



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 69 OF 2017

IN THE MATTER OF: ARTICLES 22(1), 23(1), 27(1), 47(1), 47(2), 48 AND 50(1) AND 50(2)(g)

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER SECTION 4(1) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

CRISPUS MAVUTHI KATHUMA.....PETITIONER

AND

INSPECTOR GENERAL.....1<sup>st</sup> RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2<sup>nd</sup> RESPONDENT

ATTORNEY GENERAL.....3<sup>rd</sup> RESPONDENT

RULING

1. Crispus Mavuthi Kathuma (Petitioner) was dismissed from the Kenya Police Force on 17 December 1990.
2. On 3 August 2017, the Petitioner instituted the instant Petition alleging that by dismissing him, the Respondents had violated his rights to equality before the law (Article 27); fair administrative action (Article 47); access to justice (Article 48) and fair hearing (Article 50).
3. The 3<sup>rd</sup> Respondent filed a *Notice of Appointment* to act for the Inspector General of Police on 5 October 2017 and on the same day filed a *Notice of Preliminary Objection* in the following terms
  1. **THAT** the suit is time barred and offends Section 4(1)(a) of the Limitation of Actions Act and alternatively section 90 of the Employment Act.
  2. **THAT** the Petitioner has not sought and obtained leave to file this suit out of time contrary to section 27 & 28 of the Limitation of Actions Act.
  3. **THAT** the Petitioner is circumventing the Employment Act and the Labour Relations Act by relying on the constitutional provisions having realised the matter is statute barred under the parent Acts which give effect to constitutional rights.
  4. **THAT** the Petition offends Article 22(1) of the Constitution and the *locus classicus* decision in **Mumo Matemu and Annarita Karimi Njeru**.
  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.
4. The Petitioner filed grounds of opposition to the *Preliminary Objection* on 18 February 2019, and the Court took oral arguments on 19 February 2019.
5. Because the alleged violations accrued before the commencement of the Employment Act, 2007, section 90 thereof has no relevance to the present proceedings.

6. Sections 27 and 28 of the Limitation of Actions Act are also of no relevance to the objection as they relate and apply to causes of action anchored on tort, and not contract.

7. The Petitioner has wholly relied on the Constitution of Kenya 2010 which was not in place in 1990.

8. The Supreme Court had occasion to pronounce itself on the retrospective application of the Constitution 2010 in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others (2012) eKLR** and stated

*However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provision, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately accrued before the commencement of the Constitution.*

9. In the view of this Court, the provisions of the Constitution the Petitioner alleged to have been violated do not suggest *retrospectivity* of application within the context of the facts obtaining here.

10. At the time of the dismissal of the Petitioner, both statutory law, common law and contractual law/agreement formed the *fulcrum* upon which employment disputes were resolved, and therefore the Petitioner was attempting to circumvent the law of limitation by following the Constitutional Petition route.

11. The Court in effect upholds the *preliminary objection* and strikes out the Petition. No order as to costs.

**Delivered, dated and signed in Nairobi on this 22<sup>nd</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Walela instructed by S.S. Malonza & Co. Advocates

For 1<sup>st</sup> and 3<sup>rd</sup> Respondents Ms. Shitubi, State Counsel, Office of the Attorney General

2<sup>nd</sup> Respondent did not participate

Court Assistant Lindsey