



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

PETITION NO. 6 OF 2016

JOHNSTONE OGECHI MOSE.....PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

RULING

The petitioner filed the petition on 28.09.2016 through Mongeri and Company Advocates. The petition was said to be in the matter of enforcement of fundamental rights under Articles 19, 20, 21, 22, 23, 31, 47, 48, 49, and 50 of the Constitution, and in the matter of unfair termination of ex-police constable Johnstone Ogechi Mose under sections 47 and 87 of the Employment Act, 2007. The petitioner prayed for judgment against the respondent for:

- a) An order directing the National Police Service Commission to reinstate into the service ex-police constable Johnstone Ogechi Mose No. 36925.
- b) A declaration that the petitioner's constitutional rights to a credible and a fair hearing were violated and consequently issue an order quashing the decision made by the National Police Service Commission by a letter dated 30.08.1988.
- c) An order for costs of the petition.
- d) Such other orders as the honourable court may deem fit to grant.

It is not in dispute that the petitioner was dismissed from the police service on 30.08.1988.

The respondent filed a preliminary objection dated 27.02.2017 among the grounds that the petition was time barred. The grounds in the preliminary objection were as follows:

- 1) That the suit is frivolous, vexatious, bad in law and an abuse of court process.
- 2) That the suit herein is time barred and should be dismissed.
- 3) That the petitioner has not demonstrated how his constitutional rights have been infringed by the respondent.
- 4) That the suit herein is bad in law brought in bad faith, lacks merit and should be dismissed with

costs to the respondent.

Under the applicable section 4 of the Limitation of Actions Act, the suit then based on a contract of service was to be filed within 6 years of the time of limitation; or within 3 years from the date of dismissal under section 90 of the current Employment Act, 2007. The petitioner has moved the court invoking the alleged contravention of fundamental rights. However there is no doubt that the claims are founded and rooted in the contract of employment. In the opinion of this court, all rights and freedoms despite their formal situ are incorporated in the Bill of Rights by reason of Article 19 (3) (b) which provides that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with Chapter Four of the Constitution on the Bill of Rights. In so far as the rights were incorporated, the petitioner was entitled to move the court by way of a petition.

The court, on the procedural manner litigants should invoke and approach the court's jurisdiction, further upholds its opinion in Professor Elijah Biama –Versus- University of Eldoret and 2 Others [2014]eKLR thus,

“...The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.”

As to whether the period of limitation apply in this case, the court is guided by Article 20(4) of the Constitution which provides that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights. First, the petitioner invokes sections 47 and 87 of the Employment Act, 2007 which obviously were not in force at the time he says he was dismissed from the police service on 30.08.1988. The court finds that such retrospective application would be inconsistent with Article 20(4) of the Constitution. Similarly the petitioner has invoked Articles 19, 20, 21, 23, 31, 47, 48, 49, and 50 of the Constitution retroactively and in circumstances whereby the court has found that the cause of action was limited to 6 years under section 4 of the Limitation of Actions Act or section 90 of the Employment Act, 2007. Thus the court considers that the cause of action was stale and the cited provisions of the statute and the Constitution will not aid the claimant to revive the claim. The court holds that the statutory provisions that set time of limitation are well within the envisioned safeguards in Article 20(4) of the Constitution and it would be unfair and inequitable to open up the respondent to the stale claims. The court has also considered the remedies as prayed for. The court makes findings as follows:

a) Prayer (a) is for reinstatement, the petitioner having been dismissed from the police service on 30.08.1988. Under section 12 (3) (vii), in exercise of its jurisdiction, the court may make an order

for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law. The three years having lapsed long time ago on or about 30.08.1991, the court finds a clear statutory bar to granting the relief as prayed for.

b) Prayer (b) is in the nature of certiorari to quash the dismissal decision of 30.08.1988. It is clear that Order 53 rules 2 and 3 of the Civil Procedure Act, as read with sections 8 and 9 of the Law Reform Act imposes a time of limitation of 6 months for a litigant to apply for certiorari. The court finds that such is a clear statutory bar to the prayer for the quashing order.

c) In view of (a) and (b), the court considers that the petition would be an abuse of court process and in line with the submissions made for the respondent.

While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution.

Further, while making the findings, the court has considered that the petitioner belatedly appealed on 01.07.2015 against the dismissal decision and the court returns that such administrative appeal and the decision thereon did not in any manner impair the time of limitation from running with respect to the petitioner's dismissal by the decision of 30.08.1988.

In conclusion, the preliminary objection dated 27.02.2017 is hereby upheld in so far as the petition is time barred and is an abuse of court process. The petition is hereby dismissed with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at **Nyeri** this **Friday, 16th June, 2017**.

BYRAM ONGAYA

JUDGE