



**Kivevenze v Principal Secretary Ministry of Defence & 2 others (Cause 1921 of 2017) [2023] KEELRC 2470 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2470 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 1921 OF 2017**  
**JK GAKERI, J**  
**OCTOBER 16, 2023**

**BETWEEN**

**JOSEPH KIVEVENZE ..... CLAIMANT**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF OF STAFF KENYA FORCES ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim dated 15<sup>th</sup> September, 2017 alleging unfair dismissal from employment by the Respondent.
2. It is the claimant's case that he was enlisted in the Kenya Defence Forces as a radio technician on 24<sup>th</sup> April 1984, Service Number 55982 where he rose to the rank of a Senior Sergeant earning a gross salary of Kshs 76,661/= and served for 31 years.
3. The claimant avers that he was served with an abstract of evidence and charge sheet on 8<sup>th</sup> October 2015 and charged before his Commanding Officer for an offence under section 12 of the [Kenya Defence Forces Act](#), 2012 and was found guilty and dismissed from service.
4. The claimant avers that he was accused of aiding one corporal Joseph Muthui a service member to defraud members of the public by pretending to recruit their children into the Kenya Police Service.
5. The claimant states that Corporal Joseph Muthui obtained money from the claimant's wife and two other women namely; Grace Kerubo and Doris Kanini but was unable to secure places for their children in the Kenya Police Service.



6. The claimant state that one Corporal Joseph Muthui promised to pay back the money to the three woman and in doing so he wrote several cheques in favour of the claimant but the cheques were dishonoured.
7. The claimant states that he reported the matter to the military police but was surprised when the investigation indicated that he had aided Corporal Joseph Muthui in defrauding three civilians. He states that charges were preferred against him and he was later dismissed from service.
8. The claimant avers that the Commanding Officer who dismissed him acted ultra vires as he did not subject the claimant to any trial before the Kenya Defence Forces Council or Courts Martial.
9. The claimant avers that Kenya Defence Forces practice and custom is that a service member who is a non-commissioned officer who is found guilty of an offence can only be punished either by;
  - i. Reduction in rank by one rank.
  - ii. Order for service no longer required entitling the service member to full terminal benefits.
10. The claimant avers that he sought redress twice for unfair dismissal from the Commander Kenya Army but to no avail.
11. The claimant prays for judgment against the respondents for;
  - i. A declaration that the Claimant was wrongfully and unfairly dismissed from Kenya Defence Forces and that he be reinstated in his rank of Senior Sergeant.
  - ii. In alternative the claimant be,
    - a. Paid a lumpsum gratuity payment for thirty (31) years' service that the claimant had served the country in the sum of Kshs 3,500,000/=.
    - b. Paid leave allowances.
    - c. Monthly pension in the sum of Kshs 34,748.55 from December 2015.
    - d. 12 months compensation for unfair dismissal.
    - e. Awarded long service and good conduct medal in monetary form.
    - f. Award damages for wrongful dismissal including damages for loss of promotion and future earnings.
  - iii. Any other appropriate reliefs as the court may deem fit
  - iv. Costs of the suit.

### **Respondent's case**

12. By a Memorandum of Reply dated 22<sup>nd</sup> November 2017, the Respondent admitted that the Claimant was a member of service and that he had been charged with two offences under section 121 of the *Kenya Defence Forces Act* 2021 where he was found guilty for both offences and awarded 10 days' pay for the first offence and dismissal from service for the second offence.
13. The respondent avers that the claimant aided Corporal Joseph Muthui to defraud members of the public a sum of approximately Kshs 740,000/= which formed the basis for his dismissal from service.



14. It avers that the claimant acted as the linkman between his wife and the other two ladies in the name of securing places in the National Police Service.
15. The respondent avers that the claimant's dismissal was proper as he was subjected to a summary trial by his Commanding Officer who exercised his powers in accordance with section 156 of the [Kenya Defence Forces Act](#), 2012.
16. The respondent admits that the claimant sought redress and stated that the same was declined for lack of merit.
17. It avers that the claimant was lawfully dismissed from the Kenya Defence Forces and once dismissed over such grave offence he was not entitled to any benefits in accordance with the Pension Regulations.

### **Evidence**

18. CW1, the claimant adopted his witness statement which rehashes the contents of the Memorandum of Claim.
19. RW1, Major Edwin Kibiru Mutua adopted his witness statement dated 22<sup>nd</sup> September as his evidence in chief.
20. The witness stated that the claimant was given an option of either being tried by the Courts Martial or before the Commanding Officer and he choose to be tried by the Commanding Officer.
21. That he was also given an opportunity to call a witness but stated that his witnesses were far.
22. On cross-examination the witness stated that the claimant sent Corporal Joseph Muthui Kshs 100,000/= by Mpesa as a way of encouraging the other members of public to believe the deal.
23. The witness however confirmed that there has been no previous record of misconduct of the claimant for the 31 years he was in service.

### **Claimant's submissions**

24. The Claimant's Counsel addressed the following issues namely;
  - i. Whether the court has jurisdiction over the matter
  - ii. Whether the claimant was unlawfully and unfairly dismissed.
  - iii. Whether the claimant is entitled to the reliefs sought.
25. On the first issue, counsel submitted that section 3(2) of the [Employment Act](#) is explicit "This Act shall not apply to- (a) the Armed Forces or the reserve as respectively defined in the [Kenya Defence Forces Act](#)."
26. Reliance was made on the sentiments of the court in [Gift Kambu Marandu v Kenya Defence Forces Council & another](#) (2017) eKLR that;
 

"It is incorrect to assume that because the [Employment Act](#) 2007 does not apply to the armed forces; and thus, because the Kenya Armed Forces Act 2012 limits certain fundamental rights and freedoms under Article 24(5) of the [Constitution](#) of Kenya soldiers do not have the right to peruse employment grievances against their employer"
27. Counsel submitted that in lieu of protecting the rules of natural justice, the courts have taken the mantle to determine employment matters in armed forces as the rules of natural justice are an integral



value protected by the Constitution of Kenya under Articles 50(1)(2)(a)(b)(c) and (d) which provide right to fair hearing and the rights of an accused person.

28. The claimant submitted that the court had jurisdiction to hear the matter.
29. On the second issue, counsel submitted that the amount of Kshs 100,000/= mentioned by the respondents was intended as a loan to Corporal Joseph Muthini for facilitation of a tendering business, which transaction was never followed and proper investigations conducted to determine the use of the money which was the sole piece of evidence used against the claimant.
30. Counsel further submitted that the Commanding Officer did not consider the claimants right to adduce and challenge evidence by not having the complainants present at the hearing for cross-examination which contravened Article 50 of the Constitution of Kenya, 2010.
31. Counsel further submitted that the claimant's answer that his witnesses was too far did not amount to him wavering his right to call witnesses and submitted that the decision arrived at was unfair as proper procedure was not followed.
32. The claimant relies in the holding in Walter Ogal Anuro v Teachers Service Commission (2013) eKLR where the court emphasized on the importance of procedure in termination of employment.
33. On the third issue, counsel relied on the provisions of Section 244 (2) and (3) of the Kenya Defence Forces Act provides as follows;
  - (1) "The 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 consultation with the Defence council in accordance with regulations"
  - (2) "Where an officer or a service member has been dismissed under any circumstances provided for under this Act, the Defence Council may withhold reduce the amounts or suspend any such benefits payable to the officer or service member under sub-section (1).
  - (3) "A decision to withhold, reduce in amount or suspend any benefits of an officer or a service member contemplated under subsection (2) shall be made with the concurrence of the Public Service Commission.
34. Counsel submitted that the claimant served the country for 31 years and became pensionable after the 12<sup>th</sup> Year and submitted that denying him pension and gratuity would amount to a disgrace on the part of the Defence Forces.
35. Counsel relied on the holding in Kambu Marandu v Kenya Defence Forces Council & another where Rika J expressed himself as follows;

"The claimant worked for 30 years and 362 days. He became pensionable on the 12<sup>th</sup> Year. He was caught up in a rather ill-advised indiscretion. The cooper wire he was said to have stolen was valued not more than Kshs 1, 400. Should this have cost him his job and loss of pension and gratuity?"
36. Counsel submitted that the remedies for unfair termination are outlined under section 49 of the Employment Act and urged the court to use its discretion and allow the orders prayed for.

### **Respondent's submissions**

37. Counsel for the Respondents isolated four issues for determination;



- i. Whether this Honourable court has jurisdiction to entertain the suit by dint of Section 3(2) of the [Employment Act](#), 2007
  - ii. Whether dismissal from service was procedural and lawful
  - iii. Whether the claimant is entitled to the reliefs and damages as pleaded in the memorandum of claim
  - iv. Who is to bear the cost of this suit?
38. On the first issue, counsel submitted that the claim herein is between a former Kenya Defence Forces service member and Kenya Defence Forces and the court lacked jurisdiction to adjudicate the matter by dint of Section 3(2) of the [Employment Act](#), 2007.
  39. Reliance was made on the holding in [Paul K Langat v Kenya Defence Forces 9<sup>th</sup> Battalion & another](#) (2021) eKLR where the court held that it had no jurisdiction to determine the matter.
  40. Counsel submitted that the court lacked jurisdiction to award remedies granted to employees in claims for unfair termination under section 49 of the [Employment Act](#), 2007.
  41. On the second issue, Counsel submitted that the claimant was taken through disciplinary proceedings under Part VIII of the [Kenya Defence Forces Act](#) and a punishment of dismissal from service was proper, legal and practical and within the discretion of the Commanding Officer under section 156 of the Act.
  42. On the third issue, counsel submitted that Section 244 of the Kenya Defence Forces prescribed the relevant procedure and urged the court to find that the bodies identified under Section 244 of the [Kenya Defence Forces Act](#) address the issue of gratuity.

### **Findings and determination**

43. The issues for determination are;
  - i. Whether the court has Jurisdiction over this matter  
Depending on the answer in (i) above;
  - ii. Whether termination of the Claimant’s employment was unfair.
  - iii. Whether the Claimant is entitled to the reliefs sought.
44. On jurisdiction, there is sufficient judicial authority on the centrality of jurisdiction in adjudication of disputes in court. Needless to emphasize, a court derives its jurisdiction from the [Constitution](#) or an Act of Parliament or both. A court of law can only exercise the jurisdiction conferred on it by law.
45. Section 3(2) of the [Employment Act](#), 2007 provides that;
 

“This Act shall not apply to- (a) the Kenya Defence Forces or the reserve as respectively defined in the armed forces Act (CAP 199).
46. The court is further guided by the holding of Justice Onesmus Makau in Paul K Langat V Kenya Defence Forces 9<sup>th</sup> Batalion & another where the learned Judge stated as follows;
 

“Whereas I have no doubt about the jurisdiction of the court over a dispute between the parties, I am however, clear in my mind that the provisions of [Employment Act](#) do not apply to Kenya Defence Forces pursuant to section 3(2)(a) of the Act. It follows that an officer of Kenya Defence Forces can only invoke the courts jurisdiction under the [Kenya Defence](#)



Forces Act, Constitution, Fair Administration Action Act or any other law but not under the Employment Act.”

47. Similarly, paragraph 22 of the Memorandum of Claim states that;

“By reason of the nature and circumstances of the cause of action set out above, this Honourable Court has jurisdiction to hear and determine this matter.”

48. The foregoing is further decipherable from the submissions and reliefs sought. Since the action herein is grounded on the provisions of the Employment Act, 2007, the court is satisfied that it has no jurisdiction to hear and determine the suit and proceeds to down its tools as by law required.

49. Having found and held as above, the other issues are not amenable to determination.

50. The suit is dismissed for want of jurisdiction

51. Parties shall bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF OCTOBER 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

