



**Nyambok v Kenya Defence Forces & another (Cause E092 of 2021)
[2023] KEELRC 2098 (KLR) (6 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2098 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E092 OF 2021
J RIKA, J
SEPTEMBER 6, 2023**

BETWEEN

MAJOR LABAN AGAK NYAMBOK CLAIMANT

AND

KENYA DEFENCE FORCES 1ST RESPONDENT

THE HON. ATTORNEY-GENERAL 2ND RESPONDENT

JUDGMENT

Pleadings

1. The Claimant filed his Statement of Claim on 17th February 2021. He identifies the issues in dispute, in his Statement of Claim to be:
 - a. Failure to redeploy the Claimant.
 - b. Failure to pay the Claimant pending salaries.
 - c. Failure to address the Claimant's request to either be redeployed or retired with benefits.
 - d. Conduct amounting to either unlawful or constructive dismissal.
2. He states that he was employed by the 1st Respondent as a Cadet Officer, in 1991. He rose through the military ranks. He last held the rank of Major. He was last posted to Forces Memorial Hospital as Head of the Intensive Care Unit.
3. He was court martialled in 2015 for various offences, convicted and sentenced to 1-year imprisonment, on 11th June 2018.
4. The decision of the Court Martial was quashed in its entirety by the High Court on Appeal, on 10th June 2020.



5. He states that quashing of the decision reverted the Parties to the position obtaining, before the Court Martial proceedings.
6. The Claimant therefore asked the 1st Respondent for redeployment. The 1st Respondent declined to redeploy the Claimant, falling back on the decision of its Court Martial.
7. The Claimant proposed early retirement with all benefits in the alternative, a proposal that was not accepted by the 1st Respondent.
8. He has not received any salary since he was acquitted. As a Major, there were certain procedures to be followed, in his dismissal, which were ignored. He did not in any event, receive a letter of dismissal, explaining the reason for dismissal. He was not called to any disciplinary hearing.
9. His last salary was Kshs. 254,102, including basic salary at Kshs. 172,752; house allowance at Kshs. 58,000; mess cash allowance at Kshs. 14,500; health risk allowance at Kshs. 3,850; water allowance at Kshs. 2,000; and domestic servant allowance at Kshs. 3,000. He was paid half basic salary from 2015 during the Court Martial proceedings, until convicted in 2018.
10. He prays for Judgment for: -
 - a. Declaration that the Claimant is still an Employee of the 1st Respondent and letters written to his Advocates or copied to him are null and void.
 - b. Half salary from April 2015 to May 2018 at Kshs. 3,282,288.
 - c. Full salary from June 2018 to-date at Kshs. 7,877,162.
 - d. Half risk allowance at Kshs. 146,000.
 - e. The 1st Respondent to redeploy the Claimant immediately, or in the alternative the 1st Respondent do retire the Claimant with full benefits, and do pay him 1-year salary in compensation for illegal and unlawful retirement.
 - f. Costs.
 - g. Any other suitable remedy.
11. The Respondents filed their Statement of Response [indicated as Defence], dated 5th March 2021. It is conceded that the Claimant was employed by the 1st Respondent, and rose through the ranks as pleaded.
12. He was court-martialled on 4 counts of the offence of conduct to prejudice of good order and service discipline, contrary to section 121 of the *Kenya Defence Forces Act [KDFA]*. Details were that, while discharging duties of Medical Verification Officer, he received the sums of Kshs. 100,000, Kshs. 20,000, Kshs. 150,000, and Kshs. 100,000 respectively, from the proprietor of Tahidi Nursing Home, Mwingi, in consideration for clearing fictitious hospital bills amounting to Kshs. 748,646.
13. He was charged further with 3 counts of the offence of neglect of duty, contrary to section 65 of *KDFA*. He was alleged to have approved payment for inpatient hospitalization of Naomi Mwalale and Abdinassir Juma at Tahidi Nursing Home, and Waso Medical and Nursing Home respectively, without admission authorisation.
14. He was tried and found guilty by the Court Martial on the offence under section 121, and acquitted on the offence under Section 65 of the *KDFA*.



15. It is conceded that he appealed at the High Court, and the High Court quashed the decision of the Court Martial. However, quashing of the decision did not result in the automatic reinstatement of the Claimant. The High Court did not make any pronouncement on reinstatement, redeployment or in the alternative, retirement of the Claimant with full benefits. The Claimant did not ask the High Court for reinstatement. The Respondents plead the doctrine of constructive res judicata, submitting that any matter that was within the Claimant's knowledge on Appeal, should have been raised, and because it was not raised, is deemed to have been raised and determined.
16. The Claimant was properly tried by the Court Martial, found guilty and sentenced.
17. Section 180 [6] of the *KDFA*, states that if an Officer is sentenced by a Court Martial to imprisonment, the Officer shall also be sentenced to dismissal from service. The Claimant was dismissed from service in accordance with this law. The Respondents have not disregarded any orders of the High Court. They concede the jurisdiction of the Court, and urge the Court to dismiss the Claim with costs.

Hearing.

18. The Claimant was heard and rested his case on 24th March 2022. Major Edwin Mutta, 1st Respondent's In-Charge of records at the Defence Headquarters, gave evidence for the Respondents on 1st March 2023, when the hearing closed. The Claim was last mentioned on 27th July 2023, when the Parties confirmed filing and exchange of their closing submissions.

Claimant's Evidence.

19. The Claimant adopted as his evidence-in-chief, his witness statements filed on 5th February 2021 and 21st February 2021. He also adopted documents filed on the same dates, as his exhibits, in order of their listing.
20. He is currently un-employed. He told the Court that he was not aware of Defence Council sitting, where a decision was taken to dismiss him, alleged to have taken place on 11th June 2018. He was not aware of any deliberations. A letter by the 1st Respondent dated 17th February 2020, states that termination took place on 29th May 2018. The Court Martial had not determined the Claimant's case at the time.
21. He was never called by the 1st Respondent for disciplinary hearing. The decision of the High Court did not leave any part of the decision by the Court Martial, un-quashed. The decision was quashed in its entirety.
22. The Claimant told the Court he was 57 years, at the time of giving evidence in the proceedings herein [2022]. He was set to retire at the age of 60 years. He did not receive any letter of discharge.
23. Section 251 of the *KDFA* mandates the President or the Defence Council, to discharge officers at the rank of Major. Discharge must be evinced in a gazette notice. The Claimant prays the Court to uphold his prayers.
24. Cross-examined, he told the Court that he was convicted by the Court Martial, on 11th June 2018. The Court Martial did not dismiss the Claimant; it just sentenced the Claimant. The Claimant was aware of section 180 [6] of the *KDFA*, which presumes, that conviction results in dismissal.
25. Judgment of the High Court was on 18th June 2020. It was 2 years after conviction. The Claimant was at home over the period of 2 years. He was not serving. Court Martial can dismiss from service,



as a disciplinary sentence. It is a way of separation. Defence Council must ratify dismissal. This is an administrative function. The Claimant was not aware of ratification.

26. There was no order of reinstatement, or payment of benefits, made by the High Court. Conviction is a ground for dismissal under the 1st Respondent's terms and conditions of service. The 1st Respondent needed to inform the Claimant formally, that his service had been terminated.
27. He considered himself still to be in service. He seeks salary in arrears. He did not know when the Defence Council sits, and would only come to know if there was a sitting, when an outcome was communicated to him.
28. The pay slip does not show all the allowances claimed by the Claimant. Water allowance was paid directly through the bank. He has not cleared with the 1st Respondent, because he has not received discharge instructions from the 1st Respondent. He cannot have access to the 1st Respondent's premises, without discharge instructions. He is presently engaged in small scale farming. He did not know that the State was appealing the decision of the High Court.
29. Redirected, the Claimant told the Court that he was not aware of any notice, indicating an Appeal had been lodged against the decision of the High Court. Court Martial decision was quashed, and would not be the foundation of the Claimant's dismissal from the 1st Respondent. The 1st Respondent was involved in the Appeal at the High Court.

Respondents' Evidence.

30. Major Edwin Mutta confirmed that the Claimant was employed in April 1991. The Claimant last held the rank of Major, heading the Intensive Care Unit at the Forces Memorial Hospital. He worked with Medical Insurance Companies, as a Medical Verification Officer.
31. Adopting his statement of witness and documents [1-6] filed by the Respondents, Major Mutta told the Court that the Claimant was court-martialled as pleaded. He received Kshs. 370,000 from Tahidi Nursing Home, Mwingi, in clearance of fictitious bills. He was court-martialled at Moi Airbase, Eastleigh in Nairobi. He was tried, found guilty and sentenced to 1-year imprisonment.
32. The Defence Council authorized termination of his service without benefits, on 26th June 2018 [May?]. He was dismissed on 11th June 2018. The Defence Council released its minutes. His employment ceased immediately, in accordance with the [KDFEA](#).
33. He is not entitled to benefits. He worked from 1991-2018 [27 years]. He was paid half salary during Court-Martial proceedings. Basic pay was Kshs. 164,527. Half paid was Kshs. 86,376 monthly.
34. He was being paid house allowance, meal allowance, cash allowance, water allowance, and domestic allowance during the Court-Martial proceedings.
35. Health risk allowance was not paid, because he was not exposed to risk as a Medical Officer, while at home.
36. He is not entitled to half salary that was withheld during the proceedings. The terms and conditions of service states, such salary was to be forfeited upon termination. He is not entitled to any benefits.
37. It is correct that the High Court allowed his Appeal. He was cleared of all charges. The High Court however, did not reinstate him. He did not clear with the 1st Respondent. He would be issued with a letter of termination of commission, after clearance. The 1st Respondent retains a red book, showing an officer's history. This is given at the very end. Clearance means an officer has officially parted ways with the military.



38. Cross-examined, Major Mutta told the Court that the 1st Respondent, is not subject to Public Service Commission Regulations. He was not aware, if the 1st Respondent took advice from the 2nd Respondent.
39. Termination of the Claimant's service was without benefits. It was subject to ratification of the Defence Council. There was no record showing the meeting of the Defence Council, where ratification was made. There was no record of meetings, other than in the month of November 2018.
40. The Claimant was convicted on 11th June 2018. It was on 19th November 2018. Letter dated 20th July 2018, states that authority was given, for commission to be terminated. The authority was acted upon. Major Mutta did not have any document showing that authority was acted upon.
41. The reasons for termination are indicated in the charges. The Claimant was found guilty and sentenced to 1-year imprisonment. The High Court quashed this decision.
42. Half salary was Kshs. 86,376. Full salary would be Kshs. 172,752, excluding various allowances. Paragraph 14 of the Statement of Claim gives specific figures. It is a human resource issue, which Major Mutta was not familiar with.
43. The Claimant was informed about the reasons justifying termination. Major Mutta did not have a letter communicating these to the Claimant. He was not aware of other proceedings, other than the Court-Martial and High Court proceedings.
44. He was not aware of Section 251[2] of the [KDEA](#), which requires that, there is concurrence of the Public Service Commission, in depriving an officer of his pension.
45. The Claimant worked for 27 years. Officers whose service is terminated, are entitled to transport allowance to their homes. Major Mutta was not aware if the Claimant was paid this.
46. The letter from the 1st Respondent, dated 5th October 2020, states that dismissal was on 29th May 2018. It states that dismissal was with immediate effect. The Respondents plead an alternative date of dismissal, 11th June 2018. Major Mutta explained that 29th May 2018, must have been a typographical error.
47. Appeal against the decision of the High Court was lodged, but out of time. Major Mutta was not aware that Appeals have to be made within 14 days. Judgment was on 10th June 2020. By 5th October 2020 when the Respondents allege they filed an Appeal, time had expired. Major Mutta did not have bank statements showing that the Claimant received money from Tahidi Nursing Home.
48. Redirected, he told the Court that the 1st Respondent is guided by its terms and conditions of service, not by circulars from the Public Service Commission and the 2nd Respondent.
49. Major Mutta did not have access to Defence Council Minutes. Orders were signed by the Adjutant at the Defence Headquarter/ Administrative Unit, on the instruction of the Defence Council. Defence Council gave authority for termination of commission. The pay slip showed what was payable. Allowances were paid directly to the bank. The Claimant's commission was terminated. Officers are not discharged; their commissions are terminated. The Claimant was not entitled to transport allowance, given the circumstances of termination. There is an Appeal pending at the Court of Appeal, against the decision of the High Court.



Submissions.

50. The Claimant submits that the orders dated 29th June 2018, state that the Claimant was convicted on 19th November 2015. There was no conviction on 19th November 2015 and the letter is misleading.
 51. It is submitted that dismissal by a Court Martial can only take place under section 180[6] of [KDFEA](#), while termination of commission and considering the rank of the Claimant, could only take place under section 251 [2] of the [KDFEA](#).
 52. Another letter from the 1st Respondent, dated 5th October 2020, states that the Claimant was convicted, sentenced to imprisonment and dismissed on 29th May 2018. This letter is also misleading. No conviction took place, on 29th May 2018. The letter refers to termination, not dismissal.
 53. It is submitted that under [KDFEA](#), termination and dismissal are different, and one is not a substitute for the other. The Respondents are not certain on the date the Claimant left service.
 54. It is submitted that the High Court found that the Claimant was being condemned for systemic failure at the Defence Ministry. In [David Wanyonyi v. Attorney-General & 2 Others](#) [2014], it was held that it is discriminatory, to dismiss an officer where there is systemic failure, and other involved officers are treated differently.
 55. The Claimant submits that pension due to him, is his property, within the meaning of Article 40 of the [Constitution](#), which cannot be arbitrarily taken away from him. He anchors this submission on [Cassian Ngotho Mwachanya v. Commanding Officer Kenya Navy & Another](#) [2015] e-KLR.
 56. The Claimant relies on the decision of this Court in [Gregory Gitile Mberia v. Attorney- General & 4 Others](#) [2019] e-KLR, where it was held that,

“considering that dismissal from service was part of the sentence meted by the Court Martial, sitting as a disciplinary tribunal, and that the High Court not only set aside the conviction but the sentences on all charges, it is only logical that the dismissal of the Claimant automatically stood set aside, as it became null and void in law. It was as if the conviction and sentence never took place.”
- The Court held, that the submission by the 1st Respondent that it would not reinstate the Claimant Mberia, lacked validity in law.
57. It is submitted that the Court Martial decision having been quashed, the 1st Respondent could only terminate the Claimant’s service on fresh charges, contemplated by section 212 [1] [a] of [KDFEA](#). The Claimant’s service could not be summarily terminated, without the benefit of a fresh hearing, the initial outcome of the Court Martial, having been quashed by the High Court.
 58. The conduct of the 1st Respondent went against section 4 of the [Fair Administrative Action Act](#). The Claimant was condemned without a hearing.
 59. The Respondents submit foremost, that the Judgment of the High Court, did not grant an order for reinstatement to the Claimant. They submit that the remedy of reinstatement is not an automatic right of an Employee, relying on [Teachers Service Commission v. Timothy Onyango Olale](#) [2022] e-KLR, and [Employment Law Guide](#) page 34, authored by Learned Counsel, George Ogembo.
 60. It is submitted that the Claimant could have raised the issue of reinstatement before the High Court, but did not, and the issue is res judicata. He has been out of military service for over 5 years and is unsuited for military service under the 1st Respondent’s terms and conditions of service.



61. The Claimant's employment ceased, upon conviction and imprisonment, in accordance with sections 180 [6], 244 [2], 247 [d] of the [KDFEA](#), and Part VII and paragraph 41 of the terms and conditions of service.
62. Court Martial is a disciplinary process. The Defence Council did not have any role in the exit of the Claimant from service.
63. Half salary, for the period of Court-Martial proceedings is not recoverable. Citing the decision of the E&LRC in [Hellen Amunga v. Kenyatta University](#) [2018] e-KLR, the Respondents submit that half salary would only be recoverable, upon the Employee being exonerated from the charges she faces. It is submitted that grant of salary for a period the Claimant was not in service, would result in unjust enrichment, as held in [Abraham Gumba v. Kenya Medical Supplies Authority](#) [2014] e-KLR.
64. Section 244 [2] of the [KDFEA](#) permits the 1st Respondent to withhold pension of an officer, upon dismissal. The judicial authorities cited by the Claimant, holding that pension is an Employee's property, do not apply to this dispute. Military pensions are regulated by the [KDFEA](#) and applicable regulations, and not by Public Service Commission regulations and / or circulars.
65. In conclusion, the Respondents submit that dismissal of the Claimant was done by the Court Martial. All that that the Defence Headquarters did, was to communicate the Court Martial decision to the Claimant's Service Headquarters and Unit, among other offices, for further administrative action. As soon as the Court Martial convicted and sentenced the Claimant, his employment with the 1st Respondent ceased.
66. The issues as identified by the Parties, may be summarized as follows: -
 - a. Whether dismissal/termination of the Claimant from service was unfair, unlawful and unconstitutional.
 - b. Whether he merits the remedies sought.

The Court Finds: -

67. The Claimant joined the 1st Respondent, as a Cadet Officer in 1991. He rose through the ranks, becoming a Major. He held this commissioned rank, when his service was terminated by the 1st Respondent, upon trial and conviction by a Court Martial in 2018.
68. He last worked as Head of the Intensive Care Unit and Medical Verification Officer at the Armed Forces Memorial Hospital. He verified medical claims, under the 1st Respondent's Insurance Scheme Registered Trustees, also known as Defence Forces Medical Insurance Scheme [DEFMIS].
69. He was charged with the offences of conduct to the prejudice of good order and service discipline contrary to section 121 of the [KDFEA](#) and neglect of duty, contrary to section 65 of the [KDFEA](#).
70. The Court Martial convicted him for the offence under section 121, and acquitted him for the offence under section 65.
71. He was sentenced to serve 1-year imprisonment.
72. It is common ground that he appealed the Court Martial decision at the High Court Nairobi, in Criminal Appeal Number 3 of 2018, [Laban Agak Nyambok v. Republic](#) [2020] e-KLR.



73. The High Court [Luka Kimaru J], allowed the Appeal, concluding that,
- “This Court therefore finds merit in the Appeal lodged by the Appellant. The Appellant’s Appeal is hereby allowed. His conviction by the Court Martial in count 1,2,3, and 4 is hereby quashed. He is acquitted of all charges. The custodial sentence imposed upon him is set aside. The Appellant is ordered released from prison, unless otherwise lawfully held.”
74. He asked for redeployment upon absolution by the High Court. It was not granted, resulting in this litigation.
75. Whether dismissal /termination was fair? The main bone of contention seems to the Court to revolve around Section 180 [6] of the [KDFEA](#).
76. The section provides that, if an officer is sentenced by a Court Martial to imprisonment, the officer shall also be sentenced to dismissal from the Defence Forces, and if the Court Martial fails to sentence the officer to such dismissal, the sentence of imprisonment shall not be invalid, but shall be deemed to include a sentence of such dismissal.
77. On the face of it, there are no other procedures required under section 180 [6] of the [KDFEA](#), once an officer has been sentenced to imprisonment; he automatically stands dismissed, and even if the Court Martial has not stated that he has been dismissed, he is deemed to have been dismissed, upon imprisonment.
78. Similar provision on dismissal upon imprisonment, is contained in section 181 of the [KDFEA](#) with respect to service members [in contrast to officers].
79. The sentence of imprisonment under the Court Martial, goes hand in hand, with dismissal of the officer from military service.
80. The problem that this law occasions is whether, where an imprisoned officer is successful on appeal, conviction quashed, is acquitted of all charges, and custodial sentence imposed upon him set aside, the dismissal sentence also falls by the wayside. Is the officer to be deemed restored to military service, or should he pursue a Claim for reinstatement?
81. The [KDFEA](#) does not suggest or provide an answer, to this question, but protects the officer’s right of appeal, to the High Court and other Superior Courts, under Section 186 of the [KDFEA](#).
82. Section 189 of the Act guides the High Court on grounds upon which an Appeal ought to be allowed, which include where the High Court finds that, conviction is unreasonable; it cannot be supported having regard to the evidence; it involves a wrong decision on question of the law; or there is miscarriage of justice.
83. In allowing the Appeal, the High Court found in favour of the Claimant, in accordance with section 189 of the [KDFEA](#).
84. The E&LRC in [Gregory Gitile Mberia v. Attorney-General & 4 Others](#) [2019] e-KLR, [Radido J] offered an illuminating interpretation of Section 180 [6] vis-a-vis successful Appeals, stating that,
- “considering dismissal from service was part of the sentence meted by the Court Martial, sitting as a disciplinary tribunal, and that the High Court not only set aside the conviction but the sentence on all charges, it is only logical that dismissal of the Claimant stood set aside, as it became null and void in law...”



85. The Court is convinced that the decision above is the correct interpretation of the relevant law, and is applicable to the present dispute on all fours. It addresses, and settles the main issue in this dispute - whether the Judgment of the High Court, completely rendered the Court Martial dismissal, null and void.
86. When a decision is quashed or set aside, it is nullified and becomes completely invalid. The High Court decision revoked the actions of the Court Martial, in their totality. It was not a partial Judgment, varying sentence; it set aside the whole sentence. It quashed conviction upon which the sentence was founded. Upon delivery of the Judgment of the High Court, the decision of the Court Martial ceased to have any legal effect. It rendered any actions of the 1st Respondent, based on the decision of the Court Martial invalid, under the principle of retrospective quashing.
87. It was not necessary for the High Court to give an order reinstating the Claimant; once the sentence to dismiss him was set aside, he would be deemed a continuing Employee of the 1st Respondent. It was for the 1st Respondent to instruct the Claimant to resume military service, or accede to his proposal for retirement with all retirement benefits. The doctrine of *res judicata* is improperly invoked by the Respondents. Before the High Court was a criminal appeal process. Appeal was confined to conviction and sentence imposed on the Claimant. The High Court was not required to make further orders, beyond quashing the conviction, setting the Claimant free and setting aside the sentence. The Claimant was not required to make other prayers to the High Court, after the Court exonerated him.
88. There is no evidence that the Respondents have appealed against the decision of the High Court at the Court of Appeal. There is no decision of the Court of Appeal, overturning that of the High Court, exhibited in the proceedings herein. The decision of the High Court is undisturbed, and there is no indication that it is going to be disturbed. The Claimant's dismissal by the Court Martial, remains invalidated by the Judgment of the High Court.
89. A Court Martial is a unique institution, which conducts military judicial proceedings. It is subject to the supervisory jurisdiction of the High Court. Section 170 of the [KDFEA](#) requires that, its rules on admissibility of evidence, are same as those applied in Civilian Courts [criminal and civil jurisdiction]. Section 161 of the [KDFEA](#) states that in addition to other principles and values provided for in the [Constitution](#), the Court Martial is guided in discharge of its functions by the principles provided for under Article 159 [2] of the [Constitution](#). It is an institution guided by the constitutional principles applicable to the Judiciary. The Court Martial, exercising judicial authority, has an obligation to ensure that the principles of the [Constitution](#) are protected.
90. The 1st Respondent ought therefore to have deferred to the decision of the High Court, by acknowledging that dismissal of the Claimant based on the decision of its Court Martial, was set aside, instead of prolonging the dispute with flawed submissions, such as the insistence that the High Court did not grant the Claimant an order of reinstatement. Resisting a Judgment of the High Court, to achieve the intended outcome of sustaining the Claimant's dismissal without benefits, is in violation of the [Constitution](#).
91. Section 42 of the [KDFEA](#) affirms that all persons, subject to the Act, shall enjoy all rights and fundamental freedoms enshrined in the Bill of Rights, unless limited to the extent specified in Article 24[5] of the [Constitution](#), the [KDFEA](#) or any other Act.
92. Article 47 of the [Constitution](#), granting the Claimant the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair has been violated by the Respondents, as has the right to a fair hearing, under Article 50. The latter Article protects the right of a convicted person to appeal to, or apply for review by a higher Court, prescribed by law. A decision made by the



- Higher Court must be honoured by the trial Court, in observing the convict's right to a fair hearing. The position adopted by the Respondents, is based on the assumption that the Claimant is still guilty over the offences over which he was tried and convicted by the Court Martial. They completely ignore the declaration of his innocence by the High Court, in complete disregard of the principle of fair hearing.
93. It is also the view of the Court, that the 1st Respondent, in continuing to disregard or misrepresent, the legal effect of the High Court Judgment, has violated the Claimant's right to fair labour practices. Any unfair act, or omission that arises between an Employer and an Employee, concerning the terms and condition of service, amounts to unfair labour practice, a violation under Article 41 of the Constitution.
 94. Dismissal of the Claimant, or termination of the Claimant's service, was unfair, unlawful and unconstitutional.
 95. Termination of service under Section 247 of the KDEFA, as understood by the Court, is a generic term denoting various modes, through which an officer's service with the 1st Respondent comes to an end.
 96. These include retirement, resignation, termination of commission, dismissal from office, and discharge from office. All forms result in termination of service.
 97. Section 247 is analogous to Part V1 of the Employment Act 2007, which regulates termination of employment under various forms, including regular termination [by notice], redundancy and summary dismissal.
 98. The military is a closed institution, governed by a law that is not quite familiar to a broad spectrum of the public, and which perhaps, has not been subjected to the rigours of judicial scrutiny. In developing military law, there is need to have certain terms in KDEFA, clearly defined. Section 2 of the KDEFA does not define who a commissioned officer is. The different forms of termination of service, prescribed under section 247, are not defined under section 2. Are these separate principles, or do they overlap? Major Mutta for instance, told the Court that commissioned officers are not discharged; their commissions are terminated. He used the term 'discharge' not 'dismissal.' The KDEFA needs to specify what is military discharge, dismissal, termination of service, and termination of commission, to avoid the kinds of divergent interpretations of military law, witnessed in this Claim.
 99. Procedurally, dismissal of a commissioned officer would not be complete under KDEFA, without termination of commission. There is merit, in the Claimant's position that the Act, distinguishes termination of commission from dismissal. In the view of the Court, dismissal cannot be a substitute for termination of commission, and vice versa.
 100. Termination of commission is a form of termination of service, unique to commissioned officers. The KDEFA defines non-commissioned officer under section 2, to be a service member, holding the rank of senior sergeant, sergeant or corporal, or corresponding rank, or in the rank of lance corporal. There is no definition of the term commissioned officer, but through deduction, commissioned officers are top of the military hierarchy, the Force Management, normally granted commission by the President, the Commander-in-Chief. Commissioned officers take oath of allegiance and are issued a Presidential parchment, bearing the President's signature. They serve at the pleasure of the President, while non-commissioned officers, serve under enlisted contracts. It is argued that commissioning is done to ensure that the President is fully accountable for what the military does, in defence of the Nation. The Claimant was a Major, and a commissioned officer.
 101. Section 247 of the KDEFA includes termination of commission and dismissal, as some of the modes, an officer's service with the 1st Respondent comes to an end.



102. In terminating commission, there is a special procedure, under section 251, which requires adherence to Article 47 of the Constitution. The President may terminate commission of any officer above the rank of Major. The Defence Council may terminate the commission of any officer of the rank of Major or corresponding rank or below. A Service Commander may terminate the commission of any other officer during the first 18 months of the officer's commission in the service.
103. The 1st Respondent gave various dates when the Claimant's service was terminated or when the Claimant was dismissed. They include 19th November 2015, 29th May 2018, and 11th June 2018. The High Court Judgment indicates the decision giving rise to the Appeal, was made on 29th May 2018. Major Edwin Mutta did not make matters any clearer, testifying that 29th May 2018, must have been a typographical error. There is no evidence of any meeting by the Defence Council, where commission was terminated. Court-martial proceedings closed on 22nd May 2018, and members were to reconvene, and deliberate on the verdict. It is not clear when they reconvened and made a verdict, but according to Major Mutta, the Defence Council released its minutes on 29th May 2018, and on 11th June 2018, the Claimant was dismissed. No minutes of the Defence Council were exhibited. This uncertainty in the view of the Court, is because the 1st Respondent had difficulty reconciling its position, that the Claimant's service was terminated upon sentence of dismissal imposed by the Court Martial, and that dismissal was ratified by the Defence Council. According to the 1st Respondent the Defence Council was only to ratify the dismissal decision, but as can be read from Section 251, there is a requirement to terminate the commission, through a prescribed procedure, in full compliance with Article 47 of the Constitution. The Respondent did not demonstrate that after the Court Martial pronounced itself, and dismissed the Claimant, the Defence Council, terminated the Claimant's commission, under Section 251 [1] [b] of the KDEFA. Dismissal by the Court Martial, did not result in automatic termination of commission.
104. There is inconsistency in the view of the Court, between section 180 [6] [and section 181] of the KDEFA, which allow the Court Martial to impose the dismissal sentence, and sections 247 and 251, which have the additional procedure of termination of commission. This creates challenges in determining the Effective Date of Termination [EDT] of commissioned officers' service.
105. Major Edwin Mutta confirmed in his evidence that the Claimant was not issued a letter of termination, in any form.

“The Claimant would be issued letter of termination of commission, once he cleared.”

In Nisba Nilesbbhai Bhavsar v. Kensalt Limited [2022] e-KLR, the Court held that termination takes effect, only when the Employee has received the letter of termination from the Employer. Without receipt of the letter terminating his commission, there was no termination of commission. How would the Claimant know that termination of commission had taken place, or pursue legal remedies open to him, against that termination?

106. Termination of service in the circumstances, did not meet the constitutional threshold of fair administrative action, under Article 47 of the Constitution.
107. The Claimant's termination/dismissal from military service was unfair, unlawful, and contrary to Articles 41, 47 and 50 of the Constitution.

Remedies.

108. In Gift Kambu Marandu v. Kenya Defence Forces Council & Another [2017] e-KLR, the Court held that section 244 of KDEFA provides that members of the Defence Forces shall be entitled to such



pensions and gratuity, as shall be determined by the Treasury in consultation with the Defence Council, in accordance with the Regulations. Where an officer or service member has been dismissed under any circumstances, the Defence Council may withhold, reduce the amount, or suspend any such benefits payable. A decision to withhold, reduce or suspend pension, shall have the concurrence of the Public Service Commission. Gift Marandu, a member of the service, was found to have been dismissed fairly. The Court was not able to grant specific order on payment of pensions and gratuity.

109. In the dispute herein, the Claimant appealed successfully against conviction and sentence, and ceased to be an officer whose pension and gratuity could be withheld, reduced or suspended, under Section 244 of the [KDEFA](#). The 1st Respondent has not brought evidence before the Court, showing any consultation took place with the Public Service Commission, to justify withholding of the Claimant's pension, even after he was exonerated by the High Court.
110. There is no justification in continuing to deny him pension and gratuity as given by the [KDEFA](#). The High Court at Mombasa, in [Cassian Ngotho Mwachanya v. Commanding Officer Kenya Navy & Another](#) [2015] e-KLR, held that terminal benefits are an Employee's property, citing Article 260 of the [Constitution](#), which states that property includes any vested or contingent right to, or interest in, or arising from money, choses in action or negotiable instruments. Pension is therefore property, and has the protection of the [Constitution](#), under Article 40 as submitted by the Claimant. There is no justification why the 1st Respondent, should deprive the Claimant of his property, after 27 years of military service. Details of the pension and gratuity due, have not been specified. A declaration shall suffice. The Court declares that the Claimant is entitled to pension and gratuity under the [KDEFA](#), as he would have been paid on normal retirement.
111. The evidence placed before the Court shows the Claimant is still a commissioned officer of the 1st Respondent, a Major, though not in active service, of the 1st Respondent, his dismissal sentence having been quashed. Any dismissal or termination of commission [and there is no evidence of termination of commission] became null and void, with the decision of the High Court.
112. He was paid half basic salary, for the period of the Court Martial proceedings. He was arrested and charged in April 2015. He received half pay [basic] at Kshs. 86,376 monthly, from April 2015 to May 2018. The Respondents submit, citing decision in [Hellen Amunga v. Kenyatta University](#) [2018] e-KLR, that half salary is recoverable, upon the Employee being exonerated. The Claimant was, precisely, exonerated by the High Court, and there is no reason for the 1st Respondent, to continue holding back his arrears of half monthly salary. He is entitled to recovery of half pay, from April 2015 to May 2018 [36 months], at Kshs. 86,376 monthly, amounting to Kshs. 3,109,536.
113. He prays for risk allowance at Kshs. 146,000. The 1st Respondent submits that the Claimant does not merit this, because he was at home over the period claimed, and not therefore exposed to any medical risk. This objection is flawed. Medical risk allowance was a standing and invariable allowance. It was not to be paid only when the Claimant was at Forces Memorial Hospital. Even while on annual leave, it was payable. It was an invariable allowance. It was not paid to the Claimant conditionally. The prayer for risk allowance at Kshs. 146,000 is allowed.
114. The Claimant did not resume active service, notwithstanding that the High Court reversed dismissal sentence, on 10th June 2020. The 1st Respondent stonewalled his restoration. He has not rendered any military services to Kenya, from the date he was unlawfully convicted and sentenced.
115. He remains a commissioned officer, but an inactive one, and cannot justify payment of anticipatory salaries. If this submission is to be accepted, it would result in the Claimant continuing to earn his full monthly salary from public coffers, without rendering active military service, until he retires. The



Court of Appeal in Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR restated that employment remedies must be proportionate to the economic injury suffered by the Employee, and are not aimed at facilitating unjust enrichment of the aggrieved Employee. Resumption of active service, at an age close to mandatory retirement age of 60 years, would not be reasonable. Redeployment would not be in the interest of the public or military service.

116. In Gift Marandu, the Court held that the Claimant was not entitled to remedies under the [Employment Act](#), because Section 3 of Act, precludes the Defence Forces or the Reserve, as defined in [KDEA](#).
117. The Claimant's prayer for 12 months' salary in compensation for illegal and unlawful retirement, is fashioned after Section 49 [1] [c] of the [Employment Act](#), and is not allowable. Remedial action cannot be through the [Employment Act](#). In any event, the Claimant was not retired, so as to allude to illegal and unlawful retirement.
118. Rule 7[3] of the [Employment and Labour Relations \[Procedure\] Rules](#) allows a party seeking the enforcement of any constitutional rights and freedoms, or any constitutional provision. to do so through a Statement of Claim.
119. The Claim herein involves grave constitutional violations, and calls for remedies under Article 23 [3] [a] and [e] of the [Constitution](#).
120. It is declared that the 1st Respondent violated the Claimant's constitutional rights, particularly under Articles 41, 47 and 50 of the [Constitution](#), and termination of service/ dismissal was unfair, unlawful and unconstitutional.
121. The Claimant is entitled to compensatory damages, which is granted at Kshs. 4 million.
122. Costs to the Claimant, payable by the 1st Respondent.

In sum it is ordered: -

- a. It is declared that that the 1st Respondent violated the Claimant's constitutional rights, in particular under Articles 41, 47 and 50 of the [Constitution](#), and termination of service / dismissal was unfair, unlawful and unconstitutional.
- b. It is declared that the Claimant is entitled to pension and gratuity, as he would have been paid on normal retirement.
- c. He is granted half monthly salary withheld by the 1st Respondent for 36 months, at Kshs. 3,109,536; medical risk allowance at Kshs. 146,000; and compensatory damages at Kshs. 4 million – total Kshs. 7,255,536.
- d. Costs to the Claimant payable by the 1st Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, VIA E-MAIL, AT MOMBASA, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT DIRECTIONS, 2020, THIS 6TH DAY OF SEPTEMBER 2023.

JAMES RIKA

JUDGE

