ME v Chief of Kenya Defence Forces & another (Petition E004 of 2021) [2023] KEELRC 511 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 511 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION E004 OF 2021

JW KELI, J

FEBRUARY 28, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 2 (1),3(1) 10(1) AND (2) ,19,20 (1),21(1),23(1),24(1),25(A) & (C), 26 (1),27,28,47 (1) &(2),48,50 165(3) (B),232 (1) (C),239,241 (1),(5) & (7)

IN THE MATTER OF THE VIOLATION AND CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEES UNDER ARTICLES 10 (1) (A-C) AND 2(B), 25(A) &(C) ,27,28,29 (F),47 (1) & (2), 48, 50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE CONTRAVENTION OF SECTION 4 (1) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

IN THE MATTER OF THE EMPLOYMENT ACT, 2007 LAWS OF KENYA

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

IN THE MATTER OF THE CHALLENGE OF THE UNLAWFUL DISMISSAL OF THE PETITIONER FROM THE EMPLOYMENT OF THE RESPONDENTS

BETWEEN

ME ..... PETITIONER

AND

CHIEF OF KENYA DEFENCE FORCES ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1. The Petitioner Senior Private ME an ex service man, upon discharge from service brought the instant petition against the respondents seeking for the following reliefs:-

a. A declaration do issue, that the Respondent did not follow due process in dismissing the petitioner/applicant and therefore the dismissal is null and void.

b. A declaration do issue, that the said dismissal of the Petitioner/Applicant from employment amounted to a breach of the Petitioner's Constitutional rights under Article 25(a) 27,28,29(f),41(1),43 (1) (a) 47(1) and 50 of *the Constitution* of Kenya.

c. A declaration do issue, that the termination of employment against the Petitioner/Applicant was discriminative, malicious, unlawful, unfair, unprocedurally and a fundamental violation of the rights of the Petitioner.

d. A declaration do issue to the respondents, by itself, its agent/Servant and any other officer working under its authority compelling the Respondents to pay the Petitioner a monthly salary of Kshs.20,328.00 on a monthly basis.

e. In the alternative of Clause (d) above, a declaration do issue to the Respondents, by itself, its agent/Servant and any other officer working under its authority compelling the Respondents to pay the petitioner full remuneration and benefits with interest from the date of termination of employment being the 6th day of October, 2015.

f. A declaration do issue to the respondents, by itself, its agent/servant and any other officer working under its authority compelling the respondents to provide for the petitioner future medical support of kshs.40,000/- on a monthly basis until full recovery.

g. A declaration do issue to the Respondent, by itself, its servant and or anyone acting under its authority compelling them to make payments to the petitioner in the from of damages and or compensation for the violation of the petitioner's fundamental rights and freedoms.

h. An order of Judicial review in the nature of Certiorari directed to the 1st Respondent quashing the decision made by itself on the 6th day of October, 2015.

i. General damages for pain and suffering and loss of amenities

j. General damages for loss of earnings capacity and loss of earnings.

k. Interests on (a) (f) (i) & (j) above

l. Costs of this Petition.

m. Any other relief amenable in the circumstances.

2. Together with the petition the Petitioner filed in court his supporting affidavit sworn on 20th September 2021 and annexed his documents. The petitioner also filed affidavit by Julius Etyang as his witness.

3. The Respondents initially filed their replying affidavit in response to the Petition by Major Dickson Nzauka on the 21st March 2022. Later on the 4th October 2022 the 1st Respondent filed another replying affidavit by Major Edwin Kibiru Muta sworn on 24th September 2022 . On the 11th October 2022 Ms. Tuiyott for the 2nd Respondent made an oral application to substitute the replying affidavit by Major Dickson Nzauka with that of Major Edwin Kibiru Muta. There was no objection by the Petitioner. The court allowed the application.

The hearing

The Petitioner's case

4. The Petitioner's case was heard on the 11th October 2022 with two witness of facts, the petitioner and his father Julius Etyang who relied on their affidavits and produced documents annexed to their affidavits.

The Respondents' case

5. The Respondents case was heard same date with one witness of fact Major Edwin Kibiru Muta who adopted his replying affidavit sworn on the 24th September 2022 as his evidence and produced the annexures EKM1-EKM7 therein as evidence of the respondents.

Written submissions

6. After closure of the hearing the court issued directions to the parties on filing of written submissions.

7. The Petitioner's written submissions written submissions drawn by Ndalila & Company Advocates were dated 9th November 2022 and received in court on the 10th November 2022.

8. The Respondents' written submissions drawn by B C Tuiyott Special State Counsel for the Attorney were dated 20th January 2023 and received in court on even date

The Petitioner's case in summary

9. The Petitioner was enlisted into the Kenya Defence Forces on the 1st September, 2008 and upon completion of his training he was recruited on the 27th day of March, 2009 (ME-1) whereas he was posted to 15 Kenya Riffles and later to 17 Kenya Riffles where he was deployed as an infantry. In the year 2013 -2014 the Petitioner served in AMISON III in Afmadow, Somalia whereas in March 2014 while on patrol he was involved in a road traffic accident and he sustained soft tissue injuries to his left frontal and occipital region.

10. The Petitioner was not able to seek medical attention at the time as the then major in charge known as Major Shangata indicated that he should remain in camp on grounds that his injuries were not severe enough. He only received first aid and was told to return to work but his condition kept deteriorating from that time up until the year 2015 when the mission in Somalia was completed and the troop had returned to Nyali Barracks. That is when the late Sergeant Tigo advised Major Ali who was the doctor at the time that a checkup needed to be conducted in order for them to find out what was happening to the Petitioner as he had started experiencing difficulties in performing his duties which he was performing perfectly prior to the accident in Somalia.

11. Soon thereafter, the Petitioner was discharged as he was unable to perform his duties for he had memory losses and impaired judgment. That the 1st respondent failed to investigate his case to understand the root of lack of performance which he says was the accident sustained in Somalia. That having sustained the injuries while in service it was the responsibility of the 1st Respondent to take care of the Petitioner health until when his health had improved which they did not but instead insisted that he continue to work immediately after the accident which was an infringement of his constitutional rights and as a result his health kept deteriorating leading to the eventual discharge as the Petitioner had developed a mental condition known as schizophrenia.

Respondents' case in summary

12. The Respondents filed a Replying Affidavit together with its evidence in response to the aforesaid Petition on 24th September 2022 opposing the contents of the Petition in entirety, on grounds that the Petitioner was discharged on the basis of 'service no longer required' from the Forces following the Petitioner being charged and found guilty on his own plea to various service offences in total compliance with the disciplinary procedure and termination of employment as stipulated in the *Kenya Defence Forces Act* (No. 25 of 2016) (herein after referred to as " the Forces Act) and the now repealed Armed Forces Act (Cap 199) (herein after referred to as the r" repealed Forces Act"). That the petitioner did not appeal.

13. Additionally, the Respondent stated it had produced evidence demonstrating that despite, the Petitioner's indolence in clearing three (3) years after receiving discharge instructions, he was duly paid gratuity and pension entitled to him together with compensation for his disability as determined by the Respondent's medical board in accordance with laws and procedure governing the Respondent's employment, termination of employment, pension and compensation terms and conditions.

Determination

Issues for Determination

14. The Petitioner in his written submissions raised the following issues from determination:-

    a. Whether due process was followed in dismissing the Petitioner.

    b. Whether there was a violation and contravention of the rights of the Petitioner/Applicants?

    c. Whether the Petitioner is entitled to reliefs sought

15. The Respondents in their written submissions raised the following issues for determination.

    a. Whether the petitioner discharge from the force was lawful.

    b. Whether the petitioner has proved on a balance of probabilities that the Petitioner was denied right to medical care and that his disability was as a result of the alleged accident.

    c. Whether the petitioner's claim is guilty of inordinate delay

    d. Whether the petitioner is entitled to reliefs sought.

16. The court have heard the case and having perused the pleadings and taking into considerations issues identified by the parties is of the considered opinion that the issues placed before the court for determination of the dispute are as follows:-

    a. Whether the petitioner's discharge from the forces was lawful.

    b. Whether there was violation of the petitioners fundamental freedom and rights by the 1st Respondent.

    c. Whether the petitioner's claim is guilty of inordinate delay

    d. Whether the petitioner is entitled to relief sought.

Whether the Petitioner's discharge from the forces was lawful.

The Petitioner's evidence

17. The Petitioner averred in his supporting affidavit sworn on 20th September 2021 that he served in AMISON III in Afmadow Somalia and in March 2014 while on patrol he was involved in a road traffic accident and sustained soft injuries to his left frontal and occipital region but never received treatment as the major in charge known as Major Shangate indicated he should remain in camp on grounds that his injuries were not severe enough. That he received first aid and resumed work only for him to start having headaches that were very severe and started to sleep walk which he reported to the doctor at camp and nothing was done to assist him. That the mission was completed in 2015 and he returned to Nyali Barracks and it is when the late Sergent Tigo advised major Ali who was a doctor at that time that checkup was needed in order to find out what was happening to the petitioner as he was experiencing difficulties in performing his duties which he had performed perfectly prior to the accident in Somalia. That at the camp he started experiencing back pains and could not walk properly and his request for treatment fell on deaf years.

18. That he started having memory loss and impaired judgment and could not perform duties wherein the 1st Respondent triggered to terminate his services on changes of inappropriate behaviour.

19. That the 1st Respondent failed to investigate the route of his lack of performance which he attributed to the accident in Somalia and promptly discharged him.

20. The Petitioner repeated same issues in evidence in chief and produced certificate of same and letter of clearance and discharge dated 2nd October, 2015 marked ME 2 (a) and ME 2b respectively.

21. The Petitioner further called his witness of fact Julius Etyang, his father ,who produced the petitioner's letter of discharge (JE 2 dated 25th September 2015). The Petitioner further produced report of the medical Board "ME 5). PW2 adopted his affidavit sworn on the 20th September 2021 where he stated that upon discharge the petitioner went home and was diagnosed at Bungoma Hospital for mental illness (JE3).

22. During cross examination the Petitioner told the court that he was explained the mistakes he was charged with before the commanding officer, that when he left imprisonment he was not told why he was going home. He was told to return his boots and go home. The Petitioner on his accident at Somalia he repeated he was denied treatment and request to go to Memorial Hospital.

Defence Case

23. The defence witness Major Edwin Kibiru Muta as its witness of fact who adopted his affidavit sworn on 24th September, 2022 together with the annextures EKM1 -EKM7 as in his evidence in chief. The witness told the court that the Petitioner was enlisted on 1st September 2008 and discharged on 6th January 2016 on terms of "Services No longer required" under Section 255 (1) (g) of the *Kenya Defence Forces Act*.

24. The witness told the court that the petitioner appeared before the Commanding Officer to answer charges of absence without leave, desertion and insubordinate behaviour under summary pleadings and was charged on 11th August 2015 on 11 counts (EKM 3).

25. The Petitioner was awarded conviction in civilian terms as follows:-

    Charge 5 days pay
    1.

Charge 5 days pay

2. Charge 4 days pays

3. Charge 4 days pay

4. Charge imprisoned for 42 days and later discharged for service subject to the Amy

5. commander approval who gave the said approval.

26. That the Petitioner was free to appeal the discharge. That the Petitioner appeared in 2018 with medication claims and a board was convened which diagnosed him with schizophrenia and finding the petitioner could not serve due to the condition.

27. During cross examination the witness (DW) told the court that the Petitioner had served for 7 years and 2 months and had no prior disciplinary issues before the incident in Somalia. DW admitted that the Respondent had not established that the petitioner had capacity to stand trial. DW confirmed the 1st Respondent had a procedure to assist service men who have mental issue. He did not produce evidence that the petitioner was assisted.

28. DW stated that the evidence of petitioner having deserted duty was the letter by D. Agnetta that the petitioner left without clearing. DW told the court that it was not clear from the record whether effort was made to find out why the petitioner had not cleared.

Petitioner's Submissions

29. The Petitioner submits that he was tried without proper investigations being conducted contrary to provisions of section 150 of the *Kenya Defence Forces Act* to wit:

> "If a person who is subject to this Act is accused of an offence under VI, the accusation shall be reported in the forum of a complaint to the accused commanding officer, and the commanding officer shall forward the complaint to the military police for investigation in the prescribed manner".

30. The Petitioner submits that the disciplinary hearing was not conducted in a proper manner as the petitioner testified that he was not given opportunity to prepare for the hearing, get evidence or witnesses to testify on his behalf and was not aware if a hearing was conducted. That no due process was followed and relied on decision in Cooperative Bank of Kenya Limited -vs- Banking Institutions & Finance Union (K) (2017)eKLR to buttress his case.

31. The Petitioner submits that DW admitted that the Petitioner served over 7 years without disciplinary issues hence the accident in Somalia possibly contributed to his conduct. That the employer had a duty to ensure reasonable working conditions for the petitioner.

Respondents' submissions

32. The Respondents submits that the accused was charged with conduct to prejudice good order and discipline , insubordinate behaviour, malingering, disobeying lawful order, absence without leave, all being service offences contrary to section 121 , 81, (1) (b) , 82 (1) (b) 84(1) (a) 79 and 75 (7) (a) of the KDF Act on diverse dates between 26th November, 2014 and 2nd May, 2015.

33. The 1st Respondent further submits that the petitioner had previously been charged with drunkenness on 31st March, 2012. That Section 3 (2) (a) of the *Employment Act* exempts the forces from its

application. That the matter was investigated by the Military police who prepared comprehensive reports before the charges.

34. That the Petitioner authored the caution and notice of 16th June 2015 and he confirmed the signature on the said documents in his personal records during cross-examination of this case. (The court perused the proceedings and did not find such cross- examination. No evidence was lead as to whether the petitioner acknowledged service of the Notice or caution that he has a right to be represented by a nominee of his own choice or his right to remain silent). The question to the Petition was whether he appeared before the commanding officer and whether he was explained the mistakes of which he answered in the affirmative.

35. That in compliance of Section 147 and 150 -154 of the *Kenya Defence forces Act* which presumes for the disposal of charges by way summary disciplinary proceedings and procedure, the petitioner appeared before his commanding officer in the presence of witness on the 11th August, 2015 where he was found guilty on his own plea for the aforesaid offences. That prior to the hearing, the petitioner's subordinate command read out the charges preferred against him on 5th August 2015.

36. That the Petitioner being aware of the redress mechanism under section 303 (3) (2) which he did not invoke being aggrieved with claim of the commanding officer finding. That the petitioner made no mention of irregular and non procedural hearing in letters of redress for compensation hence his claim of unlawful termination as a result of health condition lacks merit.

Decision

37. The court finds that it was not in dispute that the petitioner was involved in an accident in March 2014 while in Mission Amison III in Somalia. DW confirmed to court that prior to the AMISON III in Somalia March 2014 the Petitioner had no prior disciplinary issues on record. That is not withstanding the charge of drunkness of 2012 filed in court. DW appears to have discarded the said document by categorically stating on oath that the petitioner had no prior disciplinary issue on record. The Petitioner was accused of several offences under 5 charges and convicted and further discharged.

38. The disciplinary process of the 1st Respondent is as provided for under section 147, 150 to 154 of the *Kenya Defence forces Act* of which the Respondents submitted was complied with before discharge of the petitioner. The relevant provisions are outlined below:-

> Article VIII – Summary Disciplinary Proceedings
>
> '147. Guiding principles (1) Summary disciplinary proceedings under this Act shall be guided— (a) by Article 47 of *the Constitution*; and (b) with necessary modifications, and without derogating from the essence of the right or limiting the right to fair hearing of an accused person by Article 50 of *the Constitution*.
>
> 148. Certain charges may be dealt with summarily (1) Subject to the prescribed limits, the commanding officer or appropriate superior authority may summarily deal with a charge for an offence prescribed as disciplinary offence which a commanding officer or appropriate superior authority may deal with summarily. (2) Despite subsection (1), a commanding officer of the rank of major or corresponding rank shall not deal summarily with a charge against an officer of the rank of captain or corresponding rank or above, and a commanding officer below

the rank of major or corresponding rank shall not deal summarily with a charge against any officer.

149. Appropriate superior authority for purposes of this Act, the appropriate superior authority is the Chief of the Defence Forces, Service Commander or such officer, not below the rank of Lieutenant-Colonel or corresponding rank, as may be prescribed but an officer of a prescribed rank shall not be the appropriate superior authority for the purposes of a case in which the accused is above the prescribed rank.

150. Reporting and investigation of offences If a person who is subject to this Act is accused of an offence under Part VI, the accusation shall be reported in the from of a complaint to the accused's commanding officer, and the commanding officer shall forward the complaint to the military police for investigation in the prescribed manner.

151. Rights and representation of an accused person during trial

(1) An accused person who is subject to this Act shall be infromed of the charges against him or her and of his or her right to be represented during the summary disciplinary proceedings or trial.

(2) Subject to subsection (1), a person may be nominated as a representative if—

(a) that person is an officer or a service member and remains as such while carrying out that function;

(b) that person consents to the nomination;

(c) the nominee is available and accessible at the time of the proposed trial; and

(d) the nominee is not of an equivalent rank or higher rank than the trial authority.

(3) The nominee under subsection (2) shall not be a person trained as a lawyer.

(4) Notwithstanding subsection (3), where the offence is punishable by death, the accused person shall be entitled to legal representation at the expense of the State.

152. Conditions to be satisfied

(1) A commanding officer or appropriate superior authority may try an accused person by summary trial if the following conditions are satisfied—

(a) the accused person is within the prescribed ranks, that the commanding officer or appropriate superior authority is authorised to deal with;

(b) having regard to the gravity of the offence, the commanding officer considers that his or her powers of punishment are adequate;

(c) if the accused person has the right to elect to be tried by a courtmartial, the accused person has not elected to be so tried;

(d) the offence is not one that, according to regulations, the commanding officer is precluded from trying; and

(e) the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

(2) Unless it is not practicable, having regard to all the circumstances, for any other 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 complainant.

154. Hearing procedures

(1) If a person who is subject to this Act accepts summary trial, that person or his or her representative may present evidence and call witnesses during the hearing.

(2) The commanding officer shall consider all infromation offered during the hearing, and shall be convinced that the accused person actually committed the offence he or she is accused of before imposing the punishment.

155. Charges against officers and cadets

(1) After investigating a complaint against an officer or a cadet, the military police shall forward the investigation report in the from of an abstract of evidence and appropriate charges, if any, to the commanding officer, who—

(a) may deal summarily with the charge if it 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;

(b) may dismiss the charge on the grounds that it ought not to be further proceeded with; or

(c) shall refer the abstract of evidence and the charge in the prescribed manner to the Director of Military Prosecutions or the appropriate superior authority as the case may be, 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 to an officer of the rank of captain or corresponding rank or below are, subject to the limitations hereinafter provided, those set out in the following scale—

(a) forfeiture of up to six months' seniority of rank;

(b) a fine not exceeding half a month's pay;

(c) severe reprimand;

(d) reprimand;

(e) admonition; or

(f) if the offence has occasioned any expense, loss or damage, stoppages.

(3) If the commanding officer deals with a charge summarily and records a finding of guilt, the punishments that may be awarded to a cadet are, subject to the limitations hereinafter provided, those set out in the following scale—

(a) dismissal from the Defence Forces;

(b) severe reprimand

(c) reprimand;

(d) admonition; or

(e) such minor punishments as may be prescribed.

(4) If the commanding officer refers a charge to the appropriate superior authority, the appropriate superior authority shall either—

(a) deal summarily with the charge, if it is one that the authority has power to deal with summarily, and the authority considers that the charge should be so dealt with; or

(b) in any other case, refer the charge in the prescribed manner to the Director of Military Prosecutions.

(5) If the appropriate superior authority 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) forfeiture of up to twelve months seniority of rank;

(b) a fine not exceeding one month's pay;

(c) severe reprimand;

(d) reprimand;

(e) admonition; or

(f) where the offence has occasioned any expense, loss or damage, stoppages.

(6) Except where expressly provided for by this Act, not more than one punishment shall be awarded under this section for one offence

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.

(3) If, on a review under this section, it appears to the reviewing authority that—

(a) a punishment awarded was invalid;

(b) a punishment awarded was too severe;

(c) if the award included two or more punishments, those punishments or some of them could not validly have been awarded in combination or taken together, are too severe; or

(d) a punishment awarded was too lenient, the authority may vary the award by substituting such punishment or punishments as the authority thinks proper, being a punishment or punishments which could have been included in the original award, but no award shall be varied under this subsection to the prejudice of the accused unless the accused has had an opportunity of being heard by, or of making written representation to, the reviewing authori

(4) In this section, "the reviewing authority" means—

(a) the officer superior in command to the officer who dealt summarily with the charge;

(b) the Service Commander;

(c) the Chief of the Kenya Defence Forces, if the Commander was involved in the summary proceedings; or

(d) the Defence Council.

159. Automatic administrative review

(1) Upon reaching a determination in relation to any offence tried by the commanding officer, the commanding officer shall, within fourteen days,

submit the findings of the trial in writing, to a superior commander for review

(2) The superior commander shall within fourteen days of receipt of the findings, review the findings and infrom the accused person of the outcome of the review, in writing.

(3) The administrative review under subsection (1) shall not preclude the accused person from seeking other legal redress from any other authority provided for under this Act or any other written law, or applying for a review to the Defence Council."

Findings of the court on whether the discharge was lawful.

39. The court finds that the Respondents did not produce evidence of caution of the petitioner of his rights to witness of choice. No such evidence was produced as alleged in the written submissions. The right to representation in trial is as under section 151 to wit :-

'Rights and representation of an accused person during trial

(1) An accused person who is subject to this Act shall be informed of the charges against him or her and of his or her right to be represented during the summary disciplinary proceedings or trial.

(2) Subject to subsection (1), a person may be nominated as a representative if—

(a) that person is an officer or a service member and remains as such while carrying out that function;

(b) that person consents to the nomination;

(c) the nominee is available and accessible at the time of the proposed trial; and

(d) the nominee is not of an equivalent rank or higher rank than the trial authority.

(3) The nominee under subsection (2) shall not be a person trained as a lawyer.

(4) Notwithstanding subsection (3), where the offence is punishable by death, the accused person shall be entitled to legal representation at the expense of the State."

40. The court finds that there was no investigation report attached to all the charge sheets. The court found that there was no medical assessment report on mental status of the Petitioner before the charges. DW told the court that they did not establish the petitioner had capacity to stand the trial. The Commanding Officer ought to satisfy themselves on mental status of the accused before the summary proceedings as provided under section 152 to wit:-

'(1) A commanding officer or appropriate superior authority may try an accused person by summary trial if the following conditions are satisfied:-

(e) the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence.

The court finds and determines the 1st respondent failed to meet the legal requirement of satisfaction on the petitioner's mental status.

41. That on charge 1 of being malingering he was convicted on own plea of guilty and fined 5 days pay, charge 2 of insubordinate behaviour convicted on plea of guilty. Charge 3 of Malingering convicted on own plea of guilty Charge 5 on absence without leave he was found guilty and sentenced to jail for 42 days and recommended for discharge from service on service no longer required. Section 155(6) reads: 'Except where expressly provided for by this Act, not more than one punishment shall be awarded under this section for one offence." The court finds that the Petitioner was subjected to more than one punishment under charge 5 contrary to the provisions of section 155(6) of the Act.

42. The Medical Board opinion was that the petitioner had schizophrenia which will not enable him to serve in KDF. (ME -5 (b)).

43. The Board's recommendation was " The ex- service man was sustained mental illness while in service and should be compensated in para 22 below". (ME 5-b).

44. The court is of the considered view that the Petitioner was a mentally sick man which illness was stated by the Board to have been sustained to the accident in Somalia while in service. Still on procedure Section 159 provides for automatic review as follows:-

(1) Upon reaching a determination in relation to any offence tried by the commanding officer, the commanding officer shall, within fourteen days, submit the findings of the trial in writing, to a superior commander for review.

(2) The superior commander shall within fourteen days of receipt of the findings, review the findings and inform the accused person of the outcome of the review, in writing.

(3) The administrative review under subsection (1) shall not preclude the accused person from seeking other legal redress from any other authority provided for under this Act or any other written law, or applying for a review to the Defence Council." The court found no evidence of automatic review of the petitioner's conviction award in contravention of this provision of the law.

45. The foregoing findings of the court led to conclusion by the court that the discharge of the petitioner was not lawful. Section 147 (1)of the act provides summary disciplinary proceedings under this Act shall be guided— (a) by Article 47 of *the Constitution*; and (b) with necessary modifications, and without derogating from the essence of the right or limiting the right to fair hearing of an accused person by Article 50 of *the Constitution*.

46. Article 47 of *the Constitution* reads:-

'(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

47. In the instant case, evidence at cross examination was that the petitioner was not even informed of why he was going home after the imprisonment. He was simply told to return his boots and escorted out. The court finds and determines that the process of discharge of the petitioner from service fell short of the requirements of section 147 of the Act and article 47 of *the Constitution*.

48. In the upshot the discharge of the petitioner from service is held to have been unlawful.

Whether there was violation of the Petitioners fundamental freedoms and rights by the 1st Respondent.

49. The court had already held there was violation of the provision of article 47 of *the Constitution* in the discharge process of the petitioner where his rights to fair administrative action and fair trial were compromised and violated.

50. The Petitioner pleaded that he was subjected to inhuman and degrading treatment in violation of article 25 of *the constitution* as at the time he got the accident he was only being given first aid at the camp despite complain of severe headache and sleep walking which conditions got worse he was not attended by Doctor, that his right to dignity under article 28 of *the Constitution* were violated on being charged with malingering and engaging in inappropriate behaviors which reduced the respect, dignity and his character among his peers and right thinking members of the society, that he was exposed to unfair labour practices for his complaints of effects of the accident were ignored in violation of Article 41 of *the Constitution*, his right to highest attainable standard of health after the accident was violated by Major Shangate who decided his injuries were not severe enough for treatment in violation of article 43(1)(a) of *the Constitution*, that his right to fair trial under article 50 were violated as he was not given viable reason as to why he was dismissed or audience to ascertain if allegations levelled against him held water. The court already made its findings on the discharge process hence will not belabor the issue.

51. On the other allegations of violations of inhuman and degrading treatment , violation of right to highest standard of health and human dignity the court then considers the evidence of the parties.

The petitioner's evidence

52. The petitioner led evidence that he was injured in Amison 111 in Afmadow Somalia which issue was not in dispute. That the in charge Major Shangata Indicated he should remain in the camp grounds stating the injuries were not severe enough. That he received first aid only to start having very severe headaches, dreams and sleep walking which he reported to the doctor in the camp but nothing was done. That the mission was completed in 2015 and he returned to Nyali Barracks when the late Sergent Tigo advised Major Ali who was the doctor at the time the need of check up to find out what was happening as the Petitioner had difficulties in performing duties which he had performed properly before the accident in Somalia. That he started having back pain and could not walk properly, had

memory losses and impaired judgment but instead of treatment he was subjected to the disciplinary proceedings and discharged. The petitioner relied on report of the medical board (ME-5) which indicated he developed the illness while in service.

53. During cross-examination the petitioner confirmed there was a medical camp in Somalia. Asked whether he walked to the camp after the accident, the petitioner told the court that after the accident he found himself at the medical camp. The petitioner told the court it was true he was not allowed to see a doctor, that there was a medical camp for simple treatment and that he had asked to go to Memorial hospital but was refused.

54. PW2 told the court that the petitioner came home a changed man and his wife left. In his evidence he indicated that the petitioner could not take care of himself and had been lost on several occasions. That the petitioner was diagnosed with mental illness.

55. DW told the court on discharge the petitioner disappeared and did not clear and resurfaced in 2018 claiming medical issues and a medical board was convened. The board made a finding of his condition that he was sick of schizophrenia and could no longer serve due to the condition. The board recommended compensation at 30%. During cross examination DW confirmed that the Petitioner had served 7 years and 2 months without disciplinary issues before the accident in Somalia. DW confirmed that when a service man has mental issues at work there was a procedure to assist them and that from their medical records it was clear he was assisted in Somalia. The said medical records of treatment were not produced. DW told the court it was not clear from the record whether efforts was made to find out why the petitioner had not cleared on being discharged.

56. On re- exam DW told the court that normally they had defence forces medical insurance that assists retired officers and offers medical insurance on condition that the service man contributed while serving. That the petitioner wrote stating he no longer wished to be in the scheme.

DECISION

57. The court finds that service men leaving the country to fight in war frontiers like Amison 111 Somalia do that on behalf of the Nation. It degrading to have injured service men discharged from service upon development of complications from such injuries without any support. The court finds that the petitioner was denied proper treatment by a doctor and request for treatment at Memorial Hospital following the injury and specifically on complaining of severe headache and sleep walking. The court found that on return from the mission the 1st respondent did not ensure that the petitioner was afforded the highest standards of medial care as required under Article 43(1)A of our Constitution despite the institution having the great Memorial Hospital for the service men. DW told the court that they had in place procedures to take care of service men with mental issues but there was no evidence the petitioner was afforded the procedures. PW2 the father to the petitioner has now been reduced to be the care giver of the petitioner.

58. The court finds that it is highly unlikely to deploy a serviceman with mental issues to mission like that of Amison 111 Somalia. The court's opinion is supported by the Medical Board report that found the petitioner developed the mental illness after the accident in Somalia. The report was produced by both parties.

59. The court finds the action of taking disciplinary action and subjecting the petitioner while ill to charges which the court finds were related to the Mental illness without investigation as required by the law, and even jailing him for 42 days and the failure to afford him treatment all culminate to gross violation of the rights of the petitioner not to be treated in a cruel, inhuman and degrading manner, right to human dignity, right to health and right to fair trial.

Whether there was in ordinate delay in bringing the petition.

60. The Respondents submit that section 3(2) of the Public Authorities Act (CAP39) provides that no proceedings founded on contract shall be brought against the government or a local authority after end of three years from the date on which the cause of action accrued. That the petitioner failed to adduce sufficient evidence to prove constitutional breaches stated hence the petition is guilty of inordinate delay.

61. The Petitioner did not address this issue.

62. The Court of Appeal addressed issue of time limit in constitutional petitions in Safepak Limited v Henry Wambega & 11 others [2019] eKLR as follows:-

> " 38. Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. In present case, the Judge determined, correctly in our view, that Section 7 of the *Limitation of Actions Act* does not apply to this matter. The Judge was also satisfied that the claim was not defeated under the doctrine of laches. We do not have a basis for interfering with that decision."

63. Before the court was a Constitutional petition which clearly pleaded constitutional violations. Applying this Court of Appeal decision I find and determine that the Public Authorities Act (CAP39) was not applicable in the instant case. The petitioner was discharged from service in 2016 as per the discharge summary. He was a mentally sick man as established by the medical board and sought treatment. The court finds that there was no inordinate delay in filing the instant petition in 2021. The court wishes to reiterate that limitation of actions does not apply to constitutional petitions but inordinate delay should be justified. The mental illness of the petitioner is a good ground to excuse the delay which in any case was not inordinate.

Whether the Petitioner is entitled to reliefs sought

64. The court having found the discharge was unlawful and having found violation of various constitutional rights of the petitioner by the 1st respondent then considered the reliefs sought.

65. The petitioner reiterated that the petitioner had proved constitutional violations and was entitled to reliefs sought. That the petitioner having sustained injuries at work the respondent had duty of care to ensure the petitioner was undergoing treatment and relied on the decision in Kennedy Nyaguncha Omanga v Bob Morgan Limited (Cause No. 1983 of 2011) as cited in Package Insurance Broker Ltd v Simon Gitau Gichuru (2019)e KLR .

66. The court found that the case in Package Insurance Broker Ltd v Simon Gitau Gichuru (2019)e KLR proceeded all the way to the Supreme Court in Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] where the court made the following observations on discrimination of an employee because of a disability which finds are relevant to this case:

> ''11. The respondent ought to have considered the report or even in the least conducted its own investigation as to the appellant's medical condition. An enquiry to justify an incapacity dismissal could take a few days or years, depending mainly on the prognosis for the employee's recovery, whether

any adjustments work and whether accommodating the employee became an unjustified hardship for the employer. To justify incapacity, the employer had to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal.

12. The onus was on the respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. The respondent was hell-bent in wanting to get rid of the appellant from employment to an extent that they had to circumvent the due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary raise due to his hard work. In addition, there was no evidence that investigations were conducted on all other employees during that period and hence he was subjected to different treatment which emanated from his disability. The respondent also failed to demonstrate that they tried to accommodate the appellant in his current state. The actions by the respondent amounted to indirect discrimination due to deferential treatment.

18 .... The fact that the respondent expected the appellant to continue working in the same conditions as the rest of the employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.

19. The issue of gross incompetence was an afterthought. The respondent's action of dismissing the appellant was extremely harsh and they had not reasonably demonstrated what measures they took to accommodate the appellant's condition."

67. The Respondents submitted on burden of proof under section 107 of the *Evidence Act* to wit:-

' (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

68. The Respondents submit that in the case of Gitobu Imanyara & 2 others v Attorney General (2016)e KLR the Court of Appeal held that a person instituting suit must proof damage suffered in order o be awarded damages as follows:-

' In Romauld James v. AGT [2010]UKPC Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:

[28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage

> has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."

69. The Respondents further submit that the petitioner at discharge had done service of 7 years and 66 days to which he was entitled to gratuity and pension and compensation for disability paid in july 2019 which he continues to draw hence not entitled to further relief.

Decision

70. The court found there was gross violation of the constitutional fundamental rights by the 1st respondent through unlawful discharge, failure to accord the petitioner timely and medical treatment of the highest standards following the accident in Somalia which led to mental illness. That the Petitioner was sentenced to imprisonment and dismissal from service under charge 5 which the court found was in breach the law against double sentence for same offence by the commanding officer, his sentences were not even subjected to the automatic review nor was he treated for the mental sickness though DW told the court that they had in place procedures for assisting service men with mental issues. The court did not put weight to fact of lack of appeal by the petitioner considering he had been found to have mental illness by the medical board. An automatic review would have surfaced to find he was sick and the proceedings were irregular having been commenced without any investigations as per the evidence before the court.

71. The parties authorities are highlighted above. The court finds that the charges on the petitioner were an afterthought the 1st respondent having heard of the complaints on sudden non- performance issues and the conduct of a returning soldier from mission who had an accident in the mission. Instead of medical attention disciplinary charges were promptly instituted and without investigations and according fair trial rights the petitioner who was convicted on all charges and even imprisoned.

72. The court finds that the compensation at 30% for disability was an afterthought and measly. The Medical board of the 1st Respondent having found the accident resulted to permanent disability the petitioner was later paid at 30% of the disability. The court finds that the award was negligible for permanent disability case.

73. The court finds that the petitioner proved damages suffered as per oral evidence of witnesses of facts and the medical board report which stated as a result of the said accident he is permanently disabled and PW2, the father, told the court he is now reduced to his caregiver as the petitioner due to lost memory gets lost when left on his own. The constitutional violations in the instant case deserve monetary compensation. The gratuity and pension payable to the petitioner are with respect to service and not related to the violations of his constitutional rights. The compensation at 30% which the petitioner told the court he was paid KES 350,000/- was with respect to the accident and not the violations the petitioner suffered as an individual human being entitled to protection of the law.

74. The court holds that this was an ex service man who has paid the price of protecting our boarders with his life which from the medical report of the Board is literally over as he now needs a caregiver for life and medication. The board found he could no longer serve due to the condition. In deciding on the

amount of compensation the court was guided by the jurisprudence set out in Gitobu Imanyara & 2 others v Attorney General (2016)e KLR cited by the respondents in considering the award as follows:-

> '' In Romauld James v. AGT [2010]UKPC Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:
>
> [28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated."

75. Further the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General (2016) in addressed the appropriate relief to protect the rights that had been infringed and the amount to be awarded as follows:-

> ''The position of the Privy Council is in no way altered by the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:
>
> " ...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.
>
> "...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."
>
> In Peters v. Marksman & Another [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported), where the Court held that:
>
> " It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme

law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory."

The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 to include, a remedy that will :

(1) meaningfully vindicate the rights and freedoms of the claimants;

(2) employ means that are legitimate within the framework of our constitutional democracy;

(3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.''

Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.''

76. Applying the foregoing jurisprudence set by the Court of Appeal on compensation for the violation of constitutional rights of the individual, having found fundamental human rights to human dignity of the petitioner were grossly violated by the 1st respondent, the court checked past awards for violations of constitutional rights concerning service men. In Lieutenant Colonel Lukale Moses Sande v Kenya Defence Forces & Another [2018]eKLR the court awarded where the court awarded Kshs 20,000,000/- (Twenty Million Kenya Shillings) as compensatory damages to remedy the said violations through the respondents' illegal and unfair actions. In the alternative to foregoing award, the respondent was free to reinstate the claimant to his commission without loss of benefits within 30 days hereof. In Joseph Kipkemboi Tanui v Chief of Kenya Defence Forces & 2 others [2019] eKLR the court held:

--'The petitioner urged the court to follow Lieutenant Colonel Lukale sande v Kenya Defence forces & another [2018]eKLR where an award of Kshs.20,000,000 was made for related violations. However, as I have observed herein above, the facts of the said case are distinguishable from this case in terms of the number and the magnitude of the violation, and also the expected time of service before retirement. Accordingly, I award the petitioner Kshs.3,000,000 for the violation of his constitutional right declared above.

77. The court noted that in the above cited decisions none of the servicemen in the above decisions had suffered severe violations like the petitioner. His case was unique as he was disabled permanently which the court attributed to the conduct of the 1st Respondent. Further he was treated in a cruel and inhumane manner and unfairly in Somalia and in return from mission, in the trial and in the sentencing and discharge. In the instant case the court finds that the individual dignity of the petitioner having been violated by the cruel and degrading manner he was treated and considering the lack of medical care to the injury which the court finds led to the permanent disability, the court finds the petitioner deserved bigger compensation. The petitioner who received New Constitutional Medal(ME2A) and served in Amison III in Somalia as his last mission cannot be condemned to life of misery and indignity due to acts and omissions of the 1st Respondent. His condition was attributed to injuries sustained protecting the borders of our country and /or in pursuit of the Petitioner's interests in Amison III in Somalia (ME-5 see full Medical Board report). PW2 told the court that the petitioner had a wife and children who ran away due to his violence tendencies. The children need upkeep by their father. He is now an invalid requiring full time care. The tax payers should take care of the petitioner and not his aging father as the 1st respondent failed in its duty of care towards its own service man. The court knows it cannot value human life. Considering the jurisprudence under the Gitobu Imanyara case (supra) the court awards compensation of Kenya Shillings Thirty Million as compensation for the violation of the constitutional rights of the petitioner. The award should suffice to cater for also the loss of earnings and future medical needs. The court is of the opinion that the order of Judicial review of Certiorari sought to quash the decision of the 1st respondent, though deserved, would be in vain considering the medical board opinion that the petitioner could no longer serve due to the metal illness resulting from the injuries sustained in service.

Conclusion and disposition

78. The Court having found the disciplinary proceedings and discharge was unfair and having found violation of fundamental rights of the Petitioner not to be treated in cruel and unfair manner and in violation of human dignity the court enters judgment for the petitioner against the respondents jointly and severally as follows:-

    1. A declaration that the dismissal of the petitioner from service was unlawful.
    2. A declaration that the 1st respondent breached the petitioner's constitutional rights under article 25(a), 27,28,29(f),41(1)43(1)(a),47(1) and 50 of *the Constitution* of Kenya
    3. A declaration that the termination of employment against the petitioner was discriminative, unlawful. Unfair, unprocedural and a fundamental violation of the rights of the petitioner.
    4. Award of compensatory damages of Kenya shillings Thirty Million (KES 30,000,000).
    5. The respondents to bear costs of the petition
    6. Interest is awarded at court rate from date of judgment to date of payment in full.
    7. Right of appeal of 30 days granted.

79. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 28TH FEBRUARY, 2023.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Petitioner :- Komora holding brief for Nekesa

For Respondents: Absent