



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1437 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> September, 2018)**

**JAMES ANDREW WANDERA KAFWA.....CLAIMANT**

**VERSUS**

**PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Claimant filed the suit on 25<sup>th</sup> August 2014 through the firm of Orego & Odhiambo Advocates seeking damages for malice and bad faith against him and payment of salaries, allowances and benefits.
2. He avers that he was employed by the 1<sup>st</sup> Respondent on 3<sup>rd</sup> October 1977 in Job Group D in the position of Copy Typist II and deployed to the Ministry of Lands and Settlement. He was deployed at Nairobi Lands Registry and was paid a monthly salary of Kshs. 700 and housing allowance in the sum of Kshs. 450 per month.
3. He avers that he is a person with disability within the meaning assigned to the term in the persons with Disabilities Act No. 14 of 2013. He states that he served in the position of Copy Typist II until sometimes in 1980 when the Director of Personnel Management at the time sought to remove male employees from performing duties as Copy Typist as they sought to reserve the position of Copy Typist in the Public Service exclusively for persons of the female gender.
4. He further avers that vide a letter dated 28<sup>th</sup> July 1982, the Directorate of Personnel Management directed the Ministry of Lands and Settlement to release him from his duty station at the Nairobi Lands Registry to his new posting at the Voice of Kenya under the then Ministry of Information and Broadcasting to be stationed at Broadcasting House, Nairobi.
5. He avers that when he reported to duty at the Voice of Kenya on 28<sup>th</sup> July 1982 he was informed that there was no vacancy and advised to report back to his previous station at the Nairobi Lands Registry without any official communication. At the Nairobi Lands Registry, he was informed that his position no longer existed as he had been informally re-deployed in an inter-ministerial transfer. He lodged several complaints prompting the Permanent Secretary, Ministry of Information and Broadcasting to write a letter to the Director of Broadcasting on 19<sup>th</sup> April 1984 but no steps were taken and without any lawful cause

at all, he was interdicted with effect from 26<sup>th</sup> October 1984.

**6.** He states that he instructed the law firm of Cheloti & Etole Advocates to write a letter to the 1<sup>st</sup> Respondent seeking to know the position of his contract and vide a letter dated 27<sup>th</sup> August 1986, the Respondent responded stating that the interdiction had been lifted and he was transferred to the Ministry of Culture and Services with effect from 1<sup>st</sup> November 1985 but in a second letter dated 21<sup>st</sup> January 1987, the 1<sup>st</sup> Respondent stated that he had been dismissed from Service with effect from 28<sup>th</sup> October 1985. The two letters from the 1<sup>st</sup> Respondent were at a variance.

**7.** He also says that his salaries and allowances were paid by the 1<sup>st</sup> Respondent until January 1986. He was not allocated a Government house after December 1988 and his staff card that granted him entry at his work place, Broadcasting House was withdrawn by the Director of Broadcasting and the official transport was no longer accorded to him. He states that he has over the years persisted in enquiring about his position and in particular, his contract of service and has made appeals to various Government agencies in this regard to no avail.

**8.** He avers that after persistent demand to establish the position of his contract of service and/or the appeals together with enquiries by the Ombudsman, the Permanent Secretary, Ministry of Information, Communications and Technology wrote a letter to him stating that they had returned his personal file for their retention and rejected his application for review of the decision regarding his dismissal from service on account of gross misconduct and upheld the earlier resolution reached.

**9.** He further states that this is the first time he learnt that he had been dismissed from service on account of gross misconduct. He further avers that the decision by the 1<sup>st</sup> Respondent to dismiss him from the service was unlawful, malicious and made in bad faith.

**10.** The 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed their response to the claim where they deny each and every allegation of fact and law set out in the Statement of Claim as if the same was set out verbatim and traversed seriatim and aver that after an exchange of numerous correspondences between the Director of Personnel Management, the Ministry Headquarters, the Director of Broadcasting and Ministry of Lands, the committee came up with the recommendations that the grade of Announcer was now obsolete and has since been replaced with that of Producer Assistant (Job Group G).

**11.** That since Mr. Kafwa did not meet the requirements of Producer Assistant Job Group G, there was no vacancy for Producer Assistant hence the Director of Broadcasting then deployed him in the Radio Operation Sector on typing duties. He however refused to report on duty as directed and was placed on interdiction with effect from 26<sup>th</sup> October 1984. He was posted to the Ministry of Culture and Social Services with effect from 1<sup>st</sup> January 1985 but did not report on duty after the transfer.

**12.** They further aver that the Ministry of Information and Broadcasting then convened a Ministerial Human Resource Management Advisory Committee meeting on 9<sup>th</sup> July 1986 in which Mr. Kafwa's case was discussed and it was recommended to the commission that he be dismissed on account of desertion of duties.

**13.** On 6<sup>th</sup> November 1995 Mr. Kafwa wrote to the Commission through the authorized Officer seeking to have his appeal heard out of time but the commission would not entertain any further appeals from the officer and directed that he be informed accordingly.

**14.** He avers that on 6<sup>th</sup> June 2000 Mr. Kafwa wrote yet another appeal letter to the Commission complaining of unfair treatment/dismissal and the Commission on 9<sup>th</sup> March 2000 advised him to seek redress in a Court of law explaining that his case was time barred and he had not appealed against the "time barring" within the required time and so he had failed to act according to the prevailing lawful regulations. This also meant that the Commission's hands were tied due to legal limitations.

## **Submissions**

15. The Claimant filed his submissions where he submits that it is clear that the Respondents are not sure when the cause of action herein arose. It is also not clear from their testimony whether the Claimant was engaged in the Ministry of Lands and Settlement or the Ministry of Culture and Social Services at the time of the alleged termination on 28<sup>th</sup> October 1985. This therefore means that the provisions of Section 90 of the Employment Act, 2007 are not applicable herein as there is no letter for termination that is addressed to the Claimant in this matter at all.

16. He therefore contends that the cause action arose of 5<sup>th</sup> March 2014 when he was issued with the letter from his employer the Ministry of Information, Communication and Technology. He states that it is trite in law that there is no time bar to suit that seek interpretation and/or enforcement of constitutional rights to individual. He relied on the case of **Kiluwa Limited & another Vs Commissioner of Lands & 3 others [2015] Eklr.**

17. He avers that for a termination to be considered fair and within the law the employer must accord the employee a hearing in which the employee must be informed expressly of the charges levelled against him. Secondly, it shall be incumbent upon the employer to show that the reasons for termination were valid. This was not the case as he was never at any time informed of any charges against him nor summoned to any disciplinary process hence the Respondent did not discharge their statutory role as set out in the Employment Act 2007.

18. He further avers that Court will only grant punitive and/or aggravated damages in exceptional circumstances hence urge the Court to find and hold that the manner that the Respondents have treated him, a person with disability, warrant the grant of punitive damages. He relied on the case of **Patrick Njuguna Kariuki Vs Del Monte Kenya Limited.**

19. He also avers that he has fulfilled the provisions of Section 6 of the Pension Act which provides that for the circumstances in which pensions may be granted which include where the officer completes not less than 5 years of pensionable service, meaning that not only did he hold a pensionable office but also fulfils the circumstances in which pensions may be paid. Therefore, after years of arduous but unsuccessful attempts at public offices, he urges this Court to allow the claim in its entirety and hold the Respondents jointly liable and responsible.

20. The Respondents filed their submissions on 13/4/2018. The Respondents submitted that this claim is time barred. They cited the Court of Appeal decision of **Divecon vs Samani (1995-1998) 1 EA 48** at page 54 where the Appellant Judge rendered itself thus:-

***“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract.....”***

21. The Court of Appeal in **Kenya Airports Authority vs Kisongochi, Civil Appeal No. 6 of 2015 (Kisumu)** also rendered itself as follows:-

***“The use of the word ‘may’ in Section 4(1) of the Limitation of Actions Act does not imply that the trial Court had to do that which is expressly prohibited by statute (to extend time under Section 4(1)). That would be erroneous construction of the section”.***

22. The Respondent also submitted that the Claimant deserted his duty and was not unfairly dismissed.

23. The Respondents submitted that the Claimant deserted duty and was interdicted with effect from 26<sup>th</sup> October 1984 on grounds of abscondment.

24. The Human Resource Committee had recommended he be deployed to Radio Operation Section on typing duties but he never attended work. Afterwards he apologized for being absent without authority. The Committee heard the case and decided that he should be warned and be deployed to another

Ministry. He still absented himself and was thus dismissed.

25. I have considered the averments of both Parties. The issues for consideration by this Court are as follows:-

**1. Whether this claim is time barred.**

**2. If not, whether the Claimant's services were terminated lawfully.**

**3. What remedies if any the Claimant is entitled to?**

26. On the issue of time, I note that the Claimant was dismissed from service with effect from 28/10/1985 as per the letter appearing at page 7 of Claimant's bundle. However, paragraph 11 of Respondent's respond indicate that he was paid his salary by the Ministry of Information and Broadcasting upto December 1985. If indeed he had been dismissed from 28/10/1985, then he would not have been paid his December 1985 salary.

27. The Human Resource Management Advisory Committee (MHRMAC) meeting, which later recommended his dismissal sat on 9.7.1986 – (Paragraph 12 of the Response).

28. The Claimant however kept pursuing this matter and on 9.3.2000 his appeal was also dismissed by the Public Service Commission and he was advised to seek redress in a Court of law.

29. The Claimant ought to have taken up the matter at this point. He did not. He filed this claim in 2014. He ought to have filed this claim by 2006 if going by the time the appeal was dismissed or considered.

30. As held by the Court of Appeal in the **Kenya Airports Authority vs Kisongochi** (supra) this Court has no power to extend time within which a claim should be filed. Based on this issue, it is my finding that the claim before me is time barred.

31. The Claimant had submitted that the issues raised touch on his rights and that rights issues have no limitation period. Whereas it is true that rights issues may have no limit of time, what is before me is a pure employment claim and not a constitutional petition. In any case, even a constitutional petition must be filed within a reasonable time.

32. My finding is that this claim is time barred. There is therefore no need to determine the other 2 issues. I dismiss this claim accordingly. I will give no order of costs.

Dated and delivered in open Court this **26<sup>th</sup> day of September, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Olendo for Claimant

Kioko holding brief Chesinya for Respondent