REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 235 OF 2014

SAMUEL SABUNI ……..……....1ST PETITIONER

JACKSON MUNGAI…….....2ND PETITIONER

SAMUEL M MURIUKI ……..……....3RD PETITIONER

VERSUS

COURT MARTIAL…….....1ST RESPONDENT

CABINET SECRETARY FOR DEFENCE……...…..2ND RESPONDENT

PRINCIPAL SECRETARY FOR DEFENCE….....3RD RESPONDENT

CHIEF OF DEFENCE FORCES …….....….4TH RESPONDENT

BRIDADIER K. O DINDI…….....5TH RESPONDENT

LT.COLONEL NJUGUNA…….....……6TH RESPONDENT

CAPTAIN S.C.YATOR…….....…7TH RESPONDENT

HON. ATTORNEY GENERAL …….....8TH RESPONDENT

LT YVONNE KERUBO KIRUI …….....……9TH RESPONDENT

JUDGMENT

Introduction

1. This petition concerns the alleged violation of the petitioners' rights following their arrest and prosecution in a court martial for allegedly absenting themselves from their duties without leave. The petitioners challenge both the composition of and the proceedings before the court martial. They allege that they were held for periods that violated the Constitution and they also challenge the constitution of the court martial.

2. The respondents oppose the petition. Their case is that the petition discloses no violation of constitutional rights, and that the proceedings before the court martial were proper and were conducted in accordance with the law and the relevant provisions of the Kenya Defence Forces Act.

The Parties

3. The petitioners, Samuel Sabuni, Jackson Mungai and Samuel M. Muriuki describe themselves as male Kenyan citizens who have all worked for the Kenya Defence Forces for various years. On 17th November 2013, the 1st petitioner was arrested for the offence of absenting himself without leave. He was eventually arraigned before a court martial on 23rd December 2013. At the end of the court martial, he was convicted and sentenced to serve one and a half years. As at the time of the filing of this petition, the 2nd and 3rd respondents also had pending proceedings before the court martial where they were charged with being absent without leave.

The Case for the Petitioners

4. By way of the petition dated 16th May 2014, the petitioners seek the following orders:

> ***a) A declaration that the prosecution and sentence of the 1st petitioner was illegal and therefore null and void;***
>
> ***b) A declaration that Brigadier K. O Dindis is not qualified to prosecute cases in the Court Martial therefore he does not have powers which he can delegate;***
>
> ***c) A declaration that the petitioners be compensated by the respondents for violation of their fundamental rights***;
>
> ***d) A declaration that the convener of the Court Martial under section 163 of the KDF Act 2012 is incompetent and that section 163 is unconstitutional.***
>
> ***e) A declaration that any Court Martial convened by Lieutenant Colonel Yvonne Kerubo Kirui as the Defence Court Administrator is unconstitutional;***
>
> ***f) An order for costs for the petitioners***

5. The petition is supported by three affidavits in support, sworn by each of the petitioners, which are essentially in the same terms. In his affidavit, the 1st petitioner contends that before he was arraigned before the court martial, he was placed under closed custody for about 30 days and thereafter, he was kept at the Moi Airbase from the 24th December 2013 to the 20th March 2014. He also faults the competence of the court martial. He alleges that the court martial was improperly constituted because his prosecution was conducted under the office of Brigadier K. O Dindi, the 5th respondent herein, who was at the time holding two offices contrary to the provisions of section 213 (6) of the Kenya Defence Forces Act.

6. The 1st petitioner also claims to have raised this issue before the court martial, but received an unfavourable ruling because, in his opinion, the court martial was not willing to interrogate the matter. He also took issue with the composition of the court martial, alleging that it was improper as there was no officer of his equivalent rank, and that the convener of the court martial was not an employee of the judiciary.

7. The 1st petitioner further contends that before the commencement of his prosecution, he took up the issue of the jurisdiction and the competence of the court to proceed, but the matter was improperly handled by the court. He maintains that due to the deficiencies, the subsequent proceedings were a nullity in law, and therefore urges this Court to quash them. He further argues that his constitutional rights were violated as he was detained for a longer period than is allowed in law.

8. With regard to the proceedings against him for being absent without leave, the petitioner alleges that he was employed on a contractual basis and that there was no intention to renew his contract, and it is therefore his contention that he should not have been subjected to a court martial. He further alleges that after the expiry of his contract, he never applied for a renewal of the contract as he did not have any intention to continue in military service, and he thus wondered when he was re-engaged into the services of the Kenya Defence Forces.

9. The 1st petitioner further contends that his re-engagement was unlawful as he neither appeared before his commander nor did he appear before a service doctor for the purpose of a medical examination.

10. The 1st petitioner further faulted the procedure of the court martial for relying on rules that he alleges were, at the time of the court martial, no longer in force. He asks that the prosecution be declared null and void.

11. The 2nd and 3rd petitioners' cases are that they too were arrested and charged in a court martial for being absent without leave. They contend that before their being charged in court, they were held in custody for more than 8 days without any special report, which is required under section 143 of the Act, being availed. The 2nd and 3rd petitioners also allege that the court martial was improperly constituted and that there are no rules of procedure in place. They also invite this court to pronounce itself on the jurisdiction of the court martial, stating that the court martial as constituted is not the one envisioned under Article 169 of the Constitution.

12. The petitioners also filed submissions which were highlighted by their Learned Counsel, Mr. Were. It was his submission, first, that the Constitution is violated in the manner in which court martials are convened, which is in violation of Article 48 of the Constitution. This is because court martials are convened in protected areas where other members of the public cannot access.

13. In addition, Mr. Were submitted that the 1st petitioner did not receive a fair trial under Article 50 of the Constitution, and that the 2nd and 3rd petitioners are in danger of suffering the same fate. The petitioners contend that the court martial as established and managed and operated under the Kenya Defence Forces Act is unconstitutional as it is convened by the District Court Martial Administration, the 9th Respondent, who is not an employee of the Judicial Service Commission. They submit that as she is an employee of the Kenya Defence Forces, she is a part of the Executive and as such, the court is not independent and impartial.

14. The petitioners further submit that the 1st petitioner suffered discrimination while in service in the Kenya Defence Forces as there were senior officers who worked to frustrate him. Mr. Were submitted that prior to the expiry of the 1st petitioner's engagement, he had written letters of discharge, but that his letters were never acted upon. Mr. Were submitted that the petitioner had mentioned this fact during the court martial; that the Deputy Commander of the Kenya Air Force was interfering in his martial life, and he was subjected to victimization, ill treatment and discrimination which led him to be evicted from his staff quarters at the Laikipia Air Base while he was on official duty. It was Mr. Were's submission therefore that the 1st petitioner's right to dignity under Article 28 of the Constitution was violated.

15. The petitioners also submit that the provisions of the Kenya Defence Forces Act were not applicable to the 1st petitioner, who was alleged to have deserted on the 7th November 2013. Mr. Were reiterated, as averred by the 1st petitioner, that at the time of his alleged desertion, he had already given a notice requesting a discharge from military service; and that in the intervening period, he was not an employee of the KDF and therefore was not subject to the Act. It is therefore the petitioners' submission that as a result, the 1st petitioner could not have been amenable to the charge of being absent without leave and neither would the court martial have the jurisdiction to try him. Counsel urged the Court to find that even though some of constitutional rights can be limited in accordance with Article 24 of the Constitution, the limitation should not be effected in such a manner as to deny those rights.

16. The petitioners further argue that the entire prosecution of the 1st petitioner was flawed. They submit that there was a breach of section 213(6) of the KDF Act which provides that the office of the Director of Military Prosecution (DMP) shall be separate from the Legal Department; that in the instant case, the Director of Military Prosecutions was from the same office as the Legal Department of the Defence Forces; that Brigadier Dindi, the 5th respondent, who is the Director of Military Prosecutions, should not have prosecuted him as he had no authority to do so, and as such could not delegate the prosecution to the 6th and 7th respondents.

The Case for the Respondents

17. The respondents oppose the petition and relied on the affidavit of Lt. Yvonne Kerubo Kirui, the 9th respondent, who is the Defence Court Martial Administrator. The 9th respondent denied that the constitutional rights of the petitioners were ever violated, stating that in each of their cases, the incarceration was for the period that is allowed in law as it did not exceed 42 days which is prescribed by section 140 of the Kenya Defence Forces Act. They contend further that the appropriate reports envisaged under section 140 of the Kenya Defence Forces Act were provided to their units and to the service headquarters.

18. The 9th respondent avers that she saw no fault in the conduct of the prosecution and the court martial in general. She stated that the court martial had jurisdiction over the 1st petitioner since, as at the time he committed the offence, he had been re-engaged in the defence forces and his run out date was 17th July 2015. He was therefore subject to the Kenya Defence Forces Act at the time of his trial.

19. The 9th respondent further averred that while section 213(6) of the Kenya Defence Forces Act provides that the office of the Director of Military Prosecutions (DMP) shall be a separate office from that of the Legal Department in the Defence Forces or in the Ministry of Defence, Section 214 of the same Act provides that the powers of the DMP to prosecute may be exercised by legal officers appointed by the Defence Council and acting under the direction of the DMP.

20. In the present case, according to the 9th respondent, there was no evidence to show that the 5th respondent holds the position of Chief of Legal Services as alleged by the petitioners; and that when the issue was raised before the court martial, it was done after the close of both the prosecution and defence cases and was done by way of uncertified copies of a letter purporting to be appointment letters of the 5th and 7th respondents to other positions. It was her deposition that the court martial properly ruled that the attempt to introduce the letter was contrary to procedure.

21. The respondents argue, in the alternative, that the Kenya Defence Forces Act does not preclude the Director of Military Prosecutions from holding any other appointment or assignment in the Defence Forces, and that as long as the roles under both offices are considered and executed separately, holding of the two offices by one person would be perfectly within the law. The 9th respondent averred that in any event, no prejudice was suffered by the 1st petitioner since the 5th respondent did not lead any evidence against the accused persons; that the people who directly participated in the prosecution of the petitioner were the 6th and 7th respondents, who are commissioned officers and advocates of the High Court working under the 5th respondent, and as such are competent to carry out the prosecutions.

22. The respondents contend further that contrary to the allegation by the 1st petitioner, there is no requirement under the Kenya Defence Forces Act that the court martial be convened by a member of the Judiciary. Under section 163(1) of the Kenya Defence Forces Act, a court martial can either be convened by the Defence Court Martial Administrator or the Service Court Martial Administrator, and in the case of the petitioners, the court martial was convened by the 9th respondent who is the duly appointed Defence Court Martial Administrator.

23. The respondents further argue that the allegations made by the 1st petitioner that he had requested a

discharge from service are untrue, and that he raised this issue during the court martial, as he did the allegations that his superior was interfering with his married life. According to the 9th respondent, even if these allegations were true, there is a mechanism for redress in the military service, but the 1st petitioner never sought redress.

24. The 9th respondent avers that the offences with which the petitioners are charged are serious and their commanding officers, upon satisfying themselves of the seriousness of the offences, referred the cases to the Director of Military Prosecution for trial by court martial, which was within the provisions of section 152 and 156(1)(c) of the Kenya Defence Forces Act. In the premises, the 9th respondent considers that the trial of the petitioners by court martial is within the law and there is no malice, illegality, oppression, or abuse of the due process as alleged or at all. According to the respondents, there was sufficient evidence, including documentary evidence, to show that the petitioners committed the offences they were charged with.

25. With respect to the complaint by the 1st petitioner of being confined at the Kamiti Maximum Security Prison by his Commanding Officer, the respondents argue that there is nothing wrong with such confinement since section 202 of the Kenya Defence Forces Act mandated the Commanding Officer to commit the 1st petitioner to civil prison to serve his sentence. The 9th respondent avers that once the sentence has been passed by the court martial, it is the responsibility of the Commanding Officer and not the Judge Advocate to cause the convict to be delivered to civil prison.

26. To the petitioners' contention that there are no rules of procedure in place, the respondents averred that on the contrary, there were in fact such rules in place. The 9th respondent averred that the 1st petitioner was tried under the Kenya Defence Forces Act and the rules that applied are the rules under the Armed Forces Act, Cap 199 (Repealed) as provided for in section 7 of the 6th Schedule to the Constitution of Kenya 2010, as well as the General Provisions and Interpretation Act, Cap 2 of the Laws of Kenya and section 310(2) of the Kenya Defence Forces Act. It was also her averment that on the first day of the proceedings, upon consideration of argument made by both defence and prosecution with respect to the rules, the Judge Advocate ruled that the said rules applied with necessary modifications to give effect to the Constitution and the Kenya Defence Forces Act.

27. It is the respondents' case that the court martial was properly constituted in accordance with section 160 of the Kenya Defence Forces Act since the threshold requiring at least the lowest ranking military officer to sit in the panel trying a service member was fulfilled; that Second Lieutenant YC Daimoi (21603) was a member of the court martial and thus section 160(3)(b) of the Kenya Defence Forces Act was complied with. The respondents summed up by stating that the 1st petitioner had a right of appeal against the decision of the court martial, and that despite being supplied with typed record of proceedings within the appeal period, the 1st petitioner did not file any appeal and as such the decision of the court martial was not challenged. The respondents therefore asked the court to dismiss the petition and allow the 1st petitioner to serve his term, and that the Court should also permit the prosecution of the 2nd and 3rd petitioners.

28. In the written submissions dated 5th September 2014 which were highlighted by Learned Counsel, Mr. Kamunya, the respondents submit that all the issues raised in this petition are issues of appeal which this Court does not have jurisdiction to consider. Counsel submitted that even though the petitioners have claimed that they were discriminated against, they did not elaborate in what manner. He submitted that the petitioners received a fair trial, and a breach of Article 50 of the Constitution cannot be imputed simply because the petitioner was tried by a court martial and not in a summary manner. Counsel submitted that in view of the fact that the offences that the petitioners were charged with were serious, there was no question of electing whether or not to be tried by a court martial as section 75(2) is clear that it should be by a court martial.

29. With respect to the allegations regarding the positions held by the 5th respondent, Counsel submitted that there is no evidence before the Court that the 5th respondent held any other position other than that of

Director of Military Prosecution. In any event, according to the respondents, a clear reading of section 213(6) of the Act shows that the office of the DMP is required to be separate from the office of the Legal Department of the forces and of the Ministry of Defence but that this does not mean that the prosecution was incompetent as the 5th respondent is allowed by section 214 of the KDF Act to delegate his prosecutorial role, which he did for the purpose of the court martial, and as such, the petitioners did not suffer any prejudice.

30. With respect to the allegation that the 1st petitioner had been discharged from service, the respondents submit that this was not the case; that the 1st petitioner had not been discharged from service when he went absent without leave; that section 257 of the Kenya Defence Forces Act provides for the manner of discharge of a service member, and the petitioner had not shown any evidence that he had a certificate of discharge as proof that he was no longer in the military service.

31. Counsel further reiterated that none of the petitioners was detained unlawfully as none of them was held for more than the 42 days that is prescribed by section 140 of the KDF Act. It is the respondents' case that the 1st petitioner was held for ten days and a special report was made by the Unit Commanding Officers as required by section 140 (2) of the Act. The respondents submit that this issue was canvassed before the court martial and the judge advocate held that if there was indeed a detention for a longer period than allowed by the Act, then the remedy would be in damages.

32. The respondents further submit that contrary to the petitioners' submissions, the members appointed by the 9th respondent are not an extension of the executive arm of government, as the act provides that the Chief Justice will appoint a magistrate or an advocate of ten years standing who becomes the presiding officer, or judge advocate, whose duties are outlined in sections 160, 165 and 175 of the Act. As such, the members appointed by the Defence Court Martial Administrator do not perform any material role in the court martial proceedings. They submit that under section 163 (3), these members only offer administrative roles, akin to those of Deputy Registrars in the High Court.

33. In the respondents' view, the complaints raised by the petitioners in this petition were all handled by the court martial, and the 1st petitioner in particular had statutory procedures available to him yet he did not make use of them. The respondents therefore consider that the petitioners are improperly invoking this Court's jurisdiction under Article 22 of the Constitution instead of appealing the decision of the court martial under section 186 of the Act, and as such this Court cannot have jurisdiction to sit on appeal from the decision of the court martial.

Issues for Determination

34. Having considered the pleadings and submissions of the parties which I have set out in brief above, it is my view that this matter raises the following issues for determination:

i. W*hether the petition is defective for failure to precisely describe the constitutional violations.*

ii. Whether there has been a violation of the petitioners' constitutional rights

Whether the Petition is Defective

35. The respondents have argued that the petitioners have failed to precisely describe how their constitutional rights and freedoms have been violated, or how they are threatened. They therefore submit that the petition does not meet the required standard set by the court in **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272** and **Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others *(2013) eKLR* (Civil Appeal 290 of 2012).**

36. While it is true that it behoves the petitioner to set out his claim with a reasonable degree of precision, a failure to describe the threatened breaches, of itself, would not make the petition defective. In **Central Organization of Trade Unions (K) vs Cabinet Secretary, Ministry of Labour Social Security &**

Services & 2 Others ***[2014] eKLR*** **(Miscellaneous Application No. 21 of 2014)** the Court stated as follows:

> ***"[20] With respect to the need to state with precision the provision of the Constitution alleged to have been breached, it is my view that the case of Anarita Karimi (Njeru), though still relevant, ought to be read with the provisions of the current Constitution in mind. Under Article 22(3) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings relating to the Bill of Rights which rules are required to satisfy inter alia the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation."***

37. In the present case, the petitioners have categorically stated what rights they consider to have been violated. They allege violation of Articles 48 and 50 which guarantee to all the right of access to justice and a fair trial. They have also sought to demonstrate how the alleged violations have occurred by alleging that the convening of a court martial and the procedure before the court martial violated the rights guaranteed under these two provisions. In the circumstances, in my view, the challenge under this head must fail, and the first issue must be resolved in favour of the petitioners.

Whether there has been a violation of the Petitioners' Constitutional Rights

38. The petitioners allege violation of Article 48 of the Constitution which safeguards the right to access justice in the following terms:

> ***48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.***

39. Black's Law Dictionary, Gardner, Ed. (9th Edition) defines access to justice as

> ***"The ability within a society to use courts and other legal institutions effectively to protect one's rights and pursue claims."***

40. I understand the petitioners to argue that due to the fact that court martials, as well as the administrative setup for court martials, are found within the Army Barracks' precincts, where gaining physical access is difficult, then the right to access justice as enshrined in Article 48 of the Constitution is threatened. I have considered this position in light of the relevant provisions of the Kenya Defence Forces (KDF) Act. Section 162 of the Act provides for the sittings of the court martial, and section 162 (1) provides that ***"The court-martial may sit in any place, whether within or outside the Republic of Kenya."*** It is this provision of the Act that the petitioners now ask the court to declare unconstitutional.

41. It is a cardinal principle of statutory construction that first, provisions that protect fundamental human rights must be interpreted in a liberal manner and second, that enacted legislation is always presumed to be constitutional, and the onus is on the person challenging the enactment to show in what manner it breaches the constitution. See **Ndyanabo vs Attorney General [2001] EA 495** at para 20 where the Court stated that:

> ***[20]Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the***

constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction. (Emphasis added)

42. In determining whether or not a provision of law is at par with the Constitution, the duty of the court is limited to laying "***the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question."*** See **U.S vs Butler, 297 U.S. 1 [1936]**

43. In addition, the court must also consider not only the object that the enactment was intended to achieve, but also the effect that it has had. See **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others Petitions Nos. 628 & 630 of 204 and 12 of 2015 (unreported)** in which the following passage from the Supreme Court of Canada decision in **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** is quoted:

> ***"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."***

44. I am not convinced that the fact that the court martial is held within the barracks precincts would amount to a violation of Article 48. One factor that informs my thinking is that the courts martial are enjoined to follow all the guiding principles of the Constitution. Section 161 of the KDF Act provides that:

> ***"In addition to other principles and values provided for in the Constitution, the court-martial shall, in the exercise of its powers and discharge of its functions, be guided by the principles provided for under Article 159(2) of the Constitution."***

45. Secondly, it is clear that courts martial are only intended to try accused persons who are members of the Defence Forces and therefore would fall under the ambit of the Act under such membership as provided in section 4 of the Act, or a civilian who has provided his consent in writing that the provisions of the Act are applicable to him, as provided for in section 5 of the Act. As such, the issue of access to the physical place in which the court martial is held does not arise.

46. In the instant case, the petitioners all admit to being service members of the Kenya Defence Forces. They were therefore subject to the Act. While the 1st petitioner claims that he had, at the time of his arrest, already served out his time, he also states that his discharge was not processed by his superiors. Section 257 (1) of the Act states that ***"every service member becoming entitled or liable to be discharged shall be discharged immediately but shall, until discharged, remain subject to this Act."*** He did not have his certificate of discharge as required by section 257 (4) of the Act, and as such, the court martial had the authority pursuant to section 162 (3) to ***"try any person subject to this Act for any offence under [the] Act, and to award any punishment provided for by [the] Act for that offence."***

47. Having found that the 1st petitioner was properly subjected to the court martial, I now turn to consider whether or not the court martial as constituted and the subsequent proceedings were rendered in such a manner as to deny the petitioners a right to a fair trial under Article 50 of the Constitution.

48. The right to a fair trial, defined in **Black's Law Dictionary 9th Edition,** as ***"a trial by an impartial and disinterested tribunal in accordance with regular procedures"*** is a cardinal aspect of the right to access to justice. Article 50 of the Constitution provides for this right as follows:

> ***"50.(1) Every person has the right to have any dispute that can be resolved by the application of***

law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, ….”

(d) to a public trial before a court established under this Constitution;”

49. A fair trial is before a court that is properly constituted, and must be free from the control and influence of the executive. As was stated in **Oló Bahamonde v. Equatorial Guinea, Communication No. *468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993) Communication No. 468/1991:***

“The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.”

50. The petitioners’ contention is that the court martial was not properly constituted as it did not accord with the provisions of the Constitution. Article 169 provides for the court martial as a subordinate court in the following terms:

169. (1) The subordinate courts are—

(a) the Magistrates courts;

(b) the Kadhis’ courts;

(c) the Courts Martial;

51. The constitution of the court martial is provided for under section 160 of the Kenya Defence Forces Act which provides that:

“160. Constitution of the courts martial (1) In the case of any proceedings, the courts martial established under Article 169 of the Constitution shall consist of—

(a) a Judge Advocate, appointed under section 165, who shall be the presiding officer;

(b)at least five other members, appointed by the Defence Court-martial Administrator if an officer is being tried; and

(c) not less than three other members in any other case.

(2) The members of the court-martial shall be officers so qualified and not ineligible in accordance with section 164.

(3) At least one of the members provided for in subsection (1) shall be—

(a) of equivalent rank as the accused person where the accused person is an officer; and

(b) the lowest ranking officer in the Defence Forces where the accused person is a service member.

(4) The Chief Justice may make rules generally to regulate the administration and proceedings of the courts martial.”

52. I have considered the material before me against the provisions of sections 160 and 161 above, and I can find no evidence that the court martial was unprocedurally constituted. Similarly, while it was alleged

that the fact that the Defence Council, comprising the 2nd, 3rd and 4th respondents, ought not to have convened the court martial, there was no evidence it did; the evidence on record points to the 9th respondent as convening the courts martial before which the petitioners were charged, and this is a function of her office under section 163 (1) and (2) of the Act.

53. The petitioners also allege that they did not receive fair trials as provided for under Article 50 because they were detained for a period that is longer than allowed in law, without any reports being made to their units. Article 49 (f) of the Constitution requires that all arrested person be presented before a court of law within 24 hours of arrest in the following terms:

> ***An arrested person has the right—***
>
> ***(f) "to be brought before a court as soon as reasonably possible, but not later than—***
>
> ***(i) twenty-four hours after being arrested; or***
>
> ***(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.***

54. The rights of arrested persons are considered to be concomitant with the right to fair trial because

> ***"The right to fair trial begins the moment the criminal process is initiated; and the criminal process is initiated at the point at which the coercive power of the State, in the form of an arrest, is exercised against a suspect."***
>
> See **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 Others (supra)**

55. In the context of the armed forces however, the rights under Article 49, which can be limited in terms of the provisions of Article 24, are limited in respect of persons serving in the Kenya Defence Forces in accordance with the provisions of the Kenya Defence Forces Act which provides at section 54 (2) and (3) as follows;

> ***"(2) Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of the right of an arrested person in so far as the Act permits—***
>
> ***(a) the holding of an arrested person jointly with the persons serving a sentence;***
>
> ***(b) the holding of an arrested person without bail; or***
>
> ***(c) the holding of an arrested person in custody notwithstanding that the offence is punishable by a fine only or imprisonment for a term not exceeding six months.***
>
> ***(3) An accused person shall not be held in custody for more than eight days before he or she is arraigned before a commanding officer or a court-martial unless the commanding officer, for reasons to be recorded in writing, is satisfied that the continued arrest of the accused person is necessary.***
>
> ***(4) The commanding officer shall review his or her decision in subsection (3) after the lapse of eight days until the accused person is brought before a commanding officer or a court-martial."***

56. These provisions of law suggest that an accused person may be held for as long as is necessary, in the Commanding Officer's view, before he is arraigned in court. The Commanding Officer is thereafter to review his decision every eight days until the accused is arraigned and charged. However, these provisions are to be read with section 140 of the Act which provides that:

"(2) Where a person who is subject to this Act remains in custody for eight days without being tried by a court-martial or dealt with summarily—

(a) a special report on the necessity for further delay shall be made by the person's commanding officer to the Service Commander in the prescribed manner; and

(b) a similar report shall be made to the Service Commander in the prescribed manner every eight days until a court-martial sits or the offence is dealt with summarily or the person is released from arrest."

57. However, a failure to make the reports as required would not, as the petitioners contend, entitle them either to an acquittal or to a nullification of the subsequent proceedings. The Court of Appeal in ***Musembi Kuli v Republic [2013] eKLR (Criminal Appeal 248 of 2009)*** stated that:

"Criminal culpability or liability is an offence committed against civil order or an individual, therefore delay committed by indolent or inattentive police officers cannot vitiate a proper charge/s attributed to an individual. As a Court we have to undertake a balancing exercise in terms of public right and individual liberty when addressing delay/detention caused before a person is brought to court. We are not advocating for a blanket or prolonged detention by police officers but what we are saying is that delay or detention cannot lead to an automatic acquittal or release. We think the accused has a cardinal duty to raise the delay at the earliest opportunity, so that the court could satisfy itself from all the surrounding circumstances, and make an informed view based on the scales of justice. Once a trial begins and results in a conviction, there is need to separate the two issues, as the conviction is an accrued public right while the delay is an unproven factual issue. We therefore think that it is preposterous to submit that delay is an automatic answer or defence to a conviction. If that were to obtain, the administration of justice would be prone to abuse and manipulation.

The violation of the right to be brought to court within the constitutional time limits cannot lead to a conclusion that the entire trial becomes a nullity as counsel tried to persuade us. Such a conclusion is not to be found in the constitutional text itself and nor can a logical and practical approach to the issue permit it. The violation of the right if proved can only found an action for damages." (Emphasis added)

58. I fully agree with the sentiments of the court set out above.

59. The petitioners have also alleged violation of their rights on the basis that they were prosecuted by a person who held several roles. It is indeed correct that the KDF Act provides that the office of the Director of Military Prosecutions shall be a separate office from that of the Legal Department in the Defence Forces or Ministry. However, upon a consideration of the material before me, it is evident that there was no prejudice suffered by the 1st petitioner or likely to be suffered by the 2nd and 3rd petitioners. Further, in the absence of any evidence that the Director of Military Prosecutions held two offices, the court has no basis to find the prosecution of the petitioners to be improper.

60. The 1st petitioner has also made allegations concerning alleged interference in his marriage and alleged discrimination, but the factual issues regarding his marriage, which he alleges led to his having an unfair trial, are matters of fact which are best handled at appeal, a procedure that is well provided for under Part X of the Act. In the words of Makhandia, J (as he was then) in **Peter Ochara Anam & 3 Others vs Constituencies Development Fund Board & 3 Others** ***[2011] eKLR (Constitutional Petition No. 3 of 2010):***

"It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose." (Emphasis added)

61. In that decision, the court adopted the sentiments of the Privy Council in **Harrikisoon –vs- Attorney General [1980] AC 265** where the Privy Council held that:

> ***"…The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individuals by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action…".***

62. I would agree and add that in the instant case, the appropriate remedy for the petitioners as regards the outcome of the respective proceedings against them do not require the Court to make a determination that their constitutional rights were infringed or threatened. In the circumstances the Court finds no merit in the petition, and it is therefore dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 6th day of May 2015

MUMBI NGUGI

JUDGE

Mr Were instructed by the firm of Odera Were & Co. Advocate for the petitioners

Mr. Njoroge instructed by the State Law Office for the respondent