



No. 34

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 21 OF 2014

IN THE MATTER OF RTICLES 2 (1) (4), 3 (1), 10 (1) 2 (A AND B), 19, 20, 21, 22, 23, 24, 25, 27 (1) (2) (4) (5), 28, 29, 30, 35, 39, 47, 48, 49, 50, 51, 52, 159 (1) (2), 165 (3) (4) (6), 169 (1) (C241, 258, 259 OF THE CONSTITUTIONAL

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF KENYA DEFENCE FORCES ACT, (ACT NO. 25 OF 2012)

BETWEEN

GABRIEL KIRIGHA CHAWANA & 26 OTHERS PETITIONERS

AND

THE KENYA DEFENCE FORCES COUNCIL & 6 OTHERS RESPONDENTS

RULING

0. The petitioners who describe themselves as former service members of the Kenya Armed Forces who allegedly procedurally resigned from employment sometime between 2007 and 2008 have following arrest and charge with the offence of desertion contrary to section 74 of the Kenya defence Forces Act 2012 sued the Kenya defence Council , the Cabinet secretary for Defence, the Chief of defence Forces and the Navy Commander , the Judge-Advocate – Court Martial (presiding officer of the Courts Martial) and the Defence Court Martial Administrator and the Attorney General, seeking various relief primarily the declaration of the court martial proceedings as unconstitutional.
0. The petitioner’s complaint is set out in paragraphs 9 -17 of the Petition dated 9th April 2014 as follows:

9. At all material times the petitioners were former servicemen of the 1st respondent, majority having served the nation for a period ranging between five (5) to twenty (20) years.
10. The petitioners aver that sometime between early 2007 and late 2008 they duly and procedurally resigned from the 1st respondent's employment. They were duly cleared by their senior officers.
11. The petitioners aver that they obtained clearance from various departments before they eventually left the 1st respondent's employment. The 1st respondent has never raised any adverse issue against the petitioners since the time they left employment with the 1st respondent.
12. The petitioners aver that they were entitled to resign because the 4th respondent allowed them to resign from their employment and verbally advised them to tender their application to resign and they would be forthwith cleared.
13. The petitioners aver that the respondents are bound by the Constitution of Kenya, 2010 and the Kenya Defence Forces, Act No. 25 of 2012.
14. Sometime in January, February and March 2014, the petitioners were asked to present themselves to the Kenya Defence Force-Navy for necessary documentation and payment of their terminal benefits. The petitioners duly presented themselves to the relevant officers of the Kenya Navy on various dates.
15. However, the respondents decided to place them under close arrest without giving them any reason for their arrest and ensuring that they did not leave Mtongwe, Kenya Navy Base at Mombasa.
16. The petitioners aver that they were kept without receiving any information relating to their incarceration for unreasonable periods of time amounting to over 45 days.
17. Sometime on 5th April 2014 the petitioners received charge sheets together with statements and other documents from the investigating officer, Kenya Navy Base at Mtongwe charging the petitioners with desertion contrary to Section 74 (1) (a) of the Kenya Defence Forces Act, 2012; this was the first time during their detention that they were informed of their reasons for their arrest.

0. The respondents' case is summarised at paragraph 5 of the Replying Affidavit of Lieutenant Col. Evans Oguga sworn on 14th April as follows:

5. THAT the counsel on record for the respondents has read and explained to me the contents of the application and the affidavits sworn in support thereof by the petitioners to which I wish to reply as hereunder:
 - a. THAT the petitioners are Service Members in the Kenya Defence Forces subject to the Kenya Defence Forces Act (No. 25 of 2012) as contemplated under Section 4 (a) of the said Act.
 - b. THAT the petitioners have never been discharged from service in the regular forces of the Kenya Defence forces.
 - c. THAT some of the petitioners on various dates between 2007 and 2008 wrote to the Navy Commander through the prescribed chain of command requesting to be discharged from Service on compassionate grounds pursuant to section 175 (g) of the Armed Forces Act cap 199 Laws of Kenya (now repealed).
 - d. THAT due to exigencies of Service the material time, the requests for discharge were declined and the refusal was communicated to the Petitioners through the chain of command save for the petitioners who left as soon as they lodged their resignation papers and therefore could not be found until they presented themselves recently.
 - e. THAT the petitioners' averment that they were duly cleared by their senior officers is false and intended at misleading this honourable court. Being cleared by any department in the Kenya Navy is not tantamount to being discharged from service as clearance in the service is conducted in many instances including when a service personnel changes his duty Station, after completion of training, before leaving for a mission outside the country and on many other circumstances.
 - f. THAT the petitioners are well aware of the procedure of requesting for discharge requires that the written requests for discharge must be approved by the Service Commander, whereupon discharge instructions are issued from the service Headquarters to the Unit of the concerned Service Member that in turn communicates to the individual service member that authority for discharge has been granted.

- g. THAT no such authority for discharge was granted to any of the petitioners herein as their requests could not be granted at the time due to exigencies of duty. Further, the Commander must at all times maintain a certain number of personnel for deployment at any given time in fulfillment of the roles of the Defence Forces as provided under Article 241 of the Constitution and therefore granting mass requests to the petitioners without replacements would have compromised the security of this country which must at all times come before self interest.
 - h. THAT the decisions were communicated to the petitioners indicating that they were required to complete their periods of service for which they had voluntarily and respectively enlisted and/or re-engaged to serve.
 - i. THAT the petitioners subsequently went absent without leave (AWOL) en masse on various dates between 2007 and 2008.
0. Before the hearing of the Petition, the Petitioners sought by Notice of Motion dated the 9th April 2014 conservatory orders 'to prevent the respondents from charging, detaining and or proceedings with the hearing and determination of any proceedings before courts martial or any other courts or tribunals in respect of the allegations of the alleged desertion' and for the release of the petitioners unconditionally. Upon a replying affidavit by Lt. Col. Evans Oguga in response to the Main Petition, counsel for the applicants successfully sought leave to file a further affidavit and consequently proceeded to urge only the two prayers for stay of the court martial proceedings and for release of the petitioners even on reasonable bail terms. Counsel for the parties made oral submissions on the prayers and ruling was reserved.
 0. The central issue in this petition is whether the petitioners are persons in the service of the Kenya defence Forces who are therefore subject to the provisions of the Act relating to discipline through the court martial as sought contended by the respondents or whether the petitioners are private citizens who were completely discharged from the armed forces following resignations that were approved and accepted by the respondents, and who are therefore not subject to the forces' discipline. There are collateral issues of constitutionality of the particular provisions of the Kenya Defence Act.
 0. At this interlocutory stage of the proceedings, it is not the duty of the court to make any final determination of fact or law with regard to the dispute between the parties. The Court should only examine the pleadings and the affidavits taking into account the submissions thereon by the parties to see whether there is an arguable case or serious questions to be presented to the court on the hearing of the main petition, noting that the arguable case does not mean a case that must succeed so that the respondents' terminology of prima facie case is inappropriate.
 0. Upon considering the parties' respective cases, I consider that the petitioners have an arguable case on several matters including:
 - a. The unlimited right to fair trial under Article 25 of the Constitution applies to the petitioner's court martial proceedings and, if so, to what effect having regard to circumstances of this case;
 - b. Whether the procedure relating to the discharge of members of armed forces contravenes the constitutional provisions on the right against inhuman and degrading treatment which under Article 25 of the Constitution cannot be limited;
 - c. Whether there was a breach by the respondents of the constitutional right to information under Article 35 in failing to give reasons for the petitioner's arrest and detention and whether this has impaired their right to fair trial guaranteed under Articles 25 and 50 of the Constitution; and
 - d. Whether the limitations of fundamental rights with respect to the members of the armed forces under Article 24(5) of the Constitution are subject to the reasonable test under article 24 (1) of the Constitution, which require that limitations be reasonable and justifiable in an open and democratic society..
 0. As regards the petitioners' complaint of detention for a period of 45 days before trial, the courts attention was drawn to the binding Court of Appeal authority in **Julius Kamau Mbugua v. Republic** Nairobi Criminal Appeal No. 50 of 2008 (Githinji, Waki and Visram, JJ.A) that delay in bringing a person to court for trial or pre-charge violation of personal liberty does not affect the merit of the subsequent trial and it may be compensated by an award of damages. The court, held that

“Even if we were to agree that extra judicial incarceration before a person is charged has a direct bearing on the subsequent trial, the detention must first be shown to be unreasonable using the same principles, standards and considerations including societal interest as apply to considerations of breach of trial within reasonable time guarantee as emerge from the commonwealth and foreign jurisprudence restated above.”

0. What is clear is that the determination by the court of the breaches of the constitution can only be done after the hearing of the Petition when all the evidence is adduced. At this stage, the court has granted leave for the petitioners to file further affidavit and in the directions for hearing the court may, of its own motion or upon application, under Rule 20 of ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***, make an order for oral examination of a person who may assist the court in arriving at a decision in the matter.
0. The question then is what is to be done with regard to the court martial proceedings before a determination of this petition by the High Court, and whether the petitioners will in any event be released on bail.
0. For the respondents, it was urged by counsel that the court martial should proceed to trial as the proceedings may be terminated upon a finding by this court that the proceedings were unconstitutional and illegal for breach of the petitioners rights. Counsel emphasized the hardship in staying the court martial proceedings for whose members officers of the Kenya Defence Forces had been drawn for their duties from all over the country. It was also contended that staying the proceedings would affect the good discipline of the members of the Defence Forces, and bail was opposed on the ground that the petitioner were not charged before the court and the court should therefore not consider their bail..
0. Counsel for the petitioners urged the court to stay the court martial proceedings and argued that the award of damages should the petitioners eventually succeed in their petition could not remedy the trauma that they would have suffered by the court martial proceedings. They urged the court to release the petitioners on bail and cited ***Republic v. Danson Mgunya and Anor*** Mombasa HC Cri. Case No. 26 of 2008 (Mohamed Ibrahim, J, as he then was) for the proposition that a person’s liberty should not be denied without lawful reasons and in accordance with the law and that the constitution must be interpreted ‘in enhancing the rights and freedoms granted and enshrined rather than in any manner that curtails them.’
0. In considering the application for the conservatory orders, the Court has having established that the petitioners have an arguable case to be presented for investigation by the court proceeded to balance the respective interests of the parties and found as follows:
 - a. The court martial has a constitutional and legal mandate duty, as a subordinate court under Article 169 of the Constitution and the Kenya Defence Forces Act, to determine the charges facing the petitioners which are the subject of the petition.
 - b. There is before the High Court this constitutional application for a determination whether the petitioners are persons over whom the court martial has jurisdiction in terms of its mandate and whether certain relevant provisions of the statute are unconstitutional;
 - c. To proceed with the court martial while the petition is pending before this court may render the petition nugatory or at best academic should the court martial proceedings be heard and determined and petitioners convicted and sentenced before the High Court makes a determination of this petition.
 - d. Although there is good reason in prosecuting the offences facing the petitioner for the good discipline of the members of the Kenya Defence Forces, there is no emergency for the trial to be conducted right way without affording opportunity for the petitioners to test before High Court the constitutionality of charges and their trial.
 - e. There is no statute of limitation in prosecution of the criminal charges and the respondents may proceed with the court martial charges shortly after the High Court has determined upon full hearing that the petitioners’ case is without merit.
 - f. A responsible use of judicial resources calls for stay of proceedings before the court martial to avoid waste when the court martial proceedings with the trials only to have the proceedings subsequently terminated by the High Court. The proceedings will be stayed for a such period as is necessary for the High Court to make a determination on the Petition

herein.

- g. During the time that the court martial proceedings are stayed the petitioners, in accordance with the right to liberty be released on bail upon reasonable terms to ensure their attendance before the court martial for their trial as and when the court so directs.
 - h. The High Court has a supervisory jurisdiction over the court martial under Article 165 (6) of the Constitution and it may under sub-article (7) give directions 'it consider appropriate to ensure the fair administration of justice.'
0. Accordingly, for the reasons set out above, I make an order for the stay of the proceedings before the courts martial with respect to the petitioners' trial for a period of 60 days within which time the petitioners will prosecute their petition to hearing and determination. There will be liberty to apply.
 0. In the meantime, the petitioners will be released upon executing with this Court their own bond of Ksh.500,000/- with one surety of the same amount and upon depositing their passports with the Court Martial and upon further condition that they shall report to the Kenya Defence Forces Base in the locality of their regular residence once every fourteen (14) days pending the determination of this petition.

Dated and delivered this 30th day of April, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kamunda with Mr. Mwanyale, Mr. Mwalimu, Mr. Kurauka (and holding brief for Mr. Ondieki) for Petitioners

Mr. Jami and Mr. Ngari for Respondents

Mr. Ibrahim - Court Assistant