



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

PETITION NO. 12 OF 2017

**IN THE MATTER OF ARTICLES 25(C), 41(1), 47(A), 50(A),
162(S)(a) AND 165(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS**

BETWEEN

MICHAEL AKOKO MBERO.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

Background

The petitioner Michael Akoko was employed by the respondent as an Assistant Revenue Officer on 4th December 1990 and was posted to work at Customs Department at One Stop Centre – Kilindini Port. On 25th May 2007 the claimant was arrested while at work by officers from the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission). He was on 28th May 2007 charged with two counts of corruption contrary to Section 39(3)(a) as read with Section 48(1) of the Anti-Corruption and Economic Ethics Act No. 3 of 2003 and one count of offering a benefit contrary to Section 39(3) as read with Section 48(1) of the same Act. The charges under Section 39(3)(1) were later withdrawn and the case proceeded with the charge under Section 39(3) only. After hearing the prosecution case the claimant was discharged under Section 210 of the Criminal Procedure Code on 7th July 2010.

Upon the arrest and arraignment of the petitioner, the respondent suspended the claimant from employment. The letter of suspension states that –

“While investigation into the matter are going on and in line with the provisions of KRA, Code of Conduct, it has been decided that you cease to exercise the functions of your office.”

By letter dated 8th January 2009 the respondent required the petitioner to explain the circumstances that led to his arrest and the source of monies found on him and in his residence upon search by KACC officers. The petitioner by an undated letter in which he explained that the money found on him belonged to a family friend one SOSPETER OTIENO OCHOLA who gave him the money to make payments for purchase of a motor vehicle on the friend’s behalf, that the money found on him in the office Kshs.211,050 for deposit while the balance of Kshs.318,000 was recovered from his house.

The respondent thereafter carried out investigations internally and subjected petitioner to a disciplinary hearing by letter dated 17th July 2009. It lifted the petitioner’s suspension and retired him in public interest. In the said letter the respondent gave reasons for the decision to

retire the petitioner as follows –

“The Disciplinary Committee considered your representations as contained in your said letter, your personal presentation as well as reports presented but found your presentations not convincing. The Committee found your explanation on the source of the monies found on you and at your residence by KACC officials lacking in credibility. Mr. Sospeter Ochola was also found to be a false witness.

The authority has lost confidence in you and it has been decided that you be retired in authority’s interest.

Consequently you are hereby retired in the authority’s interest with effect from the date of this letter.”

By letter dated 4th August 2009 the petitioner appealed against the retirement. By letter dated 25th September 2009 the respondent informed the petitioner that the appeal had been disallowed.

By letter dated 15th July 2010 the petitioner informed the respondent that he had been acquitted and sought reinstatement. There was no response to the letter and the petitioner sent a reminder on 12th May 2011. There appears to have been no response even after the reminder.

By letter dated 29th September 2015 the petitioner sought a review of the decision to retire him on grounds that his case was handled with open bias and the merits of his defence were not considered. By a response dated 19th April 2016 the respondent informed the petitioner that the code of conduct provided for two appeals which had already been accorded to him and that the issues raised in his application for review had been taken into account in his appeals, the outcome of the second appeal having been communicated to him by letter dated 8th October 2012.

The petitioner thereafter send a demand letter through his advocate on 15th September 2016 which the respondent replied to on 29th November 2016.

Petition

By his undated petition filed on 24th February 2017 the petitioner avers that his dismissal/retirement violated the following fundamental constitutional and human rights that are guaranteed by the constitution –

- (i) The right to fair labour practice as enshrined under Article 41(1) of the Constitution.
- (ii) The right to fair administrative action as provided under Article 47(1) of the Constitution
- (iii) The right to fair hearing as guaranteed and protected by Articles 25(c) and 50(1) of the Constitution and
- (iv) The principles of natural justice.

The petitioner sets out the particulars of violations and/or breaches of his fundamental rights and freedoms as follows –

1. The allegations levelled against the claimant were false and the investigations and reports relied upon (if any) were inaccurate and full of falsehoods and unverified information.
2. At the Disciplinary Committee hearing the claimant was not presented and was not allowed to question the investigator and/or any witness, to challenge the allegations levelled against himself.
3. The clear and rebutting evidence presented by the claimant was completely disregarded.
4. The committee failed to make any finding of culpability on the part of the claimant and none was communicated to the claimant hence the decision had no basis.
5. The committee failed to appreciate that the claimant had no other responsibility beyond undertaking his duties as an Assistant Revenue Officer
6. The committee failed to confirm and identify the particular office and facts supporting the alleged offence committed by the claimant.
7. In the basic and malice to get the claimant retired, the committee failed to appreciate and indeed ignored evidence from the claimant.
8. The committee disregarded the fact that the claimant/petitioner had been arraigned in a criminal court being Mombasa ACC Cause NO. 7 of 2007 on the alleged corruption charges but for lack of competence and evidence of culpability the Director of Public Prosecutions (DPP) had withdrawn two counts the case at its trial end and delivery of judgment found the petitioner innocent of the charges levelled against him.

9. The claimant therefore avers that the respondent's proceedings were an unfair and illegal process which exposed him to double jeopardy in respect of the same cause contrary to the Public Service Regulation and Custom.

10. The petitioner further avers that arising from the unlawful process and the decision to dismiss him, he appealed against the decision and decision to retire him. His appeal rejected without any clear explanation as to why even after a court of law had exonerated him, the authority was adamant to stick with a decision that was based on facts that had been litigated on and the petitioner found not culpable.

11. The petitioner further avers that contrary to the provisions of Article 47(1) of the constitution he was not availed his right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair as his appeal has been pending for over three years without being heard.

12. That the petitioner is ready, able and willing to resume serving the nation through the Kenya Revenue Authority. At worst if the court finds that the petitioner cannot be reinstated back to service, he will be seeking that the court finds that the decision to dismiss him with loss of all his terminal benefits was unlawful and extremely harsh in the circumstances and that the same be reduced to normal termination with the following payments: -

a)... One month's salary in lieu of notice (less statutory deduction of NHIF & PAYE

of 320 + 200)..... Kshs.63,693/=

b)... Payment of salary from the time the petitioner was dismissed to the time of termination of this petition at Kshs.63,693 per month.

c)... Statutory damages for unlawful and unfair dismissal at the full extent of 12 months' gross salary being

Kshs.63,693 x 12 months..... Kshs.764,316/=

d)... Payment of the petitioner's lump sum and monthly pension dues as he would have been entitled to under normal termination.

The petitioner prays for the following reliefs –

a) A declaration that the petitioner's fundamental rights as guaranteed by Articles 35(c), Article 41(1), Article 47(1) and Article 50(1) of the Constitution of Kenya have been grossly infringed and violated by the respondent's decision to dismiss the petitioner from the Kenya Revenue Authority.

b) A declaration that the respondent's decision to dismiss/retire the petitioner from serving the Kenya Revenue Authority and the respondent's failure, refusal and/or refusal to take to account the decision in the Anti-corruption case filed against the petitioner and the decision to retire him was unfair, unlawful, null and void *ab initio*.

c) An order directing the respondent to reinstate the petitioner back to service at the Kenya Revenue Authority at his rank scale and salary currently being paid to the officers of his rank.

d) In the alternative a declaration that the respondent's action of retiring the petitioner from the Kenya Revenue Authority is unfair, unlawful and extremely harsh and an order for the petitioner to be paid terminal dues and damages with interest as pleaded

e) An order that the petitioner be paid costs of this petition by the respondents.

f) Any further or better reliefs that the court may consider fit to grant.

In the submission filed on behalf of the petitioner it is submitted that the petitioner's rights under Article 50(2)(a) were violated by the respondent carrying out disciplinary proceedings while the criminal case was pending in court and questions what standards were to be applied at the disciplinary hearing above what was proved before the court. Petitioner submits that Part 12 of the respondent's code of conduct which provides that the respondent may take disciplinary action against an employee irrespective of criminal charges preferred against the employees is unconstitutional. The petitioner relies on the case of **MATHEW KIPCHUMBA KOSKEI -V- BARINGO TEACHERS SACCO** as cited in the case of **SERGEANT JOSHUA MUIRURI MAINGI -V- NATIONAL POLICE SERVICE COMMISSION & 2 OTHERS** in which the court held that an acquittal in respect of criminal charges by the decision in a criminal case is conclusive as against all other authorities in so far as the liability of the accused person is concerned with respect to the particulars of the charges.

The petitioner further submits that the termination of his employment was unfair/unlawful as it amounted to double jeopardy as the retirement was on grounds upon which he was discharged. It is submitted that the respondent thus failed to prove the reasons for termination and the termination was unfair. The petitioner relies on the case of **DISHON KAMAU MUIRURI -V- KENYA REVENUE AUTHORITY** in which the court held that the retirement of the claimant was not founded upon any justifiable reason.

The Response

The respondent filed a replying affidavit of GRACE N. MWANGI in response to the petition. The respondent further filed submissions. It is the respondent's position that the petitioner was lawfully retired and his dues rightfully paid to him. It further the respondent's position that it did not violate any of the petitioner's fundamental rights as a violation cannot accrue from contractual obligation obtaining from an employment contract. It is further the respondent's position that the petitioner is challenging a contractual issue and clothing it in the garb of constitutionality in order to escape the reach of Limitation of Action Act and further that the petitioner cannot ground his petition on the provisions of the Constitution of Kenya 2010 which were not contained in the repealed constitution. The respondent submits that the current constitution does not apply to the issues in dispute in this petition as the rights and obligations arose before its enactment.

The respondent submits that the dispute herein ought to be governed by the provisions of the Employment Act (No. 1 of 2007) since the cause of action arose in the year 2009 when the respondent retired the petitioner having followed the laid down procedure.

That the court has previously held that not all breaches of the law pave way for a constitutional petition. In the case of **FRANCIS JAMES NDEGWA -V- TETU DAIRY CO-OPERATIVE SOCIETY LIMITED [2016] eKLR**, Hon. Ngaah Jairus J. quoted the huddling of Lord Diplock in the case of **HARRISON -V- ATTORNEY GENERAL OF TRINIDAD AND TOBAGO[1980] AC 265** stated,

“The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.

In the case of **BENJAMIN WACHIRA NDIITHI -V- PUBLIC SERVICE COMMISSION & ANOTHER [2014] eKLR**, the court in determining a similar issue as the one raised in this appeal followed the wisdom in the Peter O. Ngoge Case and held that,

“14. In this regard, while I agree with the Claimant that employment contracts may embody constitutional rights under the Constitution, I do not think that this elevation by itself jettisons the law on limitation as far as enforcement of these rights are concerned. In my view therefore, employment contracts remain subject to limitation either under Section 4(1) of the Limitation of Actions Act or under Section 90 of the Employment Act, 2007 depending on the effective date of the employment contract being enforced.”

Further the Court of Appeal in the case **JAMES MUKUHA GICHANE -V- NATIONAL HOSPITAL INSURANCE FUND & 3 OTHERS [2017] eKLR** has held that a claim based on a contract of employment ought to be ventilated at a civil or labour court. The court stated

“20. The grievance of the appellant related to termination of employment and the only issue for determination was whether he was lawfully terminated. No matter how broadly the scope of fundamental rights is interpreted, it cannot encompass ordinary tortious and contractual rights between individuals that do not bear on human or fundamental rights. Thus, the rights of an employee vis a vis the employer in ordinary circumstances do not connote breach of fundamental rights. In this appeal, the relationship between the appellant and the 1st respondent being that of an employee and employer relationship, was pegged on contract. The amplitude of the appellant's claims in the circumstances of this appeal does not extend beyond labour law. The allegations of breach of fundamental rights were contrived and bereft of evidence to support them. The high Court was spot on in its finding that the circumstances of the appellant's claim, if true, hinged on termination of employment and belonged to a civil or labour court. We entirely agree.”

Besides the issue of application of the constitution 2010 it is the contention of the respondent that the petitioner has not set out the particulars of the alleged breaches. The respondent specifically rebuts the allegations of alleged breaches as follows –

1. That the Petitioner has failed to demonstrate that the alleged specific falsehood and or inaccuracy of the allegations by the Respondent and has simply made a blanket allegation.
2. On the allegation that the Petitioner's "*clear and rebutting evidence was completely disregarded*" the Petitioner refers annexure "GNM 5" of its Replying Affidavit.

The Respondent while retiring the Petitioner explained to him follows:-

"The Disciplinary Committee considered your representations as contained in your said letter, your personal presentation as well as reports presented, but found your presentations not convincing. The Committee found your explanation on the source of the moneys found of you and at your residence by KACC Officials lacking credibility. Mr. Sospeter Ochola was also found to be a false witness"

3. The Respondent submits that it is clear on the face of the records that the Petitioner was given a fair hearing.
4. The Respondent's Disciplinary Committee outlined to the Petitioner vide its letter of 17th July 2009 how the decision to retire him

in the interest of the Authority had been arrived at.

5. The Petitioner's Disciplinary committee was not only aware of the charges brought against the Petitioner but also invited the Petitioner to give an explanation on the charges brought against him by the Kenya Anti-Corruption Commission (KACC) Officers.

6. The Petitioner's Disciplinary Committee's decision to retire the Petitioner was informed by a different set of offence from that which the Petitioner was charged with at the Criminal court. Specifically, the charges brought upon him at the Anti-Corruption and Economic Crimes Court were "offering a benefit contrary to section 39(3)(b) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. On the other hand, the offence with which the respondent's Disciplinary committee charged Petitioner was purely in relation to the monies found with the Petitioner whose explanation was not convincing to the Respondent.

7. The Petitioner duly made presentations to the Respondent's Disciplinary I Committee which presentations were duly considered by the Respondent.

8. It is the jurisprudence of the Court that a person who brings a constitutional Petition before a Court of law alleging contravention of a fundamental right or freedom needs to set out his case clearly stating the right that has been violated. Further the specific Article of the Constitution relied on should be stated accompanied by the demonstration of the act or nature of contravention and the extent to which such right or freedom has been violated.

9. In the case of **JUSTICE AMRAPHAEL BHOGOLI MSAGHA-V- THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND 7 OTHERS [2006] EKL**R the court quoting the holding of Justice Khamoni in **CYPRIAN KUBAI -V- STANLEY KANYONGA MWENDA NAIROBI HIGH COURT MISC. APPLICATION NO. 617 OF 2002** which stated that: -

"An Applicant moving to Court by virtue ofconstitution must be precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph or sub-paragraph of the section...allegedly contravened plus the relevant act of that contravention so that the Respondents knows the nature and extent of the case to enable the Respondent prepare accordingly".

10. The Court found that for a Petitioner to succeed by way of Petition, he has also to prove the particulars of the rights alleged to have been violated or breached in addition to stating the sections violated or breached.

".....a person alleging a breach or contravention of Chapter V (as it then was) carries a heavy burden of proof to be discharged by that person or an Applicant".

11. In **ANARITA KARIMI NIERU -V- REPUBLIC (NO. 1) (1979) K.L.R 154** the superior Court sitting at Nairobi stated that;

"Where a person is seeking redress from the High Court on a matter involving a reference to the constitution it is important (if only to ensure that justice is done to his case) that should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

12. Consequently your Ladyship, the Respondent humbly submits that the Petitioner has failed to set out specifically the manner in which his constitutional rights were allegedly violated.

On the allegations of unfair or unlawful termination the respondent submits that –

1. Section 42 of the Employment Act provides for notification and hearing before termination on grounds of misconduct. Section 43 of the Act then obliges an employer to give reasons for termination of an employee and where an employee fails to do so, such termination is then rendered unfair. Most importantly, subsection (2) provides that "**The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**"

2. The Respondent submits that not only did it duly follow procedure when terminating the Petitioner as illustrated by paragraphs 8 to 25 aforesaid. Consequently, the Respondent submits that the Petitioner's termination was not only lawful but fair.

3. The case of **MARY CHEMWENO KIPTUI -V- KENYA PIPELINE COMPANY LIMITED [2014] eKLR** quoted by Petitioner is illustrative on the procedure for termination. The Court held at Paragraph 34 as follows:-

4. "34. Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons touch on grounds of misconduct, poor performance or physical incapacity.

Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow for an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only."

5. The case of **DISHON KAMAU MUIRURI -V- KENYA REVENUE AUTHORITY [2015] eKLR** can be distinguished from the case herein. In the said case, the court observed that the decision to retire the claimant was not founded upon any justifiable reason because the court was satisfied with the evidence on record that the claimant did not solicit or receive a bribe. The court found

that the due process was not followed in prosecuting the claimant at the disciplinary committee and the termination proceedings were on their face recklessly undertaken. This is not the case herein, especially in light of the disciplinary committee's proceedings in which due process was followed by the Respondent.

6. The Respondent submits that in this instance, the Petitioner's termination was lawful.

On the allegation of the petition that the termination of his employment amounts to double jeopardy the respondent submits that the offence for which the petitioner was acquitted is distinct from the offences he was charged with the respondent submits had counts one and two were withdrawn while the petitioner was acquitted on count three. On the contrary the disciplinary action by the respondent was centred on the claimant's possession of Kshs.529,050 which he failed to sufficiently explain to the respondent.

Further the Respondent avers that part 12 of the Respondent's Code of Conduct should be relied upon in determining the issue of double jeopardy. The part states that "*the fact that criminal proceedings have been instituted against the staff member shall not preclude the Authority from taking any disciplinary action for the same report, act or omission; neither shall an acquittal or a discharge by a court of law for the same act/omission preclude the Authority from initiating the disciplinary process.*"

While the Petitioner is of the opinion that the aforesaid part 12 of the Respondent's Code of Conduct is unconstitutional for contravening article 50(2) of the Constitution, the Respondent is of the opposite view for the following reasons:-

- a. The said Article applies only to criminal matters while disciplinary proceedings by the Respondent arise out of a contractual relationship.
- b. Criminal proceedings remedy a wrong against the state whereas disciplinary proceedings under the code of conduct remedy a wrong against terms of employment.
- c. Disciplinary proceedings by the Respondent were administrative proceedings separate and independent from the said Court proceedings.

The Respondent further relies on the case of **REPUBLIC -V- SECRETARY, TEACHERS SERVICE COMMISSION & ANOTHER EXPARTE SAMUEL MULAMULA LIPEVA** in which the Court while faced with a similar case held as follows:-

"Also as submitted for the Respondents, the power to investigate a criminal offence committed by a teacher is shared by the police and the commission and is not exclusive to either. The object of action by the police is to punish for offences committed against the state through criminal proceedings while the Respondent's investigations are aimed at disciplinary action being taken against a teacher if found liable under the code. The standard of proof in respect of the two is also different as in criminal proceedings the case must be proved beyond reasonable doubt while in civil proceedings under which disciplinary proceedings may be classified the standard of proof is on a balance of probability. The two are therefore independent of each other and the determination in one may not necessarily be the same in the other as was the case herein where the applicant was acquitted of the criminal charges but found guilty on the disciplinary charges. There is therefore no proof of double jeopardy by the mere fact that the applicant was subjected to both proceedings or that the two findings appear to be in conflict, both proceedings having been conducted within the provisions of the law."

The Respondent distinguishes the case of **MATHEW KIPCHUMBA KOSKEI -V- BARINGO TEACHERS SACCO [2013] eKLR** to the extent that looking at the facts of the case herein the offence at the disciplinary committee and that of the court were different from each other. The same Court on page 8 of the judgment stated as follows:-

"The court has considered the submissions made for the parties and is of the opinion that whether an employer stays or proceeds to conclude administrative disciplinary proceedings with respect to alleged misconduct subject to criminal process is a matter of prudence to be decided either way by the employer. The court holds that in such circumstance, the employer is not necessarily exercising on election; the employer is not faced with the option of administratively deciding the case or preferring a criminal complaint whose outcome binds the employer's decision in view of the allegations of misconduct levelled against the employee. In any event, the power to prosecute for an alleged criminal offence is primarily vested in the state by the Constitution and the employer has no direct influence over the exercise of the power by the state."

With respect to the case of **SERGEANT JOSHUA MUINDI MAINGI VS. NATIONAL POLICE SERVICE COMMISSION & 2 OTHERS [2015] eKLR**, the Respondent humbly distinguishes the same by reiterating that there was no double trial of the same criminal offence in the dispute herein.

Consequently, the Respondent submits that it did not subject the Petitioner to double jeopardy. Further the Respondent submits that Part 12 of its code of conduct is not unconstitutional.

It is the submission of the respondent that the petitioner does not deserve the prayers sought and that the petition should be dismissed.

Findings and Determination

The parties herein relied entirely on their pleadings, documents, affidavits and written submissions. I have considered the pleadings, the affidavits, the documents annexed to the affidavits and the submissions. I have further considered the cases cited by both parties and the relevant law.

The issues arising for determination are in my opinion the following –

- (i) Whether the petition raises any constitutional issues
- (ii) Whether the petitioner can rely on the Constitution 2010.
- (iii) Whether the cause of action in the petition is statutorily time barred.
- (iv) Whether the petitioner's constitutional rights have been violated.
- (v) Whether the respondent's disciplinary process amounted to double jeopardy.
- (vi) Whether the petitioner is entitled to the prayers sought.

1. Whether the petition raises an constitutional issues

Article 22(1) of the Constitution provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 23(3) gives the court powers to grant appropriate reliefs which may include –

- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
 - (a) a declaration of rights;**
 - (b) an injunction;**
 - (c) a conservatory order;**
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
 - (e) an order for compensation; and**
 - (f) an order of judicial review.**

In the present petition the petitioner avers that his rights under Articles 41(1), 47(1), 25(c), 50(1) and principles of natural justice have been violated by the respondent. In the particulars of violation he states that the investigations and reports relied upon were inaccurate and full of falsehoods and unverified information, that he was not represented and was not allowed to question the investigator or any witness to challenge the allegations against him, that the consent evidence presented by him was completely disregarded and no finding of culpability was made against him or communicated to him.

Article 41(10) provides that every person has a right to fair labour practices. Article 25(c) provides that the right to fair trial shall not be limited. Article 47(1) provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair while Article 50(1) provides for the right of every person to have any dispute resolved by application of law in a fair and public hearing before a court or appropriate independent and impartial tribunal and body.

As held in the case of **ANARITA KIRIMI NJERU -V- REPUBLIC, JUSTICE AMRAPHAEL MBOGOLI MSAGHA -V- CHIEF JUSTICE OF THE REPUBLIC OF KENYA** and **CYPRIAN KUBA -V- STANLEY KANYONYA MWENDA** and more recently in trustees of A person alleging violations of constitutional right must demonstrate how such right has been violated and the nature and extent of the violation.

The proceedings that the petitioner was subjected to was private. It was according to the respondent's code of conduct, which unfortunately was not presented to court by either the petitioner or the respondent. The court therefore is unable to determine whether or not there was violation of the code of conduct.

What is material however is that Article 25(c), 57(1) and 50(1) are not applicable to internal disciplinary proceedings under the respondent's code of conduct and therefore could not have been violated by the said disciplinary proceedings. As expressed in the constitution, these provisions relate to criminal trials in a court or tribunal and not private internal disciplinary process. I therefore find that none of the petitioner's rights of fundamental freedoms under Article 25(c), 47(1) or 50(1) was violated.

Article 41(1) provides for fair labour practices generally. The petitioner did not make reference to any action of the respondent that he avers to have constituted unfair labour practices. Unfair labour practices is not defined by either the constitution or any other labour Laws of Kenya although Section 45(5) and 46 of the Employment Act cites actions which would constitute unfair labour practice in my opinion. Unfair labour practice, I think, would be actions in breach of the law or discriminative against an employee. The particulars cited do not contain any elements of unlawfulness or discrimination. I thus find that the petitioner has not proved unfair labour practice.

From the foregoing, I find that the petitioner has not proved any breach of the constitution by the respondent and therefore does not raise any

constitutional issues.

2. Whether the petitioner can rely on the Constitution 2010

The petitioner was retired by letter dated 17th July 2009, before promulgation of the Constitution of Kenya 2010. The violations alleged by the petitioner all relate to the current constitution. I am in agreement with the finding of the court in **DUNCAN OTIENO WAGA -V- ATTORNEY GENERAL** that *“the effect of Articles 263 and 264 is that the constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former constitution..... These provisions entitle this court to adjudicate violations of the constitution but they do not empower the court to apply the constitution retrospectively.”*

The alleged violations having not existed under the repealed constitution cannot be applied retrospectively. I therefore find that the constitution of Kenya 2010 is not applicable in this petition.

I therefore hold that the Constitution 2010 is not applicable to this petition.

3. Whether the disciplinary process against the petitioner amounted to double jeopardy

Section 62(1) of the Anti-Corruption and Economic Crimes Act provides that –

62. Suspension, if charged with corruption or economic crime

(1) A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case: Provided that the case shall be determined within twenty-four months.

The letter sending the petitioner on suspension stated that his suspension was pursuant to KRA Code of Conduct which as mentioned earlier was not availed to the court. At paragraph 28 of the replying affidavit it is deposed that –

That the respondent declined to accede to the petitioner request on the grounds that: -

- a. The prosecution by the KACC office was pursuant to the Anti-Corruption and Economics Crimes Act No. 3 of 2003 whereas the disciplinary proceedings instituted by the respondent were pursuant to the respondent’s Code of Conduct.
- b. The two processes were independent and distinct from each other, in view of the fact that the prosecution by KACC arose from a criminal act by the petitioner, whereas the disciplinary proceedings by the respondent arose from a contractual relationship.
- c. The Disciplinary Proceedings by the respondent were administrative proceedings completely separate and independent from court proceedings and the court did not grant orders of stay to prohibit the respondent’s Disciplinary Committee from hearing the matter.
- d. Criminal proceedings remedy a wrong against the state whereas Disciplinary Proceedings under the Code of Conduct remedy a wrong against terms of employment.

In the written submissions the petitioner submits that being subjected to the criminal process and the respondent’s disciplinary procedure amounted to double jeopardy and relied on the case of **DISHON KAMAU MUIRURI -V- KENYA REVENUE AUTHORITY**. The respondent in its submission submits that paragraph 12 of its code of conduct allows it to carry out disciplinary process notwithstanding pendency of criminal proceedings or an acquittal. As was held in **REPUBLIC -V- SECRETARY, TEACHERS SERVICE COMMISSION & ANOTHER EX-PARTE SAMUEL MULAMULA LIPEYA**, civil proceedings are independent of criminal proceedings and the same may be carried out concurrently.

In the present case, the suspension is not pursuant to Section 62(1) of the Act but under the respondent’s code of conduct. As was stated by the court in the case of **MATHEW KPCHUMBA KOSGEI -V- BARINGO TEACHERS SACCO**, *“whether an employer stays or proceeds to concede administrative disciplinary proceedings with respect to alleged misconduct subject to criminal process is a matter of prudence to be decided either way by the employer.”*

The respondent in this case decided to proceed with disciplinary process under the code of conduct and not the Act which provides for employer to await the outcome of the criminal case. The claimant did not protest against the disciplinary proceedings which were concluded and action taken long before the criminal proceedings. He cannot therefore use his acquittal to argue that he suffered double jeopardy as he had not been acquitted at the time of conclusion of the disciplinary process.

Further the charges against the petitioner in the disciplinary process were not similar to those under the criminal proceedings and the evidence in the two proceedings were not the same.

I find that there is no evidence of double jeopardy.

4. Whether the cause of action in the petition is statutorily time barred

Section 90 of the Employment Act sets the limitation period in employment cases as three years from the date on which the cause of action arose. The cause of action herein arose on 17th July 2009 when the petitioner was retired from service. The petition herein was filed on 24th February 2017; some seven years and seven months after the cause of action arose.

The respondent has submitted that he choice of a petition as the vehicle to approached the court by the petitioner was to defeat limitation. The respondent relies on the case of **FRANCIS JAMES NDEGWA -V- TETU DAIRY CO-OPERATIVE SOCIETY** in which the court quoted the case of **HARRISON -v- ATTORNEY GENERAL OF TRINIDAD AND TOBAGO** frowned upon the institution of a petition solely for the purpose of avoiding the necessity of applying in the normal way for appropriate remedy for the lawful administrative action which involves no contravention of any home right or fundamental freedom.

The same sentiments were expressed by the court in **BENJAMIN NDITHI -V- PUBLIC SERVICE COMMISSION & ANOTHER** where the court stated that the elevation of employment contracts to the constitutional platform does not jettison the law of limitation as far as enforcement of these rights are concerned and that employment contracts remain subject limitation under either Section 4(1) of the Limitation of Actions Act of Section 90 of the Employment Act depending on the effective date of the contract being enforced.

The Court of Appeal expressed itself in similar terms in **JAMES MUKUHA GICHANE -V- NATIONAL HOSPITAL INSURANCE FUND** when it held that a claim based on contract of employment ought to be ventilated in a civil or labour court.

In the present petition although this issue was raised in the replying affidavit of the respondent at paragraph 41 and 42 and again in the written submissions, the petitioner failed to address the issue in its submissions. These averments therefore are uncontroverted by the petitioner. I do agree with the respondent that this is an employment claim and is therefore stature barred. The framing of the claim in the form of a petition does not cure the defect or limitation.

Conclusion

Having found that the petition does not raise any constitutional issues, that the Constitution of Kenya 2010 upon which the petition is anchored does not apply to the petition and that the claim is statute barred, the petition has no legs to stand on and must crumble. I therefore do not need to consider the remedies sought by the petitioner as these will be a mere academic exercise.

For the forgoing reasons, I find that the petitioner has failed to prove the averments in the petition and dismiss the same.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE