



**Mugure v Ministry of Defence & another (Employment and Labour Relations
Petition E011 of 2021) [2023] KEELRC 1994 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1994 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E011 OF 2021
ON MAKAU, J
JULY 31, 2023**

BETWEEN

PETER MWAURA MUGURE PETITIONER

AND

MINISTRY OF DEFENCE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner was formerly a commissioned officer serving as a Major in the Kenya Airforce at Laikipia Air Base but he is now remanded at King'ong'o Maximum Prison Nyeri facing murder charges. It is common ground that on 25th and 26th October, 2019 he received and accommodated three civilian guests in his officer's mess at the Laikipia Air Base, allegedly with permission from the chairman of the Mess Committee who was also the acting Base Commander. The said guests namely, Joyce Syombua 31 years, Shanice Maua 10 years and Prince Michael 5 years were reported missing thereafter and their bodies discovered from a shallow grave after investigations. The petitioner was then charged as indicated above and the matter is still in court.
2. After the arrest of the petitioner and before his arraignment in court for the murder charges, the petitioner was on 18th November, 2019 taken through a summary disciplinary process before the Base Commander which culminated in a sentence for future of seniority for three months in each of the two offences charged. The Base commander also acknowledged receipt of petitioner's letter requesting for resignation from his commission but the Base Commander recommended for a termination of the commission citing the gravity of the petitioner's offence. The service commander also recommended for the termination of the petitioner's commission and it was done on 18th November, 2019 and commenced on 3rd May, 2020. Hence the petitioner brought this petition dated 6th July 2021 alleging



that his constitutional rights to fair administrative action and fair hearing under Article 47 and 50 of [*the Constitution*](#) were violated. The petition seeks the following reliefs:-

- a. A Declaration that the summary trial of the petitioner was unprocedural, irregular and/or illegal for not meeting the requirements of the KDFA and the requirements of [*the constitution*](#) under Article 50 and thus unconstitutional and null and void.
 - b. A Declaration that the administrative action taken against the petitioner was not fair and did not meet the constitutional threshold under Article 47 of [*the constitution*](#).
 - c. A Declaration that other than the failure to meet the statutory and constitutional requirements the procedure followed in the trial and punishment of the petitioner was not in accordance with the rules of natural justice.
 - d. A Declaration that the termination of the petitioner's commission without benefits having been irregular, unfair and contrary to the rules of natural justice was unlawful and unconstitutional.
 - e. An Order for reinstatement to his employment or his commission and payment of all his salary which was withheld.
 - f. An order for award of damages.
 - g. An Order in alternative to the prayer for reinstatement in (e) above for the petitioner to be paid his full remuneration and benefits inclusive of his pension from the date of termination of his communication to his retirement together with interest thereon until payment in full.
 - h. An Order for his compensation for the disability occasioned whilst in the course of duty in 2010.
 - i. An Order that the costs consequent upon this petition be borne by the Respondent.
 - j. Any other orders that this Honourable court shall deem fit and just to grant.
3. The respondent filed notice of preliminary objection dated 10th March 2022 and a Replying Affidavit but the objection was dismissed vide a ruling of the court dated 16th September, 2022. In brief the respondents averred that the termination of the petitioner's employment was done lawfully for offences he admitted and after following the due process set out by the law. Therefore the alleged constitutional violations were denied and the court urged to dismiss the petition with costs.

Petitioner's Evidence

4. The petitioner filed Affidavits and bundle of 9 documents which were not objected to by the respondents. He further testified orally in court on 15th November, 2022 as PW1. His evidence in brief is that he was enlisted in the Kenya Defence Forces (KDF) on 21st January, 2007 and served the country at home and abroad. His last station was Laikipia Air Base (LAB) where he was posted in July 2019 as the in charge of Command and Leadership School. He was also a senior instructor there.
5. After serving for barely three months, he was arrested on 15th November, 2019 for alleged murder case and instead of being placed on interdiction on half pay, he was taken through disciplinary process which did not comply with Article 47 of [*the Constitution*](#).
6. He stated that on 17th November 2019 at around 1500 hours he was informed that he would be tried before the Base Commander on 18th November 2019 under the KDF Act. On the said date he faced two charges contrary to Section 77 and 121 of the [*Kenya Defence Forces Act*](#), which do not prohibit



- one from entertaining guests if he has approval from the Base Commander or chairman of the Mess Committee. The trial took less than ten minutes and was more of a summary conviction than summary trial.
7. He stated further that Section 158 of the [Kenya Defence Forces Act](#) provides for review of the verdict by a higher authority but no review was ever communicated to him despite his appeal. Further this termination of his commission on 13th May, 2020 was unlawful since once a sentence commensurate to the offence is meted out under Section 155 of the Kenya Defence Act, higher authority was not entitled to enhance it to a more severe sentence.
 8. He further stated that he was not accorded 24 hours notice prior to the summary trial contrary to Rule 18(1) of the Military Rules of Procedure of 1969. The said rule imposes a duty on the commanding officer of Appropriate Superior Authority (ASA) to ensure that a minimum of 24 hour notice is served on the accused officer. Further, the commanding officer violated Section 152 (1) (e) of the [Kenya Defence Forces Act](#) by failing to take into account the readiness or otherwise of accused to stand trial, and his mental fitness. The petitioner maintained that he was not mentally fit to stand trial as he was under stress due to the missing family members.
 9. On the other hand, the petitioner contended that the Base Commander was not impartial and independent since he was the complainant and the Judge of his case. Further the procedure followed was meant to hastily remove him from the military law in order to face trial before civil court.
 10. He contended that although he wrote a resignation letter, the Defence council never responded within 14 days as required under Section 249(8) of the [Kenya Defence Forces Act](#). Instead he received a termination of commission and no reason why his resignation was not approved. He maintained that the termination was unlawful as he never admitted the charges against him during the summary trial.
 11. On cross-examination, he stated that his last salary was received in April 2020. He further stated that he was brought from police custody to appear before his commanding officer (Lt.Colonel) for trial which was wrong since a commissioned officer should be tried by another officer two ranks above him. His case was however done by the Base Commander, a Brigadier who was not his ASA for purposes of his trial. The proper ASA ought to have been a Colonel.
 12. He contended that under Section 159 of the [Kenya Defence Forces Act](#), an officer facing summarily trial cannot be punished by termination of his commission. He contended that only under section 251 of the Act can termination of commission be meted out. He appreciated the chain of command and contended that termination of commission can only be done by the Defence Council upon recommendation by the service commander.
 13. He admitted that when he appeared before the Base Commander he took an oath and then answered in the negative the question whether he had been served with Abstract Evidence 24 hours before. He further stated that the Base Commander told him not to worry about formalities. He denied that he was given an option to chose between summary trial and court martial process. While being escorted back to the police station, the Base Commander followed him to the parking yard and demanded him to sign the award.
 14. He reiterated that his visitors came on 25th October 2019 and that same day he spoke to the chairman of the Mess Committee about his visitors. He further admitted that he spoke to him again on 27th, 28th and 29th of October. He confirmed that he was the principal assistant to the Base Commander and Field officer.



15. He stated that Section 159 of the Kenya Defence Act provides for automatic review process but admitted that subsection (3) grants accused person the right to pursue review. Finally, he confirmed that by his letter dated 8th June 2020, he requested for consideration of his GPA which was time barred.
16. On re-examination, he contended that he was supposed to be tried by his ASA but he was tried by his superior Authority; that his summary trial was not done in accordance with the law and it violated all the norms known to law including jurisdiction; lack of prior notice; lack of impartiality as the Base Commander was conflicted; failure to verify mental fitness before the trial; failure to communicate the award to him; the chairman Mess Committee was not called to rebut the allegation that he was notified of the visitors; that the charge sheet was signed by the Commanding officer, Base Commander and Service Commander on 18th November, 2019; and that he was never served with any verdict or review by the Base Commander and the Service Commander.
17. The respondents never called any witnesses but relied on the Replying Affidavit sworn by the Staff Officer II Records Mr. Jackson Kimathi Muthee on 4th March 2022 and a bundle of documents referred to in the affidavit. The documents were given to the court after the close of the hearing including:-
 - a. Loose minutes for the Defence Council Approval Termination of Commission officers dated 18th November, 2019.
 - b. Letter dated 18th November 2019 by Kenya Defence Force Service Commander to the Chief of Defence Forces recommending for rejection of the petitioner's written resignation and instead his commission be terminated.
 - c. Request for investigations dated 7th November, 2019 (two letters).
 - d. Investigator's statement of No.xxxx Captain Rose Kuria.
 - e. Summary of proceedings before Base Commander Moi Air Base on 18th November, 2019.
 - f. Handwritten statements recorded by the investigator between 15th and 17th November, 2019
 - i. SGT Frankline Ochieng Odoyo.
 - ii. SPTE Dorothy Akinyi
 - iii. SPTE Hussanael James Randa
 - iv. SPTE Paul Mwanzia Kimetu
 - v. SPTE Moses Muthiani Mbindo
18. The petitioner's counsel agreed to the proposal by the defence council and the hearing was closed.

Petitioner's submissions

19. It was submitted for the petitioner on the following issues:
 - a. Whether the petitioner's constitutional rights to fair trial were violated and whether the violations are capable of upsetting the decision by the trial authority.
 - b. Whether the petitioner's commission was lawfully terminated and if not whether reinstatement can be ordered.
 - c. Whether the administrative commission and omission of the respondents were lawful and/or lawful.



- d. Whether the petitioner is entitled to compensation by the respondents for physical disability occasioned in active duty.
 - e. Whether the petitioner's constitutional rights have been violated by the Respondent.
 - f. Who meets the costs of the suit.
20. On the first issue it was submitted that on 18th November, 2019, the petitioner was subjected to summary trial under section 147 of the *Kenya Defence Forces Act* before his Base Commander which process was a nullity because it went against the right to fair administrative action and fair hearing under Article 47 and 50 of *the Constitution*.
 21. It was submitted that the Base Commander who presided over the trial was not the petitioner's ASA because he was more than two ranks above the petitioner. Further the trial Authority was not in accordance with the Armed Forces Rules of Procedure, 1969 (LN 249/1969) and the Third Schedule to the Act. It was submitted that rule 18 of the above rules was violated because the petitioner was not given 24 hours' notice after being served with the Abstract of Evidence by the investigator.
 22. It was further submitted that the petitioner's allegation that the Abstract was served on 17th November 2019 at 1517 hours and hearing done on 18th November 2019 at 0900 hours, was not controverted and the copy of Abstract Evidence signed by the petitioner has not been produced as evidence. It was also submitted that the allegation that the commandant KTW brought the documents to the petitioner to sign while on route to Nanyuki Law Courts was also not been controverted.
 23. It was again contended that the offence of irregular booking of visitors has not been substantiated by production of visitors' register book and the chairman of Mess committee has also been called to give evidence to rebut the allegation that he had permitted the petitioner to host his visitors in the Mess. Consequently, the petition urged that the reason for termination of his services was the criminal case he was facing and not hosting his family in the mess.
 24. As regards the defence case, the petitioner submitted that the affidavit evidence by the respondents without oral testimony from the relevant witnesses cannot shake his oral testimony and the affidavit evidence. Reliance was placed on the case of Joseph Ndung'u Kagiri v Republic (2016) eKLR where the court held that *the constitution* did not anticipate a trial that is too speedy to the detriment of an accused person but one that begins and ends without unreasonable delay. Further reliance was placed on the case of Peter M.Kariuki v Attorney General (2014) eKLR where both the High court and the Court of Appeal held that an officer facing court martial trial is entitled to adequate time to prepare a defence.
 25. It was contended that the haste in which the petitioner was tried was not justified as Section 153 of the *Kenya Defence Forces Act* allows the respondents upto three (3) years to investigate and charge an accused officer. In the petitioner's view the haste in the trial was due to pressure from reports in mainstream and social media that missing family of a senior KDF officer had been found murdered. The said report was published just a day before his arrest.
 26. Accordingly it was submitted that the dismissal of the petitioner from the military was contrary to Article 236(b) of *the Constitution* which bars dismissal, removal of public office, or demotion in rank without following the due process of the law. Reliance was placed on the Peter M.Kariuki case, supra where the court held that rules designed to ensure justice should be scrupulously followed and courts should see that there is no breach of the same.



27. Further reliance was placed on the Joseph Ndungu Kagiri case, supra where the court held that the court is the custodian of the law and ought to ensure that the constitutional safe guards are jealously protected and upheld at all times.
28. It was submitted that the petitioner's exhibit 'JKM1' which was used by the respondents to make adverse decision against the petitioner was not an admission of guilt or a confession. It was argued that Rule 9(3) and (4) of the Rules of Procedure for summary trial do not countenance admissibility of any self-recorded, handwritten statements by an accused military personnel.
29. It was reiterated that the petitioner's rights to fair administrative action and fair hearing were grossly undermined and violated on account of public outcry, in relation to criminal charges he faced and not availability of evidence. To fortify the foregoing view, reliance was placed on the case of Judicial Service Commission v Daniel Ochanja (2020) eKLR where the court observed that a decision made in breach of rules of justice is a nullity even the same decision could have been arrived at after following the rules of justice. Further reliance was placed on the case of Benjamin Muema v Attorney General & 2 others (2006) eKLR where the court held the proposition that departure from the mandatory procedures laid down by the Act, Rules and standing orders is fatal.
30. On the other hand, it was submitted that when the ASA decides to place an accused officer under summary trial as opposed to court martial under section 152 of the *Kenya Defence Forces Act*, he considers the gravity of the offence and the sufficiency of the punishment stipulated under Section 155 of the Act. Consequently, it was submitted that the forwarding of the verdict by the Base Commander (ASA) to higher authorities was under unclear circumstances and the petitioner was denied his right of appeal or to seek review to the superior Authority above the trial authority and all the way to the Defence council.
31. In the end it was submitted that the haste summary trial of the petitioner breached the rules of procedure and Kenya Defence Forces guidelines, constitutional provisions on fair hearing and fair trial, and Rules of Natural justice. Consequently, the summary trial and the decision therefrom were null and void, and the court ought to quash the same.
32. For the reasons highlighted above, it was submitted that the termination of the petitioner's commission was unlawfully terminated. Further it was submitted that the failure to respond to the petitioner's resignation letter was unlawful and contrary to section 249(7) and (8) of the *Kenya Defence Forces Act* which requires the respondent to either accept or decline a request for resignation within stipulated time lines. It was submitted that ignoring the request for resignation and terminating the petitioner's services without benefits was without legal basis and therefore unreasonable, unfair, invalid, illegal, unlawful and unconstitutional.
33. It was further submitted that the termination of commission based on the decision from the summary trial before the petitioner's Base Commander on 18th November 2019 was unlawful because, a decision to terminate the commission of a KDF officer cannot lawfully flow from a review of a decision from summary trial award by the Defence Council. That, section 155 of the *Kenya Defence Forces Act* sets out the punishments available to a commanding officers and ASA which do not include dismissal. He argued that the review of the punishment by a Superior Authority under Section 158 of the Act can only be up scaled to the highest limit provided under Section 155 of the Act and as per section 159 of the Act it cannot be done to the prejudice of the accused officer.
34. In the petitioner's view the alleged offence was a minor one and that is why the commanding officer placed him under summary trial as opposed to court martial process. Further, it was submitted that the Defence council cannot dismiss an officer after the summary trial since that is only allowed where



the officer is tried and convicted by court martial under Section 180 of the *Kenya Defence Forces Act* and then he is served with a show cause letter to defend himself. Consequently, it was submitted that the termination of the petitioner's commission was in breach of the procedure for discharging military personnel provided under section 243(1), (3) (a) and (b) of the Kenya Defence Force Act and Article 47 of *the Constitution*, and therefore he is entitled to an order for reinstatement to his job.

35. It was further submitted that the failure to interdict the petitioner on half pay pending his trial in the murder case and stoppage of salary on 13th May, 2020 was unfair and unreasonable. The court was therefore urged to reinstate the petitioner to his job and order for payment of his withheld salary from 13th May, 2020 till now.
36. As regards the claim for compensation for permanent physical disability suffered while in active duty in September 2010, it was submitted that Section 245 of the Kenya Defence Force Act entitles the petitioner to compensation and medical care even after his contract of service.
37. On the basis of the reasons highlighted above, it was submitted that the petitioner's constitutional right to fair hearing, right to fair administrative action, fair labour practices right not be discriminated on account of physical disability, right to be treated with human dignity have been violated by the respondents and the petitioner is entitled to the reliefs sought in his petition. Therefore the court was urged to grant the petition plus costs.

Respondent's submissions

38. The respondent submitted on the following issues:-
 - a. Whether the petition is properly before the court.
 - b. Whether the summary disciplinary proceedings were lawful.
 - c. Whether the termination of the petitioner's commission was lawful.
 - d. Whether the petitioner is entitled to legal representation at the public costs in the triple murder case against him.
 - e. Whether the petitioner is entitled to compensation.
 - f. Whether the petitioner is entitled to the disability claim.
 - g. What orders should issue?
39. To begin with, it was submitted that the command, control and administration of the Kenya Defence Forces is implemented through the chain of command set out under section 6 to 30 of the Kenya Defence Force Act and which is strictly followed except where looping is permitted by the law.
40. As regards the first issue for determination, it was submitted that since the dispute is based on alleged violation of Article 47 of *the Constitution*, the petitioner ought to have filed a Judicial Review application and not petition.
41. As regards the second issue for determination it was submitted that the summary proceedings were lawful because a request for investigation was raised in accordance with Section 150 of the *Kenya Defence Forces Act*; that the investigations were done and statements were recorded from 7th to 17th November, 2019; that the petitioner was served with an Abstract Evidence; and that continuing to detain the petitioner before trial would violate his constitutional rights. Further that, Regulation 19 of the Armed Forces Rules of Procedure 1969 provides that during a summary trial, an accused person may give evidence on oath, make unsworn statement or hand in a written statement.



42. It also submitted that the petitioner has not adduced any evidence to prove that the trial authority (Base Commander) was biased. It was further submitted that summary trial is not criminal proceedings and therefore the rules of procedure and standards of proof is below that of criminal justice.
43. It was contended that the allegation that the Base Commander was not the proper ASA for his summary trial is without merits considering the definition of ASA under section 149 of the [Kenya Defence Forces Act](#) and Rule 28 of the Kenya Defence Forces Rules of procedure 2017. It was submitted that under the said Rule, a Colonel or a Brigadier are qualified to be ASA for an accused officer of the rank of Major. Consequently, in this case it was submitted that the Base Commander being a Brigadier was a proper ASA to try the petitioner. Further the Base Commander never self-appointed himself to try the petitioner but rather he had the power under the law by being the formation commander under the law. It was therefore contended that it would be absurd to say that the Base Commander who was three ranks above the petitioner, with delegated powers from the service commander could not try the petitioner.
44. As regards the alleged failure to notify the petitioner of the decision of the trial authority and denial of the right to pursue review, it was submitted that the review was done by the service commander who upheld the decision and the award by the trial authority. That the petitioner has indeed produced as exhibit the evidence of the said review in the documents marked “3A” and “3B”. It was further submitted that communication of findings and award is done through directions to the unit through the chain of command and publication in the Unit orders.
45. As regards termination of the petitioner’s commission, it was submitted that the same was lawful. It was submitted that the summary disciplinary proceedings and the administrative function of termination of commission are two separate processes. The first process ended with a review by the service commander which upheld the findings and award by the trial Authority that is forfeiture of seniority.
46. On the other termination of commission is an administrative function of the Defence council done under Section 251 of the [Kenya Defence Forces Act](#) and has nothing in relation to the trial and review of awards under Section 155 and 158 of the Act. However, it was clarified that the summary award granted under section 155 of the Act may inform the reason for termination of a commission by the Defence. It was therefore submitted that it would be absurd to allege that Kenya Defence Forces became functus officio after the award given to the petitioner under section 155 and review under section 158 of the Act.
47. In view of the foregoing submission, it was argued that the termination of the commission was lawful and procedural as the Defence council complied with Section 251 of the Act. That the council has discretion as to the reason for the termination of a commission and therefore to defeat the decision one must demonstrate unreasonableness of the decision. Such action according to the respondents can only be done through Judicial Review action under Article 47 of [the Constitution](#) and not by a petition.
48. It was further submitted that the petitioner’s submission that termination is only possible after a court martial process is misconceived. It was argued that both court martial and summary trial are disciplinary proceedings whose outcome may inform the reasons for termination of the commission by the Defence council. It was clarified that termination is not a punishment under Section 180 of the [Kenya Defence Forces Act](#) but a preserve for and at the discretion of the Defence council under section 251 of the [Kenya Defence Forces Act](#).
49. It was further submitted that termination of commission without benefit is provided for under section 251 and 244 of the [Kenya Defence Forces Act](#). That the decision to terminate commission without



benefits is at the discretion of the Defence council and it can only be challenged on ground of unreasonableness. The discretion to terminate a commission is exercisable by the Defence council upon grounds set out under section 249 of the *Kenya Defence Forces Act* including ceasing to meet qualification for a commission. Subsection (5) (e) provides that one qualification for a commission is trustworthiness and exemplary character which according to the respondents, the petitioner ceased to meet the same after he was found guilty by the trial authority and an award meted against him of forfeiture of seniority in rank of six months. It was argued that the said forfeiture automatically recalibrated the petitioner's position within he chain of command as regards his precedence pursuant to section 292 of the *Kenya Defence Forces Act*.

50. It was submitted that the Laikipia Air Base acts as the fighting base for the Kenya Air Force in discharge of its mandate to secure the Kenyan airspace against external aggression and as such its security is very critical. Further that, the petitioner being the Field officer there, he was tasked to ensure that all sentry positions for the Base were properly manned and all entries into the Base were in accordance with the laid down procedures. However, it was argued that, the petitioner failed in his duty and was found guilty by the trial Authority of irregular booking of visitors into the Air Base.
51. It was further submitted that, the service commander herein received the findings and award by the trial authority through the chain command and upon review, he wrote a letter to the Chief of Defence Forces in line with the chain of command recommending for rejection of the petitioner's resignation letter and a termination of his commission. In considering the recommendation by the service commander, the Defence council had to grapple with the question whether the petitioner is a fit and proper person to serve, and secondly whether he would have a trustworthy and exemplary character.
52. To answer the said questions, it was submitted that, the Defence council had to be guided by the records of the petitioner including the outcome of the summary proceedings, the gravity of the offence committed and the area of operation. It was submitted that the Defence council in exercise of its powers under section 251 of the *Kenya Defence Forces Act* considered the above matters and found that the conduct by the petitioners had the effect of compromising security of the Base and adjudged him unfit to serve. The decision was communicated and according to the respondent the request for resignation became irrelevant. It was further observed that the petitioner has disowned the said resignation letter under oath in this case.
53. In review of the above submissions that the termination of the petitioner's commission was lawful and procedural, it was argued that the petitioner is disentitled to the claim for compensation. Further it was submitted that there is no proof of violation of the petitioner's rights, and therefore the claim for compensation including the claim for half salary pending his criminal case ought to be rejected.
54. The court was further urged to reject the claim for work related disability on grounds that it is time barred. It was further submitted that the claim is improperly before this court as the matter falls with the jurisdiction of the Director of Occupational Safety and Health Services. In conclusion the court was urged to dismiss the petition with costs.

Issues for determination

55. Having considered the petition, the supporting Affidavits, Replying Affidavit, the petitioner's oral testimony in court, and the written submissions filed by both sides, it is a fact that the petitioner was formerly employed as a commissioned officer in the Kenya Defence Forces serving in the rank of a Major. It is also a fact that on 25th and 26th October, 2019 he received and hosted a lady and two minor children in his room at the officers Mess in Laikipia Air Base. It is further a fact that the said visitors



were later reported missing and their bodies found buried in a shallow grave in a cemetery. It is common ground that the petitioner was arrested, summarily tried by his Base Commander and sentenced to forfeit seniority for six months. It is also common ground that the petitioner was charged with the offence of murder in the High Court and the trial is not yet concluded. Finally, it is common ground that the petitioner wrote a resignation letter dated 14th November 2019 but the same was rejected and instead his services were terminated based on the outcome of his summary trial.

56. The issues for determination in this petition revolves around the legitimacy and the substance of the proceedings leading up to the termination of the petitioner's commission. Since the parties did not agree on the issues for determination, I have framed the following as the main issues for determination:-
- a. Whether the summary trial under Section 155 of the *Kenya Defence Forces Act* and termination of commission under Section 251 of the Act are separate and distinct processes.
 - b. Whether the summary trial met the constitutional and statutory threshold.
 - c. Whether the termination of the petitioner's commission met the constitutional and statutory threshold.
 - d. Whether the petitioner is work injury claim is time barred and/or improperly before this court.
 - e. Whether the petitioner is entitled to the reliefs sought.

Summary trial and termination of commission

57. The respondents have maintained that the process of summary trial and termination of commission are two distinct processes as provided under Section 155 and 251 of the *Kenya Defence Forces Act*. It is further submitted that the only link is that the outcome of the summary trial may form the reason for terminating an officer's commission. The petitioner did not come out clear on the said distinction and seemed to suggest that the two process formed the same continuous process in which the award of forfeiture of rank for 6 months was enhanced in a review through the chair of command and culminated into a termination of his commission.
58. I have carefully considered the provision of Section 155 and 251 of the *Kenya Defence Forces Act* in order to answer the question at hand. Section 155 indeed provides the disciplinary procedure in relation to commissioned officers and cadets. The process starts by a hearing before the commanding officer or the ASA if a referral is made by the commanding officer. If after the hearing the officer is found guilty, an award is meted out from the list set out under Section 155(5) of the Act.
59. Under Section 158 of the Act the award of the trial authority can be reviewed by a reviewing authority and the sentence may be enhanced, reduced or upheld. However any enhancement, of the punishment by the reviewing authority cannot exceed the scale set out under Section 155 of the Act. Further any variation of the punishment from the original award that prejudices the accused officer cannot be made without first according the officer an opportunity of being heard or of making written representations to the reviewing authority. (see section 158 (3) of the *Kenya Defence Forces Act*)
60. Subsection (4) defines a reviewing authority as;
- 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



- d. The Defence council.
61. The foregoing notwithstanding, Section 159 provides for automatic administrative review process where the summary trial was done by the commanding officer. In such a case the commanding officer is required to forward the findings in writing to a superior commander within 14 days for a review. Thereafter the superior commander is to review the finding within 14 days and inform the accused officer of the outcome in writing. Subsection (3), however, provides that the said administrative review does not preclude the accused officer from seeking legal redress from any other authority provided under the [Kenya Defence Forces Act](#) or any other written law, or applying for a review to the Defence Council.
62. In view of the foregoing analysis it is clear that summary trial process is a distinct disciplinary mechanism that starts with the hearing by the trial authority under section 155 of the [Kenya Defence Forces Act](#) and ends with a reviewing authority under section 158 or 159 of the Act. Under the said process termination of commission is not one of the punishment prescribed for commissioned officers under Section 155 of the Act.
63. On the other hand, Section 251 provides for termination of commission as follows:-
- a. By the President if the officer is above the rank of Major or corresponding rank or above
 - b. By the Defence Council if the officer is in the rank of Major or corresponding rank or below.
 - c. By a service commander if the officer of any rank is serving in his first 18 months of his actual commission.
64. The section provides that the termination shall be subject to Article 47 of [the Constitution](#) and the President, Defence Council or the Service Commander shall accord and specify the reasons for the termination of the commission to the affected officer in writing. This is a distinct process which is at the discretion of the terminating authorities set out under Section 251 (1) (a) (c) above upon reasons to be specified and given to the affected officer in writing. The reasons are not set out under the Act but in this court's opinion, they should reflect the qualifications for the conferment of the commission by the president under Section 249 (5) of the [Kenya Defence Forces Act](#).
65. Arising from the foregoing analysis of Section 155-159 and 249-251, it is clear that summary trial and termination of commission of an accused Kenya Defence Forces officer are two separate and distinct disciplinary processes. The summary process starts with the summary trial before a commanding officer or ASA and ends with a reviewing authority, subject to the officer seeking review directly to the Defence council. On the other hand, termination of commission is a preserve of the president, Defence council or Service Commander according to the categorization of the affected officers set out by Section 251 of the [Kenya Defence Forces Act](#).

The summary trial process

66. The petitioner's case is that the summary trial on 18th November 2019 was not done in accordance with Article 47 and 50 of [the Constitution](#) and it breached the rules of natural justice. He contended that the trial authority was not properly constituted as the Base Commander appointed himself, the ASA yet he was more senior than what is provided under the law. He further contended that he was tried before the lapse of 24 hours from the time he received the Abstract of Evidence contrary to the Rules of Procedure. He also faulted the Base Commander for hurrying the process without any evidence to substantiate the alleged offences due to pressure from social and mainstream media. He further faulted the commander for failure to establish his mental fitness to undertake the trial. He contended that the



- failure by the respondent to produce the copy of the Abstract Evidence he signed is meant to conceal the fact that he was not given 24 hours before the summary trial. He further faulted the respondent for failure to serve him with the decision of the trial authority and the reviewing authority and thereby denying him the right to seek review.
67. The respondent contended that here was evidence to substantiate the charges against the petitioner including his own written statement and his own plea of guilty before the trial authority. Further that, any delay of the proceedings would have violated the petitioner's own rights by continuing to remain in custody of the police. It was also urged that the petitioner confirmed to the trial authority that he had been given sufficient notice before the trial and that he was ready for the hearing.
68. As earlier observed, summary disciplinary proceeding under Part VIII of the *Kenya Defence Forces Act* are to be guided by Article 47, and also 50 of *the Constitution* with necessary modifications. Section 148 then gives the commanding officer or Appropriate Superior Authority (ASA) the power to summarily deal with disciplinary offences. Appropriate Superior Authority has been defined under Section 149 as the Chief of Defence Forces, Service Commander or an officer not below the rank of Lt.Colonel or corresponding rank but not below the rank of the accused person. In addition Section 152 gives the condition to be noted before a commanding officer or ASA can try an accused person which includes;
- a. The commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or suffered mental disorder at the time of committing the offence.
 - b. The commanding officer laid the charge or caused it to be laid or he is not the complainant.
69. Section 153 gives a period of 3 years within which to try the accused person from the date of the commission of the offence. Section 154 then entitles an accused person to present his evidence and call witnesses during the hearing and the same to be considered by the trial authority before imposing the punishment.
70. In this case the petitioner was charged with disobedience to standing orders contrary to Section 77 of *Kenya Defence Forces Act* and conduct to the prejudice of good order and discipline contrary to Section 121 of the *Kenya Defence Forces Act*. There is no evidence adduced by the petitioner to prove that the commanding officer laid the charges or caused the charges to be laid or he was the complainant in the said charge. There are two letters dated 7th November 2019 requesting for investigation of the petitioner for the said offences. There is no indication of the primary source of the complaint against the petitioner. All what the respondent says in the Replying Affidavit is that the 1st respondent received a complaint that the petitioner had irregularly booked and entertained guests at the single quarters of the Laikipia Air Base on 25th October, 2019 without permission from the Base Commander or the chairman of the Mess Committee, and further that the said guests disappeared upon leaving the quarters. Accordingly, on 7th November, 2019 the petitioner's commanding officer requested the military police Battalion at Gilgil, pursuant to Section 150 of the *Kenya Defence Forces Act*, to investigate the complaint against the petitioner.
71. I have perused Section 150 of the Act and confirmed that when an accusation is made against a KDF officer for any offences under Part VI of the *Kenya Defence Forces Act*, to the commanding officer of the accused officer, the commanding officer shall forward the complaint to the military police for investigation in the prescribed manner. In view of the said provision I don't see conflict of interest since the petitioner's commanding officer was not the complainant in the disciplinary case. Therefore he was not disqualified to summarily try the petitioner under Section 152 of the *Kenya Defence Forces Act*. His rank as Brigadier did not matter in the circumstances since he was the petitioner's commanding officer. Besides the petitioner was charged with offence under section 77 of the Act which is not among



offences where a commanding officer is restricted from presiding over summary trial of his officer under Regulation 5 of the Armed Forces (Summary induction) Regulations of 1969.

72. As regards the alleged failure to accord the petitioner 24 hours after service of Abstract of Evidence to prepare for the summary trial, I am satisfied that the petitioner was served on 17th November, 2019 and he signed a certificate to that effect. He was served with a caution which he also signed. He was also notified of his right to be represented by a nominee of his choice.
73. The said documents were signed by the petitioner and dated the same date but he failed to indicate the time he received. Therefore I find that the allegation that adequate time was not given to him before the trial to be unsubstantiated. The record of summary proceedings clearly indicates that he agreed to proceed with the case.
74. The petitioner further contended that he was not accorded fair hearing and the proceedings never lasted for 10 minutes. The respondent contended that the petitioner waived the right to have witnesses attend the hearing and on his part he presented a written statement and pleaded guilty.
75. I have carefully considered the record of the summary trial proceedings and confirmed that, indeed the petitioner pleaded guilty to the charges and waived the need to have prosecution witness being called to give evidence. He also presented a written statement waiving attendance of the prosecution witnesses and admitting the charges. The said statement is allowed under Rule 19(e) of the Armed Forces Rules of Procedure, 1969. The petitioner annexed the statement as Exhibit JKM1 in the Affidavit filed in support of the petition herein. Consequently, based on the foregoing observations, I find that the summary trial the proceedings met the constitutional and statutory threshold envisaged under section 147 of the KDF Act.

Termination of the commission

76. The petitioner's case is that the termination of his commission was unlawful because the procedure for termination of a commission did not comply with Article 47 of *the Constitution* as provided under Section 243 (1), (3) (a) and (b) of the KDF Act. Further that, the failure by the Defence council to respond to the resignation letter within 14 days as required under section 249(8) of the Kenya Defence Force Act and instead issuing a letter for termination of commission was unlawful.
77. It is the respondent's case that the termination of petitioner's commission was lawfully done within the discretion of the Defence council and any challenge on the same can only be done through Judicial Review.
78. I have considered the rival contentions by the two sides. I have already made a finding of fact that the summary trial under section 155 and termination of commission under section 251 are distinct. Therefore, the termination of petitioner's commission herein was not done under the summary trial or any review of the award by the trial authority. The foregoing view is fortified by the two Charge Sheets annexed as Exhibits "MPMM3b" and "MPMM3d" in the Affidavit filed in support of the petition. The two documents show that after the Base Command found the petitioner guilty and sentenced him to loss of seniority, the award was reviewed by the Service Commander and he upheld the award bringing the summary trial process to an end.
79. Termination of Commission is provided in Section 251 of the *Kenya Defence Forces Act* in the following terms:-

“(1) subject to Article 47 of *the Constitution*-



- a. the President may terminate the commission of any officer above the rank of Major or corresponding rank or above;
 - b. the Defence Council may terminate the commission of any officer of the rank of Major or corresponding rank or below; or
 - c. a service commander may terminate the commission of any officer during the first eighteen months of the officer's actual commission in the service.
- (2) In any case of termination of a commission in this section, the President, the Defence Council or the service commander, as the case may be, shall accord and specify reasons for the termination for the termination of the commission to the affected officer, in writing.”

80. Article 47 of *the Constitution* provides that:-

“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.”

81. The rights under Article 47 of *the Constitution* are illuminated by the Fair Administrative Actions Act. Section 2 of the Act defines administrative action as –

- “(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

82. Section 4(3) of the Act then provides that –

“where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

- a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and make representations in that regard;
- c. Notice of a right to a review internal appeal against an administrative decision, where applicable;
- d. A statement of reasons pursuant to section 6;



- e. Notice of the right to legal representation, where applicable;
 - f. Notice of the right to cross-examine, where applicable; or
 - g. Information, materials and evidence to be relied upon in Making the administrative action”
83. The foregoing provisions of the KDF Act, FAA Act and Article 47 *the Constitution* confirm that before taking any administrative action against a commissioned officer, the Defence Council must among other things give the officer prior and adequate notice of the nature and the reason for the proposed administrative action, and also accord him/her opportunity to be heard and make representations.
84. In this case the petitioner contends that the respondent’s decision to terminate his commission violated his rights to fair administrative action envisaged by Article 47 of *the Constitution* because the reason for the termination was not valid and he was not accorded an opportunity to be heard before the decision was made.
85. The respondent has however contended that there was a valid reason for the termination of the commission because the petitioner had already been found guilty of violating standing orders during the summary disciplinary proceedings under section 155 of the KDF Act. The respondent did not deny that the petitioner was not accorded a hearing before his commission was terminated despite the acknowledgment that the disciplinary process under section 155 was distinct from termination of a commission under section 251 of the KDF Act.
86. I have keenly considered the evidence on record and it is clear that the petitioner wrote a resignation letter even before he was charged before his Base Commander for summary trial. It is also clear that the resignation letter was transmitted to the Defence Council through the chain of command. The base Commander endorsed in his award that the petitioner had written the resignation letter with a request for payment of service benefits, but the Base Commander recommended for termination of the petitioner’s commission.
87. On the same date, the Service Commander wrote a letter to the Chief of the Defence Forces reporting that the petitioner had, by his conduct, violated the trust placed upon him as a commissioned officer by violating Base Standing Orders. He further reported that the petitioner had also written a resignation letter dated 14th November 2019. Finally, he recommended the resignation be rejected and instead his commission be terminated.
88. On the same date the Secretary to the Defence Council circulated Loose Minutes for the Defence Council to approve the termination of the petitioner’s commission as recommended by his Service Commander. The Minute partly stated that:

“Termination of Commission

Major Pm Mugure(xxxx) – KAF

The Commander Kenya Air Force has recommended Termination of Commission with benefits in respect of the above named officer due to indiscipline.

The CDF has recommended the same to the Defence Council.

The Chairperson and members of the Defence Council are requested to write “Approved” Or “not Approved” as appropriate, sign and insert dates in the space provided.

Dr. Ibrahim Muhamed,CBS



Secretary To The Defence Council”

89. All the council members unanimously approved the recommendation between 18th and 25th November, 2019 but the decision was not communicated to the petitioner until 13th May, 2020 when the Secretary to the Defence Council wrote to him a letter which he received on 1st June, 2020. The letter partly stated that –

“The Defence Council has considered the recommendation to terminate your commission as submitted by from Headquarter Kenya Air force and has accordingly approved the Termination of the Commission without benefits.

Pursuant to section 251 of the *Kenya Defence Forces ACT* (KDFA), 2012 (revised 2018), the reasons for terminating your commission are specified hereunder:

- a. Following the summary trial before your Appropriate Superior on 18th November, 2019 to answer to charges of disobedience to standing orders and conduct to the prejudice of good order and discipline contrary to sections 77 and 121 of the KDFA respectively, you were found guilty and awarded punishment in accordance with section 155(5) of the KDFA. The particulars of the offences are:
 1. Irregularly booking and entertaining three (3) civilians at Laikipia Air Base officer’s Mess single quarters without authorization.
 2. Whilst assigned Field Officer duties at the material time, you interfered with the visitors booking register to falsely depict that the visitors had left the mess in order to conceal unlawful acts that are subject of the ongoing criminal trial against you.
- b. The Defence Council observes that the gravity of the foregoing offences, only serve to confirm that your discipline is seriously wanting and falls short of the standards expected to be upheld by a Commissioned Officer. Accordingly, the Defence Council finds you unfit to continue in Service.

You are to confirm receipt of these written reasons for terminating your commission without benefits by appending your signature to this letter as provided thereunder.

Be advised accordingly.

Dr. Ibrahim Muhamed, CBS

Principal Secretary/Secretary to the Defence Council”

90. The above letter communicated the final decision on the termination. There is no denial that the Defence Council never served the petitioner with any prior notice of the proposed termination of his commission and the reason for the same. It also never accorded the petitioner any opportunity to be heard and make his representations before the termination of his commission.
91. In addition to the foregoing, the decision on the petitioner’s resignation and request for payment of his service benefits, was not communicated to the petitioner within the required 90 days despite the same having been rejected by the Defence Council presumably vide the Loose



Minutes dated 18th November 2019, which approved the termination of his commission. Section 249(7) of the KDF Act provides that:

“ An officer or a service member may by notice in writing to the Service Commander or Defence Council as applicable request to be discharged from service or resign his or her commission and the Service Commander or Defence Council, as the case may be, shall determine the request and communicate the decision within ninety days.”

92. Based on the foregoing observations, the court is satisfied that the respondent violated the petitioner’s right to fair administrative action by failure to communicate the decision on his resignation letter, and in terminating his commission without prior notice as required under section 4 (3) (a) and (b) of the FAA Act. I say so because the said section just as Article 47 of *the Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
93. I gather support from *Fleur Investments Ltd v Commission of Domestic Taxes & another* [2018] eKLR where the Court of Appeal held thus:

“ 24. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally, and fairly and not arbitrary, whimsically, capriciously or in flagrant disregard of the rules of natural justice...

Also in *Municipal Council of Mombasa v Republic & Umoja consultant Ltd* [2002] eKLR, it was stated that although judicial review is concerned with the decision making process, not with the merits of the decision itself, the court would concern itself with issues as to whether the decision makers had jurisdiction; whether persons affected by the decision were heard before it was made, and whether in making the decision the maker took into account relevant matters or did take into account irrelevant matters.’ [Emphasis added].

Reliefs

94. In view of the foregoing holding that the rights of the petitioner were violated, I make declaration that the termination of the petitioner’s commission did not meet the legal threshold set by Article 47 of *the Constitution*, section 4 of the FAA Act and section 251 of the KDF Act. According I make further declaration that the termination of his commission was unfair, unlawful and unconstitutional as it was done in breach of express provisions of the law, *the constitution* and the rules of natural justice.
95. The petitioner also prayed that the termination to be declared a nullity and an order for reinstatement be granted. However, the order is not possible as three years have lapsed since the termination of the petitioner’s commission. Besides he did not adduce any evidence to show that reinstatement is practicable. Consequently, I award him the alternative prayer of damages, terminal benefits namely, pension as provided by the law, applicable regulations and awarded in the Loose minutes of the Defence Council dated 18th November, 2019 which stated that:

“The Commander Kenya Air Force has recommended Termination of Commission with benefits in respect of the above named officer due to indiscipline.’ [emphasis added]



96. The recommendation was approved by all the members of the Defence Council, and therefore it ought to be implemented as it is. I say so because, the termination letter written by the Secretary to the Defence Council on 13th MAY 2020, purported to amend the said Loose Minutes to deny the claimant his benefits and even made him to accept such irregular amendment by signing. Consequently, I make an order that the claimant is entitled to payment of terminal benefits including pension in accordance with the applicable law and regulations.
97. The petitioner prayed for an award of damages for the violations of his constitutional rights. Considering the circumstances of the case before the court, where in deed the petitioner had admitted to having breached Base Standing Orders, I award him Kshs. 2,000,000 for the procedural violations during the termination of his commission contrary to Article 47 of *the Constitution* read with Section 4 (3) of the FAA Act.
98. The claimant, further prayed for compensation for the injuries suffered in the year 2010 during his service for the respondent. The said injuries were reported by the petitioner to the respondent and the same was acknowledged by his Service Commander in his letter dated 18th November, 2019. The respondent failed to process the claim in time and because the parties were still engaging in a special employment relationship upon which the labour laws did not apply, it is not fair for the respondent to invoke the defence of limitation of actions. Consequently, the Court finds that it is only fair that the respondent compensates the petitioner for the said injuries pursuant to the applicable KDF regulations.

Conclusion

99. I have found that summary disciplinary process under section 155 of the KDF Act is distinct from the administrative process of termination of Commission under section 251 of the Act. I have further found that the summary disciplinary process against the petitioner met the statutory and constitutional threshold but the termination of his commission did not. Finally, I have found that the respondent violated the petitioner's constitutional right to fair administrative action, as envisioned under Article 47 of *the constitution*, while exercising its administrative power in terminating the petitioner's commission. Consequently, I enter judgment for the petitioner in the following terms:
- a. A declaration that the termination of the petitioner's commission did not meet the legal threshold set by Article 47 of *the Constitution*, section 4 of the FAA Act and section 251 of the KDF Act.
 - b. A declaration that the termination of his commission was unfair, unlawful and unconstitutional as it was done in breach of express provisions of the law, *the constitution* and the rules of natural justice.
 - c. An order that the claimant is entitled to payment of terminal benefits including pension in accordance with the applicable law and regulations.
 - d. Award of Kshs. 2,000,000.00 for the procedural violation.
 - e. The respondent compensates the petitioner for the work injuries suffered during his service pursuant to the applicable KDF Act and regulations.
 - f. The petitioner is awarded costs of the suit and interests.

DATED, SIGNED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2023.

ONESMUS N MAKAU



JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

