



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 2 OF 2017

STEPHEN KARITHI GAKULA.....PETITIONER

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

JUDGMENT

The petitioner filed the petition on 25.01.2017 through Kimathi Wanjohi Muli Advocates. The petitioner invoked Articles 3, 19, 10, 20, 21(1), 22, 23(1) and 25 of the Constitution of Kenya, 2010. The petitioner further invoked sections 43, 45 and 49 of the Employment Act, 2007 and the Teachers Service Act. The petitioner alleged the unfair and unlawful termination of his employment by the respondent. The petitioner prayed for:

- a) An order of declaration that the dismissal of the petitioner from the respondent's employment as a teacher was unfair, unjust, unlawful and unconstitutional.
- b) An order to quash the decision by the respondent's disciplinary hearing and lifting the petitioner's letter of dismissal dated 03.09.2012.
- c) An order compelling the respondent to re-employ the petitioner without loss of benefits or seniority.
- d) An order compelling the respondent to pay the petitioner's salary arrears and full benefits from 25.06.2012.
- e) In alternative to prayer (c) payment of general damages to the petitioner for unfair termination.
- f) An order of compensation to the petitioner in general damages for breach of his constitutional, contractual and statutory rights leading to mental anguish, psychological harm and emotional distress.
- g) Interests to the petitioner on (d) at prevailing court rates.
- h) Costs of this petition.
- i) Any other relief the court may deem fit to grant.

The petition was based on the supporting affidavit of the petitioner filed together with the petition and the further supplementary affidavit filed on 24.03.2017.

The respondent opposed the petition by filing the grounds of opposition on 28.02.2017 through Cavin Anyuor Advocate. The respondent urged that the cause of action, the subject matter of the petition herein, is time barred under section 90 of the Employment Act, 2007. Accordingly, the court lacked jurisdiction to determine the petition on the merits of the case. The respondent also filed on 28.02.2017 the replying affidavit sworn by Lawrence Kigen, the respondent's Assistant Director for Discipline.

Section 90 of the Employment Act, 2007 provides that notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, Cap.22, no civil action or proceedings based or arising out of a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of a continuing injury or damage within twelve months next after cessation thereof.

The claimant was dismissed from employment by the letter dated 13.09.2012 with effect from 03.09.2012 on account of carnal knowledge with a student.

It is not in dispute that the dismissal was on 13.09.2012 and the petition was filed on 25.01.2017. The court has considered the petition and the nature of prayers sought. The court finds that the petition clearly amounts to the kind of proceedings contemplated in section 90 of the Employment Act, 2007. As submitted for the respondent, the suit was clearly time barred, the period of limitation of three years having lapsed on or about 13.09.2015. Further, as submitted by counsel for the respondent, the court would not therefore enjoy the jurisdiction to consider the merits of the petition. As urged for the petitioner he may have filed an administrative appeal against the dismissal but the court finds that pendency of the appeal did not suspend section 90 of the Employment Act, 2007. In particular the court follows **Attorney General and Another –Versus- Andrew Maina Githinji [2016]eKLR** where Waki J.A in the majority decision held that section 90 of the Employment Act, 2007 preemptorily limits actions by the use of the word “shall”.

In conclusion, the petition filed for the petitioner on 25.01.2007 is hereby dismissed with costs.

Signed, dated and delivered in court at Nyeri this **Friday, 5th May, 2017.**

BYRAM ONGAYA

JUDGE