



**Mulekano v Attorney General (Cause 6 of 2020)
[2024] KEELRC 634 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 634 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 6 OF 2020
JW KELI, J
MARCH 14, 2024**

BETWEEN

DOUGLAS WAWIRE MULEKANO CLAIMANT

AND

HON. ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Claimant upon termination of his employment by the Respondent filed a Statement of Claim dated 2nd April 2020 and filed in this court on 29th June 2020 seeking the following reliefs: -
 - a. A declaration that the decision to charge him and the proceedings that ensued thereon was; unlawful, procedural, defiant of, known principles of natural justice, and the constitutional principles allied to the right to fair hearing, reason and the circumstances of the matter.
 - b. A declaration that the verdict to terminate and the termination and actions were wrongful, unfair and in breach of the Claimant's constitutional rights under Articles 27, 41, 47, 50 and 236 of the *Constitution*.
 - c. Reinstatement or in the alternative an order that the termination be without loss of his terminal benefit.
 - d. General damages for wrongful and unfair termination.
 - e. Aggravated Damages for discrimination.
 - f. Costs of this claim.
2. In addition, on even date he filed his verifying affidavit to the claim which was undated, he filed his list of witnesses dated 16th June 2020, his witness statement of 2nd April 2020, the Witness statement of Edgar Mwore Lilungu of 16th June 2020, his list of Documents dated 16th June 2020 and accompanied



by his bundle of documents. On 7th June 2020, he filed a Verifying affidavit sworn on 2nd April 2020 in support of his amended plaint.

3. The claim was opposed by the Respondent who first entered appearance through Senior State Counsel Callen Masaka of the Office of the Attorney General & Department of Justice -Kakamega on 9th October 2020. Thereafter, on 10th December 2020, State Counsel V. G. Kabi of the Attorney General Chambers- State Law- Nairobi - Office of the Attorney General & Department of Justice filed another Memorandum of Appearance dated 4th December 2020.
4. The Claimant on 15th June 2022 filed a further list of Exhibits dated 14th June 2022 which was accompanied by one document.
5. The Respondent on 7th October 2022, filed a Statement of Response dated 30th September 2022. Accompanying the Statement of Response was the List of Witnesses dated 30th September 2022, the Witness statement of Major Edwin Kibiru Muta (130057), the respondent's list of Documents dated 30th September 2022 and the respondent's bundle of documents.
6. The Claimant on 23rd February 2023, refiled all his bundle of documents dated 16th June 2020.

Hearing

The Claimant's case

7. The Claimant's case was heard on the 27th of November 2023 when the Claimant, testified on oath (CW1), adopted his written witness statement dated 2nd April 2020 and filed on 29th June 2020 as his evidence in chief, and produced his documents under the list of documents dated 16th June 2020 as exhibits C-1 to 12. He was cross-examined by counsel for the respondent, State Counsel Chemas. CW2 was Edgar Mwore Lilungu who testified on oath virtually. He adopted his written witness statement dated 16th June 2020 and filed on 29th June 2020 as his evidence in chief. He was also cross-examined by counsel for the respondent, State Counsel Chemas.

The Respondent's case

8. The Respondent's case was heard on the same day, 27th of November 2023, when its witness Major Edwin Kibiru Muta (DW) testified on oath as the Respondent's witness of fact. He adopted his written witness statement dated 30th September 2022 as his defence evidence in chief and produced defence documents filed on 7th October 2022 as exhibits D-1-6. DW was cross-examined by counsel for the Claimant, Angima.

Claimant's case in summary

9. The Claimant was enlisted by the Kenya Armed Forces as a Service member effective on 4th May 1990 and worked in various stations, and due to his amazing discipline, character and training he rose through the ranks to become a sergeant.
10. His last station was at Sangailu Detachment, where on 16th July 2019 he was charged(C-Exh-4) under Section 21 of the *Kenya Defence Forces Act* for having conducted himself in a manner to the prejudice of good order and discipline.
11. He states that allegations were levelled against him that on 30th June 2019 whilst at Sangailu Defence Camp between 1830 hours and 2000 hours, he had actively participated in the torture of one Mr. Isse Abdi by burning and beating him in the prisoner's trench, knowing that the said acts constitute an offence(C-Exh-1).



12. He states that Abdi had come to spy at their camp and that he did not witness that he was tortured through burning, but heard that he had been burnt.
13. He testified that he had served on a Mission in Somalia and Sudan and was aware of how to treat prisoners of war.
14. He states that he was taken through a disciplinary proceeding which culminated in his conviction and termination of service on or about the 8th of August 2019.
15. As at the time of his dismissal, he stated that he had worked for 29 years and was earning a salary of Kshs 91,894/-(C-Exh-1).
16. He states that the investigation request for his case was dated 11th July 2019 (C-Exh-2) and states that the process was hurried and he was not accorded adequate time to prepare for his defence as he was served with the Abstract of evidence on 16th July 2019 at 4.00 O'clock and forced to sign the same Abstract(C-Exh-6) and appeared before the Commanding officer on the morning of 18th July 2019.
17. He stated that the disciplinary proceedings he underwent were unlawful as they defied the rules of natural justice, and breached the constitutional principles of fair hearing and other constitutional principles.
18. He states that the disciplinary proceedings were hurried to appease the residents of Sangailu and this was evidenced by the Military Police statement of Daniel Kipkoech Rotich(C-Exb-3).
19. He states that when he appeared before the commanding officer, the commanding officer said he had nothing to say and remanded him to appear before the Commanding officer for orders.
20. He states that the decision to charge him and the consequential proceedings ran counter to logic and reason; and that the evidence that was brought and the circumstances of the matter were all to his prejudice.
21. He stated that the charge against him concerned a lack of leadership and the in charge of Command was Rotich.
22. He states that he requested that witnesses be availed during his disciplinary proceedings before the Commanding Officer, but the recorded proceedings before the Commanding Officer stated that he agreed in writing that witnesses were not required to give evidence in person, yet he never changed his position.
23. He states that about 20 witnesses (C-Exb- 7, 8, 9) had given evidence and he had no time to study the statements before the summary trial and only one Murithi had implicated him, yet Murithi was a suspect and he is the one who had arrested the suspect, yet he was never charged.
24. It was stated that CW2 together with others arrested the suspect Abdi and handed him to Murithi who carried him to the camp.
25. It is stated that the Claimant was not among the persons who arrested Abdi as he was not part of the Platoon that arrested Abdi. He states that the verdict reached based on the proceedings and the decision to terminate his services was wrongful, unfair, and discriminatory -affronting his right under Article 27 of the Constitution, and the right to fair labour practices under Article 41 of the Constitution.
26. He stated that he was never given his termination letter that contained the reasons for his dismissal.



27. He states that the verdict against him resulted in him losing all his benefits, a consequence that was not meted out to other servicemen charged alongside him in the same proceedings. He stated that this amounted to discrimination and an apparent indicator of malice.
28. He states that on 1st September 2019, he appealed against his conviction (C-Exh- 10), sentence and the decision to terminate him, but the defence forces neglected and/or failed to consider his appeal which terms are an affront to Article 47.
29. He seeks a declaration that his termination was unfair and unprocedural for violating rules of natural justice and fair hearing and an order for reinstatement or in the alternative, he is paid his terminal benefits; general damages and aggravated damages for the unconstitutional and unjustified discrimination against him.

The Respondent's case

30. The Respondent's case is that the Claimant was employed by the Kenya Defence Forces until 8th August 2019 when he was dismissed from service on disciplinary grounds(R-Exh-3).
31. It is stated that the Disciplinary proceedings against the Claimant followed the law and were procedural, fair and lawful since the Claimant was subjected to a disciplinary process which he was subject to before his dismissal and none of his constitutional rights were violated(R-Exh-4).
32. It is stated that the right to fair labour relations under Article 41 of the *Constitution* is limited to persons serving in the Kenya Defence Forces as provided under Article 24(5)(d) of the *Constitution*.
33. It is stated that the Claimant was given the reasons for his termination after his summary trial and it is submitted that the Claimant was not discriminated against, as all personnel who were found guilty of the offence in question were dismissed from the service or their commission terminated.
34. It stated that the decision to charge the claimant was procedural by the *Kenya Defence Forces Act* and the *Constitution*.
35. It is submitted that the Summary trial is a legal trial or disciplinary process which is provided under the *Kenya Defence Forces Act* and the procedures provide that the Commanding officer must serve the accused with the charges he is facing, together with the witness statements and documentary evidence to be relied on, give the accused person time to prepare for trial, the right to be heard and defend himself and the right to call witnesses; which the respondent confirms was accorded to the Claimant.
36. It was stated that the Summary dismissal begins with the request by the Commanding officer for investigations to the Military Police Headquarters on an individual(R-Exh-1), followed by the appointment of a Battalion head by the Military police, who appoints an individual to investigate for a certain period and hand over a document called an Abstract of Evidence where one copy is sent to the Accused who receives it(R-Exh-2) and the other to the Investigation Officer.
37. It was submitted that the accused is given not less than 24 hours to prepare his defence and appear before the Officer commanding who is the judge. The judge may hand over the case to a superior body like a commanding officer for a verdict.
38. It was stated that the accused is given a choice to either appear before the Commanding officer or before the Court-martial and asked if he needs witnesses to appear and if he can produce his witnesses.
39. It was stated that after the verdict, the Commanding officer pushes the verdict to a higher authority for review, which is a mandatory process before the Army Commander who can uphold or review the verdict downwards.



40. After the Army commander's decision, where there is dismissal he orders a discharge institution to be handed through the chain of command to the accused person(R-Exh-5).
41. It was stated that after this dismissal, the accused can choose to appeal through the same chain of trial proceedings and the redress can be reviewed upwards or downwards(R-Exh-6).
42. It is submitted that the penal sanction of dismissal is legally provided as an award in summary trial and this was awarded to the Claimant upon justifiable cause on the merits of the charge against him and evidence adduced during trial.
43. It is submitted that the charge against the Claimant was serious and carried a penalty of dismissal.
44. It is stated that the claimant's case was heard and evidence adduced which incriminated him beyond any reasonable doubt leading to his dismissal from service.
45. The Respondent states that the Claimant is not entitled to terminal benefits or any other reliefs at all, on the basis that the Claimant's case was acted upon fairly and procedurally by established law.
46. It is submitted that the provisions of the Employment Act do not apply to members of the Kenya Defence Forces in line with Section 3(2) of the Employment Act.
47. The Respondent states that the court lacks jurisdiction as the case arises from an administrative decision in which a redress mechanism has been provided by statute and which the Claimant has not exhausted.

Written submissions

48. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions dated 7th December 2023 were drawn by Omagwa Angima and Co. Advocates and filed in court on 15th January 2024. The Respondent's written submissions dated 26th January 2024 were drawn by Special State Counsel, K. Chemas, of the Attorney General's Chambers and were dated 26th January 2024 and were received in court on an even date.

Claimant's evidence

49. The court outlined the claimant's case as pleaded above. The claimant at the hearing testified under oath and produced his evidence. The claimant relied on his written statement dated 2nd April 2020 as his evidence in chief. The claimant produced his documents as C-exhibits 1-12 under his list of documents dated 16th June 2020. The claimant told the court that he did not wish to be reinstated having served the country for 29 years but was seeking his benefits and costs.

Cross-examination of the Claimant

50. Evidence during the cross-examination of the Claimant was as follows: -
51. The claimant was employed by the respondent on the 1st of April 1990. In June 2019 he was at Sangailu. He knew Issa Abdi. That Abdi was caught spying, tortured and taken to Mada. The claimant told the court he was told that Abdi was burnt. The claimant agreed that he was trained and taught torture was not allowed under service and prisoners law. He had served in missions in Somalia and Sudan. That deployment training was to equip servicemen including how to handle prisoners of war.
52. The claimant told the court on the arrest of a prisoner of war, one reports to the higher authority through the chain link. He did not know of summary trial nor had he ever lost his ID during service. The claimant admitted that the role of the military Police service was to investigate. He admitted that



the letter dated 11th July 2019 was for military police to investigate his case (C-exhibit 2). The claimant told the court that he was commanded to sign the booklet abstract of evidence (D-exhibit 2). The Claimant read the document as receipt of abstract evidence.

53. The claimant agreed that after he got the abstract evidence he appeared before the officer commanding (OC). That the OC said he had nothing to say and remanded him to appear before the commanding officer for Orders. He appeared before the Commanding Officer on the 18th July 2019 having been served on the 16th of July 2019.
54. On whether the Commanding officer asked him questions on language and whether he had sufficient time for defence, he said yes. The claimant told the court he had no choice. That the record indicated he opted for summary trial.
55. That Patrick Murithi appeared during the trial and said the claimant participated in the incident.
56. The claimant admitted that during the summary trial, service personnel appeared before his commanding officer in this case, his CO was Lieutenant Col D.K Rotich.
57. The claimant told the court after the hearing he was dismissed. The claimant told the court that he was not aware that the dismissal was subject to the approval of the commander. His discharge was signed by one Githinji for Commander.
58. The claimant wrote a redress/appeal after the dismissal where in his statement he stated the investigator turned against him. The Claimant told the court he only saw the letter dated 23rd September 2019 alleged to be response to his appeal in court proceedings. That he never received it.
59. The Claimant told the court that around 8 persons were dismissed for the same incident.

On Re-Examination of the Claimant

60. The claimant told the court that his commanding officer was Lieutenant Col. Rotich. The concern of the headquarters was a lack of leadership. Rotich was in-charge of command and leadership and there was failure. He was given 2 days to prepare, having received the abstract at 4.00 o'clock on 16th July 2019 and the trial coming up on morning of 18th July 2019. The claimant told the court that when he appeared before the Officer Commanding, he stated that he wished for witnesses to be brought. He was remanded for Commanding Officer's Orders as per record of 18th July 2019. That contrary to what he told the Officer Commanding on that morning, the Proceedings before the Commanding Officer recorded that the Claimant agreed in writing for witnesses not to give evidence in person. The claimant told the court that he never changed his mind on witnesses appearing. That about 20 witnesses had given evidence in the abstract. That he had no opportunity to study the statements before the summary trial. That only Murithi implicated him. Murithi was a suspect and had arrested the suspect. He was never charged. The claimant told the court there was no fairness.
61. CW2 was Edgar Lihungu. He gave sworn evidence. He adopted as evidence in chief his statement dated 16th June 2020.

Cross-examination of CW2 by Mr. Chemas, Counsel for Respondent: -

62. CW2 told the court he was the one who saw Isse Abdi (the suspect). That together with SPR Farak and Situma they arrested the suspect, Murithi was not there. After arrest the suspect was tortured. He heard that the suspect was burnt. He was treated. Investigations were done. People were charged and dismissed, including him and the claimant. Col. Rotich was his Commanding Officer and was the one



who heard his case. On being asked he was dismissed on what charges, CW2 told the court Col. Rotich did not hear cases it was just dismissals.

63. CW2 on re-examination told the court that they handed over the suspect to Murithi who carried him to the camp. That the claimant was not there as that was not his Platoon.

Defence Case At Hearing

64. DW was Major Edwin Kibiru Muta who testified for the respondent on oath. He adopted his witness statement dated 30th September 2022 as the defence evidence in chief. He produced evidence of the defence as filed as D-exhibits 1-6.

65. Evidence at cross-examination of DW by counsel for the claimant Mr. Angima was as follows: -

66. DW's rank was Major. There was some concern at the headquarters of service failure of command and leadership leading to the investigations of the incident. On being asked if there was a complaint, the answer was that it was an observation. DW told the court, that command refers to a structure made up of different individuals including commanding officers and key personnel. The leader of the platoon being a sergeant, corporal; lieutenant corporal who is in charge; with the Sergeant being the highest. The officers having people they command. Col Rotich was the Commanding officer of the whole operation. Major Biket was reporting to Col. Rotich. DW believed the accused got enough time to read the statements before appearing before the officer commanding.
67. On whether it was fair for an officer who had served for 29 years to be given few hours to prepare defence; DW told the court that the directions were to finalize by 18th July as per letter dated 11th July (D-exhibit -1). DW told the court the accused was tried on 18th July. That in the morning he was before the officer commanding and in the afternoon before the commanding officer. That in the afternoon he was found guilty. He was found guilty by the first officer. That before that officer the claimant indicated he wished to call witnesses. DW told the court it was recorded that before the commanding officer the claimant stated that he did not wish to call witnesses.
68. On why the officers did not come to testify in court DW told the court he was in charge of records.
69. The counsel put it to DW that he could explain why the claimant in the morning said he wished to call witnesses and in the afternoon, it was recorded no witnesses. To this DW told the court that 'there was a directive to finalize on 18th July and it had to be complied with the Order. As per the command 18th July was last day hence as much as they wanted no time for witnesses.'
70. DW admitted that Rotich as the Commanding officer was a person of interest in the accusation of failure of command and leadership.
71. DW agreed there was a trial and a fair hearing was a key issue. DW told the court there was fairness depending on the severity of the offence. He did not know what happened to Biket.
72. DW admitted that the Claimant was in Platoon 8 and the suspect was handled by Platoon 9.
73. DW stated that the commanding officer follows the law.
74. During Re-examination, DW stated that at the top was the Brigadier, Commander, Deputy and Battalion under Lieutenants and the companies A-D headed by Major deputized by Captains. Then there were Platoons headed by first lieutenant or second lieutenant. From Platoons they have sections headed by senior sergeant then subsections. Dismissal was one of the awards by Commanding officer to a Sergeant under the [*Kenya Defence Forces Act*](#).



Determination

Issues for determination

75. The claimant in his written submissions addressed the issue of fairness of the hearing and remedies sought.
76. The Respondent in their written submissions addressed the following issues:
- a. Whether the claimant's dismissal was fair, legal and procedural;
 - b. Whether the claimant is entitled to pensions and gratuity.
 - c. Whether the Claimant is entitled to general and aggravated damages
 - d. Who to bear costs of this suit.
77. The court having heard the case, considered the submissions by the parties was of the considered opinion that the issues placed before the court for determination were as follows: -
- a. Whether the claimant's dismissal from service was fair?
 - b. Whether the claimant is entitled to pensions and gratuity.
 - c. Whether the Claimant was entitled to general damages
 - d. Whether the claimant was entitled to aggravated damages
 - e. Costs of the claim

Whether the claimant's dismissal from service was fair?

78. On the 11th July 2019, military orders were issued by Brig. M.N. Hassan from Kenya Army Headquarters to HQ MPC as follows: -

'investigations Into Alleged Torture Of Mr. Isse Abdi Maalim, By Kdf Troops At Shangailu Fob On 30 Jun 19

Reference Your brief MPC /G/05 dated 9 Jul 19.

1. On 02 Jul 19, a report was received of an alleged torture of a civilian Mr. Isse Abdi by KDF troops in Sangailu FOB. Investigation conducted established that indeed a civilian was tortured by our service personnel at Shangailu FOB. This was occasioned by a serious failure in command and leadership.
2. In view of the above, and pursuant to section 150 of the [Kenya Defence Forces Act](#) 2012, you are directed to prepare abstracts of evidence of those found culpable of any offence and the cases be dealt with promptly without delay therein Manda by CO OFM and Comd BEC. Action taken to reach this HQs NLT 18 Jul 19
3. Please note and take necessary action.

MN Hassan

Brig

For Comd



Copy to:

OFM”.

79. It was undisputed that following the command, investigations were commenced and statements recorded from about 20 persons including the Claimant (C-Exb- 7, 8, 9) which were presented as Abstract Evidence to the accused/claimant on the 16th of July 2019 (D-exhibit 2 being the acknowledgement of receipt of abstract evidence). The claimant told the court he was served around 4 pm.

80. The Claimant was charged on the 18th of July 2019 which was the same date that the Brig. Hassan had stated the report be submitted. Both Parties produced the charge sheet. The claimant testified that on the morning of 18th July 2019, he appeared before the Officer Commanding, where he was charged. D-exhibit 3 produced by Major Muta (DW) was a copy of the charge sheet. The charge sheet read:

” The accused, No. No. 63829 SGT Douglas Wawire of ENGRS BDE a Service member of the Kenya Defence Forces being subject to the Kenya Defence Forces Act 2012 under section 4 (a) of the Act is charged with:

Conduct To Prejudice Of Good Order And Discipline Contrary To Section 121 Of The Kdf Act 2012 In That He (the Accused) At Sangailu Defence Camp On 30 June Between 1830 Hrs And 2000 Hrs Actively Participated In The Torture Of Mr Isse Abdi By Burning And Beating Him While Inside The Prisoner’s Trench, An Act He Knew Or Ought To Have Known Constitute An Offence.

Witness(es): 97626 Edgar Mwore- 10 Engrs

98668 Patrick Murithi -10 Engrs

Other Evidence: Documentary

Dated atthis ..16.. Day of July...2019

Signature34478 SGT Hassan Gure(Investigator).”

81. In the same document it is a recorded summary 4 stages of the processes the claimant underwent before discharge from service namely: -

- a. Before the Officer Commanding – Case heard and remanded for CO orders on the 18th of July 2019,
- b. Disposal by Commanding Officer – Found guilty and the award issued of dismissal from the Defence Forces subject to COMD KA approval dated 18th July 2019
- c. Disposal by ASA/ Formation COMD- finding Upheld and award Upheld dated 21st July 2019.
- d. Disposal by COMD KA – award upheld dated 13th August 2019.

82. The proceedings before the Officer Commanding (OC) were produced by both parties. D- exhibit 4 was the trial proceedings before the OC on the 18th of July 2019. The document appeared to be a guide to the OC with stated instructions and questions to be asked. The court looked into the record and made the following findings: -

- a. The Claimant elected for summary trial.



- b. The claimant confirmed that he had been given not less than 24 hours to prepare for defence and it was sufficient time.
- c. The document instructed the OC, after the reading of the charge sheet to ask the accused the following question: ‘Q. Have you agreed in writing that the witnesses against you need not give their evidence in person?’

The response by the Claimant was recorded to have been: ‘I would wish witnesses to be brought Sir.’”

- d. Clause 4 and 5 had instructions to follow on the Claimant asking for witnesses to wit: - ‘4. If the accused has agreed in writing that the witnesses against him need not give their evidence in person the officer dealing with the case shall read the abstract of evidence to the accused if the accused so requires but, if the accused has not so agreed, the witnesses against him shall give their evidence in person and it shall be recorded on a separate sheet to be attached to this record. (emphasis given by the court on the relevant steps which the OC ought to have followed in the instant case the claimant had asked for witnesses).5 after the abstract of evidence has been read or the witnesses against the accused have given their evidence, as the case may be, the officer dealing with the case shall say to the accused-(emphasis)

- q. Do you wish to give evidence on oath to give evidence on oath or to make or hand in statement without being sworn? Your evidence or statement may deal with the facts of the case.

Q. Do you wish to present any other evidence in your defense? No Sir.

Clause 6 guides the OC further as follows: ‘... the officer dealing with the case shall then:(i) consider all evidence and determine whether the accused is guilty of the offence or not, and (ii) if he determines that the accused is guilty make such a finding.

- e. In clause 7 the OC stated his finding to be CASE HEARD. Clause 8 was on mitigation and the OC recorded N/A and Clause 9 was on award to which the OC recorded: Award- Remanded for CO’s Orders.

83. In submissions, the Claimant submits that DW confirmed his case that, his rights were trampled up. That he was denied an opportunity to question the only witness Murithi who incriminated him in the torture of the civilian. That DW confirmed expedience and compliance were the only considerations in the trial and not fairness.

84. The claimant submits the defence did not negate his claims. That what was offered was not evidence at all to their claim and relied on the decision in *John Wainana Kagwe v Hussein Dairy Ltd* (2013) eKLR where the Court of Appeal held :-

" as it were therefore, the respondents defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defense that tendered to exonerate itself full from liability.”

85. The claimant submits he was handed over the abstract evidence with over 20 voluminous statements with few hours to the trial, though recorded sometime in June. That the KDF headquarters (exhibit 2) letter of 11th July 2019, directed investigations in 7 days and there were no directions for trial, leading to a mistrial executed by the commanding officer who had to comply, violating the critical right to fair hearing for the accused person contrary to the Constitutional tenets.



86. That CW2 was the only officer mentioned by Murithi to have been seen placing the suspect over coal and CW2 exonerated him. Murithi was not called as a witness yet he was the only one who implicated the claimant. No evidence was led by the Respondent to rebut the foregoing.

87. The next step in the trial was before the Commanding Officer. The Claimant stated that his Commanding Officer was one Col. Rotich (CO). The claimant told the Court, he appeared before him in the afternoon, his case having been remanded for his Orders after trial by the OC that morning. The parties produced the record. The record before the CO appeared to be same as one before the OC. It was also titled third schedule R.19. Interestingly on the same question on witnesses it is recorded:

" Q. Have you agreed in writing that the witnesses against you need not give their evidence in person?

The answer is handwritten as Yes Sir."

There is a finding of guilty. On the question for mitigation the Commanding officer was instructed to ask the accused to mitigate. There is no record of the proceedings and the court finds that the accused was not asked that very important question. Clause 9 of the form required the mitigation to be taken into consideration before the award. The award by the CO is indicated as:

" Dismissal from the defence forces subject to COMD KA approval."

88. The claimant submits he requested for witnesses before the OC in the morning 18th of July 2019 and when he appeared before CO Col Rotich in the afternoon of same day, it was recorded he indicated he did not wish to call witnesses. That this would suggest he changed his position without indicating the reasons. During the hearing, the Claimant told the court he never changed his position on witnesses as stated on that morning before the OC. The claimant submits that the examination of the employer's witnesses was the only opportunity to question the only witness who had incriminated him in the alleged torture of a civilian. The witness being Muriithi. That no other witness in the statements before OC corroborated Murithi's position against the claimant. CW2 (the second witness- under D-exhibit 3) implicated Murithi and exonerated the claimant as not having been in the concerned Platoon. That the strength of evidence depends on two or more witnesses to corroborate.

89. The claimant submits that the letter of 11th July 2019 had raised an issue of leadership that implicated Col Rotich, hence bias to exonerate himself. That for him to preside over the trial of the claimant was contrary to the Defence Forces Act section 152(2) which provides for disqualification for such a person as follows: -

" unless, it is not practical, having regard to all the circumstances for any commanding officer to conduct the summary trial, a commanding officer may not preside at the summary trial of a person charged with an offence if the commanding officer laid the charge or caused it to be laid or is the complaint."

90. The claimant submits that Col. Rotich was a witness in the matter and an interested party desperate, to exonerate himself and ought not to have presided over his trial. To buttress the foregoing submissions, the claimant relied on the decision in *Dari Limited and others v East African Development Bank and 2 others* (2020) eKLR where Justice Grace Nzioka in paragraph 109 cited Lord Denning Mr. who



addressed the test of bias in *Metropolitan Properties Co. (FGC) Ltd v Lannon* (1969)1 QB 577 AT 599 as follows: -

" The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit, and if he does sit, his decision cannot stand."

91. The Respondent's submissions on this issue submit that the Claimant during cross-examination agreed he signed the acknowledgement of receipt of the abstract of evidence which normally contains the charge sheet, (D-Exhibit- 2). That during the summary trial, he was asked whether he was served with a copy of the charge sheet and the abstract evidence not less than 24 hours before trial and he answered affirmatively. He also answered affirmatively that he had enough time to prepare for the defence.
92. The respondent submits that while the claimant was appearing before the trial authority, he agreed that he did not want witnesses to be called or give evidence in person for cross-examination. That the CO relied on documents and statements attached to the abstract evidence before making his decisions, that the procedures were followed to the letter.
93. On the allegation of bias of the CO, the Respondent submits that the claimant did not challenge the impartiality and independence of the CO during the trial. That the CO had powers and jurisdiction to hear and determine the charges. The Respondent submits that all procedures to appeal were followed. The Respondent to buttress the foregoing relied on the decision in *Republic v Chief of General staff & another* (2017) eKLR where the judge elaborated the procedure at summary trial within the Kenya Defence Forces and in *Arab Sugul Adow v Cabinet Secretary Ministry of Defence & 2 others* (2020) eKLR where the court having examined the process held there was fair hearing.

Decision

94. The claimant submits that he did not get a fair trial before dismissal from service. The claimant was a serviceman.
95. The right to fair trial is sacrosanct and unlimited as stated under Article 25 of the *Constitution* to wit: -
 - " 25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited–
 - (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
 - (b) freedom from slavery or servitude;
 - (c) the right to a fair trial; and
 - (d) the right to an order of habeas corpus."
96. The court finds that the defence forces are not exempt from upholding the *Constitution* in their laws, regulations, procedures and practices. The *Constitution* of Kenya is supreme and the Respondent is bound by it as stated under Article 2 to wit: -

" 2.



- (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorised under this Constitution.
- (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

97. Indeed, the Respondent in the Submissions agreed that the Constitution is supreme and that Section 3 of the Kenya Defence Forces requires compliance as follows: -

“ The Defence Forces shall, in fulfilling its mandate, observe and uphold the Bill of Rights, values and principles under Articles 10(2), 232(1) and 238(2) of the Constitution and shall— (a) strive for the highest standards of professionalism and discipline amongst its members; (c)comply with constitutional standards of human rights and fundamental freedoms;’ (emphasis given)

98. Having analyzed the evidence by the parties it is my finding the claimant agreed he had 24 hours to prepare for defence and further stated he had enough time to prepare for defence.

99. On possible bias by the CO, there was no objection by the Claimant for the CO to hear his case. The CO was the person authorized under the law to deal with his trial. The Court finds that the fact that there was no objection by the Claimant does not mean there was no bias which could be apparent from the instructing letter by the Brig. Hassan alluding to the lack of leadership at Manda camp where the CO was the leader. The Court in stating so applies the test by Lord Denning Mr. who addressed the test of bias in Metropolitan Properties Co. (FGC) Ltd v Lannon (1969)1 QB 577 AT 599 as follows: -

“ The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit and if he does sit, his decision cannot stand.”

The court was not invited to make a finding on this and will not do so.

100. The court then addresses the question of fair hearing considering the evidence placed by the parties before the court. The right to a fair trial/hearing is unlimited as stated under Article 25 of the Constitution. Article 50 provides for the threshold of the right to a fair trial as follows: -

“ 50.

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right—



- (a) to be presumed innocent until the contrary is proved;
- (b) to be informed of the charge, with sufficient detail to answer it;
- (c) to have adequate time and facilities to prepare a defence;
- (d) to a public trial before a court established under this Constitution;
- (e) to have the trial begin and conclude without unreasonable delay;
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (i) to remain silent, and not to testify during the proceedings;
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- (k) to adduce and challenge evidence;
- (l) to refuse to give self-incriminating evidence..."

101. The procedure for the trial of a service member like the Claimant is provided for under the [Kenya Defence Forces Act](#) Section 156 to wit"-

" Charges against service member

- (1) After investigating a complaint against a service member, the officer or service member shall forward the investigation report in the form of an abstract of evidence and appropriate charges, if any, to the commanding officer, who—
 - (a) (b) (c) shall deal summarily with the charge if the charge is one that the commanding officer has power to deal with summarily and the commanding officer considers that the charge should be so dealt with; may dismiss the charge if the commanding officer considers that it ought not to be proceeded with further; or shall refer the abstract of evidence and the charge in the prescribed manner to the Director of Military Prosecutions, in any other case.



- (2) If the commanding officer deals with a charge summarily and records a finding of guilt, the punishments that may be awarded are, subject to the limitations hereinafter provided, those set out in the following scale— (a) (b) if the accused is a warrant officer or a non-commissioned officer— (i) dismissal from the Defence Forces; (ii) (iii) (iv) (v) (vi) (vii) (viii) (ix) reduction in rank by one rank; forfeiture of seniority of rank for up to a maximum of six months; a fine of a sum not exceeding one month's pay; severe reprimand; reprimand; such minor punishments as may be prescribed; admonition; or where the offence has occasioned any expense, loss or damage, stoppages; if the accused is a service member other than a warrant officer or non-commissioned officer— (i) (ii) (iii) (iv) (v) (vi) imprisonment for a term not exceeding forty-two days or, if the accused is on active service, active service punishment for a period not exceeding forty-two days and where more than one term of imprisonment or active service punishment is awarded in the course of the same hearing, the terms shall not exceed forty-two days in the aggregate; dismissal from the Defence Forces; a fine of a sum not exceeding one month's pay; such minor punishments as may be prescribed; admonition; where the offence has occasioned any expense, loss or damage, stoppages.
 - (3) The punishment of— (a) dismissal; (b) reduction in rank of a warrant officer, senior sergeant or sergeant, or corresponding rank, shall be subject to confirmation by the Service Commander.
 - (4) Except where expressly provided by this Act, not more than one punishment shall be awarded under this section for one offence.
 - (5) In the case of a warrant officer or non-commissioned officer, a severe reprimand or reprimand may be awarded in addition to forfeiture of seniority of rank or a fine.
 - (6) If an offender is on active service on the day of the sentence, a fine may be awarded in addition to active service punishment.
 - (7) Stoppages may be awarded either in addition to or without any other punishment.
 - (8) Minor punishments may be awarded in addition to a fine.
 - (9) Notwithstanding the above provisions, the recovery under this section, in any one instance, shall not be more than half of the basic salary.
158. Review of summary findings and awards (1) If a charge has been dealt with summarily and has not been dismissed, the reviewing authority may at any time review the finding or award. (2) If, on a review under this section, it appears expedient to the reviewing authority, by reason of any mistake of law in the proceedings or of anything occurring in those proceedings which in the opinion of the authority involved substantial injustice to the accused, the authority may quash the finding, and if the finding is quashed the authority shall also quash the award....”

102. The court finds the procedural fairness under KDF Act especially sections 151 to 158 of the Act is implemented under the Third Schedule Rule 19 (D- exhibit 3 and 4). The court analyzed exhibit 3



and 4 and made its findings that there was substantial non-compliance. The key finding being that the claimant specifically stated he wished for witnesses who were listed in the charge sheet to be brought, the witnesses were SPR Edgar Mwore and SPR Patrick Murithi. The OC did not comply and proceeded to record 'CASE HEARD) and forwarded to the CO for the award. This was morning of 18th July 2019. The court finds that the OC heard the case and left the role of finding to the CO Col. Rotich. The court finds this to be an anomaly as the form required the OC under clause 7 to make a finding. "CASE HEARD" was what was stated as finding. How could the CO make a finding when the case was heard by the OC yet the Instructions was for the OC to make a finding. In the afternoon of same date, the claimant appeared for the award before CO as remanded by the OC.

103. Strangely the record before the CO in the afternoon where the Claimant was remanded for award, not trial, was changed to indicate the claimant has said he did not wish to call witnesses. The case had been heard so what was the basis of recording he did not wish to call witnesses? The court finds this was an attempt by the CO to correct the mistake of failing to avail witnesses at the hearing before OC. It was a superfluous attempt as the role of the CO was to give the award, the case having been heard by the OC.
104. The claimant led evidence that he never changed his mind. The record was by CO and the maker was not called to testify to affirm that the claimant changed his mind. The court finds that there was a deliberate attempt by the CO to change the record of the morning unsuccessfully as the OC had already marked it as HEARD and only remanded the case to the CO for award. DW during cross-examination by Counsel for the Claimant was asked:

" You cannot explain why the claimant in the morning said he wished to call witnesses and afternoon no witnesses?"

DW responded:

" there was a directive to finalise on 18th July and it had to be complied with the Order. As per the command 18th July was last day hence as much as they wanted no time for witness. Yes".

105. The court finds that justice for the claimant was sacrificed for expediency and compliance with the command by the Brig. Hassan. The claimant was denied opportunity to challenge the evidence against him. He was also denied the right to mitigate. The Respondent was obliged to comply with all the instructions in the record of proceedings form on witnesses and mitigation which it failed to do. The Respondent must adhere to its own procedural requirements and the *Constitution* for the process to pass muster. The court is guided by the Court of Appeal in *Attorney General & 2 others v L.T. Benjamin Muema* [2019] eKLR that:

" The guiding principles of law laid down in *Eric v J. Makokha & 4 others V. Lawrence Sagini & 2 others* (supra), is inter alia that a position of employment underpinned by statute law being a protected position, the terms of the statute must in such a case be adhered to when terminating the services of an employee whose employment is so statutorily protected".

The Court holds that the Respondent violated the right to fair trial of the Claimant which is unlimited right of the accused.

106. Consequently, I hold and determine there was no fair hearing of the claimant before the dismissal from service.



Issue 2. Whether the claimant is entitled to remedies sought

a. Claim for terminal benefits.

107. The claimant told the Court he was no longer interested in reinstatement. He had served for 29 years a fact not in dispute. The claimant sought for payment of terminal benefits.
108. The letter of discharge instructions noted the claimant was not entitled to service pension and gratuity (D-exhibit 5) and that payment would not be made by the military pension branch of the Treasury through his bank account.
109. In submissions, the Respondent defended this position by stating that the court lacks jurisdiction to decide on the issue of pension and gratuity as the same is not contributory pension scheme but allocated from the consolidated fund (exchequer) and the claimant ought to have made his application for pension to the defence council and relied on decisions of the High Court in [*Gift Kambu Marandu v Kenya Defence Forces Council & another*](#) (2017) eKLR where it was held,
- " 55. There are regulations under Section 244, which should offer guidance to Officers and Service Members, in pursuing pensions and gratuities under the [*Kenya Defence Forces Act*](#).
56. Like other pension legal regimes, the regime under Section 244 does not avail Officers and Service Members, a direct route to the Courts, in event of pensions and gratuity disputes with their Employer.
57. The Claimant worked for 30 years, and 362 days. He became pensionable on the 12th year. He was caught up in a rather ill-advised indiscretion. The copper wire he was said to have stolen was valued at no more than Kshs 1,400. Should this have cost him his job, and loss of pensions and gratuity?
58. The answer on loss of pensions and gratuity, should be given by the organs identified under section 244 of the [*Kenya Defence Forces Act*](#)."
110. The Court considered the foregoing decision and found that the Judge in the court was clear that there was no provision under the [*KDF Act*](#) limiting payment of the pension earned by an officer. The court held:
- " 49. Section 156(2) of the Act does not state that once a Serviceman has been dismissed, he automatically loses any benefits. The Court similarly has not found provisions under Section 155 on summary proceedings, or Section 180 onwards, on Court Martial, which expressly states that the punishment of dismissal from service, should have the additional punitive element, of loss of pensions and gratuity."
111. The Respondent relied on regulation 4 of the [*Kenya Defence Forces Act \(Pension and Gratuities\) \(officers and service men\)*](#) which states:
- " pensions, gratuities and other allowances may be granted by the Defence council with the concurrence of the National Treasury in accordance with these regulations to officers and service members of the Kenya Defence Forces."



Regulation 6 (2) to wit:

" an officer or service member sentenced to dismissal by a court martial or commanding officer shall not be entitled to pension, gratuity or other allowance except disability pension, where applicable."

112. The Respondent further relied on the provisions of section 244(2) of the [Kenya Defence Forces Act](#) to wit: -

" (2) Where an officer or a service member has been dismissed under any circumstances provided for under this Act, the Defence Council may withhold, reduce the amount or suspend any such benefits payable to the officer or the service member under subsection (1)."

The court noted para 3 of the section provides: -

" (3) A decision to withhold, reduce in amount or suspend any benefits of an officer or a service member contemplated under subsection (2) shall be made with the concurrence of the Public Service Commission."

The Respondent did not address the court on compliance with these provisions before the discharge instruction to deny the claimant pension.

113. The court notes that the decisions cited by the Respondent none of them upheld the denial of pension to servicemen. This court has decided on the issue in the decision of 2019 in [Maurice Otiemo Oduor v Attorney General](#) (2019) eKLR which decision I concur with and uphold to apply in the instant case where Justice Nduma faced with the denial of pension to service men dismissed from service observed: -

" 34. The court is concerned, and has expressed itself in the past while dealing with similar matters to do with public servants who are summarily dismissed being denied pension, as in the case of the petitioner. Pension earned and accumulated by the employee over a period of 33 years and 58 days, a period in which the petitioner provided unblemished service to the nation. The petitioner has urged the court to find that the respondent violated his right to dignity contrary to Article 28 of the [Constitution](#) by dismissing him after serving the nation diligently for a period of 33 years and 58 days without a penny."

35. I have grappled with the matter in several cases and I am of the considered opinion and finding that a statutory provision or subsidiary legislation dealing with terminal benefits and pensions which purport to retroactively dispossess an employee pension funds that have been earned and accrued overtime, retrospectively on the basis of an offence committed years later and which is completely unrelated to the issue of pension does not meet the threshold of validity provided under Article 24 of the [Constitution](#) of Kenya 2010.

36. I therefore find that denial of accumulated pension, retrogressively, is contrary to the principles of legality and subjects the petitioner and his family to poverty and indignity and therefore is in violation of Article 28 of the [Constitution](#) of Kenya 2010.



37. Accordingly I uphold prayer 1 as set out in the petition and declare: -
- (a) That the denial of terminal benefits/ pension accumulated by the petitioner over a period of 33 years and 58 days retrogressively is a violation of the petitioner's right to dignity under Article 28 of the Constitution of Kenya 2010.
 - (b) The court declare that the petitioner is entitled to payment of the pension dues accumulated over a period of 33 years and 58 days.
 - (c) The respondent is directed to initiate and complete relevant processes to allow the payment of pension to the petitioner in terms of the KDF pension provisions.”.

114. The claimant in the instant case served for 29 years only to be caught up with an issue in his old age for which the court found there was no fair hearing. The Court upholds the decision of Justice Nduma in Maurice Otieno Oduor v Attorney General (2019) eKLR and declares that the denial of the claimant's pension dues accumulated over 29 years of service was a violation of the right to dignity in old age and a discriminative practice by the defence forces in comparison with other civil servants. The respondent is directed to initiate and complete relevant processes to allow the payment of pension to the Claimant in terms of the KDF pension provisions.

b. General damages for wrongful and unfair termination.

115. The court found proof of unfair dismissal from service and so held. The claimant is entitled to compensation. The Claimant relied on the decision of Court of Appeal in Attorney General & 2 others v L.T. Benjamin Muema (2019) eKLR where the principles which guide the court in assessing damages in cases such as this to wit;

" In deciding on an appropriate award, we bear in mind the guiding principle on assessment of damages which is now trite, namely, that damages should not be inordinately too high or too low. Secondly, that an award of compensation by way of damages is not meant to facilitate an unjust enrichment of an aggrieved party, but to redress economic injustices suffered by the aggrieved party in appropriate circumstances as those demonstrated to exist in this appeal.”

116. The claimant further relied on the decision in Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another (2018) eKLR on principles to consider in compensation for unlawful termination:

" 36. However, the claimant is entitled to the second component of the relief being compensatory damages for the unfair termination. The award is not founded under the Employment Act but under the Constitution for the said violations of the claimant's rights under the Bill of Rights. The jurisdiction to grant the said award is donated by section 12 of the ELRC Act and Article 165 (5) of the Constitution. Considering the length of service, the rank of the claimant as acting Colonel, his reasonable expectation of promotion, the mental, physical and psychological suffering by the claimant due to the abrupt and unlawful termination of his blossoming career as a soldier, I award the claimant Kshs 20,000,000 as compensatory damages to remedy the said violations through the respondents' illegal and unfair actions.”



117. The Respondent distinguished the authority stating that the Lieutenant Lukale case the officer was a professional with a retirement date of 60 years unlike the claimant who was a serviceman and his Run Out Date (ROD) was 30th June 2021. The respondent drew the attention of the court to section 253 of the [KDF Act](#) to wit:

" 253. Term of enlistment

- (1) The term for which a person who has attained the age of eighteen years may enlist, shall be one of the prescribed periods of colour service (not exceeding twelve years) beginning on the date of attestation.
- (2) In computing the period of service of a service member, there shall be excluded therefrom— (a) (b) all periods during which the member has been absent from duty by reason of— (i) (ii) (iii) imprisonment; or desertion; or absence without leave exceeding seven days; and any period ordered by a court-martial to be forfeited.
- (3) Within two years before completing the period of colour service of a service member who is of good character, the member, with the approval of the competent service authority, may re-engage for such further period of colour service as may be prescribed, subject to subsection (5).
- (4) Except as provided by subsection (6), the further period of colour service, together with the previous period of colour service, shall not exceed a total continuous period of twenty-one years colour service from the date, of the original attestation or the date upon which the person attained the age of eighteen years, whichever is the later.
- (5) A service member who has completed a period of twenty-one years colour service may— (a) (b) with the approval of the Service Commander or an Officer authorised by the Service Commander in that behalf, continue to serve from year to year in all respects as if the period of colour service were still unexpired, and at any time give to the member's commanding officer three months' notice to be discharged, and on the expiration of that notice the member may claim to be discharged.
- (6) A service member who completes a period of colour service (and any period by which that service is prolonged under subsection (6) of this section or under section 255, or is otherwise discharged (other than under sections 254 or 256) shall thereupon be transferred to the reserve, and shall serve therein until attaining the age of fifty-five years."

118. The court reads that a service member can serve up to 55 years. It was not in dispute that the claimant was not retired but discharged upon dismissal which the court found unfair. The court must then compensate for unfair dismissal under its powers under section 12 of the [ELRC Act](#).



119. The claimant sought for Kshs 6,616,368/- stating he still had 6 years of service. The Respondent did not plead on the years left for service. They raised the issue in submissions that the claimant's run out date was 30th June 2021 as stated in his pay slip and not 6 years as alleged in the claimant's written submissions. I do find that this issue was not established at trial. The evidence before court was that the officer was still in service and had not received notice of retirement.
120. The *Employment Act* does not apply in cases for KDF servicemen. The court taking into consideration that this officer served for 29 years which is a very long period of service and his distinguished career came to an abrupt end due to an unfair process; of which the reasons were not proved for failure to call witnesses as requested by the claimant at the trial; and which witnesses were not even called before the court. The process of termination violated a sacrosanct constitutional right to fair hearing of accused and employee before termination of employment for which a court on finding violation is obliged to award compensation.
121. The court in determining how much compensation to award is guided by decided cases. In *Attorney General & 2 others v L.T. Benjamin Muema* (2019) eKLR the principles which guide the court in assessing damages in cases such as this were stated;
- " In deciding on an appropriate award, we bear in mind the guiding principle on assessment of damages which is now trite, namely, that damages should not be inordinately too high or too low. Secondly, that an award of compensation by way of damages is not meant to facilitate an unjust enrichment of an aggrieved party, but to redress economic injustices suffered by the aggrieved party in appropriate circumstances as those demonstrated to exist in this appeal."
122. The claimant further relied on the decision in *Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another* (2018) eKLR on principles to consider in compensation for unlawful termination:
- " 36. However, the claimant is entitled to the second component of the relief being compensatory damages for the unfair termination. The award is not founded under the *Employment Act* but under the *Constitution* for the said violations of the claimant's rights under the Bill of Rights. The jurisdiction to grant the said award is donated by section 12 of the ELRC Act and Article 165 (5) of the *Constitution*. Considering the length of service, the rank of the claimant as acting Colonel, his reasonable expectation of promotion, the mental, physical and psychological suffering by the claimant due to the abrupt and unlawful termination of his blossoming career as a soldier, I award the claimant Kshs 20,000,000 as compensatory damages to remedy the said violations through the respondents' illegal and unfair actions."
123. The court in *Joseph Kipkemboi Tanui v Chief of Kenya Defence Forces & 2 others* [2019] eKLR, (Justice O.N. Makau), on finding procedural flaws of non-compliance with section 251(2) of the KDF Act, the KDF failing to serve the claimant with termination letter, despite finding the reasons for dismissal were established, the court awarded the Claimant Kenya Shillings 3 million for unfair hearing. The officer had 4 years before retirement. This Court in the instant case found gross violation of right to fair hearing. There was no hearing before the Officer Commanding or the Commanding Officer to establish the culpability of the claimant as the witnesses he requested for were not called to testify and for his questioning. There was no opportunity for mitigation. The claimant also told the court he was not issued with a termination letter stating reason for dismissal which allegation was not controverted. I find the violations were gross for an officer who had good conduct certificate for service of 29 years.



The court finds that an award of Kshs 5,000,000 to be a fair compensation for the violation of the right to fair hearing and subsequent unfair dismissal.

124. The court having taken into consideration all the foregoing and authorities cited, awards the Claimant Kshs 5,000,000 (Kenya Shillings Five Million) for the unlawful and unfair termination of service

c. Whether the claimant was entitled to aggravated damages

125. The claimant sought aggravated damages.

126. In submissions, the claimant on the basis of the conduct of the commanding officer Rotich, who he says was to blame for failure in command and leadership as stated by Brig. Hassan. The claimant submits that Rotich was an interested party in the matter keen on demonstrating his firmness in dealing with officers and servicemen and in the process deflect his own failures, that this was in expense of the claimant's innocence. On that basis, the claimant sought for aggravated damages for Kshs 5million. To buttress his claim for aggravated damages the claimant relied on the decision in *Obongo v Kisumu Municipal Council* (1971) EA 91 where the Court of Appeal relied on decision in the English case of *Rookes v Barnard & 7 others* where it was held:

"exemplary damages in tort may be awarded in two classes of cases i.e. I where there are oppressive arbitrary or unconstitutional actions by servants of government and ii where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff."

Further the claimant relied on a passage in Lawpath, Legal Journal where aggravated damages were explained thus: -

"a plaintiff is awarded aggravated damages when they suffer increased distress because of the defendant's actions. The primary purpose of aggravated damages are therefore to compensate the plaintiff for the actions of the defendant..."

127. The Respondent did not submit on this.

128. The court in this decision is guided by the provisions of section 12 of the *Employment and Labour Relations Court Act*. Section 12 (3) states:

"In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders (i) (ii) (iii) (iv) (v) (vi) (vii) (viii) interim preservation orders including injunctions in cases of urgency; a prohibitory order; an order for specific performance; a declaratory order; an award of compensation in any circumstances contemplated under this Act or any written law; an award of damages in any circumstances contemplated under this Act or any written law; an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or any other appropriate relief as the Court may deem fit to grant."

129. The Court is of the opinion that the claimant having been compensated for the unlawful and unfair dismissal then to award aggravated damages for the same action would amount to double compensation. The prayer for aggravated damages is dismissed.



d. Costs of the claim

130. It is a principle of law that Costs follow the event. The claimant was successful in his case. The Court holds that the Respondent bears costs of the claim.

Conclusion And Disposition

131. The Court holds that there was unlawful and unfair dismissal from service of the Claimant by the Respondent. The Court hereby enters judgment for the Claimant against the Respondent as follows: -

- a. The dismissal of the Claimant from service by the Respondent was unlawful and unfair.
- b. The Claimant is awarded Kshs 5,000,000 (Kenya Shillings Five Million) for the unlawful dismissal and violation of the right to fair trial. The amount is payable with interest at court rates if the full amount is not paid within 30 days of the judgment.
- c. The Respondent is directed to initiate and complete relevant processes to allow the payment of pension to the Claimant in terms of the KDF pension provisions.
- d. The Respondent to pay the Claimant costs of the claim.

132. It is so Ordered.

DATED, SIGNED AND DELIVERED THIS 14TH DAY OF MARCH 2024 IN OPEN COURT AT KAKAMEGA.

J.W. KELI

JUDGE

In the presence of

C/A-Macheso

Claimant- Absent

Respondent – Kabi holding brief for Chemas

Respondent’s Application

I pray stay of 30 Days and for certified copies of written proceedings, judgement and decree.

Court Order

Stay is granted of 30 days. Respondent be availed typed and certified proceedings, judgement and decree on normal request to registry.

J.W. KELI

JUDGE

