



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 119 OF 2018

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 32, 41(1), 47, 50(1), 159, 162, 146 AND 258 OF THE
CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTIONS 70, 72, 74, 77, 81, 82 AND 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT, 2011

AND

**IN THE MATTER OF THE POLICE ACT (CAP 84, LAWS OF KENYA) AND THE KENYA POLICE FORCE STANDING
ORDERS (REVISED 2009)**

BETWEEN

SIMON TITUS YANDI.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE

COMMISSION.....1st RESPONDENT

HON ATTORNEY GENERAL.....2nd RESPONDENT

RULING

1. Simon Titus Yandi (Petitioner) was enlisted into the Kenya Police Service on 5 February 1988 as a Police Constable and was deployed to the Jomo Kenyatta International Airport.
2. Around 2007, the Petitioner was transferred to Kerugoya Police station within Central Province.
3. Sometime in 2009, the Petitioner was arrested at directions of the then Provincial Police Officer on allegations of being involved in a murder. He was later released.
4. On 11 February 2009, the Petitioner was served with a Waiver Notice of Intended Orderly Room Proceedings and the alleged offence was stated as *guilty of an act, conduct, good order and discipline contrary to regulation 3 sub-regulation 47 of the Police Act*.
5. The Notice indicated that the Orderly Room Proceedings would take place at Kerugoya/Kianyaga Police Station on 12 February 2009 (the Petitioner contended that the proceedings did not take place).
6. On or around 25 February 2009, the Provincial Police Officer wrote to the Petitioner to notify him of dismissal from service.
7. The dismissal letter cites the ground for dismissal as a bad disciplinary record and the particulars given were deserting service while at Marsabit in 1997; robbery with violence in Thika in 1997; conviction for a corruption offence of soliciting for a bribe in 2008 and being an

accessory to murder dumping of dead body within Kianyaga Police Station in 2009 (the Prosecution authority recommended the murder related charge be dealt with departmentally).

8. The dismissal letter noted that the Petitioner had failed to attend the Orderly Room Proceedings and therefore the proceedings had taken place in absentia.

9. On 17 March 2009, the Petitioner issued a Statutory Notice under the Government Proceedings Act, to institute proceedings challenging the dismissal.

10. The Petitioner thereafter entered into communication with various agencies including the Kenya National Commission on Human Rights and the Independent Policing Oversight Authority before sending a demand letter to the National Police Service Commission (the 1st Respondent) on 18 May 2018.

11. The demand was followed with the instant Petition alleging violation of the rights to fair administrative action, fair hearing and denial of liberty (detention for 14 days).

12. When served, the Attorney General (2nd Respondent) filed a Notice of Preliminary Objection on 15 November 2018 contending that

1. THAT the suit is time-barred and offends the mandatory provisions of section 90 of the Employment Act, 2007.
2. THAT the suit offends the Limitation of Actions Act Cap 21 Laws of Kenya.
3. THAT the Claimant was dismissed on 25 February 2009.
4. THAT eight (8) years have elapsed since the cause of action took place.
5. THAT the suit is an abuse of the court process.
6. THAT the suit is incompetent and ought to be struck out with costs.

13. On 20 March 2019, the Court directed the parties to file and exchange submissions in respect to the Preliminary Objection.

14. The 2nd Respondent filed its submissions on 23 July 2019 while the Petitioner filed his submissions on 7 November 2019.

15. The Court has considered the record and the submissions.

16. The Petitioner was dismissed on 25 February 2009 but only filed the Petition on 30 October 2018, hence the challenge on limitation.

17. The 2nd Respondent submitted that limitation goes to jurisdiction (*Mary Osundwa v Nzoia Sugar Co Ltd* (2002) eKLR), and since the cause of action presented before Court was filed outside the limitation period set out in the Limitation of Actions Act and the Public Authorities Limitation Act, the Petition should be dismissed.

18. The Petitioner in defending the competency of the Petition, and relying on *Beatrice Wanjiru & 2 Ors v Attorney General* (2017) eKLR contended that the Petition raised serious questions on violation of fundamental rights and freedoms, and therefore limitation ought not to be determined as a Preliminary issue.

19. The Petitioner also urged that the preliminary objection raised did not meet the threshold of a true preliminary objection as set out in *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* (1969) EA 697.

Constitutional violations

20. The Petitioner urged that the Petition raised alleged violations of his Constitutional rights and freedoms and therefore the question of limitation did not arise.

21. The Supreme Court in *Benard Murage v Fine Serve Africa Ltd & 3 Ors* (2015) eKLR rendered itself in respect to constitutional disputes/litigation thus

Not each violation of the law must be raised before the High Court as a Constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.

22. To this Court, the dismissal of the Petitioner from service in 2009 was a dispute which squarely lay within the sphere of statutory law for the Police Service had and continues to have elaborate regulations governing discipline and removal from service, which regulations have not been challenged as being unconstitutional.

23. It appears to the Court, and the Court finds that the Petitioner approached the Court through the Petition route to avoid objections such as now under examination.

24. The cause of action was given the guise of Petition to circumvent the objections based on limitation as a jurisdictional concern.

25. The Petition does not raise *real constitutional questions*, as there is no challenge to the statutory powers and authority under which the Commissioner of Police decided to dismiss the Petitioner.

Limitation

26. The Court next determine the question of limitation.

27. A Preliminary Objection goes to jurisdiction, and in the view of this Court, should be raised at the earliest opportunity whether in ordinary litigation or litigation concerning fundamental rights and freedoms.

28. It is trite that judicial time and resources should be employed optimally and judiciously and it would serve no purpose to go through the motions of a full hearing when a dispute can be resolved at a preliminary stage on account of jurisdiction.

29. Section 90 of the Employment Act, 2007 as indeed the whole statute is not applicable to the cause of action advanced by the Petitioner by dint of section 3(2)(b) of the Employment Act, 2007.

30. Any limitation objection, therefore, falls for determination under the provisions of the Limitation of Actions Act.

31. Section 4(1) of the Act provides for a limitation of 6 years in contractual disputes.

32. It is not in dispute that the cause of action accrued on 25 February 2009. Clearly, the Petitioner moved the Court outside the statutory limitation period set out in the Limitation of Actions Act, and the Public Authorities Limitation (if it applied).

33. The Petitioner issued a Statutory Notice on 17 March 2009 but did not follow it up with the filing of a suit. He equally did not exhaust the dispute resolution mechanisms he was informed of in the dismissal letter.

34. This is a case, in the view of the Court of a Petitioner who went to sleep.

35. It does not matter that a cause of action raises serious questions of violation of fundamental rights and freedoms, a party should always move Court at the earliest opportunity, for even inordinate delay may disentitle a party from relief/remedy.

36. From the foregoing, the Court finds and holds that the cause of action presented in the Petition does not raise real constitutional questions, was presented after an inordinate delay, is statute-barred and is also an abuse of the court process.

37. The Petition is struck out with no order on costs.

Delivered, dated and signed in Nairobi on this 7th day of February 2020.

Radido Stephen

Judge

Appearances

For Petitioner	Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates
1 st Respondent	did not participate
For 2 nd Respondent	Ms. Akuno, Litigation Counsel, Office of the Attorney General
Court Assistant	Judy Maina