



**PKJ v Attorney General & 3 others (Petition E028 of 2022)
[2025] KEELRC 2083 (KLR) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E028 OF 2022**

MA ONYANGO, J

JULY 10, 2025

**IN THE MATTER OF ARTICLES 22,23,24(5),
27,28,29,41,47,162(2)(A), 165(5)(B),232 AND 258 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF VIOLATION OF SECTIONS 2, 4, AND 9(2)
OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER OF VIOLATION OF SECTIONS 13,14,18 AND
22 OF THE HIV & AIDS PREVENTION AND CONTROL
ACT,2006**

AND

**IN THE MATTER OF VIOLATION OF SECTIONS
16,17,18,19,21,22 AND 23 OF THE EAST AFRICAN
COMMUNITY HIV & AIDS PREVENTION CONTROL ACT,2012**

AND

**IN THE MATTER OF SECTIONS 3,4,12,48,252(2), 253 AND
255 OF THE KENYA DEFENCE FORCES ACT, 2012**

BETWEEN

PKJ PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT



CABINET SECRETARY, MINISTRY OF DEFENCE 2ND RESPONDENT
CHIEF OF THE KENYA DEFENCE FORCES 3RD RESPONDENT
DEFENCE COUNCIL 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed the petition herein dated 30th November, 2022 against the Respondents which he amended vide Amended Petition dated 29th June 2023.
2. The 1st Respondent is sued in its capacity as the Legal representative of the Government of Kenya and principal legal adviser of the said Government in accordance with Article 156(4) of the Constitution.
3. The 2nd Respondent is sued in his capacity as the Cabinet Secretary responsible for defence in the National Government of Kenya.
4. The 3rd Respondent is Chief of the Kenya Defence Forces statutorily mandated to administer, control and manage the Kenya Defence Forces.
5. The 4th Respondent is established under Article 241 of the Constitution and is charged under section 28 of the Kenya Defence Forces Act with the recruitment and appointment of members of the Kenya Defence Forces.

The Petitioner's Case

6. In his Amended petition, the Petitioner alleged that he was dismissed from service by the Kenya Defence Forces in contravention of Articles 27(4), 28, 29, 31, 41 and 47 of the Constitution and further, that his dismissal was in violation of sections 48 and 52 of the Kenya Defence Forces Act. He sought for orders that:-
 - a. A declaration do hereby issue that the dismissal of the Petitioner from service by the 2nd and 3rd Respondents on the basis of the Petitioner's HIV status amounts to unfair and unconstitutional discrimination and a violation of the Petitioner's constitutional rights under Articles 27, 28, 29, 41 and 47 of the Constitution.
 - b. A reinstatement order does issue directing the 2nd and 3rd Respondent to reinstate the Petitioner as a KDF recruit with full prevailing benefits.
 - c. A mandatory order do issue compelling the Respondents to, within 30 days, of this order publish its policy on recruitment and retention of persons living with HIV.
 - d. A mandatory order do issue compelling the Respondents to, within 45 days, of this order to enact a constitutionally compliant HIV policy.
 - e. A structural interdict do issue compelling the 2nd and 3rd Respondent to report back to this Honourable Court every 45 days to confirm compliance with order (c) and (d) above.
 - f. Damages for unlawful termination of employment.
 - g. An order for General Damages for violation of the Petitioners' constitutional rights.



- h. Any further order, writs or directions as this Honourable Court may consider appropriate
 - i. Costs of this Petition
7. It is the Petitioner's case that he joined the National Youth Service (NYS) in 2018, where he trained for a year and worked for five (5) years overseeing various NYS projects, including the Kazi Mtaani Program and boda boda training. That he was also involved in the locust eradication program.
 8. The Petitioner contends that in November 2021, while he was in the Youth Service, the Ministry of Defence advertised and carried out recruitments for the Kenya Defence Forces (KDF) in various parts of the country, including Ndhiwa, Homabay, the Petitioner's home district.
 9. The Petitioner states that he successfully applied for and qualified to take part in the recruitment interview at the National Youth Service headquarters in Ruaraka, Nairobi, on 24th November 2021 and that as part of the interview, he was subjected to both medical and physical tests which determined that he was physically and medically fit for recruitment.
 10. It is the Petitioner's case that he received a calling letter from the Ministry of Defence on 26th November 2021 which letter indicated that the Petitioner was successful in the interview for recruitment into the KDF as a General Duty Recruit and that he was required to report to the Recruits Training School (RTS) in Eldoret on 25th December 2021 for further examinations and commencement of training.
 11. The Petitioner contends that he reported to the RTS, Eldoret on 25th December 2021 where he remained until he was dismissed unceremoniously on 2nd January 2022. He averred that the reasons for the dismissal were publicly announced by a field recruitment officer-that a medical test had revealed that the Petitioner was HIV-positive.
 12. The Petitioner further contends that he had resigned from his employment at the National Youth Service in order to join the KDF, as an army man and that as a result of the unlawful dismissal from training, the Petitioner has endured untold mental anguish.
 13. The Petitioner states that he is currently in good physical health and is still ready and willing to serve his country as a soldier as his HIV status would not affect his ability to serve as a member of the KDF. It is his view that instead of being denied an opportunity to train and serve his country in the KDF, he should have been reasonably accommodated.
 14. The Petitioner asserted that his dismissal from service directly violated Article 27(4) which prohibits discrimination by the State on any ground, including health status, that his dismissal from training was in direct violation of Article 41 of the Constitution which entitles every person to the right to fair labour practices.
 15. He thus maintained that the termination of his employment solely based on his HIV status is a constitutional violation and an invalid reason for termination hence his dismissal was unfair and wrongful.

The Respondents' Case

16. The Respondents opposed the Amended Petition vide a Replying Affidavit sworn on 13th October 2023 by Major Edwin Muta, a Commissioned Officer and a Staff Officer II Records, based at the Defence Headquarters who deposed that the purported documents relied upon by the Petitioner in this Petition being the Calling letter, medical report, notice paper, certificate of recruiting officer and copy of attestation paper did not originate from the Kenya Defence Forces.



17. According to the Respondents, the Personnel branch of the Defence Headquarters conducted a background check on the particulars of the Petitioner after the institution of this claim and it was established that the Petitioner was not part of the shortlisted recruits that were selected and issued with calling letters during the subject recruitment exercise.
18. The Respondents contended that the documents relied upon by the Petitioner are proof that the same are irregular since the said documents are usually collected by the recruiting officer owing to the fact that they are confidential documents which are normally collected for security and record purposes, once they have been filled in.
19. It is the Respondents' case that the serial number appearing on the Petitioner's purported calling letter does not exist in the Kenya Defence Force records and is different from the National Youth serialization method used by the Kenya Defence Force.
20. The Respondents maintained that the calling letters from Kenya Defence Force for purposes of recruitment are never signed by the purported persons appearing on the Petitioner's calling letter and the calling letter is normally addressed directly to the respective successful candidates contrary to the Petitioner's purported undated calling letter which is neither addressed to him directly nor signed by the relevant designated officer of the Kenya Defence Forces.
21. The Respondents particularized the irregularities, illegalities, fraud and under dealings of the Petitioner as: -
 - a. Purporting to participate in a recruitment exercise with fake documents and without being shortlisted and/or formally invited to take part in the same yet shortlisting is the first stage of KDF recruitment exercise.
 - b. Procuring and filling in fake attestation paper, medical examination forms, notice paper and calling letter and claiming the same to have originated from the KDF.
 - c. Having in his possession; fake pre-filled attestation paper, medical examination forms, notice paper and calling letter. Documents which ordinarily if were valid, would be confidential and would not be in his possession as the same are normally collected once filled in for archiving.
 - d. Having in his possession; fake attestation paper, medical examination forms, notice paper and calling letter, which documents lacks requisite security features.
 - e. Having in his possession pre -filled fake attestation paper, medical examination forms, notice paper and calling letter. Documents which ordinarily in a KDF recruitment process would be collected at different stages of the recruitment exercise by the respective recruiting officers. Therefore, it is not possible for a recruit to have all the said documents with him at any given point.
 - f. Showing up at KDF recruitment exercises uninvited, without being shortlisting and with fake documents. The recent case being the just concluded KDF recruitment exercise last month.
 - g. Instituting a fictitious Claim herein and before the Eldoret ELRC yet being well aware that the root of his case is anchored on under dealings, illegalities and fraud.
22. The Respondents maintained that the allegation of unlawful medical tests conducted on the Petitioner is not true on the basis that due diligence is the first stage during Kenya Defence Force recruitment exercise which is aimed at weeding out impostors before the other processes can follow. The



- Respondent asserted that the Petitioner could not have even made it to the medical stage since his name was not among the shortlisted recruits.
23. With regard to the medical examination report relied upon by the Petitioner, the Respondents averred that it did not emanate from the Kenya Defence Force as it does not bear the signature and particulars of a Kenya Defence Forces Medical Officer contrary to valid Kenya Defence Forces medical examination forms.
 24. The Respondents maintained that the allegations of recruitment of the Petitioner into Kenya Defence Forces, ill treatment, unlawful medical tests and dismissal are misleading since the Petitioner was not shortlisted to participate in the subject recruitment exercise, he did not make it past the documentation stage and cannot purport to consider himself as an employee of the Kenya Defence Forces.
 25. It is the Respondents case that successful recruitment into the Kenya Defence Force culminates with issuance of service number and commencement of training once a candidate has successfully met the Kenya Defence Force recruitment standards and as such, the allegations by the Petitioner that he was dismissed after start of training yet he does not have a service number is proof that the Petitioner is not being truthful.
 26. The Respondents maintained that the Petitioner was not shortlisted for the said recruitment exercise and the Kenya Defence Forces recruitment process just like any other formal recruitment exercise, starts with shortlisting such that only such shortlisted candidates are considered for the subsequent processes.
 27. The Respondents further averred that the Petitioner has come to the Honourable Court with unclean hands since he turned out for a recruitment exercise uninvited and with fake documents.
 28. The Respondents urged the court to decline the invitation by the Petitioner to rubber stamp an illegality alleging that the Petitioner is the author of his misfortunes for playing a role in attempting to irregularly join the Kenya Defence Forces.
 29. The court was thus urged to dismiss the Amended Petition with costs.

The Petitioner's rejoinder

30. In response, the Petitioner filed a further affidavit sworn on 18th January 2024 and denied the allegations made by the Respondents that he participated in a recruitment exercise with fake documents and without being shortlisted in the recruitment exercise.
31. The Petitioner stated that following his dismissal from KDF training on 2nd January 2022 on account of having HIV, he took his ARV medication and waited for another opportunity to re-enlist to the Kenya Defence Forces.
32. He averred that he contacted his senior recruitment officer, Colonel, Vincent Mburu, who led Team No. 36 to which he was assigned in his calling letter dated 26th November 2021 where he updated him on his health status and informed him of his wish to re-enlist and serve his country. The Petitioner averred that he went as far as informing him that he had all the original documents in his possession from the recruitment exercise that he was dismissed from on 2nd January 2022.
33. The Petitioner maintained that on 5th October 2023, he presented himself to the Recruitment Training School (RTS) where he provided his documents for re-enlisting and upon perusal of his documents, he was taken for interrogation and assigned to one Sergeant Wanjala who recorded his statements, took a photo of him, and confiscated the documents that he had in his possession including his calling letter.



34. The Petitioner stated that one Major Mutiso who was part of the recruitment officers stated that the documents were Kenya Defence Forces documents that ought not to be in his possession and told him in Swahili: -
- “KDF huwezi train ukiwa na HIV If you are wise enough, withdraw the case”.
35. The Petitioner stated that he was thereafter taken to the Soy police station in the company of one Sergeant Ombachi for arrest on impersonation and fraud and he spent a night at the police station only to be released unconditionally without any explanation.
36. The Petitioner averred that the allegations by the Respondents of fraud against him are a deviation tactic from the basis of this amended petition, as they have not made public any policy setting standards for hiring and retention of persons living with HIV. He maintained that dismissal from training was informed by his HIV status, which was disclosed publicly and without my consent and counselling as prescribed by the *HIV and AIDS Prevention and Control Act*.
37. The Petitioner urged the court to grant the orders as prayed for in the amended petition dated 29 June 2023.
38. The suit was heard on various dates. The Petitioner testified on 24th January 2024 and on 4th March 2024 as PW1 in furtherance of his case. In his testimony, the Petitioner stated that he was issued with a calling letter dated 26th November 2021 by the Ministry of defence requiring him to report to the training school on 25th December 2021. He stated that after he arrived at the school, he was subjected to medical examination and was thereafter told to fill the notice paper. It was his evidence that his fingerprints were taken; that he signed the nature of his engagement in the notice paper and after signing the final medical report, he was found to be medically fit and was told to wait for his service number.
39. The Petitioner avers that on 2nd January 2022, he was called among other recruits and told that he was HIV positive. He stated that he was given his documents and escorted out of the Recruits Training School.
40. The Petitioner further told the court that on 4th October 2023, when other recruits were reporting to the training school, he reported and showed the recruiting officers the documents he had and when asked how he got hold of them, he explained that he had been recruited in December 2021 but to his shock, he was immediately arrested and handed over to their military police who handed him to the anti-terror police and DC1 for investigations. It was his testimony that he was booked at Soi Police cells under OB. 19/4/10/23 on the charge of impersonation and obtaining military documents but was released the next day unconditionally.
41. The Petitioner urged the court to issue a reinstatement order arguing that he is fit medically and physically to serve the country.
42. On being cross examined by state counsel Tuitoyek, the Petitioner stated that he filed another case before HIV/AIDS tribunal where he sought damages for discrimination against his HIV status.
43. He averred that all the documents presented in court were certified scanned copies and that although he had the documents in 2022 when he instituted the suit herein, he lost them in 2023 after they were confiscated by the officers from Kenya Defence Forces during the recruitment exercise on accusation of that he had obtained them fraudulently. He confirmed that he was never issued with a service number as he was never employed in KDF.



44. The Petitioner maintained that the documents he was accused of irregularly obtaining were issued to him during the period he was invited for recruitment at the Recruits Training School in 2021.
45. The Respondent called major Edwin Muta, its Staff Officer 11 Records, who testified as RW1. RW1 explained that he is in charge of records for serving and retired members. He relied on his Replying Affidavit dated 13th October 2023 as his evidence in chief. RW1 stated that as per the records, the Petitioner was never a recruit. He explained that for each recruit who is successful at the recruitment, a file is opened after the recruit has been given a service number. RW1 stated that the Petitioner herein was not successful in the recruitment of 2021 and that the documents he presented in the recruitment of 5th October 2023, did not originate from KDF as they did not bear the KDF stamp.
46. RW1 explained to the court that a calling letter is issued to a recruit upon the successful passing of all the processes of the recruitment and that it does not mean that when a recruit reports to the training school, he has been employed.
47. He reiterated the Respondents' case that the documents produced by the Petitioner are not released to recruits as they are kept in the personal file at the records office.
48. On cross examination by counsel Namulanda, the Respondent's witness stated that Kenya Defence Forces does not recruit persons living with HIV. He also told the court that a personal file for a recruit is opened once a recruit has been issued with a service number and a service Identity Card.
49. At the close of the Respondent's case, the court directed parties to file written submissions. The Petitioner's submissions are dated 5th April 2024 whereas the Respondents submissions are dated 29th April 2014. The submissions of the parties by and large reiterate their pleadings on record.

Determination

50. I have analyzed the Petition, the rival affidavits, the oral testimony adduced in court, the submissions of the parties as well as the cited authorities. The broad issues for determination in my view: -
 - i. Whether the Petitioner's rights were violated under Articles 27, 28, 29, 41 and 47 of the [Constitution](#)
 - ii. Whether the Petitioner is entitled to compensation for the alleged discrimination on account of his status
 - iii. Whether the Petitioner is entitled to an order for reinstatement as sought
 - iv. What reliefs should issue?
51. On the first issue, the Petitioner submitted that he was discriminated against in the recruitments conducted on 25th December 2021 on account of his HIV status. In his testimony, he stated that on the 2nd January 2022 as he was waiting for his service number after completion of the physical and medical examination, he was called together with other recruits and told that he should go home as he was HIV positive.
52. The Respondents did not give a response to the allegation that the Petitioner was sent home on 2nd January 2022 on account of his health status but delved into the recruitment exercise conducted on 5th October 2023. The Respondent averred that the Petitioner had impersonated and fraudulently obtained documents from the Kenya Defence Forces.
53. Discrimination is defined in Black's Law Dictionary as the unjust or prejudicial treatment of different categories of people, especially on the grounds of ethnicity, age, health status, sex, or disability.



54. The right to equality and freedom from discrimination is provided for under Article 27 of the Constitution. Article 27(4) expressly prohibits discrimination on grounds of health status. The Respondent's action amounted to direct discrimination and lacked justification.
55. Article 28 of the Constitution guarantees human dignity. In his testimony, the Petitioner stated that his HIV status was publicly announced in the presence of other recruits. The 2nd Respondent's treatment of the Petitioner was not only insensitive but also degrading and humiliating.
56. Article 41 provides for fair labour practices. Although the Petitioner was not yet a formal employee of the Kenya Defence Forces, he was at the initial stages of a structured recruitment and training process, which is subject to constitutional labour standards. In this regard, the 2nd Respondent's action violated the Petitioner's right to fair labour practices.
57. Article 47 on the right to fair administrative action guarantees every person the right to administrative action that is lawful, reasonable and procedural. The decision to remove the Petitioner from the training school was administrative in nature. His right under Article 47 was violated as the 2nd Respondent failed to act reasonably and fairly in its decision making.
58. The violations of the Petitioner's rights were the subject the HIV & AIDS Tribunal in its final judgment in a claim filed at the tribunal by the Petitioner herein in PRJ v KDF (Tribunal Case 048 of 2022) [2024] KEHAT 990 (KLR) (26 July 2024) (Judgment).
59. In the said findings the Tribunal held as follows:
 44. This Tribunal has noted from the medical report that HIV test seems to be crucial in the medical forms as a pre-requisite to KDF enlistment not only in Kenya but in other Countries. Comparative legal study and jurisprudence shows that due to significant advancements in the diagnosis, treatment, and prevention of Human Immunodeficiency Virus (HIV), the United States of America Secretary of Defence in June 2022 updated DoD policy with respect to individuals who have been identified as HIV-positive by directing: "officers living with HIV will have no restrictions applied to their deployability or to their ability to commission while a Service member solely on the basis of their HIV-positive status. Nor will such individuals be discharged or separated solely on the basis of their HIV positive status.."
 45. RW-1 testified that that KDF recruitment standards boarders medical witness, physical witness, spiritual witness as well as moral witness. However, persons living with be embraced and allowed to serve due to the advancement in HIV testing and treatment.
 46. This Tribunal holds that the Respondent is not excluded from the operations of the HIV and AIDS prevention and Control Act and encourage the Respondent to train it's personnel and uphold the provisions of the Act.
60. There is no indication that the Respondents appealed against the Tribunal decision and this court therefore takes judicial notice of the said decision.
61. On the issue whether the Petitioner is entitled to compensation for the alleged discrimination on account of his status, the court having had the advantage of perusing the judgment in the case before the tribunal PRJ V KDF (supra) wherein the Petitioner had sought for compensation for the alleged discrimination on account of his health status and was awarded Kshs 1,050,000. The Tribunal award in my view is sufficient compensation and any additional award would constitute double compensation.
62. On the third issue, the Petitioner seeks an order that he be reinstated as a KDF recruit with full prevailing benefits. Reinstatement is a remedy reserved for persons who have been dismissed from



a subsisting employment relationship. The Petitioner herein had not yet been employed by the 2nd Respondent, although he had already qualified for recruitment but for his medical condition, going by the evidence on record. The Court finds that reinstatement is not available to the Petitioner, as no employment relationship had been perfected between him and the Respondent. The Court however directs that the Petitioner be included in the next recruitment exercise without having to go through the preliminary stage that he already passed, unless there will be other prevailing reasons to prevent him from being so recruited.

What orders should issue?

63. This court finds it just and necessary to issue structural orders directing the 2nd and 3rd Respondents to review the recruitment policies with regard to HIV positive applicants noting that RW1 in his testimony categorically told the court that Kenya Defence Forces does not recruit persons living with HIV into its employment.
64. This is further to the orders of the Tribunal PRJ V KDF (supra) where the Tribunal directed that:
1. A declaration is hereby issued that KDF in Kenya is not excluded from the operation of the HIV & AIDS Prevention and Control Act.
 2. KDF is hereby directed to review and update its regulations, procedures and practices for enlistment and recruitment informed by scientific developments in HIV treatment and management and in compliance with the provisions of the HIV & AIDS Prevention and Control Act and existing standards and guidelines and provide evidence of the same before this Tribunal within 90 days from the date of this judgment.
65. In the upshot, the following orders issue: -
- i. A declaration be and is hereby issued that the 2nd and 3rd Respondents violated the Petitioner's constitutional rights under Articles 27, 28, 29, 41 and 47 of the Constitution.
 - ii. The prayer for reinstatement is declined but the Respondent is directed to enlist the Petitioner in the next recruitment exercise unless there are valid reasons for not doing so which shall be communicated to the Petitioner in writing.
 - iii. A mandatory order is hereby issued compelling the Respondents to, within 90 days of this order, publish its policy on recruitment and retention of persons living with HIV that is compliant with the Constitution and the orders of the HIV and AIDS Tribunal in PRJ v KDF (Tribunal Case 048 of 2022) [2024] KEHAT 990 (KLR) (26 July 24) (Judgment) dated 26th July, 2024.
 - iv. A structural interdict is issued compelling the 2nd and 3rd Respondents to report back to this Honourable Court within 120 days to confirm compliance with the orders of this court in respect of development of a policy on recruitment and retention of persons living with HIV.
 - v. In view of the award made to the Petitioner by the Tribunal, the court declines to make any further orders in respect of compensation.
 - vi. Each party shall bear its own costs.

DATED, SIGNED AND VIRTUALLY AT ELDORET ON THIS 10TH DAY OF JULY 2025

MAUREEN ONYANGO

JUDGE

