



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

PETITION NO. 12 OF 2018

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 20, 35, 47, 50, 258 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 5 & 6 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2011 AND PARAGRAPH 3 OF THE FIRST SCHEDULE THERETO

AND

IN THE MATTER OF: NATIONAL POLICE SERVICE COMMISSION ACT

BETWEEN

TONY KIPROTICH KOSKEI.....PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION....1ST RESPONDENT

NATIONAL POLICE SERVICE.....2ND RESPONDENT

JUDGMENT

1. The Petitioner seeks through the petition dated 15th August 2018 for relief against the Respondent for his dismissal for alleged desertion of duties on 26th January 2011. He states that he was employed as a police officer on 29th August 1998. Upon dismissal he appealed on 30th January 2013 and in a response on 7th February 2013 the Respondent indicated it would give feedback but never did so. He asserts that he was in a different station having been transferred and thus did not desert duties. He received salaries and only responded to the letter of dismissal upon learning of it. He indicated that he received a transfer signal number POL/1/2/29 Vol. iii/45 dated 23rd June 2009 from Baricho Police Station to Ukasi Police Station. He stated that he booked his exit in the OB and this was thereafter approved by the Deputy OCS Baricho Police Station who cleared him to travel to his new post in Eastern Kenya and received a marching order. He asserts that he was later transferred by Officer Commanding Mwingi Police Division transferred him from Ukasi Police Station to Kaningo Police Station on 20th February 2010 vide signal reference number B/EST/3/21/IV/3008. On arrival at Ukasi Police Station he was assigned regular duties as per the nominal roll dated 28th February 2010. Between 11th October 2009 and 23rd November 2009 he proceeded on one-month annual leave but on return realised that his salary had not been processed. He states that he was given permission to travel to Nyeri vide marching orders issued. Upon arrival at Nyeri Provincial Police Headquarters he received a letter of dismissal and a charge of desertion had been commenced against him for the alleged desertion and neglect of duties. He wrote a letter of appeal against the dismissal detailing the circumstances of his service and his appeal letter of 30th January 2013 was acknowledged vide the Respondent's letter of 7th February 2013. He engaged in follow up but no redress was forthcoming hence the petition. He thus sought declarations that the failure to respond to his letters of appeal and reverse the dismissal was a violation of his rights under Article 35(2), that to the extent that the Respondent had failed to resolve the matter for more than 3 years preferring to keep the Petitioner without salary violated his rights under Article 47(1) and (2) of the Constitution and the Fair Administrative Act, a declaration that the process commenced at Baricho Law Courts be quashed for being unlawful, an order compelling that the Petitioner be paid all the withheld salaries together with interest, an order compelling the Respondent to reinstate him to the National Police Service, an order compelling the Respondent to compensate the Petitioner for the loss suffered, mental anguish and opportunities he has missed as a result of the unlawful dismissal. He also sought the costs of the petition and any further or other consequential orders as this court may deem fit to make.

2. The 1st Respondent was opposed to the Petition and assert that it is frivolous, vexatious and an abuse of the court process. It is opposed for

being time barred and being a matter that was lawfully concluded. The 1st Respondent denies an infringement or denial of the Petitioner's fundamental rights and freedoms as claimed or at all.

3. In his submissions, the Petitioner submits that the Petition should be treated as an undefended cause as the Respondents had not filed a response to the Petition. He submitted that he was transferred to Ukasi and was deployed to Kaningo Police Post by the OCPD Mwingi. He states that he reported and assumed general duties and thereafter proceeded on leave and on return from leave found that his salary had not been processed. He stated that he went to Nyeri to follow up on the matter and it was there that he found that he was termed a deserter and dismissed from the service. He submitted that the issues in question for determination were whether the current suit is time barred; whether the dismissal was procedurally fair and whether the reliefs can issue. He submits that under Section 90 of the Employment Act, no court should assume jurisdiction on a claim brought after 3 years. He submitted that though he was dismissed on 8th February 2011, when he sent the appeal on 30th January 2013, the Respondents became enjoined by the Fair Administration Act to act fairly and expeditiously on the matter. He submitted that having failed to act or give a verdict the case fell in the category of continuing injury. He cited the case of **Stephen Muange Mutua v Kenya Revenue Authority [2017]** where the Court dismissed a preliminary objection to the suit on account of the laches doctrine holding that the *claim was about continuing injuries whose cessation had not come so that the suit is not time barred under Section 90 of the Employment Act, 2007*. The Petitioner submitted that the suit herein is a continuing injury based upon a hanging and undetermined or unresolved appeal where the Respondents committed themselves to and have treated casually. The Petitioner quoted Section 9 of the Fair Administrative Actions Act and argued that the Section allows this court to review the administrative action in exceptional circumstances by exempting the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. The Petitioner submitted that he was not afforded an opportunity to make any representations regarding his intended dismissal or the dismissal itself. It was his position that whether this is a practice permissible under the National Police Standing Orders or not it must bow to the provisions of Article 41 of the Constitution of Kenya, and the rights of employees articulated under Section 41 of the Employment Act and the Fair Administrative Actions Act. He cited the case of **Republic v National Police Service Commission ex Parte Daniel Chacha Chacha [2016] eKLR** where the court held that *if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue and a fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward*. The Petitioner submitted that the court should find the decision was unfair as against him.

4. The Respondents were opposed and assert that the Petitioner was enlisted as a Police Officer in the then Kenya Police Force on 29th August 1998 and was later dismissed on 26th January 2011. He was charged with the offence of being absent without official leave between 1st and 19th July 2010 and was taken through orderly room proceedings where he was fined Kshs. 3,000/- after being found guilty on 28th July 2010. He was also charged on 29th October 2010 with being absent without official leave for 556 days from 21st April 2009 and was taken through orderly room proceedings and was dismissed from the force with effect from 26th January 2011 after a guilty plea. The Respondents asserted that he appealed vide a letter dated 8th April 2011 but the appeal was disallowed and he applied for a discharge letter on 5th September 2012 and was issued with a discharge certificate on 15th May 2013. The 1st Respondent asserts that it has no mandate to reopen disciplinary matters concluded before its inception. It cited the case of **Republic v Commission on Administrative Justice ex Parte National Social Security Fund Board of Trustees [2015] eKLR** where the court held that *A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The court concluded I have no doubt that the same principle is applicable to the jurisdiction of all state corporations, government agencies and commissions. None of them has unlimited mandates and they can only do that which they were established to do. The Respondent's jurisdiction is not limitless. It can only do that which the Constitution and the law allow it to do and nothing more*. The 1st Respondent submitted that the Petitioner was dismissed and his appeal finalised by the Commissioner of Police before the 1st Respondent was established and operationalised. The 1st Respondent argued that despite the Petitioner being acquitted of the criminal charges of desertion that did not negate the disciplinary process already concluded and it stated that internal disciplinary proceedings are not bound by the outcome of the criminal proceedings. It cited the case of **Teachers Service Commission v Joseph Wambugu Nderitu [2016] eKLR** where the court held that *professional disciplinary proceedings are distinct from the criminal proceedings even if they emanate from the same set of circumstances*. The 1st Respondent thus submitted that the Petitioner had been accorded the necessary processes under the law prior to his dismissal and the internal process was not subject to review by the criminal court as they were distinct and separate. The 1st Respondent submitted that there was no violation of the Petitioner's constitutional rights and argued that whoever alleges violation of his rights against another must prove such violations with precision and not just quote constitutional provisions. It relied on the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another [2018] eKLR** where the court held that *It is now an established principle of law that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it*. It was argued by the 1st Respondent that it was not in dispute that the Petitioner was procedurally taken through orderly room proceedings and during the proceedings pleaded guilty and signed the defaulter sheet to that effect. The 1st Respondent submitted that the belated attempt to appeal to it, a body established after the conclusion of his matter was misplaced and that the Petitioner filed the petition as a ploy to escape the limitation period after being aware of the dismissal over 7 years ago. The 1st Respondent relied on the case of **John Miriti Mbarire v Attorney General [2014] eKLR** where the court held *The Petitioner argues that because his claim is brought by way of a petition under the Constitution, then he is not bound by the provisions of limitation. In the submissions filed on his behalf, the Court was referred to several authorities on the point that actions for breach of fundamental rights and freedoms are not bound by limitation of time. While I fully agree with these authorities, I do not think that every action that is brought by way of a petition falls under this insulation*. The 1st Respondent also cited the Court of Appeal decision in **James Kanyitua Nderitu v Attorney General & Another [2019] eKLR** where the court held that: *In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi v The National Police Service [2017] eKLR, where the learned judge correctly expressed:*

“While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before

the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution.”

The 1st Respondent thus urged the court to disallow the Petition with costs.

5. The Petitioner moved the court seeking redress for action that was predating the existence of the 1st Respondent. The Fair Administrative Action Act, 2015 commenced on 17th June 2015. In essence the Act he seeks some respite under also came into play a few years after the dismissal and appeal efforts in 2013. In making an appeal to the Commissioner of Police, the Petitioner was within his rights. The letter to the 1st Respondent and its acknowledgment of the letter with a promise to revert in my view did not reopen or reverse the course of the matter. It did not give life to the case as it was previously determined. In the case of **James Kanyiita Nderitu v Attorney General & Another** (*supra*) the learned Judges of Appeal, (Waki, Nambuye, Otieno-Odek JJA) stated that: *To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007.”*

In my view, the Petition is nothing more than a claim for redress for employment rights and these squarely fall under the Employment Act 2007. No constitutional violations exist and even if they did, they are not grounds for the delay in seeking redress and in any event were to be made within 3 years as envisaged under the law. I find the Petition devoid of merit and dismiss it with but with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of May 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar