



**Ochieng v Attorney General & 3 others (Cause 2059 of 2015)
[2024] KEELRC 892 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 892 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2059 OF 2015
MA ONYANGO, J
APRIL 18, 2024**

BETWEEN

ANDREW ODHIAMBO OCHIENG CLAIMANT

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

CHIEF OF KENYA DEFENCE FORCES 2ND RESPONDENT

THE ARMY COMMANDER 3RD RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF DEFENSE 4TH RESPONDENT

JUDGMENT

1. The Claimant herein is a former employee of the Kenya Defence Forces.
2. The 1st Respondent is the Government’s Principal legal advisor established under Article 156 of *the Constitution*.
3. The 2nd Respondent is the person in charge of the Kenya Defense Forces and the head of the military in Kenya.
4. The 3rd Respondent is the person in charge of the Kenya Army wing of the Kenya Defense Forces in Kenya.
5. The 4th Respondent is the person in charge of the Ministry of Defense in Kenya.

The Claimant’s case

6. The suit herein was instituted by a Memorandum of Claim dated 19th November 2015 in which the Claimant seeks the following orders against the Respondents: -



- a. A declaration that the brutal arrest, the cruel, inhuman and degrading treatment inflicted on the Claimant upon being taken into custody, the violence, brutalities and extreme, harsh and inhuman conditions that the Claimant was subjected to in the various military custody constituted violations of the fundamental rights and freedoms of the Claimant as to human dignity, protection of the law, prohibition against torture, cruel, inhuman and/or degrading treatment or punishment guaranteed by sections 70(a) and 74(1) of the Repealed Constitution (now Articles 27(1), (2), 28 and 29(a),(b),(c),(d),(f) of *the Constitution* of Kenya,2010.
- b. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully and unfairly.
- c. Damages for wrongful termination.
- d. A declaration that the Respondent's action in terminating the Claimant's employment, discriminated on the Claimant on based on his health condition and such an act amount's to unfair, unjust and discriminating practices.
- e. Damages for unfair termination based on discrimination of the Claimant on his condition known as Bipolar
- f. A declaration that the rights of the Claimant not to be discriminated upon have been violated by the Respondent contrary to Article 27(5) of *the Constitution*.
- g. Damages for violation of the Claimant's right not to be discriminated upon as enshrined under Article 27(5) of *the Constitution*.
- h. Sixteen (16) years two months' salary of Kshs. 14,617,786.
 - i. Lump sum amount for Warrant Officer 1-Kshs 3,500,000
 - j. Pension Kshs. 50,000 monthly
 - k. Award of service pay for each completed year of service from the date of employment.
 - l. Without prejudice to the above prayers, the Claimant be reinstated in his former employment without any loss of benefits and/or services.
 - m. Any other or further relief that the Honourable court may deem fit and just to grant
 - n. Damages of twelve (12) months (12 x 81,360 x 12)= Kshs 976,320
 - o. Medical disability at Kenya Shillings five thousand monthly Kshs 5,000
 - p. The Claimant prays for costs of this cause plus interests
 - q. Any other relief the court might deem just and expedient to grant
 - r. Interests and costs
7. The Claimant avers that he was employed by the Kenya Defence Forces sometimes in August 1992 as a recruit. That he served the 2nd Respondent diligently rising through the ranks within the Kenya Army to become a Sergeant in the year 2012.
8. He states that during the course of employment, he had a known history of bipolar and was attending treatment at Defence Forces Memorial Hospital over a long period.



9. According to the Claimant, on 23rd May 2012, he was deployed to work at the Officer's Mess, National Defence College in Karen, Nairobi, when a colleague levelled wild allegations of assault against him.
10. The Claimant contends that he was detained severally on diverse dates without any meaningful reason, cause or legal basis and was subjected to degrading inhuman treatment and denied other basic needs.
11. He further avers that he was accused, not tried but judged and dismissed without being given audience; that the whole process was flawed since he was never served with witness statements or given the option to prefer a trial before a Court Martial as provided in the *Kenya Defence Forces Act* 2012. That the Commanding Officer relied on evidence from witnesses that did not testify and were not present when the offence is alleged to have been committed.
12. It is the Claimant's case that he had prospects of earning a salary until retirement; that he was denied a fulfilled life of service to the nation and prospects of career advancement in the Military Service.
13. The Claimant averred that he was forced out of employment through a terse statement in the retirement certificate on 5th November 2013 to the effect that: "Your services are no longer required". According to the Claimant, he was condemned and cannot be accepted anywhere for employment. That this is notwithstanding his medical condition that requires serious monitoring and regular medication; that he was stripped of all honors and accolades he earned during the subsistence of his employment with the 2nd Respondent.
14. The Claimant maintains that the dismissal was illegal, discriminatory and was not based on genuine consideration.

The Respondents' case

15. The Respondents filed a response to the Memorandum of Claim on 7th March 2017 denying the averments made in the Memorandum of Claim. The Respondents aver that on 23rd May 2013, the Claimant was deployed to work at the officer's mess where he assaulted a fellow colleague. It is the Respondents' case that the matter went through the military disciplinary process during which the Claimant was accorded a fair hearing.
16. The Respondents aver that the Claimant was discharged from service under section 255(1) of the *Kenya Defence Forces Act* and a discharge instruction issued to him.
17. According to the Respondents, the Claimant appeared before his Commanding Officer on 20th June 2013 for two charges under section 121 of the *Kenya Defence Forces Act* and was convicted on the said charges. It is contended that the Claimant participated in the trial and was accorded the opportunity to defend himself and put questions to the witness, which he did.
18. The Respondents deny that the Claimant was dismissed on medical grounds and aver that the decision to discharge the Claimant was based on the nature of the offence he had committed which severely threatened the unit, given access to weapons within the unit (National Defense College).
19. The Respondents concluded that the Claimant had not established a prima facie case, that the Respondents complied with the law in dismissing the Claimant and that the Claimant was not entitled to the reliefs sought.
20. The suit was heard on 13th June 2022. The parties called witnesses who testified in furtherance of their respective cases.



21. The Claimant testified as CW1. He adopted his witness statement recorded on 19th November 2015 as his evidence in chief and relied on the bundle of documents he filed in support of his case.
22. The Claimant stated that he was diagnosed with Bipolar disorder in 2010, and at the time he was served with the discharge letter, he was admitted at the Forces Memorial Hospital suffering from Bipolar disorder.
23. On being cross-examined by State Counsel Mr. Tuitoek, the Claimant reiterated that he was discharged from service while he was admitted in hospital. He testified that before the discharge, he was taken to the Commanding Officer around May 2013 on allegation that he had assaulted his colleague.
24. The Claimant admitted that investigations were done before he was discharged but stated that there were no findings in the said investigations. He stated that at the disciplinary hearing he was found guilty of one offence, being, selling chips to a civilian. The Claimant stated that he was not given a report of the investigations. When referred to document 5 of the Respondents bundle of documents, the Claimant admitted he signed receipt of the statements of the investigations.
25. The Claimant further testified that upon being diagnosed with bipolar, he appeared before the medical board whose findings were that he should continue being in service.
26. The Claimant admitted that when he was discharged, he was paid benefits and he is currently on pension.
27. The Claimant stated that he was discriminated as he did not assault anyone. That he was unlawfully detained after the alleged assault.
28. On re-examination, the Claimant reiterated that he was unlawfully detained and discriminated during his trial before the Commanding Officer.
29. The Respondents called Gilbert Gichuhi, a Commanding Officer in Wajir, who testified as RW1. He testified that in 2015 he was Staff Officer 2 in charge of records.
30. RW1 adopted his witness statement dated 26th November 2018 together with the witness statement dated 29th December 2015 recorded on behalf of the Respondents as part of his evidence in chief.
31. RW1 told the court that the Claimant appeared before his then Commanding Officer, Lt Col. J.L. Gala on 20th June 2013. That he had been accused of giving food to a person without authority and inflicting a minor injury to a colleague.
32. According to RW1, the Claimant was taken through a disciplinary hearing in the presence of Major N.A Garise, W.O.I Joseph Jonyo and Sgt Jackson Mutua. That the two witnesses present were W.O.2 Githunga who was the duty officer, Maj Kipkirui and Cpl Mohammed Isaac.
33. RW1 stated that the Claimant was found guilty and was discharged. He testified that the sentence imposed upon the Claimant was consistent with the law.
34. On cross examination by counsel for the Claimant Mr. Sewe, RW1 stated that the Claimant was never arrested but was taken before the Commanding Officer by Regimental Police. He explained that a Regimental Police is in-charge of discipline at the gate and guard room. He further told the court that the guard room was for people who had been arrested and serving their term. He stated that there is an open and a closed arrest. That closed arrest is when an officer is kept in the guard room.



35. RW1 explained that an officer is escorted to guard room by his immediate commander who is his arrestor. That in the instant case the Claimant was accompanied to the guard room by his commander, W.O.I Joseph Jonyo.
36. RW1 told the court that a person who is taken to the Commanding Officer is accompanied by an escort, a colleague of his rank and that an officer has an option to choose whether he wants to be tried by a Court Martial or not. RW1 could not tell whether this procedure was followed in the Claimant's case.
37. On re-examination, RW1 told the court that once the Claimant was found guilty, he was given the option to accept the order of the Commanding Officer or proceed to the Court Martial and that the Claimant chose the Commanding Officer's award.
38. RW1 further stated that in the Kenya Defence Forces no one is exempt from arrest.
39. At the close of the Respondents' case, the court directed parties to file written submissions. Both parties filed their submissions.

The Claimant's submissions

40. The Claimant's submissions were centered on the allegation that the Respondents did not adhere to the law in discharging him from service.
41. According to the Claimant, the proceedings before the Commanding Officer show that the provisions of section 157 of the [Kenya Defence Forces Act](#) were not followed.
42. It was the Claimant's submission that section 157 of the Kenya defense Forces Act is coached in mandatory terms that the accused person must be given an option of election before his Commanding Officer and that going by the proceedings, it is clear that the opportunity was never accorded to him.
43. He submitted that although an employer has a right to institute disciplinary process on an employee, the employer has a duty to ensure that a fair disciplinary process is adhered to. The case of *Anne Wambui Kamuiru v Kenya Airways Ltd (2010) eKLR* was cited.
44. The Claimant also submitted that having adduced evidence to the effect that he is a victim of bipolar mood disorder, the Commanding officer ought to have considered whether at the time of the alleged offence, he was suffering from a disease which affected his mind and made him incapable of understanding what he was doing. In support of this position, reliance was placed on the case of *Leonard Mwangemi Munyasia v Republic (2015) eKLR* was cited.
45. It was the Claimant's submission that the employer ought to have retired him on medical grounds under which he would have benefited from the Respondent's medical scheme instead of the termination which denied him the right to the medical attention from the employer.
46. The Claimant urged the court to find that he had proved that he was not accorded a fair hearing since the proceedings against him were flawed and that he had demonstrated that he was a person with a condition which needed to have been medically assessed. The Claimant also submitted that he had proved that he was unfairly detained when he was sick.

Respondents' submissions

47. On their part, the Respondents in their submissions identified the issues for determination to be:
 - a. Whether the Claimant's discharge from the Kenya Defence Forces was fair, legal and procedural,



- b. Whether the Claimant is entitled to loss of earnings, damages including loss of promotion and future earnings, award of pension and gratuity due to the alleged mental disorder
 - c. Whether the Claimant has proved this claim to warrant award of the prayers sought
 - d. Who to bear costs of this suit
48. On the first issue the Respondents submitted that the Claimant was subjected to a fair hearing as stipulated by section 147 of the *Kenya Defence Forces Act*. It is averred that the procedure of reporting and investigating an offence is provided for under section 150 of the *Kenya Defence Forces Act* and that in the instant case the investigation report in form of an abstract of evidence together with the preferred charges were forwarded to the Commanding Officer for trial and disposal as provided for under section 156(1) of the Kenya Defence Forces. It is further submitted that the Commanding Officer is empowered under the provisions of section 156(1)(a) to deal with the charges summarily after the Claimant elected so.
49. It is the Respondents case that the Claimant subjected himself to be tried by the Commanding Officer after being asked whether he wanted to be tried by the Commanding Officer or the Court martial as envisaged by section 157(1) of the *Kenya Defence Forces Act*. The Respondents submitted that the answer of the Claimant was clearly noted by the Commanding Officer in the Summary Trial proceedings.
50. On the second issue the Respondents submitted that upon discharge the Claimant was paid his terminal benefits for the 21 years served including a monthly pension which he continues to be paid. It is also submitted that the Claimant admitted during his cross examination that he was discharged and not dismissed as pleaded.
51. Thirdly, on the issue whether the Claimant has proved his claim, the Respondents submitted that the Claimant has not proved the prayers sought as required by the law. According to the Respondents, no documents have been produced or witnesses called to corroborate the allegation that the Claimant was unlawfully detained or terminated from service as alleged.
52. Lastly, on the issue of costs, it is the submission of the Respondents that it is a well set principle that costs follow the event. That since the Claimant's case lacks substratum, the same ought to be dismissed with costs.

Determination

53. I have carefully considered the Pleadings, the evidence of the parties as well as the submissions filed by the parties. The issues that fall for my determination are:
- i. Whether the Claimant was discharged or dismissed from service?
 - ii. Whether the disciplinary proceedings the Claimant was taken through adhered to the substantive and procedural requirement under the *Kenya Defence Forces Act*
 - iii. Whether the Claimant was unlawfully detained
 - iv. What reliefs should then issue?
54. The guiding legislation officers serving in the Military is the *Kenya Defence Forces Act* and the Kenya Defence Forces (Pensions and Gratuities) (Officers and Service members) Regulations, 2017
55. On the first issue, the Respondent's witness in his testimony stated that the Claimant was not dismissed but was discharged from service.



56. The Kenya Defence Forces (Pensions and Gratuities) (Officers and Service members) Regulations, 2017 define "discharge" as "in the case of a service member, being relieved of military duties by the Commander or an officer authorized by him in that behalf."
57. The Claimant testified that he was paid his terminal benefits and has been enjoying his monthly pension. On this basis, it is clear that the Claimant was not dismissed from service as he alleges but was discharged. Upon discharge an officer of the Kenya Defence Forces is entitled to full benefits upto the date of discharge.
58. In respect of the second issue, the Claimant faulted the disciplinary procedure taken against him by the 2nd Respondent. According to him, the disciplinary proceed did not comply with section 157 of the [Kenya Defence Forces Act](#).
59. The Respondents on the other hand maintained that the disciplinary proceedings were conducted in strict conformity with section 157 of the Act. According to the Respondents the Claimant subjected himself to be tried by the Commanding Officer after being asked whether he wished to be tried by the Commanding Officer or the Court Martial as envisaged by section 157(1) of the [Kenya Defence Forces Act](#).
60. Section 157(1) provides:
- Option election by accused to be tried by court-martial
- (1) Before dealing with a charge summarily, the commanding officer or appropriate superior authority, as the case may be, shall give the accused the opportunity to opt to be tried by a court-martial.
 - (2) If an accused opts to be tried by a court-martial, the commanding officer or appropriate superior authority, as the case may be, shall refer the charge to the Director of Military Prosecutions who shall be the final authority in deciding whether the charges should be dealt with by court martial or be referred back to summary trial.
 - (3) If two or more charges against an accused are to be heard summarily together, an option stands for trial by a court-martial in respect of any of the charges.
 - (4) If, after the start of a summary hearing—
 - (a) a charge is amended;
 - (b) a charge is substituted for another charge; or
 - (c) an additional charge is brought, this subsection shall apply to the amended, substituted or additional charge as if the reference in subsection (1) to dealing with a charge summarily were a reference to proceeding with the hearing.
 - (5) If the accused refuses to make an option, that refusal shall be treated as option to be tried by a court-martial and the accused shall be so informed.
 - (6) The accused may withdraw an option to be tried by a court-martial at any time before the court-martial is convened.



61. From the Summary Trial proceedings for the Claimant in the Third Schedule of the record of proceeding before Commanding Officer, it is evident that the Claimant's answer on whether he wished to be tried by the Commanding officer or to be tried by a court martial was recorded as follows:

Question: Would you accept my award or you choose to be tried by Court Martial?

Answer: I will accept your award

62. I find that the disciplinary proceeding against the Claimant as conducted was in compliance with the procedure set out under by section 157(1) of the [Kenya Defence Forces Act](#).

63. On the issue of substantive fairness, from the evidence on record as well as the Abstract of Evidence, the Claimant was accused of giving food to a civilian person without authority and inflicting a minor injury to a colleague. He was subjected to a hearing and given an opportunity to examine the witnesses who testified against him. When asked at the hearing why he did not charge or take other disciplinary action against Cpl. Isaack he did not answer.

64. On the charge of selling food to civilian Wafula the Claimant answered that he made a mistake by not confirming whether the request by Wafula was genuine.

65. Section 86 of the [Kenya Defence Forces Act](#) provides as follows;

Quarrelling, fighting and threatening behavior

(1) A person subject to this Act who without reasonable excuse—

- (a) fights, threatens or quarrels with any other person whether subject to this Act or not; or
- (b) uses threatening, abusive, insulting or provocative words or behavior with the intent to provoke or cause disturbance, commits an offence and shall be liable, on conviction by a court-martial, to imprisonment for a term not exceeding two years or any lesser punishment provided for by this Act.

(2) In this section "behavior" includes acts, signals or anything said by that person.

66. From the above provision it is evident that the Claimant was guilty of the offence of quarrelling with a colleague and that he admitted to the offence of selling food to a civilian.

67. The other issue that I need to address is whether the Claimant was unlawfully detained. RW1 testified that officers in the military are subject to detention irrespective of their rank. Although the Claimant alleged that he was unlawfully detained, he did not adduce evidence to prove the same.

68. The Claimant further raised the issue of his medical condition. From the evidence on record, the issue of the Claimant's medical condition was never raised during the disciplinary process. He further did not mention the same in his appeal.

69. Having found that the Respondents complied with the provisions of section 157(1) and section 86(2) of the [Kenya Defence Forces Act](#), I find the petition to be without merit and dismiss the same.

70. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 18TH DAY OF APRIL 2024

MAUREEN ONYANGO

JUDGE



NRB ELRC 2059 OF 2015 JUDGMENT

