



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 32 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 15th December, 2016)

CORPORAL HENRY A. CHOGO.....1ST PETITIONER

POLICE COSNTABLE RUTH JEBET.....2ND PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

COUNTY POLICE COMMISSIONER, NYANDARUA.....4TH RESPONDENT

JUDGMENT

1. This Petition is dated 13th day of May of 2014 filed by the firm of Billy Amendi & Company where the Petitioners pray for:

1. A declaration be issued to declare that the Petitioners right to fair hearing as guaranteed by Article 50 of the Constitution has been contravened by the Respondents.

2. A declaration be issued to declare that under Articles 27 and 28 of the Constitution, the Petitioners right to equality before the law and fair treatment enjoins the Respondents to protect and respect the Petitioners rights to fair hearing and the Petitioners right to equal benefit and protection of the law has been infringed.

3. A declaration be issued to declare that there is contravened by the Respondents of the Petitioners right to fair administrative action as guaranteed by Article 47 of Constitution.

4. A declaration that the minutes of police headquarters disciplinary appeal board meeting held on the 24th day of April 2006 and the unilateral and summary decision of the 3rd Respondent are unconstitutional, illegal and therefore a nullity.

5. A declaration that the headquarters disciplinary appeal board meeting held on the 24th day of

April 2006 is unconstitutional, illegal and therefore the decision and recommendation arising there from null and void ab initio.

6. The Honorable Court be pleased to uphold the Petitioners right under Articles 27, 28, 47, 50 and 236 of the Constitution by issuing an order quashing the decision of the Respondents to terminate the Petitioners service.

7. The Honourable Court be pleased to order the Respondents jointly and severally pay damages to the Petitioners for violation of their rights and freedoms under Articles 27, 28, 47, 50 and 236 of the Constitution.

8. The Honorable Court be pleased to order the Respondents jointly and severally to compensate the Petitioners the sum monies at the rate of Kshs. 26,750.00 and Kshs. 18,500.00 per month respectively with interest for the unexpired period they would have served as Corporal and Police Constable from 27th day of November 2003 and loss of benefit of career.

9. The Honorable Court do make orders reinstating the Respondents to their work and to their former positions.

10. Damages for misfeasance in public office.

11. The costs of this Petition be provided for.

Facts

2. The Petitioners in this matter were Police Officers with the ranks of Corporal and Police Constable respectively. On or about the 22nd and 23rd October 2003, while performing traffic duty checks along Ol Kalau/Gilgil road, it was alleged that they were caught on video camera/cassettes receiving bribes from motorists whose particulars they are yet to receive. The then Provincial Police Officer, Central Province, Mr. Mengo (deceased) decided it was not in the interest of the police force that the Petitioners should not continue to serve.

3. The Petitioners were asked to return their uniforms, weapons, and surrender their living quarters and ordered to vacate them on the same day of 27th November 2003 at 7 pm at night with nowhere else to go together with their families thereby subjecting them to mental anguish, torture, inhuman treatment and contempt.

4. The Petitioners aver that they were not subjected to any disciplinary procedure known to law either through Court Process, Tribunal, Orderly Room Procedure or at all. They aver that the video evidence relied on was never subjected to any independent analysis to ascertain authenticity nor was an investigation carried out of any kind nor was it corroborated in any way.

5. The Petitioners aver that they appealed their dismissal to the appropriate authorities vide their letters dated 27th November 2003, 3rd December 2003 and 20th July 2012 to no avail. They state that the Respondent have stuck to their illegal position arrived at the appeal proceedings held on the 24th of April 2006 in which it is conceded that no Orderly Room Proceedings were conducted against the Petitioners, hence the averment that the Petitioners were condemned unheard.

6. The Petitioners state that they were not given a chance to defend themselves, and that Article 50 of the Constitution and Section 77 of the Repealed Constitution protects their rights to fair hearing in that:

a) They were entitled to a trial before an independent and impartial tribunal.

b) They were to benefit from the presumption of innocence until the contrary is proved.

c) They were entitled to an opportunity to adduce and challenge evidence in any proceedings against them.

d) They were entitled to adequate time and facilities to prepare for their defence.

e) The Petitioners were entitled to face their accusers and cross examine the witnesses against them or challenge the evidence against them.

f) The Respondents are enjoined to protect and respect the Petitioner's right to fair hearing.

g) The Respondent's acceptance at the Appeals board that "No Orderly Room Proceedings" were conducted appeared that the Respondents had already condemned the Petitioners unheard.

h) Failing to accord the Petitioners an opportunity to cross examine the witnesses against them and/or challenge the evidence against them infringed the Petitioner's right to a fair trial.

i) The Respondents were in pursuit of arbitrary, illegal, disproportionate and unfair enforcement of illegal practices to the detriment of the Petitioners.

j) The Petitioners conduct jointly and severally is utterly arbitrary against the Petitioners infringing the Petitioners rights under Article 50 of the Constitution of Kenya 2010.

7. They Petitioners state that in furtherance of their right to fair trial and due process, there was a merger of the investigative, prosecutorial and judicial roles in the proceedings against the Petitioners. Further, they state that under Article 27 of the Constitution they are entitled to equal protection and benefit of the law in addition to not being discriminated against.

8. The Petitioners further state that the acts, decisions and omissions of the Respondent contravene Articles 27, 28, 47, 50, and 236 of the Constitution. They expound by stating that under Article 27, they had a right to equality before the law, under Article 27 as read with 28 of the Constitution, they should not be subject to unconscionable, unfair and discriminative treatment.

9. The Petitioners state that they have a right to fair administrative action under Article 47 which implies that they should have been given reasonable notice to appear before the Respondents and respond to the allegations placed against them, further, that the rule of law and due process should always be effected in a reasonable, lawful, efficient and expeditious manner.

10. Further, under Article 19, all administrative policies and practices ought to be in sync with the bill of rights and therefore fundamental rights and freedoms guaranteed under the Constitution and under Article 236 the Petitioner is entitled not to be victimized or discriminated against for having performed the function of office in accordance with the Constitution or in any other law or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.

11. The Petitioners state that they had 16 years and 34 more years to serve in the police service respectively, with prospects of advancement to senior rank. They state that they were victims of a choreographed scheme by the Respondents to have them out of the force by all means necessary.

12. In Response the Respondents have filed a Replying Affidavit dated 23rd July 2015 deponed to by Gladyce Ogonda, the Staff Officer Personnel 3 at the Kenya Police Service.

13. In it, they aver that the Claimants have made their claim invoking the Industrial Court Act 2011 and the Constitution of Kenya 2010, which they state cannot apply to a past but to a future. They aver that according to Shroud's Judicial Dictionary of Words and Phrases, Vol 3, retrospectivity is defined as "*nova Constitutio faturn forman imporere deber, non*" unless there be clear words to the contrary,

statutes do not apply to a past but to a future.

14. They aver that the Petitioners were dismissed from the force based on video evidence of them obtaining bribes from motorists and engaging in un-professional practices and conduct while performing duties along Olkalau/Gilgil Road on 22nd and 23rd October 2003.

15. They aver that the dismissal was in accordance with Section 35 of the Force Standing Orders CAP 20 which requires the Provincial Police Officer to notify affected officers of such dismissal, and exempt particular cases from being heard as part of orderly room proceedings.

16. They aver that the given policy was founded upon the Government Policy on zero tolerance on corruption, and that the dismissal letters informed the Petitioners of their right to appeal to the Commissioner of Police within seven days of receipt of the said letter in order to accord them a fair hearing.

17. They aver that the Headquarters Disciplinary Board on the 24th April 2004 whilst considering the appeal by the Petitioners observed that even though the Petitioners were not tried in Orderly Room Proceedings, the Provincial Police Officer acted properly by dismissing them based on the video evidence and this concurred with the dismissal sentence.

18. They aver that the decision that the appeal was devoid of any merit was upheld by the Commissioner of Police who is the final appellate authority in disciplinary matters and in relation to employment, retention or dismissal of subordinate officers under Section 108 (2) of the former Constitution.

19. They aver that the Commissioner acted in good faith and accorded the Petitioners a fair trial and the right to be heard, further that all appeal cases that were dealt with prior to 3rd October 2012, being the date the National Service Commission was operationalized were disallowed as most cases were procedurally exhausted and over ten years old.

20. They aver that a notice of intention to institute proceedings against the Attorney General were served on the 15th of September 2006 and 10th July 2007 but no further action was taken. They aver that the Petition is therefore time barred and an abuse of the Court process.

21. They aver that the Petitioners' prayers for compensation with interest for unexpired period goes against the protection and promotion of fair dealing between labour and capital and would be transgression of the principle of fair go all round. Further that an aggrieved employee must move on and not sit back waiting to enjoy anticipatory remuneration, the remedies must be proportionate to the economic injuries and not aimed at facilitating unjust enrichment.

22. They oppose the Petition.

Submissions

23. In their submissions, the Petitioners rely on their pleadings and reiterate that there was an infringement of their rights as enshrined in the Constitution. They add that an action to bring a breach of fundamental right and freedom has no duration and time does not run from the time of breach to when the Court action is instituted.

24. They contend that the actions, decisions and omissions of the Respondents herein either jointly or severally are unconstitutional as they contravene Articles 27, 28, 47, 50 and 236 of the Constitution. They were never subjected to any disciplinary procedure either through a Court process, tribunal, orderly room procedure or any other known to law.

25. Respondents have filed written submissions dated 26th September 2016. In it they submit that the application before the Court is time barred as the dismissals took place in 2003 and the claim was brought

in 2014.

26. They rely on Section 90 of the Employment Act which provides that such an action should have been brought within three years after the dismissal but the Petitioners have been seating on their rights. They further submit that the Petitioner has not given ground as to why they had filed their Petition in 2014.

27. They further rely on the decision of Justice Mbaru in **Fred Mudave Gogo vs. G4s Security Services (K) LTD [2014] eKLR** where the matter was dismissed stating that:

“it cannot be denied that the cause of action herein is based on a contract of employment. The Claimant’s employment was terminated on the 8th of August 2008, a period of over 3 years from date of filing this claim in the Industrial Court on the 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the Claimant/Applicant from filing the claim in good time. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before the parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist the parties who for good reasons are unable to come to court in good time. This was not the case here.....”

28. The Respondents submit that the Petitioners claim for sum monies for an unexpired period where they would have served as Corporal and Police Constable is without legal or factual foundation and to this end they rely on the case of **Wilfred Kyallo Kangulu vs. Tetra Park Limited [2014] eKLR** at paragraph 55 where Judge Rika stated as follows:

“The claim for loss of earnings calculated at Kshs 6,770,904 is without legal or factual foundation. The Claimant had no reason to expect he would have continued working invariably until the age of 55 years or 60 years....”

29. They pray that the prayer sought should be denied.

30. The Petitioner submit that the first Petitioner Henry A. Chogo was served with a dismissal letter on record and a Memorandum of Appeal against punishment of dismissal also presented as well as minutes of a disciplinary appeal which proves that there was in deed procedure that was followed prior to the dismissal.

31. They submit that according to Section 35 of the Force Standing Orders, for a dismissal on these grounds orderly room proceedings are not mandatory all that is needed is to notify them of effective date of such dismissal. They submit that the Petitioners were notified and served with letters of dismissal.

32. The Respondents submit that the Petitioners rights have not been infringed or violated. They submit that the Petitioners have not stated precisely and in entirety how those Articles have been violated, infringed upon as they have only quoted entire Articles.

33. They rely on the case of **John Kimanu vs. Town Clerk Kangema** where the court citing **SWN vs. GMK** made the following observation:

“Our courts have over the years established that for a party to prove violation of their rights under various provisions of the Bill of Rights, they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is twofold. First the Respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to men but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point

to a specific provision of the Constitution that has been abridged.”

34. The Respondents submit that the Petitioners have only quoted two legal provisions in their Petition without even stating Sections in which the rights have been infringed or violated. They submit that the Petitioners actions are a waste of the Courts time.

35. The Respondents submit that the claim does not hold water and should be dismissed.

36. Having considered the submissions of both parties, the issues for determination are as follows:

1. Whether the Petition is time bared.

2. Whether there were any infringements against the Petitioner rights under the Constitution.

3. If yes what law to apply.

4. What remedies to give in the circumstances?

37. On the 1st issue, the Respondents have submitted that the course of action having arisen in 2003, the matter is time barred and therefore could not have been filed in 2014 and survive. They relied on Section 90 of Employment Act which states:

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or 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 continuing injury or damage within twelve months next after the cessation thereof.

38. The Petitioners on their part have submitted that an action to bring a breach of a fundamental right and freedom has no duration and time does not run from the time of breach to when the Court action is instituted.

39. The issue of limitation of time has been dealt with in several cases. It is true that under Section 90 of Employment Act a claim arising out of an employment relationship should be filed 3 years after the occurrence of the breach.

40. This case is however not of that category being a claim for breach of constitutional rights and freedom (see James Kanyiita Nderitu vs. Attorney General and Another Nairobi Petition No. 180/2011 (unreported), Peter Kagume and Others vs. Attorney General Petition No. 128/2006 (unreported) and Durity vs. Attorney General (2002) UKPC 20, Wachira Waheire vs. Attorney General Nairobi HC Misc. Appl. No. 1184 of 2003 (2010) eKLR).

41. In the case of **Richard Wasilwa Wafula vs. Commissioner of Police & 2 others (2014) eKLR** Majanja J found that for the Petitioner in this Petition filed in 2012 for atrocities committed in 1995. Courts (supra) have held that provisions of Public Authorities *Limitation Act* cannot defeat the right to seek relief for constitutional violations. However, the grant of relief may be defeated by inordinate delay.

42. In the case of **Leonard Mutua Munyao & Another vs. Attorney General & Another Pet No. 229/2013 (2014) eKLR**, the Petitioners claimed infringement of their rights in 2003 which claim the Court entertained for the reasons that a claim for a constitutional infringement cannot be defeated by reason of limitation.

43. It is therefore the finding of this Court that in the instant matter, though events complained of occurred in 2003, limitation will not bar the Petitioners from seeking relief for constitutional violation.

44. On the 2nd issue, the Petitioners have claimed infringement of their rights under the Constitution of

Kenya 2010, Articles 27, 28, 47, 50 and 236. I will start by stating that though a claim for an infringement of a right or freedom may lie, this must be brought under the law as subsisting at the time of the infringement.

45. However in Civil Appeal 224/2012 the Court of Appeal (JJA Azangalala, J. Mohammed and Kantai) had this to say concerning retrospective Application of the Constitution:

“The Supreme Court has best stated what the law is on this issue in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, [2012] eKLR:

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”

46. In applying the text above I do find that it is not the intention of Parliament to apply Articles 27, 28, 47, 50 and 236 retrospectively. The Articles all appear to project to future events where Article 27 and 47 envisages a situation where legal action would have to be put in to ensure proper implementation.

47. However, considering the issue before Court, the Petitioners have pleaded lack of a fair hearing which the Respondents concede to. The Petitioners were not subjected to any orderly room proceedings nor any other hearing before their dismissal. The rules of natural justice demand that a man should not be condemned unheard.

48. Section 77 of the repealed Constitution provided as much that one facing any charges should be given a fair hearing in the following terms:

1. ..”If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

2. Every person who is charged with a criminal offence: -

a) shall be presumed to be innocent until he is proved or has pleaded guilty;

b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

c) shall be given adequate time and facilities for the preparation of his defence;

d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

f) shall be permitted to have without payment the assistance of an interpreter if he cannot

understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

3. When a person is tried for a criminal offence, the accused person or a person authorized by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

4. No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

5. No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial of that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

6. No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

7. No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

8. No person shall be convicted of a criminal offence unless that offence is denied, and the penalty therefor is prescribed, in a written law:

Provided that nothing in this subsection shall prevent a court from punishing a person for contempt notwithstanding that the act or omission constituting the contempt is not denied in a written law and the penalty therefor is not so prescribed.

9. A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

10. Except with the agreement of all the parties thereto, all and except with his own consent the trial shall not take place in his Election of officials proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

11. Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority:

a) may by law be empowered to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

b) may by law be empowered or required to do in the interests of defence, public safety or public order.

12. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of:-

a) subsection (2) (a) to the extent that the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts;

b) subsection (2) (e) to the extent that the law in question imposes conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or

c) subsection (5) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding a trial and conviction or acquittal of that member under the disciplinary law of that force, so, however, that a court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law.

13. In the case of any person who is held in lawful detention, subsection (1), paragraphs (d) and (e) of subsection (2) and subsection (3) shall not apply in relation to his trial for a criminal offence under the law regulating the discipline of persons held in lawful detention.

14. Nothing contained in subsection (2) (d) shall be construed as entitling a person to legal representation at public expense.

15. In this section “criminal offence” means a criminal offence under the law of Kenya”.

49. I do in the circumstances find that the fact that the Petitioners were dismissed without any hearing, the Respondents breached provisions of Section 77 of the repealed Constitution.

50. Having found as such, I do find that indeed the rights of the Petitioners to a fair hearing were breached and I do find for each Petitioner and award each Kshs. 1 million as damages for breach.

51. The Respondents will meet costs of this Petition.

Read in open Court this 15th day of December, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioners – Present

Respondents – Absent