Attorney General & 2 others v Miyogo (Civil Appeal 57 of 2019)
[2025] KECA 1836 (KLR) (7 November 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 57 OF 2019

DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA

NOVEMBER 7, 2025

BETWEEN

ATTORNEY GENERAL ..... 1ST APPELLANT

CABINET SECRETARY FOR DEFENCE ..... 2ND APPELLANT

CHIEF OF DEFENCE FORCES ..... 3RD APPELLANT

AND

POLYCARP MIYOGO ..... RESPONDENT

(Being an appeal against the judgment of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated 21st July 2017 in ELRC Petition No. 32 of 2013)

JUDGMENT

1. I have had the opportunity to read the draft judgment of my senior brother Asike-Makhandia JA. The background, pleadings and the facts in this appeal have in my view, been concisely summarized in the said judgment, and I will only highlight certain facts and averments that were pleaded by the parties herein which I will specifically refer to in this judgment.

2. Polycarp Miyogo, the respondent herein, pleaded in Nairobi ELRC Petition 32 of 2013 (formerly Nairobi HC Constitutional Petition No 287 of 2013) that he was enlisted as a serviceman in the Kenya Defence Forces in 2002, and for the first ten years of his employment he would ask for permission in advance to worship whenever he had been assigned duty on the Sabbath day, with a rider that if a distress call was made he would always respond as part of his teaching as a Christian. However, that on 31st May 2012 when he sought permission to be absent from duty to worship on the Sabbath day, his immediate supervisor declined to grant permission for the first time in his ten years of service.

3. He described the efforts made to get permission and a replacement to enable him worship, which were declined by his immediate supervisor. In particular, that after he was denied permission to worship

on Saturday, he pleaded to be given half day but the officer in charge declined, and consequently he pleaded to be accorded only two hours for worship from 9 a.m. to 11a.m., however the same was again declined. Similarly, that permission was again declined on 13th June 2012, and when he proceeded to attend church to worship on 2nd June 2012 and 14th June 2012 and failed to report to work on these occasions, disciplinary action was taken against him, leading to his eventual discharge from the Kenya Armed Forces.

4. The respondent's claim was that his discharge was unconstitutional and illegal for two reasons. Firstly, the discharge was on account of his religious convictions which was in contravention of Articles 27 and 32 of *the Constitution*, and that the limitation in section 44 (2) of the Kenya Defense Forces Act of 2012 was not applicable in the circumstances, as the refusal of permission and discharge was not reasonable as contemplated by the Act; and secondly it was contrary to the conditions provided for in section 255(1) of the *Kenya Defence Forces Act*, 2012, for the discharge of an officer and was based on provisions which were non-existent.

5. In reply, the Cabinet Secretary for Defence and Chief of Defence Forces, the 2nd and 3rd appellants herein, and the respondent's employers, were of the view that the respondent was discharged under section 255(1) of the *Kenya Defence Forces Act* on the ground that his services were no longer required as he was advised on " his misguided position maintaining that he would not perform duties on his day of worship but he remained adamant and stubborn" and willfully defied orders given to him. Therefore, that it was found that the respondent could not be relied on as a soldier and to perform tasks as detailed to him, hence the decision was taken that his services were no longer required, and his discharge was premised on "his negative attitude towards work, open defiance to his superiors and the fact that it became apparent that he would not change his radical position on performing essential duties during his day of worship".

6. Furthermore, that the disciplinary trials were conducted in accordance with the provisions of the law that was in force at the time, and in particular section 80 of the Armed Forces Act; the 42 days' imprisonment of the respondent was permissible punishment and provided for under the law; and was reasonable and justified, taking into account that it was the third time the respondent was tried for a similar offence involving similar facts. Lastly, the 2nd and 3rd appellants denied that the respondent was discriminated against, because other service personnel are required to work and do work on their worship day. In particular, Muslims work on Fridays and Christians of other denominations work on Sundays and Seventh Day Adventists are not superior to other religions and cannot be given preferential treatment. Further, that to do so will be discriminating against other religions.

7. The Employment and Labour Relations Court (Nduma Nderi J.) delivered a judgment on 21st July 2017 and awarded various orders in favour of the respondent, which are aptly set out in the judgment by my senior Brother, Asike-Makhandia, JA. This judgment precipitated the instant appeal by the appellants, and the grounds of appeal are also succinctly summarized by my senior Brother.

8. I will address myself on three issues raised by the appeal. The first is whether the respondent's right to religious freedom and worship was infringed by the conduct of the appellants, and if the answer is positive, whether the infringement was a permissible limitation by the appellants. The second issue is whether the discharge of the respondent complied with the provisions of the law. The last issue is what remedies, if any, are merited in this appeal. This being a first appeal, my mandate is to consider the evidence before the trial court, re-evaluate and re-assess the same, and draw my own conclusions - see Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123.

9. On the first issue, the respondent needed to demonstrate that his rights had been infringed, and once proven, it was upon the party relying on any limitation of the rights to demonstrate that the

infringement of the right is permissible. Learned counsel for the respondent submitted that the reason that was advanced for the respondent's discharge from service as indicated in the respondent's Certificate of Service issued by the 3rd appellant which was produced as an exhibit, was that his services were no longer required due to his religious conviction. In addition, that none of the conditions or circumstances provided under section 44 of the *Kenya Defence Forces Act* existed to warrant curtailing the respondent's freedom of worship which he had enjoyed for 10 years, and none were advanced. Learned counsel cited the decision of this Court in the case of Seventh Day Adventist Church (EA) Ltd v Minister for Education and 3 Others (2017) eKLR to submit that the respondent's right to freedom of worship as enshrined under Article 32 of *the Constitution* was thereby violated. Furthermore, that freedom of worship as protected by *the Constitution* cannot be violated on grounds that the respondent was a serviceman, since *the Constitution* binds all persons and all state organs.

10. Learned counsel for the appellants justified the infringement of the respondent's rights on three grounds in her submissions. Firstly, while citing the article published in the University of Baltimore Law Journal namely "Religious Liberty in the Military: The First Amendment under "Friendly Fire", 9 J. L. & Religion 471 (1992); the decisions by the United States Supreme Court in Goldman v Weinberger, 475 U.S. 503, 507 (1981) and Parker v Levy 417 U.S. At 758; and the decision by the European Court of Human Rights in Kalac v Turkey (1997)127 EHRR 522, it was urged that the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, renders permissible within the military that which would be constitutionally impermissible outside it. Therefore, that members of the Defence Forces willingly surrender on a temporary basis certain rights when it impinges on military discipline and the successful completion of a military objective. It was submitted that the respondent's voluntary acceptance that military service could impose limitations on his right and freedom to take part in religious activities could not be held as a violation of his right to manifest his religious beliefs.

11. Secondly, that in a military setting, the right to practice one's religious beliefs does not excuse one from complying with directives, instructions, and lawful orders; however, service personnel may request religious accommodation, and the requests can be denied based on military necessity. In particular, it was submitted that:

> "Commanders and supervisors at all levels are expected to ensure that requests for religious accommodation are dealt with fairly. Depending on the nature of your request and the military duties from which one seek excusal, they may request that their chain-of-command provide accommodation for a service personnel's religious practice. Generally speaking, immediate command should grant one's request for accommodation unless it will have an adverse impact on the unit or the task. However, the accommodation may be very limited in scope (e.g., one may be excused from duty only on Sunday mornings in order to attend a worship service)."
>
> Counsel further submitted that the Kenya Defence Forces accommodate individual expressions of sincerely held beliefs unless it could have an adverse impact on military readiness, unit cohesion, or good order and discipline; and that it cannot be gainsaid that national security interest override individual interests and may justify restriction of rights and freedom.

12. Lastly, that this Court ought to take cognizance of the fact that the Kenya Defence Forces is comprised of members from various religions and a determination that the right to religious freedom to the respondent who is a Seventh Day Adventist is absolute, will lead to preferential treatment and indirect discrimination against other service members who practice their faith on other days of the week,

but are still expected to perform military tasks when and if deployed for such on their particular days of worship. According to the appellants, this would be in contravention Article 27(4) of *the Constitution* of Kenya, 2010 and lead to degradation of morale, good order, and military discipline. Counsel concluded by invoking the political question doctrine that limits the adjudication by Courts of matters within the area of responsibility of other arms of Government, and cited the decision in Okoiti v Ministry of Defence & Another (2022) KEHC 13172 (KLR) for the submission that it is not within the province of courts to delve into matters that touch on national security interests.

13. The right to religious freedom and worship is guaranteed and protected under Article 32 of *the Constitution* on the following terms:

> "(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
>
> 2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
>
> 3. A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.
>
> 4. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

14. The essence and scope of this right was the subject of the decision by the South African Constitutional Court in S v Lawrence (1997) (4) SA 1176 (CC) as follows:

> " The right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."
>
> Additionally, this Court emphasized in Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017] KECA 751 (KLR) that for one's right to freedom of religion to be protected and guaranteed under article 32, one's religious belief or practice had to be genuine and sincere and not spontaneous, isolated or occasional; the practice had to be peculiar and particularly significant manifestation of a person's faith and identity; the practice had to be a person's way of expressing his or her roots and faith and what was important was the meaning of the practice and belief to the person involved.

15. Specifically on the Seventh Day Adventist religious beliefs and practices, the Court observed as follows:

> " The Seventh Day Adventists accorded primal and overriding importance to the Sabbath as one of its trademark beliefs and core identity, wherever they were throughout the world. Given that significance to its members' moral obligation and duty, Sabbath- keeping was considered the ultimate test that defined the true SDA believer. As one of the Ten Commandments, observance of the Sabbath to the Adventist was a perpetual covenant binding them through observance throughout the generations forever. The Adventists appeared to be guided by the Hebrew calendar under which the first day of the week was said to begin on the preceding sunset of Friday till Saturday at sunset hence the belief that Sabbath fell on the hours between sunsets on Friday to sunset on Saturday.

They also genuinely believed in the teaching that failure to observe the Sabbath attracted consequences."

16. The limitation of the right to religious belief and worship with respect to members of the defence forces is provided for both in *the Constitution* and the *Kenya Defence Forces Act* of 2012, which was in operation on the date of filing of the respondent's petition in the ELRC on 7th June 2013. It is notable that the limitations in the Defence Forces Act of 2012 were not in operation at the time of the impugned conduct by the 2nd and 3rd appellants, but were relied on during the petition and in the judgment that is appealed. I shall therefore consider if the learned Judge of the ELRC erred in his findings that they were not demonstrated by the appellants.

17. Article 24(1) and (2) of *the Constitution* in this regard provide that a right or fundamental freedom shall not be limited except by law, only to the extent that the limitation is reasonable and justifiable in an open and democratic society, and that legislation limiting rights, Article 24(5) proceeds to specifically provide as follows:

> " Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service––
>
> a. Article 31—Privacy;
>
> b. Article 36—Freedom of association;
>
> c. Article 37—Assembly, demonstration, picketing and petition;
>
> d. Article 41—Labour relations;
>
> e. Article 43—Economic and social rights; and
>
> f. Article 49—Rights of arrested persons."

18. It is notable that Article 32 which guarantees the right to religious belief and worship is not among the rights that are subject to limitation under the Article 24(5) of *the Constitution* for members of the Armed Forces. Section 44 (2) of the Kenya Defense Forces Act however specifically limits this right on the following terms:

> "(1) The right to freedom of conscience, religion, thought, belief and opinion set out in Article 32 of *the Constitution* shall be subject to limitations in respect of a person to whom this Act applies only under the conditions set out in subsection (2).
>
> 2. Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of freedom of conscience, religion, thought, belief and opinion set out in Article 32 of *the Constitution* if that act is reasonably done—
>
> a. in the interests of defence, security, public safety, public order, public morality or public health;
>
> b. for the purpose of protecting the rights and freedoms of other persons including the right to observe and practice religion, belief, opinion without the unsolicited intervention of members of another religion; or

c. for good order and discipline in the Defence Forces.

19. Section 43(3) of the Act in addition sets the following conditions for the limitation to pass the muster of law:

> " 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."

20. The main test that applies to determine whether a limitation of fundamental rights and freedom is permissible and justifiable, is whether the limitation is legitimate and proportionate. The operative factors that determine the legitimacy and proportionality of a limitation as set out in Article 24(1) of *the Constitution* are:

> " (a) the nature of the right or fundamental freedom;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

21. It is notable that the legitimate and proportionate test is specifically acknowledged in sections 43(3) and 44 of *Kenya Defence Forces Act*. The purposes that justify a limitation in the said Act are defence, security, public safety, public order, public morality or public health and good order and discipline of the Kenya Defence Forces. It is also notable that some of these purposes of the Kenya Defence Forces are also provided in *the Constitution*, and most of them are purposes that serve the public interest. The appellants therefore needed to demonstrate that the limitation of the respondent's rights served one of these purposes, and that there was sufficient proportionality between the harm done by the infringement of the respondent's rights and the benefits it was designed to achieve. The application of this test was summarized as follows in paragraph 7.2 (c) of the Bill of Rights Handbook, Fifth Edition by Iain Currie and Johan de Waal at page 185:

> " ..Once it is established that a law of general application infringes a right protected by the Bill of Rights the state of the person relying on the law may argue that the infringement constitutes a legitimate limitation of the right. Rights are not absolute. They may be infringed, but only when the infringement is for a compellingly good reason. A compellingly good reason is that the infringement serves a purpose that is considered legitimate by all reasonable citizens in a constitutional democracy that values human dignity, equality and freedom above all other considerations. The infringement must however not impose costs

that are disproportionate to the benefits that it obtains. This will be the case where a law infringes rights that are of great importance in the constitutional scheme in the name of achieving benefits that are of comparatively less importance. It will also be the case where the law does unnecessary damage to fundamental rights, damage would be which could be avoided or minimized by using other means to achieve the same purpose (emphasis mine)"

22. Turning to the present appeal and the legal issue at hand, it is not in contest that the order and conduct of the appellants in question required the respondent to work on a Saturday, and expressly denied him his request not to work and to worship on that day, which was a basic tenet of his religious belief and practice as a Seventh Day Adventist. The respondent's averments and evidence produced in this respect were not controverted by the appellants, and were indeed admitted in their response. Since the right to worship is expressly recognized by *the Constitution*, it is my finding that the order by the respondent's supervisor and commanding officer refusing the respondent permission to worship on Saturday was patently unconstitutional.

23. The question that needs to be answered therefore, is whether it was permissible and justifiable for the appellants to infringe on the respondent's right to religion and worship under Article 24(1) of *the Constitution* and section 44 of the *Kenya Defence Forces Act*. Put differently whether the appellants have demonstrated a reasonable legitimate purpose that values human dignity, equality and freedom to justify the infringement. It is necessary at this juncture to point out that the existence of limitation provisions do not operate as a free rein for the infringement of rights for just any reason. If rights can be overridden simply on the basis that it would serve the benefits of the majority and general welfare, then the constitutional entrenchment of the rights would serve minimal purpose. As held by this Court in: Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [supra]:

> " The fundamental character of those freedoms was reflected in the opening words of article 24 of *the Constitution*. In a practical sense, however it was granted that no legal order could guarantee absolute religious liberty without any qualification, hence the legitimate restriction and strictures in article 24. The overall objective of the article was, however not to asphyxiate the rights and fundamental freedoms but to ensure that the exercise of one religion had not unduly interfered with the exercise of other religions, or inhibited the exercise of other civil liberties. Ultimately the purpose of the limitation of human rights was still for the sake of protecting those very human rights."

24. It was upon the appellants to demonstrate that infringement served the purpose of the limitation as set out in *the Constitution* and sections 43 and 44 of the *Kenya Defence Forces Act*. In this regard, it is noted as follows in paragraph 7.1 c. of the Bill of Rights Handbook, (supra) at page 167:

> "...The question whether an infringement of a right is a legitimate limitation of that right frequently involves a far more factual enquiry than the question of interpretation. Appropriate evidence must often be led to justify a limitation of a right in accordance with the criteria laid down... A Court cannot determine in the abstract whether the limitation of a right is 'reasonable' or 'justifiable in an open and democratic society based on human dignity, equality and freedom'. This determination often requires evidence (such as sociological or statistical data) about the impact that the legislative restriction has on society. Where justification rests on factual and/or policy considerations the respondent must put such material before the court..."

25. The appellants therefore needed to demonstrate, by way of credible and persuasive evidence, that the infringement of the respondent's right met the criteria set out in Article 24(1) and section 43 and 44 of

the Kenya Defences Forces Act. Put simply, the appellants needed to demonstrate the exceptional and legitimate purpose the infringement served, and that the infringement was the only way that purpose would be achieved. Limitations of rights, even when prescribed by law, must be demonstrated to be strictly necessary and proportionate.

26. Three aspects of the appellants' response are of concern in this respect. Firstly, the appellants appear to proceed from the premise that the respondent had waived his rights to worship by joining the Kenya Defence Forces, and should therefore not complain when denied this right so to speak, given the nature of military service. I disagree with this approach for the reason that the Kenya Defence Forces and all other state officers are primary duty-bearers in relation to the promotion, protection, and respect of all human rights, and are not only obliged to uphold these rights, but also to ensure that others do not violate them.

27. It is trite that the Defence Forces have a constitutional mandate of defence and national security, and are one of the national security organs established under *the Constitution*. Article 241 of *the Constitution* provides for the following duties and functions of Defence Forces:

> "(a) is responsible for the defence and protection of the sovereignty and territorial integrity of the Republic;
>
> b. shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the National Assembly whenever deployed in such circumstances; and
>
> b. may be deployed to restore peace in any part of Kenya affected by unrest or instability only with the approval of the National Assembly."

28. These functions of the Defence Forces are reiterated in section 8 of the Defence Forces Act. Article 238 (1) in this respect defines national security as "the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests". *The Constitution* also sets out certain principles that underpin the operation of the Defence Forces in Article 238(2) as follows:

> "(a) national security is subject to the authority of this Constitution and Parliament;
>
> b. national security shall be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms;
>
> c. in performing their functions and exercising their powers, national security organs shall respect the diverse culture of the communities within Kenya; and
>
> d. recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions."

29. Likewise, section 3 of the *Kenya Defence Forces Act* sets out guiding principles that guide the Defence Forces as follows:

> "The Defence Forces shall, in fulfilling its mandate, observe and uphold the Bill of Rights, values and principles under Articles 10(2), 232(1) and 238(2) of *the Constitution* and shall—

a. strive for the highest standards of professionalism and discipline amongst its members;

b. prevent corruption and promote and practice transparency and accountability;

c. comply with constitutional standards of human rights and fundamental freedoms;

d. train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

e. ensure that recruitment reflects the diversity of the Kenyan people in equitable proportions."

30. There is thus a specific and express obligation on the part of the Defence Forces and their command structures to uphold the Constitution, and in particular to uphold the Bill of Rights and respect the rule of law and human rights and fundamental freedoms. This obligation is also relevant to the facts and circumstances of the present appeal in so far as it also demands that orders issued by commanding officers are constitutional and lawful. It is notable that rule 7 of The Defence Forces Code of Conduct and Ethics contained in Legal Notice 126 of 2003 published in Kenya Gazette Vol. CV No. 80 on 8 August 2003 requires a member of the armed forces to obey all lawful orders and directions from a superior officer, and all members of the Defence Forces are bound by the law, including *the Constitution*. The preamble to the said Code of Conduct and Ethics also states as follows:

> " The armed forces are a professional national defence institution. The armed forces serve the President and the Republic of Kenya in accordance with *the Constitution* and the laws of Kenya. They are charged with the defence of the Republic and the support of the civil power in the maintenance of order.
>
> The valued traditions of the armed forces include honour and discipline as well as a strong sense of loyalty. Service in the armed forces places special demands on its members including unquestioning obedience to lawful orders and even the sacrifice of their lives.
>
> This Code is intended to establish standards of ethical conduct and behaviour for members of the armed forces. This Code contains rules of conduct and ethics to be observed by members of the armed forces so as to maintain public confidence in the integrity of the armed forces. The Code does not in any way replace the laws and orders governing the discipline and general conduct of members of the armed forces. Members of the armed forces must obey those laws and orders and all other applicable laws."

31. Secondly, the appellants' counsel admitted in the submissions that "it is a command responsibility to provide for religious accommodation.". The appellants proceeded to argue that when such accommodation is not availed for one reason or the other, members cannot claim absolute rights to such accommodation, and the main reason proffered for not availing this accommodation to the respondent was to maintain good order and discipline in the defence forces. In the words of counsel, "the respondent's actions if condoned would potentially get rampantly infectious thus compromising on the Kenya Defence Force's Constitutional mandate to protect the sovereignty and territorial integrity of Kenya". The counsel also pointed out some of the factors that military commanders may consider before granting request for accommodations for religious practices are:

a. the importance of military requirements in terms of individual and unit readiness, health and safety, discipline, morale, and cohesion;

b. the religious importance of the accommodation to the individual; the cumulative impact of repeated accommodations of a similar nature;

c. alternative means available to meet the requested accommodation; and

d. previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.

32. It is indeed international best practice for defence forces to accommodate religious or belief requirements, subject to considerations of operational effectiveness, national security, public health and public safety. The factors to be considered alluded to by the appellants' counsel hereinabove are also provided for by the United States Department of Defense in DOD Instruction 1300.17: Religious Liberty in the Military Services, September 1, 2020. Section 1.2 of the instruction on the Department's policy states as follows:

> "a. Pursuant to the Free Exercise Clause of the First Amendment to the United States Constitution, Service members have the right to observe the tenets of their religion or to observe no religion at all, as provided in this issuance.
>
> b. In accordance with Section 533(a)(1) of Public Law 112-239, as amended, the DoD Components will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) which do not have an adverse impact on military readiness, unit cohesion, good order and discipline, or health and safety. A Service member's expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse action, discrimination, or denial of promotion, schooling, training, or assignment."

33. The nature of the accommodation, and the circumstances when accommodation may be refused are stated as follows in the said section:

> "e. DoD Components have a compelling governmental interest in mission accomplishment at the individual, unit, and organizational levels, including such necessary elements of mission accomplishment as military readiness, unit cohesion, good order and discipline, and health and safety. In accordance with RFRA (The Religious Freedom Restoration Act) and the guidance in this issuance, DoD Components will normally accommodate practices of a Service member based on sincerely held religious belief.
>
> Accommodation includes excusing a Service member from an otherwise applicable military policy, practice, or duty. In accordance with RFRA, if such a military policy, practice or duty substantially burdens a Service member's exercise of religion, accommodation can only be denied if:
>
> 1. The military policy, practice, or duty is in furtherance of a compelling governmental interest.
>
> 2. It is the least restrictive means of furthering that compelling governmental interest.

In applying the standard in Paragraphs 1.2.e.(1) and 1.2.e.(2), the burden of proof is placed upon the DoD Component, not the individual requesting the exemption."

34. Likewise, the Ministry of Defence (MOD) in the United Kingdom has similar provisions in its Guide on Religion and Belief in the Armed Forces, and paragraph 28 of the Guide provides as follows as regard requests for time off and facilities for prayer during the working days:

> " 28. Some religions require their followers to pray at specific times during the day (see summary in Annex C). Although the Act does not specifically require the provision of time and facilities (such as a quiet room) for religious or belief observance in the workplace, it is MOD policy to make such provision where circumstances allow. Individuals should discuss their needs with their Commanding Officers or line managers and every effort should be made to accommodate such needs. Time off for religious observances such as a prayer session during exercises or operations may have to be delayed or deferred due to unit activities. Wherever practicable, areas for worship or contemplation should be made available in all MOD Buildings and Service establishments, including ships and submarines. Personnel will normally be expected to use break times for their religious observances."

35. Additionally, the import and tenor of the decision cited by the appellants of the European Court of Human Rights in Kalaç v. Turkey - 20704/92 (1997) 27 EHRR 552, is that of accommodation. The said Court held as follows when discussing the right to religion vis-à-vis the dictates of military discipline:

> " 27. The Court reiterates that while religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private (see the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 17, para. 31). Article 9 (art. 9) lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 (art.9) does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.
>
> 28. In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, para. 57). States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.
>
> 29. It is not contested that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion. For example, he was in particular permitted to pray five times a day and to perform his other

religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.

30. The Supreme Military Council's order was, moreover, not based on Group Captain Kalaç's religious opinions and beliefs or the way he had performed his religious duties but on his conduct and attitude (see paragraphs 8 and 25 above). According to the Turkish authorities, this conduct breached military discipline and infringed the principle of secularism.

31. The Court accordingly concludes that the applicant's compulsory retirement did not amount to an interference with the right guaranteed by Article 9 (art. 9) since it was not prompted by the way the applicant manifested his religion.

36. In Kalaç v Turkey it was alleged that the applicant therein belonged to a sect which was known to have unlawful fundamentalist tendencies, and the military produced various documents to show that the applicant had given the sect legal assistance, had taken part in its training sessions and had intervened on a number of occasions in the appointment of servicemen who were members of the sect. On the basis of those documents, the military concluded that the applicant had breached military discipline and he was compulsorily retired. The facts of the present appeal are therefore distinguishable from the position in Kalaç v Turkey, since the respondent herein was expressly denied his right to worship, and the sole reason for his discharge from the defence forces was that he elected to exercise this right in disobedience of the orders of his commanding officer.

37. Additionally, no evidence of the adverse effects of the respondent's worship on Saturday on any operations, missions or duties that were required to be performed or undertaken by the respondent or his unit was provided, nor of how his request to worship on Saturday would have prejudiced national security, public safety, public order, public health or morals, or prejudiced the rights of other members of the defence forces. This observation is particularly relevant since the appellants did not controvert the statements by the respondent that he had been given the accommodation to worship for the previous 10 years of service, and the appellants did not demonstrate any prejudicial effect or negative cumulative impact of the previous accommodation accorded to the respondent. The respondent also stated that he had made arrangements with fellow officers to undertake the required duties, which was an alternative that ought to have been taken into account by the appellants, as they are constitutionally and legally required to consider less restrictive means to achieve the purposes they intended to be achieved. In this case the burden shifted to the appellants to show that there were no other servicemen available to step in for the respondent during his period of worship and that it was not possible to permit him a limited period within which to exercise his freedom, even if not the usual period of worship. Consequently, the effect of the appellants' decision was not only a limitation of the respondent's right to worhsip but denial of the same, and *the Constitution* and Defence Forces Act in this respect contemplate a limitation rather than a denial of the right.

38. The main justification proffered by the appellants, that limitation of the respondent's right not to worship on Saturday was necessary to maintain good order and discipline in the Defence Forces, requires more elaboration and clarity as regards its application in Kenya's constitutional context. Colonel Jeremy S. Weber described the concept of good order and discipline as "an idea in search of a definition" in his article "Whatever Happened to Military Good Order and Discipline?", published in 66 Cleveland. State Law Rev. 123 (2017). The said author noted that the most comprehensive,

workable definition found on the subject was in Jeffrey C. Benton's Air Force Officer's Guide 41 (35th Ed. 2008) as follows:

> " Military discipline is intelligent, willing, and positive obedience to the will of the leader. Its basis rests upon the voluntary subordination of the individual to the welfare of the group. It is the cohesive force that binds the members of a unit, and its strict enforcement is a benefit for all. Its constraint must be felt not so much in the fear of punishment as in the moral obligation it imposes on the individual to heed the common interests of the group. Discipline establishes a state of mind that produces proper action and prompt cooperation under all circumstances, regardless of obstacles. It creates in the individual a desire and determination to undertake and accomplish any mission assigned by the leader."

39. Colonel Weber also opined that traditionally, the concept of good order and discipline centered on providing commanders with broad authority so that they can keep tight control over their forces, and that this authority was considered necessary for two reasons. First, warfare is inherently chaotic. For instance, service members are directed to kill other human beings, to risk being killed themselves, and when necessary, to refrain from killing others even when threatened. Moreover, service members are asked to carry out these actions under harsh, stressful, and confusing conditions. Thus, under the traditional view, commanders must be granted authority to a degree not acceptable in civilian society to instill in their charges absolute, conditioned obedience to authority even in the midst of chaos, when military members' natural tendencies would be to do the opposite of what is demanded. The second traditional reason good order and discipline has normally been equated with near-absolute command authority is the fear of a military that becomes too powerful and oversteps its limited defense role. A military force that lacks good order and discipline risks committing war crimes or even upending civilian control over military forces.

40. The author also recognized that the environment in which the military operates has changed in recent decades. The nature of warfare, the pool of people from which the military draws, and society's expectations on how military members will be treated have all undergone significant modifications, and the meaning and application of the concept of good order and discipline needs to adapt as well, and is not a "fire and forget" term.

41. It is my considered view that two main factors consequently determine whether a military personnel's action will be detrimental to good order and discipline to warrant a limitation of his right to worship. The first is the prevailing security context, and in this respect as indicated earlier on in this judgment, it is a recognized constitutional duty and purpose of the Defence Forces to maintain territorial integrity, peace, stability, law, and order during times of war, hostilities and insurrections. A soldiers' or serviceman's individual needs will in such circumstances be subsumed to the greater interests of the public and of the defence forces, and the obligation on a soldier or serviceman to obey orders of superior officers is necessary and vital to the efficiency and success of a military unit and mission in such a context.

42. The decision by the United States Supreme Court in Parker v Levy, 417 U.S. 733, 748 (1974) was made in such a prevailing context, being the backdrop of the Vietnam War. The appellant therein, who had disobeyed an order of a commanding officer to undertake a training programme on account of his medical ethics, and he made statements in relation to the said war inciting some enlisted personnel to refuse to go and fight in Vietnam. He was convicted by a general court-martial of violation of among others, Article 90(2) of the Uniform Code of Military Justice which provided for punishment of any person subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer", and Article 134 which punished any person subject to the Code for, inter alia, "all disorders and

neglects to the prejudice of good order and discipline in the armed forces". The appellant challenged his conviction and one of the grounds was that Article 134 was "void for vagueness" under the Due Process Clause of the Fifth Amendment and in violation of the First Amendment.

43. It is in this context that the Supreme Court held that the military is, by necessity, a specialized society separate from civilian society and has developed laws and traditions of its own during its long history. Further, the differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise". Likewise, it is notable that the United States Congress enacted legislation subsequent to the decision in Goldman v Weinberger, 475 U.S. 503 (1986) that was also relied upon by the appellants, which now provides that a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force. The United States Supreme Court had held in that decision that a Jewish Air Force officer was justifiably denied the right to wear a yarmulke (Jewish religious headgear) when in uniform on the grounds that the Free Exercise Clause and the First Amendment in general did not apply to the military in the same way that it did to civilian society, for the reason that there was a need to "foster instinctive obedience, unity, commitment, and esprit de corps (spirit of the group)'.

44. No evidence was adduced by the appellants in the present appeal of any war, insurrection, hostilities or public emergency that was obtaining at the time to justify the denial of the respondent's right to worship on grounds of operational exigencies, national security, or good order and discipline, and which would undeniably have taken precedence. It is also notable that the appellants did not demonstrate which national security considerations were at play to divest this Court of jurisdiction under the "political question" doctrine. In any event, the application of the political question doctrine in Kenya is not absolute, and Courts have recognized that there may be instances where they can intervene in political or national security matters, especially where there are allegations of constitutional violations or breaches of fundamental rights. See the decision in William Odhiambo Ramogi & 2 others v Attorney General & 6 Others, Mombasa High Court Petition No.159 of 2018 [2018] eKLR.

45. The second factor that needs to be considered to determine the circumstances when good order and discipline of the Defence Forces warrant a limitation of the right to worship of its members and particularly in the absence of war, insurrection, hostilities or public emergency, is the applicable legal and constitutional context. In this respect, the right to religious freedom and worship is constitutionally guaranteed for every person in a number of countries, Kenya included. However, in some countries, such as France and Turkey, there are constitutional guarantees of secularity, while in others, like the United States, there is a separation of church and state. In such countries, there may be a concern that state measures that actively facilitate the practice of religion could be found to be unconstitutional. In addition, in countries where the right to freedom of religion or belief exists for each individual and is guaranteed, difficulties may arise when attempting to accommodate diverse and, perhaps, conflicting religious practices, such as in the provision of prayer, space, or of time off for holy days. Thus, military institutions should seek, as far as possible, to safeguard this right and to restrict it only when it is absolutely necessary, and where there are no other or less restrictive means to ensure discipline, order and safety for defence forces members. Hence the requirements in most constitutional democracies that any restrictions should be prescribed by law, demonstrated to have a legitimate aim, and be necessary and proportionate; so as to avoid arbitrary decisions being made in the name of good order and discipline.

46. In the present appeal as previously noted, other than making the bare statement that it was in the interests of good order and discipline for the respondent to obey orders, the appellants needed to demonstrate, in the absence of any war or civil unrest or hostilities , how the request by the respondent

to worship on a Saturday pursuant to his religious beliefs would have adversely affected the operational effectiveness or ability of his unit, or the ability of his team to perform cohesively as a unit, which they did not. Paradoxically, the appellants urged that allowing the observance by the respondent to worship would also entail allowing this right to worship by other members of the Defence Forces and that this would lead to breakdown of law and order, without providing any evidence of this eventuality.

47. This leads me to the third and final response by the appellants that accommodating the respondent's request to worship on a Saturday would have been indirect discrimination. I am not in agreement with this view for two reasons. Firstly, the right to a religious belief and manifesting of that belief is an individual and personal right and choice, and its observance is guaranteed by *the Constitution*. It is not fathomable how in the circumstances, observance of this right can result in indirect discrimination, since every person is afforded this right, and which right can only be subjected to the limits set down by the Constitution and the law, whose existence were not demonstrated by the appellants. It may be necessary to clarify that indirect discrimination only arises where a law or policy appears to treat everyone equally but, in practice, disadvantages or is less fair to those with certain protected characteristics such as gender, age or disability. It is therefore not evident how the respondent's exercise of his right to worship would have disadvantaged other members of the defence forces, who have an equal right to worship in accordance with their individual religious beliefs. In any event, the appellants did not bring any evidence that the other members of the forces had requested and been denied the right to worship.

48. Secondly and of more concern, is that the appellants' response borders on a blanket refusal and non-recognition of the right of members of the defence forces to manifest their religious beliefs and to worship, and is a perilous avenue for harassment and victimization for those officers who choose to exercise this right. It is notable that the Department of Defence of the Unites States in section 3.2 of the DOD Instruction 1300.17 : Religious Liberty in the Military Services provides as follows on the mode of processing requests for accommodation:

> "Officials charged with making recommendations or taking final action on a Service member's request for the accommodation of religious practices will review each request individually, considering the full range of facts and circumstances relevant to the specific request. Factors to consider include:
>
> 1. The compelling governmental interest in mission accomplishment, including military readiness, unit cohesion, good order and discipline, or health and safety.
>
> 2. Alternate means available to address the requested accommodation. The means that is least restrictive to the requestor's religious practice and that does not impede a compelling governmental interest will be determinative."

49. Likewise, the UK Ministry of Defence in the Guide on Religion and Belief in the Armed Forces provides the following procedure as regards the handling of requests at paragraph 27 thereof:

> "27. The Act (UK Equality Act) does not say that employers must provide time off or facilities to enable personnel to meet religious observances in the workplace. However, reasonable requests must be considered objectively and met wherever practical. Indeed, blanket policies or refusals may constitute indirect discrimination unless justifiable as a proportionate means of achieving

a legitimate aim (e.g. where the granting of leave for a religious holiday would substantially impact on a unit's or department's need)."

50. The risk of harassment of junior officers in the military in the name of good order and discipline was also acknowledged by the European Court of Human Rights in Larissis v Greece (1999) 27 EHRR 329 as follows:

> 50. The Court observes that it is well established that the Convention applies in principle to members of the armed forces as well as to civilians. Nevertheless, when interpreting and applying its rules in cases such as the present, it is necessary to bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 23, § 54, and, mutatis mutandis, the Grigoriades v. Greece judgment of 25 November 1997, Reports of Judgments and Decisions 1997-VII, pp. 2589–90, § 45).
>
> 51. In this respect, the Court notes that the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasised that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces."

51. The conclusion I reach is that the 2nd and 3rd appellants' refusal to allow the respondent to manifest his religion and worship on Saturdays was in the circumstances unreasonable and disproportionate, for the reason that the appellants did not demonstrate that permitting the respondent to worship on a Saturday would have caused a breakdown of 'good order or discipline' within the defence forces, or that such refusal served any other legitimate purpose. On the contrary, the respondent's request to worship on a Saturday was not considered in a professional, legal, or constitutional manner, and the refusal to permit him to worship on Saturdays in the circumstances of this appeal infringed the respondent's right to religious belief and worship under Article 32 of *the Constitution*. It also needs to be noted that this infringement was independent of the respondent's consequent actions that led to his discharge.

52. On the second issue of whether the respondent's discharge complied with the provisions of the law, the learned counsel while reiterating that the respondent's discharge was unconstitutional, submitted that where violations of constitutional rights and or freedoms have been established by a competent court, public interest would demand that wrongs be corrected through such payment of compensation, and the contention that the damages are to be paid from public coffers is not a relevant consideration. The decision in Capital Markets Authority v Jeremiah Gitau Kiereini & Another [2014] eKLR was cited for the submission that the rights of the individuals are so fundamental that they cannot be limited even by public interest.

53. Learned counsel for the appellants submitted that under section 255 (1) (g) of the *Kenya Defence Forces Act*, 2012 which is similar to the repealed Armed Forces Act, section 176 (g), a service member can be discharged if the Service deems that it no longer requires the services of the individual. Accordingly, the respondent was discharged after summary trial by his Commanding Officer, which was conducted in adherence to the provisions of section 80 of the Armed Forces Act (repealed), and his punishment of 42

days' imprisonment was lawful in accordance with section 82 of the said Act. Counsel reiterated that allocation of duties is done by superiors through a hierarchical chain of command as well as individual autonomy, and that selective obedience can never be condoned as the same would lead to anarchy whose resultant effects would be mutinous.

54. The counsel also submitted that the ELRC erred in awarding: general damages in the sum of Kshs. 3,000,000/= for malicious prosecution and false imprisonment since the respondent was legally tried under the then applicable Armed Forces Act; general damages in the sum of Kshs 5,000 000/= for violation of the respondent's rights and fundamental freedom to worship which was subject to lawful limitation under *the Constitution*; and the exemplary damages of Kshs 3,000,000/= as the respondent was not tortured during the 42 days he was in confinement. On the payment of pension, that the respondent had worked for 10 years and 96 days, and was therefore not eligible under the Armed Forces (Pension and Gratuities)(Officers and Servicemen) Regulations 1980 which also provided that a monthly pension was not an entitlement to a serving person. In particular, that Regulation 21 which stipulated that Non-Commissioned Officers (Service Members) only become eligible for payment for pension upon serving for a total period of twelve 12 years or more. On the contrary, that the respondent was entitled to a service gratuity of Kshs. 499,662.90 as assessed, and had a liability of Kshs. 616,536.55 which was settled against the said gratuity.

55. The applicable law at the time of the respondent's discharge in August 2012 was the Armed Forces Act (since repealed), since the Defence Forces Act came into operation in September 2012. The offence of absence without leave and two offences of failure to perform military duty that the respondent was charged with between June and July 2012 were provided in sections 32 and 34 of the Armed Forces Act, and section 80 and 82 of the Act provided for procedure of investigating and trying charges against servicemen, including summary trial as submitted by the appellants or by a court martial. On 30th July 2012 the respondent was charged with the offence of failure to perform military duty contrary to section 34 of the Armed Forces Act, and after being found guilty by the commanding officer on 1st August 2012, the said officer recorded the punishment awarded as follows: "42 days imprisonment and discharge from the service on service no longer required subject to the commander's approval". The punishment of 42 days' imprisonment was provided for under Section 82 (4)(b) of the Armed Forces Act (since repealed), and discharge for services being no longer required was provided for under the section 176 of the repealed Act.

56. However, section 82(5)-(7) of the Armed Forces Act provided the following limitations as regards the nature of punishment that can be awarded:

> 5. Where the commanding officer deals with a charge summarily and considers that the accused is guilty, then, if he intends to award a punishment of dismissal from the armed forces, reduction in rank or stoppages-
>
> a. a finding shall not be recorded until the accused has been afforded the opportunity of choosing to be tried by court martial; and
>
> b. if the accused chooses to be tried by court martial, a finding shall not be recorded but the prescribed steps shall be taken with a view to the charge being tried by court martial:
>
> Provided that where the accused has not chosen to be tried by court martial the punishment of-
>
> i. dismissal;
>
> ii. reduction in rank of a warrant officer; or

iii. reduction in rank of senior sergeant or sergeant, or corresponding rank, to private or corresponding rank, shall be subject to confirmation by the Commander.

5. Except where expressly provided by this Act, not more than one punishment shall be awarded under this section for one offence.

6. Where a serviceman is sentenced to imprisonment he may in addition be sentenced to dismissal from the armed forces...

57. The punishment meted out on the respondent was therefore illegal, since section 82(5) expressly provided that a commanding officer could not award more than one punishment for an offence, and the respondent was not only imprisoned for 42 days but also discharged for the same offence. It is notable in this regard that there was a legal distinction in the repealed Armed Forces Act between a dismissal and discharge, particularly as regards the consequent options that were available to the respondent. Section 82(7) also expressly provided that where a serviceman was sentenced to imprisonment he could in addition be sentenced to dismissal but not a discharge. The punishment meted out on the respondent was therefore also excessive. Lastly, the reason for the respondent's discharge was due to his religious conviction, which was not an offence under the Armed Forces Act nor the offence he was tried for, and given my earlier findings that the refusal to grant the respondent permission to worship was an infringement of his rights, this discharge was also manifestly unconstitutional.

58. On the last issue of the remedies that are merited, the findings made in the foregoing support the award of general damages of Kshs 5,000,000/= for infringement of the respondent's right to worship and the award of exemplary damages of Kshs 3,000,000/= that were ordered by the trial Judge. I am also persuaded that the quantum of the awards is reasonable, and note that the trial Judge cited and relied on comparable awards. I also find that the respondent's discharge having being both unconstitutional and illegal, he was also entitled to compensation for loss of employment, and the award by the trial Judge of 12 months' pay was reasonable in the circumstances. It is notable in this respect that under Article 23(3) of *the Constitution*, a Court may grant appropriate relief in proceedings for infringement of rights, including an order for compensation.

59. I however agree with the appellants that at the time of discharge, the respondent had not served the 12 years provided in the Armed Forces (Pensions and Gratuities) (Officers and Servicemen) (Amendment) Regulations, 1980 which were then in force, to qualify for payment of his pension. The respondent did not dispute this averment and admitted as much in his petition, and there was also evidence that he was paid a gratuity in accordance with the said Regulations. I would therefore disallow that remedy.

60. In the end, I would dismiss this appeal, and affirm the decision of Employment and Labour Relations Court (Nduma Nderi, J.) of 21st July 2017 in Nairobi ELRC Petition 32 of 2013 in terms of the following orders:

1. A declaration is hereby made that the discharge of the respondent from the Defence Forces on the grounds of his religious conviction was unconstitutional and in contravention of the Article 32 of *the Constitution*.

2. A declaration is hereby made that the resultant penalties, imprisonment and discharge of the respondent were illegal and unconstitutional.

3. General damages of Kshs 5,000,000/= are awarded to the respondent for infringement of his right to religious freedom and worship as against the 2nd and 3rd appellants.

4. Exemplary damages of Kshs 3,000,000/= are awarded to the respondent for unlawful imprisonment as against the 2nd and 3rd appellants.

5. Compensation for unlawful termination of employment of 12 months' salary as paid at the date of discharge is awarded to the respondent as against the 2nd and 3rd appellants.

6. Interest on the awards in orders (3), (4) and (5) hereinabove shall be paid from the date of the judgment of the Employment and Labour Relations Court (Nduma Nderi, J.) delivered on 21st July 2017 in Nairobi ELRC Petition 32 of 2013 until payment in full.

7. The order in the judgment of the Employment and Labour Relations Court dated 21st July 2017 in Nairobi ELRC Petition 32 of 2013 that "Petitioner be treated as an ordinary retiree and be paid lump sum and monthly pension in terms of Kenya Defense Forces Act and relevant regulations within sixty (60) days of this judgment" be and is hereby set aside.

8. The 1st, 2nd and 3rd appellants shall meet the respondent's costs of the petition in the Employment and Labour Relations Court and of this appeal.

Dated and delivered at Nairobi this 7th day of November, 2025.

NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA (P), ASIKE-MAKHANDIA & NYAMWEYA, JJ.A.)

CIVIL APPEAL NO. 57 OF 2019

BETWEEN

ATTORNEY GENERAL ..... 1ST APPELLANT CABINET SECRETARY FOR DEFENCE ..... 2ND APPELLANT CHIEF OF DEFENCE FORCES .... 3RD APPELLANT

AND

POLYCARP MIYOGO RESPONDENT

(Being an appeal against the Judgment of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated 21st July 2017 in ELRC Petition No. 32 of 2013)

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CONCURRING OPINION OF D. MUSINGA (PRESIDENT)

I have had the benefit of reading in draft the judgment of Nyamweya,

J.A. I fully concur with the reasoning and findings of the learned Judge.

Consequently, the judgment of the Court shall be as proposed by Nyamweya, J.A.

Dated and delivered at Nairobi this 7th day of November 2025.

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA (P), ASIKE-MAKHANDIA & NYAMWEYA, JJ.A.)

CIVIL APPEAL NO. 57 OF 2019 BETWEEN

ATTORNEY GENERAL ..... 1ST APPELLANT

CABINET SECRETARY FOR DEFENCE ..... 2ND APPELLANT

CHIEF OF DEFENCE FORCES 3RD APPELLANT

AND

POLYCARP MIYOGO .....

RESPONDENT

(Being an appeal against the judgment of the Employment and Labour Relations Court at Nairobi (Nduma Nderi, J.) dated 21st July 2017

in

ELRC Petition No. 32 of 2013)

****

DISSENTING JUDGMENT OF ASIKE-MAKHANDIA, J.A

61. Adherents of religions manifest their beliefs in many ways, for instance, by abstaining from work on certain days, fasting for a specific period, and attending places of worship at certain times and places. This may often lead to conflicts between the employer and employee at workplaces if such adherents are employees. This aspect was brought home by Robin Allen, QC, and Rachel Crasnow,in their book Employment Law & Human Rights, paragraph 9.5 at page 137 thus:

> " It has long been recognized that the demands of the workplace can come into conflict with both manifesting and changing religion in many different ways: Muslims may wish to visit the mosque on Fridays; Jews may not wish to work on Saturdays; Christians on Sundays..."

62. It is this conflict that is - the crux of this appeal by the Attorney General, ("the appellant"), against the judgment and decree of Nduma Nderi, J. of the Employment and Labour Relations Court (ELRC) in Petition No. 32 of 2013.

63. Mr. Polycarp Miyogo ("the respondent") was enlisted into the Kenya Defence Forces on 3rd August 2002 and posted to Moi Air Base, Eastleigh as a Fireman Class l. He was a Seventh-Day Adventist adherent ("SDA"). He served until 2nd June 2012, when he failed to report for duty on grounds that

it was his day of worship (Saturday). He was subjected to summary disciplinary proceedings before his Commanding Officer pursuant to the Armed Forces Act (AFA) (now repealed), for the offence of failing to perform military duties contrary to section 34 of the said AFA. At the end of the proceedings, he was found guilty and sentenced to a fine equivalent to his two (2) days' pay. On 8th June 2012, the respondent again absconded duty, without permission. When asked to explain, he reiterated that it was his day of worship; that worship day (sabbath) for his faith commences at sunset on Friday to sunset on Saturday. He was once more subjected to disciplinary proceedings and ordered to forfeit two (2) days' pay and fined of 2 days for his illegal absence. He was further advised against his misguided notion that he could not work on Saturdays but still remained adamant that nothing and no one would limit his freedom of worship.

64. On 14th July 2012, the respondent for the third time again failed to turn up for the assigned duties without permission. He was summoned to appear before his Commanding Officer on 1st August 2012 for summary disciplinary proceedings, charged with failure to perform military duties under section 34 of the AFA. He was found guilty, and imprisoned for 42 days and six days' salary deducted. It was further recommended that he be discharged from service on the basis that his services were no longer required, subject to the Kenya Air Force Commander's approval. On 7th December 2012, the respondent was discharged from service on the aforesaid ground.

65. The respondent then filed a constitutional petition on 7th June 2013 in the ELRC alleging breach of his constitutional rights and freedoms enshrined in *the Constitution*. He sought declarations that: the Kenya Defence Forces as an organ of Government was bound by *the Constitution* and that it was under duty to respect, uphold and defend *the Constitution* in terms of Articles 2 (1) (3), 24 (5) (a) (b) (c) (d) (e) (f), 27 (1) (4), 28, 29 (a) (d) (f), 32 (1) (2) (3) & (4), 47 and 73; the imprisonment for 42 days and deduction of the respondent's salary for six days was illegal and in contravention of Articles 27 (1) (4), 32 (1) (2) (3) & (4) and 47 of *the Constitution* of Kenya; the respondent be compensated for wrongful confinement; the discharge of the respondent from the service on grounds of religion was illegal and in contravention of Articles 2 (1) 3, 10, 19 (c), 20 (1) (2) (3), 24 (5) (a) (b) (c) (d) (e) (f), 27 (1) (4), 28, 29 (a) (d),(7), 32 (1) (2) (3) & (4), 47 and 73; the respondent be compensated for lost employment and earnings; the respondent be entitled to pension and monthly benefits as an ordinary retiree because he was ready to serve until he attained the retirement age after? 12 years; the respondent was entitled to general damages and compensation for the violation of his fundamental rights and freedoms; the respondent was entitled to exemplary and aggravated damages for unlawful imprisonment and in contravention of *the Constitution* and costs of the petition.

66. The respondent's case was as set out in the petition summarized above, and I need not therefore rehash the same. Suffice to add that according to the respondent, all the actions of the appellant complained of were carried out in complete violation and disregard of his constitutional rights and fundamental freedoms.

67. The 2nd and 3rd appellants filed a replying affidavit in opposition to the constitutional petition. It was their case that the respondent was defiant in spite of constant advice to obey lawful orders of his superiors; that the charges and penalties meted out were lawful and procedural. That SDA was not superior to other religions and cannot therefore be given preferential treatment in the Armed Forces. That doing so would amount to discrimination against other religions. Finally, it was urged that the respondent had not established the violations of any of the alleged human rights and fundamental freedoms. They therefore prayed for the dismissal of the petition with costs. There was, however, no response by the 1st appellant.

68. In a judgment delivered on 21st July 2017, the trial court found that the respondent's constitutional right not to be discriminated against upon grounds of religion, freedom of worship, and right to dignity were infringed upon by the appellants in a most cavalier manner and were deserving of deterrent sanctions by the court. That the termination of the respondent's employment was therefore unlawful, and the orderly proceedings conducted against the respondent were null and void.

69. The trial court then proceeded to grant the declarations sought and, thereafter, awarded the respondent damages as follows:

> "General damages in the sum of Kshs.3,000,000 for malicious prosecution and false imprisonment; General damages in the sum of Kshs.5, 000,000 for violation of the respondent's human rights and fundamental freedom to worship in accordance to his religion. Exemplary damages in the sum of Kshs.3, 000,000; General damages for lost earnings equivalent to twelve (12) months' salary to be computed and filed in court within thirty (30) days of Judgment; respondent be treated as an ordinary retiree and be paid lump sum and monthly pension in terms of *Kenya Defence Forces Act*, and relevant regulations within sixty (60) days of this Judgment; Interest at court rates from date of Judgment till payment in full and Costs of the suit."

70. Aggrieved by the judgment and decree, the appellant filed the instant appeal on eight grounds, that the trial court erred in law and fact by: finding in favour of the respondent; finding that the appellants violated the respondent's constitutional rights; holding that the respondent was wrongly terminated from employment without due process; failing to appreciate the defence offered by the appellants; not appreciating that the respondent was an employee of the Kenya Defence Forces and AFA had provisions governing freedom of worship; and, lastly, by awarding the respondent damages without proper justification.

71. The appeal was canvased by way of written submissions with limited oral highlights. During the plenary hearing of the appeal on 13th May 2024, Ms. Mungata, learned counsel appeared for the appellants whereas Mr. Omega Ochieng, learned counsel appeared for the respondent. In her submissions, Ms. Mungata stated that it would be disastrous for the military to give in to the demands of each service officer based on his or her religious orientation. I was asked to imagine a military where Muslims are un-deployable on Fridays, Christians on Sundays, and Adventists on Saturdays. That the issue before the court primarily was about religious accommodation vis-à-vis limitation of rights as enshrined in *the Constitution*, that is, Article 32 vis-à-vis Article 24 of *the Constitution*. She submitted that the nature of service in the military is not the same as in the civilian setting. The respondent was enlisted for a period of 12 years until it came a time when he felt that he could not be tasked with or deployed on duties on Saturdays. She implored the Court to consider the voluntary terms of acceptance of military service and the commensurate obligation by the respondent to obey lawful orders from his superiors.

72. Relying on the case of Goldman v. Weinberger. 475 US. 503, 507 (1986), Kalac v. Turkey (1997) 127 EHRR 522, counsel submitted that the 3rd appellant did not violate any of the respondent's guaranteed human rights and fundamental freedoms enshrined in *the Constitution* of Kenya. That the respondent was discharged from service after he was found guilty of disobeying orders to perform duties on Saturdays. That a determination that the right to religious freedom of the respondent is absolute will out rightly lead to discrimination against other service members who practice their faith on other days of the week but are still expected to perform military tasks when and if deployed for such on their particular days of worship. To do so would result in contravention of Article 27 (4) of *the Constitution* of Kenya and degradation of morale, good order, and military discipline. Section 44(2)

(c) of the AFA stipulates that the right to freedom of religion is subject to a limitation of the same if it is reasonably done on the basis of good order and discipline in the Defence Forces.

73. It was further submitted that the respondent's actions, if condoned, would potentially get rampantly infectious, thus compromising the Kenya Defence Force's Constitutional mandate to protect the sovereignty and territorial integrity of Kenya. It was submitted that under section 255 (I) (g) of AFA, a service member can be discharged if the service deems that it no longer requires the services of the individual. The respondent was discharged after a trial was conducted in accordance with the provisions of section 80 of the AFA. The respondent's right to practice his religion does not exist in vacuum devoid of the commensurate obligation to obey orders and to perform military tasks. That individual autonomy and selective obedience can never be condoned as the same would lead to anarchy, whose resultant effects would be mutinous.

74. On whether the respondent was entitled to the damages, counsel submitted that the trial court erred in awarding the colossal damages without proper legal justification. That as at the time of discharge, the respondent had worked for 10 years, and 96 days. He was therefore not eligible for pension, having not served for the requisite minimum period of at least 12 years. While relying on the cases of Felix Barnabus Shikutwa v. Ministry of State for Defence & 4 Others [2016] eKLR, Arab Sugal Adow v. Cabinet Secretary Ministry of Defence & 2 Others [2020] eKLR, and Gift Kiambu Marandu v. Kenya Defence Forces Council & The Attorney General [2017] eKLR, the appellants submitted that the computation of benefits flouted the well-settled legal principle that he who alleges bears the burden of proof. Terminal benefits are special damages in nature and must be specifically pleaded and strictly proven. The respondent failed to adduce evidence to prove the monthly basic salary and the criterion used in the calculation of the lump sum, monthly pension arrears, and lost earnings. That the trial court adopted computation by the respondent without strict evidentiary proof of the formulae used to arrive at the amounts and contrary to section 109 of the *Evidence Act*. The appellants thus prayed that the appeal be allowed with costs.

75. On his part, Mr. Omega Ochieng, while relying on the cases of Seventh Day Adventist Church (EA) Ltd v. Minister for Education & 3 Others [2017] eKLR, submitted that the circumstances under which the respondent was dismissed from employment were purely based on the fact that he took part in worship, which was a guaranteed constitutional right. The respondent was therefore dismissed from service on grounds of religious conviction. That though the AFA has limitations as to the enjoyment of rights pursuant to Article 24 (5) of *the Constitution* which provides that persons serving in the Kenya Defence Forces or the National Police Service may be exempted from enjoyment of some of the rights which shall not be construed as limiting the right of fundamental freedom, however, from the facts presented before the court, the respondent actually had been attending to his duties for 10 years before the very last moment when he went to seek permission to worship and was denied. That the fact that the respondent was denied permission to worship clearly demonstrated the appellants' lack of adherence to Article 44 of the Constitution, and that the trial court was therefore right in finding that the respondent was denied the right to worship.

76. On whether the provisions of AFA can override the fundamental provisions of *the Constitution* governing the freedom of worship, the respondent submitted that the contention by the appellants that the trial court erred by not appreciating that the respondent was an employee of the Kenya Defence Forces and subject to the AFA and provisions governing the freedom of worship cannot stand.

77. On damages, counsel submitted that this Court can only interfere with the award of damages where the damages are so inordinately high or low that they must be a wholly erroneous estimate of damages. For this proposition, counsel relied on the case of Butt v. Khan [1978] eKLR. This was not however,

the case here, and that the damages awarded were deserved. In the ultimate, the respondent prayed for the dismissal of the appeal with costs.

78. A first appellate court is expected to subject the whole of the evidence tendered in the trial court to a fresh and exhaustive scrutiny and draw its conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was reiterated in the cases of Selle v. Associated Motor Boat Co. Ltd & Others [1968] EA 123 and in Peters v. Sunday Post Limited [1958] E.A. 424. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

79. Having laid out my mandate, the issues that I discern for determination in this appeal are whether: the trial court was right to find that the dismissal of the respondent from service violated his constitutional and fundamental freedoms; and whether the damages awarded were deserved.

80. The appellant in his petition cited various articles of *the Constitution*, which he alleged to have been violated by the appellants and in particular, Articles 2 (1) 3, 10, 19 (c), 20 (1) (2) (3), 24 (5) (a) (b) (c) (d) (e) (f), 27 (1) (4), 28, 29 (a) (d), (7), 32 (1) (2) & (4), 47 and 73 of *the Constitution*. However, of interest to us are Articles 24, 27, and 30 of *the Constitution* and sections 44 and 255 of AFA.

81. Article 24 of *the Constitution* provides that:

> " 1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> a. The nature of the right or fundamental freedom;
>
> b. The importance of the purpose of the limitation;
>
> c. The nature and extent of the limitation;
>
> d. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
>
> 2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom:
>
> a. In the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom and the nature and extent of the limitation;
>
> b. Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
>
> c. Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
>
> ...

5. Despite clauses (1) and (2), a provision in legislation.

6. May limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service:

    a. Article 31 – Privacy;

    b. Article 36 – Freedom of association;

    c. Article 37 – Assembly, demonstration, picketing and petition;

    d. Article 41 – Labour relations;

    e. Article 43 – Economic and social rights; and

    f. Article 49 – Rights of arrested persons."

82. Article 27 of *the Constitution* of Kenya, 2010 provides for equality and freedom from discrimination and in particular provides that:

> " 1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> 2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
>
> 3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social sphere.
>
> 4. The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> 5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4)."

83. Article 30 of *the Constitution* of Kenya, 2010 provides that:

> " 1. Every person has the right to freedom of conscience, religion, thought, belief and opinion.
>
> 2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
>
> 3. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

84. Finally, Article 32 of *the Constitution* provides as follows:

> "(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

3. A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

4. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion."

85. On the other hand, section 44 of the *Kenya Defence Forces Act*, 2012 provides, inter alia, that:

> " 1. The right to freedom of conscience, religion, thought, belief and opinion set out in Article 32 of *the Constitution* shall be subject to limitations in respect of a person to whom this Act applies only under the conditions set out in subsection (2).
>
> 2. Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of freedom of conscience, religion, thought, belief and opinion set out in Article 32 of *the Constitution* if that act is reasonably done:
>
> a. in the interests of defence, security, public safety, public order, public morality or public health;
>
> b. for the purpose of protecting the rights and freedoms of other persons including the right to observe and practice religion, belief, opinion without the unsolicited intervention of members of another religion; or
>
> c. for good order and discipline in the defence forces."

86. Then there is section 255 of the *Kenya Defence Forces Act*, 2012 which provides that:

> " 1. A service member may be discharged by the Service Commander or an officer authorized in that behalf, at any time during the member's period of colour service:
>
> a. if, within two years after the date of attestation, the commanding officer considers that the member is unlikely to be an efficient member of the Defence Forces;
>
> b. for activities or behavior likely to be prejudicial to the preservation of public security;
>
> c. if the member is convicted of a civil offence;
>
> d. if the member is pronounced by a medical officer to be mentally or physically unfit for further service;
>
> e. on reduction of establishment;
>
> f. at the member's request on compassionate grounds;
>
> g. if for any reason the member's services are no longer required;

h. if the member is granted a commission; or

i. if the member is sentenced by a court martial to be dismissed from the Defence Forces.

2. The Service Commander or an officer authorized in that behalf, as the case may be, shall afford specific reasons in writing for any discharge, to the affected service member."

87. Having laid down the provisions of the law relevant to this appeal and which the respondent maintained to have been violated, infringed, or contravened, I note that the main contention before the trial court by the respondent was basically a breach of Article 32 of *the Constitution*.

88. Of particular relevance to this judgment is Article 32 (2) and (4), whose elements include:

a. The right to manifestation of one's belief(s) through observance of a day of worship; and,

b. That one shall not be compelled to act or engage in any act that is contrary to the person's belief or religion.

89. It should be noted that neither Articles 8, 32 nor 260 which deals with the interpretation of *the Constitution* define religion and the enjoyment of that right but in the Human Rights Review 2012, in an analysis of Article 9 of the European Convention on Human Rights which is similar word for word to Articles 9 (2), 32 (2) and 24 (1) of *the Constitution*, the authors noted as follows:

i. The right to hold, as distinct from the right to manifest, religious and other beliefs is an absolute right.

ii. The right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others."

90. Religion is a matter of faith, and not of logic. It is not open to a court to accept an egalitarian approach over a practice that constitutes an integral part of religion. *The Constitution* allows the followers of every religion to follow their beliefs and religious traditions. *The Constitution* assures believers of all faiths that their way of life is guaranteed and will not be subjected to any challenge. *The Constitution* extends this guarantee because faith constitutes the religious consciousness of the followers. It is this religious consciousness that binds believers into separate entities. *The Constitution* endeavours to protect and preserve the beliefs of each of the separate entities, under Article 32.

91. Though religion is important in Kenya, the country has successfully retained its secular character. To make secularism acceptable, freedom of religion was guaranteed. This was made possible, in large part, because the framers of *the Constitution*, wanted to base society on an understanding that man has an "inward association" with religion. Religious freedom is premised on the belief that every human being has the inherent dignity to explore his or her conscience and pursue the truth. Article 8 of *the Constitution* provides clearly that: "There shall be no State religion." The import of the provision is that no religion shall have prevalence over any other and no particular one should be seen as the one each citizen is obligated to be an adherent, including the observance "of a day of worship."

92. It is common ground that the respondent, on the occasions adverted to in this judgment, deliberately, without authority, and in gross insubordination of his superiors' orders, failed to attend to his military duties assigned to him. He opted instead to go and worship. The respondent was repeatedly cautioned

about the insubordination but refused to heed the warnings. This left the appellants with no other alternative but to terminate his services pursuant to section 255 of AFA. Was this termination unlawful, illegal, and unjustified as held by the trial court?

93. In the case Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004) which was a religious discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. of Idaho Law, Richard Peterson claimed that his former employer, the Hewlett-Packard Company, engaged in disparate treatment by terminating him on account of his religious views and that it failed to accommodate his religious beliefs. The District Court granted Hewlett-Packard's motion for summary judgment on the grounds that: 1) Peterson failed to raise an inference of disparate treatment; and 2) accommodating Peterson's beliefs would inflict undue hardship upon Hewlett-Packard.

94. Again, in the Turkish case of Kalac v. Turkey [1997] 27 EHRR 522, Kalac (K), a Judge, Advocate, and Director of Legal Affairs for the Turkey Airforce, was a practicing Muslim who was permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque. He was one of three officers and twenty-eight non-commissioned officers whose compulsory retirement was ordered by the Supreme Military Council for breaches of discipline and scandalous conduct based on religious beliefs.

95. After the Supreme Military Council's decision had been approved by the President, the Prime Minister, and the Defence Minister, he was ordered to surrender his Social Security (Health Insurance) card, Military Identity Card, and Licence to bear arms. His application to have all these measures set aside was dismissed as Turkey's Constitution guaranteed freedom of religious belief and worship, but provided that no rights could be exercised to set up a State order based on religious beliefs. He thereafter proceeded to the European Court of Human Rights.

96. In its judgment, the court held, inter alia, that:

> "Art 9, although implying freedom to manifest one's religion, did not protect every act motivated or inspired by a religion or belief and an individual might need to take his specific situation into account:
>
> 2. that K, by choosing a military career, was accepting of his own accord a system of military discipline which by its very nature implied the possibility of placing on certain rights and freedoms limitations incapable of being imposed on civilians;
>
> 3. that States could adopt disciplinary regulations forbidding this or that type of conduct and in particular an attitude inimical to an established order reflecting the requirements of military service;
>
> 4. that it was not contested that K was, within the limits imposed by the requirements of military life, able to fulfil the obligations which constitute the normal forms through which a Muslim practices his religion;
>
> 5. that the supreme military council's order was not based on K's religious opinions and beliefs but on his conduct and attitude which, according to the Turkish authorities, breached military discipline and infringed the principle of secularism;
>
> 6. that K's compulsory retirement was not prompted by the way he had manifested his religion and was not, therefore, a violation of Art 9."

97. I am persuaded that the above considerations were applicable in the circumstances of this case. As already stated, the right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law. By disobeying lawful orders in favour of his religious orientation, he was simply manifesting a belief which was not absolute since there was a law in place dealing with such a situation, that is, section 44 of the Defence Forces Act.

98. In the Finland case of Konttinen v. Finland, Dec., No. 24949/94, E Comm HR (Plenary), 3 December 1996, which involved the dismissal of a worker, motivated by his repeated refusal to work during the holidays of his religious persuasion, the European Commission of Human Rights court found that Article 9 of the ECHR does not guarantee, as such, the right of the worker to take time off from work on religious holidays or in certain time slots, making him change his belief or infringe on his constitutional rights. Again, in the case of Copsey v. A.W.B. Devon Clays Ltd [2005] ICR 1789, Stephen Copsey, a practicing Christian, worked as a team leader at a sand processing plant and quarry. A new order substantially increased the tonnage of sand that needed to be harvested. Mr. Copsey's employer sought to include him in a shift pattern that would involve Sunday working. Due to his religious beliefs, Mr. Copsey refused to agree to vary his contract so that he could not be required to work on Sundays. After seeking alternative options, including alternative jobs within the company and favourable severance terms, Mr. Copsey's employers eventually gave him an ultimatum which resulted in him being dismissed. The Court of Appeal found that the dismissal was fair regardless of whether Article 9 was engaged. The employer had compelling economic reasons for requiring the change in hours, had done everything it reasonably could to accommodate the employee's wish not to work on Sundays, and had fully explored all alternatives to dismissal.

100. The European Court of Human Rights speaking to its fundamental character and its limits of this right in Kokkinakis v. Greece (1993) 17 EHHR 397 at 418-419 stated:

> " 31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism is dissociable from a democratic society, which has been dearly won over the centuries, depends on it.
>
> While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion." Bearing witness in words and deeds is bound up with the existence of religious convictions.
>
> 32 .....
>
> 33. The fundamental nature of the rights guaranteed in Article 9(1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs in Articles 8, 10 and 11, which cover all the rights mentioned in the first paragraphs of those Articles, that of Article 9 refers only to "freedom to manifest one's religion or belief." In so doing, it recognizes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."

101. Based on the foregoing, it appears to me that the dismissal of the respondent was motivated by his repeated refusal to obey lawful orders under the pretext that he could not work on his days of worship, being Saturdays. From the Articles of *the Constitution* and the provisions of the *Kenya Defence Forces Act* cited elsewhere in this judgment, freedom of conscience and religion are not absolute. They can be limited, and this was the case as far as the respondent was concerned. In my view, the appellants' decision was not based on the respondent's religious beliefs but on his conduct and attitude, which, according to the appellants, breached military discipline. The appellants had compelling reasons for taking the decision that they did; maintenance of order and discipline. That being the case, the trial court should have avoided reading into their actions and elements of discrimination. The appellants' demand that the respondent respect working hours does not represent any form of pressure or a coercive measure aimed at discriminating against him or coercing him into abandoning his religious beliefs and convictions.

102. I no doubt appreciate that members of the Kenya Defence Forces, on joining the forces, willingly surrender temporarily, free exercise of rights when it impinges on military discipline, and the successful completion of a military objective. Thus, the respondent's voluntary acceptance of military service that could impose limitations on his freedom to take part in religious activities could not be held as a violation of the right to manifest his religious beliefs.

103. Prof. Kenneth Lasson in the Article, Religious Liberty in the Military: The First Amendment Under "Friendly Fire", 9. J. L. & Religion 471 (1992) states:

> " The military rules are altogether different, especially in view of the fact that enemies seek to take advantage of the religious customs and practices of their adversaries. For example, on December 7th 1941, Japan attacked pearl harbour anticipating that the church going military would be less able to respond to its attack on Sunday. Similarly, the Arab nations invaded Israel on Yom Kippur in 1973 believing that the Israel military would not be able to function on the holiest of Jews holidays. If its service members had not been subjected to some degree of military discipline, neither of these nations would likely? have been able to respond as well as they did."
>
> It cannot be gainsaid, therefore, that national security interests override individual interests and may justify restrictions of rights and freedom for purposes of military readiness, cohesion, or good order and discipline.

104. In my view, if the respondent's actions were condoned, they would potentially get rampantly infectious, thus compromising the Kenya Defence Force's Constitutional mandate to protect the sovereignty and territorial integrity of Kenya, as correctly observed by counsel for the appellant.

105. Having so stated, I turn back to the incidences that resulted in the termination of the respondent's employment. Interference with the right to manifest one's religion is the only ground on which the dismissal of the respondent was alleged to have been found to be unfair by the trial court. The claim as set out in the petition was the alleged breach of Article 32 of *the Constitution* being the failure by the appellants to make reasonable accommodation for the respondent's religious beliefs regarding his days of worship. From the record, it cannot be said that what was presented was a claim for discrimination on the grounds of religion or belief. I note that despite the tone of the petition and the judgment of the trial court, this was not a case of religious persecution or religious intolerance.

It was a bona fide employment dispute regarding the legal limitations placed by *the Constitution* and the *Kenya Defence Forces Act* for the type of work the respondent was engaged in.

106. I am satisfied that the respondent was not dismissed for being a Seventh Day Adventist member, as there were no findings that the appellants were anti-Sabbath or anti any other religion or religious practice or observance. Indeed, the respondent, by his own admission, had been allowed to practice his religion for the last 10 years. The only issue was his deliberate failure to proceed to work on the time and day required when he was on duty on grounds that he was to worship. As such, this case is distinguishable from Phillip Okoth & LSK v. BOM, St Anne's Primary Ahero [2023] eKLR, cited by the respondent, where the Court unequivocally held that compelling students to participate in interfaith activities that contradict their faith is a direct violation of their freedom of religion under Article 32 of the Kenyan Constitution.

107. I do not agree with the trial court that religious conviction and observance of a day of worship, even for staff in the Kenya Defence Forces or the National Police Service cannot in any circumstance be limited. Article 24 provides for areas that can be limited and observance of a day of worship is not among them. Being a member of the KDF, I reiterate that there exist limitations as to how and when the worship time and day can be observed. Section 44 of the *Kenya Defence Forces Act*, 2012, provides that Article 32 shall be subject to limitations. The said section outlines the circumstances under which a religious right/freedom can be limited. The conditions and circumstances included in the interests of: defence; security; public safety; public order; public morality; public health; for the purpose of protecting the rights and freedoms of other persons, and for good order and discipline in the Defence Forces. In any case, and as I have already stated, by signing up with the Kenya Defence Forces, the respondent knew very well that there would be some limitations to the enjoyment of his constitutional and fundamental freedoms enshrined in *the Constitution*. It is clear that the application of Article 32 of *the Constitution* is limited in the circumstances listed above, so that one's right to worship would be curtailed in the interest of defence, and for good order and discipline in the defence forces. Whereas members of KDF have the right to practice their religion, there are limitations to ensuring good order and discipline.

108. I have said enough to demonstrate that the appellants acted properly when they exercised their powers to interfere with the respondent's scheduled time of worship but did not limit the same. I thus come to the conclusion that there was no contravention of Article 32 of *the Constitution* contrary to the holding by the trial court. Termination of his employment was not wrongful but lawful in the circumstances.

109. Having found as much, it follows that there is no need to tackle the other framed issue on damages. The appeal is accordingly allowed. The judgment and decree of ELRC are set aside and substituted with an order dismissing the respondent's petition. Each party shall bear their own costs both in the ELRC and in this appeal.

110 Since I am in the minority, and the majority are of a contrary view, the final orders of the judgment shall, therefore, be in terms as proposed by Nyamweya, J.A.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.