



**Arondo v National Police Service Commission & 2 others (Petition
E067 of 2022) [2022] KEELRC 12889 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12889 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E067 OF 2022**

MA ONYANGO, J

OCTOBER 11, 2022

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22, 23
AND 162(2)(A) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: VIOLATION OF THE RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 27(1) & (2), 28,
40(1) & (3), 41(1), 47(1) & 50(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: RULE 7(1) OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016 AND
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF: CONSTITUTION OF KENYA RIGHTS
ENSHRINED IN CHAPTER FOUR THEREOF IN SO FAR AS THE
PETITIONER'S CONSTITUTIONAL RIGHTS WERE INFRINGED**

BETWEEN

BEATRICE AKINYI ARONDO PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT



RULING

1. The petition herein is filed by Beatrice Akinyi Orondo in her capacity as widow and legal representative and/or Administrator of the state of Henry Omondi Omollo (deceased) who died on January 16, 2017. The deceased was dismissed from the police force in 2007.
2. The petition is against the National Police Service Commission as the 1st Respondent and the Inspector General of Police as the 2nd Respondent in their capacity as predecessors of the Kenya Police Force. The Attorney General is named as the 3rd Respondent in its capacity as principal legal advisor to the government under the provisions of Article 156 of the [Constitution of Kenya 2010](#).
3. The Petitioner seeks the following orders:-
 - a. A declaration that the Respondents and/or their predecessors jointly and severally violated the Deceased's rights in a manner particularized above and thus the estate of the deceased is entitled to compensation.
 - b. An award in damages and /or compensation to the deceased and/or his estate for unlawfully lost employment benefits including unpaid and/or wrongfully withheld salary from the time when the deceased was wrongfully dismissed up to the date of his death.
 - c. An order directing the Respondents jointly and severally to compute and release the Deceased's pension, gratuity and/or other social security benefits.
 - d. General damages for violation of the deceased's constitutional rights in the process leading to the unlawful dismissal.
 - e. Interest on (b), (c) and (d) above at court rates from the date of judgement until payment in full.
 - f. Costs of these proceedings and interest thereon at court rates.
 - g. Any other relief that the Honourable Court may deem just to grant.
4. By way of a notice of preliminary objection, the 1st Respondent raises the following objections to the petition
 - i. The 1st Respondent lacks the mandate to reopen disciplinary matters that were lawfully, procedurally and exhaustively concluded before its inception
 - ii. The suit is time barred
 - iii. The filing of a petition does not extinguish the time limitation for filing employment disputes between an employer and an employee
5. The 2nd Respondent also filed a notice of preliminary objection citing the following grounds –
 - i. The Petitioner's claim is statutory time barred contrary to section 90 of the [Employment Act 2007](#) Laws of Kenya and Section 3(2) of the [Public Authorities Limitation Act](#).
 - ii. That the claim is incompetent, fatally defective and an abuse of the Court process.
 - iii. That the Court therefore lacks jurisdiction to entertain this claim and the same ought to be struck out with costs to the Respondents.



6. Both notices of preliminary objections were disposed of by way of written submissions.
7. The 1st Respondent submits that it is established under Article 246(3) of the [Constitution of Kenya, 2010](#) and was operationalised in 2012 through the [National Police Service Commission Act 2011](#). That its mandate under both the [Constitution](#) and the Act are to –
 - (3) The Commission shall—
 - a. recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;
 - b. observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and
 - c. perform any other functions prescribed by national legislation.
8. It submits that the procedure for discipline of police officers is provided under [National Police Service Commission \(Discipline\) Regulations 2015](#). That it does not conduct disciplinary proceedings under the Regulations.
9. It submits that the human resource functions in the police force including hearing and determination of disciplinary appeals and reviews was the mandate of the Commissioner of Police. It submits that the deceased was taken through the disciplinary procedure and his appeals determined by the Commissioner of Police as communicated to him.
10. It is submitted that the 1st Respondent lacks the jurisdiction to re-open the disciplinary matters that were concluded before its establishment.
11. The 1st Respondent relies on the decision of the Supreme Court in [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others](#) [2012] eKLR where the Court stated that jurisdiction flows from the [Constitution](#) or legislation or both.
12. It is further the submission of the 1st Respondent that the suit is time barred as the deceased was removed from the police force on May 31, 2007 and the dismissal of his appeal communicated to him by the Commissioner of Police by letter dated December 10, 2007. The petition is thus filed after 14 years from the date of dismissal.
13. The 1st Respondent relies on the decision in [Johnstone Ogechi Mose v National Police Service Commission](#) [2017] eKLR where the Court held that under Section 4 of the [Limitation of Actions Act](#), the suit ought to have been filed in six years while under Section 90 of the [Employment Act](#), suits must be filed within three years from the date of dismissal.
14. The 1st Respondent further relies on the decision in [Daniel Kago Gachanja v Inspector of General & 2 others](#) [2020] eKLR where the Court held that the relevant law was Section 3(2) of the [Public Authorities Limitation of Actions Act](#) which provides that proceedings against the government founded on contract must be brought before the end of three years from the date of the cause of action.
15. The 1st Respondent further relied on the case of [Haron Onyancha v National Police Service Commission & another](#) [2017] eKLR; [Iga v Makerere University](#) [1972] EA 65; [Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd](#) [2019] eKLR; [Gathoni v Kenya Co-operative Creameries Ltd](#) [1982] KLR 104; [Leisure Lodges Limited v Amirali Shariff](#) [2019] eKLR; [Rift Valley Railways \(Kenya\) Ltd v Hawkins Wagonza Musonye & another](#) [2016] eKLR and [Stephen Mulungu Kyalo v National Police Service Commission](#) [2022] eKLR.



16. On the issue whether a petition is subject to the *Limitation of Actions Act*, the 1st Respondent relies on the decision in *James Kanyiita Nderitu v Attorney General & another* [2019] eKLR where the Court of Appeal cited with approval the decision of the Trial Court in *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR to the effect that litigants should not avoid the provisions of the Act on limitation by going behind the statute and seeking to rely directly on constitutional provisions.
17. For the 2nd and 3rd Respondents, the Attorney General submitted that both Section 90 of the *Employment Act* and Section 3(2) of the *Public Authorities Limitation Act* limit the period for filing suits to three years.
18. It is submitted that jurisdiction is a pure question of law and should be resolved on a priority basis as was held by the Supreme Court in *Mary Wambui Munene v Peter Gichuki King'ara & 2 others* [2014] eKLR.
19. The 2nd and 3rd Respondents further rely on the decisions in *Benjamin Wachira Ndiithi v Public Service Commission & Another* [2014] eKLR where the Court held that of course of action accrues on the date of termination of employment and not on the date of determination of appeal or review.
20. They further rely on the decision in *Divecon v Samani* [1995-1998] 1 EA 48 and *Mary Osundwa v Sugar Company Limited* [2002] eKLR where the courts held that there is no jurisdiction to extend limitation period.
21. The 2nd and 3rd Respondents further rely on the decision in *Thuranira Karauri v Agnes Ncheche* [1997] eKLR and the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court held that limitation goes to the jurisdiction of a Court.
22. It is further the submission of the 2nd and 3rd Respondents that the suit herein is an abuse of Court process citing decisions in *Peter Njeru Mugo v Nairobi City County* [2015] eKLR; *Uhuru Muigai Kenya v Nairobi Star Publications Limited* [2013] eKLR; *Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & Another* [2016] eKLR; *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR and *Alphonse Mwangemi Munga & 10 others v African Safari Club Limited* [2008] eKLR.
23. For the Petitioner, it is submitted that the petition as framed and presented seeks various reliefs on behalf of the estate of the deceased whose rights under Articles 27(1) and (2), 28, 40(1) and (3), 41(1), 47(1) and 50(1) were violated by the Respondents.
24. It is submitted that the preliminary objections raised by the Respondents are misconceived and devoid of merit. That what constitutes a preliminary objection as defined in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 must be a pure point of law, the determination of which will dispose of the suit in its entirety.
25. The Petitioner submits that Section 90 of the *Employment Act* does not apply to the deceased. That Section 3 of the Act provides that the Act does not apply to amongst others, the police force. The Petitioner relies on the decision in *Felister Waitibigeni Mugweru v National Police Service Commission & 2 others* [2018] eKLR.
26. On the issue of delay in filing the suit, the Petitioner relies on the decision in *Henry A. Chogo & Another v Attorney General & 3 Others* [2016] eKLR where the Court held that limitation is not a bar and cannot defeat a claim for constitutional infringement.
27. That likewise, Section 3(2) of the *Public Authorities Limitation Act* cannot defeat a claim for violation of constitutional rights.



28. In its further submissions, the Petitioner relies on the decision in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR where the Court of Appeal held that unless expressly stated in the *constitution* the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in the *Constitution* and that the law concerning limitation cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.
29. The Petitioner further relies on the decision in *Job Cheruiyot Kerui v Attorney General & 2 others* [2018] eKLR where the Court cited with approval the case of *Henry A. Chogo & another v Attorney General & 3 others* [2016] eKLR and *Leonard Mutua Munyao & another v Attorney General & another* [2018] eKLR in which the Courts held that the infringement of constitutional rights cannot be defeated by limitation.
30. The Petitioner further relies on the decision in *Richard Wasilwa Wafula v Commissioner of Police & 2 Others* [2014] eKLR where the Court similarly held that the law on limitation of actions cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the bill of rights.

Analysis and Determination

31. Having considered the very elaborate submissions of the parties on the two preliminary objections raised by the Respondents, the issues arising for determination are the following: -
 - i. The applicable legislation;
 - ii. Whether the claim by the Petitioner is statute barred and should be struck out for want of jurisdiction.
32. According to the pleadings on record the deceased was dismissed from service sometime in 2007. He appealed against the dismissal and the appeal was dismissed. The grounds on which the deceased was dismissed also led to criminal charges against him for which he was arraigned in Court in Rongo RM Criminal Case No 629 of 2007 together with two of his colleagues. They were all acquitted In a judgment delivered on 1st September 2008.
33. Having been dismissed in 2007, both the *Employment Act 2007* and the *Constitution of Kenya, 2010* are not applicable to this petition as both had not been enacted at the time of dismissal of the deceased. Further, the *Employment Act, 2007* does not apply to police officers by virtue of Section 3(2) thereof which provides:
 - "(2) This Act shall not apply to—
 - a. the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap. 199);
 - b. the Kenya Police, the Kenya Prisons Service or the Administration Police Force;
 - c. the National Youth Service; and
 - d. an employer and the employer's dependants where the dependants are the only employees in a family undertaking."



34. Even the repealed *Employment Act* that was in force in 2007 did not apply to Kenya Police by virtue of Section 1(2) thereof which provided that:

- "(2) The provisions of this Act shall not apply to -
- a. the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap 199);
 - b. the Kenya Police, the Kenya Prisons Service or the Administration Police Force;
 - c. the National Youth Service; or
 - d. such person or class of persons, such trade or industry, or such public body, as the Minister may, by order, exempt from all or any of those provisions of this Act,"

35. The Petitioner has anchored the petition on violation of the rights of the deceased under Section 77(9) of the repealed *constitution*. The said Section provides as follows –

- (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.

36. Section 77(9) of the repealed *Constitution* does not make any reference to *Limitation of Actions Act*.

37. The reliefs sought in the petition as the following: -

- a. A declaration that the Respondents and/or their predecessors jointly and severally violated the Deceased's rights in a manner particularized above and thus the estate of the deceased is entitled to compensation.
- b. An award in damages and /or compensation to the deceased and/or his estate for unlawfully lost employment benefits including unpaid and/or wrongfully withheld salary from the time when the deceased was wrongfully dismissed up to the date of his death.
- c. An order directing the Respondents jointly and severally to compute and release the Deceased's pension, gratuity and/or other social security benefits.
- d. General damages for violation of the deceased's constitutional rights in the process leading to the unlawful dismissal.
- e. Interest on (b), (c) and (d) above at court rates from the date of judgement until payment in full.
- f. Costs of these proceedings and interest thereon at court rates.
- g. Any other relief that the Honourable Court may deem just to grant.

38. It is evident from the reliefs sought that this is an employment claim. The violations referred to are under Section 5 of the *Employment Act*, Articles 2, 10, 23, 27, 28, 41, 47 of *the Constitution* 2010 all of which as I have stated above are not applicable to the deceased by virtue of both the law applicable at the time of his dismissal and fact that the *Employment Act* does not cover members of the police force.



39. Under the repealed *Employment Act* that was applicable at the time of the termination of employment of the deceased, the limitation period applicable was six years as provided in Section 4(1) of the *Limitation of Actions Act* which provides:
1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - a. actions founded on contract;
 - b. actions to enforce a recognizance;
 - c. actions to enforce an award;
 - d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
40. As was held in *James Kanyिता Nderitu v Attorney General & another* (supra) *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* and in many other cases, litigants cannot go behind the law of limitation by clothing their employment claims as constitutional petitions.
41. In the instant petition the provisions of Section 77(9) of the *repealed Constitution* that the Petitioner has anchored the petition on does not provide any immunity to the law of limitation.
42. It is for the foregoing reasons, that I find that the claims made in the petition herein are all statute barred. The result is that the petition must suffer the fate of all statute barred claims. The same is accordingly struck out on grounds that it is statute barred.
43. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS

11TH DAY OF OCTOBER 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with *Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

