



**Osman v Cabinet Secretary, Ministry of State for Defence and Chairperson of the Defence Council & another (Cause 32 of 2014) [2025] KEELRC 186 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 186 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 32 OF 2014  
J RIKA, J  
JANUARY 31, 2025**

**BETWEEN**

**HASSAN ADEN OSMAN ..... CLAIMANT**

**AND**

**THE CABINET SECRETARY, MINISTRY OF STATE FOR DEFENCE AND  
CHAIRPERSON OF THE DEFENCE COUNCIL ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed this Claim way back on 17<sup>th</sup> January 2014.
2. He avers that he was enlisted in the Kenya Armed Forces on 28<sup>th</sup> April 1998. He was trained and certified. His military number was 61635. He was posted to the 12<sup>th</sup> Engineering Battalion, Thika.
3. He was later trained, and qualified as a military driver on 1<sup>st</sup> October 1992. He resided at the Thika barracks, with his wife and children.
4. He was dedicated, and was selected to serve in United Nations Peace Missions, in the former Yugoslavia and Sierra Leone, in the years 1995 and 2000 respectively.
5. He was charged before his Commanding Officer [CO], on 22<sup>nd</sup> March 2006, with the offence of, conduct to the prejudice of good order and service discipline, contrary to Section 68 of the Armed Forces Act.
6. He was alleged to have stolen a bicycle belonging to a colleague, corporal Boniface Muriithi, on 15<sup>th</sup> February 2006.
7. The CO convicted him, and sentenced him 42 days' imprisonment and dismissal from service. The CO relied on the investigations report, prepared by the Military Police.



8. The Claimant submits that the CO failed to investigate the allegations, and ceded his mandate to the Military Police.
9. The CO was prohibited by Section 39 [a] of the Armed Forces Act, and Regulation 5 [c] of the Armed Forces [Summary Jurisdiction] Regulations, from dealing with a charge where the subject matter exceeded the sum of KShs. 1,000. It was obvious that the bicycle subject matter of the charges, exceeded this value.
10. The CO's decision was ultra vires.
11. Dismissal from service, carried with it automatic denial of terminal benefits, under the Armed Forces [Pensions and Gratuities] [Officers and Servicemen] Regulations.
12. The Claimant submits that the Pensions Act, Cap 189 the Laws of Kenya, is the principal law, governing pensions in the public service. Under Section 113 [1][a] and [b] of the retired Constitution of Kenya, the Public Service Commission was required to concur with any decision to deny, withhold, reduce or suspend any payable pension. No concurrence was sought and given, in denying the Claimant his pension.
13. The Claimant submits that the above Armed Forces Regulations on pensions, were unconstitutional.
14. The Claimant prays for Judgment against the Respondents as follows: -
  - a. Declaration that investigation, conviction, imprisonment and dismissal of the Claimant from the Armed Forces was unlawful, null and void.
  - b. Reinstatement of the Claimant to the Kenya Defence Forces and /or award of the requisite pension and gratuity.
  - c. Payment of salary arrears from 22<sup>nd</sup> March 2006 to the date of reinstatement.
  - d. Damages for unlawful imprisonment, unlawful dismissal, loss of promotion, lost earnings and injured reputation.
  - e. Costs of the Claim.
  - f. Any other order the Court deems just to grant.
15. The Respondents filed a Statement of Response, dated 24<sup>th</sup> January 2014. It is their position that the Claimant's dismissal was done in accordance with Part VIII of the Kenya Defence Forces Act, 2012. The Respondents state that the Claim is time-barred, under Section 3 [1] of the Public Authority Limitation Act, Cap 39 the Laws of Kenya [this was argued preliminarily, and objection declined, in a ruling dated 19<sup>th</sup> January 2016].
16. The Respondents state, that prosecution and dismissal of the Claimant from service, was carried out in accordance with Sections 147 and 156 of the KDF Act. The allegations against the Claimant were investigated, he was informed about the charges, he was heard and given a chance for review of the verdict.
17. It is submitted for the Respondents that the Claimant fully participated in the proceedings against him, and would be deemed to have waived his right to challenge the validity of the proceedings.
18. Section 156 [3] of the KDF Act outlines applicable punishments after disciplinary hearing. They include: dismissal; and reduction in rank.
19. The Respondents urge the Court to dismiss the Claim with costs.



20. The Claimant gave evidence on 20<sup>th</sup> September 2023 and 12<sup>th</sup> July 2024 when he closed his case. Colonel Francis Omuse, Staff Officer at Defence Headquarters, gave evidence for the Respondents on 12<sup>th</sup> July 2024 closing the hearing. The Claim was last mentioned on 5<sup>th</sup> November 2024, when Parties confirmed filing and exchange of their closing submissions.
21. The Claimant relied on his witness statement and 3 documents, in his evidence-in-chief. His witness statement is a replica of the Statement of Claim, whose contents are outlined above.
22. Cross-examined, he told the Court that he was arrested in March 2006. He was alleged to have stolen a bicycle. No investigations were carried out. He was taken before the CO. He was told he had been convicted. He was not formally charged, heard and convicted. He was sentenced to 42 days of imprisonment and dismissed.
23. Colonel Omuse told the Court that he is the custodian of all staff records at KDF. He adopted his witness statement and documents filed by the Respondents, in his evidence-in-chief. The disciplinary procedure, under the KDF Act is clear. There are offences that are subjected to summary procedures. Others are tried before court martials. The CO has the mandate to investigate offences through the Military Police. The Military Police is an independent unit. The accused elects whether to be tried by the CO, or the court martial. The Claimant elected to go before his CO. He pleaded guilty and was sentenced to imprisonment of 42 days and dismissed from military service. He was required to clear by handing over his military card. He was issued his civilian card.
24. Cross-examined, Colonel Omuse told the Court that Section 80 of the repealed KDF Act, allowed the CO to investigate. He would request the Military Police to investigate. Rule 7[1] of the Procedural Rules requires the CO to read the charges. Rule 8 requires witnesses to be called. Omuse did not have the proceedings on the Claimant's summary trial. Some documents were classified. They would be declassified after 7 years. They were destroyed after 10 years, in accordance with Regulation 73. Colonel Omuse did not have evidence of any documents that were destroyed. Some documents are exempted from destruction, depending on their importance. The Claimant issued a statutory notice to the AG before presentation of the Claim. The AG forwarded the notice to the Defence Ministry in July 2006. There was no response from the Defence Ministry. The Claim was filed in 2014. The Respondents did not know that the destroyed documents would be required in Court. Part 11 orders marked as 'HAO 2' in the Claimant's documents, shows the offence was committed on 15<sup>th</sup> February 2006. The repealed KDF Act did not mention investigations through the Military Police. Procedure was followed, even though relevant documents have since been destroyed. Part 11 Orders is just a summary of the trial and the outcome.
25. Colonel Omuse told the Court that Section 83 of KDF Act provided for appeals and reviews. The Army Commander had the appellate and review mandate. The trial documents would be forwarded to him. The process would not take long.
26. Omuse did not have the Claimant's personnel file. He did not have his testimonials. He would not know if the Claimant had decorations. On dismissal, pension was not payable.
27. Redirected, Colonel Omuse told the Court that the Commander would approve award and discharge. Discharge instructions and certificate are forwarded to the service unit. Comments on the conduct of the officer are made at the unit. CO requests for investigations by the Military Police. The Military Police supplies an abstract of evidence. The KDF Act does not require the CO to investigate personally.
28. The issues as agreed by the Parties' Advocates, on 30<sup>th</sup> August 2019, are whether: investigations of the allegations against the Claimant, and subsequent conviction and sentencing of the Claimant on



22<sup>nd</sup> March 2006, was done in accordance with the law; dismissal of the Claimant from service on 22<sup>nd</sup> March 2006 was un-procedural and /or unlawful; and whether the Claimant is entitled to the prayers sought.

**The Court Finds: -**

29. There is no dispute that the Claimant was enlisted in the Kenya Armed Forces [presently Kenya Defence Forces], on 28<sup>th</sup> April 1988. He was certified, and assigned military service number 61635. He transitioned to a military driver, on 1<sup>st</sup> October 1992. He was stationed at Thika barracks, in the 12<sup>th</sup> Engineering Battalion.
30. He served in the UN Peace-Keeping Missions in the former Yugoslavia, and Sierra Leone, in the years 1995 and 2000 respectively.
31. With this commendable military service, partly overseas with a reputable global organization, it is disconcerting that on 15<sup>th</sup> February 2006, the Claimant was alleged to have stolen a bicycle from a colleague, Corporal Boniface Muriithi.
32. He was charged before the CO, with the offence of conduct to the good order and service discipline, contrary to Section 68 of the Armed Forces Act. He was convicted, and sentenced to 42 days' imprisonment and dismissed from military service through an order dated 7<sup>th</sup> April 2006.
33. In support of the Claim, the Claimant relied on 3 sets of documents, most of which are photocopies, and of considerably poor quality, exhibited as 'HAO1' 'HAO 2' and 'HAO3.'
34. 'HAO1' comprises certificate of service. It confirms the Claimant's rank and service number. It also confirms that the Claimant was discharged through dismissal. It has a slot for the Claimant's honours and awards. The certificate includes a section showing the Claimant undertook military driver class II course.
35. The testimonial in 'HAO1' characterizes the Claimant's conduct as 'good.' It is noted that he was enlisted on 24<sup>th</sup> April 1988. He was trained at Eldoret Military training facility. He was afterwards, posted to the 12<sup>th</sup> Engineering Battalion, Thika. He was trained and qualified as a driver in 1992. The testimonial indicates that the Claimant was a recipient of service medal, and concludes with the recommendation that he is suitable for employment, in any other organization.
36. The certificate of discharge, discloses the date of discharge and reason for discharge. It shows that he served for 17 years and 232 days.
37. The service history of the Claimant, is therefore well captured in 'HAO1,' and is in line, with what is contained in his pleadings and oral evidence.
38. 'HAO2' is Part II Orders. The Orders contain nothing new, from what is contained in 'HAO1.' The document merely summarizes the history of the Claimant's service, from the date of his charging with an offence under Section 68 of the Armed Forces Act, to the date of his conviction and dismissal.
39. 'HAO3' contains the statutory notice by the Claimant to the AG dated 4<sup>th</sup> July 2006, and a letter by the AG to the PS Ministry of Defence, dated 17<sup>th</sup> July 2006. The AG forwards the statutory notice issued by the Claimant, with advice on the need for the PS to investigate the subject matter, and give adequate instructions to the AG.
40. The Respondents did not avail to the Court important documents, even after receiving a notice to produce from the Claimant, dated 27<sup>th</sup> October 2023.



41. Among the documents notified to produce, include: Part II orders; memorandum to the Army Commander seeking approval of CO's decision against the Claimant; personnel file of the Claimant; service record of the Claimant including decorations, record of UN Peace-Keeping service, particulars of offences over which the Claimant was convicted, and procedure followed, dates the Claimant was under confinement, and relevant medical records; letter to the Director of Pensions communicating dismissal of the Claimant, and seeking concurrence for denial of pension / gratuity; and current salary scale of SSPR [the Claimant did not assist Court with the full rank represented by the abbreviation].
42. Sadly, instead of assisting the Court by producing the Claimant's entire personnel file, including the investigations report and trial proceedings, the Respondents resorted to legal tactics, that were intended to obfuscate the just resolution of the substantive dispute.
43. There were various applications for dismissal of the Claim, on the ground that it is statute-barred. There was an application made by the Respondents to have the documents exhibited by the Claimant, marked as 'HAO1' and 'HAO2' struck out, allegedly for contravening Sections 68 and 80 of the *Evidence Act*, Cap 80 the Laws of Kenya. The Court declined the application, finding that the same was dilatory, and intended to delay prosecution of the Claim, after previous attempts to have the Claim dismissed on statute-bar, failed.
44. It was not lost on the Court, that the Respondents failed to produce documents as requested through the notice to produce, and striking out the photocopies exhibited by the Claimant, would have resulted in a Claim unsupported by any form of documentation, from either the Claimant or the Respondents. In effect, the Claim would have aborted.
45. The evidence by Colonel Omuse, the military personnel records custodian, on the Respondents' failure to produce relevant documents, bordered on the bizarre. To quote him verbatim under cross-examination, he told the Court: -I do not have the proceedings on summary trial. Different documents are classified. They are disposed of, depending on classification. Documents on summary dismissal are destroyed after 7 years, in accordance with Regulation 73. Those required for future use are exempt [from destruction]. I do not have evidence of their destruction. My evidence is based on his personnel file. I am the custodian of the personnel file. I do not have his personnel file. The notice to the AG issued by the Claimant, is dated July 2006. The Claim was filed in 2014. The Respondents did not know if the destroyed documents would be needed in [Court] in the future.
46. Colonel Omuse spent most of his allotted time, submitting on the provisions of Armed Forces Act, relating to the investigation process, the trial procedure, conviction and sentencing, while as the custodian of relevant documents, could not supply the Court with documents upon which his abstract legal submissions, rested. Submissions, however forceful, cannot be a substitute for evidence, particularly where the submitting party, is deliberately withholding relevant evidence.
47. From the bare pleadings and evidence of the Respondents, there is nothing to show that the Claimant stole the bicycle of a colleague. There is no record of an abstract of evidence, showing how the evidence was collected, preserved and presented before the CO. The record of the actual hearing before the CO, if there was a hearing at all, is not before the Court. His findings, reasons for the findings, and record of conviction and sentencing is not before the Court. Colonel Omuse agreed that the decision against the Claimant was subject to review or appeal by the Army Commander. There is no record of such review or appeal.
48. The testimonial issued to the Claimant by his Commander, after discharge, indicates that his service conduct was good. The KDF recommended the Claimant for employment by any other organization. How would an officer who was charged and convicted for the offence of conduct to the prejudice of



good order, be upon dismissal, declared to be of good conduct? How would he be recommended for employment by other organizations? The investigation, trial, conviction, sentencing and dismissal of the Claimant, based on the documents on record, and the evidence and pleadings of the Respondents, does not make sense.

49. Section 80 of the repealed Armed Forces Act, Cap 199 the Laws of Kenya, as submitted by the Claimant, required the CO to investigate the charge, in the prescribed manner. There was no evidence presented by the Respondents, that the accusation against the Claimant, of stealing a bicycle, was investigated by his CO.
50. The Armed Forces Rules of Procedure, made pursuant to Section 228 of the Armed Forces Act, were elaborate on how investigations were to be carried out, and summary proceedings executed.
51. Rule 7 required the CO to investigate the charge. He would explain the charge to the accused. The evidence would be reduced to writing. He would hear the accused personally. The Rules required that each prosecution witness gives evidence orally, in the presence of the accused. Rule 10 demanded that before the CO deals summarily with the charge, after evidence has been reduced to writing, any prosecution witness who had not given evidence, would be called to give evidence, upon the request of the accused. The CO would give the accused a further opportunity to give evidence on oath, or make an unsworn statement.
52. Although described as summary proceedings, the procedure under the Armed Forces Rules of Procedure, had rigorous procedural guarantees and protections, for accused persons, which the Respondents have not demonstrated to the Court, to have adhered to.
53. They seem to have equated summary proceedings, to a process to be conducted without legal formalities. Summary proceedings in the disciplining of military officers and servicemen, is not intended to be akin to summary execution of soldiers, that is legalized in certain emergencies and warfare. There must be a disciplinary enquiry, with all formalities, and prescribed procedural rules, followed.
54. The Claimant's position, which was not controverted by the Respondents through evidence, was that his CO, relied solely on a report of the Military Police, in making his decision against the Claimant. He neither investigated the charge, nor heard the Claimant, in accordance with the Armed Forces Rules of Procedure.
55. The Court does not however agree with the Claimant, that the CO did not have the mandate, to deal with the offence the Claimant was charged with, by virtue of Section 39 of the Armed Forces Act, and Regulation 5 [c] of the Armed Forces [Summary Jurisdiction] Regulations. The CO is barred under the Regulation, from dealing with charges where the subject matter exceeds Kshs. 1,000. According to the Claimant, the bicycle he was alleged to have stolen, did not exceed Kshs. 1,000. There is however no evidence on the value of the bicycle, and the Claimant was not charged under Section 39; he was charged under Section 68. A charge under Section 68 of the Act, is not among the charges, exempted from the mandate of the CO, under Regulation 5, of the Armed Forces [Armed Forces Constabulary-Summary Jurisdiction] Regulations.
56. In the end, the Claimant was punished thrice, for the same offence. He was imprisoned for 42 days; he was dismissed from service; and worst of all, deprived of his pension, after almost 18 years of service.
57. The sentencing was not in accordance with rules of natural justice, and the Armed Forces Act. Section 82 [5] stated that where an accused had not chosen to be tried by the court martial, the imposed punishment would be subject to confirmation by the Commander.



58. None of the sentences imposed on the Claimant was reviewed and confirmed by the Army Commander. Section 83 allowed the Commander to quash or vary the decision of the CO, where there were infirmities. Without evidence that the decision of the CO was reviewed by the Commander, none of the sentences- imprisonment, dismissal and forfeiture of pension- was sustainable.
59. In *Gift Kambu Marandu v. Kenya Defence Forces & Attorney-General* [Cause 470 of 2014] [2017] KEELRC 201[15<sup>th</sup> December 2017] [Judgment], this Court dealt with sentencing and deprivation of pension to military officers and servicemen, upon dismissal under the KDF Act, which has since, replaced the Armed Forces Act.
60. Under the Armed Forces Act, forfeiture of remuneration by a convicted serviceman, would be applied in redressing loss or damage occasioned by the serviceman, through his commission of the offence. What would be the rationale in taking away the pension, in addition to other forms of punishment?
61. The Court was of the view in the above decision, that Section 156 [2] of the KDF Act, does not state that once a serviceman has been dismissed, he automatically loses his service benefits. The Court did not find any provisions under Section 155 of the Act on summary proceedings, or from Section 180 on trials by court martials, which states that the punishment of dismissal, should invariably be in addition to loss of pension and gratuity. Section 244 of the Act confers on members of the Armed Forces, such pension and gratuity, as shall be determined by Treasury, in consultations with the Defence Council, in accordance with the Regulations.
62. The Court held that where an officer has been dismissed under any circumstances provide for under the Act, the Defence Council may withhold, reduce the amount or suspend any such benefits payable to the officer. The Defence Council does not take such a decision unilaterally. Sub-section 2 requires there is the concurrence of the Public Service Commission.
63. Any Law or Regulations under the repealed Kenya Armed Forces Act, that would have the effect of depriving an officer of their pension benefits once dismissed from service, would, as submitted by the Claimant, have been unconstitutional, under Section 113 [1] of *the Constitution*. Like the present KDF Act, *the Constitution* in force at the time, required that there is concurrence of the Public Service Commission, before dismissed officers, could be deprived of their pension.
64. The Court in the decision above, concluded that Section 244 of the KDF Act, and the Regulations made thereunder, does not avail officers a direct route to Court, in disputes over pension and gratuity. The KDF Act requires such disputes to be dealt with by the Defence Council and the Public Service Commission. The Court is divested of primary jurisdiction, like in most other Pension Schemes.
65. The current law, the KDF Act, should guide the Claimant, in pursuit of his pension and any relevant gratuity.
66. Reinstatement of an officer who was recruited in 1988 – some 37 years ago- and who was dismissed 19 years ago, would be most unreasonable, illogical, impracticable and contrary to the law. It is most likely that the Claimant has attained, or is close to attaining, the mandatory age of retirement. The KDF has moved on, and he would not be able to keep pace, with the demands of the modern KDF.
67. He also is mistaken, in his claim for salary arrears with effect from 22<sup>nd</sup> March 2006 to the date of reinstatement. Reinstatement is not available, and even if it was, it is doubtful that the Court would grant an order for arrears of salary, over a period of 18 years, none of which the Claimant rendered any military service.



68. In the absence of any documents from the custodian, the Respondents herein, the Court grants the prayer for declaration, that the investigation, conviction, imprisonment and dismissal of the Claimant from the Armed Forces, was unlawful.
69. General damages for unlawful dismissal and unlawful imprisonment are merited. The prayer for damages for loss of reputation is not well-founded. It is not clear if the Claimant meant damages for loss of, or diminished employability, under his prayer on reputation. The Respondents gave him a certificate after discharge, indicating that his conduct was good, and recommended him for employment by other organizations. To that extent, the Respondents did not render the Claimant unemployable, or of diminished employability. He could find gainful employment as a driver, having been trained as such, by the military.
70. The prayer for damages for loss of earnings is similarly not well-articulated. The Claimant did not give the Court any figures to work with, or relate this prayer to his other prayer on payment of back salaries. He did not submit on his work-life expectancy, or suggest any multiplier, in seeking damages for loss of earnings.
71. He however was subjected to a bizarre and dishonourable exit, warranting an award of general damages. He was an honourable officer, who had served in UN Missions overseas. It was most unfortunate that he was dismissed for alleged theft of a bicycle. He was subjected to dishonourable discharge. He cites a decision of this Court, *Nyambok v. Kenya Defence Forces & Another* [2023] KEELRC 2098 [KLR], in urging the Court to grant him general damages. Major Nyambok was granted general damages at Kshs. 4 million.
72. The nature of violations in Major Nyambok dispute were distinguishable, and much more pronounced, than those the Claimant herein was subjected to. He only submitted on one Section of the retired Constitution which he deemed the Respondents to have violated- Section 113 [1]. He is granted general damages for unlawful investigation, conviction, imprisonment and dismissal at Kshs. 1,000,000.
73. Like in the case of *Gift Kambu Marandu*, the Court is not able to grant a blanket order for payment of pension and / or gratuity. The Claimant herein did not even attempt to quantify the pension and gratuity sought. He worked for 18 years, and it would look unconscionable, of any Employer, to deprive such an Employee or Officer, of his pension benefits, on the ground that he stole his colleague's bicycle. The Court shall simply declare that the Claimant is entitled to pension and / or gratuity. The amounts payable in pension and/ or gratuity, may be pursued with the Defence Council and the Public Service Commission.
74. No order on the costs.
75. The prayer for interest is allowed, at court rate.
- In sum it is ordered: -
- a. It is declared that the investigation, conviction, imprisonment, and dismissal of the Claimant from the Armed Forces, was unlawful.
  - b. The Claimant is granted general damages for unlawful investigation, conviction, imprisonment and dismissal at Kshs. 1,000,000.
  - c. It is declared that the Claimant is entitled to pension and/or gratuity, and the same may be pursued with the Defence Council and the Public Service Commission.
  - d. No order on the costs.



- e. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,  
UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT  
PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF JANUARY 2025.**

**JAMES RIKA**

**JUDGE**

Court Assistant: Bernard Kirui

Kamunya & Company Advocates for the Claimant

V.Kabi, State Counsel for the Respondents

