



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 19 OF 2014

BETWEEN

THE DEFENCE FORCES COUNCIL

THE CABINET SECRETARY, MINISTRY OF DEFENCE

THE CHIEF OF THE DEFENCE FORCES

THE COMMANDER KENYA NAVY

THE JUDGE ADVOCATE COURT MARTIAL

THE DEFENCE COURT MARTIAL ADMINISTRATOR

HE HONOURABLE ATTORNEY GENERAL.....APPELLANTS

AND

GABRIEL KIRIGHA CHAWANA & 26 OTHERS....RESPONDENTS

(Being an application for stay of execution of the ruling at High Court of Kenya at Mombasa (Muriithi, J.) dated 30th April, 2014 and 2nd April, 2014

in

H.C. Constitutional Petition No. 21 of 2014)

JUDGMENT OF THE COURT

[1] This appeal arises from two rulings that were made by *Muriithi, J.* in *Mombasa H.C.C.Petition No. 21 of 2014*. The Petition was filed on 9th April, 2014 by *Gabriel Kirigha Chawana* & 26 other persons (*hereinafter referred to as “the respondents”*). It was filed against the Kenya Defence Forces Council, the Cabinet Secretary- Ministry of Defence, the Chief of The Defence Forces, the Commander Kenya Defence Forces -Navy, the Judge Advocate Court Martial, the Defence Court Martial Administrator, and the Honourable Attorney General (*hereinafter referred to as “the appellants”*).

[2] Filed contemporaneously with the petition was a Notice of Motion dated 9th April, 2014, brought under certificate of urgency in which the respondents sought a plethora of orders. The orders included injunctive and conservatory orders restraining the appellants from charging, detaining, convening and/or proceeding with any Court Martial proceedings against the respondents; a *habeas corpus* order compelling the unconditional production of the respondents by the appellants; a restraining order prohibiting the appellants from compelling the respondents to give self-incriminating evidence, and a mandatory injunction compelling the appellants to clear the respondents and hand over copies of all the respondents' personal files as may be in the appellants' possession.

[3] The application was supported by an affidavit sworn by **Gabriel Kirigha Chawana**, in which he stated the facts giving rise to the application as follows: that the respondents were servicemen enlisted in the Kenya Navy under the provisions of the Armed Forces Act (repealed) now replaced by the Kenya Defence Forces Act **No. 25 of 2012** (the KDF Act); that the respondents served as such servicemen for various periods until sometime between 2007- 2008, when by letters written individually on diverse dates, they each sought to resign from service; that the letters were addressed to the respondents' respective senior officers; that upon receipt of these letters, the said senior officers directed each of the respondents to hand over all military property in their possession to the relevant departmental heads of the Navy; that the respondents were each issued with form 7110, for purposes of handing over military property; that the forms were duly filled and the military property handed over; that the respondents were thereafter issued with clearance forms which they presented to the relevant departmental heads and were duly cleared prompting them to leave the Navy Base for the civilian world.

[4] Between January and March 2014, the respondents received communication from the 1st appellant, asking them to present themselves at their respective former base for purposes of documentation and payment of their terminal benefits; that upon reporting to the base, the respondents were placed under close arrest without any reason being given to them for such arrest; that they remained under close arrest for over 45 days; that it was not until 5th April, 2014 that the respondents were served with charge sheets and supporting documents indicating that they faced charges of desertion contrary to **section 74(1)** of the KDF Act; and that the respondents were also served with convening orders, requiring them to attend Court Martial proceedings on 10th April, 2014 for the hearing of their cases.

[5] The respondents maintained that their constitutional right to fair hearing under **Article 50** of the Constitution, right against servitude and forced labour under **Article 30** of the Constitution, right to information under **Article 35** of the Constitution, and right to protection against discrimination under **Article 27** of the Constitution were violated by the appellants, hence their prayer for conservatory orders pending the hearing of their petition.

[6] The Motion was opposed by the appellants through two replying affidavits sworn by **Lieutenant Colonel Evans Oguga** (Oguga) on 14th April, 2014. In short, Oguga stated that the respondents are servicemen in the Kenya Defence Forces subject to the KDF Act (**No. 25 of 2012**); that the respondents had never been discharged from the Kenya Defence Forces; that some of the respondents had requested to be discharged from service on compassionate grounds, but the request for discharge was declined and refusal communicated to them; that the procedure for discharge from service requires that written request for discharge be approved by the Service Commander, and authority issued from the Service Headquarters; and that in the case of the respondents, no such authority for discharge was granted to any of them.

[7] Further, Oguga swore that the respondents were absent without leave on various dates between 2007-2008; that they later presented themselves voluntarily to the Kenya Navy Base; that in accordance with the KDF Act **section 140** the respondents were kept under close arrest; that they appeared before the Commanding Officer who read the charges to each of them; that after forty two (42) days, the respondents were released from close arrest and put under open arrest awaiting trial; that the respondents were granted adequate time to prepare for their defence; that the respondents are highly trained members of the Kenya Defence Forces, hence the need for them to be handled cautiously; that by leaving the Navy Base without authority as they did, the respondents became deserters and opened themselves to charges of

desertion; that desertion is a matter within the sole and exclusive jurisdiction of the Court Martial; and that in light of **Article 24(5)** of the Constitution read together with the provisions of the KDF Act, the High Court had no jurisdiction to interfere with the Court Martial proceedings.

[8] The application came up for hearing before **Muriithi J.** who upon hearing the parties allowed the application to the extent of issuing an order for stay of the Court Martial proceedings pending the hearing of the High Court Petition, and orders for release of the respondents on bail on three conditions. That is each to execute a personal bond of Kshs.500,000/- and provide one surety of same amount; each to deposit passport with the Court Martial; and each to report to their respective local military base every fourteen days pending, the determination of the High Court Petition.

[9] The appellants who were aggrieved by this outcome, lodged the present appeal raising six grounds. In effect the six grounds of appeal can be collapsed into two main issues. First, whether the High Court had jurisdiction to grant bail and/ or stay Court Martial proceedings when the Court Martial had exclusive jurisdiction to deal with the charge of desertion that was the subject of the Court Martial proceedings; secondly, whether the respondents had right to be granted bail in light of the limitation provided under **Articles 24(5)** of the Constitution read together with **section 54** of the KDF Act.

[10] When the hearing of the appeal proceeded before us, the appellants were represented by **Mr. Muteti** Assistant Director Public Prosecuting Counsel, **Mr. Kiprop**, Principal Prosecuting Counsel, and **Mr. Eredi**, Senior Principal legal Litigation Counsel. The respondents were represented by **Mr. Daniel Kamunda** from the firm of Kamunda Njue & Co. Advocates.

[11] On the issue of jurisdiction, Mr. Eredi submitted that under **section 252** and **253** of the KDF Act, the respondents' having enlisted in the service, remained servicemen until discharged; that in this case, none of the respondents was discharged; that since the respondents were still servicemen, only the Court Martial could entertain the charges of desertion against them; that the respondents were free to apply for bail at the said Court Martial and not to the High Court; that the respondents had a right of appeal to the High Court if dissatisfied with the Court Martial's decision on bail; that the jurisdiction of the High Court in matters military has been ousted; that the High Court had no jurisdiction to grant bail in hearing the petition as the right to bail is limited by **Article 24(5)** of the Constitution and **section 54** of the KDF Act; that the respondents failed to show that the KDF Act did not apply to them as they did not demonstrate that they were discharged from the service; and that in the circumstances the court could not use its inherent jurisdiction to stay the Court Martial proceedings.

[12] **Mr. Muteti** added that the High Court had no jurisdiction to entertain the respondents' application for bail and stay of proceedings. He pointed out that the respondents did not challenge the convening order for the Court Martial nor did they raise the issue of bail in the Court Martial; that the Court Martial is a special court with its own rules; that the *prima facie* evidence was that the respondents were servicemen; that the respondents having filed a constitutional petition of a civil nature, the burden was upon the respondents to demonstrate that they were not servicemen; that the request for a discharge did not amount to an automatic discharge; that the respondents ought to have submitted to the jurisdiction of the Court Martial and if dissatisfied with the decision of the Court Martial on any issue, appeal to the High Court.

[13] **Mr. Kamunda**, learned counsel for the respondents submitted that under **Article 169** of the Constitution the Court Martial is listed as a subordinate court; that under **Article 165(6)** of the Constitution, the Court Martial is subject to the supervisory jurisdiction of the High Court; that where rights were being infringed, the supervisory jurisdiction of the High Court could be invoked without waiting for the Court Martial proceedings to be finalized; that the procedure of the Court Martial can be challenged in the High Court; that the respondents were therefore not constrained to ventilate their grievance at the Court Martial; that in any case, the respondents sought bail but were denied at the Court Martial; that in their petition, the respondents challenged the constitutionality of **section 310** of the KDF Act and violation of various fundamental rights; that desertion is not a continuous offence; and that since the petition is still alive the Judge was right in granting bail.

[14] The issue for determination in this appeal is whether the High Court had jurisdiction to entertain the application for grant of bail and stay of Court Martial proceedings, and if so, whether the said jurisdiction was properly exercised. In his judgment, the learned Judge stated as follows:

“13. In considering the application for the conservatory orders, the Court has having established that the petitioners have an arguable case to be presented for investigation by the court proceeded to balance the respective interests of the parties and found as follows:

- a. ***The court martial has a constitutional and legal mandate duty, as a subordinate court under Article 169 of the Constitution and the Kenya Defences Forces Act, to determine the charges facing the petitioners which are the subject of the petition.***
- b. ***There is before the High Court this constitutional application for a determination whether the petitioners are persons over whom the court martial has jurisdiction in terms of its mandate and whether certain relevant provisions of the statute are unconstitutional.***
- c. ***To proceed with the court martial while the petition is pending before this court may render the petition nugatory or at best academic should the court martial proceedings be heard and determined and petitioners convicted and sentenced before the High Court makes a determination of this petition.***
- d. ***Although there is a good reason in prosecuting the offences facing the petitioner for the good discipline of the members of the Kenya Defence Forces, there is no emergency for the trial to be conducted right way without affording opportunity for the petitioners to test before High Court the constitutionality of charges and their trial.***
- e. ***There is no statute of limitation in prosecution of the criminal charges and the respondents may proceed with the court martial charges shortly after the High Court has determined upon full hearing that the petitioner’s case is without merit.***
- f. ***A responsible use of judicial resources calls for stay of proceedings before the court martial to avoid waste when the court martial proceedings (sic) with the trials only to have the proceedings subsequently terminated by the High Court. The proceedings will be stayed for a (sic) such period as is necessary for the High Court to make a determination on the Petition herein.***
- g. ***During the time that the court martial proceedings are stayed the petitioners, in accordance with the right to liberty be released on bail upon reasonable terms to ensure their attendance before the court martial for their trial as and when the court so directs***
- h. ***The High Court has a supervisory jurisdiction over the court martial under Article 165(6) of the Constitution and it may under sub-article (7) give directions “it consider appropriate to ensure the fair administration of justice”***

[15] It is evident from the above extract that in granting bail to the respondents and staying the Court Martial proceedings, the learned Judge was purporting to exercise the High Court supervisory jurisdiction under **Article 165(6)** of the Constitution. That Article states as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”

[16] Read together with **Article 169(1)(c)** of the Constitution that identifies Court Martials as one of the subordinate courts, the Article leaves no doubt that the High Court has supervisory jurisdiction over the Court Martial. The issue is whether the exercise of that jurisdiction was appropriate in the circumstances of this case. In this regard the following statement from the often cited case of ***The Anisminic Ltd v The***

Foreign Compensation Commission & Another [1969] 2 A.C 147, (1969)2 W.L.R. 163, (1969) I ALL E.R. 208 (House of Lords); is instructive on when the supervisory jurisdiction of the Court ought to be invoked.

“...For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error. The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise... If the tribunal is intended, on a true construction of the Act, to enquire into and finally decide questions within a certain area, the courts’ supervisory duty is to see that it makes the authorised enquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (that is questions other than those which Parliament directed it to ask itself). But if it directs itself to the right enquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction.”

[17] Thus in its supervisory jurisdiction, the High Court must maintain a delicate balance, distinguishing its role of an arbiter from that of an overseer whose mandate is to consider and review the procedure and conduct of proceedings in the subordinate courts with a view to determining the legality or otherwise of the process, including any actions undertaken without jurisdiction. The supervisory jurisdiction is not intended to usurp the role of the tribunal but to ensure that the inferior tribunal acts within its bounds. In this case, the Court Martial having been convened against the respondents, the respondents raised an issue regarding the jurisdiction of the Court Martial to try them, as they contended that they had been discharged from the service and were no longer servicemen subject to military rules. On their part, the appellants faulted the assertion that the High Court had supervisory jurisdiction in regard to the arrest and arraignment of the respondents before the Court Martial, on the basis that both the Constitution and the KDF Act have ouster clauses which specifically exclude the High Court’s jurisdiction when it comes to military matters.

[18] It has been repeated time and again that jurisdiction is the authority which a court has to consider and determine the matter before it and that where such jurisdiction is questioned the issue must be determined forthwith on the evidence before the court. In particular, the following statement from “Words and Phrases Legally defined” volume 3: I-N page 113 applied in **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** is instructive:

“If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction: but except where the court or tribunal has been given power to determine conclusively whether the facts exists...”

The crux of the matter was whether the respondents were still servicemen at the time they were alleged to have deserted. The establishment of this fact is what determined whether the respondents were subject to the jurisdiction of the Court Martial. Therefore, it was imperative that the issue be determined by the Court Martial as a preliminary issue.

[19] **The question is** whether in granting bail to the respondents, the High Court properly exercised its supervisory or original jurisdiction. In this regard it is pertinent to revisit the issue of the respondents’ rights as arrested persons in greater detail. Generally, the rights of an arrested person are safeguarded by **Article 49** of the Constitution that provides *inter alia*, that an arrested person is entitled: to be informed promptly of the reason(s) for his arrest; to remain silent; to be brought to court within 24 hours of his

arrest; and to be admitted to bail. Although **Article 24(1) & (2)** of the Constitution ousts limitation of a right or fundamental freedom in the Bill of Rights, **Article 24(5)** of the Constitution provides for the limitation of certain rights of persons serving in the Kenya Defence Forces and the National Police Service as follows:

“...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. (emphasis**

added)”

[20] In the case of persons serving in the Kenya Defence Forces, **section 54** of the KDF Act activates the limitation of such rights and fundamental freedoms as follows:

1. ***The rights of an arrested person in Article 49 of the Constitution may be subject to limitation in respect of a person to whom this Act applies as set out in subsections (2) and (3).***

2. ***Nothing contained in or done under the authority of this Act shall be held to be inconsistent with or in contravention of the right of an arrested person in so far as the Act permits-***

- a. ***the holding of an arrested person jointly with the persons serving a sentence;***

(b) the holding of an arrested person without bail; or

(c) the holding of an arrested person in custody notwithstanding that the offence is punishable by a fine only or imprisonment for a term not exceeding six months (emphasis added)”

[21] The import of the above is that the listed categories of rights may not be available to members of the National Police Service and the Kenya Defence Forces if arrested during the period of their enlistment. These provisions provide ouster clauses which limit the jurisdiction of the High Court to grant bail to servicemen either in exercise of their original or supervisory jurisdiction. Nonetheless, there was a hotly contested issue regarding whether the respondents were still members of the Kenya Defence Forces subject to **Article 24(5)** of the Constitution and **section 54** of the KDF Act.

[22] The application before the learned Judge, having been an interlocutory application, the judge was correct in holding that the issue as to whether the respondents were still servicemen was one that could only be conclusively determined after the hearing of the petition. It is this determination that held the answer as to whether the respondents’ right to bail was limited or whether the respondents were entitled to bail. As we stated in Civil Application No. 9 of 2014, when considering the appellants’ application under **Rule 5(2)(b)** of the Court Rules for stay of the orders of **Muriithi, J.**

“Until proved that the relationship between the respondents and the Armed Forces has been severed, the presumption is that the respondents are subject to the KDF Act and it may be premature to treat them as civilians and grant them bail on civilian terms”

[23] In our view it was wrong for the learned Judge to render **Article 24(5)** of the Constitution inferior by applying **Article 20(3)(b)** of the Constitution that requires the adoption of an interpretation that most favours the enforcement of a right or fundamental freedom, when the status of the respondents remained

undetermined. The respondents could not be treated as any other person entitled to bail as the position was that the respondents were *prima facie* servicemen until proved otherwise. Indeed, the respondents having been charged with desertion, they sought to justify their alleged absence from their duty station by contending that they had been properly discharged from the Force. That was a defence to the charge of desertion that ought to have been raised and addressed in the Court Martial proceedings.

[24] It is noteworthy that the High Court proceedings were commenced before the hearing at the Court Martial proceeded. The application before the High Court was filed and heard at first instance on 9th April 2014, at which stage the proceedings at the Court Martial were stayed pending the hearing of the High Court application. Consequently, upon determination of the application, the Court Martial proceedings were stayed pending the hearing of the Petition, with the respondents being granted bail on the terms stated earlier. As a result, the hearing at the Court Martial never took off, and thus the tribunal did not have the opportunity to consider the issue of bail, or the issue of its jurisdiction over the respondents such as to be a subject of the High Court's supervisory jurisdiction.

[25] Since it was not disputed that the respondents were servicemen until their alleged discharge, the burden was upon the respondents who alleged that they had been discharged to establish the alleged discharge. Without the Court Martial having been given an opportunity to consider the issue of discharge, or an application for bail, the exercise of the supervisory powers of the High Court in this regard was premature. It resulted in the High Court simply usurping the statutory powers of the Court Martial, which effectively allowed the respondents to circumvent the jurisdiction of the Court Martial.

[26] In their petition, the respondents invoked not only the jurisdiction of the High Court under **Article 165(6)** of the Constitution but also invoked **Article 165(3) & (4)** of the Constitution that deals with original jurisdiction of the High Court to hear and determine matters concerning redress for violation or threatened violation of rights and fundamental freedom under the Bill of Rights; as well as the determination of any questions regarding the interpretation of the Constitution. In particular, the respondents alleged that in charging and initiating the Court Martial proceedings, the appellants had violated the respondents' rights and **invoked the original jurisdiction of the High Court to avert the violations and threatened violations of their rights under Articles 27, 30, 35, 47 and 50** of the Constitution.

[27] We are mindful of the fact that the respondents' petition is still pending in the High Court, and therefore it may be prejudicial at this stage to discuss the competence of the claim or the veracity of the alleged violations. Suffice to state that the rights provided under **Articles 30 & 50** of the Constitution are by virtue of **Article 25** of the Constitution not subject to any limitation. Therefore, *prima facie* the High Court would have jurisdiction to consider the respondents' complaints regarding such violation and if necessary provide redress. However, it should be noted that the alleged violations of **Articles 27, 30, 35, 47 & 50** of the Constitution are independent of the right to bail under **Article 49** of the Constitution which in the case of the respondents was *prima facie* limited and which ought to have been dealt with in the Court Martial proceedings. The question is whether it was necessary for the High Court to stay the Court Martial proceedings in order to address the alleged violations relating to **Articles 27,30,35,47 & 50** of the Constitution.

[28] We note from the afore quoted extract (supra paragraph 14) of the ruling that in granting the orders of stay of the Court Martial proceedings, the learned Judge was more concerned with the issue of expediency and optimal use of judicial time. However, the learned Judge failed to weigh that concern against the security concerns and the public interest element giving rise to the constitutional limitation of certain rights to members of the Kenya Defence Forces which as stated under **section 43** of the KDF Act is as follows:

“ **43. Conditions for limitation of rights and fundamental freedoms**

(1) The purpose of this Part is to specifically limit or restrict certain rights or fundamental freedoms set out in Chapter Four of the Constitution, as contemplated in Article 24 of the Constitution.

(2) The limitations of rights and freedoms under this Part are necessary for purposes peculiar to military service, based on human dignity, to ensure-

- a. **the defence and protection of the sovereignty and territorial integrity of the Republic of Kenya;**
- (b) the protection of classified information;**
- (c) the maintenance and preservation of national security;**
- (d) the security and safety of members of the Defence Forces;**
- (e) that the enjoyment of the rights and fundamental freedoms by any individual member of the Defence Forces does not prejudice the rights and fundamental freedoms of any other individual member of the Defence Forces;**
- (f) good order and service discipline; and**
- (g) public health and safety.**

(3) The limitation under this Part shall comply with Article 24 of the Constitution and shall satisfy the following four criteria-

- a. **ensure the protection of national security, public safety, public order, public health or morals, protection of the rights and freedoms of others;**
- b. **be necessary to achieve the mandate of the Defence Forces;**
 - (c) operate without discrimination; and**
 - (d) be exceptional and not impair the essence of the freedom being limited.”**

[29] Thus, the learned Judge erred in failing to take into account the peculiar circumstances of the case and the security concerns arising therefrom. Further, the Judge underplayed the need for the Court Martial proceedings to be dealt with expeditiously. Such a need is stated succinctly by *Kavuma, JA*. (as he then was) in *Uganda Law Society & Another v The Attorney General Constitutional Petition Nos 2 & 8 of 2002* as follows:

“Among the cardinal principles of the Army is one that the armed forces depend on the strictest discipline in order to function efficiently and that all alleged instances of non adherence to the rules of the military need to be expeditiously dealt with within the chain of command and punishment therefore administered without undue delay.”

[30] An order for stay of proceedings in a constitutional application is essentially a conservatory order issued under Article 23(3)(c) of the Constitution. Such an order is intended to maintain the *status quo* while the High Court enquires into the alleged contravention. In this case the effect of the order for stay of the Court Martial proceedings was to stop the Court Martial from performing its statutory mandate by keeping the matter subject of the Court Martial proceedings in abeyance pending the determination of the High Court petition. Such an outcome militates against the expediency and disciplinary objectives of the Court Martial proceedings, thereby undermining the disciplinary process in the Force. Moreover, it is apparent that as at the time the order of stay of Court Martial proceedings was given, the Court Martial proceedings had barely been initiated, and the respondents’ complaints of violation of rights under **Articles, 27, 30, 35, 47 & 50** of the Constitution were basically anticipatory. Thus, there was no urgency in granting the order for stay of proceedings.

[31] We come to the conclusion that the High Court erred in granting bail to the respondents, and did not

properly exercise its jurisdiction in issuing the order for stay of Court Martial proceedings. Accordingly, we allow the appeal and set aside the orders issued by the learned Judge on 30th April, 2014 and 2nd May, 2014. In light of the nature of the litigation giving rise to this appeal, we order that each party shall bear their own costs.

Those shall be the orders of this Court.

Dated and delivered at Malindi this 26th day of February, 2015

H. M. OKWENGU

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR