



REPUBLIC OF KENYA



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**Lombelo v Chief of Kenya Defence Forces & 2 others (Constitutional Petition E220 of 2021)
[2023] KEHC 484 (KLR) (Constitutional and Human Rights) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E220 OF 2021
AC MRIMA, J
JANUARY 31, 2023**

BETWEEN

BENJAMIN CHELANG'A LOMBELO PETITIONER

AND

CHIEF OF KENYA DEFENCE FORCES 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

RULING

Background:

1. The Petitioner, Benjamin Chelang'a Lombelo, is a former member of the Kenya Defence Forces. He was enlisted to the service on June 2, 2001, under Kenya Army Service No xxxx.
2. In his military career, the Petitioner served in The 5th Kenya Infantry Rifles Battalion, Army Regimental Police and later in Military Intelligence Battalion as an intelligence operative.
3. The Petitioner's last day in service was on May 1, 2014. Before his exit, he was subjected to disciplinary proceedings of March 29, 2010 where he appeared before the Commanding Officer to answer to charges of 'Conduct to the Prejudice of Good Order and Service Discipline' contrary to section 68 of the Armed Forces Act (now repealed).
4. The Petitioner was accused of authoring and distributing leaflets in the form of anonymous letters in contravention of military norms and chain command of communicating a grievance.



5. In the case, he pleaded not guilty on the basis that on the material date, he was on annual leave. Upon being processed however, he was found guilty and sentenced to 42 days imprisonment and to be discharged from service.
6. The Petitioner's recommendation for dismissal from service was later on quashed by the Army Commander and accordingly, he reported to work after completing the imprisonment.
7. The Petitioner subsequently sought redress of his punishment by writing to the Army Commander. His effort was however met with a letter dated October 16, 2013 from Brigadier JL Mrashui requesting him to desist from seeking redress. He was informed that if he did not stop, disciplinary action would be taken against him and would be dismissed from the Kenya Defence Forces and consequently lose his benefits.
8. The receipt of the foregoing letter precipitated the Petitioner's exit from the Military. He voluntarily tendered his request for early retirement from service. Accordingly, he was discharged on compassionate grounds.
9. In a quest to vindicate violation of his constitutional rights derived from proceedings that yielded the guilty verdict and 42-day imprisonment, the Petitioner approached this Court with the Petition dated June 7, 2021.
10. It was his claim, among others, that he was discriminated against when his conduct was classified as 'Good' whereas a fellow soldier whom he worked with who was also discharged from services was classified as 'Very Good'.
11. The Petitioner further pleaded violation of his rights as an arrested person his right to fair trial as guaranteed under Articles 49 and 50 of the Constitution respectively.
12. On the foregoing, he sought the following reliefs;
 1. To declare 1st Charge Annex 'A' illegal as 2nd Charge 'B' was dismissed by the Judge in the Orderly room proceedings.
 2. To order for my reinstating to the service.
 3. To quash the illegal letter HQKA:KA/2204/ dated October 16, 2013.
 4. To order a publication of a part II Order to quash an entry to my qualification record card (vide Part II Order 2Bde 11/10 dated May 14, 10.
 5. To pay me damages caused by the case.
 6. To compensate me with a Rank of WOII for the eleven years of stagnation in one rank.
 7. To be compensated for all the damages caused by malicious charge;
 - a. For the brutal handcuffing, inhuman degrading lockdown under custody for twelve (12) days.
 - b. For the forty-two (42) days of illegal imprisonment.
 - c. Compensation for the maliciously aborted Kenbat 19 UN Mission privilege worth US Dollar 1028 monthly for a year (Twelve months) due to false charge in the year 2010.
 8. Any other thing deemed good to the Court.



The Objection:

13. In opposition to the Petition, The Chief of Defence Forces and The Attorney General, 1st & 2nd Respondents herein respectively, filed the Preliminary Objection dated October 5, 2021. They jointly sought to have the Petition be dismissed in its entirety on the following grounds: -
 1. That this Honourable Court lacks Jurisdiction to entertain the claim pursuant to;
 - a. Section 186 and 187 of the [Kenya Defence Forces Act](#), No 25 of 2012.
 - b. Section 3(2)(a) and 9(3) of the [Employment Act](#).
 - c. Section 3(2) of the [Public Authorities Limitations Act](#), Cap 39 Laws of Kenya.
 - d. Order 53, Rule 2 of the [Civil Procedure Rules, 2010](#) (as Amended)
 2. Prayer 3 and 4 are Judicial Review Orders and the law on Judicial Review is specific and the Petitioner has not been complied therewith.
 3. The Petition does not precisely state the fundamental rights and freedoms or threatened and violated the principles enshrined in [Anarita Karimi Njeru vs Republic](#) (1979) eKLR.

The submissions:

14. In support of the Preliminary Objection, the 1st and 2nd Respondents filed submissions dated November 12, 2021.
15. It identified the issues for determination as being; whether the Petitioner has demonstrated breach of fundamental rights and whether this Court has jurisdiction to entertain this matter.
16. On the first issue, it was its case that the Petitioner failed to demonstrate with specificity the fundamental freedoms violated by the Respondents.
17. To that end, reliance was sourced from the decision in Petition No 457 of 2015, Godfrey Pau Okutoyi (suing on his behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs Habil Olaka Executive Director/Secretary of Kenya banking Association being sued on behalf of Kenya Bankers Association) & Another 2018 eKLR where it was observed *inter-alia*: -

....It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in a manner allowed by that particular statute or in an ordinary suit as provided for by procedure.

18. The 1st and 2nd Respondents further relied on the often-quoted decision in [Anarita Karimi Njeru vs Republic](#) and the one in [Harrison vs Attorney General of Trinidad and Tobago](#) (1980) A L 265 where in the later it was observed;

.... The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the [Constitution](#) is fallacious. The right to apply to the High Court under Section 6 of the [Constitution](#) for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be



diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.”

19. The 1st and 2nd Respondents were of the position that the Petitioner was convoluting an employment issue into a constitutional matter. They drew support from the decision in Petition No 322 of 2018, *Peter Solomon Gichiria vs Attorney General & Another* (2020) eKLR.
20. On the issue regarding jurisdiction, it was submitted that the issue emanates from the Petitioner’s employment and subsequent dismissal from service. It was further its case that the issues raised are judicial review prayers and not within the Jurisdiction of the Constitutional Court.
21. The 1st and 2nd Respondents submitted that the Petitioner’s recourse was within the *Kenya Defence Forces Act* and as such, this court cannot usurp jurisdiction.
22. It was urged in conclusion that Court dismisses the Petition for want of jurisdiction.

The Petitioner’s Response:

23. The Petitioner opposed the Preliminary Objection through the submissions dated January 31, 2022.
24. In reference to the decision in Petition No 63 of 2013, *John Muruge Mbogo vs The Chief of Defence Forces & Another*, a similar dispute of as in the instant case, the Petitioner submitted that this Court can hear and determine his case.
25. It was his submission that section 2(3) and 3(3) of the *Employment Act* does not apply to Armed forces or the reserve as respectively defined in Armed Forces Act, Cap 199.
26. He rebutted the application of section 3(2) of *Public Authorities Limitation Act* regarding limitation of time on proceedings brought against Government or a local authority after the lapse of three years by stating that in constitutional disputes, limitation of time do not apply.
27. The Petitioner further submitted that he had precisely demonstrated the rights and fundamental freedoms that were breached by the Respondent including right to fair trial, the right against non-discrimination and violation of his right as an arrested person guaranteed under Article 50, 27 and 49 of the *Constitution* respectively.
28. The Petitioner asserted this Court’s jurisdiction in reliance on the decision in *John Muruge Mbogo vs The Chief of Defence Forces & Another*, and the one in *Musa Mbwagwa Mwanasi & 9 others vs Chief of The Kenya Defence forces & Another* (2021) eKLR where the Court found various constitutional infractions and to that end made various declarations and awarded damages to the Petitioners.
29. On the foregoing, the Petitioner urged this Court to strike out the Preliminary Objection.

Analysis:

30. The foregoing discourse yields the following issues for determination: -
 - i. Whether the preliminary objection is valid in law.
 - ii. Depending on (i) above whether the preliminary objection is merited.
31. I will hence deal with the issues sequentially.



(a) Whether the objection is valid in law:

32. In Petition No E235 of 2021, *Patrick Wabwire Juma vs Hans Kenya Limited* (unreported), this Court, in reference to various decisions, discussed the legal contours of a valid preliminary objection in the following manner;

As a settled principle of law, preliminary objections are considered only if they align with the requirement that they raise pure questions of law capable of disposing off the dispute without delving into contested facts that demand the calling of evidence.

Therefore, for a preliminary objection to be valid, it must not be caught up or seen to be raising contested issues of fact amenable to evidentiary proof by either party.

The decision in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*, (1969) E A 696 at page 700 is hailed for crystallizing the foregoing position when it made the following findings: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

Further to the foregoing, in Civil Suit No 85 of 1992, *Oraro vs Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit vs West End Distributors* (*supra*) when he spoke to the operation of preliminary objection in the following manner: -

.... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

In the process of ascertaining the validity of preliminary objections, the Court’s hands are not tied strictly to the objection. It has the liberty of perusing the pleadings and looking at other relevant documents. This was the position in *Omondi vs National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, where it was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.



33. Deriving from the foregoing, it is now set to interrogate the validity of the Respondent's objection.
34. Firstly, the 1st and 2nd Respondents contest of this Court's jurisdiction on three main grounds. Firstly, that by virtue of Section 186 and 187 of the *Kenya Defence Forces Act*, No 25 of 2012 and section 3(2) and 3(3) of the *Employment Act* and section 3(2) of Public Authorities Limitations Act, this Court is divested of jurisdiction.
35. Secondly, they contended that, some of the Petitioners prayers are of judicial review nature and the Petitioner has not complied with the procedure.
36. Thirdly, the 1st and 2nd Respondents contended that the Petition fails to abide by the requirement of identifying with reasonable precision constitutional violations, a principle developed by courts and embraced in constitutional disputes.
37. As can be gleaned from the objection, the first ground is a pure question of law. This Court's jurisdiction is declined from the provision of the *Kenya Defence Forces Act*, *Employment Act* and the Public Authorities Limitations Act.
38. Taking guidance from the Supreme Court decision in Petition No 7 of 2013, *Mary Wambui Munene v Peter Gichuki Kingara and Six Others*, [2014] eKLR, where Court affirmed its earlier position in *Samuel Kamau Macharia & Anther vs Kenya Commercial Bank Limited Kenya & 2 Others* (2010) eKLR that 'Jurisdiction of a pure question of law and should be resolved on priority basis, I do find and hold that the first ground of the objection meets the threshold of raising purely legal issues.
39. As for the second ground which is a claim that prayers 3 and 4 of the Petition have not complied with the requirements under judicial review, suffice to say the ground is also a legal issue as it is the basis of invoking the Court's jurisdiction. The ground passes the test of a valid objection.
40. With respect to the third ground, whereas the issue is not provided for in law, it a principle developed by Courts that touches on the Court's jurisdiction.
41. I will therefore consider the validity of the jurisdictional contest in light of the *Kenya Defence Forces Act*, the *Employment Act* and Public Authorities Limitations Act.
42. In *Samuel Kamau Macharia & Anther vs Kenya Commercial Bank limited Kenya & 2 Others* (2010) eKLR the Supreme Court made the following remarks about the jurisdiction.
- A court's jurisdiction flows from either the *Constitution* or legislation or both. That a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law.
43. A preliminary issue to dispense with at this early opportunity is the application of *Employment Act* in this dispute. The 1st and 2nd Respondents sought to oust this Court's jurisdiction based on provision of Section 3(2)(a) and 3(3) of the *Employment Act*.
44. Section 3(2) limits the application of employment. It provides as follows;
3. Application
- 1 This Act shall apply to all employees employed by any employer under a contract of service.
- 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.
45. Despite the fact that Petitioner voluntarily went on early retirement, the substratum of the Petition emanates from an existing employer-employee relationship.
46. However, the provision of section 3(2)(a) of the *Employment Act* expressly precludes the use of *Employment Act* in the resolution of employment disputes for members of the disciplined forces.
47. It is, therefore, incumbent upon this Court to decline jurisdiction by taking cognizance of the fact that employment cases involving service men are not the usual run-of-the-mill disputes that can be resolved by application of the *Employment Act*.
48. Flowing from the foregoing, the next issue to consider is whether the 1st and 2nd Respondents' challenge on this Court's jurisdiction on the basis of section 186 and 187 of *Kenya Defence Forces Act* (hereinafter referred to as 'KDF Act') is merited.
49. Section 186 of KDF Act provides as follows: -
186. Appeal to High Court
- 1 If a person has been convicted by a court-martial—
 - a the person convicted may appeal to the High Court and make subsequent appeals to any other superior court, against the conviction, the sentence, or both; or
 - b the Director of Public Prosecutions may appeal to the High Court against the sentence.
 - 2 If a person has been acquitted of a charge by a court-martial, the Director of Public Prosecutions may appeal to the High Court against the acquittal.
50. Further to the foregoing, the 1st and 2nd Respondents relied on section 187 of KDF Act which provides as follows: -
187. Notice of Appeal
- 1 An appeal to the High Court shall not lie unless a notice of Appeal is lodged with the Registrar within twenty-one days after the acquittal, conviction or sentence, as the case may be.
 - 2 The notice of appeal shall be in the prescribed form.
 - 3 Except in the case of a conviction involving sentence of death, the High Court may extend the period within which a notice or Appeal shall be lodged, whether that period has expired or not.
 - 4 An appellant may present the appeal case in writing.



51. What comes to the fore from the plain interpretation of the foregoing sections is that, the High Court’s jurisdiction is only invoked in instances where a person has been convicted by a Court Martial.

52. I have carefully perused the documents on record and noted that the Petitioner was not subjected to Court Martial proceedings, a mechanism established under Article 169(1)(c) of the Constitution as read with section 160 of the KDF Act. From the documents on record, the Petitioner was subjected to Summary Disciplinary Proceedings, a process established under section 147 as read with 148 of the KDF Act. The said sections provide as follows;

Part Viii – Summary Disciplinary Proceedings

147. Guiding principles

1 Summary disciplinary proceedings under this Act shall be guided—

a by Article 47 of the Constitution; and

b with necessary modifications, and without derogating from the essence of the right or limiting the right to fair hearing of an accused person by Article 50 of the Constitution.

148. Certain charges may be dealt with summarily

1 Subject to the prescribed limits, the commanding officer or appropriate superior authority may summarily deal with a charge for an offence prescribed as disciplinary offence which a commanding officer or appropriate superior authority may deal with summarily.

53. The circumstances of this Petition are made peculiar by two crucial factors. Firstly, despite the Petitioner being a former employee, Employment Act is not applicable.

54. In the premises, the Employment Court despite having wide powers to interpret and vindicate violation of rights and fundamental freedoms within the context of employment, cannot entertain the dispute herein.

55. Secondly, the Petitioner is no longer in military service. He voluntarily sought early retirement. The difficulty this latter scenario presents is that, the Petitioner can no longer pursue the internal mechanisms anticipated by the KDF Act in section 158 and 159 which provide as follows respectively: -

158. Review of summary findings and awards

1 If a charge has been dealt with summarily and has not been dismissed, the reviewing authority may at any time review the finding or award.

2 If, on a review under this section, it appears expedient to the reviewing authority, by reason of any mistake of law in the proceedings or of anything occurring in those proceedings which in the opinion of the authority involved substantial injustice to the accused, the authority may quash the finding, and if the finding is quashed the authority shall also quash the award.

3 If, on a review under this section, it appears to the reviewing authority that—

a a punishment awarded was invalid;

b a punishment awarded was too severe;



- c if the award included two or more punishments, those punishments or some of them could not validly have been awarded in combination or taken together, are too severe; or
 - d a punishment awarded was too lenient, the authority may vary the award by substituting such punishment or punishments as the authority thinks proper, being a punishment or punishments, which could have been included in the original award, but no award shall be varied under this subsection to the prejudice of the accused unless the accused has had an opportunity of being heard by, or of making written representation to, the reviewing authority.
- 4 In this section, “the reviewing authority” means—
- a the officer superior in command to the officer who dealt summarily with the charge;
 - b the Service Commander;
 - c the Chief of the Kenya Defence Forces, if the Commander was involved in the summary proceedings; or
 - d the Defence Council.

159. Automatic administrative review

- 1 Upon reaching a determination in relation to any offence tried by the commanding officer, the commanding officer shall, within fourteen days, submit the findings of the trial in writing, to a superior commander for review.
- 2 The superior commander shall within fourteen days of receipt of the findings, review the findings and inform the accused person of the outcome of the review, in writing.
- 3 The administrative review under subsection (1) shall not preclude the accused person from seeking other legal redress from any other authority provided for under this Act or any other written law, or applying for a review to the Defence Council.

56. Deriving from the foregoing, had the Petitioner still be in service, this Court’s jurisdiction would have been barred by the exhaustion doctrine.

57. However, in view of the obtaining circumstances, that avenue will result in locking out the Petitioner from the doors of justice, a position that contrives Article 48 of the *Constitution* which champions for access to justice for all persons.

58. In conclusion, therefore, the Petitioner’s only refuge resides in Article 165(3)(b) as read alongside Article 23(1) of the *Constitution*. It is only this Constitutional Court that will provide the forum where the Petitioner can ventilate his grievances.

59. The last issue I must address is whether the section 3(2) of the Public Authorities Limitations Act, Cap 39 bars the Petitioner from accessing this Court.

60. Section 3(2) of the Public Authorities Limitations Act provides as follows;

No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the course of action accrued.



61. The *Constitution* sits head and shoulder above other statutes. It cannot be subjected to limitation of time in the manner in which other statutes operate.
62. Constitutional infractions, therefore, no matter the time it happened cannot be said to be caught up with the bar of lapse of time. This was the finding in the High Court at Nairobi in Constitutional Petition No 33 of 2020 *Peter Odoyo Stanley Kinyanjui & 2 others (Suing on behalf of the Outdoor Advertising Association of Kenya) versus Kenya National Highways Authority & others* (2021) eKLR where the Learned Judge rendered as follows: -
158. In the end, therefore, the conclusions and findings of the Court are as follows: -
- i That human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.
 - ii Statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.
63. The above legal principle was recently affirmed by the Supreme Court of Kenya in Petition No 26 of 2019 (as consolidated with Petition Nos 34 & 35 of 2019) *Monica Wangu Wamwere & 5 Others vs The Attorney General*.
64. The contention on limitation, therefore, fails.

Disposition:

65. As I come to the end, this Court wishes to profusely apologize for the late delivery of this judgment. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
66. In the premises, this Court makes the following final orders: -
- a. The Preliminary Objection dated October 5, 2021 is devoid of merit and is hereby dismissed.
 - b. Costs in cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF JANUARY, 2023.

A C MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

Benjamin Chelang'a Lombelo, the Petitioner in person.

Mr Tuitowet, Learned Counsel for the 1st and 2nd Respondents.

Miss Gathu, Learned Counsel for the 3rd Respondent.

Regina/Chemutai – Court Assistants



