



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. E3 OF 2020

JAMES ETYANG KARANI.....APPELLANT

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1st RESPONDENT

INSPECTOR GENERAL OF POLICE.....2nd RESPONDENT

HON ATTORNEY GENERAL.....3rd RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrates Court of Kenya at Kisumu

(the Hon Martha Agutu, SRM) given on the 27th day of November 2020

in KSM ELRC No. 428 of 2019)

JUDGMENT

1. James Etyang Karani (the Appellant) sued the Respondents before the Magistrates Court on 16 December 2019, alleging that the termination of his employment on 15 January 2008 was unfair and unlawful.
2. When served with the Statement of Claim, the Respondents filed a Notice of Preliminary Objection contending:
 - (i) THAT the suit is time-barred as it offends the mandatory provisions of the Limitation of Actions Act and or the Employment Act, 2007.
 - (ii) THAT the Court lacks jurisdiction to entertain the Claim as the Claimant's right to sue has lapsed.
 - (iii) The suit is an abuse of the court process.
3. The Preliminary Objection was canvassed through submissions, and in a Ruling delivered on 27 November 2020, the Magistrate held that the suit was time-barred.
4. The Appellant was dissatisfied, and after securing leave, he filed a Memorandum of Appeal contending that:
 - (i) The Learned Magistrate erred in both law and fact in failing to appreciate sufficiently or at all that the PO raised by the Respondents bore factual aspects calling for proof and was therefore not a true PO as envisaged under the law.
 - (ii) The Learned Magistrate misdirected herself in finding that the letter of dismissal (dated) 15th January 2008 was final, yet from the pleadings, it is clear that the Claimant filed for appeal against his dismissal to the Public Service Commission that was later transferred to the National Police Service Commission, whose outcome has not been communicated to the Claimant to date.
 - (iii) The Learned Magistrate erred in finding that the cause of action arose in 2008, yet the decision on the Claimant's appeal by the National Police Service Commission was made and allegedly communicated to him via a letter ref NPSC/1/28/VOL. I (106) dated 2nd February 2017.

(iv) The Learned Magistrate failed to appreciate the fact and the law that the course of action arose on 2nd February 2017, when the Respondents considered and rendered the decision on the appeal by the Claimant against his dismissal.

(v) The Learned Magistrate erred in law and, in fact in failing to appreciate that the Respondents had infringed the Claimant's fundamental right to fair labour relations, the right to fair administrative action and had further disregarded his legitimate expectation as enshrined under Article 47 of the Constitution of Kenya, the Commission on Administrative Actions Act, 2011 and the Fair Administrative Action Act (No. 4 of 2015).

(vi) On the basis of the law and the evidence led, the Learned Magistrate erred in allowing the Preliminary Objection, thereby dismissing the suit summarily.

5. Pursuant to directions by the Court, the Appellant filed his submissions on 8 June 2021, while the Respondents filed their submissions on 10 June 2021.

6. The Court has considered the Record of Appeal and the submissions.

Role of Court on first appeal

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court will keep in mind the edict on its role.

Whether Objection required fact-finding?

9. The Appellant contended that the Preliminary Objection did not meet the threshold as contemplated under *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* (1969) EA 696 because it called for the examination of disputed facts.

10. To buttress the argument, the Appellant submitted that under section 89(6) of the National Police Service Act, his dismissal could only take effect after approval and confirmation by the National Police Service Commission.

11. In the Appellant's view, the Court needed to establish as a fact whether the Commission had approved and confirmed his dismissal from service.

12. The section provides:

89(6) The sanctions under subsection (1)(c), (d), (e), (f) and (g) only take effect after approval and confirmation by the Commission.

13. The interpretation given to the provision by the Appellant appears to be correct, save that the National Police Service Act was enacted in 2011 while the Appellant had been dismissed on 15 January 2008.

14. The National Police Service Commission was not in existence in 2008, and the Appellant did not demonstrate that the Act had a retrospective application, and the Court, therefore, finds that the Act does not apply to his case.

15. The Commission could not approve and or confirm what had happened before its existence unless it was expressly mandated to do so.

16. The Magistrate did not fall into either error of law or fact in this respect.

When did the cause of action accrue?

17. It is not in dispute that the Appellant was dismissed through a letter dated 15 January 2008.

18. The Employment Act, 2007 had not commenced by that date.

19. Further, section 3(2)(b) of the Employment Act, 2007 ousts its application to the Kenya Police Service.

20. The Court finds reference to the Act misplaced.

21. On the question as to when a cause of action accrues, the Court of Appeal had this to say in *Attorney-General & Ar v Andrew Maina Githinji & Ar* (2015) eKLR:

I have considerable sympathy for the reasoning in all the above cases, which leads me to the conclusion that the cause of action, in this case, did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed

before them in the disciplinary proceedings, and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not.

22. In *David Ngugi Waweru v Attorney General & Ar* (2017) eKLR, the Court of Appeal stated:

We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court? Was it at the time he received the letter of dismissal on 29th April 2004 or at the time he received the letter converting the dismissal to termination in the public interest on 13th July 2006 or after the decision of the JR court on 17th June 2009? The answer, we think, is the 29th April 2004. For it bears no logic for a cause of action to accrue, and then, instead of proceeding to court, the aggrieved party pursues an appellate disciplinary process that would take him outside clearly stated statutory limitation periods. The detour to the JR Court was a calculated risk.

23. From the foregoing, it is this Court's view that an appeal or an internal disciplinary process does not stop time from running unless there is estoppel from the employer within the context of section 39 of the Limitation of Actions Act.

24. The Court, therefore, concludes that the Magistrate did not fall in error, either of law or fact, in finding that the cause of action was statute-barred.

25. The Appeal is dismissed with no order on costs.

26. The Court regrets that it could not deliver the Judgment as earlier scheduled due to other official engagements.

Delivered through Microsoft teams, dated and signed in Kisumu on this 25th day of November 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Oundo Muriuki & Co. Advocates

For Respondents Ms Grace Essendi, Senior Litigation Counsel, Office of the Attorney General

Court Assistant Chrispo Aura