



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 33 OF 2018

JANE ATIENO OTIENO.....PETITIONER

- VERSUS -

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE.....2ND RESPONDENT

DEPUTY INSPECTOR GENERAL OF KENYA POLICE SERVICE.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

RULING

The petitioner filed the petition on 19.04.2018 through M’Njau and Mageto Company Advocates. The petitioner prayed for judgment against the respondents for:

- a. A declaration that the disciplinary proceedings conducted by the respondent on 12th January, 2011 and the resultant decision made on 17th January, 2011 dismissing the petitioner from National Police Service and subsequent subjecting the petitioner to Criminal Proceeding on the same grounds in Kikuyu PMCC Criminal Case No. 27 of 2011 was unconstitutional and in violation of the petitioner’s rights under Articles 41, 47, 50, 159 of the Constitution of Kenya.
- b. A permanent injunction to restrain the respondents and their agents, servants or employees from confirming dismissal and or termination and ill treatment of the petitioner in any manner on account of having brought the petition to the Honourable Court.
- c. Reinstatement of the petitioner to the position she held prior to the said dismissal without any loss of rank or insignia, salary, and allowances, and any benefits entitled to her.
- d. Damages as compensation for the constitutional violations under Article 23 of the Constitution of Kenya, 2010.
- e. Costs and interest.
- f. Any other relief which the Honourable Court deems fit and just to grant.

The 2nd and 3rd respondents filed a notice of preliminary objection on 07.05.2018 through Wangeci Gichangi, State Counsel, for the Hon. Attorney General. The 2nd and 3rd respondents raised a preliminary objection that the petition is incompetent and ought to be struck out with costs upon the following grounds:

1. That the petition is time barred and offends the mandatory provisions of section 90 of the Employment Act, 2007.
2. That the petitioner is circumventing the Employment Act and the Labour Relations Act by relying on constitutional provisions having realised the matter is statute barred under the parent Acts which give effect to constitutional rights.
3. That the petition is an abuse of court process.

The main issues for determination are whether the petition is time barred under section 90 of the Employment Act, 2007 and whether in view of the provisions of the section, the claimant is seeking to circumvent the section by alleging the violation of fundamental rights and freedoms.

The facts of the case as pleaded are as follows:

- a. The petitioner was dismissed from the Kenya Police Service by the letter dated 18.01.2011 on account of being found guilty of a disciplinary offence of negligently allowing a prisoner committed to her charge to escape and that she had been found guilty and convicted accordingly.
- b. On the same 18.01.2011 the petitioner was arrested and on 19.01.2011 was arraigned before the Chief Magistrate's Court at Kiambu and subsequently before the Principal Magistrate in Criminal Case No. 27 of 2011 and charged with the offence of aiding a prisoner to escape contrary to section 124(a) of the Penal Code. The petitioner was acquitted of all the charges under section 215 of the Criminal Procedure Code as per judgment delivered on 24.07.2014.
- c. The petitioner's appeal to Public Service Commission against her dismissal had been declined by the letter conveying the decision dated 12.04.2011. The petitioner further applied for review by the Commission by the letter of 21.03.2013 but the Commission upheld the dismissal by the letter dated 29.12.2014.
- d. The petitioner appealed to Deputy Inspector General of Police by the letter dated 21.10.2014 and by the letter dated 13.08.2015 the petitioner was informed that the case had been closed after the National Police Service Commission upheld the petitioner's dismissal. The petitioner again appealed to the National Police Service Commission by his letter dated 02.11.2015 but that particular appeal has not been decided as it is said to be pending.
- e. The disciplinary procedure as provided for under sections 88 and 89 of the National Police Service Act and Article 47 of the Constitution was not followed in the petitioner's case.
- f. The rules of natural justice were violated in the manner the petitioner was subjected to disciplinary as well as the criminal proceedings.
- g. Consequential to the acquittal, the claimant ought to have been reinstated at work.
- h. The orderly room proceedings were unconstitutional as they breached the rules of natural justice and Articles 47 and 50 of the Constitution.
- i. At paragraph 93 of the petition it is stated, "**93. The respondents failed to furnish the petitioner with copies of the disciplinary proceedings for the purposes of filing the appeal the provisions of Article 35, 59(4), 79, 248 and 252 of the Constitution were violated.**"
- j. The petitioner has further specifically pleaded the alleged violations of Articles 47 (1) & (2), 50, 236, 35, 59(4), 79, 248, 252, 73(a), 73(2) (b), and 159 of the Constitution.

The Court has carefully considered the pleadings in the petition. At this stage the respondents have not objected or opposed any of the facts as pleaded. The Court returns that the petitioner's cause of action clearly goes beyond the dismissal as conveyed in the letter dated 17.01.2011. The petitioner is seeking to enforce constitutional provisions and rights in view of the dismissal, the manner the disciplinary proceedings were conducted, the constitutional consequence of the acquittal, and the specific remedies. In view of the pleadings and the remedies, the Court returns that even if the cause of action founded on the dismissal collapsed as time barred, the petitioner's case will survive and stand for determination of the constitutional violations as pleaded and prayed for – so that at best, there would be severable causes of action. In the present case, the Court considers that the petitioner's case would best be determined at full hearing.

The Court follows Beatrice Wanjiru and 2 Others –Versus- The Attorney General and Another [2017]eKLR where the Court stated as follows,

"The court has also considered the judgment in Njuguna Githiru –Versus- Attorney General [2016]eKLR (Lenaola J, as he then was). The holding in that case was that each case must be considered on its own merits in the court's exercise of the discretion that the time of limitation shall not apply to cases of enforcement of the Bill of Rights. The essence of a time of limitation was upheld by the court in that case as preventing a plaintiff from prosecuting stale claims on the one hand, and on the other hand, protecting the defendant after he had lost evidence for his defence, from being disturbed after a long lapse of time; but it was not to extinguish the claims. The law as set out in that case appears to be that in cases for enforcement of rights and fundamental freedoms, time of limitation may not apply provided it is established that the petitioner did not ignore the enforcement of his rights or freedoms under the general principles of law (say common law or equity or statutory law) with a calculation to convert his claims or grievance into a "constitutional issue" after the expiry of the time of limitation; and, the petitioner must offer an acceptable explanation or demonstrate some justification for prolonged delays in instituting claims especially in light of the fact that the avenues and mechanisms for addressing such violations were already in existence after the change of the alleged oppressive regime of governance. Thus a claim may not be bound by the prescribed period of limitation if, there exist a genuine constitutional issue (meaning an issue not properly enforceable by ordinary action under prevailing laws); and, the petitioner explains the delay or belated filing of the claim as per the circumstances of the case."

The Court has considered that the petitioner was dismissed on 18.01.2011 and acquitted on 24.07.2014. The time of limitation for a suit based on the dismissal had lapsed on or about 18.01.14. The petitioner's case is partly that in view of the dismissal and the acquittal, her constitutional rights were violated. The Court returns that the petitioner has alleged genuine concerns because the issues raised do not properly fall for determination in a suit for termination of employment under section 90 of the Employment Act, 2007. It could be that the cause of action in the petition and as submitted for the petitioner is partly founded upon the judgment in the criminal case in which the petitioner was acquitted.

Again, the Court follows **Beatrice Wanjiru and 2 Others –Versus- The Attorney General and Another [2017]eKLR** where the Court stated as follows.

“The court has considered whether it was appropriate to take up the issue of limitation of time as a substantive issue rather than a preliminary issue in the suit. As a preliminary issue, the court would be restricted to examining the pleadings without having to go into the merits of the case and the possible evidence that would be available only at the full hearing. In that event, looking at the pleadings, a case for “no constitutional issue” would not have been successfully urged for the 2nd respondent because, the petitioners had clearly pleaded allegations and claims of violation of rights and fundamental freedoms. The court has returned that there was no constitutional issue after examining the evidence and taking into account the full merits of the case. The court therefore holds that in a case in which the petitioner has on the face of the pleadings clearly alleged and claimed violation of rights and fundamental freedoms, a challenge based on the limitation period will invariably be best argued at the full hearing of the petition where and when the evidence and full merits of the case are evaluated. Thus, in such cases, the court returns that the issue of limitation period for filing the petition becomes a substantive rather than a preliminary issue. Accordingly, the court returns that the issue of limitation period for filing the present petition was properly urged as a substantive issue in the petition.”

In the present case, the petitioner has clearly pleaded the violation of fundamental rights and freedoms and at this preliminary stage, the Court returns that there would be no basis to find that the petition is bad in law as it is clearly framed to enforce fundamental rights and other constitutional provisions.

Thus to answer the issues for determination, the Court returns that the petitioner is not circumventing section 90 of the Employment Act, 2007 that would otherwise render the petition time barred under the 3 years' time of limitation.

In conclusion the preliminary objection filed for the 2nd and 3rd respondents and dated 04.05.2018 is hereby dismissed with costs in the cause and parties are now invited to take directions on further steps in the petition.

Signed, dated and delivered in court at Nairobi this Friday 22nd June, 2018.

BYRAM ONGAYA

JUDGE