



REPUBLIC OF KENYA



**Njiru v Attorney General & 2 others (Petition 329 of 2019) [2023] KEHC 21367 (KLR)  
(Constitutional and Human Rights) (15 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21367 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 329 OF 2019**

**HI ONG'UDI, J**

**AUGUST 15, 2023**

**BETWEEN**

**DANIEL MUCHIRI NJIRU ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE COMMANDER KENYA ARMY ..... 2<sup>ND</sup> RESPONDENT**

**PS MINISTRY OF DEFENCE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petition dated 20<sup>th</sup> August 2019 was filed under Articles 2(1),10(1)(2)(b),19(2) & (3)(c), 20(1) (2), 23(1) & (3), 25 (a), 27(1) & (2), 28(1), 29(a) & (b) and 49(1)(a)(c) (f) of the Constitution. Accordingly the petition seeks following orders:
  - i. A declaration that the petitioner's detention on the 2<sup>nd</sup> November 2016 to 1<sup>st</sup> January 2017 was against Article 49(1) of the Constitution thus illegal, unlawful and unconstitutional.
  - ii. A declaration that the petitioner's dismissal dated 13<sup>th</sup> January 2017 from the Kenya Defence Forces was unconstitutional thus null and void.
  - iii. A declaration that the withholding of terminal benefits by the Kenya Defence Forces for the years worked (8 years) is illegal, unlawful and unconstitutional.
  - iv. An order directing the Ministry of defence to pay all the accrued terminal benefits of the petitioner for the years worked.
  - v. General damages for unlawful and illegal detention.



### **The Petitioner's Case**

2. The petition was supported by the petitioner's affidavit of even date where he informed that he was enlisted in the Armed Forces on 6<sup>th</sup> June 1985 under service number 58003. He was then attached to the Parachute Battalion and later posted to the 2<sup>nd</sup> Bridge Camp Admin Unit-Gigiri.
3. He deposed that in August 1993 while on official leave he was involved in a tragic road accident that left him physically hurt and mentally incapacitated. He as a result underwent treatment in several hospitals where a psychiatrist problem was discovered. Following this he underwent psychiatric treatment at the Ministry of Medical Services, Nyeri Provincial General Hospital, Jamii Hospital and Highway Health Facility, Embu.
4. He averred that due to the mental incapacity, he was not able to serve in the Armed Forces until 2012 when he recovered fully. His recovery was confirmed vide a letter dated 18<sup>th</sup> March 2012 from the Ministry of Medical Services and a letter dated 29<sup>th</sup> May 2012 from the Highway Health Facility.
5. Following this confirmation he wrote to the Army Commander vide a letter dated 5<sup>th</sup> June 2012 seeking reinstatement to the Kenya Defence Forces (KDF). He never received positive feedback on the same. He as a last resort decided to engage the services of an advocate who wrote a letter dated 21<sup>st</sup> June 2016, to the Army Commander. The letter sought the official discharge of the petitioner from the Kenya Army, issuance of his Certificate of Service at the Kenya Army, his identification documents and his dues up to the time of the accident.
6. In response, the Army Headquarters in their letter dated 14<sup>th</sup> July 2016 asked the petitioner to report to the headquarters which he did on 2<sup>nd</sup> November 2016. He deposed that it was at this point that he was arrested and held incommunicado for 60 days until 1<sup>st</sup> January 2017.
7. He asserts that he was charged with desertion and not granted an opportunity to communicate with his Advocate. He further states that he was not brought to court in violation of Article 49 of the Constitution. Subsequently on 13<sup>th</sup> January 2017 he was dismissed from service without being given his benefits for the 8 years he had worked. He in view of this asserts that the detention and dismissal were not only illegal and unlawful but also unconstitutional as the respondents failed to follow the set procedures in law.

### **The Petitioner's Oral Evidence**

8. During the hearing held on 1<sup>st</sup> November 2021 the petitioner (PW 1) testified in Court where he recapped the contents of his affidavit and adopted his affidavit as part of the evidence in chief.
9. During the cross examination he explained that he knew the procedure a service man should undertake once he is involved in an accident. It was his evidence that he had sent Kanyua to inform the office of the accident.
10. He further acknowledged that the medical documents attached to his affidavit did not indicate that he had been involved in an accident and neither did he produce the police OB number to that effect.
11. With reference to his disappearance from work since 1993, He deposed that his wife and father had reported the matter to Kahawa Barracks.



## The Respondents' Case

12. The respondents in response and opposition to the petition filed their replying affidavit dated 16<sup>th</sup> October 2019 as sworn by Major Anthony Mwiti Manyara, a Staff Officer II Records at the Kenya Army Headquarter.
13. He informed that the petitioner was enlisted in the Kenya Defence Forces (KDF) on 6<sup>th</sup> June 1985 under Service No.58003 and attached to the 20<sup>th</sup> Parachute Battalion. He was then posted to Brigade Camp Admin Unit- Gilgil and later on to 2<sup>nd</sup> Brigade in Nakuru.
14. He deposed that sometime in the year 1993 the petitioner developed a habit of frequently asking for leave which he would extend without official permission. In July 1993, he sought to see the Commanding Officer with a view to be advised on how he would be discharged honorably owing to a personal matter he had to attend to.
15. He noted that before the request could be considered, the petitioner on 27<sup>th</sup> July 1993 absented himself from duty without taking an official leave. Following the lapse of 90 days of absence, the petitioner was declared a deserter in accordance with the Armed Forces Act, 1968.
16. It is deposed that on or about 5<sup>th</sup> June 2012, the petitioner wrote to the 2<sup>nd</sup> respondent requesting to be reinstated to duty. Further on 1<sup>st</sup> November 2016 he presented himself before the Military Police Headquarters with a demand letter from his Advocate seeking to be discharged from service and paid his dues up to 1993.
17. He deposed that the petitioner at that point alleged that he had been critically injured and immobilized for the 23 years he had been out of service. He noted that this was never reported to any official body such as the civilian police or a chief as is required of Serving Military Personnel. Neither did his family report the same to the 2<sup>nd</sup> respondent.
18. He further averred that the petitioner alleged that he had been admitted at the Nyeri Provincial Hospital for 8 years. Additionally that he had also been treated at the Highway Health Facility and Jamii Hospital. He deposed that the truth of this claim was subsequently revealed by the Military Police's investigations when it engaged the said hospitals to ascertain the allegation.
19. In its correspondence, the Nyeri Referral Hospital refuted having attended to the petitioner as no such records existed and as such the medical record shared was confirmed to be false. Jamii Hospital confirmed that the petitioner had been admitted as a patient on 24<sup>th</sup> August 2006 and discharged on 4<sup>th</sup> September 2006. The cause of the illness was noted to be chronic diabetes and diabetic foot ulcer not a mental condition as alleged. On the flipside, the Highway Health facility was found to be non-existent.
20. Following the conclusion of these investigations by the Military Police, the petitioner appeared before the Commanding Officer on 29<sup>th</sup> December 2016 for the summary disciplinary proceedings and was charged with the offence of desertion contrary to Section 74(1)(a) and (2)(e) of the Kenya Defence Forces Act(KDF Act) which is said to have been a fair trial. He was found guilty and dismissed from service. Cumulatively, the petitioner had been in active service for 8 years and 124 days of reckonable service and out of service for 23 years and 98 days of non-reckonable service.
21. He deposed that, considering the fact that his dismissal was based on disciplinary grounds, the provisions of the KDF Act dictate that he was not entitled to his benefits in the form of pension and gratuity save for his salary and road travel expenses for his years of active service. It was further noted that due to the number of active years in service, the petitioner was not eligible for discharge benefits such as pension.



## The Respondent's Oral Evidence

22. During the defence hearing dated 18<sup>th</sup> January 2023, the respondents called their witness, Anthony Manyara (Lt.Carnol.) (RW1). In his oral testimony he reiterated the contents of his replying affidavit.
23. During the cross examination, he stated that after the petitioner presented himself on 1<sup>st</sup> November 2016 he was not detained as alleged and he did not know where the petitioner was until the day of his discharge. He noted that the petitioner was presented before the Commanding Officer on 29<sup>th</sup> December 2016.
24. He further admitted that he had not filed the documentation to show what had gone on during the hearing of the petitioner's case before the Commanding Officer. He similarly stressed that there was no medical report on the petitioner's mental health and that he was of unsound mind when he deserted in 1993. In the end he stated that all the procedures as outlined in law were adhered to before the petitioner was dismissed.

## The Petitioners' submissions

25. The petitioner through his advocates, Oyugi and company Advocates, filed written submissions and a list of authorities dated 15<sup>th</sup> February 2023. Counsel identified the issues for determination as follows:
  - i. Whether the petitioner's rights were violated and infringed upon by the 2<sup>nd</sup> respondent.
  - ii. Whether the petitioner is entitled to the reliefs sought.
26. Counsel begun by submitting that the petitioner's arrest, detention and being held incommunicado from 2<sup>nd</sup> November 2016 to 29<sup>th</sup> December 2016 (57 days) violated his constitutional right under Article 49(1)(f) of the *Constitution*. He further emphasized that despite the *KDF Act* having variations and being unique to its officers, the distinction does not give the Defence Forces leeway to abuse the limitations to the detriment of its members.
27. It was submitted that owing to the adduced evidence and witness testimony, the petitioner's whereabouts were unknown for the period which was also pointed out by the respondents' witness. Counsel took issue with the fact that the respondent's witness being a records officer in view of this information never sought to confirm from other sources whether the petitioner's allegations were true.
28. Further that he is required by the Act to keep proper records and submit regular reports. It is thus these records that Counsel argues ought to have been produced in Court to rebut the petitioner's allegations. He thus submitted that the 2<sup>nd</sup> respondent not only ignored the dictates of the *Constitution*, *KDF Act* and its *Regulations* but also violated the petitioner's rights.
29. To buttress this argument Counsel cited the case of *David Gitau Njau & 9 others v Attorney General* (2013) eKLR where it was held that the Act endeavors to ensure as much as possible that the arrest, confinement, prosecution and punishment of an offender under the *Armed Forces Act* ensures conformity with the provisions of the *Constitution*.
30. Comparable dependence was placed on the cases of *Preston Kariuki Taiti & 9 others v Chief of Kenya Defence Forces & another* (2019) eKLR and *Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces & another* (2021) eKLR, among others.
31. With reference to the petitioner's dismissal counsel submitted that the petitioner was not accorded a fair trial before the decision was made. No record of the hearing was produced. He further noted that the 2<sup>nd</sup> respondent had not supplied the proceedings of the summary trial as tried by the Commanding



- Officer. It was as well stated that the petitioner as per Section 152(1)(e) of the *KDF Act* was not fit to be tried by the Commanding Officer by virtue of the fact he was suffering from a mental disorder and was not subjected to a psychiatric examination by the 2<sup>nd</sup> respondent at the arrest or before the trial.
32. Considering these factors as detailed in the petitioner's affidavit, Counsel submitted that the 2<sup>nd</sup> respondent had not accorded the petitioner the bare minimum as regards the right to a fair trial and as such his dismissal was a nullity. In support dependence was placed on the case of *Mcfoy v United Africa Company Ltd* (1987) 3 ALL ER 1169 where the Court held that if an act is void, then it is in law a nullity and every proceeding which is founded on it is also bad and incurably bad. He further relied on the cases of *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* (2012) eKLR and *Wambui v Mwangi & 3 others* (2021) eKLR.
33. On the award of general damages for the unlawful and illegal detention of the petitioner Counsel submitted that he was entitled to Ksh.5,000,000 as general damages. He submitted that this sum was informed by similar cases where various courts awarded like damages. The decisions relied upon in this regard are *Musa Mbwagwa Mwanasi & 9 others v Chief of the Kenya Defence Forces and another* (2021) eKLR, and *Dinesh Gumbe Osire v Cabinet Secretary, Ministry of Defence & another* (2017) eKLR, among others.

### **The Respondents' Submissions**

34. Special State Counsel, A. K. Tuitoek on behalf of the respondents filed written submissions dated 14<sup>th</sup> March 2023 where the issues for determination were identified as:
- i. Whether the petitioner's dismissal from the Kenya Defence Forces was fair, legal and procedural;
  - ii. Whether the petitioner's detention was illegal, unlawful and unconstitutional;
  - iii. Whether the petitioner is entitled to pensions and gratuity; and
  - iv. Whether the petitioner exhausted the internal mechanisms of appeal or review to confer this Court jurisdiction to entertain the matter.
35. On the first issue, counsel while referring to Section 3(a) of the *Kenya Defence Forces Act* submitted that members of the Kenya Defence Forces are required to maintain high standards of professionalism and exemplary discipline which the petitioner was required to adhere to.
36. He noted further that the petitioner had been tried through a summary trial as provided under Section 147(1) of the *Act* which is guided by the dictates of Article 47 and 50 of the *Constitution*. He submitted that summary disciplinary proceedings are also dealt with under the *Kenya Defence Forces Rules of Procedure*, 2017 under Rule 15(1)(a).
37. Counsel submitted that, investigations under Section 150 of the *Act* were conducted by the military police who in the end preferred charges against the petitioner as required by the law. Once charged, the charges were forwarded to the Commanding Officer for trial and disposal as provided under Section 156(1) of the *Act* where upon the matter was heard and determined in accordance with the principles of the *Act* under Section 152 (a).
38. In this regard counsel emphasized that the petitioner did not challenge the impartiality and independence of the Commanding Officer who has jurisdiction to deal with such matters. Furthermore it was noted that the petitioner willingly submitted himself to be tried by the Commanding Officer as opposed to the Court Martial as allowed under Section 157(1) of the *Act*.



39. In support of this submission counsel cited the Court of Appeal case of *Republic v Chief of General Staff & another* (2017) eKLR where the court explained the procedure of summary trial within the Kenya Defence Forces. The court found that the failure to controvert this process, refuted the allegations of breach of rules of natural justice, bias, yielding to external pressure, failure to consider all the relevant considerations and alleged unreasonableness of the resultant award. In light of this, he submitted that the petitioner's dismissal from the KDF was fair, legal and procedural.
40. In the second issue, he submitted that Section 137 of the *Act* provides that the military police may arrest any person who is subject to the Act and suspected to have committed an offence under the *Act*. Additionally, it was stated that according to Section 140(2)(a)(b) of the *Act*, a person under the *Act* cannot be placed in custody unless there is a letter from the Commanding Officer and thereafter after lapse of 8 days a delay report be sent to the Service Headquarters explaining why the person is still in custody without being tried by the Court martial or summarily.
41. Controverting the petitioner's allegations on his detention, Counsel submitted that the petitioner had failed to produce any evidence to show that he was under custody from the period he reported until his dismissal from service which he computed at 57 days. Equally, Counsel pointed out that the petitioner had not even stated the place he had been detained. Further at no point was the petitioner denied access to his family and or an advocate.
42. In all this Counsel submitted that the general proposition is that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmation of the issue which the petitioner has failed to do as held in the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR, and *Susan Mumbi v. Kefala Grebedhin* (Nairobi) HCCC No.332 of 1993.
43. On the third issue counsel submitted that Section 244(2) of the *KDF Act* provides that where an officer is dismissed under the *Act*, the Defence Council may withhold, reduce the amount or suspend any such benefits payable to the officer. This is further underscored under Rule 6 of the *Kenya Defence Forces (Pensions and Gratuities)(Officers and Servicemen) Regulations*, 2017 which inform that no officer or service member will have an absolute right to compensation, pension, gratuity or other allowance. Additionally, an officer sentenced to dismissal by the Court Marshall or Commanding Officer shall not be entitled to pension, gratuity or other allowance. This was appreciated in the case of *Gift Kambu Marandu v Kenya Defence Forces Council & another* (2017) eKLR which was cited in support. Owing to these provisions Counsel submitted that the petitioner was not entitled to the any pension, gratuity or other allowance due to the reason that he had been summarily dismissed from service. Nevertheless, counsel submitted that this Court does not have jurisdiction to entertain this issue.
44. On the last issue, Counsel submitted that the petitioner had failed to exhaust the internal mechanism of appeal or review as provided in the *KDF Act* and its *Regulations*. He noted that the petitioner dissatisfied with the Commander's decision ought to have written to the Chief of Defence Forces as seen under Paragraph VII of General Administration on Discipline General (Terms and Conditions of Service). Likewise, the petitioner did not lodge an appeal or review with the Defence Council. In light of this Counsel submitted that the Court under Section 9(2) of the *Fair Administrative Action Act*, 2015 is directed not to review an administrative decision unless the internal mechanisms are exhausted. This is also the Courts' position as seen in the case of *Non – governmental Organizations Co-ordination Board v EG & 5 others* (2019) eKLR. To this end Counsel submitted that the petition had failed to meet the set threshold for this Court to allow it and so should be dismissed.



## Analysis and Determination

45. I have carefully considered the pleadings and submissions of the parties herein and the authorities relied on. Consequently the issues that arise for determination are as follows:
- i. Whether the petitioner exhausted the respondents' internal mechanisms before invoking this Court's jurisdiction.
  - ii. Whether the petitioner's constitutional rights were violated by the respondents'.
  - iii. Whether the petitioner is entitled to the reliefs sought.

### Whether the Petitioner Exhausted the Respondents' Internal Mechanisms before invoking this Court's Jurisdiction to entertain the Matter

46. The respondents' through their Counsel in the written submissions submitted that the petitioner failed to exhaust the internal mechanisms of appeal and review as provided in the *KDF Act* and its *Regulations*. That this Court under Section 9(2) of the *Fair Administrative Action Act*, 2015 is urged to refrain from reviewing an administrative decision until the internal mechanisms are exhausted. The petitioner did not submit or respond to this issue.
47. It is noted that the issue of jurisdiction was not raised in the respondents' response vide their replying affidavit but only appeared in the respondents' written submissions. Palpably this issue was not answered to by the petitioner in rejoinder to enable this Court make a definitive and impartial finding on the same as part of the issues raised in the parties' pleadings. This Court is as well minded to the legal principle that parties are bound by their pleadings and as such this Court ought to refrain from making a pronouncement on issues that were not pleaded by the parties.
48. This position is reinforced by a number of authorities. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR citing the Nigerian Supreme Court with approval observed as follows:

“First, in *Adetoun Oladeji (nig) Ltd v Nigeria Breweries Plc* S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

....

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”



(See also: *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta* (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Order) and *Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others* [2014] eKLR.)

This court will therefore not entertain that issue.

### **Whether the petitioner's constitutional rights were violated by the respondents'**

49. The petitioner's main contention is that his alleged detention from 2<sup>nd</sup> November 2016 to 1<sup>st</sup> January 2017 and subsequent dismissal from KDF on 13<sup>th</sup> January 2017 was unlawful and unconstitutional. This is because the prolonged detention went against his rights under Article 49(1) of the *Constitution*. Similarly, that his trial proceedings were not in line with the principles of a fair trial and in the end led to his dismissal. He also pointed out that the trial process failed to consider his mental state that led to his disappearance from active duty for the 23 years.
50. This assertion was strongly opposed by the respondents who noted that the process that led to the dismissal of the petitioner was in accordance with the principles of the *Constitution* and dictates of the *KDF Act*. The respondents further argued that the petitioner had failed to discharge his burden of proof in view of his allegations.
51. In a constitutional suit a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This principle was pronounced in the case of *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272. Plainly, the threshold for proving constitutional cases is now well settled and reiterated in law. In the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR the Court reiterating the principle held as follows:
- “ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru v Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of the *Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”
52. The standard of proof as set out in the case of *Anarita Karimi Njeru* case (*Supra*) as such places the onus of proof on the petitioner. Considering this, the petitioner is required to prove the elements that constitute the violation of the cited rights to justify a finding that his rights were indeed violated. This is done by showing the way of infringement by laying the factual basis and supporting the same through the evidence, presented.
53. The petitioner submitted that around August 1993 while on official leave he was involved in an accident that left him with physical and mental difficulties which led to his disappearance from duty for the 23 years. According to the respondents an officer who is absent from duty for more than 90 consecutive days without a reason is termed as a deserter as per the law which was the case in the instant suit. It was thus upon his re-appearance that the petitioner was charged and summarily dismissed from service.



54. It was not in dispute that the petitioner was out of the military service for 23 years starting from the year 1993. According to the Armed Forces Act Cap 199(now repealed) Section 31 of the Act provided for the law on desertion and absence without Leave. In particular Section 31(2) describes the offence of desertion as follows:

For the purposes of this Part, a person deserts if he-

- i. Leaves the armed forces, or fails to join or rejoin the armed forces when it is his duty to join or rejoin them, with (in either case) the intention, subsisting at the time of the leaving or failure or formed thereafter, of remaining permanently absent from his duty; or
- ii. being an officer, enlists in or enters the armed forces without having resigned his commission, or being a serviceman enlists in or enters the armed forces without having been discharged from his previous enlistment; or
- iii. absents himself without leave with intent to avoid serving in any place outside Kenya or to avoid service or any particular service when before the enemy; or
- iv. absents himself without leave for a continuous period of more than ninety days.

55. In the case before this court, the petitioner was declared a deserter under Section 31(2)(d) of the Act. This Section is now captured under Section 74 of the Kenya Defence Forces Act, 2012. A perusal of the petitioner's evidence does not show any document adduced to ascertain whether he had taken official leave at the time or whether he had permission to be away. This in essence would be evidenced by an official leave form as signed by the 2<sup>nd</sup> respondent and petitioner indicating the number of leave days and date to report back. It is reasonable to infer hence in absence of this that as per Section 31 of the repealed Act and Section 74 of the KDF Act the petitioner was in the end declared as a deserter in accordance with this law.

56. With reference to offences under the Act, the KDF Act provides that one can be subjected to either Summary disciplinary proceedings under Part VIII or be presented before the Court Marshall under Part IX. With reference to summary disciplinary proceedings, Section 148(1) provides as follows:

Certain charges may be dealt with summarily

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.

57. Before the proceedings occur, Section 150 of the Act provides as follows:

Reporting and investigation of offences

If a person who is subject to this Act is accused of an offence under Part VI, the accusation shall be reported in the form of a complaint to the accused's commanding officer, and the commanding officer shall forward the complaint to the military police for investigation in the prescribed manner.

58. In conducting the summary disciplinary proceedings the process is to adhere to the following:

- i. Section 147 - The principles under Articles 47 and 50 of the Constitution.



- ii. Section 151 - The accused person's right during the trial and the right to be represented during the trial.
  - iii. Section 152 - Before the commanding officer tries an accused person under this Part, he must meet the conditions listed in this Section.
  - iv. Section 154 - The hearing procedure that must be followed.
  - v. Section 157 - Grants the accused under this part an opportunity to choose to be tried by the Court Marshall instead of the Commanding Officer.
59. Manifestly, the [KDF Act](#) provides a comprehensive trial procedure for an accused person as per the provisions of the Act. A look at the facts of this case reveals a number of things. The petitioner in his affidavit informs that he was dismissed from service on 13<sup>th</sup> January 2017 but does not give an account of how the dismissal was arrived at by the respondents. Such dismissal is either through summary disciplinary proceedings or the Court Martial.
60. The respondents on the other hand vide Major Antony Mwiti's affidavit make known that once the petitioner presented himself to the Military Police an investigation was instigated into his allegations. This is detailed by the correspondence between the investigating officers and named hospitals. At the conclusion of the investigations, it is said that the petitioner was tried summarily by the Commanding Officer an option that he elected. It is noted that this assertion was not rebutted by the petitioner in a further affidavit. What is regrettable however from both accounts is that neither adduced documentation of the conduct of the summary proceedings before the Commanding officer.
61. Be that as it may, a number of facts are certain from the adduced evidence. The genesis of the petitioner's disappearance from work in the year 1993 was an accident that led to the alleged physical and mental injuries. The veracity of this accident was not demonstrated through any documentation such as a police abstract or a report at the police station or even the 2<sup>nd</sup> respondent's office. This was neither made manifest in the medical records adduced as part of the petitioner's annexures. There is also no demonstration that the accident was reported to respondents. Although the petitioner averred that the same was reported by one, Kanyua, this person was not called as a witness. The claim for mental incapacity owing to the said accident was also not proved through the adduced evidence and neither were any of the doctors called as witnesses to collaborate the petitioner's claims.
62. The same goes for the detention allegations. The petitioner did not show whether indeed he was detained incommunicado and where exactly he was detained. He claimed that he could not access documentation of the same. However, demonstration of his family members reporting him missing to the police or 2<sup>nd</sup> respondent since the day he reported would have sufficed.
63. With this background and culmination of the respondents' investigations owing to the offence of desertion as provided under the [KDF Act](#), the petitioner was charged and dismissed on 13<sup>th</sup> January 2017.
64. As already established, the petitioner is required to demonstrate the manner of infringement by laying a factual basis for that allegation by way of evidence. The Court in the case of [Edward Akong'o Oyugi & 2 others v Attorney General](#) (2019) eKLR determined as follows:
- “ 72. Section 107 (1) of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is



said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

65. From the foregoing analysis and the material placed before this court, the petitioner in this case has failed to discharge his burden of proof. This is because failure by him to show how the respondents violated his rights by applying the law as provided in the *KDF Act* and its *Regulations* and his failure to controvert the respondents' averments negates his allegations of breach of his constitutional rights.
66. The petitioner as discussed above was required to prove the elements that constitute the violation of the said rights to justify a finding that the said rights were indeed violated. Being away from official duty for 23 years with, no explanation cannot be taken lightly. I am persuaded that the petitioner has not proved his case against the respondents in this regard. Accordingly I am compelled to find that the respondents did not violate the petitioner's constitutional rights as alleged.
67. Let the 2<sup>nd</sup> respondent pay the petitioner any money that may be due to him as averred to by Major Anthony Mwiti Manyara in terms of his salary and road travel expenses for his years of active service.
68. The upshot is that the petition dated 20<sup>th</sup> August 2019 lacks merit and is hereby dismissed. Each party to bear its own costs.

Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15<sup>TH</sup> DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

