



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.149 OF 2016**

**BETWEEN**

**SPT E STEPHEN ODEDE..... PETITIONER/APPLICANT**

**AND**

**COURT MARTIAL AT KAHAWA GARISSON..... 1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

**Introduction**

1. The Petitioner, Spte Stephen Odede is the accused person at the Court Martial at Kahawa Barracks in **Case No.5 of 2015** where he is facing the charge of desertion contrary to **Section 76** of the **Kenya Defence Forces Act, 2012**. The offence is serious as the sentence may be imprisonment for life if it is proved beyond reasonable doubt.

2. The Petition before me is predicated on the allegation that during his trial, the Petitioner's right to a fair trial was violated by the Court Martial and its decisions have impacted on that right.

**Factual Background**

3. The facts leading to the Petition are largely uncontested save for the events of 10<sup>th</sup> February 2016 as shall become apparent shortly.

4. In any event, the Petitioner's trial commenced on 20<sup>th</sup> January 2015 and on 27<sup>th</sup> October 2015, after all witnesses for the prosecution had been heard, the Judge – Advocate ruled that he had a case to answer. The Defence case was then fixed for hearing on 15<sup>th</sup> January 2016. On that day, his advocate was indisposed and the hearing was adjourned to 10<sup>th</sup> February 2016 but again on that day, Counsel was unable to attend Court but the application for adjournment was declined and the Petitioner was ordered to proceed with his defence case in the absence of his advocate. He stated that that he was unable to do so and the Judge - Advocate proceeded to close the defence case and ordered submissions to be filed on or before 25<sup>th</sup> February 2016.

5. On that day, an oral application to set aside the orders of 10<sup>th</sup> February 2016 was made but the same

was dismissed and the matter adjourned to 31<sup>st</sup> March 2016 to finalise submissions. On that day judgment was fixed for 25<sup>th</sup> April 2016. The present Petition was then filed on 15<sup>th</sup> April 2016 and upon hearing Parties on 25<sup>th</sup> April 2016, this Court, in the interim, stayed the Court Martial proceedings which orders were confirmed upon its Ruling of 6<sup>th</sup> May 2016 pending this judgment.

### **Petitioner's case**

6. The Petitioner's case is set out in the Petition, Affidavit in support and in the submission on record. He has raised issues as set out hereunder.

7. The first issue is that by denying him the opportunity to have his advocate lead him in his defence and by forcing him to defend himself without the opportunity to call witnesses, the Court Martial acted in breach of his right to a fair trial under **Article 50(1) and (2) of the Constitution**. In that regard, he relies on the decision in **Juma & Others v AG (2003) 2 EA 461**.

8. Secondly, that in denying him an adjournment to enable his advocate attend Court, the Court Martial occasioned him a miscarriage of justice and relies on **Peter M. Kariuki v AG Civil Appeal No.79 of 2012** to argue that a court ought to be more circumspect in rejecting any application for adjournment more so in criminal trials.

9. Thirdly, that one of the elements of a fair trial in **Article 50(2) of the Constitution** is the right to adduce evidence in one's defence which right was negated in his case. Reliance for that proposition has been placed in the Supreme Court of India decision in **Kalyani Baskar v Sampornam Criminal Appeal No.1293 of 2006**.

10. Fourthly, the Petitioner has taken issue with one Lt. Col. Catherine Gichuki swearing a Replying Affidavit on behalf of the Court Martial. In his view, as a prosecutor before the Court Martial, the said Lt. Col. Gichuki could not do so because pursuant to **Article 169(1)(c) of the Constitution** as read with **Section 160 of the Kenya Defence Forces Act, 2012**, she could not equate herself to the Judge - Advocate or a member of the Court Martial. In any event, that her conduct aforesaid is a sign of bias and that the Affidavit is also so incurably defective that it must be expunged in totality.

11. On the issue of costs, it is the Petitioner's case that since the filing of the Petition was occasioned by the unlawful conduct of the 1<sup>st</sup> Respondent, it should be condemned to pay costs.

12. To put matters into perspective, these are the specific orders that the Petitioner now seeks:

***"a) An order of declaration declaring that the decision of the Court Martial denying the Petitioner an opportunity to adduce evidence in his defence and closing the Petitioner's case violate the Petitioner's right to be heard and the right to a fair hearing under Article 50 of the Constitution of Kenya; and is therefore null and void.***

***b) All proceedings undertaken and all consequential orders made by the Court Martial denying the Petitioner an adjournment to adduce evidence in his defence and closing the Petitioner's case be set aside and the Petitioner's case be set aside and the Petitioner allowed to adduce evidence in his defence.***

***c) Costs.***

***d) such other orders that the Honourable court shall deem just to grant."***

### **Respondents' case**

13. The Respondents, in opposing the Petition, rely on the Replying Affidavit sworn on 22<sup>nd</sup> April 2016 by Lt. Col. Catherine Gichuki who states that she is a commissioned officer of the Kenya Defence Forces

deployed as Senior Officer 1 Legal at the Kenya Army Headquarters. She also confirms that she is the Lead Prosecutor in the Court Martial sitting at Kahawa Garrison and which is trying the Petitioner.

14. It is her deposition that as of 6<sup>th</sup> May 2015 when the prosecution closed its case having called 7 witnesses, the Petitioner and his advocate, Mr. Peter Kaluma, fully participated in the trial and never once raised any issue as to how it was being conducted.

15. That thereafter, the Judge – Advocate, Hon. Kimingi, was transferred and Hon. Anne Mwangi took over the proceedings as such Judge - Advocate on 22<sup>nd</sup> July 2015. On 14<sup>th</sup> August 2015, 24<sup>th</sup> August 2015 and 14<sup>th</sup> September 2015, the hearing was adjourned to enable the Petitioner’s advocate prepare and file submissions on a no case to answer on behalf of the Petitioner. The said Submissions were only filed on 29<sup>th</sup> September 2015 and upon the Prosecution filing its own submissions on 6<sup>th</sup> October 2015, a Ruling was delivered on 27<sup>th</sup> October 2015 placing the Petitioner on his defence which was to be tendered on 13<sup>th</sup> November 2015. On that day, defence Counsel indicated that he wanted to appeal against the case to answer Ruling and on 2<sup>nd</sup> December 2015 and 19<sup>th</sup> January 2016, Mr. Kaluma was absent save that a Ms Maumo appeared on his behalf and sought to take over the defence case. She was allowed to do so and the matter was adjourned to 10<sup>th</sup> February 2016 the outcome of which I have stated elsewhere above.

16. Further in Lt. Col. Gichuki’s view, the appearances by Counsel for the Petitioner on 16<sup>th</sup> February 2016, 25<sup>th</sup> February 2016, 31<sup>st</sup> March 2016, and 25<sup>th</sup> April 2016 were all matters on record and the refusal by the Judge - Advocate to reopen the defence case was justified in fact and in law. That any inconvenience cause to the Petitioner can only therefore be placed on his and his advocate’s shoulders and not on the Respondents.

17. Relying on the decision in **Bernard Kimathi v R [2013] e KLR**, it is Mr. Moimbo’s submissions on behalf of the Respondents that an adjournment should not be granted as a matter of course and is given at the discretion of the presiding judicial officer. Further, that **Article 159(2)** of the **Constitution** as read with **Section 161** of the **Kenya Armed Forces Act**, require that Justice should be expedited and that unnecessary adjournments are an impediment to the achievement of that expectation of the law.

18. On whether Lt. Col. Gichuki was competent to file any replying affidavit in these proceedings, it is Mr. Moimbo’s submission that the said officer was in the Court Martial at all material times as Lead Prosecutor and is therefore competent to respond to all allegations of procedural impropriety levelled at the said Court.

19. Mr. Moimbo also raised one other issue; whether the Petition is properly before this Court. In his view, under **Sections 186** and **187** the **Kenya Defence Forces Act**, the right of an accused person to approach this Court arises only at the appellate stage and not during on-going proceedings. Relying on the decisions in **Bania Investments Prol Ltd v Capital Markets Authority & Others** (no citation given) and **Rich Products Ltd v Kenya Pipeline Company & Anor [2014] e KLR** to buttress the point that a party must follow mechanisms and processes known to law in ventilating its grievances. To the extent therefore that the Petitioner has approached this Court at this stage, it is Mr. Moimbo’s view that the Petition is misguided and should be dismissed.

20. On costs, he has urged the point that for the reasons above, the Petitioner should bear the costs of the Petition.

### **Determination**

21. Although this matter was really about the exercise of discretion by the Judge - Advocate on 10<sup>th</sup> February 2016 in declining to grant an adjournment to allow the Petitioner’s advocate appear and lead the defence case in **Court Martial Case No.5 of 2015**, it has attracted other matters that would require resolution. The first is whether this Petition was filed prematurely as is Mr. Moimbo’s submission. With

respect, that submission is wholly misguided.

22. I say so because the Petition is premised on **Article 50** of the **Constitution** which grants every accused person the right to a fair hearing and right to a fair trial. In addition to that fact, **Article 165(6)** and **(7)** grants this Court the supervisory jurisdiction over Subordinate Courts and in doing so may call for the record of any of their proceedings and satisfy itself that there has been fair administration of justice. One of the Subordinate Courts is a Court Martial as is provided for under **Article 169(1)(c)** of the **Constitution**.

23. In addition to the above, this Court also has an appellate jurisdiction under **Article 165(3)(e)** and in the instant Petition, **Section 186** of the **Kenya Defence Forces Act** (on appeals to the High Court after convictions by a Court Martial) must be read in that context.

24. Turning back to **Article 50** of the **Constitution**, the High Court has the jurisdiction under **Article 22(1)** as read with **Article 165(3) (b)** to determine whether a fundamental freedom or right has been violated, infringed upon or threatened with violation. In respect of criminal proceedings, it matters not at what stage of such proceedings such a claim may be made.

25. In effect, the submission made that this Petition is premature has no constitutional or any other lawful basis.

26. The second preliminary issue to address is whether Lt. Col. Gichuki had the competence to swear an Affidavit in response to the Petition. I propose to spend little with this issue because it is not contested that she is the Lead Prosecutor in the Petitioner's trial and from the Petition, the events of 10<sup>th</sup> February 2016 and related matters are at the heart of the Petition. What is prejudicial about her narration of those events to counter the Petitioner's own evidence? I see none whatsoever and the Petitioner has made a mountain out of a mole hill by arguing that Lt. Col Gichuki has turned herself into a Judge in the Court Martial proceedings. The Petitioner's attack on the Replying Affidavit with respect is flippant and shall be disregarded in the determination of the Petition.

27. Having disposed of the two issues that I consider to be preliminary, I should not turn to the main issue for determination; whether the right to a fair trial was violated in circumstances that I have already set out.

28. In that regard, **Article 50(1)** and **(2)** grant every person and specifically accused persons the right to a fair trial and fair hearing in very clear terms and they include the following rights;

- i. To have adequate time and facilities to prepare a defence – **Article 50(2) (c)**
- ii. To choose, and be represented, by and advocate, and to be informed of this right promptly – **Article 50(2)(g)**
- iii. To adduce and challenge evidence – **Article 50(2)(k)**

29. In addressing the import of the above rights, in **Juma & Others v AG (supra)**, the High Court stated as follows, although it was interpreting similar rights in the Repealed Constitution (but which I consider relevant in all regards as the rights were the same):-

***“He [an accused person] should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.”***

30. Further, in **Ms. Kalyani Baskar (supra)** the Supreme Court of India stated thus;

***“The appellant cannot be convicted without an opportunity being given to her to present her***

*evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them."*

31. Without belabouring the point, the right to a fair hearing and fair trial should not be unduly impeded and a trial Court must be circumspect in purporting to limit or take away such a crucial right more so when in fact, **Article 25(c)** of the **Constitution** specifically provides that there should never be a derogation to the right of a fair trial.

32. In that regard, the Court Martial may well have felt exasperated that on two previous occasions, the Counsel for the Petitioner, Mr. Kaluma, did not turn up and that Ms. Maumo who appeared for him was vague as to whether she was holding his brief or taking up the brief as Counsel. To my mind, whatever the misconduct or mistake (if at all) on the part of both Mr. Kalume and Mrs. Maumo, the Petitioner should not have been forced to proceed, without preparation, for his defence case.

33. I have, in stating the above, refused to delve into the question whether an adjournment on 10<sup>th</sup> February 2016 was warranted or not. I have simply stated that derogation from a fundamental right in the nature of a fair trial could not have been done by an independent, impartial Court, properly applying its mind to the facts before it and the Constitution.

34. In the circumstances, it is my finding that the conduct and decision of the Court Martial on 10<sup>th</sup> February 2016 and thereafter was a violation of **Article 50** of the **Constitution**.

### **Conclusion**

35. In this and other Petitions before this Court arising from Court Martial Proceedings, the Respondents have over relied on **Article 24(5)** of the **Constitution** to argue that the rights of military personnel facing criminal charges can be curtailed at will. That is a misreading of **Article 24** which does not take away rights but merely limits those rights as has been done by provisions in the **Kenya Defence Forces Act** including **Sections 43** and **54** thereof. The non-derogable rights cannot in any circumstance be limited even with those provisions being firmly in our laws.

### **Disposition**

36. Having held as above, the proper orders to make are that the Petition herein is allowed in the following terms;

*a) An order of declaration is hereby issued declaring that the decision of the Court Martial denying the Petitioner an opportunity to adduce evidence in his defence and closing the Petitioner's case violate the Petitioner's right to be heard and the right to a fair hearing under Article 50 of the Constitution of Kenya; and is therefore null and void.*

*b) All proceedings undertaken and all consequential orders made by the Court Martial denying the Petitioner an adjournment to adduce evidence in his defence and closing the Petitioner's case be set aside and the Petitioner allowed to adduce evidence in his defence.*

*c) Let each Party bear its own costs.*

37. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2016**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2016**

**EDWARD MURIITHI**

**JUDGE**

**In the presence of:**

Victor – Court clerk

Mr. Moimbo for Miss Maumo for the Petitioner

Capt. Kiilu for Lt. Cl. Gichuki for 1<sup>st</sup> Respondent

Mr. Ogemo for 2<sup>nd</sup> Respondent

**Court**

Judgment delivered.

**EDWARD MURIITHI**

**JUDGE**