REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CIV APPLI 509 OF 2006

ROBERT TOM MARTINS KIBISU…….....…….PETITIONER

Versus

ATTORNEY GENERAL…….....…….. ….1ST RESPONDENT

ZACHARY N. MWAURA…….....……..2ND RESPONDENT

PS MINISTRY OF DEFENCE OFFICE OF THE PRESIDENT GENERAL JEREMIAH

MUTINDA KIANGA CHIEF OF GENERAL STAFF.....……..3RD RESPONDENT

LIEUTENANT COLONEL JEREMIAH MWAURA NG'ANG'A COMMANDING

OFFICER DOD CAU….....4TH RESPONDENT

JUDGMENT

Lieutenant Colonel Robert Martins Kibisu petitioned this court under Section 73, 74 and 84 (1) of the Constitution alleging violation of his fundamental rights and freedoms by the Attorney General, The Permanent Secretary Ministry of Defence, the Chief of General Staff and Commanding Officer Department of Defence. He seeks the following orders.

That the Petitioner:-

1. be granted his ½ pay and allowances inclusive of house allowance till his appeal is duly determined at the High court Nairobi;

2. Be granted access to medical facilities for file cover for self and family;

3. Be allowed access to AFCO benefits for self and family;

4. be awarded damages as the court may determine;

5. The Respondents meet the costs of the suit.

The grounds upon which the Petition is premised are inter alia, that the decision to deny the Petitioner his ½ pay, allowances, medical cover for himself and his family, and access to AFCO is unfair burdensome since his appeal is pending determination in the High Court; that the Respondents have acted ultra vires their powers; breached rules of natural justice, breached statutory provisions and especially the Commander in Chief's Regulations for Kenya Armed Forces dated 1997, the Armed Forces Standing Orders, 3rd Edition dated November 2003.

The Application was opposed and one Yvonne Kerubo Kirui, a Captain in the Kenya Armed Forces who claimed to be conversant with the matter swore a Replying Affidavit dated 16th October 2006.

From the onset, I wish to point out the fact that this Petition was filed under S. 84 of the Constitution and the rules made under S.65(3) of the Constitution in 2006. Under Rule 13, the Petition is supposed to be supported by an Affidavit. I have perused the Court file and note that only the Chamber Summons dated 11th September 2006, the same date of the Petition, is accompanied by an affidavit sworn by the Petitioner on the same date. The Petitioner then swore a further supporting Affidavit dated 14th November 2006. There is no Affidavit in support of the Petition which makes the Petition bare and with no evidence in support thereof. The further affidavit is incompetent as there is no affidavit that it would be sworn in support of.

Ideally the Petition should be struck out even on that basis alone. This point is however not raised by the Respondents and it is not therefore clear whether they did not notice the anomaly or they were served with an affidavit that the court is unaware of.

The Petitioner did not set out the background of this case but Captain Kerubo in her Replying Affidavit did so. The facts leading to this case as narrated by Capt. Kerubo in her affidavit are not disputed. They are that the Petitioner who was a Commanding Officer of the Unit at Kahawa Barracks refused to have his boot inspected as per the regulations. He was charged and convicted and sentenced to loss of seniority and it was published but the Petitioner published another order canceling the said publication but the same was intercepted. It is then the Petitioner was charged with misconduct and a Court Martial was set up to try him on 16th March 2005 by an order of the Army Commander Lt. General J.N. Kianga. The trial resulted in his conviction, sentenced him to a year's imprisonment and dismissal from the service. The proceedings of the Court Martial were exhibited to Capt. Kerubo's affidavit. That the sentence was read in court on the same date and signed by the judge advocate and chairman, and confirmed by the convening officer Lt. General Kianga.

It is the Petitioner's contention that the sentence and conviction could only be effective for confirmation after the expiry of 30 days, the period allowed for filing an appeal and that the sentence was illegal as per S.111 (3) of the Armed Forces Act. He was released on bail in Misc 315/05 on 29th July 2005. That he filed appeal and under the Armed Forces Standing Orders, he should not have been treated differently from other officers, and that appeal acts as an automatic stay. That he has never been discharged from Armed Forces yet he has been denied medical facilities; access to AFCO and that he cannot get another job till the appeal is finalized. That he did not pray for ½ pay in his appeal. In his Application in Misc Application 365/05 the convening of the Court Martial was stayed.

The Petitioner further submitted that before the Court Martial was set up there was no convening order in accordance with S.85 (1) (2) & (3) of the Armed Forces Act and the proceedings and sentence before the Court Martial were null and void.

That the Respondents published part II Orders contrary to paragraph 5166 2(a) of the Orders. It is where one is convicted and the result should not be published till the result of the appeal. His contention is that the conviction could not have been confirmed because the proceedings had not yet been typed (S. 107 & 108 of Armed Forces Act).

He said that though the Respondents were served with an order issued in HCC 365/05 dated 15th March 2005 and 14th April 2005, the Respondents ignored them and failed to obey the courts orders and proceeded with hearings at the Court Martial.

It is also the Petitioner's contention that the Respondents failed to make records in accordance with Armed Forces Standing Orders and failure to publish the part II Orders was meant to punish him without cause. That decision to deny the Petitioner ½ pay was based on the mistaken belief that the sentence of the Court Martial was final which breached his rights. He said that the standing orders provide for bail pending appeal and that though the Armed Forces Act is silent on what happens an officer who is convicted and has appealed, the Public Service Act defines who a public officer is and Regulation 23 (2) provides that an Officer who is interdicted be entitled to ½ pay and he should have been paid the ½ pay till the appeal was determined.

It is also the Applicants case that he is pensionable under S.112 (a) of the Constitution and should be paid the same.

The Petitioner in his submissions, challenged the record of the proceedings before the Court Martial. That there was no convening order by the Commanding Officer, and what is before court is not a true copy of what transpired at the Court Martial, that there are no proceedings for 16th April 2005, no evidence of when the record was pronounced and no signature, or when the Court Martial adjourned on 15th April 2005 and so the conviction and sentence are illegal.

The Petitioner asked that the Affidavit of Capt. Kerumbo should be struck off as the maker is not a legal representative of the Respondents. She is junior to him and is not possessed of sufficient knowledge about the working of the Armed Forces.

Mr. Ombwayo in opposing the Application said that the Petition does not fall within the ambit of S.84 of the Constitution as the Petitioner has not demonstrated that any of the Sections 70 and 83 have been violated. Counsel submitted that the prayers sought of ½ pay, allowances, access to AFCO shop are only available to a serving officer since the Petitioner was dismissed and he had filed an appeal which was pending before the High Court then. He submitted that the fact that an appeal was filed did not mean that the findings of the Court Martial would be reversed.

In respect of the affidavit of Captain Kerubo Mr. Ombwayo found no good reason to have it struck off. Captain Kerubo took part in the Court Martial proceedings and was well versed in the said matters.

Counsel denied that the Court Martial disobeyed the court's orders. Counsel submitted that the Petitioner filed Misc Application 365/05 for orders of Judicial Review. He was given order on conditions that he filed a Notice of Motion within a certain period but failed to comply.

In regard to Court Martial proceedings, Mr. Ombwayo submitted that they are a true record of the proceedings in the Court Martial taken verbatim in compliance with Rule 90 of the Armed Forces Act. That the Court Martial was properly convened by Army Commander, and commenced on 16th March 2005, signed by judge, advocate and presiding officer on 16th April 2005 and confirmed on same date by the Commander. The allegation of ill motive by the Petitioner is said to be baseless as under Rule 83 of Armed Forces Rules, a Saturday is not exempted from working days.

As to whether the Public Service Act applies to the Petitioner, Mr. Ombwayo submitted that it does not apply and relied on the case of **CAPT WAFUBWA V THE AG CA 278/03** where the Court of Appeal held that both PSC Act and Armed Forces Act cannot apply and the law relating to officers of the Armed Forces renumeration is the Armed Forces Act under S. 102(2) of the Armed Forces Act, once the Petitioner was sentenced he was automatically dismissed in terms of S.146 (1)(c) of the Armed Forces Act.

As to whether or not the Petitioner is still a member of the Armed Forces, it was submitted that he cannot

be discharged because of the order of dismissal and cannot therefore be entitled to pension. Withholding of the Armed Forces identity card by the Petitioner does not make him an officer.

I have considered both the Petitioner's and Respondent's submissions, Petition, reply thereto. Though the Petitioner in his submissions dwelt at length on how the Court Martial was not properly convened as per provisions of the Armed Forces Act and that the proceedings are not a true record of the said proceedings, he has not invoked this court's jurisdiction by citing any of the provisions in Chapter V of the Constitution alleging violation of his rights as a result of how the hearing was conducted by the Court Martial. The courts have held that for one to seek to enforce their rights under S.84 (1) of the Constitution, the said violations should be specifically and precisely pleaded by citing the provision of the Constitution that is violated or likely to be violated, the paragraph and even sub-paragraph and state the nature of the violation. If the petitioner was alleging that the Court Martial acted improperly in handling his case, he must have invoked the specific Section of the Constitution, say S.70 or 77 of the Constitution and then the specify paragraphs breached. See the cases of **ANARITA KARIMI NJERU V REP (1979) KLR 154** and **CYPRIAN KUBAI V STANLEY KANYONGA MISC APPLICATION 612/02.**

The Sections cited by the Petitioner as having been violated are S.73 and 74 of the Constitution. The protections under the said Sections are as follows;

Section 73: Protection from slavery and forced labour.

Section 74: Protection from inhuman treatment.

The Petitioner then went ahead to specify the nature of the violations as denial of ½ pay and allowances, including house allowance, denial of access to medical facilities and treatment for self and family and denial of access to Armed Forces Canteen Organisation for self and family. The Petitioner never ever demonstrated in his Affidavit or in the Petition how Section 73 and 74 were violated. It is not enough just to allege. It was upto the Petitioner to adduce evidence in support thereof. The Petition in my view does not disclose any cause of action and does not fall under S.84 of the Constitution.

The petitioner was charged under S.68 of the Armed Forces Act, that he committed an act to the prejudice of good order and services discipline. Under that Section, one could be sentenced to 2 years imprisonment if found guilty. He was sentenced to 1 year imprisonment.

S. 102 of the Armed Forces Act provides for the different punishments that can be handed down to officers found guilty of offences under the Act. They include imprisonment and dismissals. At the time the Petitioner filed this Petition he had been imprisoned for a year and dismissed from the service. The question is whether he would have been entitled to the ½ pay salary, allowances and AFCO facilities. An order of dismissal meant that the Petitioner was no longer a member of the Armed Forces of Kenya. The sentence is final unless set aside by the High Court on appeal or if not confirmed by the convening officer under S.108 of the Armed Forces Act. In the instant case the conviction and sentence were confirmed on 16th April 2006. The prayers sought are for serving officers.

It was the Petitioner's contention that since the Armed Forces Act does not specifically provide for what happens to one who has been convicted but has appealed, the Public Service Act did apply and that is why he sought the above orders. He relied on the following regulations in the Public Service Act as Regulations -

S23 (2) Provides that a Public Officer who is interdicted shall receive ½ salary;

S25 (2) If a Public Officer is charged with a criminal offence he will not be dismissed till determination of any appeal that may be preferred;

S.112(a) of the Constitution provides for pensions for officers in the military which will be regarded as an office in the Public Service;

S.113 (6) provides for power to withhold pension in respect of Armed Forces Officers who are deemed to be officer in the Public Service.

The provisions of the Constitution are not relevant to this case because the Petitioner was not seeking pension and in any event the Armed Forces Officers are only regarded as Public Officers for purposes of Pension, not any other purpose. Though the Petitioner alluded to the fact that he has not been paid pension, that is not a matter to be canvassed in this Petition.

As to the applicability of the Public Service Act to the officers of the Armed Forces, that is doubtful. The preamble to the Armed Forces Act reads as follows:

"An Act of Parliament to provide for the establishment, government and discipline of the Kenya Army, the Kenya Air Force and the Kenya Navy and their reserves; to make provision in relation to seconded and attached personnel and visiting forces; and for purposes connected therewith and purposes incidental thereto;

The Court of Appeal in the case of **CAPTAIN WAFUBWA V AG CA 278/03** considered whether it was the Armed Forces Act or the Pensions Act that applied to the Applicants terms of services and the court said that since the Act declared in its preamble that it is "for purposes connected there with and purposes incidental thereto" it would be assumed that the said Act provides for the terms of service of the Armed Forces Personnel and the Public Service Act does not apply.

The Petitioner had made reference to paragraph 250 of the Armed Forces Standing Orders which provides for bail when one is charged with a civil offence, that he should not be treated differently from other officers and that though he was released on bail pending appeal he was treated differently by denial of his ½ pay. Paragraph 250 of the Standing Orders only applies to one charged with a civil offence. The Petitioner was charged with an offence under Chapter five of the Armed Forces Act in a Court Martial which relates to his employment. It was not a civil offence.

In his arguments the Petitioner was challenging the merits of the decision of the Court Martial but here the court is only supposed to enquire into allegations of violations or threatened violations of the Petitioner's rights as pleaded. As earlier found there has been no proof of violation of any right and consequently I dismiss the Petition for being unmeritorious, with each party bearing its own costs.

Dated and delivered this 29th day of March 2007.

R.P.V. WENDOH

JUDGE

Read in presence of:-

Petitioner in person

Mr. Mutinda holding brief for Mr. Ombwayo for Respondent

R.P.V. WENDOH

JUDGE