



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 60 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th July, 2018)

AG. SP. JOB CHERUIYOT KERUI.....CLAIMANT

VERSUS

H. ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION....2ND RESPONDENT

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

RULING

1. The Petitioner filed this Petition on 22nd June 2015 through the firm of Billy Amendi & Company Advocates seeking damages for violations of the constitution and the law.
2. He avers that at all material time he was a Police Officer of the rank of Ag Superintendent of Police, having been enlisted in the Police Force as a direct entry cadet on 31st October 1987 and confirmed to permanent and pensionable terms in 1989 upto the time of his dismissal in 2006. He had worked with distinction for 19 years without any charge as proven by his promotion through the departments culminating in the appointment of District Criminal Investigation Officer (DCIO) Kisii, District. He was and remains a dedicated and loyal Senior Police Officer.
3. He further avers that on or about 11th January 2006 he reported to his place of duty at 0600 hours as was the norm. He did the morning call up as required at 0615 hours and continued with normal routine duties till he signed off for the day at about 2000 hours. This was after he had made arrangements for silent hours (night duty) coverage patrols covering his entire command of the whole district.
4. During the night of 11th/12th January 2006 two robbery incidents occurred one after another. While these incidents did not warrant his personal attention at the scenes, the officers he had deployed for night duty were up to task and performed their duties well.
5. It was during that same night that he was alleged to be absent from duty and/or place of work and required to show cause by Police Headquarters and/or Public Service Commission vide fax reference P/CONF/215488/37 dated 13th January 2006.
6. That no absent report had been generated at the duty station or by his immediate supervisor the Provincial Criminal Investigation Officer (PCIO) or the Officer Commanding Police Division (OCPD) or any report in the Occurrence Book (OB) in any Police Station. But regardless of this the Police Headquarters and or Public Service Commission on their own volition and arbitrarily decided that he should not continue to serve as a police officer without following due process.
7. He states that he was subjected to mental anguish, torture, inhuman treatment by being dismissed from service and forfeiting all rights, claims to pension and any gratuity due, salary and allowances legally earned.
8. He avers that these were all denied pursuant to a regulation that had been repealed (Provisions of Regulations 8(1) Laws of Kenya). He avers that he was never subjected to any fair disciplinary procedure or any other administrative action known to law either through Court process, Tribunal or any at all.
9. He appealed his dismissal to the appropriate authorities vide letters dated 19th May 2006 and 22nd September 2006 all to no avail. He

states that acts, decisions and omission of the Respondents herein either jointly or severally are unconstitutional as they contravene Articles 27, 28, 47, 50 and 236 of the Constitution hence violating his constitutional right to human dignity, equal protection and sanctity, his right to protection and full benefit of the law, right to fair administrative action and fair hearing.

10. The 1st and 3rd Respondents filed their Grounds of Opposition where they state that the Petition is made in bad faith and has no legal basis at all. They aver that the said matter is an ordinary claim couched as a Petition to circumvent statutory time limitation hence it is time barred and should be dismissed on the face of it as they followed due process in dismissing the Petitioner. They also state that they did not collude as alleged by the Petitioner to have him dismissed from service and put him to strict proof thereof.

11. They further aver that employment rights are subject to limitation including limitation by operation of the law as it happened to his employment status. That fair Labour practices connote fair remuneration for work done and in the instant Petition the Petitioner did not work during the stated periods and as such is not entitled to any salaries and allowances and as such the remedies sought are outrageous in nature to Kenyans and is an affront to the Kenyan taxpayers.

Submissions

12. The Petitioner filed his submissions where he submits that he was not given a chance to explain himself and/or to defend the alleged claims against him hence denying and infringing his rights under Article 50 (1). That this also means that the Public Service Commission dismissed him without a fair and public hearing.

13. He states that whereas the Respondents claim that the Petition is time barred, the Respondents do not deny that his constitutional rights were violated by his former employers and continue to be infringed as the mischief has not been ameliorated and therefore limitation cannot bar him from seeking constitutional rights.

14. He avers that the fact that the breach of his constitutional rights arises out of employer-employee relationship does not bar him from relief for violation of his constitutional rights as he was dismissed from working in the police force without being given an opportunity to be heard. The reason for his dismissal was and is up to date not known to him.

15. He was dismissed based on nonexistent provision of the law thus not only violating his rights but also occasioned his loss of earnings and loss of career advancement. They tainted his name in treating him in an undignified manner, given that he had over the years risen to the rank of District Criminal Investigation Officer and had worked for the Kenya Force for over 19 years. He relied in the case of **Gitobu Imanyara and 2 others Vs The Attorney General (2016)**.

16. He therefore asks this Honourable Court to consider the violations of his rights under the Constitution of Kenya 2010 by the Respondent, the circumstances under which the said violations were occasioned and award him the appropriate remedy deemed fit by this Honourable Court.

17. The 1st and 3rd Respondent filed their submissions where they submit that the instant Petition is an ordinary claim couched in a Petition to circumvent statutory time limitation hence it is time barred and should be dismissed at the earliest opportune time. The Cause of action for the Petitioner arose on 13th January 2006 when he received his dismissal letter, the instant suit is statute barred under Section 90 of the Employment Act. They relied on the case of **Industrial Court Cause No. 1201 of 2012 Banking Insurance and Finance Union (K) Vs Bank of India**.

18. They aver that the circumstances surrounding the dismissal of the Petitioner herein is that on the night of the two robberies, he was nowhere to be seen. It was later established that he was at a bar in Kisii town. It was also reported that on the same night he had threatened to harm an advocate namely Mr. Julius Nyabuto Ondika if he did not move out of Kisii town.

19. He was granted a fair hearing as per the dictates of the law and the principle and his termination was fair and within the meaning of Section 45 of the Employment Act, 2007 as not only did they give the Petitioner a fair hearing, they even went further to review his case upon his application vide a letter dated 22nd September 2006 and the same was declined for lack of merit.

20. They state that the Petitioner is not entitled to any of the orders sought for reasons that the dismissal was fair and justifiable and that it is outrageous in nature to Kenyans and is an affront to the Kenyan taxpayers. That his offence amounts to gross misconduct which was subject to disciplinary action, this was per the law and clearly no constitutional right of the Petitioner has been violated or proved to be violated. They aver that therefore, the Petition lacks merits and they urge the Court to dismiss the instant Petition with costs to the 1st and 3rd Respondents.

21. 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.

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

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

24. I note that the Petitioner alleges breach of Articles 27, 28, 47, 50 and 236 of the Constitution of Kenya 2010 plus Articles 3, 19, 20, 21, 22, 23, 27, 28, 162 and 165 of the Constitution of Kenya 2010 amongst breach of the Kenya Police Act.

25. In the body of the Petition, he alleges that the events leading to the alleged breaches occurred in January 2006 to April 2006 when he was dismissed from the service.

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

27. 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”.

28. 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”.

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

30. In **Anarita Karimi case**, the requirement for setting out ones 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.

31. 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.

32. I therefore strike out the Petitioner’s Petition with costs.

Dated and delivered in open Court this 17th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Asena for Petitioner – Present

Motende for Respondent – Present