Shikutwa v Ministry of State for Defence and others & 4 others (Civil Appeal 254 of 2017) [2023] KECA 1285 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1285 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 254 OF 2017

MSA MAKHANDIA, AK MURGOR & J MOHAMMED, JJA

OCTOBER 27, 2023

BETWEEN

FELIX BARNABUS SHIKUTWA .... APPELLANT

AND

THE MINISTRY OF STATE FOR DEFENCE AND OTHERS .. 1ST RESPONDENT

GENERAL JEREMIAH KIANGA .... 2ND RESPONDENT

LIEUTENANT GENERAL JACKSON TUWEI .... 3RD RESPONDENT

COLONEL BISHOP ALFRED K ROTICH .... 4TH RESPONDENT

HON ATTORNEY GENERAL .... 5TH RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Nduma Nderi, J.) delivered on the 25th November, 2016 in ELRC Number 671 of 2013)

JUDGMENT

Background

1. Felix Barnabus Shikutwa (the appellant) is an ordained Catholic priest.

   In 2003 he was seconded to the armed forces after undergoing an interview and training. On 7th April, 2003 he was commissioned as an officer in the Kenya Armed Forces by the President of the Republic of Kenya. In the year 2007 he was nominated for a peace keeping mission in Southern Sudan. He stayed in South Sudan for thirteen months. Upon his return to Kenya, he reported to Colonel Bishop Alfred Rotich (the 4th respondent) and proceeded on leave.

   The Ministry of State for Defence and Others, General Jeremiah Kianga, Lieutenant General Jackson Tuwei, Colonel Bishop Alfred K. Rotich and the Hon. Attorney General are the 1st to 5th respondents respectively.

2. It was the appellant's case that when he returned from annual leave, on or about 14th July, 2008, the 4th respondent issued him termination of commission instructions from the Defence Council with effect from 9th October, 2008. The letter did not provide reasons for termination. As a result, the appellant complained to the Public Complaints Committee who wrote to the Principal Secretary for Defence on 19th November, 2008. The Principal Secretary in a letter dated 2nd December 2008 confirmed that the appellant's commission was terminated for conducting shoddy deals whilst in Sudan.

3. Consequently, the appellant filed a plaint on 24th September, 2009 contending inter alia that the termination was unlawful and reeked of malice and ill will; that there was no proper Defence Council meeting constituted to terminate his commission; that the laid down procedure was not followed on termination of commission; that no proper Investigation Board was constituted to terminate his commission; that he was not accorded a hearing on the issues; that he had no disciplinary record; and that no reasons were given for the termination.

4. The appellant further averred that being a Spiritual leader, the termination had painted him in bad light to right-thinking members of

the society; that he was not in a position to conduct mass for fear of reprisals; and that he had lost his livelihood due to the respondents' actions.

5. The appellant prayed for judgment to be entered in his favour against the respondents jointly and severally for:

> " (a) A declaration that the plaintiff's termination and removal from employment was unlawful, null and void;
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> b. General damages for unlawful termination and rape (sic) of reputation;
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> c. Terminal dues to be proved at the hearing;
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> d. Costs of the suit;
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> e. Interest on the above at court rates; and
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> f. Such further or any other relief this court may deem fit to grant."

6. In the appellant's witness statement, he highlighted his achievements including successfully accomplishing tasks in Thika such as completing the construction of the Roman Catholic Church; organized workshops, seminars and spiritual tasks; celebrated mass daily; organized hospital visits in Thika District Hospital; and organized pastoral counseling for the soldiers and their families. Further, that while in Sudan for the UN Peacekeeping Mission, he worked well and regularly briefed the Commanding Officer.

7. In opposition, the respondents filed a defence and denied: that the appellant's record was marked with a lot of indiscretion; that the termination of the appellant's commission was unlawful, malicious and based on ill will as particularized in the plaint; and that the decision of the Defence Council had injured the appellant's reputation.

8. The 1st, 2nd and 3rd respondents averred: that no procedure was violated by the Defence Council and there was no requirement under the law that an Investigation Board be constituted to terminate the appellant's commission; that the Defence Council is under no obligation to provide reasons for its decision under Section 171 of the Armed Forces Act; that the termination of commission of the

appellant was properly done and the appellant granted privilege and terminal leave and was paid his terminal dues; and that the suit was bad in law and ought to be struck out.

9. The defence called Major Anthony Mwangangi Mutuku (Major Mutuku) to testify on its behalf. Major Mutuku testified that he had known the appellant since 2005. It was the defence case that the appellant's commission was terminated in April, 2008 due to matters that took place in Sudan. That Major Mutuku was elected Chairman of St. Michael Church in Sudan; that together with congregants agreed to improve the tabernacle and buy a sound system; that the church members contributed USD 2000 which was availed to the appellant to purchase the items in Kenya. Further, that the appellant bought a faulty public address system and he also took personal emoluments from Church contributions without authority.

10. Consequently, a board of inquiry was set up by the Commanding Officer that unearthed various malpractices by the appellant including irregular ex-communication of a catechist and purchase of substandard equipment. Further, that the appellant refused to talk to the committee. When the mission returned to Kenya, the commanding officer made a report to Defence Headquarters and the appellant's commission was terminated. It was the defence case that the appellant was lawfully terminated by the President upon the recommendation of the Defence Council.

11. Upon considering the evidence before him, the learned Judge found that the respondents did not provide any defence to the appellant's claims and found them to have been proved on a balance of probability. The court therefore awarded the appellant Kshs.345,000/= special damages made up as follows: Kshs.56,000/- unpaid house allowance; Kshs.275,000/- in lieu of untaken leave; and Kshs.14,000/- in respect of erroneously deducted rent.

12. The learned Judge made the following orders:

> "i. The claimant's commission was lawfully terminated by the respondents.
>
> ii. The claimant is entitled to return to the Diocese of Kakamega, to serve as a priest, unless otherwise directed by the Head of the Catholic church.
>
> ii. The respondent to pay special damages in the sum of Kshs.345,000 with interest at court rates from date of filing suit till payment in full.
>
> ii. The respondents are bound to give access to the claimant to make full clearance to allow him access gratuity due and owing to him for the period served. This access be granted within thirty (30) days of this judgment.
>
> ii. The respondents are directed to, within thirty (30) days of this judgment facilitate payment of gratuity due and owing to the claimant less any liabilities lawfully deductible from the said gratuity and render the accounts to this court within sixty (60) days from date of judgment.
>
> ii. The respondents to pay the costs of this suit."

13. The appellant was aggrieved by the judgment and decree and filed the instant appeal on five grounds, to wit that the learned Judge erred in law and fact: by holding that the appellant was properly and lawfully de- commissioned from the Armed Forces; by solely relying on the testimony of the respondents' witness without any proof to his claims; by relying on the testimony of the respondents' witness despite the glaring contradictions; by failing to apply the principle that the parties are bound by their pleadings; and by failing to take into account the testimony of the appellant and the documents produced by the appellant.

Submissions

14. This appeal was canvassed by way of written submissions that were orally highlighted in Court by learned counsel, Mr. Sylvester Ngacho and Mr. Ngome Kakai for the appellant, and learned counsel Mr. Kioko for all the respondents.

15. Mr. Ngacho submitted that the committee that handled the appellant's disciplinary hearing was not properly constituted in accordance with the provisions of the Armed Forces Standing Orders. In the circumstances,the appellant was denied the right to a fair hearing. Further, that Chapter 18 of the Armed Forces Standing Orders deals with Chaplaincy services and provides for the procedures of dealing with misbehavior of the Chaplains/Catechists/Maalim in the Armed Forces. That the respondent's witness who allegedly chaired the disciplinary hearing was not a chaplain but a congregant and therefore the committee was not properly constituted.

16. Further, that the learned Judge erred in holding that the appellant was commissioned as a specialist officer and therefore exempted from the application of the provisions of the repealed Armed Forces Act (the repealed Act) as read with the Standing Orders which fact was not supported by evidence.

17. Counsel further submitted that the offence alleged to be committed by the appellant does not fall under the offences which are subject to a board of inquiry under Chapter 22 of the Armed Forces Standing Orders. Counsel contended that the termination of the appellant's commission was subject to the appellant's right to fair labour practices, fair administrative action and fair hearing under Section 76 and 77 of the retired Constitution as read with the Armed Forces Act and the Armed Forces Standing Orders.

18. Counsel further submitted that the respondents did not produce any evidence to substantiate the claims levelled against the appellant, and that his record of service does not have any disciplinary issue.

19. In opposition, Mr. Kioko submitted that the Armed Forces Standing Orders are purely administrative and cannot override the repealed Act. That under Section 223(d) of the said Act a board could be constituted to investigate any matter of a prescribed class. Counsel further submitted that Chapter 13 para 2(h) of the *Armed Forces Standing Orders* is also clear that any officer empowered to convene a board could do so on any other matter that was referred to him. Counsel asserted that under Section 223 (2) the commanding officer is empowered to convene a board of inquiry.

20. Further, that the respondents' witness confirmed that a board was convened and the appellant was summoned but refused to submit to its authority. Counsel further submitted that Section 171(2) of the repealed Act empowered the Defence Council to terminate the commission of an officer below the rank of Major as long as the reasons availed to it were justified. Counsel asserted that on the weight of the findings of the board of inquiry against the appellant, and the recommendations of his Bishop, the Defence Council was justified in terminating the appellant's commission for misconduct.

Determination

21. This being the 1st appeal, this Court's duty is well settled. In *Selle & Another v Associated Motor boat Co. Ltd. & Other*s [1968] EA 123 it was stated:

> " An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan [1955]22 EACA 270".

22. We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. We discern the issues for determination to be whether the respondents followed proper procedure before de- commissioning the appellant and whether the appellant was entitled to general damages and terminal dues.

23. The relevant law in the instant case is the retired Constitution of Kenya and the repealed Armed Forces Act. The respondents contended that under Section 223 of the repealed Act, a commander or an authorized officer was authorized to convene a Board of Inquiry to investigate and report on facts relating to a particular case. Further, that the appellant was under the commanding officer in Southern Sudan for all purposes including discipline and administration. Accordingly, the convening of the board by the commanding officer in the circumstances was therefore lawful.

24. On the other hand, the appellant argued that Chapter 18 of the *Armed Forces Standing Orders* deals with Chaplaincy services and provides for procedures for dealing with misconduct of the chaplain in the armed forces. That the principal chaplain becomes the Chairman or appoints another chaplain to be the Chairman of the Church Committee or the committee appointed to look into the issue raised. Accordingly, it is not the function of the Board of Inquiry to deal with such matters.

25. Section 223 of the repealed Act provided that:

    1. The Commander, or any officer authorized by regulations made under this Act, may convene a board of inquiry to investigate and report on the facts relating to-

        a. the absence of any person subject to this Act; or

        b. the capture of any such person by the enemy; or

        c. the death of any person where an inquiry into the death is not required to be held by a civil authority; or

        d. any other matter of a prescribed class, and a board of inquiry shall, if directed so to do, express their opinion on any question arising out of any matters referred to the board.

    2. The Defence Council, the Commander or the commanding officer may convene a board of inquiry to investigate and report on any other matter.

    3. A board of inquiry shall consist of the prescribed number of persons, being persons subject to this Act, and the chairman of the board shall be an officer not below the rank of lieutenant or corresponding rank.

    4. Evidence given before a board of inquiry shall not be admissible against any person in proceedings before a court martial, appropriate superior authority or commanding officer other than proceedings for an offence under section 53, or for an offence under section 69 where the corresponding civil offence is perjury [Emphasis supplied].

26. It is clear that Section 223(1)(d) of the repealed Act gave a commander authority to convene a board of inquiry in all instances where there was a dispute between the parties.

27. The respondents' witness testified that a board was convened under section 223(d) of the repealed Armed Forces Act and that the appellant was summoned but refused to submit to the board's authority. However, no written evidence was submitted before the ELRC to rebut the testimony of the respondents' testimony.

28. In *Judicial Service Commission v Mbalu Mutava & another* [2015]eKLR this Court relied on the land mark decision of the House of Lords in *Ridge v Baldwin [1964] AC 40* where it was held that:-

> " the rules of natural justice, in particular right to fair hearing, (audi alteram partem rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:
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> a. the right to be heard by an unbiased tribunal.
>
> b. the right to have notice of charges of misconduct
>
> c. the right to be heard in answer to those charges"

29. It is trite that natural justice as well as the Constitution should be adhered to before one is dismissed from employment. In this case, the appellant was afforded an opportunity to appear before the board, but declined to do so. Having failed to appear, he cannot be heard to complain that he was unlawfully de-commissioned. Consequently, we are satisfied that the learned Judge did not err in finding that the appellant was fairly de–commissioned. In the circumstances, the appellant is not entitled to compensation for unfair dismissal from work. We agree with the trial court's findings that in the circumstances, the appellant was properly de- commissioned.

30. Having found that he was properly de-commissioned, this appeal must fail and it is dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MURGOR

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JUDGE OF APPEAL

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JAMILA MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR