REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION NO. 188 OF 2019

MAJOR ERASTUS HEZBON OTIENO.....PETITIONER

-VERSUS-

THE DIRECTOR OF MILITARY PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

KENYA DEFENCE FORCES.....3RD RESPONDENT

JUDGEMENT

1. Through a petition dated 21st May, 2019 and amended on 27th June, 2019, the Petitioner, Major Erastus Hezbon Otieno, an officer of the Kenya Defence Forces (KDF), is challenging his arrest and subsequent detention for a period of over 100 days without a trial during which period he was placed under an escorting officer and was not allowed visits by family, friends or an advocate except for visits once a week by his wife in the presence of his military escort. The petition is supported by the Petitioner's own affidavit sworn on 21st May, 2019.

2. The Petitioner's case in brief is that on 16th February, 2019 he met one Nobert Odundo who introduced him to a friend by the name Cliff whose friends had purportedly won a supply contract with the Department of Defence and needed his assistance. He avers that on 17th February, 2019, the said Nobert Odundo drove him to Langata Barracks where he was to meet the said Cliff and his friends to see the nature of assistance they required from him. However, on their way to Langata Barracks, the said Cliff called Nobert Odundo informing him that they were already at the officers' mess at Langata Barracks, which was unusual because a civilian would not access the officers' mess unaccompanied.

3. Upon arriving at the mess and before he could sit down with them, he received a phone call and on return, the said Cliff and the two ladies, one of them going by the name Gladys, handed him a sealed envelope containing the said tender. It is his averment that just as he was walking out of the Officers' Mess, he was approached by an individual in plain clothes who identified himself as a military police officer who asked him to hand over the envelope he had just been given by Cliff. The officer whom he later confirmed to be Major Oyamo arrested him, letting the said Cliff and the two ladies to leave the Barracks. His averment is that he was not informed of the reason for his arrest. He further averred that he was put under close arrest from 18th February, 2019 until 5th March, 2019 when he was put under open arrest until he filed this petition. It is his deposition that he has also been put on half pay making it impossible for him to provide for his family as he is the sole breadwinner.

4. The Petitioner further averred that the terms spelt out by the respondents under close and open arrest violated his rights and fundamental freedoms under the Bill of Rights. He further stated that pursuant to Section 213 of the Kenya Defence Forces Act No. 25 of 2012 (KDF Act), the Director of Military Prosecutions has the power to decide whether or not to prosecute in relation to any offence committed under the Act. Further, that Section 54(3) of the same Act provides that an accused person shall not be held in custody for more than 8 days before he is arraigned before a commanding officer or a court martial.

5. The Petitioner named the Director of Military Prosecutions (DMP) as the 1st Respondent, the Director of Public Prosecutions (DPP) as the 2nd Respondent and the Kenya Defence Forces (KDF) as the 3rd Respondent. He seeks the following reliefs:-

> **"a) An ORDER OF DECLARATION declaring that by failing to arraign the Petitioner for trial over 3 months after arrest, the Respondents have violated the Petitioner's constitutional right under Article 50(2)(e) of the Constitution to have his trial begin and conclude without unreasonable delay.**
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> **b) AN OF DECLARATION declaring that by requiring and forcing the Petitioner to record a statement on the matter, the**

Respondents have violated the Petitioner's constitutional right under Article 49(1)(a) and (b) of the Constitution to be informed of the reason for his arrest, his right to remain silent and to remain silent.

c) JUDICIAL REVIEW ORDER OF CERTIORARI bringing before the Honourable Court for purposes of being quashed the decision of the Respondents to arrest [and] deprive the Petitioner of his liberty without due process.

d) JUDICIAL REVIEW ORDER OF CERTIORARI bringing before the Honourable Court for purposes of being quashed the charges proposed to be brought against the Petitioner herein.

e) JUDICIAL REVIEW ORDER OF PROHIBITION prohibiting the Respondents from continuing to hold or detain the Petitioner herein absent due process.

f) JUDICIAL REVIEW ORDER OF PROHIBITION prohibiting the Respondents from trying the Petitioner on the proposed charges herein as the same do not disclose an offence known to law.

g) AN ORDER FOR COMPENSATION requiring the Respondents to compensate the Petitioner in such just amount as the Honourable Court shall determine for violation of the Petitioner's fundamental rights and freedoms.

h) AN ORER OF DECLARATION declaring that section 53 and section 140 of the Kenya Defence Forces Act No. 25 of 2012 are inconsistent with the Constitution and therefore null and void.

i) AN ORDER OF DECLARATION declaring that the court martial as currently constituted under Section 160 as read together with 176 of the Kenya Defence Forces Act No. 25 of 2012 is constitutional (sic).

j) AN ORDER OF DECLARATION declaring that Section 160 and 176 of the Kenya Defence Forces Act No. 25 of 2012 are inconsistent with the Constitution and therefore null and void.

k) AN ORDER OF DECLARATION declaring that Section 121 of the Kenya Defence Forces Act No. 25 of 2012 creates a vague, uncertain and subjective offence in law and is thus inconsistent with Article 50(1)(n) of the Constitution and is therefore unlawful, null and void.

l) Costs."

6. In response, the 1st and 3rd respondents filed a replying affidavit sworn on 26th May, 2019 by Lieutenant Colonel Joseph Kipchirchir Ngeny. He averred that he is employed by the KDF and deployed as the Commanding Officer, Defence Headquarters' Camp Administrative Unit. He accepted that the Petitioner is an officer of the KDF and was deployed as Staff Officer II Education Services, Defence Headquarters but has never been assigned procurement duties.

7. It was Lieutenant Colonel Ngeny's declaration that Article 49(f)(1) of the Constitution which requires an arrested person to be arraigned in court not later than 24 hours after arrest is expressly limited under Article 24(5)(f) of the Constitution as read together with Section 54(3) and (4) of the KDF Act. He further proclaimed that in placing the Petitioner under arrest, he considered and complied with the provisions of sections 54(3) and 140 of the KDF Act.

8. Lieutenant Colonel Ngeny stated that the Petitioner was arrested on 18th February, 2019 after complaints from members of the public that the said officer acting in connivance with civilians, falsely pretended that he was in a position to secure them a contract to supply Anti-Lock Jam Pins to the Ministry of Defence. Further, that at the time of his arrest, the Petitioner was informed of the reasons for his arrest. He conceded that the Petitioner was put under close arrest from 18th February, 2019 until 5th March, 2019 when he was put in open arrest but denied that the arrest violated the Petitioner's dignity. He deposed that the reasons for putting the Petitioner under arrest was to allow for investigations to be conducted, a court martial to be convened and to ensure that he does not flee from the jurisdiction of the court martial.

9. It was further stated that the Petitioner was put on half pay in accordance with the law as provided for in the Terms and Conditions of Service Part VIII Chapter 3 Para 44. The document was attached to the replying affidavit. Further, that Article 24(5) of the Constitution provides that an Act of Parliament may make provision for limitation of rights enjoyable by members of the KDF and those rights include the freedom of movement provided for in Article 39 as well as the rights of an arrested person under Article 49 of the Constitution.

10. It was Lieutenant Colonel Ngeny's averment that there was no intention of holding the Petitioner in custody without trial since a court martial was scheduled to convene on 30th May, 2019. Further, that Section 140(2) of the KDF Act provides that where a person has been arrested and has been in custody for more than eight (8) days without being tried summarily or by a court martial, a special report shall be made by the commanding officer to the service commander in the prescribed manner and the report on the necessity for further delay be made every eight (8) days the person remains in custody and this was done in the Petitioner's case.

11. It was avowed for the 1st and 3rd respondents that Section 140 of the KDF Act further provides that where summary disciplinary proceedings have not commenced or a court martial has not been convened after the expiry of 42 days from the date of arrest, the commanding officer shall hold the accused in open arrest. It was Lieutenant Colonel Ngeny's position that whereas that provision allowed for the holding of the Petitioner in close arrest for a maximum of forty two days, he nevertheless placed him under open arrest on 5th March, 2019 which was only fifteen days after his arrest. His averment was that upon conclusion of the investigations he referred the case to the Commandant who in turn referred it to the DMP who advised that the matter be tried by a court martial. Consequently, the Defence Court Martial Administrator issued a convening order scheduling the court martial to be held on 30th May, 2019 at Kahawa Garrison.

12. Lieutenant Colonel Ngeny affirmed that there is sufficient evidence to support the charges against the Petitioner and the weight of the evidence is to be determined by the court martial. In conclusion, he denied that the Petitioner's arrest was a setup or that the Petitioner was coerced or induced to record a statement or that he was subjected to inhuman treatment. He therefore termed the petition as unmeritorious and an abuse of the court process.

13. In two other affidavits sworn on 21st June, 2019 and 8th July, 2019 respectively, Lieutenant Colonel Ngeny averred that the charges preferred against the Petitioner in the court martial are in respect of offences committed by him at the Langata Barracks on 18th February, 2019. He stated that the Petitioner had contested the jurisdiction of the court martial to try him in respect to those charges and the court martial had ruled that it had jurisdiction to try the charges. Further, that the Petitioner's arrest and placement in custody was done in accordance with Section 139(1) of the KDF Act.

14. It was also averred for the 1st and 3rd respondents that Section 118 of the Criminal Procedure Code allows a police officer to conduct a search without a warrant in circumstances where obtaining a warrant would substantially prejudice an investigation. He proclaimed that in any event there was no conspiracy to fix the Petitioner and the intended prosecution is not actuated by malice and neither is it discriminatory.

15. It was also Lieutenant Colonel Ngeny's averment that the court martial is an *ad hoc* court that is constituted as and when need arises and the trial is by peers who are knowledgeable on military customs and practices thus explaining the constitution of a court martial as spelled out in the KDF Act. It was his averment that the offence created by Section 121 of the KDF Act is a hallmark for maintenance of good conduct and service discipline in the military. He therefore urged the court to dismiss the petition.

16. The 2nd Respondent was by the consent of the advocates for the Petitioner and the 1st and 3rd respondents expunged from the proceedings on 27th May, 2019.

17. In his rebuttal, the Petitioner averred that the offences with which he is charged are not those which he was arrested for nor are they military offences. Further, that the respondents have not given any good reason for the inordinate delay before trial. He maintained that the law requires that one ought to be arrested upon conclusion of investigations and a determination made that an offence has been committed. He reiterated that he was subjected to the most inhuman and degrading treatment, robbed of all rights attached to his status following his arrest and subsequent detention. He declared that his house and car were searched without a warrant. Further, that his phone was seized upon arrest. He asserted that he was not allowed to eat in the mess with fellow military officers or to join fellow officers in the TV room or the dining area or in any public place. He was also not allowed to see his parents and brothers who had travelled from their rural home to visit him or his young family.

18. It was further the Petitioner's proclamation that the call logs annexed to his affidavits confirm that the purported victims had engaged in communication and business transactions with the military through fellow military officers. His assertion was that the said military officers had been involved in the conspiracy against him since 2018. He therefore averred that his intended trial is malicious, selective, discriminatory, and an abuse of the court process aimed at securing extraneous ends.

19. Mr. Kaluma appearing for the Petitioner highlighted his written submissions dated 5th July, 2019. Counsel submitted that the Petitioner's fundamental rights and freedoms under Articles 27(1), (2), (4) & (5), 28, 29, 47(1) & (2), 49(1) (a), (b), (c), (d), (f) & (h), 50 (1), (2) (a), (b)&(e) & (4), and Article 51(1) and (3) of the Constitution have been violated by the respondents.

20. Counsel for the Petitioner asserted that the Petitioner was neither informed of the reasons for his arrest, as confirmed by the respondents through their witness statements, nor was he informed of his right to remain silent hence forcing him to record a statement against his will. Thereafter, the Petitioner was put under arrest and detained under solitary confinement and ripped of all his dignity as a human being and as an officer of the KDF from 18th February, 2019 until 5th March, 2019 when he was held at the camp guardroom and was not authorized to leave the guardroom without express authority.

21. It was further the Petitioner's claim that he was then put under open arrest on strict and inhuman terms for a period of over 100 days from 5th March, 2019 without being charged during which time he was denied food and required to pay for his meals despite being in remand. Further, that he was not allowed any visitors without the presence of an escort and was not allowed to wear a head dress, sword or belt or to even appear in public places. The Petitioner's counsel submitted that by denying the Petitioner an opportunity to see his family except his wife once a week for only an hour in the presence of an escorting officer, the respondents had subjected the Petitioner to close arrest in circumstances not contemplated by the Defence Forces Standing Orders, 2015 (Standing Orders).

22. Counsel also contended that the placement of the Petitioner on half pay without prosecution went against his right to be presumed innocent until the contrary is proved.

23. It was also the Petitioner's case that by singly and selectively subjecting him to legal process before the court martial while shielding away individuals directly mentioned as offenders and/or accomplices in the acts charged violated his rights under Articles 27 and 28 of the Constitution by depriving him of his dignity as a person and as an officer.

24. It was further counsel's submission that the Petitioner's rights under Articles 29 and 39 of the Constitution were violated by depriving him of his freedom arbitrarily without just cause, detaining him without trial for a period of over 100 days and subjecting him to psychological torture and treating him in a cruel, inhuman or degrading manner.

25. Counsel also urged that the Petitioner's right to fair administrative action under Article 47, right to fair hearing under Article 50 and the rights of person held in custody under Article 51 were also violated by the respondents.

26. On whether the court martial has jurisdiction to try the Petitioner, counsel submitted that Section 2 of Chapter 19 of the Standing Orders

provides that **"jurisdiction in respect of offences by service personnel may lie either with service authorities under the Kenya Defence Forces Act or it may lie with the civil authorities under ordinary law",** while Section 3 of Chapter 19 of the same Standing Orders provides that **"in cases where jurisdiction lies jointly with either the service or civil authorities, commanding officer is to refer to local police authorities…any other case in which a civilian or his/her property is involved."** Counsel pointed out that Section 5 further provides that **"if a service offender has a civilian accomplice, proceedings against both will normally be taken in a civil court."**

27. Based on the cited provisions of the Standing Orders, counsel posited that the Petitioner therefore having been charged with the offence of having conspired with others not before court to defraud a civilian, the charge is not a military offence to be tried exclusively by the service authorities under Section 2(a) of Chapter 19 of the Standing Orders but is an offence falling under Section 2(b) of Chapter 19 of the same Standing Orders whose jurisdiction is vested in both service authorities and civil authorities.

28. Accordingly, counsel submitted that the offence of conspiracy to defraud involves civilians and their property and is thus not a service/military offence but is an offence under Section 3(c) of Chapter 19 of the Standing Orders which requires that it be referred to civilian authorities/courts, not service authorities for consideration, hearing and determination. He stressed that the jurisdiction of the service authorities and by extension the court martial has been ousted by the express provisions of the cited law and the court martial cannot proceed to hear and determine the case over which the Petitioner is threatened with prosecution.

29. On whether the intended prosecution was malicious, selective, discriminatory and an abuse of the criminal justice system, counsel submitted that the DMP has abused his powers under Section 213 of the KDF Act by having maliciously, discriminatively and selectively subjected the Petitioner to be charged and tried before the court martial in an offence allegedly committed in conspiracy with others not before court who are confirmed to be civilians and therefore not subject to the jurisdiction of the court martial.

30. It was submitted that pursuant to Article 157(12) of the Constitution, Parliament enacted the KDF Act which conferred prosecutorial powers in the Office of the DMP who, subject to Section 213, shall have power to decide whether or not to prosecute in relation to any offence under the Act. It is counsel's submission that this power which is subject to the Constitution cannot be abused in furtherance of open violations of the fundamental rights and freedoms of the Petitioner. Counsel cited the case of **George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR** in support of that assertion.

31. On whether sections 53 and 140 of the KDF Act are inconsistent with the Constitution, counsel submitted that the respondents have placed heavy reliance upon the said provisions to justify the violation of the Petitioner's fundamental rights and freedoms but in his view the provisions are inconsistent with Articles 47 and 49 of the Constitution. It was counsel's submission that the provisions are null and void to the extent that they unlawfully presuppose that a person can be arrested and detained without being arraigned before court or subjected to lawful process beyond the 24 hours stipulated in Article 49(1)(f) of the Constitution. Further, that the said provisions are also offensive to the Constitution as they presume that the right of an accused person under Article 50(2)(e) of the Constitution to have the trial begin and conclude without unreasonable delay can be limited and that a person can be arrested before investigations are concluded.

32. On the claim of inconsistence between sections 160 and 176 of the KDF Act on the one part and the Constitution on the other part, counsel submitted that a court martial is established as a subordinate court under Article 169 of the Constitution and by dint of this provision, courts martial ceased to be the peer military tribunals they use to be before and became part of the court system. He asserted that Article 160 of the Constitution stipulates that in the exercise of judicial authority, the judiciary as constituted shall be subject only to the Constitution. Counsel pointed out that whereas Section 160 of the KDF Act provides that a court martial comprises of a Judge Advocate and at least five members consisting of military officers appointed by the Defence Court Martial Administrator, Section 176 of the same Act states that the decisions of the court martial are made by a majority of the members of the court excluding the Judge Advocate.

33. It is therefore the submission of the Petitioner's counsel that it is the military members of the court martial who decide the cases and they are subject to military command. Counsel therefore posited that the members of a court martial are not judicial officers obligated by the Constitution to be absolutely independent in the discharge of their judicial mandate. Accordingly, counsel claimed that the court martial is not properly and lawfully constituted as the Judge Advocate is robbed of the power to decide cases and therefore sections 160 and 176 of the KDF Act are inconsistent with the provisions of Articles 160 and 169 of the Constitution.

34. In conclusion, the Petitioner's counsel proclaimed that the orders sought in the petition are provided in Article 23(3) of the Constitution. He cited the case of **Peter M. Kariuki v AG, Civil Appeal No. 79 of 2012; [2014] eKLR** where the Court of Appeal granted the appellant, an army officer of the rank of major general Kshs. 15,000,000/- as damages for violation of his right to a fair trial within reasonable time by an impartial court. He therefore urged this court to allow the petition and award the Petitioner Kshs. 500,000,000/- as compensation for violation of his fundamental rights and freedoms.

35. Mr. Yator appearing for the 1st and 3rd respondents highlighted their submissions dated 18th June, 2019 and the supplementary submissions dated 11th July, 2019. On whether his clients violated the fundamental rights and freedoms of the Petitioner, counsel submitted that the Petitioner was informed of the reasons for his arrest and that he recorded his statement voluntarily and was put on half pay from the date of his arrest in compliance with Part VII (paragraph 44 of Chapter 3) of the Terms and Conditions of Service. He further submitted that Section 47(a) of the KDF Act limits the right to freedom of movement under Article 39 of the Constitution when one is lawfully held in service custody.

36. It was also counsel's submission that the right guaranteed by Article 49(1)(f)(i) of the Constitution requiring that an arrested person be arraigned in court not later than 24 hours after arrest is expressly limited under Article 24(5)(f) of the Constitution as read with Section 54(3) and (4) of the KDF Act. On the allegation of unreasonable delay in arraigning the Petitioner before court, counsel submitted that under Section 140(5) of the KDF Act, if a court martial has not been convened after the expiry of 42 days from the date of arrest, the commanding officer shall hold the accused on open arrest on such conditions as the commanding officer may determine. He also submitted that the charges preferred against the Petitioner were framed according to the law and in fact the Petitioner took plea on 11th June, 2019. Further, that in any event, the issues raised by the Petitioner herein are best suited for the determination by the trial court.

37. To buttress his arguments, counsel cited the case of **Peter M. Kariuki v Attorney General [2014] eKLR** where the Court of Appeal held that the trial court can take cognizance of the pre-charge violation if the violation is linked to or affects the criminal process. To that end, counsel argued that there is no assertion that the pre-trial custody prejudiced the Petitioner's trial in the sense that his memory has lapsed or that his witnesses have died.

38. On whether this is the proper court to determine the issues of fact pleaded, counsel cited the case of **Samuel Sabuni & 2 others v Court Martial & 8 others [2014] eKLR** where the court held that matters of fact should be considered by the court martial. Accordingly, he submitted that this court is not the proper court to determine issues of fact presently before the trial court because to do so would be prejudicial to the ongoing criminal trial.

39. Counsel for the 1st and 3rd respondents also relied on the case of **George Joshua Okungu & another v Chief Magistrate's Court Anti-Corruption Court at Nairobi & another [2014] eKLR** for the proposition that the court is not expected to investigate and determine the merits of the criminal case and the mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail or that the Petitioner has a good defence in the criminal process are matters that ordinarily ought to be dealt with by the trial court and should not be canvassed in these kind of proceedings. He also cited the case of **Musembi Kuli v Republic [2013] eKLR (Criminal Appeal No. 248 of 2009)** where the court stated that the violation of the right to be brought to court within the constitutional time limits does not make the entire trial a nullity.

40. On whether the prosecution of the Petitioner is actuated by malice, counsel distinguished the case of **George Joshua Okungu** (supra), which the Petitioner sought to rely on, and submitted that in that case there had been formal communication that the petitioners would not be prosecuted and that prosecution was later mounted to assuage the public emotions that action was being done in regard to the Triton scandal when the petitioners had nothing to do with it. He also distinguished the case of **Ronald Leposo Musengi v Director of Public Prosecutions & 3 others, High Court Petition No. 436 of 2014** stating that in that particular case the criminal trial against the petitioner was commenced despite the Director of Public Prosecutions, after considering the facts of the case, advising that a prosecution should not be mounted.

41. On the Petitioner's challenge to the constitutionality of sections 53 and 140 of the KDF Act, counsel cited the case of **Ndyanabo v Attorney General [2001] E.A. 495** on the principle of the presumption of constitutionality of statutes and the Canadian Supreme Court decision in **R v Big M Drug Mart Ltd [1985] 1 S.C.R. 295** on the relevance of purpose and effect in determining constitutionality of legislation. Relying on the said principles of constitutional interpretation, counsel submitted that sections 53, 54 and 140 of the KDF Act seek to protect the rights of arrested persons by providing safeguards to ensure speedy trial while recognizing those rights are limited in respect of KDF members.

42. On the constitutionality of sections 160 and 176 of the KDF Act, counsel for the 1st and 3rd respondents submitted that the court martial is an *ad hoc* court that is constituted as and when need arises and trial is by peers who are knowledgeable on military customs, traditions and practices hence the constitution of the court as provided for in Section 160 and the mode of decision making in the court martial as provided in Section 176.

43. Turning to the Petitioner's assertion that Section 121 of the KDF Act is unconstitutional, counsel submitted that the offence created under that provision is a hallmark for maintenance of good conduct and service discipline in the military in Kenya hence consistent with Article 50 of the Constitution. Further, that the offence enacted by the said provision is a common offence for most militaries in the world.

44. As to whether the Petitioner should be granted the reliefs sought, counsel submitted that the amended petition lacks merit and ought to be dismissed with costs. Counsel consequently urged the court to allow the case before the court martial to proceed to its logical conclusion by dismissing this petition.

45. From the pleadings and submissions filed in this petition, the first issue the court is called upon to determine is the constitutionality of sections 53, 54, 121, 140, 160 and 176 of the KDF Act. The second issue is whether the Petitioner's prosecution is tainted with irrationality, unreasonableness and procedural impropriety necessitating the intervention of the court. The third issue, which is dependent upon a favourable outcome for the Petitioner of both or one of the first two issues, is the remedies to be awarded to the Petitioner.

46. Are sections 53, 54, 121, 140, 160 and 176 of the KDF Act inconsistent with the Constitution? Section 53 of the KDF Act provides that:-

> **"The economic and social rights set out in Article 43 of the Constitution, in respect of a person to whom this Act applies, may be limited to the extent necessary for military training and operation as shall be prescribed by regulations."**

47. Section 54 of the KDF Act states that:-

> **"54. (1) The rights of an arrested person in Article 49 of the Constitution may be subject to limitation in respect of a person to whom this Act applies as set out in subsections (2) and (3).**
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> **(2) Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of the right of an arrested person in so far as the Act permits—**
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> **(a) the holding of an arrested person jointly with the persons serving a sentence;**
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> **(b) the holding of an arrested person without bail; or**

(c) the holding of an arrested person in custody notwithstanding that the offence is punishable by a fine only or imprisonment for a term not exceeding six months.

(3) An accused person shall not be held in custody for more than eight days before he or she is arraigned before a commanding officer or a court-martial unless the commanding officer, for reasons to be recorded in writing, is satisfied that the continued arrest of the accused person is necessary.

(4) The commanding officer shall review his or her decision in subsection (3) after the lapse of eight days until the accused person is brought before a commanding officer or a court-martial."

48. Section 121 of the KDF Act states that:-

"121. Any person subject to this Act who commits any act, conduct or neglect to the prejudice of good order and service discipline commits an offence and shall be liable, on conviction by a court martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act."

49. The KDF Act at Section 140 legislates that:-

"140.(1) The allegations against a person arrested under sections 137 or 141 shall be investigated without unnecessary delay, and as soon as practicable thereafter either proceedings shall be instituted to deal with the allegations or the person shall be released from arrest.

(2) Where a person who is subject to this Act remains in custody for eight days without being tried by a court-martial or dealt with summarily—

(a) a special report on the necessity for further delay shall be made by the person's commanding officer to the Service Commander in the prescribed manner; and

(b) a similar report shall be made to the Service Commander in the prescribed manner every eight days until a court-martial sits or the offence is dealt with summarily or the person is released from arrest.

(3) Where an accused person is on active service, subsection (2) shall not apply except so far as is reasonably practicable, having regard to the exigencies of active service.

(4) Notwithstanding the extensions granted under subsection (2), circumstances under subsection (3) or limitation of rights of an arrested person provided for under section 54, a person shall not, at any given time, whether in active service or not, be held in custody for a period exceeding forty two days in aggregate.

(5) Where the summary disciplinary proceeding have not commenced or the court-martial has not been convened after the expiry of forty two days, the commanding officer shall hold the accused person under open arrest on such conditions as the commanding officer may determine."

50. Section 160(1) of the KDF Act provides for the composition of courts martial as follows:-

"In the case of any proceedings, the courts martial established under Article 169 of the Constitution shall consist of—

(a) a Judge Advocate, appointed under section 165, who shall be the presiding officer;

(b) at least five other members, appointed by the Defence Court-martial Administrator if an officer is being tried; and

(c) not less than three other members in any other case."

51. The manner in which a court martial shall make decisions is provided by Section 176 of the KDF Act as hereunder:- **"176.(1) Subject to this section, every question to be determined on a trial by a court-martial shall be determined by a majority of the votes of the members of the court.**

(2) The Judge Advocate is not entitled to vote on the finding.

(3) In the case of an equality of votes on the finding, the court shall acquit the accused. (4) In the case of an equality of votes on the sentence, the Judge Advocate has a casting vote.

(5) A conviction, where the only punishment that the court can award is death shall not have effect unless it is reached with the concurrence of all members of the court and, where all the members do not concur in a conviction in such a case, the presiding officer shall declare a mistrial and the accused may be tried by another court."

52. Having reproduced all the impugned sections of the KDF Act, I will now proceed to consider the principles to be applied in determining

whether a statutory provision is constitutional or not. Mativo, J summarized the principles of constitutional interpretation in the case of **Apollo Mboya v Attorney General & 2 others [2018] eKLR** by stating that:-

> **"34. It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[13]In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[14]Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism.'[15]It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[16] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[17] Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[18]"**
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> [Footnotes omitted]

53. In the case of **R. v Stillman, 2019 SCC 40** the Canadian Supreme Court expressed the principles for interpreting a bill of rights as well as exception clauses in the following words:-

> **"[21] A *Charter* right must be understood "in the light of the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 157), accounting for "the character and the larger objects of the *Charter* itself", "the language chosen to articulate the specific right or freedom", "the historical origins of the concepts enshrined" and, where applicable, "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (*Big M*, at p. 344). It follows that *Charter* rights are to be interpreted "generous[ly]", aiming to "fulfi[l] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question (*ibid.*). As Professor Hogg observes:**
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> **In the case of most rights . . . the widest possible reading of the right, which is the most generous interpretation, will "overshoot" the purpose of the right, by including behaviour that is outside the purpose and unworthy of constitutional protection. The effect of a purposive approach is normally going to be to narrow the scope of the right. Generosity is a helpful idea as long as it is subordinate to purpose. [Footnote omitted.]**
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> **(*Constitutional Law of Canada* (5th ed. Supp.), at p. 36-30)**
>
> **[22] Generally speaking, the same core interpretive principles that apply to *rights* stated in the *Charter* also apply to *exceptions* stated in the *Charter*. They are to be read purposively, rather than in a technical or legalistic fashion. And, just as courts must take care not to "overshoot" the purpose of a *Charter right* by giving it an unduly generous interpretation, so too must they be careful not to "undershoot" the purpose of a *Charter exception* by giving it an unduly narrow interpretation. But since a *Charter* exception can be understood only if the right it qualifies is understood, the court should consider the two together."**

54. Applying the above principles of constitutional interpretation, I now proceed to determine the identified issues. The Petitioner submitted that the respondents have placed heavy reliance upon sections 53 and 54 of the KDF Act to justify the violation of his fundamental rights and freedoms. His case is that the said provisions are inconsistent with Articles 47 and 49 of the Constitution and are therefore unconstitutional.

55. It is important to note that the said provisions of the KDF Act are premised on Article 24(5) of the Constitution which states that:-

> **"Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—**
>
> **(a) Article 31- Privacy**
>
> **(b) Article 36- Freedom of association**
>
> **(c) Article 37- Assembly, demonstration, picketing and petition**
>
> **(d) Article 41- Labour practices**
>
> **(e) Article 43- Economic and social rights**
>
> **(f) Article 49—Rights of arrested persons."**

56. It is also important to appreciate that in enacting the KDF Act Parliament was alive to the requirements of Article 24 of the Constitution which sets out the conditions to be met in enacting a law that limits rights and fundamental freedoms. Parliament in that regard provided at Section 43 of the KDF Act that:-

"43. (1) The purpose of this Part is to specifically limit or restrict certain rights or fundamental freedoms set out in Chapter Four of the Constitution, as contemplated in Article 24 of the Constitution.

(2) The limitations of rights and freedoms under this Part are necessary for purposes peculiar to military service, based on human dignity, to ensure-

(a) The defence and protection of the sovereignty and territorial integrity of the Republic of Kenya;

(b) the protection of classified information;

(c) the maintenance and preservation of national security;

(d) the security and safety of members of the Defence Forces;

(e) that the enjoyment of the rights and fundamental freedoms by any individual member of the Defence Forces does not prejudice the rights and fundamental freedoms of any other individual member of the Defence Forces;

(f) good order and service discipline; and

(g) public health and safety;

(3) The limitation under this Part shall comply with Article 24 of the Constitution and shall satisfy the following four criteria-

(a) ensure the protection of national security, public safety, public order, public health or morals, protection of the rights and freedoms of others;

(b) be necessary to achieve the mandate of the Defence Forces;

(c) operate without discrimination; and

(d) be exceptional and not impair the essence of the freedom being limited."

57. It is clear from a reading of Article 24(5) of the Constitution that the Constitution specifically allows for the limitation of the rights to privacy; freedom of association; assembly, demonstration, picketing and petition; labour relations; economic and social rights; and rights of arrested persons in respect of persons serving in the KDF and the National Police Service. The Constitution talks of limitation which is not equivalent to outright denial of the said rights. Where a right does not operate against the objectives of the disciplined forces, there is no reason why a member of the disciplined forces should not be allowed to enjoy such a right.

58. Parliament was indeed alive to the fact that members of Kenya Defence Forces like other Kenyans are indeed entitled to enjoy their constitutional rights hence the enactment at Section 42 of the KDF Act that:-

"42. All persons subject to this Act shall enjoy all rights and fundamental freedoms enshrined under Chapter Four of the Constitution unless limited to the extent specified in Article 24(5) of the Constitution, this Act or any other Act."

59. Whenever a provision limiting the rights of a person is challenged, the court ought to be alive to the purpose underlying the limitation which may include the maintenance and preservation of national security. In this regard, Mwita, J in **Robert Alai v The Hon Attorney General & another [2017] eKLR** held as follows:-

"The principle enunciated above is that constitutionally guaranteed rights should not be limited except where the limitation is reasonable, justifiable and the objective of that limitation is intended to serve the society. The standard required to justify limitation, is high enough to discourage any limitation that does not meet a constitutional test. And that limitation to a right is an exception rather than a rule.

In the Swaziland case of Thulani Maseko vs. Prime Minister of Swaziland & others (2180/2009 {2016} SZHCn180 (16th September, 2016), the court dealt with a law which was said to be inconsistent with the constitution. The court stated that it was the duty of the government to show that any limitation of a fundamental freedom was justified. The court stated;

"It is not insignificant to note that the 2nd respondent nowhere in his affidavit states why the limitation is necessary and what purpose is meant to achieve or serve or what mischief it is meant to address or curb. He merely states that the limitation or restriction is reasonably required '…in the interest of certain public purposes'…The averred 'interests' and public purposes' are not disclosed. This, in my judgment, is not an adequate answer to the challenge.""

60. In the case at hand, the reasons for the limitation of the rights of a member of KDF, and in particular the rights of arrested persons, are contained in the KDF Act. The Petitioner has not stated that the reasons given for the limitation are insufficient. He has also not explained the insufficiency, if any. The environment under which members of KDF operate makes it necessary to hold suspects in custody for a slightly

longer period than that envisaged by the Constitution. One reason for such delay is that the offence may be committed when the country is at war. Another reason is that a court martial is only constituted once a decision is made that a member of KDF should be court-martialed. The limitation on the other rights accruing to arrested persons is also justified for the reasons already stated. In the circumstances I find and hold that sections 53 and 54 of the KDF Act meet the constitutional parameters for limiting rights and are therefore constitutional.

61. There is the averment by the Petitioner that his arrest and detention contravened Section 140 of the KDF which provides that a person arrested for suspicion of having committed an offence under the Act shall be investigated and tried without unnecessary delay. The Petitioner contends that he was detained for over 100 days pending investigation and at the time of filing this petition, he had not been arraigned before a court martial or dealt with summarily. The 1st and 3rd respondents' reply is that the delay was occasioned by the investigations and the convening of a court martial. The question that arises therefore is whether there was unnecessary delay in investigating the allegations, reporting the incident to the service commander and the commencement of the trial of the Petitioner. Has the delay been satisfactorily explained? I have carefully examined the 1st and 3rd respondents' replying affidavit and I note they have attached thereto 12 reports filed with the Service Commander in compliance with Section 140(2) of the Act.

62. The text of Section 140(4) of the KDF Act which provides that a person shall not be held in custody for a period exceeding forty two days in aggregate was indeed complied with by the Commanding Officer Lieutenant Colonel Ngeny who held the Petitioner under close arrest from 18th February, 2019 until 5th March, 2019, a period of about two weeks before placing him under open arrest. The question is whether the 1st and 3rd respondents unreasonably delayed the convening of a court martial and the prosecution of the Petitioner.

63. In interpreting the exemption under Article 24(5) of the Constitution, the reasons underlying the limitation of rights of persons serving in the disciplined forces must first be understood. My understanding of the limitation is that it is meant to bring order and discipline to the military and the police. The purpose of the limitation is not meant to completely obliterate the rights identified by Article 24(5) of the Constitution as limitable. That explains the use of the term 'limit' and not 'denial' in that particular provision.

64. I have already stated what may cause delay in prosecuting a member of the KDF. In my view, the limitation of rights granted by the Constitution and enacted in the KDF Act does not allow those in charge of the KDF to act arbitrarily so as to achieve a complete denial of constitutional rights. Much is expected from those given greater responsibility by the law and/or the Constitution. Provisions of laws that are made to limit rights ought to be enforced with the spirit of the Constitution being borne in mind. In all situations, even where the Constitution permits limitation, the standard to be applied is the constitutional standard. The aim is to always ensure that the Constitution is adhered to and where there is failure, cogent reasons must be availed for such failure.

65. It is a duty of each and every Kenyan to ensure that the Constitution is obeyed. The Commanding Officer of the Petitioner had a duty to ensure that the Petitioner was quickly processed so that he could know his fate, including facing his accusers. Whereas the law provides for the holding of a suspect in close arrest for 42 days, that provision does not allow the holding of a suspect without good reason. What is a good reason depends on the circumstances of each case. The ideal situation is to ensure that the offender is summarily dealt with or a court martial convened.

66. The reasons found in the reports filed by Lieutenant Colonel Ngeny are that the DMP was perusing the file and that the court martial had not been convened. The reasons why the DMP delayed in making a decision and why it took long to convene a court martial have not been placed before the court. This has resulted in abuse of the constitutional exemption granted to the 1st and 3rd respondents to hold a suspect for a period longer than that required by the Constitution.

67. It is indeed true that the Petitioner was not held in close arrest for the maximum 42 days. He was placed under open arrest after 15 days of close arrest. This, however, does not change the fact that he was under arrest and his rights were limited. Open arrest may be less severe than close arrest but the two types of arrest result in limitation of rights. For example the freedom of movement and the right to freely associate with others, even within the limits applicable to members of the military, are greatly imperiled by any kind of arrest.

68. It is my view that in circumstances where rights and fundamental freedoms have been limited by the operation of the law, the implementers of such law should nevertheless strive to ensure that constitutional rights are adhered to. In situations where the Constitution provides timelines the aim should be to operate within those timeless or as close to them as reasonably possible. Plausible reasons should be given for any delay because limitation of rights is not equivalent to denial of rights. Limitation laws should not be seen as obliterating rights and fundamental freedoms.

69. It is important to note that it is only after the Petitioner moved to this court that a court martial was convened. The 1st and 3rd respondents have not demonstrated that the convening of the court martial was in the works at the time the Petitioner came to court. If there were arrangements to have the court martial in place, there is no evidence that the information had been conveyed to the Petitioner. In light of all the stated reasons, I agree with the Petitioner that his right to trial without unnecessary delay and within a reasonable time was violated by the 1st and 3rd respondents. I therefore find that his pre-trial rights were violated. I will provide the appropriate remedy at the conclusion of this judgement.

70. The Petitioner is also challenging the constitutionality of the composition of courts martial and the manner in which they make decisions as legislated in sections 160 and 176 of the KDF Act. He has argued that a court martial is established as a subordinate court under Article 169 of the Constitution and by dint of that provision, it is bound by the principle of judicial independence. It is the Petitioner's case that the court martial as constituted is a peer military tribunal subject to military command.

71. Section 160 of the KDF Act provides for the constitution of a court martial. The judge advocate who is either a magistrate or an advocate with experience of over ten years is appointed by the Chief Justice. The judge advocate is the presiding officer of a court martial and pursuant to Section 165 of the Act, his or her role is that of advising on legal and procedural points of law.

72. The solemn role of a judge advocate was underlined by the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014]**

eKLR when it held that:-

> **"The second issue relates to the role of Mr Aragon, the judge advocate, in the court martial. Under Rule 78(2) of the Rules of Procedure, the role of the judge advocate was to advise the court martial on any question of law or procedure relating to the charge or the trial. The heavy duty on the judge advocate to ensure that the trial was fair was underlined by section 78(7) which provided as follows:**
>
> **"The judge advocate shall have equally with the presiding officer the duty of ensuring that the accused does not suffer any disadvantage in consequence of his position as such, or his ignorance, or his incapacity to examine or cross-examine witnesses or to make his own evidence clear and intelligible, or otherwise."**
>
> **In our view, this duty is not any less onerous merely because the accused person has retained counsel. We believe the reason why *section 78(2) of the Act* expressly provided that the judge advocate was responsible for the proper discharge of his duties to the Chief Justice, was to emphasize that he was not beholden to the court martial or any of the parties before it, but that his singular duty was to the cause of justice and the rule of law."**

73. It is therefore the duty of the judge advocate to ensure that the proceedings before the court martial meet the constitutional dictates subject to the exceptions provided by the Constitution itself and the laws enacted pursuant to those exceptions. In **Samuel Saburi & 2 others v Court Martial & 8 others [2015] eKLR,** Mumbi Ngugi, J affirmed this fact when she stated that:-

> **"44. I am not convinced that the fact that the court martial is held within the barracks precincts would amount to a violation of Article 48. One factor that informs my thinking is that the courts martial are enjoined to follow all the guiding principles of the Constitution. Section 161 of the KDF Act provides that:**
>
> **"In addition to other principles and values provided for in the Constitution, the court-martial shall, in the exercise of its powers and discharge of its functions, be guided by the principles provided for under Article 159(2) of the Constitution.""**

74. It needs to be stressed that a court martial like any other subordinate court is subject to the supervisory jurisdiction of this court. The mandate conferred upon this court is to ensure that the proceedings before subordinate courts, the courts martial included, are compliant with the Constitution and the laws of the land. Further, that apart from the limitations imposed by the Constitution and the KDF Act, a person who is subject to the KDF Act is entitled to enjoy all the other constitutional rights and fundamental freedoms. I say so because courts martial are rooted in the Constitution vide Article 169(1) of the Constitution and the KDF Act which confers jurisdiction, functions and powers on the courts martial is founded on Article 169(2) of the Constitution.

75. In **Stillman** (supra) the Court Martial Appeal Court of Canada had rejected the appellant's assertion that he was entitled to trial by jury as provided in the Canadian Charter/Constitution. However, in **R v Beaudry, 2018 CMAC 4, 430 D.L.R. (4th) 557**, the same Court had held that a member of the military was entitled to trial by jury for certain offences as required by the Constitution. The Court Martial Appeal Court then proceeded to strike out a provision of the law governing courts martial trials on the ground that it violated the Constitution.

76. When the conflicting decisions moved to the Supreme Court of Canada, the Court in a 5-2 decision while agreeing with the decision in **Stillman** opined that the members of the court martial are equivalent to a jury. They ensure that the accused is judged by his peers. In reaching its decision, the Supreme Court opined:-

> **"[36] The military justice system is therefore designed to meet the unique needs of the military with respect to discipline, efficiency, and morale. As Lamer C.J. wrote in *Généreux*, "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct" (p. 293). Further, "[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military" (*ibid.*). And, while these purposes of the military justice system have remained consistent over the years, the complexion of the system itself has changed significantly over time in response to developments in law, military life, and society, more broadly."**

77. The Supreme Court of Canada went ahead to explain the efficiency of courts martial and why trial by peers was important. The Court stated that:-

> **"[66] The role of a military panel is unique, bringing to bear upon the proceedings the military-specific concerns for discipline, efficiency, and morale. As Lamer C.J. observed in *Généreux*, it "represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military" (p. 295). Similarly, as noted in the *Dickson Report*, panel members "bring military experience and integrity to the military judicial process. They also provide the input of the military community responsible for discipline and military efficiency" (p. 55).**
>
> **[67] In some respects, a military panel is analogous to a jury, and over the years they have become more and more so. Like a jury, the panel is the trier of fact, while the judge makes rulings on legal questions (see *NDA*, ss. 191 and 192(1)). Furthermore, as already mentioned, while panels used to reach their verdicts based on a majority vote, they are now required to reach their verdicts unanimously. And as in the civilian criminal justice system, it is now the judge who is tasked with imposing a sentence in the event of a guilty verdict, a role which before 2010 was entrusted to the panel."**

78. Although the courts martial system of Canada is more advanced than our system, I find those observations appropriate to our situation.

As correctly submitted by counsel for the Respondent, in a discipline that calls for insider understanding of the norms and customs, the civil courts may not do justice in military cases hence the need to have members of the military sit in the courts martial.

79. Even with the kind of system we have in Kenya, mechanisms have been put in place to ensure that justice is done to those who are charged before courts martial. I need only highlight provisions of the KDF Act in order to demonstrate the safeguards put in place to ensure the independence of courts martial: the judge advocate is appointed by the Chief Justice (Section 165); one of the members of the court martial should be of the same rank with or a lesser rank to the accused person (Section 160(3)); the accused is allowed to object to the appointment of any member of the court martial (Section 167); an independent office (Defence Court Martial Administrator) appoints the members of the court martial (Section 160(1)(b)); the person who convenes the court martial, the accused's commanding officer and the investigating officer are expressly barred from being judge advocate or member of the court martial (Section 164); the principles established by Article 159(2) of the Constitution are to be applied by a court martial (Section 161); the court martial is required to sit in open court (Section 169); the rulings and directions by the judge advocate on questions of law, procedure or practice are binding on the court martial (Section 175(2)); the decision is made by the majority of the members of the court martial (Section 176(1)); and there is a right of appeal to the High Court (Section 186). The cited provisions create an environment for the courts martial to operate independently without fear of any influence from any quarter. In the circumstances, the Petitioner's assertion that the court martial as constituted does not meet the constitutional expectations for an independent tribunal is therefore found to be without merit.

80. I now turn to the assertion that Section 121 of the KDF Act is unconstitutional for ambiguity as it does not disclose the offence purportedly committed by the Petitioner. Counsel for the 1st and 3rd respondents urged this court to find Section 121 of the KDF Act to be constitutional stating that the provision is a hallmark for the maintenance of good conduct and service discipline not only in Kenya but also in many advanced militaries including the United States, the United Kingdom, Canada and South Africa and has been part of military law globally since the 17th century. Further, that the said enactment is consistent with Article 50 of the Constitution in the sense that it clearly provides that acts, conduct and neglect that is prejudicial to good conduct and discipline are chargeable and punishable in the military if a military personnel is culpable.

81. Okwany, J stated the importance of the need for clarity in drafting a statutory provision carrying punitive consequences when she held in **Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR** that:-

> **"59. Courts have held the view that criminal statutes that are couched in unclear terms are unconstitutional. This was the position taken in the American case of Ignatius Lanzetta Vs The State of New Jersey 306 US 888 at 893 it was held that:**
>
> **"...Criminal Statute which defines the offence in such uncertain terms that persons of ordinary intelligence cannot in advance tell whether a certain action or cause of conduct would be within its prohibition is subject to attack of unconstitutionality as violative of the provisions as to due process and the Clause which requires that the accused be informed of the nature and cause of the offence with which he is charge."**
>
> **60. In the Tanzanian case of Pumbun Vs The Attorney General [1993] 2 LRC 317 at p.323, the Court of Appeal approved the holding in DPP Vs Pete [19911 LRC (Const) 553 that:**
>
> **"A law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution (our Article 43) only if it satisfies two essential requirements: First, such a law must be lawful in a sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority by those using the law. Secondly the limitation imposed by such a law must not be more than is reasonably necessary to achieve the legitimate objective. This is what is also known as the principle of proportionality. The principle requires that such a law must not be drafted too widely so as to net everyone including even the untargeted members of society. If a law which infringes a basic right does not meet both requirements, such a law is not saved by Article 30 (2) of the Constitution, it is null and void."…**
>
> **62. It is trite that a law, especially one that creates a criminal offence, should be clear and unambiguous. It should not be so widely and vaguely worded that it nets anyone who may not have intended to commit what is criminalized by the section. This principle was stated in the case of Andrew Mujuni Mwenda Vs. Attorney General (Supra), where the court stated, thus:-**
>
> **"The section does not define what sedition is. It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought…The way impugned sections were worded, have an endless catchment area to the extent that it infringes ones right enshrined in Article 29 (1)) (a)."**
>
> **63. The above principle was echoed in the case of Geoffrey Andare Vs Attorney General [2015] eKLR, where the court stated;-**
>
> **"…The principle of law with regard to legislation limiting fundamental rights is that the law must be clear and precise enough to enable individuals to conform their conduct to its dictate…"…..**
>
> **72. My finding, therefore, is that the impugned section is unconstitutional to the extent that it infringes on the citizens right to freedom of expression guaranteed under Article 33 of the Constitution and derogates the right to a fair hearing by providing for an offence in such broad and unclear terms thereby making it subject to the arbitrary and subjective interpretation by the Director of Public Prosecution or the court contrary to Article 50(2)(b) of the Constitution. I wish to reiterate that under Article 25(c) of the Constitution, the right to a fair trial cannot be limited."**

82. In order to pass the test of constitutionality, a statutory provision that creates a criminal offence should clearly state what one should not do and the consequences of contravening the provision. Section 121 of the KDF Act was not drafted for the general populace. It is a provision specifically targeting members of the KDF. Each member of the military is expected to know what acts, conduct or neglect are prejudicial to good order and service discipline. The training of every member of the disciplined forces is expected to include what a member of the organization is expected to do or not to do.

83. The offence created by Section 121 of the KDF Act may be a difficult one to prove but the fact that it may be onerous to prove an offence does not make it unconstitutional. In an article titled **"What Happened to Military Good Order and Discipline?" published by EngagedScholarship@CSU , 2017 on 31/12/2017 by Colonel Jeremy S. Weber of the United States Air Force in the Cleveland State Land Review,** the author observed that the authority to actually punish behaviour that detracts from good order and discipline is increasingly constrained. One of the constraints identified by the author is that the military has demonstrated difficulty in defining what **"good order and discipline"** actually means.

84. The courts of the United States have for a long time struggled with a provision similar to our Section 121 of the KDF Act and they have always found the provision to be constitutional-see **United States v. Frantz, 7 C.M.R. 37, 39 (C.M.A. 1953)** and **Parker v. Levy, 417 U.S. 733 (1974)**. Indeed in **Levy** (supra), the Supreme Court of the United States acknowledged that **"[i]t would be idle to pretend that there are not areas within the general confines of the articles' language which have been left vague,"** and noted the possibility that **"sizeable areas of uncertainty as to the coverage of the articles may remain."** The Court nevertheless concluded that **"less formalized custom and usage"** could fill any further areas of uncertainty and concluded that the provision could properly apply **"without vagueness or imprecision."** The Court proceeded to uphold the constitutionality of the impugned provision.

85. I must state that Section 121 of the KDF Act is a bit unnerving for a person who is not a member of the military. I, however, agree with counsel for the 1st and 3rd respondents that the provision is necessary for maintenance of good order and service in the military. In view of what I have already stated, I find the provision constitutional. Although I have upheld the constitutionality of the said provision, it is necessary for Parliament to re-look at this provision with a view to fine-tuning it in order to ensure maximum justice to those who serve in the military. In my view, defining what amounts to 'neglect that is prejudicial to good order and service discipline' would go a long way in providing better understanding of the offence.

86. Indeed Colonel Weber (supra) proposed the questions to be posed before a finding of guilt can be made where a person is accused of committing acts that prejudice good order and disciple. This is what he said:-

> **"To be punishable under Article 134 of the Uniform Code of Military Justice, acts must directly prejudice good order and discipline in an articulable fashion. Acts which remotely or indirectly prejudice good order and discipline may be dealt with through administrative action or other means, but not through punishment under this Code. Factors to consider in whether an act directly prejudices good order and discipline include:**
>
> **(1) Did the act raise an appreciable risk of others engaging in similar behavior?**
>
> **(2) Did the act negatively impact the unit's performance to any measurable extent?**
>
> **(3) Did the act negatively impact the authority, stature, or respect of unit leadership?**
>
> **(4) Did the act occur during the performance of the member's duty, on a military installation, or in the presence of other members of the unit?**
>
> **(5) Was the act known to other members of the unit?**
>
> **(6) Did the act occur after counseling or other actions taken regarding the same or similar conduct?**
>
> **(7) Were other unit members placed in danger as a result of the act?**
>
> **This definition may or may not be complete or ideal. However, it represents a first step for discussion, and its mere existence represents a significant step over the nebulous state of understanding regarding good order and discipline today. When military leaders use the term, they should do so deliberately and with reference to this definition, and they should be prepared to explain why the needs for good order and discipline weigh in favor of their position. Likewise, military lawyers, commanders, and courts should employ the definition and its factors to determine what actions truly prejudice good order and discipline to the extent that they become criminal."**

87. There was the cry by the Petitioner that he was placed on half pay before he was taken to court. Mr. Yator adequately answered him by citing Paragraph 44(a) of Chapter 3 of the Terms and Service, 2016 which provides that service personnel confined in military or civilian custody awaiting trial either by a civil court or court martial for a criminal or service offence will be put on half pay from the date following arrest. The Petitioner did not return any fire on that issue indicating that he agreed with the submission. It is clear that the said provision does provide for a salary cut immediately after arrest. The 1st and 3rd respondents' decision to pay the Petitioner half salary upon his arrest was therefore based on the regulations governing his employment.

88. Another issue taken up by the Petitioner is that his prosecution for the offence of conspiracy contrary to Section 317 of the Penal Code is selective, malicious and discriminatory thereby violating Article 27 of the Constitution. The 1st and 3rd respondents on the other hand hold the view that the petition is basically an assortment of facts and evidence through which the Petitioner seeks to establish a defence to his indictment. It is their view that the matter should be dismissed and the trial before the court martial allowed to proceed to its logical

conclusion.

89. The court in petitions of this nature is required to ensure that a person is not charged with criminal offences which have no foundation. The DMP just like the DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by this court. However, if the DMP acts outside the bounds of legal reasonableness, he acts *ultra vires* and the court can intervene, because it is the court's duty to ensure justice for those brought before it. It is indeed my considered view that in exercising the powers conferred upon him by the KDF Act, the DMP should be guided by Article 157(11) of the Constitution so that he or she shall **"have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process"** whenever making any decision.

90. In **George Joshua Okungu** (supra) the role of this court was expressed as follows:-

> **"The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration."**

91. Similarly, in **Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto [2015] eKLR** the court held that:-

> **"The principles which guide the grant of the orders in the nature sought herein are now well crystallized in this jurisdiction. What is important is the application of the same to the facts of each case. Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring to a halt or quash criminal proceedings. However while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court. The Court in judicial review proceedings is therefore not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial Court. This Court in determining the issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them."**

92. In **Republic v Attorney General & 4 others Ex-Parte Kenneth Kariuki Githii [2014] eKLR** the court cited with approval the case of **Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003; [2007] 2 EA 170,** where the Court of Appeal held that:-

> **"Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

93. In the case of **Kuria & 3 others v Attorney General [2001] 2 KLR 69**, which was cited with approval in the case of **Johnson Kamau Njuguna & another v Director of Public Prosecutions [2018] eKLR,** the court stated as follows:-

> **"A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose. Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting criminal prosecution otherwise the prosecution will be malicious and actionable"**

94. In a case challenging the exercise of prosecutorial powers by the DPP, and in this case the DMP, the duty to establish that there is no basis for mounting the prosecution belongs to the petitioner. The Petitioner herein has been charged with three counts; one offence being conspiracy to defraud contrary to Section 317 of the Penal Code. In the alternative he is charged with the offence of conduct to prejudice of good order and service discipline contrary to Section 121 of the KDF Act.

95. The Petitioner is also charged with the offence of attempting to commit an offence contrary to Section 133(1)(b) of the KDF Act, that is to say personification contrary to Section 382(1) as read together with Section 36 of the Penal Code and in the alternative conduct to the prejudice of good order and service discipline contrary to Section 121 of the KDF Act. The last count relates to the conduct to the prejudice of good order and service discipline contrary to Section 121 of the Kenya Defence Forces Act.

96. In respect to the charges above, the Petitioner contends that he was set up by his fellow colleagues. Secondly, he contends that for a charge of conspiracy to defraud to stand, the respondents need to charge him with another person or other persons. The Petitioner also contends that in respect of the charge of conspiracy the allegation is that he committed the offence with civilians and he should therefore be charged in an ordinary court as per the Defence Standing Orders, 2015.

97. It is clear from the Petitioner's submissions that he is trying to make this court interfere with the decisional authority of the DMP. The Petitioner does indeed agree that under Section 213 of the KDF Act, the DMP is mandated to decide whether to prosecute or not to prosecute. There is no contest that the Petitioner falls under the jurisdiction of the KDF Act. The offence of conspiracy is not one of the offences excluded from the jurisdiction of courts martial by Section 55 of the KDF Act. Whether the DMP will succeed in the manner he has proceeded against the Petitioner is a matter for the determination of the trial court. This court will be exceeding its supervisory jurisdiction were it to direct the DMP on how he should proceed.

98. Delving into the veracity of the charges, the merits or otherwise of the criminal process would amount to unnecessarily trespassing into the arena specially reserved for the court martial. I also need to point out that the Petitioner being a military officer is subject to the provisions of the KDF Act. It is upon the DMP, where a person falls under the jurisdiction of the KDF Act, to elect whether to proceed under military law or to cede jurisdiction to the civilian authorities.

99. The Petitioner also seems to suggest that other military officials have also been engaged in the activities for which he has been arrested and charged. The fact that no other person has been arrested and charged is not a legal ground for terminating the charges against the Petitioner.

100. In my view, this court should not act as if it were exercising appellate jurisdiction, which mandate would involve going to the merits of the decision itself as to whether or not there was sufficient evidence to support the charges preferred against the Petitioner. That is not to say that the prosecution's case at the trial will definitely succeed. The Petitioner has pointed out why his prosecution should not succeed. Whether that will be the outcome of the trial is not for this court to determine. The court martial convened to try the Petitioner is the one to decide on the sufficiency and the quality of the evidence.

101. In **Stillman** (supra), the Supreme Court of Canada held that:-

> **"[103] Thus, based on case-specific factors, military prosecutors may decide that it would be more appropriate to stream a particular case into the civilian criminal justice system. Yet the distinction between the *existence* of jurisdiction and the *exercise* of jurisdiction is an important one. While military prosecutors may decline to exercise jurisdiction in any particular instance that falls within the scope of the CSD, this does not change the fact that, as a matter of law, the military justice system nonetheless *has* jurisdiction. In our view, the role of defining the scope of military prosecutors' jurisdiction belongs to the courts, while the role of deciding whether jurisdiction should be exercised in any particular case — and what factors guide that decision — is properly left to military prosecutors. Moreover, it is worth noting that Crown counsel advised the Court during oral argument that, to his knowledge, there has not been a single instance in which military prosecutors and civilian prosecutors could not agree on which system should handle a particular matter. This speaks to the cooperation and mutual respect between prosecutorial authorities in these two systems."**

102. I am persuaded by the decision in **Stillman** that it was upon the DMP to decide whether to prosecute the Petitioner before the court martial or to cede jurisdiction to the civilian courts. His decision to take the Petitioner to the court martial cannot be interfered with by this court.

103. I now come back to the question of the remedy to be granted to the Petitioner based on this court's finding that his delayed prosecution violated his rights. It should be stated from the outset that the identified pre-trial violation cannot result in the quashing of the trial. Award of damages will be sufficient to assuage the suffering of Petitioner in the circumstances of the case. The court martial in which his trial is proceeding had no role to play in his delayed prosecution.

104. The applicable principles in such a situation were pronounced by the Court of Appeal in **Peter M. Kariuki v Attorney General [2014] eKLR** as follows:-

> **"The learned trial judge found that the appellant's right to liberty was violated for which he awarded damages. There certainly will be cases where the violations alleged and proven are best remedied by an award of damages. Considerations of public interest, the demands of justice and proportionality would justify such an approach. However, where the proven violations are so egregious as to go to the very root of a fair trial, an award of damages alone will not suffice as a proper and fitting remedy for purposes of securing protection of the law."**

In the instant case the level of violation does not rise to the level that the trial should be obliterated.

105. Counsel for the Respondent relying on the above cited case in which Kshs. 15 million was awarded for violation of constitutional rights proposed that the Petitioner be awarded Kshs. 500 million on the same head. The suggested amount was not backed with any authorities. On my part, I note that the Petitioner was not held in close custody for the maximum 42 days. Credit should therefore go to the Petitioner's Commanding Officer. Having said so, I note that no plausible reason was given why the Petitioner was placed under arrest, close and open, for over three months before he was charged. In my view an award of Kshs. 500,000/- is sufficient and I award the Petitioner this amount for violation of his pre-trial rights. All the other claims by the Petitioner fail and they are dismissed. In the circumstances the Court Martial at Kahawa Garrison is at liberty to proceed with the Petitioner's trial.

106. It is only the brave and courageous like the Petitioner who challenge the *status quo*. The Petitioner has vigorously shaken the tree of justice. He may have expected several fruits to fall from the tree. Only one fruit has landed on his lap. He is therefore entitled to costs. The

Petitioner is therefore awarded costs for the proceedings.

107. For record purposes, it is noted that on 14th October, 2019 this court in **Nairobi High Court Constitution & Human Rights Division Petition No. 400 of 2019, Major Erastus Hezbon Otieno v Court Martial at Kahawa Garrison & another**, issued orders suspending the Petitioner's trial at the court martial pending the delivery of the judgement herein. It is observed that the proper procedure should have been for the Petitioner to file an application in this petition. Considering that Petition No. 400 of 2019 was limited to protecting the substratum of this petition, it therefore follows that the said petition is now finalized as a result of the delivery of this judgement. Appropriate orders shall be entered in that file.

Dated, signed and delivered at Nairobi this 31st day of October, 2019.

W. Korir,

Judge of the High Court