the Respondent that the Petitioner has failed to plead with precision which rights he enjoys under the constitution of Kenya and how the said rights have been violated by the Respondent as was held in **Kenya pharmaceuticals associations and another –v- Nairobi City County and 46 other county governments and another [2017] eklr.**

9. He argued that a reading of the petition does not reveal which specific actions of the Respondent were illegal and extent of the violation of

the Petitioner constitutional rights, rather that the petitioner has merely listed articles of Constitution without proving particulars in support of the allegations.

10. It was submitted that the petitioner in a bid to avoid being caught by the doctrine of laches converted her claim to a petitioner instead of an ordinary claim that it ought to be.

11. The Respondent submitted that the Petitioner filed this claim over 3 years required under section 90 of the Employment Act and time within which employment claims ought to be filed and prayed that the same be dismissed as was done in the case of **Attorney General and another –v- Andrew Naina Githinji and another [2016] eklr.**

12. He argued that the termination of the Petitioners employment was done on the 19th May, 2017 and the latest the Petitioner ought to have filed this claim was the 20th May, 2020 however the Petitioner filed it on 27th November, 2020 , 6 months after the time limit therefore argued that the cause was filed out of time without leave and the same ought to be dismissed as the court lacks jurisdiction to hear it and cited the Court of Appeal case of **G4S Security Service (K) Limited –v- Joseph Kamau and 468 others [2018] eklr.**

13. He also submitted that the issue of limitation of time is not a procedural technicality that can be cured by Article 159 of the Constitution and neither can the court extend the time of limitation for filing suit out of the statutory 3 years as this Court is not clothed with such jurisdiction to extend time to file these suits and cited the case of **Denis Sang -V- Kenya Commercial Bank Limited [2016] eklr.**

14. He thus prayed for this Court to dismiss the claim.

Petitioner's Submissions.

15. The petitioner submitted from the onset that this Court has immense jurisdiction to deal with enforcement of right of person which were violated in the cause of employment and cited the case of **Chimweli Jangaa Mangale & 3 others –v- Hamisis Mohamed Mwasasa & 15 others [2016] eklr.**

16. The Petitioner accordingly submitted that the current case is a claim brought about due to violation of the Petitioners rights which the law does not provide for limitation of time within which such a petition can be filed. He reinforced his arguments by citing the case of **wachira Waheire –v attorney General (OS) [2010] EKLK** and the case of **James Kanyiiya Nderitu –v- Attorney General and another, Nairobi Petition No. 180 of 2010(UR) .**

17. The Petitioner submitted that the delay in filing the petition herein was contributed by the outbreak of Covid 19 and the closure of Court. She thus prayed for the Preliminary Objection to be dismissed and the suit be heard and determined on merit.

18. I have examined the averments of the parties herein. The preliminary objection raised herein relates to this court's jurisdiction to deal with this petition.

19. The respondents have submitted that this court has no jurisdiction to deal with this matter as the matter is time barred.

20. I note that this is a petition and not a cause filed by the petitioner. The petitioner filed this petition alleging infringement of her constitutional rights by the respondent who were her employers. From that point of view and in relation to Article 162 (2) of the Kenya Constitution 2010 and Section 12 of the Employment and Labour Relations Act, this court has jurisdiction to deal with any matter arising out of an employer-employee relationship.

21. As relates to the petition being time barred, in **Joan Akinyi Kaba Sella and 2 others versus AG Pet No. 41 of 2014** the learned Judge stated as follows;

*“Nonetheless, I take into account the view of the court with regard to limitation in respect of claims for enforcement of fundamental rights, in a line of cases such as **Dominic Arony Amollo Vs AG, Nairobi High Court Misc. Civil Cause No. 1184 of 2013 (OS) 2010 eklr Otieno Mak Anyango VS AG and another, NRB HCCC No. 845 of 2003 (unreported)** courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights*

*25 I note also the sentiments of the court in **James Kanyita VS AG & Another, NRB Petition No. 180 of 2011** that although there is no limitation period for filing proceedings, to enforce fundamental rights of freedom the court considering whether or not to grant relief under Section 84 of the constitution is entitled to consider whether there has been inordinate delay in lodging the claim.*

The court is obliged to consider whether justice will be served by permitting respondent whether an individual or state in any of the manifestation should be vexed by an otherwise stale claim”

22. In considering the above sentiments and in relation to the current petition the petitioner was dismissed on 9/3/2017. The petition was filed in 2020. I would not consider the time between March 2017 and 2020 to be inordinate delay in view of the fact that this is a constitutional petition.

23. I find the preliminary objection has no merit and I dismiss it and order this petition to proceed on merit before the Judge in Kericho.

24. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kirui for petitioner – present

Mumma holding brief Ms Opiyo for respondent – present

Court Assistant - Fred