



**Said v Principal Secretary Ministry of Defence (Judicial Review Application
2 of 2024) [2024] KEELRC 2432 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION 2 OF 2024**

MN NDUMA, J

OCTOBER 3, 2024

BETWEEN

87850 KASSIM RASHID SAID-19 KR APPLICANT

AND

PRINCIPAL SECRETARY MINISTRY OF DEFENCE RESPONDENT

JUDGMENT

1. There is a long history leading to the matter before Court. The applicant had in the year 2021 filed a Criminal Appeal No. E144 of 2021 before the High Court, Criminal Division. This was an Appeal from the judgment of a Court-Martial delivered on the 23rd November 2021 at the Langata Barracks, Nairobi in Court Martial No. 09 of 2021.
2. Before the Court Martial, the Applicant was charged in Count one with possession of narcotic drugs contrary to section 3 (1) of the Narcotic Drug and Psychotropic Substances (Control) Act. In the second count, he was charged with the offence of committing a civil offence contrary to section 133 (1) (b) of the *Kenya Defence Forces Act*, that is, the use of narcotic drug contrary to section 5(1) (a) of the Narcotic Drug and Psychotropic Substances (Control) Act. In the alternative, he was charged with disobedience to standing orders contrary to section 77(1) of the *Kenya Defence Forces Act*. He was acquitted in count one and the alternative charge but convicted on count two. The Court Martial proceeded and sentenced him to three (3) years imprisonment. Additionally, he stood automatically dismissed from the army by virtue of his imprisonment.
3. The Appeal before the High Court succeeded, and the Judge, JM Bwonwong'a J proceeded and ordered that the Applicant be reinstated to his rank of a senior private. He was also not to lose any benefits that he was entitled to by virtue of his service with the defence forces from date of conviction and sentence. This is the judgment delivered on the 19/10/2022.



4. The Applicant later filed Judicial Review Application No. E038 of 2023 before the High Court, Civil Division vide a Motion dated 13/4/2023 seeking an order of Mandamus to compel the Respondent to fully comply with the orders of the High Court Criminal Division given on the 19/10/2022. The Respondent in response filed a Notice of Preliminary Objection dated the 30th May 2023 which questioned firstly, the jurisdiction of the High Court to issue the orders sought in the Motion dated 30/5/2023, and the jurisdiction of the High Court Criminal Division to issue orders of reinstatement. The Notice of Preliminary Objection wholly succeeded.
5. What is before Court now are execution proceedings of the orders issued by the High Court Criminal Division by JM Bwonwong'a J on the 19/10/2022.
6. The Court has looked at the submissions of the Applicant dated the 7/6/2024 and that of the Respondent dated the 11/7/2024 and has duly considered the same in arriving at this judgment.
7. Article 162 (1) of *the constitution* of Kenya 2010 provides that the superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2). Sub clause (2) states that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (a) employment and labour relations;
8. This Court is established under section 4 as read with section 12 of *Employment and Labour Relations Court Act*, 2014. Section 12 of the said Act provides as follows;
 - (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials;
and
 - (j) disputes relating to the registration and enforcement of collective agreements.
9. In *United States International University (USIU) versus The Hon Attorney General 2012 Eklr Majanja J* held that;

‘In the final analysis, I would adopt the position of the Constitutional Court of South Africa in *Gcaba v Minister of Safety and Security (Supra)*. The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section



12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court'. See also the Court of Appeal decision in Daniel N Mugendi versus Kenyatta University and 3 others 2013 Eklr

10. Section 29 of the *Civil Procedure Act* 2010 provides that the expression

“Court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include—

- a. where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance;
- b. and where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. (Emphasis added)

11. This being the Court which has jurisdiction to hear and determine employment claims, the Court accordingly allows the Motion dated the 13/4/2023 as prayed and makes the following final orders: -

- a. An order of mandamus is issued compelling the respondent to comply with the order of the High Court dated 19/10/22 to reinstate the Applicant to the position of Senior Private without loss of any benefits from the date of dismissal (23/11/21).
- b. Interest at court rates on the benefits due to the Applicant till payment in full.
- c. Costs of this application.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr Gichuki for the Applicant

Ms Muturi for the Respondent

Court Assistant Kemboi

