



**Musau v Attorney General & 3 others (Petition E027 of 2022)  
[2024] KEELRC 2024 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2024 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E027 OF 2022**

**JK GAKERI, J**

**JULY 25, 2024**

**BETWEEN**

**JOSEPH MULWA MUSAU ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DEFENCE COUNCIL OF KENYA DEFENCE FORCES ..... 2<sup>ND</sup> RESPONDENT**

**COMMISSIONER GENERAL OF PRISONS ..... 3<sup>RD</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner commenced the instant Petition against the Respondents, namely; Attorney General, Cabinet Secretary Ministry of Defence, Defence Council of the Armed Forces of Kenya, Public Service Commission and the Commission or General of Prisons.
2. The Petitioner avers that he was an employee of the Kenya Air Force.
3. That on 1<sup>st</sup> August, 1982 while working as Airfield Army Personnel at Nanyuki Air Force Base, he was arrested by the Kenya Army who accused him of being one of the perpetrators of the coup against the government.
4. It is the Petitioner's case that he was arrested, beaten, stripped and left cold and hungry.
5. That on 4<sup>th</sup> August, 1982, he and other officers were taken to King'ongu Prisons and held for 2 weeks, taken back to the Nanyuki Air Force Base on 18<sup>th</sup> August, 1982 and held in communicado for 2 days and as a result suffered mental torture.
6. The Petitioner avers that he was later taken to Kamiti Maximum Prison where he was tortured and held in communicado until 1<sup>st</sup> December, 1982 and later driven to the Naivasha Maximum Security



Prison where he suffered inhumane and degrading punishment as he was held alone in a room full of water for 5 days and ordered to confess what he knew about the attempted coup after which he was released on 3<sup>rd</sup> December, 1982 to go home.

7. Finally, the Petitioner avers that on 12<sup>th</sup> March, 1983, he and others were subjected to inhumane and degrading treatment when he was ordered to remove his uniform and pick clothes from a heap on the floor and was not paid from 1<sup>st</sup> August, 1982 to 14<sup>th</sup> March, 1983.
8. The Petitioner prays for;
  - i. A declaration that the Petitioner's fundamental rights and freedoms were contravened and grossly violated by the Respondent.
  - ii. A declaration that the Petitioner is entitled to the payment of damages and compensation for the violations and contravention of his fundamental rights and freedoms under the provisions of the Constitution.
  - iii. General damages and exemplary damages and moral damages on an aggravated scale under Section 84(2) of the Constitution of Kenya, 1969, Articles 23 and 29 of the Constitution of Kenya, 2010 for the unconstitutional conduct by the Kenyan government, servants and agents awarded.
  - iv. An order compelling the 4<sup>th</sup> Respondent to pay the Petitioner his salary arrears, allowances, pension plus interest thereon at commercial rate from the day of dismissal till payment in full.
  - v. Costs of the Petition be provided for.

#### **Respondent's case**

9. Although the 2<sup>nd</sup> Respondent entered appearance on 14<sup>th</sup> November, 2023, filed a Preliminary Objection dated 14<sup>th</sup> November, 2023 and submissions in support of the Preliminary Objection, it did not file a response to the Petition.

#### **Petitioner's submissions**

10. Counsel for the Petitioner submits that the detention of the Petitioner from 1<sup>st</sup> August, 1982 to 14<sup>th</sup> March, 1983 was illegal as it violated Section 72 of the Armed Forces Act, 1968 and no reason has been provided to justify the detention.
11. That the provisions of Section 74(1) of the Constitution of Kenya, 1969 were violated as the conditions under which the Petitioner was detained constituted torture, inhuman and degrading treatment.
12. Reliance was made on the sentiments of the court in the Greek Case (1969) Y.B. Eur. Conv. On H.R. 186 as well as Samwel Rukenya Mburu v Castle Breweries, Nairobi HCC 1119 of 2003 and Kenneth Stanley Njindo Matiba v Attorney General to buttress the submission.
13. Concerning unfair termination of employment, counsel submits that he was not given his discharge letter and the termination letter states that the Petitioner left service on 14<sup>th</sup> March, 1983, an afterthought according to counsel.
14. Reliance is made on the provisions of Section 180 of the Armed Forces Act and the sentiments of the court in Peter M. Kariuki v Attorney General (2014) eKLR, Geoffrey Kusoga v Attorney General and Samuel Chege & 238 others v Attorney General to urge that the Petitioner's termination from employment was unfair and the failure by the Respondent to pay salary, allowances and pension was unconstitutional.



15. Counsel submits that the Petitioner is entitled to terminal dues, salary arrears, retirement benefits and pension.
16. Finally, counsel invited the court to rely on the decisions in *Ezra Maana Laibuta v Attorney General, R v Chief Justice of Kenya & 6 others Ex Parte Ole Keiwua* (2010) and *Central Medical Council v Sparkmen* (1943) 2 ALLER 337 on due process.

### **Respondent's submissions**

17. The Respondents did not file submissions in opposition to the petition nor a response as adverted to earlier.
18. However, the 2nd Respondent's submissions in support of the Preliminary Objection are relevant to the determination of this petition.

### **Analysis and determination**

19. The issues that commend themselves for determination are;
  - i. Whether the Petitioner was an employee of the Kenya Air Force.
  - ii. Whether the Claimant was detained, tortured or treated in a degrading manner.
  - iii. Whether termination of the Claimant's employment by the Respondent was unfair.
  - iv. Whether the Petition was filed within a reasonable time.
  - v. Whether the Petitioner is entitled to the reliefs sought.
20. As to whether the Petitioner was an employee of the Respondent, it is essential to underline the principles that govern undefended suits or where the Respondent fails to participate in the proceedings.
21. In *Humphrey Munyiithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, the court stated as follows;

“In the case of *Monica Kanini Mutua V Al- Arafat Shopping Centre and another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
22. Similarly, in *Nicholus Kipkemoi Korir v Hatari Security Guards Ltd* (2018) eKLR, Abuodha J. stated as follows;

“This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case . . .”
23. Finally, in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* (2014) eKLR,

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The Claimant lays on the table evidence of facts contended



against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standards of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side”.

24. See also *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR, *William Kabogo Gitau V George Thuo & 2 others* (2010) KLR 526, Re H & others (minors) 1996) AC 563 586, *Palace investment Ltd V Geoffrey Kariuki Mwenda & another* (2015) eKLR and *Michael Hubert Kloss & another v David Seroney & 5 others* (2009) eKLR among others.
25. In the instant petition, the Petitioner alleges that he was a member of the Kenya Armed Forces, having been trained at Lanet and deployed at the Eastleigh Air Force Base as a Senior Cadet and later to Nanyuki Air Base as a second lieutenant.
26. Strangely, although the Petitioner’s List of Documents dated 15<sup>th</sup> February, 2023 identifies 6 documents including a notice of intention to sue the Attorney General, Certificate of Service, Letter from the Department of Defence and photographs of the Petitioner as a Parade Commander at the Meru Agricultural Society of Kenya in 1981, only a copy of the national identification card was attached to the list as per the Judiciary Case Tracking System (CTS).
27. In sum, the Petitioner tendered no scintilla of evidence of his having been a member of the Kenya Armed Forces as alleged.
28. It is the finding of the court that the material before the court is insufficient for the court to find or hold that the Petitioner has demonstrated the fact of having served as a member of the armed forces of Kenya.
29. On the second issue, having found that the Petitioner has failed to prove that he was an employee of the Department of Defence, the question of termination of employment cannot arise.
30. Concerning the timing of the Petition which was raised by the 2<sup>nd</sup> Respondent in its Notice of Preliminary Objection, dated 14<sup>th</sup> November, 2023, the court was of the view that as it was being called upon to exercise discretion and declined to uphold the Preliminary Objection.
31. The salient issue for determination is whether the Petitioner filed the instant suit within reasonable time of the occurrence of the events complained about.
32. In *Bosire Ogero v Royal Media Services* (*Supra*), the court underscored the essence of the law of limitations as follows;

“The law of limitation of action is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendant’s against unreasonable delay in bringing of suits against them. The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo V David Mutegi Njuru* CA 2778 of 1998. It is for this reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See *Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd* (1989) KLI per Nyarangi JA) . . .”



33. As held in *Edward Okong'o Oyugi & 2 others v Attorney General* (2019) eKLR, unreasonable delay in filing a suit must be prejudicial to the Respondent as witnesses die or loose memories, documents are often lost or degraded and interference with the Respondent's planning, among others.
34. As a consequence, the Petitioner must sufficiently account for the delay. A plausible explanation must be provided.
35. In *Wellington Nzioka Kioko v Attorney General* (2018) eKLR, the Court of Appeal held that as the 30 years delay was not explained, the suit was unsustainable and upheld its dismissal by the court of first instance.
36. A year later in *Daniel Kibet Mutai & 9 others v Attorney General* (2019) eKLR, the Court of Appeal found and held that as the inordinate delay had not been explained, the same suit had been properly dismissed.
37. The court stated inter alia;

“Delay is an anathema to fair trial which is one of the key fundamental rights to all litigants under Article 50 of the *Constitution*. Further, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay without any justifiable reason.

For this reason, we find that the appellant's action was properly dismissed”.

38. In the instant suit, it is common ground that the occurrences complained about happened in 1982/1983 and the instant petition was filed on 15<sup>th</sup> February, 2022, about 39 years ago and about 11 years after the Promulgation of the *Constitution* of Kenya, 2010.
39. In his Supporting Affidavit, the Petitioner avers that he was discharged on 12<sup>th</sup> March, 1983.
40. Regrettably, neither the Petition nor the Supporting Affidavit nor any other document on record endeavours to explain or justify either the 39 years or the 11 years of delay.
41. Having failed to explain or justify the patently inordinate and inexcusable delay in filing the instant Petition, it is difficult for the court to fathom the basis on which it can find the Petition sustainable.
42. Consequent to the above finding, the issue of reliefs does not commend itself for determination.
43. Flowing from the foregoing, it is clear that the Petitioner's case against the Respondent is for dismissal and it is accordingly dismissed.
44. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

