REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 278 of 2003

BETWEEN

CAPTAIN J.N. WAFUBWA …………………….................……………. APPELLANT

AND

THE ATTORENY GENERAL …………………..…........................….. 1ST RESPONDENT

GENERAL MOHAMOUD MOHAMED ……….........................………… 2ND RESPONDENT

MAJOR GENERAL D.K. WACHIRA ……….........................…….…..... 3RD RESPONDENT

(Appeal from the decree of the High Court of Kenya at Nairobi (Justice Hayanga) dated 26th June, 2003

in

H.C.C.C. NO.674 OF 1993)

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JUDGMENT OF THE COURT

It is necessary to begin this judgment by setting down in some detail the events that have prompted the present appeal and cross-appeal before us.

Jammies Nyongesa Wafubwa, the appellant, was born on ***22nd May, 1954***. He was recruited into the Kenya Air Force (KAF) on 22nd May, 1978, apparently on his twenty fourth birthday. After undergoing basic military courses, both local and overseas, he was promoted to the rank of 2nd Lieutenant and commissioned as a pilot on 2nd February, 1980. The appellant exhibited exceptional skills in the operation of Puma helicopter and was tasked with the responsibility of training other pilots in the handling of similar aircraft. As a result of what was deemed excellent performance by his superiors the appellant earned fast promotions. For example, he was cited for various exemplary services to the country, given commendations and appointed a Helicopter Instructor Pilot. The pinnacle of his achievements saw him promoted to the rank of captain.

It is the appellant's case; and he avers so in paragraph 10 of his Amended Plaint, that by 9th October, 1991, he had qualified for the rank of substantive Major since due recommendation

had been made by the Air Force. He believes that failure to promote him was due to reasons "which were not disclosed … and which were said to emanate from outside the Air Force". He laments that other officers who joined the KAF with him and some of the students he trained had by-passed him and had been promoted from as far back as 1985 to the coveted rank of Major. The appellant contends that failure and or refusal to effect the promotion was calculated to hold him in the rank of Captain in which case he would be forced to retire from the Airforce at the age of 39 years.

However, despite the appellant's apparent sterling performance as an exceptionally skilful pilot, he was convicted of three serious disciplinary breaches under The Armed Forces Act. The offences according to the regimental entries were recorded on 27th July, 1989, on 25th July, 1990 and on 1st November, 1990. As a result of his having been found guilty the appellant was condemned under **sections 19, 27, 34, 60** and **68** of the Armed Forces Act to suffer loss of seniority, salary deduction and severe reprimand. There is no indication from the records laid before us that those convictions were ever lifted.

The worst befell the appellant on 24th September, 1992, when he was served with a Notice of Retirement from the 82 Air Force effective 22nd May, 1992.

The notice triggered this suit which the appellant instituted by way of plaint dated 12th February, 1993 and amended on 24th March, 1993. The appellant sought, inter alia, the following reliefs:

a) A declaration that the Notice to retire given to the appellant is unlawful, invalid, of no legal effect and is null and void.

b) A finding that as the 82 Air Force does not exist in Law, it is a mere pressure group and that the appellant cannot be retired from what does not exist.

c) A declaration that the appellant is entitled to be promoted to the next rank and /or to be given reasons for failure to promote him.

Alternatively judgment for:-

a) General Damages for illegal and unlawful termination of employment.

b) An injunction to stop the use of the Air Maneuver (sic) Displays designed by the appellant until there are properly qualified and trained personnel to execute the maneuvers.

c) Compensation to the appellant at 6% of the standard Puma Helicopter Aircraft Account.(sic)

d) Compensation of 6% of the value of the equipment the proposed plaintiff held with full responsibility for the months the appellant had worked.

The written statement of defence is terse: that the appellant's conditions and terms of service required that if he had not been promoted to the rank of Major, he should be retired upon attaining the age of 39 years; that promotion in any "Disciplined Force" is not automatic and that the Notice of Retirement was in accordance with the Regulations governing the appellant's terms of service.

In a protracted trial spanning a period of well-nigh ten years and characterized by myriad of and sometimes totally unnecessary adjournments the learned Judge (*Hayanga J.*) in a somewhat contradictory findings held in his judgment:-

“**From the evidence it is proved to my satisfaction that the plaintiff was to retire at 39 years of age which would be 1993. By the time he was given authority to retire he was about to reach that age and he had accumulated leave. It is also not disputed that he needed Certificate of Retirement after receiving authority to retire.”**

The learned Judge noted that the appellant’s services were perfect and that the regimental entries did not cause retirement which he found to have been occasioned by age. The learned Judge then concluded:-

“**I find that the Plaintiff deserved being promoted to the rank of Major and if he had been so promoted at the time of his being retired he should have earned Major’s salary upto the age of 44 years. I, therefore, decide that the plaintiff is entitled to salary of Major for the 5 years from the date of retirement to the time he attained 44 years.”**(underlining ours).

On the issuance of the discharge certificate the learned Judge faulted the Defence Council for having withdrawn it without assigning any reason. The learned Judge read mischief in its withdrawal and he thought it was done so as to bar the appellant from taking the French contract which he had secured after having been served with the Notice of retirement. The learned Judge held:

“**This is draconian and clear injustice. It means that the Plaintiff has been kept out of his retirement benefits, his gratuity and pension for over 10 years and for no reason expressed to him or known by anybody. The Defence (sic) blames him for not clearing but that blame is not genuine and to me amounts to passing the buck.”**

The learned Judge found that the appellant had proved his case on a balance of probabilities, and, also noted that some prayers and reliefs were at variance with evidence and did not make sense. He concluded:-

“**I grant prayer 1(a), (b) and (c)**

Of prayer;

“**2(a) I grant General damages for wrongful termination of service assessed at 10 months salary as at the date of retirement**.

Of prayer;

5. (i) I grant Payment to Plaintiff of the salaries for 5 years from the time he was retired as Captain at 39 years to when after 5 years when (sic) he would have been Major at 44 years.

ii) Payment of all his terminal benefits pension and gratuity calculated at the time he would retire as Major at the age of 44 years.

iii) Payment of costs of this suit.

iv) Interest on all these monies up to the time he will be paid.

v) The defence to supply Plaintiff with the ID Card and requisite certificates.

vi) Costs of the suit.”

The appellant being aggrieved by the judgment which is apparently in his favour, has preferred this appeal. The crux of all the eight or so grounds of appeal is that the learned Judge erred in

fixing his retirement age when the evidence on record establishes that the appellant did not qualify for any pension or gratuity; and moreover, that the terms of service on age limitations are invalid and cannot be enforced under the ***Armed Forces Act***. The appellant further avers in ground 3 of the grounds of appeal that as he held a regular commission under the said Act he cannot be retired or ordered released from his duties by any person or body in public office (including courts) unless regulations established under the Armed Forces Act are observed.

The appellant further contends that:-

"*4 - That the trial Judge erred in law when he ordered assessment of damages based on the salary other than quantifying the actual amount since he did not realize that the Armed Forces Act is self accounting as Treasury pays salaries only for specific number of commissioned officers holding special duties at a time*"

The appellant therefore prays for orders to amend the decree to read as follows:-

"*……….. (4) THAT the defendants to pay Ksh. 32.9 million jointly and severally the plaintiff (sic) general damages for wrongful termination of service.*"

(b) THAT paragraph 6 of the said decree be deleted and substituted with the new paragraph as follows:

"*………….. (6) THAT the defendants to pay the plaintiff Lt. Colonel's salaries when he attains the age of 44 years till when a valid retirement or release from the Service order is published by the Minister.*

(c) THAT paragraph 9 of the said decree be deleted and substituted with the new paragraph as follows:-

"*……………. (9) THAT the defendants to supply the plaintiff with the military ID Card and be accorded assistance to resume his duties in the Armed Forces.*"

(d) THAT the court be pleased to allow Kshs800,000 as costs of the voluminous research for excavating the concealed law from the archives and the pre-historic legal grave sites that can not adequately be taxed.

(e) THAT the Court be pleased to cancel the plaintiff's illegal attachment of pay with the refund of shs.54,000/= deducted from his salaries."

On 6th January, 2004, the respondents through the Attorney General filed a Notice of Cross-Appeal contending that the decision of the learned Judge ought to be varied or reversed on eleven grounds. We will deal first with the grounds of appeal canvassed by the appellant by way of written arguments, a mode sanctioned under ***rule 97*** of the Court of Appeal Rules.

It is trite that the primary object of the Armed Forces of Kenya is to safeguard the sovereignty and well-being of the people of Kenya, their property, peace and territorial integrity of the Republic. By dint of ***section 4*** of the Constitution the President is the Commander-in-Chief of the Armed Forces of the Republic and has supreme power in matters relating to the defence of the country. Further, the President is responsible for the organization and command of the Armed Forces. In this regard the President acts only through certain legal instruments, the principal one being the ***Armed Forces Act Chapter 199 Laws*** of ***Kenya*** (the "**Act"**). Its long title reads as follows: -

"**An Act of Parliament to provide for the establishment, government and discipline of the Kenya Army, the Kenya Air Force and the Kenya Navy and their reserves; to make provision in relation to seconded and attached personnel and visiting forces; and for**

purposes connected therewith and purposes incidental thereto."

The appellant avers that the Armed Forces terms of service as regards age limitations, pension and gratuity are invalid and cannot be enforced under the Act. With respect, this submission is misconceived. The preamble to the Act boldly declares that it is "*for purposes connected therewith and purposes incidental thereto."* It is only reasonable, in this regard, to assume that the appellant's promotion, his retirement and removal from the Armed Forces must be deemed to be matters squarely falling within the ambit of the Act and other cognate statutes. We so hold.

Section 5 of the Act establishes a Defence Council whose chairman is the Minister. It enables the Defence Council under ***section 5(4)*** to make standing instructions providing for: -

(a) the organization of the work of the council and the manner in which it may perform its functions, subject to any assignment of responsibilities by the chairman under subsection (3) of this section;

(b) the procedure to be followed by the Council in conducting its business; and

(c) all matters which the Council may consider it necessary or desirable to provide for, in order to secure the better performance of the functions of the council.

Again, under ***section 227(1) (a)*** of the Act the Defence Council is authorized to make regulations with respect "*to commissioning and appointment of officers and their terms of service, RETIREMENT, resignation and precedence, in similar matters."*

In April, 1983 the Defence Council made and promulgated "Terms and Conditions of Service of Officers" which at paragraph 75 thereof states as follows: -

"**75. All Officers of the Armed Forces will be required to retire on age grounds as follows: -**

(a) General Service Officers (GSO'S)

GSSO's who are not recommended for further substantive promotion will normally be compulsorily retired on reaching the following ages.

(i) Captain …………………… 39 years.

(ii) Major ..………………………44 years.

(iii) Lt. Col. ……………………. 48 years.

(iv) Col. …………………………. 50 years.

(v) Brig. ………………………… 52 years.

(vi) Major General ………….. 55 years.

(vii) Lt. General ………………. 58 years.

(viii) General & Above ……… 62 years."

It is not in dispute that the appellant was a GSO and the 39 years rule of retirement on age grounds applied to him. It made no difference that he served in the Air Force, whether KAF or 82 Air Force.

On our consideration of these two sections, - ***sections 5*** and ***227*** - of the Act, we are satisfied that retirement, pensions and gratuities of the Armed Forces falling under the Act are not invalid.

The appellant was served with a Notice of Retirement on 24th September, 1992 to take effect on 22nd May, 1993, his 39th birth day. His last promotion was to the rank of Captain. There was no proof before the learned Judge that he had been recommended for further substantive promotion. And again, there was no evidence that he sat for and passed the mandatory two promotion examinations which were necessary to catapult him to the rank of Major. Above all, no approval of the perceived promotion by the Defence Council was tendered before the trial court. It can only be concluded, in the circumstances, that the appellant's retirement at the age of 39 years was proper and legal. This being our finding, it must follow that the learned Judge was, with respect, wrong to hold that the appellant was automatically entitled to the rank of Major and that he was entitled to salary of the rank of Major for the 5 years from the date of his retirement as a Captain.

The appellant submitted that the Kenya Armed Forces is an institution which is neither in the Executive, Parliament nor the Judiciary arms of Government. We need not waste time on this misconceived submission. The Constitution on this aspect is clear. This country's Armed Forces are under the sole authority and command of the President and fall under his direct control. The Armed Forces have no independence of their own like, for example, the Judiciary. They are inseparable from the Executive.

We now turn to consider ground 3 of the grounds of appeal which is in regard to "*the regular reserve"* of which the appellant has placed much reliance to augment his assertion that as he held a commission he cannot be retired or ordered released from his duties by anybody in public office unless ***section 4*** of the Act is observed. He contends that the Defence Council has no authority to retire nor to award pensions to members of the Armed Forces while they are still subject to the Act.

The appellant has urged that regular reserves are mandatory components of the Kenya Army, the Kenya Air Force and the Kenya Navy as stipulated in the ***Armed Forces Act (Cap. 199) s.4(a), (b) (i)*** and ***(ii)*** which provides as follows: -

"***The Kenya Army, Kenya Air force and Kenya Navy shall each consist of: -***

(a) the regular force;

(b) the reserve consisting of: -

(i) the regular reserve and

(ii) the volunteer reserve if the defence Council decides that there shall be one:"

The appellant has thus submitted, and we would agree with him, that the three services of the Kenya Armed Forces are incomplete in the absence of the regular reserves. But, the omission to establish the regular reserve does not render the Kenya Armed Forces an illegal entity. Again, as it appears that the regular reserve is not in existence, the appellant cannot be heard to say that he is a member of a non-existent body. If that were so then the Government would not be justified in any event whatsoever, to pay for services which are not being rendered.

The appellant has submitted that his transfer to the regular reserve was mandatory if he met the conditions specified in ***section 170 (2)*** of the Armed Forces Act. ***Section 182*** of that Act provides: -

"***Every officer and every serviceman who is liable to be transferred to the regular reserve***

shall until transferred remain subject to this Act."

Section 7 (1) (a) of the Act indeed specifies the categories of personnel who are subject to the Act: -

"***The following persons are subject to this Act –***

(a) officers and servicemen who are not reservists….

The appellant avers that he remains subject to the Armed Forces Act until he is transferred to the regular reserve; and that he is in fact serving in the regular forces of the Kenya Air Force and so he should be entitled to payment of salary and allowances until he is transferred to the regular reserve. However, he acknowledges that he has not enjoyed these rights since May, 1993. This submission is indeed fallacious. Firstly, as we have held that the appellant was lawfully retired from the Kenya Air Force on age basis, he cannot in the circumstances be said to be still serving in the force. Secondly, there appears to be no regular reserve in existence. Again, on what justification should he be retained in the payroll?

We think that the appellant's retirement from the Armed Forces being valid, he cannot continue in employment despite the provisions of ***section 7*** of the Act. His employment effectively terminated on the determined date of retirement and he could not be treated as a member of the Armed Forces with all attendant benefits.

True, the appellant's employment was protected by statute and he could not be removed from service unless the statutory provisions were fully complied with. However, the appellant has been unable to point out which statutory provisions were breached by the Defence Council.

By virtue of ***section 227 (i) (f)*** of the Act, the Defence Council, with the consent of the Treasury may make provisions with respect to the pay, allowances, pensions and gratuities of members of the Armed Forces. The section mandates both the Defence Council and the Treasury to make provisions as relates to salaries, allowances, pensions etc. This fusion seems to occasion some uncertainty as to which of the two bodies carries more power in determining the entitlements of the Armed Forces personnel. We would, however, agree with the appellant that the functions of the Defence Council are limited and it cannot by itself order any grant or gratuities to the members of the Armed Forces without the consent of the Treasury.

In our considered view, we would express disapproval in the current situation whereby a civil law statute – for example the ***Pensions (Increase Act) Chapter 190 Laws of Kenya*** and a military law statute like ***Chapter 199***, ***Laws of Kenya*** – are applied simultaneously to a given matter since this gives rise to conflict as to which set of laws or regulations are to be followed or applied. The result of this incongruity in Kenya has been an unprecedented rise in the number of legal actions against the Armed Forces concerning pensions, gratuities, retirement benefits etc.

We do not agree with the appellant that the Kenya Armed Forces is a legally rudderless institution with no proper law underpinning its establishment and existence, its grants of commissions, retirement enlistments, salaries and pensions. On the contrary, we take judicial notice that the Armed Forces appear to have rendered exemplary services to the Republic and its people, both locally and internationally, despite perceived unsatisfactory statutes.

We agree with the respondents that promotion in the Armed forces is in the discretion and sole prerogative of the Defence Council. Being a discretionary power of the Defence Council to promote or not to promote any of its officers, it is not for the courts to direct the Council on how to exercise its discretion in a particular manner i.e to promote the appellant to the rank of Major.

The suit, in its totality, really amounts to asking the courts to decide on the appellant's

promotion and retirement which are purely matters of military law and procedure. We would reiterate that it is not normally the business of civil courts to interfere in matters relating to military law and prescribing rules for the guidance and discipline of its officers.

After considering the Act and related statutes, we are unable to say that the Defence Council misdirected itself in failing to promote the appellant to the rank of Major and in retiring him.

It remains for us to determine the fate of the appeal. It is plain to us that the entire suit lodged in the High Court of Kenya at Nairobi being **HCCC 674** of **1993** is wholly misconceived. In our view the appellant was lawfully retired on age basis which fact was one of the basic terms and conditions of his service with the Kenya Armed Forces.

The learned Judge erred in finding that the appellant was automatically entitled to the rank of Major which holding was outside the regulations to which the appellant had subscribed to. Further, the assessment of the appellant's terminal benefits, pensions etc. based on the same findings by the learned Judge was erroneous and illegal.

We dismiss all the grounds of appeal preferred and canvassed by the appellant before us. We have not seen any reason to consider each and every one of them since they are mostly tautologous. However, we commend the appellant for exhibiting exceptional acumen in understanding the statutes on which he relied, and indeed, for his great eloquence.

We allow the cross-appeal in its entirety. Finally, we make the following orders: -

1. The appeal is dismissed with costs to the respondents.

2. The cross-appeal is allowed with costs to the respondents.

3. The Judgment of the High Court of Kenya (Hayanga, J) dated 26th June, 2003, in Nairobi H.C.C.C No. 674 of 1993 is hereby set aside and vacated together with all consequential orders.

4. We make an order that the suit Nairobi H.C.C.C. 674 of 1993 be dismissed with costs.

These shall be our orders.

Dated and delivered at Nairobi this 27th day of October, 2006.

P.K. TUNOI

………………….**..**

JUDGE OF APPEAL

P.N. WAKI

……………

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…………………….**..**

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR