



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.553 OF 2015**

**BETWEEN**

**MAJOR LABAN A. NYAMBOK ..... PETITIONER/APPLICANT**

**AND**

**COURT MARTIAL NO.7 OF 2015 .....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY FOR DEFENCE ..... 2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY FOR DEFENCE ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF OF THE DEFENCE FORCES ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF MILITARY PROSECUTIONS ..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Application dated 16<sup>th</sup> August 2016 is premised on **Rules 20 and 21** of the **Constitution** of Kenya (**Supervisory Jurisdiction and Protection of fundamental Rights and Freedoms of the Individual**) High Court Practice and Procedure Rules 2006) which I know have long been repealed. It seeks a revision of this Court's earlier decision denying the Petitioner herein bail and/or bond and as a consequence to admit him to bail on reasonable terms.

2. The background to the said Application is that the Petitioner has been in service custody for more than 15 months and by a Ruling dated 19<sup>th</sup> March 2016 and delivered on 24<sup>th</sup> March 2016, this Court partly stated as follows:

***“It is not in dispute that the Petitioner has not made an Application for the grant of bail before the Court Martial in regard to the intended prosecution. In that regard, in my view, it is not proper for this Court to entertain any such application while the same falls squarely within the jurisdiction of the Court Martial.”***

3. Having said so, the Court went further to find that the **Constitution** in **Article 24** as read with **Article 49** (on the right to bail or bond) specifically limited that right in the case of members of the Defence Forces such as the Petitioner. This Court therefore declined to grant bail or bond at the material time.

### **Applicant's case**

4. It is the Applicant's case that he has been in confinement since his arrest in April 2015 and that save for a few occasions when he was granted "**a pass**" by his Commanding Officer, he has been unfairly held in "**open arrest**". That no commissioned officer of his rank has ever been so unfairly treated and it is obvious that he is being targeted with a view to frustrating and intimidating him in the on-going proceedings.

5. It is also his case that he is not a flight risk, a fact allegedly confirmed by his Commanding Officer and there are no compelling reasons for his confined detention. That the existence and invocation of **Section 54** of the **Defence Forces Act** cannot be the sole ground for denying him bail without other real and factual compelling reasons being placed before the Court Martial or this Court.

6. The Applicant has also made reference to the fact that while the Defence Standing Orders give the Presiding Officer of any Court Martial the jurisdiction to unconditionally release a suspect pending his trial in a Court Martial, in the Applicant's case, the Presiding Officer has declined the invitation to exercise that jurisdiction and instead keeps referring the Applicant and his advocate to his superiors in the Army in that regard.

7. It is his further case that his application for bail or bond pending before the Court of Appeal is no bar for this Court to exercise discretion in that regard and that he has continued to suffer mistreatment and has developed ulcers hence the need for this Court's quick intervention by allowing his Application on such terms as it considers fit.

### **Respondent's case**

8. In response to the Application, the Applicant relied on an Affidavit sworn on 1<sup>st</sup> September 2016 by Lt. Col. Erick Kibet Chumba in which he deposed that the Application for bail or bond is misguided as at no time did the Applicant seek such orders in the Court Martial.

9. Further, that the Applicant was initially held under "**closed arrest**" but has previously sought a variation of that order and is now held under "**open arrest**" with his Commanding Officer at liberty to grant him "**passes**" whenever necessary.

10. That in the circumstances and taking into account **Articles 24** and **49** of the **Constitution** as read with **Section 54** of the **Defence Forces Act**, the Applicant is not entitled as a matter of right to bail or bond.

11. Lastly, that the Court Martial is capable of ensuring that the Applicant's constitutional rights are enforced and enjoyed by the Applicant without any recourse to this Court.

### **Determination**

12. From what I heard in submissions, it seems to me that since his arrest, the Applicant has been in both closed and open arrests with occasional passes being issued to him to attend to personal matters including the attendance of a relative's burial. By his letter of 28<sup>th</sup> April 2015, Major M.S. Ahmed indicated to the Applicant that a closed arrest meant that the Applicant;

i) Would be confined to his room throughout the day.

ii) Would have his meals at the Mess free of charge but stick to whatever menu would be provided for to him and;

iii) Would not appear outside his room or the Mess unless he had express authority of Major Ahmed and even then he must appear fully dressed in combat gear.

13. By another letter dated 5<sup>th</sup> June 2015, Major Ahmed, invoking powers conferred on him by **Section 140(5) of the Kenya Defence Forces Act**, informed the Applicant that this arrest had been changed from closed to open with the difference being that;

i) He would be confined within the Mess premises but he would be allowed time to exercise or to undertake any other duty outside the Camp as the situation would demand.

ii) He would be allowed the opportunity to entertain visitors only with the express authority of the said Major Ahmed.

14. The above background is important because in a Ruling delivered on 27<sup>th</sup> July 2016, the Judge-Advocate, R. N. Makungu, upheld Major Ahmed's actions with regard to the Applicant's detentions including the grant and denial of passes to the Applicant. Nowhere in her Ruling did she allude to grant or denial of bail or bond to the Applicant and having now read the record of the Court Martial, I reiterate my findings in my Ruling of 24<sup>th</sup> March 2016 that from the record, no bail or bond application seems to have been made before the Court Martial. In fact in the Judge Advocate's Ruling referred to above, the question she was determining was; **"Does the Court Martial have power to intervene or direct a C.O. in the exercise of his administrative or ministerial decisions?"**

15. In the above context then, I should now address the question of bail or bond to military personnel facing charges before a Court Martial. Although I partly addressed that issue in my earlier Ruling, I am now being asked to revise those earlier findings for reasons elsewhere set out above.

16. In that regard, and while reiterating my findings that following the decision in **Samuel Sabuni and Others vs Court Martial & Others, Petition No.235 of 2014** a Court Martial has inbuilt mechanisms to address all questions placed before it including protection of the fundamental rights of suspects, the issue of bail or bond for the Applicant is certainly a matter that this Court can readdress in the Applicant's circumstances and more so where it is alleged that there is refusal by the Judge Advocate to do so even with jurisdiction granted both by the **Constitution** and the **Kenya Defence Forces Standing Orders**.

17. I further note that the Respondents have not raised any factual reason why the Applicant should not be denied bail. All they have stated is that the **Constitution** and **Section 54 of the Kenya Defence Forces Act** limits that right and therefore he is undeserving of it. In advancing that argument, the Respondents relied on the decision of the Court of Appeal at **Malindi in C. A. No.19 of 2014, Defence Forces Council and Others v Gabriele Kirigha Chawana and 26 Others** and having looked at the said decision, it cannot be true that the mere fact that one is an officer in Military Service does not entitle him to his constitutional right to bail. I say so because the Learned Judges of Appeal in overturning the decision of the High Court to stay the Court Martial proceedings, faulted the fact that he had failed to take into account **"the peculiar circumstances of the case and the security concerns arising therefrom"** and that **"the Judge underplayed the need for the Court Martial proceedings to be dealt with expeditiously."**

18. In addition to the above, the Court of Appeal for the same reasons faulted the Learned Judge of the High Court for granting the Respondents bail more so because the subjects of the Court Martial proceedings were charged with the offence of desertion which militated against grant of bail in the circumstances. The court of Appeal also stated that; **"without the Court Martial having been given the opportunity to consider the issue of bail, the exercise of the supervisory powers of the High Court in this regard was premature. It resulted in the High Court usurping the statutory powers of the Court Martial, which effectively allowed the Respondents to circumvent the jurisdiction of the Court Martial."**

19. What do I gather from the above decision which is binding on me? First, that for the High Court to exercise its supervisory jurisdiction over the Court Martial it must be shown that bail or bond was sought

and was denied at the Court Martial.

20. Second, for bail or bond to be granted to military personnel, the security concerns of the Nation must be taken into account which can easily be gleaned from the nature of the charges faced by the said personnel and as a corollary;

21. Third, each case must therefore be looked at in its own circumstances and specifically on the nature of the charges a suspect is facing.

22. In applying the above criteria, I need not repeat my finding on the import of **Article 24(5)(f)** (on the limitation of the right to bail for military personnel) as read with **Article 49(h)** and **Section 54(1)** of the **Kenya Defence Forces Act** because I exhaustively addressed that matter in my earlier Ruling subject to what I shall state below.

23. I have also read the record before me and it would seem that the Applicant was charged with uncertain offences relating to his service at the Defence Forces Medical Insurance Scheme. No security or other concerns have been raised as regards those charges. The circumstances would be therefore that barring any other considerations (and the Respondents have raised none), the Applicant would otherwise be eligible to bail subject to the ouster clause in **Article 24(5)(f)** of the **Constitution** which by necessity I must turn to. It provides as follows:

**“1) ...**

**2) ...**

**3) ...**

**4) ...**

**5) *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) ...**

**(b) ...**

**(c) ...**

**(d) ...**

**(e) ...**

**(f) *Article 49—Rights of arrested persons.*”**

24. I should also add that **Section 43** of the **Kenya Defence Forces Act** provides as follows;

***“Conditions for limitation of rights and fundamental freedoms;***

***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;**

**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) Be exceptional and not impair the essence of the freedom being limited.”**

25. In addressing the above provisions, the Court of Appeal in the **Kenya Defence Forces Case (supra)** stated thus;

**“The import of the above is that the listed categories of rights may not be available to members of the National Police Service and the Kenya Defence Forces if arrested during the period of their enlistment. These provisions provide ouster clauses which limit the jurisdiction of the High Court to grant bail to servicemen either in exercise of their original or supervisory jurisdiction. Nonetheless, there was a hotly contested issue regarding whether the Respondents were still members of the Kenya Defence Forces subject to Article 24(5) of the Constitution and Section 54 of the Kenya Defence Forces Act.”**

26. My understanding from the above provisions is that a limitation of a right is not akin to a complete denial of the right so that it cannot be the law that all military personnel are not entitled to bail or bond under any circumstance. It only means that in granting bail or bond, the Court ought to be alive to the purpose for which the limitation is to be invoked including the maintenance and preservation of national security. The mere citation of the above provisions as has been done by the Respondents is not a sufficient reason to deny the Applicant bail or bond and one would have expected them to cite the reasons for denial of bail beyond that but with respect, even after much prodding from this Court, they were unable to do so.

27. Having so said, then, I must return to the first criteria; was the Applicant expressly denied bail or bond by the Court Martial to trigger the jurisdiction of this Court? In his Affidavit sworn on 16<sup>th</sup> August 2015, the Applicant deponed partly as follows;

**“2) That this Honourable Court had allowed the Petitioner to revisit the issue of bail and/or bond herein since the Court had earlier declined application for bail on the impression that the same had not been denied by a Court Martial.**

**3) The Petitioner’s Constitutional rights has been violated, are still being violated and will**

*continue being violated if Orders sought herein are not granted.*

**4) *The Respondents have acted irresponsibly, illegally and this Court should not allow its machinery to be abused.***

**5) *That the Applicant may spend longer period in service custody than the penalty prescribed for the alleged offences hence the need for granting bail and/or bond in the circumstances of this case.***

28. The above statements do not indicate when the bail application was made before the Court Martial, when it was denied and for what reason.

Further, I have now had the benefit of perusing the proceedings before the Court Martial and nowhere is there any specific plea made that the Applicant specifically applied for bail and that the same was denied.

Although therefore this Court may have its views as to whether the Applicant is entitled to bail, how can it delve into the matter when no such application was ever made before the Court Martial?

29. It seems to me that the Applicant and his Counsel have taken the mistaken and utterly misguided view that the passes the Applicant has been given in the past and their application to have the passes reviewed by the Court Martial were akin to applications for bail hence their insistence that they require this Court to grant them bail.

30. I reiterate that passes by a Commanding Officer to a suspect before a Court Martial are not the same as bail under the **Constitution** and following the directions of the Court of Appeal as above, it is very difficult for this Court to grant bail originally in proceedings pending before the Court Martial.

### **Conclusion**

31. I have shown that my Ruling of 24<sup>th</sup> March 2016 was not made in error and when I orally allowed Counsel for the Applicant to revisit the bail and bond application, if he was minded to do so, it was made in the hope that he would convince me that there was an error in my said Ruling requiring a revision or review. He has not done so and the only recourse open to the Applicant is to properly and on the record, apply for bail before the Court Martial and thereafter approach this Court if the same has been denied or pursue the Appeal he has filed at the Court of Appeal against my Ruling of 24<sup>th</sup> March 2016.

### **Disposition**

32. For the above reason therefore, the application dated 16<sup>th</sup> August being misguided is hereby dismissed with no orders as to cost.

33. Orders accordingly.

**DATED, AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Were for Petitioner

Mr. Murang'a for Respondent and holding brief for Mr. Njoroge and AG

**Court**

Ruling delivered in open Court.

**EDWARD MURIITHI**

**JUDGE**