



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 203 OF 2019

(Originally Nairobi High Court Civil Case No. 444 of 2009)

SENIOR PRIVATE BENSON MAINA KIAMA.....CLAIMANT

VERSUS

ATTORNEY GENERAL.....1st RESPONDENT

PERMANENT SECRETARY, MINISTRY

OF STATE FOR DEFENCE.....2nd RESPONDENT

LT. COLONEL OWARA.....3rd RESPONDENT

JUDGMENT

1. This Cause has been pending for 10 years for the Claimant sued the Respondents before the High Court on 14 August 2009 alleging malicious and false prosecution and breach of contract.
2. The Respondents filed a *Defence* on 6 October 2009 and an *Amended Defence* on 19 October 2009. The Claimant joined Issue with the Defence on 30 October 2009.
3. Thereafter, there were appearances before the High Court on 27 February 2015, 21 May 2015, 28 April 2016, 30 May 2016, 5 July 2016, 28 November 2016 and 15 February 2017 which the Respondents did not attend.
4. The first Court session attended by the Respondents was on 21 June 2017.
5. On 26 February 2019, the High Court issued a *Notice to Show Cause* why the suit should not be dismissed and after hearing from the parties, the High Court delivered a Ruling on 29 March 2019 in which it ordered that the suit be transferred to this Court for hearing and determination.
6. The High Court also made an order marking the heads of claim for malicious prosecution and unlawful detention as withdrawn.
7. Upon transfer, the Cause was mentioned before this Court on 27 May 2019 and the Court directed the parties to file and exchange documents ahead of hearing on 18 June 2019.
8. The Respondents filed their witness statements on 12 June 2019 but because the Court did not sit on 18 June 2019, the hearing was rescheduled to 23 October 2019.
9. When the Cause was called for hearing on the scheduled date, the Respondents applied for an adjournment on the ground that their witness had been summoned for an urgent meeting at the Defence Staff College.
10. The Court declined to grant the adjournment and the reasons are on record thus forcing the Respondents to close their case.
11. The Court in the circumstances reserved judgment to 29 November 2019.
12. However, on 5 November 2019, the Respondents moved the Court under a certificate of urgency seeking the setting aside of the order closing the hearing and the re-opening of the hearing.

13. The application was argued on 2 December 2019 and in an *ex-tempore* Ruling, the Court declined to allow the application to set aside mainly because the grounds advanced (that the witness had fallen ill) on the face of the motion were diametrically inconsistent with the grounds which were advanced while seeking adjournment on 23 October 2019.

14. Consequently, the Court directed that it would deliver the Judgment today.

15. The Claimant testified and filed his submissions on 4 December 2019. The Respondents also filed their submissions on 4 December 2019.

16. The Court has considered the pleadings, evidence and submissions.

17. In the view of the Court, there are only 2 primary Issues for determination as examined hereunder.

Breach of contract

Unpaid salaries

18. The Claimant sought unpaid salaries for July 2006 up to 14 August 2006 and computed the same as Kshs 35,580/-.

19. A worker on terminal leave is to all intents both factual and legal an employee.

20. Pay therefore is both a contractual and statutory entitlement. The Claimant was on terminal leave up to 14 August 2006.

21. The Respondents did not produce any pay records to show that the same was paid to the Claimant but contended that the Claimant effective date of dismissal was 28 June 2006.

22. The Court will allow this head of the claim.

Whether the Claimant was dismissed or had a discharge on services no longer required

23. The Claimant's case was straightforward.

24. It was that he got a *discharge on services no longer required*, and therefore by dint of the terms and conditions of service he was entitled to terminal dues including pension.

25. The Claimant produced a copy of the *green-book* purportedly issued to him upon discharge and a *Serviceman's Leave Pass* to demonstrate that his case was one of *discharge on services no longer required* and not a dismissal (the date of discharge was indicated as 14 August 2006).

26. The Respondents, however, contended that the Claimant was not *discharged on services no longer required*, but was *dismissed* by the Chief of General Staff.

27. The Respondents, although not leading any evidence had filed copies of records including the dismissal letter dated 28 June 2006. Although disputing the validity of the *green-book* and *serviceman's leave pass* produced by the Claimant, the Respondents as custodians of such records did not produce any duplicate or file copies.

28. The Court has considered all the documents filed by the Respondents notwithstanding that they were not formally produced as evidence.

29. Under cross-examination, the Claimant admitted that he was charged with several counts including theft and that he appeared before his Commanding Officer, was found guilty and penalised by demotion, surcharge and being jailed for 42 days.

30. The copy of *Serviceman's Leave Pass* issued to the Claimant shows that the Claimant was proceeding on 106 days terminal leave ending on 14 August 2006. There is no indication in the *Pass* that the leave was pursuant to a *dismissal*.

31. Section 180 of the *Armed Forces Act* required the issue of a *Certificate of Discharge* containing certain prescribed particulars.

32. The *green-book* or *Certificate of Service* issued to the Claimant gave the reason for discharge as *services no longer required* and date of discharge as 14 August 2006.

33. The dates in the *Serviceman's Leave Pass* and *green-book* or *Certificate of Service* as to the effective date of separation is consistent.

34. On the process leading to the separation, it is not in dispute that the Claimant's Commanding Officer disposed of the charges by awarding a surcharge of Kshs 1,770/-, 42 days imprisonment and discharge subject to the approval of the Army Commander.

35. Section 82 of the *Armed Forces Act* provided for the sanctions a Commanding Officer could award against a serviceman on summary trial.

36. In terms of section 82(5) of the Act, if a Commanding Officer made a guilty conviction and was minded to award *a dismissal, reduction in rank or stoppages*, he was under an obligation to ask the serviceman to choose whether he wanted to be tried by a Court Martial.

37. There is nothing on record to show that the Commanding Officer gave the Claimant the option to appear before a Court Martial, considering that he found him guilty, and awarded reduction in rank and discharge.

38. The Court will, however, assume that the Claimant was given the option but declined and chose not to appear before a Court Martial, and therefore the awards or sanctions were only to be subjected to confirmation by the Commander in terms of section 82(5)(b) and 83 of the *Armed Forces Act*.

39. The Court has looked at section 83 of the Act.

40. It provides that where the Commander (as a reviewing authority) reviews an award/sanction to the prejudice of a serviceman, the serviceman ought to be afforded another opportunity to be heard.

41. The Claimant's Commanding Officer awarded a discharge and not a dismissal.

42. The Commander as the reviewing authority varied the discharge into a *dismissal*.

43. There was no suggestion even remotely in the pleadings or witness statements that the Claimant was afforded an opportunity to make representations before the Commander as a reviewing authority before he reviewed and converted the *discharge on services no longer required* into a dismissal.

44. The varying of the award of *discharge* by the Commander as a reviewing authority into a *dismissal* without reference to the Claimant consequently was invalid.

45. The Court, therefore, finds the Claimant separated with the Armed Forces on discharge, *services no longer required* and not on dismissal and that he is entitled to pension and gratuities.

46. In the submissions, the Claimant drew the attention of the Court to the case of *Gift Kambu Marandu v Kenya Defence Forces Council & Ar* (2017) eKLR. The Court finds the decision not helpful as it turned on the application of the provisions of the Kenya Defence Forces Act and not the Armed Forces Act.

Salary in lieu of notice

47. The Claimant did not prove to the required standard that under contract or statute he was entitled to 3 months' pay in lieu of notice in case of *discharge on account of services no longer required*.

Prematurity of Cause

48. The Respondents urged in the submissions that the Claimant had not exhausted the dispute resolution mechanisms established under the Armed Forces (Pensions and Gratuities)(Officers and Servicemen) Regulations, 1989.

49. In the view of the Court, the submission was a red herring as the Respondents contention all along had been that the Claimant had been dismissed and was ineligible for pension, and therefore it was inevitable that the Court determines the question of separation as a foundational issue in the first instance.

Conclusion and Orders

50. The Court finds and declares that the variation of the Commanding Officer's award of *discharge on services no longer required* to a dismissal by the Commander was invalid, and that the Claimant separated with the Armed Forces on account of *discharge services no longer required* and therefore he is entitled to terminal benefits (pension and/or gratuity) which the Respondents should compute and process.

51. The Claimant is awarded

(a) Pension and/or gratuity

(b) Unpaid salaries Kshs 35,580/-

52. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 6th day of December 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Simiyu instructed by L.W. Wangombe and Co. Advocates

For Respondents Ms. Mjomba, Litigation Counsel, Office of the Attorney General

Court Assistant Lindsey