



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2230 OF 2001

LT COL BENJAMIN MUEMA.....PLAINTIFF/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

MAJOR GENERAL HUMPHREY W. NJOROGE.....2ND RESPONDENT

COMMISSIONER OF POLICE3RD RESPONDENT

RULING

1. On 2nd June 2006, this court entered judgment in favour of the plaintiff and against the defendants in the following terms inter alia.

“That the plaintiff be paid damages for unlawful termination of employment calculated from the date of resignation of commission upto the age of 50 years when the plaintiff would have retired.”

2. Pursuant to the aforesaid judgement Lt Col. Benjamin Muema the Plaintiff herein, took out the summons dated 16th January 2014 in which he sought for the following orders inter alia:

- I. ***THAT this honourable court be pleased to quantify the amount payable under HEAD No. 6 of the Decree of this Honourable court issued on 21st July 2006 at kssh.34,923,803/=***
- II. ***THAT this Honourable court be pleased to quantify the amount payable under head No. 7 of the Decree of this Honourable court issued on 21st July 2006 at ksh.13,632,800/=.***
- III. ***THAT costs of this application be borne by the defendants.***

3. The application is supported by the affidavit of Lt. Col Muema. When served the defendants filed the replying affidavit of Lt. Col Sammy Kingetich to oppose the summons. The defendants also filed grounds of opposition to further resist the application. When the summons came for inter partes hearing this court gave directions inviting the parties to present oral evidence to guide this court compute damages.

4. Pursuant to the aforesaid directions, the plaintiff filed his list of documents dated 22nd May 2015 and a supplementary list dated 29th June 2015.

5. The plaintiff (PW1) testified and summoned Muia Malinda (PW 2) to testify in support of the plaintiff's case. The defendants on the other hand summoned Lt. Col. Sammy Kingetich (DW1)

to testify in support of their case.

6. The plaintiff's case appears to be short and straightforward. Lt Col. Benjamin Muema (PW1) told this court that at the time of his dismissal, he was aged 35 years and that he would have attained the 50 years as of 15th May 2007. He stated that considering career progression in the military and all things kept constant and in normal course of military practice he would have been a major general by age 50 years.
7. PW1 enumerated the terms and conditions of service, Kenya Armed Forces dated 1st July 1992 popularly referred to as the Tonje Rules. According to aforesaid rules, general service officers who are not recommended for further substantive promotion will normally be compulsorily retired on reaching the following ages:
 - Captain – 39 years
 - Major – 44 years
 - Lieutenant colonel – 48 years
 - Colonel – 50 years
 - Brigadier – 52 years
 - Major general – 55 years
 - Lt. General – 58 years
 - General and above – 62 years
8. PW1 further gave a detailed explanation of the number of years a military officer would serve in a given rank if is not promoted to the next rank as follows:
 - Captain – not more than 5 years
 - Major – not more than 4 years
 - Lieutenant col. – not more than 2 years
 - Colonel - not more than 2 years
 - Brigadier – not more that 3 years
 - Major general – not more than 3 years
 - Lieutenant general – not more than 4 years.
9. The plaintiff averred that since he was an helicopter instructor pilot he was entitled o allowance known as flying additional pay and qualified flying instructor's pay. He claimed that he was capable of rising to the highest military rank if he was not forcefully retired in April 1993. By that time, PW1 held the rank of Lt. Colonel. The plaintiff further averred that between April 1993 and 15th may 2007 is a period of 15 years. He said that within that period an officer in the military would have risen from the position of Lt. Colonel to a major general. PW 1 further gave in detail how the remuneration of military officers as set by the armed forces pay review board which body made recommendations to the president. PW1 tendered in evidence various gazetted pay report by the armed forces pay review board. Using those reports as a guide, the plaintiff asked this court to award him kshs.63,988,103/= as unpaid salaries, allowances and other general damages awarded under the decree dated 21st July 2006. Major (rtd) Muia Malinda (PW 2) an accountant by profession worked with the pay section of the armed forces. For 18 years,PW2 stated that he had been a pay and payroll administrator in the military. PW2 stated that he was contracted by PW 1 to assist him to compute the damages payable under head 6 and 7 of the decree dated 21.7.2006. In making the plaintiff's computation, PW2 used the pay review reports produced by PW1 to ascertain the figure of kshs.63,983,103/=
- 10.PW2 pointed out that the aforesaid figure excludes pension which is payable to the plaintiff which in any case is not the subject of the summons. The plaintiff included the estimated value of the motor vehicles which were not restored to the plaintiff as ordered by this court. The aforesaid motor vehicles were identified as Toyota Corona and Isuzu Trooper which are no longer in production.

11.Lt. Colonel Sammy Kingetich, (DW 1) testified in support of the defence case. He stated that the plaintiff was entitled to be paid Kshs.16,651,852/52 which has not been paid to date. DW1 further stated that military rank progression is in accordance with the terms and conditions of service, Kenya Armed Forces dated 1st July 1992. It is DW1's evidence that this court ordered that provisions should be made for adjustment to reflect a high status to which the plaintiff would have moved in the normal course of military practice. DW1 pointed out that the computation annexed to the plaintiff's application is incorrect because it is based on the assumption that the plaintiff would have automatically been progressively promoted to the rank of major general which is untrue. He also averred that promotion through the ranks for senior officers of the rank of Lt. Colonel in the defence forces is subject to the discretion of the defence council and is premised on performance and availability of vacancies.

12.I have considered the evidence presented by both sides plus the rival written submissions. The assessment and or computation that are the subject matter of the summons dated 16th January 2014 are in respect of Order no. 6 and 7 of the decree which provides inter alia.

- i. ***THAT the defendants jointly and severally do pay to the plaintiff general damages for the loss in career advancement to which the plaintiff was subjected by their acts in contravention of the protective statute law, in a figure equivalent to his net income from his employment as a lieutenant colonel for the whole period running from the beginning of April, 1993 to his 50th birthday, with appropriate adjustments made to reflect higher status to which he would have moved in the normal course of military practice. This figure is to be taken into account any compensations such as may have already been paid to the plaintiff, and the upto date figure of monies payable under his head is to be formulated by the parties and appropriate orders made by the deputy registrar, any further dispute on amount is to be resolved through application before a judge in chambers, in the Civil Division of the High Court.***
- ii. ***THAT defendants and in particular the commissioner of police shall within fifteen days of the date hereof, restore the plaintiff his two motor vehicles, Isuzu trooper Reg. No. KE70-014061 and Toyota Corona Reg. No. KAB 825Q***

13.The plaintiff testified before this court and alleged that had he not been forced to early retirement he would have risen to the rank of major general.

14.I have carefully examined the applicable terms and conditions of service, Kenya Armed Forces dated 1st July 1992 and it is clear in paragraph 26 (IV) promotion of military officers serving as lieutenant colonel and above, is by selective competition.

15.I am convinced by the evidence and submissions made by the defence that promotion depended on the discretion of the defence council and the availability of vacancies. I am also convinced that there was nothing untoward that would have prevented the plaintiff from getting promotion hence his assumption that he would have risen to the rank of major general is not farfetched but a possibility.

16.The first issue to be determined is the question of the amount due and payable to the plaintiff under Order 6 of the decree dated 21.7.2006.

17.I have already outlined the position of the plaintiff. He is of the view that he would have risen to the rank of major general hence the salaries and allowances payable should be calculated on aforesaid rank. I have already pointed out that the position taken by the plaintiff would appear to be purely speculative which may turn out to be a possibility. However, in my humble view, the promotion through the ranks from the plaintiff's position i.e. lieutenant colonel in the defence forces is subject to the discretion of the defence council, performance and the availability of vacancies. In other words the progression is not automatic but subject to selective competition earlier alluded. The calculation given by the defendant assumed that the plaintiff would remain at the rank of lieutenant colonel. The defendant's calculation therefore is erroneous.

18. In cross examination DW1 admitted that in normal military practice, the plaintiff would have risen to the rank of brigadier by age 50 years.

19. I have stated that there is no evidence to show that the plaintiff would not have risen to the rank of major general in normal military practice. The plaintiff gave examples of his contemporary and junior who rose. He named lieutenant general Mwaniki as his contemporary who by 15th May 2007, he was a lieutenant general. The plaintiff stated that Hussein Ali was his student and by 2007, he was promoted to the rank of major general. I am convinced that the plaintiff has given the correct mode of calculation. I find the plaintiff's proposal to be reasonable. His proposal was not seriously controverted by the evidence by the defendants. I am also convinced that apart from the salary, the plaintiff is entitled to flying additional pay, for category A helicopter instructor pilot. He is also entitled to house and entertainment allowances.

20. Consequently, the plaintiff is awarded kshs.63,988,103/= under paragraph 6 of the decree of 21.7.2006.

21. The plaintiff has taken quotations showing the estimated value of those motor vehicles as follows:

Isuzu trooper – 5,138,200/=

Toyota corona- 2,280,200/=

22. The aforesaid proposal was not contested by the defendant. I have no reason to doubt the estimated value attached. Under paragraph 7 of the decree, I award the plaintiff kshs.7,418,400/=

23. In the end, I allow the summons dated 16th January 2014 as follows.

Under paragraph 6 of the

decree dated 21.7.2006 - ksh.63,988,104/=

under para 7 of the

decree dated 21.7.2006 - ksh.7,418,400/=

Total - ksh.71,406,504/=

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent/Defendant

.....for the Plaintiff/Applicant