



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

ELR CAUSE NO. 6 OF 2020

DOUGLAS WAWIRE MULEKANO..... CLAIMANT

VERSUS

THE HON. ATTORNEY GENERALRESPONDENT

R U L I N G

1. The Ruling is on the Notice of Motion Application dated 4th December 2020 by the Respondent filed in response to the Claim dated 2nd April 2020.
2. The Claimant filed claim dated 2nd April, 2020 seeking the following orders: -
 - a. A declaration that the decision to charge him and the proceedings that ensued thereon was, unlawful, unprocedural, defiance of Union Principles of Natural Justice and the constitutional Principles allied to the right to fair hearing, reasons and circumstance of the matter.
 - b. A declaration that the verdict to terminate and the termination and actions were wrongful, unfair and in breach of the Claimant's constitutional rights under Articles 27,4,47,50 and 236 of the Constitution.
 - c. Reinstatement or in the alternative an order that the termination be without loss of his terminal benefits.
 - d. General damages for wrongful and unfair termination.
 - e. Aggravated damages for discrimination
 - f. Costs of the claim.
3. The Respondent entered appearance and filed Notice of Motion Application dated 4th December 2020 (under Article 22(3) 50(10,159(20 (b) of the Constitution of Kenya 2010, and Section 1A, 3A and 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Section 4,7(a),8 9 of the Fair Administrative Act, Act No. 4 of 2015 under Section 148,149,152, 156, and 159 (30 of the Kenya Defence Forces Act, Act Number 25 of 2012, Order 2 Rule 15, Order 51 rule 1 of the Civil Procedure Rules 2010 , and any other enabling provision of the Law) seeking the following orders:-
 - a. That the Honourable Court be pleased to hear this Application in priority to the hearing of the main Claim herein.
 - b. That this Honourable Court be pleased to find that the Claim herein arises from a quasi-judicial administrative process and thus is a subject for judicial review and not the instant bench.
 - c. That the Claimant has wrongly filed the Claim without adhering to and exhausting the laid down statutory procedures prior to approaching the instant bench.
 - d. That the Claimant has delayed in instituting the instant claim within the province of mandatorily couched statute and has not sought leave for extension for such period.
 - e. That the instant claim wrecks want of form, forum and laches.
 - f. That this Honourable court be pleased to find the delay in mounting the claim herein in inexcusable and one that defeats equity.

g. That consequently this Honourable court be pleased to strike out and/or dismiss in its entirety the claim herein.

h. That costs of this Application be provided for.

The Application was supported by Affidavit of A. M MATE COLONEL sworn on 11th December, 2020.

4. The Claimant filed a Replying Affidavit in response to the Notice of Motion sworn on the 6th April, 2021.

5. The court gave directions that the Notice of Motion be canvassed first by way of written submissions. The Applicant's submissions are dated 20th December 2021 and the Claimant's /Respondent's submissions are dated 18th January 2022. The Applicant submits that the Claim dated 2nd April 2020 be dismissed on among other grounds that:-

a. There is a clear procedure for redress of the Claimant's particular grievance prescribed by an Act of parliament and that the procedure should be followed.

b. The Claimant in the instant Claim deliberately seeks to circumvent the provision of the Applicable statute, the Fair Administrative Act No. 4 of 2015.

c. That the Honourable court lacks jurisdiction to entertain the Claim.

d. That the Claim is an abuse of the court process.

6. The Applicant lists two issues for determination: -

a. Whether the Claimant has exhausted the internal grievance mechanism as a member of the Kenya Defence Forces?

b. Whether this Honourable court has jurisdiction entertain the Claim.

7. The Claimant/Respondent identifies the following as the issues for determination in his written submissions namely:-

a. Whether the Honourable court is seized with jurisdiction to entertain the claim herein.

b. Whether the claim is time barred.

c. Whether the application is merited or not

d. Who bears costs of the Application?

8. The court having considered the Application and issues identified by parties considers the following as the issues to be determined in the Application:-

1. Whether the Honourable court has jurisdiction to entertain this claim.

2. Whether the Claimant has exhausted the internal grievance mechanism as a member of the Kenya Defence Forces

3. Whether the Claim is time barred or not.

9. DETERMINATION

Whether the Honourable court has jurisdiction to determine the claim.

The court agrees with the Applicant that jurisdiction of the court draws for the Constitution and Legislation or both and indeed upholds the authorities cited by Respondent in *Karisa Chengo & 2 others -vs- Republic (2013)eKLR* and the court of Appeal the landmark decision in *Owners of motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd Mombasa Court of Appeal Civil Appeal No. 50 of 1989 (1989) eKLR* to effect that jurisdiction is everything and without it the court should down its tools.

The Applicant submits that the court cannot usurp the jurisdiction of the Chief of Defence Forces under Section 303 of the Kenya Defence Forces Act under which the Claimant should have sought redresses had he not obtained satisfactory redress prior to launching the instant claim in court.

10. Section 303 of the Kenya Defence Forces Act establishes internal grievance mechanism in the office of Chief of the Kenya Defence Forces to address any complaint brought by or against member of the Defence forces. Sub section (3) provides for rules of procedure to be

in accordance with Article 47 of the Constitution and to make provisions ‘in respect of investigation and determination of any complaint by or against a member of the defence forces and the rules of procedure may make provisions with respect to:-

a. The procedure to be observed in lodging a complaint.

b. Manner in which the complaint is to be investigated and

c. Manner in which appeals are to be made where a member of the Defence Forces has not obtained satisfactory redress.’

11. The claim before the court raises issues of constitutional rights violations which only this court has original and unlimited jurisdiction to determine thus Section 303 of the Kenya Defence Force Act cannot oust the jurisdiction of this court under the Constitution. The Constitution is the supreme law of the land.

12. This court has unlimited and original jurisdiction in all employment claims. The court upholds the position held in *Abdikadir Suleiman -vs- County Government of Isiolo & Another* (2015) eKLR where it was stated :-“ the original and unlimited jurisdiction to make a finding on legitimacy and lawfulness of decision in dispute between employers and employees rests with this court as vested under Article 162 (2) (a) of the constitution as read together with Article 165 (5) and (6), and the provisions of the Employment & Labour Relations Act 2011” The court holds that the compass or golden test for the court’s jurisdiction is the subject matter in the dispute namely, disputes relating to employment and labour relations as provided for under Article 162 (2) (a) of the Constitution and amplified under the Employment & Labour Relations Court Act 2011 and not remedies sought or the procedure of moving the court or the site of the applicable law or any other extraneous considerations as may be advanced by or for any litigant”.

13. The Claim challenges the termination of service process for breach of the Fair Administrative Act and the violation of Claimant’s Constitutional Rights. These are issues over which only this court and not any other forum has the original and unlimited jurisdiction to determine pursuant to Article 162 (a) of the constitution and Section 12 of the Employment and Labour Relations Court”. The court finds it has jurisdiction to determine the claim herein as filed. As noted in the in *Abdikadir Suleiman(supra)* jurisdiction of this court is noted affected by the procedure of approaching it whether by claim or judicial review.

14. on whether the Claimant herein has exhausted the internal grievance mechanism as a member of the Kenya Defence Forces?.

The Applicant submits that the Claimant underwent summary trial proceedings before his commanding officer on 18th July, 2019 pursuant to Section 156 of the Kenya Defence Force Act, following the said trial the Claimant was awarded the punishment of dismissal from Defence Forces. That Section 9 (2) of the Fair Administrative Actions Act provides that the High court or a subordinate court under sub- section (1) shall not review and administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and on remedies available under any other written law are first exhausted. That the Kenya Defence Force Act provides for internal mechanism under legal Notice No. 229 of 2017 made pursuant to Section 303 of the Kenya Defence Force Act.

15. The Respondent submits that there is no proof that the Claimant has exhausted the said internal grievance mechanism. That the Claimant alleges that he did an appeal for review of the sentence on or about 1st September 2019 to the Kenya Defence Forces and they failed to consider the appeal. On the appeal the court noted that in the list of documents ii the alleged appeal by Claimant of 1st September 2019 addressed to Army COMD: Through COMD ENGR BDE. The documents have not been produced and admitted by court and hence at this stage the court only note the alleged appeal is filed in the claim.

16. The Applicant submits that the instant claim is a deliberate attempt to subvert justice since the same amounts to an appeal of the decision of the commanding officer before a forum stranger to the law and hence should be struck out. The Claimant/Respondent submits that this is a dispute between employer employee and court has jurisdiction under Section 12 of the Employment and Labour Relations Act and relies on the decision of *Charles Oyoo Kanyangi & 41 others -vs Judicial Service Commission of Kenya* (2018) eKLR where court held : “*In part the fact that the dispute relates to the termination of employment, the matter is about employment and whether the Respondent followed the procedure in bringing the employment to an end...*”.

17. The Claimant alleged in statement he appealed and the appeal was not considered and filed the said appeal with his claim. As stated at this stage the issue of admissibility of the said letter of appeal has not been addressed.

18. In a similar claim of employee not having brought complaint under internal grievance mechanism where the said employee raised Constitutional issues, the Court of Appeal in Civil Appeal No. 93 of 2020 *Justice Lucy Njoki Waithaha -vs- The Tribunal Appointed to investigate the conduct of the Hon. Lady Justice Lucy Njoki Waithaka and others* ((eKLR 2021). In this case, the ELRC court declined jurisdiction and held that the Tribunal was the conclusive forum to vindicate the petitioner as may be found by the tribunal other than the court to make a finding on the grounds raised by the (Appellant). The Court of Appeal considered whether the learnt Judge erred to decline jurisdiction by stating the tribunal was the right forum notwithstanding the Appellant had raised complaints of her constitutional violations. The Court of Appeal found that the learnt Judge/wrongly abdicated jurisdiction granted under Article 165 (5) (b) of the Constitution on violation of constitutional rights. The Court of Appeal found that there are no exceptional reasons for court to decline jurisdiction that is expressed by the Constitution. The court should strive to hear and determine the disputes actually before them as opposed to driving away parties from the judgment seat unheard.

19. The court upholds the said decision of Court of Appeal. The court finds the KDF internal grievance mechanisms are specific and narrow flowing from Section 303 of the KDF Act and that it is not upon the Chief of KDF to hear and make any determination on the alleged violation of constitutional rights. The Applicant has relied on *Authority of Republic -vs- The Principal Magistrates Court at lamu & Another* (2016) eKLR to buttress the alternative remedy exhaustion. In the Court of Appeal case (supra) the court states that whereas it is correct principle that a party should not invoke court process where there exists another sufficient and adequate avenue or forum for the effective resolution of disputes, the tribunal does not qualify as such alternative, effective forum for such sound of complaints for reasons

given which was only the court had jurisdiction to determine questions of constitutional rights violations. This court takes the similar position and finds that the issues raised by the Claimant on violation of Constitutional Rights in the procedure of dismissal from service are competently before court under Article 162 (2) (a) as read together with article Section 165 (5) (b) of the Constitution and the Employment and labour Relations Court Act, 2011. Under the claim the court has powers to grant order sought if found to have merit.

On whether the claim is time barred

20. The court finds that the claim was filed within the window period of 3 years. Section (3) (2) of the Public Authorities Limitation Act proceedings against government founded under contract must be brought within 3 years of cause of action. In this instant claim cause of action arose on the dismissal proceedings of 18th July 2019 and claim was filed on 29th June 2020 within the time period. The claim is valid.

21. In conclusion the Notice of Motion dated 20th December, 2021 is hereby dismissed with costs. Parties to consider taking directions for further steps towards the expeditious determination of the claim.

SIGNED, DATED AND DELIVERED AT BUNGOMA THIS 24th DAY OF FEBRUARY 2022.

J. W. KELL,

JUDGE

IN THE PRESENCE OF:

Court Assistant: Brenda Wesonga

Applicant/Respondent:- Attorney General absent

Claimant/Respondent:-Okaka holding brief for Ms Ratemo Advocate