



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 006 OF 2021**

**IN THE MATTER OF**

**THE CONSTITUTION OF KENYA ARTICLES 2(1),3(1), 10(1) AND 2, 19, 20(1),**

**23(1), 24(1), 25(a) & (c), 26(1), 27, 28, 29(a), 47(1) & (2), 48, 165(3)(b), 232(1)**

**(c) & (f), 238(2)(b), 239, 241(1),(5) & (7)**

**AND**

**IN THE MATTER OF**

**VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**GUARANTEED UNDER ARTICLES 10(1)(a) – (c) AND 2(B), 25(a) & (c),**

**26(1), 27, 28, 29(a), 47(1) & (2) AND 48 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF**

**SECTIONS 12, 156(4), 251(2) OF THE KENYA DEFENCE FORCES ACT NO. 25 OF 2015**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTION 4(1) & (2) OF**

**THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF SECTION 9(2)(d) OF THE FAIR**

**ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF**

**CONTRAVENTION OF SECTION 9(2)(d) OF THE PUBLIC SERVICE**

**(VALUES AND PRINCIPLES) ACT, 2017**

**BETWEEN**

**KENNEDY NUNDA OKOTH.....PETITIONER**

v

**CHIEF OF KENYA DEFENCE FORCES ...1<sup>st</sup> RESPONDENT**

**KENYA DEFENCE FORCES COUNCIL...2<sup>nd</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

1. Kennedy Nunda Okoth (the Petitioner) joined the Kenya Defence Forces in 2012 and was discharged from service on or around 13 April 2017 after being charged and taken through summary trial.
2. On 20 January 2021, the Petitioner sued the Chief of Kenya Defence Forces, the Kenya Defence Forces Council and the Honourable Attorney General (the Respondents), alleging that the trial and discharge violated his rights to fair administrative action, human dignity, freedom of association, fair labour practices and fair hearing.
3. The Respondents caused a replying affidavit sworn by Major John Dickson Nzauka and submissions in opposition to the Petition to be filed on 13 January 2022.
4. The Petitioner filed his submissions on 17 January 2022.
5. The Court has considered the Petition, affidavits and submissions.

**Background**

6. The Petitioner was deployed to Somalia in 2015, and on 16 November 2015, he sought for and was granted 28 days annual leave. The leave was to lapse on 13 December 2016.
7. Upon the lapse of the leave, the Petitioner applied for and secured another 10 days leave. The extended leave was to end on 24 December 2015.
8. The Petitioner did not report back to his duty station and, upon inquiries, was granted another 14 days, up to 7 January 2016.
9. The Petitioner did not resume on 7 January 2016, and therefore his unit reported him as absent without permission.
10. On 12 May 2016, the Petitioner reported to his unit and indicated that he had been sick. The Commanding Officer requested the Military Police Corps to launch investigations on the absence on the same day. It was indicated that the investigations were predicated on section 150 of the Kenya Defence Act.
11. The investigations were conducted, and a recommendation was made that the Petitioner be charged with the offence of desertion. The abstract of evidence was sent to the Director of Military Prosecutions on 21 July 2016.
12. On 23 August 2016, the Director advised that a mental examination of the Petitioner be conducted at the Defence Forces Hospital. The examination established that the Petitioner was not suffering from any mental illness, and on 6 September 2016, authority was given for the commencement of disciplinary proceedings.
13. As a result, the Petitioner was served with and acknowledged an abstract of evidence.
14. The Petitioner appeared before the Commanding Officer on 14 November 2016 and was charged with desertion. A copy of the proceedings shows that the Petitioner acknowledged that he was informed of the process and his rights.
15. The Commanding Officer found the Petitioner guilty and awarded him 42-days imprisonment and dismissal from service. The award was subject to approval.
16. The Petitioner's Formation Commander acting on the strength of section 158(3)(c) of the Kenya Defence Forces Act, reviewed the findings of the Commanding Officer and substituted the awards with dismissal from service subject to further approval by the Army Commander.
17. When the case was remitted to the Army Commander, he reviewed the findings by the Commanding Officer and Formation Commander and upheld the award of 42-days imprisonment and substituted the recommendation to dismiss with a discharge under section 255(1)(g) of the Act (with gratuity/pension).
18. The Petitioner was informed of the discharge through a communication dated 27 January 2017.

## **Evaluation**

### **Prematurity**

19. The Respondents objected to the jurisdiction of the Court on the ground that the Petitioner had not exhausted the dispute resolution avenues outlined in section 303(3)(c) of the Kenya Defence Forces Act as read with the Armed Forces (Summary Jurisdiction) Regulations, 1969 (now repealed).

20. The section provides:

303 Establishment of internal grievance mechanism

(1) The Defence Council shall establish an internal grievance mechanism which shall be under the Office of the Chief of the Kenya Defence Forces to address any complaint brought by or against a member of the Defence Forces.

(2) The Defence Council shall, within ninety days of the commencement of this Act make rules of procedure with respect to internal grievance mechanism established under subsection (1).

(3) The rules of procedure made under subsection (2) shall be in accordance with Article 47 of the Constitution and shall make provisions with respect to investigation and determination of any complaint by or against a member of the Defence Forces and without prejudice to the generality of the foregoing, the rules of procedure shall 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 a satisfactory redress.

21. The Court has keenly examined the aforecited proviso and come to the view that it does not apply to disciplinary proceedings such as faced the Petitioner.

22. The Court is of that view because under Part VIII of the Kenya Defence Forces Act, and more so section 159 of the Act, the guidelines for summary trials are set out in detail, and these include recourse to other authorities as contemplated by written law (including Courts).

### **Rights to fair administrative action/fair labour practices**

23. Section 147 of the Kenya Defence Forces Act expressly incorporates the right to fair administrative action to summary trials under the Act.

24. The right to fair administrative action is closely intertwined with the right to fair labour practices and the right to fair hearing/procedural fairness.

25. In alleging that he was not afforded the right to fair administrative action, the Petitioner asserted that the Trial tribunal was not properly constituted, he was not given notice of the hearing and that the reasons for the discharge were not valid.

26. The Petitioner was served with an abstract of evidence which he acknowledged. He was cautioned at the same time, and he was also furnished with a charge sheet.

27. The record of proceedings shows that the Petitioner was informed of his rights, including the option to be tried before a Court Martial, to be represented by a nominee and to call witnesses.

28. The Petitioner was then tried by his Commanding Officer.

29. Section 148 of the Kenya Defence Forces Act envisages trials before a serviceman's Commanding Officer or appropriate superior officer.

30. The Petitioner was tried before his Commanding Officer, and the award was subjected to review and or approval by the Formation Commander and Army Commander.

31. The Petitioner, though alleging that the trial authority was not properly constituted, did not give any evidence to support the allegation.

32. On the basis of the evidence placed before it, the Court is satisfied that the Petitioner's rights to fair administrative action or fair labour practices were not violated.

### **Validity of the reasons for discharge**

33. The Petitioner not only challenged the process leading to his discharge, but he also challenged the validity of the reasons for the discharge by asserting that there was no evidence at all that he was involved in misconduct.
34. The charge against the Petitioner was that he had deserted for about 125 days.
35. The Petitioner admitted that he did not resume duty after the end of his leave because of he was suffering from post-war trauma and that he was under treatment at Kisumu District Hospital for 3-months.
36. The Petitioner filed a single document to support the contention that he fell ill and was treated ( a Ministry of Health card from Kisumu District Hospital dated 5 January 2016, the date appears altered).
37. The card does not indicate the nature of the Petitioner's illness or the treatment offered.
38. As it is, the card does not disclose much. The Court would want to believe that the Petitioner should have obtained a Certificate of Incapacity from a Medical Practitioner. No such Certificate was placed before the Court.
39. The Respondents placed before the Court a medical report indicating that the diagnosis of the Petitioner did not tally with the treatment which had purportedly been given.
40. The medical report further opined that the medical examination of the Petitioner did not reveal any signs of mental disorder.
41. It was up to the Petitioner to demonstrate that he had valid or lawful cause to be absent from duty without permission. He did not discharge that burden either before the Respondents or the Court.
42. The Court is, therefore, unable to find that the discharge of the Petitioner was devoid of valid reasons.

#### **Delay in investigations and trial**

43. The Petitioner also contended that the Respondents violated section 140 of the Kenya Defence Forces Act in that he was detained for 8-months, beyond the 8-days prescribed.
44. The Respondents did not deny that the Petitioner was in custody beyond the 8-days prescribed by section 140(2) of the Kenya Defence Forces Act, but it attempted to justify the delay/detention on the grounds that the investigations took time and that Delay Reports as contemplated by sections 54(3) and 140(2) of the Act were issued to the appropriate authorities, the Petitioner was on half-pay and further that he was a flight risk.
45. Section 140(1) of the Kenya Defence Forces Act demands that the Respondents conduct investigations without unnecessary delay and that reports be issued to the Service Commander on any delays.
46. The Respondents filed in Court the relevant Delay Reports. Part of the investigations required that the Petitioner undergo mental assessment.
47. The Petitioner was also deployed at the material time within a unit that was conducting operations outside the country.
48. The Court does not find that the 8-months it took to conclude the Petitioner's case was inordinate, warranting an award of damages.

#### **Retirement benefits**

49. The Petitioner was discharged on the ground of services no longer required but with terminal benefits.
50. The Respondents asserted that the Petitioner had not been paid the benefits because he had failed to return equipment and other items issued to him.
51. The Petitioner did not rebut the claim that he had not cleared with the Respondents. Therefore, the Court finds it would be usurping the Respondents' discretion in ordering payment of terminal dues before clearing with his commanders, more so considering that the Petitioner was a member of a disciplined service.

#### **Conclusion and Orders**

52. From the foregoing, the Court finds no merit in the Petition, and it is dismissed with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF FEBRUARY 2022.**

**RADIDO STEPHEN, MCIARB**

## **JUDGE**

### **Appearances**

For Petitioner

Mwamu & Co. Advocates

For Respondents

O.M. Mjomba, Litigation Counsel, Office of the Attorney General

Court Assistant

Chrispo Aura