



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NUMBER 1 OF 2015

BETWEEN

ANDREW MULANGO.....CLAIMANT

VERSUS

1. NATIONAL CEREALS & PRODUCE BOARD

2. THE ATTORNEY GENERAL

3. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

RULING

1. The Petitioner filed Petition Number 34 of 2014 at the High Court, Mombasa. He petitioned the Court to grant him the following orders against the Respondents:-

a) A declaration that that Petitioner's right to fair administrative action as provided for under Article 47 of the Constitution, and the right to fair labour practices provided by Article 41 of the Constitution were violated.

b) An Order for compensation of the respective violations of rights and fundamental freedom as follows:-

i. Compensation for gross violations of the Petitioner's rights to be assessed by the Court.

ii. Salary arrears from May 2005 to November 2017 when the Petitioner would have retired at the age of 60, at the rate of the gross salary at termination.

iii. Compensation for loss of reputation and dignity.

c) Costs

d) Any other order the Court deems fit.

2. The Petition was transferred by the High Court to the present Court, on the ground that in dispute is an employment issue.

3. The Respondents have raised Preliminary Objection, submitting the Petition was filed hopelessly out of

time, Petitioner's termination of employment having taken place in the year 2005. It is the Respondents' position that the Petitioner seeks to overcome time-bar, by disguising his grievance as a Constitutional Petition.

4. The Objection was heard on 15th February 2017.

The Court Finds

5. The Petitioner was employed by the 1st Respondent as a Weighbridge Clerk.

6. He was alleged to have participated in theft of 203 bags of maize, and 293 empty gunny bags, from 1st Respondent stores, at Changamwe Mombasa.

7. He was arrested, and charged with the offence of stealing by servant, vide Mombasa CM's Criminal Case Number 1625 of 2005.

8. The 1st Respondent terminated the Petitioner's contract of employment, in a letter dated 11th August 2005, before the Criminal trial concluded.

9. The Petitioner was eventually acquitted on 26th October 2005.

10. He argues in the Petition that termination was against principles of natural justice; it violated Petitioner's right to fair labour practices under Article 41 of the Constitution; it violated his right to fair administrative action; and that the 1st Respondent should have waited for the outcome of the criminal trial, before terminating Petitioner's contract.

11. The Court agrees with the Respondents that the Petition is not properly before the Court.

12. The Petitioner served under a contract of employment. In event of termination, he would have to look for a remedy from the four corners of the contract. This Court has in the past suggested that the contract, is always the first port of entry.

13. His resort to the Constitution, while there are Acts of parliament which offered him an avenue in redressing his grievance, can only be explained on the ground stated by the Respondents: Petitioner's desire to side-step the time-bar placed upon his Claim, by the relevant Legislation.

14. Specifically, the Petition aims at circumventing Section 90 of the Employment Act 2007, placing a time-bar of 3 years on filing of Claims under the Act, from the date of their accrual.

15. The Petitioner had the option of filing a trade dispute under the Trade Disputes Act Cap 234 the laws of Kenya, in 2005 when termination took place. He had the option of filing his Claim under the Labour Relations Act Number 14 of 2007; and the Employment Act 2007.

16. There is no reason given why he did not bring his grievance under any of the legal regimes at his disposal.

17. The Constitution of Kenya was only promulgated in 2010. The Court does not see how an Employer, acting against an Employee in the year 2005, can be held to have violated fair labour practices and fair administrative action rights, which are rights flowing from an organic law made in 2010.

18. Although Courts have held that the Constitution of Kenya can be invoked in redressing wrongs preceding its promulgation, not every wrong, is to be redressed in retrospection.

19. The wrongs intended to be redressed this way are those committed by the State against Individuals or Communities, those in the nature of historical injustices. The Decision cited by the Petitioner in support

of his Petition, *CA Civil Appeal Number 79 of 2012 between Peter M. Kariuki v. Attorney General [2014] e-KLR* is distinguishable from the present Petition.

20. First, as can be read at the outset, the Judgment was aimed at redressing an historical injustice, occasioned by the State to Major Peter M. Kariuki, “*In the aftermath of an infamous event in the history of Kenya.*”

21. Second, the Judgment dealt with fundamental rights under the old Constitution predating 2010. It dealt with redress of violations under the old Constitution, and a Petitioner’s right to seek redress at the High Court under section 84 the retired Constitution.

22. The Petitioner herein does not rely on the old Constitution which was in place when his contract was terminated, but invokes the new Constitution to redress what is clearly a statutory/contractual infringement, rather than an historical injustice.

23. There is no constitutional moment in the Petition filed herein. Courts have held that the Constitution is not a blue-print for dealing with everyday disagreements between Parties. Where there are remedies given under statute or contract, a Party who considers himself to have been wronged, ought to pursue remedy under these regimes. If legislation does not offer a remedy, it could be challenged for being unconstitutional.

24. The Petition is in abuse of the Constitution. It seeks to use the Constitution as a means of escaping time limit placed on the filing of an employment dispute by the relevant Act of Parliament. It seeks to nullify section 90 of the Employment Act.

25. The Preliminary Objection is allowed. **IT IS ORDERED:-**

(a) The Petition is improperly before the Court.

(b) It is hereby struck out with no order on the costs.

Dated and delivered at Mombasa this 24th day of March 2017.

James Rika

Judge