



**Konyelo v Chief of Kenya Defence Forces & 2 others (Petition
E073 of 2022) [2024] KEELRC 1087 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1087 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E073 OF 2022
NZIOKI WA MAKAU, J
MARCH 12, 2024**

BETWEEN

NATHAN WEKESA KONYELO PETITIONER

AND

CHIEF OF KENYA DEFENCE FORCES 1ST RESPONDENT

THE KENYA DEFENCE FORCE COUNCIL 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition and Supporting Affidavit dated 11th May 2022 under Articles 2(1), 19, 20(1), 21, 22, 23, 27, 48, 50(1), 156, 241, 258 and 259 of *the Constitution* of Kenya and prayed for:
 1. A Declaration that the removal of the Petitioner herein from the Kenya Defence Forces was tainted with illegality, irregularity, unfairness and contrary to the principles of natural justice.
 2. A Declaration that the removal of the Petitioner herein from the Kenya Defence Forces was in contravention of his right to fair administrative action under Article 47 of *the Constitution*.
 3. A Declaration that the process of termination of commission of the Petitioner was done in violation of the Petitioner's right to human treatment, respect and protection of his dignity under Article 28 of *the Constitution*.
 4. A declaration that the termination of the Petitioner's commission was in violation of legitimate expectation.
 5. A declaration that the termination of the Petitioner's contract of service was otherwise unlawful and unconstitutional.



- b. The Petitioner sought for orders that the impugned decision of the Kenya Defence Service to terminate the Petitioner’s regular commission be rescinded; that he be paid pension from 11th April 1991 to 12th June 2019; that he be paid the salary that he would have been paid from 12th July 2019 until retirement; that he be awarded damages/compensation for violation of his fundamental rights and freedoms; that the cost of this Petition be borne by the Respondents.
 1. The Petitioner averred that on 11th April 1991, he was recruited as a Soldier in the Kenya Defence Forces (KDF) assigned number 66110 CPL and wherein he rose through the ranks to become a Corporal. That during his service, he was awarded three medals namely, 20th Great Years of Nyayo era, long services and good conduct, and UN Peace-keeping Medal. He asserted that he worked for the defence forces for 28 years without any records of misconduct but on 12th July 2019, was unfairly dismissed on allegations of conduct to prejudice of good order and service discipline. His case was that on 1st March 2019, while on a tete-a-tete with his colleagues jokingly discussing the need to develop themselves, he was video recorded without consent and the said video later widely circulated. That the conversation was friendly, light-hearted and one-off statements by the colleagues he was with at the time. That he was subsequently accused and charged of the aforementioned offence and what followed was the commanding officer manipulated the process to ensure he was dismissed from KDF. The Petitioner asserted that he was not accorded fair procedural process and despite requesting for a review of the decision to summarily dismiss him, he was never given a chance to explain the grounds for his request of review. He further averred that he demanded for his pension and other monies owed to him through a letter dated 8th November 2021 but the 2nd Respondent ignored his demand.
3. It was the Petitioner’s averment that the 1st and 2nd Respondents violated his right to fair administrative action as envisaged under Article 47 of *the Constitution*, by terminating his commission through conducting unfair summary disciplinary proceedings without investigating the contents of his conversation with his colleagues and further meting an unprovided punishment of summary dismissal contrary to section 121 of the *Kenya Defence Forces Act*, 2012 (hereinafter KDF Act). Secondly, that the 1st and 2nd Respondents also violated his right to fair hearing when they failed to allow him present his witnesses at the trial before the commanding officer in clear violation of Rule 8 of the Armed Forces Rules of Procedure, 1969. Thirdly, that the 1st and 2nd Respondents violated his right to fair remuneration as no pension or gratuity was paid to him despite having served for 28 years and 97 days, in violation of Article 41 of *the Constitution*. Lastly, that the 2nd Respondent violated his right to pensions and gratuity as envisaged under section 244 of the KDF Act by ignoring the demand letter dated 8th November 2021 and withholding his pension and gratuity without an explanation.
4. The Petitioner averred in a Further Affidavit sworn on 31st March that in the video recording, he is heard saying, “We enda Somalia uko, kimbria uko chini, We enda safisha koo mess kidogo, vitu ingine wachana nayo bwana, Jenga kwako hapana sema unajenga taifa, jenga kwako unaskia, who owns Kenya nayo watasema wanachunga nini? We ata ukikufa councillor hawezi kuja matanga yako na unasema unachunga nchi, unachunga nchi gani”. He explained that the conversation was meant to encourage his younger colleagues to equally develop themselves in the societies they hail from. He further averred that after the dismissal, he wrote a letter of appeal to the Commander Kenya Army who declined the appeal and upheld the Petitioner’s Commander’s decision. It was the Petitioner’s contention that his dismissal from the Kenya Army and denial of his pension amounts to double punishment, which is contrary to section 181(3) of the KDF Act 2012.



5. Respondents' Case

The Respondents filed a Replying Affidavit sworn by Major Edwin Kibiru Muta (130057), a Staff Officer II Records Department at the KDF Headquarters in Nairobi County. Major Muta averred that the Petitioner was properly and lawfully dismissed from KDF under section 156(2) (a)(i) of the KDF Act 2012. That in a Video Clip 20190503 – WA0011 of size 4.52 MBs, the Petitioner talked negatively about KDF by saying, “wacha kusema mnachunga nchi, mnachunga nchi gani, muanze kujijenga. Tunachunga taifa, enda jenga kwako, ata sahii ukifa hata councillor hawezi kuja kwako”. That the said video was recorded and uploaded by Private Kimanzi (150096) of 40RR and went viral on social media and that the Petitioner was to be blamed for the words he used, which he knew or ought to have known constituted an offence. He further averred that the Military Police completed investigations against the Petitioner who was then served with an Abstract of Evidence on 21st May 2019, which he acknowledged receipt of. That the Petitioner later appeared in person for summary trial before his Commanding Officer to answer to the charge of conduct to prejudice of good order and service discipline and he elected not to be represented by a person of his choice. That the Petitioner is therefore misleading this Court because he was fully aware of and participated in the summary trial wherein he was awarded the punishment of dismissal by his Commanding Officer on 28th May 2019, and the same was upheld by the Army Commander.

6. Major Muta further averred that the Respondents' contention was that section 244(2) of the KDF Act as read together with Regulation 6 of the Armed Forces (Officers Servicemen) (Pensions and Gratuities) Regulations provide that pensions and gratuities in the military are not a right and that the Defence Council may withhold the same in cases where service personnel are dismissed. He also argued that this Court lacks the jurisdiction to hear and determine any dispute on retirement benefits and pension and that the Petitioner is not entitled to any of the relief sought in the Petition. That this Court however has jurisdiction in so far as the Petition is premised on alleged constitutional infringement of rights and obligations arising from the Petitioner's service with KDF. Major Muta also stated that the Petitioner had thus not demonstrated the manner in which his right to a fair hearing was violated as the same was lawful and initiated in accordance with the law. He urged this Court to find that the Petition is bad in law and an abuse of court process and to dismiss it entirely with costs.

7. Evidence

The Petitioner testified that the other colleagues he had the impugned conversation with are still in service and that what he did was normal joking in the camp as was the norm. He asserted during cross-examination that he used to train cadets at the Kenya Military Academy, Lanet whereat he made the said statements the subject of the video recording and that the soldiers he spoke to were there for further studies and were Private soldiers. He confirmed that a Corporal is superior to a Private and that the said soldiers were therefore his juniors. He denied that he told the said soldiers not to defend Kenya and stated that whilst he received the Abstract dated 21st May 2019 served upon him on 22nd May 2019, he was not left with any copies. The Petitioner's testimony was that he did not accept the Charge when it was read to him at the disciplinary hearing and asserted that the Respondents did not inform him that he could go with witnesses. Furthermore, that he did not spend more than five (5) minutes at the said hearing. Whereas he admitted that the copies of the payslips in Court did not indicate anything on pension, he asserted that after 12 years of service in the KDF, one becomes pensionable. The Petitioner reiterated in re-examination that KDF did not follow the procedures for dismissal and that he was not given time to prepare his defence.

8. The Respondents' witness, Major Edwin Muta testified that the Petitioner's conduct was inappropriate because Kenya has enemies within and abroad and has lost citizens and soldiers and that



the said video demeaned the image of KDF and was against the good order of the Defence Forces. Under cross-examination, Maj. Muta stated that the Petitioner being a senior instructor ought not have had the discussion with his juniors. He confirmed that the letter of outcome of redress following the Petitioner's appeal was not produced in Court and that the Petitioner did not also receive a letter of dismissal.

9. Petitioner's Submissions

The Petitioner submitted that the issues for determination by this Court are:

- a. Whether the Court has jurisdiction to determine the Petition before it.
- b. Whether the Petitioner was wrongfully, unlawfully or illegally dismissed from the Kenya Army.
- c. Whether the Respondents discharged their burden of proof before Court.
- d. Whether the Court can grant the prayers sought by the Petitioner.

10. It was the Petitioner's submission that in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1, Nyarangi JA stated that jurisdiction is everything and once a Court determines it does not have it, the Court must down its tools. That this Court has unlimited original and appellate jurisdiction in employment and labour relations dispute pursuant to Articles 161(2)(a) and 165(5) of *the Constitution* of Kenya. Furthermore, that this Court has a duty to protect claimants against violations of constitutional rights within the realm of employer-employee relationships as pronounced in the case of United States International University (USIU) v The Attorney General and others [2012] eKLR. The Petitioner asserted that having sought redress within Kenya Army but was never heard and instead sent away without any response, the Petition herein was within the jurisdiction of this Court to determine.

11. The Petitioner submitted that the Summary Dismissal Trial is provided for under Part VIII of the KDF Act 2012 and that section 147 of the said Act demands that Articles 47 and 50 of *the Constitution* be upheld while conducting the Trial. He argued that freedom of expression is a right and fundamental freedom guaranteed under Article 33 of *the Constitution* and that as evidenced in the Abstract of Evidence, all the witnesses confirmed that he did not mean to utter the words which were stated as jokes. He further argued that the Commanding Officer could not have been the complainant and in the same time proceed to conduct summary trial as the same was a violation of section 152(2) of the KDF Act. He urged the Court to look at the principle behind the decision of the Court in the case of Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR on the requirement for substantive reasons for termination of employment under section 43 of the *Employment Act*, and find that the Commanding Officer ought to exercise his power by ensuring he is not clouded with his expectations but by facts presented before him. It was the Petitioner's submission that the Summary Trial was not fair as the adjudicator told him that he was acting by orders "from above" and that this Court cannot verify the proceedings of the Trial as the Abstract was never filled on the provided section for Record of Proceedings before Commanding Officer.

12. In affirming the position that his right to a fair administrative action was violated, the Petitioner relied on the case of Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & another [2018] eKLR wherein the Court observed that:

"...I also strongly hold the view that the right to terminate the claimant's commission was subject to his right to fair labour practices, fair administrative action, fair hearing, and right to protection from dismissal, removal from office, demotion or otherwise subjected to disciplinary action without due process of the law as guaranteed under Article 41, 47,



50 and 236(b) of *the constitution*, KDF Act and the rules of Natural Justice. The said express constitutional provisions as enshrined in the Bill of Rights supersedes any statutory provisions and privileges and are thus binding on the respondents. And I dare say that they cannot be violated without the consequence of this court making declaration and decree for compensation of the victims of the respective violations.”

13. The Petitioner further submitted that the Court in the case of Joseph Kipkemboi Tanui v Chief of Kenya Defence Forces & 2 others [2019] eKLR granted a declaratory order that the termination of the claimant was in contravention of the right to a fair administrative action under Article 47 of *the Constitution* and that it was therefore unlawful and unconstitutional. It was the Petitioner’s submission that he expected to be awarded pension and gratuity as provided in Legal Notice No. 237 and that Rule 6 of the KDF (Pensions and Gratuities) (Officers and Service Members) Regulations, 2017 only extends to a service member who has been lawfully dismissed from service. That he had demonstrated that he was unlawfully dismissed from service, in that the words he uttered did not warrant his removal from service without pension and the process of removal was deeply flawed. He further submitted that the 2nd Respondent ought to have communicated its decision to withhold the terminal benefits but did not. The Petitioner urged this Court to consider that he had served the Country for 28 years and 97 days and had no disciplinary record nor had previously been charged before the Court Martial and to allow the Petition as prayed.
14. Respondents’ Submissions
The Respondents submitted that this Court lacks jurisdiction to adjudicate the claim herein by dint of section 3(2) of the *Employment Act*. That in the case of Gift Kambu Marandu v Kenya Defence Forces Council & another [2017] eKLR, the Court addressed the import of limitations on the rights and freedoms of officers governed under the KDF Act and that section 52 of the said Act limits what is termed as right to fair labour relations under Article 41 of *the Constitution*. That the Court in the Gift Kambu case went on to establish that it lacked a basis to consider the petitioner’s grievance within the provisions of the *Employment Act*. It was the Respondents’ submission that premised on the foregoing, this Court lacks jurisdiction to award remedies granted to employees in claims for unfair termination under section 49 of the *Employment Act*.
15. As to whether the dismissal was fair, procedural and lawful, the Respondents submitted that Article 241(3) of *the Constitution* lays out the core roles and mandate of KDF which is the defence and protection of the sovereignty and territorial integrity of the Republic of Kenya. That by his words, the Petitioner undoubtedly incited his juniors to the end that personal development was more important than their duty to protect the nation. That there was nothing on record to show that the Petitioner was prejudiced by the disciplinary panel that heard him. The Respondents urged this Court to be persuaded by the decision of Rika J. in the Gift Kambu case (supra), that the removal of the petitioner from the forces was legal, fair and based on valid ground, and had been carried out in accordance with the KDF Act of 2012.
16. The Respondents submitted that in the case of Arab Sugal Adow v Cabinet Secretary Ministry of Defence & 2 others [2020] eKLR, the Court declined to grant orders for payment of pension and terminal benefits to an ex-KDF after finding that the Court has no jurisdiction to determine those issues under KDF (Pensions and Gratuities) (Officers and Service Members) Regulations, 2017. They further submitted that since the claim for pension is a special damages claim, it ought to be particularised as reiterated by the Court in the case of Simon P. Karimi v Kenya Commercial Bank Limited & another [2005] eKLR. It was the Respondents’ submission that the claim on loss of pensions and gratuity should thus be addressed to the organs identified under section 244 of the KDF Act and that the Petitioner had failed to establish a cause of action against them for grant of the reliefs



sought. They also asserted that since costs follow the cause, the Petition should be dismissed and/or struck out with costs against the Petitioner.

17. The Petitioner is said to have uttered words that negatively cast the Kenya Defence Forces to ridicule, contempt and embarrassment. The Petitioner asserts that the words he uttered were advisory and states these had been made in jest. It is common ground that the Petitioner uttered the following words: “We enda Somalia uko, kimbia uko chini, We enda safisha koo mess kidogo, vitu ingine wachana nayo bwana, Jenga kwako hapana sema unajenga taifa, jenga kwako unaskia, who owns Kenya nayo watasema wanachunga nini? We ata ukikufa councillor havezi kuja matanga yako na unasema unachunga nchi, unachunga nchi gani”. It is agreed that he uttered these words to his juniors. The Petitioner asserted that the conversation was meant to encourage his younger colleagues to equally develop themselves in the societies they hail from. He was recorded by one miscreant in the group and in a twist of fate, the video was uploaded online where it went viral.
18. Whereas the posting of the video was unprofessional on the part of the soldier who recorded it, the fact that is inescapable is that the Petitioner did not speak well of his employer. He made it seem that it was not worthwhile to defend our Nation from enemies both within and outside. His rhetorical question regarding what country the junior officers would be defending when they are not highly ranked seemed to suggest that it does not augur well for anyone to defend our beloved nation. In the mind of any right-thinking Kenyan, he was portraying the Kenya Defence Forces as a terrible place to serve yet the Kenya Defence Forces are our defence against any external aggression. These words were uttered at a time Kenya was engaged in a mission in Somalia. This, in my considered view, was sufficient to trigger the disciplinary process that the Petitioner faced. The 1st Respondent undertook the process of discipline paying heed to the rules of natural justice. The 1st Respondent gave the Petitioner a statement of charges, he was aware of the ingredients of the charge and how he was to respond. He knew as a member of the disciplined forces what was required of him in response and he did make a reply. The Petitioner was heard, his defence considered and his dismissal from service recommended by his Commander. The Petitioner appealed and upon appeal, the appeal was dismissed after consideration by the Kenya Army Commander who confirmed the sentence.
19. The 1st and 2nd Respondents cannot be faulted for coming to the decision to terminate the Petitioner’s commission for his utterances. The said Respondents however went overboard when they denied the Petitioner his pension. He was punished by being removed from service and the denial of pension was, in my considered view, double jeopardy. This punishment was in contravention of Articles 28 and 29(f) which curiously, the Petitioner did not cite. The Petitioner merely recited the standard constitutional Articles which point to the procedure and the establishment of the Kenya Defence Forces, the obligations of the Honourable the Attorney General and the effect of the laws that are found to be inconsistent with *the Constitution*. Nevertheless, it is contrary to the constitutional imperative that the Petitioner will have his dignity respected and not subjected to the kind of treatment he received by being denied a livelihood in addition to losing his job. *The Constitution* of Kenya makes various provisions on the rights that we enjoy. Article 25(b) of *the Constitution* provides as follows:-

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

- (a) ...
 - (b) freedom from slavery and servitude
20. The Court finds that this is a constitutional right that this Court handling such a petition as the one before me, can deal with. The inherent right not to be subjected to slavery and servitude does not



require a special dispensation. It is an inalienable right. The Petitioner served this Nation for 28 years without incident and he is entitled to have his sweat rewarded. Declining to pay his pension is to subject him to slavery and servitude as only slaves work for no wage. As this denial of his fundamental rights is unconscionable, the Court will issue an order that the Petitioner's pension be restored forthwith and paid out to him as required under the law. The sums that have accumulated since his dismissal from service are to be paid in lumpsum so that the next payment which shall fall due on 31st March 2024 must be paid on time. The payments are not to cease until the 1st and 2nd Respondents are freed from that obligation as provided for in law.

21. On the issue of costs, the court has considered the position of the parties before it. I appreciate that the 3rd Respondent was only joined as the Legal Advisor to Government through no fault of their own. It is noted that the gravamen of the dispute were missteps on the side of the 1st and 2nd Respondents. As such the 1st and 2nd Respondents shall meet the costs of the suit to the exclusion of the Honourable the Attorney General. In the final result I order as follows:-
- a. The Petitioner be paid his pension for the period of his service which is from 11th April 1991 to 12th June 2019.
 - b. The 1st and 2nd Respondents to pay costs of the Petition to the Petitioner.
 - c. Pension to continue to be paid per law.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2024

NZIOKI WA MAKAU

JUDGE

