



REPUBLIC OF KENYA



**Owaga v Kenya Defence Forces (Cause 296 of 2018)
[2023] KEELRC 2379 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2379 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 296 OF 2018
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

LENOX OJUANG OWAGA CLAIMANT

AND

KENYA DEFENCE FORCES RESPONDENT

JUDGMENT

1. In the year 1980 the claimant was employed as a service man and rose through the ranks to Senior Sergeant WOII. The claimant was discharged from the service on 30 June 2015 after 35 years.
2. The claim is that the claimant suffered diabetes while in the service and upon discharge he was entitled to 10% of his monthly salary payable during retirement. He cleared and discharged but he was recalled back and charged by the Commanding Officer on allegations of misappropriation of funds which was illegal since he was discharged. Following the illegal charges, the benefits due were withheld.
3. The claim is that the respondent acted unfairly and should pay terminal dues and benefits at Kshs. 3,186,420 in terms of pension and Kshs. 39,830.25 in monthly gratuity from the date of retirement and costs of the suit.
4. The claimant testified that he served as an officer of the respondent diligently until he was discharged from service but was recalled and charges levelled against him that he had misappropriated funds leading to discontinuation of payment of his benefits in pension and gratuity. Upon discharge on 30 June 2017 he had served for 35 years and was issued with a Certificate of Discharge which entitled him to pension and gratuity pay since he had a clean record of service. While at home in Migori, military officers came to him and placed him in custody in Nakuru and a military officer presided over his case and he was dishonoured and benefits withdrawn. The allegations made had no basis since he had already left the respondent's service.



5. The alleged offences had been committed in the year 2013 and he was arrested 3 years later in the year 2015.
6. Before he was discharged, the matter was assessed by the Medical Board but the report was not issued to him.
7. In response, the respondent's case is that the claimant was enlisted on 15 April 1980 and run-out date was 30 June 2015 having completed 35 years and 76 days.
8. The medical board convened for the purpose of the claimant's condition after the dismissal of the claimant from service on account of misconduct and discipline and is therefore not entitled to 10% monthly disability compensation.
9. On 16 June 2015 the claimant appeared before the Commanding Officer to face charges of conduct to the prejudice of good order and discipline contrary to Section 121 of the *KDF Act* and was found guilty. On various dates between 2012 and 2013 while posted to 7 Kenya rifles Battalion in Langata as Chief Paymaster, the claimant misappropriated funds of up to Kshs. 1,374,638 and was awarded dismissal from service which was approved by the service commander.
10. The claimant's run-out date was 30 June 2015, he was subjected to the KDF during his hearing and is not entitled to the claims made.

No witness was called.

At the close of the hearing, both parties filed written submissions.

11. The claimant submitted that the due process was not followed in his summary trial as held in *Joseph Kipkemboi tanui v Chief of Kenya Defence Forces & 2 others [2019]* eKLR. Notice should have been issued in terms of Sections 159(2) and 251(2) of the *KDF Act*. The verdict reached against the claimant was contrary to Article 47 of *the Constitution* on fair administrative action as held in *David Wanyonyi v AG & 2 others [2014]* eKLR.
12. The claimant cleared with the respondent and was discharged. Any other matter which arose after such discharge should have been addressed within the fair administrative procedures under *the Constitution* and *KDF Act*
13. The respondent submitted that once some service personnel is suspected of committing an offence, the unit sends a request for investigations to the Military Police Corps which was done for the claimant. As the chief paymaster at 7 Kenya Rifles at Langata, records and investigation show that he misappropriated funds amounting to Kshs. 1,374,683. Upon discharge, investigations were conducted and he was arrested.
14. It emerged that on 9 August 2012 while the claimant was acting as unit paymaster he received Kshs. 24,638 that was meant to clear the bar bill in respect of Colonel Joseph Sirma from Ministry of State for Defence which had been recovered from his retirement benefits but he failed to record it in the units' books of accounts. he thus stole the money. On 9 August 2012 Kshs. 105,310 consisting of Kshs. 24,638 and Kshs. 80,762 was deposited and then withdrawn by the claimant. The Kshs. 80,672 was meant to settle repair to a tractor while Kshs. 24,638 could not be accounted for as there was no entry in the books.
15. The claimant was also charged on the facts that on 31st October 2013 while on duty he received Kshs. 550,000 from Captain E Kiplagat in respect of stock credit that had been issued to Liboi Military Camp and he stole the money. The money was meant to clear stocks of Kshs. 737,080.80 only for the claimant to cancel the transaction by crossing the books.



16. In November 2013 while the claimant was on duty he stole Kshs. 200,000 and subsequently made an entry in the books indicating that the payment had been made to WOI Patrick Mokamba without authority.
17. While the claimant was deployed as chief paymaster on 20 February 2014 he failed to record an entry of Kshs. 600,000 paid to 7KR by China Road and Bridge Corporation hence stealing the money.
18. Of these charges, the claimant was notified of the particulars and given a hearing before the Commanding officer. He was dishonoured and the claim for gratuity and disability allowance withdrawn. At the point of retirement, the claimant was cleared without knowledge of the full investigations of misconduct and which has since been addressed and the claims made should be dismissed. in the case of *Felister Waitbiegeni Mugweru v National Police Service Commission & 2 others [2018]* eKLR the benefits envisaged in law upon dismissal from service are not available to the claimant. The claimant was convicted and found guilty and cannot justify a claim as herein done for payment of gratuity and pension as held in *Gift Kambu Marandu v KDF Count and AG [2017]* eKLR.

Determination

19. It is common cause that on 2 February 2015 the claimant was issued with Certificate of Discharge from his service with KDF. This was after service for 35 years. The claimant retired and placed under a disability benefit of 10% due to his medical condition.
20. On 6 June 2015 the claimant was arrested by Kenya Military Police and on 16 June 2015 taken before the Commanding officer where he was charged and convicted and released on 23 June 2020
21. The respondent has submitted to the jurisdiction of this court. Upon the Certificate of Discharge from the Service, the claimant became entitled to the benefits of disability as assessed by the respondent's medical board and his pension dues.
22. The claimant has since been charged under the *KDF Act* under which he served as a service person and found guilty and convicted. There is no appeal against such conviction. The claimant does not challenge the matters put against him with regard to monies lost under his custody, care and application. He challenges the fact the he was issued with Certificate of Discharge and hence was cleared. The charges made against him were three years after the fact and hence unfair labour practice.
23. The claimant served under a disciplined service regulated under *KDF Act*. Unlike ordinary employees, he was under a disciplined service with own regulations and procedures with regard to conduct and honour. Upon illness or medical condition, a medical board of set up to assess and award disability percentage under which a benefit is payable and the rules and regulations thereof. This cannot be subjected to ordinary matters where illness occurs at the workplace and the same is assessed and compensation awarded under the *Work Injury Benefits Act*, 2007. For the claimant it is different as correctly held in *Gift Kambu v Kenya Defence Forces and Attorney General [2017]* eKLR.
24. The claimant, without any appeal against the dishonoured discharge from service, a claim for disability allowance therefrom is without foundation. The benefit had accrued with the Certificate of Discharge. Following his arrest and charges, a guilty verdict resulted in dishonour and benefit lost. The submissions that no letter of dismissal issued after the Certificate of Discharge and conviction cannot apply to reinstate the benefit.
25. With regard to pension claims, the Supreme Court has affirmed the position that all pension claims ought and should be addressed under each scheme rules and regulations and where a party is regulated under any statute in terms of access to pension dues, such mechanisms under such statute ought



to apply before invoking the judicial process. Under the doctrine of ‘exhaustion’ where there is an alternative method of dispute resolution established in law, the court must exercise restraint in exercising their jurisdiction and give deference to such dispute resolution mechanism as held in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of plaintiffs and other members/beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* of an Act of Parliament, that procedure should be strictly followed. In this case the Commission on Administrative Justice has jurisdiction to determine the question of a state’s organ refusal to release requested information.

26. All pension schemes are now regulated. Before invoking the court procedure, the claimant ought to have certified that such mechanism in terms of accessing his pension dues, if any, was applied and he had no access to justice therefrom.
27. On these findings, the claim herein is found without merit and is hereby dismissed with costs to the respondent.

The file shall be returned to ELRC Nairobi Registry.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

