



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 23 OF 2014**

**IN THE MATTER OF: CONSTITUTIONAL PETITION BROUGHT PURSUANT TO  
ARTICLES 22, 23, 165, 93(B) & 258 OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLE 40(2) AND (3) OF THE CONSTITUTION REGARDING THE RIGHT TO  
PROPERTY**

**AND**

**IN THE MATTER OF: THE PRINCIPAL LEGITIMATE EXPECTATION AND ALL OTHER  
ENABLING PROVISIONS OF THE CONSTITUTION**

**BETWEEN**

**CASSIAN NGOTHO MWACHANYA.....PETITIONER**

**VERSUS**

**1. THE COMMANDING OFFICER KENYA NAVY**

**2. HON. ATTORNEY-GENERAL .....RESPONDENTS**

**JUGMENT**

1. In his Petition dated and filed on 2<sup>nd</sup> May, 2014 the Petitioner claims the following orders -

- (a) A declaration that the failure of the First Respondent to compensate the Petitioner of the education costs incurred by the Petitioner while a member of the Kenya Navy is a breach of the Petitioner's rights and freedoms as enshrined in Article 40 of the Constitution;
- (b) General damages;
- (c) The costs of the Petition

2. The Petition was supported by the Affidavit of the Petitioner sworn on 2<sup>nd</sup> May, 2015, the grounds on

the face of the Petition, the Petitioner's counsel's written submissions dated and filed on 19<sup>th</sup> August, 2015.

3. The Petition was however opposed by the Respondent through the Replying Affidavit of the Lieutenant Colonel Joseph Karbuali Kosen sworn on 9<sup>th</sup> February, 2015, and filed on 16<sup>th</sup> February, 2015.

4. The facts are not disputed. The Petitioner was recruited to the Kenya Defence Forces in the year 1984 and was posted to the Kenya Navy as a Pay Clerk, a trade the Petitioner **“mastered up to class one”**. The Petitioner was granted time to pursue a Biblical and Religious Studies Course at Daystar University, but was recalled later in 2010 due to exigencies of the service.

5. However, because the Petitioner was keen on his studies, he voluntarily opted to sponsor himself for evening classes, but without obtaining clearance from his Commanding Officer in accordance with the **Armed Forces Continuing Education Programme**, before also taking a loan for his studies. For the same reason a request to attach the Petitioner to the Armed Forces Memorial Hospital for his practical training in Psychology was also turned down. It was irregularly presented without reference to the chain of command.

6. Consequently, the Petitioner requested to be discharged from the Armed Forces to pursue a full-time course in Biblical and Religious Studies. The Petitioner's request was approved, and he was discharged on 21<sup>st</sup> December, 2007. At the time he was discharged he had an outstanding loan of Shs. 1,558,439.05 which sum was deducted from his terminal benefits. The Respondents deny being liable to refund the Petitioner the said sum under its Armed Forces Continuing Education Programme.

7. The Petitioner's counsel raised two issues in his submissions. **Firstly**, whether the Petitioner's retirement was done on his own free will or under duress. **Secondly**, whether there were violations of the Petitioner's constitutional rights and freedoms.

8. On the first question, whether the Petitioner retired voluntarily or under duress the evidence and circumstances are clear. The Petitioner applied in writing to be discharged from the Armed Forces. The Armed Forces needed his services. The Petitioner felt he had a calling to Biblical and Religious Studies. He opted for what his heart and mind both desired. I discern no element of coercion to resign. I see no basis for that claim.

9. On whether there were violations of the Petitioner's rights and freedoms, the Petition refers to violation of the Petitioner's right to property contrary to Article 40(1) of the Constitution, and the right to information under Article 35(c) of the Constitution.

10. The right to information under Article 35 (c), sought by the Petitioner from the Respondent is in respect of information he already had, namely that once he had been recalled to the service, the Armed Forces Continuing Education Programme ceased to apply to him.

11. On the question whether the sum of Shs. 1,55,439.05 which was recovered from terminal benefits was “property” within the provisions of Article 40(1) of the Constitution, the answer is found in the definition of property contained in Article 260 of the Constitution –

**“Property” includes any vested or contingent right to, or interest in, or arising from –**

**(a)– (c),**

**(d) money, choses in action or negotiable instruments.”**

12. The sum in question (Shs. 1,558,439.05) was “property” of the Petitioner. The only question was whether the money or property was lawfully recovered by the Respondent.

13. The sum in question were proceeds of a loan which the Petitioner had borrowed from the Kenya

Commercial Bank Limited and which the Petitioner had been repaying through the check-off pay system which had been agreed to and guaranteed by the Petitioner under the check-off pay system. Once the Petitioner had left the employment with the Respondent, his salary ceased, and by extension, the Respondent could not enforce any check-off system. The only recourse by the Respondent was to recover from his terminal benefits and pay the Bank directly as it had done under the check-off system. That was not deprivation of property.

14. Once the Petitioner had opted to be discharged from the Armed Forces, he had also by implication of law, opted to liquidate his liabilities and obligations to the Respondent and to his Bank. Consequently, the Petitioner cannot claim any denial, violation or infringement or threat of his constitutional rights.

15. For those reasons, the Petitioner's Petition dated and filed on 2<sup>nd</sup> May, 2014 is hereby dismissed with a direction that each party bears its own costs.

16. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 3<sup>rd</sup> day of December, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

No Appearance for Petitioner

Ms. Lutta for Respondent

Court Assistant Silas Kaunda