



REPUBLIC OF KENYA



**Lombelo v Chief of Defence Forces & 2 others (Constitutional Petition E220 of 2021)  
[2025] KEHC 766 (KLR) (Constitutional and Human Rights) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 766 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E220 OF 2021**

**LN MUGAMBI, J**

**FEBRUARY 4, 2025**

**BETWEEN**

**BENJAMIN CHELANG'A LOMBELO ..... PETITIONER**

**AND**

**THE CHIEF OF DEFENCE FORCES ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition is dated 7<sup>th</sup> June, 2021. The Petitioner explains that he was enlisted as a member of the Kenya Defence Forces and Corporal on the 2<sup>nd</sup> of June, 2001 with the Kenya Army Service Number 71101. He served in various positions in the military finally ending up as an Intelligence Officer in the Military Intelligence Battalion in 2012. He was discharged from the service on the 1<sup>st</sup> of May, 2014.
2. This Petitioner complains against alleged unjust actions that the Respondent subjected him to prior to and eventually dismissing him from the service as a member of Kenya Defence Forces.
3. He thus seeks the following reliefs:
  - a. Declare the 1<sup>st</sup> Charge Annex 'A' illegal as charge Annex 'B' was dismissed by the Judge in the orderly room proceedings;
  - b. Order his reinstatement to the service;
  - c. Quash the illegal letter HQKA: KA/2204 dated 16<sup>th</sup> October, 2013;



- d. Order the publication of a Part II Order to quash the entry on his qualification record card (vide part II Order 2BDE 11/10 dated 14<sup>th</sup> May, 10);
- e. Pay damages caused by the case;
- f. Compensate him with a rank of WOII for the eleven years of stagnation on one rank;
- g. Compensate him for all the damages caused by the malicious charge: for the brutal handcuffing, inhuman degrading lockdown under custody for 12 days, for the 40 days' imprisonment;
- h. Compensate him for all the maliciously aborted KENBAT 19 UN Mission privilege worth US dollars 1028 monthly for a year due to the false charge in the year 2010;

### **Petitioner's Case**

4. He states that on the 29<sup>th</sup> of March, 2010 he was charged with malicious charges which according to the annexed charge sheet were:

1<sup>ST</sup> Charge: conduct to the prejudice of good order and service discipline contrary to section 68 of the Armed Forces Act

Particulars: At Lanet Barracks 2 BDE HQS on or about the 13<sup>th</sup> of Jan, 2020 he (the Accused) authored and distributed leaflets in form of anonymous letters concerning KENBAT selection, an act he knew or was expected to know constituted an offence.

2<sup>ND</sup> Charge: conduct to the prejudice of good order and service discipline contrary to service discipline an Act he knew constituted an offence.

Particulars: At Lanet Barracks 2 BDE HQS on or about the 13<sup>th</sup> of January, 2010 he (the Accused) authored and distributed an anonymous document aimed at creating discontent among the service personnel an act he knew constituted an offence.

5. The Petitioner contends that he was discriminated upon throughout the entire investigation process when they recalled him from annual leave and put him on close arrest for twelve days and in forwarding only his handwriting sample to the Directorate of Criminal Investigation (DCI) which contravened his right under Article 27 (1), (2) and (4) of *the Constitution*. He also states that despite the grave charges levelled against him, he was never accorded a fair trial in accordance with Articles 50(2) (e), (g), (h), (i), (j), (k), (q) (4), (5), (6) (a) (b), (7) read together with Article 49 (1) (a) (i)-(iii) (b), (c), (d), (e), (f) (g). That he raised the defence of alibi but it was not taken into consideration.
6. He stated that although he was not objecting to the way the Kenya Defence Forces deal with crime or punish offenders, the same should not amount to punishing an innocent service member contrary to principles of natural justice.
7. He pleaded further his the conviction led to an entry to qualification record card and his first attempts for redress on 12<sup>th</sup> April, 2010, 17<sup>th</sup> November, 2010, 15<sup>th</sup> June, 2011 and 7<sup>th</sup> June, 2013 were all declined. That the discharge from service has made him unemployable and has caused him mental anguish. He sought the intervention from the Commission of Administrative Justice vide letter reference number CA/POL/015/2013/2014-SAK and the Commission advised that he had been made to resign under duress due to the unlawful and irregular letter which was signed by Brig L. Mashrui.



## **1<sup>st</sup> & 2<sup>nd</sup> Respondents' Response**

8. Major Edwin Muta deposed the affidavit dated 27<sup>th</sup> December, 2023 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Save for the fact that the Petitioner was a member of the Kenya Defence Forces until his resignation in 2014, the Respondents denied all the other allegations that the Petitioners had levelled against them. That the investigations conducted by the military personnel led to the Petitioner being charged with two offences under section 68 of the repealed Armed Forces Act, for conduct to the prejudice of good order and service discipline after he was implicated in authoring and circulating inciting leaflets in the camp. That he was presented with all the necessary evidence in preparation of his defence and accorded sufficient time to prepare for the hearing before he was subjected to a fair and lawful summary process by the Commanding Officer in line with the Repealed Armed Forces Act and Armed Forces Rules and Procedures, 1969. That upon conclusion of the trial process, the Petitioner was found guilty of charge one and sentenced to 42 days' imprisonment but charge two was dismissed for being duplex to charge one. He was further recommended for discharge from service under Section 176 (b) of the Repealed Armed Forces Act.
9. The Respondents deposed further that the awards as approved by the Army Commander were booked in the Petitioner's service record card in accordance with the standing orders on disciplinary entries but the same was reviewed by another commander who directed that the Petitioner continue in service. They explained that although the Petitioner did continue in service, he sought numerous redresses from the Kenya Army Commander against the publication of the 42 days' imprisonment punishment in his service record which redresses were all considered and declined on merit. Consequently, the Petitioner voluntarily requested to be discharged from service/early retirement on compassionate grounds on the 9<sup>th</sup> of December, 2013 which request was considered and approved.
10. The respondent dismissed the allegations of constructive dismissal as implied by the Petitioner and termed them as misleading since the punishment meted against him was only temporary and was aimed at bringing him on the right track as he was a member of the disciplined forces. That upon his resignation, the petitioner was paid his retirement benefits less the service and government liabilities. The Respondents allege that this Petition is a front by the Petitioner to unjustly enrich himself after squandering all this pension and seeking reinstatement after his voluntary resignation.
11. The Respondents deposed further that the substratum of this case is employment in nature and ought to have been litigated before the Employment and Labour Relations Court where the evidence adduced can be tested in cross-examination before the Court arrived at a verdict. They contend further that the delay in lodging this petition massively prejudices the Respondents bearing in mind that the matters complained of took place 13 years ago and many actors are no longer available to testify as witnesses in support of their case and that the Defence Forces Standing Orders provided for the duration during which documents are to be destroyed.
12. The Respondents concluded by deposing that the petition does not meet the threshold for constitution petition set by the Court in the case of Anarita Karimi Njeru Vs. Republic (1979) EKLR and urged this Court to dismiss the petition.

## **Petitioner's Rebuttal**

13. The Petitioner filed two further affidavits dated 23<sup>rd</sup> January, 2023 and 21<sup>st</sup> February, 2023 in response to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' affidavit. In the affidavits he reiterates the averments in the petition and blamed the Respondents for seeking to deny him important information for use in this case. He also faulted them for convoluting the court process and reiterated that he is in Court because of the



violation of Article 47, Article 50(2)(q) and Section KDF Act Section 159 (3). The Petitioner also faulted the 3<sup>rd</sup> Respondent for failing to file a response to the petition.

### Submissions

14. The Petitioner's submissions are dated 31<sup>st</sup> January, 2022. He submitted on one issue for determination: whether he had demonstrated the breach of fundamental rights by the 1<sup>st</sup> Respondent. He responded in the affirmative and proceeded to submit that despite the gravity of the allegations levelled against him, he was not accorded a fair trial in contravention of Article 50 (2) (e)-(q), (4) - (6), 7 and Articles 49 and Section 54(3) of the *Kenya Defence Forces Act* No. 25 of 2012. He states that he was discriminated against throughout the investigation process right from being recalled from home and being the only service member who was investigated. That it took the prosecution 67 days to prefer charges against him and throughout the investigation, he was presumed guilty in violation of his constitutional rights. He relied on the cases of John Muruge Mbogo Vs. Chief Of Defence Forces & Another (2018) Eklr And Musa Mbwagwa Mwanasi & 9 Others Vs. Chief Of The Defence Forces & Another (2021) EKLR and submitted that no evidence has been adduced to contravene his evidence before this Court.
15. The Petitioner concluded by submitting that every person has the right to a fair hearing as enshrined in *the Constitution* of Kenya, 2020 and that he had demonstrated his case that he deserved the orders and declarations sought in the Petition.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's submissions are dated 6<sup>th</sup> May, 2024. They commenced by quoting the case of Anarita Karimi Njeru (supra) and submitted that the main issue for determination is whether the Petitioner had demonstrated a breach of his fundamental rights to entitle him the reliefs sought. They stated that the Petitioner was charged with two offences under Section 68 of the Repealed Armed Forces Act CAP 199 for conduct to the prejudice of good order and service discipline. He was tried and found guilty of charge 1 and awarded 42 days' imprisonment while charge 2 was dismissed. He was also recommended for discharge but the award was not recommended by the Air Force Commander and the Petitioner continued in service after completing the 42 days' sentence.
17. The Respondents continued to submit that the Petitioner was not only accorded a fair hearing of the time of his disciplinary proceedings having been served with the evidence of hearing and the record of the proceedings shows that he was allowed time to prepare his defence. That the prayers sought in the petition are unmeritorious particularly because the Petitioner voluntarily opted to be discharged from service. They relied on the case of Serah Njeri Mwabi Vs. John Nkimani Njoroge (2013) EKLR and submitted that all the grievance mechanisms were utilised by the Petitioner.
18. That the Petitioner was lawfully tried and adjudged guilty and when he opted to be discharged, the same was allowed and he was paid his dues based on his rank. They concluded by faulting the Petitioner for failing to discharge his burden of proof by his failure to establish a prima facie case to warrant the prayers sought. They blamed the Petitioner for being the author of his own misfortunes and stated that he was just a disgruntled soldier who was treated fairly while in service. They prayed that the Petition be dismissed with costs.

### Analysis And Determination

19. The petition raises the following issues for determination:
  - a. Whether the petition meets the threshold of a constitutional petition;



- b. Whether the Respondents infringed the Petitioner's rights under *the Constitution* during the summary dismissal process from the Kenya Defence Forces; and
- c. Who caters for the costs of the Petition?

**Whether the petition meets the threshold of a constitutional petition;**

20. The celebrated case of Anarita Karimi Njeru Vs. Republic [1979] EKLK laid down the essential ingredients that a Constitutional petition must satisfy. The Court held as follows:

“... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

21. This has been subsequently reinforced in subsequent decisions by Superior Courts. The Court of Appeal in the case of Communications Commission Of Kenya & 5 Others Vs. Royal Media Services Limited & 5 OtherS [2014] EKLK reaffirmed this position by stating as follows:

“Although article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

22. The Respondents contend that this Petition falls short of the above threshold. I do not think so. Paragraph 4 of his petition alleges that the right to a fair trial was violated in contravention to Articles 49 & 50 of *the Constitution*. Further that the Petitioner was discriminated as the investigation process by the Respondents only singled him out for investigation as the only service man, was arrested and detained for in custody for 12 days and that only his handwriting was sent to the DCI for analysis hence his rights under Article 27 of *the Constitution* were contravened.
23. In my view, the particulars sufficiently lay out the articles of *the Constitution* that were violated and the manner of the said violation by the Respondents is also described with clarity hence meets the test laid down in Anarita Karimi Njeru (supra).

**Whether the Respondents infringed the Petitioner's rights under *the Constitution* during the summary dismissal process from the Kenya Defence Forces;**

24. The petitioner case is that while serving with the Kenya Defence Forces, the following charges were brought against him in the year, 2010:
- a. 1<sup>st</sup> Charge (as contained in the copy of charge report annexed to the Petition as well as the Respondents' affidavit) was that:

The accused No. 71101 Rank SPTE Name: Benjamin Lombelo Unit 2 BDE HQS  
a serviceman of the Armed Force being subject to the Armed Forces Act, under



Section 7(a) of that Act, is charged with Conduct To The prejudice of good order and service discipline contrary to section 68 of the Armed Forces Act.

In that, he at Lanet Barracks 2BDE HQS on or about 13<sup>th</sup> January he, (the Accused) authored leaflets in form of anonymous letters concerning KENBAT selection in contravention of military norms and chain of command of communicating a grievance, an act he knew or was expected to know constituted an offence.

- b. 2<sup>Nd</sup> Charge (as contained in the copy of the charge report annexed to the Petition as well as the Respondents' affidavit) was that:

The accused No. 71101 Rank SPTE NAmE: Benjamin Lombelo Unit 2 BDE HQS a serviceman of the Armed Force being subject to the Armed Forces Act, under section 7(a) of that Act, is charged with Conduct to the prejudice of good order and service discipline contrary to section 68 of the Armed Forces Act.

In that, he, at Lanet Barracks 2BDEHQs on or about 13<sup>th</sup> January, 2010, he (the Accused) authored and distributed an anonymous document aimed at creating discontent among the service personnel, an act he knew constituted an offence.

25. The Petitioner was found guilty of the first charge and sentenced to 42 days' imprisonment and recommended to be discharged from service under Section 176(b) of the Armed Forces Act, 1968 subject to the Army Commander's approval. He was however found not guilty of the second charge for reasons that it was duplex to the 1<sup>st</sup> charge. The administrative recommendation for discharge of the Petitioner was reviewed and it was directed he continues in service.
26. The petitioner was however dissatisfied with the publication of the 42 days' imprisonment in his service record and applied severally for review of the same but all attempts were rejected.
27. The petitioner does not dispute that he applied to be discharged from the army as per his letter dated 9<sup>th</sup> December, 2013; which discharge was approved on the 7<sup>th</sup> of January, 2014.
28. The Petitioner insists that Kenya Defence Forces conducted shoddy investigation and failed to consider his alibi defence on tendered during the summary trial. He attached a visitors' book of a church in Kapsowar showing where he had been on the 10<sup>th</sup> of January, 2010.
29. In his summary trial on the 29<sup>th</sup> of March, 2010(annexure EM2 of the Respondent's Replying Affidavit), the Petitioner raised the issue of the alibi. The Commanding Officer explained that the charge he was facing included authoring the leaflets not distribution of the same.
30. He explained during the proceedings that he had been shunned from the recruitment of the KENBAT selection and that when he attempted to complain, the Chief Clerk gave him plain papers to write on which he contends was a set up for a standing grudge against him for declining to lend him money to buy cigarettes. He confirmed that he wrote the complaint on plain papers and made three copies of the same but did not lodge it because he never found the chief clerk. The Petitioner also stated that the photocopy that was presented as evidence was subject to manipulation and he contested the opinion of the expert as to which documents were given to him and whether other servicemen were also recommended for the opinion.
31. 11356 WOII G Masinde testified as a witness in the proceedings. He stated that sometime on the 30<sup>th</sup> of December, 2009, the Petitioner went to him seeking to know about KENBAT selection and he informed the latter that the selection had been done. That the Petitioner then started complaining and lamenting and stated that he was going to write a letter to the Army Commander. That he then gave



him plain papers to jot down his complain so that they could transfer the same to the Shauri Book and the Petitioner left with the plain papers still bitter and complaining.

32. The Petitioner cross-examined the witness who reiterated that the Petitioner complained about the recruitment and explained that he gave him the plain papers to write on before transferring them to the Shauri book so as to avoid errors. He declined the allegations that he had a personal vendetta against the Petitioner.
33. The Petitioner's case falls under the Repealed Armed Forces Act, 2009 and not under the current *Kenya Defence Forces Act*, 2012 as he has pleaded.

Section 68 of the Repealed Act provides that:

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

Section 82 (1) and (4) of the same Act provides for the procedure of summary proceedings against a serviceman by a Commanding Officer. They provide thus:

1. After investigating a charge against a serviceman, the commanding officer shall either-
  - a. if the charge is one which he has power to deal with summarily and he considers that the charge should be so dealt with, deal summarily with the charge;
- (4) Where the commanding officer deals with a charge summarily and records a finding of guilty, the punishments which he may award are, subject to the limitations hereinafter provided, those set out in the following scale;
  - (a) if the accused is a warrant officer or a non-commissioned officer-
    - i. dismissal from the armed forces;
    - ii. reduction in rank to private or corresponding rank, or any less reduction in rank;
    - iii. forfeiture of seniority of rank in the prescribed manner;
    - iv. a fine of a sum not exceeding one month's pay;
    - v. severe reprimand;
    - vi. reprimand;
    - vii. such minor punishments as may be prescribed;
    - viii. admonition;
    - ix. where the offence has occasioned any expense, loss or damage, stoppages;
  - b. if the accused is a serviceman other than a warrant officer or non-commissioned officer-



- i. imprisonment for a term not exceeding forty-two days or, if the accused is on active service, active service punishment for a period not exceeding forty-two days.

34. The summary procedure took place within the confines of the retired Constitution although the Petitioner has been relying on the Articles of the current Constitution.

35. The right to a fair trial was enshrined under Section 77 thereof while freedom from discrimination is provided under Section 82 of the said Constitution. The import of these section and Articles 27 (freedom from discrimination), 49 (rights of arrested persons) and 50 (right to a fair hearing) of the current constitutional dispensation is the same.

36. The issue of enforcement of discipline among the members of military service is a matter that has been before Courts. The Court in the case of Gift Kambu Marandu Vs. Kenya Defence Forces Council & Another [2017] EKLK as follows:

“ 45. The Claimant describes himself as Warrant Officer Class 1. He was taken through summary proceedings. In the Court’s view, the punishment of dismissal from the Defence Forces, for convicted Warrant Officers, is based on Section 156(2) (a) of the [Kenya Defence Forces Act](#).

46. This law empowers the Commanding Officer to charge Officers summarily, record a finding of guilt, and impose punishment. The action against the Claimant was taken by his Commanding Officer. There is nothing on record to show the Claimant complained against the disciplinary panel which heard him, or that he was in any way prejudiced by its composition....

47. The Court does not find removal of the Claimant from the Defence Forces illegal or unfair. It was based on valid ground, and carried out in accordance with the [Kenya Defence Forces Act](#) 2012.”

37. A similar finding was reached in [Ochieng Vs. Attorney General & 3 Others \(cause 2059 Of 2015\)](#) [2024] KEELRC 892 (KLR) (18 April 2024) (judgment).

38. Clearly therefore, the power to undertake a disciplinary process against a member of the service can be exercised by his Commanding Officer.

39. On whether any of the Petitioner’s abovementioned rights and freedoms were infringed upon by the Commanding Officer of the 1<sup>st</sup> Respondent in the summary proceedings, it is my finding the Repealed Armed Forces Act was painstakingly followed.

40. The Petitioner was informed of his case and was given an opportunity to defend himself including an adjournment so that he could prepare for the hearing.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**L N MUGAMBI**  
**JUDGE**

