



**Losuru v Attorney General & another (Petition E001 of 2023)
[2025] KEELRC 2679 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2679 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
PETITION E001 OF 2023
MA ONYANGO, J
SEPTEMBER 25, 2025**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27,28,29,47 AND 53 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF INTERPRETATION, ENFORCEMENT
AND PROTECTION OF BILL OF RIGHTS UNDER ARTICLES
19,20,22,23,24,4,165,258 AND 259 OF THE CONSTITUTION**

BETWEEN

CHRISTOPHER LOSURU PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF DEFENSE 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is a former employee of the Kenya Defence Forces.
2. The 1st Respondent is the Government's Principal legal advisor established under Article 156 of *the Constitution*.
3. The 2nd Respondent is the officer responsible for the Ministry of Defense in Kenya.



The Petitioner's case

4. The Petitioner herein filed the instant Petition dated 10th January 2023 seeking the following orders: -
 - a. A declaration that the termination of service of the Petitioner by the 2nd Respondent was an unfair termination and therefore illegal and unlawful.
 - b. A declaration that the Petitioner's right to a fair administrative action has been breached in contravention of Article 47 of the Constitution of Kenya, 2010 and the Fair Administrative Action Act, 2015.
 - c. A declaration that Section 148 of Kenya Defence Forces Act 2012 is unconstitutional for offending rules of natural justice and the basic tenets of human rights law therefore void and invalid in terms of Article 2(4) of the Constitution
 - d. A declaration that the Petitioner's right to a fair hearing was violated
 - e. An Order for Payment as calculated below:
 - i. Salary for one month in lieu of notice Kshs 55,307
 - ii. 8 years pay for compensation for loss of employment Kshs 5,280,000
 - iii. Compensation for loss of employment..... Kshs 10,000,000
 - iv. Compensation for psychological torture Kshs 5,000,000
 - v. Service Gratuity Kshs 200,000 Total Kshs 20,535,307
 - f. A further declaratory order to the effect that the failure to conduct independent and effective investigations is a violation of the positive obligation to investigate and prefer disciplinary action as appropriate.
 - g. Costs of this suit
 - h. This Honourable Court be pleased to issue such other orders as it may deem just and expedient for the ends of justice.
5. The Petition is supported by the affidavit filed together with the Petition, sworn by the Petitioner on 10th January 2023.
6. The Petitioner avers that he was offered a position as a General Service Officer (GSO) Cadet candidate, having been selected during the Kenya Defence Forces (KDF) country-wide recruitment in August 2010.
7. He contends that he reported to the Kenya Military Academy (KMA) to undergo two years of fundamental military training, at the completion of which he would be commissioned with a Diploma in Military Science before reporting to his respective units and base for further specialized training and deployment.
8. The Petitioner avers that he was granted Presidential Commission on 23rd May 2012 after successful completion of Officer Cadet Training at the Kenya Military Academy and posted to the Kenya Air Force.



9. It is asserted that on 23rd November 2013, the Petitioner earned a one-year scholarship to the Republic of South Africa to undertake further training as a Kenya Air Force Pilot at the South African Flight Training Academy (SAFTA).
10. The Petitioner states that as an industrious student, he regularly used his free weekends at the Flying Academy to take advantage of available aircraft to increase his flying hours, a goal that is the aspiration of every pilot.
11. It is the Petitioner's case that on 27th April 2014, a Sunday, he received a call regarding the availability of an aircraft. He proceeded to the Flying Academy flight preparation room to complete the necessary documentation before embarking on a flight from Heidelberg to Newcastle and back for several circuits.
12. While in the preparation room, the Training Academy's Director, Mrs. Nonhlanhla Dube unexpectedly arrived and greeted the eight students present. The Petitioner did not notice her entry. The Director became furious because none of the students responded to her greeting and angrily shouted at the them. During this commotion, the Petitioner rose on behalf of the team and apologized to the Director for the students' failure to respond to her greetings.
13. The Petitioner maintains that the Academy Director singled him out for victimization "as a lesson to others."
14. The Petitioner avers that, coming from a disciplined background, he reported the incident to his course senior, in accordance with the normal procedures and practices of the Military.
15. The Petitioner states that he and his Kenya Air Force colleagues agreed to contact the Defence Attaché based in Pretoria, South Africa, to report the incident. That the Defence Attaché advised him to meet the Academy's Director and apologize in person; however, as she was unavailable due to her official duties as a commercial airline pilot, he was instructed to submit a written apology instead.
16. The Petitioner states that he acted on this advice and drafted an apology letter to the Academy's Director in an attempt to mitigate her anger, but to no avail.
17. The Petitioner further avers that, three days later, an order was issued by the Department of Defence (DOD) in Nairobi, Kenya, instructing that he be brought back to Nairobi.
18. The Petitioner asserts that, contrary to his expectations, no disciplinary proceedings were initiated as he was subsequently instructed to report to Laikipia Airbase in Nanyuki and Moi Airbase in Eastleigh, Nairobi, where he was handed a Termination of Commission letter on 11th June 2014.
19. The Petitioner contends that the termination was not based on a factual assessment of the incident but was influenced by the Academy Director's interests, who had entered into a lucrative pilot training deal with the Kenya Air Force, to the detriment of his career.
20. It is the Petitioner's case that throughout his service with the 2nd Respondent, he had no prior disciplinary record, warnings or proceedings against him, having strictly adhered to the Rules of Service.
21. The Petitioner asserts that his dismissal from the Kenya Air Force was malicious, discriminatory and executed in bad faith as he was dismissed without being heard, contrary to the basic rules of natural justice.
22. The Petitioner avers that the 1st and 2nd Respondents failed to act in accordance with natural justice and fundamental human rights principles in terminating his employment.



23. The Petitioner states that the 2nd Respondent acted contrary to the *Kenya Defence Forces Act*, 2012, and the *Employment Act*, 2007, as the grounds relied upon for termination suggested that he had committed a felony, rendering the termination invalid under both Kenyan and international law.
24. The Petitioner asserts that his services were not terminated in accordance with established Kenya Defence Forces practices or applicable law at the time.
25. It is the Petitioner's case that the 2nd Respondent breached relevant provisions of the *Kenya Defence Forces Act*, 2012, and the *Employment Act*, 2007, discriminating against him and causing greater injustice due to petty differences with a foreign national.
26. According to the Petitioner, the reasons for dismissal are vague and unclear, as reflected in his Certificate of Service, which merely states "Termination of Commission."
27. The Petitioner avers that his final dues and emoluments under the *Employment Act*, 2007, have not been paid, and no explanation has been provided, either in writing or verbally.
28. He states that he has suffered psychological distress, as prospective employers have questioned the vagueness of his Certificate of Service regarding the termination reason.
29. The Petitioner further avers that he has received direct threats against pursuing legal redress, particularly after the unlawful dismissal was reported by the media, specifically in The Standard Newspaper on 10th February 2016.
30. The Petitioner contends that the failure by the 2nd Respondent to provide a forum for him to defend himself, and the lack of an independent investigation prior to dismissal, violated his fundamental rights, including protection from unfair termination of employment.
31. The Petitioner has maintained that the termination of his commission was substantively and procedurally flawed, contravening the rules of natural justice and the procedures outlined in Section 151 of the *Kenya Defence Forces Act*, 2012.
32. The Petitioner avers that Sections 45(2)(a) and (b) of the *Employment Act* provide that no employer, including the 2nd Respondent, shall terminate the employment of an employee unless there is a valid reason. According to the Petitioner, the incident leading to his dismissal did not constitute a valid ground for termination nor summary dismissal as there was no valid reason given for his dismissal.
33. The Petitioner further asserts that the proper procedure for termination was not followed arguing that the Respondents did not comply with sections 35 and 41 of the *Employment Act*, along with Section 151 of the *Kenya Defence Forces Act*, 2012 which require that a notice of termination be served, followed by a forum allowing the employee to respond to the grounds for dismissal before termination from employment.

The Respondents' case

34. In response to the petition, the Respondents filed a Replying Affidavit sworn by Major Mwenda Bernard on 26th April 2024, in which he deposed that the Petitioner was conferred a Commission by the President of the Republic of Kenya on the recommendation of the Defence Forces Commissioning Board, in accordance with Section 249(1) of the *Kenya Defence Forces Act*, on 23rd May 2012.
35. The Respondents state that upon the Petitioner's commissioning on 23rd May 2012, he was granted a Short Service Commission for a period of five (5) years, including the probationary period, in the rank of Second Lieutenant and was posted to the Kenya Air Force.



36. The Respondents contend that, after completing three (3) years of service or such additional period as deemed in the interest of the Kenya Defence Forces, the Petitioner would have qualified to be offered a Regular Commission by the Defence Council. Officers granted a Regular Commission are required to serve until they attain the compulsory retirement age for their rank, or until termination of commission on disciplinary grounds, or upon resignation from the commission.
37. The Respondents state that on 23rd November 2013, the Petitioner proceeded to South Africa to undertake Ab-initio Pilot Training, during which he was promoted to the rank of Lieutenant on 13th March 2014.
38. It was asserted that the Petitioner fell under the command of the Defence Attaché in South Africa and when the Academy Director informed the Defence Attaché about the incident at the Academy, the Petitioner was summoned by the Defence Attaché and given an opportunity to be heard, after which the Petitioner admitted to the indiscipline case and apologized to the Academy Director personally.
39. According to the Respondents, the Defence Attaché, in his capacity as the Petitioner's Commander, informed the relevant chain of command of the incident, namely the Kenya Air Force Commander and subsequently the Defence Council.
40. It is averred that the Defence Council, in the exercise of its role, deliberated and determined that the Petitioner's Commission be terminated on the grounds that his discipline, integrity, and character were not up to the high standards required of a Kenya Defence Forces Officer.
41. The Respondents averred that the Petitioner, through his conduct while attending the course, acted contrary to service discipline, which led to the due administrative process culminating in the termination of his Commission.
42. It is stated that the Petitioner was provided with reasons for the termination of his Commission. Subsequent to the termination, he was duly cleared from the Kenya Defence Forces and issued with his Certificate of Service. Additionally, the 2nd Respondent contended that it computed the benefits accruing to the Petitioner upon retirement and forwarded them to the National Treasury for payment.
43. It is the Respondents' case that at the time of the termination of the Petitioner's Commission, he had served for three (3) years, eleven (11) months, and twenty-eight (28) days, and had accrued a pension gratuity of Kshs. 488,649.60. The Respondents further averred that the Petitioner had not attained the requisite pensionable service and was therefore not entitled to a monthly pension, in accordance with the applicable terms and conditions of service.
44. The Respondents stated that at the time of the termination of the Petitioner's Commission, he had accrued a government liability of Kshs. 1,161,883.60, which he acknowledged on 26th August 2014 and authorized recovery from his terminal benefits. That on 17th September 2014, the Ministry of Defence forwarded the Commutation of Pension Certificate, among other documents, to the Director of Pensions and copied the Petitioner, advising him of the Defence Council's approval of his belated option to commute a quarter of his monthly pension in accordance with Regulation 10(4) of the Defence Forces Pensions and Gratuities Amendments for Officers and Servicemen/Women.
45. The Respondents contended that, pending clearance with the Kenya Defence Forces, the Petitioner did not seek redress through the internal grievance mechanism provided under Section 304 of the [Kenya Defence Forces Act](#), No. 25 of 2012 nor has he applied to the Defence Council to re-join the Defence Forces.



46. In addition, the Respondents stated that the Petitioner is guilty of laches of more than ten (10) years, and that this Petition has been instituted in circumvention of the statutes of limitation on labour matters and Section 26 of the *Government Proceedings Act*, Cap 40 of the Laws of Kenya, read together with other enabling statutory provisions. According to the Respondent, as a result of the Petitioner's laches, the Respondents' aver that its defence has been prejudiced due to the loss of witnesses with knowledge of the case and the unavailability of relevant documents over time.
47. The Respondents aver that due process was fully complied with when the Petitioner's Commission was administratively terminated, and, as such, the Petitioner is not entitled to any of the reliefs or orders sought in the Petition.

The Evidence

48. The Petitioner testified on 30th January 2024 as PW1. In his evidence-in-chief, he reiterated the averments contained in his Petition and in the affidavit sworn in support thereof.
49. On cross-examination, the Petitioner stated that he was commissioned as an officer of the Kenya Defence Forces on 23rd May 2012 at the Kenya Military Academy but had not been granted a regular commission. He stated that he was still on probation when his employment was terminated. He admitted that under military law, he was subject both to the KDF Act and the rules of the training institution in South Africa. He further admitted that, by the terms of discipline and employment, he was governed by the KDF Act.
50. The Petitioner stated that he was issued with a letter terminating his commission on 11th June 2014 at Moi Airbase and that his commission was terminated by the Defence Council.
51. The Petitioner testified that he was entitled to payment of his benefits but has not received the same. He stated that instead of being paid, he was informed that he had two liabilities which were offset against his benefits. He denied ever acknowledging or consenting to any reassignment of his benefits.
52. The Petitioner stated that no reasons were given for the termination of his commission, despite the fact that he had been in communication with his supervisors regarding the incident. He further testified that he did not lodge an appeal against the termination as he was unaware of the existence of any internal appeal mechanism. He, however, acknowledged that he was paid three months' salary in lieu of notice.
53. On re-examination, the Petitioner clarified that his liabilities were with Co-operative Bank and HELB, and that he was never informed that his gratuity had been used to clear those loans.
54. The Petitioner explained that he delayed in filing the present suit because there was no mechanism for clearance from the system. He added that he had been threatened by an officer from the Department of Defence, which deterred him from pursuing justice at the time.
55. He reiterated that his termination was effected by the Defence Council without being afforded an opportunity to defend himself.
56. The Petitioner called Maria Naisoi Sitek, who testified as CW2 in support of his case. She stated that she had known the Petitioner since 2013 when they met in South Africa, where they both enrolled for a piloting course at the same academy. According to her, a misunderstanding arose at the academy when the director entered the flight room and greeted the students, but none of them responded. A few days later, the Petitioner was singled out and subjected to disciplinary action. She recalled that the other students were surprised that only the Petitioner had been picked out, yet none of them had responded to the greeting. She testified that she herself did not respond because she had not heard it.



She further stated that there was no requirement under the school rules to respond to greetings, and that disciplinary action was taken against the Petitioner merely because he was from the disciplined forces. In her view, the Petitioner ought to have been given a warning, considering that this was the first incident of its kind.

57. On cross-examination, CW2 stated that she was in South Africa undertaking a flying course. She stated that the Petitioner was not the only military student at the academy, but was the only one present in the flight room on the day of the incident. She reiterated that none of the trainees responded to the director's greeting. She further stated that she was not familiar with military rules of discipline.
58. On re-examination, CW2 reiterated that none of the students in the flight room responded to the director's greeting. She emphasized that the applicable rules were those of the academy and not those of the sponsoring institutions.
59. Daudi Tepela Tiwa testified as CW3 and adopted his witness statement as his evidence-in-chief. He testified that he attended the flight training academy with the Petitioner in 2013.
60. On cross-examination, CW3 testified that he was present in the flight preparation room when the director entered and greeted the students. He testified that none of the students responded. He stated that the Petitioner later apologized on behalf of all the students. He further stated that thereafter, the students were required to submit the names of their sponsors.
61. On re-examination, CW3 stated that there were no school rules requiring students to respond to greetings. He further confirmed that he was not subjected to any disciplinary action for failing to respond.
62. The Respondents called Major Mwenda Benard, the Records Officer at the Department of Defence, who testified as RW1. He adopted his replying affidavit sworn on 26th April 2024. RW1 testified that the Petitioner was accused of misconduct while undergoing training in South Africa on 27th April 2014. He stated that while the Petitioner and other students were engaged in pre-flight planning, the director of the school entered the classroom and greeted them, but none of the students responded. According to RW1, the Petitioner admitted that he did not respond to the greeting. He further stated that the reasons for the Petitioner's termination were set out in his affidavit, and that the termination was effected by the Department of Defence.
63. RW1 further testified that the Petitioner had previously appeared before his then Commanding Officer, Lt. Col. J.L. Gala, on 20th June 2013, on allegations of giving food to a person without authority and inflicting a minor injury on a colleague.
64. RW1 stated that the Petitioner was subjected to a disciplinary hearing in the presence of Major N.A. Garise, W.O.I Joseph Jonyo, and Sgt. Jackson Mutua. He added that other witnesses present included W.O.2 Githunga (the duty officer), Major Kipkirui, and Corporal Mohammed Isaac.
65. RW1 testified that the Petitioner was found guilty and subsequently discharged. He maintained that the sentence imposed was consistent with the law.
66. On cross-examination by the Petitioner's Counsel, RW1 stated that the Petitioner was never formally arrested but was escorted to the Commanding Officer by the Regimental Police, who are responsible for discipline at the gate and the guard room. He clarified that the guard room was reserved for individuals who had been arrested or were serving a term. He further distinguished between open arrest, where an officer remains free, and closed arrest, where an officer is confined in the guard room.



67. RW1 explained that an officer is usually escorted to the guard room by his immediate commander, who is regarded as the arresting officer. In the Petitioner's case, he was accompanied by his commander, W.O.I Joseph Jonyo.
68. RW1 further testified that a person taken before the Commanding Officer is accompanied by an escort of equal rank, and that such an officer has the option of electing to be tried by a Court Martial. He, however, could not confirm whether this procedure was followed in the Petitioner's case.
69. On re-examination, RW1 maintained that once the Petitioner was found guilty, he was given the option of either accepting the Commanding Officer's order or electing trial before a Court Martial, and that the Petitioner chose to accept the Commanding Officer's award. RW1 further stated that within the Kenya Defence Forces, no person is exempt from arrest.
70. At the close of the Respondents' case, the court directed parties to file written submissions.

The Petitioner's submissions

71. In his submissions dated 27th December 2024, the Petitioner framed the issues for determination to be:
 - a. Whether the termination of the Petitioner's commission violated his rights under Articles 27, 28, 41, 47, and 50 of *the Constitution*.
 - b. Whether the termination was procedurally and substantively justifiable.
 - c. Whether all the documents that were relied upon by the respondent offended the provisions of sections 68 (2) (c) and 80 of the *Evidence Act*
 - d. Whether the claimant is entitled to the reliefs sought herein.
72. The Petitioner argues that the termination of his commission violated his constitutional rights under Articles 27, 28, 41, 47 and 50 of *the Constitution*.
73. The Petitioner submitted that Section 303(1) of the *Kenya Defence Forces Act*, 2012 establishes an internal grievance mechanism, but noted that the Kenya Defence Forces (Internal Grievance Mechanism) Rules were only published in 2017 and were therefore not applicable in 2014 when the cause of action arose. He argued that any suggestion that he failed to exhaust internal remedies is therefore without any basis.
74. The Petitioner submitted that he was denied a fair hearing, as he did not attend any disciplinary proceedings, was never served with a charge sheet, and was not furnished with the complainant's statement. Citing the Court of Appeal decision in *Sawe v Republic* [2003] eKLR, he argued that the Respondents failed to produce any records of disciplinary processes. He added that he only became aware of the allegations against him upon perusal of the exhibits filed by the Respondents in this Petition.
75. The Petitioner further submitted that he was subjected to discrimination, having been singled out for punishment in an incident where other students were equally involved but faced no penalty. He contended that this selective treatment cost him his career and violated his constitutional right to equality and freedom from discrimination. In support of this submission, he cited the decision of the Supreme Court in *Law Society of Kenya v Attorney General & Another* (Petition No. 4 of 2019) [2019] KESC 16 (KLR).
76. The Petitioner asserted that the Kenya Defence Forces is not exempt from the application of *the Constitution*. He relied on Article 2 of *the Constitution* of Kenya, 2010, which declares *the Constitution*



to be the supreme law of the Republic and expressly provides that it binds all persons and state organs at both levels of government. On that basis, he argued that the Respondents were under a duty to uphold constitutional standards of fairness, due process, and equality in handling his case.

77. In the end, the Petitioner submitted that the absence of evidence, the lack of procedural fairness, and the discriminatory nature of the termination amounted to violations of his rights under Articles 27, 28, 41, 47, and 50 of *the Constitution*. He therefore urged this Honourable Court to find that the termination of his commission was unconstitutional, unlawful, and unfair.
78. The Petitioner thus urged the court to grant him the reliefs he sought in his Petition.

Respondents' submissions

79. On their part, the Respondents in their submissions crystallized the issues for determination as follows:
- a. Whether the termination of the Petitioner's Commission violated Article 47 of *the Constitution*, and Section 251 of the *Kenya Defence Forces Act*.
 - b. Whether the Termination of Commission was procedurally and substantively justifiable.
 - c. Whether all documents that were relied upon by the Respondents offended the Provisions of Sections 68 (2) (c) and Section 80 of the *Evidence Act*.
 - d. Whether the Petition is time-barred and was filed in disregard of the doctrine of constitutional avoidance.
 - e. Whether the Petitioner failure to redress affects his Petition.
 - f. Whether the Petitioner is entitled to the reliefs sought.
80. On the first issue it is the Respondents' submission that the Petitioner had his commission terminated administratively under Sections 251(1)(b) and 251(2) of the *Kenya Defence Forces Act* (KDFA). According to the Respondents, this process is administrative in nature and must be distinguished from summary disciplinary proceedings under Part III and section 155 KDFA, and court martial proceedings under Part IX and Section 180 KDFA.
81. The Respondents contended that the summary proceedings and court martial processes are judicial in character which involve the preferring of charges, investigations by military police under section 150 of the KDFA, and trial before a Commanding Officer or a Court Martial.
82. The Respondents submitted that Termination of Commission is not among the punishments available under Sections 155 or 180 of the KDFA but that it is an administrative discretion vested in the President, the Defence Council, or Service Commanders depending on an officer's rank. Reliance was placed in the case of *Mugure v Ministry of Defence & Another* (ELRC Petition E011 of 2021) [2023] KEELRC 1994,
83. It is submitted that since the Petitioner was below the rank of Major, the Defence Council had jurisdiction to terminate his Commission which discretion, they submitted, was duly exercised, in the termination of his commission.
84. The Respondents submitted that Section 251 of KDFA requires that such termination comply with Article 47 of *the Constitution* and that in the Petitioner's case, Article 47 was adhered to as the termination was effected within 46 days of the incident, followed by 81 days of paid leave.
85. It is further submitted that the Petitioner was given written reasons under Article 47(2) of *the Constitution* and section 251(2) KDFA, citing arrogance, refusal to cooperate in training, cancellation



- of scheduled flights without justification, and disrespect to the Director of the South Africa Flight Training Academy.
86. The Respondents contended that termination of the Petitioner's Commission was lawful, expeditious, reasonable, and procedurally fair, consistent with the discipline expected of members of a disciplined force.
 87. With regard to the third issue, the Respondent relied on sections 68(1)(c) and 68(2)(a) of the *Evidence Act*, and maintained that the loss of the documents they relied on resulted from the Petitioner's inordinate delay in filing the Petition, not from the Respondents' negligence. It is the Respondents' submission that the Petitioner did not in any event object when the documents were produced.
 88. On the issue whether the Petition is time barred and was filed in disregard of the doctrine of constitutional avoidance, the Respondents maintained that the Petition is time-barred, having been filed over 10 years after the termination. This unexplained and inordinate delay, according to the Respondent is prejudicial, since witnesses and records are no longer available.
 89. The Respondents further submitted that the Petition offends the doctrine of constitutional avoidance, as the issues raised are not constitutional in nature but instead relate to an administrative employment decision. To support this argument, they relied on the decision in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR
 90. On the issue of failure to redress, the Respondents argued that following the Petitioner's termination of commission through the letter dated 11th June 2014, and during the period up to his last day of service on 31st August 2014, the Petitioner did not raise any grievance through the internal redress mechanisms provided for in law.
 91. The Respondents further argued that although the Kenya Defence Forces (Internal Grievance Mechanism) Rules were only published in 2017, there was no legal vacuum in 2014. The Respondents submitted that section 225(1) of the repealed Armed Forces Act, which was saved by Section 310 of the *Kenya Defence Forces Act*, remained in force. It is submitted that under that provision, an officer who felt wronged by a superior officer or authority could lodge a written complaint through his commanding officer to the Defence Council, which was mandated to investigate the complaint and grant any necessary redress.
 92. The Respondents contended that the Petitioner failed to utilise the mechanisms available to him under the law. They relied on the Court of Appeal decision in *Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR, and Constitutional Petition No. 152 of 2018 (consolidated with Petition No. 201 of 2019) [2020] eKLR in support of the submission that where a dispute resolution mechanism exists outside the courts, the same must be exhausted before a litigant can properly invoke the jurisdiction of the courts.
 93. On this basis, the Respondents argued that by failing to exhaust the internal grievance procedure, the Petition was premature and defective. They further relied on Section 9(2) of the *Fair Administrative Action Act*, which prohibits courts from reviewing administrative action unless internal mechanisms of appeal or review are first exhausted.
 94. With respect to the reliefs sought, the Respondents submitted that the Petitioner's monetary claims amounting to Kshs. 20,535,307 are largely founded on the *Employment Act*, 2007. They argued that Section 3(2)(a) of the Act expressly excludes its application to members of the Kenya Defence Forces, and that as such, the Petitioner's claims are untenable.



95. The Respondents contended that the Petitioner had been fully paid his salary up to 31st August 2014 while on terminal leave, and that his gratuity had been assessed but after computation, it was found that he had government liabilities amounting to Kshs. 1,161,883.55, which exceeded the gratuity of Kshs. 481,649.60 that he was entitled to.
96. They maintained that in light of these facts, the Petitioner was not entitled to any further payment, and his claim for additional compensation was without basis.
97. In conclusion, the Respondents argued that the Petition is incompetent, an abuse of court process, and devoid of merit, and therefore ought to be dismissed with costs.

Analysis and Determination

98. I have carefully considered the Petition, the supporting affidavit, the Respondents' reply, the evidence adduced, and the rival submissions. In my view, the following issues arise for determination: -
 - i. Whether the Petition is time-barred
 - ii. Whether the termination of the Petitioner's commission was substantively justified and whether due process and fair hearing were accorded to the Petitioner.
 - iii. Whether section 148 of the *Kenya Defence Forces Act* is unconstitutional.
 - iv. Whether the Petitioner's constitutional rights were violated.
 - v. Whether the Petitioner is entitled to the remedies sought.

Whether the Petition is time-barred

99. In its response to the Petition, the Respondents argued that the Petition is time-barred. The evidence on record is that the Petitioner's Commission was terminated on 11th June 2014. The instant Petition was filed in January 2023, nearly a decade later.
100. The Respondents argued that the delay is prejudicial since key records and witnesses may no longer be available. The Petitioner, however, attributed the delay to intimidation by the Respondents.
101. The Petitioner on the other hand argues that the ongoing effects of the termination of his Commission such as non-payment of his benefits, lost employment opportunities, psychological distress, and reputational harm constitute continuing violations of his constitutional and employment rights. The Petitioner also averred that he was threatened when his case was published in one of the print media, The Star, both the Petitioner and the journalist who published the story were threatened by a caller from Department of Defence (DoD) and the story was pulled down. He stated that his colleague who spoke to the journalist was also threatened, an averment that the Respondents did not deny or as much as mention the same in its evidence.
102. Courts have consistently held that constitutional petitions, while not strictly bound by statutory limitation periods, should ordinarily be filed without unreasonable delay.
103. It is however settled law that constitutional claims may be entertained outside the strictures of the *Limitation of Actions Act* where continuing violations are alleged. In *Janmohammed v District Land Registrar Uasin Gishu & 4 Others* [2024] KESC 39 (2 August 2024), the Supreme Court held that constitutional petitions alleging violations of fundamental rights and freedoms are not automatically subject to the *Limitation of Actions Act*. The Court emphasized that this principle is not absolute and must be applied on a case-by-case basis, taking into account factors such as the nature of the right,



the time taken to ventilate the alleged violation, and whether the claimant has provided a credible explanation for the delay.

104. In that case the Supreme Court stated:

This Court has had occasion to pronounce itself, albeit not so comprehensively, on the question whether the *Limitation of Actions Act* applies to claims based on violations of fundamental rights and freedoms. In the case of *Monica Wangu Wamwere & 5 Others v. The Attorney General*, SC Petition Nos, 26, 34 & 35 of 2019 (Consolidated) [2023] KESC 3 (KLR) , this Court stated;

“(37) In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under *the Constitution*, which are evaluated and decided on a case by case basis. Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights.” [Emphasis added].

93. In view of our decision in *Monica Wangu* [supra], we do reiterate that as a general principle, petitions founded on claims of violation of fundamental rights and freedoms are not subject to limitation of actions. However, having so affirmed, it is to be noted that this principle is not absolute. It is to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief.

105. While there was obvious delay in instituting the instant Petition, it is my view that the Petitioner has sufficiently explained the reason he did not come to court earlier.

106. On the question of constitutional avoidance as raised by the Respondents, the Petitioner argued that he was singled out from among the many students who were with him in the flight operation room when the incident that led to the termination of his commission occurred, which according to him, was a violation of his right to equality and freedom from discrimination. Further, that he was not accorded a hearing in violation of his right to fair administrative action and fair labour practices which were violations of his fundamental rights and freedoms under articles 27, 28, 29,47 and 50.

107. Section 250 of KDF Act which provides for summary proceeding specifically requires compliance with Article 47 of *the Constitution*. It provides as follows:

251. (1) Subject to Article 47 of *the Constitution*—

- (a) the President may terminate the commission of any officer above the rank of major or corresponding rank or above;
 - (b) the Defence Council may terminate the commission of any officer of the rank of major or corresponding rank or below; or
 - (c) a Service Commander may terminate the commission of any officer during the first eighteen months of the officer's actual commission in the Service.
- (2) In any case of termination of a commission in this section, the President, the Defence Council or the Service Commander, as the case may be, shall accord and specify reasons for the termination of the commission to the affected officer, in writing.



108. It was the evidence of RW1 that the reason for termination of the Petitioner's Commission was, in his words "the director entered the room, greeted the class and no one responded. The greetings were directed to the class, not the Petitioner as a person." RW1 further stated that the incident happened on a Sunday and that the Petitioner later apologized on behalf of the class to the director who was infuriated by the lack of response by the students.
109. Section 251 of KDF Act provides for summary proceeding as follows:
251. (1) Subject to Article 47 of *the Constitution*—
- (a) the President may terminate the commission of any officer above the rank of major or corresponding rank or above;
 - (b) the Defence Council may terminate the commission of any officer of the rank of major or corresponding rank or below; or
 - (c) a Service Commander may terminate the commission of any officer during the first eighteen months of the officer's actual commission in the Service.
- (2) In any case of termination of a commission in this section, the President, the Defence Council or the Service Commander, as the case may be, shall accord and specify reasons for the termination of the commission to the affected officer, in writing. [Emphasis added]
110. The offences that an officer may be charged with are set out in Part VI of the KDF Act. Failing to respond to greetings by an instructor while undergoing training is not part of the offences set out in that part.
111. RW1 further stated that the Defence Attache in South Africa to whom the Petitioner reported while on training did not recommend termination of the Petitioner's Commission, but only reported the incident. RW1 however stated he was not aware of any report sent to Headquarters by the Defence Attache. RW1 further testified that the Petitioner did not appear before the Defence Council.
112. There is no evidence that the Petitioner was taken through the disciplinary process as provided under the KDF Act or any other disciplinary process. His discharge Certificate does not state the reasons for termination of his Commission. There are further no records produced by the Respondents to prove that the Petitioner was given any opportunity to state his case. There is no evidence of a complaint against the Petitioner or a charge preferred against him as provided in the KDF Act.
113. The KDF Act provides for compliance with *the Constitution* at section 151 of KDF Act provides as follows:
- 151.(1) An accused person who is subject to this Act shall be informed of the charges against him or her and of his or her right to be represented during the summary disciplinary proceedings or trial.
- (2) Subject to subsection (1), a person may be nominated as a representative if—
- (a) that person is an officer or a service member and remains as such while carrying out that function;
 - (b) that person consents to the nomination;
 - (c) the nominee is available and accessible at the time of the proposed trial; and
 - (d) the nominee is not of an equivalent rank or higher rank than the trial authority.
- (3) The nominee under subsection (2) shall not be a person trained as a lawyer.



- (4) Notwithstanding subsection (3), where the offence is punishable by death, the accused person shall be entitled to legal representation at the expense of the State.
114. From the foregoing I find that the Petitioner's constitutional rights were violated and that he had valid reason to approach this court through a constitutional petition.

Whether the termination of the Petitioner's commission was substantively justified and whether due process and fair hearing were accorded to the Petitioner

115. In their response to the Petition, the Respondents averred that the Defence Council terminated the Petitioner's Commission under Section 251(1)(b) of the *Kenya Defence Forces Act*.
116. The reasons given for the termination of the Petitioner's Commission were that his discipline, integrity and character were allegedly not up to the high standards required of an officer in the Kenya Defence Forces, and that his conduct during the training in South Africa constituted a breach of service discipline.
117. Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act* demand that administrative decisions be lawful, reasonable, and procedurally fair.
118. The Petitioner contends he was never charged, never given an opportunity to defend himself, and never served with a statement of the case against him. The Respondents maintain that the Petitioner was informed in writing of the allegations and given the option of electing a Court Martial, and opted for summary proceedings.
119. The constitutional standard of fairness demanded that the Petitioner be accorded a hearing before the adverse decision was made. This is also a requirement under KDF Act. The record does not demonstrate that such a hearing was held. To that extent, I find the procedure followed in terminating the Petitioner's Commission violated Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*. The termination further violated section 151 and 250(1) of the *Kenya Defence Forces Act*.

Whether section 148 of the *Kenya Defence Forces Act* is unconstitutional

120. Section 148 of the *Kenya Defence Forces Act* provides for Summary Disciplinary Proceedings as follows:

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148. Certain charges may be dealt with summarily
1. Subject to the prescribed limits, the commanding officer or appropriate superior authority may summarily deal with a charge for an offence prescribed as disciplinary offence which a commanding officer or appropriate superior authority may deal with summarily.
 2. Despite subsection (1), a commanding officer of the rank of major or corresponding rank shall not deal summarily with a charge against an officer of the rank of captain or corresponding rank or above, and a commanding officer below the rank of major or corresponding rank shall not deal summarily with a charge against any officer.

121. The Petitioner contended that this provision is unconstitutional as it permits arbitrary termination.



122. Part V of the KDF Act provides for limitation of rights and fundamental freedoms of person subject to the Act at section 42 as follows Rights and fundamental freedoms.
42. All persons subject to this Act shall enjoy all rights and fundamental freedoms enshrined under Chapter Four of *the Constitution* unless limited to the extent specified in Article 24(5) of *the Constitution*, this Act or any other Act.
123. Section 43 of the Act provides for conditions for limitation of rights and fundamental freedoms as follows:
43. (1) The purpose of this Part is to specifically limit or restrict certain rights or fundamental freedoms set out in Chapter Four of *the Constitution*, as contemplated in Article 24 of *the Constitution*.
- (2) The limitations of rights and freedoms under this Part are necessary for purposes peculiar to military service, based on human dignity, to ensure—
- (a) the defence and protection of the sovereignty and territorial integrity of the Republic of Kenya;
 - (b) the protection of classified information;
 - (c) the maintenance and preservation of national security;
 - (d) the security and safety of members of the Defence Forces;
 - (e) that the enjoyment of the rights and fundamental freedoms by any individual member of the Defence Forces does not prejudice the rights and fundamental freedoms of any other individual member of the Defence Forces;
 - (f) good order and service discipline; and
 - (g) public health and safety.
- (3) The limitation under this Part shall comply with Article 24 of *the Constitution* and shall satisfy the following four criteria—
- (a) ensure the protection of national security, public safety, public order, public health or morals, protection of the rights and freedoms of others;
 - (b) be necessary to achieve the mandate of the Defence Forces;
 - (c) operate without discrimination; and
 - (d) be exceptional and not impair the essence of the freedom being limited.
124. Sections 44 to 54 of the KDF Act specify the fundamental rights and freedoms that are limited by the Act and the extent of the limitations.
125. Section 148 is part of Part VIII of the Act which provides for summary disciplinary proceedings. The section is preceded by section 147 which provides for guiding principles for summary disciplinary proceedings as follows:
147. Guiding principles
- (1) Summary disciplinary proceedings under this Act shall be guided—
- (a) by Article 47 of *the Constitution*; and



- (b) with necessary modifications, and without derogating from the essence of the right or limiting the right to fair hearing of an accused person by Article 50 of *the Constitution*.

126. Section 148 can therefore not be read in isolation as it is preceded by section 147 which safeguards fair administrative action.
127. I therefore find that Section 148 read together with Section 147 and section 251 of the KDF Act is not unconstitutional as the Act complies with the provisions of Article 24.

Whether the Petitioner's constitutional rights were violated

128. The Petitioner alleged violations of Articles 27, 28, 41, 47 and 50 of *the Constitution*.
129. The Petitioner testified that he was singled out of the class for punishment only because he apologized to the director on behalf of the Class. He further testified that he was discriminated by being denied protection and benefit of the provisions of the KDF Act with respect to disciplinary process and that the manner in which his case was treated amounted to a violation of his human dignity.
130. On fair administrative action under Article 47, I have already found that the Petitioner was not afforded a proper hearing before termination. There is no evidence that he was subjected to the disciplinary process under the KDF Act.
131. It is further my finding that by failing to accord the Petitioner a hearing before termination and by terminating his employment on grounds that did not constitute offences under the KDF Act his rights under Article 41 on fair labour practices was violated
132. For these reasons I find that the Respondents violated the Petitioner's fundamental rights and freedoms under 27, 28, 41, 47 and 50 of *the Constitution*.

Whether the Petitioner is entitled to the remedies sought

133. The Petitioner sought declaratory orders, compensation of Kshs. 20,535,307, and other reliefs anchored partly on the *Employment Act*, 2007. No basis was given for the amount claimed.
134. Having found that the Petitioner's rights and fundamental freedoms were violated by the Respondents and taking into account all circumstances of his case, it is my view that an award of Kshs. 1,000,000 is reasonable compensation. I thus award him the same.
135. The Petitioner was paid salary in lieu of notice and his gratuity was computed and utilized to offset his liabilities, leaving him with a liability to the Government. In these circumstances, he is not entitled to further monetary compensation in respect of these two heads.
136. In light of the foregoing, I make the following orders:-
- a. A declaration is hereby issued that the Petitioner's right to fair administrative action under Articles 27, 28, 41, 47 and 50 of *the Constitution* were violated by the Respondents in the manner the termination of his commission was effected.
 - b. The Petitioner is awarded compensation in the sum of Kshs. 1,000,000.
 - c. The Respondents shall bear the Petitioner's costs of this suit.
 - d. Interest shall accrue from date of judgment.

DATED, DELIVERED AND SIGNED THIS 25TH DAY OF SEPTEMBER, 2025.

M. ONYANGO



JUDGE

