



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 99 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2018)

BETWEEN

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLES 3(1), 20(1) (2) 21, 22, 23,24,47(1)
AND 165(3) B OF THE CONATITUION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE RIGHT TO DIGNITY ENSHRINED IN ARTICLE 28 OF THE
CONATITUION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLED INFRINGEMENT OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION ENSHRINED IN
ARTICLE 47 AND ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED INFRINGEMENT OF THE RIGHT TO FAIR HEARING ENSHRINED IN ARTICLE 50
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AN FUNDAMENTAL FREEDOMS
PRCATICE AND PROCEDURAL RULES 2013**

BETWEEN

JOHN MUNENE GATHANGI.....PETITIONER

AND

THE PERMANENT SECRETARY MINISTRY OF INTERIOR &

COORDINATION OF NATIONAL GOVERNMENT..... 1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HON ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGEMENT

1. The Petitioner herein filed this Petition on the 29th August 2017 through the firm of Mwathi Chege Muremi and Associates Advocates alleging violation of his constitutional rights.

Petitioner's case

2. The Petitioner's case is that, he was appointed as an Assistant Chief in **Ikinu Sub Location** in the larger **Ikinu Location** sometime in **21st April 1998** vide an appointment letter dated 21st April 1988.
3. He avers that sometime on **20th November 2001**, he was interdicted from his position in the Public Service as Assistant Chief, Ikinu Sub-location for allegedly inciting the public to demonstrate against the construction of a building on a road reserve. However, shortly thereafter, the Petitioner was reinstated to his position in the service as Assistance Chief, Ikinu Sub-Location on **14th November 2002**.
4. Again on **19th November 2005** the Petitioner was retired from the public service as Assistant Chief, Ikinu Sub-Location on grounds of Public Interest vide a letter dated **21st February 2005** from the then Ministry of Provincial Administration & National Security.
5. According to the letter dated 21st February 2005, the Petitioner was required to make presentations and show cause why he should not be retired on grounds of public interest within twenty one (21) days i.e. on or before **14th March 2005**.
6. However and of importance in this suit, the letter dated 21st February 2005 from the then Ministry of Internal Security was only delivered to the Petitioner on 23rd March 2005. Having received the letter dated 21st February 2005 late, the Petitioner was obviously not able to make presentations, show cause or defend himself before the Permanent Secretary, Ministry of Provincial Administration & National Security.
7. It is the failure by the Petitioner to appear before the Permanent Secretary as per the letter dated 21st February 2005, that informed the decision to retire the Petitioner from the Public Service on 19th November 2005.
8. The Petitioner avers that it is following the disregard and flagrant breach of his constitutional rights to fair administrative action, fair hearing, right not to be discriminated and right to dignity that the Petitioner has filed his Petition herein.
9. It is the Petitioner's submission that for the actions of the 1st and 2nd Respondents and/or their agents, the Petitioner was condemned unheard.
10. He submits that but for the actions of the 1st and 2nd Respondents and/or their agents, he lost his job and means of fending for himself and his family rendering him poor and causing him untold suffering and misery.
11. He avers that for the actions of the 1st & 2nd Respondents and/or their agents, the Petitioner was unfairly retired and/or discharged from the Public Service in an undignified manner thereby tarnishing his name and standing in the eyes of the Petitioner's peers and general public.
12. The Petitioner therefore seeks the following Orders as against the Respondents:-

(a) A declaration that the proceedings before the Permanent Secretary and the decision thereof to retire the Petitioner on grounds of Public Interest was unprocedural, bad in law, unfair and in violation of the Petitioner's right to fair Administrative Action and Right to fair hearing and right to Human Dignity as enshrined under the Constitution of the Republic of Kenya.

(b) An Order for general damages to be awarded to the Petitioner for the pain, suffering, and humiliation meted on him by the 1st & 2nd Respondents and/or their agents in unfairly and unprocedurally dismissing him from the Public Service as Assistant Chief in Ikinu Sub-Location.

(c) Costs of this petition.

(d) Any other or further relief as this honorable Court may deem fit and just to grant.

13. The Petitioner has alleged that his rights to be heard under Art 27 of the Constitution and Art 47 of the constitutional on Fair administrative action were infringed upon. He further avers that his rights under Art 50 of the constitution were grossly violated as he was not given an opportunity to be heard.

Respondent's case

14. The Respondents filed their joint Grounds of opposition dated 23.04.2018 which raised the following salient points:-

- *That the Respondent's actions (presumably to retire the Petitioner) were neither illegal, unlawful nor contravened the rules of natural justice as alleged by the Petitioner.*
- *That the Petitioner has failed to state how his fundamental rights were infringed and denied by the 1st and 2nd Respondent.*
- *That the Petitioner is circumventing the law as the employment claim (sic) is time barred.*

- *That the Petitioner should have sought remedies through an employment and labour relations claim as opposed to a Petition.*

15. In response to the Petition the 1st 2nd and 3rd Respondent filed Grounds of Opposition dated 23rd April 2018 and raised the following grounds: -

1. ***THAT the Petition lacks merit and is based on unfounded allegations.***
2. ***THAT the Respondent actions were neither illegal, unlawful nor contravened the rules of Natural Justice as alleged by the Petitioners.***
3. ***THAT the Petitioner has failed to state and prove how his fundamental rights were infringed and denied by the 1st and 2nd Respondent.***
4. ***THAT the Petitioner is circumventing the law as the employment claim is time barred.***
5. ***THAT the Petitioner should have sought remedies through an employment and labour relation claim as opposed to a petition.***
6. ***THAT the damages the Petitioner is seeking can only be granted through an Employment and Labour Relations claim and not a petition.***
7. ***THAT the Respondent shall be denied the opportunity to Defend the claim by producing evidence through viva-voce proceedings.***
8. ***THAT the application is an abuse of Court process and lacks merit.***
9. ***THAT the Petition is therefore baseless, misconceived and devoid of any merit and orders sought should not be granted.***
10. ***THAT the Petition be dismissed with costs to the Respondent's.***

16. The Respondent submitted that there is no wrong doing by them and that the Petition is not properly before the Court as the Petitioner seeks to rely on the current Constitution whereas the alleged infractions occurred during the pendency of the repealed Constitution.

Issues for determination

17. I have examined all the averments and submissions of both parties. The issues for determination are as follows:-

- a) ***Whether the Petitioner is properly before Court.***
 - b) ***Whether the Petitioner's rights were infringed upon by the Respondents herein.***
1. ***Whether the petitioner is properly before this Court***

18. The Respondent that the Petitioner is not properly before this Court. The Petitioner cause of action arose in 2005, which should be under the old constitution and not the 2010 constitution. The Petitioner has however based his argument in the new constitution, which was not in force at the time he was dismissed.

19. In determining this Petition, I would refer to the case of **Anarita Karimi Njeru vs Republic (1979) Eklr** where Hon. JJ Trevelyan and A. R. W Hancox settled the preposition on how a constitutional Petition should be framed in that the person alleging the infringement must set out the right infringed upon and the particulars of such infringement or threat and the particulars of such infringement or threat. The Hon. Judges rendered themselves thus:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, (if only to ensure that justice is done to his case) that he 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.

20. This principle was affirmed in **Mumo Matemo vs Trusted Society of Human Rights Alliance & Others** Nairobi Civil Appeal No. 290 of 2012.

21. Following the principles enunciated in the above case, I need to determine if the Petition before me meets the criterion set above.

22. I note that the Petitioner alleges breach of Articles 27, 47, and 50 of the Constitution of Kenya 2010.

23. In the body of the Petition, he alleges that the events leading to the alleged breaches occurred in 2005 when he was retired in the public interest.

24. The prayers sought are also for breaches under the Constitution of Kenya 2010.

25. The question then is whether the Constitution of Kenya 2010 can be applied retrospectively for breaches occasioned before its promulgation. Article 264 of the Constitution of Kenya 2010 states as follows:-

“The Constitution in force immediately before the effective date shall stand repealed on the effective date, subject to the Sixth Schedule”.

26. My reading of this provision is that the Constitution came in force upon promulgation in August 2010. Hon. J. Majanja in **Duncan Otieno Waga vs Attorney General Pet No. 94 of 2011** stated as follows:-

“The acts of the Respondent in relation to the Petitioner must therefore be construed by reference to the former Constitution particularly Section 82 which prohibits discrimination. Counsel for the Petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the Court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this Court to adjudicate violations of the Constitution but they do not empower the Court to apply Constitution retrospectively”.

27. J. Majanja struck out the above Petition accordingly.

28. In **Du Plessis & others Vs. De klerk & Others (1996) Zaacc 10** the court opined as follows:-

“The constitution is neither retroactive nor retrospective it does enact that as at the date prior to its coming in to force. The law shall not be taken to have been that which it was not.”

29. In **Anarita Karimi case**, the requirement for setting out one's case with precision was emphasized. I note that indeed the petitioner herein have set out their rights infringed prior to the 2010 Constitution but filed alleging infringement of rights under the 2010 Constitution.

30. It is my view that the Petitioner have failed in setting out this case properly and precisely and for this case I am unable to grant remedies sought. For the above reasons, I do not find any need to delve into the second issue above. The upshot is that the petition is improperly before Court and the same stands dismissed accordingly.

Dated and delivered in open Court this 8th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kirui holding brief for Mandela for the Petitioner – Present

Respondents – Absent