



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Kenya Defence Forces & another (Cause E662 of 2021)  
[2024] KEELRC 2205 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2205 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E662 OF 2021  
L NDOLO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**GEORGE BWIRE ONYANGO ..... CLAIMANT**

**AND**

**KENYA DEFENCE FORCES ..... 1<sup>ST</sup> RESPONDENT**

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

**JUDGMENT**

**Introduction**

1. The Claimant is a former officer of the Kenya Defence Forces. His claim is that his salary was unlawfully withheld by the 1<sup>st</sup> Respondent on account of court martial proceedings taken out against him.
2. When this matter came up for viva voce hearing, it became apparent that the Claimant had difficulties recalling the events leading to his discharge from the Kenya Defence Forces. By consent of the parties, it was agreed that the matter be dispensed with on the basis of the parties' pleadings and written submissions.

**The Claimant's Case**

3. In his Memorandum of Claim dated 11<sup>th</sup> August 2021, the Claimant states that he was arrested and arraigned before a Court Martial on 1<sup>st</sup> October 2014. He was tried and eventually convicted on 18<sup>th</sup> March 2016. The Claimant appealed against the decision of the Court Martial and the High Court in Nakuru quashed the conviction.
4. The Claimant claims that by the decision of the High Court, the 1<sup>st</sup> Respondent was directed to take necessary steps to deal with his case but no action was taken.



5. The Claimant states that during the period he was going through trial before the Court Martial, he was not paid any salary and his salary was not reinstated upon his acquittal. According to the Claimant, all persons who were subjected to court martial trials were placed on half salary with their full salary being reinstated upon acquittal. He therefore claims that he was discriminated against.
6. The Claimant's claim is for unpaid salary for 92 months being Kshs. 3,554,328. He further seeks deployment and full reinstatement of his salary, including salary increments over the years. He also asks for costs and interest.

### **The Respondents' Case**

7. The Respondents' Response is by way of a Replying Affidavit sworn by Major Edwin Kibiru Muta on 29<sup>th</sup> September 2023.
8. Major Muta, who describes himself as a Staff Officer II, Records Department at the Kenya Defence Forces Headquarters, concedes that the Claimant was arraigned before a Court Martial, for the offences of desertion, absence without leave and escape from lawful custody.
9. Major Muta states that the Claimant was sentenced to one-year imprisonment and was subsequently dismissed from the Kenya Defence Forces, effective 6<sup>th</sup> April 2016. He admits that the Claimant's appeal was allowed by the High Court in Nakuru and the conviction quashed. The High Court then directed the Kenya Defence Forces to consider the Claimant's case, with a view to giving an appropriate and satisfactory remedy.
10. Major Muta denies the existence of an order of reinstatement and states that in compliance with the court order, the Kenya Defence Forces revised the terms of the dismissal to discharge from the service on account of service no longer required, which was later revised to medical grounds.
11. It is deponed that the effect of the revision was that the Claimant was entitled to his service benefits for the total period served, being 1<sup>st</sup> September 2008 when he was enlisted until 6<sup>th</sup> April 2016, when he was dismissed from service by the Court Martial.
12. It is further deponed that the Kenya Defence Forces constituted a Medical Board, which conducted a medical assessment and awarded the Claimant 35% disability allowance.
13. Major Muta states that the disability allowance is subject to review by the Pensions Assessment Committee but this had not been done because the Claimant had failed to clear with his Unit to pave way for forwarding of his file to the Pensions Assessment Committee.

### **Findings and Determination**

14. Gleaning from the parties' pleadings and submissions, the dispute before the Court arises from divergent positions regarding the effective date of the Claimant's exit from the Kenya Defence Forces. According to the Claimant, he remained an employee of the Defence Forces until 11<sup>th</sup> May 2022, when a Medical Board found him unfit to continue serving in the Forces, on medical grounds.
15. On the other hand, the Respondents maintain that the Claimant ceased to be an employee of the Defence Forces on 6<sup>th</sup> April 2016, when the Court Martial found him guilty of the offences of desertion, absence without leave and escape from lawful custody.



16. In reversing the Claimant's conviction by the Court Martial, Joel Ngugi J (as he then was) stated as follows:

“All orders issued pursuant to the said conviction are hereby set aside. The Kenya Defence Forces is ordered to consider the Appellant's case with a view to giving an appropriate and satisfactory remedy to the Appellant.”
17. It is on record that the foregoing decision was made pursuant to a finding that at the time of commission of the alleged crimes, the Claimant was suffering from a mental illness that placed him under the cover of the M'Naghten Rule which is also codified in Section 12 of our Penal Code.
18. The Appeal Judge did not however give a direct order on the Claimant's employment but instead left it to the Kenya Defence Forces to give an appropriate remedy. The parties engaged in negotiations, which culminated in the Claimant being discharged on medical grounds.
19. It is however evident that the Claimant did not resume duty and he did not therefore work after his initial dismissal on 6<sup>th</sup> April 2016. There is therefore no justification for the Claimant's claim for salary from the dismissal date to the date of his discharge on medical grounds.
20. In their written submissions dated 21<sup>st</sup> May 2024, the Respondents concede that the Claimant is entitled to all his benefits, including full salary for the days worked and the period of court martial proceedings, until the dismissal date. The Respondents add that the Claimant is also entitled to 35% disability allowance. They submit that these dues have remained unpaid because the Claimant has failed to clear with his Unit.
21. In the result, I find and hold that the Claimant has failed to prove his claim against the Respondents. The claim therefore fails and is dismissed with an order that each party will bear their own costs.
22. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY SEPTEMBER 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Were for the Claimant

Ms. Goro for the Respondents

